REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CASE NO. 501 OF 2015

BETWEEN

HARRY EPHRAIM.....CLAIMANT

AND

S.J. MAULA.....1st DEFENDANT

LEONARD DIZA.....2nd DEFENDANT

PRIME INSURANCE COMPANY LIMITED.....3rd DEFENDANT

Coram: **WYSON CHAMDIMBA NKHATA** (SRM)

Mr. Chimowa- of Counsel for the Claimant

Mr. Chayekha- of Counsel for the Defendant

Mr. Chimtengo- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

On the 9th of October, 2015, the Claimant's motor vehicle, a Toyota Hiace Minibus Registration Number NB2703 was hit from behind by another vehicle FTR lorry Registration Number BQ4065 which was being driven by the 2nd defendant and is owned by the 1st defendant. Apparently, the claimant's vehicle had been stopped for a search by police officers who had set an ad hoc roadblock and it was hit while stationary. The claimant in this matter took out a writ of summons issued on the 16th of November 2015 against the defendants claiming replacement costs of a motor vehicle, loss of use and costs of this action.

The issue of liability was settled in favour of the claimant by a Judgment by Honourable Justice Tembo delivered on the 5th of May, 2020. This is the court's order on assessment of damages.

The claimant was the sole witness for his case. He adopted his witness statement in which he stated that his motor vehicle was hit from behind whilst stationary at a police roadblock by a motor vehicle belonging to the 1st defendant. He avers that his motor vehicle was forced to swerve and fall into a drainage whereby it got damaged beyond repair. He further averred that he was using the minibus for business he was plying between Limbe and Muloza boarder from Monday to Saturday. He stated that he was making a sum of K10,000.00 on a daily basis. He therefore prays for compensation for loss of use of his vehicle from 9th October 2015 to 31st July 2020. He further prays that the court should assist so that the defendants can pay him the cost of replacing his minibus. He exhibits a quotation for K12,880,608.45 which he got from Mr. Prudence Chigamba a Sales Consultant based in Blantyre of Autocom Japan.

In cross-examination, he stated that he comes from Muloza Boarder. He stated that he knew the name Maula and not John. He stated that he did not know the name Steven Maula. He stated that he did not know what the initials S. J. stands for. He stated that the minibus in question was his and had proof that it was. He stated that he bought the same in 2014 in January. He stated that there was never a time it broke down. He stated that it was on the road from Saturday to Saturday. He stated that he bought it from a white man at Nyambadwe. He stated that he could not say it was new since he bought it from another person. He reiterated that he was making K10,000.00 a day. However, he stated that he did not record. He stated that the driver could deduct expenses for fuel and give him K10,000.00 daily.

On the other hand, the defendants paraded one witness as well. He adopted his witness statement in which he averred that he is John Bonface Maula a father to the 1st defendant. He averred that he bought motor vehicle registration number BQ4065 and gave it to his son, the 1st defendant hence it was registered in his name. he further stated that apart from the said vehicle, which was sold after the accident, as he needed to settle the loan which he used to purchase the vehicle. He further stated that the 1st defendant being a young person does not own anything else. He also stated that the vehicle was insured by Prime Insurance Company Limited hence the insurance company must indemnify the 1st defendant. He exhibits a copy of insurance certificate marked "JM1". He also stated he knows motor vehicle registration number NB2703 which was hit by the 1st defendant's motor vehicle. He avers that it was not a new vehicle hence the claimant should not be claiming costs of a fairly new vehicle per quotation attached to the claimant's witness statement. He states that the sum being claimed for loss of business is very much on the higher side and must be proved with evidence.

In cross-examination, he stated that he recalls having testified during trial. He stated that he testified as the 1st defendant. He admitted having read the judgment in this matter. He stated that his son is 20 to 21 years by now. He stated that it was in 2019 when the matter came to court and that his son was 20 years old then. He explained that his son has since left his house to stay alone and its been three months now. He stated that at the time of the accident the 1st defendant was at school but under his charge. He could get proceeds of the business to pay for their fees and could repair the vehicle himself.

Such was the evidence adduced for the assessment proceedings. Counsel for the Claimant filed skeletal arguments which he adopted as his final submissions in this matter. As earlier alluded to, this court has been called upon to make a determination on the quantum that would reasonably compensate the claimant for the damages and losses suffered.

It is trite that a person who suffers bodily injuries or losses due to the negligence of another is entitled to recover damages. The fundamental principle which underlines the whole law of damages is that the damages to be recovered must, in money terms, be no more and no less than the Plaintiff's actual loss. The principle was laid down in numerous case authorities more particularly by **Lord Blackburn** in the case of ***Livingstone v. Rawyards Coal Company*** **(1880) 4 AC 25** in the following terms:

> where any injury or loss is to be compensated by damages, in settling a sum of money to be given as damages, 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 loss, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

The present matter, firstly, relates to a claim in respect of replacement costs for the claimant's motor vehicle and secondly damages for loss of use of the vehicle. However, before I proceed with the determination of these issues, I noticed that there is an interesting twist of issues by the defendants if not a clumsy attempt to escape liability so to speak. To put issues into a proper perspective, let me begin by re-iterating that the 1st defendant in this matter is sued as the owner of the motor vehicle that hit the claimant's vehicle. The 2nd defendant is sued as the person who was driving the vehicle at the material time being the 1st defendant's employee. The 3rd defendant is sued as the insurer of the 1st defendant's motor vehicle. The drift from the defendant's cross-examination of the claimant and indeed from the claimant's examination in chief denotes a departure. The 1st defendant wants this court to believe that the vehicle at fault did not belong to him but his son who by virtue of youth does not own anything. He suggests that the Insurance Company should indemnify his son being the insured.

I found the contention by the 1st defendant quite interesting and superficial at most. Upon going through the record, I took note that the 1st defendant, who now at the stage of assessment of damages, wants to escape liability was in fact at the forefront during trial before the Judge. On page 2 of the Judgment by Justice Tembo it is indicated that "he testified at trial and submitted written submissions too". Observably, there was no mention therein that he was responding on behalf of his son. There is no indication whatsoever that he was responding to the matter in a representative capacity. In any case, he told the court on assessment of damages that the said son was 20 years old when the matter came for trial before the Judge. Observably, his focus then was on showing that the claimant had failed to attribute negligence on the part of the defendants. In so doing, the court considered him to be the owner of the vehicle at fault and a decision was entered on that understanding. I believe I will not be wrong in my thinking to conclude that the issues of parties to these proceedings and that of ownership of the vehicle in question is *res judicata*. In the case of **Inspector of Taxes vs- Sacranie** [1923-60] AL Mal 615 the High Court held:

> If, however, I am wrong in thinking that this is strictly speaking a matter of res judicata, then I am of opinion that the plaintiff ought not to be allowed in these subsequent proceedings to raise a point which was open to him in the other proceedings. If it was thought that the order in the bankruptcy court was wrong, an application could have been made for review or the matter could have been decided on appeal in the proper way. I think, therefore, that it would be wrong to allow the plaintiff to raise this matter over again in these fresh proceedings and that whether or not the principles of res judicata strictly apply, this court ought to exercise its inherent jurisdiction to prevent the same question between the parties being agitated for a second time. For these reasons I must hold in favour of the defendant and order that paras. 2 and 3 of the reply be struck out.

In the case of **Enelesi Daiton vs Malasha Holdings Limited and United General Insurance Company Limited** Civil Cause No. 67 of 2011, the High Court struck out the defendants' defence and entered judgment for the plaintiff. Damages were duly assessed. After costs were taxed, the 2nd defendant took out an application to have itself discharged or struck out as a party after it had exhausted its maximum policy limit. The court held that the moment judgment on liability was entered, the 2nd defendant's right to strike out the action was automatically extinguished. The court further held that as the matter came to an end and the 2nd defendant just watched this up to assessment of damages, it could not apply to strike out action, but the best way was to appeal against the judgment.

It goes without saying therefore that the law is clear that parties are required to prove their respective cases at trial or before the Court makes its determination. In the event that a party opts not to bring

evidence on its assertion then he/she is precluded from doing so when the Court has already issued a judgment on the matter. In this case, the 1st defendant ought to have brought the issue of ownership before the Judge instead of contesting liability only to turncoat during assessment of damages upon noting that the decision has gone the other way. I accordingly dismiss this contention as misplaced and inconsequential.

Reverting to the claim in respect of replacement costs for the claimant's motor vehicle, the position of the law is that where an item has been damaged and is in a reparable state, the court will award as damages the cost of repairing the same. On the other hand, where the item is beyond repair, the court will award as damages, the cost of replacing the item, see **Hara vs Malawi Housing Corporation, 16(2) MLR 527** and **Tea Brokers (Central Africa) Ltd vs Bhagat (1994) MLR, 339.** In the present case, it is not in contention that the vehicle was damaged beyond repair. The only issue that the defendants seem to raise has to do with whether it was new at the time it was bought by the claimant. I shall therefore proceed on the basis that the vehicle ought to be replaced. The claimant tendered a quotation for K12,880,608.45 which he got from Mr. Prudence Chigamba a Sales Consultant based in Blantyre of Autocom and another from Be Forward Co. Ltd for K10,342,281.00. The quotations are marked "HE3" and "HE4" respectively. The claimant submits that the quotation from Autocom is best suited as replacement for the cost of his minibus. However, this court does not agree with the assertion. In the case of **Pemba v Stagecoach (Mal) Ltd [1993] 16(1) MLR 420 (HC)** it is stated that where a number of quotations were obtained, the lowest quote should be the extent of claimant's loss. In this case, it is only proper that the quotation from Beforward be approved. I see no reason why the court should make deductions on the understanding that the claimant's vehicle was fairly used. I believe it was open for him to obtain a quotation from companies selling new cars like Toyota Malawi but he opted for companies selling fairly used cars. In this vein, I would like to believe that this is an appropriate and reasonable quantum for the vehicle in question.

The present claim also relates to a claim for damages for loss of use of his motor vehicle. It is trite law that in determining such damages, the court actually considers the market value of the use of the car. Thus, such damages will usually depend on the type of the car and the period of the loss (see the case of **Hassen vs SR Nicholas**, 11 MLR 505 and **Namandwa vs Tennet (J) and Sons Ltd**, 10 MLR 383). The court may, however, award such damages on conventional basis where there is no evidence of hiring a vehicle and the court opines that general damages may suffice. Where the court adopts this approach, damages are awarded by reference to comparable cases (see **Emmie Chanika vs Blantyre City Assembly**, civil cause No. 84 of 2010.

In the present case, the claimant indicates that he was using the minibus for a commuter business which he was plying between Limbe and Muloza boarder from Monday to Saturday and was making a sum of

K10,000.00 on a daily basis. He therefore prays for compensation for loss of use of his vehicle from 9th October 2015 to 31st July 2020. The defendants through Counsel challenge the claim. They state that the sum being claimed for loss of business is very much on the higher side and must be proved with evidence. In dealing with a similar contention in the case of **Knight Frank v Blantyre Synod and Another** ((MSC Civil Appeal No.38 of 2000)) [2001] MWSC 3 (23 August 2001) it was stated that:

> We agree with Counsel for the appellants that special damages must be proved strictly. In fact, the rule is that such damages must be specifically pleaded and proved strictly. The point is that special damages are damages that have already crystallized before a case come to court, and the plaintiff must therefore be able to prove such damages strictly. This poses the question of what is meant by saying that special damages must be "proved strictly". Does it mean that special damages must be "proved beyond reasonable doubt"? We would answer this question in the negative. The standard of proof in civil cases is on a balance of probability and not beyond a reasonable doubt as is the standard generally in criminal cases. Rather, what it means is that special damages cannot be presumed as is the case with general damages. The plaintiff who claims special damages must therefore adduce evidence or facts which give satisfactory proof of the actual loss he alleges in his pleadings to have suffered. A follow-up question is, does it mean that a plaintiff must always produce receipts or other documentary evidence in support of his case, as was contended by Counsel for the appellants in the present case? Again, we would answer this question in the negative. We accept that such receipts would proffer the best evidence, but there is no rule of law which requires a party to adduce such evidence, best evidence that is, in order to prove a civil case. In our judgment, it is principally a question of whether the plaintiff's evidence, even if only oral, is believed by the court.

In the light of this authority, I believe it is open for this court to make an assessment of the claimant's credibility as a witness with regard to accepting his assertions or not. The claimant testified in court narrating how much he made on monthly basis and underwent cross-examination. This court was not given a reason to disbelieve the claimant. The only issue I have from the assertions is that vehicle for all that period never developed mechanical faults and was on the road six days a week. For fairness sake, it is only proper to factor in days that the vehicle needed mechanical attention apart from the usual service. I am inclined to award as follows:

- 9th October 2015 to 9th October 2016 = 365 days – 60 days = 305 days
- 9th October 2016 to 9th October 2017 = 365 days – 60 days = 305 days

- 11th October 2017 to 11th October 2018 = 365 days – 60 days = 305 days
- 12th October 2018 to 12th October 2019 = 365 days – 60 days = 305 days
- 13th October 2019 to 31st July 2020 = 210 days – 48 days = 162 days

Thus 1383 x K10,000.00 = K13,820,000.00

From the foregoing analysis, the damages awarded to the claimant can be summarised as follows:

1. The sum of K10,342, 281.00 as cost for replacing the motor vehicle.
2. The sum of K13,820,000.00 as damages for loss of use.

In total, therefore, the claimant is awarded the sum of K24,162,281.00. The claimant is further awarded costs for the assessment proceedings.

MADE IN CHAMBERS THIS 7th OF DECEMBER, 2020

WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTR