

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2014/HP/1494

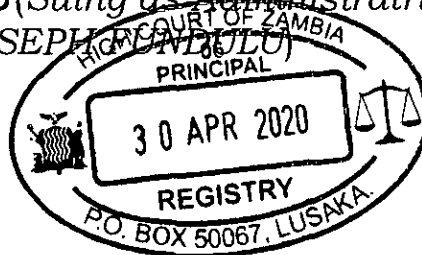
BETWEEN:

AGNESS SEKE KAPEU (*Suing as Administratrix
of the Estate of late JOSEPH MULENGA*)

PLAINTIFF

AND

NSAMA MULENGA



DEFENDANT

Before:

The Hon. Mr. Justice Charles Zulu.

For the Plaintiff:

Mr. H.M. Hamakando, of Messrs Batoka
Chambers.

For the Defendant:

Mr. K. Mulenga, of Messrs Kumasonde
Chambers.

JUDGMENT

Cases referred to:

- 1. *Mwenya & Others v The People* (1997) Z.R 221.**
- 2. *Sipalo Chibozu & Another v The People* (1981) Z.R. 28.**
- 3. *Attorney General & Others v Phiri* (SCZ Appeal No. 161/2014).**
- 4. *Martin Nyandoro v. Attorney General* (1979) Z.R 276.**
- 5. *Victor Koni v The Attorney General* (S.C.Z. APPEAL NO. 7 OF 1990).**

Other Works referred to:

- 1. *Harvey McGregor "McGregor on Damages, Eighteenth Edition (London Sweet & Maxwell, 2009) at paragraph 37-001.***

The Plaintiff, Joseph Fundulu (hereinafter referred to as the Plaintiff) before his death took out the present action via a writ of summons and statement of claim dated September 24, 2014, against the Defendant, claiming reliefs couched as follows:

Special Damages: Medical treatment-K5, 000 for drug/treatment.

- (i) Damages for assault and battery;**
- (ii) Exemplary damages;**
- (iii) Special damages totaling K5,000,00.00 for drugs/treatment;**
- (iv) Further or other relief as the Court may deem fit or reasonable; and**
- (v) Costs.**

According to the death certificate, the Plaintiff died on August 7, 2017, and by Order of Appointment of Administrator dated March 22, 2018, the Plaintiff's mother, Agness Kapeu Fundula was appointed the Administratrix of the estate. And she is the one that represented the estate of the late in these proceedings. She testified as the Plaintiff's first witness (PW1).

The Plaintiff in his statement of claim averred that on December 24, 2013, while at Lusaka Club, he was assaulted by the Defendant and sustained head and brain injuries. It was averred that a report was made to Longacres Police Post, and thereafter was attended to at the University Teaching Hospital (UTH) after being issued with a [Police] Medical Report. It was also alleged that the Defendant offered to compensate K2, 000.00 for the said injuries, but he rejected the offer.

The Defendant in his defence denied assaulting the Plaintiff, but alleged that the purported assault reported to Longacres Community Police Post took place at Jazz Club. He also alleged that the Police advised the parties to settle the matter amicably as neighbours. According to the Defendant's averment in paragraph 5, of the defence, it was stated that the Plaintiff demanded to be paid K3, 500.00, but the Defendant counter-offered with a sum of K2, 000.00.

PW1, Agness Seke Kapeu- Fundulu testified that she used to live with her son, Joseph Fundulu, at House No. 2 Mushemi Road Rhodes Park, Lusaka. She said on December 25, 2014 around 02:00am, her son knocked on the gate, and when she opened the gate, she observed that Joseph Fundulu's face was swollen with a red eye. She said her son informed her that he was assaulted by Nsama from the neighbourhood. She said her son advised her that further discussions on the issue be deferred to the morning.

PW1 added that on December 26, in the morning her son had gone to visit the owner of Jazz Club with a view to be assisted with some money, and on his return he was carrying some *Panado*. She said around lunch time a worker called for her, and thereafter approached her son's room and found Joseph fitting. She said Joseph was immediately rushed to the University Teaching Hospital (UTH) where he was admitted for nine days. She said a CT Scan of the brain was done, which revealed that he had suffered bleeding from the brain and two bones in the head were fractured. PW1 said at the material time she did not personally know the Defendant, Nsama Mulenga, the alleged assailant, but his mother.

She said after the Police Medical Report was signed, a Police Call-Out was issued to the Defendant, but the Police kept advising them that the assailant could not be located. She said the assailant was only arrested in April, 2014, after being spotted by Joseph, who later engaged the Police. She added that two days later, the Defendant and her mother visited her. She said the words uttered by Nsama's mother were: "can you forgive my son". According to her, she then asked Mrs. Mulenga if she was aware about the gravity of the case, to which she replied, she was not sure. PW1 added that she then told Mrs. Mulenga that it was hard to forgive since she was not sure what her son had done, and what he was arrested for. She said thereafter she advised them to leave.

PW1 said while the matter was pending criminal trial, the Defendant approached her son with a view to settle the matter *ex curia*, and proposed to pay K2, 000.00, but turned down the offer. She said as a family they resolved that her son proceed to take out an action in the High Court. She said later her son died, and the cause of death according her was the said beating.

PW2 was Doctor Kachinga Aggrippa Sichizya, a Neurosurgeon Specialist. He said he was working as a Consultant at the UTH. He gave his credentials; that he was a Medical Doctor for 25 years and as a Neurosurgeon for 15 years, trained to take care of people with brain and spine ailments. It must recorded that this witness did not personally attend to the Plaintiff, save perhaps to state that he recounted and sought to amplify on the Medical Report dated July 22, 2014 authored by Doctor Kaseya.

PW2 said on December 26, 2013, Joseph Fundulu was taken to the UTH as a patient experiencing seizures and was in a semi-comatose state. He said upon examination, it was learned that two days prior to his admission he was assaulted. PW2 said after the patient was examined, he was found to have had subconjunctival haemorrhage, and was found to have bled in the eye, and had a swollen face.

PW2 added that the most important examination was a CT Scan of the brain, which showed a fracture on the left temporal and parietal bones. He explained that in the brain there was haematoma i.e. a collection of blood in the wrong place. According to PW2 the head injuries were severe. He said the patient responded well to treatment after being cared for in a High Dependence Unity. He said the scan that was done in April showed that the fracture had healed and the haematoma had resolved. He, however, stated that due to the said injuries, the patient remained confused for about a month until the haematoma was cleared fully.

In cross-examination he said the patient was not fully cured; that although the patient was free of seizures because he was on medication, he had cerebral malaise. PW2 said because of this condition the patient continued to have seizures.

The Defendant testified and called one witness. He testified that on Christmas Eve, on December 24, 2013, he was at Jazz Club together with his friends, drinking. He said while drinking, he was approached by the deceased, Joe Fundulu (Plaintiff), who he described as a bottle picker at Jazz Club. He said Joe asked to have a share from their *Jameson* whisky, but he refused. He said,

thereafter Joe became confrontation. According to the Defendant, he said he merely pushed the Plaintiff, and the Plaintiff fell down. He said after falling, the Plaintiff got up and exchanged words, and before the exchange escalated his friends stepped in to separate them. He said he continued with his drinking and the Plaintiff continued with his work, and that he left the club for home around 23:00 hours.

The Defendant further stated that on December 25, he went to Jazz Club, and met with the Plaintiff and that he bought a bottle of *Castle* lager beer for him, and reprimanded him that his behaviour the previous night was unacceptable.

The Defendant said later on, he was approached by the Plaintiff's sister and accused him of having assaulted Joe, but he denied. He said he heard stories that Joe was assaulted elsewhere on December 28. He observed that whereas PW1 alleged that the incidence happened on a Saturday, December 24, was a Tuesday, and a Saturday was on December 28. He also stated that Joe knew that the said injuries were not caused by him, as such the Plaintiff was not willing to proceed with the case, but was forced by his mother and sister. He further stated that in this vain, Joe asked him to request his mother to visit the Plaintiff's mother in order to dissuade her from going ahead with the assault case. He said Joe did this because he knew where exactly he was assaulted.

In cross-examination he denied being at large, and admitted that he was only arrested in April, 2014. And he admitted being convicted for the offence of assault. He denied making

compensatory offers to the Plaintiff, and said he had no sight of his defence filed in Court. He denied inflicting the Plaintiff's alleged head injuries.

The witness for the Defendant was Champion Mbewe, the friend to the Defendant. He stated that on December 24, he was with the Defendant at Jazz Club. He recapitulated the testimony of the Plaintiff as regards how Joe, was not allowed to have a shot from their whisky, and how an argument ensued between Joe and the Defendant. He said Joe was pushed by the Defendant and fell down, but got up and continued with his chores. He said they left the club around 22:00 hours to 23:00 hours.

The Plaintiff's Counsel filed written submissions which by and large contain in summary a repeat of the evidence adduced. Nevertheless, it was submitted that the Plaintiff had proved the case on a balance of probability. He also argued that the operative cause of death for the Plaintiff on August 7, 2017 were the injuries the Plaintiff suffered from the said beating.

The Defendant's Counsel submitted that PW1's testimony was speculative because it was not supported by the other two, reported to have been with her at the time they found the Plaintiff fitting. And that in the absence of an admission card it was equally speculative whether or not her son was admitted to the Hospital on December 25, 2013. He observed that the Medical Report dated January 17, 2014, indicated that the Plaintiff was examined on January 17, 2014, meaning that he was admitted to the UTH on that date. According to Counsel this also supported the assertion

that the injuries the Plaintiff suffered were as a result of the beating on December 28, 2013.

As regards the testimony of Dr. Sichizya (PW2), it was submitted that his evidence should not be accepted because he was not the one that examined the Plaintiff, neither did he prepare the report date January 17, 2014. In this regard, reference was made to the case of **Mwanza & Others v The People (1997) Z.R 221**, wherein Beron D.C.J. stated:

Neither the trial court nor this court could say from this statement of facts precisely what was the nature or the severity of the injuries inflicted on the deceased. We point out to those responsible for prosecutions that this information is essential to a proper consideration of the question of sentence, and may in some cases be essential on the question of verdict. There may be cases in which the medical report will be sufficient to supply this information without it being necessary to call the doctor, but our experience is that medical reports usually require explanation not only of the terms used but also of the conclusions to be drawn from the facts and opinions stated in the report. It is therefore highly desirable, save perhaps in the simplest of cases, for the person who carried out the examination in question and prepared the report to give verbal evidence in court; certainly the doctor should have been called in the present case.

Furthermore, the case of **Sipalo Chibozu & Another v The People (1981) Z.R. 28**, was also cited, in which it was held:

Medical reports usually require explanation not only of the terms used but also of the conclusions to be drawn from the facts and opinions stated in the report. It is therefore highly desirable for the person who carried out

the examination in question and prepared the report to give verbal evidence.

It was finally submitted that the Plaintiff's case was not proved, by way of connecting the injuries to events that occurred on December 24, 2013. According to Counsel this was so because the injuries were so serious, as such the victim was not expected to have continued drinking beer thereafter. I was therefore urged to dismiss the Plaintiff's case.

I have carefully considered the evidence adduced and the submissions made thereof. There is no doubt that on Christmas Eve, December 24, 2013, the plaintiff and the Defendant were at Jazz Club- Lusaka. And I have no doubt whatsoever that the Plaintiff was seriously assaulted and battered by the Defendant on that material night or about the wee hours of Christmas Day on December 25, 2013. The injuries to the Plaintiff's face were so visible such that when he returned to his parent's house, his mother visibly noticed the injuries; the face was swollen and the eye was red. At that point, the Plaintiff even named his assailant, the Defendant.

The credibility of the Defendant in terms of truthfulness and reliability is materially questionable. While there were attempts by the Defendant and his family to settle the case *ex curia* with a possibility of avoiding criminal prosecution, he denied making these overtures. And because of his dishonest, he even denied making a counter-offer to compensate the Plaintiff, when in his defence he was categorical by stating that when the Plaintiff made

a demand of K3, 500.00 for compensation, his counter-offer was K2, 000.00, which the Plaintiff rejected.

Furthermore, the fabrication to say the Plaintiff was assaulted elsewhere by other people on December 28, 2013, is the Defendant's vain machination aimed at escaping liability. It is unfounded that the Plaintiff was assaulted on December 28, when he went to the Hospital on December 26, after his condition got serious on December 26, after experiencing seizures and fittings. This prompted his evacuation to the UTH, where he was admitted for nine days. Therefore, the argument by the Defendant's Counsel that the Plaintiff was first taken to the Hospital on January 17, 2014, was unfounded and misconceived.

Certainly, the Plaintiff was not examined once and for all on December 26, but a series of examinations and appointments with his doctors took place thereafter, and one such examination was on April 10, 2014, the Medical Report dated July 22, 2014 attests to this fact.

The fact that the Defendant led by his mother, Mrs. Mulenga approached the Plaintiff's mother at her home to settle the matter *ex curia* given their affinity as neighbours, has a sound degree of probative value, corroborating the fact that the Defendant was accepting civil responsibility for his unjustified act of assaulting and battering the Plaintiff. The act to seek forgiveness from the Plaintiff and his mother deprecate the Defendant's notion that the Plaintiff was instead assaulted by third parties on December 28. The Police Medical Report confirms that the Plaintiff reported the case on December 25, 2013, and it was endorsed that the Plaintiff

was complaining of swollen head and face. Clearly, the reality of the matter is that the Defendant unlawfully descended on the Plaintiff and severely assaulted him, and his brutality caused the Plaintiff to suffer severe head injuries.

It was alleged that the said head injuries occasioned in December, 2013, were the cause of death to the Plaintiff in August, 2017. The Plaintiff's pleadings were not amended to plead that the death of the Plaintiff was as a result of that negligent act. Therefore, I am precluded to making findings of fact or otherwise that the death of the Plaintiff was consequential from the beating occasioned by the Defendant. Understandably so, the claim herein is essentially for assault and battery, and not for loss of expectation of life or damages under the Fatal Accidents Acts 1846-1908.

Turning to assessment of damages for assault and battery, I have recourse to the learned author, Harvey McGregor of "McGregor ON Damages, Eighteenth Edition (London Sweet & Maxwell, 2009)" at paragraph 37-001, wherein it is reported as follows:

In so far assault and battery results in physical injury to the claimant, the damages will be calculated as in any other claim for personal injury.

Further recourse is had to the case of Attorney General & Others v Phiri (SCZ Appeal No. 161/2014) wherein the Supreme Court held:

The learned trial Judge accepted that the respondent was beaten by the Police officer, 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 that justify an award higher than any of our previous award. Therefore we award the respondent a sum of K20, 000.00 as damages for assault and damages.

While it is undeniable that Dr. Sichizya (PW2) neither attended to the Plaintiff nor authored the medical report, dated July 22, 2014, hence the relevance of his testimony was limited to amplifying on some medical terms. However, the extent of the injuries the Plaintiff suffered is clearly discernible from the testimony of PW1, the Police Medical Report, and the UTH Medical Report, dated July 22, 2014. The Plaintiff's 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 was fitting. And when he was first examined at the UTH and admitted for nine days, he was found to have subconjunctival haemorrhage. When the CT Scan of the brain was done, he was also found to have suffered a linear fracture of the left temporal and parietal bones, with a haematoma in the left temporal region.

The severity of the head injuries cannot be doubted. The argument that since the gravity of injuries did not manifest immediately after the assault, takes away the injury from the events that occurred on December 24, at Jazz Club, is unacceptable. The immediate and progressive manifestation of severe head injuries are solely connected to the assault and battery occasioned by the Defendant.

The award of damages for personal injuries must be adequate, fair and commensurate to the injuries suffered. It is for 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.

I now turn to the claim for exemplary damages, factors relevant to be considered in this regard were outlined in the case of **Martin Nyandoro v. Attorney General (1979) Z.R 276**, and the following head-note is reproduced.

In awarding exemplary or aggravated damages, the conduct of the parties has always been taken into account. It would be difficult for the court to award damages where evidence has not been led to prove the conduct of the parties where torture and brutality are alleged.

In the present case no sufficient evidence was adduced to warrant the award of exemplary damages. In any event, attempts by the Defendant to reconcile and seek an amicable settlement show that the Defendant was remorseful, he cannot, therefore, be condemned in aggravated damages for showing remorse post the assault and battery. The claim for exemplary damages is unsuccessful.

Turning to the claim for special damages, I start by making reference to the case of **Victor Koni v The Attorney General (S.C.Z. APPEAL NO. 7 OF 1990)** in which the Supreme Court held:

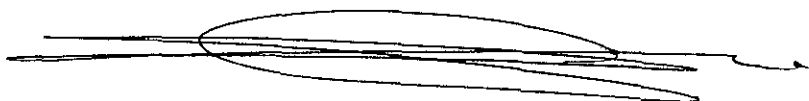
"...It is, of course for any party claiming a special loss to prove that loss and to do so with evidence which makes it possible for court to determine the value of that loss with a fair amount of certainty. As a general rule, therefore, any short comings in the proof of a special loss should react against the claimant...."

The alleged claim for special damages in the sum of K5, 000.00 or K5, 000,000.00 for drugs /treatment was not proved with certainty and particularity; as such the claim is dismissed.

Finally, the award of *Fourty Thousand Kwacha* (K40, 000.00) shall carry interest at the average short term deposit rate from the date of the writ of summons to date of judgment and thereafter at the lending rate per annum until final payment.

Costs shall be borne by the Defendant to be taxed in default of agreement. And leave to appeal granted.

DATED THIS 30TH DAY OF APRIL 2020.



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THE HON. MR JUSTICE CHARLES ZULU