

IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY

**CIVIL CAUSE NO. 1188 OF 1996**

**BETWEEN:**

THOMAS LAPUKENI .....PLAINTIFF

AND

MIKE APPEL & GATTO LIMITED .....DEFENDANT

**CORAM : S. A. KALEMBERA, DEPUTY REGISTRAR**

Chirwa, Counsel for the Plaintiff

Osman, Counsel for the Defendant

**ORDER ON ASSESSMENT OF DAMAGES**

The plaintiff commenced this action against the defendant claiming damages for personal injury, pain and suffering; loss of earning capacity, loss of amenities and costs arising out of an accident which occurred on the 15<sup>th</sup> day of September, 1995 at the defendants premises. The plaintiff obtained a judgment in default of notice of intention to defend on the 18<sup>th</sup> day of September, 1996 and this assessment arises there from. This is therefore an order for assessment.

The defendants were duly served with a notice of appointment to asses damages. There was one witness, the plaintiff himself who testified during the assessment.

It was the plaintiffs testimony that in 1995 he was working at the defendants company as a cleaner and that he left after being hit by a car. He was taken to Queen Elizabeth Central Hospital where he was treated. He had lost consciousness and he could not remember how long he stayed in hospital. As proof of medical treatment (Exhibit TL 1). The witness further tendered Exhibit TL 2 as proof of the effects of the injuries.

In cross examination by Mr A.R. Osman, counsel for the defendant the plaintiff testified that he was attached to Valbar Honda Centre and Mike Appel and Gatto and that he started work on 17<sup>th</sup> February, 1994 and he was getting K150.00 per month. That while working at Mike Appel & Gatto he was hit by a vehicle, which was being driven by one Mr Mapanje who was a mechanic. He further testified that since his dismissal he has been going to Mr Hassan the Workshop Manager for financial assistance but he would only give him K20.00 or K10.00. He also informed the court under cross examination that he was hit by the car in the workshop when the said Mapanje reversed the car with speed and he fell down and hit his head against the concrete and the car ran over his leg. He further testified that the defendant never gave him any compensation. He contended that the accident affected his brain as he was just talking nonsense.

As already noted herein there is a default judgment entered in favour of the plaintiff. What this court is being called upon therefore is to assess damages payable to the plaintiff as a result or consequence of the injuries he sustained arising from the accident. As to the measure of damages the general rule is contained in the speech of Blackman in **Livingstone –v- Rawyards Coal Company [1880] 5 App. Cas 25** at page 39 where the measure of damages for compensation purposes was defined as follows:

**“that sum of money which will put the party who has been  
Injured or who has suffered, in the same position as he  
Would have been in if he had not sustained the wrong for  
Which he is now getting his compensation or reparation.”**

I am mindful that it is a very difficult exercise to try to come up with compensation which will totally compensate the plaintiff with money for the injuries sustained and for the incapacity occasioned by the fault and negligence of the defendant – **Livingstone –v- Rawyards Coal Company [1850] 5 App Cas 25; Ruo Tea Estate and Others –v- Owen Mwalwanda, MSCA Appeal No. 25 of 2000.**

Nevertheless courts have strived to award plaintiffs damages for injuries suffered, which represent fair and adequate compensation. In the matter at hand the plaintiff was injured in the course of his employment by an agent or servant of the defendant. He suffered head and neck injuries, lost consciousness for five days, now has short term memory loss and sees flicker of light with mental illness and has suffered 70% incapacity (**Ref.**

**Exhibit TL 1).** The said Exhibit TL 1 further states that the plaintiffs' brain shook and he would have lapses of memories, constant headaches and so forth.

As already indicated herein the plaintiffs' incapacity is at 70% due to the head injuries he suffered. There have been several cases with different awards of damages for pain and suffering and loss of amenities of life for injuries similar to those suffered by the plaintiff. In the case of **Dereck Namagonya –v- P Saidi t/a Dusiya Minibus Civil Cause No. 1753 of 1997 (unreported)** the plaintiff was awarded K60,000.00 for pain and suffering and loss of amenities of life. The award was made in December 1997. **Mr Godfrey Litete –v- Yassen Sherry, Civil Cause No. 796 of 1996 (unreported)** the plaintiff was awarded K160,000.00 for pain and suffering.

In the present matter the plaintiff suffered head injuries which has led to lapses in memory, lost consciousness for 5 days, his brain shook and there is some mental illness. The awards of comparable cases which I have referred to were awarded some time back and the kwacha has since fallen in value several times. The plaintiff continues to suffer as a result of that accident. I therefore award the plaintiff the sum of K200,000.00 for pain and suffering and loss of amenities.

As for loss of earning capacity it is always difficult to determine the actual future loss. The courts have nevertheless used what is called the multiplicand and multiplier formula in order to arrive at the award. The multiplicand is a figure representing the plaintiffs' monthly earnings. The multiplier is an estimated number of years the plaintiff would have still been working before the retirement age. In the matter at hand the plaintiff was earning K460.00 per month which comes to K5,520.00 per annum. This is therefore the multiplicand. What then would be a suitable multiplier? The plaintiff was aged 25 years at the time of the accident. He would therefore have worked for 30 more years before his retirement at the age of 55 years, which is a normal retirement age in this country. This figure of 30 years must be discounted for to allow some other factors, that is the inevitable contingencies and uncertainties of human life and working capacity. Quite apart from the accident herein the plaintiff might have died or have been incapacitated by some other accident or by illness at any time during the said 30 years. Furthermore the plaintiff's earnings which he is assumed to have lost would have been spread over his whole future working life whereas damages will be paid to him as a lump sum. Some discount is therefore required for early payment (**Refer Laston Tsamwa –v- Impresia inc. Fortunato S.P.A. Civil Cause No. 370 of 1998**). In **Comwell –v- Wilson [1982] A.C. 27** The House of Lords accepted a multiplier of 16 for a boy of 15 in one case and a young man of 22 in the other. In the same premise, I reduce the figure of 30 and select the figure of 25 as a suitable multiplier. When I apply it to the multiplicand I came to K138,000.00 as loss of earnings capacity and I so award it to the plaintiff.

Counsel for the plaintiff has further submitted that this is a matter where despite awarding damages on the other heads the court should also award damages for future care. I have

carefully looked at the injuries suffered by the plaintiff and it is clear that the plaintiff will always rely on others, that is his relations in his future life. He will always rely on services rendered by others to him. In the cases of **Cunningham –v- Harison [1973] QB 943; Donnelly –v- Joyce [1974] QDD 544** the court of appeal affirmed the position that indeed damages may be awarded for future care.’ In our own Local case of **Samson Ngwira –v- Felix Malisero t/a Contract Dulles, Civil Cause No. 402 of 1993** the court awarded the plaintiff K50,000.00 for future care. In the present case considering the devaluation of our currency in recent times I award the plaintiff the sum of K100,000.00 for future care.

The total award therefore comes to K438,000.00. The defendant is further condemned to cost of this action.

**MADE IN CHAMBERS** this 7<sup>th</sup> day of April 2004 at Blantyre.

S. A. Kalembera

**DEPUTY REGISTRAR**