



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CASE NO. 59 OF 2018

BETWEEN

RICHARD CHINSINGA.....CLAIMANT

AND

ELECTRICITY SUPPLY CORPORATION OF MALAWI.....DEFENDANT

Coram: **WYSON CHAMDIMBA NKHATA (AR)**

Kamunga- of Counsel for the Claimant

Kaliwo – of Counsel for the Defendant

Chitsulo- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

By way of a specially endorsed writ of summons which was issued on the 14th of February 2018 the plaintiff commenced these proceedings against the defendant claiming damages for pain and suffering, deformity, disfigurement, loss of earnings, special damages and costs of the action. Apparently, the plaintiff was injured while under the employment of the defendant. On 23rd March 2018, a default judgment on liability was entered in favour of the plaintiff. This is the court's order on assessment of damages pursuant to the said default judgment.

The background of the matter as discerned from the Statement of Claim is that the claimant was at all material times an employee of the defendant working as a Temporary Linesman. The defendant is a company involved in transmission and distribution of electricity. On or about the 20th of October 2016, between 9-10am at Mbayani market power lines within the district of Blantyre the claimant was greatly injured as he was pulling a bare wire from a pole and was tightening and fixing it to one of the disks at a power tapping pole when the part of the wire that had crossed the disk thrust into the air and came into contact with a live conductor causing great electric shock and injury to the claimant.

Consequent to the said accident, the claimant sustained burnt wounds on the neck which exposed the tendons, serious injuries to the eyes which led to an operation, very large burnt wounds on the left cheek and left ear and burnt wounds on the shoulder. He was admitted at Mwaiwathu Hospital from 20th of October 2016 to 8th December 2016. He underwent several surgical treatment which among others led to an amputation of his arm. It is against this background that the claimant claims damages for pain, suffering, loss of amenities, damages for disfigurement, damages for deformity, loss of earning capacity, special damages and costs of this action.

The matter came for hearing on assessment of damages on the 2nd of August 2018. The claimant was the sole witness for his case. He adopted his witness statement and tendered several documents which I shall refer to as and when necessary. Suffice to say for now that this court has been called upon to make a determination on the quantum that would adequately compensate the claimant for the injuries he suffered.

The law generally provides that a person who suffers bodily injuries or losses due to the negligence of another is entitled to recover damages. The fundamental principle which underlines the whole law of damages is that the damages to be recovered must, in money terms, be no more and no less than the Plaintiff's actual loss. The principle was laid down in numerous case authorities more particularly by **Lord Blackburn** in the case of *Livingstone v. Rawyards Coal Company* (1880) 4 AC 25 in the following terms:

where any injury or loss is to be compensated by damages, in settling a sum of money to be given as damages, you should as nearly as possible get at the sum of money which will put the party who has been injured, or who has suffered loss, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

However, it ought to be borne in mind that it is not possible to quantify damages for pain and suffering, loss of amenities and deformity as claimed in this matter with mathematical precision. As a result, courts use decided cases of comparable nature to arrive at awards. That ensures some degree of

consistency and uniformity in cases of a broadly similar nature: See **Wright -vs- British Railways Board** [1983] 2 A.C. 773, and **Kalinda -vs- Attorney General** [1992] 15 M.L.R. 170 at p.172. As such this court will have recourse to comparable cases to arrive at the appropriate quantum of damages for the plaintiff.

First of all, under the head of pain and suffering Counsel for the claimant called upon the court to have recourse to the case of **Fainess Kaphatikira and Wema Tepani (Suing as Administrator and on her own behalf as sister of the deceased and on behalf of the other beneficiaries of the deceased-Bibi Kaphatikira) v ESCOM**, Personal Injury Cause No 216 of 2011 where the 1st claimant suffered multiple and heavy electric burns at the back, multiple and heavy electric burns on the right leg exposing the bones and tendons, heavy burns wounds on the hip, heavy burn wounds on the back, heavy burn wounds on the chest exposing the ribs, suffered deformity, permanent scars, had difficulties in walking, is not able to do any work to earn a living, was admitted for 7 weeks and follow up checkups for 8 months. The court awarded K18,500,000.00 for pain and suffering, loss of amenities of life, loss of earning capacity and for deformity. The award was made on 5th November 2014.

It was therefore Counsel's submission that the injuries in this case are almost the same in seriousness as in the case cited above and considering the devaluation of the kwacha since 2009 for the case above, K35,000,000.00 would adequately compensate the plaintiff for damages for pain and suffering.

On loss of amenities of life, Counsel cites the case of **Lewis Mtawanga v Jenifer Kamteme & Southern Region Water Board** Personal Injury Cause No. 371 of 2011 in which the plaintiff was awarded the sum of K2,500,000.00 as damages for loss of amenities of life. The award was made on 3rd October 2013. He therefore proposes K15,000,000.00 in the circumstances of this case.

On deformity, Counsel for the claimant cites the case of **Rabecca Mbwana vs Attorney General, Civil Cause No. 1958 of 2009** where the court awarded the plaintiff the sum of K1,000,000 for deformity. Counsel proposes a sum of K10,000,000.00 as damages for deformity in this case.

Counsel further claims damages for disfigurement separately and cites the case of **Piason Shadi v Reunion Insurance Company Limited** Personal Injury Cause No. 200 of 2014 where the plaintiff was awarded K600,000.00 as damages for disfigurement for a simply fracture. He therefore claims K10,000,000.00 contending that the plaintiff has been disfigured on the left arm as well as suffered a very large deep horrific burnt wound on the left cheek.

Lastly, on loss of earning capacity he proposes that the court should adopt the calculation $K90,114.00 \times 15 \times 12 = K16,220,520.00$. He further avers that the claimant is now 40 years old and that life expectancy is 55 years.

In summary, the plaintiff prays for K35,000,000.00 as damages for pain and suffering, K15,000,000.00 for loss of amenities, K10,000,000.00 for deformity, K10,000,000.00 for disfigurement and K16,220,520.00 for loss of earning capacity giving a total of K86,220,520.00.

On the other hand, Counsel for the defendants cited the case of **Jane Mabaso and 21 others v R.Y. Kumwenda and Citizen Insurance Company Limited**, Civil Cause No. 242 of 2010 where the 2nd plaintiff sustained multiple fractures in the left humerus and right femur. He was hospitalized for 8 months and was awarded the sum of MK1,500,000.00 as damages on all heads by the court. The award was made in 31st of October, 2012.

Muleso and others v Rashly Motors Civil Cause number 1626 of 2010 (unrep) in which the 1st plaintiff sustained soft tissue injuries and general body pain and muscular skeletal injuries. The court awarded him K1,000,000.00 for pain and suffering and loss of amenities on the 7th of August 2012.

Muleso and others v Rashly Motors Civil Cause number 1626 of 2010 (unrep) in which the 2nd plaintiff sustained a fracture of the lower arm and was in POP for 6 weeks. The court awarded him K2,200,000.00 for pain and suffering and loss of amenities on the 7th of August 2012.

Noah Makina vs. Sammy's Transport Limited and United General Insurance Company Limited (Civil Cause No. 89 of 2011), in which the plaintiff was scalded by hot water that came out of the vehicle's radiator. He suffered severe burns on the whole right arm; it was bandaged for 3 months and was left with an ugly scar which is painful during whenever there is hot weather. He was awarded K2,500,000.00 damages for pain and suffering and loss of amenities. The award was made on 3rd November, 2011.

Duncan v Kamadzi and Others Civil Cause No. 2016 of 2010 where the plaintiff had suffered a fractured right humerus, traverse mid shaft, with radial palsy, mild head injuries and multiple bruises. 30% permanent incapacity was awarded K3,000,000.00 on the 28th of July 2012.

Kaunda v Prime Insurance Company Limited Civil Cause No. 826 of 2011 where the plaintiff was paralysed on the arm and leg, head injuries, big cut wound on the scalp. The injuries left her with some degree of mental incapacity and 80% permanent incapacity. He was awarded K4,000,000.00

It is therefore Counsel for the defendant's submission that taking into account the medical reports submitted by the plaintiff and having seen him in court it is conceded that he suffered serious injuries. However, Counsel is of the view that much as the injuries appear comparable to the cases discussed above and therefore the sum of K86,220,520.00 even taking into account inflation is punitive. He therefore submits that the quantum be as follows:

| | |
|---|----------------|
| Damages for pain and suffering | K10,000,000.00 |
| Damages for loss of amenities of life | K2,500,000.00 |
| Damages for deformity and disfigurement | K2,500,000.00 |

Further to this, Counsel proposes that the court should not make an award for loss of earning capacity since the plaintiff is still employed by the defendant and receiving his salary. In total, Counsel for the defendant suggests K15,000,000.00 as a reasonable amount to compensate the claimant.

I took time to look at the medical evidence as to the injuries and the prognosis given by the medical experts. I had the opportunity to observe the injuries that were sustained by the claimant and his present physical condition. I must state that I am highly indebted to both Counsel for the illuminating submissions which went a long way in informing the court in arriving at the quantum in this matter.

I thought I should begin by stating that as conceded by the defendants in their written submissions the claimant was indeed critically injured. It would be unwise to attempt to downplay the injuries in any manner whatsoever. On the other hand, I do not intend to sensationalize the injuries but to say the least he struck me like he was actually lucky to be still alive. The court took note of the devastating burn injuries on the head, neck and some parts of the body. Evidently, the burns were so severe that he had to have an arm amputated. He now has to wear a prosthesis. Apart from that, he has also lost most of his left ear due to the burns. The burns further left telltale scars on the gravity of the injuries sustained spread across his neck and shoulders. The court took note from the medical reports as well as the claimant's oral testimony that he incurred further scars on the legs due to skin grafting to some heavily affected areas. The claimant was in admitted for months both in our hospitals in Malawi and even in South Africa. All in all, from the multiple injuries all over the plaintiff's body, I believe he had to contend with unbearable pain that ought to attract substantial compensation.

Evidently, he still experiences some heat and irritation on his neck. He has partly lost his sight because of the injury. He has lost his capacity by 50%. He is not able to do the simply things he used to. The court witnessed a sorrowful episode as he struggled to put on back his shirt in court. I must also mention that this is a person who may have attended reconstructive surgery but to say the truth it did not do much to help him regain his former physical appearance. His aesthetic stature has been distorted. I also take of his lamentations that being the first born in his family he was responsible for supporting his aged parents and that has been affected as well. On the other hand, obviously, he has lost out on his pursuit of leisure. In my view, this is a case where substantial awards must be made for loss of amenities and deformity as well.

The claimant is also claiming damages in the form of loss of earning capacity. Apparently, there has been no reduction really in his earnings. He was employed as a Temporary Linesman and after the injury he was re-assigned to other duties that he could manage with his injury. Admittedly, he maintains the salary he was earning as a linesman. The most that has happened in this matter is that because of the injury he cannot continue with what he was doing prior to the injury. There is however a substantial prospect that his capacity to earn the income in future has been affected by the injury. After all, he is but a temporary employee. In **Mary Kamwendo v Stagecoach Malawi Ltd and National Insurance Company Limited** Civil Cause No. 840 of 1995 Justice Mwaungulu as he was then cites with approval the case of **Tembo -v- City of Blantyre and National Insurance Company** (1994) Civ. No. 1355 in which it is stated that:

“Where there has been no change in earnings ... there cannot be a claim for loss of earnings. Courts, however, are not naive. They do not approach the problem from the perspective that no damages should be awarded because there is no loss of earnings...They consider the prospect of the victim losing the job because of the injuries which now appear to have no impact on his earnings. Where there is such a prospect courts have made awards under the style of loss of earning capacity to distinguish it from loss of earnings...The prospect of such a disadvantage must be substantial.”

In this case, the claimant expresses incredulity on the continuation of his working relationship with the defendant. He told the court that the defendant was initially at the helm of supporting him with medical attention when he got injured however upon commencing these proceedings the defendant changed heart. He explained that the defendant has failed to facilitate his appointments with doctors in South Africa. He told the court that he was told to wait for the outcome of this case. In my view, if the outcome of this case has a bearing on the medical attention that he was receiving courtesy of the defendant, the claimant's future under the defendant's employment is not promising. The claimant here, through these injuries, has a disability which would reduce his prospects of employment if he was to be thrown into open market. It is only proper for this court to make an award under this head as well. The plaintiff's earnings are K90, 114.00 per month. He is forty years old. He would be in employment up to the age of fifty-five years. Whatever the award, it must take into account that the award is global and it will earn income for the period in which the plaintiff could have worked. I award the plaintiff the sum of K10,000,000-00 for loss of earning capacity.

Finally, I thought I should comment on the part that the defendant played after the injury. The evidence through cross-examination discloses that the defendant was responsible for the claimant's medical bills.

The defendant even made recommendation for further treatment for the claimant outside Malawi. They facilitated processing of a passport and paid for his travel by air to South Africa as well as for his guardian. They paid the claimant allowances whenever he went to South Africa. In my view, the defendant did not spare a dime to assist the claimant in accessing medical treatment. The itchy question is whether the defendant must be held accountable for the full extent of the consequences of their conduct regardless of any aid or compensation through employment contractual obligations or gratuitous assistance to the claimant. I believe it is now settled that the claimant necessarily incurred the medical expenses because of injuries resulting from the defendant's negligence. The essential purpose and the most basic principle of tort law is that the claimant must be put at a position he was but for the defendant's negligence. I shall therefore strive to align the awards with this purpose than anything else.

It is therefore upon a thorough consideration of facts and circumstances of this case, and upon an exhaustive consideration of the submissions by both Counsel in the light of the relevant and applicable law regarding damages for the claimed heads herein that I make the following awards:

| | |
|---|----------------|
| Damages for pain and suffering | K20,000,000.00 |
| Damages for loss of amenities of life | K5,000,000.00 |
| Damages for deformity and disfigurement | K5,000,000.00 |
| Loss of earning capacity | K10,000,000-00 |

In total, the claimant is awarded K40,000,000.00. He is further awarded costs of this action to be taxed if not agreed by the parties.

DELIVERED IN CHAMBERS THIS 30th DAY OF AUGUST 2018


WYSON CHAMDIMBA NKHATA
ASSISTANT REGISTRAR