



The Judiciary



IN THE HIGH COURT OF MALAWI

MZUZU REGISTRY

CIVIL CAUSE NUMBER 178 OF 2016

BETWEEN

TAONA VIOLET MSISKACLAIMANT

AND

MADALITSO BANDA.....1ST DEFENDANT

CONSOLIDATED MINING INDUSTRIES CO..... 2ND DEFENDANT

CORAM: A.J. BANDA, ASSISTANT REGISTRAR

Mr. M. Chiwaya, of counsel, for the Claimant

For the Defendant, None present

Mrs. F.M. Luwe, Clerk/Official Interpreter

Banda, AR

ASSESSMENT ORDER

Background

Following the overturning of a motor vehicle in which the claimant Taona Msiska and two minors for whom she is litigation guardian, Madalitso Mbewe and Fortune Harawa, were passengers, the claimant commenced a lawsuit by a specially endorsed writ. She claimed that the accident happened as a result of the negligence of the 1st defendant who was the driver of the motor vehicle which is owned by the 2nd defendant. The 2nd defendant was sued as being vicariously liable for the 1st defendant's negligence. In the amended statement of claim the claimant on her own behalf and on behalf of the two minors, sought the following damages for personal injuries; K6,000.00 cost of two police reports, K9,000.00 cost of three medical reports,

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damages for pain and suffering, damages for future medical treatment, damages for loss of amenities of life and costs of this action. The defendants did not enter any defence. The claimant as such obtained a default judgment on 30th September, 2016. When she took out a notice for the assessment of damages, the defendants did not appear despite due service being effected and evident. The court thus proceeded to hear the claimant in the defendants' absence.

Evidence

The claimant was the only witness in the assessment hearing. The uncontroverted evidence from her prepared witness statement, which she adopted under oath is that she and the two minors were passengers in a Freight Liner Articulated Truck driven by the 1st defendant who was an employee of the 2nd defendant. It was said that the 1st defendant recklessly went around a bend in very high speed which made the vehicle overturn. She presented a police report of the accident. From such an accident, she said that she suffered damage and loss.

Taona Msiska told the court that she had a large cut on the right leg and another above the right knee where some nerves were cut off and the bone was exposed. She also showed the court that her ear lobe was cut off from the accident. She said that she had multiple cut wounds on the face. She said that she stayed in the hospital with pains from the 31st day of December, 2016 to the 13th day of February, 2017, and had to ask the doctors if they could just discharge her as she felt she had stayed long in the hospital. She said she was still going to the hospital for medication to get painkillers and other medical attention for headaches and bodily pains. She said that at times there were no medicines that she required for the pains and she had to buy them. She said that on the day she gave her evidence she had spent K5, 000.00 on drugs that the hospital could not provide. She said that she goes to the government hospital once every two months on average since the accident and a return journey to the hospital costs K1, 800.00.

She further told the court that she could not do her farming activities properly since the accident. She said she is not able to lift or carry heavy items. She said that she also has to lift her leg on a desk when she sits at her workplace where she works as a teacher as she finds difficulty to sit normally.

The claimant told the court that Fortune had two fractures, one of the clavicle, on the left shoulder and another of the right femur. She further said that the child had cut wounds on the face and lips. It was said that Fortune stayed in the hospital for two days before he was discharged. She said that the child was not completely healed as he still had pain in the leg, seizures at times and that he hallucinated a lot since the accident. It was said by the claimant that Fortune also still has to attend hospital for routine treatment since the accident.

As for Madalitso Mbewe, the claimant stated that he had a fracture of the clavicle, cut wounds on the shoulder and face and also complained of bodily pains, and complains now and again of headaches since the accident and that he was still accessing medical help at the hospital around Robert Laws Secondary School where he is a student.

Issue

The only issue in this case is the quantum of damages that must be paid to the claimant and the two minors as compensation under the heads in the pleadings as follows: special damages, pain and suffering, loss of amenities of life and cost of future medical treatment.

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 place that the victim would have been had the wrongful act not been done to him. See **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, 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 and Loss of Amenities of Life

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. Damages are paid under the head of loss of amenities of life to compensate the claimant's deprivation of the pleasures of life, which amounts to substantial loss, whether the claimant is aware or not of that loss. See **City of Blantyre v. Sagawa** [1993] 16(1) MLR 67 (SCA).

It is my finding that the injuries suffered by Taona Msiska were very serious such that she lost an ear lobe, bled profusely from the deep cuts on her leg that exposed the bone but also had some nerves cut as the medical report shows. These injuries no doubt caused a great deal of pain. Further pain was inflicted in suturing the wounds but also their otherwise treatment considering that she spent a month and a half in hospital. She may have impaired hearing from loss of the ear lobe that ordinarily directs sound waves to the inner ear. She cannot do farming as she used to do in the past. The two minors, Fortune and Madalitso also had serious injuries. They both had clavicle fractures and multiple wounds or bruises. As for Fortune he also had a fracture of the femur.

In **Chilembwe Phiri v. General Alliance Insurance Company Limited, Personal Injury Cause Number 350 of 2012 High Court, Principal Registry**, a claimant was awarded K7, 000,000.00 for pain and suffering and loss of amenities of life for a fracture between the ankle and knee on the right leg, and dislocation on the left ankle and head injuries, on 19th April, 2013.

In **Rose Chipala v. Prime Insurance Company Limited, Personal Injury Cause Number 472 of 2013, Principal Registry**, the court made an award of K4, 950,000.00, on 13th October, 2015 as damages for loss of amenities of life and disfigurement for a fracture of the right femur, swollen right ankle and bruises on the face.

~~In **Wonderson Mbeta v. Steve Adam and Prime Insurance Company Limited Civil Cause 178 of 2011**, a claimant who suffered a deep cut wound on the head, had a cut in the eye and a bruised left ear got K2,000, 000.00 damages for pain and suffering, and loss of amenities of life.~~

I have considered the need to maintain the value of the currency from the near comparable cases above and others in which awards were made some time back, but also the specific injuries suffered by the three in this case. In the premises, considering the gravity of the injuries and the pain it brought and the embarrassment of failure to sit properly in a school setting and also the loss of the ear lobe, I award Taona Msiska **K5, 800,000.00** damages for pain and suffering and loss of amenities of life. I also award Fortune Harawa and Madalitso Mbewe awards of **K2, 500,000.00** and **K2, 300,000.00** respectively under these heads.

Costs for future medical treatment

Evidence on file shows that the claimant and the minors still require medical treatment after the initial treatment of their varying degree of injuries. The claimant spoke of going to the hospital once in two months and spending K1, 800.00 on transport. It is not clear how long more she will need to continuously visit the hospital pertaining to these injuries. She further said that she was buying drugs at times and she had expended K 5,000.00 that far on drugs. As for Fortune, she said, he also still visits the hospital for check-up. For the two, future medical care of **K100, 000.00** should be adequate. There is no evidence though that Madalitso Mbewe incurs expenses to obtain this treatment. I award nothing for him.

Special Damages

Special damages should be specifically pleaded and proved. I find that there are two police reports on file and three medical reports. The evidence of the claimant is uncontroverted that she obtained each of the 5 reports at the cost K3,000.00 each. I therefore award special damages at **K15,000.00**.

Conclusion

The claimant and the two minors for whom she is litigation guardian suffered injuries of different gravity for which the defendants are liable and must compensate. The total award of the compensation reflecting the damages for pain and suffering, loss of amenities of life, future medical care and special damages come up to **K10, 715,000.00** (Ten million, seven hundred and fifteen thousand kwacha). The defendants are to pay costs of the assessment hearing of the claimant, which if not agreeable, shall be assessed by the assistant registrar.

Made this 8th day of June, 2018.



Austin Jesse Banda

ASSISTANT REGISTRAR