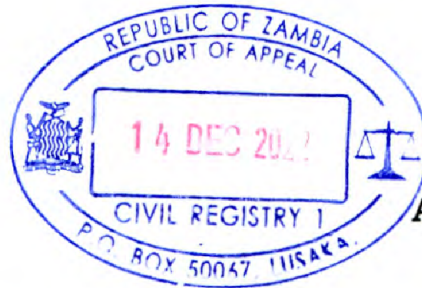


IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 237 OF 2020
HOLDEN AT NDOLA
(Civil Jurisdiction)

B E T W E E N:

NSAMA MULENGA
AND

AGNESS SEKE KAPEU (*Suing as Administratrix
of the late Joseph Fundulu*)



APPELLANT

RESPONDENT

CORAM: Chashi, Siavwapa and Banda-Bobo, JJA

ON: 15th November and 14th December 2022

For the Appellant: Non-Appearence

For the Respondent: C. Musonda (Ms), Messrs Batoka Chambers

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court

Cases referred to:

- 1. *The Attorney General & 3 Others v Masauso Phiri - SCZ Judgment No. 28 of 2017***
- 2. *The Attorney General v Marcus Kampumba Achiume (1983) ZR, 1***
- 3. *Communications Authority v Vodacom Zambia Limited (2009) ZR, 196***
- 4. *Griever Chola Sikasote v Southern Cross Limited - CAZ Appeal No. 62 of 2018***
- 5. *The Attorney General v Felix Chris Kalenga (1982) ZR, 1***

6. *Times Newspapers Zambia Limited v Alias Andrew Kashita (1982) ZR, 162*

Rules referred to:

1. *The Court of Appeal Rules, Statutory Instrument No. 65 of 2016*

1.0 INTRODUCTION

1.1 This appeal is against the Judgment of Honourable Mr Justice Charles Zulu delivered on 30th April 2020. In the said Judgment, the learned Judge awarded the Respondent damages for personal injuries in the sum of K40,000.00 together with interest at the average short term deposit rate, from the date of the writ of summons to date of Judgment and thereafter at the commercial lending rate per annum until final Judgment.

2.0 BACKGROUND

2.1 The Respondent (*now deceased*) as plaintiff in the court below, commenced an action on 24th September 2014, claiming *inter alia* damages for assault and battery. The Respondent in the statement of claim is alleged to have

been assaulted by the Appellant on 24th December 2013 at the Jazz Club in Lusaka. According to the averments, he suffered great pain and injuries and he continued having seizures after being discharged, even though he was on medication.

2.2 The initial CT scan conducted on 27th December 2013 showed a linear fracture of the left temporal and parietal bones, with hematoma (30x2.2cm) in the left temporal region.

2.3 The defence by the Respondent filed into court on 6th October 2014 consisted of general denials.

3.0 DECISION OF THE COURT BELOW

3.1 After considering the pleadings and evidence, the court below dismissed all the claims, save for damages for personal injury which it pegged at K40,000.00. In arriving at the quantum, the learned Judge had recourse to the case of **Attorney General & 3 Others v Masauso Phiri**¹ in which the Supreme Court, in awarding the sum of K20,000.00 for personal injuries, had this to say:

“The learned trial Judge accepted that the Respondent was beaten by the police officers, using axe handles and found that the battery inflicted on him was severe as to warrant hospitalization for a month, although medical report is not on the record, the evidence shows that the Respondent sustained swelling all over his body and sores on both legs. We find that these aggravating factors justify an award higher than any previous award. Therefore we award the Respondent a sum of K20,000.00 as damages for assault.”

3.2 The learned Judge then went on to remark as follows (*at page J12*):

“The extent of the injuries suffered by the plaintiff is clearly discernable from the testimony of PW1, the Police Medical Report and the UTH Medical Report dated July 22, 2014. The plaintiffs face after the assault was swollen, with a red eye, and in less than 48 hours after

the assault and battery, he had seizures and fits. And when he was first examined at UTH and admitted for nine days, he was found to have subconjunctival hemorrhage. When the CT scan of the brain was done, he was found to have suffered a linear fracture of the left temporal and parietal bones, with a hematoma in the left temporal region...The severity of the head injuries cannot be doubted...The award of damages for personal injuries must be adequate, fair and commensurate to the injuries suffered. It is for that reason I award to the plaintiff a reasonably fair solatium in the sum of Forty Thousand Kwacha (K40,000.00) to cover damages for personal injuries."

4.0 THE APPEAL

- 4.1 Dissatisfied with the award, the Appellant has appealed to this Court advancing one ground of appeal couched as follows:

“The court below misdirected itself in both law and fact when it awarded the Respondent the sum of K40,000.00 damages for personal injuries without having regard to the earlier decision of the Supreme Court on the same point.”

5.0 ARGUMENTS IN SUPPORT OF THE APPEAL

- 5.1 The Appellant’s Counsel on 8th November 2022 filed into Court a notice of non-appearance pursuant to Order 10/18 (1) of **The Court of Appeal Rules¹ (CAR)**. In the said notice, the Appellant indicated that he will rely wholly on the heads of argument filed into Court of 24th November 2020
- 5.2 It was the Appellant’s argument that in the **Masauso Phiri** case, the Supreme Court awarded the Respondent the sum of K20,000.00 because they had found aggravating factors that justified an award higher than any of their previous awards for damages for assault. That however in this case, the court below did not indicate in its Judgment that there were aggravating factors thereby offending the principle of *stare decisis*.

5.3 It was submitted that the court below did not make findings of fact to the effect that there were aggravating circumstances. Our attention was drawn to the case of **The Attorney General v Marcus Kampumba Achiume²** and we were urged to interfere with the award by the court below.

6.0 ARGUMENTS IN OPPOSING THE APPEAL

6.1 At the hearing of the appeal, Ms Musonda, Counsel for the Respondent, relied on the Respondent's heads of argument filed into Court on 4th November 2022. Our attention was once again drawn to the **Masauso Phiri** case and submitted that, the court below came to its finding regarding damages for the personal injury due to the fact that the victim had suffered severe head injuries which were solely connected to the assault by the Appellant.

6.2 That it was in that regard, that the learned Judge in his discretion awarded damages that he considered adequate and fair for the injuries suffered. According to Counsel, the Supreme Court in the **Masauso Phiri** case observed that *"quantum of damages cannot be resolved with any*

precision and that awards in other cases must always be treated with caution if it is sought to rely on them as guide."

6.3 The cases of **Communications Authority v Vodacom Zambia and Griever Chola Sikasote v Southern Cross Motors Limited**³ were cited as to when an appellate court can reverse findings of fact made by a trial court. According to the Respondent, the evidence adduced in the court below clearly showed that the victim suffered subconjunctival hemorrhage, linear fracture of the left temporal and parietal bones with a hematoma in the left temporal region. That in light of the aforestated, the court below awarded sufficient and appropriate damages corresponding to the injuries suffered.

7.0 CONSIDERATION AND DECISION OF THE COURT

7.1 We have considered the Judgment being impugned and the arguments by the parties. The Appellant's contention is that, in the **Masauso Phiri** case, the Supreme Court awarded K20,000.00 because they found aggravating factors that justified an award higher than any of their previous awards for assault. That in *casu* the court below

did not indicate in its Judgment that there were aggravating factors justifying a higher award than that awarded in the **Masauso Phiri** case, thereby offending the principle of law of *stare decisis*.

- 7.2 In the **Masauso Phiri** case, the Supreme Court guided that there can be an award given by the court, which is higher than they have awarded before, where there are aggravating factors. The Supreme Court then went on to state as follows:

“Where the tortious circumstances are more serious, then the awards must reflect this, as well as the impact of inflation in order to arrive at a fair and reasonable amount. Local precedents favour moderate figures consistent with Zambian values under the prevailing economic and social situation.”

- 7.3 In the **Masauso Phiri** case, in awarding damages of K20,000.00 as damages for assault and battery, the Supreme Court found that there were aggravating factors

that justified an award higher than any of the previous awards.

- 7.4 In the case of **The Attorney General v Felix Chris Kalenga⁵**, the Supreme Court guided as to when an appellate court can interfere with an award of damages when they stated as follows:

“Before an appellate court interferes with findings of the trial court as to the amount of damages, it must be shown that the trial court has applied a wrong principle or has misapprehended the facts or that the award is so high or so low as to be utterly unreasonable, or is an entirely erroneous estimate.”

- 7.5 Equally in the case of **Times Newspapers Zambia Ltd v Alias Andrew Kashita⁶**, they held inter alia as follows:

“Although an appellate court will not normally interfere with an assessment of damages, it will do so where the lower court has misapprehended the facts or misdirected itself on the evidence.”

- 7.6 We note in the case before us that the Appellant has not alleged and showed that the trial court had applied a wrong principle in arriving at the award of K40,000.00. Neither has it been shown that the learned Judge misapprehended the facts or that the award is so high or low as to be utterly unreasonable or is an entirely erroneous estimate.
- 7.7 We emphasize that each case when it comes to assessment of damages, must be assessed on its own facts and circumstances and in doing so, the court must take into consideration any aggravating factors, such as the extent of the injuries and also the prevailing economic and social situation and impact of inflation.
- 7.8 The incident in the **Masauso Phiri** case occurred in 2013 and the award was only made in 2017. If we take into consideration the impact of inflation in the preceding five years, the K20,000.00 which was awarded in that case has definitely been impacted.
- 7.9 Although the learned Judge in the court below did not explicitly state that there were aggravating factors in this

case, his observation as earlier alluded to on the gravity of injuries, which involved injuries to the brain and the fact that the victim never stopped having seizures and fits until his death are clearly aggravating factors.

7.10 In the view that we have taken, we find no basis on which to interfere with the award by the learned Judge.

8.0 CONCLUSION

8.1 In view of the aforestated, the appeal has no merit and it is accordingly dismissed with costs to the Respondent. Same to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



M. J. SIAVWAPA
COURT OF APPEAL JUDGE



A.M BANDA-BOBO
COURT OF APPEAL JUDGE