

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 840 OF 1995

BETWEEN

MARY KAMWENDO

PLAINTIFF

AND

STAGECOACH MALAWI LIMITED

**FIRST
DEFENDANT**

AND

NATIONAL INSURANCE COMPANY LIMITED

**SECOND
DEFENDANT**

CORAM: D.F. MWAUNGULU, J

Chizeze, for the plaintiff

Chisanga, for the defendant

Mtchera, Official Interpreter

Chingota, Recording Officer

Mwaungulu, J

JUDGMENT

On 25th May, 1995 the plaintiff, Mrs. Kamwendo, took out this action claiming damages for personal injuries. Mrs. Kamwendo suffered these injuries when an omnibus operated by the first defendant overturned at Nkhwazi Trading Centre on the Lilongwe/ Mchinji

Road. This was on 27th August, 1993. The second defendant is the insurer of the second defendant's motor vehicle. On the date set down for hearing it looked as if the matter was all set for trial. The defendants however decided to concede liability. The only matter left for the Court was to assess damages. The plaintiff is claiming damages for pain and suffering, loss of amenities, disfigurement, medical expenses, loss of earning capacity, loss of business, loss of profits and the cost of a police report.

In the accident the plaintiff suffered concussion due to head injuries. She had multiple sprains and bruises. She also had extensive facial and scalp lacerations. She lost a lot of hair. She has an obscene disfigurement right across her face, leaving a horrible disfigurement. She now has partially lost her sight. She has lost her capacity by 30%. She has been to two medical specialists. Immediately after the accident she was rushed to the nearest health centre, St. Gabriels Hospital. There the wounds were only sutured. She was seriously injured. She was rushed to Kamuzu Central Hospital. She was in an intensive care unit for a couple of days. She remained in hospital for six weeks. She attended a hospital as an outpatient from 9th October, 1993 to 14th March, 1994. She told the court that the first few days were really painful for her. She suffered intensive pain. She could not open her mouth. She fed on juices. She still has some pain in the neck. She experiences headaches. She is now unable to carry out her daily household chores. She told the Court that the scars cause her some embarrassment. When she went to the hospital, a few months later she learnt that the poor sight developing was because of the accident. She now puts on spectacles. She did not do so before the accident.

The plaintiff has been incapacitated to the extent of 30%. She can run the business within the limit of her incapacity. Both doctors who attended on her recommended that she undergoes plastic surgery to her face. The plaintiff is a housewife. She however used to run a business. She was buying clothes and selling them. She used to make a modest sum out of the business.

The plaintiff's medical and other expenses were met by her husband. The transport expenses have not been given to the Court. The plaintiff however spent approximately K2, 000. This includes consultation fees. The plaintiff will go to South Africa for plastic surgery. The cost of the surgery has been put at K50, 000. Transport will cost K24, 000. This air fares for the plaintiff, the husband, the plaintiff's sister and a hospital nurse. The nurse will be paid government rates. It is not known for how long the nurse will be there.

The best place to start would be at what was said in **Tembo -v- City of Blantyre and National Insurance Company Limited** (1994) Civ. No. 1355:

"The policy behind damages is, where it is possible and money can do, to fully compensate the victim for the new situation in which he is because of the wrong done to him. The scope of what has to be compensated, however, is difficult to define. If the

problem of remoteness has been overcome and it is decided that the victim is entitled to recover, courts endeavour to adequately compensate the victim. As a guide courts award in accordance with the accepted heads of damages. These heads of damage ensure that all conceivable areas of injury are covered.”

In personal injury claims courts intend to compensate for the financial losses and non-pecuniary injury that attend such injury. In relation to the former the Courts aim for full compensation. There it is a question of *Kwachas and Tambalas*. There might be difficulties at arriving at the correct award arising from the sort of considerations that have to be looked at. It is still possible to aim at full compensation. In **Pickett -v- British Rail Engineering** [1980] A.C. 136, 168, Lord Scarman said:

“But when a judge is assessing damages for pecuniary loss, the principle of full compensation can properly be applied. Indeed everything else would be inconsistent with the general rule. Though arithmetical precision is not always possible and though in estimating future pecuniary loss a judge must make certain assumptions (based upon evidence and certain judgment, he is seeking to estimate a financial compensation for financial loss. It makes sense in this context to speak of full compensation as the object of the law.”

Personal injury however has consequences on the victim which are not financial which courts have acknowledged should be compensated for. These are pain and suffering and loss of amenities. “All these are incapable of quantification. Even if quantification was possible, it would be difficult to attach any meaningful monetary value. It is inherently difficult, therefore, to arrive at a precise award for non-pecuniary losses. Once the loss has been recognised, there is a duty, and courts have noticed that, to compensate the victim.”(**Tembo -v- City of Blantyre and National Insurance company Limited.**)

Here, although there were no fractures, there were multiple injuries and bruises all over the plaintiff’s head. The pain was considerable. The plaintiff was in a hospital for several months. She still experiences some pain. The suffering was unbearable. She has partly lost her sight because of the injury. The plaintiff has lost her capacity by 30%. She is not able to do her chores as she used to. Obviously she has lost out on her pursuit of leisure. She cannot do the thing that she loved most, go across the border and buy goods to sell. The plaintiff is awarded K40, 000 for pain and suffering and loss of amenities.

The plaintiff is claiming damages for disfigurement. Part of this is already taken care of in the award for pain and suffering. For all the pain and shame of such deformity is part of the suffering that the plaintiff has to endure because of the injury. Courts however have awarded damages directly for the disfigurement (**Nakanga -v- Automotive Products** (1982) Civ. No. 573). Here the court has to be more cautious because the plaintiff is claiming damages for plastic surgery. This may improve her looks some, although not completely. Anyway the plaintiff has to live with the scar of being under plastic surgery. I would on that basis award a modest sum for the disfigurement. The plaintiff will be

awarded K5, 000 for the disfigurement.

The plaintiff is entitled to recover for the medical expenses actually incurred and prospective ones. The ones incurred before action should normally be pleaded as special damages. This however matters less The plaintiff can still recover them if they have been proved. The plaintiff is also entitled to future medical expenses. These are awarded as general damages. The plaintiff has quotation from a South African hospital. These have been put at K50, 000. I accept the figure. It is not necessary that the plaintiff call the doctor to prove that. She can be contradicted by cross-examination or by evidence from the defence. That is all that a court can allow to happen. I accept the evidence on that. There is also a claim for travel expenses to South Africa. The plaintiff will have these as well.

The plaintiff is also claiming damages in the form of loss of earning capacity. There has been no reduction really in her earnings. The most that has happened in this matter is that because of the injury she cannot continue with what she has been doing. Anyway her revenues on the business have not been established to the court's satisfaction. There is however a substantial prospect that her capacity to earn the income in future has been affected by the injury. The approach of the Courts in such prospect was stated in **Tembo - v- City of Blantyre and National Insurance Company:**

“Where there has been no change in earnings ...there cannot be a claim for loss of earnings. Courts, however, are not naive. They do not approach the problem from the perspective that no damages should be awarded because there is no loss of earnings...They consider the prospect of the victim losing the job because of the injuries which now appear to have no impact on his earnings. Where there is such a prospect courts have made awards under the style of loss of earning capacity to distinguish it from loss of earnings...The prospect of such a disadvantage must be substantial.”

In that case it was also suggested that where the prospect is substantial an award in several thousands of kwachas would be appropriate. If the prospect was really serious an award above K10, 000 would be appropriate. Here I award K4, 000 for loss of earning capacity.

There will therefore be judgment for the plaintiff for K128, 000.

Made in open Court this 19th Day of September 1997

D.F. Mwaungulu

JUDGE