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REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NUMBER 331 OF 2021

BETWEEN:

LAZARO ZINAUKAONA (suing on behalf of the dependants
of ELIZABETH ZINAUKAONA, deceased)CLAIMANT

AND

THE ATTORNEY GENERAL.....DEFENDANT

CORAM: WYSON CHAMDIMBA NKHATA (AR)

Mr. Mwabungulu- of Counsel for the Claimant

Mr. Chuma-of Counsel for the defendant

Ms. Chida- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

Through a writ of summons, the Claimant commenced this action on behalf of the dependants of Elizabeth Zinaukaona, deceased. The action emanates from a medical negligence where foreign bodies such as a forceps and a gauze were forgotten inside the deceased's abdomen after a caesarian operation. The issue of liability was settled in favour of the claimant through a consent order executed by the parties on 18th March, 2021 in which it was adjudged that the defendant do pay the claimant damages for personal injuries, loss of expectation of life and loss of dependency. Subsequently, the matter was referred to this court to determine the quantum of damages that would adequately compensate the claimant for the losses suffered. This is the court's order thereto.

When the matter came for hearing on assessment of damages, the defendant did not appear for trial. There being evidence that they had been duly served, the court proceeded to hear the claimant. Two witnesses testified on the part of the claimant. PW1 was the claimant himself who adopted his witness statement in which he averred that he knew Elizabeth Zinaukaona (nee Boyana) who was his wife and they had been married since 1970 and that she died on 14th December, 2013. He further stated that they had eight children together. He further averred that the events leading to her illness and subsequent death are that on 22nd March, 1985 she gave birth to their last born son, Wyson, at Kamuzu Central Hospital ("KCH"). Subsequently, on the 25th March, 1985, she underwent a surgical operation so as to stop conceiving again as they had planned that Wyson would be their last child. After the operation and through the years she complained of excruciating pain in her stomach. They consulted medical practitioners at KCH and she was given painkillers. The situation became so bad that she was failing to pass stool and would always cry out and complain that there was maybe a swelling in her rectal area. When they went again to KCH, they gave her liquid paraffin but it did not help.

It was only in 2013 that KCH suggested a scan. Unfortunately, this could not be done on the appointed day as the Hospital was attending to emergencies. Seeing that she was in excruciating pain, they went to Daeyang Luke Hospital ("Daeyang") where a scan was done. Then she underwent a surgery at Daeyang on 12th December, 2013 that unearthed that she had had metal object (forceps) and gauze in her stomach which had been forgotten in her stomach during the time of her operation at KCH. She exhibits a photo of the foreign object marked "LZ 1". At the time of going to the operation she had been ill from the same stomach pains. She passed on 14th December, 2013. She exhibits a medical report from Daeyang marked "LZ 2". He further averred that his wife died at the age of 63 as per the death report marked "LZ 3".

He contends that events leading to his wife's suffering over the years and subsequent death started with the forceps and gauze left in her stomach at KCH. Unfortunately, this cause was only discovered on 12th December, 2013 during the operation at Daeyang. His wife suffered for 28 years. It was 28 years of pain and suffering not knowing that she had foreign objects in her stomach. He, therefore, claim damages for pain, suffering, loss of amenities of life, loss of expectation of life and loss of dependency, costs of funeral expenses and costs of the action.

The second witness (PW2) was Sara Zinaukaona Magombo. She added that as the eldest daughter she used to take care of her mother during the time she was suffering excruciating stomach pain. She was the one who was accompanying her to the hospital. She further stated that during the years she was experiencing stomach pain, she had difficulties passing stool, sitting down and pricking sensation from the anus. She would cry out and call for her even in the toilet so that she should check her rectal area to see if there was any swelling because that was the sensation she was having. Eventually due to

difficulties in passing stool at the time she felt like, she developed an irregular condition when stool would come out at any time even when walking/travelling. She, thus, had to travel with her anywhere with a change of clothes just in case. Even when she got married in 2003, she would still go home and spend months caring for her mother. The situation was such that she eventually agreed with her husband to rent a house nearby her mother's place in area 25 so that she could take care of her without difficulties. This was done and they started living two houses away from my mother's place. It was only in 2013 when she underwent a medical procedure that they were told and advised at Daeyang Hospital that the cause of her pain was the forceps and gauze that had been forgotten in her stomach during an operation at Kamuzu Central Hospital in 1985. She passed on on 14th December, 2013 at the age of 63.

Such was the evidence on assessment of damages. I would like to thank counsel for both parties 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 and attached to the assessment bundle. This court has given the submissions and the authorities counsels cited the most anxious consideration.

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 fully damages for loss of dependency and loss of expectation of life. 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 and loss of amenities of life

Pain means the physical hurt or discomfort attributable to the injury itself or consequent upon it. It includes the pain caused by any medical treatment which the plaintiff might have to undergo. See **Sakonda v S. R. Nicholas** Civil Appeal Cause No. 67 of 2013. 'Suffering' on the other hand denotes the mental or emotional distress which the plaintiff may feel as a result of the injury. This includes but not limited to anxiety, worry, fear, torment and embarrassment. In **City of Blantyre v. Sagawa** [1993] 16 (1)MLR 67, 'pain' and 'suffering' were defined to suggest physical experience of pain caused by consequent upon the injury while "suffering" relates to the mental element of anxiety, fear, embarrassment and the like. On the other hand, in the case of **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 able to do, see, and experience. Justice Mwaungulu (as he then was) in the case of **Mtika v. US Chagomerana t/a trans Usher (Zebra Transport)** [1997] 2 MLR 123, 126 explained

that this head covers the loss caused by the injury in that the claimant will be unable to pursue the leisure and pleasures of life that he used to enjoy but for the injury.

In this case, the uncontroverted evidence indicates that the claimant had to contend with excruciating abdominal pain for 28 years arising from forceps and a gauze that was forgotten in her stomach during an operation. Both PW1 and PW2 have stressed the point that the deceased herein suffered continually for the said period and would always cry out and complain that there was maybe a swelling in her rectal area. I have no reason to doubt this evidence just by imagining a piece of sharp equipment and a gauze lodged in the abdomen. Further to that, it can only be the intensity of pain and suffering that could compel a parent to abandon her dignity and ask her daughter to check her rectal area if there was a swelling. Without losing myself into sensationalism, I strongly hold the view that the deceased herein spent the last 28 years of her life in extreme pain under circumstances where with due diligence the problem could have been dictated earlier.

In awarding damages for pain and suffering and loss of amenities of life, Counsel representing the claimant calls upon the court to consider the following cases:

- **Richard Chinsinga vs Electricity Supply Corporation of Malawi**, Personal Injury Cause No. 59 of 2018, in which the Claimant was awarded MK20,000,000 for pain and suffering and MK5,000,000 for loss of amenities of life. The Claimant suffered burnt wounds of on the neck which exposed the tendons, burnt wounds on the cheek and shoulder and amputation of arm. The award was made on 30th August, 2018.
- **Peter Nsona vs Lujeri Tea Estate Limited**, Personal Injury Cause number 857 of 2015, in which the Claimant was awarded the sum of **MK19,000,000** for pain and suffering, loss of amenities of life and deformity. The claimant sustained amputation of the arm by a machine. The award was made on 24th May, 2018.

Counsel contends that the pain and suffering in the cases cited above can be distinguished from the pain the deceased suffered. He points out that in the above cases, the pain was for a limited period of time and probably the claimants got healed from the pain and that in the present case the deceased suffered every day for 28 years. He submits that in a year (or less) a person is awarded MK25,000,000.00, then for 28 years of continuous suffering, for 336 months of continuous suffering, for 10,192 days of continuous pain and suffering, a sum of MK25,000,000.00 multiplied by 28 years of suffering should give MK700,000,000.00 (Seven Hundred Million) in damages for pain and suffering and loss of amenities of life. He further submits that they are of course aware that an award for pain and suffering is

a conventional one and that there is no Arithmetic formula to it. He observes that awards are reached at from comparable case authorities but would still submit that MK700,000,000 is adequate compensation for pain, suffering and loss of amenities of life.

On the other hand, Counsel representing the defendant while not taking issue with the lamentations on pain and suffering by the claimant calls upon the court to consider the following cases:

- **Bernadetter Vaz v The Attorney General** Civil Cause No. 563 of 2004, in which the claimant suffered paralysis of lower extremities, suffered incontinence of both urine and stools following a surgical operation. She also lost the ability to walk, sneeze and cough. The court awarded her MK1,000,000.00 as damages for pain and suffering and loss of amenities of life. The award was made in September, 2005.
- **Shadreck Mateyu v Anderson Matache and Prime Insurance Company Limited** Personal Injury Cause No. 324 of 2012, in which the claimant was unable to sit down for a long time because he felt a lot of pain, had difficulties in performing manual work and could not manage to run for a long distance as a result of the road accident. The court awarded him MK1,000,000.00 as damages for loss of amenities of life on 27th June, 2018.

Counsel submits that looking at the nature of injuries the deceased sustained, the comparable cases and considering the devaluation of Malawi Kwacha, MK2,000,000.00 and MK1,500,000.00 as damages for pain and suffering and loss of amenities of life respectively would adequately compensate the claimant.

In making the assessment, I thought I should begin by reiterating that this is a phenomenal case of a lady who had to endure 28 years of excruciating pain and suffering. I have seen the submission by the parties. It is submitted on behalf of the claimant that K700,000,000.00 would reasonably compensate the claimant. Truly, the circumstances surrounding this case invite for a substantial award. However, I am of the view that the proposed figure is far on the higher side. I take note that the figure was arrived at by quantifying the pain and suffering and loss of amenities of life on a daily basis multiplied by the period the deceased was exposed to the suffering. In my view, adopting this basis would be an unprecedented recipe for occasioning miscarriage of justice. I had occasion to search for similar cases. I chanced upon the case of **Charity Kamwathendo v The Attorney General (Queen Elizabeth Central Hospital)** Personal Injury Case Number 633 of 2016 presided over by Her Honour Soko in that case on or about the 6th day of September 2013, the claimant delivered through Caesar at Queen Elizabeth Central Hospital and immediately after she was out of the theatre, she started feeling abdominal pains and was

frequently vomiting until the 14th day of May 2014 when she had another operation where it was discovered that she had gauze in her body which was left inside her body at the time she was delivering through Caesar. The claimant was awarded a sum of K10,000,000.00 as damages for pain and suffering and loss of amenities. In arriving at the award, the court considered the degree of pain and suffering vis a vis the cases that had been cited. In the case of **Kalinda -vs- Attorney General** [1992] 15 M.L.R. 170 at p.172 it is stated that to establish consistency in awards of this nature, reference can be had to similar cases (*Kambwiri v Attorney General* [1991] 14 MLR 151), and a matter in which the existing awards are reviewed (*Chisanga v Stagecoach (Mal) Ltd* Civil Cause No. 74 of 1991 (unreported)).

On the other hand, I have seen the proposal by the defendant. In their opinion, K3,500,000.00 would adequately compensate the claimant for pain and suffering and loss of amenities of life. I am of the view that the proposal does not subscribe to the rationale behind compensation which is to place the claimant in a position he would be had he not suffered the damage or loss. Considering the pain and suffering that the deceased had to endure and the period itself, the proposal is far on the lower side to a point one would say it is absurd.

Upon a thorough consideration of facts and circumstances of this case, and upon an exhaustive consideration of the submissions by the both counsel in the light of the relevant and applicable law regarding damages for pain and suffering, I award the claimant **K150,000,000.00** under these heads.

Loss of expectation of life

The claimant has also been awarded damages for loss of expectation of life. In **Flint v Lovell** (1935) 1 KB 354 it was stated that a man has a legal right that his life should not be shortened by the tortious act of another. It is further stated that his normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be given. Another point is that under this head, damages are claimable on the basis of loss of prospective happiness by the deceased. Further to that, damages for loss of expectation of life are fixed and ought not to fluctuate with each case. In determining what damages to award the claimant for loss of expectation of life, current awards are looked at to determine an appropriate amount of compensation. In **Cain v Wilcock** [1968] ALL ER 817, the court upheld the view in **Benham v Gambling** and stated that:

The award of damages is usually a conventional figure. In this realm mathematical calculations do not come at all. Upon any view, that which is to be awarded for loss of expectation of life can be only an artificial figure, and really, in the end, the only

guidance that one derives from the cases cited is that the artificial figure should be a moderate one.

In the present matter, Counsel for the representing the claimant proposes K2,500,000.00 as damages for loss of expectation of life. He invites the court to have recourse to the following cases:

- **Annie Chilinga suing for and on behalf of the beneficiaries of Friday Nyopola (Deceased) v Duncan Nyalugwe and Prime Insurance Company Limited** Personal Injury Cause Number 659 of 2011, the deceased was 39 years old and the court awarded MK1, 500, 000.00 as loss of expectation of life. The ruling was made on 7th June, 2016.
- **Masauko Ephraim vs Prime Insurance Company Limited** CC No 658 of 2012, the deceased who was aged 10 years was killed in a road accident and the court awarded MK900, 000.00 as loss of expectation of life. The ruling was made on 19th July, 2013.

On the other hand, the defendant while not disputing the proposal by the claimant motivates the court to consider the following cases:

- **Florence Chipukunya (suing as the beneficiary of the Estate of Edith Alubino) v Daniel Tembo & Prime Insurance Company Limited**, Personal Injury cause no. 568 of 2018, where an award of MK1, 800,000.00 was made under this head on the 3rd of April, 2019.
- **Mary Kalupsya (suing on her own behalf and on behalf of the dependants of the Estate of Annie Kalupsya, deceased) v Gerald Malikebu & Prime Insurance Company Limited** Civil cause no. 154 of 2019, where an award of MK2,000,000.00 was made under this head on the 1st June, 2019.

It is the defendant's submission that **MK2, 500,000.00** will adequately compensate the claimant under this head looking at the comparable cases that were decided in 2019 and considering the devaluation of Malawi Kwacha.

This court having looked at the prevailing circumstances in this matter and the cases cited above, I am of the view that **MK2,500,000.00** is fair recompense to the claimant for loss of expectation of life.

Loss of dependency

The plaintiff claimed damages for loss of dependency. Salmond on the Law of Torts, 17th Edition, Sweet & Maxwell 1977: 582-587, reasons that damages for loss of dependency is premised on the proof of a

pecuniary loss by the death of the deceased. The practice of the High Court has been to apply the multiplier and multiplicand principle in arriving at the quantum of damages for loss of dependency. **Mbila and another v Attorney General** 16[1] MLR 313. Salmond (supra) states that the multiplier is the estimate of the probable length of the deceased's earning period. The amount earned is subjected to deductions like the sums that would have been spent by the deceased on himself. **Kundwe v Stagecoach Malawi Limited**, 16[2] MLR 556.

In this case, considering that the deceased was 68 years old at his time of death, both counsel for the claimant and the defendant move the court to consider that the deceased was already past the age of life expectancy in Malawi. However, Counsel for the claimant contends that in such instances courts have always adopted a multiplier of 5 years. He cites the case of **Mkanda (as Administrator of the Estate of Mkanda and other dependants) vs Mpingasa and Citizen Insurance Company Limited** Civil Cause Number 1340 of 2009. Counsel for the defendant, on the other hand proposes 4 years as the multiplier. He cites the case of **Peter Chilundu (Suing on his own behalf and own behalf of the beneficiaries of the Estate of James Kamowa (Deceased) v Reunion Insurance Company Limited**, Personal Injury Cause No. 1005 of 2014, in which the court adopted a multiplier (allowance) of 4 years to the deceased who was 70 years old. In my opinion, the court can not lose sight of the fact that the deceased was a strong-willed person who albeit having a retained forceps and a gauze in her abdomen and the attendant excruciating pain managed to survive for 28 years with the problem. All things held equal; I am of the view that she would have in fact lived even to her 80s or beyond. I shall adopt 5 years as a multiplier.

On the issue of the deceased's earnings, it is clear that this is not known. Counsel for the claimant submits that the deceased was a housewife and that the minimum wage for domestic workers in Malawi is MK38,000.00. On the other hand, Counsel for the defendant while acknowledging that the deceased was a house wife and that there is no evidence as regards to her actual income per month proposes MK8,242.00 per month having been the minimum domestic worker's wage for 2013. The dichotomy of the approach by the parties on this aspect presents the question on the issue of principle whether the date of death or the date of trial is the proper approach in assessing damages for loss of dependency. The issue in this case is whether the current approach to assessing the financial losses suffered by the dependant of a person who is wrongfully killed properly reflects the fundamental principle of full compensation. In the case of **Knauer (Widower and Administrator of the Estate of Sally Ann Knauer) (Appellant) v Ministry of Justice (Respondent)** [2016] 2 WLR 672 the court was of the view that the correct date as at which to assess the multiplier when fixing damages for future loss in claims should be the date of trial and not the date of death. It was held that calculating damages for loss of

dependency upon the deceased from the date of death, rather than from the date of trial, means that the claimant is suffering a discount for early receipt of the money when in fact that money will not be received until after trial. I find the reasoning impeccable and I adopt it. I shall base the calculation on the date of trial and in this case K38,000.00.

Having considered the submissions by the claimant, this court is of the view that a multiplier of 5 years and the minimum wage pegged at MK38,000.00 reduced by 2/3 would be adequate compensation for loss of dependency. Therefore, using the multiplier/multiplicand formula loss of dependency this court is of the view that damages for loss of dependency would, thus, be $\text{MK}38,000.00 \times 12 \times 5 \times \frac{2}{3} = \text{K}1,520,000.00$.

Conclusion

In summary, the claimant is awarded damages as follows:

- Pain and suffering and loss of amenities of life - K150,000,000.00
- Loss of expectation of life - K2,500,000.00
- Loss of dependency - K1,520,000.00

In total, the claimant is awarded **K154,020,000.00**. 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 18th DAY OF MAY 2021


WYSON CHAMDIMEANKHATA

ASSISTANT REGISTRAR