



The Judiciary

IN THE HIGH COURT OF MALAWI

CIVIL DIVISION

PRINCIPAL REGISTRY 328

PERSONAL INJURY CAUSE NUMBER 506 OF 2019

Between

NOEL ZONDOLACLAIMANT

-and-

HAMZ t/a SUPER HARDWARE 1ST DEFENDANT

NICO GENERAL INSURANCE COMPANY LIMITED2ND DEFENDANT

CORAM: Austin Jesse Banda, Assistant Registrar

Mr. Msuku, for the Claimant

None for the Defendants

F. Makhambera, Clerk/ Official Interpreter

Banda

JUDGMENT ON ASSESSMENT OF DAMAGES

Background

By a Default Judgment dated 26th August, 2019, Hamz trading as Super Hardware (1st Defendant) and Nico General Insurance Company Limited ("2nd Defendant") were adjudged to be liable to pay Noel Zondola ("Claimant"); the cost of replacement of a Nissan Vanette minibus registration number MC 9741 ("the motor vehicle"), damages for loss of business, damages for loss of use of the motor vehicle, and costs. All of the above mentioned damages were to be assessed by the Court. The Claimant obtained a notice of appointment for the assessment of damages set for 7th November, 2019, initially, before the hearing was postponed to 18th December, 2019 at the insistence of the Defendants. The notice for the 18th December, 2019 hearing was served on the Defendants through their lawyers, Hara and Associates, on 8th November, 2019 at 15:00 hours as the Return of Service filed by the Claimant shows.

The Court was compelled to proceed to hear the Claimant in the absence of the Defendants as the Defendants were duly served with a notice and on the day the Defendants did not communicate anything to the Court as to their absence. Counsel for the Claimant informed the

Court that he had communication from the Defendants' Counsel that he could proceed with the matter.

Evidence

The only witness in the hearing was the Claimant himself, Noel Zondola. He adopted his witness statement under oath. He stated that he was the owner of a motor vehicle, a Nissan Vanette minibus, registration number MC 9741. He said that on the 14th of February, 2019, his motor vehicle was hit by another motor vehicle, an Isuzu 5 tonner, registration number MJ 552 belonging to the 1st Defendant and insured by the 2nd Defendant.

Noel Zondola further stated that following the impact, his motor vehicle was extensively damaged. He said that he consulted a number of garages and they all indicated that the motor vehicle would just have to be replaced as it was a 'write off', as the cost of repairing it was not making any economic sense. He tendered the Reports that he obtained from the consulted garages, marked NZ1 as a bunch. It was his evidence that he therefore obtained quotations for possible replacement with a similar vehicle. The cheapest quotation that he obtained was at K4, 200,000.00. He said that the vehicle had not been replaced at the time that he made the statement. He tendered a bunch of Quotations marked NZ2.

The Claimant further told the Court that the motor vehicle was being used to carry passengers and make money, plying its trade between Blantyre and Milepa, along the Chiradzulu Road. He said that actually on the day that the accident happened the vehicle was hit whilst at a stage stopped for passengers to board, such that some passengers were injured in the process.

The Claimant further stated that by agreement with the driver, the vehicle was making K15, 000.00 a day for him. He tendered NZ3 which are extracts from the record book in which was recorded monthly income from the motor vehicle. He said the vehicle used to run 6 days a week and on Sundays it was serviced although on rare occasions it could ply trade even on Sundays. He stated that he can no longer earn from the vehicle since the accident.

Issue

The issue at this stage of trial is the amount of damages that must be paid, by the Defendants to the Claimant, as under the heads in the Default Judgment.

Law and Fact

Damages are paid to a Claimant to put him in a position that he would have been if he had not suffered damage, in as far as money can do it- **George Kankhuni v. Shire Bus Lines Limited Civil Cause Number 1905 of 2002**. Where a party has suffered loss because of the negligent act or omission of another, the innocent party ought to be compensated by the wrongful party. It is on that basis that in this case, the Defendants being jointly and severally liable for the loss that the Claimant suffered, they must compensate the Claimant under the heads as claimed.

Cost of Repairing/Replacing the Motor Vehicle

The case of **Hara v. Malawi Housing Corporation [1993] 16(2) Malawi Law Reports 527** is to the effect that where property has been damaged but has not been destroyed, the measure of damages is the cost of repair, unless there has been diminution to the value of the property. Where the item has been destroyed to the extent that it cannot be repaired, the measure of damages is the cost of replacing them. See also **Tea Brokers (Central Africa) Ltd v. Bhagat [1994] Malawi Law Reports 339**.

In the instant matter, the uncontroverted evidence of the Claimant is that his damaged motor vehicle was condemned as a 'write off'. It was recommended by three garages, namely RODGFRA Motor Vehicle Mechanics, Maoni Motors Car Repair Company and another owned or managed by a Mr. Noel Theu, whose reports the Claimant tendered, marked NZ1. In that instance the Court cannot award cost of repairs because the motor vehicle was damaged beyond repair. The Claimant has to be awarded cost of replacing the motor vehicle.

The Claimant did obtain three Quotations for a 2nd hand Nissan Vanette minibus from three dealers, namely Vakomesa General Dealers, JJ Investment and PEMO General Dealers. JJ Investment quoted the price at K4, 500,000.00. The other two all quoted the price at K4, 200,000.00. Normal damages are not bent at punishing the Defendant, and in fact under law the Claimant is obligated to mitigate his loss in law. The Claimant is supposed to obtain a motor vehicle to replace the damaged one from the source that is least costly available, since the motor vehicle would be of similar quality. For that reason, as prayed by the Claimant, I award him the sum of **K4, 200,000.00** as damages for replacing the motor vehicle.

Damages for Loss of Business

The Claimant told the Court that the damaged motor vehicle was being used for business, to carry fee paying passengers between Blantyre and Milepa. It was his evidence that the vehicle was making K15, 000.00 per day as was agreed with the driver. A perusal of NZ 3 which is the exhibited copy of the daily recordings of the money brought in by business of the vehicle shows that there were days the income could be lower than K15, 000.00, and yet there were days the amount was higher than K15, 000.00, which is normal in a business. It is clear though that on average the minibus was bringing in K15, 000.00 per day.

The Claimant further informed the Court that the motor vehicle was normally used every day of the week excluding Sundays (6 days a week). The motor vehicle was damaged on 14th February, 2019. By the time the Court heard the Claimant for assessment on 18th December, 2019, it was 264 days. The matter was adjourned for Judgment on assessment to 17th January, 2020, which is a further 24 days (excluding Christmas day and Sundays falling within), upon the 264 days of lost business since the accident that damaged the vehicle. In total the vehicle did not do business for 288 days. The amount of loss of business is therefore **K4, 320,000.00** (288 days multiplied by K15, 000.00). I award the Claimant that amount.

Damages for Loss of Use of Motor Vehicle

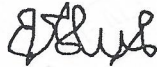
The evidence is clear that the motor vehicle was mostly used for the business of taking fee paying passengers. The vehicle was on the road six days of a seven day week with the seventh day reserved mainly for service. From the evidence, it is clear that the motor vehicle was very rarely put to any other use on Sundays. In making an award for loss of use of the motor vehicle I should only consider the rare days it was used differently from spending time for service at a garage on Sundays. This is to avoid duplicating awards.

Normally loss of use is a conventional figure that takes into account the value of the chattel and period for the lost use, in this case the motor vehicle- See the case of **Namandwa v. Tennet and Sons Ltd 10 Malawi Law Reports, 383**. There are 48 Sundays from the date of the accident to this date of Judgment on assessment. The motor vehicle in issue is not among the most prestigious ones. It is a normal passenger vehicle. It is clear that the Claimant's own use would have been close to negligible over the 48 Sundays. I award the Claimant **K55, 000.00** for loss of use.

Conclusion

The Claimant is hereby awarded a total sum of **K8, 575,000.00** in damages under all heads. The Defendants are liable to pay those damages and also cost of the assessment. If the amount of costs is not agreed between the parties, the Court will assess them.

Made this 17th day of January, 2020.



Austin Jesse Banda

ASSISTANT REGISTRAR