

MZUZU DISTRICT REGISTRY
HIGH COURT OF MALAWI
21 AUG 2018
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HIGH COURT
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THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
MZUZU REGISTRY
CIVIL DIVISION
CIVIL CAUSE NO. 206 OF 2017

Between:-

EDWARD NKHOMA (Suing on his own behalf and as a Personal Representative of the estate of Davis Nkhoma, Deceased).....CLAIMANT

-and-

KELVIN DIAS.....1ST DEFENDANT

ELECTRICITY SUPPLY CORPORATION OF MALAWI LIMITED...2ND DEFENDANT

CORAM

His Honour Brian Sambo, Assistant Registrar (Ag)

Jivason, of counsel for the Claimant

Chijere, of counsel for the Defendants

Kachingwe, Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

Sambo, B

On Thursday, April 10, 2018, I received the plaintiffs' submissions on assessment of damages for loss of life and dependency and prayer for costs of the action. The matter was set down for assessment of damages following the parties' mutual consent to settle the matter extra-judicially, within 14 days after the Defendants had admitted liability. This agreement came after the Applicant had obtained a regular default judgment. Initially, there were three defendants including NICO General Insurance Company Limited (3rd Defendant), but the parties had also reached a mutual agreement to exempt the insurance company on an understanding that the 1st Defendant had used the motor vehicle for the intended purpose. This assessment, therefore, relates to the first two Defendants. I therefore proceeded to receive evidence and hear the plaintiff's testimony in the presence of Counsels for both parties. Both parties had duly filed their closing submissions towards the assessment herein. The foregoing suffices history of this matter.

The facts of this matter are simple, enough. On August 15, 2017 around 6 hours the 1st Defendant, Kelvin Dias was driving motor vehicle Registration Number BU 6424 Nissan Pickup Truck from the direction of Karonga Boma heading towards Chiluma. On reaching Ipyana PM Junction, the motor vehicle hit a male pedal cyclist, Davis Nkhoma.

Davis Nkhoma sustained severe head injuries and died while receiving treatment at Karonga District Hospital.

A Police Report disclosed that death of Davis Nkhoma occurred as a result of the 1st Defendant's reckless and negligent driving of motor vehicle.

At this point, the way I understand the action brought by the Claimant is that he brings the action on his own behalf and on behalf of other dependants claiming loss of dependency. Such action would be brought under Part I of the Statute Law (Miscellaneous Provisions) Act, (Cap 5:01) of the Laws of Malawi, (in places in my order, 'the Act'). I am also mindful that the Plaintiff has not provided names of other Dependants as is required in these types of claims. My assumption, therefore, is that the Claimant is the sole dependant.

According to the Act, the cause of action survives the death of a person who, but for the death, would have been entitled to bring an action against a tortfeasor for the loss of life occasioned as a result of the defendant's tort. That cause of action survives by, and is brought under Part II of the Act. That cause of action is 'loss of expectation of life' and, as will be demonstrated, can only be brought by an executor or a personal representative on behalf of the estate of the deceased. A claim for loss of life and loss of amenities is, I think, unknown to the law regarding claims in torts causing death.

I have carefully considered the skeletal arguments submitted for this assessment. I want to thank Counsel Jivason for the guidance given me on the law and the authorities cited in support of their submissions. Where appropriate, I will take into account these submissions in my order.

I intend not to repeat the evidence contained in the witness statements; it is on record, and hence readily obtainable. I think, we can save time and turn to other matters of equal importance.

Turning to the claim by the plaintiff, again, it is important to remind ourselves that we have the Statute Law (Miscellaneous Provisions) Act; because at common law no action lay against a defendant where death resulted in circumstances in which the deceased would have had an action in respect of injury resulting from the defendant's tort, for the benefit either of his dependants for injury to themselves by the death (Cf: *Jackson -v- Watson* [1909] 2 K. B. 193 (C.A.), where, exceptionally, a dependant in a contractual relationship with the defendant could recover damages to himself through the death), or for the benefit of his estate by way of survival of the cause of action which would have accrued to him before the moment of death.

Our statute allows both actions to be brought. Part I of the Act allows an action for damages to be brought in instances where, if not for the death, the deceased would have been entitled to bring an action for damages for injuries against a tortfeasor responsible for the death (see ss. 3 & 4). Part II provides for the survival of causes of action subsisting against or vested in the deceased against, or, as the case may be, for the benefit of, his estate (s. 10 (1)). These two actions are respectively 'loss of dependency' and 'loss of expectation of life'.

Now, authority clearly shows that the claim for loss of dependency and loss of expectation of life are two separate causes of action (see *May -v- Sir Robert McAlpine & Sons (London) Ltd* [1938] 3 All E. R. 85). In *Mbaisa -v- Ishmael Brothers* (1971 - 72) 6 ALR (Mal) 321, Skinner, C.J., said at page 322:

"It is necessary . . . to refer to the causes of action provided for in the Statute Law (Miscellaneous Provisions) Act [. . .]. Part I of the Act provides that an action may be maintained by or on behalf of the dependants of the deceased person. Part II of the Act provides that a cause of action survives for the benefit of the deceased person's estate. *These two actions are quite distinct and separate.*

The former is on behalf of the dependants and the provisions of the Act are similar to those of the Fatal Accidents Acts in England. The latter action is on behalf of the deceased's estate and is similar to that which can be maintained in England under the Law Reform (Miscellaneous Provisions) Act, 1934." (Emphasis supplied)

This distinction is important because the claim for loss of dependency can be brought by a wife on her own behalf and on behalf of other dependants, but the claim for loss of expectation of life can only be brought by the executors of the estate or personal representatives of the deceased's estate, (see *Mbaisa -v- Ishmael Brothers* (supra)).

The claim for loss of dependency arises from the relationship which would be derived from the continuance of the life (which may consist of money, property or services-the value of the dependency). On the other hand, loss of expectation of life accrues to the estate of the deceased because it is a surviving cause of action that would

have arisen if death itself had not occurred (See *Rose -v- Ford* [1937] 3 All E. R. 359 and *Nyambalo -v- Malawi Railways Limited*, Civil Cause No. 483 of 1986 (unrep.)).

However, it would seem that in the years after 1990 this distinction has not been particularly insisted on by our courts when assessing damages in actions for loss of dependency and loss of expectation of life but I do not think from a deliberate intention to change the law, (see for example *Mary Matemba -v- Attorney General & Nico Insurance Co. Ltd*, Civil Cause No. 2917 of 2003 (unrep.); *Robeni Malidadi -v- Peerless Logistics Ltd*, Civil Cause No. 2887 of 2007, (unrep.) and *Maureen Chiputula -v- The Attorney General*, Civil Cause No. 1646 of 2007, (unrep.).

Mwaungulu, R., as he then was, observed in *Nyirongo -v- United Transport (Mal) Ltd* (1990) 13 MLR 344 (HC) that this distinction, if not carefully addressed, would lead to overlapping of awards and may result in overcompensation. He pointed out that "the ideal is when both actions, . . . under Part I and Part II of the Act are made in one action as where the widow sues both as administratrix or executrix of the deceased estate and on her [own] behalf and on behalf of [other] dependants . . ." This position is supported by *Davis -v- Powell Duffryn* [1942] 1 All E. R. 657 in which Lord Macmillan said at page 660:

"It was suggested that a difficulty would arise if, at the time of assessing the damages under the Fatal Accidents Act, no proceedings had been taken under the Act of 1934, and it was unknown whether any such proceedings would ever be taken."

For that reason, *Mwaungulu, R.*, suggested that it would be 'ideal' if both causes of action were brought at the same time. *Davis* also supports such an approach. Lord Macmillan continued in *Davis* that "[t]he authority assessing [. . .] damages could always take into account the possibility of such proceedings and make allowance accordingly." (*Id.*) *Mwaungulu, R.*, however, did not address the requirement that the action for loss of expectation of life should be brought by a personal representative of the estate; *Mbaisa* did.

In *Mbaisa*, the facts were that the plaintiff brought an action claiming damages for loss of expectation of life and loss of future earnings on behalf of the estate of his brother, who died in an automobile accident. Since the plaintiff was not the personal representative of the estate, he applied to amend the title of the action by adding his deceased brother's widow as plaintiff, and to show that he was suing as the next friend of two named infant children of the deceased. Skinner, C.J., dismissing the application, held that both the plaintiff and the widow could not bring the application as they both were not personal representatives of the deceased and could not therefore bring an action for the benefit of the estate.

Taking note that the application in *Mbaisa* was made under Part II of the Act, Skinner, C.J., pointed out that the plaintiff and the widow of the deceased could have competently brought the action under Part I of the Act. However, since they had brought the action under Part II of the Act, they could not competently do so since they were not the personal representatives of the estate or, if they wished to be, needed to take out letters of administration first.

The assessment before me is not too different either. The plaintiff can competently bring the action for loss of dependency under Part I of the Act. He cannot claim loss of expectation of life under Part II. If he wished to claim under that part, he should have specified this and should have obtained letters of administration. In the alternative, he could have combined the two causes of action in one claim but needed to have letters of administration before he could do so.

Damages for loss of expectation of life accrue to the estate of the deceased and for that reason can only be claimed by an executor, administrator or personal representative. In the present case, as was the case in *Mbaisa and Nyirongo*, the plaintiff cannot bring this action in the absence of letters of administration. The plaintiff, if he desires to sue for loss of expectation of life, should bring an action under Part II of the Act and obtain a grant of letters of administration first.

In view of the above, I would be stretching the law too far and open a can of worms if I allow the Plaintiff, Edward Nkhoma to recover on the claim of loss of expectation of life. Mr. Nkhoma did not have the necessary letters of administration to act as personal representative of the deceased's estate. In the circumstances, I would be justified to allow him recover damages for loss of dependency, only. See *Binwell Tembetani and another v Malasha Holdings Ltd t/a Malasha Bus Co. Ltd and Prime Insurance Co. Ltd and another*, Civil Cause Number 45 of 2011

Now in assessment of damages for loss of dependency, courts have evolved a particular method for assessing the value of the dependency, or the amount of pecuniary benefit that the dependant could reasonably expect to have received from the deceased in future. The amount is calculated by taking the present annual figure

of the 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 at once instead of periodical payments over the years. See *Binwell Tembetani and another v Malasha Holdings Ltd t/a Malasha Bus Co. Ltd and Prime Insurance Co. Ltd and another*, Civil Cause Number 45 of 2011. This latter figure is called the multiplier and the former is called the multiplicand.

There are various adjustments that are sometimes made to the multiplicand and multiplier to take account of contingencies of life such as future increases or decreases in the annual dependency, inflation, taxation, savings, and etcetera. These factors are either included in the figure of annual dependency to be multiplied by the multiplier, or they are excluded from the figure of annual dependency and a separate, and additional sum is calculated and awarded in respect of them. These various facets of the method of assessment by the courts are set out concisely by Lord Pearson in *Taylor -v- O'Connor* [1971] A. C. 115 at page 140:

"There are three stages in the normal calculation, namely: (i) to estimate the lost 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 earnings, and to express the lost benefit as an annual sum over 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 damages which is a lump sum."

In calculating the multiplicand the starting point has for long been the amount earned by the deceased before his death. From this has been deducted that portion of his earnings which was not used for the support of his dependants but was spent exclusively on himself, (Cf. *Harris -v- Empress Motors* [1984] 1 W.L.R. 212, C.A., per O'Connor L.J.). See also *Msowoya, R Binwell Tembetani and another v Malasha Holdings Ltd t/a Malasha Bus Co. Ltd and Prime Insurance Co. Ltd and another*, Civil Cause Number 45 of 2011

In modern days, it has become common to express the annual dependency as a percentage of the deceased's annual earnings (*Young -v- Percival* [1975] 1 W.L.R. 17, (C.A.); *Dodds -v- Dodds* [1978] Q.B. 543; *Malone -v- Rowan* [1984] 3 All E.R. 402) or as a fraction of them (*Graham -v- Dodds* [1983] 1 W.L.R. 808 (H.L.)). This has become, as a conventional figure, $66\frac{2}{3}$ per cent. of the earnings for the dependency of a widow alone and 75 per cent. of earnings for a widow and children (*Robertson -v- Lestrangle* [1985] 1 All E.R. 950, 955d), but there is room for variation if the particular circumstances justify. Of course the calculations have to be made on the earnings after deduction of income tax which would have been payable on them, (see *British Transport Commission -v- Gourley* [1956] A.C. 185).

In the present case, Davis Nkhoma (deceased) was not employed. The evidence before me shows that he was nothing but a child. PW1, Edward Nkhoma testified that the deceased was helping the family in household chores and also in farming. He

told the court that the deceased was very intelligent in class such that he had trust in him that he would help the whole family in future.

Counsel for the Defence submitted that since the deceased was 14 years of age, the court had to use the multiplier of 20 considering that the deceased, according to her, could have died much earlier than the average life expectancy in Malawi which is at 56 years according to World Health Organisation, and that the Defendants were going to receive the benefit of one lumps in damages as opposed to several payments. She further submitted that since the deceased was not of employable age at the time of his death, the court should use half of the minimum wage of a domestic workers at the time of the deceased death which was MK17, 880.20, as the multiplicand. She thus proposed $\underline{K17, 880.20 \times 12 \times 20 \times 2/3 = MK1, 430,416.00}$.

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In my view, the starting point in the calculation of the multiplier is the number of years that it is anticipated the dependency would have lasted had the deceased not been killed. In some instances, a different multiplier has been applied for different dependants, as in *Kassam -v- Kampala Aerated Water Co.* [1965] 1 W.L.R. 668, where eight children ranging from three to 23 years were held to be dependants but for varying lengths of time. *Young* (supra) applied different multipliers to the separate calculations made in respect of the dependency at death and the dependency arising from future prospects. *Robertson* (supra) applied a single multiplier but then split between the period when both the widow and children would have been dependent and the later period when it would have been only the widow, the portion of the multiplier allocated to the later period being applied to a different multiplicand representing a lower percentage of a higher income. In this case, a single multiplier

would be appropriate. Finally, it is worth mentioning that in the instances where a single multiplier has been used, it has ordinarily been calculated from the date of death, (see *K. -v- J.M.P. Co.* [1976] Q.B. 85 (C.A.)). See also *Binwell Tembetani and another v Malasha Holdings Ltd t/a Malasha Bus Co. Ltd and Prime Insurance Co. Ltd and another*, Civil Cause Number 45 of 2011.

In calculating the multiplier, I have to consider life expectancy in Malawi. Life expectancy in Malawi has fluctuated a lot these past few decades and, for that reason, the Court has tended to give different figures in different cases. In *Annie Solomoni -v- Reunion Insurance Company Limited*, Civil Cause No. 1907 of 2007 (unrep.) life expectancy was pegged at 47. In *Stephen Chawanie et-al -v- Chisambiro and Noel Chipeta*, Civil Cause No. 1877 of 2001 (unrep.) the court suggested that based on the 1998 population census, the official life expectancy between 2004 and 2023 should fluctuate between 48 and 55 years. This was the approach followed in *W.R. Kazembe -v- Attorney General*, Civil Cause No. 2853 of 2000 (unrep.); *Richard Nasiyaya -v- F. Mazinga*, Civil Cause No. 2484 of 2002 (unrep.) and *Isaac Mazaza Jere -v- R. Gaffar Transport et al*, Civil Cause Number 2979 of 2005 (unrep.).

At some point, life expectancy in Malawi dropped to as low as 37 years as a consequence of the HIV/AIDS pandemic (see *Malita Mahikili -v- Wilson Kandava and another*, Civil Cause No. 2816 of 2004 (unrep.)). But, in *Ethel Hiwa -v- Frank Chikomba and Nico General Insurance Company Limited*, Civil Cause No. 1717 of 2007 (unrep.), the court pegged life expectancy at 50. Admittedly, this is akin to the 56 pegged by the World Health Organisation. I will therefore let 56 remain.

The deceased died at the age of 13 years; meaning that his life was curtailed by 43 years. I think, I would be unjustified to adopt defence counsel's proposition, that because the deceased was not of employable age the court should use half of the minimum wage of a domestic worker which is MK35,760.40. Half in this case is MK17,880.20.

Counsel for the Applicant prefers the case of Suzgo Mapunda (Suing on his own behalf and on behalf of Constance Mapunda, deceased) v Steve Duwa and Reunion Insurance Company Limited, Personal Injury Case No. 962 of 2015 where life expectancy was pegged at 58; that was in 2015. In that case, the deceased died at the age of 12 years. The court reduced 46 years by 6 leaving 40. In terms of income, the court pegged it at MK107,269.20. I find this understanding a bit fair that what counsel for the Defence proposed. Of course MK107,269.20, in the circumstances before me, would be much on the higher side. What is justifiable, considering all circumstances, is MK17,000. I have gone for the minimum wage of a domestic worker but I have reduced it a bit because the deceased was not in employable age. Deep down my heart, admittedly, I know this figure may be unrealistic, one; because the future of the deceased cannot be ascertained, it is possible that he would have grown into a renowned lawyer or indeed a medical doctor; two; that it was possible that he would have fallen, and fail to read his books to success. Nevertheless, using the formula as described earlier, the calculation becomes $MK17,000.00 \times 40 \times 13 \times 2/3$ which translates to MK5,440,000.00. This was what the Applicant was supposed to get for loss of dependency. I have, however, noted that counsel for the claimant has cited a very old minimum wage for a domestic worker half of which is MK12,506.00. I cannot give beyond what has been claimed. It is for this reason that I will still use

his formula of $MK12,506 \times 40 \times \frac{2}{3}$ which gives us MK4,001,920.00. This is what I have awarded being damages for loss of dependency.

Coming to damages for loss of expectancy of life, I think it will be enough for me to consult comparable case law. In *Loveness Chiotcha (suing on behalf of the estate of Kondwani Chiotcha Mbewe, deceased vs J.T. Matete personal injury cause no. 598 of 2013)* an award of K1,000,000.00 was made for loss of expectation of life. This award was made on the 16th July, 2014.

In *Joseph Satha (suing on his own behalf and behalf of all the dependants of the estate of MIRACLE SATHA, deceased) vs. Sailosi Dzoole, National Bus Company & NICO General Insurance Company Limited, Personal Injury Cause No. 50 of 2012*, the court awarded the plaintiff an amount of MK600,000.00 for loss of life, K900,000.00 for loss of dependency, special damages at K1,505,500.00 on the 24th of January, 2013.

In *Ellen Kanyenga vs. United General Insurance Company Limited, Civil Cause No. 2405 of 2010*, the plaintiff was awarded MK500,000.00 on the 18th September, 2012, for loss of expectation of life, K3,199,999.20 as loss of dependency. The total came to K3,699,999.20 on 18th September, 2012.

In *Malesi Bweya (on behalf of and behalf of the estate and dependants of Mr. Godfrey Bweya, Deceased) vs. Prime Insurance Company Limited, Civil Cause No. 69 of 2011*, put the life expectancy in Malawi at 55, the deceased was 40 years old, the court reduced the years by one thirds to cater for the eventualities of life. The court awarded K500,000.00 as loss of expectation of life and K2,820,960.00 as loss

of dependency. The court reduced the years by one thirds to cater for the eventualities of life on 28th August, 2012.

In *Aaron Amosi (on his own behalf and on the behalf of the Estate of TELEZA AMOSI) & Lanjesi Lile vs Prime Insurance Company Limited Personal Injury Cause No. 133 of 2013*, Mrs Teleza Amosi died at the age of 30, the court used 55 yrs as the Life expectancy for Malawi and made a discount of 10yrs for the reason that a lump sum was being given. The court made an award of K800, 000.00 as loss of expectancy and K 989,070.00 as loss of dependency, amounting to K1, 789,070.00 on the 24th of February, 2014.

I therefore, award the Plaintiff (on his own behalf and on behalf of all other dependants of the deceased and other direct members of her family the sum of MK1,500,000.00 being damages for loss of expectation of life.

On special damages, I was not helped much with evidence. The Applicant testified that he spent more than MK450, 000.00 on funeral expenses. No evidence was provided to that effect. He further testified that he incurred expenses amounting to MK5, 000.00 on Death Report and MK3,000.00 on Police Report. No evidence was also tendered in support of this assertion. The Applicant further told the court that all he spent during the funeral ceremony was MK10, 000.00. By saying so, I was not told how much did he spent on other things incidental to the funeral ceremony. I will have to put on the shoes of equity to arrive at a rational prescription. It cannot be ruled out that expenses are synonymous during funerals. Nevertheless, MK10, 000.00 although not supported by evidence is justifiable in the circumstances being reimbursement of funeral expenses. I do not have the problem with MK8, 000.00

being costs incurred in obtaining Death Report and Police Report. I take judicial notice that these reports are being paid for within that minimum.

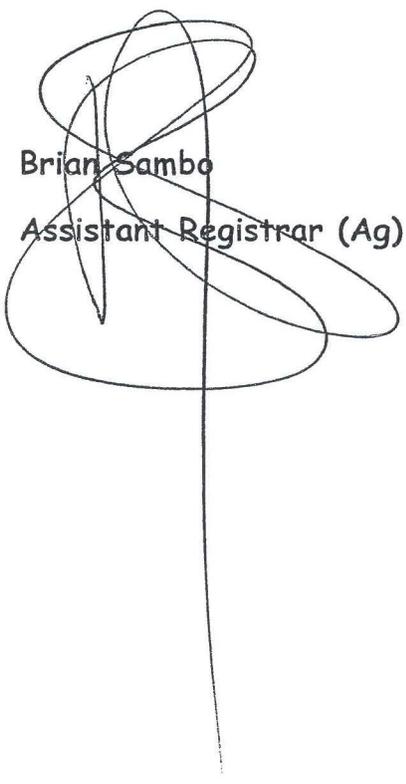
In summary, I award the Claimant as follows:

- i. MK4,001,920.00 being damages for loss of dependency.
 - ii. MK1,500,000.00 being damages for loss of expectation of life
 - iii. MK10,000.00 being reimbursement of funeral expenses
 - iv. MK8,000.00 being costs for Death Report and Police Report.
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I award the Applicant costs of this action.

Right of appeal explained.

Pronounced in chambers today the 24th of April, 2018



Brian Sambo
Assistant Registrar (Ag)