

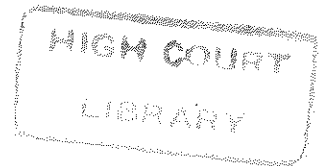


REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CASE NO. 682 OF 2020



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BETWEEN

LOVEMORE CHILONGO.....CLAIMANT

AND

PLASTICO INDUSTRIES LIMITED.....DEFENDANT

Coram: WYSON CHAMDIMBA NKHATA (AR)

Mr. Edward- of Counsel for the Claimant

Ms. Chida- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

This is the court's order on assessment of damages pursuant to a judgment entered in favour of the claimant on the 14th of August 2020 by Honourable Justice N'riva. Through a writ of summons issued by the court on the 5th of March 2019, the claimant commenced these proceedings claiming damages for pain and suffering, loss of amenities of life, disfigurement, loss of earning capacity, special damages and costs of the action. Apparently, the action emanates from injuries that the claimant suffered under the employment of the defendant. The facts as discerned from the record indicate that on or about 14th August, 2012 the claimant was manually operating a machine at the defendants' workplace and in the process his index finger got trapped by the machine consequent upon which he sustained serious injuries.

The matter came for assessment of damages before this court on the 8th of December 2020. The defendants did not avail themselves for the hearing albeit having been served. There being no excuse from the Lovemore Chilongo v Plastico Industries Company Civil Cause No. 682 of 2020

defendants, the court proceeded to hear the claimants on assessment of damages. The claimant was a sole witness for his case. He adopted his witness statement in which he averred that he was employed by the Defendant around January, 2012 as a Machine Operator. On or about 14th August, 2012 he was manually operating machine No. 11 at the Defendants' workplace in the course whereof his index finger got trapped by the machine consequent upon which he sustained serious injuries. Immediately after the accident he was given First Aid treatment and thereafter rushed to Queen Elizabeth Central Hospital. He was admitted at the hospital on 14th August, 2012 and got discharged on 16th August, 2012. As a result of the accident herein, he sustained a traumatic amputation of the 2nd finger/index finger, fractures of the 3rd and 4th metacarpals, deformed right hand and his permanent incapacity was pegged at 80%. He exhibited copies of the Medical Report and Orthopaedic Discharge/Audit form issued by Queen Elizabeth Central Hospital marked "LC 1" and "LC 2" respectively.

It was his testimony further that he continued receiving treatment as an outpatient for about five months and was put on Plaster of Paris during the entire five months period. During this period, he was feeling a lot of pain on the affected parts. The hand was frequently getting swollen especially when the weather was hot. He was not able to work at his work place due to the said injuries. Consequently, immediately after being discharged the Defendants granted to him sick leave. He received full salaries for three months. After three months since he still could not work as a machine operator the Defendants terminated his employment. At the time his employment was terminated he was receiving a salary of MK12,800.00 per month. Since then he has not been able to secure another employment as he can no longer work as a machine operator. At present he cannot handle a hoe for cultivation using his right hand. He is not even able to properly handle a lot of things using the right hand like pens. By reason of the amputation of the finger herein he has been permanently deprived of the use of the finger that was amputated.

Such was the evidence adduced for the assessment of damages. Counsel for the claimant adopted his Skeleton Arguments as part of submissions in this matter. I must express my gratitude to Counsel for the submissions as they went a long way in informing this court in arriving at the decision herein. Suffice to say, the issue for determination is the quantum of damages that could reasonably compensate the claimant for the injuries and losses suffered.

The law generally provides 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.

However, it ought to be borne in mind that it is not possible to quantify damages for pain and suffering, loss of amenities and deformity as claimed in this matter with mathematical precision. As a result, courts use decided cases of comparable nature to arrive at awards. That ensures some degree of consistency and uniformity in cases of a broadly similar nature: See **Wright -vs- British Railways Board [1983] 2 A.C. 773**, and **Kalinda -vs- Attorney General [1992] 15 M.L.R. 170 at p.172**. As such this court will have recourse to comparable cases to arrive at the appropriate quantum of damages for the plaintiff.

In this case, some of the cases cited by Counsel representing the claimant in his Skeleton Arguments were as follows:

Ben Nyozeni -v- Easy Pack Limited; Personal Injury Cause No. 607 of 2019, in which the Claimant had an amputation of his left distal middle finger. The court on 28th October, 2020 awarded him the sum of K4,000,000.00 as damages for pain and suffering, loss of amenities of life and disfigurement.

Steven Mwale -v- Prime Insurance Company Limited; Personal Injury Cause No. 323 of 2013, in which the Claimant had a fracture of the index finger, deformed and stiffness of the index finger (2nd metacarpal), a cut wound on the index finger, permanent incapacity assessed at 10%. The Court on 27th October, 2020 awarded the Claimant the sum of MK3,500,000.00 as damages for pain and suffering and disfigurement and MK800,000.00 as damages for loss of amenities of life. In total the Court awarded the sum of MK4,300,000.00 as damages.

It is Counsel for the claimant's submission that with regards to the amputation injury alone on the authority of **Ben Nyozeni** the sum of MK4,000,000.00 is reasonable as damages for pain and suffering, loss of amenities of life and disfigurement. He further submits that with respect to the fractures of the 3rd and 4th metacarpals on the authority of **Steven Mwale** the sum of MK7,000,000.00 would be reasonable. Counsel is of the view that since the injuries the Claimant sustained herein constitute a combination of the injuries the Claimants suffered in the cases of **Ben Nyozeni** and **Steven Mwale**. It is his submission that the sum of MK11,000,000.00 would be reasonable as damages for pain and suffering, loss of amenities of life and disfigurement.

The evidence herein shows that as a result of the accident herein the Claimant sustained a traumatic amputation of the 2nd finger/index finger, fractures of the 3rd and 4th metacarpals, deformed right hand and permanent incapacity of 80%. He was admitted for three days to wit 14th August, 2012 to 16th August,

2012. After being discharged from hospital he continued receiving treatment as an outpatient for about five months. He was put on Plaster of Paris for five months during which period he felt a lot of pain on the affected parts. During this period his hand was frequently getting swollen especially when the weather was hot. At present he cannot handle a hoe for cultivation using his right hand and is unable to properly handle a lot of things using the right hand like pens. He is permanently deprived of the use of the finger that was amputated.

Turning to the cited cases, although they have been of assistance, it is settled law that each case must be adjudicated upon its own merits and no one case is structurally the same as another. It must be borne in mind that previous awards offer only guidance in the assessment of damages. **Brumage v SA Eagle Insurance Co Ltd (C) QOD, Vol IV, E2-33 at E2-50**. In my view, the contention that the injuries the Claimant sustained herein constitute a combination of the injuries the Claimants suffered in the cases of **Ben Nyozeni** and **Steven Mwale** hence the court should make awards that were made in both cases is an alien sense of legality that defies the principles obtaining in assessment of damages. In my considered opinion, the claimant suffered injury manifested in various forms such as amputation and fractures. The totality of which caused the claimant severe pains and denied him use of his hand as stated above. There is therefore no reason at all to treat the injuries separately and make awards separately.

Therefore, having regard to the severity of the claimant's pain and suffering, loss of amenities and disfigurement as described above, I am of the view that an award of K4,000, 000.00 in respect of pain and suffering, K2,000,000.00 in respect of loss of amenities and K3,000,000.00 in respect of disfigurement would be fair and just.

On loss of earning capacity, 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)**. Justice Mwaungulu, as he was a judge of the High Court then, in the case **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.

In this case, the evidence indicates that after the accident herein the Claimant was unable to work. Apparently, he exhausted the three months sick leave that he was granted by the defendant but still could not work. Consequently, the defendants terminated his employment. It is thus clear that the Claimant lost

his employment due to the injuries herein. The evidence further shows that the Claimant has not been able to secure another employment as he can no longer work as a machine operator. I believe it is only proper that the court should indeed make an award on loss of earning capacity.

Firstly, on the issue of his monthly income, it is stated that at the time of the termination of his employment the Claimant was earning a monthly salary of K12,800.00. However, the Claimant did not adduce evidence to support this assertion. It is Counsel for the claimant's submission that in the circumstances the Court should just use the minimum wage currently applicable which is K35,000.00 as a multiplicand since it reflects the acceptable value of minimum earnings for an employee at present. He is of the view that using the minimum wage applicable in 2012 would result in a monthly salary not commensurate with the current prevailing economic conditions. I agree with the reasoning and in any event if the Claimant was working now his income could have increased to an amount not less than the minimum wage herein.

Further to that, it appears that the claimant was then 32 years old and Counsel for the claimant suggests 12 as the multiplier. I see no reason to rule otherwise. Therefore, taking into consideration other vicissitudes of life, the claimant's loss of earnings translate to:

$$K25,010.00 \times 12 \times 12 \times 35/100 = K1,260,504.00$$

Further to that, the claimant also claims special damages being K3,000.00 for the cost of the Police Report. These being special damages, they must be specifically pleaded and proved as required by the law – **Govati v Manica Freight Services (Mal) Limited [1993] 16(2) MLR 521 (HC)**. A claimant who claims special damages must therefore adduce evidence or facts which give satisfactory proof of the actual loss he or she alleges to have incurred. This being a Police Report, it carries with it a GR number which is proof enough that it was paid for. I award the claimant the K3,000.00 claimed under this head.

In summary, the claimant is awarded damages in the following amounts:

Damages for pain and suffering	K4,000,000.00
Loss of amenities	K2,000,000.00
Disfigurement	K2,000,000.00
Special damages	K3,000.00
Loss of earnings	K1,260,504.00

In total, the claimant is awarded K9,263,504.00 under all heads claimed and proved.

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DELIVERED IN CHAMBERS THIS 4th DAY OF JANUARY 2021



WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR