RIDGEWAY HOTEL LTD v VICTOR ODONG OCAYA & VICTOR OCAYA
(1987) Z.R. 53 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND SAKALA, JJ.S.
14TH APRIL ,1987.
(S.C.Z. JUDGMENT NO. 9 OF 1987)

Flynote
Damages - Inflation - Date of calculation.
Damages - Assessment of - Relevance of awards in other countries - Relationship of Kwacha to foreign currencies.

Headnote
The appellant appealed against the judgment of the High Court awarding damages for personal injuries suffered by the respondent as a result of the negligence of the appellant. The appeal was as to the quantum of damages.

Held:
(i) The date at which inflation should be calculated is the date of the trial judgment and not the date of appeal.
(ii) In comparing English awards it is unrealistic to carry out a simple mathematical calculation concerning the value of the English pound against the Zambian Kwacha at any one time, because the purchasing power of the two currencies is different in the two countries; but it is always helpful to look to England and other countries for guidance.

Cases referred to:
(1) McNaughton v Pleasure Pools Limited (1979) Z.R. 237
(2) Kapembwa v Maimbolwa and Attorney-General (1981) Z.R. 127

For the appellant: Mr Lwatula, Ellis & CG.
For the respondents: Mr. K. Simbuo, Mulungushi Chambers.

Judgment
GARDNER, J.S.: delivered the judgment of the court.

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This is an appeal from a judgment of the High Court awarding damages for personal injuries suffered by the first respondent as a result of the negligence of the appellant. The appeal is as to the quantum of damages.

The facts of the case were that the first respondent, a very young child, was a guest at the appellant's hotel and was playing near the swimming pool when he fell and injured his left index finger on a piece of a broken glass.

The first respondent had a lacerated wound of the left palm, and the tendon of the left index finger was cut. He underwent an operation to repair the cut tendon and the hand was in plaster. The plaster was removed after five weeks, and he attended for physiotherapy treatment for approximately six months. There was permanent disability to the finger in that there was restriction of flexion. The second respondent further gave evidence that the finger could not be straightened and that, as a result, the first respondent could no longer pursue his interest in music and some other hobbies.

It was held that the injury was due to the negligence of the appellant and the learned trial commissioner awarded damages of K5,000.00 for permanent disability and K1,500.00 for pain and suffering together with special damages of K28.00 a day for three days a week, being transport costs of attending physiotherapy treatment. The learned trial commissioner said that there was no evidence as to how long these special damages were to run and in consequence made no calculation of the award under that head.

Mr Lwatula on behalf of the appellant has put forward two grounds of appeal, the first that the award of special damages for transport costs was not conclusive, and the second that the awards for general damages were excessive.

As to the first ground of appeal, there was evidence from the second respondent, the first respondent's father, that the physiotherapy treatment continued for approximately six months, and, in this court, the parties have agreed that judgment should be entered for such damages for twenty weeks at K60.00 per week. Accordingly, this ground of appeal succeeds, and a consent judgment for K1,200.00 special damages is entered on behalf of the respondent against The appellant.

As to the second ground of appeal, namely that the general damages were excessive, Mr Lwatula referred to the principle that this court will interfere with awards of damages where they are utterly unreasonable or entirely erroneous. He cited in particular two cases in which damages have been awarded in the past in Zambia, the first being the case of *Mac Naughton v Pleasure Pools Limited* (1). In that case the plaintiff suffered injures to his left knee as a result of which he underwent an Operation and had a plaster cast on his knee for an unspecified length time. There was a doctor's report indicating that there was a risk of osteo-arthritis developing and the doctor estimated that the plaintiff should obtain about 90 degrees full flexion of his knee. The general damages awarded in that case were K1,500.00 and The date of The award was May, 1979.

The other case was the case of *Kapembwa v Maimbolwa and the Attorney-General* (2) at page 135, where this court, on appeal, awarded the sum of K500.00 as general damages for personal injuries to the plaintiff who suffered a lacerated wound, one inch in length and skin-deep, in the skull, another laceration of the lower rib and left knee

and a fracture of the fourth rib; one tooth had fallen out and two others were broken. The plaintiff attended as an out-patient at the hospital for eight days and there was a doctor's report that he would have suffered pain whilst eating for the first five to six days and pain for a few days because of the broken rib which had healed. The doctor said that the injures were minor. The date of the accident

in that case was June 1974, the date of the award on appeal was March, 1981, but there was no indication in the report as to when the trial judgment was delivered, which is the date which governs the rate of inflation to be taken into account.

Mr Simbao, on behalf of the respondent, argued that the damages for pain and suffering and general disability could not be calculated with mathematical precision, that the case of *Kapembwa* should be distinguished from this case because in that case there was no permanent disability, but only what was regarded by the doctor as minor injures. He maintained that in this case the damages awarded were not so high that they should be interfered with by this court.

We agree with Mr Lwatula that this court will interfere where an award of damages is utterly unreasonable or entirely erroneous, but we would point out that these are the only circumstances in which this court should interfere, unless it is shown that an award is based on a wrong principle. It is not sufficient for this court to be of the opinion that we would have awarded a different sum from that awarded by a lower court. There must be a very real error in the amount awarded before this court will intervene.

We have considered the cases cited to us and in particular the case of *Kapembwa,* where this court awarded K500.00 for general damages. We agree win Mr Simbao that it is distinguishable because in that case the injuries referred to, although apparently more spectacular, were regarded by the doctor as minor, and the period of eight days for the recovery of the plaintiff was quite different from the period of six months treatment and permanent deformity and disability of the first respondent in this case. In respect of injuries to fingers, we have examined the examples cited by Kemp and Kemp on the Quantum of Damages, Volume II, and the nearest similar case is that cited at page 9884, that is the unreported case of *Martin v Bott,* where a male aged 39 years had a laceration of his right, little, ring and middle fingers and division of the tendon of the middle finger which required stitching. There was some permanent deformation and loss of dexterity in the finger and continuous aching.The general damages awarded at the date of the trial were 1,000 Pounds, which the learned authors of the book to which we refer valued at 4,200.00 Pounds in December, 1982. We consider this to be the most appropriate example because it deals specifically with the cut tendon of a finger.

In considering the cases which have been cited to us and the one case to which we have referred we would confirm that since the dates of those cases the inflation which has occulted in this country should be taken into account. The date at which the rate of such inflation should be calculated is the date of the trial judgments October,1984, and not the date of this appeal. We also take the view that in comparing English awards it is unrealistic to carry out a simple mathematical calculation concerning the value of the English pound against the Zambia kwacha at any one time because the purchasing power of the two currencies is different in the two countries; but it is

nevertheless, always helpful to look to England and other countries for guidance.

In all these circumstances, whilst it is possible that this court, sitting as a trial court, might have awarded different amounts of damages in this case, there is nothing in the total award of K6,500.00

general damages for personal injury that we find to be so erroneous that we should intervene. The second ground of appeal against the quantum of damages fails.

The appeal is therefore dismissed except as regards the quantum of special damages which, by consent, are awarded to the respondents in the sum of K1,200.00.

As to costs, although Mr Lwatula has argued that, as he had to deal with the first ground of appeal as to the special damages because they had not been quantified, the costs of this appeal should be apportioned, we agree with Mr Simbao that the question of special damages should have been dealt with by review under Order 39 of the High Court Rules, and, as the appellant has not succeeded on the other ground of appeal, there was no need for the matter to come on appeal at all. In consequence the costs will follow the event and the respondents will have the costs of this appeal and in the court below.

Appeal dismissed
