



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO. 1059 OF 2019

BETWEEN:

ROZALIYO KADZUWA.....CLAIMANT

AND

LIBERTY GENERAL INSURANCE COMPANY LIMITED.....1ST DEFENDANT

DAVIE NAMPEYA..... 2ND DEFENDANT

CORAM: WYSON CHAMDIMBA NKHATA (AR)

Mr. W. Kamunga- of Counsel for the Claimant

Mr. M. Msuku-of Counsel for the Defendant

Ms. Chida- Court Clerk and Official Interpreter

ORDER ON TAXATION OF COSTS

INTRODUCTION

On 16th December 2019, the claimants commenced these proceedings by writ of summons claiming damages for pain and suffering, loss of amenities of life, disfigurement and costs of this action. The action arose from an accident that occurred on the 2nd day of November 2019 when a motor vehicle driven by the 2nd defendant injured the claimant who was a passenger in the said vehicle at the material time. The 1st defendant is sued by virtue of being the insurer of the said motor vehicle. The issue of liability was settled in favour of the claimant through a default judgment entered on the 22nd of May, 2020. Subsequently, the matter proceeded for hearing on assessment of damages and the claimant was awarded a total sum of MK7,953,000.00 in all heads of damages claimed and proved on 23rd of March, 2021. This is the court's order on assessment of costs.

The parties appeared before this court for assessment of costs on the 16th of June, 2021. The claimant (hereinafter referred to as the receiving party) through Counsel filed a notice of appointment to assess costs and a bill of costs which Counsel Kamunga representing the receiving party adopted in court. In the said bill of costs, the receiving party is claiming K18,444,800.00 as costs of this action. The Defendants (hereinafter referred to as the paying party) did not file points of objection.

LAW AND PRINCIPLES ON ASSESSMENT ON COSTS

Basically, the principle upon which costs should be taxed is that the successful party should be allowed costs reasonably incurred in prosecuting or defending the action. The taxing master must hold a balance: On one hand, the successful litigant, who has been awarded the costs so that he is made whole by being able to recover costs necessarily incurred and on another the unsuccessful party so that he does not pay an excessive amount of money. In the case of **Harold Smith** [1860] 5H & N 381, Bramwell B stated that Costs as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them, or given as a bonus to the party who receives them. In the case of **Smith v Buller** [1875] LR 19 Eq 473, Sir Richard Malins V.C. stated that:

It is of great importance to litigants who are unsuccessful that they should not be oppressed into having to pay an excessive amount of costs ... the costs chargeable under a taxation as between party and party are all that are necessary to enable the adverse party to conduct litigation and no more. Any charges merely for conducting mitigation more conveniently may be called luxuries and must be paid by the party incurring them.

Order 31(5)(3) of the Courts (High Court) (Civil Procedure) Rules 2017 hereinafter CPR 2017 provides that in awarding costs the Court shall also have regard among others things the amount or value of any money or property involved; the importance of the matter to all the parties; the particular complexity of the matter or the difficulty or novelty of the questions raised; the skill, effort, specialized knowledge and responsibility involved and the time spent on the case.

Order 31 rule 5 of the CPR provides that the court should have regard to whether the costs were proportionate and reasonable in amount. It is clear that the law regulating assessment of costs abhors costs disproportionate to the amount recovered that was the subject matter of the proceedings. I believe the proportionality of costs to the value of the result is central to the just and efficient conduct of civil proceedings. The test of what is a proportionate amount of costs to incur therefore involves considerations of the amount recovered.

Order 31(4)(1) provides that where the Court is to assess the amount of costs, whether by summary or detailed assessment, those costs shall be assessed on the standard basis or the indemnity basis, but the Court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

Order 31(4)(2) provides that where the amount of costs is to be assessed on the standard basis, the Court shall (a) only allow costs which are proportionate to the matters in issue and (b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.

PROPORTIONALITY OF COSTS

Order 31 rule 5 of the CPR 2017 provides that the court should have regard to whether the costs were proportionate and reasonable in amount. It is clear that the law regulating assessment of costs abhors costs disproportionate to the amount recovered that was the subject matter of the proceedings. I believe the proportionality of costs to the value of the result is central to the just and efficient conduct of civil proceedings. The test of what is a proportionate amount of costs to incur therefore involves considerations of the amount recovered. In this case, the receiving party moves the court to tax the costs herein at the sum of K18,444,800.00 against the MK7,953,000.00 that was recovered. Clearly, this defies the test of proportionality that this court ought to apply. In view of this, this court shall proceed mindful of the need to adhere to o.31 r. 5 of the CPR 2017.

THE BASIS FOR THE ASSESSMENT

Order 31(4)(4) of the CPR provides that where the Court makes an order about costs without indicating the basis on which the costs are to be assessed or the Court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis, the costs will be assessed on the standard basis. In this case, the order on costs as stipulated in the Judgment does not indicate the basis upon which the costs ought to be assessed. It follows therefore that this court ought to assess the costs on standard basis which according to Order 31(4)(2) of the CPR the court ought to allow only those costs which are proportionate to the matters in issue and resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.

1. THE HOURLY RATE

The receiving party is of the view that the items on the bill be taxed at K40,000.00 per hour. It is indicated that the matter was handled by Counsel Isaac Wezi Kamunga of 16 years standing at the bar. As earlier mentioned, the matter was commenced on 16th December 2019. Going by the number of years Counsel has been practicing law and the Legal Practitioners Hourly Expense Rate for Purposes of Taxing Party and Party Costs 2018 gazetted on the 16th of November 2018, the court finds no issue with the said **K40,000.00** per hour.

2(A). THE CLIENT

The receiving party is proposing 20 hours for holding several conferences with the client. Counsel indicates that they had conferences with the client on 25th November, 2019, 22nd May, 2020, 22nd July, 2020, 23rd July, 2020 and on 23rd March, 2020. However, there are no time sheets attached. This court is aware that the new rules do not stipulate that a party needs to file a time sheet. I believe that it is the duty of the parties to assist the court to make the right determinations in terms of time allowed by providing some sort of guidance. In the absence of time sheets or minutes what would stop Counsel from merely plucking figures from the air or the court doing likewise. Whatever the case may be, I must state that the underlying principle that should resonate throughout this assessment exercise is that only costs reasonably expended should be allowed. I am of the firm view that despite having held divers conferences with the client, 20 hours is on the higher side. I shall allow 6 hours for this part.

2(B). DOCUMENTS PERUSED

The receiving party is claiming 15 minutes each for perusing a Medical Report and a Police Report. Further to that, they are claiming 30 minutes for perusal of the defendants' defence. I have seen the said documents. They are at most 2 paged and I believe would not take 15 or 30 minutes for Counsel of 16 years experience to peruse. Nevertheless, I am aware that at this stage it is not a matter of just reading through the document. Counsel had to read with care to establish if the said documents disclose a cause of action worth pursuing or the impact of the said documents on his case. I shall allow the one hour as claimed by the receiving party for this part.

2(C). COURT DOCUMENTS PERUSED

The court takes note that Counsel for the receiving party has listed 24 case authorities that he claims to have read in the course of the action. The cases have varying time allocated to each which obviously denotes that

they are of varying lengths. However, I take note that out of the 24 cases listed only 6 have been attached to the assessment bundle. Order 31 rule 12(3) of the CPR 2017 stipulates that a bill of costs shall be accompanied by an assessment bundle which shall contain all documents, excluding those on the Court file, that a party shall rely on at the assessment hearing. In this case, the doubt thereof must be exercised in favour of the paying party by trimming the cases. Further to that, without unnecessarily encouraging a sloppy approach to conduct of matters on the part of counsel, I believe for Counsel of over 10 years standing at the bar with all the experience in similar matters, it was unnecessary industry to read such a plethora of cases, this being a simply personal injury matter in which liability was settled through a default judgment. I shall allow 10 cases with an average of 1 each giving a total of **10 hours**.

2(d). DOCUMENTS PREPARED

The receiving party prays for 16 hours for preparation of documents in this matter. Having seen the proposals by the receiving party on each document and having considered the length and complexity of the listed documents, this court summed up this part as follows:

DOCUMENT	PROPOSAL BY THE RECEIVING PARTY	TIME ALLOWED BY THE COURT
Writ of summons and statement of case dated 13 th December, 2019	3 hrs	2hrs
Claimant's statement of issues dated 10 th March, 2020	2 hrs	1hr
Notice of Mediation dated 11 th May, 2020	30mins	15mins
Statement of issues	1hr	15mins
Notice of mediation dated 11 th May, 2020	30 mins	15mins
Notice of assessment of damages dated 26 th June, 2020	30 mins	15mins
Assessment of damages bundle dated 22 nd July, 2020	10 hrs	4hrs
TOTAL		8hrs

3. COURT ATTENDANCES

The receiving party proposes 4 hours each for the attendances. They indicate that attended mediation on the 22nd of May 2020 and hearing on assessment of damages on 23rd March, 2021. They further indicate that the proposed time is inclusive of travelling and waiting to be attended to.

The court is of the view that 4 hours each for the attendances herein is a bit on the higher side. Mostly, proceedings on assessment of damages take about 30 minutes and likewise mediation sessions. I am fortified in this position having seen the record. I shall allow 2 hours each to cover the travelling and waiting giving a total of 4 hours.

4. GENERAL CARE AND CONDUCT

The receiving party proposes 70% of items 1 to 4 as General Care and Conduct. It has not been indicated as to why the same should be perched at 70%. In my opinion, this is a personal injury matter. It does not raise anything out of the ordinary. Essentially, it falls squarely under ordinary cases. In the case of **Kavwenje v Chilambe** 1996 MLR 113 it was stated that for ordinary cases Care and Conduct should be between 50% and 60%. In this case, I am of the opinion that 50% General Care and Conduct is reasonable.

5. INSTRUCTION FEES

The receiving party is claiming K6,000,000.00 as instruction fees. Order 31 rule 10 of the CPR 2017 provides that a legal practitioner or his law firm shall be entitled to an instruction fee and not a brief fee where he or his firm have had instructions to act for a party from the commencement of a proceeding to trial. Considering the circumstances surrounding this case, I have no doubt that the same is payable. However, having gone through the record, I am of the view that there was nothing complex about the matter at all. The issues that came before the court involved liability and then quantum on damages which in my view are straight forward issues being a personal injury case. Clearly, the amount claimed is on the higher side. I shall allow the K1,500,000.00 as instruction fees.

6. DISBURSEMENTS

On disbursements the receiving party is claiming K346,000.00 for disbursements being K26,000.00 for filing various documents, K200,000.00 for stationery and K120,000.00 for travelling.

The court has no issues with the filing fees. The documents in question are on the record and it is clear that they were paid for. However, there are no supporting documents for the other disbursements. The court does not even have knowledge as to where the Law Firm for Counsel representing the receiving party is situated warranting K120,000.00 for travelling expenses. I am of the view that the doubt should be exercised in favour of the paying party by allowing K100,000.00 for stationery and K60,000.00 for travelling. In total the court shall allow K186,000.00 for disbursements.

7. TAXATION

The receiving party proposes 20 hours for preparation of the bill of costs and photocopying and 65% of this part as Care and Conduct. However, I notice that photocopying has already been covered under disbursements and it would be a duplication including it under this part well. Other than that, mindful that the task of preparing the bill is rather tedious and time consuming, I was of the view that the 20 hours suggested by the receiving party is on the higher side. I make this assertion having seen the bill and upon evaluating the work that went into compiling and preparing the same. I shall allow 8 hours. Further to that, the receiving party is also granted 50% Care and Conduct for the Taxation proceedings. The total for this part is K480,000.00.

SUMMARY

I therefore tax the bill as follows:

PART	AMOUNT
Conferences with client	K240,000.00
Documents perused	K40,000.00
Court Documents Perused	K400,000.00
Documents Prepared	K320,000.00
Court Attendance	K160,000.00
Instruction fees	K1,000,000.00
Total Part A	K2,160,000.00
General Care and Conduct	K1,080,000.00
Taxation	K480,000.00
Total Professional Fees	K3,720,000.00
16.5 % Surtax	K613,800.00
Add disbursements	K186,000.00
TOTAL	K4,519,800.00

The costs are taxed at **K4,519,800.00**.

MADE IN CHAMBERS THIS 12th OF JULY, 2020

WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR