

IN THE SUPREME COURT FOR ZAMBIA-

Appeal No. 85 of 2001

HOLDEN AT KABWE

BETWEEN:

ABEL CHARLES MWEWA

- Appellant

AND

E & D SERVICES LIMITED

- 1st Respondent

GOLDMAN INSURANCE

- 2nd Respondent

Coram: Lewanika, DCJ; Chirwa, JS, and Mambilima, JS on the 7th November, 2001 and 2nd August, 2002.

For the Appellant : In person

For the Respondents : No appearance.

JUDGMENT

Mambilima, JS, delivered the Judgment of the Court.

Cases Referred to:

- (1) Administrator of the late Amos Sinya and Zambia State Insurance Corporation Ltd vs William A. Manda 1990/92 ZRL.
- (2) Duncan Sichula & Another vs Catherine Mulenga Chewa, SCZ No. 8 of 2000.

This is an appeal against the assessment of damages by the Deputy Registrar. By a Writ of Summons, the Appellant sued the Respondents in the lower Court, claiming damages for personal injuries, which he sustained in a road traffic accident which occurred on 14th December, 1997. A Consent Judgment was entered in his favour and the Judge ordered that the damages due to the Appellant be assessed by the Deputy Registrar.

Before the Deputy Registrar, the Appellant claimed general damages amounting to K134,100,000.00 and special damages for loss of business in the sum of K9 million. He also claimed transport costs with regard to his transfer from Kabwe General Hospital to University Teaching Hospital in the sum of K500,000.00, fares to and from Kapiri Mposhi in the sum of K50,000.00 and fares to the University teaching Hospital in the sum of K510,000.00.

The Learned Deputy Registrar in his Ruling considered pecuniary and non-pecuniary damages which the Appellant was entitled to. Under the Head of pecuniary damages he considered the loss of earnings which the Appellant claimed amounting to K9 million. This was in respect of income from his taxi which he operated. He adduced evidence to prove that he used to make an average of K50,000.00 per day. This was in form of a schedule on daily takings and a Road Service Licence to show that he operated a

taxi. The Learned Deputy Registrar found that the Appellant was totally disabled from engaging in the business of operating a taxi during the time that he was incapacitated from 14th December, 1997 to 8th April, 1998. He was of the view however, that the Appellant ought to have mitigated his loss by finding someone to operate his taxi for him while he was unwell. He reduced the loss of earning to K500,000.00 which translates to K50,000 per day for 10 days. On the medical and related expenses which the Appellant claimed, the Learned Deputy Registrar awarded the Appellant K75,000.00 in respect of the costs of Police Report at K10,000.00, a Medical Report at K15,000.00 and transport to obtain a Police Report at K50,000.00. He rejected the claim of K500,000.00 in respect of the Appellant's transfer from Kabwe General Hospital to the University Teaching Hospital. He did not believe that the Appellant could have been referred to the University Teaching Hospital at his own cost. On the claim for transport costs to and from the University Teaching where he attended for review on a number of occasions, the Learned Deputy Registrar rejected the claim on the grounds that it was not backed by any medical records to show that the Appellant was attending hospital.

Under the Head of non pecuniary damage, the Learned Deputy Registrar considered the claim for pain and suffering. He considered the

nature of wounds which the Appellant suffered and the Medical Report which was before him. The Appellant had produced two Medical Reports. The first one showed that he had a disability of 15% while another report put his disability at 45%. He rejected the Appellant's explanation that the document was one and the same and that the first one did not come out well due to poor photocopying. He accepted the first report which put the Appellant's disability at 15%. This is the report which showed that the Appellant suffered compression fracture of the 1st lumbar vertebrae with neurological deficit and a fracture of the left clavical. The report stated that the Appellant was still in pain on the date of its compilation on 16th April, 1998. After considering the dates when the Appellant was in hospital and the date of discharge, the Learned Deputy Registrar awarded the Appellant 10 days of pain and suffering which he pegged at K1,000,000.00.

The total award given to the Appellant for both pecuniary and non pecuniary damages was K1, 575,000. He was also awarded interest of 25% from the date of the Writ up to the date of the assessment and thereafter, at the rate of 6% per annum until payment. The 1st Respondent has since paid into Court the sum of K2,406,000 in full and final payment of the claim, together with interest.

Before us, the Appellant seems to be advancing two main grounds of appeal, firstly that the award of K1,000,000.00 for pain and suffering at an interest of 25% and 6% respectively is grossly inadequate. Secondly, the Appellant also seems to contend that the award of K575,000.00 for loss of earning and medical related expenses is also grossly inadequate. He contends that the Deputy Registrar misdirected himself by awarding him K50,000.00 per day for a period of 10 days for loss of business when he was in the hospital at Kabwe from 14th December, 1997 after which he was transferred to the University Teaching Hospital in Lusaka where he was discharged on 13th January, 1998. On the medical related expenses, the Appellant submits that there was no reason for the Deputy Registrar to have assumed that when one is transferred from one hospital to another, authorities provide transport. He maintained that on this occasion, he travelled from Kabwe General Hospital to the University Teaching Hospital at his own cost. On the rejection of his claim for K510,000.00 in respect of taxi fares to the University Teaching Hospital on a number of occasions, the Appellant submits that this is harsh because the documents which the Court wanted were hospital property and he was not asked to produce them. The information is still available at the University Teaching Hospital and it can be provided on request.

On the award of 10 days for pain and suffering, the Appellant submitted that this is in conflict with the medical evidence on record to the effect that on 16th April 1998 when he was obtaining the 1st Medical Report, he was still in continuous pain and suffering. He asks this Court to review the period and the figure allowed by the Deputy Registrar. He also contends that the interest awarded was too low.

We have considered the submissions by the Appellant and the Judgment of the Learned Deputy Registrar. On the claim for damages for loss of earnings, we find that the Appellant did prove that he was operating a registered taxi from which he had average daily takings of K50,000.00. From the evidence on the Medical report, the Appellant had serious injuries in form of fractures. He could therefore not operate the taxi. Much as we would agree that he had a duty to mitigate his loss, we are also of the view that in the condition that the Appellant was, ten days was too short a time in which he could have found a suitable person to drive his taxi. Being a money making chattel, one has to exercise extreme care before entrusting it to a stranger. In the circumstances, of this case, we award loss of earnings for a period of 120 days at K50,000.00 per day. This translates to K6,000,000.00. The appeal on this ground succeeds.

On the claim relating to Medical related expenses, we find that the Appellant did provide an invoice to show that he was transported from Kabwe General Hospital to the University Teaching Hospital at a cost of K500,000.00. There was no evidence before the lower Court to challenge this evidence. The conclusion by the Learned Deputy Registrar that the Appellant, having been “a stretcher case” was transported by hospital authorities is unsupported. The Appellant is entitled to the sum claimed and we award him accordingly.

On the claim for transport costs to and from the University Teaching Hospital, the Learned Deputy Registrar rejected the receipts presented for lack of Medical evidence to support the contention that the Appellant was going for review. We note from the record that the accident happened on 14th December 1997. The receipts presented go up to July 2000. While it is reasonable to expect that the Appellant had to go for review after hospitalization, it would be absurd to expect that on all the occasions, especially the later days, the Appellant had to book a taxi to go to the hospital, more-so that by that time, he could have been able to drive in his own taxi. We will therefore allow the Appellant to recover expenses only up to April, 1998 on the basis of the receipts provided.

On the claim for damages for pain and suffering, the Plaintiff was awarded K1 million Kwacha for 10 days. The Learned Deputy Registrar took into account our decision in the Administrator of the late Amos Sinya and Zambia State Insurance Corporation Limited vs William A Manda (1) in which we awarded K300.00 per week for pain and suffering. But, as we stated in our decision in the case of Duncan Sichula and Another vs Catherine Mulenga Chewa (2) "... previous decisions of the Courts in various cases often offer useful guidelines, though ultimately, the facts and circumstances of each case have to determine in which broad category of similar cases the case under review should be placed." In the Duncan Sichula case, we did not disturb an award of K25 million awarded by the lower Court because of the severity of the injuries. As a result of the road traffic accident, the Respondent in that case was a paraplegia who could not do anything without assistance.

In this case, it is on record that the Appellant suffered a compression fracture of the first lumbar vertebrae with neurological deficit and a fracture of the left clavical. His disability was put at 15%. It is on record that the Appellant was still in pain at the time that the Medical report was compiled in April, 1998. The 10 day period for pain and suffering on which the Court based its award of K1 million Kwacha is clearly not supported by the facts

: J9 :

on record. We set this award aside and in its place award the Plaintiff K5 million for pain and suffering and the disability of 15%.

For the avoidance of doubt, this appeal succeeds and the Appellant is awarded the following damages:

1. Loss of earnings for 120 days at K50,000.00 per day amounting to K6,000.00.
2. Transport costs from Kabwe General Hospital to the University Teaching Hospital in Lusaka amounting to K500,000.00.
3. Transport costs to and from the University Teaching Hospital when attending on review based on documents 54 to 61 in the Record of Appeal amounting K510,000.00
4. Damages for pain and suffering and 15% disability, K5 million.

The awards of K10,000.00 for a Police Report, K15,000 for a Medical Report and K50,000 for Transport to obtain a Police Report remain unchanged.

We Order that these amounts be paid with interest at the average bank short term deposit interest rate from the date of Writ up to the date of Judgment in the Court below and thereafter at the average lending rate as determined by the Bank of Zambia.

: J10 :

Costs to the Appellant.

D. M. Lewanika
DEPUTY CHIEF JUSTICE

D. K. Chirwa
SUPREME COURT JUDGE

I.M.C. Mambilima
SUPREME COURT JUDGE