



IN THE HIGH COURT OF MALAWI

CIVIL DIVISION

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 307 OF 2018

Between

NENENJI MPHAYA (Administrator of the Estate of Harrison Kesten)
.....CLAIMANT

-and-

PRIME INSURANCE COMPANY LIMITED
DEFENDANT

CORAM: Austin Jesse Banda, Assistant Registrar

C. Kalua and Ndhlovu, for the Claimant

Mussa, for the Defendant

Makhambera, Clerk/ Official Interpreter

JUDGMENT ON ASSESSMENT OF DAMAGES

Background

The deceased Harrison Kesten commenced this proceeding against the Prime Insurance Company (Defendant) as the then insurer of motor vehicle number MHG 1563 Nissan UD Lorry which hit him as he walked as a pedestrian. He suffered a fractured left leg and swollen right leg. He therefore sued for damages for pain and suffering, loss of amenities of life, disfigurement, costs of obtaining a medical report and a police report, and costs of the proceeding. In the course of the action there was the unfortunate event of the death of Harrison Kesten. His sister Nenenji Mphaya was allowed by the Court to proceed as claimant on behalf of the estate of the deceased Harrison Kesten.

When this matter came for mediation before Honourable Justice Chirwa, an order was made pitting liability at 70% liability on the defendant and 30% as contributed by the deceased. He further ordered that damages be assessed by the Registrar. I heard the parties for assessment of damages.

Evidence

It was the evidence of Nenenji Mphaya that her brother Harrison Kesten was involved in an accident where he suffered the injuries that she said were in the witness statement that her brother had earlier on made before his death. She attached the witness statement to her own. In his statement, her deceased brother had stated that he had suffered a fracture of the left leg and a swollen right leg. He said that he was taken to Queen Elizabeth Central Hospital (QUECH) where he was admitted from 23rd November, 2017 to 4th December, 2017. He said that his leg was inserted with metals and placed in a Plaster of Paris for a month and was still visiting the hospital for check-ups.

Nenenji Mphaya further said that her brother was visiting the hospital for dressing his wounded leg. She said that her brother complained of serious pain on the wounded leg such that she took him to the hospital where he was admitted until his death on 14th August, 2018. She prayed for compensation as his brother left two children, then aged 10 and 6, that were looking up to him.

In cross examination, Nenenji Mphaya said her brother died at the age of 41 years and had two daughters and two younger sisters, as his dependants. She also said that her brother was a vendor in Blantyre but she could not tell what his periodic income was.

Nenenji Mphaya was the only witness. The defendant did not call any witness. Counsel for the defendant submitted that the Court needed to be aware of the apportionment of liability and also the policy's limit when making the assessment order.

Issue

The only issue in the matter, this far is the amount of damages awardable to the claimant for his damage in the accident attributed to the wrong of the defendant at 70%.

Law and Fact

The starting point is that assessment of damages presupposes that damages have been proved and the business that 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*.”

It is not easy to quantify damages for losses that are not monetary in nature such as personal injuries. Courts as such use comparable cases as a guide to the quantification of applicable damages, without losing sight of particularities in the individual case that the court is dealing with. See **Chipeta v. Dwangwa Sugar Corporation, Civil Cause No. 345 of 1998, High Court, Principal Registry (unreported)**. The court will also consider factors such as passage of time since a particular comparable award was made, as well as currency fluctuations within the period between the case at hand and the comparable one- **Hon. Kennedy Kuntenga v. Attorney General, Civil Cause No. 2002 of 2002, High Court, Principal Registry, (unreported)**.

Pain and Suffering

The word 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, embarrassment and sickness- Ian Goldrein et al, Personal Injury Litigation, Practice and Precedents (Butterworths, 1985) p8. The award of damages for pain and suffering depends upon the claimant's personal awareness of pain, and his capacity for suffering- see **Limpoh Choo v. Camden and Islington Area Health Authority [1980] AC 174 @ 183**.

Loss of Amenities of Life

Damages are paid under the head of loss of amenities of life to compensate the claimant's deprivation of the pleasures of life, which amounts to substantial loss, whether the claimant is aware or not of that loss. See **City of Blantyre v. Sagawa [1993] 16(1) MLR 67 (SCA); Kemp and Kemp, The Quantum of Damages, Vol. 1 (2nd Edition), 1961, p. 624**.

Disfigurement

Disfigurement is concerned with change of looks of the individual. This may be scars, amputations and postures. See **Lemon Banda and 19 others v Motal Engil Limited and General Alliance Insurance Limited, personal injury cause number 178 of 2012 (unreported)**. Damages for disfigurement are awarded separately if the Claimant has been ridiculed, lost his social status, or that he is in need of plastic surgery. See **Mary Kamwendo v Stage Coach Malawi Limited Civil Cause Number 840 of 1995**.

Injury and Loss in this Case

I believe that Harrison Kesten sustained all the injuries that were stated in his statement made before his death. There is no doubt about the extent of the injuries and his condition in the aftermath of treatment. I only have issues with the cost of the medical report. No receipts were tendered to prove the expense for the medical report. It is a special damage. It ought to have been strictly proved. The police report I believe was paid for, at the cost of K3, 000.00 as a government general receipt number 5392620 was issued as is evidenced on the police report on file.

Comparable Cases

In **John Madeya v. Maphumuzana Jere and Prime Insurance Co. Ltd, Personal Injury Cause No. 476 of 2012**, the claimant was awarded the sum of K3, 500, 000.00 for pain and suffering and disfigurement, K1, 500,000.00 for loss of amenities of life on 12th June 2018 for injuries as follows open fracture of the femur, rib fractures, backache and soft tissue injuries.

In **Malichi v. Prime Insurance Company Ltd, Civil Cause Number 2613 of 2009, High Court, Principal Registry (unreported)**, the claimant suffered a cut wound on the scalp, bruises on the face, swollen head and fracture of the left tibia. He had headaches and limped when walking. He was awarded K4,500,000.00 for pain and suffering and loss of amenities of life, on 29th May, 2012.

In **Christine Mande v Charter Insurance Company Personal Cause No. 329 of 2016** the claimant was awarded MK 6,300,000.00 as damages for pain and suffering and loss of amenities of life after sustaining a fracture of the right femur, dislocation of the right hip joint, cuts on the head and loss of consciousness.

Determination

After weighing the comparable cases, the circumstances of this case and factoring in the loss of value of the currency since the awards, I award the claimant the sum of **K6, 800,000.00** for pain and suffering, loss of amenities of life and deformity. I also award him **K3, 000.00** for the special damage of obtaining a police report. Even though counsel for the defendant alluded to an idea of a policy limit, there was no such evidence on file and as such I disregard the submission totally. The claimant will get 70 % of the award.

Conclusion

In line with the order that the claimant was 30% liable for the accident, the claimant will get 70% of the award. The Claimant is awarded a total sum of **K4, 762,100.00**. The Claimant is also awarded cost of the assessment of damages at 70% of the assessed costs if the costs cannot be agreeable.

Made this 29th day of July, 2021.

A handwritten signature in black ink, appearing to read 'AJ Banda'.

Austin Jesse Banda

ASSISTANT REGISTRAR