



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 364 OF 2015

BETWEEN

NYADANI DYSON SEYAMA CLAIMANT

-AND-

GADINA KUMBANGA 1ST DEFENDANT

ANGELINA CHAKHUMBIRA 2ND DEFENDANT

REUNION INSURANCE COMPANY LIMITED 3RD DEFENDANT

CORAM: HER HONOUR MRS E BODOLE, ASSISTANT REGISTRAR
Kadyampakeni, of Counsel for the Claimant
Ms. Wasili, of Counsel for the Defendants
Chitsulo, Court Clerk/Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

Introduction

The Claimant brought proceedings against the Defendants for pain and suffering, loss of amenities of life, disfigurement, future nursing care, loss of earning capacity, loss of earnings, replacement value of his damaged motor vehicle, and cost of the proceedings. This order on assessment of damages follows judgment on liability which was entered for the Claimant on 11th June, 2018 and ordered that damages be assessed by the Registrar.

The Evidence

The matter came for assessment of damages on 14th January, 2020 and the Claimant was the sole witness for his claim. The evidence before this court is that on 20th October, 2014 the Claimant was driving motor vehicle registration number MC 2884 Toyota Camry. He had only one passenger who was seated in the passenger seat in front. He was driving from Blantyre to Chirimba township. Upon reaching Chonde area he saw a motor vehicle registration number NU 8298 Toyota saloon which was being driven by the 1st Defendant in a zigzag way and encroaching the Claimant's lane at close range. The Claimant steered the motor vehicle to the extreme near-side of the left lane but there was a ditch immediately after the tarmac road. The 1st Defendant's motor vehicle hit the Claimant's motor vehicle head on and on the right side. The impact caused the Claimant's motor vehicle to roll backwards.

As a result of the accident, the Claimant sustained injuries. He sustained fracture around the left hip, fractured bones of the heel and ankle of the left leg, and open fracture of the right tibia. He also sustained multiple lacerations and cuts on various parts of his body. He was admitted at Queen Elizabeth Hospital from 21st October, 2014 to 17th November, 2014. He has been receiving medical treatment as an outpatient from 2014 since his discharge.

The treatment he received was reconstruction of the left acetabulum bone by fixing a metal plate to support it, reconstruction of the calcaneus bone by fixing it with wires, fixing two ununified bones of the right leg with wires and screws externally. He was in the metal grip support aids and plaster of Paris for 3 months. For months after the accident the Claimant was in so much pain that he found it very difficult to sleep and he would wake up and groan and moan at night. The pain was continuous and still persists to date four years after the accident. For the first 6 months after the accident he could not eat on his own. He experiences recurrent pain around the fractured areas of both legs especially in cold weather as the fractured bones were reconstructed by metal plating together with wire and screw fixations. He was conscious during the occurrence of the accident and got so terrified that the memory lives to his day whenever he passes through the place of the accident. The injuries he sustained caused him not to relate sexually with his wife. This affected how he related with his wife. He has undergone significant reduction in enjoyment of his normal use of both legs. He is unable to walk long distances and he walks with a

limp. He is unable to lift heavy objects as he used to. The multiple cuts and lacerations on various parts of his body have left ugly scars. His leg is bent at the affected ankle.

The Claimant is a mechanic by profession and used to earn an average K700,000.00 per month net of tax from his mechanics business CASC Motor Spares and General Trading. He exhibited invoices issued between 18th October, 2013 and 10th October, 2014. He was in hospital from 21st October, 2014 to 17th November, 2014. He only resumed working in April, 2015. He lost some earnings from his business from October, 2014 to March, 2015. He is claiming a sum of K3,500,000.00 as lost earnings.

He is unable to carry out his business with the same industriousness as before the accident due to the fact that he has lost competent use of both legs. His earning capacity has been negatively affected as he cannot earn as much as before the accident.

The Claimant's motor vehicle was totally wrecked as per the copies of photographs of the motor vehicle he took from Wima Motors in Chitawira, Blantyre where it is. He took the pictures after he was discharged from hospital. His motor vehicle was certified as beyond economic repair by both Nunes Panel Beating Services Ltd and Fernando Motors. The Claimant contacted GM Insurance Assessors to advise the value of the motor vehicle as at the date of the accident. They valued it at K1,8000,000.00 as per their quotation.

The Claimant is claiming sums of K3,500.00, K3,000.00 and K10,000.00 as costs of obtaining medical and Police reports, and two quotations for the value of the motor vehicle respectively.

Issue for Determination

The only issue in this matter is the appropriate measure of the quantum of damages that the claimant ought to be awarded in the circumstances.

Applicable 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] AC 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 - *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 - *Lemon Banda and 19 others v Mota Engil Limited and General Alliance Insurance Limited* Personal Injury Cause Number 178 of 2012. In the *City of Blantyre v Sagawa* 16(1) MLR the court stated 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."

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 a result of the injury be curtailed - *Lemon Banda and 19 Others V Mota Engil Limited and General Alliance Insurance Limited* (supra).

Disfigurement

Disfigurement is a limitation either physically or mentally for someone to do what any other person can do without reasonable accommodation. It is concerned with change of looks of the individual. This may be scars, amputations and postures - *Lemon Banda and 19 Others V Mota Engil Limited and General Alliance Insurance Limited* (supra). In *Ching'amba v Deerless Logistics Ltd* Civil Cause No. 2888 of 2007 the Court stated that disfigurement is not a matter to be taken lightly and casually. It is something that one has to live with permanently.

Comparable Cases

In *Javious Enerst v Steven Levison and Prime Insurance Company Ltd* Personal Injury Cause No. 231 of 2015 the Claimant sustained fractured tibia of the left leg, multiple bruises, multiple cuts on the upper and lower extremities and a dislocated shoulder. On 23rd March, 2018, he was awarded a sum of K6,000,000.00 as damages for pain and suffering, loss of amenities of life and disfigurement. In *Shadreck Fuduwick v James Balala Kachepa and NICO General Insurance Company Ltd* Personal Injury Cause No. 639 of 2018 the Claimant sustained right segmental femur fracture with spiral ends 2 degrees, soft tissue injury, bruises, general body pains and headache. He underwent open reduction and internal fixation, application of Plaster of Paris, and clutches to aid him whilst walking. The Claimant was still using clutches to aid him to walk. He was at high risk of developing arthritis. He was always in pain. He was admitted for 21 days and was treated as an out-patient for 6 days. He was awarded a sum of K6,000,000.00 as damages for pain and suffering, loss of amenities of life and disfigurement on 5th August, 2019.

Loss of Earning Capacity/Loss of Earnings

Loss of earning capacity goes to the ability to earn. Loss of earnings goes to lost earnings. In either case the Court must account for the loss and provide for it. The losses are different and that is why the methods of arriving at them differ. Where

one continues in the same job at the same earnings, the claim can only be for loss of earning capacity unless of course where there has been a shortening of life, but that is covered by loss of earnings in lost years.

Loss of earnings goes to lost earnings. The real loss must be ascertainable and calculable. In loss of earnings, Courts look at whether it is total or partial loss of earnings – *Chidule v Medi* [1993 MSCA Civil Cause No. 2016 of 2010].

In loss of earning capacity, Courts award damages where a claimant is unable to earn the same rate of earnings as he previously could before the occurrence of the accident. Courts also assess the prospect of the claimant losing employment or reduced earnings in the future – *Tembo v City of Blantyre* Civil Cause No. 1355 of 1994. Courts can make an award where the loss is unascertainable or incalculable. The award is calculated using the multiplier and multiplicand formula. In *Manda v Malawi Social Action Fund* [2003] MWHC 55 the Court stated that:

“The amount of loss of earnings is calculated by taking the figure of the plaintiff’s present annual earnings less the amount, if any, which he can now earn annually, and multiplying this figure by a figure which, while based upon the number of years during which the loss of earning power will last, is discounted so as to allow for the fact that a lump sum will be given now instead of periodic payments over years. The latter figure has come to be known as the multiplier and former figure, the multiplicand. See Mitchell v Mulholland No. 2 [1972] 1 Q.B. 65. Further adjustment however has to be made to the multiplicand and multiplier on account of other factors like inflation the so called contingencies of life and taxation...If he cannot earn anything nothing falls to be deducted.”

Courts take into account some factors when making an award. In *Chizola v Stagecoach (Mal) Ltd* [1993] 16 (1) MLR 57 the Court held that

“Some of the factors...are the prospects of the employer’s business; the plaintiff’s age and qualifications; his length of service; his remaining length of working life; the nature of his disabilities...”

Courts also quantify the loss by having regard to the Claimant's earnings - see *Nangwiya v Makwasa Tea Estates* [1993] 16 (1) MLR 373. In *Namate v Mr. Latif and Another* 2018] MWHC 663 the Court stated as follows:

“For loss of earning capacity, I am mindful that the claimant was a businessman in the informal sector. He was not amenable to a mandatory retirement age. He would have, however, still slowed down his business operations with age, mostly from around 55 years. He is 33 years old. For the next 22 years he would have actively have the earning capacity he had before the injury. I have also considered contingencies and life misfortunes apart from the injury coming from the actions of the defendants’ insured negligence driver and also the fact that the sum granted here-in will be a lump sum that would be invested and earn more. I will use 6 years as such as the multiplier. His known monthly income is a non-taxable K70,000.00. There is nothing to take away from the income as it is not currently earning anything since the injury – Manda v Malawi Social Action Fund, High Court Principal Registry, Civil Cause No. 756 of 2003 (unreported). The formula being a multiplicand of K70,000.00 (average monthly income) times 12 months (the annual income) times the multiplier of 6 (years), the claimant is therefore awarded K5,040,000.00 representing loss of earning capacity.”

Analysis of the Evidence and Applicable Law

It is clear from the evidence that the Claimant went through a lot of suffering and was in pain. He is still suffering and in pain. He sustained fracture around the left hip, fractured bones of the heel and ankle of the left leg, and open fracture of the right tibia. He also sustained multiple lacerations and cuts on various parts of his body. He was admitted at Queen Elizabeth Hospital from 21st October, 2014 to 17th November, 2014. He has been receiving medical treatment as an outpatient from 2014 since his discharge.

The treatment he received was reconstruction of the left acetabulum bone by fixing a metal plate to support it, reconstruction of the calcaneus bone by fixing it with wires, fixing two ununified bones of the right leg with wires and screws externally. He was in the metal grip support aids and plaster of Paris for 3 months. For months after the accident the Claimant was in so much pain that he found it very difficult to sleep and he would wake up and groan and moan at night. The pain was continuous

and still persists to date four years after the accident. For the first 6 months after the accident he could not eat on his own. He experiences recurrent pain around the fractured areas of both legs especially in cold weather as the fractured bones were reconstructed by metal plating together with wire and screw fixations. He was conscious during the occurrence of the accident and got so terrified that the memory lives to his day whenever he passes through the place of the accident. He is unable to relate sexually with his wife and this has affected how he relates with his wife.

The Claimant is unable to enjoy life as he used to. He is unable to relate sexually with his wife. This is so unfortunate for him being a married man. He has undergone significant reduction in enjoyment of his normal use of both legs. This has affected his business and livelihood. He is unable to walk long distances as he walks with a limp. He is unable to lift heavy objects as he used to.

The Claimant has been disfigured as the multiple cuts and lacerations on various parts of his body have left ugly scars. His leg is bent at the affected ankle and as such he walks with a limp.

It is clear that the injuries sustained by the Claimants in the above-cited cases of *Javious Enerst v Steven Levison and Prime Insurance Company Ltd* (supra) *Shadreck Fuduwick v James Balala Kachepe and NICO General Insurance Company Ltd* (supra) are less than the injuries sustained by the Claimant in the present case. This Court, therefore, awards the claimant a sum of K10,000,000.00 as damages for pain and suffering, loss of amenities of life and disfigurement.

The Claimant is a mechanic by profession and was earning an average monthly sum of K700,000.00 net of tax from his mechanics business CASC Motor Spares and General Trading. He exhibited invoices issued between 18th October, 2013 and 10th October, 2014. He was in hospital from 21st October, 2014 to 17th November, 2014. He only resumed working in April, 2015. He lost some earnings from his business from October, 2014 to March, 2015. He is claiming a sum of K3,500,000.00 as lost earnings.

The Claimant is entitled to the earnings he lost during the period he was not doing business due to the injuries he sustained. This Court awards him the sum of K3,500,000.00 as lost earnings.

As regards loss of earning capacity, the Claimant is unable to carry out his business with the same industriousness as before the accident due to the fact that he has lost competent use of both legs. The Claimant was earning an average monthly sum of K700,000.00 net of tax. He has not provided any evidence to show how much he is earning now. He has only told this court that he cannot earn much as before the accident. His present earnings are important in the calculation of the award. Since he is earning something that amount needs to be deducted from what he is earning now – see *Manda v Malawi Social Action Fund* (supra). This Court deducts K300,000.00 representing a sum he is earning now. This Court, therefore, adopts a sum of K500,000.00 as the multiplier.

The Claimant was aged 38 years at the time of the accident, and this Court adopts a multiplier of 5 years taking into account the factors raised in the case of *Namate v Mr. Latif and Another* (supra). The award under this head would, therefore, be K400,000.00x12x5(years) which is K24,000,000.00.

The Claimant is entitled to the replacement value of the motor vehicle. The Claimant's motor vehicle was totally wrecked. It was certified as beyond economic repair by both Nunes Panel Beating Services Ltd and Fernando Motors. GM Insurance Assessors assessed the value of the motor vehicle to be K1,800,000.00 as at the date of the accident. This Court awards him a sum of K1,800,000.00 as replacement value of the motor vehicle.

Special damages are supposed to be pleaded and proved. The Claimant's evidence shows that he expended some money to procure the medical and Police reports, and the two quotations of the motor vehicle. He had to travel from home to the hospital and the two companies in order to obtain the medical and two quotations. He is, therefore, awarded a sum of K3,500.00 as costs for procuring the medical report, K3,000.00 as costs for procuring the Police report, and K10,000.00 as costs for procuring the two quotations of the motor vehicle.

Conclusion

The Claimant is awarded a total sum K39,316,500.00 as damages. He is further awarded costs of the proceedings to be taxed at a later date if not agreed by the parties. Each party is at liberty to appeal to the Supreme Court of Appeal within the requisite time frames.

Pronounced in Court this 12th day of March, 2020 at Blantyre.



EDNA BODOLE (MRS.)
ASSISTANT REGISTRAR