

IN THE SUPREME COURT OF ZAMBIA

Appeal No. 160/2004

HOLDEN AT LUSAKA

SCZ Judgment No. 18/2006

(Civil Jurisdiction)

BETWEEN:

SECURICOR ZAMBIA LIMITED

Appellant

AND

RAPHAEL MABENGA

Respondent

Coram: Lewanika, DCJ. Chitengi and Mushabati, JJS.
on 22nd November, 2005 and 3rd May, 2006.

For the Appellant : Mr. N. K. Mubonda of Messrs D.H. Kemp &
Company

For the Respondent: Mr. M. Musonda of Messrs Musonda &
Company

JUDGMENT

Chitengi, JS, delivered the judgment of the court.

Cases referred to: -

1. *Administrator of the late Amos Sinya and Zambia State Insurance Limited V William A. Banda (1990/1992) ZR 3.*
2. *Mary Patricia Soko (suing as next of friend of the minor child Prisca Mwanza) V The Attorney-General (1988/1989) ZR 158.*

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3. *Bank of Zambia V Carolyn Anderson and Another* (1993/1994) ZR 47.
 4. *Paul Harrison V The Attorney General* (1993/1994) ZR 68.
 5. *Times of Zambia Limited V Lee Chisulo* (1984) ZR 244.
 6. *Kawimbe V The Attorney General* (1974) ZR 244.
 7. *Ndola Central Hospital Board of Management Alfred Kaluba and Priscilla Kaluba* (1995/1997) ZR 215.
 8. (1941) 2 ALLER 527.
 9. *Mary Kunda V The Attorney-General* (1993/1994) ZR1.

Works referred to: -

1. *The Quantum of Damages in Bodily and Fatal Injury Cases* by M. M. Corbett and J.L. Buchanan. Juta 1969 Edition P5.
2. *Kemp and Kemp The Quantum of Damages in Bodily and Fatal Injuries Volume 2* 1985 Edition Part 12 Paragraph 12 - 064.
3. *Mc Greger on Damages* 15th Edition at Paragraph 1519.
4. *Remedies for Torts and Breach of Contract* (1987) London Butterworths.

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In this case we shall refer to the Appellant as the Defendant and the Respondent as the Plaintiff, which is what they were in the court.

The facts of this case are briefly that the Plaintiff drove to a place called Food Palace with his wife, children and a passenger, Mrs. Emma Nawiko (PW3). When at the Food Palace, the Plaintiff and his wife left the car to go and buy food. As the Plaintiff was about to enter the Food Palace, a guard dog owned by the Defendant and handled by the Defendant guard bit the Plaintiff on the right thigh. The Plaintiff felt embarrassed as the restaurant was full of people.

According to the Medical Evidence the Plaintiff suffered one tooth of a dog on the right thigh. Further, the medical evidence was that because of shock, the Plaintiff's blood pressure rose to 187/129. The Plaintiff was not hypertensive before this incident.

On this evidence the Plaintiff took a Writ of Summons out of the Principal Registry claiming damages in negligence for pain and injury to his leg, medical expenses and full expenses in following up the matter with the Defendant and attending hospital.

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The learned trial Judge in the court below found that the Defendant security guard was negligent in handling the dog that bit the Plaintiff and that the Defendant was vicariously liable for the negligence of its guard.

On quantum of damages the learned trial Judge said the evidence showed that the Plaintiff suffered abrasions consistent with one tooth of dog bite as well as elevated blood pressure, the circumstances in which the attack occurred were very damaging and embarrassing particularly that it was in a public place with a lot of people in attendance. Because of this the learned trial Judge awarded the Plaintiff K20 Million damages which he called an all encompassing and adequate compensation which was inclusive of pain and suffering and refund of medical expenses.

The Defendant appealed against the award of K20 Million, contending in the only ground that the damages of K20,000,000.00 awarded by the learned trial Judge as compensation are inordinately high and excessive. The learned trial Judge misdirected himself in law and fact in this regard.

Both counsel filed written heads of argument, which they supplement with oral submissions.

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The sum and substance of Mr. Mubonda's written and oral submissions is that the award of K20,000,000.00 made by the learned trial Judge was arbitrary because the judgment does not show how the learned trial Judge arrived at the figure. It was Mr. Mubonda's submission that in essence there was no assessment by the learned trial Judge. Mr. Mubonda argued that in assessing the damages, the learned trial Judge should have had regard to awards that have been made by the courts, particularly the Supreme Court in the past. Mr. Mubonda pointed out that there should be consistencies. On the need for consistency Mr. Mubonda referred us to the case of *Administrator of the late Amos Sinya and Zambia state Insurance Limited V William A. Manda*⁽¹⁾ and Other cases where we have emphasized the need for consistency. In the late *Sinya Case*⁽¹⁾, we said that when considering what figure we should award we bear in mind awards which have been made in the past by this court. We made similar statements in the case of *Mary Patricia Soko (suing as next of friend of the minor child Prisca Mwanza) V The Attorney-General*⁽²⁾.

Mr. Mubonda then referred us a Legal Text Book called "*The Quantum of Damages in Bodily and Fatal Injury Cases*"⁽¹⁾ by M. M. Corbet and J Buchanan where the learned authors say that when assessing damages in bodily injury cases, it is helpful to have regard to award of damages made by the

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courts in comparable cases. Mr. Mubonda pointed out that as at present, there are no reports of the level of damages awarded for dog bites in Zambia. Mr. Mubonda then referred us to ***Kemp and Kemp The Quantum of Damages in Bodily and Fatal Injuries***⁽²⁾ where in the case of ***Edmond V Shippey*** quoted in ***Part 12 at paragraph 12 - 064*** the Plaintiff was awarded 175 British Pound Sterling for dog bite which was described as a frightening incident in which the dog hang on the leg for some time before being beaten off. The Plaintiff attended out patient treatment. The leg was painful for about six weeks and the Plaintiff was unable to sit comfortably.

Mr. Mubonda also referred us to the case of ***Lorner V Barnett and Others*** quoted in ***Part 12 - paragraph 12 - 067*** where the Plaintiff was awarded 150 British Pound Sterling as damages for two vicious dog bites. Mr. Mubonda then referred to the South African case of ***Da Silva V Coetzee*** where the Plaintiff was bitten on the buttock by a dog and had three teeth wounds and a scratch on her shoulder was awarded, inter alia R50.00 general damages. There is no citation for this case but Mr. Mubonda attached a Photostat copy of the judgment.

It was Mr. Mubonda's submissions that the award of K20,000,000.00 exceeds the awards made in different category of cases with more severe injuries. Mr. Mubonda referred to

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the case of *Bank of Zambia V Carolyn Anderson and Another*⁽³⁾ where the Plaintiff was awarded K4,500,000.00 as general damages for pain and suffering and loss of amenities for very severe multiple injuries.

Mr. Mubonda pointed out that this would be the first case to come before this court in respect of a dog bite. He said that the decision of this court in this case would impact on future awards in the area of dog bite injuries. He also said that the injury the Plaintiff in this case suffered was a minor injury. He pointed out that in the cases cited in *Kemp and Kemp*⁽²⁾ the injuries were more serious and severe than the injuries in this case but were classified as minor. It was Mr. Mubonda's submission that in this case a fair award for the non pecuniary damages should be between K2,000,000.00 and K5,000,000.00.

Mr. Mubonda argued that the learned trial Judge should not have made an award of K20,000,000.00 comprising both pecuniary and non pecuniary damages. He said that the pecuniary and non-pecuniary damages should have been considered separately as pleaded. Mr. Mubonda pointed out that as the receipts for medical expenses show that the Plaintiff spent K195,600.00, it means that the non pecuniary damages are K19,804,400.00.

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Mr. Mubonda ended by saying that the award of K20,000,000.00 was inordinately high and excessive so as to make it an erroneous estimate of the damages to which the Plaintiff is entitled. Mr. Mubonda also said that the award of K20,000,000.00 comes with a sense of shock and urged us to set it aside.

In his written and oral submissions, Mr. Musonda, learned counsel for the Plaintiff, first referred us to what the learned trial Judge said about the demeaning and embarrassing circumstances in which the tort was committed.

Mr. Musonda then referred to us to ***Mc Gregor on Damages at paragraph 1519*** where the learned authors say that: -

"It is virtually impossible to give clear guidance on amounts, varying as they do with particular injury, the particular circumstances and the particular Judge."⁽³⁾

Further, Mr. Musonda referred us to the case of ***Paul Harrison V The Attorney-General***⁽⁴⁾ where we said that the seriousness of the tortious circumstances should be taken into account in order to arrive at a fair and reasonable amount. It was Mr. Musonda's submission that when the learned trial Judge awarded K20,000,000.00 as all encompassing compensation for damages (inclusive of pain and suffering and refund of medical expenses, means the learned trial Judge

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was alive to the meaning of pain and suffering as described at Paragraph 1517 of **Mc Gregor on Damages** as: -

"Pain is the immediately felt effect on the nerves and brain of some lesion or injury on a part of the body while suffering encompasses distress, fright at the time of the injury and fright reaction."

Mr. Musonda referred us to **Remedies for Torts and Breach of Contract** where the learned author says at page 1667 that:-

"Courts award damages for all the mental distress that the Plaintiff suffered and will suffer in the future as a result of the personal injury⁽⁴⁾."

In this regard, Mr. Musonda also referred us to **Kemp and Kemp⁽²⁾** at Page 1016 Paragraph 1 – 013 and the case of **Bank of Zambia V Caroline Anderson⁽³⁾** on the need for the Court to have regard to prospective future pain and suffering when assessing damages.

It was Mr. Musonda's submission that there is uncontroverted evidence that the Plaintiff did not only suffer injury as a result of the dog bite but his blood pressure also got raised up and that his blood pressure has persistently been moderately high such that the Plaintiff needs treatment and that after the attack each time the Plaintiff sees a dog he suffers high blood pressure.

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Mr. Musonda pointed out that this court has consistently said that it will be reluctant to interfere with assessment of damages by trial courts unless the court below had misapprehended the facts or misapplied the law or when the damages awarded were so high or so low as to be an entirely erroneous estimate of the damages to which the Plaintiff is properly entitled. In this regard, Mr. Musonda cited, inter alia the cases of *Times Newspapers Limited V Lee Chisulo*⁽⁵⁾ and *Kawimbe V The Attorney-General*⁽⁶⁾ as authority. It was Mr. Musonda's submission that in this case, the award of K20,000,000.00 cannot be described as being so inordinately high that it was a wholly erroneous estimate of the damages to which the Plaintiff was properly entitled. Mr. Musonda said that when awarding K20,000,000.00 the learned trial Judge took into account the "ugly features" of the tort in issue as described in the *Paul Harrison case*⁽⁴⁾.

Mr. Musonda then submitted that when assessing damages for pain and suffering shock should be taken into account. As authority for this proposition, Mr. Musonda again referred us to *Kemp and Kemp*⁽²⁾ at page 2006 where the learned authors say shock should be taken into account when assessing damages for pain and suffering. In this regard Mr. Musonda also cited as authority the case of *Ndola Central Hospital Board of Management V Alfred Kaluba and Priscilla Kaluba*⁽⁷⁾ where this court made an award of

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K10,000,000.00 for shock. Mr. Musonda emphasized that this was seven years ago.

On other awards on pain and suffering, Mr. Musonda referred us to the case of **Bank of Zambia V Caroline Anderson**⁽³⁾ where we awarded K4,500,000.00 for pain, suffering and loss of amenities in 1993; **Gould V Mc Auliffe**⁽⁸⁾ where the Court of Appeal awarded £150 damages for dog bite in 1941. Mr. Musonda said that when assessing damages inflation must be taken into consideration. To support this statement, Mr. Musonda cited the cases of **Mary Kunda V The Attorney-General**⁽⁹⁾ and **Bank of Zambia V Caroline Anderson**⁽³⁾.

In conclusion, Mr. Musonda submitted that the cases relied upon by the Defendant deal with ordinary dogs' bites while bite in this case was by a guard dog. He pointed out that the dog bite in this case also triggered hypertension a health condition, which is life threatening. According to Mr. Musonda, the future pain and suffering which the Plaintiff will suffer for the rest of his life was a critical factor in arriving at the award. Mr. Musonda then made submissions on the effect of hypertension. The submissions in effect are a medical opinion, which should be properly given by a medical doctor and not by a lawyer.

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Finally, Mr. Musonda submitted that an award that will send a signal to security firms who handle guard dogs that they should handle guard dogs carefully should be made.

Mr. Mubonda's reply to Mr. Musonda's submissions was basically an emphasis of his main submissions.

We have considered the evidence that was before the learned trial Judge, the submissions of counsel and the judgment appealed against.

We commend counsel for their industry and research. Mr. Musonda addressed us at length on what influenced the learned trial Judge to make the global award of K20,000,000.00. Unfortunately, the learned trial Judge did not have in his mind any of the matters that Mr. Musonda has raised in his submissions. According to the learned trial Judge, the Plaintiff suffered minor injuries. This is what the learned trial Judge said: -

"On quantum of damages, I must say that although the evidence in this case establishes that the Plaintiff suffered abrasions consistent with one tooth of dog bite as well as elevated blood pressure, the circumstances in which the attack occurred were very demeaning and embarrassing, particularly that it was in a public place with a lot of

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people in attendance. In my considered opinion, the circumstances were aggravating in nature."

Clearly, when the learned trial Judge referred to the words "demeaning" and "embarrassing" he was referring to the "honour" of the Plaintiff and not to the seriousness of the injury or its effect in future. The learned trial Judge is clear in his judgment that what aggravated the dog attack are the circumstances under which it happened. Therefore, much of the arguments and submissions by Mr. Musonda on the seriousness of the injury, shock, and their likely effect in future are not of much help to the Plaintiff and to us. Many of these submissions and the authorities submitted in their support would have been of much relevance if there was a cross appeal against the quantum of damages. As we understand the learned trial Judge's judgment, he would have awarded less than K20,000,000.00 had the circumstances not been demeaning and embarrassing.

The facts before us, and as found by the learned trial Judge, are that the Plaintiff suffered an abrasion and elevated blood pressure. The critical issue we have to resolve is whether the award of K20,000,000.00 was excessive or adequate.

Mr. Mubonda submitted that the award of K20,000,000.00 was inordinately high and excessive so as to make it an

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entirely erroneous estimate of the damages to which the Plaintiff is entitled. If these circumstances, Mr. Mubonda submitted that in terms of ***Kunda V The Attorney-General***⁽⁹⁾, we should interfere with the award. Mr. Musonda, on the other hand, submitted that the award is not caught by the principle in ***Kunda V The Attorney-General***⁽⁹⁾ and therefore should stand. In fact, Mr. Musonda referred to cases like ***Bank of Zambia V Caroline Anderson***⁽³⁾ where we made an award of K4,500,000.00 some seven years ago and where we also said that when assessing damages the rate of inflation should be taken into account.

On the evidence, we accept Mr. Mubonda's submissions that the award of K20,000,000, having regard to the extent of the injury the Plaintiff suffered and the circumstances in which the Plaintiff came to be bitten by the Defendant's guard dog, was inordinately excessive. As Mr. Mubonda rightly submitted and as stated in the authorities he cited we have to maintain consistency in the awards made in respect of personal injuries. Mr. Musonda has referred us to cases like ***Bank of Zambia V Caroline Anderson***⁽³⁾, where the Plaintiff suffered serious injuries. Compared to the injuries suffered by Caroline Anderson, the Plaintiff's injuries in this case are minor. In line with the awards we have made for personal injuries and taking into consideration the rate of inflation, we consider K10,000,000 as adequate to compensate the Plaintiff

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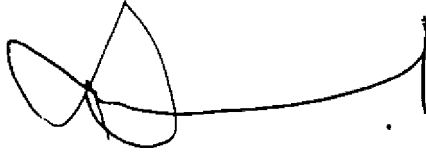
for the dog bite and recovery of his medical expenses. Of course, we have taken into consideration the circumstances under which the Plaintiff was bitten by the dog. The guard dog was brought in a public place by the Defendant's negligent dog handler. There is no evidence that the Plaintiff passed near the dog like in the ***Da Silva V Coetzee case***. The K2,500,000.00 proposed by Mr. Mubonda would in the circumstances of this case be totally inadequate. The award we have made should also send a signal to dog handlers to be extra careful when going about with dogs in public places. K10,000,000.00 is not little money to be paid for a dog bite.

For the reasons we have given, we allow the appeal but only to the extent that we substitute the award of K20,000,000 with one of K10,000,000.00. On the facts of this case we make no order as to costs. We note that the learned trial Judge ordered interest at the Bank of Zambia lending rate from the date of the Writ to date of judgment and thereafter at 8% until the Judgment sum is liquidated. This formula is erroneous. We quash it and substitute it with one of short term deposit rate from date of Writ to date of judgment and thereafter at the bank lending rate as advised by the bank of Zambia.

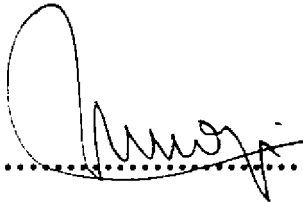
Before we leave this matter, we wish to say that global awards should not be made. As we said in ***Kunda V The Attorney***.

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General⁽⁹⁾ it is erroneous to incorporate both pecuniary and non-pecuniary damages into a single lump sum.



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D. M. LEWANIKA
DEPUTY CHIEF JUSTICE



.....
PETER CHITENGI
SUPREME COURT JUDGE



.....
C. S. MUSHABATI
SUPREME COURT JUDGE