

**IN THE COURT OF APPEAL FOR ZAMBIA  
HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

**Appeal No. 207/2021**

**BETWEEN:**



**MICHAEL BANDA** (*Suing in his capacity as Administrator of the estate of the late Barbra Chimimba*)

**1<sup>st</sup> APPELLANT**

**DOREEN CHIMIMBA** (*Suing in her capacity as Administratrix of the estate of the late Barbra Chimimba*)

**2<sup>nd</sup> APPELLANT**

**AND**

**THE ATTORNEY GENERAL**

**RESPONDENT**

**Coram: Kondolo, Sichinga and Sharpe-Phiri, JJA**

**On the 12<sup>th</sup> October, 2022 and 7<sup>th</sup> February, 2023**

*For the Appellant: Mr. K. Mainga- Messrs Milner and Paul Legal Practitioners*

*For the Respondent: Mr. P. Kachimba- Principal State Advocate  
Ms. M. Mulasa- State Advocate*

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## **JUDGMENT**

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**Sichinga, JA**, delivered the judgment of the Court.

**Cases referred to:**

1. *Zambia State Insurance Corporation and Zambia Consolidated Copper Mines v Andrew Muchili (Administrator of the Estate of the Late Nelson Chinene)* (1988-1989) Z.R. 149
2. *CR Holdings Limited v Mary Musonda (Suing as Administrator of the Estate of the late Boyd Kabaso) and 12 others*, CAZ Appeal 71/2019
3. *CR Holdings Limited and Cassius Rumsey v Jennipher Lintini (Administrator of the estate of Amrah Doran Lintini)* SCZ Selected Judgment No. 9 of 2019.

4. *The Attorney General v George Mwanza (suing in his capacity as Personal Representative of the late Grace Mwanza) and Another*, CAZ Appeal No. 30 of 2017, Selected Judgment No 38 of 2017
5. *Orman Corrigan (suing by next friend Albert John Corrigan) v Tiger Limited and Abdi Jumale*, SCZ Judgment No. 5 of 1981
6. *Vincent Hang'andu, Mazhandu Family Bus Services and Phoenix of Zambia Assurance Company Limited v Lynda Mataka (Suing as Administrator of the estate of the late Misozi Mataka and Lowani Mataka)* CAZ Appeal No. 144 of 2019
7. *Stanley v Saddique* (1991) 2 WLR 459
8. *Konkola Copper Mines v John Mulenga Kapaya (Suing as administrator of the estate of the late Geoffrey Chibale) and Another* (2004) Z.R. 233

**Legislation referred to:**

1. *Law Reforms (Miscellaneous Provisions) Act Chapter 74 of the Laws of Zambia*

## **1.0 Introduction**

- 1.1 This is an appeal against the decision of the Deputy Registrar (DR) Mrs. R. M. Chilembo, on assessment. The appeal raises questions of the propriety of the quantum of damages awarded by the DR with respect to various claims.

## **2.0 Background**

- 2.1 The appellant herein commenced this action by Writ of Summons on 16<sup>th</sup> February 2018. It was alleged that on 8<sup>th</sup> May, 2017, Barbara Chimimba (the deceased), who was a military personnel employed by Zambia Army, was admitted at the maternity ward of Chilenje First Level Hospital, where she was due to deliver a baby boy. The baby was eventually born at 06:00 hours. Around 15:00 hours, the deceased's

mother found her lying on a mattress on the floor while bleeding heavily. She was then taken to the University Teaching Hospital about 20:00 hours. Sadly, she died about 21:00 hours on the same day.

2.2 The appellant claimed the following reliefs:

- (a) Damages for negligence and/ or breach of duty of care;
- (b) Damages for mental anguish and pain;
- (c) Damages for loss of reasonable expectation of pecuniary benefits from the deceased;
- (d) Special damages;
- (e) Interest; and
- (f) Any other relief the Court may deem fit.

2.3 The learned High Court Judge entered judgement in default of appearance in favour of the appellant and granted the awards as prayed. The learned Judge then referred the matter to the DR for assessment of the quantum of damages due to the appellants.

### **3.0 Consideration of evidence and decision of Deputy Registrar**

3.1 The Deputy Registrar assessed damages under the following heads:

- a) Damages for loss of reasonable expectation of pecuniary benefit from the deceased (damages for bereavement);
- b) Damages for mental anguish and pain; and
- c) Damages for negligence and breach of duty of care.



- 3.2 In relation to loss of reasonable expectation of pecuniary benefit, the appellants contended that the deceased could have worked for a further 23 years before attaining retirement age with the reasonable expectation that she would have been promoted, which would have resulted in a salary increment. The learned DR considered the earning capacity of the deceased prior to her death, which her family has been deprived of. This was a monthly salary of K8,575.30 as evidenced by her pay slip.
- 3.3 Taking into account that the deceased was a breadwinner who enjoyed good health prior to her death, had three children below the age of majority and would have served another 23 years earning a monthly income of K8,575.30 before retirement, the learned DR arrived at the sum of K450,000.00 as damages for bereavement.
- 3.4 As regards damages for mental anguish and pain, negligence and breach of duty of care, the learned DR considered that while the respondent did not cause the bleeding of the deceased, she was neglected her circumstances, which led to complications, hence her death on the same day.
- 3.5 The DR stated further that the time interval between when the deceased gave birth at about 06:00 hours and her death about 21:00 hours is a determining factor under this head. She was guided in this regard by the case of **Zambia State Insurance Corporation and Zambia Consolidated**

***Copper Mines v Andrew Muchili (Administrator of the Estate of the Late Nelson Chinene)<sup>1</sup>.***

- 3.6 The learned Judge having found that the deceased suffered pain and anguish soon after delivery of her baby and was neglected thereafter, the estate of the deceased was awarded damages for negligence, pain and suffering in the amount of K50,000.
- 3.7 In relation to special damages, the DR noted that although the deceased's death certificate was produced, no receipts were produced to show how much was spent on funeral expenses. In the circumstances, the estate was awarded K10,000.00 under this head, bringing the cumulative amount on all claims to K510,000.00 plus interest.

**4.0 The appeal**

- 4.1 Dissatisfied with the decision of the DR, the appellant launched this appeal on the following grounds:

- 1. The learned Deputy Registrar erred in law and fact when she awarded a hopelessly low amount of K450,000 as damages for bereavement without justification as to the computation of the award and when she did not adhere to or rather state in her judgment the prescribed factors listed below when determining loss of dependency or rather bereavement as set out by the Apex Courts of law in Zambia namely;***
  - i. The multiplicand***
  - ii. The multiplier***
  - iii. The possibilities of the deceased had they been alive***



- iv. *The period during which the deceased would have been able to provide the dependency*
  - v. *Age and life expectancy of the deceased*
  - vi. *Age of the children or rather level of dependency*
  - vii. *Improbables*
2. *The learned Deputy Registrar erred in law and fact when she awarded a low sum of K50,000 as combined damages for negligence and pain; notwithstanding the fact that negligence and pain were pleaded separately and ought to have been awarded separately with legal justification on the sum awarded, if any.*
  3. *The learned Deputy Registrar erred in law and fact when she did not consider awarding damages for loss of expectation of life even though the same was not specifically pleaded by the appellants but rather, the appellants proved that the deceased died due to the negligence of the respondent; hence the court should have considered awarding the estate damages for loss of expectation of life.*

## **5.0 Appellants' arguments**

- 5.1 The cases of ***CR Holdings Limited v Mary Musonda (Suing as Administrator of the Estate of the late Boyd Kabaso) and 12 others***<sup>2</sup> and ***CR Holdings Limited v Cassius Rumsey Jennipher Lintini (Administrator of the estate of Amrah Doran Lintini)***<sup>3</sup> were cited to advance the argument that for a court to arrive at a quantum of damages for dependency, the principles of multiplicand, multiplier, possibilities of the deceased, life expectancy and duration of employment should be considered.

- 5.2 It was argued further that although the DR acknowledged that the deceased was the breadwinner who was survived by her spouse and three children who were yet to attain the age of majority, she still awarded a low amount which cannot cover the financial needs of her dependents.
- 5.3 That the deceased's multiplicand was K8,575.30 and she could have provided dependency to her dependents on her pay for 23 years, considering that 63 is the life expectancy. On this premise, it was argued that the lower court should have awarded not less than K2,366,700, taking into account *inter alia* the possibility of the deceased being promoted from staff sergeant to a more superior rank. We were urged to interfere with the award of the DR, as it was arrived at without following precedents set down by the superior courts on the subject.
- 5.4 In support of the second ground of appeal, the appellant argued that the amount of K50,000 as damages for negligence and pain and suffering was low, considering the aggravating circumstances which occurred at the hospital prior to the death of the deceased, which could have been avoided.
- 5.5 With particular reference to pain and suffering, the appellant argued that it is not clear how much was awarded by the DR because she combined it with the award for pain and suffering. The arguments advanced in support of the first ground were repeated as regards the principles that



ought to be taken into account in arriving at a quantum of damages in the circumstances presented by this case.

- 5.6 In support of the third ground of appeal, the appellant argued that the learned DR should have awarded damages for loss of expectation of life under the ***Law Reform (Miscellaneous Provisions) Act<sup>1</sup>***. We were urged to follow our decision in ***CR Holdings Limited v Mary Musonda (Suing as Administrator of the Estate of the late Boyd Kabaso) and 12 others supra*** where we awarded K25,000 for loss of expectation of life.

## **6.0 Respondent's arguments**

- 6.1 In response to the first ground of appeal, the respondent argued that the DR, in awarding K450,000 as damages for bereavement, did take into account the deceased's monthly salary, the 23 years she was to serve prior to her retirement and the possibilities of her being promoted.
- 6.2 The case of ***Zambia State Insurance Corporation and Zambia Consolidated Copper Mines v Andrew Muchili (Administrator of the Estate of the Late Nelson Chinene)*** *supra* was cited to buttress the application of the multiplicand and multiplier in arriving at a figure for damages for bereavement or dependency. In this regard, counsel submitted that although the learned DR did not show what multiplicand and multiplier was applied in arriving at the sum of K450,000, she used her discretion. It was also argued that various uncertainties of life ought to be



taken into account- for instance, that it is no guarantee that the deceased would have been able to work up to 23 years, given the considerably highly risky working environment in the army.

- 6.3 In response to the second ground of appeal, counsel argued that the learned DR has the jurisdiction to use her discretion to combine the claims for damages for negligence with damages for pain and suffering. The case of ***Zambia State Insurance Corporation and Zambia Consolidated Copper Mines v Andrew Muchili (Administrator of the Estate of the Late Nelson Chinene)*** *supra* was once again cited, with particular reference to the portion of the judgment where the Supreme Court held that:

***“Any award for pain and suffering should reflect its extent and duration. It is unlikely that any or substantial award can be made where the deceased died within hours of the injury.”***

- 6.4 Counsel submitted that the learned DR did take note of the duration of the deceased’s pain and suffering, as the deceased had given birth at 06:00 hours, upon which she began to bleed, and was only attended to around 22:00 hours. That in the circumstances, the award of K50,000 for both negligence and pain and suffering was reasonable.
- 6.5 Responding to the third ground of appeal, counsel submitted that like any other claim, a claim for damages for loss of expectation of life should be specifically pleaded for in the Statement of Claim. Our attention was drawn to the

case of the ***Attorney General v George Mwanza (suing in his capacity as Personal Representative of the late Grace Mwanza) and Another***<sup>4</sup>, where it was stated in *obiter* that the court could not award damages for dependency, as the same was not pleaded. On this premise, we were urged to dismiss this ground of appeal.

## **7.0 Our decision**

- 7.1 We have perused the judgment that is the subject of this appeal, considered the arguments advanced on behalf of the appellants and respondent, and we have reviewed the law on the tort of negligence resulting in death and the quantum of damages arising therefrom.
- 7.2 As an appellate court, what would warrant our interference with an award for damages by the lower court? As guided by the Supreme Court in the case of ***The Attorney General v Mwanza & Another*** *supra* where the Supreme Court stated, following ***Orman Corrigan (suing by next friend Albert John Corrigan) v Tiger Limited and Abdi Jumale***<sup>5</sup>, that:

***“Before an appeal court can properly interfere with damages, it must be satisfied either that the Judge in assessing the damages applied the wrong principle of law or if he did not err in law then that the amount awarded was either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”***



- 7.3 It then follows that the question we ought to ask ourselves as we determine this appeal is whether the learned DR properly applied the principles of law that are relevant to the respective heads of awards for damages that are the subject of this appeal, and if she did, whether such award was a reasonable estimate.
- 7.4 The appellant's main contention under the first ground of appeal is that the learned DR, in arriving at a quantum of damages for loss of dependency, did not take into account the principles of multiplicand, multiplier, financial possibilities of the deceased, life expectancy and duration of employment. These are indeed the considerations we applied in **CR Holdings v Mary Musonda** *supra*. This is not to say that the court is prohibited from awarding a lump sum for loss of dependency.
- 7.5 The question of what would warrant a lump sum as opposed to computation on the basis of a multiplicand and multiplier is not unprecedented. We recently dealt with this issue in the case of **CR Holdings v Mary Musonda** *supra*, to which we made reference as we sought to resolve a similar issue in **Vincent Hang'andu, Mazhandu Family Bus Services and Phoenix of Zambia Assurance Company Limited v Lynda Mataka (Suing as Administrator of the estate of the late Misozi Mataka and Lowani Mataka)**<sup>6</sup> where we stated at page J32-J33 that:

***"We did however state in the case of CR Holdings v Mary Musonda (supra) that a Judge can depart from the***

*conventional method of computing the award where there are imponderables. Our reasoning was informed by the case of Stanley v Saddique, in which such imponderables existed and a lump sum was awarded. Even though the learned Registrar did not say it, in so many words, she did in fact award a lump sum. In the circumstances, we cannot fault her for abandoning the traditional method of computing the damages by using the multiplier and multiplicand."*

- 7.6 The Supreme Court in the case of **CR Holdings Limited and Cassius Rumsey v Jennipher Lintini (Administrator of the estate of Amrah Doran Lintini)** *supra* acknowledged that where the deceased was on a monthly salary, it is easy to determine the multiplicand. The circumstances of this case are indeed distinguishable from those in **Stanley v Saddique (1991)**<sup>7</sup>, which raised what the court termed as 'imponderables' as to what would have been the possible monthly income of the deceased, and **CR Holdings v Mary Musonda** *supra*, where there was no proof of consistent monthly income, thereby making it difficult to determine the multiplicand. Based on the legal principles so far discussed, it was appropriate in these two cases, for the court to award a lump sum.
- 7.7 In the present case, however, there is undisputed and unequivocal evidence that the deceased had a monthly income in form of a salary, which eases our task of determining the multiplicand. Factors such as the deceased's age, retirement age and life expectancy are



indeed factors which aid the court to determine the multiplier. In the wake of such evidence, the learned DR proceeded to award a lump sum, which in itself is not unconventional or an error in law.

7.8 In our view, the circumstances of this case do not raise imponderables, or factors that would render it difficult or impossible to estimate, to justify a lump sum as opposed to a computation based on the multiplicand and multiplier, as guided by precedent. On this premise, we find that this is an appropriate case to interfere with an award for damages, as the learned DR did not properly apply the law. The lump sum of 450,000 is hereby set aside.

7.9 We will now proceed to compute the appropriate estimate of damages. Although it is not in dispute that the deceased had a monthly salary of K8,575.30, it does not automatically follow that this figure should be holistically applied in computing the multiplicand. We have little choice but to adopt the approach taken by the Supreme Court in ***CR Holdings Limited and Cassius Rumsey v Jennipher Lintini (Administrator of the estate of Amrah Doran Lintini)*** *supra*, where a third of the deceased's income was deducted from his income, as an estimate of what the deceased would have spent on himself, and a further ten percent deduction as what the deceased would have saved.

7.10 In this case, a third of K8,575.30 comes to K2,858.5, while 10% is K857.5, bringing the total deductible figure at K3,716. This figure deducted from the K8,575.30 monthly salary leaves us with K4,859.3. This figure is to be multiplied by 12 to arrive at an annual income of K58,311.6. This is the multiplicand to be applied.

7.11 The multiplicand must then be multiplied by the multiplier, which is the number of years the deceased would have been able to support the dependents. The respondent has argued that uncertainties such as the possibility of an early death should be accounted for, given the risky nature of the work environment in the army. This is a fair argument, as even in the **CR Holdings Limited and Cassius Rumsey v Jennipher Lintini (Administrator of the estate of Amrah Doran Lintini) supra and Konkola Copper Mines v John Mulenga Kapaya (Suing as administrator of the estate of the late Geoffrey Chibale) and Another<sup>8</sup>**, the Supreme Court applied 15 years, considering the short life span of miners.

7.12 *In casu*, we will apply 23 years as the multiplier, this being the number of years the deceased would have worked until retirement age. The multiplicand multiplied by the multiplier, i.e. K58,311.60 x 23, gives us K1,341,166.80 as the total gross dependency, which we accordingly award.



7.13 We are bound by precedent to distribute this award amongst the dependents depending on their respective levels of dependency as at the deceased's death. For instance, in ***Konkola Copper Mines v John Mulenga Kapaya (Suing as administrator of the estate of the late Geoffrey Chibale)*** *supra* the Supreme Court awarded 5% to the widow, 5% to the deceased mother and 90% to the children.

7.14 According to the records of birth on record, the three children were aged seven, two and the last one barely a day, having been born few hours prior to the death of the deceased. Seeing as the children's needs must be and have always been considered primary to those of the surviving spouse, and bearing in mind the possibility of the 1<sup>st</sup> appellant re-marrying, we allocate 5% of the award to the 1<sup>st</sup> appellant as the surviving spouse, and the remaining 95% to the three children. That is, K67,058.34 for the appellant and K1,274,108.46 for the three children. The first ground of appeal succeeds.

7.15 The second ground of appeal is premised on the award for pain and suffering. Under this head, the quantum will depend on the intensity and duration of the pain and suffering. It then follows that where victim dies instantly, no damages are awarded under this head. The practice as regards pain and suffering has been to apportion a weekly tariff and multiply that by the period of admission only, such that in the ***CR Holdings v Mary Musonda*** case, we

awarded K1,200 to the estate of the deceased who died a day after the accident, having suffered lacerations on the head, right hand and a torn ear.

7.16 In this case, the duration of suffering could be reduced to barely a day, as the deceased herein died in the night after having given birth in the morning and had been bleeding possibly for that duration of time.

7.17 In ***Vincent Hang'andu, Mazhandu Family Bus Services and Phoenix of Zambia Assurance Company Limited v Lynda Mataka (Suing as Administrator of the estate of the late Misozi Mataka and Lowani Mataka)*** *supra*, which we decided only a year ago, we applied a weekly rate of 7,600. The same rate, if applied in the matter *in casu*, would amount to a daily rate of K1,085.71, which would have been applicable had the deceased endured pain and suffering for at least a day. However, since the deceased died on the same day she had given birth, this amount would be significantly lower and actually so nominal as to render our computation thereof an academic exercise. In this vein, the learned DR's omission to separately compute the award for pain and suffering is inconsequential. As such, we shall not tamper with the award of K50,000.00 as damages for negligence and pain and suffering. The second ground of appeal fails.

7.18 A perusal of the Statement of Claim shows that the appellants did not claim for loss of expectation of life, neither was any argument advanced in this regard on assessment before the DR. It appears to us that Counsel overlooked this claim and now wishes to sneak it in. It is trite law that generally, no novel issues are to be raised on appeal. We are not inclined to cover for counsel's oversight in this regard, and we accordingly disallow the third ground of appeal.

7.19 In conclusion, our decision is as follows:

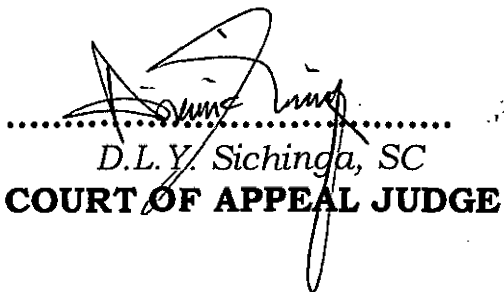
1. The award of K450,000 as dependency is set aside.
2. We award a total of K1,341,166.80 as dependency, to be distributed among the dependents as follows-
  - a) K67,058.34 for the 1<sup>st</sup> appellant as the surviving spouse; and
  - b) K1,274,108.46 for the three children
3. The award of K50,000 toward negligence and pain and suffering is maintained
4. The total judgment sum is K1,391,166.80

7.18 The judgment sum of K1,391,166.80 is to be paid with interest at short term deposit rate from the date of writ to judgment and thereafter at the current bank lending rate as determined by Bank of Zambia until paid in full.


7.19 Given that this appeal has only partially succeeded, each party shall bear its own costs of this appeal.



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*M. M. Kondolo, SC*  
**COURT OF APPEAL JUDGE**



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*D.L.Y. Sichinga, SC*  
**COURT OF APPEAL JUDGE**



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*N. A. Sharpe-Phiri*  
**COURT OF APPEAL JUDGE**