



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY NO. 166 OF 2015

BETWEEN

OLIVIA MBONELA.....PLAINTIFF

AND

STEVENSON INVESTMENT.....1st DEFENDANT

GERALD MADULA.....2nd DEFENDANT

Coram: **WYSON CHAMDIMBA NKHATA** (ASSISTANT REGISTRAR)

Chayekha - of Counsel for the plaintiff

Chitsulo- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

This is an order for assessment of damages to a motor vehicle pursuant to a default judgment entered in favour of the plaintiff on the 13th September 2016. The claim arises from an accident that occurred on the 5th of April 2014. By writ of summons dated 30th April 2015, the plaintiff commenced this action against the defendants claiming damages for loss of earnings, loss of use, inconvenience and costs of this action.

The background of the matter indicates that on the 5th of April 2014, the 2nd defendant was driving motor vehicle registration number NS4447/BJ1480 a freightliner Articulated truck belong to the 1st defendant. The 2nd defendant drove negligently that the motor vehicle rolled backwards hitting motor vehicle

number CZ4441 and damaging it in the process. The plaintiff also indicated that the vehicle being used for ferrying people from place to place for a fee, she has lost earnings. She further lamented on inconvenience caused considering that she could use the same for personal use. It is against this background that she now claims for loss of earnings, loss of use, inconvenience and costs of this action.

The matter came for hearing on assessment of damages on the 25th of July 2018. The defendants never appeared for the hearing. However, there was evidence that the notice of assessment was duly served on them. For this reason this court ordered the hearing to proceed in their absence. The evidential summary through the plaintiff's witness which she adopted in its entirety was as follows:

The plaintiff was the owner of motor vehicle registration number CZ4441, minibus, which was hit and damaged by motor vehicle registration number NS4447/BJ1480 on or about 5th April 2014. The minibus was bought in 2009 at a price of K2,500,000.00 and I used the minibus for transportation business. She started this business in Lilongwe and in January 2011 she shifted to Blantyre. The minibus used to ply between Limbe, Blantyre and Zomba. Sometimes it would ply between Limbe and Zomba. She used to keep records for money received and expended on daily basis. On average she used to make K36,916.77 per day and that in 244 days she lost K9,007,916.88 as her earnings from the vehicle. She attached a letter marked "OM1" and daily record book marked "OM2".

She further averred that the letter from Chirimba garage, it can be seen that the vehicle is a write off hence could not be repaired meaning that he has lost the use of the vehicle from the period of accident (5th April 2014) to date. She exhibited a letter from Chirimba garage marked "OM3". When the mini bus was not doing business, she used to use it for her personal errands. Due to the damage he could no longer use it and alternatively used other means at a fee. She there prays that the court awards her the sum of K5,000,000.00 as costs of replacement/repairing value owing to the passage of time and the loss value of the kwacha the estimated K1,200,000.00 cannot be adequate, K9,007,916.88 as damages for loss of earnings, K500,000.00 as damages for loss of use. All amounting to K16,007,916.00.

Counsel for the plaintiff filed skeletal arguments in which he adopted as his final submissions in this matter. I have had ample time to look at and consider all the documents filed by the plaintiff in support of these proceedings. The documents are not contentious and the skeletal arguments are clear as to what the plaintiff is claiming for.

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 repairing the motor vehicle. The position of law is that where an item has been damaged and is in a reparable 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 in a reparable state and the court is therefore obliged to award as damages, the cost of replacing it.

In the present case, the vehicle is in an irreparable state. There is a letter from Chirimba garage succinctly declaring the vehicle herein a write off as attempts to repair it would be uneconomical. It is clear therefore that the court should consider making an award equivalent to replacement value. Apparently, the replacement value was pegged at K2,200,000.00 by the insurer. The defendant's insurer only paid K1,000,000.00 being its repair policy limit leaving a balance of K1,200,000.00. However, Counsel for the plaintiff in his skeletal arguments bemoans the passage of time and submits that K5,000,000.00 would be adequate compensation. It is not a far-fetched assertion that there has been devaluation of the kwacha since the evaluation of the vehicle was made. It is neither an exaggeration that prices for minibuses have gone up since then. However, K5,000,000.00 is slightly higher considering that the plaintiff already received K1,000,000.00 from the insurer. I make an award of K3,000,000.00

With regard to loss of earnings, it is in evidence that the plaintiff in the present case would have been realising a net sum of K36,916.77 everyday but for the damages on his motor vehicle. By the time the assessment proceedings were conducted, 277 days had gone. Thus $277 \times K36,916.77$ is equal to K9, 007,691.88. Based on this analysis, I proceed to award the plaintiff the sum of K3, 460,000.00.

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, there is no evidence of hiring of a motor vehicle. There is a mention of having used alternative means at a fee but there are no amounts mentioned. The court will therefore adopt the conventional approach. I have seen the comparable cases cited by counsel for the plaintiff in this regard. Counsel wishes to rely on the case of **Wilson Kamwendo v Reunion Insurance Company Limited** Civil Cause Number 913 of 2010 where the Plaintiff was awarded K250,000.00 as damages for loss of use. The vehicle was used for domestic use and this was in 2015. Counsel therefore prays for K1,500,000.00 as loss of use. In the present case, the vehicle was by and large for ferrying people from one place to another for a fee. The plaintiff has been largely compensated for loss of earnings. I see no reason to stretch the award under this head in the circumstances. In my view a conventional award of K500,000.00 considering the period the vehicle has been off the road as damages for loss of use of the plaintiff's motor vehicle.

With regard to damages for inconvenience, it is trite law that where a party suffers inconvenience due to the wrong doing of the other, he is entitled to damages as inconvenience is a cause of action in its own right, see **Pemba vs Stagecoach (Mal)Ltd**, 16(1)MLR348 and **Kalulu vs Blantyre Water Board**, 13MLR 160. In **Potex Kamenya Banda vs Mr Zhao**, civil cause No 939 of 2009, the Plaintiff who was merely a small scale businessman was awarded K150,000.00 for inconvenience when he was detained for about 6 hours over and above damages for false imprisonment. Furthermore, in the case of **LM Nakoma vs Kachemwe and Reunion Insurance Limited**(supra) the plaintiff was awarded K100,000.00 for inconvenience when his motor vehicle was off road for 49 days. In the present case, Counsel prays for K500,000.00 as damages for the inconvenience. Taking into consideration the period of inconvenience, time factor and currency devaluation and depreciation, I am of the view that K300,000.00 would fairly compensate the plaintiff for the inconvenience suffered and I proceed to award her accordingly.

From the foregoing analysis, the damages awarded to the plaintiff can be summarised as follows:

1. The sum of K3,000,000.00 as balance for replacing the plaintiff's motor vehicle.
2. The sum of K9, 007,691.88 as damages for loss of earnings.
3. The sum of K500,000.00 as damages for loss of use.
4. The sum of K300,000.00 as damages for inconvenience. 144

In total, therefore, the plaintiff is awarded the sum of K12, 807,3691.88 in all heads of damages pleaded and proved. The plaintiff is further awarded costs of the action.

MADE IN CHAMBERS THIS 30th OF JULY, 2018



WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR