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The Judiciary

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 335 OF 2016

Between

DAMISON WATSONCLAIMANT

-and-

KINGSLEY SENDEMA 1ST DEFENDANT

PRIME INSURANCE COMPANY LIMITED 2ND DEFENDANT

CORAM: A.J. Banda, Assistant Registrar

Mr. Kanyika, for the Claimant

Mr. Ndlovu, for the Defendant

Ms. C. Kazembe, Clerk/ Official Interpreter

JUDGMENT ON ASSESSMENT OF DAMAGES

Background

By a Consent Judgment endorsed by the Court on 23rd October, 2017, Kingsley Sendema and Prime Insurance Company Limited (1st and 2nd Defendant respectively) were found liable to pay damages for pain and suffering, loss of amenities of life, disfigurement and special damages as pleaded by Damison Watson (Claimant). I heard the parties for the purposes of assessment of damages on 15th July, 2020.

Evidence

The only witness in the hearing was the claimant himself. He told the court that he was involved in a road accident near Jussab Garage along the Liwonde- Balaka road. As a result of the

accident, he said that he suffered a fractured right ankle, bruises on the scalp and on the right foot. He said that he suffered excessive pain and suffering.

The claimant further stated that he was treated at Balaka District Hospital where a medical report was issued in respect of the injuries he suffered and the treatment he received. He tendered the report and said that he was assessed at 18% degree of permanent incapacity. It was the claimant's evidence that he was still feeling pain on his back and left knee, which he was feeling two months after the accident. He also said that he was a builder before the accident, but was thereafter having problems to continue with his work because he feels pain on his leg and back.

In cross examination, the claimant told the court that he started having pain after two months from this accident but he was not certain that it was the result of the injuries he sustained in the accident. He said that he did not obtain any new medical report on that development. The claimant went on to say that he was both a farmer and a builder and that he was having no problems with farming. He also said he had an injury on the scalp but there was no scar as hair had grown on it.

In re-examination he said that he only stated about farming as his occupation at the time of the injury because then he was only farming, he had stopped working as a builder for some other reason.

The defendants proffered no evidence at all.

Law and Fact

The burden of proof in civil matters such as this one rests on the one who asserts the affirmative, and the standard of proof is on a balance of probabilities- **Miller v. Minister of Pensions [1947] 2 All ER**. Assessment of damages presupposes that damages have been proved and the business that remains is the measure of the amount of the damages- see the case of **Ngosi t/a Mzumbanzumba Enterprises v. Amosi Transport Co Ltd [1992] 15 MLR 370(HC)**. The rule is that the injured party has provided proof of the damage sustained prior to the assessment hearing- **Yanu Yanu Co v. Ltd v. Mbewe 11 MLR 405 (SCA)**. Damages in a case like this one, are not awarded to punish the defendant, but to fully compensate the claimant of all the losses that he has suffered as a direct or consequential result of the defendant's wrongful act or omission. In the case of **George Kankhuni v. Shire Buslines Ltd, Civil Case Number 1905 of 2002**, Katsala, J stated as follows:

“The law demands that the plaintiff, as far as money can do it, be put in the same position as if he has not suffered the loss. This is what is referred to as *restitution in intergrum*.”

It is not easy to quantify damages for losses that are not monetary in nature such as personal injuries. Courts as such use comparable cases as a guide to the quantification of applicable damages, without losing sight of particularities in the individual case that the court is dealing

with. See **Kalinda v. Attorney General [1992] 15 Malawi Law Reports 170 @ 172**. The court will also consider factors such as passage of time since a particular comparable award was made, as well as currency fluctuations within the period between the case at hand and the comparable one- **Hon. Kennedy Kuntenga v. Attorney General, Civil Cause No. 2002 of 2002, High Court, Principal Registry, (unreported)**.

Pain and Suffering

The word pain connotes that which is immediately felt upon the nerves and brain, be it directly related to the accident or resulting from medical treatment necessitated by the accident, while suffering includes fright, fear of future disability, humiliation, embarrassment and sickness- Ian Goldrein et al, Personal Injury Litigation, Practice and Precedents (Butterworths, 1985) p8. The award of damages for pain and suffering depends upon the claimant's personal awareness of pain, and his capacity for suffering- see **Limpoh Choo v. Camden and Islington Area Health Authority [1980] AC 174 @ 183**.

Loss of Amenities of Life

Damages are paid under the head of loss of amenities of life to compensate the claimant's deprivation of the pleasures of life, which amounts to substantial loss, whether the claimant is aware or not of that loss. See **City of Blantyre v. Sagawa [1993] 16(1) MLR 67 (SCA); Kemp and Kemp, The Quantum of Damages, Vol. 1 (2nd Edition), 1961, p. 624**.

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 Motal Engil Limited and General Alliance Insurance Limited, personal injury cause number 178 of 2012 (unreported)**. Damages for disfigurement are awarded separately if the Claimant has been ridiculed, lost his social status, or that he is in need of plastic surgery. See **Mary Kamwendo v Stage Coach Malawi Limited Civil Cause Number 840 of 1995**.

Extent of Injuries in this Case

The defendants have punched holes into the evidence of the claimant. They raise doubt that he sustained fractures, and that he had a bruise on the head, from their written submission. In the absence of Photostats I still believe, weighing the probabilities, that the claimant sustained a fracture of the ankle. It was his evidence given *viva voce* which has not been controverted by any evidence from the defendants. While as a Plaster of Paris is a significant part of treating a fracture, and that it was not stated in evidence until cross examination, the ankle fracture as being part of the injuries suffered by the claimant was stated and forms part of evidence in the medical report.

On the bruise on the head, it is my finding that it is not all cuts or wounds that heal into noticeable scars. Mere bruises may heal without a noticeable trace of a scar. However, the lack of a noticeable scar goes to show that the bruise was a mere scrape of the outer skin, something

minor. From the foregoing, I have no doubt that the claimant suffered a fracture. I find that he also suffered soft tissue injury and bruising. For that reason I will award him accordingly.

Comparable Cases

In an award made on 19th May, 2016, in **Enelesi Kaponda v. Emmanuel Chimenya and Prime Insurance Company Limited, Personal Injury Cause No. 187 of 2015**, the claimant who sustained a fracture of the lateral malleolus on the right ankle was awarded K3, 000,000.00.

In an award made on 19th May, 2016, in **Enelesi Kaponda v. Emmanuel Chimenya and Prime Insurance Company Limited, Personal Injury Cause No. 187 of 2015**, the claimant who sustained a fracture of the lateral malleolus on the right ankle was awarded K3, 000,000.00.

In **Wilson Kamwendo v. Reunion Insurance Company Limited Civil Cause No. 913 of 2010**, the plaintiff sustained a fracture of the right femur, fracture of the right knee, soft tissue injuries and chest pains. The court made an award of K4, 800,000.00 for pain, suffering and loss of amenities of life on 5th May, 2012.

The Award

The first two cases cited are more comparable to the injuries in this case. The **Wilson Kamwendo** case had much more serious injuries. In the circumstances, I award the claimant the sum of K3, 500,000.00 covering damages for pain and suffering, loss of amenities of life and disfigurement. I also award him K3, 000.00 special damages as cost of obtaining the police report that was tendered. The claimant brought no proof of his expense in obtaining a medical report. I award him nothing under that head.

Conclusion

The claimant is awarded a total of K3, 503,000.00 as damages for the personal injuries he suffered. The claimant is further awarded costs of the assessment hearing.

Made this 14th day of October, 2020.



Austin Jesse Banda

ASSISTANT REGISTRAR