

MARY MUSAMBO KUNDA v ATTORNEY - GENERAL (1993-1994) Z.R.1 (S.C.)

SUPREME COURT
NGULUBE, AG. C.J., SAKALA AND CHIRWA, JJ.S.
3RD DECEMBER, 1992 AND 22ND JANUARY, 1993.
(S.C.Z. JUDGMENT NO.1 OF 1993)

Flynote

Damages - Interest on award - Effective date on successful appeal.
Damages - Pecuniary and non-pecuniary damages - Award of single lump sum encompassing both - Effect of.
Damages - Pecuniary damages - Necessity to prove loss.

Headnote

The appellant was shot in her left leg by a policeman who fired shots carelessly at a taxi in which she was travelling. The trial judge in the Court below awarded her a single lump sum of K35, 000 as damages encompassing both pecuniary and non-pecuniary damages. The appellant appealed against the award on the grounds that the award was erroneous and totally inadequate.

Held:

- (i) It is erroneous to incorporate both pecuniary and non-pecuniary damages into a single lump sum.
- (ii) A plaintiff must adduce evidence to quantify net loss in claims for pecuniary damages.
- (iii) Where damages awarded on appeal have changed, the interest rate will run from the issue of the writ to the date of appeal.

Cases referred to:

- (1) A-G. v Martha Mwiinde (1987) Z.R. 70.
- (2) Re: Estate Sinya v Manda (1990-92) Z.R. 3.

For the appellant: R.E. Mwape, Mwape and Co.
For the respondent: A.M. Sitali, Assistant Senior State Advocate.

Judgment

NGULUBE, AG. C.J.: delivered the judgment of the Court.

This is an appeal against the award of a single lump sum of K35,000 as damages encompassing both pecuniary and non-pecuniary damages arising out of a shooting incident. The appellant (hereafter called the plaintiff) contends that the award was erroneous and in any case totally inadequate.

The facts of the case were that on 3rd January, 1989, the plaintiff, a business woman, was a passenger in a taxi. A police officer ordered it to stop at a checkpoint and the driver got out and spoke to the officer. After that, the taxi started again, according to the plaintiff in order to park the vehicle where the policeman had indicated, but according to the defence as pleaded in an apparent move to drive away contrary to the direction given by the police officer. There was evidence that an armed policeman who was not involved in the discussions but who was some distance away fired a shot at the taxi as the result of which the plaintiff was injured in her

left leg. The medical evidence given by the doctor called by the plaintiff showed that she was hospitalised for a week during which she was operated upon, pellets removed from the leg and the fractured limb encased in

p2

plaster of Paris which was removed on 26th May, 1989. She continued to attend hospital as an outpatient once a week for six months. A more recent review and X-ray taken on 31st May, 1990, showed that the plaintiff still had some pellets awkwardly imbedded in the bone and she still complained of pain. The doctor gave evidence that she was now permanently disabled in the leg. The learned trial judge found as a fact that the plaintiff had experienced and would continue to experience pain and suffering. She had lost some amenities of life such she can no longer lift heavy loads or walk for long.

The learned trial judge also accepted that the plaintiff, who used to gross K3,000 per day in her grocery shop, must have lost some income during the period of one month when her shop was inoperative due to her indisposition. The learned trial judge declined to award exemplary damages in his award. For both the pecuniary and non-pecuniary damages, the learned trial judge determined that a global sum of K35,000 would suffice, with interest at 15% from the issue of the writ till payment.

On behalf of the plaintiff, Mr Mwape criticised the award of a single sum for both the pecuniary and the non-pecuniary. Mrs Sitali was unable to support the learned trial judge's approach and neither do we. Contrary to Mr Mwape's submission, however, it is feasible in personal injuries cases to take various heads of non-pecuniary claims into account and having regard to those heads to assess a global sum covering all of them. It is not defensible, however, to incorporate an unspecified award for loss of earnings from the plaintiff's grocery shop into the sum awarded for the trespass to the person involved in the assault with the gunshot, the past and future pain and suffering and the permanent disability and the special damages relating to the taxi fares she had to pay to attend hospital. We have to agree also that the overall result was such that the award was, in our considered opinion, so low as to have been a wholly erroneous and inadequate estimate of the damages to which the plaintiff was entitled. We have no difficulty in setting aside the award below and we are at large.

There was no dispute that the plaintiff incurred expenses in the sum of K2,000 in taxi fares and this we award to her as special damages. The other pecuniary head of claim related to the loss of profits when for a month the grocery shop was closed. The evidence in this respect was far from satisfactory and we do not wonder that the learned trial judge attempted to skirt around this problem. The plaintiff admitted that she kept no accounts and even if the learned trial judge accepted, as he did, that she used to gross K3,000 per day, he had no evidence upon which to make an award since, obviously, only the clear profits would have been the loss suffered. The gross loss was claimed at K87,000 but the failure by the plaintiff to adduce evidence to quantify the net loss must react against her. This Court has frequently lamented these failures by plaintiffs and the practice of expecting the Courts to make inspired guesses must be discouraged. We can only award a token sum of K1,000 in acknowledgement that the plaintiff lost something but which she did not prove.

This brings us to the non-pecuniary damages and the first issue is whether there should have been an element of aggravation or exemplary damages, as contended by Mr Mwape. Mrs Sitali, of course, supports the learned trial judge's finding that there was nothing in the facts to support the

p3

arguments and we recall that the facts here are very similar to those in *Attorney-General v Martha Mwiinde* [1]. Following our discussion in that case, we considered that the action of shooting a taxi containing innocent passengers was unwarranted and dangerous in the extreme because of the possibility of wounding an innocent passenger. This is therefore an appropriate case of the award of damages for assault to include an exemplary element in respect of the conduct of the policeman who discharged the firearm. As in the *Mwiinde* case (although in the case now under consideration exemplary damages were pleaded) we do not consider that a separate award of exemplary damages should be made because the compensatory damages will take into account the aggravated conduct of the offending policeman. Beyond that, we are unable to say that such compensatory damages will be insufficient to meet the justice of the case such that a further sum should be given by way of punitive or exemplary damages. The decision in *Mwiinde* was delivered on 19th March, 1987, and the plaintiff there, who was shot in her arm and buttock, was awarded K20,000 damages for trespass to the person and K12,000 for pain and suffering and permanent disability. The judgment of the learned trial judge in this case was on 15th February, 1991, the date at which inflation for this case must be taken into account when comparison is made with earlier awards. We also do not lose sight of the facts of this case and the injuries and suffering endured by the plaintiff, including the pain and suffering to be endured even in future because of the pellets still lodged in the leg. We also recall the guideline we gave in *Re: Estate Sinya v Manda* [2] delivered on 1st March, 1992, where we recommended K300.00 per week as suitable for settling claims for pain and suffering. By February, 1991, a rate of K500.00 per week would not have been unreasonable. We cannot, of course, calculate the amount for pain and suffering indefinitely such as for the remainder of the plaintiff's life but we have attempted to find a figure in relation to the date of trial which should be fair for this award.

In the light of the foregoing, we award for the trespass to the person K30,000, for the pain and suffering and permanent disability K60,000, together with the pecuniary damages of K3,000, already discussed for the taxi fares and loss of earnings. The total award is K93,000, which will carry interest of 15% from the issue of the writ to the date hereof. The appeal is allowed, with costs to the plaintiff to be taxed in default of agreement.

Appeal allowed.