



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY



PERSONAL INJURY CASE NO. 47 OF 2018

BETWEEN:

ENOCK FRANK KAUTSIRE.....CLAIMANT

AND

FREDRICK KACHIPONDE.....1st DEFENDANT

LIBERTY GENERAL INSURANCE COMPANY LIMITED.....2nd DEFENDANT

CORAM: WYSON CHAMDIMBA NKHATA (AR)

Mickeus- of Counsel for the plaintiff

Chidothe – of Counsel for the defendant

Chitsulo- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

The claimant in this matter took out a writ of summons issued on the 16th of February 2018 against the defendants claiming money worth the cost of replacing his damaged motor vehicle, damages for loss of use of the motor vehicle herein, refund for the cost of securing alternative means of transport from the date the accident occurred to the date the same shall be replaced, damages for inconvenience, K300,000.00 being cost of towing the motor vehicle herein from the scene of accident to the claimant's house in Blantyre and costs of this action. On the 15th of May 2018, the claimant appeared before Honourable Justice N'riva on an application for summary judgment against the defendants. The application was successful and the claimant was granted the reliefs sought. This is the court's order on assessment of damages.

The parties appeared before this court on assessment of damages on the 15th of August 2018. The claimant was the sole witness for his case. He adopted witness statement in which he stated that at all

material times he was the owner of the motor vehicle registration number IT5507, Mercedes Benz B180 saloon which he had just imported into Malawi. He further stated that the 1st defendant was at all material time the driver of motor vehicle registration number BLK 2035 Toyota Spacio Saloon. The 2nd defendant was at all material time the insurer of motor vehicle registration number BLK 2035 Toyota Spacio Saloon and was sued in that capacity. He further avers that he purchased the motor vehicle from Japan and instructed a Mr Daniel Makunganya to drive the same from Dar es Saalam, Tanzania to Malawi. On the 30th day of December 2017 while the vehicle herein was in transit to Blantyre from Dar es Saalam, it was involved in an accident at or near Nathenje MRA check point. His motor vehicle was hit by motor vehicle registration number BLK2035 which had left its proper lane. Due to the collision his motor vehicle was damaged beyond repair hence the claim herein. In cross-examination, he indicated that he did not take steps to replace the vehicle as he had exhausted his saving to purchase the vehicle damages herein. He further stated that the replacement value of the vehicle is K6, 248, 221.44. He also indicated that he has been involved with Insurance business before and he is aware that there are Policy limits which are matters of contract. He stated that he was not aware of the actual terms of the insurance policy between the 1st and 2nd Defendant. He further stated that the damage to his motor vehicle has occasioned serious loss and inconvenience. He stated that he lost the use of the motor vehicle and spent MK300, 000.00 in towing the damaged motor vehicle from place of accident to his house in Blantyre.

On the other hand, the defendant also paraded one witness, Blessings Chitete who also adopted his witness and tendered the Insurance Policy for the vehicle in question. In his witness statement, he averred that he works with Liberty General Insurance Company Limited as Claims Assistant. He further stated that on the 17th of April 2017, the 2nd defendant issued a Third Party Insurance Policy respecting motor vehicle registration number BLK 2035 Toyota Spacio Saloon. He exhibits the Insurance Policy marked "BC". He went on to add that in terms of the Insurance Policy herein the maximum amount of money the 2nd defendant can indemnify its insured on the motor vehicle herein in terms of property damage arising from an accident involving the motor vehicle herein is K1,000,000.00 and the maximum cover for loss of use is K50,000.00. he therefore concludes by stating that he verily believes that the 2nd defendant's liability to the claimant is limited to the sum of K1,000,000.00 as compensation for damage occasioned to the motor vehicle herein and K50,000.00 for loss of use if the court finds that its insured is liable to pay damages for loss of use. In cross-examination he indicated that the Insurance Policy is between Liberty and their client who happens to be the 1st Defendant. He further admitted that insurance policies are not the same as the parties can negotiate terms of the policy. He further admitted that the insurance policy exhibited was not signed by the 1st Defendant. Unfortunately, the 1st defendant was not called as a witness to confirm or not the issues of policy limits.

Counsel for the plaintiff filed skeletal arguments which he adopted as his final submissions in this matter and added through an oral submission that the issue of Policy Limits was between the defendants. On the other hand, Counsel for the defendant also made final submission. He argued that the damages payable must be limited to the insurance policy between the Defendants. He argued further that the Claimant did not mitigate his loss as he was a person who could easily replace his damaged motor vehicle. He therefore suggested that the Claimant be paid the nominal sum of MK100, 000.00 as damages for loss of use or inconvenience. I must state at the onset that the issue of policy limits is between the defendants. The court makes an award that it deems reasonable and fair in the circumstances. It is not up to the court to apportion the award. The defendants themselves will know better the apportionment based on their agreement in the insurance policy. In the present case the 1st Defendant was never brought as a witness to confirm the actual terms of the policy. It will be fair to leave that to the Defendants.

The law of Torts provides that a person who suffers bodily injuries or losses due to the negligence of another is entitled to recover damages. The purpose of awarding damages is to compensate the injured party as nearly as possible as money can do. That is to say, to place the Plaintiff in a position he would be had he not suffered the damage (See *Livingstone v Rawyards Coal Company (1880) 5 AC 25*). This is what is termed the principle of *restitutio intergrum*.

The present claim relates to a claim in respect of which damages are recoverable for cost of replacing the motor vehicle. The position of the law is that where an item has been damaged and is in a repairable state, the court will award as damages the cost of repairing the same. On the other hand, where the item is beyond repair, the court will award as damages, the cost of replacing the item, see **Hara vs Malawi Housing Corporation, 16(2) MLR 527** and **Tea Brokers (Central Africa) Ltd vs Bhagat (1994) MLR, 339**. In the present case, the evidence which is not in dispute shows that the motor vehicle was not in a repairable state and the court is therefore obliged to award as damages, being the cost of replacing it. The quotations sourced out indicate that it would be uneconomical to have the vehicle repaired. It is clear therefore that the court should consider making an award equivalent to replacement value. Apparently, the replacement value was pegged at **K6, 248, 221.44**. This piece of evidence was not disputed as such I proceed to award the same to the Claimant as the cost of replacing his damaged vehicle herein.

As for damages for loss of use of the said motor vehicle, it is further trite law that in determining such damages, the court actually considers the market value of the use of the car. Thus, such damages will usually depend on the type of the car and the period of the loss (see the case of **Hassen vs SR Nicholas**, 11 MLR 505 and **Namandwa vs Tennet(J) and Sons Ltd**, 10 MLR 383). The court may however, award such damages on conventional basis where there is no evidence of hiring a vehicle and the court opines that general damages may suffice. Where the court adopts this approach, damages are awarded by reference to comparable cases (see **Emmie Chanika vs Blantyre City Assembly**, civil cause No. 84 of 2010. In the present case, the claimant indicates that he did not have a vehicle for personal use at the time of the accident save for a mini bus which he uses for business. He told the court that he resides at Chinyonga in Blantyre and he works at Zomba. The claimant further indicates that he is not entitled to motor vehicle at the office. Sufficing to say that he was using public transport when travelling to and from work and when he was on private duties. The court will therefore adopt the conventional approach. I have seen the comparable cases cited by counsel for the Claimant in this regard. In the case of **Wilson Kamwendo v Reunion Insurance Company Limited** Civil Cause Number 913 of 2010 the Plaintiff was awarded K250, 000.00 as damages for loss of use. In the case of **LM Nakoma vs Kachemwe and Reunion Insurance Limited** the plaintiff was awarded **K100, 000.00** for inconvenience when his motor vehicle was off road for **49 days**. The vehicle was for domestic use and this was in 2015.

In the present case, the vehicle was for domestic use and the Claimant has been without it for the past 10 months. The Claimant had stated that he had exhausted his savings to purchase this motor vehicle hence he could not manage to replace it himself. In my view an award of **K1, 000, 000.00** considering the period the vehicle has been off the road will be reasonable in the circumstance as damages for loss of use and inconvenience suffered by the Claimant herein and I proceed to award him this amount accordingly.

The claimant also claimed the sum of **MK300, 000.00** as the cost of towing the motor vehicle herein from the scene of accident to the Claimant's house in Blantyre. This amount was not contested by the defendants and the same is awarded to the claimant accordingly.

From the foregoing analysis, the damages awarded to the Claimant can be summarized as follows:

1. The sum of **K6, 248, 221.44** as balance for replacing the plaintiff's motor vehicle.
2. The sum of **K1, 000, 000.00** as damages for loss of use and inconvenience.
4. The sum of **K300,000.00** being the cost of towing.

In total, therefore, the Claimant is awarded the sum of **K7, 548, 221.44**. The plaintiff is further awarded costs of the action.

MADE IN CHAMBERS THIS 17th day of October, 2018



WYSON CHAMDIMBA NKHATA
ASSISTANT REGISTRAR