

Library



The Judiciary

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 560 OF 2017

Between

JOSEPH MATANDA CLAIMANT

-and-

WILSON KANDAYA1ST DEFENDANT

RAB PROCESSORS LIMITED.....2ND DEFENDANT

BRITAM INSURANCE COMPANY LIMITED3RD DEFENDANT

CORAM: Austin Jesse Banda, Assistant Registrar

Mr. Mwabungulu, for the Claimant

Mr. Mwakhwawa, for the Defendants

Ms. G. Mkandawire, Clerk/ Official Interpreter

Banda

ORDER ON ASSESSMENT DAMAGES

Background

The claimant commenced this matter against the defendants by a writ of summons claiming damages for: pain, suffering and loss of amenities of life; loss of earning capacity; special damages at K13, 346.00 and cost of the action on 25th September, 2017. The claimant's claim arose from an accident where he was hit by a vehicle driven by the 1st defendant, which vehicle was owned by the 2nd defendant and insured by the 3rd defendant. The parties resolved the issue of liability by themselves through a consent judgement that was endorsed by the court on 10th October, 2018, in which judgment was entered against the defendants. The parties resolved that damages for the personal injuries should be assessed by the Registrar if not agreed.

I heard the parties on 28th November, 2018 for assessment of damages. The claimant was his own witness and he also called one other witness, a medical practitioner. The defendants through counsel cross examined both witnesses. The defendants paraded no witness of their own but counsel made written submissions.

Evidence

It was the statement of Joseph Matanda that he was riding his bicycle on the extreme left hand of Tsiranana road when he was hit by a motor vehicle and he was injured in the process. He produced a police report of the incident.

Mr. Matanda went on to state that he sustained a fracture of the right femur, fracture of the right mid shaft femur, supracondylar fracture of the left humerus, fracture of the left femur, fracture of the left elbow, cut wound on the left thigh, deep cut wound on the face, dislocation of the right hand joint, multiple bruises on the right elbow and multiple bruises on the body.

The claimant said that he was taken to Queen Elizabeth Central Hospital (QECH) where he was admitted from the 10th of May, 2017 to the 7th of June 2017. He was inserted with metal rods where he sustained fractures. He said further that his left arm and right knee were cast in a Plaster of Paris. He exhibited three documentary pieces of evidence about his hospitalisation, namely a medical report, a copy of his health passport and an Orthopaedic Discharge/Audit Form from the QECH.

Joseph Matanda went on to state that he stayed for some days without stretching his left hand up until it was operated on. He said that he still felt a painful right hip and right knee such that he can only flex the knee up to 50 degrees and he fails to walk properly such that he uses crutches. He also said that his left elbow joint has been deformed/ shortened and he can only flex it up to 90 degrees. He said due to his condition he can no longer work as a labourer since his limbs were affected. He said he was 32 years old when the accident occurred on 10th May, 2017. Joseph Matanda prayed for damages for pain and suffering, loss of amenities of life and loss of earning capacity. He also prayed for the cost of the police report at K3,000.00.

In cross examination Joseph Matanda told the court that he was not substantially healed as there were areas of his body where he was not healed. He also said that although he had not used crutches on the day of the hearing, he had not stopped using them completely as there were times that he used them. He also said that although he was undergoing physiotherapy he may not heal in some parts of his body and that he may forever be like that.

The second witness was Mr. Master Yesaya who said that he was a Trauma and Orthopaedic Technologist at QECH. He testified that he held a Bachelor of Science in Trauma and Orthopaedics with a duty to assess and treat patients but also to author reports on patients' medical condition. He told the court that on 1st September, 2017 he assessed Mr Joseph Matanda and that he authored a medical report from the assessment which he tendered in evidence. He also tendered x-ray photostat copies which showed the fractures that were sustained by the claimant, and the pins that were inserted in the body of the claimant to aid the healing of the fractures.

Mr. Yesaya went on to state that the claimant could not swing the elbow joint more than 90 degrees and that this situation could not change as this was a permanent disability from which the claimant would not heal. He further said that the claimant had improved a lot on the hip and leg fractures such that he no longer needed crutches. He however, said that the knee joint was still a problem.

In cross examination, Mr. Yesaya said that there was improvement on the knee joint after physiotherapy as the claimant could now flex the knee up to 90 degrees from only up to 50 degrees, he was able to before. He also said the claimant was discharged from physiotherapy as the claimant's Health Passport Book would show even though he did not tender the book or a discharge report. He said that even specialists at Beitcure could not help the claimant's cause to further improve, stating that Mr Yesaya himself was already working with specialists from Beitcure and he knew the claimant could not be improved any further.

Issue

The only issue to be determined is the amount of damages as pleaded, that the claimant should be compensated with for the personal damage he sustained as a result of the wrong by the 1st defendant using a vehicle owned by the 2nd defendant, which vehicle was insured by the 3rd defendant.

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.**

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**

Loss of Earning Capacity

The court, where it finds that the claimant can no longer earn his pre-accident rate of earnings, awards damages for loss of earning capacity. It is calculated based on the annual figure and taking into account the age of the claimant and his working life span. It also takes into account the usual working contingencies and also taxation. Courts also assess the prospect of losing employment or reduced earnings in future- **Tembo v. City of Blantyre Civil Cause Number 1355 of 1994, High Court Principal Registry (unreported)**.

Justice Mwaungulu, as he was a Judge of the High Court then, in the case **Sakonda v. S.R. Nicholas Ltd, Civil Appeal Cause No. 67 of 2013, High Court Principal Registry (Unreported)** suggests that for loss of income, the real loss must be ascertainable and hence

calculable for purposes of the award of damages, whilst a court can make an award for loss of earning capacity where the loss is not ascertainable.

Finding

There is no dispute as to the extent of injuries sustained by the claimant. The injuries are as expressed in his evidence in chief. The defendants however, through submission made by counsel, states that there is no evidence that the claimant used to work as a labourer or that he can no longer do any other work apart from working as a labourer, and that there is no evidence that he has completely lost any means whatsoever of earning a living and that he is destitute.

The defendants further submit that the claimant admitted in cross examination that there is no evidence from a physiotherapist to substantiate a claim that he would not heal with physiotherapy. The defendants state that in fact, there is evidence that he is no longer using crutches and he came to court and climbed staircases without the aid of crutches. The defence further raise issue on the claim of damages for loss of earning capacity. The defendants submit that there is nothing pleaded in the statement of claim about the job the claimant used do before the accident; that there is no pleading as to the claimant's earnings before the accident and what he has lost. The defendants state that there is instead only a claim for damages for loss of earning capacity, and that the Consent Judgment agrees to damages for personal injuries and not damages for loss of earning capacity.

I must hasten to state that the claimant had relied on the skeleton arguments that were filed prior to the hearing of the assessment hearing and as such he did not submit on the issues that the defence raised.

It is my finding that indeed the claimant did not provide evidence from a physiotherapist that he cannot become any better with physiotherapy. It is difficult in such circumstances for the court to conclude that the claimant cannot improve by the use of physiotherapy. We would never know for sure if he would improve or not without expert analysis. It should no doubt be clear though that the claimant would never be the same as the pre-accident health no matter the skill and effort of a physiotherapist and no matter the number of hours put in physiotherapy. Of course, I am mindful that the claimant did not plead for damages for deformity or disfigurement.

I disagree with the opinion of the defendants that the issue of loss of earning capacity was not pleaded. A look at the claimant's Statement of Claim that was attached to the writ, especially in paragraph 11 shows that loss of earning capacity was pleaded, but perhaps further and better particulars would have been desired. To be fair to the defendants though, I agree that there is

no evidence, for the purposes of assessment of damages as to what exactly the claimant was doing before the accident in his job as a labourer at Hope and Success Merchant, that he cannot do to the same level now. There is no evidence at all whether the claimant is still doing the job but only at reduced capacity than before and therefore earning less, or that it may lead to him earning less. In my opinion, this appears to fortify the defendants' argument that the loss of earning capacity was not envisaged when the parties drew the Consent Judgment which only alludes to damages for personal injuries, and not to the incidental loss of earning capacity. As such, I will not make any award on this head.

Comparable Cases

Both the claimant and the defendants submitted cases that are comparable to this case. I have selected those that in my opinion are closer to this case in terms of type and seriousness of injuries but also those that are closer in time of the award to this one.

In the case of **Steve Nansongole v Unitrans Malawi Limited and Prime Insurance Company Limited**, Civil Cause No 898 of 2010, (unreported) the Plaintiff suffered fracture of right humerus, deep cuts on the left leg and had wounds sutured and Plaster of Paris applied twice and could not rotate his head nor extend his arm with a permanent degree of incapacity pegged at 16% was awarded K3, 000,000.00 as damages for pain and suffering and loss of amenities of life. The award was made on 20th February 2017.

In the case of **F. Madeya vs A Seedat, Real Insurance Company Limited & Halls Cars Limited, Personal Injury Cause No. 626 of 2014:**

The Claimant suffered a fracture of the right thigh, pieces of glass entered into the Plaintiff's eyes and suffered cuts on both hands. Plaintiff was admitted in hospital for 23 days, his leg got shortened by 2 cm and now walks with a limp, cannot walk long distances and cannot lift more than 5 kg. His permanent incapacity was assessed at 35%. He was awarded **K5 Million** as damages for pain and suffering and loss of amenities of life. The award was made on 7th June 2016.

In **Friday Mtelera vs Prime Insurance Company Limited**, Personal Injury Cause no. 530 of 2015, the plaintiff was awarded MK7,000,000.00 for damages for personal injuries. The plaintiff sustained fracture of the knee joint of the right leg, fracture of the right lower leg, fracture of the ankle of the right leg, a cut of the left leg and bruises on the right elbow. The award was made on 16th February, 2017.

In **Thomasi Matemba v. Richard Kalitendere and Britam Insurance Company Limited**, Personal Injury Cause Number 913 of 2016, the claimant had sustained a fracture of the right

tibia and fibula. He was awarded the sum of K6, 000, 000.00 for personal injuries in an award made on the 26th of October, 2017.

In **Christina Mande vs Charter Insurance Company Limited**, Personal Injury Cause no.329 of 2016, the plaintiff was awarded MK6, 300,000.00 damages for personal injuries. The plaintiff sustained fracture of the right hip joint, cuts on the head and lost consciousness on the spot. The award was made on 11th January 2017.

In the case of **Black Luwayo v. Adam Msimuko, Panganani White Sambo and Prime Insurance Company Limited**, Civil Cause No. 1262 of 2009 (unreported), the Plaintiff suffered a fracture of the left leg and the left tibia somewhere around half way his leg, a crushed nose, a cut on the left hand near the wrist, a dislocation of the right elbow which left him unconscious and with visible scars. He was admitted to hospital for 4 months and 21 days. His leg was placed in a P.O.P on two occasions. His nose was stitched and pipes were inserted in the nostrils for 20 days. The right arm was placed in a P.O.P for 14 days. The leg shortened. The Court on 3rd January 2014 awarded him: K2, 500, 000.00 for pain; 1, 500, 000.00 for suffering; K800, 000.00 for loss of amenities of life; and K300, 000.00 for disfigurement.

In the case of **George Sakonda v S.R. Nicholas**, Civil Appeal No 67 of 2013, (unreported) the applicant suffered paraplegia following fracture spine described (weakness of the lower extremities due to fracture of spine (12) and other injuries. The applicant lost permanent and complete control of lower limbs and cannot stool, urinate or walk. The applicant suffered 100% permanent incapacity. Justice Mwaungulu after evaluating the law and applying it to the facts awarded the Applicant the sum of K4, 037, 760.00 as damages for pain and suffering and loss of amenities of life. K500, 000.00 was awarded for disfigurement. The award was made on 26th September 2014.

Determination

As far as the extent and multiplicity of fractures and injuries are concerned, this case is similar to the Friday Mtelera case cited above. The award was made two years from this case. The case of Saikonda, as far as degree of incapacity is concerned appears to be more serious than this case. The rest of the cases are somewhat similar but a bit less serious. In light of the above comparable cases and facts of this instant case, and the time that has passed since those awards were made, with reference to currency value fluctuations, I make an award of K8,750,000.00 for pain and suffering which the claimant went through at the time of the accident, through the kind of treatment he went through and the pain that he intermittently goes through even now. I award the sum of K1, 500,000 for loss of amenities of life. I award the claimant K3, 000.00 as special damages for the cost of the police report. There is no evidence of a special damage suffered by the claimant in obtaining a medical report.

Conclusion

The claimant is hereby awarded a sum of **K10, 253,000.00** as damages for the personal injury that he suffered as a result of the negligence of the 1st defendant. The 3rd defendant is only liable to the extent of K5,000,000.00 as is stipulated in the policy of insurance which subsisted at the time of the accident. The defendants should also pay costs of the assessment hearing, which are to be assessed if not agreed.

Made this 21st day of February, 2019.



Austin Jesse Banda