



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

Personal Injury Cause Number 808 of 2011

BETWEEN:

MR D HELANI.....PLAINTIFF

AND

AJ HAWKEN.....1ST DEFENDANT

FRIDAY PHIRI.....2ND DEFENDANT

REUNION INSURANCE COMPANY LIMITED.....3RD DEFENDANT

CORAM:

MANDALA: ASSISTANT REGISTRAR

Masanje: Counsel for Plaintiff

Chagoma: Counsel for Defendants (absent on delivery)

Chitsulo: Court Clerk

ORDER ON ASSESSMENT OF DAMAGES

INTRODUCTION AND BACKGROUND

This is an order for assessment of damages pursuant to a Consent Judgment issued on 11th November 2016 by the Honorable Assistant Registrar. In this Judgment, the Defendant was ordered to pay damages to the Plaintiff to be determined and assessed by the Registrar and costs to be taxed if not agreed.

The Plaintiff commenced the present action on 9th September 2011 claiming damages for loss of dependency, loss of expectation of life, funeral expenses, cost of police report and death report and costs of the action. The basis of the Plaintiff's claim was the passing of his nephew who was hit by the 2nd Defendant at Tam-Tam and died on arrival at Queen Elizabeth Central Hospital.

EVIDENCE

The Plaintiff, Davis Helani, told the court that this matter involves his nephew who was living with him after he had picked him up from the village. The Plaintiff adopted his witness statement as evidence in Chief. It states:

1. My name is Davis Helani of c/o Box 503, Blantyre. I am the Plaintiff in this case in which I am claiming damages for loss of dependency, loss of expectation of life, funeral expenses and costs of the action.
2. The deceased, Lackson Givison was my nephew. I was living with him as both parents of his were living in the village.



3. At the time of his death the deceased was 11 years old. He was survived by his parents, myself, my wife and his grandmother in the village. I exhibit his death certificate marked 'DHA1'. This was tendered to the court and marked Exhibit P1, it stated: 'Date, Place and cause of Death: 21st May 2009 at Muta Wholesale at Chemusa along Zalewa Road Blantyre, Accident. Full Name, Address, Description and Nationality of Deceased: Lackson Givison, PO Box 9, Ntcheu, Student, Malawian. Sex: M. Age: 11 years. Length of Residence in the state: Since Birth. Name, Address and Description of Informant: Davis Hellan, PO Box 9, Ntcheu, Driver. Date of Registration: 16th September 2011. District Commissioner by whom Registered: GE Nkhata.'
4. At 11 years, Lackson was an intelligent boy and that was why I thought of staying with him to exploit all the potential that such an intelligent young man had other than leaving him to get spoiled in the village.
5. That far he lived a healthy life and was so happy a boy. His loss was loss of hope to the entire family.
6. As a boy, he used to do domestic errands like washing, cooking, sweeping mopping, switching on the radio or television for me when I got home tired and needed to relax, he used to narrate stories as to what he encountered during the day, at home, at the playground and at school. It was fun having him around.
7. When he died, his parents and I were so devastated and did not come to terms with the death. That is why I took time to begin these proceedings, especially when the parents were not forthcoming to commence the action.
8. When I approached my lawyers to help me with the case, they advised me that I firstly had to obtain letters of administration to be able to make the claims I made. I therefore instructed them to process the same for me and it was done. I exhibit a copy of the Letters of Administration which were granted to me and I marked them as exhibit 'DHA2'. These were tendered and marked Exhibit P2, it states: '**High Court, Principal Registry, Probate Cause Number 1234 of 2011, In the Matter of Section 42(4) of the Wills and Inheritance Act and In the Matter of Lackson Givison (Deceased) and Mr Davis Helani (Applicant). Letters of Administration with Limited Grant: UPON** hearing Counsel for the Plaintiff, **AND UPON** reading the affidavit in support, **IT IS HEREBY ORDERED** that, **LETTERS OF ADMINISTRATION BE and ARE HEREBY GRANTED** to **DAVIS HELANI** limited to the commencement and pursuit of a claim on behalf of the estate of **LACKSON GIVISON** for damages for the death of the deceased. Dated this 28th day of October 2011. Signed by the Registrar.'
9. Apart from the loss of the boy I also incurred some expenses in form of funeral expenses. We bought the coffin at the cost of K15,000.00. That time we did not insist on a receipt. I also incurred about K40,000.00 for food at the funeral. Again, there were no receipts issued to us. Burial took place at our village in Ntcheu and I had to hire a pick up to help us ferry the remains of our loved boy. This cost us K50,000.00 that time. Again, there was no receipt issued to us.

10. *Apart from the above, I had to obtain a police report at the cost of K2,000.00 and a death report at the cost of K1,500.00. The death report has already been exhibited and I now exhibit the police report marked exhibit 'DHA 3'. The Abstract Report was tendered and marked Exhibit P3 which states in its enquiries: 'Revealed that the driver of motor vehicle reg No SA 111 Ford Pick Up Mr Friday Phiri influenced the accident by excessive speeding. He was charged with the traffic offence of causing death reckless/negligent driving c/s 126(C1) of RTA and paid a fine of K20,000.00 by Blantyre Magistrate Court under CDR number 251978. File completed. '*
11. *I therefore pray that the court should compensate me for the loss of life of our boy and for the expenses I incurred as outlined above. I also pray that I be awarded costs of these assessment proceedings.*
12. *I believe in the truth of the statement above given.*

In cross examination, the Plaintiff told the court that he could not remember the date when the matter was commenced in court as it was a long time ago. It may be September 2011 but he was not sure since it was such a long time ago. The Plaintiff confirmed that he approached his lawyers to help him with the case and they advised him to obtain letters of administration. He could not remember the exact date when. It may be October 2011 but he could not remember. The Plaintiff bought a coffin worth K15,000.00 and he got a receipt but was not sure where the receipt was since it was a long time ago. The Plaintiff also didn't bring a receipt for the food he bought, nor did he bring a receipt for his transportation costs, and costs of death report and medical report.

In re-examination Plaintiff told the court that he bought the food from the market and receipts are not issued at the market. The Plaintiff was in grief and could not ask for receipts. The person from whom the car was hired did not issue receipts.

SUBMISSIONS BY COUNSEL FOR THE PLAINTIFF

Counsel for the Plaintiff filed written submissions before the court.

Counsel for the Plaintiff argues that the deceased had a reasonable expectation of life ahead of him having died at 11 years of age. The evidence provided also shows how healthy and happy the deceased was and how much joy he brought to the Plaintiff. Counsel cited the following comparable awards on loss of expectation of life:

- ***Makifale Dimingu et al v The Attorney General*** Personal Injury Cause Number 749 of 2012 – the 6th Plaintiff was awarded the sum of MK900,000.00 as damages for loss of expectation of life. The 6th Plaintiff was 64 years old and the award was made in 2013.
- ***Wasili v Prime Insurance Company Limited*** Civil Cause Number 997 of 2011 – where the deceased was aged 39 years, he was awarded MK800,000.00 for loss of expectation of life and the award was made in July 2012.

- **Masauko Ephraim v Prime Insurance Company Limited** Personal Injury Cause Number 658 of 2012 – the Plaintiff was awarded the sum of Mk900,000.00 as damages for loss of expectation of life and the award was made on 23rd July 2013.

Counsel for the Plaintiff submitted that the sum of Mk1,600,000.00 would be reasonable compensation for loss of expectation of life.

Counsel for the Plaintiff submitted that the statutory minimum wage to be used be the current one, being the minimum wage at the time of the hearing (assessment), which is K887.50 per day. The multiplier should be 35 considering the deceased's chances of dying due to other natural causes. As well as that there are 20 working days in a month.

Counsel proposed that damages for loss of dependency should be calculated as follows:

$$K17,750.00 \times 12 \times 35 \times 2/3 = K4,970,000.00$$

SUBMISSIONS BY COUNSEL FOR THE DEFENDANTS

Counsel for the Defendant submitted that damages for loss of expectation of life accrue to the deceased's estate. They are claimed by an executor, administrator or personal representative of the deceased. Section 10(1) of the **Statute Law (Miscellaneous Provisions) Act, Mbaisa v Ishmael Brothers** 6 ALR (Mal) 321 at 322 and **Tafwirachi Mwakiyeye v Kangawe Ali and General Alliance Insurance**, Civil Cause No 116 of 2012. It should be noted that, whereas, in the case of an executor his title to sue relates back to the date of the death of the deceased, in the case of an administrator, his title to sue relates back to the date of the grant of letters of administration, which must therefore be obtained before the action is commenced, and the court has no power to allow an amendment where the grant is obtained after the issue of the writ. Bullen and Leake, **Precedents of Pleadings**, 12th Ed, p432 and **Mbaisa v Ishmael Brothers** 6 ALR (Mal) 321 at 322.

Counsel for the Defendant noted that the Plaintiff commenced this action in September 2011 but obtained the letters of administration in October 2011. In terms of the law, the Plaintiff clearly had no title to commence the present action in September 2011 before obtaining the letters of administration in October 2011. Counsel for the Defendant submitted that the Plaintiff is at law disentitled to recover damages for loss of expectation of life as he clearly did not have any title whatsoever at law to sue or bring and maintain a claim under this head of damages.

On damages for loss of dependency, Counsel for the Defendant submits that these damages are for the benefit of the dependants of the deceased. Counsel for the Defendant proposes that the multiplicand be the minimum wage of a domestic worker at the time of the deceased's death – May 2009. At the time of the deceased's death, the minimum wage of a worker was K117.30 per day as per the **Employment (Minimum Wage) (Amendment) Order** of 2007 as amended in 2010. Counsel for the Defendant suggests that half of the minimum wage of a domestic worker be used since the deceased minor could not have earned the full wage of an adult domestic worker. Counsel also submits that there are 20 working days per month.

Counsel for the Defendant submits that the multiplier be 39 as the life expectancy in Malawi was at 50 years in 2009. Counsel suggests that the multiplier be 35 years due to the fact that a lump sum is being given at once and that the deceased may have died earlier anyway due to vicissitudes of life.

Counsel submitted that the damages be calculated as follows:

$$K117.30 \times 20 \text{ working days/month} \times 35 \text{ years} \times \frac{1}{2} \times \frac{2}{3}$$

$$=K328,440.00$$

Finally, Counsel submits that the Plaintiff's claim for purchase of a coffin, cost of food, cost of transportation of the deceased's remains, police report and death report have neither been specified or particularized in the statement of claim or strictly proven as required by law. Counsel for the Plaintiff submitted that the Plaintiff is at law disentitled to recover the damages.

THE LAW ON ASSESSMENT OF DAMAGES

The High Court in **Ngosi t/a Mzumbamzumba Enterprises v H Amosi Transport Co Ltd** [1992] 15 MLR 370 (HC) set the basis for assessment of damages:

'Assessment of damages.....presupposes that damages have been proved. The only matter that remains is the amount or value of the damages.'

The rule is that prior to assessment, the injured party has provided proof of damage sustained – **Yanu-Yanu Co Ltd v Mbewe** (SCA) 11 MLR 405. Even in the face of difficulties in assessing damages, the Plaintiff is not disentitled to compensation – **Mkumuka v Mphande** (HC) 7 MLR 425.

The cardinal principle in awarding damages is '*restitutio in integrum*' which means, in so far as money can do it, the law will endeavour to place the injured person in the same situation as he was before the injury was sustained – **Halsbury's Laws of England** 3rd Ed. Vol. II p.233 para 400.

This principle was further enunciated in **Livingstone v Raywards Coal Co** (1880) 5 App Cas 25 at 39, where Lord Blackburn said:

'...where any injury is to be compensated by damages, in settling the sum to be given for reparation you should as nearly as possible get at the sum of money which will put the party who has been injured or who has suffered, in the same position as would he have been in had he not sustained the wrong for which he is now getting his compensation or reparation.'

The law distinguishes general damages and special damages as follows – general damages are such as the law will presume to be the direct natural or probable consequence of the action complained of. Special damages, on the other hand, are such as the law will not infer from the nature of the course – **Stros Bucks Aktie Bolag v Hutchinson** (1905) AC 515. In determining the natural consequences, the court considers if the loss is one which any other claimant in a like situation will suffer – **McGregor on Damages** p23 para 1-036.

Special damages must be specifically pleaded and must also be strictly proved - **Govati v Manica Freight Services (Mal) Limited** [1993] 16(2) MLR 521 (HC). A Plaintiff who claims special damages must therefore adduce evidence or facts which give satisfactory proof of the actual loss he or she alleges to have incurred. Where documents filed by the Plaintiff fail to meet this strict proof then special damages are not awarded – **Wood Industries Corporation Ltd v Malawi Railways Ltd** [1991] 14 MLR 516.

Although perfect compensation is impossible, what the plaintiff should get is fair and adequate compensation - **British Commission v Gourley** (1956) AC 185. Since it is difficult to assess damages involving monetary loss, courts resort to awarding conventional figures guided by awards made in similar cases and also taking into account the money value. Lord Morris buttresses this contention in **West v Shepherd** (1964) AC 326 at 346 where he states: ‘*money cannot renew a physical frame that has been battered and shattered. All judges and courts can do is to award a sum which must be regarded as giving reasonable compensation.*’

The court bears in mind the sentiments laid out in **Steve Kasambwe v SRK Consulting (BT) Limited** Personal Injury Cause Number 322 of 2014 (unreported):

‘At times the court is faced with situations where the comparative cases have been rendered obsolete because of the devaluation of currency and inflation. It would not achieve justice if the court insisted on the same level of award as was obtaining in the previous cases. In such situation, when deciding the new cases, the court must take into account the life index, i.e. cost of living and the rate of inflation and the drop-in value of the currency. The court must therefore not necessarily follow the previous awards but award a higher sum than the previous cases.’

COMPENSATION

Loss of Expectation of Life

Damages under this head are claimable by a Plaintiff where injuries suffered by him have reduced his expectation of life - **Flint v Lovell** [1935] 1 KB 354. The claim for damages under this head also survives the demise of the injured plaintiff and is thus available to the personal representative of his estate – **Nyirongo v United Transport (Mal) Ltd** [1990] 13 MLR 344. In assessing damages under this head, the thing to be valued is not the prospect of length of days but of a predominantly happy life – **Bentham v Gambling** [1941] AC 157. No regard must be had to the financial losses or gains during the period of which the victim has been deprived, as these damages are in respect of loss of life, and not of future pecuniary loss - **Bentham v Gambling** [1941] AC 157.

Counsel for the Plaintiff contends under this head that since a consent judgment was entered in favor of the Plaintiff, by consenting the Defendants waived all the defenses they may have had to the Statement of Claim. Ergo, all the claims in the statement of claim are payable, including those for loss of expectation of life. Counsel for the Defendant argues that the Plaintiff commenced the action before he was granted letters of administration and therefore cannot be awarded damages under

this head for that reason. Counsel for the Defendant cited the case of **Tafwirachi Mwakiyeye v Kangawe Ali and General Alliance Insurance**, Civil Cause No 116 of 2012 where, in considering whether damages for loss of expectation of life are awardable in the circumstance that the Plaintiff was not a personal representative of the deceased estate having not obtained the letters of administration, the court stated: *"In my most considered opinion, since the issue was not expressly and unequivocally settled by the consent order herein, looking at its provisions or clauses, it is appropriate for the issue whether or not damages for loss of expectation of life are awardable herein to be determined by this court at this stage."*

Looking at the consent order in the present matter, and in light of the High Court's contention in the **Mwakiyeye Case**, this court finds that the issue of whether or not damages for loss of expectation of life are awardable herein can be determined by this court as they were not expressly and unequivocally settled by the consent order.

It was correctly noted by Counsel for the Defendant that at the time the matter was commenced the Plaintiff had not yet obtained the letters of administration. Effectively, on the date that the matter was commenced the Plaintiff had not yet been appointed administrator of the estate. As Counsel for the Defendant submitted, it should be noted that, whereas, in the case of an executor his title to sue relates back to the date of the death of the deceased, in the case of an administrator, his title to sue relates back to the date of the grant of letters of administration, which must therefore be obtained before the action is commenced.

This court therefore finds that the Plaintiff was not administrator at the time that the action was commenced and therefore damages for loss of expectation of life are not awardable to the Plaintiff. Accordingly, this court will not make any award under this head.

Loss of Dependency

For damages under this head, the basic rule is that they are to be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of life – **Franklin v SE Ry** (1858) 3 H & N 211 at page 214. There is no need for the dependant to show that the deceased was under a legal liability to support him or her - **Franklin v SE Ry** (1858) 3 H & N 211. There is also no need to show that the dependant was receiving pecuniary benefit at the time of the death, a purely prospective loss being sufficient. Thus, a dependant parent might not have reached an age of requiring assistance - **Franklin v SE Ry** (1858) 3 H & N 211; alternatively, a deceased child might not have reached an age when he or she could afford to render assistance – **Taff Vale Railway v Jenkins** [1913] AC 1.

In calculating damages for loss of dependency, the courts use the multiplicand and the multiplier method. The multiplicand is a figure representing the annual value of the dependency, and the multiplier is an approximated number of years over which such dependency is deemed to continue. The assessment is divided into two stages: firstly, the period between the date of death and the date of the trial and, secondly, the period following the trial. In arriving at the proper multiplicand, the

calculations are made on the assumption that the deceased would have spent one-third of his income for personal expenses. The product of the multiplicand and the multiplier (starting figure) is scaled up or down, after taking into account the relevant considerations. The method adopted by the courts in determining the starting figure is to keep the multiplicand intact and either decrease or increase the multiplier. *Mbila et al v Attorney General et al* [1993] 16(1) MLR 283, *Banda and Chibuku Products Ltd v Chunga* [1987-89] 12 MLR 283 and *Thindwa v Attorney General et al* [1995] 1 MLR 336.

There are basically two considerations for which the courts decrease the multiplier. The first consideration is that a lump sum is being given and that it is therefore, likely to be invested. The second consideration is that contingencies might have arisen to cut off the benefit prematurely. Suffice to say, for now, the most important of the contingencies are to do with death and marriage. Conversely the multiplier may be increased over the years. It should be noted that where the deceased's income was ascertainable, the award for loss of dependency would be equal to the annuity lost for the period of the deceased's expected employment had he been alive. However, when there is no evidence as to how much the deceased was earning, the court awards something equivalent to what a domestic worker earns – *Mbila et al v Attorney General et al* [1993] 16(1) MLR 283, *Thindwa v Attorney General et al* [1995] 1 MLR 336 and *Kenson Shapu v NICO General Insurance Company Limited* Civil Cause Number 222 of 2007.

The deceased herein was aged 11 years. He was a student in the care of his uncle who took him from the village away from his parents to raise him as his own.

In terms of the multiplier, existing case authorities state that life expectancy in this country is in the region of 45-50 years – *Emma Sitenala Piyano v Geoffrey Chipungu and Prime Insurance Company Limited* Civil Cause No 1254 of 2001. Statistics released in 2011 from UNDP pegged life expectancy in Malawi at 52 years. Having considered the contingencies of the deceased person's life, this court adopts a multiplier of 35 years.

The court will use the multiplicand of a domestic worker's income. The deceased died on 21 May 2009. At the time of his death, the minimum monthly wage was K117.30 per day, K2,346 per month.

$$= K2,346 \times 12 \text{ months in a year} \times 2/3 \times 35$$

$$= \underline{\underline{MK 656,880}}$$

Special Damages

This court will not make an award for the cost of police and medical reports as no evidence was led to prove the same. Cost of police and medical reports are special damages and must be specifically pleaded and proved as required by law – *Govati v Manica Freight Services (Mal) Limited* [1993] 16(2) MLR 521 (HC). A Plaintiff who claims special damages must therefore adduce evidence or facts which give satisfactory proof of the actual loss he or she alleges to have incurred.

The Plaintiff also claimed reimbursement of funeral expenses. Counsel for the Defendant argues that the Plaintiff did not show proof of the payments he made. However, Counsel for the Plaintiff states that it is a well-known fact that service providers, especially in markets do not give receipts. And that it is also difficult for a grief-stricken person to demand a receipt as the grief and shock are overwhelming especially a sudden death such as the deceased's. This court agrees with Counsel for the Plaintiff and awards damages for the funeral expenses as follows: K15,000.00 being amount spent on the coffin, MK40,000.00 being the amount spent on food at the funeral and MK50,000.00 being the amount spent on transportation.

DISPOSAL

Summary

The Plaintiff is therefore awarded nothing for loss of expectation of life, MK656,880 for loss of dependency and MK105,000.00 being funeral expenses.

A total sum of MK761,880.00 is awarded in damages.

Apportionment

The court apportions the damages as follows:

- | | |
|---|---------------|
| 1. Father to Lackson Givison(deceased) | MK 150,000.00 |
| 2. Mother to Lackson Givison (deceased) | MK 150,000.00 |
| 3. Siblings to Lackson Givison | MK 300,000.00 |
| 4. Davis Helani (Uncle) | MK 161,880.00 |

Each party is at liberty to appeal to the Supreme Court of Appeal within the requisite time frames.

Ordered in Chambers on the 6th day of March 2017 at Chichiri, Blantyre


CM Mandala

ASSISTANT REGISTRAR