



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
Personal Injury 388 OF 2017**

**BETWEEN
OSCAR WILSON GAMA PLAINTIFF
AND
MALDECO FISHERIES DEFENDANT**

Coram :

Matapa Kacheche	Deputy Registrar
Kadyampakeni	For the Claimant
Ndau/ Khaki	for the Defendant
Mtegha	Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

1. The claimant commenced an action on 13th June 2017 through a summons claiming damages for personal injuries caused to him due to exposure to asbestos. He claimed for damages for pain and suffering, loss of amenities, disfigurement and loss of earning capacity.
2. The defendant failed to file a response or defence culminating in the claimant obtaining a judgment on all heads claimed. The judgment was entered on 19th August, 2020.
3. Subsequently, on 11th February, 2021 the claimant filed an application to amend the statement of claim. The application was heard on 10th June, 2021 and was granted. The amendment was meant to introduce more particulars of damages and to slightly increase the particulars of special damages on account of medical expenses from K900,000.00 to K984,050.00.
4. The amended statement of claim states particulars of damage as follows: brain failure, dry skin, pneumonia, heat in the chest, throat itching, pains in

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the eyes, suffocation, chest pains, dryness of the throat, painful skin, brain failure among others, difficulty in breathing especially during sleeping hours, improper/half digestion sleepless nights, burning sensation on the skin and persistent thirst and difficulties in breathing.

5. The amended summons was filed on 22nd July and issued on 26th July, 2021. It is not apparent on the Court Record if the same was ever served. If it was not, then it was an anomaly in my view as the amended summons should have been served so as to give the defendant a chance to respond to the same as, in my opinion, the amendments were substantial.
6. Be that as it may, the claimant filed a notice of assessment of damages, initially set down for 27th September, 2021. The record does not show what happened on the 27th September, 2021 suffice to say that the claimant filed a fresh notice and I proceeded to hear evidence on assessment on 19th January, 2022.
7. When the matter came for assessment the parties brought one witness each. The claimant testified for himself. And the defendant brought one Chisomo Lamya, a Human Resource and Administration Manager in the defendant's company.
8. The undisputed facts are that the claimant is a carpenter who used to be engaged on small repair and maintenance contracts from time to time by the defendant. On 10th December, 2016 he was, as usual engaged in such maintenance contract. He was to do some maintenance in a boat called Kandwindwi. The work involved maintaining toilets, beds, cupboard and coldroom among others. The room in which he was to do the work was floored with blockboard and walled and ceilinged with plywood. Maintenance of the room involved removing old plywood and replacing it with new one.
9. What he was not told about the room was that some of the ingredients used in the wall and ceiling had

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asbestos and that he needed to use protective wear in case the asbestos escaped into the air in the room.

10. The room was so hot that it necessitated that he takes out his shirt and trousers for comfort although this had minimal effect. As he was removing the plywood the asbestos dust started dropping from the ceiling onto his body and the floor. The asbestos dust thus filled the room and some got stuck to his skin. He began losing breath, had heat in the chest, itching throat and pain in the eyes. He also felt suffocated if he stayed long in the room.
11. It was only when one of the defendant's employees found him there that he was told that he was working in a hazardous environment. He was told to drink a lot of milk but, alas, this remedy did not relieve the symptoms that he was having.
12. From that day he began visiting medical facilities: starting with the Maldeco Clinic, then Mangochi District Hospital, then Blantyre Adventist Hospital and several other clinics. He explained his symptoms and notified the doctors of his recent exposure to asbestos. All he was given were pain killers, and other medications to relieve his pain and shortness of breath. He was also told that it was difficult to trace the asbestos in his system and that asbestos related illnesses do not have a cure.
13. This is where the undisputed facts come to an end.
14. In his testimony the claimant states that his health has been affected significantly. He experiences chest pains, pneumonia, difficulty in breathing especially during sleeping hours, improper/half digestion, sleepless nights, burning sensation on the skin and persistent thirst. He did not experience these before the asbestos exposure. When he was asked what he meant by pneumonia it was clear he did not mean the bacterial or viral pneumonia. He only meant he feels sharp, stabbing pain when he breathes in and out. This is therefore a severe extension to his breathing problems.

15. In the meantime, the claimant states that he still has all the symptoms that he particularized in the statement of claim. In his original witness statement, he stated that he can no longer run his carpentry business and that he used to be a member of Nkopola Social Football club. He stopped these activities due to the symptoms he is experiencing. In addition he claims that he suffers anxiety due to the knowledge that he had been exposed to so much danger.
16. However, he changed some aspects of his statement after the defendants witness statement, made by Ms Chisomo Lamya, disputed this. In his supplementary statement in direct response to allegations in Ms Lamya's statement he stated that his children are now carrying out the carpentry business and he supervises them. Further he stated that he does exercises, that is, hiking the Nkopola Hill, which is more than 600 metres high, because it is a prescription from doctors to relieve his breathing problems.
17. He also claimed that he has spent K984, 050.00 seeking medical help. He attached an invoice prepared by himself and sent to the defendant showing a breakdown of expenses. The expenses are in three categories namely: transport, medical diagnosis and treatments. The defendant generally disputed these claims for lack of cogent proof in the form of receipts that he paid for the stated services. Indeed, he attached only three receipts stating that the other receipts got lost in the custody of his previous lawyers. I will deal with this aspect later in the order.
18. Ms. Lamya alleged in her witness statement which she fully adopted that the claimant did not suffer significant injuries according to all medical reports available. Indeed, all medical reports available do not indicate any injury on the part of the claimant. However, despite the fact that no injury was detected by the medical personnel it is not in dispute that the claimant has been suffering various symptoms since the alleged exposure. The only disputable claim is brain damage or failure. It is not clear how the claimant came to realise that he has brain damage or

failure. For him to make this claim he needed a medical examination confirming the same.

19. My finding therefore is that the claimant has indeed been suffering breathing difficulties, skin itching and burning sensations, eye problems and persistent thirst. I am therefore going to make an award representing compensation for this suffering and related loss of amenities. I will then consider the special damages.
20. A person who suffers bodily injuries due to the negligence of another is entitled to the remedy of damages. The principle is that the Court must, as nearly as possible, award an amount, as far as money can, which will put the plaintiff in the same position s/he would have been in if s/he had not sustained the wrong for which s/he is being compensated.
21. Such damages are recoverable for both pecuniary and non-pecuniary losses. The pecuniary losses include loss of earning capacity and related benefits and medical expenses and related expenses.
22. In this case we are to assess non pecuniary damages for pain and suffering, loss of amenities of life and pecuniary damages being the claim for loss of earning capacity.
23. Pain refers to the immediately felt effect on the nerves and brain of some lesion or injury to a part of the body, while suffering is distress which is not felt as being directly connected with any bodily condition.
24. Loss of amenities of life concentrates on the curtailment of the plaintiff's enjoyment of life by his/her inability to pursue the activities s/he pursued before the injury. Bricket L.J. put it thus in *Manley v. Rugby Portland Cement Co. (1951) C.A. No 286*, reported at Kemp and Kemp, *The Quantum of Damages*, Vol. 1 (2nd Ed., 1961, p. 624)

"There is a head of damage which is sometimes called loss of amenities; the man made blind by the accident

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will no longer be able to see the familiar things he has seen all his life; the man who has had both legs removed will never again go upon his walking excursions- things of that kind-loss of amenities.”

25. The amount to be awarded for this head of damages cannot be quantified in monetary terms by use of a mathematical formula but by use of experience and guidance afforded by awards made in decided cases of a broadly similar nature. See *Wright v British Railway Board* [1983] 2 AC 773.
26. As for loss of earning capacity, it simply refers to the inability of the claimant to pursue gainful employment or business due to the injury. This is mostly due to the fact that the injury to a particular part of the body has made the claimant so disabled that he can no longer pursue the gainful work or, if he can, it would be only at a reduced capacity.
27. Unlike the nonpecuniary damages discussed above, damages under this head are quantifiable by use of a scientific formula. We use the multiplier and the multiplicand formula. The multiplier being the estimated number of years that the claimant would be expected to work and the multiplicand being the annual wage that the claimant would be expected to receive.
28. In respect of his submission for pain and suffering and loss of amenities of life, counsel cited a number of previous awards, most of them coming from six years ago. And the injuries are unlike the present ones. Indeed, I do not blame counsel for failure to bring such precedents. The claimed injuries, as demonstrated by the symptoms that the claimant is suffering are unusual and indeed it is impossible to find precedents. I have considered all the cited cases, however, in coming up with my final award.
29. In awarding the claimant for pain and suffering I have considered the fact that the claimant is still suffering from the effects of the asbestos exposure even today, long after the exposure. And we do not

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know how long after will he continue suffering. The award must therefore take into account the future suffering. I award him K3,000,000.00 for pain and suffering.

30. In awarding him for loss of amenities I consider that it has not been disputed that the claimant previously used to enjoy football which he can no longer participate in. Although he involves himself in a different kind of exercise, the same cannot replace football. I award him K1,500,000.00 for loss of amenities.
31. The claimant also pleaded that he be awarded for disfigurement. He did not present and disfigurement in this court. I make a zero (0) award on this head.
32. Coming to the special damages pleaded: the claimant only proved the payment of K263, 000.00 for the detox treatment and K12, 000.00 for payment at Koche Community Hospital. Although he produced a receipt for payment for the eye treatment the same is self-contradictory. The amount in words is nine hundred kwacha but the amount in figures is K90,000.00. I therefore will not accept it as evidence that the claimant paid K90,000.00.
33. The defendant submits that even the K275, 000.00 should not be entertained as the claimant went on a kind of seeking medical treatment without professional authorization. I am unable to accept this submission. In my view the claimant was entitled to go about looking for remedies to reduce the pain he was suffering. In short his intent was to mitigate the damage. I will therefore award the K275, 000.00. There is no proof for the rest of the alleged payments. Even the visits to the hospitals (and they seem so numerous) could have been proved better by production of the health passport books.
34. I will not award anything on the loss of earning capacity head as, apart from stating that he can no longer do his job as a carpenter, a claim which was subsequently qualified, the claimant failed to show how much he used to earn prior to the injuries and

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how much he is earning now after the exposure. In any event, the medical report, produced by the claimant himself shows that the claimant is able to do his normal daily work. The claimant therefore provided no basis for awarding him under this head. I award him zero (0) damages.

35. All in all, therefore, the claimant is awarded K4,275,000.00 in damages under all heads.

36. I also award costs of these proceedings to the claimant.

Made this 29th day of June 2022.



CM Kacheche

Deputy Registrar