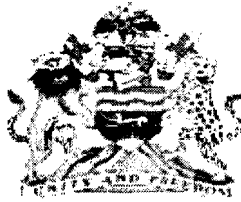


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REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 857 OF 2015

BETWEEN:

PETER NSONA.....CLAIMANT

AND

LUJERI TEA ESTATE
LIMITED.....DEFENDANT

CORAM

Mrs T. Soko	: Assistant Registrar
Mwabungulu	: Counsel for the claimant
Ulaya	: Counsel for the defendant
Mrs Mkandawire	: Court Clerk

ORDER ON ASSESSMENT OF DAMAGES

BACKGROUND

This is an order of assessment of damages following a Judgment by Justice Madise dated 19th February 2018. The claimant's claim is for damages for pain and suffering, damages for loss of amenities of life, damages for loss of earning capacity, damages for disfigurement, special damages for medical report and

costs of the action. The facts of the case are that on 24th June 2015, the claimant was ordered to clean the machine and whilst in the process the claimant's left arm was caught by the rollers of the grinder which pulled him to the machine and minced his left forearm below the elbow and his arm was crushed in the process. The claimant's left arm was further, subsequently and properly, amputated at Mulanje District Hospital.

EVIDENCE

On the date of hearing, the claimant appeared through his Legal Practitioner. The claimant was the sole witness and he adopted his witness statement. In the witness statement, the claimant stated that on the said date of the incident, he was ordered to clean the machine and whilst in the process, his left arm was caught by the rollers of the grinder which pulled the claimant to the machine and crushed his forearm below the elbow. The claimant added that he was taken to Mulanje District Hospital where his arm was amputated. The claimant stated that as a result of the injury, he lost his job and he has been unable to get another employment. He lamented that he still feels pain where his arm was amputated. The claimant tendered a medical report as part of evidence. The claimant also tendered a health passport as part of evidence.

In cross examination, the claimant refused being paid any workers compensation. He said he used to receive K850 per day as his wages. He said that the company did not re-employ him because he sued the company. The claimant said that he cannot secure any job.

In re-examination, the claimant said that he cannot perform manual work. He said before the company laid him off he was offered to work as a cleaner.

SUBMISSIONS

In submissions, Counsel for the claimant submitted that the claimant should be awarded a sum of 23, 450,000.00 as damages. Counsel cited a case of **Edson Lwanda vs Terrastone Company Limited personal injury cause number 58 of 2012** where the plaintiff was injured in an accident and his leg was amputated above the knee. The Court awarded him K14, 500,000.00 damages for pain and suffering, K6000000 damages for loss of amenities of life, K1, 500,000.00 damages for disfigurement and K2, 848,000.00 loss of earning capacity. The award was made on 23rd January 2013. Counsel also cited a case of **Rabbecca M'bwana vs The Attorney General and NICO General Insurance Company Limited Civil Cause Number 1958 of 2009 where** the plaintiff was involved in a road accident and his right leg was amputated. The Court awarded the plaintiff a sum of K13, 070, 220.00 being damages for pain and suffering, loss of amenities of life, disfigurement and cost of prosthesis. The award was made on 17th July 2016.

GENERAL LAW ON DAMAGES

In assessing damages for personal injuries, the intention of the court is to compensate the injured party as nearly as possible as money can do. The principle is to put the plaintiff at the position he would have been if it would have not been for the tort committed. See *Namwiyo v Semu* (1993) 16 (1) MLR 369.

In calculating damages, therefore, the Courts consider, in monetary terms, the sum which will make good to the sufferer, as far as money can do, the loss he has suffered as a result of the wrong done. See *Admiralty Commisioners vs S.S Valeria* (1992) 1 A.C. 242 at 248.

In *Christina Mande vs Charter Insurance Co. Ltd Personal Injury Cause No. 329 of 2016* the Court quoting *Wright vs British Railway Board* 1938 AC 1173, 1177 stated that:

'Non-economic loss... is not susceptible of measurement in money. Any figure at which the assessor of damages arrives cannot be other than artificial and, if the aim is that Justice meted out to all litigation should be even handed instead of depending on idiosyncrasies of the assessor, whether Judge or Jury the figure must be basically a conventional figure derived from experience and from awards in comparable cases.'

In the case of *City of Blantyre vs Sagawa* the court said the following:

'It would appear to us that if the award is to be conventional, an award for a similar injury should be comparable and should, to some extent, be influenced by amounts awarded in the previous case, either in the same or neighboring jurisdictions. In citing previous awards the court should not lose sight of factors like devaluation of the currency since the awards were made.'

PAIN AND SUFFERING

In damages for pain and suffering, the court considers the physical experience of the nerves and mental anguish which comes as a result of the injury. See *Lemon Banda and 19 others V Mota Engil Limited and General Alliance Insurance Limited, personal injury cause number 178 of 2012* (unreported).

In the *City of Blantyre vs Sagawa* 1993 16 (1) MLR 67 the court quoted Kemp and Kemp volume II paragraph 1007 where it was stated that;

Pain is, it is suggested, used to describe the physical pain caused by or consequent upon the injury, while suffering relates to the mental element of anxiety, fear, embarrassment and the like.

Page 831 of **Mc Gregor** on damages defines pain as the immediately felt effect on the nerves and brain of some lesion or injury to a part of the body, while suffering has been defined as the distress which is not felt as being directly connected with any bodily condition. Pain includes any pain caused by medical treatment or surgical operations rendered necessary by the injury inflicted by the defendant. Suffering includes fright at the time of the injury and fright reaction, fear of future incapacity, either as to health, sanity or the ability to make a living, and humiliation, sadness and embarrassment caused by disfigurement. **Also see Gedion Mhango vs Nico General Insurance Co. Ltd Personal Injury Cause No. 703 of 2016 (unreported).**

LOSS OF AMENITIES OF LIFE

Loss of amenities is concerned with loss of enjoyment of life. This follows from the fact that human beings enjoy certain activities which may as a result of the injury be curtailed. **See Lemon Banda and 19 others V Mota Engil Limited and General Alliance Insurance Limited, personal injury cause number 178 of 2012 (unreported).**

Birkett L.J in Manley vs Rugby Portland Cement Co. (1951) C.A No. 286 stated that there is a head of damage which is sometimes called loss of amenities, the man made blind by the accident will no longer be able to see familiar things he has seen all his life, the man who had both legs removed and will never again go upon his walking excursions- things of that kind- loss of amenities. **Mc Gregor on damages at Page 834** explains that loss of impairment of any one or more of the five senses is compensated under this head. Besides loss resulting from interference with the plaintiff's sexual life.

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 Mota Engil Limited and General Alliance Insurance Limited, personal injury cause number 178 of 2012 (unreported).** Damages for disfigurement are normally awarded as part of pain and suffering. They are awarded separately if the plaintiff has been ridiculed, lost his social status, or that his is in need of plastic surgery. **See Mary Kamwendo vs Stage coach Malawi Limited Civil Cause No. 840 of 1995.**

LOSS OF EARNING CAPACITY

This in essence is the decrease in ability to earn income. For example, in cases of continuing disability the claimant may be able to remain in his employment but with the risk that, if he loses that employment at some

time in future, he may then, as a result of his injury be at disadvantage in getting another job or an equally paid job. See Winfield & Jolowicz on Tort page 957

The amount is calculated by taking the figure of the claimant's present annual earnings less the amount, if any which he can now earn annually and multiply this by a figure which, while based on the number of years during which the loss of earning power will 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. The latter has long been called the multiplier, the former figure has now come to be referred to as the multiplicand. Further adjustments however may have to be made to the multiplicand or multiplier on account of variety of factors viz, the probability of future increase or decrease in the annual earnings, the so called contingencies of life and the incidence of inflation and taxation. Mc Gregor on damages page 797.

SPECIAL DAMAGES

The rule is well settled that special damages have to be specifically pleaded and strictly proved. See Phiri V Daudi 15 MLR 404. This means the plaintiff must produce evidence to prove the amount of special damages.

DETERMINATION

In the matter at hand, the evidence from the medical report indicates that the claimant's arm was amputated above the elbow. The medical report recorded that the treatment resulted into loss of function of the arm. The report also indicated that the claimant will have difficulties to perform manual work. The assessment on incapacitation was 60%. I must state that the claimant injuries were crucial. Losing an arm is not a simple thing and the claimant will live with this disability for the rest of his life. The claimant experienced great pain and suffering. Considering the nature of the injuries suffered by the claimant, the comparable authorities cited by Counsel for the claimant and the devaluation in currency the Court awards a sum of K 19,000,000.00 damages for pain and suffering, loss of amenities of life and disfigurement.

The claimant lost his job after the injuries and it will be difficult to secure another job looking at his current condition. The Court therefore awards a sum of K7, 500,000.00 as damages for loss of earning capacity.

The total award will be K27, 500,000.00. At 30% contributory negligence the total award will be K19, 250,000.00.

Costs are for the claimant.

Pronounced in chambers on this 26th day of May 2018.

A handwritten signature in black ink, consisting of a stylized 'T' followed by a cursive 'S' and a horizontal stroke.

T. Soko

Assistant Registrar