



IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO.555 OF 2018
BETWEEN

ALEFA MKWATE CLAIMANT

AND

KUNJE SUWEDI 1ST DEFENDANT

PRIME INSURANCE COMPANY LIMITED 2ND DEFENDANT

CORAM : HER HONOUR MRS. E. BODOLE, ASSISTANT REGISTRAR

Lemucha, of Counsel for the Claimant

Counsel for the Defendants, absent

Ms. Kazembe, Court Clerk

ORDER ON ASSESSMENT OF DAMAGES

Introduction

The claimant brought proceedings against the defendants claiming damages for pain and suffering, loss of amenities of life, disfigurement, loss of earnings and earning capacity, costs for procuring police and medical reports, and costs of the action. Judgment on liability was entered for the claimant on 12th December, 2018. The matter has now come for assessment of damages.

The Evidence

The claimant is a business woman and she used to engage in the trade of buying and selling commodities. She was aged 37 years. On 28th March, 2016 she went to

Ntcheu to buy for business irish potatoes, kidney beans and tomatoes all of which were valued at K120,000.00. On her way back, she boarded motor vehicle registration number PE Toyota Dyna Lorry which was being driven by the 1st defendant. It was coming from the direction of Kameza roundabout heading towards Machinjiri Township along the Chirimba Industrial site/Machinjiri road. Upon arrival at Namilango SDA Church, the motor vehicle suddenly left the road and crashed into a nearby stream.

As a result of the accident, the claimant sustained injuries and suffered damage. She sustained bruises and multiple cuts on the left leg, severe head injuries, fracture of the tibia and fibula on the right leg leading to deformed and shortened leg. She was admitted at Queen Elizabeth Central Hospital from 28th March, 2016 to 23rd May, 2016. After being discharged, she has been receiving treatment as an outpatient up to September, 2017.

In order to fix her disfigured frame, metal rods were inserted into her bones for a period of 6 months. The process of inserting the metal rods was very painful and she had been feeling persistent pain in addition to the chest and general pains she had been feeling since the accident. After removing the metal rods from her bones, POP cast was applied on her right leg for a period of 12 weeks.

She also had to endure debridement and skin graft. There has been rotation of the pelvis, valgus of knees and swelling of the leg since the occurrence of the accident.

As a result of the injuries she sustained, the claimant is failing to perform in sports such as jogging and cycling which she used to do before the occurrence of the accident. She is failing to perform manual work and normal household chores, and she has difficulties in walking. Her deformity can be seen as she is walking in that she walks with a limp. There are scars on the places where the metal rods were inserted. Her permanent incapacity has been assessed at 30%.

The claimant lost all the goods she went to buy and cash amounting to K110,000.00. Due to the accident and loss, she has been failing to engage in the business which was bringing her, on average, a sum of K100,000.00 per month. All indications are to the effect that she will not be able to regain her health to the status where she will be able to re-engage in her business.

The claimant is also claiming a sum of K13,500.00 as costs for procuring police and medical reports.

Applicable Law

A person who suffers bodily injuries due to the negligence of another is entitled to the remedy of damages. Such damages are recoverable for both pecuniary and non-pecuniary losses. The principle underlying the award of the damages is to compensate the injured party as nearly as possible as money can do it – *Elida Bello v Prime Insurance Co. Ltd* Civil Cause No. 177 of 2012.

The damages cannot be quantified in monetary terms by use of a mathematical formula but by use of experience and guidance affordable by awards made in decided cases of a broadly similar nature – *Wright v British Railway Board [1983] 2 AC 773*. The court, however, considers the time the awards were made and currency devaluation – *Kuntenga and Another v Attorney General* Civil Cause No. 202 of 2002.

The non-pecuniary head of damages include pain and suffering, loss of amenities of life and disfigurement. These are assessed by the court. Pecuniary loss must be pleaded and proved - *Renzo Benetollo v Attorney General and National Insurance Co. Ltd* Civil Cause No. 279 of 1993.

Pain and Suffering

Pain and suffering is attributable to the claimant's injury or to any necessary surgical operations and mental anguish such as that suffered by a person who knows that his expectation of life has been reduced or who being severely incapacitated, realizes the condition to which she has been reduced – *Sakonda v S.R. Nicholas* Civil Appeal Cause No. 67 of 2013.

Loss of Amenities of Life

Loss of amenities is attributable to deprivation of the claimant's capacity to engage in some sport or past-time which he formerly enjoyed – *Kanyoni v Attorney General* [1990] 13 MLR 169. It means that he is incapable of performing some activities he used to do.

Deformity/Disability

Disability is a limitation either physically or mentally for someone to do what any other person can do without reasonable accommodation. In ***Ching'amba v Deerless Logistics Ltd*** Civil Cause No. 2888 of 2007 the court stated that disfigurement is not a matter to be taken lightly and casually. It is something that one has to live with permanently.

Comparable Cases

In ***Nelson Mandala v Plem Construction Ltd and General Alliance Insurance Company Ltd*** Civil Cause No. 283 of 2011 the claimant sustained fracture of the right leg, multiple cuts and bruises. He was awarded a sum of K4,500,000.00 as damages on 21st August, 2016. In ***Robert Mose (suing as administrator of the Estate of Zakaria Robert (Deceased) and 5 Others v Lyson Benjamin Chapo, Prime Insurance Company Ltd and Symon Door*** Personal Injury Cause No. 350 of 2015 the claimant sustained fracture of the tibia of the left leg, bruises on the lower right leg, cut on the lower chin and leg. He was awarded a sum of K3,300,000.00 on 21st August, 2016.

Loss of Earning Capacity/Earnings

Loss of earning capacity goes to the ability to earn. The court awards damages where a claimant is unable to earn the same rate of earnings as he previously could before the occurrence of the accident. Courts also assess the prospect of the claimant losing employment or reduced earnings in the future – ***Tembo v City of Blantyre*** Civil Cause No. 1355 of 1994. The court can make an award where the loss is unascertainable or incalculable. The award is calculated using the multiplier and multiplicand formula. In ***Manda v Malawi Social Action Fund*** [2003] MWHC 55 the court stated that:

“The amount of loss of earnings is calculated by taking the figure of the plaintiff’s present annual earnings less the amount, if any, which he can now earn annually, and multiplying this figure by a figure which, while based upon the number of years during which the loss of earning power will last, is discounted so as to allow for the fact that a lump sum will be given now instead of periodic payments over years. The latter figure has come to be known as

*the multiplier and former figure, the multiplicand. See **Mitchell v Mulholland No. 2** [1972] 1 Q.B. 65. Further adjustment however has to be made to the multiplicand and multiplier on account of other factors like inflation the so called contingencies of life and taxation...If he cannot earn anything nothing falls to be deducted."*

In loss of earnings, courts look at whether it is total or partial loss or earnings. The real loss must be ascertainable and calculable. In **Sakonda v S.R. Nicholas Limited** Civil Appeal Cause No. 67 of 2013 (HC), the court stated that:

*"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/multiplier approach based on the applicant's age."*

Analysis of Facts and Applicable Law

It is clear from the evidence that the claimant went through a lot of suffering and was in great pain and is still suffering. She sustained bruises and multiple cuts on the left leg, severe head injuries, fracture of the tibia and fibula on the right leg leading to deformed and shortened leg. She also had chest pains and general body pains. She was admitted in hospital for 2 months and had been receiving treatment as an outpatient up to September, 2017. Metal rods were inserted into her bones for a period of 6 months. She was in POP cast for a period of 12 weeks after the metal rods were removed from her right leg. As a result of the injuries she sustained, she experiences excruciating pain on her knee and restricted full range of motion of the knee. She had to endure debridement and skin graft. There has been rotation of the pelvis, valgus of knees and swelling of the leg since the occurrence of the accident.

The claimant is unable to enjoy life as she used to as she experiences difficulties in walking as she walks with a limp. She is unable to perform manual work and normal household chores. She is unable to perform in sports such as jogging and cycling as she used to before the occurrence of the accident.

The claimant has been disfigured in that her right leg has been shortened. As a result, she walks with a limp. There are scars on the places where the metal rods were inserted.

The injuries suffered by the claimants in the above-cited cases are comparable to the injuries suffered by the claimant in the present case. This court would take into account the fact that the awards were made some time back and the value of the Kwacha. This court, therefore, awards the claimant a sum of K6,000,000.00 as damages for pain and suffering, loss of amenities of life, and disfigurement.

As regards loss of earning capacity, the claimant was aged 37 years at the time of the accident. She was a business woman in the informal sector. She was not amenable to a mandatory retirement age. She would have been actively doing her business way into her 50s. I would adopt a figure of the age of about 55 years. She had, therefore, 18 years of doing business. That figure of 18 years shall be reduced to cater for eventualities of life that may have reduced her capacity to earn in any event. This court is also mindful of the fact that the sum to be awarded would be a lump sum that would be invested and earn more. This court, therefore, makes a reduction of 13 years and so adopts the multiplier of 5 years.

The claimant was earning a non-taxable sum of K100,000.00 per month. The claimant has not been earning anything since the occurrence of the accident. The court would, therefore, not deduct anything from the earnings. This court adopts this figure as the multiplicand. The award under this head would, therefore, be K100,000.00 x 12 x 5 which is K6,000,000.00.

The claimant sustained her injuries in the accident on 28th March, 2016. She has not been doing any business and as a result has lost income. This court awards the claimant a sum of K3,600,000.00 as lost earnings from the period when she was injured to the period of assessment which is March, 2019.

The claimant lost the commodities worthy K120,000.00 which she had gone to buy in Ntcheu. She also lost cash amounting to K110,000.00. This court awards her a total sum of K230,000.00 representing the lost commodities and cash.

The claimant proved that he had spent K13,500.00 in order to procure the Police and medical reports. This court, therefore, awards her this sum.

Conclusion

In conclusion, the claimant is awarded total sum of K15,743,500.00. The claimant is also awarded costs of this action.

Pronounced in court this 25th March, 2019 at Blantyre.



EDNA BODOLE (MRS.)

ASSISTANT REGISTRAR