



The Judiciary

IN THE HIGH COURT OF MALAWI

CIVIL DIVISION

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 230 OF 2016

Between

BERNADETTA PHISO (Administratrix of the Estate of Esaltino De Souza)... CLAIMANT

and

Mr. FALISON DICKSON 1ST DEFENDANT

PRIME INSURANCE COMPANY LIMITED..... 2ND DEFENDANT

CORAM: A.J. Banda, Assistant Registrar

Mr. Kapoto, for the Claimant

Mr. G. Phiri, for the Defendants

Ms. Makhambera, Clerk/ Official Interpreter

Banda

JUDGMENT ON ASSESSMENT OF DAMAGES

Background

Bernadetta Phiso (“Claimant”) commenced this proceeding against Mr. Falison Dickson (“1stDefendant”) and Prime Insurance Company Limited (“2nd Defendant”) on 22nd March, 2016, claiming against the Defendants damages for loss of expectation of life, damages for loss of dependency, special damages, and costs. The Claimant’s claims derives from the negligence on the part of the 1st Defendant who started off a motor vehicle insured by the 2nd Defendant without first taking a proper look out. Due to the negligent driving, the car hit and killed Esaltino Phiso De Souza, a son of the Claimant.

During mediation, the parties reached a settlement agreement that the Defendants be held liable to pay damages as assessed by the Registrar if the parties did not agree on the amount. On 3rd December, 2019, I heard the parties for the purposes of assessing the damages, hence this Judgment.

Evidence

The only evidence for the Claimant came from the Claimant herself, Bernadetta Phiso. She adopted her witness statement under oath. In the statement, she informed the Court that her son Esaltino Phiso De Souza (Deceased), aged 1 year and 6 months, who was playing in the yard of the Chagwamnjira premises died when he was hit by a motor vehicle. She tendered a police report outlining how the accident happened (“Exhibit BP 1”), and a Death Certificate (“Exhibit BP 2”). It was her evidence that the minor was pronounced dead upon arrival at Mlambe Hospital. She said that the minor had enjoyed a vibrant healthy life.

The Claimant told the Court that she missed her son so much and that she was in pain having lost her son. She therefore prayed on her own behalf and on behalf of other beneficiaries of the estate of the minor that the beneficiaries be compensated for loss of dependency, loss of expectation of life, funeral expenses and the sum of K13, 500.00 for procuring BP 1 and BP 2 respectively.

In cross examination, she retaliated that the deceased was a year and six months old when he died. She also said that she paid K3, 000.00 for the police report and that she had the receipt somewhere but did not bring it in court.

The defence did not parade any witnesses. They asked for 14 days to make submissions which was granted to both parties. Neither party filed submissions within time, or at all.

Issue

The amount of damages that the Claimant should be compensated with under the heads as claimed in the Statement of Claim is the only issue in this matter.

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.

The minor in this case died at the very sprout of life, at 1 and a half years. Life expectancy in Malawi, at the time of his death, was 63 years on average for both males and females, according to the data published by World Health Organisation (“WHO”) 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 2,000,000.00** 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.

There are different approaches to finding the multiplicand where the deceased is a minor who due to age was not in any formal employment in which the minor was earning an income. In the case of **Samuel Chawanda v. Attorney General Civil Cause No. 3556 of 2002 High Court, Principal Registry (unreported)** the Honourable Registrar at the time used a quarter of the domestic servant’s wage, normally equated to the minimum wage applicable as the multiplicand, using the precedent set in the case of **Libana v. Attorney General Civil Cause No. 296 of 1998, High Court, Principal Registry (unreported)**. The Court in the case of **Mr. Phillip Banda v. Alfred Mhone, Civil Cause Number 507 of 2002, High Court Principal Registry (unreported)** used the material time’s half of the annual industrial wage as the multiplicand. The approach he adopted from the Registrar in the case of **Vincent Mwakamo v. Flexer Ngoma Civil Cause Number 1519 of 1997 (unreported)**.

In most cases, a third of the income is taken away as representing the sum of money that the deceased would have used on their own, to remain only with the sum for dependency.

It would be fair in my view, to tax the income at half for minors as opposed to three thirds, as the loss of dependency suffered is not only in the time immediately after the death but futuristic as well, to the time of life expectancy, minus of course time taken as allowance for life’s misfortunes. Over the period of years, the claimant’s deceased benefactor would have earned the income had it not been for the wrongful death, the industrial wage would be changing too due to loss of value of the currency and other labour and economic related factors. In fact, an individual’s worth in the industry goes up with experience and qualification. Of course, the deceased would have been dependable economically from some other age.

The minimum wage that was effective at the time, as promulgated by the minister under section 54 of the Employment Act is K962.00 per day. Normally domestic workers work 6 days a week and there are four weeks a month. I will round off the minimum monthly wage at K25, 000.00. Half of that is K12, 500.00, and this is our multiplicand. Life expectancy at the time of the deceased’s death, in the year 2008, according to WHO Country Statistics was 63 years. Esaltino

died at the tender age of **barely** 2 years. He was expected to live for 61 more years. It is common knowledge and I take judicial knowledge that children under the age of 5 are prone to more misfortunes of life. I will subtract 5 years to cater for life's events, but also the fact that the sum will be paid as a lump. The multiplier is therefore 56. As such the damages awardable for loss of dependency is K12, 500.00 multiplied by 12 (the annual income) multiplied by 56, and multiplied by two thirds. This is **K5, 600,000.00**.

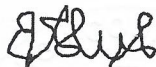
Special Damages

Funeral expenses are special damages that must be specifically proved. The Claimant did not give any evidence on this at all. Little wonder that in the skeletal arguments filed by Counsel for the Claimant these expenses are not tackled at all. I award nothing on that. The Claimant claims that she expended K3, 000.00 for the police report. No receipt was tendered as she said that she did not bring forth the receipt in Court. However, it is not fatal at all times when receipts are not exhibited in court. If the court finds the evidence of expenses having been incurred to be believable on the balance of probabilities, then the expenses are proved- see the case of **Renzo Benetollo v. Attorney General and National Insurance Company Limited, Civil Cause No. 279 Of 1993, High Court, Principal Registry (unreported)**. The Police Report tendered shows it was paid for K3, 000.00, under General Receipt Number 2241852. I award the Claimant **K3, 000.00**. There is no evidence that the Death Report was paid for, for K10, 500. 00. I do not make any award on that claim.

Conclusion

The Claimant is hereby awarded the total sum of **K7, 603,000.00** as damages for all the heads claimed. The 2nd Defendant is only liable to the extent of the Policy Limit as pertains the damages. Both Defendants are liable in costs of the assessment.

Made this 14th day of January, 2020.



Austin Jesse Banda

ASSISTANT REGISTRAR