



The Judiciary

IN THE HIGH COURT OF MALAWI

CIVIL DIVISION

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 383 OF 2019

Between

PRAISE MULIMBA (Mother of the late King Ntchema, Deceased) CLAIMANT

and

MALAWI BUREAU OF STANDARDS 1ST DEFENDANT

NICO GENERAL INSURANCE COMPANY LIMITED..... 2ND DEFENDANT

CORAM: A.J. Banda, Assistant Registrar

Mr. C. Kalua, for the Claimant

Mr. Juma, for the Defendants

Mr. L. Chimtengo, Clerk/ Official Interpreter

Banda

JUDGMENT ON ASSESSMENT OF DAMAGES

Background

King Ntchema (deceased) died in a road accident when the bicycle on which he was a pillion passenger was hit by the driver of a motor vehicle registration number 17 SC 36 VW Amarok Double Cabin Pick Up. The accident was attributed to the negligence of the driver of the said motor vehicle. The motor vehicle belonged to Malawi Bureau of Standards, a Statutory Corporation ("1st Defendant") and was insured by Nico General Insurance Company Limited ("2nd Defendant"). Praise Mulimba ("Claimant") is the mother of the deceased King Ntchema and she brought this proceeding as administrator of the estate of her son against the owner and insurer of the motor vehicle in issue respectively. She claimed for damages for loss of expectation of life, damages for loss of dependency, special damages as pleaded and costs of the action.

In a Default Judgment dated 8th August, 2019, the Defendants were adjudged to be liable to pay the above stated claims, with damages to be assessed by the Court. On 27th November, 2019, I heard the two parties for assessment of damages. This Judgment follows.

Evidence

Praise Mulinda herself was the only witness for the Claimant. She adopted her witness statement inclusive of exhibits attached to it. It was her statement under oath that her son died on the spot, after being hit by a motor vehicle, at the age of 21 years whilst he was working with Malawi Girl Guides Association on 8th May, 2018. She tendered a police report which contained a chronicle of the road accident. She also tendered a Death Certificate of her son. She further tendered a pay slip that she said she found when the family of the deceased King Ntchemwa was removing personal effects of the deceased from the house that he was living in. This was a pay slip for the month of September, 2017.

In cross examination, the Claimant stated that she did not have any external evidence showing that her son died whilst still working for Malawi Girl Guides Association, apart from her orally given evidence given under oath. It was said in re-examination that the deceased stopped working for Malawi Girl Guides Association due to the death in the road accident mentioned before.

The Defendants called one witness, Mr. Victor Banda, a Claims Assistant Officer for Nico General Insurance Company. It was his evidence that the car in issue was under a contract of insurance between the 1st Defendant as the insured, and the 2nd Defendant as the insurer. He further said that the 2nd Defendant had already paid K1, 300,000.00 as compensation to Mr Joseph Thomas out of the K5, 000,000.00 third party policy limit under the contract who was the cyclist who carried the deceased King Ntchemwa, under a consent order. He stated therefore that the 2nd Defendant was only liable up to K3, 700,000.00, being the balance under the limit, as third party policy limit was K5, 000,000.00. He tendered the Motor Private Car Policy, and the Consent Order entered in the Joseph Thomas case.

The evidence of Mr. Victor Banda marked the close of the hearing. The two parties asked the court to make written submissions. They both submitted and the submissions were useful, for which the Court is grateful. I will make reference to the submissions wherever necessary in the Judgment henceforth.

Issue

The only issue in this case is the amount of damages that the Defendants are liable to pay to the Claimant as damages for the claims as pleaded.

Analysis

The starting point is that assessment of damages presupposes that damages have been proved and what remains is the measure of the amount of the damages- see the case of **Ngosi t/a Mzumbamzumba Enterprises v. Amosi Transport Co Ltd [1992] 15 MLR 370(HC)**. The rule is that the injured party has provided proof of the damage sustained prior to the assessment hearing- **Yanu Yanu Co v. Ltd v. Mbewe 11 MLR 405 (SCA)**. Damages in a case like this one, are not awarded to punish the defendant or tortfeasor, but to fully compensate the claimant of all the losses that he has suffered as a direct or consequential result of the defendant's wrongful act or omission. In the case of **George Kankhuni v. Shire Buslines Ltd, Civil Case Number 1905 of 2002**, Katsala, J stated as follows:

“The law demands that the plaintiff, as far as money can do it, be put in the same position as if he has not suffered the loss. This is what is referred to as *restitution in intergrum*.”

For fatal accidents such as the one in this case, the law under section 3 and 4 of the Statute Law (Miscellaneous Provisions) Act provides that the beneficiaries to the deceased estate may recover damages from the person who would have been liable to the deceased in negligence had it been that there was no death. Damages recoverable for the benefit of the beneficiaries of the deceased are for loss of expectation of life and pecuniary dependency thereon.

Loss of Expectation of Life

Awards for claims of loss of expectation of life takes into account the number of years a deceased person was expected to live without necessarily attaching value to the years but that the Claimant enjoyed a predominantly happy life. Generally, Courts consider the country's life expectancy when making such an award- **Samuel Chawanda v. Attorney General Civil Cause No. 3556 of 2002 High Court, Principal Registry (unreported)**. The Court also factors in life's ups and downs. It is a fact of life that misfortunes abound in the human realm that lessens a person's natural length of life- **Aaron Amosi and Another v. Prime Insurance Company Limited, Personal Injury Cause no. 133 of 2013, High Court, Principal Registry**.

The award for the loss of expectation of life is a conventional figure and Courts refer to comparable cases to ensure some degree of general consistency and uniformity in broadly similar cases, when making awards under this head as there is no mathematical formula for it. Needless to state that the Court should not lose sight of currency fluctuations between the time an award was made in a comparable case to the time the Court is making its own award in another case.

I have looked at a plethora of cases on this head. The awards are ranging between K900,000.00 and K2,000,000.00 In the case of **Masauko Ephraim (suing on his own behalf and on behalf of other dependents of the estate of Shadreck Banda, Deceased) v. Prime Insurance Company Limited, Personal Injury Cause Number 658 of 2012**, K900,000.00 was awarded as damages for loss of expectation of life. In the case of **Esther Kassim (suing on behalf of the estate of Losani Willy, deceased) v Stanley Dimusa and Prime Insurance Company Limited Personal Injuries Cause Number 56 of 2015**; an award of K1, 200,000.00 was made.

In **Anne Chilanga (suing on behalf of the beneficiary of Friday Nyopola (deceased) v Duncan Nyalugwe and Prime Insurance Company Limited Personal Injury Cause Number 659 of 2011** an award of K1, 500,000.00 was made as damages under this head. In the case where a boy had his life wrongfully terminated at a tender age of 12, the court awarded K1, 800,000.00- **Lastone Chidule (suing on his own behalf and on behalf of other dependants of Mphatso Chidule) v. ESCOM Limited Personal Injury Cause No. 947 of 2015**. This award was made in May, 2018.

In Malingaliro Elia and Others v. Paramount Electrical Engineering Company Personal Injury Cause Number 215 of 2017, an award of K2, 000,000.00 was made on 14th August, 2018 under this head.

King Ntchemba died at the age of 21. Life expectancy in Malawi, at the time of his death, was 63 years on average, according to the data published by World Health Organisation in 2018, (www.worldlifeexpectancy.com). Ordinarily the deceased was expected to live on until the age of 63. In that regard, mindful of the comparable cases, I award the Claimant the sum of **K 1, 800,000.00** in this matter, as damages for loss of life expectancy.

Loss of Dependency

Courts use a multiplicand and multiplier formula to come up with an award for loss of dependency. The multiplicand is the figure representing the deceased's monthly earnings which is also multiplied by the figure 12, being the number of months in a year. The multiplier is an estimated number of years the deceased would have lived if it were not for the wrongful death. A third of the earnings is taken away representing a part with which the deceased would have used on himself if he was not untimely killed by the wrong action or omission of the Defendant. The Court also considers life's misfortunes that are not necessarily borne out of any person's negligence that would shorten a person's life from the time expected of death. I will take off 5 years in this case.

In this case I have to determine the issue of the deceased's monthly income. The Claimant in her statement told the Court that the deceased was working with Malawi Girl Guides Association. She stated that her late son died whilst still working with Malawi Girl Guides Association. The Defendants submitted that the Claimant has not provided proof that the deceased was still working at the time of his death, and that the pay slip exhibited was authentic as it was not signed by anybody at all. The Defendants as such submitted that since the minimum wage is not known, the Court should use the minimum wage, as is law where income of the deceased cannot be ascertained. Minimum wage applicable in Malawi was then placed at K25, 012.00 per month.

I agree with Counsel for the Claimant that a pay slip need not be signed at all. Counsel for the Defendants agreed that there is no law which states that pay slips need to be signed to be authentic. In my view the Claimant proved to the requisite standard on balance of probabilities by showing the pay slip that the King Ntchemba, deceased, was working for Malawi Girl Guides Association by her oral evidence under oath but also the pay slip exhibited. It was up to the Defendants to disprove this piece of evidence by adducing their own from Malawi Girl Guides, or indeed from any source. They did not. I therefore find that the deceased was working at the time of his death, and I find that the pay slip was authentic from Malawi Girl Guides Association.

The Defendants submitted that the Claimant was contradicting herself as to the actual income that the deceased was earning. The Defendants pointed out that the deceased was said to earn K124, 000.00 per month in the pleadings, yet he was said to earn K105, 000.00 in the statement of the Claimant during the assessment hearing, and the pay slip has yet another figure. I have

gone through the documents and have found that the assertions of the defendants on this point are correct.

I do not understand where the Claimant got the figure of K124, 000.00 as the monthly income of the deceased, as put in the statement of claim. However, I understand why the Claimant claims that the earning of the deceased was K105, 000.00. Actually the figure is K105, 050.00. The pay slip has K81, 050.00 as the net. There was a deduction of K24, 000.00 that was servicing a loan. A loan is just advance payment. The sum deducted is, in all fairness, part of the deceased income and it should be regarded as such.

The contradiction by the Claimant about the actual monthly income of the deceased cannot be held against her to state that income of the deceased was not known when the Court can ascertain from evidence provided what the income was. The Court has to justly decide the matter on the relevant and admissible evidence available. The Court recognises how difficult it can be for a mother to know her son's exact income if she cannot access credible sources. From the evidence available to her, the pay slip, I am able to find that her late son's income was K105, 050.00 after normal taxes sometime before his death. It was not his last pay slip. The income may have actually gone up in the period between September, 2017 and 8th May, 2018, the date of his death. I will as such use the figure on the pay slip.

Loss of dependency is therefore calculated as follows;


Two thirds of the monthly income of K105, 050.00, multiplied by 12 (Annual Income), multiplied by 36 (the years more, the deceased was expected to live and earn and support his beneficiaries). This totals **K30, 254,400.00**, and that is the sum that must be paid as compensation for loss of dependency.

The Defendants must also pay the special damages as pleaded and already awarded by the operation of the Default Judgment, the figure being liquidated at **K5, 500.00**.

Conclusion

The Claimant must be compensated by a total sum of **K32, 059,900.00**. By the policy limit of the contract of insurance between the 1st Defendant and the 2nd Defendant, the 2nd Defendant is only liable to the extent of the sum of K3, 700,000.00. The difference from the total sum, which is K28, 359, 900.00, to be borne by the 1st Defendant. Both Defendants are liable in costs of the assessment.

Made this 10th of January, 2020.



Austin Jesse Banda

ASSISTANT REGISTRAR