



MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI
SITTING AT BLANTYRE PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO. 469 OF 2013



BETWEEN

MAGRET ZAGWAZATHA **PLAINTIFF**

and

THE ATTORNEY GENERAL **DEFENDANT**

CORAM : **HIS HON. N. USIWA USIWA..... DEPUTY REGISTRAR**
Mr. Wame of Counsel for the Plaintiff/Applicant
Miss Itimu .. of Counsel for the Defendant/Respondent
Mr. M. KakhobweOfficial Interpreter

RULING/ORDER ON ASSESSMENT OF DAMAGES

Background

I shall deal with two applications in this sitting. The reasons for doing so will become clear in due course.

By way of background this is a Personal Injury cause. One Magret Zagwazatha took out summons on 8th May 2013. She is suing the Attorney General for the accident that occurred on 27 January 2000 while she was traveling in vehicle attached to the Malawi Defence Force in Mzuzu. In her Statement of Claim she states that she "has not yet received her compensation **despite several meetings and several letters being sent to the Malawi Defence Force unlike other fatal victims who were ably compensated.**"

Prior to the summons, the Plaintiff duly served the Defendant a notice of civil suit on 25th January 2013.



The Plaintiff who moves around by the aid of a wheelchair, is claiming for damages for personal injuries under various heads which include pain and suffering; loss of amenities of life and disfigurement.

The plaintiff sustained a fracture of the ribs numbers 3 and 4, pneumothorax, fracture and dislocation of the spine, fracture of the left arm, neurological deficiencies of lower limbs(both legs not functioning; and bladder not functioning (incontinence), right knee dislocation with torn ligaments, and hypostatic pneumonia, and was admitted for 6 months before being treated as an outpatient to date at Balaka District Hospital. His permanent incapacity was assessed at 100% both her legs cannot function and she is always on the wheel chair with a helper.

On 17 August 2015 this Court did assessment of damages in this matter from 09h22. Soon after the victim of the accident finalized her testimony, Counsel Itimu arrived at the court. I gave her an opportunity to address the court although Counsel Wame had left. She argued the assessment was to take place in the afternoon. And that given a chance she would like to raise a preliminary objection against the assessment. So Counsel was allowed to make an application to set aside the default judgment from which emanated the assessment of damages.

Hence on 30 October 2015 both Counsel appeared before me. I shall quote Counsel Itimu verbatim:

*"It's our application to set aside a default judgement .
We filed summons and affidavit and skeletal arguments.
We adopt them.*

The judgement was obtained regularly.

*Our failure to file defence on time was due to **delay in receiving instructions from MDF because the matter stems from the year 2000 which is about 14 years ago.**
The records were not easy to find.*

The matter herein is statutory barred. It being a personal injury matter. It ought to have been commenced 3 years from the time of the accident, but it wasn't. So many years have passed; and if the matter were to proceed the Defendant would be prejudiced.

It's mainly on that basis, having a defence on merit that the Defendant wishes to have the default judgment

herein set aside." (pages 1 and 2 of the long hand record of 30 October 2015.)

At page 13 of the said hand record Counsel for the defendant said they would rely on their skeletal arguments "which in our view have all the arguments". The said arguments for the applicant are contained in the following ruling.

It is also very important to note that in her affidavit sworn on 14 August 2015 Counsel for the Defendant stated that

"unfortunately due to funding constraints I could not travel to Blantyre to attend to this matter or check the court record and make enquiries as to what exactly was going on and asked Counsel Nyemba to appear on behalf of the defendant and adjourn the matter."

This financial constraint explains some of the delay encountered by the Defendant.

RULING ON PRELIMINARY OBJECTIONS

This is an application to set aside a default judgment from which damages were assessed as above explained. The Defendants made the application because they believe they have a defence on merit.

The Law and Analysis

The Defendant called upon the court to examine several cases: In **Brian Mungomo v NICO and Chirimba Garments, civil cause number 736 of 199(unreported)** it was held that the court has discretion to set aside a regular judgment, this power is unconditional and its purpose is to avoid injustice which may be caused if judgment follows automatically on default. If the defendant can show merits the court should not prima facie desire to let a judgment pass on which there has been no proper adjudication. The case of **Alpine Bulk Tpt Company V. Saudi Eagles Shipping Company (1986) 2 Lloyds Rep 221** was also used.

Where the judgment was regularly obtained an application to set aside the judgment must be supported by an affidavit disclosing facts showing that the defendant has a good defence on the merits: **Farden v. Ritcher (1989) 23 Q.B.D 142; Kachunjulu v. Magaletta (1971-72) 6 ALR 403.**

The rationale behind this was well articulated by Lord Atkin in **Evans v. Bartlam (1937) 2 ALL ER 646 at page 650** where he stated that the principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure.

The Defence also reminded the Court that in the present case the court has not pronounced judgment upon the merits nor by consent.

If the defendant can show merit, they argued, the court should not prima facie desire to let judgment pass on which there has been no proper adjudication: **Alpine Bulk Tpt company v. Saudi Shipping Company (1986) 2 Lloyds Rep 221**.

In the present case the Defendant stated that it has shown in its affidavit that there is a defence on merit as such the court should not prima facie desire to let a judgment pass on which there has been no proper adjudication.

The Defence finally submitted that although the default judgment was obtained regularly, the defendant has a defence on merit therefore it would be unjust if the default judgment were to pass without proper or full adjudication; and hence prayed for an order setting aside the default judgment herein.

On the other hand, Counsel for the Plaintiff, stated that looking at the date of the Default Judgment, more than **two years** had now elapsed; and the Defendant has no automatic right to set aside the Default Judgment in circumstances where he is guilty of inordinate delay.

He then called upon this court to retain its discretion whether to set aside or not even where there is a defence on merit.

He further cited the case I delivered on 3 July 2015. In **Clemence Dziko vs Yesum Banda & P/C PI 8 of 2014**, I held that a delay of **9 months** to set aside a default judgment was an inordinate delay. I dismissed the Defendants application with costs to the Plaintiff.

In **NICO General Insurance Co. Ltd vs Tomas Munyimbiri MSCA Civil Appeal No. 54 of 2008** it was held that a delay of **5 months** amounts to inordinate delay. And the Supreme Court agreed with the High Court decision on the decision.

Recently Kenyatta Nyirenda in **Registered Trustees of Zambezi Evangelical Church vs Zambezi Evagelical Church and Others Civil Cause No. 48/2013** held a delay of **3 months** amounts to inordinate delay and refused to set aside a D/Judgment.

In the present case therefore, a delay of more than 2 years is clearly inordinate delay according to the Plaintiff who prays that the application be dismissed with costs.

But I also remember the submissions of the Defendant, that if the defendant can show merits the court should not prima facie desire to let a judgment pass on which there has been no proper adjudication. However, where the Defendant has had problems to consult the MDF on the matter; where the matter has also stalled because of financial constraints on the part of the Defendant; where the victim of the accident was assessed at 100% and moves helplessly on a wheelchair; **I think it is in the interest of justice to hold the Defendants guilty of inordinate delay of two years; and so I hold. I therefore dismiss the Defendant's application to set aside the Default Judgment the result of which was the assessment of damages against the defendant as follows:**

ORDER ON ASSESSMENT OF DAMAGES

This is an Order on Assessment of damages. It follows a writ of summons dated 8th May 2013, the plaintiff herein commenced this action and subsequently on 19th July 2014, a Default judgment against the defendant in terms of the plaintiff's statement of claim. Notwithstanding the said judgment the parties by consent judgment on 5th February 2015 agreed to proceed with the matter for assessment of damages out of court.

She is claiming for damages for personal injuries under various heads which included pain and suffering. Loss of amenities of life and disfigurement. The plaintiff further claims MK2, 500.00 being the cost of purchasing medical report as well as costs of this action. Following the accident which was caused by the motor vehicle attached to Malawi defence force, the plaintiff sustained a fracture of the ribs numbers 3 and 4, pneumothorax, fracture and dislocation of the spine, fracture of the left arm, neurological deficiencies of lower limbs (both legs not function, and bladder not function (incontinence), right knee dislocation with torn ligaments, and hypostatic pneumonia, and was admitted for a 6 months before being treated as an outpatient to date at Balaka District Hospital. His permanent incapacity was assessed at 100% both her legs cannot function and she is always on the wheel chair with a helper.

Issues:

The only issue to determine is what would be the quantum of damages payable to the Plaintiff.

The Law:

On damages in general

It is a well settled law of Tort that a person who suffers bodily injuries due to the negligence of another is entitled to recover damages which are recoverable for both monetary and non-monetary losses: **McGregor on Damages, 15th Edn. P.885**

The aim of awarding damages is to compensate the injured party as nearly as possible as money can do. The principle which the courts have followed is therefore the principle of restitution integrum so as to put the injured party to the same position he would have been in if he had not sustained the injury claimed: **Livingstone v Rawyards Coal Company [1880] 5AC25**. Lord Blackburn laid down this principle in the following terms:

'Where any injury is to be compensated by damages, in setting a sum of money to be given for damages, you should as nearly as possible get at that sum of money which will put the party who has been injured in the same position he would have been in if he had not sustained the injury for which he is now claiming compensation.'(at p.49)

Furthermore, in assessing damages for pain and suffering, the court must consider the pain which the particular plaintiff has suffered because the circumstances of the particular plaintiff are bound to have a decisive effect in the assessment.⁴

It is important to bear in mind that damages in personal injury cases cannot give a perfect compensation in monetary terms as money cannot renew a physical frame that has been battered and shattered. Therefore, the award of damages in such circumstances has to be a sum which must be regarded as giving reasonable compensation: **West v Sheperd [1964]AC 326**

To avoid absurdity, courts in awarding a quantum of damages apply some degree of general consistency and uniformity in cases of similar nature.⁶ Therefore courts must award damages by using experience and guidance from decided cases of comparable nature.⁷ However, this is only taken as a guiding principle and a starting point as it is equally true that not every injury in a particular case will be similar to another comparable case as was stated by their Lordships in **H Q Chidule v AG**.

In no-fatal personal injury cases, the usual non-pecuniary heads of damages which the courts have awarded are pain and suffering, loss of amenities of life

and disfigurement: **Yesaya Brinda v The Regd. Trustees of Archdiocese of Blantyre and Brother Gilbert (2007) Civ Cause No. 149 (Unrep).**

On Damages for pain and suffering and loss of amenities of life.

This is a compendious lump sum of damages awarded to the injured in an accident. As a matter of practice, it has always been treated under one head awarding damages for personal injuries. However, these are distinct heads of damages since they have different elements: **City of Blantyre v Sagawa [1993]16 MLR 67.**

While pain is attributable to the physical pain caused by or consequent upon the injury, suffering relates to the mental element of anxiety, fear, embarrassment and the likes. **Kemp v Kemp vol II at para 1007.** Loss of amenities of life on the other hand is awarded in respect of the plaintiff's loss of or inability to the enjoyment of life. i.e. a deprivation of an amenity in life due to the injury whether to the plaintiff's knowledge or not: **Sagawa case, supra ,p 72** The court has held that loss of amenities of life must include the loss of all the things the claimant used to be able to see, do and or experience and need not to be of leisurely nature at all: **Kanyoni v AG[1990]13 MLR169;171.**

On Damages for Disfigurement.

It is trite law in personal injury cases that where any part of the body is disfigured as a result of a tortuous act, the court is entitled to award damages for disfigurement: **Mwasinga v Stagecoach [1993]16(1) MLR 363.** Normally damages for disfigurement are to be awarded as part of pain and suffering. The case of **Steven Mhango vs Oplen Ng'oma and Charter Insurance Company Limited CC No 1880 of 2009 (u)** can be of good guidance on this. In that case His Lordship Justice Manda had this to say:

'in terms of embarrassment, while acknowledge that the plaintiff would indeed be embarrassment by his disfigurement, I would want to believe that the embarrassment is to be included as part of the suffering.'¹⁶

It is essential because of the embarrassment which is the emotional and psychological suffering of the fact of disfigurement from injury which is also likely to continue even if the victim is one who takes a light view of his circumstances¹⁷. The same view was held by Potani J. in **James Chaika v. Nico General Insurance Company Limited, CC No. 909 of 2007** that:

'Disfigurement is not a matter to be taken lightly and casually as it is something that one has to permanently live with'.

However, it should be noted that though disfigurement is regarded as part of pain and suffering, in certain circumstances it has been awarded as a separate head of damages: **Mwasinga case, supra**. Disfigurement is also awarded separately where a person sustains an injury that has the effect of diminishing or reducing his/her attraction: **Jumbe v UTM 15 MLR 165**.

Assessment

The plaintiff herein sustained serious injuries. The plaintiff cannot longer walk on her own and she is permanently deformed. She is always on the wheel chair. Her permanent incapacity was assessed at 100% as evidenced by her medical report exhibited hereto. It is a fact that due to these injuries, the plaintiff underwent enormous pain both physically and mentally. She languished in the hospital for over 5 months before being treated as an out-patient to date. It is obvious that during this period she was and is not in a position of enjoying the amenities of her life such as unrestricted chatting with friends and relatives as well as doing her routine activities. She lost or was unable to enjoy life at its best at all the time she was in the said pain as she used to do before the injury. Further to that, the said injuries left the plaintiff with scars especially on the fractured part of the leg. It is therefore submitted that any impairment on the plaintiff's organ which is a direct result of the leg. It is therefore submitted that any impairment on the plaintiff's organ which is a direct result of the accident herein entitles her to recover damages for disfigurement from the tortfeasor

As to comparable cases, the following cases are of good guidance to the case herein. In **Davison Kambambe v. Tendai Kaphwiyo and Prime Insurance Company Limited CC No.2248 of 2008**, the plaintiff who sustained a femur fracture; multiple injuries on the thigh, collar bone and multiple bruises with a permanent incapacity of 35% was on 16th April 2010 awarded by this court mk1,500,000.00 for pain and suffering; Mk 1,800,000.00 for loss of amenities of life and MK200,000.00 for disfigurement. This court also on 28th July 2011 awarded the plaintiff in **Mayeso Yasini v. Prime Insurance Company Limited CC No. 2790 of 2008**, MK800,000.00 for pain and suffering and loss and loss of amenities of life and mk500,000.00 for disfigurement. The plaintiff therein sustained a scalp injury which left him with scars, a traumatic eye resulting in loss of vision and stretched muscles with a 30% permanent incapacity. In **Chiwmbwe Phiri v. General Alliance Company Limited P.IC NO 350 OF 2012**, the plaintiff sustained fractures on both legs and the plaintiff could not do manual work. The plaintiff was awarded mk4, 000,000.00 pain and suffering, MK3, 000,000.00 for loss of amenities of life. The award was made on 19th April 2013.

In **Maclaud Makunganya v. Prime Insurance Company Limited CC No.3 of 2009**, the plaintiff who had a lump on the thigh with a scar following a fracture sustained on the same was on 22nd February 2010 awarded MK700,000.00 for disfigurement by the Zomba District Registry of the High Court.

Likewise, in the said case of **James Chaika v. Nico General Insurance Company Limited supra**, the court on 3rd November 2009 awarded the plaintiff therein MK300,000.00 for disfigurement, MK 500,000.00 for pain and suffering and MK700,000.00 for loss of amenities of life.

The injuries in the instant case are more serious than the ones sustained by the plaintiff in **Chilembwe Phiri vs. General Alliance Insurance Company Limited Personal Injury Cause Number 350 of 2012** as in both cases the nature of injury involved a fracture with permanent incapacity of higher degrees. Applying the principles in **HQ Chidule vs. Attorney General** case and taking the awards in the above cited authorities herein as a starting point; and considering the different times at which the same made, as well as considering the fact that the plaintiff's permanent incapacity in the instant case was assessed at 100% ,the Plaintiff prayed for the following awards: MK8,000,000.00 for pain and suffering; MK7,500,000.00 for loss of amenities in life; MK3,000,000.00 for disfigurement; MK2,500.00 as special damages for cost of police report.

But I think that a lump sum of **MK14,000,000.00** would be fair and reasonable compensation for this helpless woman.

The Defendants shall also be condemned with costs.

MADE in Chambers this 13th day of **June, 2016**.



Nyakwawa Usiwa Usiwa
DEPUTY REGISTRAR