



MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO. 703 OF 2016

BETWEEN:

GEDION MHANGO PLAINTIFF

AND

NICO GENERAL INSURANCE CO.LTD DEFENDANT

CORAM: K. BANDA, ASSISTANT REGISTRAR

Mr. Mauya Msuku, Counsel for the plaintiff.

Counsel for the defendants-Absent.

Mrs. Chimang'anga, Court Clerk.

ORDER ON ASSESSMENT

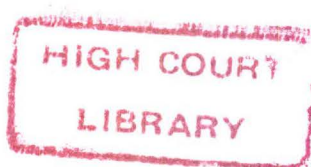
INTRODUCTION

This is an order on assessment of damages pursuant to a default judgment obtained on 11th of November, 2016. The plaintiff is claiming damages for the following: pain and suffering, loss of amenities of life, disfigurement, loss of earning capacity, future nursing care and further reimbursement of medical expenses and costs of this action.

At the hearing of assessment of damages the defendants did not appear despite due service of notice. The copy of the affidavit of service is on court record. Further counsel informed the court that they were proceeding against the second defendant and would bring a notice of discontinuance against the first defendant. The said notice of discontinuance was filed with the court on 11th of January, 2017. I hasten to state that on the afore stated premise, the prayer to continue with assessment against the second defendant was granted.

EVIDENCE

Only one witness, the plaintiff himself gave evidence. He firstly adopted his witness statement in its entirety filed earlier on with the court. In short the averments in the witness statement were that on 15th January, 2016, whilst at Ndirande, he was hit by a



motor vehicle belonging to the plaintiff and insured by the second defendant. It was his testimony that he suffered a fracture on his right leg, serious cuts on the head, and cuts on the right hand side of the body and on the backside. That he was furthered admitted from the 15th January, 2016 to 13th April, 2016. That a metal rod was inserted in the leg. He tendered in evidence a copy of a medical report marked as **GM1** and a copy of health passport marked **GM2**.

He then went on to show the scar on the said leg which measures approximately 30centimetres. He went on to state that despite his discharge from the hospital he continually goes through a lot of pain and is in constant visits to the hospital. Mainly he attributes much pain to the metal rod inserted.

The plaintiff further testified that due to the injury to the leg, he no longer does things he used to do such as playing football. His most important worry however was that his job, i.e of a cameraman, then with a Blantyre based Media film First Dawn Arts, required long periods of standing and constant movements when shooting, has been affected and hence seriously compromising his earning capacity. He stated that being only 29years of age, the injury is affecting his family.

Additionally, by oral testimony, he stated that he had a broken collar bone and did demonstrably show the scars to the court.

It should be noted however that the issue of injuries to the collar and consequent scars were never part of the statement of claim. That being so the superficial view would be to state that this should be precluded on the basis that at trial one must prove what was pleaded. I however have got a different view. That is to say it must be considered herein. I am mindful of the fact that the nature of damages herein is not specific but general as such it ought not to have been specifically pleaded. Moreover it is a trite fundamental principle on damages that one must be compensated fully and as such that same cannot be achieved if some injuries arising from the same accident are compensated and others not. And further on this basis I would be failing if I emphasise on procedure and ignore the substance. So the injuries to the collar bone that were demonstrated to the court will be taken on board.

That said, in addition the medical report tendered as exhibit **GM1** confirmed the age, dates of admission, surgery done, the injuries suffered and the fifteen percent degree of permanent incapacity.

THE PRINCIPLES OF LAW ON DAMAGES

It is trite principle of law that once one has suffered injury due to the negligent acts of another, then the one responsible has to compensate fully that other for the injury. And in determining the amount to award, the fundamental principle of law to be followed is the

one enunciated by Lord Blackburn in *Livingstone v Rawyards Coal Co.* (1880) 5 App. Cas . 25 at 39. As being “...*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.*”

Further compensation should essentially not 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 should be noted that it is not easy to maintain consistency and achieve fairness to both the victim and the defendant at the same time without well-defined reference parameters 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, states the law in 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 were 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.”

That said, maintenance of the value of money is also 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”

DISPOSAL

PAIN AND SUFFERING

For reasons that will come out clear at a later stage when I separately tackle the question of damages for disfigurement as a separately claimed head, I hasten to state that the award under this head, that is pain and suffering will include that of disfigurement.

That said, pain is the immediately felt effect on nerve and brain of some lesion or injury to the part of the body. As such for purpose of damages pain encompasses any pain caused by medical treatment or surgical operation carried out because of the injury caused by the defendant. See. *Mc. GREGOR ON DAMAGES* at page 1289 paragraph. 35-213.

On the other hand, “suffering” is suggested to be distress which is not felt as being directly connected with any bodily condition. For purpose of damages, suffering may include fright at the time of incident, fear of future incapacity as to health or indeed the ability to make a living. It equally includes humiliation, sadness and embarrassment caused by disfigurement. Again see. *Mc. GREGOR ON DAMAGES* (ibid)

In the matter herein I remind myself before going further that the fundamental factor to consider when assessing damages for pain and suffering was aptly put by the Supreme Court of Appeal in *Chidule v Medi*, (1993) M.S.C.A. For the purpose of this order I repeat the quote hereunder and this is what the court said;

“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 of damages”

In essence that whole quote can simply be summarised as giving wider latitude to the assessing registrars' in deciding matters of damages for pain and suffering without being fettered so much by precedents of the higher courts.

Reverting to the case herein, the plaintiff suffered a fracture to his right leg, serious cuts on the head and cuts on the right hand side of the body and on the backside. A surgical procedure involved insertion of metal rods in the leg which up to date he avers continues to be a source of a lot of pain. I must mention that during assessment proceedings I had the privilege of seeing the area operated on. It is marked by a scar hugely drawn. From its appearance I must admit that it will be there for the rest of his life. And from the look alone it tells a story of how big the wound must have been. From the foregoing, that is insertion of metal rods, it is clear that the pain to the plaintiff emanated from both the accident and the surgical procedures done on the fractured leg.

On the amount to award, counsel cited the cases of ***Zuze Bonjesi v Prime Insurance Co. Ltd***, Civil Cause No.488 of 2011 in which the plaintiff suffered a fracture of the left Tibia, big wound exposing the bone and tendons and a deep wound on the right leg. She was awarded the sum of MK 7,000,000.00 for pain and suffering and loss of amenities. He asks me to follow this case. However, whilst I appreciate the level of seriousness of the injury in this case as being of a relatively comparable nature to the one before me, I also take note that this was not a claim brought separately(in terms of disfigurement)as the case herein. In other words the award was global. Equally was the award in the second cited case of ***Jack Pangani v Real Insurance Co.Ltd***, Civil Cause No. 235 of 2012. I therefore decline to religiously follow the two cases.

Going a step further, counsel cited the case of ***Mavuto Luka v Prime Insurance Co.Ltd***, Civil Cause No. 91 of 2013, and with due respect, I am left with no doubt that counsel did not execute his noble task diligently. He omitted to indicate whether this award was global or not. He simply left me to speculate. On this premise, I would not let it form the base of my award. I discard it as well and find solace in the ***Chidule case*** which clearly leaves the discretion to the court to consider each case based on its own facts as each case involving pain and suffering tend to be different. In my exercise of discretion herein, I am also mindful of the issue of inflation and the fact that even though figures look convincing but the value is completely gone. In my view therefore an award of MK 5,000,000.00 would do for pain and suffering and disfigurement and I order that the plaintiff get just that under this head.

DISFIGUREMENT

As earlier on mentioned that this award has been awarded under the head for pain and suffering and also stated that I will give the reason why I have done so. The reason is that

an award for disfigurement as a separate head is normally given where the plaintiff is embarrassed about the disfigurement because he is being ridiculed. If no proof of being ridiculed is given to the court, then this award is normally awarded as part of pain and suffering. In *Mwasinga v Stagecoach (Mal) Ltd* [1993]16(2) MLR, Mwaungulu(R) awarded the victim damages for disfigurement under a separate head because she was embarrassed about the disfigurement because her colleagues ridiculed her. As to the reason, the learned Registrar stated that an award of disfigurement is normally awarded as part of pain and suffering essentially because the emotional and psychological suffering of the fact of disfigurement from injury is likely to continue even if the victim is one who takes a light view of his circumstances.

Reverting to the evidence as adduced in this case, the plaintiff did not show that he is being ridiculed. I therefore take it that the nominal aspect of the award under the head of claim herein is built in the award for pain and suffering.

LOSS OF AMENITIES OF LIFE

As for loss of amenities of life the same concentrates on the curtailment of the plaintiff's enjoyment of life by his inability to pursue the activities he pursued before the injury. Per Brickett L.J in *Manley v. Rugby Portland Cement Co.* (1951) C.A. reported in Kemp and Kemp, *The Quantum of damages*, Vol .1 (2nd Ed),, 1961,p.624.2

The plaintiff used to enjoy playing the game of football. This is a game that requires running up and down. It also involves dribbling and twisting of the body and indeed doing other flexible body movements inherent in the nature of the game. All these he cannot do so anymore. This clearly demonstrates the curtailing of the plaintiffs enjoyment of life. He deserves compensation.

By way of diversion however I note that in the plaintiffs statement of claim, this head is pleaded separately but in the skeletal arguments this head is argued together with that for pain and suffering. This ought not to have been so. And I am inclined to think that this perhaps explains why counsel throughout his argument of what sum to award for pain and suffering kept on citing comparable cases that had pain, suffering and loss of amenities lumped together. It would seem in my view that there was a disjointed knowledge on how

these matters are handled. For sure as correctly done in the statement of claim, these ought to have been argued separately as they are distinct heads of damages and such exhibit different elements that may have a direct effect on the amount to award upon consideration by the assessor. See. *City of Blantyre v Sagawa* [1993]16MLR 67.

That said, I have viewed the cases cited by counsel which are essentially the very ones I earlier on listed when I dealt with the claim for pain and suffering and I must add they were not of any significance in my assessment. I have also considered most cases decided by my fellow registrars and notice that the award has continuously been treated together with pain and suffering. In other words as a global award. And in those instances that it has been done separately, especially recent decisions, the award varied between MK500, 000.00 and MK2, 000,000.00 in most serious cases. It has at times even went beyond this. However in my reasonable view, a sum of MK700, 000.00 would do and I award the same.

LOSS OF EARNING CAPACITY

This award is considered when an award for future financial loss based on a multiplier/multiplicand method is not possible because there is no measurable annual loss to act as a basis for finding a proper sum for an award to the victim but the situation is such that there is clear evidence that the claimant will not earn as much in the future as he or she would have done but for the injury.

This type of award is also called a *Smith v Manchester* award, deriving its name from the case of *Smith v Manchester Corporation* (1974)17KIR 1. It essentially compensates the plaintiff for the lost earning capacity and not the lost earnings. The lost earning capacity is also termed as the “handicap on the labour market”, and is assessed and quantified as a lump sum.

In respect of the claim herein, it is clear looking at the age of the plaintiff who is only 29 that the range of jobs open on the job market now is narrower than it was. Be that as it may, there was earlier conflicting pieces of information from the plaintiff in the course of adducing evidence. For instance in paragraph 6 of the plaintiffs witness statement which he adopted in its entirety, he claims to have been involved in a business of his own. On the

contrary at page 4 of the record, and that was his oral testimony, he stated that he was employed by a Blantyre based Media film styled First Dawn Arts.

That said, also the witness statement and equally the oral testimony given at the assessment proceedings, did not state the nature of the business or his average or approximated monthly and annual earnings from the business or his employment leaving us with no measurable annual earnings on which to use the multiplier /multiplicand method. This clearly shows us that the nature of the award is more of one that is more based on awards awarded earlier by superior courts. And it is normally around lump sum given with the hope that it will cover any other problems that may arise from the injury in the future.

Counsel cited the case of ***Tapiwa Luhanga vs Real Insurance Co. Ltd***, Civil cause No.12 of 2015, where the plaintiff suffered a fracture of the hip and was awarded MK7,920,000.00. He did not explain as to how the court arrived at these figures and whether they were of the superior courts or not. And without elaborating further counsel went on to propose that a sum of MK5,000,000.00 would adequately compensate the plaintiff herein. I must admit that I had problems to adopt the figure as proposed without a reasonable premise for doing so. And in an effort to find the right course, I tried to search for a decision well premised on principle and only one by Mwaungulu J (as he then was) did convince me as a proper one to form my reference. The said case is ***Benson Tembo v City of Blantyre and National Insurance Company Limited***, Civil Cause No.1355 of 1994 in which the court made an award of MK10 , 000.00.

As earlier indicated this is a High Court decision and I am bound by it. This award I must state was made way back and cannot be the same in the current financial time. A rough approximate in 1994, the Dollar to the Kwacha was trading around US\$1 to K6.70 kwacha on 4th February, 1994. And K9.88 per US\$1.0 on 28th February,1994. And though the kwacha kept losing values due to the floating policy of the currency in that period to date, I would adopt K10 to a dollar for the purposes of getting a rough estimate of the kwacha award in dollars.

At the rate adopted, MK10,000.00 translates to US\$1,000.00. Impliedly this means that converting to the dollar this would at the current rate be around MK733, 500.00 at the rates prevailing as at 26th of January, 2017. Comparatively an award of one thousand pounds was awarded for the same in the *Smith v Manchester case*. At the prevailing banking rate, this would translate to MK920, 540.00. (This is considering that one pound is equivalent to MK920.54 as at 26th day of January,2016). I would therefore, allowing the long period and inflationary changes award a sum of MK1, 000,000.00 for loss of earning capacity.

DAMAGES FOR FUTURE NURSING CARE.

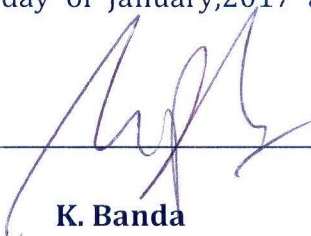
The plaintiff also asked the court to award damages for future nursing care. He proposed the sum of MK500,000.00 under this head. I have looked at the submissions of counsel and equally on the pieces of evidence in form of medical reports. I am convinced that the plaintiff has failed to prove his case on this head and I award nothing under this claim.

MEDICAL EXPENSES

Again the same has not been demonstrated as a need for the plaintiff in his current state. The long and short of it is that it has not been proven. I equally award nothing and this head.

For the avoidance of doubt the plaintiff is awarded the total sum of **MK6,700,000.00** plus costs of this action to be assessed by the court.

Pronounced in chambers this 31st day of January,2017 at Blantyre in the Republic of Malawi


A horizontal line is drawn across the page, and a handwritten signature in blue ink is written over it. The signature is stylized and appears to be 'K. Banda'.

K. Banda

ASSISTANT REGISTRAR