

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 482 OF 2016

BETWEEN

ARTHUR NAPHAZI 1ST CLAIMANT

HENDERSON MAJAWA 2ND CLAIMANT

THOKOZANI PINTO 3RD CLAIMANT

AND

ULUMBA TRUST DEFENDANT

CORAM : HER HONOUR MRS. E. BODOLE, ASSISTANT REGISTRAR

Mickeus, of Counsel for the Claimant

of Counsel for the Defendant

Mrs. Chilemba/Mrs. Mataka, Court Clerk

ORDER ON ASSESSMENT OF DAMAGES

Introduction

The Claimants brought proceedings against the Defendant claiming replacement value of damaged motor vehicles, damages for loss of use, and costs of the action. Judgment on liability was entered for the Claimants on 18th December, 2020. The matter has now come for assessment of damages.

The Evidence

The 1st and 3rd Claimants filed a joint witness statement made by the 1st Claimant by which he stated that he made the statement on his own behalf and on behalf of the 3rd Claimant.

The 1st Claimant stated that he purchased a motor vehicle registration number IT 0418 Toyota Passo salon from B Forward Company Limited, Japan while the 3rd Claimant purchased his motor vehicle registration BQ 3494 Toyota Carina as a second-hand motor vehicle. These motor vehicles were involved in an accident on the 2nd day of July, 2016 near Manja Pick and Buy Superette. His and the 3rd Claimant's motor vehicles were hit by motor vehicle registration number KU 7887/SA 2924 Freight Liner Truck which at the material time was being driven by the 1st Defendant.

As a result of the accident, the motor vehicles were extensively damaged beyond economic repair. According to the quotation from Soche Garage Limited and Quick Thinkers Mechanics and General Dealers, the cost of repairs for the 1st Claimant's motor vehicle was K3,951,200.00 while that of the 3rd Claimant was K2,231,500.00. The cost of replacing the 1st Claimant's motor vehicle is K2,761,162.97 according to the quotation sourced from Be Forward Company Limited dated 23rd July, 2019. This includes CIF to Dar Salaam which is K1,337,662.97 using the current exchange rate of the dollar from National Bank of Malawi plc. The cost of replacing the 3rd Claimant's motor vehicle is K2,100,000.00.

The 1st Claimant went on to state that as a result of the accident, they have lost use of the motor vehicles. They have incurred costs in towing the motor vehicles from the place of the accident to their houses. Their mobility was crippled due to the absence of the motor vehicles. They had difficulties to travel to work and pick their children from school as the motor vehicles were intended to provide means of transport for them. They continue to suffer expenses in procuring alternative means of transport when going and coming from work, and they have been forced to be hiring alternative means of transport. Sometimes literally walking due to lack of transport. The 1st Claimant tendered in evidence rates of hiring different types of motor vehicles from SS Rent A Car.

By a Consent Order dated 9th May, 2017, the Claimants received a sum of K333,3333.33 from United General Insurance Company Limited towards their claim. The 3rd Claimant sold his motor vehicle for an undisclosed sum as evidenced by the letter from the Claimants' lawyers dated 30th July, 2019.

The 1st and 3rd Claimants are claiming the sum of K2,761,162.97 and K2,100,000.00 respectively as cost of replacing the damaged motor vehicles and damages for loss of use of the motor vehicles, and costs of this action.

Issue for Determination

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

Applicable Law

In assessing damages, 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 as if he had not suffered the damage – *George Kankhuni v Shire Bus Lines Limited* Civil Cause No. 1905 of 2002.

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. Where a party has not proved special damages reasonable compensation in the circumstances can be awarded. - *Renzo Benetollo v Attorney General and National Insurance Co. Ltd* Civil Cause No. 279 of 1993.

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.

Replacement Value of Motor Vehicle

Where goods have been damaged beyond economic repair, the measure of damages is the replacement market value of the damaged goods – *Chimbereko v Chigwe* Civil Cause No. 587 of 2003. Where an item is a write-off, the remedy is the market value of the item at the date of its destruction together with consequential loss which is not too remote – *Milion v Misolo and Meru* Civil Cause no. 323 of 2015. In *Mwangupiri v Manica (Malawi) Limited and Mphaka* Civil Cause No. 103 of 2004 the Court stated that only in the absence of the market price can the loss of replacing the goods be used as the replacement value. In *Test White Mamba v Daniel Kennedy Ndawala and Prime Insurance Company Limited* the Claimant tendered a quotation through which he pleaded the cost of replacing the motor vehicle as K5,000,000.00 with a deduction of

K500,000.00. However, in his witness statement, the Claimant stated that at the time of the accident on 16th July, 2016, the value of his motor vehicle was K1,300,000.00. The Court considered the said sum of K1,300,000.00 as the market value of the motor vehicle. The Court then applied a 30% depreciation percent on the market value to arrive at the sum of K910,000.00 as the replacement value of the motor vehicle in its assessment of 3rd April, 2018.

From the discussion above, it is clear that damages for the replacement value of a motor vehicle are arrived at by considering the market value of the motor vehicle at the time of the accident, less depreciation of the motor vehicle up to the time of assessment in order to arrive at the market price the motor vehicle would have fetched if the owner were to sell it or value it at the time of assessment as a going concern.

Damages for Loss of Use

Where the motor vehicle is not for profit earning and there is no substitute motor vehicle hired or no stand-by motor vehicle kept available, damages for loss of use are generally to be calculated on the basis of interest upon the capital value of the damaged motor vehicle at the time of the accident and the capital value is ascertained by taking the original cost and deducting depreciation. Where no evidence has been presented to support such calculations, damages for loss of use will be speculative and must not be awarded – *Makuluni and others v Katunga and Others* Personal Injury Cause No. 741 of 2015. In *Moyo v Mkandawire and Reunion Insurance Company Limited* Civil Cause No. 188 of 2015 the Claimant was awarded the sum of K250,000.00 as damages for loss of use of his family and business motor vehicle which loss he did not support with evidence of hiring of an alternative mode of transport for the undisclosed duration the motor vehicle underwent repairs. The award was made on 22nd June, 2018. In *Chikuse v Malopa* Personal Injury Cause No. 2 of 2016 the Claimant was awarded a sum of K595,000.00 as damages for loss of use of his motor vehicle which was for personal use. The award was based on receipts he had produced on payment made for alternative mode of transport he had to use while his motor vehicle was undergoing repairs. The award was made on 27th February, 2018.

Hearsay Evidence

Facts conveyed by others are inadmissible – *Bisno Properties Ltd v BP Malawi Limited* Civil Cause No. 323 of 2003. A witness may only give evidence of personally known facts. In *Subramanian v Public Prosecutor* (1956) 1 W.L.R. 965 the Court held that a

statement made by a witness who is not called to testify may be hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement or may not be hearsay and admissible if it is to establish, not the truth of it, but the fact that it was made.

Analysis of Facts and Applicable Law

The 1st Claimant is claiming the replacement value of Toyota Passo registration number IT 0418. It is a well-known fact that Be Forward Company Limited Japan sells second hand motor vehicles. It is also a fact that this motor vehicle was a second-hand motor vehicle.

The 1st Claimant is relying on a quotation from Be Forward Japan dated 23rd July, 2019 which puts the value of the motor vehicle at US\$1,525.00 and translates to MK2,761,162.97. The sum of MK2,761,162.97 is the exact replacement of the motor vehicle. It is not the market value of the motor vehicle at the time of the accident. The market value of the motor vehicle would be arrived at by looking at the value of the motor vehicle at the time of the accident subject to depreciation or the value of the motor vehicle at the time it was bought subject to depreciation. That is the only value the 1st Claimant would be entitled to as replacement value.

The 1st Claimant did not produce any evidence as to how long the motor vehicle had been in Malawi other than the fact that it was unregistered. This court cannot make assumptions that it had just been imported. The motor vehicle was involved in an accident at Manja which shows that it had started depreciating as it was being used.

There being no evidence as to when the 1st Claimant bought the motor vehicle, the cost of buying and its value at the time of the accident, this Court is of the view that the evidence adduced is insufficient for assessment of damages. This Court is, therefore, unable to assess the damages.

The 1st Claimant received a sum of K333,333.33 from United General Insurance Company Limited towards his claim. In the circumstances, that sum suffices.

As to the 3rd Claimant, it is worth noting that he did not give evidence before this Court. The 1st Claimant gave evidence on his behalf. It appears to this Court that the purpose of the evidence of the 1st Claimant is to establish the truth of what happened as regards the 3rd Claimant. It is, therefore, hearsay evidence and facts conveyed by others are inadmissible – *Bisno Properties Ltd v BP Malawi* (supra).

Even if it can be argued that this evidence is admissible, there is no evidence as to how much the 3rd Claimant bought his motor vehicle. There is also no evidence as to how much a similar motor vehicle in a similar condition would have cost in July, 2016. To add on unto that, he sold his motor vehicle as evidenced by the letter from the Claimants' lawyers dated 30th July, 2019. He also received a sum of K333,3333.33 from United General Insurance Company Limited towards his claim.

The 3rd Claimant having sold his motor vehicle and there being no proof as to how much he sold it for and having been compensated, this Court is unable to make any assessment as doing so would result in overcompensating him.

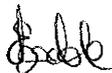
Loss of Use

The Claimants claimed that they had been hiring alternative means of transport when going to and from work and picking their children from school. They would sometimes they would walk. They put in evidence cost of hiring of different types of motor vehicles from SS Rent A Car. There is no evidence as to which type of motor vehicle(s) they were hiring. There is also no evidence as to the period(s) they hired the motor vehicles. This Court is mindful of the fact that they lost the use of their motor vehicles. This Court adopts the decision in the case of *Moyo v Mkandawire and Reunion Insurance Company Limited* (supra) and awards each Claimant a sum of K600,000.00 as damages for loss of use of motor vehicles.

Conclusion

The Court has been unable to make an award on damages for replacement of motor vehicles due to insufficient evidence, and assessment proceedings on that aspect are dismissed. Each Claimant is awarded a sum of K600,000.00 as damages for loss of use of motor vehicles. They are also awarded costs of these proceedings. Each party is at liberty to appeal to the Supreme Court of Appeal within the requisite time frames.

Made in Court this 29th November, 2021 at Blantyre.



EDNA BODOLE (MRS.)

ASSISTANT REGISTRAR