



THE MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 387 OF 2013

Between

TENNYSON LUHANGA (Minor suing through Joseph Luhanga, Next of Friend)
.....**CLAIMANT**

-and-

THE ATTORNEY GENERAL **DEFENDANT**

CORAM: Austin Jesse Banda, Assistant Registrar

Mr. Mwangomba, for the Claimant

Mr. Maulidi, for the Defendant

Miss. M. Galafa, Clerk/ Official Interpreter

Banda

JUDGMENT ON ASSESSMENT OF DAMAGES

Background

This is the Court's Judgment on assessment of damages. The assessment of damages is pursuant to a default Judgement entered against the Defendant by the Registrar, as the Defendant failed or neglected to serve and file a defence. The Claimant commenced this action against the Defendant on 18th April, 2013, claiming damages for pain and suffering, loss of amenities of life and compensation for breach of his constitutional right to liberty and dignity.

On 20th July 2011, the Claimant was playing with his friends about 100 metres from the main road at Chirimba within the city of Blantyre, during which officers of Malawi Police were chasing and shooting at people who were involved in a countrywide demonstration. One of the police officers, in breach of his constitutional duty to respect the right to life, negligently shot

the Claimant, who was a minor at that time of the incident but also commencement of this matter.

Evidence

Counsel for the Claimant paraded one witness, Tennyson Luhanga. The Claimant upon oath adopted his witness statement that he duly signed and filed together with a discharge form marked **JH1** and a medical report marked **JH2** to be in evidence in this case.

In his statement Tennyson Luhanga told the Court that on 20th July, 2011, he was playing with his friends close to his house in Chirimba. He suddenly felt pain around his shoulder and saw blood oozing from the painful area. He was rushed to Queen Elizabeth Central Hospital (QUECH) when it was discovered that he was shot by a gun. At QUECH he was admitted in and treated.

Tennyson Luhanga further stated that he suffered an injury to the shoulder and surrounding areas. According to the medical report that was presented, the Claimant went through severe pain and suffering as a result of the gunshot wound that he sustained on the left shoulder. The injury on the shoulder and surrounding regions was evidenced in a copy of an x-ray picture which was taken on the material day, herein marked **JH3**.

Issue

The issue at hand is the determination of the quantum of damages for the pain and loss of amenities of life and also breach of constitutional right to liberty and dignity.

Analysis of Fact, Law and Determination

Damages are pecuniary compensation obtainable by success in an action for a wrong, for example, a tort. The High Court in **Ngosi t/a Mzumbamzumba Enterprises v H Amosi Transport Co Ltd (1992) 15 MLR 370 (HC)** set the basis for assessment of damages:

Assessment of damages presupposes that damages have been proved. The only matter that remains is the amount or value of the damages.

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*.

The compensation is in the form of a lump sum of money which will put the party who has been injured or who has suffered in the same position as he would have been in if he had not sustained the wrong. In the case of **Livingstone v Rawyards Coal Co.**, Lord Blackburn stated as follows:

Courts award general damages not to punish the defendant or tortfeasor, but to fully compensate the claimant for all the losses that he/she has suffered as a direct or consequential result of the wrongful act or omission by the defendant.

In **Steve Kusambwe v SRK Consulting (BT) Limited Personal Injury Cause Number 322 of 2014 (unreported)** it was stated that at times, the Court is faced with situations where the comparative cases have been rendered obsolete because of the devaluation of currency and inflation. It would not achieve justice if the Court insisted on the same level of award as was obtained in the previous cases. In such situations, when deciding the new cases, the Court must take into account the life index, i.e. the cost of living and the rate of inflation and the drop-in value of the currency. The Court must therefore not necessarily follow the previous awards but award a higher sum than the previous cases.

Damages to be considered should be as at the date of hearing and not when the accident actually occurred, as stated in the case of **Jobling v Associated Diaries (1982) AC 794**.

The Claimant in this case asked for aggravated damages for pain and suffering and loss of amenities of life. He also asked for compensation for breach of his constitutional right to liberty and dignity. The term aggravated damages may equally refer to compensatory damages and to exemplary damages. Such an award is given only where any of the three scenarios as follows are met: where there is an express authorisation for such an award by a statute; where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and where the conduct is calculated to result in profit- see **Mc Gregor on Damages, (15th Ed) (footnote to paragraph 280)**.

In this case, it was resolved, though not on merits, by the default Judgment that the minor Claimant (then) was shot by a police officer, a servant of the government, who did not care about the life, liberty and dignity of the persons around the area he shot, and specifically the Claimant who was actually shot. This case as such falls squarely within the scope of aggravated damages. Essentially this Court does not have to award aggravated damages separately from the awards under the conventional heads as pleaded. Mindful of that and also the fact that the Claimant's other sought relief is compensation for breach of his constitutional right to liberty and dignity, I will endeavor to avoid duplicity of awards by making one aggravated award of damages to cater for both conventional pain and suffering and loss of amenities and also the constitutional breach that necessitates aggravated damages.

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.**

Loss of Amenities of Life

This head of damages concentrates on the curtailment of the plaintiff's enjoyment of life not by the positive unpleasantness of pain and suffering but by his inability to pursue the activities he pursued beforehand. These amount 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).**

The Claimant in his oral testimony stated that as a result of the pain he still experiences from the gunshot wound, he cannot carry heavy loads, and that the hospital advised that he should refrain from work which involves carrying heavy loads.

Comparable Cases and the Award

Counsel for the Claimant cited the following authorities in his submission in support of the claim against the heads of damages stated above;

Elida Bellow v Prime Insurance Company Ltd Civil Cause No. 177 of 2012 where the Claimant sustained a deep cut wound on the left leg and another on the head. The Court awarded the claimant MK2, 500, 000.00 as damages on 14th January, 2013.

In Robertson Piason & 3 others v Prime Insurance Company Limited Personal Injury Cause No. 413 of 2013 the 1st Claimant sustained a cut wound on the head, chest pains and a painful shoulder and she was awarded MK3,000,000.00. This award was made on September 2014.

In Alice Kachisi and Kelvin Baluti Vs. United General Insurance Company Limited Personal Injury Cause No. 87 of 2017 the 2nd Plaintiff had multiple bruises and a head injury. The Court awarded him MK2,000,000.00 as damages for pain and suffering and loss of amenities of life on 14th July, 2017.

All the above cases cited by Counsel for the Claimant are dealing with personal injuries from road accidents. Unsurprisingly, they are associated with other injuries that are not present in this case. They do guide the Court, but to a limited extent.

I did find the case of **Andrew Mwachunda v. Attorney General Civil Cause Number 1627 of 2003 High Court Principal Registry (unreported)** to be instructive. In this cited case the Assistant Registrar Tembo (as he then was) made an award of K200,000.00 for pain and suffering and loss of amenities of life. The claimant had a gun-shot wound that led to an injury of the lungs and as such the Claimant underwent internal body surgery. The Claimant also had neck pains prevalent even after treatment.

In a 1998 case, the sum of K60,000.00 for pain and suffering and loss of amenities of life was awarded to a Claimant who was shot by a gun in the chest- **Kagona v. Attorney General, Civil Cause Number 918 of 1998 (High Court)**.

The two cases are very old in time. The Kwacha between then and now has fluctuated in many folds. Those awards would be in the region of K2,500,000.00 in the present day. I am mindful that in this case I also have to factor in the issue of aggravation coming from the fact that it was an unconstitutional act of a government servant that led to the injuries that the Claimant sustained. It is therefore upon a thorough consideration of facts and circumstances of this case, and upon exhaustive consideration of the submissions by the Claimant's Counsel, in light of the relevant and applicable law regarding damages for the claimed heads herein that I award the Claimant the sum of K3,950,000.00 catering for the pain and suffering, loss of amenities and the loss of dignity and liberty occasioned to him by the government servant.

Conclusion

The claimant is awarded the sum of **K3, 950,000.00** as damages. The defendant to pay costs of assessment incurred by the claimant which will be assessed by the Registrar if the parties cannot agree on the amount.

Made this 2nd day of October, 2019.



Austin Jesse Banda

ASSISTANT REGISTRAR