IN THE HIGH COURT OF MALAWI, BLANTYRE

CIVIL CAUSE NO. 431 OF 1979

LEYA MWERA GONDWE (FEMALE).....PLAINTIFF

versus

CEDRIC CHIBAMTIKA LORA (MALE).....DEFENDANT

Coram: Skinner, C.J.
Mbalame, Chief Legal Aid Advocate, for the Plaintiff
Chiume of Counsel, for the Defendant
Mkandawire, Court Reporter
Kadyakale/Sonani, Official Interpreters

J U D G M E N T

The Plaintiff's claim is for assault and battery. She alleges in her statement of claim that on or about the 24th September, 1978, the Defendant assaulted her at Zingwangwa in the City of Blantyre by striking her with his open hand on the left ear. She alleges that as a result of this she suffered injury to her left ear which necessitated surgery and that she was in hospital from the 7th to 24th of December, 1978. She further pleads that the injury has caused deafness and that she remains deaf up to this date and that she suffers from headaches and high blood pressure. The Defendant entered a defence in which, while admitting an assault on one Leya Sabudu under provocation, he denied having assaulted the plaintiff, however, at the outset of the trial, I was informed by counsel that the Defendant admitted liability and that the remaining dispute between the parties concern the damages only. I made a formal finding as to the liability and I have heard evidence on the issue of damages.

The Plaintiff gave evidence. She said that on the night of the 23rd of September, 1978, she heard voices near her house. She went out in order to check the house of a friend which had been left in her care. When she returned she found the Defendant near the door of her house. She was a tenant of the Defendant. He asked her why she was coming from the direction of the bathroom and accused her of having urinated there. She did not reply. At 7.30 on the next morning, the 24th of September, she asked the Defendant if he remembered the conversation of the night before. She told the Defendant that she would continue to urinate in the bathroom. She was not serious as to this but said so because of his accusation of the night before. He jumped over to her and hit her on the left ear. She did not know whether the blow was with his fist or an open hand. She felt pain in her ear. The parties went before the local Chairman of the Malawi Congress Party and according to the witness the Defendant admitted having hit her and the matter was reported to the police. She then went on to describe the treatment which she received to her ear. She said that she went to the dispensary on the 25th of September because she had difficulty in hearing and she went

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to the Queen Elizabeth Central Hospital for further treatment on the 26th of September. She was treated at the hospital on and off until the 12th of December for the pain in her ear and her difficulty in hearing. She was admitted to that hospital on the 12th of December and remained there until the 24th of December and during that time she underwent an operation to her ear. She underwent a second operation in the month of February, 1979 and she was in hospital from the 7th to the 18th of February. She pointed to scars over her ear and on it which she said were caused by the second operation. Both operations were carried out by Dr. Borgstein and after his death, her treatment was continued by Dr. Rycken. She was sent to the Nguludi Hospital for the deaf and she was examined there by another doctor. She said that she cannot hear in her left ear even now and that she still gets some pain. In September 1978, she worked as a typist but she now works as a City Health Demonstrator but it is clear from her evidence that no significance is to be attached to the change of employment. She said that the injury to her ear did not affect her in her work other than that she often has to go to the hospital. She further said that she now suffers from high blood pressure. She is a married lady.

Mr. Chiume's cross examination was directed towards her conduct on the 23rd and 24th of September and also to the extent of her injuries and the medical treatment which she received. The witness said that she was annoyed because the Defendant had accused her of urinating in the bath. Later she changed this to say that she was not annoyed, but I do not attach any great significance to this change because there was considerable difficulty and dispute about the interpretation. She denied that the Defendant had said that he would kick her off the premises and she further denied catching his shirt. She said that a man came to separate them and that at this time she was running away. She denied tearing the Defendant's shirt. Mr. Chiume engaged in considerable cross examination as to the time when the witness first attended for medical treatment, but I think that it was clear from her evidence that she was being treated from the 25th of September onwards. Again, in cross examination, Mr. Chiume challenged the witness's testimony concerning her deafness and to this end, he made her undergo a test as to whether or not she could hear him when she covered her right ear. The test also extended to her hearing when she covered her left ear. I observed the witness carefully during this part of her evidence and it seemed to me that she was unable to hear Mr. Chiume when her right ear was covered but that she could hear him when her left ear was covered and it was clear that she could hear when she was in the witness box.

P.W.2, Dr. Y.M. Rycken, is a surgeon at the Queen Elizabeth Central Hospital. His evidence was that the plaintiff had been treated by Dr. Borgstein at first. She was admitted to the hospital on 12th of December 1978 and it was found that her ear-drum was infected and there was a large central perforation. This was discovered under anaesthetic. She was treated with antibiotics until the infection to the ear had cleared up and she was re-admitted to hospital on the 7th of February, 1979. The ear was then operated on and the perforation was closed. She was examined on the 4th of May, 1979, when it was found that there was still a small perforation. A large defect of the eardrum was seen by the witness himself on the 21st August, 1979, and in

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December of that year he found a recurrent infection of the eardrum. After that the perforation got smaller and when the witness saw the Plaintiff in November, 1980, the perforation was small. The witness thought it is quite possible that a repetition of infection will take place again and in that event, the perforation will again enlarge and this may well happen from time to time. There is a degree of pain which is less when the infection is absent. The witness said that there was a permanent injury to the inner ear and the loss of hearing will be maintained.

P.W.3, Mr. T.C. Kaluba, is an audiologist employed at the Education Centre for the Deaf. He was trained at Edinburgh and Manchester Universities. The Plaintiff was sent to him from the Queen Elizabeth Central Hospital to test her hearing and he did so on the 23rd July, 1980. Prior to testing her, he examined her ear and found a large central perforation of the left eardrum. He tested both ears. She had normal hearing in the right ear, but her hearing in the left ear was defective. The witness described the tests in detail. I do not find it necessary to re-state his evidence. He said that her hearing was dull on the speech level test and that she cannot hear with the left ear unless one uses abnormal speech. It was necessary to shout at her in order that she might hear with that ear. The witness spoke of the pain and the permanent injury to the inner ear. I accept the evidence of these experts, it was clear and unchallenged by other testimony.

The Defendant gave evidence. He said that he looks after his uncle's buildings at Zingwangwa and has been doing so since 1974. The Plaintiff was a tenant. There is an outside bathroom made from corrugated sheets. He had complaints from the other tenants about the smell of urine in the bathroom and he noticed this himself. He spoke to all the tenants about it, but no one admitted urinating in the bathroom. There are separate urinals and the bathroom does not contain one. After that, he kept an eye on the bathroom and sometime before the month of September, he found the Plaintiff urinating there. His evidence on this latter point loses much of its value as it was not put to the Plaintiff in cross examination. On the night of the 23rd of September, he was in his house. It is about ten yards from the bathroom. He heard someone going in the direction of the bathroom, it was the Plaintiff. He went outside and he could hear her urinating in the bathroom. He then went and stood near her house. When she came back, he asked her what she was doing and said to her that she had been urinating in the bathroom. She made no reply; he then went to bed. The Plaintiff called him in an angry tone on the morning of the 24th of September. She asked him if he remembered what he had said the previous night. He said that he did, and told her that she had disobeyed his orders about urinating and that the bathrooms were temporary and might fall down and in that event, he would have to repair them and he would not like to touch the place where people had been urinating. According to the witness, the Plaintiff then said she would go to the bathroom to urinate deliberately so as he would have to touch her urine. He was provoked by this statement and lost his temper. He was shivering with temper and came near to the Plaintiff and she grabbed him. He slapped her with an open hand. When she grabbed his shirt it was torn. According to the witness, the Plaintiff then left, picked up a stone and threw

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it at him. She picked up a second stone, but a friend took it away from her. The witness went away, but she followed him and grabbed him again. He had not intended to beat her; he was provoked.

D.W.2, Mr. A. Ngwira, is a school friend and relative of the Defendant and lives at the houses looked after by the Defendant. His evidence was that on the morning of the 24th of September, he heard a woman shouting. He went out and he found the Defendant being beaten by the Plaintiff. Another man was holding the Defendant so as the Plaintiff could beat him, though the other man pretended to separate them. The witness rushed to separate them and did so. He saw that the Defendant's shirt was torn. The Plaintiff then went away and found a stone which she wanted to throw at the Defendant, but she was stopped. In cross examination the witness said that he was stating the truth and that he saw the plaintiff beating the defendant. She hit him with the palm of her hand.

In evaluating the testimony of the Plaintiff and the Defendant, I thought that the evidence of both was coloured by a desire to forward their cases. It seemed to me that the Plaintiff was basically a truthful person, but I think that she was far more annoyed than she would have me believe by the accusation of urinating in the bathroom and further I did not accept her version about not catching the shirt, though this may have arisen from forgetfulness arising from the heat of the argument on that morning. I was not impressed by the evidence of the Defendant. I did not believe his version that the Plaintiff said she was going to urinate in order that he might touch her urine. It is significant that that act of provocation was not pleaded though the tearing of the shirt was. Again, it was not put to the Plaintiff in cross examination. It seemed to me an after thought and it did not ring true. Again, the whole prior history of urinating in the bathroom seemed to me to be much exaggerated. Again, it is significant that there were a number of matters in his evidence which were not put at all to the Plaintiff. It would suggest that he had not instructed his counsel on these matters until a very late stage. D.W.2 was destroyed in cross examination. His version of what happened varied from that of the other witnesses and he seemed to me distinctly uncomfortable under cross examination. In any event, his evidence relates to what happened after the Plaintiff was struck.

I am satisfied that the Plaintiff was angry on the morning of the 24th of September because of the accusation made by the Defendant on the previous night. I do not accept that she said she was going to urinate in the bathroom with the intention that the defendant would touch her urine. I find, however, that she did tell the Defendant that she would continue to urinate in the bathroom. I further find that as a result of this, he lost his temper and that in his own words he was shivering with temper and that he then came near to the Plaintiff. In his own version he came near to the Plaintiff to ask if she really meant what she said and he was then actually shivering with temper, then as he came near, the Plaintiff thought he wanted to fight and so she caught him and he slapped her. That was the Defendant's own version. I cannot see that the grabbing of the shirt can be said to be provocation. The Defendant himself thought that she was

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grabbing his shirt because he was going to attack her. It seems to me that what the Plaintiff did was limited to making a taunting remark, i.e., by saying she was going to continue urinating in the bathroom. I find that this angered the Defendant and that he hit her a very hard blow either with his fist or his open hand, more likely the latter. The effect of this blow was to perforate her eardrum and to give rise to the injuries described in the medical evidence. In my view, the retaliation by the Defendant was brutal and entirely out of proportion to the occasion; whereas the conduct of the Plaintiff was comparatively trivial nor did it constitute a tort.

The law relating to the effect of provocation on damages in assault cases has been the subject of considerable judicial pronouncement in recent years. In the past, it was thought that matters of provocation not amounting to justification would nevertheless afford ground for mitigation of damages. This changed in the 1960s and by the end of the decade it seemed to be settled law that the amount of compensation to be awarded to a Plaintiff as damages for physical injuries could not be reduced by reason of the provocation afforded by the Plaintiff's conduct. An Australian case, Fontin vs. Katapodis (1962) 108 C.L.R. 177 is in point. The facts in that case were that the Plaintiff struck the Defendant with a weapon, a wooden T-Square. It broke on his shoulder but caused little injury. The Defendant took a sharp piece of glass with which he was working and threw it at the Plaintiff, causing him severe injury. The trial Judge reduced the damages from £2,850 to £2,000 by reason of the provocation. But the High Court of Australia held that while provocation could be used to wipe out the element of exemplary or aggravated damages, it could not be used to reduce the figure for pecuniary compensation and the Court increased the damages to the full £2,850. That decision was followed by the Court of Appeal in the case of Lane vs. Holloway (1968) 1 Q.B. 379. The facts in that case are somewhat similar to the facts before me. Lane, aged 64, lived in a quiet court in Dorchester. Backing onto the court was a cafe run by Holloway, aged 23. Relations between Holloway and the inhabitants of the court were strained. At about 11 p.m. on July 21, 1966, while Lane, who had returned from a public house, was enjoying the air with a neighbour in the court, Holloway's wife shouted abuse at them from her first floor bedroom window. Lane replied: "Shut up, you monkey-faced tart." When Holloway asked Lane what he had said to his wife, Lane replied: "I want to see you on your own," implying a challenge to fight. Holloway came out into the courtyard in pyjamas and dressing-gown. He moved close to Lane, causing the latter to think that he might be struck. Lane threw a punch at Holloway's shoulder. Holloway then drew his right hand from his pocket and punched Lane very severely in the eye. The blow caused a most severe wound, entailing 19 stitches, an operation, and a month in hospital.

The Judge held that Lane's conduct in bringing the injuries on himself to a substantial extent, by his insult to Holloway's wife, his challenge to Holloway and by striking the first blow, must operate to reduce the damages very considerably. Lane was awarded £75 damages. On appeal it was held that the provocation did not reduce the real damages he suffered. Lord Denning M.R. having referred to the decision in Fontin vs. Katapodis went on

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to say: (P.387 G):

> "I think that the Australian High Court should be our guide. The defendant has done a civil wrong and should pay compensation for the physical damage done by it. Provocation by the plaintiff can properly be used to take away any element of aggravation. But not to reduce the real damages."

The point was also dealt with Salmon L.J. in the following passages which appear on page 390 of the report:

> "I entirely reject the contention that because a plaintiff who has suffered a civil wrong has behaved badly, this is a matter which the court may take into account when awarding him compensatory damages for physical injuries which he has sustained as the result of the wrong which has been unlawfully inflicted upon him.
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> "I would unhesitatingly come to that view without any authority at all. I cannot see how logically or on any principle of law the fact that the plaintiff has behaved rather badly and is a cantankerous old man can be even material when considering what is the proper compensation for the physical injury which he has suffered."

The Court was a strong one and the law on the point appeared to be settled after the decision in this case, but in Murphy vs. Culhane (1977) Q.B. 94, the Court of Appeal appeared to qualify the principle enunciated in these cases. Lord Denning said of them:

> "But those were cases where the conduct of the injured man was trivial - and the conduct of the defendant was savage - entirely out of proportion to the occasion. So much so that the defendant could fairly be regarded as solely responsible for the damage done. I do not think they can or should be applied where the injured man, by his own conduct, can fairly be regarded as partly responsible for the damage he suffered."

He then went further by referring to what he had said in the case of Gray v. Barr (1971) 2 Q.B. 554, 569:

> "In an action for assault, in awarding damages, the judge or jury can take into account, not only circumstances which go to aggravate damages, but also those which go to mitigate them,"

and he said that was the principle he preferred rather than the earlier cases. It seems to me that that part of the judgment was not the ratio decidendi in that case and that it was obiter dicta; the ratio decidendi dealt with the possibility that the defence arising from ex turpi causa non oritur actio would be available and that the damages might be reduced under the Law Reform

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(Contributory Negligence) Act. Be that as it may, in the case before me, the conduct of the Plaintiff was not such as to fall within the qualification set by Lord Denning. I do not think that she was partly responsible for the damage she suffered. It cannot be said that she commenced a criminal affray for the purpose of injuring the Defendant. Her conduct was trivial and the conduct of the Defendant was entirely out of proportion to it.

The defence, neither in the pleadings nor before me, took any point arising from Section 12 of the Statute Law (Miscellaneous Provisions) Act; nor do I think that, if such point had been taken, it would be of any avail, in my view the Plaintiff's injury was not partly the result of her "own fault".

I am satisfied that the Plaintiff's pain and suffering have been considerable and will continue to a lesser degree. The evidence shows that she was in pain from the day of the blow. It is a localise pain, but nevertheless it is persistent for a long time and at times there must have been a considerable degree of pain. She has also had the pain caused by the surgical investigation and the operation. There must have been a degree of fear during these and there must be some - not great - embarrassment caused by the inability to hear properly in the left ear.

I turn to the loss of amenities of life. The Plaintiff is at a partial loss of one of the five senses namely, hearing. I need not re-state the evidence of the experts. I am satisfied that the degree of impairment in the left ear affects her hearing generally and will affect her enjoyment of life. The medical evidence is clear that there is a permanent impairment to the inner ear, and that this affects the Plaintiff's hearing. I accept Mr. Kaluba's evidence as to the degree of impairment to the ear. Again, I must take account of the evidence of Dr.Rycken that eruptions of infection may take place in the future from time to time and that the perforation may again enlarge in such circumstances and require medical treatment from time to time. This would again affect her enjoyment of life.

The awards of damages made in previous cases, where the injuries are somewhat similar to those in the case before the Court, serve as a guide. But they are only a guide and in each case damages have to be assessed on the facts of the case. The English cases relating to similar injuries are an imperfect guide, dealing as they do with plaintiffs who live in a different society where wages are greater and the cost of living is greater; but they are some guide. Again, one has to bear in mind the change in the value of the money over the years. Attention has been drawn by counsel to various cases. I have looked at these and they are of some assistance but, of course, subject to the qualifications which I have referred to earlier.

I have borne in mind that the Plaintiff has not been affected in her employment or matrimonial prospects by the injury. I disregard her high blood pressure.

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I award K1,000 for pain and suffering. I award K3,000 for loss of amenities of life. For the reasons given earlier in the judgment, I will not reduce the damages because of the Plaintiff's conduct. In the result, I enter judgment against the Defendant for the Plaintiff in the sum of K4,000 with costs.

Pronounced in open court this 9th day of February, 1981 at Blantyre.

J. J. Skinner
CHIEF JUSTICE