

IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NUMBER 1079 OF 1989



BETWEEN:

KANTHU KALINDA (an infant by  
B E Kalinda)) his father and  
next friend ..... PLAINTIFF

and

THE ATTORNEY GENERAL ..... DEFENDANT

Coram: D F MWAUNGULU, REGISTRAR OF THE HIGH COURT  
T C Nyirenda, Counsel for the Plaintiff  
Counsel for the defendant absent

O R D E R.

The situation in this case is much like that of Rodrick Kambwiri in Kambwiri vs. The Attorney General Civil Cause Number 643/90, with only two differences. There it was loss of the left leg through amputation. In this case it is loss of the left arm by amputation. The negligence in the Kambwiri case was at Thyolo District Hospital. This time it is at Mulanje District Hospital. The circumstances in which these two young persons found themselves are, to say the least, pathetic and could have been avoided. The plaintiff here had a simple sprain that could have been cured by a simple application of plaster of paris. Much like in the Kambwiri case, the plaster of Paris was unskillfully applied too tight. The plaintiff went through gruelling pain as a result of the arm and the fingers swelling because of poor circulation of blood to this area caused by the grip tight of the plaster of Paris. By the time the Hospital realised there was danger, it was a little too late. The arm could not be saved inspite of all attempts by Malamulo Hospital. It had to be amputated. Amputated it was.

The plaintiff was nine (9) years at the time of the injury. He was eleven (11) on the date of assessment. He goes to a Local Education Authority Primary School. He was in standard three (3) at the time of the trial. He still feels a lot of pain in the remnant arm. He seems not to be perturbed socially. Generally his friends are very helpful to him and his situation.

2/.....



Judgment was obtained by consent. The only question is the quantum of damages. For injuries of this nature, Courts are aiming at a fair compensation for the injuries sustained. Courts award damages for non-pecuniary loss and pecuniary loss.

For non-pecuniary loss, Courts, generally award damages for pain and suffering and loss of amenities. In Kambwiri vs. the Attorney General I awarded K15,000 for pain and suffering and loss of amenities. Much of that award pertained to loss of amenities after considering the sort of pursuits that Rodrick was involved in. I have stated lately that in Chisanga vs. Stage Coach (Malawi) Ltd. and Another, I was trying to bring in a consistency in awards of the like that I am dealing with now. I actually settled for awards around the K10,000 bracket for pain and suffering and loss of amenities. In that case, I looked at the case of Mayenda-yenda vs. Bangwanji, where I reviewed most of the awards. In this particular case, I want to award K10,000 for pain and suffering and loss of amenities. The difference between this case and Kambwiri vs. the Attorney General is what was lost in terms of amenities in view of the recreational activities in which Kambwiri was involved.

An award is to be made for loss of earning or earning capacity. The plaintiff is still in school. He is in primary school. It is not easy to envisage what the

future holds for him. There is very little evidence of his mental capacity as to indicate whether he would have taken a white collar job. He could in future take a sedentary job. It is better to assume that he would have taken a manual job which would require him to use both his hands. Even if he were only to use one hand, the assistance, which normally follows use of the other hand, would be denied. Since there are no earnings, the most that can happen is to award general damages in the form of loss of earning capacity. When a Court has to award for loss of earning capacity, the Court has to decide whether the chance of him losing earnings in future as a result of the injury is real or substantial. Then the Court has to come up with an appropriate award. In this particular case, definitely with one arm, it is a real and substantial probability that, were Kanthu Kalinda to be thrown into the labour market, his prospects of employment and, if employed, his continuity in that employment would be severely reduced. In Martin vs. John Mowlen Company Limited 1951 C.A. No. 272 Lord Denning approved a statement made by a trial judge that:

"Employers must consider their own interests, and as the time comes when anyone has to be stood off, as the expression is, quite obviously they don't stand off the employee who is most capable of doing the work - they only stand off the employee least capable and the man who has been incapacitated to a certain extent."



In Keatin vs. Sankey 1951 C.A. No. 21, Lord Justice Somervell said:

"The plaintiff suffered a permanent injury to his hand and there is evidence that there is a loss of function which might, if he were thrown on the labour market, militate against his getting work. He might want to get work or better paid work, which he could have expected if he had all his fingers and a full, competent hand .... The chances of life are such that, I think, with a man of 54, one must, in awarding damages, give some sum in respect of such loss of capacity or any power as is found here which would impose a financial loss if, for any reason, he was thrown on the ordinary labour market."

When awarding damages in form of loss of earning capacity for boys who are still in school Courts have exercised a measure of circumspection. Generally, awards have been very low because generally, the plaintiff could very well get a better job. Further most of that money would be paid early in life before the child had the capacity of earning it. Further that money would be invested immediately which means it would be earning interest well before it was earned. So in Thomas vs. British Railways 1976 2 W.L.R. 761, in awarding £5,000 to a child, Lord Justice Denning said:

"The loss of earning capacity or future earnings is also very difficult to assess. He might perhaps obtain some slightly best or other work in which he could sit down and earn almost as much as if she were able-bodied, and it is to be remembered that in many cases it would be several years before she could earn any awards; whereas the compensation is to be paid now and will accumulate interest. I would award £5,000 on this head. It is to be stated here that the awards that are made for loss of earning capacity in an infant whose future is precarious and unknown are only speculative. The Courts, where obvious loss of earning or earning capacity and have to make an award well before those earnings accrue have to come up with some figure which safe-guards the victim for such a loss. It is for this reason that even on appeal, the courts do not interfere with such awards."

In Thorne vs. May and Others 1975 C.A. No. 313, Lord Justice Ore said:

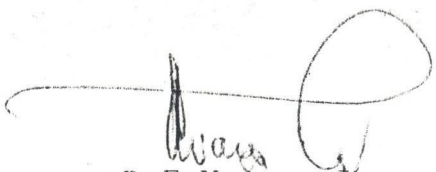
"In my judgment, taking these matters into account, it cannot be said that the figure allowed by the learned Judge under this head was extensive. It is true that so far as loss of earnings or of earning capacity is concerned, it was impossible for me to

make any close attempt; it was very much a matter of speculation. But I see no reason to consider that he approached that matter on any wrong basis, and I bear in mind that in Davies vs. Howell Duffryn 1942 A.C. 616, Lord Wright observed that where there was an element of speculation about the awarding of damages there was all the more reason why the appellant court need to be too slow to interfere with a figure."

In this case, I award K10,000 for loss of earning capacity.

In all, therefore I award K20,000.

Made in Chambers this 13th day of May 1992, at Blantyre.



D F Mwaungulu  
REGISTRAR OF THE HIGH COURT