



The Judiciary

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 477 OF 2012

Between

ELIZA GWEMBERE..... CLAIMANT

-and-

SIRAJ A.S. OMAR.....1ST DEFENDANT

CITIZEN INSURANCE COMPANY LIMITED2ND DEFENDANT

CORAM: Austin Jesse Banda, Assistant Registrar

Mr. Mambulasa, for the Claimant

None, for the Defendants

Ms. Madalitso Galafa, Clerk/ Official Interpreter

Banda, Assistant Registrar

ORDER ON ASSESSMENT OF DAMAGES

Background

The claimant commenced this proceeding by a writ on 16th August, 2012 seeking damages for personal injuries for the injuries that she sustained when the first defendant's driven vehicle hit her as she crossed the road at Mbulumbuzi Trading Centre along the Zomba- Limbe road. The defendants did not file any defence within time stipulated by the applicable Rules of Procedure, and a default judgment was entered on 19th December, 2012. Between then and now there were several dismissals of the assessment of damages hearing. The matter was last restored to the cause list on 18th December, 2015.

When the matter came for the assessment hearing on 20th December, 2018, the matter was adjourned to allow the defendants prepare for the assessment hearing as it was clear that despite there being a restoration Order the same was not on court file and counsel for the defence present on the day Mr. Twea had no knowledge of the restoration. Mr. Twea had prepared to raise an objection to the hearing since as far as he knew, and as the court file showed, the proceeding stood dismissed. This was before the defendant's was shown the Order which the claimant's present counsel Mr. Mambulasa had handy. We adjourned to 10th January, 2019.

On the 10th of January, 2019, the defendants did not attend either in person or by counsel. The claimant's counsel informed the court that he got a phone call from counsel that was to attend for the defendants that he was at Zomba High Court. Much as I would not expect counsel to lie, I also expect on good practice and procedure that counsel would have the courtesy to inform the court and colleague on the other side if she was appearing before a superior court in good time to avoid attendant costs and delays in concluding cases. I was minded to proceed in the absence of prior notice.

Evidence

The claimant had one witness, Eliza Gwembere, the claimant herself. She told the court that she was hit by a small vehicle (understood by the court to be a saloon car) at Mbulumbuzi on or about the 24th day of March, 2010- as she was crossing the road to buy food for breakfast. She said the car had been driven at high speed as she was sure before crossing that the car was far, yet it hit her shortly after she heard the honking of the car. She tendered a police report of the accident.

She further told the court that as a result of the impact she was injured as follows: had a cut on the upper eyelid; had lacerations on the face; had head injuries; and she was left with a very painful arm even though it was not fractured. The claimant told the court that she was taken to Zomba General Hospital where she was admitted for three weeks undergoing treatment. She said the hospital furnished her with a medical report that she tendered in evidence.

It was the claimant's testimony that she was now feeling better even though she could not carry a heavy bucket of water as she used to before but a small one only. As a result, she says she is forced to hire people to do the chore for her. She also said that she now has memory loss at times citing as an example that she constantly has to be reminded that she was cooking nsima by her children.

She prayed that the court should order the 1st defendant to compensate her since the 2nd defendant closed down business and was winded up in the year 2014.

Issue

The only issue to be determined is the amount of general damages as pleaded, that the claimant should be compensated with for the personal damage she sustained as a result of the wrong by the defendant's insured.

Analysis

Damages are the remedy that is open to a victim of a wrongful act of another. With general damages courts do award them not to punish the defendant or tortfeasor, but to fully compensate the claimant of all the losses that he has suffered as a direct or consequential result of their wrongful act or omission. In the case of **George Kankhuni v. Shire Buslines Ltd, Civil Case Number 1905 of 2002**, Katsala, J stated as follows:

“The law demands that the plaintiff, as far as money can do it, be put in the same position as if he has not suffered the loss. This is what is referred to as *restitution in intergrum*.”

It is not easy to quantify damages for losses that are not monetary in nature such as personal injuries. Courts as such use comparable cases as a guide to the quantification of applicable damages, without losing sight of particularities in the individual case that the court is dealing with. See **Chipeta v. Dwangwa Sugar Corporation, Civil Cause No. 345 of 1998, High Court, Principal Registry (unreported)**. The court will also consider factors such as passage of time since a particular comparable award was made, as well as currency fluctuations within the period between the case at hand and the comparable one- **Hon. Kennedy Kuntenga v. Attorney General, Civil Cause No. 2002 of 2002, High Court, Principal Registry, (unreported)**.

Pain and Suffering

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 award of damages for pain and suffering depends upon the claimant's personal awareness of pain, and his capacity for suffering- see **Limpoh Choo v. Camden and Islington Area Health Authority [1980] AC 174 @ 183**.

Disfigurement

Damages are paid under the head of disfigurement for the change in the physical form of a person injured either as a result of the impact of the injury or its treatment, such as a scar

coming in as a result of surgical operation necessitated by the injury. It is a change in appearance but it is capable of limiting a person from doing certain things as was observed by the court in the case of **Austin Julius v. Rasika Gunawardena and General Alliance Limited, Personal Injury Cause Number 316 of 2014**. Potani, J, in the case of **Chingamba v. Deerless Logistics Limited Civil Cause No. 2888 of 2007**, stated that disfigurement was not something to be taken lightly and casually as a person lives with the deformity for the rest of his life. In **Zaina Chipala v. Dwangwa Sugar Corporation Civil Cause Number 345 of 1998, High Court, Principal Registry, per Chimasula, J**, it was held that money cannot renew a physical frame that has been battered and shattered. The courts must therefore award a sum that is regarded as reasonable compensation.

Loss of Amenities of Life

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)**; *Kemp and Kemp, The Quantum of damages, Vol .1(2nd Ed).*, 1961, p.624.2

Finding on the Injuries in this Matter

The medical report tendered in this matter stated it all. The claimant was admitted for a week only and not the three weeks as she testified. Perhaps it was loss of memory given the time that has passed since the incident. She was brought to the hospital whilst unconscious and with injuries including a head injury. The injuries as outlined in the claimant's evidence are uncontroverted and credible too so I take the evidence wholesome as it is on that aspect. I however, wonder how the claimant can be said to have a permanent degree of incapacity of 75 % when she appears and in fact said she feels fully recovered except for the fact that she cannot carry huge load anymore like she used to and has intermittent memory loss, which I believe is not that serious as in the case that it were it should be corroborated in the medical report, but it was not.

Comparable Cases

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.

In **Robert Piason and 3 Others v. Prime Insurance Co. Ltd Personal Injury Cause No. 413 of 2013** the 3rd claimant sustained a head injury, deep cut wound on the back near the

shoulder, multiple bruises on the knee and a cut on the pelvis. In an award made on 6th September, 2014, the claimant got K3,000,000.00 as general damages.

In the case of **Patricia Demesani Bannet v. Isaac Lizimba and Bernard Pinda Jeremani, Civil Cause No. 811 of 2011 (unreported)** the claimant who had a sprained ankle, multiple bruises over the body and face, and was admitted in the hospital for a day, the court awarded her the sum of K2,000,000.00 for pain and suffering and loss of amenities of life, on 20th July, 2015.

In an award made on 20th July, 2012, a claimant who suffered a sprained right ankle and had multiple bruises such that she was admitted in hospital for a day was awarded K2,000,000.00 for pain and suffering and loss of amenities of life- see **Patricia Demesani Bannet v. Isaac Lizimba and Another, Civil Cause No. 811 of 2011 (unreported)**.

In **Wisted Chaleka v. Dalitso Subaila and Prime Insurance Company Limited, Personal Injury Cause Number 247 of 2014 (unreported)** the court on 26th June 2014 awarded a sum of K3, 800,000.00 as damages for pain and suffering and loss of amenities of life. In that case, the claimant had sustained soft tissue injuries, a painful neck, multiple bruises on the neck and had excessive body pain.

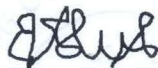
Determination

In light of the above comparable cases that are serious than the case at hand, and facts of this instant case, I make an award of K1, 800,000.00 for pain and suffering, K200,000.00 for loss of amenities of life and K300,000.00 for disfigurement. I award the claimant K5,000.00 as special damages as pleaded and proved.

Conclusion

The claimant is hereby awarded a sum of **K2,305,000.00** as damages for the personal injury that she suffered as a result of the negligence of the 1st defendant. I also order that the compensation be paid by the 1st defendant personally since his insurers wound up in 2004. The defendant should also pay costs of the assessment.

Made this 18th day of January, 2019.



Austin Jesse Banda

ASSISTANT REGISTRAR