ALRO ENGINEERING LIMITED v B.HIMUYANDI (1987) Z.R. 83 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND SAKALA, JJ.S.
2ND JULY,1987
(S.C.Z. JUDGMENT NO. 14 OF 1987)

Flynote
Damages - Personal injuries - Part of middle finger - Quantum.

Headnote
In this case the infant respondent suffered the loss of the distal phalanx of the left middle finger. The judge awarded the infant K15,000.00 general damages for pain end suffering. The appellant appealed.

Held:
The Supreme Court would not interfere with an award in 1986 of K15,000.00 for the loss by a nine year old child of part of a middle finger.

Cases cited:
(1) Auty v London County Council, Kemp and Kemp Vol. 1 (2nd Ed.)
(2) Harris v Harris, Kemp and Kemp Vol. 1 (2nd Ed.)
(3) Clyne v General Motor Limited, Kemp and Kemp Vol. 2 (4th Ed.)
(4) Newman v Gurnham Limited, Kemp and Kemp Vol. 2 (4th Ed.)
(5) Ridgeway Hotel Limited v Ocaya and Anor. (1987) Z.R. 53

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For the appellant: G. Patel, Musa Dudhia and Company.
For the respondent: D. Luywa, Mwisiya and Company .

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

For convenience we shall refer to the appellant as the defendant and the respondent s as the plaintiff which they were in the court below. The plaintiff, an infant aged nine years at the time of the injury, by his father sued the defendant for damages for personal injuries and consequential loss sustained as a result of negligence on the part of the defendant's servants or agents while installing a water tank at the plaintiff's father's farm on the 30th of October, 1981.

The brief facts found by the learned trial commissioner were that the plaintiff's father engaged the defendant company to install a water tank at his farm. On 30th October, 1981, the defendant company sent its servants or agents to carry out the work. During the installation or thereafter one of the servants or agents of the defendant company asked the infant plaintiff to switch on the electrical motor for the water pump in the process of which the infant plaintiff after switching on the electrical motor fell clown and was caught by the fan-belt which cut off the distal phalanx of the

left middle finger.

The foregoing facts were accepted as proved by the learned trial commissioner who entered judgment in favour of the infant plaintiff and awarded him general damages for pain and suffering in the sum of K15,000 with costs.

Originally two written grounds of appeal were filed on behalf of the defendant. The first, which has been abandoned in this court, related to liability. The only ground argued before us related to the award of K15,000 as general damages for pain and suffering. The argument by Mr Patel on behalf of the defendant was that the award of K15,000 was excessive having regard to the doctor's report which stated that the minimum degree of disablement with respect to the amputation of the respondent's left middle finger with a loss of a distal phalanx was a mere 2%. For this argument Mr Patel referred the court to the Workmen's Compensation Act Cap. 509 and the schedule under Section 59 of the Act. Counsel pointed out that by that reference he was not suggesting that that Act applied to the facts of the case but merely to show that under that Act the injury suffered by the infant plaintiff was not severe. He submitted that it was incorrect on the part of the plaintiff to have referred in his submission to the middle finger having been cut off when the medical report discloses that it was only the distal phalanx, which he explained to be the tip of the left middle finger that had been cut off. He further submitted that the award of K15,000.00 comes with a sense of shock regard being had to two English eases of *London County Council* (1), in which the appellant lost on the left-hand the tip of two fingers with a third finger badly damaged and was awarded 850 Pounds; and the case of *Hams v Hams* (2) a 1957 case in which the appellant in that case lost half of the top joint of the middle finger of the left hand, he was awarded 400 Pounds.

It was the contention of Mr Patel on behalf of the defendant that it would not be proper in any event to equate the purchasing power of a pound with that of a kwacha and argued that K15,000 was totally excessive.

On behalf of the plaintiff Mr Luywa pointed out that while counsel for the defendant conceded that Cap. 509 did not apply in the facts of this case, the reference

to 2% in these proceedings was inappropriate because the Workmens Compensation Act serves a specific purpose in relation to persons in employment who receive a salary or an allowance when in the present case it was a boy of nine years not receiving a salary or an allowance. He argued that the most appropriate authorities are those referring to young men who are unemployed. He referred the court to the case of *Clyne v General Motor Limited* (3) in which the court awarded 2,500 Pounds. He submitted that K15,000.00 today for a boy aged nine years who lost part of his finger is not excessive and is possibly on the low side. He urged the court to take into account the effect of the injury which cannot be determined at this time.

Mr Luywa also referred the court to the case of *Newman Gurnham Limited* (4), in which a sum of 3,350 Pounds was awarded. Counsel submitted that, taking into account the possible future effect and bearing in mind inflation, the figure of K15,000.00 cannot be said to be excessive. He pointed out that the award of this court in the case of *Ridgeway Hotel Limited v Ocaya and Anor* (5), which

was K6,500.00, would today be about K19,000.00, which is short of what the learned trial commissioner awarded in the present case.

We have very carefully considered the arguments and submissions of both learned counsel, we agree that the Workmen's Compensation Act does not apply to the case before us as that Act relates to the earning power of employees. In the instant case we have an infant who is not earning any salary. The Act is, therefore, inappropriate. *The case of Harris v Harris* referred to us by Mr Patel does not support his arguments particularly when one looks at the value of a pound at various dates as set out in the schedule at page 601 of Kemp and Kemp Volume two. The schedule shows that the value of a pound in July 1957 was 7.21**.**

In respect of injuries to fingers this court recently confirmed an award of K6,500 general damages for personal injuries in the case of *Ridgeway Hotel Limited*. In that case 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 index finger on a piece of broken glass. He sustained a lacerated wound on the left palm and the tendon of the left index finger was cut. He underwent an operation to repair the cut tendon. The hand was in plaster removed after five weeks. He attended physiotherapy treatment for approximately six weeks. There was permanent disability to the finger in that there was restriction of flexion. There was evidence that the finger could not be straightened. We were in that case referred to two Zambian cases where this court stated the principle that it will not interfere with awards of damages unless shown that the award is wholly unreasonable or entirely erroneous. We confirmed in that case that the inflation that has occurred 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 judgment and not the date of the appeal. In the present case the date of the trial judgment is January 1986, after the introduction of the auctioning system. In this case we see nothing in the total award of K15,000.00 general damages for personal injury resulting in the loss of the distal phalanx of the middle left finger that we find to be erroneous and there is no reason for us to interfere. This being the case the appeal is dismissed with costs.

Appeal dismissed
