

THE ATTORNEY-GENERAL v MARTHA MWIINDE (1987) Z.R. 71 (S.C.)

SUPREME COURT
NGULUBE D.C.J., GARDNER AND SAKALA, JJ.S.
19TH MARCH, 1987.
(S.C.Z. JUDGMENT NO. 5 OF 1987)

Flynote

Damages - Exemplary damages - Exemplary element to be included in compensatory damages.
Damages - Exemplary damages - Necessity to plead.
Damages - Inflation - Date of award - Effect of.

Headnote

The respondent, was shot in the elbow and buttock by a policeman, who carelessly fired gun shots at a minibus in which she was travelling. The deputy registrar awarded her damages of K57,100. The appellant appealed against the award of damages on the grounds that the respondent had not specifically pleaded exemplary damages in her statement of claim and that the award of damages was excessive.

Held:

- (i) Compensatory damages should in all cases of aggravating conduct include an exemplary element.
- (ii) No separate exemplary damages maybe awarded unless they are specifically

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pleaded in the body of the statement of claim and the facts relied upon to support the claim are also specifically pleaded.

- (iii) Inflation that has taken place between the date of the injury and the date of the trial should be taken in to account in assessing damages; thereafter, if there is an appeal, inflation between the date of the trial and the date of appeal is not taken into account.

Cases cited:

- (1) Kapwepwe v Attorney-General (1974) Z.R. 207
- (2) Kapwepwe v Zambia Publishing Co., (1978) Z.R. 15 (S.C.)
- (3) Taylor v Bristol Omnibus Co. [1973] All E.R. 1107
- (4) Times Newspapers Ltd. v Kapwepwe (1973) Z.R. 292
- (5) Rookes v Bernard [1964] 1 All E.R. 367

For the Appellant: D.L.Goel, Senior State Advocate,
For The Respondent: K.M.Maketo, Christopher, Russell Cook & Co.

Judgment

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

This is an appeal against an assessment of damages by the deputy registrar after a consent judgment.

The facts of the case are that the respondent, a house-wife, was travelling to Chelstone in a minibus. When it arrived at a police check point the driver was called upon to stop. After he had been spoken to by a policeman, the bus started again, and there was evidence that the policeman fired three shots at the back of the bus as the result of which the respondent was injured in the elbow and received one bullet wound in the buttock.

The defence of the defendant was to the effect that the police officer had discovered that the

vehicle was unlicensed and had no certificate of fitness so the driver was told to pull in a few metres ahead. Instead of obeying this direction the driver drove away and increased his speed as he was doing so. As a result of this, the policeman on duty thought that the minibus had been stolen and he fired at the tyres in order to stop it. The shooting was inaccurate and some of the bullets injured the respondent.

The deputy registrar heard evidence from the respondent and had produced to him a medical report indicating that the respondent had been treated and had spent three weeks in hospital. It was found that her elbow had been injured and some seven months after the first operation to repair the damage, she was found to have a further complication which involved another operation, despite which she continued to have a tingling sensation in her fingers. She also had a permanent diminution of strength in the affected left arm and her permanent disability was assessed medically at 10%. In her evidence, the respondent said that she used to be a keen swimmer and was now no longer able to continue this activity, further that, in carrying out some house work such as laundry, she found she could not lift heavier things. She agreed, however, that she had a servant both before the accident and after the accident.

The deputy registrar awarded damages as follows: K30,000.00 as punitive damages, K15,000.00 for unlawful wounding, K7,000.00 for permanent disability, K5,000.00 for pain and suffering and K100.00 as special damages, being transport to and from the hospital, making a total of K57,100.00.

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Mr Goel on behalf of the State appealed against the deputy registrar's award. The first ground of appeal was that there was no claim for exemplary damages in the statement of claim, and, under Order 18 Rule 8 (3) of the Supreme Court Practice (the White Book), as there was no pleading of exemplary damages, no such damages could be awarded.

Mr Goel accepted that in this particular case, the action of the policeman had been wrong and that is why the State had consented to judgment. He argued, however, that the policeman had been no more than negligent, and, as there was no aggravation, his conduct did not warrant an award of aggravated damages. As to the award of K15,000.00 for unlawful wounding Mr Goel argued that no damages could be awarded under a separate head because the damages awarded in a case of personal injuries were covered by an award for pain and suffering and general disability. As far as the permanent disability is concerned, he maintained that there was no justification for such a high award by the deputy registrar and the same thing applied to the award of K5,000.00 for pain and suffering. He maintained that in the whole of the evidence before the deputy registrar there was nothing to justify the amount of the award.

Mr Goel's final argument was that, despite the fact that this court has approved the taking into account of inflation when making awards for a plaintiff's loss of property, this principle should not apply to awards in personal injury cases because in such cases the only award was not for loss of property.

In reply Mr Maketo argued that the deputy registrar was aware that exemplary damages had not been claimed in the statement of claim but in any event made an award because he felt it was justified. He argued that in fact prior to the hearing of the summons for assessment of damages there had been further pleadings in the form of an affidavit by the respondent in which she had put forward her claim for exemplary damages. Mr Maketo further said that, if it were found that the respondent was not entitled to exemplary damages because they had not been pleaded, then he asked for aggravated damages because the very circumstances of the incident revealed that the policeman concerned had acted in an extremely dangerous and negligent way by shooting at a minibus which he knew was full of innocent passengers. For these reasons Mr Maketo asked that the damages for trespass to the person, which had been awarded earlier for unlawful wounding, should reflect the aggravation and should be more than pure compensator damages, so that the award brought home to the defendant the error of its ways and the policeman concerned should be disciplined. This is in accordance with the remarks of Doyle C.J., in *Kapwepwe v Attorney-General* (1) at page 215. Lastly, Mr Maketo argued that inflation affects all awards of damages for loss of property or for personal injuries and that the awards given in Zambia in earlier years would be increased if such awards were made in the conditions prevailing today.

We have considered the arguments on both sides in respect of the failure to include a claim for exemplary damages in the statement of claim. In this respect we note that the editor's note in the White Book under Order 18/8/6 is to the effect that the order is to be strictly observed to the extent that, not only is the claim for exemplary damages to be specifically pleaded in the body of the statement, and not only in the prayer, but the facts relied on to support the claim must also be specifically pleaded. In default

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of a specific rule relating to the contents of pleadings in the Zambian High Court Rules, the rule set out in the White Book applies, and that rule, as in the case of all other rules, must be adhered to. In this-particular case, the appellant consented to judgment on the basis of a statement of claim which did not include a claim for exemplary damages. Quite apart from the rule that an affidavit should-not include a prayer, we cannot accept Mr Maketo's argument that the affidavit of the respondent constituted separate pleadings in the assessment of damages. The assessment of damages was not a separate proceeding, and, in the absence of an amendment to the statement of claim on the basis of which judgment was consented to, the damages should not have been assessed on any other basis. There was no application for any amendment of the statement of claim, and consequently the award under the head of punitive damages was improperly made. We agree with Mr Goel, therefore, that the award under that head must be set aside, and, having regard to the fact that the removal of the damages under that head affects the remainder of the damages, this court is now at large so far as the other damages are concerned.

In assessing those damages we take into account the very helpful arguments of Mr Goel and Mr Maketo and we will also take into account other awards which have been made for similar injuries and similar disability. We do not agree with Mr Goel that inflation only affects awards of damages for loss of property. We entirely agree with Mr Maketo that awards for personal injuries are equally affected by inflation. This is supported by *Kemp & Kemp on The Quantum Damages* where examples of past awards of general damages for personal injuries indicate that, where an award of 2,000.00 Pounds was awarded in a case of 1970, in 1982 (the date of the publication of the authority to which we refer) the value is stated as having increased to approximately 9,200.00 Pounds. It is proper, therefore, to take into account inflation which has taken place since former examples were adjudicated upon. We would make it clear that where inflation takes place in any case between the date of the injury and the date of the trial the inflation to that time is taken into account in assessing the award; but, thereafter, if there is an appeal, inflation between the date of the trial and the date of appeal is not taken into account. *Taylor v Bristol Omnibus Co.*, (3). For this purpose, our assessment will be on the basis of what should have been awarded at the date of the assessment of the award before the deputy registrar.

Despite Mr Goel's argument that the damages for pain and suffering and disability were the only damages which could be claimed in this case, we are satisfied that this was a case of assault, and damages for the assault itself could be awarded (see *The Gregor on Damages* 14th edition paragraph 1353). In considering these damages, we bear in mind our ruling in the case of *Times Newspapers Limited v Kapwepwe* (4) when this court held that the law in Zambia relating to exemplary damages should be the law as it was understood in England before *Rookes v Barnard* (5), namely that exemplary damages may be awarded in any case where the defendant has acted in contumelious disregard of the plaintiff's rights. In that case, Baron D.C.J., set out at page 302 the principle relating to the award of compensatory and exemplary damages. We respectfully agree with that principle, that is to say that compensatory damages should take into account the whole of any aggravating conduct of the defendant, and that only if such compensatory damages are insufficient to punish a particular defendant should a further sum be awarded as punitive or exemplary damages.

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The learned D.C.J., further pointed out at page 302 that the financial circumstances of the defendant should be the deciding factor as to whether he was already sufficiently punished by the award of compensatory damages, which should, in all cases of aggravating conduct, include an exemplary element.

In this case, the policeman shot at a minibus containing innocent passengers, and although he may have been aiming at the tyres, his action was unwarranted and dangerous in the extreme because of the very real possibility that he might (as he in fact did) hit and wound an innocent passenger. In this respect, without awarding exemplary damages, the claim for which has been disallowed, we find that this is an appropriate case for the award of damages for assault to include an exemplary element in respect of the conduct of the appellant's servant, the policeman.

For the reasons we have given, this appeal is allowed and the awards made by the deputy registrar are set aside. In their place, we substitute the following awards: damages for trespass to the person, K20,000.00; damages for pain and suffering and permanent disability K12,000.00; special damages for taxi fares K100.00; making a total of K 32,100.00. In assessing these figures, we have taken into account interest and there will be no separate award for interest.

As to costs, Mr Goel has very fairly indicated that, despite the fact that there has been a measure of success in the appeal, he will not ask for an order for costs against the respondent. There will, therefore, be no order as to costs.

Appeal allowed
