



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 510 OF 2020

BETWEEN:

HEMSON LIPENGA.....CLAIMANT

AND

QUALITY PRODUCTS LIMITED.....DEFENDANT

CORAM: WYSON CHAMDIMBA NKHATA (AR)

Mr. Dziwani- of Counsel for the Claimant

Mr. Lunguzi-of Counsel for the Defendant

Mr. Amos- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

INTRODUCTION

The claimant suffered injury while under the employment of the defendant. The statement of case indicates that the defendant was at all material time a company registered in the Republic of Malawi manufacturing soya pieces and maize flour. The claimant was working as a machine operator. On or about 10th April, 2019, he was instructed to operate a maize flour making machine. The claimant's left hand got injured when one of the grain breaker augers suddenly and violently moved down. Consequently, he suffered a crushed and traumatic amputation of 4th proximal phalangeal, bruises and laceration on the hand. He commenced this action against the Defendant claiming damages for pain and suffering, loss of amenities of life, damages for disfigurement, loss of earning capacity and costs of the action. The issue of liability was settled in favour of the claimant through a default judgment on 7th December, 2020. The matter was referred to this court for assessment of damages which I must now consider.

THE EVIDENCE

Through his witness statement that he adopted in court, the Claimant testified in part that whilst scooping flour with his left hand, one of the grain breaker augers suddenly and violently moved down and crushed his hand with consequences that he sustained a crushed and traumatic amputation of 4th proximal phalangeal, bruised and lacerated left hand, severe pain immediately after the accident, whilst awaiting treatment, during treatment and even after treatment hence he will always rely on painkillers. He was treated at Kamuzu Central Hospital where k-wires were inserted on his hand and it remained so fixed for a period of 6 weeks, x-ray scan was conducted. To ease the pain he was experiencing, he was given pethidine and Panadol during the period between 10th April, 2019 and 20th May, 2020. On 10th May, 2019, his left finger was amputated on the 4th proximal phalangeal joint and later he was referred for physiotherapy. He was given pain killers. He tendered a Health Passport and a Medical Report marked “HL1” and “HL2” respectively.

He further avers that consequent to the accident he suffered pain such that it had to be managed using pethidine which is a very strong pain killer. He still experiences pain and relies on painkillers that he buys from pharmacies and grocers. He had his finger amputated and he is now deformed and left with a sorry and terrible look and he can no longer do things he used to do like lifting heavy objects and doing manual work. He had to leave his job as a machine operator which was well paying than that of a minibus conductor which he found as an alternative. He added that his earning capacity has been greatly reduced and cannot compete favorably in the labour market. He stated that as a machine operator he used to earn K60,000.00 a month whilst as a mini-bus conductor he earns K15,000.00 a month. He stated that the low wage is a result of being engaged by drivers only when they conductors are absent. He further stated that the defendant never gave him a payslip as evidence of receipt of his wages.

In cross-examination, the claimant confirmed that he was familiar with the contents of his witness statement and the exhibits tendered in evidence and stood by the truth of their contents. He also confirmed that the accident occurred on the 9th May 2019 and was shown exhibit “HL” with specific reference to entries on 3rd, 4th, 7th, 8th and 9th pages of the health passport where the entries show hospital visits, in the month of April 2019, for the treatment of the said accident injuries, a month before the accident occurred. The Claimant was asked if he still insisted on the truth of the entries, and he responded that there must be errors because the accident occurred in May 2019. He was also shown exhibit “HL2” on page 3, item number 6 which also shows that treatment for the injury was from 10.04.2019 to 20.05.2020 and the Claimant, when asked, could not explain the anomaly. The claimant was asked to explain what his work entailed and he testified that it essentially involved the packing of 900g packs of puffs and that the loading of the heavy material for production of the puffs was done by others. The claimant was also asked what

work he was assigned to after being taken off the duty of operating the machine after the accident, and he responded that he was assigned to various duties including sweeping the surroundings and loading bags of maize which he did “reluctantly”. Further asked why he states that he is unable to do the job he was doing before because he cannot lift heavy objects anymore when he admitted that his job only involved packages of 900g of puffs and that the loading was not done by him. The Claimant was also asked to confirm if he was treated at Kamuzu Central Hospital and if he was ever treated at Thyolo District Hospital, and he responded that he was treated at Kamuzu Central Hospital but never at Thyolo District Hospital. The claimant confirmed never tendering any evidence of his pay as a machine operator or from his work as a conductor.

In re-examination, the claimant was shown exhibit “HL1” on 1st page of the health passport which showed an entry that treatment was done on the 9th May 2019.

Such was the evidence on assessment of damages. I would like to thank both Counsel for the guidance as evidenced by the well-researched submissions filed in support of the assessment of damages herein in which several authorities have been cited. This court has given the submissions and the authorities counsels cited the most anxious consideration.

THE LAW AND APPLICABLE LEGAL PRINCIPLES

On the law and principles governing assessment of damages, it is trite that the purpose of awarding damages is to compensate the injured party as nearly as possible as money can do. That is to say, to place the claimant in a position he would be had he not suffered the damage or loss. This is what is termed the principle of *restitutio intergrum*. It is not possible to quantify damages with exactitude. However, courts use comparable cases as a guide in coming up with a reasonable quantum of damages. See the case of **Kalinda –vs- Attorney General (1992) 15 MLR 170 at p 172**. The Court will also consider factors like passage of time when the award was made, as well as the value of the kwacha at the time of making the award.

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) and **City of Blantyre vs. Sagawa: [1993] 16(1) MLR 67 (MSCA)**. In **Sakonda vs. S.R. Nicholas: Civil Appeal Cause No. 67 of 2013**, it was highlighted that pain and suffering is attributable to the claimant's injury or to any necessary surgical operations and mental anguish.

The fundamental factor in assessing damages for pain and suffering was aptly put by the Supreme Court of Appeal in **Chidule vs. Medi**: Malawi Supreme Court of Appeal, Civil Appeal No. 12 of 1993, to say:

“In assessing damages for pain and suffering, the court must consider the pain which the particular plaintiff has suffered because the circumstances of the particular plaintiff are bound to have a decisive effect in the assessment of damages”.

The implication of the above statement is that, in principle and practice, each case must be dealt with according to its peculiar circumstances.

Loss of amenities of Life

Loss of amenities is attributable to deprivation of the claimant's capacity to engage in some sport or past-time which he/ she formerly enjoyed. Basing on the case of **Kanyoni vs. Attorney General**: [1990] 13 MLR 169. It means that he is incapable of performing some activities he used to do. Damages for loss of amenities of life are therefore 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. **Poh Choo vs. Camden and Islington Area Health Authority**: [1979] 2 All ER 91.

Disfigurement

Damages under the head of disfigurement are paid for the change in physical form of a person injured either as a result of the impact of the injury or its treatment, such as scar coming in as a result of surgical operation necessitated by the injury. It is a change in appearance but it is capable of limiting a person from doing certain things- see- **Francis Chikoti vs- United General Insurance Company Limited** Personal Injury Cause No. 730 of 2016.

COMPARABLE CASES

Basically, it is not possible to quantify such damages 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 claimant. In this case, the claimant claims to have sustained a crushed and traumatic amputation of 4th proximal phalangeal, bruised and lacerated left hand. Counsel representing the claimant calls upon the court to consider the following cases for comparison:

- **Alex Kameko vs Staplex Industries** Personal Injury Case No. 305 of 2014 wherein the claimant's index and middle finger were amputated and the fourth finger was immobile. They were awarded

K3,000,000.00 for pain, suffering and loss of amenities of life. The ruling was delivered in May 2017

- **Alfonso Vincent v Tem Limited and General Alliance Insurance Co. Ltd** Personal Injury Cause No. 804 of 2015 in which the claimant who lost a finger was awarded the sum of K4,000,000.00 for pain and suffering, loss of amenities of life and disfigurement. The case was decided on 28th February, 2019.
- **Martin Chikwawe vs Chikopa Lackson and Jimmy Gunya and Reunion Insurance Company Limited** P.I Cause No. 220 of 2017 in which the claimant was awarded K4,000,000.00 for damages for personal injuries. The plaintiff had three fingers amputated.

In view of the foregoing, Counsel representing the Claimant prays for an award of M3,500,000.00 for damages for pain and suffering, K2,000,000.00 for loss of amenities of life and K2,000,000.00 for disfigurement.

On the other hand, Counsel for the defendants called upon the court to consider the following cases for comparison with the case herein:

- **Alex Kameko vs Staplex Industries** Personal Injury Case No. 305 of 2014 wherein the claimant's index and middle finger were amputated and the fourth finger was immobile. They were awarded K3,000,000.00 for pain, suffering and loss of amenities of life. The ruling was delivered in the Claimant in May 2017.
- **George Langston vs Eastern Produce Malawi Ltd** Civil Cause Number 4 of 2012, wherein the claimant was awarded K900,000.00 for pain, suffering, and loss of amenities of life where he lost distal phalanx of the left finger. The ruling was delivered in August 2012.

In view of the foregoing, Counsel representing the defendant prays that the claimant be awarded MK1,500,000.00 for damages for pain and suffering, loss of amenities of life and for disfigurement.

DETERMINATION

The injuries sustained by the claimant are not in dispute. The evidence indicates he sustained a crushed and traumatic amputation of 4th proximal phalangeal, bruised and lacerated left hand. A visual assessment in court affirmed the injuries. In my considered opinion, the injuries exposed the claimant to excruciating pain during the occurrence of the accident as well as during recuperation. The evidence suggests that he lost the finger through a crushing and traumatic impact which definitely must have been painful. Further

to that, there is evidence tendered which indicates that he continues to suffer pain and may need future medical attention. Apparently, he has to contend with painkillers that he has to buy from pharmacies occasionally.

On the part of deformity, the claimant has lost a finger. I noticed that Counsel representing the defendants in his submissions points out that the claimant's amputation involved part of the 4th finger and not the entire finger. I could not help but ask myself of what use would the stump remaining be to the claimant. Essentially, there is no doubt that the amputation has altered the physical integrity of the claimant. This is something he will live with for the rest of his life. This court is aware that the general societal attitude towards disfigurement often causes psychological distress to disfigured individuals. Justice Potani (as he was then) in the case of **James Chaika v NICO General Insurance Company Ltd** Civil Cause No. 909 said disfigurement is not a matter to be taken lightly and casually as it is something that one has to permanently live with.

Lastly, under the head of loss of amenities, the defendants contend that the claimant did not state in his witness statement which amenities of life he no longer enjoys. However, under paragraph 14.3 of his witness statement, the claimant lamented that he can no longer do things he used to do like lift heavy objects and manual work. Observably, this was not controverted. Perhaps, the scope of loss of amenities has been narrowly construed. In the case of **Kanyoni v Attorney General** [1990] 13 MLR 169 (HC) it is stated that loss of amenities of life has to do and has to include the loss of all the things the claimant used to be able to do, see, and experience. As it stands it shall be without basis to dismiss the claim under this head.

Turning to cases cited for comparison, I take note that they involve at least an amputation of a finger. Observably, the awards range from K900,000.00 and K4,000,000.00 and both cases were decided from the year 2012 to 2019. In the light of the cited cases, I believe the K7,500,000.00 submitted by the claimant is on the higher and most definitely the K1,500,000.00 submitted by the defendant is on the lower side. I award the claimant K4,500,000.00 under all heads claimed and proved.

Loss of earning capacity

The claimant is also claiming damages for loss of earning capacity. The same 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 *Nangwiya v Makwasa Tea Estates* [1993] 16(1) MLR 373 (HC) stated that:

When deciding on whether the plaintiff is entitled to loss of earning capacity where the plaintiff continues in the same employment and there is no reduction in the earnings, the court must consider whether there is a substantial, as opposed to a speculative, risk that the plaintiff would lose his job if he was thrown into the labour market. It must always be remembered that when things go tough, employers want to safeguard their interest. When that happens, they do not lay off employees who are able-bodied. They lay off those who in some way are infirm or deficient.

In this case, the claimant testifies that his earning capacity has been greatly reduced and he cannot compete favourably in the labour market. The facts of this matter indicate that the claimant could not proceed in his duty as a machine operator but he could do other tasks as assigned like sweeping albeit reluctantly. He later resigned and started working as a minibus conductor. On the strength of the case of **Tabord vs David Whitehead and Sons Malawi Ltd** (1995) 1 MLR 297, the defendants argue that where the claimant is fit to work and is still employable, then there could be no loss of earning capacity. Much as this is the position of the law, the defendants seem to ignore another important aspect of this head which is the weakening of the claimant's competitive position in the open labour market: that is to say, should the claimant lose his current employment, what are his chances of obtaining comparable employment in the open labour market? The evidence here is plain in that, the claimant could not perform his initial job with a missing finger. I am fortified in this position because it is in evidence that they later assigned him sweeping duties. Upon resigning, in an effort to compete in the domestic labour market with peers who are physically fully able, the claimant had to settle for a less paying job that is being a minibus conductor. This represents a serious weakening of his competitive position in the market into which he can go to obtain employment. I believe that loss of earning capacity is payable in this case.

For purpose of estimating loss brought about by the claimant's reduced earning capacity, counsel representing the claimant proposes that the multiplicand of K45,000.00 be adopted. He explains that the same has been arrived at by deducting what he is earning at the moment from what he used to earn before the accident being K60,000.00 despite that there will be increments made overtime. He further proposes that a multiplier of 20 years be adopted considering that the claimant is only 26 years and all things being equal he has over 40 years to go before reaching age of retirement. He is of the view that the loss of earning capacity be calculated thus: 20 years x 12 months x K45,000.00 = MK10,800,000.00.

In my opinion, the claimant has not been rendered totally unemployable. He has started engaging in other activities like being a minibus conductor. He is earning K15,000.00 for now because he is engaged when other conductors have not turned up. The bottom line is that there are chances for him earning even more and that he will eventually find an opening which is steady. Simply deducting K15,000.00 from what he was supposedly earning does not cut it. In fact, his previous earnings have not been proved albeit that the defendant did not provide the pay slips. I am of the view that being represented, this was information that could have been easily obtained. As it is, it is merely speculation that he was earning K60,000.00. Clearly, in the light of the circumstances of this case, the nature of the award is more of one that is based on previous awards which it is normally a lump sum. Faced with a similar situation, the court in **Mhango v Nico General Insurance Co. Ltd** (Personal Injury Cause No. 703 of 2016) awarded the claimant K1,000,000.00 for loss of earning capacity. The award was made in January 2017. Considering the passage of time, in this case, I award the claimant K2,500,000.00 for loss of earning capacity.

CONCLUSION

It is upon a thorough consideration of facts and circumstances of this case and upon an exhaustive consideration of the submissions by Counsel in the light of the relevant and applicable law regarding damages that this court awards the claimant as follows:

General damages - K4,500,000.00

Loss of earning capacity - K2,500,000.00

In total, the claimant is awarded **K7,000,000.00**. The claimant is further awarded costs for the assessment of damages proceedings to be taxed if not agreed by the parties.

DELIVERED IN CHAMBERS THIS 22ND DAY OF NOVEMBER 2021

WYSON CHAMDIMBA NKHATA