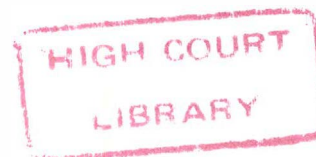


Library



The Judiciary

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY



PERSONAL INJURY CAUSE NUMBER 242 OF 2016

Between

MONICA BENESI..... CLAIMANT

-and-

ANDREW THAWE.....1ST DEFENDANT

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

CORAM: Austin Jesse Banda, Assistant Registrar

Mr. Domasi, for the Claimant

Mr. Stenala Chisale, for the Defendants

Mr. Mathanda, Clerk/ Official Interpreter

ASSESSMENT ORDER

Background

The claimant commenced this matter against the defendants seeking damages for pain and suffering, disfigurement, loss of earnings and earning capacity, and special damages. In a consent judgment, endorsed by the court on 17th November, 2017, the issue of liability was resolved by the parties. It was adjudged that the first defendant's percentage of contribution was 70 %, whilst that of the claimant was 30 %. The second defendant is the insurer of the motor vehicle that was negligently driven by the first defendant. The parties appeared before me for assessment of damages. The claimant was the only witness. The defendants did not parade any witnesses. They simply made an oral submission through counsel which I have given due consideration in this order, as was given to the written arguments by the claimant.

Evidence

Monica Benesi, the only witness in the hearing adopted her witness statement that she had filed with the court earlier on, under oath. She said that due to the accident whose occurrence the first defendant contributed to at 70%, she sustained a fracture of the left foot, bruises on the right ribs and left knee. She said that she was taken to Queen Elizabeth Central Hospital where her leg was placed in a Plaster of Paris which stayed on her for a month. She said that she felt a lot of pain that could not ease even with pain killers, and she was not able to sleep, until later on. She said she was able to sleep without pain at the time of making her statement.

The claimant said that she was no longer able to do her vegetable business after the accident from which she could earn a profit of K2000 to K3000 a day. She said she used to walk in the residential areas of Blantyre as she sold vegetables, such that the walking also provided body exercise.

In cross examination, she told the court that she sustained a fracture of the shoulder as she fell, alongside the broken bones in her foot. She said she bruised her ribs and a knee. She said that she was treated as an outpatient but she was visiting the hospital for check-ups. She also said that she was not completely fine as it takes her effort to walk, and that was the reason why she was no longer doing the business of selling vegetables.

Issue

The only issue in this matter now is the quantum of damages that the defendants must pay the claimant for the contribution of the first defendant to the injuries that she sustained.

Analysis of Law and Fact

Every victim of a tortious act is entitled to be compensated by the tortfeasor. The level of damages must be adequate enough to put the victim, as far as money can, in the same position that the victim would have been had the wrongful act not been done to him- **Namwiyo v. Semu and Others [1993] 16(1) MLR 369**. It is impossible to come up with an amount of money that fully compensates a non-monetary loss, with mathematical precision, like is the case with personal injuries. 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)**. Courts also take into account the rise or fall of value of the currency over the period of time that has passed between a comparable case and an instant one- **Paulo v. Mwakabanga [1991] 14 MLR 409**.

Pain and Suffering, and Disfigurement

In the instant matter, the claimant had a fracture of the metatarsal, had a painful shoulder, not fractured, in my finding from her medical report, ribcage and a bruised knee. She was in a Plaster of Paris for a period of more than a month. She is looking for damages for pain and suffering caused from the injuries among others. 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.

The claimant also prays for damages for disfigurement. Disfigurement refers to changes in the physical bodily frame that has been caused by the injuries in an accident. In the case of **Chingámba v. Deerless Logistics Limited Civil Cause No. 2888 of 2007**, Potani, J stated that disfigurement was not something to be taken lightly and casually as a person lives with the deformity for the rest of her life.

In the case of **Charles Mauzu v. Wild Batson and Prime Insurance Personal Injury Case no. 77 of 2014** a claimant sustained fractures of tibia and fibula on both legs, had multiple wounds on the right shoulder and the face, and deep cut wounds on the left and right leg. He was awarded K1,000,000.00 for pain and suffering, and K800,000.00 for deformity. The order of those awards was made on 16th June, 2017.

This court, as recently as 19th July, 2018 made an award of K1, 450,000.00 for pain and suffering and K 750,000.00 for deformity to a claimant who had sustained a fracture of the distal right leg and had been put in a Plaster of Paris and had difficulties to carry on manual

work after the injury. This is the case of **Chidoola v. Chilunga and Prime Insurance, Personal Injury Cause No. 488 of 2014**.

In my view, an award of **K1, 500,000.00** and another of **K 750,000.00** will be adequate compensation to the claimant here-in for pain and suffering for the first award and disfigurement for the second award respectively.

Loss of Earnings and Loss of Earning Capacity

Damages are paid for loss of earnings ascertainable for the period immediately after the injury to the date of judgment. Damages are also payable, a futuristic loss, for loss of earning capacity based on the previous known earnings to compensate for the claimant's loss of an extent inability to earn and/or marketability on the job market after the assessment. It is my view that loss of earning capacity also applies for a person such as the claimant in this matter, who was in the business of selling different types of vegetables, but with an ascertainable income therefrom. It would be unjust and discriminatory if such a remedy was only open to those in the sector, normally referred to as formal. Such inequality before the law is what our celebrated supreme law, the Constitution, no doubt abhors.

The claimant had a daily profit range of K2,000.00 to K3,000.00 at the time she was hit by the motor vehicle. This means she was averaging K2, 500.00 as income every day. Normally, business persons have a six-day week, and four weeks make a month. Her monthly income was an average of K60, 000.00.

The claimant was injured on 26th October, 2015. Consent judgment was entered on 17th November, 2017. Her loss of earnings from the injury is the period from the injury to the date of judgment, a period spanning a complete 24 months. Her loss of income is therefore K60, 000.00, for each of the 24 months which is **K1, 440,000.00**. I award her that sum as compensation for loss of earnings arising out of the incident that led to her injury.

The claimant is entitled to a futuristic award representing a loss of earning capacity. Based on the known income of K60,000.00 (average) a month, as a multiplicand, times 12 months, the annual income is K720,000.00. For loss of earning capacity, the age of the claimant is used to find the multiplier. As this court observed in the case of **Chikondi Namate v. Latif and Prime Insurance Co. Ltd, Personal Injury Case Number 553 of 2013**, persons in the informal sector are not amenable to the mandatory age. They can go on in the business until natural forces slow them down or halts them completely, or when death comes sooner than expected.

Normally it is widely acceptable that at the age of 55 human beings' productivity slow down. It would no doubt be the case for the claimant, that at that age and beyond she would not be

expected to tread through a number of residential areas happily touting for and selling her vegetables. The claimant's age was not stated. I saw her in the assessment hearing. She is no doubt slightly above middle ages, such that she could be around 10 years closer to the age of 55. Since a lump sum will be awarded, which she can of course invest in a more settled business that may not require her to walk a distance, for example investing in renting a stall in established markets to sell her vegetables there-from, I will reduce the multiplicand to 3 years. I therefore award a sum of **K2, 160,000.00** as a compensatory sum for loss of earning capacity.

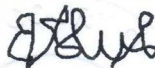
Special Damages

The claimant asked for special damages for the medical report at K10, 500.00, and K3, 000.00 for the police report. These are special damages that needed proof. There was no proof on the medical report. The police report shows it was paid for at the cost of K3,000.00 under general receipt number 2254167. I will award only **K3, 000.00** as proved by the police report itself.

Conclusion

Lastly, I am mindful that the claimant contributed 30% to the occurrence of the incident of the claimant's injury. For that reason, she is entitled only to 70% of the total awards made in this order. The total award being K5, 853, 000.00, 70% of that is **K 4, 095,000.00**. The claimant has been largely successful, and I exercise my discretion to grant her the costs of the assessment, which if not agreed shall be assessed by the registrar.

Made this 23rd day of July, 2018.



Austin Jesse Banda

ASSISTANT REGISTRAR