



THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO.165 OF 2020

Between

Emmanuel Chisesa..... Claimant

and

Attorney General (Ministry of Education)..... Defendant

<p>CORAM: <i>Madalitso Khoswe Chimwaza,</i> <i>Phombeya</i> <i>Zikagwa /Chuma</i> <i>C. Zude</i></p>	<p><i>Assistant Registrar</i> <i>Counsel for the Claimant</i> <i>Counsel for Defendant</i> <i>Court Clerk</i></p>
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ORDER ON ASSESSMENT OF DAMAGES

Introduction

Matter was set down to assess damages following a default judgment dated 5th June, 2020.

Brief Facts:

1. The claimant is a victim of a road traffic accident. On or about the 26th June 2017 at about 14:30 hours the defendants servant and/or agent was driving motor vehicle registration number BP 9993 Nissan Hard Body double Cabin from the direction of Dedza heading towards Ntcheu along the M1 road. The defendant's vehicle belonging to Ministry of Education was being driven by their servant/agent Mrs Annie Mandala, Upon arrival at Masasa village the defendant's servant and /or agent was overtaking another motor vehicle at a curve and in the process, she collided with the claimants motor vehicle registration No. BP 1570. The accident was wholly caused by the negligence of the defendant's servant/agent.
2. As a result of the accident the claimant sustained fractured rib, forehead and shoulder cut, soft tissue injury right whiplash injury. He was bed ridden for two weeks and his vehicle was extensively damaged beyond repair. The motor

vehicle was assessed at the total value of K7, 618,037.32 by Messrs 'Co-operative General Insurance Limited', the defendant's insurers.

3. The defendant's insurers only paid K1, 500,000.00 and advised the claimant to claim from the Malawi Government who were the owners of the vehicle. During this period the claimant was forced to hire a motor vehicle from 30th June 2017 to 10th October at a total cost of K7, 825,000.00. Therefore the claimant has suffered the following loss which he is seeking damages for: balance for loss of the motor vehicle K6,118,037.32; Hiring cost from 30th June 2017 to 10th October, 2017 at K7,825,000; loss of use of the motor vehicle from 10th October to date of replacement of the motor vehicle or payment of the value of the vehicle, damages for pain and suffering, loss of amenities of life, cost of medical expenses, cost of police report and costs of the action.

Issue for determination

How much should be paid as damages / compensation.

Reasoned Analysis of the Law and Evidence

4. The cardinal principle in awarding damages is restitution intergrum which means in so far as money can do it, the law will endeavor to place the injured person in the same position as he was before the injury was sustained. Halsbury's Laws of England 3rd Ed. Vol.11 p. 233 – 400
5. The principle was further enunciated in the case of *Livingstone vs Raywards Coal Company (1879-80)* L.R. APP, Lord Blackburn observed:
'Where any injury is to be compensated by damages, in setting a sum of money to be given for reparation you should as nearly as possible get the sum which will put the party who has been injured or who has suffered 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.'
6. The law further places an obligation on the injured party to take reasonable steps to mitigate the loss and the injured party cannot recover for the loss, which they would have avoided. See the case of *Mrs H. Carvalho vs Encor Products Limited*, Civil cause No. 1587 of 2010(unreported).
7. The purpose of compensation is to put the wronged party in a position in which he would have been if he were not wronged: see *Nsaliwa vs MACRA Matter No. IRC 24 of 2015 (PR)*. The objective of compensation is not to make the employee richer overnight or leave him or her poorer. At the same time the court should not aim at punishing the employer. What the court will strive at is to strike a balance which should leave both parties happy and feel that justice has been done.

8. The claimant is claiming damages for pain and suffering, loss of amenities of life, cost of medical expenses, cost of police report, balance for loss of the motor vehicle K6, 118,037.32; Hiring cost from 30th June 2017 to 10th October, 2017 at K7, 825,000; loss of use of the motor vehicle from 10th October to date of replacement of the motor vehicle or payment of the value of the vehicle, damages and costs of the action.

The Court will determine whether the claimant should recover all this loss.

Pain and Suffering and Loss of amenities of life

9. Pain is used to suggest physical experience of pain caused by and consequent upon the injury while suffering relates to the mental elements anxiety, fear, embarrassment and the like. On the other hand, loss of amenities of life embraces all that which reduces the plaintiff's enjoyment of life, his deprivation of amenity whether he is aware of it or not (See *City of Blantyre v Sagawa* [1993] 16 (1) MLR 67). In *Kanyoni v Attorney General* [1990] 13 MLR 169, 171 the court held that loss of amenities of life must include the loss of all the things the claimant used to be or to do, see, and experience-they need not be of leisurely nature at all.
10. Loss of amenities of life concerns 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. In the case of *Manley v Rugby Portland Cement and Company* [1950] No 286 (reported in Kemp and Kemp, "Quantum of Damages," Volume 1 2nd edition 1961 at p.2640) Birkett, LJ had this to say:
"There is a head of damages which is sometimes called loss of amenities; the man-made blind by accident will no longer be able to see familiar things he has seen all his life, the man has both legs removed will never again go upon his walking excursions, things of that kind-loss of amenities."
11. Although pain and suffering and loss of amenities for life are distinct however for purposes of quantum the court does consider them together. (see *Henry Manyowa v. Phiri and Prime Insurance Co. Ltd* Personal Injury Cause No. 139/2012; *Andrew Katola v. Prime Insurance Co Ltd* Civil Cause No. 2807/2009).
12. Counsel for the claimant in their submissions gave proposed awards on each head and cited some comparable awards to which the court is grateful. The court has further noted that in the submissions Counsel has included a claim for disfigurement. However going through the record there was no claim for disfigurement and no evidence has been given to substantiate the claim for disfigurement, therefore the court will not consider it when making the award.

13. On the comparable cases, the most relevant to the present case and which is recent with similar circumstances like that of the claimant will be referred to when arriving at the reasonable award.

In the case of *Kazembe and Yusufu Chionya vs NICO General Insurance Company*, Civil cause No. 605 of 2011 the 2nd plaintiff who suffered a fracture of the ribs of the left side and chest pains was awarded K2,500,000.00. the award was made in October, 2014.

In another case of *Evelyn Jamu vs Prime Insurance Ltd* Personal Injury cause No. 612 of 2011, the claimant who sustained a deep cut wound on the left leg, fracture of the ribs on the right side of the chest, soft tissue injury to the right shoulder was awarded a total sum of K6, 000,000.00 in a judgment delivered on 13th December, 2018.

The claimant in the present case sustained a fractured rib, forehead and shoulder cut, soft tissue injury, right whiplash injury. He was bed ridden for two weeks. Upon considering all relevant factors in this case and having regard to comparable awards in cases of similar nature it is the fortified view of the court that K4, 000,000.00 be awarded as damages for pain and suffering, loss of amenities of life and disfigurement suffered.

Claim for the balance of the Value of the Motor Vehicle

14. During the hearing on assessment of damages it appeared that parties were in agreement that the vehicle got damaged beyond repair and its assessed value was K7,618,037.32. The claimant conceded to have been paid K1, 500,000.00 from the insurance Company. The claimant is therefore claiming balance of the value for the vehicle at K6, 118,037.32. There being no dispute on the value of the vehicle being claimed, the court proceeds to award the balance of MK6, 118,037.00 as the replacement value of the vehicle. It is so ordered.

Damages for Loss of Use of the Motor Vehicle

15. It has not been disputed that the claimant has been denied the use of the vehicle from the time it was damaged in 2017 and the law recognizes such loss. In the case of *Pemba vs Stagecoach (MW) Ltd* [1993] 16(1) MLR 420 (HC) it was held that although the plaintiffs vehicle was not used to generate income, he was entitled to general damages for loss of use of the vehicle and the inconvenience suffered as a result.
16. Damages for loss of use of a motor vehicle were also awarded in the case of *Mariwu vs Sambani* and another [1993] 16(2) MLR 586 (HC) where it was held that loss of use may be assessed as the interest on the value of the chattel at 1% over the base rate from the date when the cause of action arose up to the time the chattel was replaced.

17. The court is alive to the fact that in such claims the claimant has an obligation to mitigate loss as he may not recover damages for loss of use for indefinite period. Mike Mlombwa t/a Countrywide Car Hire vs Oxfam, civil cause no. 2343 of 2003 (HC.PR. Unrep.)
18. According to the evidence of the claimants he stated that he hired an alternative vehicle for use as a means of transport from 30th June, 2017 to the 10th October, 2017 from Atlas Car hire at K50,000/day and the total cost was K7,825,000.00. Exhibit EC4 .
19. The claimant hired a vehicle from another firm Milan Car hire at K95,000/day from 10th October , 2017 to day of replacement of his vehicle and the total cost is K100, 290,000.00. Exhibit EC5.
20. Upon proper examination of the two exhibits it is disclosing that EC4 an invoice from Atlas Car Rentals with a total cost of K7,825,000.00 was calculated from 30th June to 31st October, 2017. This is inclusive of the dates which are also appearing on Exhibit EC5, invoices from Milan Car Rentals, with a total cost of K100,290,000.00 from 10th October, 2017. Clearly period from 10th - 31st October, was charged twice using two different rates from two different hiring firms. When cross examined during the assessment hearing the claimant admitted to have hired from another firm while the contract with the first firm was still running.
21. There is no reasonable explanation provided as to why the claimant changed hiring firms from Atlas to Milan. In any case if there was any cost that was reasonably incurred was the hiring from Atlas car hire considering that the claimant was expected to mitigate his losses. Instead the claimant moved from low cost Car hire to a higher priced car hire without giving any reasonable explanation for a change. This move and the attendant expense incurred of K100, 290,000.00 does not make economic sense, it is excessive when the value of the vehicle is considered and it smacks of abuse of opportunity. It is the finding of the court that the claimant did not mitigate his loss and it is trite law in matters of this nature that the claimant should at all cost mitigate the losses by not incurring further losses. Therefore the claim for K100,290,000.00 is not awarded. The court will take into account this fact of failing to mitigate loss when considering damages for loss of use. Therefore for hiring charges the claimant is awarded K7,825,000.00 as an expense reasonably incurred.
22. In this case the claimant is also claiming loss of use of the vehicle calculated above base rate on the value of the vehicle (K6, 118,037.32) for a period of 38 months. Claimant submitted the rate of 13.6 % from National Bank as at 30th October, 2020 plus time value of the money) which was raised by 6.4% to 20%. As already indicated the claimant is expected to mitigate losses and in this case

the claimant did not, therefore he will not recover full loss due to failure to mitigate loss.

23. Upon careful consideration of all factors surrounding this case and the law the court makes an award of general damages basing on the interest rate of 15% which is 1.4% above the base rate applicable at National Bank at 30th October, 2020 for calculating for loss of use of a vehicle for a period of two years. The Court therefore awards K1,835,411.00 as just and reasonable compensation for loss of use of the vehicle and it is so awarded.

SUMMARY OF AWARDS

For avoidance doubt the claimant is awarded as follows:

Pain and suffering, loss of amenities of life and K4,000,000.00

Value of the motor vehicle K6,118,037.00

Cost of hiring K7,825,000.00

Loss of use of the motor vehicle K1,835,411.00

Costs of this action to be assessed if parties do not agree.

Either party aggrieved by this order of assessment has the right to appeal.

Made this 14th day of December, 2021



Madalitso Khoswe Chimwaza

ASSISTANT REGISTRAR