

VICTOR KONI v THE ATTORNEY GENERAL (1990) S.J. (S.C.)

SUPREME COURT

GARDNER, A.J.S., SAKALA AND LAWRENCE, JJ.S.
20TH JUNE, 1990 AND 19TH SEPTEMBER, 1990.
(S.C.Z. APPEAL NO. 7 OF 1990)

Flynote

Assessment of damages - When an appellate court interferes with an award by lower court -
Extent of injuries - Whether these determine the amount of damages

Headnote

The appellant was shot in the chest, neck and shoulder by a police officer. There was no dispute as to liability, which was admitted and consent judgment was duly assented to by the parties. The appellant was awarded K5,000 general damages and K1,870 for loss of business but no interest by the Deputy Registrar in Chambers. The appellant appealed against the assessment of damages.

Held:

- (i) An appellate court will not reverse the court a quo on award of damages unless it is shown that the latter court applied a wrong principle, or misapprehended the facts, or that the award was so high or so low as to be utterly unreasonably, or that the estimate of damages was so erroneous as not to reflect the damages to which the plaintiff is entitled
- (ii) The appellant's injuries were serious enough to entitle him to an award considerably higher than the K5,000 general damages awarded by the Deputy Registrar

Cases referred to:

- (1) Miller v The Attorney General (1983) Z.R. 66
- (2) Mhango v Ngulube and Others (1983) Z.R. 61
- (3) United Bus Company of Zambia Ltd v Shanzi (1977) Z.R. 397

For the appellant: L P Mwanawasa, Esq of Mwanawasa and Co.

For the respondent: R O Okafor, Assistant Principal Senior State Advocate

Judgment

LAWRENCE, J. S.: delivered the judgment of the court.

This is an appeal against an assessment of damages by the learned Deputy Registrar at Chambers. There is no dispute as to liability which was admitted and consent judgment was duly assented to by the parties.

For convenience we shall refer to the appellant as the plaintiff and the respondent as the defendant which they were in lower court.

Although there was consent judgment, it is useful to refer to the brief history of the case which is that on the 9th day of October, 1983, the plaintiff, a taxi operator, was negligently shot in the chest, neck and shoulder by a police officer. The plaintiff consequently suffered fracture of the collar bone and the humerus bone of the left arm. He was admitted to the Ndola Central Hospital on the same day and underwent surgery for the removal of two bullets which lodged in the neck and left arm respectively.

The evidence from Dr. A F Tab Ahmad who treated the plaintiff for the injuries was briefly that on the 10th of September, 1986 when he last saw the plaintiff he was of the opinion that the injuries, which were transitory, had completely healed with the exception of the injury to the left humerus which would take another two to three years to heal fully.

Evidence as to pain and suffering and loss of amenities was given by the plaintiff and after having heard this evidence the learned District Registrar assessed the damages and made the following awards:

- (a) K5,000 general damages and
- (b) K1,870 for loss of business

The plaintiff appeals against these awards including the failure by the learned Deputy Registrar to award interest.

Mr Mwanawasa has, on behalf of the plaintiff, forcefully advanced two main grounds of appeal in favour of increasing the amounts awarded and criticised the learned Deputy Registrar's rejection of loss of general business and earnings. On the other hand, Mr Okafor for the respondent argues that the learned Deputy Registrar was entitled to reject any claims not supported by documentary or other supporting evidence and that, because of the plaintiff's failure to mitigate his losses the awards for loss of earnings should be considerably reduced. The Okafor further submitted that the award of K5,000 could only be enhanced if this court was of the opinion that the amount was ludicrously low.

We propose to consider first the claim for pain and suffering and loss of amenities. The evidence on this point showed that although the plaintiff suffered no permanent disability, however, as late as 10th September, 1986 the injuries to the upper lip and neck had healed, but were still tender. The injury to the humerus bone which was shattered by the bullet still persisted and would only heal within two to three years. The plaintiff's own evidence showed that he can no longer enjoy the game of lawn tennis and that he suffered scarring of the neck and left arm. At the time the damages were being assessed, i.e., September, 1986, he still felt pain when driving and consequently could only work for three to four hours a day.

First of all we wish to re-iterate the principle that this court will not reverse the court a quo on award of damages unless it is shown that the latter court applied a wrong principle or misapprehended the facts or that the award was so high or so low as to be utterly unreasonable or that the estimate of damages was so erroneous as not to reflect the damages to which the plaintiff is entitled (see *Miller v The Attorney General* (1) and other cases referred to therein). Although the plaintiff's injuries in the present case were not so serious as to place him in the "total Wreck" category nevertheless we believe that the injuries were serious enough to warrant a considerably higher award than the K5,000 allowed by the learned Deputy Registrar which award we find to be totally inadequate considering the current money values. We would, therefore, allow the appeal under this head and set aside the award of K5,000.

Having set aside the learned Deputy Registrar's award for its inadequacy we are at large as to the amount to be awarded. The appellant was in hospital for 17 days and was unable to carry on his business for a further 103 days after his release from hospital when he began to work for three to four hours a day. However, the pain persisted up to September 1986, and the appellant was not expected to recover fully for a further two to three years. In the premises we would award a sum of K30,000 (approximately K200 per week for 3 years) as general damages for pain and suffering and loss of amenities.

The second ground of appeal relates to the award for loss of earnings. The learned Deputy Registrar having rightly rejected the claim for loss of future earnings on the basis that the

plaintiff suffered no permanent disability, proceeded to award the plaintiff a sum of K1,870 as damages for loss of earnings from the 9th of October, 1983, the date of the accident, to the 25th day of October, 1983, when the appellant was discharged from the hospital. This award was made on the basis that there was sufficient documentary evidence showing that the plaintiff had, during the 17 days he was hospitalised, lost the taxi fares of five mini bus drivers who paid K4.00 per day and the fares of a further fifteen who paid him K6.00 per day to transport them to their places of work every morning for five days a week. The learned Deputy Registrar, however, rejected the plaintiff's viva voce evidence that he realised K176.00 per day from running his taxi business before the accident, pointing out that the appellant had not produced any documentary or independent evidence to support such a claim. He found some support for this approach in the case of *Mhango v Ngulube and Others* (2) where this court said:

"...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..."

We agree with the learned Deputy Registrar, and indeed, this court has on several occasions indicated that claims for special damages should be supported by documentary or independent evidence. However, Mr Mwanawasa argues that the appellant's evidence in the present case was not seriously challenged and should, therefore, have been accepted. This is a valid argument with which we agree considering that taxi drivers, by the nature of their business do not give receipts and do not keep written records of their transactions. The appellant had testified that he made K106.00 per day from contract work and K70.00 per day from general business, making a total daily takings of K176.00. The learned Deputy Registrar accepted part of this evidence as having sufficiently proved but rejected the claim for loss of general business on basis that there was no supporting evidence, but, as we said earlier, it was this very evidence which stood unchallenged and should, therefore, have been accepted for the reasons we have stated. In the circumstances we would agree with Mr Mwanawasa that the loss of earnings was K176.00 per day.

Mr Okafor, for the respondent argues that the award for loss of earnings should only be nominal, because the appellant failed to mitigate his losses by his failure to employ a driver during the period he was incapacitated. Mr Mwanawasa, however, properly pointed out that the appellant had testified that the reasons he did not employ a driver was the high risk involved in such a move. This we find to be perfectly good reason for the appellant's failure to mitigate. He only had one taxi and it would have been very foolish of him to put it in the hands of a stranger.

What remains is for us to look at, is the number of days during which the appellant was unable to ply his taxi business. The evidence showed that the appellant was injured on 9th of October, 1983 and that he was hospitalised on the same day. He was discharged on the 25th of the same month, i.e., after seventeen days. His arm remained in plaster of paris until the 2nd day of December, 1983 when he finally reclaimed his vehicle which had been at the police station. He was, however, unable to drive his taxi, due to the persisting pain, until February, 1984. He does not say what date in February he resumed work and it can only be assumed that it was on the 1st day of February, 1984 since no date in February has been specified. The above evidence was given on oath and was in no way controverted and we see no reason why, on a balance of probabilities, it should not have been accepted. We are satisfied that the learned Deputy Registrar misapprehended the facts and we, therefore, allow the appeal on this ground as well and set aside the award of K1,870 and substitute, therefore, the sum of K20,240 as loss of earnings calculated on 115 days from 9th October, 1983 to 31st January, 1984 at K176,000 per day. The appellant's damages would be as follows:

Pain and suffering and loss of amenities K30,000
Loss of earnings K20,240

Total damages K50,240

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The learned Deputy Registrar, through what seems to us to be inadvertence, made no order for payment of interest on the sums awarded. We are, therefore, at large to consider what interest should be allowed on the amounts we have awarded. In accordance with the principles laid down by this court in *United Bus Company of Zambia v Shanzi* (3) and taking into account the present bank rates we would award 14% from the date of service or writ to date of this judgment assessment on the amount awarded for pain and suffering and loss of amenities. As to loss of earnings award we would allow 7% from the date of the accident to the date of assessment of the damages. We order the costs here and below to follow the event.

Appeal allowed
