



IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL DIVISION

CIVIL CAUSE NO. 766 OF 2018

BETWEEN:-

Melina Chizowa and Macdonald M'bobo (Suing as administrators of the estate of Agness Chizowa on behalf of the estate and dependants of the deceased).....CLAIMANT

-AND-

Daylous Kishombe.....1st DEFENDANT

Kenneth Ndovie t/a Link Malawi.....2nd DEFENDANT

Coram:

Brian Sambo, Assistant Registrar

Mr. Kambalame, of counsel for the Claimant

Mr. Z. Matumba, of counsel for the Defendants

Mr. Kumwenda, Official Interpreter/ Law Clerk

ORDER ON ASSESSMENT OF DAMAGES

BACKGROUND

The present assessment follows the summary judgment that was entered by the honourable judge on the 10th of December, 2019 for the following;

- i. Damages for pain and suffering from 13th December, 2017 to 30th March, 2018.

- ii. Damages for loss of expectation of life.
- iii. Damages for loss of dependency.
- iv. Cost for the Police Report and Death Report.
- v. Cost of action.

On 13th October, 2021 I received evidence for assessment of damages. I will analyse the evidence later. I wish to, first give a brief account of the facts attendant.

BRIEF FACTS

On 13th December, 2017 at about 5 hours, the 1st Defendant was driving motor vehicle Nissan Caravan Minibus, Registration Number KA 8089 from the direction of Kasungu heading towards Lilongwe, along Kasungu/Lilongwe M1 Road, with fee-paying passengers on board, including the deceased. Upon arrival at Chakalamba Village, he negligently drove the motor vehicle by excessively overspeeding to the extent that he lost control of it and veered to the offside dirt verge where the motor vehicle overturned several times. The deceased sustained serious injuries, and she eventually died on the 30th of March, 2018.

EVIDENCE ON ASSESSMENT

Melina Chizowa was the only witness on the part of the Claimants. She told the court that she was one of the appointed administrators of the estate of Agness Chizowa (Deceased). She tendered letters of administration marked MC 1 in support of her assertion that she was indeed an administrator of the said estate. She said the deceased died because of the negligent driving by the 1st Defendant. She tendered a Police Report marked MC 2 and a Death Report marked MC 3. She tendered Ministry of Health Master Pay Roll marked MC 4 showing the amount of money that the deceased was earning per month before her death. She testified that at the time of her death, the deceased was 43 years old, and was working in the Ministry of Health in Lilongwe as a Health Surveillance Assistant. She was earning around MK86, 648.60 per

month in salaries. She went on to say that the deceased was also into cross boarder business, and she was making between MK200, 000.00 and MK400, 000.00 profits per month. She said, before her death, she was able to support her parents and children. She said she was the one paying school fees for her four children. She said, one of her children, Shira M'bobo was studying at the African Bible University of Uganda and she was the one responsible for her school fees. She tendered documents marked MC 6a, MC 6b, MC 6c, MC 6d and MC 6e in support of her evidence that Shira was at the said college.

She said Macdonald M'bobo was studying at Malawi Assemblies of God University, and it was the deceased who was paying school fees for him. She tendered documents MC 7a, MC 7b and MC 7c in support of her evidence about Macdonald M'bobo.

She went on to testify that Kelvin M'bobo was in Secondary School and that the deceased was responsible for his school fees. She tendered a deposit slip purported to have been made in favour of Kelvin M'bobo.

She finally told the court that Miracle M'bobo was in primary school, and the deceased was the one expected to take charge of her future.

During cross examination, she told the court that the deceased was working as a Health Surveillance Assistant and was receiving MK86, 648.60 per month. She said it was true that the Pay Roll was indicating MK85, 992.00/month and not MK86, 648.60. She said the deceased was also doing business from which she was realizing between MK200, 000.00 and MK400, 000.00 in a month. She said it was true that MC 5 was only a Passport Copy and did not witness to the fact that the deceased was making so much money from her business. She said there were no payment receipts or other documents showing how much she was making from her business. She also said that the passport copy tendered did not also show that she was travelling outside this country for business. She said the deceased was doing business before she got involved in the accident. She said some of her business

documents got lost at the scene of the accident. She said she was not telling lies. She went on to tell the court that the deceased was the one paying school fees for Shira M'bobo. She agreed that tendered documents from MC 6a to MC 6e were not showing any payments but were simply passport copies. She said Shira was at that time 21 years old. She said Shira did not come to court because she was sick.

She said it was true that Macdonald M'bobo was a student at Malawi Assemblies of God University. She admitted that tendered documents MC 7a to MC 7 c were not showing any payment of fees.

She told the court that the deceased was also paying school fees for Kelvin M'bobo at Chaminade Secondary School. She said that the deposit slip of 2018 showed that Kelvin M'bobo paid MK92, 000.00 after she had already passed away in 2017. She said, the deceased used to give money for school fees to her children, and it was her children that paid their respective school fees by themselves.

She said the deceased was survived by four children and a mother. She said it was true that she had tendered photocopied documents without certification. She said all original documents were not with her.

ISSUE

The only issue at this point is to find the appropriate amount of damages payable to the Claimants by the Defendants. I should also state it at once that the claim for damages for pain and suffering is not attainable at this stage. If the Claimants wanted it to be considered, they should have done so before the death of Agness Chizowa. They cannot bring it now.

DETERMINATION

The fundamental principle of the law on damages is the principle of restitutio in intergrum which means that the damages to be recovered are in monetary terms no more and no less than the Claimant's actual loss. (Liesboch Dredger

V Edisons [1993] AC, 449). It has also been described as the principle of compensation.

It is actually not possible for an assessment court to assess damages which would compensate the Claimant to the exact mathematic or scientific calculation hence courts have devised a way of dealing with this problem and in so doing the general principles which can be applied are that the damages must be fair and reasonable, that a just proportion must be observed between the damages awarded for the less serious and those awarded for the more serious injuries, and that although it is impossible to standardize damages an attempt should be made to award a sum which accords "with the general run of assessments made over the years in comparable cases" (Bird v Cocking & Sons Ltd [1952] W.N.5; [1951]2 T.L.R. 1260.

According to Lord Blackburn in Livingstone v Rawyards Coal Co. (1880) 5 App. Case. 25 the principle behind damages is that the injured party is to be placed as far as money can do it in the same position as he would have been in but for the negligence of the defendant. This is what is known as the principle of *restitutio in integrum*.

In Charlesworth On Negligence, 5th Edition, page 97 it is stated that in the interest of justice it is of some importance that attempts should be made to obtain a measure of consistency in the assessment and the award of damages. (See: Elida Bello v Prime Insurance Co. Ltd Civil Cause No. 202 of 2002).

It is trite law that in order to achieve consistency courts look at comparable cases and also take into consideration the fall in monetary value due to inflation.

DAMAGES FOR LOSS OF EXPECTATION OF LIFE.

The case of Rose v Ford [1937]AC, 826 established a principle that damages for loss of expectation of life are recoverable for the benefit of the deceased and the principal factor to be always kept in mind is the prospect of a predominantly happy life (see also Benham v Gambling [1964]AC, 157.

Again, the awards of damages for 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. The court requires to consider the country's life expectancy when making such awards.

It is necessary for the Court to be satisfied that the circumstances of the individual life were calculated to lead, on a balance of probabilities, to a positive measure of happiness of which the victim has been deprived by the Defendant's negligence. What is to be valued is the prospect of length of days, thus the number of years lost is of subordinately importance and social status and wealth are immaterial.

In the present matter, the evidence is clear that the deceased enjoyed good health and had normal expectation of a healthy and good life which was shortened by her sudden death. The deceased person died at the age of 43 years.

I have not considered the evidence by the Claimant to the extent that because the deceased, before her death, was paying school fees for her children, and was taking care of her parents then the award should be upgraded. There was also an attempt to say because the deceased was, before her death, involved in businesses then the award should be bigger. There was no sufficient evidence to support those facts. In fact, counsel for the Defendants was able to challenge and discredit all those facts and supporting exhibits during cross examination.

Considering the time factor and the devaluation of the Kwacha the Claimant herein is awarded **K2, 000,000.00** as reasonable quantum of damages for loss of expectation of life.

DAMAGES FOR LOSS OF DEPENDENCY

For the loss of dependency the approach courts have developed in arriving at an award of damages is by employing the multiplicand and multiplier formula. The multiplicand is a figure presenting the deceased monthly earnings and the multiplier is the estimated number of more years the deceased could have lived if not for the wrongful death. (See: **Emma Sitenala Piyano-vs-Geofrey Chipungu and Prime Insurance Company Ltd** civil cause No.1254 of 2001.

In the case of **Makifale Dimingu and Others -vs.- The Attorney General** Personal Injury Cause No. 749 of 2012 (High Court) (Unreported) the court held that:

“Damages for loss of dependency are calculated in reference to reasonable expectation of pecuniary benefit as of right or otherwise from continuance of life. The approach the courts have adopted in arriving at damages recoverable in suits for loss of dependency is that of using what is termed the multiplicand and multiplier formula.”

Again, in **Ntelera vs Sabot Hauliers** 15 MLR 373 and **Mallet vs Mc Monagle**, 1970 AC 166 175. Where it was provided that the multiplicand is the deceased's monthly income whilst the multiplier is the approximated number of years the deceased would have lived if it were not for the wrongful death.

In the present matter, before her death, the deceased was working with the Ministry of Health as a Health Surveillance Assistant and was receiving a salary of **MK85, 992.00** per month. When calculating damages for loss of

dependency, we also consider the age of the deceased at the time of death, her earnings per annum during life time and life expectancy at the time of death.

According to the World Health Organization (WHO) data published in 2018 life expectancy in Malawi was: Male 61.4, female 66.8. (See: www.worldlifeexpectancy.com/malawi-life-expectancy). This included 2017.

Assessment courts do not adopt the figures wholesale considering that there are other numerous factors affecting one's life. It is possible that the deceased would not have reached even the age of 45 years due to these factors. May be she would not have passed the age of Covid – 19. This is why the courts would always subtract some years from one's life expectancy to carter for these vicissitudes of life. Ordinarily, according to the WHO's statistics at that time, the deceased had 24 more years to live on earth.

In the case of Samuel Chawanda -vs. - Attorney General, Civil Cause Number 3556 of 2002, (Principal Registry) (Unreported), the court also factored in life's ups and downs.

In Davie Maston Fransiku (suing on his own behalf as father of the deceased and on behalf of other dependents of RUTH MASTON), Personal Injury Cause Number 29 of 2017, 5 years were subtracted to carter for life's events while,

In this case, where the deceased died at the age of 43 years, I will adopt 15 years as a multiplier. I have done away with the other part her life expectancy to carter for the factors I have outlined above.

Therefore, loss of dependency should be calculated as follows:

K85, 992.00 (her monthly income) x 12 months in a year x 15 (multiplier) x 2/3

=**K10, 319,040.00** being damages for loss of dependency.

SPECIAL DAMAGES

It is trite law that not only must special damages be specifically pleaded but they must also be strictly proved. (See: **(General Farming Limited -vs- Chombo [1996] MLR 16)**).

In the matter at hand, though the Claimant has not exhibited receipts for Police Report and Death Report, it is however not in dispute that the Claimant obtained them and the same have been attached to the Claimant's witness statement. This court should, however take judicial notice that K5, 000.00 is paid for Police Report and at least MK10, 000.00 for a Death Report. The Claimants are demanding MK20, 000.00 but I award **MK15, 000.00** under this head.

In total, the Defendants shall pay **MK12, 334,040.00** in damages. This whole sum is payable in two instalments as follows;

- i. **MK6,334,040.00** to be paid on or before the 15th of December, 2021, and
 - ii. **MK6, 000,000.00** to be paid on or before the 30th of January, 2021.
- Costs are for the Claimant, and shall be assessed separately if not agreed upon by the parties.

Made in chambers today Friday the 19th of November, 2021.

Brian Sambo
Assistant Registrar

Melina Chizowa and another vs Daylous and another, Civil Cause No. 766 of 2018