



The Judiciary

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CASE NUMBER 553 OF 2013

Between

CHIKONDI NAMATE..... CLAIMANT

-and-

MR. LATIF..... 1ST DEFENDANT

PRIME INSURANCE COMPANY LIMITED..... 2ND DEFENDANT

CORAM: A.J. Banda, Assistant Registrar

Mr. S. Mumba, for the Claimant

None present, for the Defendant

Ms. M. Galafa, Clerk/ Official Interpreter

Banda, A.R.

ASSESSMENT ORDER

1. Background

The claimant suffered personal injuries in a road accident whereby he was a fee paying passenger in a minibus owned by the first defendant, and insured by the 2nd defendant. He sued to claim damages stating that the driver of the minibus was negligent in his driving and that he was responsible for the accident. The honourable judge Justice Mbvundula found the defendants liable, holding that the 2nd defendants were only liable to the extent of their policy limit. The honourable judge further ordered that damages be assessed if not agreed on.

The claimant obtained an appointment with the registrar for assessment of damages. The defendants did not turn up for the assessment hearing. There is evidence on file that the defendants' legal representatives were served with the necessary process. The court as such proceeded to hear the claimants in the inexplicable absence of the defendants.

2. Evidence

The claimant had one witness, just himself. By his filed witness statement which he adopted under oath, Chikondi Namate told the court that he was a front seat passenger in the minibus owned by the first defendant, a Toyota Hiace LA 3076, on 9th December, 2012. The minibus was over-speeding and it plunged into the roadside drainage. He was awakened to see that everyone was out of the minibus except himself. He heard voices of people stating that he was alive. He was alerted to the fact that he was feared dead. He was rescued out of the vehicle with an effort by the people who gathered and the pull of the vehicle parts off him by a police land cruiser vehicle which had come to the scene. He watched all this as it happened.

Chikondi Namate further said he realised that he had been badly injured in the limbs as he felt excruciating pain in both legs which were also bleeding. He said his left leg had been dislocated and badly fractured at the knee area. His right leg was fractured on the femur. He said he had a deep cut on his left hand, multiple deep cut leg wounds that had the bone exposed, and also multiple cuts on all limbs.

The claimant said that he was taken to Queen Elizabeth Central Hospital where he underwent treatment. He said he underwent sign nailing surgical procedure and skin gratification. He said he experienced excruciating post operation pain and post traumatic pain and arthritis.

Chikondi Namate said that ever since the accident, he has reduced range of the hip joint, he has difficulty in walking, and his left leg swells after he has walked some distance, an indication that the bones that had to be bonded have not fused completely. As for the right leg, where there was an insertion of a rod, he feels severe pain whenever he has walked some distance.

The claimant went further to state that he cannot run. He cannot do manual work such as lifting any object beyond 5 kilograms. He said that between the dates of 9th December, 2012 and end February of the year 2014 he could not have sex. He said that he cannot run business errands like he used to do which has resulted in loss of income between December 2012 and the time of his testimony. He said he used to earn around K70, 000.00 a month

from his business of selling rice. Consequently, his family suffered. He said that his mother was taken out of the rented premises in which she was housed together with his younger sibling as he could no longer afford to pay K10,000.00 monthly rentals that he was paying for them. He said the degree of permanent incapacity was rated at 35% by the medical practitioners. He tendered the medical report.

Chikondi Namate further said he still requires medical attention. He needs correctional treatments for the bones that were broken. He also said he still requires regular pain killers that he must purchase.

Namate told the court that he was 33 years old and that he did formal education up to the level of Malawi School Certificate of Education level. He said that he was earning a living as a micro businessman selling farm produce such as rice and beans among other produce. On averaged he could earn K70,000.00 a month, from which he could spend K1,000.00 on relish for his household and K300.00 on charcoal daily and K3, 000.00 for monthly water kiosk fees. He said in a month he would remain with K5,000.00 to K10,000.00 as savings.

The claimant said that he incurred specific losses as a result of the accident. He said that he paid the sum of K3, 000.00 for a police report of the accident. He also paid K2, 500.00 for the medical report. He therefore asked the court to order that the defendants compensate him for the specific losses but also for the following: pain and suffering; disfigurement/ deformity; K1,330,000.00 earnings/ income lost between December, 2012 to June, 2014 and in further respect of the period ahead to be determined by the court; a sum representing loss of earning capacity; damages for future treatments; and any other reliefs the court deems fit and proper and the costs of these proceedings.

3. Issue

The issue in this matter is the quantum of damages payable in the circumstances.

4. Analysis of Law and Fact

It is a principle of law that anyone who suffers loss from a wrongful act or omission of another must be compensated for the loss by the person who unlawfully caused the loss. Damages are therefore paid to compensate for the loss in as far as money can do. In **Livingstone v. Rawyards Coal Co [1880] 5 AC 25** Lord Blackburn pointed out that where any injury is to be compensated by damages, in setting the sum of money to be given for reparation, the court should, as nearly as possible, award the sum of money which will put the injured party in the same position as he would have been if he had not sustained the injury for which he is being compensated.

It is impossible to come up with an amount of money that fully compensates a non-monetary loss, coming from personal injuries, with mathematical precision. As result to achieve certainty and consistency of awards in like cases, courts use awards in comparable cases as a guide, without losing sight of specific losses suffered by a particular claimant. See **Chipeta v. Dwangwa Sugar Corporation, Civil Cause No. 345 of 1998, High Court, Principal Registry (unreported)**.

Pain and Suffering

The word pain connotes that which is immediately felt upon the nerves and brain, be it directly related to the accident or resulting from medical treatment necessitated by the accident, while suffering includes fright, fear of future disability, humiliation, embarrassment and sickness- Ian Goldrein et al, Personal Injury Litigation, Practice and Precedents (Butterworths, 1985) p8. See also **City of Blantyre v. Sagawa [1993] 16(1) MLR 67 (SCA)**.

Disfigurement

Damages are paid under the head of disfigurement for the change in the physical form of a person injured either as a result of the impact of the injury or its treatment, such as a scar coming in as a result of surgical operation necessitated by the injury. It is a change in appearance but it is capable of limiting a person from doing certain things as was observed by the court in the case of **Austin Julius v. Rasika Gunawardena and General Alliance Limited, Personal Injury Cause Number 316 of 2014**.

Potani, J, in the case of **Chingamba v. Deerless Logistics Limited Civil Cause No. 2888 of 2007**, stated that disfigurement was not something to be taken lightly and casually as a person lives with the deformity for the rest of his life. In **Zaina Chipala v. Dwangwa Sugar Corporation Civil Cause Number 345 of 1998, High Court, Principal Registry, per Chimasula, J**, it was held that money cannot renew a physical frame that has been battered and shattered. The courts must therefore award a sum that is regarded as reasonable compensation.

Loss of income/ earning Capacity

Under this head, the court awards loss where a claimant continues in the occupation that he was into before the accident, after suffering an injury in the accident. The court, where it finds that the claimant can no longer earn his pre-accident rate of earnings, awards damages for loss of earning capacity. It is calculated based on the annual figure and taking into account the age of the claimant and his working life span. It also takes into account the usual working contingencies and also taxation. Courts also assess the prospect of losing employment or reduced earnings in future- **Tembo v. City of Blantyre Civil Cause Number 1355 of 1994, High Court Principal Registry (unreported)**.

Justice Mwaungulu, as he was a judge of the High Court then, in the case **Sakonda v. S.R. Nicholas Ltd, Civil Appeal Cause No. 67 of 2013, High Court Principal Registry (Unreported)** suggests that for loss of income, the real loss must be ascertainable and hence calculable for purposes of the award of damages, whilst a court can make an award for loss of earning capacity where the loss is not ascertainable. The honourable judge stated as follows whilst commenting on the case **Chidule v. Medi Civil Appeal case No. 3633 of 2005 Malawi Supreme Court of Appeal (unreported)**:

The Chidule v Medi award is, if it be for loss of earning capacity, many times over the conventional awards in England and Wales. The appellant in Chidule v Medi, however, was at the time of the accident, from the judgment, employed and earning MK 500 per a month. The Supreme Court could not, therefore, have been awarding for loss of earning capacity, rather for loss of earnings at the multiplier of 10. Since the applicant's earnings were known, the award should have followed the multiplicand/multiplicand approach based on the applicant's age.

Comparable Cases

The claimant did cite comparable cases for the award of damages. In **Zuze Bonjesi v. Prime Insurance Co. Ltd Civil Cause No. 488 of 2011**, the court awarded K7, 000,000.00 for pain, suffering and loss of amenities of life on 17th July, 2012. In this case the injuries were a severe open fracture of the left tibia, massive wound exposing the bone and tendons and deep wound on the right leg.

In **Margret Zagwazatha v. The Attorney General PI Cause No. 469 of 2013**, a claimant who had sustained a fracture of the ribs, pneumothorax, neurological deficiencies of the lower limbs, fracture and dislocation of the spine, fracture of the left arm, right knee dislocation with torn ligaments and hypostatic pneumonia was awarded damages in the region of K14, 000,000.00, on 13th June, 2016.

In **Chisomo Katsukunya v. Malasha Holdings and United General Insurance Co. Ltd Civil Cause No. 2028 of 2010** K10, 287, 500.00 was awarded to a claimant who suffered a numbness on her left arm, fracture of the humerus, numbness of a leg due to a cut nerve, deep cuts on the left thigh bone of the femur, open fracture and an amputated leg and had to walk on clutches.

In **Owen Lyson Kayira, Getrude Kayira and Alice Nkhana v. Mr. Unusu Shaikh Personal Injury** the 1st claimant sustained a fracture of the right tibia and fibula, internal injuries of the stomach, several cuts on both legs, deep cut wound on the left ankle and

several bruises on the ribs. He was awarded K7, 200,000.00 for pain and suffering and loss of amenities of life on 1st July, 2014.

The present case

In this case the claimant's injuries are serious as outlined in his evidence which is uncontroverted. He submitted through counsel that based on the comparable cases, an award of K20, 000, 000. 00 would be fair, just and reasonable, taking into account the value of the Kwacha since the awards were made, and the after effects of the injury. I have considered the cases cited in light of the injuries actually suffered by the claimant. It is my opinion that an award of **K10, 000,000.00** is adequate for pain and suffering and **K1, 500, 000.00** for deformity.

I award the claimant **K4, 690,000.00** representing the loss of income, over the period between December, 2012 when the claimant was injured and lost earning capacity to the period of the assessment, June 2018, given his average monthly income at K70,000.00 which is a fair representation of the occupation he was in.

For loss of earning capacity, I am mindful that the claimant was a businessman in an informal sector. He was not amenable to a mandatory retirement age. He would have, however, still slowed down his business operations with age, mostly from around 55 years. He is 33 years old. For the next 22 years he would have actively have the earning capacity he had before the injury. I have also considered contingencies and life misfortunes apart from the injury, coming from the action of the defendants' insured negligent driver and also the fact that the sum granted here-in will be a lump sum that would be invested and earn more. I will use 6 years as such as the multiplier. His known average monthly income is a non-taxable K70,000.00. There is nothing to take away from the known income as he is not currently earning anything since the injury- **Manda v. Malawi Social Action Fund, High Court Principal Registry, Civil Cause No. 756 of 2003 (unreported)**. The formula being a multiplicand of K70,000.00 (average monthly income) times 12 months (the annual income) times the multiplier of 6 (years), the claimant is therefore awarded **K5, 040,000.00**, representing loss of earning capacity.

The claimant further asked the court for an award of future nursing care. He is not fully recovered. The bones have not come back together. He may require another surgery or Plaster of Paris casting. I award the claimant damages for future care and treatment at **K150,000.00**.

I award the claimant the sum of **K3,000.00** and **K2, 500.00** respectively as recovery for the costs of the police and medical report respectively, as incurred by the claimant. The claimant should also recover costs of the assessment hearing too.

5. Conclusion

The claimant is hereby awarded a total of **K 21, 385,500.00** representing damages for pain and suffering, disfigurement, loss of income, loss of earning capacity, future treatments and recovery for costs of medical and police report. The claimant is given costs of the assessment hearing.

Made this 2nd day of July, 2018.



Austin Jesse Banda
ASSISTANT REGISTRAR