

THE ATTORNEY-GENERAL v PAUL MULENGA KAYULA (1983) Z.R. 7 (S.C.)

SUPREME COURT

GARDNER, AG. D.C.J., CULLINAN, J.S AND MUWO, A.G.J. S.

26TH MAY, 1981 AND 23RD MAY, 1983

(S.C.Z. JUDGMENT NO. 9 OF 1983)

APPEAL NO. 18 OF 1979

Flynote

Damages - Exemplary damages - Specific plea of - Necessity for.

Damages - Interest - Provisions of law Reform (Miscellaneous Provisions) Act- Effect of.

Damages - Award - Considerations - Inclusion of Income tax and existing employment.

Evidence - Witnesses - Assessment of damages - Number of witnesses necessary.

Headnote

In an action for damages against the state, the respondent was awarded K33,000. The Attorney-General appealed, contending among other things that the award of damages was grossly excessive and erroneous since it was based upon wrong considerations.

Held:

- (i) Exemplary damages may only be awarded where they are specifically pleaded.
- (ii) Under the Law Reform (Miscellaneous Provisions) Act, the Court should make an award of interest.
- (iii) In assessing the amount of damages, the court should consider the plaintiff's earnings in his existing employment taking into account income tax.
- (v) The court may rely on the evidence of one witness in assessing the amount of damages and there is no duty upon the plaintiff to call a multiplicity of witnesses.

Cases cited:

1. A.G. v Musonda and Ors. (1974) Z.R. 220.
2. West Suffolk County Council v W Rought Ltd [1957] A.C. 403.

Legislation referred to:

Law Reform (Miscellaneous Provisions) Act, Cap. 74, s.4.

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For the appellant: A. M. Kasonde, Principal Advocate.

For the respondent: M. F. Sikatana.

Judgment

GARDNER, AG. D.C.J., delivered the judgment of the court.

This is an appeal against the judgment of the High Court whereby Paul Kayula was awarded the sum of K33,000.00 as damages for unlawful imprisonment and assault. These damages were calculated as to K30,000, for future loss of earnings as a professional boxer, and as to K3,000, for partial loss of hearing and pain and suffering.

I shall refer to the appellant and the respondent as the defendant and plaintiff respectively in the course of this judgment.

The facts of this case were that the plaintiff had been falsely imprisoned and assaulted by the police as a result of which he was forced to give up his proposed career as a professional boxer. Evidence was called to the effect that the plaintiff was employed by the University of Zambia as a draughtsman and that having won an amateur boxing title, he intended to become a professional boxer but was prevented from so doing because of the injuries he sustained by the assault.

On behalf of the defendant it was argued that the learned trial judge was wrong in his judgment when he said "when the plaintiff had to give up boxing he was employed by the University of Zambia". It was submitted that those words suggested that it was only after the injury, which forced the plaintiff to give up boxing, that he was employed at the University. The facts of the case however, are quite clear that prior to the assault the plaintiff was employed by the University and he continued to be so employed thereafter. Having read the learned trial judge's reasons for awarding damages, I am quite satisfied that he was not under any false impression as to the employment of the plaintiff.

The second ground of appeal was that the learned trial judge erred in law, and in fact, in that he failed to assess and evaluate the evidence of the plaintiff's only witness, Gibson Nwosu, correctly or fairly or at all. On behalf of the defendant Mr Kasonde argued that the learned trial judge merely echoed the statements of the plaintiff's witness and that he did not consider the fact that the witness was a Manager and Promoter of professional boxers and was therefore likely to exaggerate the prospective earnings of the plaintiff. In view of the fact that Mr Nwosu was the only witness called to give evidence as to the prospective earnings of the plaintiff as a professional boxer, and, in view of the fact that his evidence was not shaken in any way in cross-examination, I cannot find that it was improper of the learned trial judge to rely on his evidence. There was however, a further criticism by Mr Kasonde to the effect that the learned trial judge failed to take into account that the plaintiff's boxing activities were practically spare time, since he was employed full time by the University of Zambia.. This argument is not in accordance with the facts. In the course of cross-examination the plaintiff said that, had it, not been for the injuries he sustained, it

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was his intention to give up his employment at the University and concentrate on professional boxing as a full time occupation. It was also argued on behalf of the defendant that the plaintiff had only a proposed three-year contract for professional boxing and estimated earnings for that contract would have been much less than that awarded by the learned trial judge. In fact the evidence was to the effect that the plaintiff could have continued in his career as a professional boxer for a further 8 years and it was on his estimated income over this period that the learned trial judge calculated the damages. However, such damages were reduced by the judge because of the uncertainty involved in a professional boxing career and for the purposes of the final calculation, the period was reduced to

6 years.

In his third ground of appeal Mr Kasonde argued that the plaintiff's claim for damages as a professional boxer should have been specially pleaded and cited the case of the Attorney-General v Musonda and Ors (1); where it was held by this court that special damages should be specifically pleaded. Apart from the fact that, in an amended Statement of Claim, the plaintiff did in fact claim damages for future loss of earnings as a professional boxer, it appears to me that there has been a misconstruction of the words "special damages" in the argument put forward on behalf of the defendant. The case referred to dealt with the question of remoteness of damages and the duty on a plaintiff to prove that the damages he was claiming arose out of the alleged tort. In the case before this court there is no doubt whatsoever that the plaintiff's having to relinquish a career as a professional boxer was a direct result of the injuries he sustained and in the Statement of Claim, the general damages for the injuries sustained by the plaintiff were properly pleaded. It was of course impossible for such damages to come under the heading of special damages and although Mr Kasonde argued that the only proper basis for the award of damages to the plaintiff was upon the basis of general damages plus exemplary "or punitive damages", I am unable to agree that exemplary damages can be awarded in this case in view of the fact that they were not specifically pleaded.

With regard to Mr Kasonde's fourth ground of appeal that other professional boxers in Zambia were not called to support the plaintiff's claim, I have no hesitation in holding that there is no duty upon a plaintiff to call a multiplicity of witnesses to support his claim and, provided the court accepts the evidence of one witness as to damages, it is entitled to rely on that evidence assessing the appropriate sum to be awarded.

I will deal with the fifth ground of appeal later in this judgment. As his sixth ground of appeal Mr Kasonde argued the question as to the rate of interest and the period thereof which should have been awarded to the plaintiff. The learned trial judge did not make an award of interest, although an award of interest is provided for in section 4 of the Law Reform Miscellaneous Provisions) Act, Cap.74. Having regard to Mr Kasonde's concession that such interest should have been awarded I would agree that such an award should be made.

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In general Mr Kasonde argued that the award of damages was erroneous because it was grossly excessive.

I have considered the arguments put forward on behalf of both parties and I find that the learned trial judge did not misdirect himself in any way which would justify interference by this court. The learned trial judge's estimate of the damages for the plaintiff's future loss of earnings as a professional boxer should therefore stand. The Memorandum of Appeal refers to the general damages of K3,000 awarded for loss of hearing, pain and suffering as being excessive, but this argument was not pursued at the hearing of the appeal. I find no reason to interfere with this award, and the general damages of K3,000 should stand.

The fifth ground of appeal put forward by Mr Kasonde was to the effect that the learned trial Judge had failed to take into account the plaintiff's earnings in his employment at the University of Zambia, nor did he take into account the income tax which should be paid on any loss of earnings. There is no doubt that it was the plaintiff's duty to mitigate his damages by taking employment available to him in order to reduce the loss, if any, which he suffered as a result of not being able to undertake the career as a professional boxer. For this purpose his earnings at the University of Zambia for a period of 6 years after the date of the assault (which is the period taken into account by the learned trial judge) should be deducted from the learned trial judge's estimate of the plaintiff's prospective earnings as a professional boxer. If there is any excess between his prospective earnings as a boxer and his actual and prospective earnings as an employee of the University, that is the figure which should be awarded. In the case of *West Suffolk County Council v W. Rought Ltd* (2), it was held that it was incumbent upon the claimants to prove their loss by taking into account the incidence of taxation. That rule is equally applicable in this country and the onus is on the plaintiff to show his actual loss after taking into account his liability to pay income tax. For these reasons I would allow this appeal and order that the case be vent back to the High Court to assess the amount to be deducted from the award of K30,000, for loss of earnings. This amount should be calculated by assessing the earnings and prospective earnings of the plaintiff in his employment by the University of Zambia over the period of 6 years, and his liability for income tax if any. I would also order that an appropriate order for interest should be made.

In view of the fact that the plaintiff failed to adduce all the necessary evidence before the trial court to enable a proper calculation of the damages to be made, I would order that the costs relating to the assessment of damages in the court below and in this court should be paid by the plaintiff. Liberty to apply.

Appeal allowed

JOEL CONSTANTINE BARNETT v