

# Hassan Duwa v Gerald Khoviwa and United General Insurance Personal Injury Cause Number 1127 of 2021 Company Ltd

## Judgment

<b>Court:</b>	High Court of Malawi
<b>Registry:</b>	Civil Division
<b>Bench:</b>	Honourable Justice Allan Hans Muhome
<b>Cause Number:</b>	Personal Injury Cause Number 1127 of 2021
<b>Date of Judgment:</b>	December 20, 2024
<b>Bar:</b>	Mr. Swaleh Imaan, for the Claimant Mr. Emmanuel Nyamwela, for the Defendants

1. The Claimant was a passenger in a motor vehicle registered as BR 3131 Tata van pursuant to his employment with F & F Industries Limited, the owners of the vehicle. The vehicle was involved in an accident that occurred along the Blantyre – Zalewa road on 2nd February 2021 around 5:00 hours. The 1st Defendant was driving the vehicle which was insured by the 2nd Defendant. The vehicle hit a stationary trailer registered as DZ 6193. The Claimant alleges that the 1st Defendant was negligent and particularised the same, including the injuries suffered. The Defendants deny all the claims and contend that the accident was

wholly or largely caused by the Claimant's own negligence by failing to put on a seat belt.

2. During trial, the Claimant adopted his witness statement as evidence in chief together with exhibits HD 1 (a Police Report stating that the accident was influenced by the 1st Defendant) HD 2 (a medical report) and HD 3 (a health passport). In cross examination, the Claimant admitted that he was not wearing a seat belt at the time of the accident. He did not know the speed at which the vehicle was travelling and he did not warn the driver that he was over-speeding. In re-examination, he explained that he went to the hospital on the same day that the accident happened but went again after some days hence the date in the health passport being 7 days later than the date of the accident.

3. The first Defendant testified that he suddenly noticed a trailer positioned ahead of him within his lane. It was stationary and he could not see it in time due to the foggy weather. He tried to avoid it but it was too late and he hit it. That the Claimant suffered his injuries because he did not put on his seat belt. That there were no warning signs towards the motionless vehicle however the police insisted that he pay a fine for reckless driving.

4. The second witness for the defence was Kanthu Kambalametore, the 2nd Defendant's Legal Officer. He admitted that the Claimant was covered by the insurance policy, which was not exhibited, being in the course of employment as envisaged under section 144 of the Road Traffic Act, Cap. 69:01 of the Laws of Malawi.

5. The main issue for determination before this Court is whether the first Defendant was negligent and if so whether the Defendants are liable to compensate the Claimant for the resultant injuries. The collateral issue is whether the Claimant himself contributed to his injuries by failing to put on a seat belt. The standard of proof in civil matters is on a balance of probabilities and the burden of proof lies on he who asserts the affirmative, in this case the Claimant: see *Tembo and Others v Shire Bus Lines Limited* [2004] MLR 405 at 406. Negligence has been defined as the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do: see *Blyth v Birmingham Waterworks Company* (1856) 11Ex Ch 781. The essential elements of actionable negligence are (a) a duty to take care owed to the Claimant by the Defendant, (b) a breach of that duty, and (c) damage suffered by the Claimant resulting from the breach of duty: see *J. Tennet and Sons Ltd v Mawindo* 10 MLR 366.

6. The Court has taken time to appreciate the oral and written arguments from both Counsel. The accident occurred early morning and it was foggy and so visibility was an issue. Despite such visibility problems, the duty of a driver remains the same: that is that a driver of a motor vehicle owes a duty of care to other road users and fellow passengers to drive with reasonable care. In *Banda and Others v ADMARC* [1990] 13 MLR 59 Hon. Justice Banda (as he was then) had this instruction: 'A reasonably skillful driver has been defined as one who avoids excessive speed, keeps a good look-out, and observes traffic signs and signals.' The fact that the first Defendant did not notice that there was an immobile

trailer in front of him and failed to avoid hitting it shows that he was negligent. He failed to keep a good look-out, as admitted. This finding is in keeping with the dictum of Nriwa J in *Galeta v Bruesson and Another* Personal Injury Cause Number 635 of 2019 at page 7, where he states that ‘...if the driver strikes a person or object without seeing that person or object, he may be placed in the dilemma that either he was not keeping a sufficient look-out or that he was driving too fast having regard to the limited look that could be kept.’ More pointedly, Unyolo J stated, in *Mhango v Positi and National Insurance Company Limited* [1995] 2 MLR 402, that ‘a driver of a vehicle has a duty, when following another vehicle, to allow sufficient space between the vehicles in which to be able to stop safely if the vehicle in front slowed down or stopped suddenly.’

7. That said, it is also clear, from the evidence, that the Claimant is to blame for failing to wear a seat belt which could have alleviated his injuries. The Claimant explained that he forgot to fasten the seat belt which is not a legal excuse per *Froom v Butcher* [1976] Q.B. 286.

8. Having considered the totality of the evidence, this Court assigns 80% of the liability to the Defendants and the Claimant shall suffer 20% contribution. Costs shall be settled in the same proportion and if costs and damages are not agreed, within 14 days, the same shall be assessed by the Registrar.

Made in Open Court this 20th day of December, 2024.