

JP

IN THE COURT OF APPEAL FOR ZAMBIA APPEAL NO. 005/2017
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

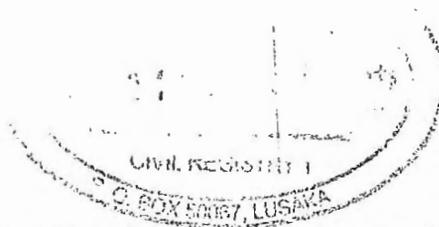
REBA INDUSTRIAL CORPORATION LIMITED

APPELLANT

AND

NICHOLAS MUBONDE

RESPONDENT



Coram: Mchenga DJP, Chashi and Mulongoti, JJA

On 6th April, 2017 and 21st September, 2017

For the Appellant: Mr. N. Nchito SC, of Messrs Nchito & Nchito

For the Respondent: Mr. W. Banda of Messrs Wilson & Cornhil

J U D G M E N T

MULONGOTI, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Mazoka and Others v Mwanawasa and Others (2005) ZR 138 (SC)*
2. *Chilufya Kusensela v Astridah Mvula (2014) 1 ZR 82 (SC)*
3. *Konkola Copper Mines and Zambia State Insurance Corporation Limited v John M. Kapya (2004) ZR 233 (SC)*
4. *Fair v London and North Western Railway Company (1869) 21 LT 36*
5. *Reuben Nkomanga v Dar Farms International Limited SCZ Judgment No.25 of 2005*

6. *Moriarty v McCarthy* (1978) 1 WLR 155
7. *Cook v K.L. Kier and Company Limited* (1970) 1 WLR 774
8. *Michael Mukula and Highway Transport Limited v Pamela Ngungu and Others* (2014) 2 ZR 21 (SC)
9. *British Transport Commission v Gourley* (1955) 3 ALL ER 796 (HL) 797
10. *Mallett v McMonagle* (1969) 2 ALL ER 179 at 191
11. *Cavangh v Ulster Weaving Company Limited* (1960) A.C 145
12. *Easton v Concrete (Northern) Limited* 1979 C. A No. 30 (paragraph 1-011 Kemp & Kemp)
13. *Nance v British Columbia Electrical Railway* (1951) 2 ALL ER 448
14. *Henwood v Naoumoff* (1966) ZR 78 (SC)

Legislation referred to:

1. The Workers Compensation Act No. 10 of 1999

Books referred to:

1. Gordon Exall, 'Munkman on Damages for Personal Injuries and Death', 11th Edition, Lexis Nexis Butterworths pages 43 to 46 and 89
2. Simon Allen et al 'Guide to Damages' 3rd edition, Jordans pages 1 - 2
3. Harvey McGregor 'Mcgregor On Damages' 13th edition, Sweet & Maxwell, London 1972 pages 186-187 paragraph 262 (b)
4. Kemp & Kemp 'The Quantum of Damages' vol.1, Sweet & Maxwell page 1015 paragraph 1-011

This is an appeal against the awards granted to the respondent Nicholas Mubonde, following a decision of the Deputy Registrar at assessment.

Before we dwell in detail of the amounts awarded, it is necessary to say a little about the background of the matter. The respondent is an

unmarried male, who was aged 22 at the time of the injury that gave rise to these proceedings. The respondent a student of Northern Technical College (NORTEC) in Ndola, was on industrial attachment with the appellant company. On 12th October, 2012, while on duty, he was instructed by his supervisor to go underneath a truck which was being repaired and which had no chocking blocks on its wheels.

Unfortunately, the truck rolled over after the respondent attempted to release the lever as instructed by his supervisor. The respondent was crushed resulting in severe injuries to the spinal cord that left him paralysed and will have to spend the rest of his life in a wheelchair. He has been medically classified as paraplegic. He sued the appellant in the High Court. The appellant conceded liability on the merits which culminated in a consent judgment. The matter was then referred to the Deputy Registrar for assessment of the quantum of damages.

After evaluating the evidence, the Deputy Registrar awarded damages to the respondent as follows:

I. Pain and suffering	K300,000.00
II. Loss of amenities	K150,000.00
III. Permanent disability	K250,000.00

IV. Loss of future and prospective earnings:

- Salaries	K2,064,000.00	(calculated at a projected earning of K4000.00 X 12 X 43 years)
- Medication	K 10,000.00	
- Taxi fares	K 900,000.00	
- Care and Maintenance	K1,080,000.00	
Total		K4,754,000.00

V. Special damages:

- Unpaid salaries K7,280.00
- Taxi fares K1,600.00

Total

K 8,880.00

Total amount assessed

K4,762,880.00

Less defendant's (appellant's) expenditure

- Statutory pension (Workers Compensation)
K451.86 X 12months X 50years = K271,200.00
- Constant attendance allowance (Workers Compensation) K500 X 12months X 50years = K480,000.00
- Payments to Sinozam Hospital by Workers Compensation:
 - Medical receipt (dated 25/08/14) K 80.00
 - Medical receipt (dated 25/08/14) K100.00
 - Medical Aid (dated 25/08/14) K240.00
 - Lunch allowance (dated 25/08/14) K 60.00

Total Defendant's expenditure

K 751,680.00

Total amount assessed due to the
plaintiff (respondent)

K4,011,200.00

Dissatisfied with these awards, the appellant has raised seven grounds of appeal as follows:

1. The learned Deputy Registrar erred in both law and fact when he departed from the award of K55,000.00 for pain and suffering awarded by the Supreme Court in *Chilufya Kusensela v. Astridah Mvula* (SCZ Judgment No. 3 of 2014) on the basis of devaluation of the Kwacha over a two year period which consideration was discounted in the same *Kusensela* case for a five year period.
2. The learned Deputy Registrar erred in both law and fact when he awarded the respondent damages under heads the respondent had not pleaded namely loss of future and prospective earnings, special damages and permanent disability.
3. The learned Deputy Registrar erred in both law and fact when, having found that the respondent's salary prior to the accident had been K1,040.00 he projected respondent's net earnings to be K4,000.00 per month.
4. The learned Deputy Registrar erred in law and fact when, in calculating loss of future and prospective earnings, he included medication, taxi fares and care and maintenance which are neither future nor prospective earnings.

5. The learned Deputy Registrar erred in both law and fact when he did not reduce the final award to the respondent to cater for taxes.
6. The learned Deputy Registrar erred in law and fact when he calculated the monthly constant attendance allowance payable to the respondent by the Workers Compensation Fund Board at the rate of K500.00 when the evidence led showed that the actual rate is K800.00 per month.
7. The learned Deputy Registrar erred in law and fact when he did not consider the evidence led before him by the Workers Compensation Fund Board to the effect that the Board pays the respondent's periodical medical expenses, continues to provide him with rehabilitation services and also medical and surgical kits for life.

The parties both filed heads of argument.

Mr. Nchito SC, who appeared for the appellant relied on the appellant's heads of argument. Counsel argued ground two first. He contended that since the respondent had not pleaded damages for loss of future and prospective earnings, special damages and permanent disability, the Deputy Registrar erred in both law and fact when he awarded damages under these heads. The Supreme Court decision in the case of **Mazoka and Others v. Mwanawasa and Others**¹ was relied upon that:

"the function of pleadings is to give fair notice of the case which has to be met and define the issues on which the court will have to

adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties are bound by their pleadings and the court has to take them as such”

In arguing grounds one, three and four, the learned State Counsel conceded that ground one pegs the holding in the **Chilufya Kusensela v. Astridah Mvula**² case at K55,000.00 for pain and suffering when in fact the court awarded K3,000.00. However, State Counsel argued that departing from the K3,000.00 award in that case is an excessive departure from precedent. The Deputy Registrar was bound to follow the Supreme Court decision in that case as it is the latest case on pain and suffering. In addition that there was no evidence of the excessive depreciation of the Kwacha between the years 2014 and 2016.

It is the further submission of counsel that apart from the award of future and prospective income being erroneously awarded as it was not pleaded, the Deputy Registrar erred in using K4,000.00 as monthly salary when the respondent was merely on attachment with a salary of K1, 040.00. That there was no mathematical justification for the projection of K4,000.00.

The case of **Konkola Copper Mines and Zambia State Insurance Corporation Limited v. John M. Kapya**³, a 2004 case was relied on. In that case, it was argued, the Supreme Court used the deceased's actual salary less taxes as a multiplier. It was counsel's argument that should this Court find that loss of future earnings (though not pleaded), could be awarded, taxi fares and care and maintenance, be

excluded as they consist of expenses rather than earnings in this instance.

According to State Counsel, earnings are as defined in section 2(1) of the Workers Compensation Act No. 10 of 1999 that "*the average remuneration of a worker at the time of an accident or disease calculated in the manner provided in section seventy-nine*". Going by this definition taxi fares and care and maintenance do not fit to be qualified as earnings. The Deputy Registrar therefore, misdirected himself in including these items as part of future and prospective earnings.

With regard to ground five, State Counsel submitted that the learned Deputy Registrar erred both in law and fact when he did not reduce the final award to cater for taxes.

Ground six was argued on the basis that the evidence led showed that actual rates of the monthly attendance allowance payable is K800.00. Therefore, the Deputy Registrar erred when he calculated it at K500.00. Thus an amount of K180,000.00 ought to be reduced from the final award.

Finally, in arguing ground seven, the learned State Counsel contended that evidence was led by the Worker's Compensation Fund Board, at page 191 of the record of appeal, that it provides periodical medical expenses to the respondent to provide him with rehabilitation services

and medical and surgical kits for life. Therefore, the Deputy Registrar erred in law and fact when he did not consider this evidence. That due regard should be taken of this evidence so as to have a fair assessment of the damages.

In arguing ground one, the respondent's counsel, Mr. Banda contended that the Deputy Registrar noted the injuries the respondent suffered at pages J14 to J15 and that he suffered 100% permanent disability as a result of the defendant's negligence. That in assessing the award for pain and suffering, the Deputy Registrar considered several factors such as the extent of the plaintiff's injury, the period for which the plaintiff was hospitalized, the injury and excruciating pain he experienced as elucidated by the Supreme Court in the case of **Chilufya Kusensela**² including the depreciation of the Kwacha.

It was the further submission of counsel that the appellant wrongly referred to the sum of K55,000.00 as having been awarded for, pain and suffering in the **Chilufya Kusensela**² case when in fact K55,000.00 was awarded for damages for permanent disability. While K3,000.00 for pain and suffering.

According to counsel, the Deputy Registrar was on firm ground when he made an award for pain and suffering.

In arguing ground two, the respondent's counsel referred to the authoritative writings in the book "*Munkman on Damages for Personal Injuries and Death*" at page 43 paragraph 6.10 that:

"The personal loss, then, has a number of elements or aspects. Where there is permanent injury, damages to be assessed may include the following:

- i. Total loss, impairment of limb or other specific part of the body, or impairment of the body as a whole*
- ii. Shock of the injury, sometimes followed by neurosis*
- iii. Physical pain at the time of the injury, during surgical operation and perhaps during the rest of life."*

He also referred to the case of **Fair v. London and North Western Railway**⁴, where it was held that:

"in assessing the compensation, the Court should take into account two things; first the pecuniary loss (plaintiff) sustains by the accident; Secondly, the injury he sustains in his personal or his physical capacity of enjoying life. When they come to the consideration of the pecuniary loss, they have to take into account not only his present loss but his incapacity to earn a future improved income".

In addition, counsel referred to the case of **Reuben Nkomanga v. Dar Farms International Limited**⁵ where the Supreme Court of Zambia guided as follows:

"..... the principle is that in every case of personal injuries, there are two main factors which have to be taken into account in assessing damages. On the one hand, there is the personal injury itself, rising from the loss of a limb or other part of the body to slight cuts or bruises and involving not only pain and hardships but also loss of the pleasures of life. On the other hand, there is the financial loss".

Furthermore, in the Nkomanga case the Supreme Court guided that:

“in a claim for damages for personal injuries, the Court will usually deal with the claim under the following heads; that is to say (i) pain and suffering (ii) loss of amenities (iii) permanent disability and (iv) loss of future or prospective earnings”.

Thus, according to counsel the unpleaded claims complained of by the appellant are components of the broader claim for damages. He submitted that ground two is equally devoid of merit and it be dismissed.

As to grounds three and four counsel submitted that the respondent was paid K1,040.00 per month because he was on attachment in order to gain experience. This amount was not based on the rate that he would have been earning if he was a full time employee. The Deputy Registrar was therefore, on firm ground when he used pay slips of full time employees with similar qualifications to determine what the respondent would earn as future earnings had he not been incapacitated by the accident.

Furthermore, that the Deputy Registrar was on firm ground to include medication, taxi fares and care and maintenance as part of loss of future or prospective earnings. Due to the respondent's paralytic condition, he is prone to physical ailments which would require medication for the rest of his life, travel to and from the hospital which would require a taxi. He is also incontinent and needs constant

assistance for the rest of his life. Accordingly, grounds three and four lack merit and be dismissed.

Regarding ground five, counsel argues that the amount awarded as damages is the value for which the respondent is entitled to and therefore exclusive of tax. The quantum of damages granted should thus now be in addition to the taxes.

In relation to ground six, counsel submits that the Deputy Registrar erroneously indicated the constant allowance as K500.00. Counsel contends that this notwithstanding, the calculations were done on the constant allowance of K800.00. Thus the correct amount was arrived at after multiplying the constant allowance (K800.00) by twelve (12) months and by fifty (50) years which is equal to K480, 000.00 and not K300,000.00 if K500.00 had been used.

In arguing ground seven, counsel submitted that the Deputy Registrar acknowledged the contribution of the Workers Compensation Control Board to the financial welfare of the respondent, when he made the award for other future requirements. As stated at page J22 last paragraph, ***"I am of the view that these can be sourced from the funds awarded under medication and salaries and same are provided by the Workers Compensation Control Fund Board"***.

Furthermore, that section 6 (1) of the Workers Compensation Act No. 10 of 1999 provides for the consideration of the expenditure incurred

of payments made by the Board to a claimant in a civil suit. The Deputy Registrar was cognizant of this and deducted from the total award by the Court, the total expenditure incurred by the Board. At page J27, he also considered that some of the claims could not be granted as they would be made by the Workers Compensation Fund Control Board such as medicated soap, linen, washing powder, air freshener, mosquito nets and special bed. That clearly, ground seven lacks merit as the Deputy Registrar took into account the fact that the Board was and would continue making financial contributions to the respondent.

In conclusion, counsel submits that the appellant has not attacked the quantum of the judgment below. The awards should therefore, be upheld.

We have considered the arguments by counsel, the consent judgment and the judgment of the Deputy Registrar. Before we turn to an analysis of the grounds of appeal against the backdrop of the facts in this case, we note that in the High Court the respondent claimed for *inter alia* payment of damages for injuries suffered arising out of the defendant's negligent act or omissions, damages for pain and suffering, damages for loss of expectation of life and damages for loss of amenities. It is a notorious fact that no trial was conducted because the parties entered into a consent judgment couched thus:

“By consent of the parties herein, IT IS HEREBY ADJUDGED as follows:

1. That an interlocutory judgment be and is hereby entered for the plaintiff and damages be assessed by the Deputy Registrar.
2. That the costs be agreed and in default to be taxed
3. That neither party to this action or their representative shall have any further claims on these facts or similar facts nor incidental thereto upon the payment of the amount contemplated in paragraph 1 hereof”.

The consent judgment was signed by the parties through their legal representatives and the High Court Judge.

We note that before the Deputy Registrar both parties gave oral evidence. The respondent testified and gave details of his injuries. He referred to the final medical report exhibit ‘NM5’ of his affidavit in support of the application for assessment. The said final medical report is at page 97 of the record of appeal, showing that the respondent suffered total paralysis after vertebral fracture with spinal cord injury. The report is from Sinozam Hospital. It also indicates that the respondent was admitted from 23rd October, 2012 to 21st February, 2013. The respondent further testified that he was also admitted to the Zambian – Italian Orthopaedic Hospital in Lusaka. At page 55 of the record of appeal is a letter dated 12th April, 2013, from Doctor E. Simwanza of the Orthopaedic hospital to NORTEC informing that the respondent sustained a spinal cord injury and had since become paralysed.

The defendant’s (appellant’s) counsel cross examined the respondent on the extent of his injuries at page 290 of the record of appeal. At

page 292 he was cross examined on loss of future earnings. We note at pages 278 to 283 that the appellant had raised the issue of unpleaded claims before the Deputy Registrar in particular special damages. The respondent's counsel contended that the claims are within the schedule of damages the law allows or contemplates in cases of damages for personal injuries. The Deputy Registrar was referred to the book '*Munkman on Damages for Personal Injuries and Death*'.

The Deputy Registrar reserved ruling. Unfortunately, perusal of the record is clear that the ruling was never delivered though the parties proceeded to assessment as afore mentioned.

Be that as it may, we read the book Munkman on Damages and also the Supreme Court decisions in the **Chilufya Kusensela**² case and **Reuben Nkomanga v. Dar Farms International Limited**⁵. We couldn't agree more with Mr. Banda's submissions on this score based on the book Munkman on Damages and the Supreme Court decisions as cited.

We also had recourse to the learned authors of '*Guide to Damages*' who put it simply that pain and suffering damages are subjective. They are "*awarded for pain which the claimant feels consequent to an injury, both in the past and into the future. The level of damages will depend upon the duration and intensity of the pain and suffering*".

Additionally that loss of amenity is objective. Damages are awarded for the reduction in the ability of the claimant to perform everyday tasks and enjoy life, and it does not matter whether the claimant is conscious or not of the affect upon his life. It can include interference with hobbies, a reduction in marriage prospects as in **Moriarty v. McCarthy**⁶ or interference with the claimant's sex life as was the case in **Cook v. K.L. Kier and Company Limited**⁷.

It is settled law therefore, that in assessing a claim for damages for personal injuries, the awards should be classified under the following heads (i) pain and suffering (ii) loss of amenities (iii) permanent disability and (iv) loss of future prospective earnings. It is immaterial whether they are specifically pleaded or not. In casu, we note also that the appellant's counsel did cross examine the respondent on these issues.

Therefore, the Deputy Registrar did not err in law and fact when he awarded damages for permanent disability and loss of future and prospective earnings as these awards are consequential and are naturally considered in claims for damages for personal injuries. However, we agree with Mr. Nchito, SC, that special damages should have been specifically claimed i.e. taxi fares and unpaid salaries. We note that in fact the respondent testified in cross examination at page 289 line 25 of the record of appeal that the appellant continued paying him after the accident. Ground two is therefore partially successful to

the extent that taxi fares and unpaid salaries should have been specifically pleaded.

With regard to ground one, we note that the respondent suffered severe injuries after the accident. He has been medically classified as paraplegic (100% permanent disability) per medical report at page 97 of the record of appeal. We note that in the Kusensela case, the respondent suffered 30% permanent disability.

The Deputy Registrar took into account the serious injuries the respondent sustained as follows; T12 vertebral fracture with spinal cord injury, total paralysis from T12, also considered was the period of hospitalization for seven months, 100% disability and the fact that he is incontinent and confined to a wheelchair. In light of the serious injuries especially the 100% disability we would therefore not interfere with the award of K250,000.00 for permanent disability. The Deputy Registrar properly relied on the **Chilufya Kusensela**² case where the extent of the disability was considered and depreciation of the Kwacha.

The Deputy Registrar after considering the **Chilufya Kusensela**² case and **Michael Mukula and Highway Transport Limited v. Pamela Ngungu and Others**⁸ where the Supreme Court upheld the award of K180,000.00 given by the High Court for pain and suffering, opted to follow the **Michael Mukula and Highway Transport** case reasoning that it was the latest decision. We cannot fault him for this approach.

We are cognizant that in arguing ground one on pain and suffering, the appellant's counsel also contends that the Deputy Registrar took into account the depreciation of the Kwacha which he stated was sky rocketing and yet there was no evidence of the excessive depreciation between the years 2014 and 2016. We are inclined to agree with counsel on this score. In that regard we would interfere with the award of K300,000.00 for pain and suffering. We instead award K280,000.00 for pain and suffering.

We shall consider grounds three, four and six together as they are interrelated. Regarding ground three, the evidence before the Deputy Registrar was clearly that the respondent was a student on industrial attachment with the appellant and was getting a salary of K1,040.00 per month. The basic principle as far as loss of earnings and out of pocket expenses are concerned, is that the injured person should be placed in the same financial position, so far as can be done by an award of money, as he would have been had the accident not happened per Lord Goddard in **British Transport Commission v. Gourley**⁹. Lord Reid stated in the same case that:

“if he (the Plaintiff) had not been injured, he would have had the prospect of earning a continuing income, it may be, for many years, but there can be no certainty as to what would have happened. In many cases the amount of that income may be doubtful, even if he might have died or suffered from some incapacity at any time. The loss which he has suffered between the date of the accident and the date of the trial may be certain, but his prospective loss is not. Yet damages must be assessed as a lump sum once and for all, not

prospective loss. Such damages can only be an estimate, often a very rough estimate, of the present value of his prospective loss."

In **Mallett v. McMonagle**¹⁰ per Lord Diplock:

"the court must make an estimate as to what are the chances that particular thing will or would have happened and reflect those chances, whether they are more or less even, in the amount of damages ¼".

In **Cavangh v. Ulster Weaving Company Limited**¹¹ it was observed that:

"the position before and after the accident should be contrasted to estimate the difference."

According to the book "*Munkman on Damages for Personal Injuries and Death*", this entails if a claimant was working before the accident and incapable of work after then the calculation is based on the figure that the claimant would have earned if he had not been injured. The author of Munkman on damages acknowledges that damages for loss of future earnings are not easy to calculate, while past income maybe fairly easy to calculate, things get a little more muddy when it comes to expected future income losses especially lost earning capacity which means the ability to make a living in either the job one had before or in a comparable one.

According to the book '*Guide to Damages*' "*the claimant (respondent) has the burden of showing (a) the likely pattern of her future earnings if*

she had not been injured and (b) the likely pattern of the future earnings of the claimant given the fact that she has now been injured as a result of the defendant's negligence."

Mcgregor On Damages observes that claims for loss of prospective earnings arise every day in personal injuries cases, and two factors militate against any exactness in the assessment of the loss, viz the uncertainty as to the precise length of time that the plaintiff's disability will last, and the uncertainty as to the precise pattern that the plaintiff's future earnings would, but for the injury have taken. Neither of these uncertainties prevents the court from making an assessment of the probable loss.

In Kemp & Kemp 'The Quantum of Damages' it is observed that **"in most of the reported cases dealing with loss under this head the court has assessed a lump sum by way of damages. Usually, as Megaw L. J said in Eaton v Concrete (Northern) Limited¹² 'the assessment of damages under this head is nothing more than a guess to be made'"**

The authors also recognize that the way in which the Court calculates the appropriate lump sum is by applying a suitable multiplier to the multiplicand. The selection of multiplier was an arbitrary process in the sense that the multiplier was not calculated in a precise or logical manner.

In the present case the Deputy Registrar accepted the respondent's salary of K1,040.00 per month. He reasoned that the respondent

would have retired at 65 years old. Furthermore, that his projected net earnings per month at 65 years old would have been K4,000.00 as an upward adjusted salary. He then calculated the lump sum as follows: K4000.00 X 12 months X 43 years (difference between 65 years of retirement and 22 years age at accident) = K2,064,000.00. This was the sum awarded as loss of future and prospective earnings.

We are inclined to interfere with this award going by the various cases and books we have referred to above and as argued by Mr. Nchito SC. Furthermore, we note that the respondent will be paid a statutory monthly pension of K451.86 and a constant attendance allowance of K800.00 for life in accordance with the Act as testified by DW2. We will deal with this in detail later.

In the case of **Konkola Copper Mines Plc and Zambia State Insurance Corporation Limited v. Kapya**³ cited by Mr. Nchito, SC, the Supreme Court in considering whether the awards were wrong at law stated thus:

“the guiding principles on which an appellate court can interfere with the quantum were clearly given in the case of Nance v. British Columbia Electrical Railway¹³ and followed by our Court of Appeal then, in the case of Henwood v. Naoumoff¹⁴ and these are that the appellate court must be satisfied either that the Judge, in assessing the damages applied a wrong principle of law, or if he did not err in law, then the amount was either so inordinately low or so inordinately high, that it must be a wholly erroneous estimate of the damage”.

We are of the considered view that the assessment by the Deputy Registrar resulted in over compensation of the respondent as the award is inordinately high. We wish to clarify that the Deputy Registrar did not use the salaries of the respondent's friends who are fully qualified as stated by Mr. Banda, but he projected a future income of K4,000.00. The projected future income at K4,000.00 per month is too high. We find a projected income of K2,800.00 per month to be appropriate. We are alive to the fact that the respondent was a student on industrial attachment at time of accident though awaiting his final results. We consider also that the multiplier of 43 years as the number of years he would have worked to be wrong in principle. As noted by Lord Reid in **British Transport Commission v Gourley**⁹:

“there is no certainty as to what would have happened had he not been injured”.

Furthermore, according to Kemp & Kemp the age to consider is the plaintiff's age (respondent) at trial. The respondent here was 25 at time of trial. Thus taking all of the above into account, we would take 30 years as the multiplier. We, therefore, reduce the multiplier from 43 years to 30 years.

We opine that following his injuries his life expectancy has also severely reduced. Thus, the loss of future earnings be calculated as follows: K2,800.00 X 12 X 30 years = K1,008,000.00 as the amount for loss of future and prospective earnings.

We now wish to clarify on the issue of the statutory monthly pension and the constant attendance monthly allowance as intimated earlier. We have noted the arguments in grounds four and six that the Worker's Compensation Fund Control Board will cater for taxi fares, care and maintenance as testified by DW2 (page 297 -299 of the record of appeal) and that the respondent would get a monthly pension of K451.86 and K800.00 constant attendance allowance for life. We note that the appellant argued that the Deputy Registrar erred when he calculated the constant attendant allowance at K500.00 per month. The respondent's counsel conceded to ground six to the effect that K800.00 is the monthly rate. Counsel however, contended that the calculation was done at K800.00 per month such that the total amount remains the same. We agree with the respondent's counsel that the Deputy Registrar erroneously referred to K500.00 but the total amount is clear that he used K800.00 as the monthly rate.

However, we note that the Deputy Registrar considered the constant attendance allowance and the statutory monthly pension to be expenditures which he deducted from the final award. The respondent's counsel argued that this was in accordance with section 6 (2) of the Act. Clearly, section 6(1) and (2) of the Act enjoins the Court to reduce from the award any compensation which has been paid to the claimant (respondent) by the Workers Compensation and is due to be repaid by the employer (appellant). The Deputy Registrar reduced from the final award the monthly pension and the constant attendance allowance as expenditures due to the appellant. At page 224 of the

record of appeal is the respondent's statement of account showing that the Workers Compensation Fund has been paying him the monthly pension already.

The monthly pension and constant attendance allowance are to be paid to him for life. The Deputy Registrar used 50 years as the multiplier of which we are inclined to interfere with. As canvassed above we consider 30 years to be a fair projection of life expectancy considering the respondent's injuries. Thus the monthly pension is to be calculated as follows $K451.86 \times 12 \times 30 = K162,669.60$ and constant monthly allowance $K800.00 \times 12 \times 30 = K288,000.00$ these amounts are to be deducted from the total due to the respondent. The hospital bills paid to Sinozam Hospital by the Workers Compensation were also deducted as expenditures by the appellant. We opine that these could only be deducted if the appellant refunds the Workers Compensation Fund. In light of all the foregoing we allow grounds three, four and six as indicated.

In relation to ground seven, we note, as submitted by the respondent's counsel, that the Deputy Registrar did consider that the Workers Compensation Fund Control Board would provide the respondent with medicated soap, linen, special bed and medical or surgical requirements for life. Accordingly, ground seven is dismissed.

We are also inclined to allow ground five as argued by the appellant's counsel serve to clarify that the tax relates to loss of earning capacity. According to Munkman, it is now the established rule that loss of earnings will be calculated on the basis of the net earnings after the deductions of tax and any similar unavoidable charges. That is both the earnings before the accident and the estimated earnings afterwards, will be taken at the net figure. Thus, it does not matter whether tax is deducted at source or assessed later. This flows from the decision of the House of Lords in **British Transport Commission v. Gourley**⁹ also cited by Mr. Nchito, SC that awards for loss of earning capacity must take into account the income tax which the plaintiff would have had to pay on the earnings.

In light of the foregoing ground five is allowed as elucidated. The tax to be assessed by the Deputy Registrar.

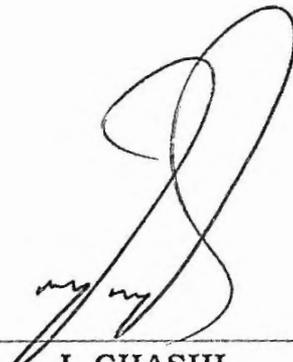
In the net result, the appeal is partly successful. The final award to be reduced as indicated in this Judgment.

In the circumstance, we order each party to bear own costs in this Court. In the Court below costs remain for the respondent as ordered.

Leave to appeal is granted.



C.F.R. MCHENGA
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL



J. CHASHI
COURT OF APPEAL JUDGE



J.Z. MULONGOTI
COURT OF APPEAL JUDGE