REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NO. 477 OF 2013

BETWEEN:

SIZA MAKWAKWA.....PLAINTIFF

AND

MR ISSAC NYIRENDA.....1ST DEFENDANT

GENERAL ALLIANCE INSURANCE COMPANY LIMITED.....2ND DEFENDANT

CORAM: **K. BANDA, ASSISTANT REGISTRAR**

Mr. I. Kalua, Counsel for the plaintiff

Mr. D. Banda, Counsel for the defendant

Ms. Faith Ngoma, clerk

ORDER ON ASSESSMENT

This matter is before this court for purposes of assessment of damages subsequent to the consent order entered between the parties on 30th July, 2015. The plaintiff alleged that due to the accident he suffered injuries namely: painful swollen left upper leg and bruises on the same. He particularized the injuries by use of a medical report. By order 18 rule 12(53) of the rules of the supreme court, practically the medical report operate as the detailed particulars of the personal injuries alleged in the body of the statement of claim to have been sustained. This court accepts the same without problems.

In brief facts of the case as per the plaintiffs evidence based on his witness statement during assessment proceedings was that on or about the 16th of February,2013 at around 16:00hrs he was in his car registration number MZ 9813, Mercedes Benz Saloon when the 1st defendant Mr. Isaac Nyirenda was reversing his car, registration number TO 2910 Toyota Hilux double Cabin Pickup and in the process hit the plaintiffs car which was stationery with him on board. As a result of this accident, the plaintiff sustained injuries attributable, as alleged ,to the negligence of the second defendants insured in his capacity as driver of the said motor vehicle registration number TO 2910 Toyota Hilux double Cabin Pickup.

However as will be seen later, after assessment proceedings, both counsel made submissions. And it was defendants counsels submission that the contents of the statement of claim and the evidence adduced at hearing were in contradiction. That they were a lot of inconsistencs that could not be wished away. That on the whole the court should find that the plaintiff has not proved the injury and dismissed the application or in the alternative award nominal damages.This court will first address this issue before proceeding to make its order on assessment.

To address the issue raised by defendants counsel this court will quote the contents of the consent order as prepared by the parties and endorsed by the court on 30th July, 2015 which was as follows:

CONSENT JUDGMENT

The plaintiff and defendants having agreed terms of settlement and consenting that judgment be entered in such terms as hereinafter provided.

By consent it is hereby ordered that:

1 .Judgment is entered for the plaintiff;

2. Damages are to be agreed between the parties, failing which, to be assessed by the court; and

3. Costs to be agreed between the parties, failing which, to be taxed by the court.

As noted the consent order shows that the defendant accepted liability. The same was subject to the parties agreement on quantum of damages or indeed upon their failure to do so by

assessment by the court. Clearly in this case for the matter to find its way back into court it is beacause there was failure by the parties to agree on sums payable. It therefore follows that if the parties had agreed on the damages payable the matter would not have been here at all. Equally issues of evidence contradicting the pleadings could not have risen.

Despite the preceding clear line of view, counsel for the defendant still proceeded to raise the issue of the defect in the pleadings. This court must accept that it was not oblivious of this mistake. It must be indicate that just as counsel noted this so did the court. The same being that when called to give evidence under oath in support of this claim, the plaintiff after first adopting the witness statement filed earlier with the court proceeded to state in his oral testimony that he was hit whilst outside his car and not on board. Primae facie a contradiction in terms. And so counsel for the defendant advanced the argument of the evidence as not supporting the claim in the pleadings as a reason why the court should hold, because of the doubt created by this gap in information, in favour of the defendant. This court declines to do that and is very much indifferent to such view. This court thinks such defect is not so serious as to deny the plaintiff claim after previous delays by the defendant.

This court reasons that counsel may not have addressed his mind to the pertinent issues and in its view what wass vital and important was that firstly, the injuries were basically pleaded in the statement of claim and sufficiently particularized by the medical report serve for the minor incoherence. Secondly that the gap in information forming the basis of the said contradictions in the statement of claim and in the witness statement was cured by the oral testimony that clearly explained the events as they unfolded on the date of the accident. In fact the oral testimony was to show how the claimed injury occurred and that it was indeed there.

This court therefore implore counsel to consider, as earlier indicated, that these proceedings were for mere assessment of damages and costs payable as all issues of liability that he was trying to bring about were closed the moment consent to liability was effected.

And on the preceding paragraph basis, the court is in agreement with the averments of Justice Mbalame in ***Kassam v. Lusitania***[1984-86]11MLR327 at 330 where Mbalame J as cited by counsel. In that case the learned judge held that:

"where a plaintiff claims damages, for him to justify an award of substantial damages, he must satisfy the court both as to the fact of damages and as to its amount. If he fails to satisfy the court of these , his action is bound to fail. He may at most be rewarded nominal damages if he proves a right to have been infringed. Where the fact of damage is proved but no evidence is given as to its amount, so that it is virtually impossible to assess damages, only nominal damages may be awarded."

The plaintiff was before this court. He gave evidence under oath. The court agrees with counsel that at times he seemed jittery and defensive. That his demeanor could easily be understood in the negative. This court however would not want to speculate and conclusive state that this was a mark of dishonesty. Witnesses appearing before the court can at times be defensive or jittery due to the court environmental which is at times at a greater disparate to their usual environment. And true at times they do so deliberately. In the circumstances, no inquiry was made as to whether the plaintiff and indeed the only witness has ever appeared in court before. Extending in that line of thought, this court is also mindful that this is not a criminal matter where the standard of proof is slightly higher. Here the standard is on a balance of probabilities.

That said, medical reports from both Queen Elizabeth Central hospital and Beit Cure International hospital marked "**SM 1**" and **"SM 2"** respectively were tendered as part of evidence in support of his case. Of the two, one to wit **"SM 2",** that from Beit Cure was on the insistence of the defendants insurance. The same was prepared way over six months after the accident. This in the view of this court cannot be relied on and is discarded in its entirety. The court therefore relys on "SM1" as the same is in agreement with the evidence given by the plaintiff and note that counsel never rebutted the contents of the report but rather issue of dates. This court equally find no merit in counsels argument against it and so disregard his argument in its entirety. In short it agrees with the findings on the basis that nothing substantive in it was contested with much particularity serve for minor mere technicalities.

That said, the policy of the law on damages generally is, if money can do it, to afford the victim fullest compensation to bring the victim to the position before the wrong. See. ***Chidule v Medi*** (1993) M.S.C.A. And Lord Blackburn in ***Livingstone v Rawyards Coal Co.*** (1880) 5 App.Cas. 25 at 39, puts it this way:

" 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."

So in essence compensation for damages in this instance is not meant to be punitive. According to Holmes J statement in ***Pitt v Economic Insurance Company Ltd*** (3) SA 284(D) 287E-F compensation;

"...must be fair to both sides-it must give compensation to the plaintiff, but must not pour out largesse from the horn of plenty at the defendants expense"

However it is not easy to maintain consistency and achieve fairness to both the victim and the defendant unless the court awards damages on the basis of comparable awards in cases of similar nature. Lord Diplock in ***Wright v British Railway Board*** (1938) AC.1173, 1177, puts it this way:

"Non-economic loss...is not susceptible of measurement in money. Any figure at which the assessor of damages arrives cannot be other than artificial and , if the aim is that justice meted out to all litigation should be even-handed instead of depending on idiosyncrasies of the assessor , whether judge or jury, the figure must be basically a conventional figure derived from experience and from awards in comparable cases.''

It must be noted however that this the court will do without losing site of the fact that even though money can compensate to an extent, the truth remains that it cannot exact the experience to remain as it was before the event giving rise to the action. Lord Morris in ***West v Sheppard***[1964] AC 326 summarized it this way;

"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."

Maintenance of the value of money is a factor to be considered to ensure that the wrongdoer does not gain an advantage over the victim. Mwaungulu J (as he then was) in ***George Sakonda v S R Nicholas***, Civil Appeal Number 67 of 2013(HC) (PR) (unrep) commented on this need to maintain value of money on assessment so that the plaintiff does not lose out. This is what the learned judge stated:

"Moreover, conventional awards must factor inflation and value of money changes. Awards made at a higher value of the money and low inflation cannot compare to similar awards at lower value of money and high inflation. Victims stand to lose; wrongdoers stand to gain. Courts must therefore regard money value and inflation."

And earlier on in ***Tembo v City of Blantyre*** (1994) Civil Cause No.1355 (HC) (PR), Mwaungulu J expressed his position explicitly on views to the contrary in this manner;

"...any other view involves the necessary implication that the victims of personal injuries should bear a reduction in the level of their compensation as the value of money falls though there is no rational justification for such reduction"

It follows that though courts have a duty to ensure that damages do not become at large, the same should not at the minimum, in cases of assessment of damages for pain and suffering, disregard the individual endurance and facts of each particular case as was rightly put in ***Chidule v Medi***(ibid).

Counsel cited a number of authorities as a basis for his proposed quantum of damages. He firstly cited the case of ***Leginala v BP(MW)LTD and another***,Civil cause number 524 of 2010 where on 23rd of July,2013 the plaintiff was awarded the sum of MK600,000.00 as damages for pain and suffering and loss of amenities of life for soft injuries to his right knee.

Secondly, counsel cited the case of ***Kwengwere v Citizen Insurance Co. Ltd***, Civil Cause No. 2042 of 2010 where the plaintiff was awarded MK300,000.00 for pain and suffering and loss of amenities of life. In this case the plaintiff sustained soft tissue injuries to her right shoulder,left knee and left leg.

The other two authorities relied on by counsel were: ***katunga v Chungu and another*** and ***Kamenya v Chitawo and another***, Civil Cause numbers 1922 and 374 of 2010 and 2013 respectively. In the first case an award of MK800,000.00 was ordered for swollen left knee,friction wound, bruises and abrasions on left leg. This decision was pronounced in 2011. On the other hand an award of MK700, 000.00 for bruises on the left ankle, painful back and left hand. The award given was for pain, suffering and loss of amenities for life. This was in 2013.

This court has carefully examined the authorities cited by counsel for the plaintiff and is convinced that the cases cited are not on four walls with the case herein. The nature of the injuries in the cited cases seem to be in more serious and sensitive parts of human anatomy. For instance counsel has cited the case of ***Leginala***. A look at that case shows that the injury was on the knee. In ***kwengwere*** it was more multiple, that is to say two different limbs were affected namely right shoulder, left knee and leg. The same was the cases of ***Katunga and kamenya*** cited earlier. In both cases one notices that serious and sensitive parts like the ankle and the knee are mentioned. Unlike in the case herein, the parts in the cited case are such that there injury tends to

be difficult to treat. And even if treated properly treated, the award ought to cover for any other continued problems that may arise later. This informs the view of this court as to why the sums in the above cases were on the higher side.

Again counsel has not indicated the percentage of permanency incapacity in each of them as to determine the extent to which they can be compared to the case at hand here. For clarities sake the percentage herein was placed at 10%. This court in all reasonableness think that it would not be achieving fairness if the doubt created by this gap in information pertaining to the percentage of permanency in terms of capacity in the victims could be put to the disadvantage of the defendant. The usual approach of the law on these matters is to hold the doubt in favour of the defendant. In these circumstances the court find an award of MK500,000.00 sufficient for pain and suffering and do so award it to the plaintiff. The court equally make a similar order for the special damages pleaded which for the avoidance of doubt are MK3, 000.00 for police report and Mk3,000.00 for medical report. The further condemns the defendant in costs, the same to be assessed by the court. The said total sum as awarded herein is to be paid to the plaintiff within 30days from the date of this order.

Ordered in chambers this 23rd of June, 2016 here at Blantyre in the Republic of Malawi

KONDWANI BANDA

ASSISTANT REGISTRAR