



THE REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CIVIL CAUSE NO.603 OF 2010  
BETWEEN

Major Ngwira (Suing on his own behalf and on behalf the estate of Emilda deceased)... .....Claimant  
AND

R. Gaffar Transport Ltd..... Defendant

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CORAM:	<i>Madalitso Khoswe Chimwaza,</i>	<i>Assistant Registrar</i>
	<i>G. Liwimbi</i>	<i>Counsel for the claimants</i>
	<i>Kumwenda</i>	<i>Court Clerk</i>

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**ORDER OF ASSESSMENT FOR LOSS OF USE AND PROFIT**

**Introduction:**

The plaintiff commenced action claiming damages for loss of expectation of life and loss of dependency and loss of use and profit of a motor vehicle on his own behalf and on behalf of the estate of the late Emilda Ngwira (deceased). The late Emilda Ngwira was the registered owner of a minibus Toyota Hiace 16 seater. She died intestate on 17<sup>th</sup> August, 2009 from a road accident that involved the defendants vehicle registration number BLK 1026/LA1322 at Chailoko village along Kasungu /Mzuzu M1 road. The deceased's motor vehicle got extensively damaged that it was declared beyond economic repair by MA Motors and Andrews Panel Beaters. Exhibit MJ4 and MJ5.

The defendants insurers, General Alliance Insurance Company paid compensation for loss of life and loss of dependency but declined to compensate for loss of use and profit of the said vehicle.

The claimant is therefore seeking damages for loss of use and loss of business profit for the minibus Toyota Hiace 16 seater from 17<sup>th</sup> August 2009 to 24<sup>th</sup> September 2010 being the date compensation for loss of life and loss of dependency was paid. The period is 14months (402 days). The minibus was being used for business/commercial purposes. The claimant tendered

a record of transactions on how much the vehicle was making from May to July 2009 before the accident and on average it has shown that it was making K10,000 as profit. Exhibit MJ8. The claimant further claims interest on the total loss of K3, 649,646.15 since the compensation has been outstanding for nine years. The defendants were duly served with notice for assessment but they were not present and no reason was given for such failure. The court proceeded to hear the applicant alone.

### **Issue for Determination**

The duty of this court is to assess how much should be paid for loss of use and loss of profits.

### **Proof of Damages**

Damages for loss of use and loss of profits of a profit earning chattel are special damages and as such must be specifically pleaded and particularized and, of course, proved. The measure is based on the nature of business the chattel is put to and the general return there from. (See *Namandwa v. Tennet & Sons 10 MLR 383* applying *Barrows Engr. Ltd v. Jewa*, Supreme Court of Appeal, Civil Cause No. 7 of 1981, unreported, at p.386).

The plaintiff's claim is that the bus was making an average income of K10,000.00 per day after all expenses but he did not specify how many days his bus was on the road per month. He referred the court to Exhibit MJ8 which he said to be proof of the records for daily income and expenditure from the month of May 2009 to July 2009. This exhibit MJ8 however does not show who authored it and nobody signed to authenticate the figures. Essentially, MJ8 is just a compilation of income, expenses and the balance. This court is reluctant to rely on such records as it is unsafe although it was not challenged by the defendants.

There being no dispute that the plaintiff's vehicle was being used for business, the court finds the average figure of K10,000.00 to be reasonable average earnings per day and will therefore make use of this figure as a basis for the assessment for the 14 months (402 days.)

At K10, 000.00 per day its translating to K3,640,000 as total loss of use for the 402 days. The plaintiff's loss of use and profits is therefore assessed and awarded at K3,640,000.

### **Interest Payable**

The plaintiff has made submissions claiming interest on the amount due K3,640,000.00 at 17.75% plus 1 bank lending rate. The defendants did not challenge or raise any objection to such a submission.

This court is mindful of the fact that an award of interest is in the discretion of the court. According to **section 11 (a) (v) of the Courts Act (Cap 3:01) of the Laws of Malawi**, gives the court discretionary power to grant interest on a debt:

*(a) Without prejudice to any jurisdiction conferred on it by any other written law the High Court shall have:*

*Jurisdiction*

*(v) to direct interest to be paid on debts, including judgment debts, or sums found due on taking accounts between parties or sums found due and unpaid by receivers or other persons liable to account to the High Court.*

In the case of **Gwembere vs Malawi Railways Ltd** MSCA 9 ALR (M) 369 , the Honorable Chief Justice Skinner held that:

*Interest was not to be paid because the principle of payment of interest only applies where the party ordered to do so should have been shown to be wrongfully holding someone's money or owed someone money and was using it thereby putting the other out of his money.*

Payment of interest on the judgment sum is in the discretion of the trial court. In the case of **Standard Bank Ltd & Another vs ML Luka and Others**, [2014] MLR, the Supreme Court held that it was within the jurisdiction of the trial judge to order payment of compound interest on the judgment sum. The reasoning of the trial court was that:

*As regards the claim for interest on the sum of K65,800,000.00 such a claim is merited. The second defendant being a banker in the business of among others, lending out money with interest, it must have most likely made substantial gains with the money it wrongly received from the receiver/manager which money ought (to) have been paid to the plaintiffs. It is therefore ordered that the 2nd defendant should pay interest on the sum at 1% above base lending rate from the date of receipt up till the date of this judgment.*

In the present case the plaintiff has been kept out of the money from August, 2009 to September 2010 when the insurers paid compensation for loss of life and dependency. Had it been the money for loss of use of a motor vehicle was paid at that time, the plaintiff could have made profits or used it for economic gains.

In the circumstances this court is awarding interest as prevailing in 2009 at 18.75% on the monthly income as calculated and submitted by the claimants. The plaintiff is therefore awarded interest of K53,669.68, on the principle sum of K3,640,000.00.

The plaintiff is awarded a total sum of K3, 693,669,68 plus costs of this action to be taxed if not agreed by the parties.

Either party not satisfied with the order of assessment has the right to appeal.

Made in Chambers this 27th day of December, 2018 at Lilongwe.



Madalitso K. Chimwaza

**ASSISTANT REGISTRAR**