



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
Civil Cause Number 914 of 2019

BETWEEN:
THOMAS MALONDA.....CLAIMANT
AND
ATTORNEY GENERAL (MALAWI POLICE SERVICE)DEFENDANT

CORAM: **CM MANDALA:** **ASSISTANT REGISTRAR**
 W Namasala Counsel for Claimant of Wilberforce Attorneys
 Defendant: Attorney General's Chambers
 C Zude: Court Clerk

ASSESSMENT OF DAMAGES

INTRODUCTION AND BACKGROUND

This is an order for assessment of damages pursuant to default judgment entered on 13 January 2020. The Defendant is liable for: damages for pain and suffering, damages for loss of amenities of life, damages for disfigurement, the sum of MK6,000.00 being special damages and costs of the action. The hearing on Assessment of Damages was conducted on 6th February 2020.

This matter arose from an incident that occurred on 7th July 2019 when a police officer whilst on privately hired duty at Lilongwe Dairy Company shot the Claimant on the leg without any provocation and for unknown reasons.

EVIDENCE

Claimant's Evidence

The Claimant adopted his witness statement as their evidence in chief. It states:

1. **THAT** I am the Claimant in this matter.
2. **THAT** on or about 7th July 2019 while on duty at the headquarters of Lilongwe Dairy Company Limited where I was employed at the time, I was shot by a Malawi Police Officer who was on duty and privately hired by my employer.
3. **THAT** it was around 6 PM as I was waiting to start a night shift and I had gone outside the factory to start a fire so that I could boil bath water.
4. **THAT** while I was in the process of starting the fire, I felt a sudden pain as if something had hit me and I noted blood oozing from my buttock.
5. **THAT** I realized I was shot by a Police Officer who was nearby under a shelter and that I had not provoked the said Police Officer in any way.
6. **THAT** I believe the police officer shot me deliberately and intentionally because before the incident he had threatened about shooting some of my colleagues.
7. **THAT** I was rushed to Kamuzu Central Hospital where I learnt that the bullet had passed through the Lumbar and exited through the right buttock. Now shown and exhibited to me is a copy of medical report from Kamuzu Central Hospital marked "TM 1".

8. **THAT** I later learnt that the Police Officer was drunk at the time as such I attribute my injury to his drunken state and his carelessness in handling of the rifle.
9. **THAT** I reported the incident to Lingadzi Police substation. Now shown and exhibited to me is a copy of the said formal complaint marked "TM 2".
10. **THAT** as a direct consequence of my injury, I was put on bed rest from July to November 2019 and during this period I could not walk except for short distances but with an aid of a cane.
11. **THAT** when I tried to return to work in December, I discovered that I had not fully recuperated that I struggled to carry out heavy tasks.
12. **THAT** as a result of my lack of recuperation I was relieved from my duties since I could not carry out my assignments without physical strain.
13. **THAT** at assessment I will present myself to Court to testify as to how much pain and suffering I have gone through since the occurrence of the incident.
14. **THAT** therefore the pain, loss and damage that I have suffered were wholly caused by the negligence of the said Police Officer thus I am entitled to claim damages from the Defendant.
15. **THAT** I therefore seek damages for pain and suffering; damages for loss of amenities of life; damages for disfigurement, exemplary and/or punitive damages.
16. **THAT** I further aver that I am entitled to costs of this action.

In his oral evidence, the Claimant showed the Court the sites of his injuries. The Court saw a scar on the left side of the Claimant's stomach, just under his rib cage. The Claimant explained that he was shot in the buttock and the bullet exited through the stomach. On the day he was shot he felt pain all over his body and he was not sure where exactly he had been injured. The Claimant was relieved of his duties at Lilongwe Dairy Company because he was failing to carry out his duties. There is no other work that the Claimant can do to sustain his family.

The Claimant tendered a medical report authored and signed by Dr Kunyenga for the Hospital Director of Kamuzu Central Hospital. It states: "He was shot on the left lower abdomen and the bullet exited on the left buttock. The wounds were sutured, and pain killers given. The stitches were removed after four weeks and antibiotics (DSN) and analgesics (ASA) were given due to wound sepsis on 24/08/19. The result of the injury is that he has scars on entry and exit wound areas and he feels pain on injured areas especially when doing work."

SUBMISSIONS BY COUNSEL FOR THE CLAIMANT

Counsel for the Claimant filed written submissions in support of the application. Counsel avers that the extremity of the Claimants' injuries and the devaluation of the Kwacha would attract a global award of K22,000,000.00 for the Claimant as compensation. Counsel for the Claimant cited the following comparable awards in support:

- ***Yasin Mutsinze v The Attorney General*** – Civil Cause Number 55 of 1993 where the Claimant sustained an injury in the abdomen by gun shots fired by the police during a referendum riot at Nkoloksa township in 1993. On 17th September 1997 the Claimant was awarded K52,258.00 for pain and suffering, and loss of amenities of life.
- ***Andrew Mwachunda v The Attorney General*** – Civil Cause Number 1627 of 2001 where the Claimant was shot in the back by a Malawi Police Officer on 27th May 2002. In May 2004 the Claimant was awarded K250,000.00 for pain and suffering, and loss of amenities of life.
- ***Darious Chawinga v The Attorney General*** – Civil Cause Number 97 of 2013 where the Claimant sustained multiple gun wounds with an open fracture of the femur after he was hit by stray bullets fired by a Malawi Police Officer. On 30th September 2003, the Claimant was awarded K450,000.00 for pain and suffering, and loss of amenities of life.

- **Emma Muniya v Prime Insurance Company Limited** – Personal Injury Cause Number 344 of 2018 where the Claimant was hit by a motor vehicle and sustained injury on her thoraco lumbar, had severe back ache, walking difficulties and could not carry out chores. On 21st January 2019 the Claimant was awarded K6,163,500.00 for pain and suffering, loss of amenities of life and disfigurement.
- **Pearson Tambala v Prime Insurance** – Personal Injury Cause Number 120 of 2014 where the Claimant sustained a fracture of the fibula, degloving wound on the left leg, was hospitalised for a month, and laid off from work as a result. On 9th July 2018, the Claimant was awarded K5,300,000.00 for pain and suffering, loss of amenities of life and disfigurement.
- **Manuel Lingson v Naming'omba Tea Estate** where the Claimant sustained a deep cut wound, received sutures after being cut with a knife on the right leg. On 30th July 2018 the Claimant was awarded K4,000,000.00 for pain and suffering, loss of amenities of life and disfigurement.
- **Mrs Agrey Macheka v Charter Insurance Company** – Personal Injury Cause Number 110 of 2018 where, on 5th July 2018, the Claimant was awarded K1,500,000.00 as damages for disfigurement after she developed walking difficulties and had scars.
- **Kennedy K Nyirenda v Prime Insurance Company Limited** – Personal Injury Cause Number 22 of 2016 where, on 20th June 2017, the Claimant was awarded K700,000.00 as damages for disfigurement for a scar on the left ankle.

Counsel for the Claimant provided further submissions to the court on punitive damages. Counsel argues that the Claimant is entitled to punitive damages because the Police Officer's action was an '*oppressive, arbitrary and unconstitutional action by a servant of the Government*' - **Rookes v Barnard** (1964) 1 All ER 367. Counsel argues that the Police Officer acted so irresponsibly and in outright contravention of a myriad of Constitutional rights guaranteed to the Claimant. Counsel states that the Officer acted with malice as defined by Madise J in **Joseph Jonathan Zinga v Airtel Malawi** – Civil Cause Number 74 of 2014. The Police Officer had contemplated his actions as he had earlier made threats to this regard. It is not ideal for Malawian citizens to watch their shoulders and be wary of government officers.

ASSESSMENT GUIDELINES

Damages for personal injuries are awarded for a Claimant's pecuniary and non-pecuniary losses. The pecuniary losses include the loss of earnings and other gains, which the Claimant would have made had they not been injured, and the medical and other expenses which accrue from care and after-care of the injury. The non-pecuniary losses include pain and suffering, loss of amenities of life and loss of expectation of life. The principle underlining the award of damages is to compensate the injured party as nearly as possible as money can do it.¹

Perfect compensation for a Claimant is unlikely. The Claimant, however, is entitled to fair and adequate compensation.² Since it is difficult to assess damages involving monetary loss, courts resort to awarding conventional figures guided by awards made in similar cases and also taking into account the money value. Lord Morris buttresses this contention in **West v Shepherd**³ by stating: '*money cannot renew a physical frame that has been battered and shattered. All judges and courts can do is to award a sum which must be regarded as giving reasonable compensation.*'

The mode of assessment of damages requires the court to consider comparative awards of a similar nature. In doing so, regard must be had for fluctuations in the value of the currency. The court should make an award that is commensurate with the value of the currency at the time the award is made. In **Malamulo Hospital (The**

¹ See **Cassel and Co v Broom** [1972] AC 1027. See also **Tembo v City of Blantyre and The National Insurance Co Ltd** – Civil Cause No. 1355 of 1994 (unreported).

² **British Commission v Gourley** (1956) AC 185.

³ **West v Shepherd** (1964) AC 326 at 346.

*Registered Trustees) v Mangani*⁴, the Supreme Court states: “It is, therefore, recognised by the courts that awards of comparable injuries should be comparable. This is done by looking at previous awards of similar cases and adjusting the award according to the fall of the value of the money.”

In *Tionge Zuze (a minor, through A.S. Zuze) v Mrs Hilda Chingwalu*,⁵ the Court states: “Where a claim relates to non-monetary loss in respect of which general damages are recoverable it is not possible to quantify the loss in monetary terms with mathematical precision. In such cases courts use decided cases of a comparable nature to arrive at an award.”

In *Steve Kasambwe v SRK Consulting (BT) Limited* Personal Injury Cause Number 322 of 2014 (unreported), the High Court states thus: ‘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 obtaining in the previous cases. In such situation, when deciding the new cases, the court must take into account the life index, i.e. 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.’

COMPENSATION

The Claimant was shot on the left lower abdomen and the bullet exited on the left buttock. The wounds were sutured, and pain killers given. The stitches were removed after four weeks and antibiotics (DSN) and analgesics (ASA) were given due to wound sepsis on 24/08/19. The affected areas are still painful especially when he works.

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. See: *Ian Goldrein et al, Personal Injury Litigation, Practice and Precedents* (Butterworths, 1985) 8 and *City of Blantyre v Sagawa* [1993] 16(1) MLR 67 (SCA).

The Claimant told the court that he was shot in the buttock and the bullet exited through the stomach. On the day he was shot, he felt pain all over his body and he was not sure where exactly he had been injured. The Claimant’s medical report states that the bullet wounds were sutured, and he received pain killers. The stitches were removed after four weeks. On 24th August 2019 the Claimant received additional medication because his wound had become septic. He was given antibiotics (DSN) and analgesics (ASA). It is clear that the Claimant endured pain and suffering through both the injury itself and the treatment. Based on this, this court awards the sum of K3,500,000.00 as damages for pain and suffering.

Loss of Amenities of Life

The expression ‘loss of amenities of life’ simply means loss of faculties of pleasures of life resulting from one’s injuries. Damages for loss of amenities of life are awarded for the fact that the plaintiff is simply deprived of the pleasures of life, which amounts to a substantial loss, whether the plaintiff is aware of the loss or not. See: *Poh Choo v Camden and Islington Area Health Authority* [1979] 2 All ER 910 and *City of Blantyre v Sagawa* [1993] 16(1) MLR 67 (SCA) at 72.

⁴ [1996] MLR 486.

⁵ Quoting from *HQ Chidule v Medi* MSA 12 of 1993.

As a result of the accident, the Claimant was relieved of his duties at Lilongwe Dairy Company because he was failing to carry out his duties. The medical report states that the Claimant 'feels pain on injured areas especially when doing work.' Due to the injuries, the Claimant is now unemployed and cannot find employment because of the pain he feels on the affected sites. The Claimant's life has significantly been altered by the injuries. Based on this, this court awards the sum of K1,000,000.00 as damages for loss of amenities of life.

Disfigurement

In the matter of **James Chaika v NICO General Insurance Co Ltd** the High Court stated that 'Disfigurement is not a matter to be taken lightly and casually as it is something that one has to permanently live with.' In **Nyirenda v Moyo and others**, the claimant was awarded the sum of K500,000.00 as damages for disfigurement in 2018.

In this case, the Claimant showed the Court the sites of his injuries. The Court saw a scar on the left side of the Claimant's stomach, just under his rib cage. The Claimant explained that he was shot in the buttock and the bullet exited through the stomach. The medical report states: 'he has scars on entry and exit wound areas.' The Claimant therefore has scars permanently which alters his appearance. Based on this, the Claimant is hereby awarded K1,000,000.00 as damages for disfigurement.

Exemplary and/or Punitive Damages

Exemplary damages often called punitive damages are awarded when the defendant's willful acts were malicious, violent, oppressive, fraudulent, wanton or grossly reckless. The purpose of these damages is to punish the defendant for outrageous conduct and/or to reform or deter the defendant and others from engaging in conduct similar to that which formed the basis of the lawsuit.

Exemplary/Punitive damages ought to be specifically pleaded and proved - **Andrew Mwachunda v Attorney General** Civil Cause Number 1627 of 2003.

Counsel specifically pleaded, through his summons and statement of case that exemplary and/or punitive damages be awarded. The Default Judgment does not award exemplary and/or punitive damages but Counsel paraded evidence to prove that exemplary and/or punitive damages are necessary in this case. This court therefore perceives the lack of mention of exemplary and/or punitive damages in the Default Judgment as an inadvertent error and will proceed to consider them despite this error.

Counsel for the Claimant argues that the Claimant is entitled to punitive damages because the Police Officer's action was an 'oppressive, arbitrary and unconstitutional action by a servant of the Government' - **Rookes v Barnard** (1964) 1 All ER 367. The Claimant's witness statement describes the situation and infers the state of mind of the police who blatantly stated that he would shoot someone, while he was on duty and waved his weapon recklessly. The witness statement says:

***"THAT** I believe the police officer shot me deliberately and intentionally because before the incident he had threatened about shooting some of my colleagues.*

***"THAT** I later learnt that the Police Officer was drunk at the time as such I attribute my injury to his drunken state and his carelessness in handling of the rifle."*

The Claimant's evidence was unopposed as the Defendant did not appear for the hearing despite having been served notices of hearing. A reading of the Claimant's statement describes a police officer who reported for duties whilst drunk and had made his intentions about shooting his colleagues known to them.

The powers and functions of the police are provided under Section 153 of the *Constitution*. It states in part (emphasis provided by the Court):

1. *The Malawi Police Force shall be an independent organ of the executive, which shall be there to **provide for the protection of public safety and the rights of persons in Malawi according to the prescriptions of this Constitution and any other law.***
2. *The Malawi Police Force shall enjoy **only such powers as are necessary for the protection of rights under this Constitution and the maintenance of public safety and public order** in accordance with the prescriptions of this Constitution and the law.*

Additionally, section 4 of the *Police Act* [Cap 13:01] of the Laws of Malawi provides for the general functions of the police service. It states (emphasis provided by Court):

- (1) *The Police Service shall be employed in and throughout Malawi for—*
 - (a) the prevention, investigation and detection of crime;**
 - (b) the apprehension and prosecution of offenders;**
 - (c) the preservation of law and order;**
 - (d) the protection of life, property, fundamental freedoms and rights of individuals;**
 - (e) the due enforcement of all laws with which the Police are directly charged;*
 - (f) the exercise or performance of such other powers, functions and duties as are conferred on the Police by or under this Act or any other written law or as may by law be exercised, performed or otherwise discharged by the Police.*
- (2) *For the performance of any of the functions under subsection (1), **the Police shall be entitled to carry and to use arms but shall so use such arms only as authorized by this Act or by any other law.***

Further, section 34 (4) of the *Police Act* provides for the general duties and powers of police officers. It states (emphasis provided by the court):

- (1) *Every police officer shall exercise such powers and perform such duties as are conferred or imposed on a police officer by or under this Act or any other written law and as are by law conferred or imposed on police officers.*
- (2) *Every police officer shall—*
 - (a) obey all lawful directions in respect of the execution of his office which he may from time to time receive from any competent authority;*
 - (b) serve, and be willing to serve, at any station to which he may be assigned; and*
 - (c) promptly obey and execute all orders and warrants lawfully issued by a competent authority.*
- (3) *It shall be the duty of every police officer to—*
 - (a) collect and communicate intelligence affecting the functions, powers and duties of the Police;*
 - (b) prevent the commission of offences and public nuisances;*
 - (c) detect crime and bring offenders to justice; and*
 - (d) apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient grounds exist.*
- (4) **Every police officer shall be deemed to be on duty at all times and may at any time be detailed for duty in any part of Malawi.**

Section 44 of the *Police Act* provides for a police officer's power to use firearms. It states (emphasis provided by the court):

- (1) *Subject to subsection (2), any police officer may use any firearm against—*
 - (a) **any person in lawful custody** charged with or convicted of a felony when such person is escaping or attempting to escape;*
 - (b) any person who by force **rescues or attempts to rescue any other person from lawful custody;** or*
 - (c) any person who by force **prevents or attempts to prevent the lawful arrest of himself or of any other person.***

In the matter at hand, the police officer, through his actions violated numerous constitutional provisions such as the right to life,⁶ and the right to human dignity.⁷ Not only were Constitutional provisions not upheld but also statutory provisions governing the Malawi Police Service such as Section 44 of the *Police Act* that deems that discharging a firearm without just orders or cause is an offence against discipline. Not only were statutory provisions violated but also international law and standards. To which the Human Rights Committee's report on Malawi's implementation of the *International Covenant on Civil and Political Rights* remained: '*concerned that the law (Police Act) does not comply with international standards in regard to the use of firearms by police officers.*'⁸ Additionally, the police officer in question is purported to have been drunk at the time the shooting occurred, a further act of indiscipline as per the Schedule to the Police Act.

This court finds that the police officer shot the Claimant intentionally and without cause. Punitive damages are awarded for wilful acts by a defendant that are malicious, violent, oppressive...or grossly reckless. As per *Rookes v Barnard*, this court finds that the Police Officer's actions were '*oppressive, arbitrary and an unconstitutional action by a servant of the Government.*' Based on this, the Claimant is hereby awarded K20,000,000.00 being an award for exemplary and/or punitive damages.

DISPOSAL

The Claimant is therefore awarded K3,500,000.00 for pain and suffering; K1,000,000.00 for loss of amenities of life; K1,000,000.00 for disfigurement and; K20,000,000.00 as exemplary/punitive damages and costs of the action (to be taxed). A total of K25,500,000.00 (twenty-five million five hundred thousand kwacha).

Each party is at liberty to appeal to the Supreme Court of Appeal within the requisite time frames.

Ordered in Chambers on the 1st day of June 2020 at the High Court, Lilongwe.



C Mandala

ASSISTANT REGISTRAR

⁶ Section 16 of the Constitution

⁷ Section 19 of the Constitution

⁸ See Malawi - The Law on Police Use of Force found at <https://www.policinglaw.info/country/malawi> last visited on 31 May 2020 at 22:12.

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Ordered in Chambers on the 1st day of June 2020 at the High Court, Lilongwe.



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