



IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL DIVISION

CIVIL CAUSE NO. 635 OF 2019

BETWEEN

CHIMWEMWE KAZEMBE.....CLAIMANT

AND

HERMIS LOMORIWA.....1ST DEFENDANT

ATTORNEY GENERAL (MACHINGA POLICE STATION).....2ND DEFENDANT

Coram:

Brian Sambo, Assistant Registrar

Mr. P. Kambalame, of counsel for the Claimant

Mr. A. Mahonga, of counsel for the Defendant

Mr. G. Kumwenda, Official Interpreter/ Law Clerk

ORDER ON ASSESSMENT OF DAMAGES

BACKGROUND

On 28th October, 2019, the Claimant obtained a default judgment for the following;

- a. Damages for pain and suffering
- b. Damages for loss of amenities of life
- c. Damages for disfigurement
- d. Damages for loss of earning and earning capacity

Chimwemwe Kazembe vs Hermis Lomoriwa and Attorney General, Civil Cause No. 635 of 2019

- e. Special damages incurred on Medical Report and Police Report
- f. Costs of this action.

On 13th October, 2021 I received evidence on assessment *interparte*. I now come to give my own assessment of damages, but before I do so, let me first give a summary of the facts of this matter.

BRIEF FACTS

On 8th February, 2019 at about 11.30 hours, while the Claimant, his wife and another person sat under a tree at Umbwa Trading Centre, a police car, Foton Pickup registration number MP 2479, which was travelling from the direction of Nselema going towards Ntaja, hit the Claimant, his wife and the other person. The accident happened because of over-speeding, which caused the 1st Defendant to lose control of the vehicle, and it swerved to the extreme nearside of the road where it hit the three people.

EVIDENCE

The Claimant was the only witness in his case. Testifying as PW1 he told the court that, as a result of the accident, he sustained a deep cut wound on his right leg. He testified that as a result of the injury he was unable to stand for a long time, to walk a long distance and also to do some manual work. He said, before the accident, he used to sell dry fish at Mkando, Chonde and Limbuli Markets, and that because of the difficulties stated, he stopped doing his business. He said, he used to realise between MK280, 000.00 and MK300, 000.00 per month. He said the hospital had assessed his degree of incapacity at 9%. The witness further tendered a Medical Report and a Police Report for which he said he had spent MK6, 000.00.

During cross examination he told the court that the accident happened on 8th February, 2019. He said he was admitted in the hospital for a month. He told the court that he did not have evidence to show that he was hospitalized for a

Chimwemwe Kazembe vs Hermis Lomoriwa and Attorney General, Civil Cause No. 635 of 2019

month. He said that the hospital lost his medical report. He said his Health Passport showed only one day of treatment. He said the wound was big as he pierced by a metal rod. He agreed that he was now healed and that there was no disfigurement. He added that he was no longer going to the hospital for treatment. He said he was able to do what he used to before the accident.

ISSUE

The hearing was conducted in order to assess the appropriate level of damages payable by the Defendants under the heads specified above.

ANALYSIS AND DETERMINATION

I have gone through the evidence adduced by the Claimant, and also submissions made by counsel for the Claimant. Counsel for the defence was given 29 days to file his closing submissions for the assessment but he did not utilize the opportunity. I had time to look at other comparable case law relevant to the present assessment, as well.

When it comes to cases of this nature the requirement is that the victim should prove that he indeed incurred or suffered some damage and that the defendant was the cause of his injuries out of his negligence. Once that has been done, the duty remains with the court to assess the extent to which the victim should be compensated. This follows the cardinal principle of ***restitution in integrum*** which simply means to be compensated as far as money can do; the law will try to place the injured person in the same condition he was before the accident had happened. See **Black's Law Dictionary 9th Edition p1428**.

I appreciate the fact that unliquidated or general damages are difficult to assess. However, it has been held in **Raninger Simbeye vs. Chibowa & another Civil Cause No. 58 of 2012**, that the only possible way to circumvent to these difficulties is to seek guidance from decided cases of a comparable nature. And that in doing so, the court bears in mind the devaluation of the Malawi Kwacha that has obtained since the awards in those comparable cases were made.

Chimwemwe Kazembe vs Hermis Lomoriwa and Attorney General, Civil Cause No. 635 of 2019

Further, the courts also bear in mind the merits of each case to avoid occasioning injustice.

In order to avoid possible over-compensation, I will deal with the claims together starting with the claim for pain and suffering.

The definition of pain and suffering was given in the case of **Esnart Mpulula v Prime Insurance Ltd**, Personal Injury Cause number 108 of 2016, where the court stated that '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, embracement and sickness.

Whereas 'Loss of amenities of life' was described as loss of faculties of pleasures of life resulting from one's injuries. See **Esnart Mpulula vs Prime Insurance (Supra)**.

Coming to the issue of special damages, generally, special damages are specifically pleaded and strictly proven. See **General Farming Limited v Chombo** (1996) MLR 16. On this part I have appreciated the tendering of the Medical report and Police Abstract Report as evidence for this. The Claimant spent **MK15, 000.00** on the same, and I award him thus.

Regarding costs, it is a settled law that cost follow the event. The successful litigant is compensated for the troubles faced in commencing a case.

In conclusion, the Defendants shall pay the sum of **MK2, 6,000.00**. This whole amount has to be paid within 7 days from today.

In the instant case, with due respect, the injuries were not serious. The Claimant sustained a deep cut wound, of course and some bruises. I know deep cut wounds are synonymous with pain and agony but he was treated as an out-patient. The first impression that one makes when one is treated as an out-patient is that the injuries were not serious. His degree of incapacity was assessed at 9%, and this is not worrying. I had the opportunity to inspect the *Chimwemwe Kazembe vs Hermis Lomoriwa and Attorney General, Civil Cause No. 635 of 2019*

Claimant in court, during the time he was giving his testimony, he was not in a bad state or in a state to be, honestly, described as being too bad to continue running a fish selling business. I doubted this piece of evidence to the effect that he had stopped running his business because he had difficulties to stand for a long time or to walk for a long distance let alone carry out manual duties. This was not supported by the tendered Medical Report or any other evidence, and therefore difficult for this court to believe. During cross examination he told the court that he was healed completely, and he was no longer going to the hospital to seek medical treatment. In the same vein, it is difficult to believe that the Claimant was indeed into fish selling business, and that he was making between MK280, 000.00 and MK300, 000.00 per month. There is, again no evidence to support this fact. During cross examination he told the court that he was back to his normal duties, and he was doing them as he used to before the accident. Therefore, it cannot be true that he stopped doing his fish selling business. This being a court of law, I must make determination based on the law and relevant facts. I will therefore not make any award with regard to the claim for damages for loss of earnings and earning capacity.

On the issue of disfigurement, there is again, serious speaking, no disfigurement registered. A disfigurement is not in abstract; it is physical. 'Disfigurement' can simply be described as permanent physical deformity of the body. See **Ronaldo Likoloma vs. Iqbal Mahomed**, Civil Cause No. 870 of 2013.

Today, it is heartrending to see every claim of personal injury carrying the same claims. Most of such claims do not even make sense. Nobody wants to be exact on what the claims should really be. For instance, today, if one suffers a bruised finger, and another has a fractured arm, and yet another has lost a limb, all of them will bring identical claims, and damages for disfigurement will be part of the claims.

In the present case, there is no evidence supporting the claim for damages for disfigurement. The permanent degree of impairment of 9% in itself is not evidence of disfigurement. I will therefore not award damages for disfigurement.

For the other remaining claims, there is evidence of pain and suffering and loss of amenities of life. The Claimant sustained a deep cut wound and some bruises. The pain and suffering associated with these cannot be underestimated. The claim for damages for loss of amenities, although not sufficiently supported is also attainable. It can only be observed that the loss of amenities is not permanent; the Claimant may get his permanent healing (assuming he is still in pains), and continue enjoying his amenities as before.

Considering all the above, I award the Claimant the sum of **MK2, 006,000.00** including special damages for the cost of the Medical Report and the Police Report. This whole sum is payable within 7 days from today.

Costs are for the Claimant, and shall be assessed separately if not agreed upon by the parties.


Brian Sambo
Assistant Registrar