



THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO.120 OF 2018

BETWEEN

Humphrey Zuze..... Plaintiff

and

OG Construction Defendant

CORAM: *Madalitso Khoswe Chimwaza, Assistant Registrar*
 D. Silungwe, Counsel for the Claimant
 Zude Court Clerk

ORDER ON ASSESSMENT OF DAMAGES

INTRODUCTION

This matter was set down for assessment of damages following a default judgment dated 20th August, 2018 thereby settling the issue of liability. The defendants were duly served with notice of assessment but they are not present and no reason has been given for their absence. The court proceeded to hear the plaintiff only. The only duty of the court at this stage is to assess how much damages should be awarded to the claimant.

Briefly the facts are that on or about the 7th October, 2017, the defendant instructed the claimant to break a substandard concrete base where a heavy metal rod had been planted so that the concrete base could be redone. In the course of his duty the heavy metal rod got disengaged from the substandard concrete base and injured the claimant. As a result the claimant suffered severe perineum tear (area between the testicles and anus), deep cut on the left ankle and has scars on the injured sites. According to his medical report he has 30% permanent incapacity.

The claimant is now seeking damages for pain and suffering, disfigurement, loss of amenities of life loss of earning capacity and special damages of K17,000 for obtaining medical report.

ISSUE FOR DETERMINATION

How much damages should the claimant be awarded .

GENERAL PRINCIPLES ON DAMAGES

A person who suffers injury as a result of another's negligence is entitled to be compensated for the injury suffered by the negligent party. Such damages are awarded to compensate the plaintiff in so far as money can do (see *Nakununkhe v Paulo Chakhumbira and Attorney General* Civil cause no.357 of 1997 (Unreported). As was held in the case of *Namwiyo v Semu et al* [1993] 16 (1) MLR 369, in awarding compensation, the court attempts to put the plaintiff in the position he would have been but for the injury arising from the tort. Such damages however cannot be quantified by any mathematical calculation as such the court relies on decided cases of a comparable nature for guidance. Sight must not be lost however, of peculiar facts of each case in order to avoid occasioning injustice by inflexible maintenance of consistency and uniformity (*D. Kwataine Malombe & Another vs. G.H. Chikho t/a Bec Line Minibus* Civil Cause No. 3687 of 2001 (HC Unreported).

Pain and Suffering and Loss of Amenities of Life

Pain is used to suggest physical experience of pain caused by and consequent upon the injury while suffering relates to the mental elements anxiety, fear, embarrassment and the like. On the other hand, loss of amenities of life embraces all that which reduces the plaintiff's enjoyment of life, his deprivation of amenity whether he is aware of it or not (See *City of Blantyre v Sagawa* [1993] 16 (1) MLR 67). In *Kanyoni v Attorney General* [1990] 13 MLR 169, 171 the court held that loss of amenities of life must include the loss of all the things the claimant used to be or to do, see, and experience-they need not be of leisurely nature at all. In the case of *Manley v Rugby Portland Cement and Company* [1950] No 286 (reported in Kemp and Kemp, "Quantum of Damages," Volume 1 2nd edition 1961 at p.2640) Birkett, LJ had this to say:

"There is a head of damages which is sometimes called loss of amenities; the man-made blind by accident will no longer be able to see familiar things he has seen all his life, the man has both legs removed will never again go upon his walking excursions, things of that kind-loss of amenities."

Although pain and suffering and loss of amenities for life are distinct however for purposes of quantum the court does consider them together and make a single award under those heads. (see *Henry Manyowa v. Phiri and Prime Insurance Co. Ltd* Personal Injury Cause No. 139/2012; *Andrew Katola v. Prime Insurance Co Ltd* Civil Cause No. 2807/2009).

In the present matter Counsel made submissions on separate heads to be awarded. Having considered comparable case awards like the case of *Banda and Ellen Banda vs Tutlas Fast save*, Civil cause No. 229 of 2016 in which the plaintiff suffered fractures of the thigh, traumatic amputation of the forearm an award of K7,000,000.00 was made for pain and suffering and loss of amenities of life.

The injuries in the present case are not of the same magnitude as the above case. The claimant suffered injury between the testicles and anus and he was sutured. He had no fractures but a deep cut on the left ankle.

In this case for pain and suffering and loss of amenities of life the plaintiff is awarded a sum of K 3,000,000.00.

Damages for Disfigurement

Damages for disfigurement are awarded for permanent scars or deformity on the body of the plaintiff. Looking at some comparable cases like *Mbalame v. Prime Insurance Co Ltd* Personal Injury Cause No. 244/2014 and *Chipala v. Prime Insurance Co Ltd* Personal Injury Cause No.472/2013 where in 2015 the court awarded the sum of K950, 000 for disfigurement. In both cases there was limb shortening. Counsel cited the case of *Triza Lunduka vs Zenengeya and United General Insurance Company Ltd*, Civil Cause No. 1144 of 2016, a plaintiff who was left with a shortened leg and scars, was awarded the sum of K1,500,000.00. The award was made recently in 2017. This court finds the injury suffered by claimant not to have left visible disfigurement and a sum of K500,000.00 would be reasonable. Therefore the plaintiff is awarded K500,000.00 for disfigurement.

Damages for loss of earning capacity

Loss of earnings is the total loss or actual reduction in the income of the claimant as a result of the injury suffered, while loss of earning capacity is the likely or prospective loss or reduction in the income of the claimant as a result of the injury suffered. **Kambwiri vs Attorney General [1991] 14 MLR 151 (HC).**

Manda vs Malawi Social Action Fund Civil Cause No. 756 of 2003 adapting from **McGregor on Damages:**

In calculating the loss of earning capacity courts have evolved a certain method. The amount of loss of earning is calculated by taking the figure of the plaintiffs present annual earnings less the amount, if any which he can now earn annually, and multiplying this figure by a figure which, while based upon the number of years during which the loss of earning power will last, is discounted so as to allow for the fact that a lumpsum will be given now instead of periodic payments over years. These figures are known as multiplier and multiplicand and they can be adjusted either upwards or downwards to reflect inflation or other contingencies of life and taxation.

Multiplicand:

At the time of the accident the claimant was doing duties of construction and earning K25,000.00 per fortnight but after the injuries his duties were reduced to a general cleaner earning K18,000 per fortnight. Counsel submitted that the multiplicand should be K14,000

In the case of **Nangwiya vs Makwasa Tea Estates [1993] 16(1) MLR 373**, Mwaungulu (as he then was) provided a very helpful dictum on how to handle matters of this nature. He said:

When deciding on whether the plaintiff is entitled to loss of earning capacity where 'the plaintiff continues in the same employment and there is no reduction in the earnings, the court must consider whether there is a substantial, as opposed to a speculative, risk that the plaintiff would lose his job if he was thrown into the labour market. It must always be remembered that when things go tough, employers want to safeguard their interest. When that happens, they do not lay off employees who are able bodied. They lay off those who in some way are infirm or deficient."

Therefore this court will adopt the multiplicand of K14,000 per month.

Multiplier:

This is found by deducting the current age of the claimant at the time of the accident from the life expectancy. Counsel submitted that the court should use the age of 61.2 according to the **Population and Housing Census 2008, Analytical report Vol.2 (Mortality) published by National Statistical Office, August 2010** which puts exact life expectancies of a males and females at different ages. In the alternative he submitted that the court should use the life expectancy used in the case of **Lucy Chitsotso Chatayika vs Emmanuel Kaludzu and UGI** Civil cause No. 1146/2016 in which the court used the life expectancy of 61.2 years.

In the present case the claimant was 30 years at the time of the accident. The court adopts the life expectancy of 61.2 therefore the multiplier in this case will be 31.2. The court will not consider the 40% increase for every three years since the claimant is going to get a lumpsum and is still employed, if there any increments to be made he will benefit.

For loss of earning capacity the claimant is awarded:

$K14,000 \times 12 \times 31.2 = K5,241,600.00$

1. Special Damages

It is trite law that special damages must be strictly pleaded and proved. The plaintiff is claiming expenses incurred on medical report and police report amounting to K17,000. Although there was no strict proof for the same but it is understandable that such documents could not be processed without a fee. It is therefore awarded.

ORDER

In summary the court has made the following awards:

Pain and suffering and loss of amenities of life-K3,000,000

Damages for loss of earnings and earning capacity K5,241,600

Disfigurement K500,000.00

Special damages K17,000

The total award made is **K8,758,600.** claimant is awarded costs of the action to be assessed if parties do not agree.

Right of Appeal

Either party aggrieved by the decision of the Registrar has the right to appeal.

Made in chambers this 27th day of December, 2018



Madalitso K. Chimwaza (Mrs)

ASSISTANT REGISTRAR