



The Judiciary

IN THE HIGH COURT OF MALAWI

CIVIL DIVISION

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 714 OF 2018

Between

ISAAC NYERERECLAIMANT

-and-

ESCOM MALAWI LIMITEDDEFENDANT

CORAM: Austin Jesse Banda, Assistant Registrar

Chitsonga, for the Claimant

Kayira, for the Defendants

F. Makhambera, Clerk/ Official Interpreter

JUDGMENT ON ASSESSMENT OF DAMAGES

Banda

Background

Isaac Nyerere (“Claimant”) obtained a Judgment in Default in which ESCOM Malawi Limited (“Defendant”) was adjudged to be liable to pay the Claimant damages for pain and suffering, damages for loss of amenities of life, damages for loss of earning capacity, damages for loss of earnings, special damages and costs of the action. Hearing for the purpose of assessment of damages was done on the 27th of November, 2019. This Judgment follows.

Evidence

The Claimant was the only witness in the hearing. He adopted his witness statement under oath. He stated that he was employed by the Defendant as a general worker. On 28th January, 2018 he was instructed by his supervisor to transfer some poles from a vehicle, and whilst doing that job one pole bounced off the vehicle and hit him on his leg. The pole hit him on the leg again injuring him further, as it slipped off the hands of the workmates that attempted to take the log off his leg.

Library



Isaac Nyerere further stated that he was taken to Chiradzulu District Hospital where he was further referred to Queen Elizabeth Central Hospital (“QUECH”). He said that he sustained an open segmental fracture of the left tibia and fibula and had general body pains. He said that at QUECH he was treated with external fixators for 5 months before his leg was put in a Plaster of Paris (“POP”), for a period of two months. He tendered a medical report (“Exhibit IN 1”), Health Passport Book (“Exhibit IN 2”), and a Photostat of an X-ray scan of his injured leg (“Exhibit IN 3”).

It was the Claimant’s evidence that since the occurrence of the accident he is unable to carry out manual work, and he is unable to farm to feed his family and have difficulties in carrying out household chores.

In cross examination, the Claimant told the Court that he had two fractures on one leg. He said that his highest academic qualification was a Primary School Leaving Certificate of Education (“PSLCE”). He said that he had not returned to work since the injury. He said that he was a brick layer and not a farmer before joining ESCOM Malawi Limited as a general worker. It was his evidence that he was not doing anything else that earned him income when he was at ESCOM.

The Claimant said that he was not doing any other job for his income. He said that he would work as a brick layer but the challenge was that he cannot climb to do his work once the structure was at some top level. He also said that he cannot do household chores such as lifting heavy things as the fractured bones of the leg that he stands on are not fully together.

The evidence of the Claimant closed the case. The Defendant did not call any witnesses. Counsel asked for 2 days to make submissions. The Court granted both parties 4 days to make submissions. Either submissions were submitted rather late.

Issue

The only issue at this stage of the proceeding is the amount of damages that the Defendant must pay the Claimant as compensation.

The Law and Fact

It is a principle of law that anyone who suffers loss from a wrongful act or omission of another must be compensated for the loss by the person who unlawfully caused the loss. Damages are therefore paid to compensate for the loss in as far as money can do. In **Livingstone v. Rawyards Coal Co [1880] 5 AC 25** Lord Blackburn pointed out that where any injury is to be compensated by damages, in setting the sum of money to be given for reparation, the court should, as nearly as possible, award the sum of money which will put the injured party in the same position as he would have been if he had not sustained the injury for which he is being compensated.

It is impossible to come up with an amount of money that fully compensates a non-monetary loss, coming from personal injuries, with mathematical precision. As result to achieve certainty and consistency of awards in like cases, courts use awards in comparable cases as a guide, without losing sight of specific losses suffered by a particular claimant. See **Chipeta v. Dwangwa Sugar Corporation, Civil Cause No. 345 of 1998, High Court, Principal Registry (unreported)**.

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-
Ian Goldrein et al, Personal Injury Litigation, Practice and Precedents (Butterworths, 1985) p8. See also **City of Blantyre v. Sagawa [1993] 16(1) MLR 67 (SCA)**.

Loss of Amenities of Life

Damages are paid under the head of loss of amenities of life to compensate the claimant's deprivation of the pleasures of life, which amounts to substantial loss, whether the claimant is aware or not of that loss. See **City of Blantyre v. Sagawa [1993] 16(1) MLR 67 (SCA); Kemp and Kemp, The Quantum of damages, Vol.1 (2nd Ed) ..., 1961, p.624**.

In **Rex Walala v. Davison Chikuta and Prime Insurance Co. Limited Civil Cause No. 461 of 2011**, the claimant sustained a fracture of the left tibia, bruises on the left arm and cuts on his face. He was awarded a sum of K 6, 500, 000.00 as damages for personal injuries on 17th July, 2012.

In a case submitted by the Claimant, **Kayira and Others v. Shaikh Personal Injury Cause No. 1160 of 2013 (unreported)**, the 1st Claimant sustained a fracture of the right tibia and fibula, among other injuries, and was hospitalized for 16 days. The Claimant was awarded K 7, 200,000.00 for pain and suffering and loss of amenities of life on 1st July, 2014.

In **Malichi v. Prime Insurance Company Ltd, Civil Cause Number 2613 of 2009, High Court, Principal Registry (unreported)**, the claimant suffered a cut wound on the scalp, bruises on the face, swollen head and fracture of the left tibia. He had headaches and limped when walking. He was awarded K4, 500,000.00 for pain and suffering and loss of amenities of life, on 29th May, 2012.

From the foregoing, I award the Claimant the sum of **K7, 500,000.00** as damages for pain, suffering and loss of amenities of life.

Loss of income/ earning Capacity

Under this head, the Court awards loss where a Claimant continues in the occupation that he was into before the accident, after suffering an injury in the accident. Where the Court finds that the Claimant can no longer earn his pre-accident rate of earnings, awards damages for loss of earning capacity. It is calculated based on the annual figure and taking into account the age of the Claimant and his working life span. It also takes into account the usual working contingencies and also taxation. Courts also assess the prospect of losing employment or reduced earnings in future- **Tembo v. City of Blantyre Civil Cause Number 1355 of 1994, High Court Principal Registry (unreported)**.

Mwaungulu J, as he was then, in the case of **Sakonda v. S.R. Nicholas Ltd, Civil Appeal Cause No. 67 of 2013, High Court Principal Registry (Unreported)** suggests that for loss of income, the real loss must be ascertainable and hence calculable for purposes of the award of damages, whilst a court can make an award for loss of earning capacity where the loss is not ascertainable.

The Claimant pleaded both loss of capacity to earn and loss of earnings. The Claimant did not show in his evidence the actual loss occasioned by him arising out of the accident. There is certainly no basis on which the Court can award damages for loss of earnings. I therefore cannot award any damages under that head. On the loss of earning capacities, the Claimant said that he no longer has capacity to farm, brick lay nor do the general work that he was doing.

In reply, the Defendant submitted that the Claimant is not wholly incapacitated as he can work that involves the use of other body parts than the injured leg. He cannot completely fail to farm. It was submitted that with his qualification, he can still find and do manual work to earn a living. The Defendant submitted that the Claimant was fairly young, healthy and strong. The Defendant sought of warned the Court to avoid giving a retirement package but to compensate for the injury suffered.

I feel compelled to heed the mildly put warning. The Defendant's capacity to earn has been diminished, but not extinguished. It is my opinion that he has ability to do most of the chores, and the trade he was engaged in. It is only but diminished.

It is on that premise that I award the Claimant a global sum of **K850, 000.00** as damages for loss of earning capacity.

The Claimant pleaded special damages. There was no evidence proffered on this head in the assessment hearing. I will therefore not make any award on this head.

Conclusion

To conclude, the Claimant is hereby awarded a total of **K8, 350,000.00** as damages for the heads as pleaded. The Claimant is also awarded costs of the assessment hearing that will be assessed by the Registrar if not agreeable between the parties.

Made this 19th day of March, 2020.



Austin Jesse Banda

ASSISTANT REGISTRAR