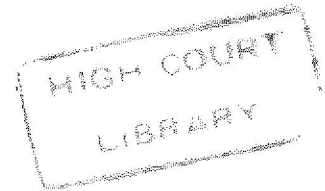


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IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
Personal Injury 515 OF 2020

BETWEEN
LYSON ROBERT CLAIMANT
AND
FRANCISCO FRIDAY 1ST DEFENDANT
PRIME INSURANCE
COMPANY LIMITED 2ND DEFENDANT

CORAM : MATAPA KACHECHE Deputy Registrar
Chizimba for the Plaintiff
Tembo for the Defendant
Mtegha (Mrs) Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

- i. Following mediation proceedings that took place on 22nd March, 2021, the Court entered a judgment in favour of the claimant whereby the defendants were found liable for the wrongful death of Robert Time on whose dependents' behalf the claimant brought this claim.
2. The formal order was issued on 20th October, 2021 and I reproduce it:

JUDGEMENT ON LIABILITY

The matter came for mediation on 22nd March, 2021 and upon hearing both parties herein through their legal practitioners, and upon the Defendants admitting liability in this matter; **IT IS HEREBY ORDERED** as follows:

1. **THAT** Judgment in respect of the claimant's claims of damages for loss of expectation of life, damages for loss of dependency, MK500,000.00 being funeral expenses, MK25,000.00 being cost of death report and costs of the action herein be and IS HEREBY entered in favour of the Claimant as against the defendant herein.
2. **THAT** the parties are given 14 days within which to agree on the quantum of damages on the unliquidated claims herein and costs and the same shall be assessed by the Registrar on a date to be fixed if not agreed by the parties.

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3. I have observed certain anomalies which, although I will proceed with the assessment. I need to bring to the attention of the parties so that they do not commit similar errors in future.
4. The judgment ordered that damages be assessed by the Registrar "if not agreed by parties". Yet it was filed together with the assessment bundle – meaning that at the time the judgment was being filed and issued the parties had already failed to reach an agreement.
5. In fact, the Judge's notes clearly gave the parties 14 days to discuss and report on 7th April, 2021. They never reported. In my view the best practice is for the parties to report the outcome of their discussions and have the Judge direct the Registrar to proceed to assess the damages. So I will proceed on the assumption that the parties failed to reach an agreement. I am fortified in this because none of the parties raised it as an issue.
6. My second observation is that at the time of hearing the defence asked the Court to exercise its discretion to allow it to bring a witness to testify on the policy limit. My take on this is that it is not procedural to bring a witness on policy limit at the time of assessment of damages, as, by that time, issues on liability are already settled.
7. The correct position is to bring the issues of policy limit, including the amount payable under the policy during trial, or mediation, as the case may be. The judgment must clearly state the maximum amount payable by the defendant rather than leaving it to the Registrar to determine the limit during assessment.
8. The only task for the Registrar at this stage is to assess the damages payable. They may be more or less than the policy limit. The Registrar's task ought to end there and the only extension may be just to state the excess amount payable by the insured.

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9. By bringing evidence on policy limit at the time of assessment it may be interpreted that the Court can only assess damages to the extent of the policy limit which is not the case in my view.
10. My last observation is that although I will proceed to assess the damages herein, it has not escaped my mind that the first defendant has not been heard in all of this process.
11. It is clear from the Court Record that Counsel Tembo herein represents the second defendant not the first. I am even surprised how the second defendant could admit liability on behalf of the first. The notice of appointment talks only of the second defendant. Counsel could therefore not proceed to represent the first defendant when he was never appointed by him. The judgment therefore cannot bind the first defendant.
12. I only proceed because I am bound by the judgment to proceed as such and that the outcome of this order will likely not substantially affect first defendant's rights in that the assessed sum is less than the policy limit. If it were more than the policy limit I would have specifically stated that the first defendant is not bound by the assessment outcome.
13. All that I have stated here is obiter but it is my wish that Counsel be strict with procedures and good practice to avoid damaging their client's cases.
14. Coming to the substantive issues now one witness testified and it was the claimant himself. Basically he simply adopted his witness statement. In the statement he states that the deceased was 56 years old at the time of his death.
15. He was a carpenter by trade and is survived by members of his immediate and extended family. He did not state the identities or ages of the family members. Suffice to say that the claimant himself was 41 years old at the time of assessment. The

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claimant did not obtain any letters of administration before commencing the action.

16. He did not state any periodical earnings of the deceased though he stated that the family depended on the deceased financially.
17. The deceased enjoyed robust health and he was an active and reliable member of the community both socially and in religious circles. He had good humour too.
18. The purpose of awarding damages is to compensate the injured party as nearly as possible as money can do. Damages are to place the claimant in a position he or she would be had he not suffered the damage or loss.
19. It is acknowledged that it is not possible to precisely compute damages for loss of dependency and loss of expectation of life. There are thus no tables or some precise arithmetic formulae for coming up with these awards. To come up with the awards therefore we use comparable conventional awards. See the case of **Kalinda -vs- Attorney General (1992) 15 MLR 170** at p 172.
20. 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.
21. To ensure that the awards do not unnecessarily fluctuate from case to case we look at the most recent awards from courts of similar jurisdiction to get guidance on the conventions.
22. The claimant proposed K2, 500,000.00 as damages for loss of expectation of life. He cited two cases

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where one was compensated with K1, 200,000.00 and another one was compensated with K1,800,000.00. These are unreported cases and no hard copy of the judgment was provided, nor did the claimant narrate the full facts of the case for us to appreciate the basis of the award.

23. Recently in the case of *Maryam Symon v Mr Daile Kumwenda* and others an award of K2,000,000.00 was made for loss of expectation of life. A similar award was also made in the case of *Sellina Golozero v Electricity Supply Corporation of Malawi*. The awards were made on 13th August and 16th August 2021 respectively. I have no reason to depart from the awards and I award K2,000,000.00 as damages for loss of expectation of life.
24. The other head of damages is loss of dependency. Loss of dependency is awardable on the basis that the deceased left behind individuals who depended on him while he was alive. The wrongful death leads to an early termination of the dependency of the said individuals on the deceased.
25. It is a pecuniary loss and the Court has evolved a particular method for assessing the value of the dependency, or the amount of pecuniary benefit that the dependants could reasonably expect to have received from the deceased in the future.
26. This amount is calculated by taking the present annual figure of dependency, whether stemming from money or goods provided or services rendered, and multiplying it by a figure which, while based upon the number of years that the dependency might reasonably be expected to last, is discounted so as to allow for the fact that a lump sum is being given now instead of periodical payments over the years. See *Mc Gregor on Damages, 15th Edition. Para 1557*.
27. Lord Pearson set it out concisely in *Taylor -vs- O'Connor* [1971] AC 115 at 140. He said:

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“There are three stages in the normal calculation, namely; (i) to estimate the loss of earnings, i.e. the sums which the deceased probably would have earned but for the fatal accident; (ii) To estimate the lost benefit, i.e. the pecuniary benefit which the dependants probably would have derived from the lost earning, and to express the lost benefit as an annual sum of the period of the lost earnings; and (iii) to choose the appropriate multiplier which, when applied to the lost benefit expressed as an annual sum, gives the amount of the damages which is a lump sum.”

28. To come up with the awardable damages the court first has to determine the monthly earnings of the claimant. this is a straight forward issue. The claimant has to simply show that the deceased used to earn money either from a wage/salary earning employment or from a business. The claimant is then under a duty to show to the court how much the deceased used to earn from the employment or the business.
29. Even in the absence of such, it is assumed that no person is completely useless. Every person gives a service to the family and the community. As such where there is no proof of earnings the court uses the minimum wage set by the state as the basis. This amount is subjected to deductions on the basis that not all that the deceased earned was given to the dependants. The fiction is that one third of the earnings would be spent by the deceased on his own needs.
30. It the present case the claimant did not prove the earnings of the deceased. Therefore, the minimum wage of 50,000.00 will be used as the multiplicand.
31. It is the multiplier that becomes an issue in cases of loss of dependency. The reason being that no person, even with scientific progress can tell how long a person will live on the earth. He/she may live to be a hundred or may die tomorrow of other natural causes. Even estimated life expectancies are not useful in this

regard. Life expectancies are just average calculations on the expected longevity of individuals in a particular community. Many do live long beyond the life expectancy and many also do not reach the stated life expectancy. In any event life expectancies do change from time to time so that we do not have any consistent figures on life expectancy.

32. In the circumstances the best approach is to use the expected period within which the person could earn the supposed income as the basis. This would be, in my opinion, up to the time the deceased would be expected to mandatorily retire from employment were he employed. Although different employers have their own retirement ages, the best approach would be to use the mandatory retirement age in the Civil Service which is 60 years of age.

33. From this age we subtract the age of the deceased at the time of his death. In this case the deceased was 56 years of age, if subtracted from 60 he remained with 4 years of gainful life. I will use that as the multiplier.

34. The loss of dependency therefore is: $K50,000.00 \times 12 \times 4 \times 2/3 = K1,600,000.00$.

35. The claimant also testified that the family incurred MK500,000.00 funeral expenses and also paid MK25,000.00 to obtain the death report. The judgment already awarded these and I will not go on to assess them.

36. In summary, the claimant is awarded as follows:

- Loss of expectation of life - K2, 000,000.00
- Loss of dependency - K1,600 ,000.00
- Funeral expenses - K 500,000.00
- Death report - K 25 ,000.00

37. In total, the claimant is awarded **K4,125,000.00**.

38. The claimant is further awarded costs of the assessment of damages proceedings to be taxed if not agreed by the parties.

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39. The defendant is ordered to pay the damages within 21 days upon being made aware of this order.
40. In view of the fact that the claimant did not obtain letters of administration to administer the estate herein and that he did not mention the beneficiaries of the estate, I further order that the damages be paid in court and only be paid out to lawful administrators and/or beneficiaries of the estate.

Delivered this 24th day of June 2022



Chimbizani Matapa Kacheche
DEPUTY REGISTRAR