



THE REPUBLIC OF MALAWI
 IN THE HIGH COURT OF MALAWI
 LILONGWE DISTRICT REGISTRY
 CIVIL CAUSE NO. 89 OF 2015

BETWEEN

Mrs I Dzanjalimodzi.....1st Plaintiff

DR. E. Dzanjalimodzi.....2nd Plaintiff

AND

Smith Mkandawire.....1st Defendant

Prime Insurance Company Ltd 2nd Defendant

CORAM: *Madalitso khoswe Chimwaza, Assistant Registrar*

W. Singini, Counsel for the plaintiff

L. Kapinda Counsel for both defendants

Mpandaguta, Court Clerk

ORDER ON ASSESSMENT OF DAMAGES

Matter was set down for assessment of damages following a summary judgment obtained on 20th June 2016. The 2nd plaintiff was the only witness.

Brief Facts

According to the witness statement of the 2nd plaintiff, it was on or about the 17th of June 2014 at around 1:30pm when he was driving a motor vehicle registration No. DZ3952 from area 10 heading towards Lumbadzi along Chayamba road and stopped at the area 10 junction as the traffic lights were red. Whilst stationary and waiting for the traffic lights to go green, his vehicle was hit by another vehicle Registration no, NA 55 driven by the 1st defendant who had lost control while joining into Chayamba road from area 18.

Due to the impact of the accident the 2nd plaintiff sustained non displaced fractures involving the left C5/C6 facets and left lamina as well as loss of normal cervical spine lordosis. He said he was bed ridden for over one month after the accident and as a result he could not meet his official obligations since at the time he had a contract with Vestegaard Frandsen Group SA based in Switzerland for the sale of mosquito nets at commission of 2.5% but that commission was subject to change if reports were not submitted. He tendered the contract document as evidence EXH ED2. He said he was unable to attend to his contractual obligations as a result instead of getting a greed commission of K68,434.58 he only

got K35,696.94 because he failed to submit reports. He therefore claims that the accident caused him loss in that regard and he is entitled to reparation.

He said ever since the accident he had serious difficulty in balancing and cannot walk long distances, has difficulty turning on his side as he is sleeping and cannot turn without having to sit up first. He gets frequent episodes of numbness in his legs and had no complete control over his lower limbs.

The plaintiff therefore claims damages for pain and suffering, loss of amenities of life, damages for loss of earnings, motor vehicle repairs, medical costs and costs of the action. Through out the file there is no evidence that the 1st plaintiff suffered any injury therefore she is just appearing as one of the co-owner of the said motor vehicle. In the witness statement it does not refer to any injury suffered by the 1st plaintiff nor any specific relief that she is claiming, no medical report or police report or any mention that she was in the vehicle that was hit by NA 55. This court is assuming that the 1st plaintiff was joined because she was a co-owner of the vehicle DZ 3952. This court will take this fact into account when assessing damages to be awarded.

SUBMISSIONS

In the submissions the plaintiff is claiming:

Pain and suffering, loss of amenities of life and disfigurement K4,000,000.00

Loss of earnings USD32,737.64

Loss of value for the vehicle, K2,500,000.00

Medical costs K537,000.00

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/she 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. Chicho Va 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 of 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 1951 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."

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Although pain and suffering and loss of amenities for life are distinct however for purposes of quantum the court does considers 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).

Counsel for the plaintiff gave some comparable awards for cases of injury of similar nature to that of the plaintiff which have been very useful in guiding the court to come with a just and reasonable award.

This court has noted that the plaintiff in the pleadings did not include a claim for disfigurement. This head of claim is only appearing in the submissions and there is no evidence that the pleadings were amended at any stage to include such a claim. Therefore this claim for disfigurement fails and it is excluded. The plaintiff is awarded damages in the sum of K3,500,000 for pain and suffering and loss of amenities of life.

REPAIR COSTS OF THE VEHICLE

In the statement of claim this court noted that the plaintiff is claiming special damages for repair costs of the vehicle. However, in their submission the plaintiff are claiming loss of value of the motor vehicle being K2,500,000.00 which was not in the statement of claim.

Pursuant to **Order 18 of the RSC**, it is a cardinal rule of practice and procedure that a plaintiff must specifically plead in his statement of claim special damages and that the plaintiff will not be allowed at the trial to give evidence of any special damage which is not claimed explicitly, either in his pleadings or particulars. **PN 18/12/32 RSC**. See also *Hayward vs Pullinger and Partners Ltd* [1950] II All ER 581.

In the case of **Registered Trustees of African international Church vs Registered Trustees of African Church** [1954] MLR 271, Justice Unyolo (as he was then) held that:

...In the course of the trial, the plaintiff also sought to claim the sum of K2,500.00 being the value of bricks and iron sheets belonging to the plaintiff and allegedly misappropriated by the defendant. This is clearly a claim for special damages. By rules of pleadings and procedure such damages must be specifically pleaded and proved. In this case the plaintiff pleaded general damages only, therefore the claim cannot succeed.

In the circumstances of this case the court will not allow to be ambushed by claims that were not pleaded. This claim for K2,500,000 the value of the motor vehicle is therefore not awarded. Further the claim for repairs has not been proved as no evidence was led to prove how much was spent in (or buying spare parts) repairing the said vehicle. This claim also fails.

COSTS FOR MEDICAL EXPENSES

The plaintiff is further claiming costs of medical expenses amounting to K537,000. These are special damages which ought to have been specifically pleaded and strictly proved by evidence, but this did not happen. In the witness statement, or in the oral testimony, the plaintiff did not mention anything as to how much was spent for his medication neither did he produce any supporting invoices or receipts from the hospital to support the claim. Although the head of claim was pleaded in the statement of claim the law requires that it has to be strictly proved by the one asserting in the affirmative.

In a more recent case of **Kamlepo Kalua vs Attorney General** [2013] MLR, in which among other claims, the appellant appealed against the decision of the Assistant Registrar in not awarding him general expenses for travelling from Rumphu to Zomba during the 2009 elections. The appellant claimed that that the Assistant Registrar should have awarded him the K5,000,000.00 expenses as claimed since the defendant had not challenged the witnesses statement and skeleton argument during assessment of damages which followed the issue of liability being settled by a default judgment.

The High Court held that although the claim for general expenses of K5,000,000.00 was part of the default judgment recorded for the plaintiff, the claim being a special damage ought to have been strictly proved by the plaintiff. The Assistant Registrar in refusing to award the expenses stated;

“... Sadly no relevant evidence was adduced to support this claim. No fuel receipts, no bus tickets, no accommodation receipts for example were exhibited to show that indeed at the material time the plaintiff travelled between the two towns and how much was expended, neither did he summon a witness to support his story.”

Justice Chirwa on appeal held that assessment of damages being part of the trial of the action, the burden reposed on a party who asserts the affirmative to prove the assertion continues to apply to the assessment of the damages. The ground of appeal was dismissed as being without merit.

In view of the above observations, this claim for K537,000 fails for lack of evidence. However the court is mindful that the plaintiff received medical treatment which was not for free in some cases and for that reason it will make a just and reasonable award for medical expenses in the sum of K200,000.00.

LOSS OF EARNINGS USD32,737.64

On this head the plaintiff claims that he lost USD 321,737.64 because at the time of the accident he had a contract with Vestergaard Franden Group SA in which he failed to make timely reports thereby affecting the commissions that was agreed upon. This head of claim is seriously opposed by the defendant for a number of reasons.

The defendants challenged the contract document which was exhibited by the plaintiff as Exh ED2 as being invalid since it had not been signed or dated by both parties to the contract. The law on written contracts is clear that it becomes valid once both parties have pended their signatures. In this case therefore this exhibit is not a valid document to prove the existence is of a contract.

The defendants further challenged the legitimacy of the plaintiff claim in the contract since he was not a party to it. When cross examined, the plaintiff admitted that the contract was between Nankwirinji Co. Ltd and Vestergaard Franden Group SA.

The defendants submitted that at law the contract was between two limited companies who have different legal personality from the plaintiff, Directors or the shareholders, such that any loss or damage occasioned to the company itself it is for the company to claim such loss or damage and not its directors or shareholders in their personal capacity. *Salomon vs Salomon*

This court has noted that the contract document was not in the name of Dr. Edward Dzanjalimodzi, it was between Nankwirinji Company Ltd and Vestergaard Franden Group. This court agrees with the defendant counsel that the earnings that would have accrued to the company by virtue of the contract agreement were not the earnings of the plaintiff as an individual, the shareholder but for the company. Therefore the plaintiff as an individual was a stranger to the contract and he could not claim loss of earning on behalf of the company. Even the shareholders or Directors they could only do so in the name of the company and not in their personal capacity. *Salomon vs Salomon*

This court finds this claim for loss of earnings of about USD32,767.64 to have failed and no award is made.

ORDER

The final award in this case is for pain and suffering and loss of amenities of life in the sum of K3,500,000 and medical expenses in the sum of K200,000.00. The 2nd plaintiff is awarded a global sum of K3,700,000.00 and costs of these proceedings to be assessed if parties do not agree. The following claims have failed; disfigurement, loss of earnings and value of replacing the motor vehicle.

No award is made to the 1st plaintiff as there was no evidence adduced regarding her case.

Right of Appeal

Either party aggrieved by the decision of this court has the right to appeal within 30 days.

Made in Chambers this 19th day of March 2018



Madalitso Khoswe Chimwaza (Mrs)

ASSISTANT REGISTRAR