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IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO 378 OF 2018

BETWEEN

HANLECK MICHEAL.....CLAIMANT

-AND-

POLYPACK LIMITED.....DEFENDANT

CORAM:Texious Masoamphambe, Deputy Registrar

Mr Kamunga for the Claimant

Mr Mundolo for the Defendant

Mr Mtegha Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

Introduction

This order of assessment follows judgement on liability entered in favour of the Claimant on 16th August 2019. The Claimant brought a claim for damages for pain and suffering, loss of amenities, disfigurement, loss of earning capacities, cost for procuring medical report and costs of proceedings. The Claimant was an employee of the Defendant, working as machine operator. On 8th January 2016 while washing one of the machines, ink splash into his eyes and he got injured as a result. Due to the injury sustained his right eye was removed and the left eye was left with red colouring.

Evidence

The matter initially came for assessment of damages on 1st October 2019 but was adjourned to 10th October 2019 due to unavailability of defence counsel. The matter then came for assessment on 10th October 2019. The Claimant was a sole witness for his claim and stated that his name was Henleck Michael residing in Bangwe. He was shown his own witness statement by his Counsel and adopted it in its entirety. During cross examination, he told the court that he lives in rented accommodation in Bangwe. He confirmed to have been an employee of the Defendant and that he had stopped working for him three months after the accident that led to his injury. He resigned from his work due to his injury as the Defendant did not want to change him to another section. At the time of resignation, his salary was **K29,250.00** and now his colleagues are now receiving **K50,000.00**. He did not have proof for the new salary but he heard from Human Resources Personnel. As a result of the accident, he was not able to see

properly. He was asked how he came to court and indicated to have come alone from home through public transport. When re-examined, he told the court that the current salary for the grade he was, was K50,000.00 and when he was leaving it was K23,000.00 and K39,046.00 with overtime.

The Law

In assessing damages for personal injuries, the intention of the court is to compensate the injured party as nearly as possible as money can do. The principle is to put the Claimant in the position he would have been if he did not suffer the injuries he is claiming damages for: **Halsbury's Laws of England 3rd Ed. Vol.II p.233 para 400**. This principle was further enunciated in **Livingstone v Raywards Coal (1880) Case 25 at 39**, where Lord Blackburn said:

'...where any injury is to be compensated by damages, in settling the sum to be given for reparation you should as nearly as possible get at the 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 had he not sustained the wrong for which he is now getting his compensation or reparation'.

Such damages are recoverable for both pecuniary and non-pecuniary losses. Pecuniary losses must be specially pleaded and proved, while non pecuniary losses are assessed by the court: see **Mary Ntulongwa & 9 Others v Makandi Tea Estate, Personal Injury Cause No 844 of 2012**.

Damages cannot be quantified in monetary terms by use of mathematical formula but use of experience and looking at awards made in decided cases of similar nature: **Wright v British Railway Board [1983]2 AC 773**. In reaching the final award for damages through looking at similar awards made, the court considers the time the awards were made and currency devaluation: **Kuntenga and another v Attorney General, Civil Cause No 202 of 2002**.

As to claims for personal injuries, damages are always awarded under the headings of pain and suffering, loss of amenities of life and disfigurement.

Pain and Suffering

In damages for pain and suffering, the court considers the physical experience of the nerves and mental anguish which comes as a result of the injury: see **Lemon Banda and 19 others v Motal Engil Limited and General Alliance Insurance Limited, Personal Injury Cause Number 178 of 2012(unreported)**.

In the **City of Blantyre v Sagawa 1993 16(1) MLR at 72**, the court quoted **Kemp and Kemp** volume 11 paragraph 1007 where it was suggested that:

"Pain is, it is suggested, used to describe the physical pain caused by or consequent upon the injury, while suffering relates to the mental element of anxiety, fear, embarrassment and the like."

Page 831 of **Mc Gregor on damages** defines pain as the immediately felt effect on the nerves and brain of some lesion or injury to a part of the body, while suffering has been defined as the distress which is not felt as being directly connected with bodily condition. Pain includes any pain caused by medical treatment or surgical operations rendered necessary by the injury

inflicted by the defendant. Suffering includes fright at the time of the injury and fright reaction, fear of future incapacity, either as to health, sanity or the ability to make a living, and humiliation, sadness and embarrassment caused by disfigurement: see **Gideon Mhango v Nico General Insurance Co Ltd Personal Injury Cause 703 of 2016(unreported)**.

Loss of Amenities of Life

Loss of amenities is concerned with loss of enjoyment of life. This follows from the fact that human beings enjoy certain activities which may, as result of the injury, be curtailed: see **Lemon Banda and 19 Others V Motal Engil Limited and General Alliance Insurance Limited, Personal Injury Cause Number 178 of 2012 (unreported)**.

Birket L. J., in **Manley vs. Rugby Portland Cement Co. (1951) C.A No. 286**, stated that there is a head of damage which is sometimes called loss of amenities, the man made blind by the accident will no longer be able to see familiar things he has seen all his life, the man who had both legs amputated and will never again go upon his walking excursions – things of that kind -loss of amenities. **McGregor on Damages** at pages **834** explains that loss of impairment of any one or more of the five senses is compensated under this head. Besides, loss resulting from interference with Plaintiff's sexual life.

Disfigurement

Disfigurement is concerned with change of looks of the individual. This may be scars, amputations and postures. See **Lemon Banda and 19 Others V Motal Engil Limited and General Alliance Insurance Limited, Personal Injury, Cause No 178 of 2012 (unreported)**. Damages for disfigurement are awarded as part of pain and suffering. They are awarded separately if the Claimant has been ridiculed, lost his social status, or that he is in need of plastic surgery. See **Mary Kamwendo Vs. Stage Coach Malawi Limited, Civil Cause No 840 of 1995**.

Loss of Earning Capacity

A Claimant is entitled to be compensated for loss of earning capacity if there has been change in his income as a result of the injuries he suffered: see **Richard Chinsinga v Electricity Supply Corporation of Malawi, Personal Injury Case No 59 of 2019**. In order for Claimant to succeed he/she needs to prove that as a result of the injuries he no longer does the job he was doing before and has lost his income. The courts also will consider the Claimant's prospects of losing his job in future. This was stated in **Tembo v Blantyre City and National Insurance Company, Civil Cause No 1355 of 1994** where it was stated that:

“Where there has been no change in earning...there cannot be a claim for loss of earnings...the courts, however are not naïve. They do approach the problem from the perspective that no damages should be awarded because there is no loss of earnings. They consider the prospect of the victim losing the job because of injuries which now appear to have no impact on his earnings. Where there is such prospect, court have to make awards under the style of loss of earning capacity to distinguish it from loss of earnings.... the prospect of such disadvantage much be substantial.”

Comparable Cases

I have to admit, I found the comparable cases provided by Counsel for Claimant less helpful. The case at hand involves an injury that led to loss of a body organ, to be specific an eye. I expected counsel to submit comparable cases with similar injury. Counsel provided comparable cases that had fractures as injuries. A fracture is an injury that is repairable and an injured person can attain normalcy after some time. Therefore, to provide cases that involve repairable injuries like fracture for purpose of assessing non repairable injury like removing of body organ is unreasonable. The Claimant could be under or over compensated if such cases are used in assessing damages. I am certain that counsel found himself in predicament to find similar cases as they are rare. But it could have been helpful to submit cases with amputation of limbs than fractures. Amputation involves removal of body limbs which are organs of the body and such cases could have been closer to the current case.

I opted to ignore the comparable cases submitted by Counsel and looked at cases that are close in similarity to the current one.

In Kittie Banda v Francis Limbulo & others, Civil Cause No 1148 of 2003, an award of **K300,000.00** was made for a crushed skull which led to the removal of the right eye.

In Richard Chinsinga v Electricity Supply Corporation of Malawi, Personal Injury Case No 59 of 2019, the Claimant was awarded **K40,000,000.00** for a number of injuries including amputation of the arm

In the case of **Mackson Makwete v Shraf Muhammed and Prime Insurance Company Limited Personal Injury Cause No 149 of 2018** the Claimant was awarded **K18,500,000.00** for fractures and amputation of right leg.

In Rebecca M bwana v Attorney General, Civil Cause No 1958 of 2009 an award of **K13,070,220.00** for injuries which include amputation of left leg.

In Malimu v Motal Engil, Civil Cause No 206 of 2011 the Claimant was awarded **K10,000,000.00** for multiple injuries include amputation of leg.

The Award

Having looked at the case record and also the awards in the cases sighted above, I am of the view that an award of **K10, 200,000.00** will adequately compensate the Claimant for pain and suffering, loss of amenities and disfigurement. The claim for special damages for the cost of procuring medical report is dismissed as it is not sufficiently proven.

I now turn to the claim for loss of earning capacity. As per evidence on record, the Claimant resigned from his work on the basis that he was unable to continue working as a result of his injury. He further stated that it was on recommendation of the Doctor that he should stop working. I have not seen any such recommendation on file. Again, the Claimant job with the Defendant was not something we can classify as professional in any away that he had to acquire professional qualification. It was unskilled labour, a job that he was trained while working for the Defendant. As a result, the Claimant can look for a job that he can do despite his injuries. The Claimant is not totally blind; he can do other jobs. If the Claimant was professionally trained for the job he was doing, I would be tempted to conclude that he may be in a position not to work again considering that it may be a problem to change to another professional.

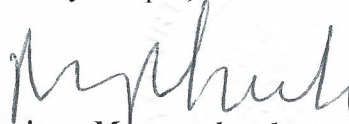
From the evidence, he had to catch a minibus from Bangwe Township to Chichiri Court Complex to attend assessment proceedings unaided. This does give me an impression that he is not substantially disadvantaged. He is capable of doing other things including working. He could possibly work as office messenger or switchboard operator, answering phone calls. Without evidence from a medical expert as to his inability to work and him have shown to this court that he is able to walk long distance unaided, I am not convinced that the Claimant is incapable of working again. Therefore, the claim for loss of earning capacity is dismissed in its entirety.

Before I conclude, let me point one thing. The Claimant mentioned that he resigned because the Defendant could not move him to another section. If that was case, I see a possibility of him bringing action for constructive dismissal at the Industrial Relations Court.

In total, the Claimant is awarded **K10, 200,000.00**.

Lastly, the Claimant is further awarded costs of proceedings to be taxed at a later date if not agreed.

Made in Chambers this Monday the 6^h day of April, 2020.



Texious Maseamphambe
DEPUTY REGISTRAR