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REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 618 OF 2016

BETWEEN:

ESTHER PICHESI

CLAIMANT

AND

YOHANE GIBSON

1st DEFENDANT

PRIME INSURANCE COMPANY LIMITED

2nd DEFENDANT

CORAM: JUSTICE M.A. TEMBO

Tandwe, Counsel for the Claimant
Suzi-Banda, Counsel for the Defendants
Mankhambera, Official Court Interpreter

JUDGMENT

1. This is this court's decision following a trial of this matter on the claimant's claim for damages for the personal injuries she had suffered due to the alleged negligence on the part of the 1st defendant, who is the 2nd defendant's insured, in the manner he drove his motor vehicle herein resulting in the burglar bars that were carried in the motor vehicle hitting the claimant.
2. The claimant gave evidence at trial. She was not cross-examined. Her evidence was therefore uncontroverted. The claimant also filed submissions

in support of her claim. The defendants did not bring evidence in their own defence but filed submissions.

3. The facts of this matter are straightforward. On 23rd March 2016, the claimant was walking from the direction of Namponya towards Chikweo in Machinga District. When she got to Kondoni Village, she was hit by burglar bars which were carried in motor vehicle registration number MHG 1744 which was being driven in the opposite direction by the 1st defendant, who is the 2nd defendant's insured. The incident was reported to Mselema police and both the claimant and the 1st defendant gave statements.
4. As a result of being hit by the burglar bars the claimant sustained injuries and as per the medical report she got treated at Zomba Central Hospital. She still suffers from the effects of her injuries.
5. The defendants denied the allegation of negligence as stated in the claimant's evidence whilst admitting being insurer and insured respectively.
6. The issue for determination before this Court is whether the 2nd defendant's insured was negligent in the manner he drove the motor vehicle herein resulting in the burglar bars hitting the pedestrian herein.
7. The standard of proof in these civil matters is on a balance of probabilities as rightly noted by both parties. And, the burden of proof lies on he who asserts the affirmative, in this case the claimant. See *Nkuluzado v Malawi Housing Corporation* [1999] MLR 302 and *Miller v Minister of Pensions* [1947] All ER 372.
8. The parties have correctly submitted on the duties of a driver of a motor vehicle on the road which if breached result in the driver being held liable for negligence and the resultant damage caused by such negligence to those other road users to whom the driver owed the said duties. See *Banda and others v ADMARC and another* 13 MLR 59, *Chuma and another v India and others* [1995] MLR 97, *Somani and Mulaga v Ngwira* 10 MLR 196 and *Sagawa v United Transport (Mw) Limited* 10 MLR 303.
9. Indeed, as submitted by the parties, in the case of *Banda and others v ADMARC and another* Banda CJ stated succinctly the driver's duty of care to other road users as follows

A driver of a motor vehicle owes a duty of care to other road users not to cause damage to persons, vehicles and property of anyone on or adjoining the road. He must use reasonable care which an ordinary skilful driver would have exercised

under all the circumstances. A reasonably skilful driver has been defined as one who avoids excessive speed, keeps a good look-out, observes traffic signs and signals.

10. The impression that this Court got from the evidence of the claimant is that, as she correctly submitted, she was injured by the burglar bars that the 1st defendant was carrying in the motor vehicle he was driving.
11. The defendants' main contention is that the claimant is bound by her pleadings, namely her statement of claim. It correctly referred to the case of *Nseula v Attorney General and another* [1999] MLR 313 (SCA), where Banda CJ, delivering the judgment of the Malawi Supreme Court of Appeal, said at page 332 a:

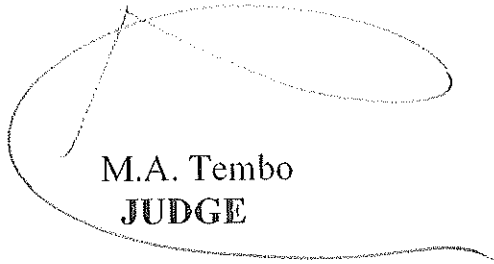
In our judicial system, it is the parties themselves who set out the issues for determination by the court through their pleadings and both of them must strictly adhere to the pleadings..... It was therefore wrong for the judge to decide on a matter which had not been raised by the parties on their pleadings and he should not have made it the definitive basis of his decision.

12. The defendant contended further that, in her testimony, the claimant never alleged that the 1st defendant was negligent or that he drove without regard to other road users despite alleging that fact in her statement of claim filed herein and that she therefore failed to prove negligence on the part of the 1st defendant driver.
13. This Court notes that indeed the claimant is bound by what she stated in her statement of claim to ensure it is proved. Further, that in her testimony she did not mention the word negligence or that the 1st defendant drove without regard to her as a fellow road user. This Court is however persuaded by the claimant's evidence that she got injured by the burglar bars that the 1st defendant was carrying in the motor vehicle and that from that set of facts it can be deducted that the 1st defendant was negligent. And further that a different conclusion is not plausible on the uncontroverted evidence of the claimant.
14. In such circumstances, the 1st defendant breached his duty of care to the claimant, a fellow road user, by failing to drive with due regard to her as another road user.

15. This Court is therefore satisfied that the claimant has made out her case against the defendants who are liable as insured and insurer respectively. And consequently, this Court finds the defendants liable for negligence in causing the injuries suffered by the claimant herein. Damages shall be assessed by the Registrar.

16. Costs normally follow the event and shall therefore be for the successful claimant.

Made at Blantyre this 26th October 2020.



M.A. Tembo
JUDGE