IN THE COURT OF APPEAL OF ZAMBIA **APPEAL 71/2019**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

REPUBLIC OF ZAMBIA
COURT OF APPEAL
06 NOV 2020
REGISTRY 2
P.O. BOX 50067, LUSAKA.

BETWEEN:

CR HOLDINGS LIMITED **APPELLANT**

AND

MARY MUSONDA **RESPONDENTS**
(Suing as Administrator of the Estate of the Late Boyd Kabaso and 12 others)

CORAM: **Kondolo, Chishimba and Mulongoti, JJA**

On 26th August, 2020, 9th September, 2020 and 6th November, 2020

For the appellants: *Mr. J. Zulu of Japhet Zulu & Company*

For the respondents: *Mr. T.K Ndhlovu of Batoka Chambers*

J U D G M E N T

Mulongoti, JA, *delivered the Judgment of the Court.*

cases referred to:

1. ***Zambia Publishing Company Limited v Pius Kakungu (1982) ZR 167***
2. ***Zambia State Insurance Corporation Limited and another v Andrew Muchili (Administrator of the estate of the late Nelson Chinene) (1988-89) ZR 149 S.C***
3. ***Administrator of the late Amos Sinoya and another v William Manda (1990-92) ZR 3***

4. ***Andrew Tony Mutale v Crushed Stone Sales Limited (1994) S.J 154***
5. ***Konkola Copper Mines Plc and another v John Mubanga Kapaya (Administrator of the estate of the late Geoffrey Chibale) and another (2004) ZR 233***
6. ***Caroline Anderson v Anderson (1994) ZR 47***
7. ***Ruston v National Coal Board (1952) 1QB 495***
8. ***Zambia Postal Services Corporation v Saxon Mulambya and 40 others-SCZ Appeal 117/2015***
9. ***King Farm Products Limited and Mwanamuto Investments Limited v Dipti Sen (2008) ZR 72***
10. ***Duncan Sichula and another v Catherine Chewe (2000) ZR 56***
11. ***Mukula Highway Transport v Chiwala and another (SCZ Appeal No. 25 of 2006)***
12. ***Kabwe International Transport Limited and Madison Insurance Company Limited v Mathew Njelekwe-SCZ Judgment No. 12 of 1998***
13. ***Millet v MC Managle (1970) AC 166; (1969) ALL ER***
14. ***Rose v Wiley (1951) CA 221***
15. ***Augustine Kapembwa v Danny Maimbolwa and Attorney General (1981) ZR 127***
16. ***Reba Industrial Corporation Limited v Nicholas Mubonde- CAZ Appeal No. 6 of 2017***
17. ***Fair v London North Western Railway (1869) 21 LT 36***
18. ***CR Holdings Limited and Cassius Rumsey v Jennipher Lintini (Administratrix of the Estate of Amrah Doran Lintini) SCZ SJ No. 9 of 2019***
19. ***Reuben Nkomanga v Dar Farms SCZ Judgment No. 25 of 2005***
20. ***Chilufya Kunsensela v Astridah Mvula (2014) ZR 82 (SC)***
21. ***H. West and Son Limited v Shephard (1963) 2 WLR 1359***
22. ***Administrator of the late Amos Sinya and another v William Manda (1990/92) ZR 3***
23. ***Litana v Chimba and another (1987) ZR 26 (SC)***
24. ***Stanley v Saddique (1991) 2 WLR 459***

Legislation and works referred to:

1. ***The Fatal Accidents Act 1846-1908 (England)***

2. ***Law Reform (Miscellaneous Provisions) Act Chapter 74 of the Laws of Zambia***
3. ***Mayne and McGregor on Damages, Sweet and Maxwell, 12th edition, at 784***
4. ***Charlesworth and Percy on Negligence paras 5-82, 5-84 and 5-86 at pages 373 to 375***
5. ***John Munkman, Damages for Personal Injuries and Death, London, Butterworth and Company, (publishers) 2nd edition, 1960***
6. ***Simon Allen et all Guide to Damages, 3rd edition, Jordans***

I **Introduction**

1. This is an appeal against the decision of the Deputy Registrar (DR), Mrs. A.M. Chulu, at assessment. The appeal is against the quantum of damages awarded by the DR under the various heads.

2. Dissatisfied with the quantum, the appellant appealed to this Court.

3. The appeal therefore discusses whether the quantum of damages awarded by the DR were inordinately low or so inordinately high that they were a wholly erroneous estimate of the damages and whether the DR applied a wrong principle of law as to warrant our interference on appeal.

II **Background**

4. On 9th October, 2008, the respondents were among the passengers aboard the appellant's Scania Marco Polo Bus Registration number ABD 5307 (the bus), headed to South Africa. While transiting through Kadoma District in Zimbabwe the bus was involved in a road traffic accident. The accident caused death, minor and major injuries to the passengers on the bus.

5. As a result, the respondents sued the appellant, its driver and insurer for damages in negligence. The High Court per Chashi, J (as he then was) found the appellant vicariously liable for the negligent acts of its driver and awarded the respondents damages for personal injuries, death, loss of property at accident scene, medical expenses and loss of business for those who were travelling to South Africa for business. The Judge then referred the matter to the DR to assess the quantum due on these damages and the precise sums of money which the respondents were entitled to recover from the appellant.

III **Evidence Adduced at Assessment**

6. A brief overview of the affidavit and oral evidence adduced at assessment is as follows.

7. PW1, Mwelwa Musonda (60) sustained a deep laceration and a fracture on the left leg (injury to tibia and fibular) and was flown from Zimbabwe to UTH for treatment. Mwelwa suffered a 30% disability but was able to go back to work two (2) months post the accident. PW1 worked as a private entrepreneur but there was no supporting evidence as to his earning capacity.

8. PW2, Lydia Chimata (51), testified that she sustained a deep laceration on her right leg and arm due to impact from a broken glass. Her wound took four (4) months to heal. The DR observed that she had a big scar on her right arm. The medical records show that she recovered fully and has no permanent disablement at all.

8.1 PW2 testified that she lost her job as a nurse in Eswatini due to the accident. However, she did not produce any evidence to show that she was employed

at a private hospital in Eswatini as claimed. Similarly, her claim that she lost SAR1,500.002 at the accident scene was not supported by evidence. She testified that she later got a job as a nurse at Chipata level 1 Hospital in 2013.

9. PW3, Nellia Bweupe (38), said she was a business woman who sold goods sourced from South Africa.

9.1 Her medical report showed that after the accident, she suffered 80% permanent disablement. Her right forearm was amputated and she sustained damage to her left ear and a degloving injury on the left side of the face as stated on her medical report.

9.2 She testified that her arm had been replaced with an artificial one which cost her K5,500.00. She also claimed that she lost her memory due to the head injury, experiences irregular menstruation periods and suffers back pain which has negatively affected her sex life with her husband.

9.3 PW3 also claimed that she lost US$5,000.00 dollars at the accident scene. However, she did not report the

missing cash to the police and she could not recall having declared the money when transiting through Zimbabwe. Her affidavit in support contains forex receipts showing that she bought US$5,000.00 between 1st October 2008 and 7th October 2008 in batches of US$1,000.00.

9.4 PW3 accepted that the appellant contributed K1,000.00 towards her medical expenses.

10. PW4, Jenerah Martha Phiri Kabaso (40), gave oral evidence on behalf of her deceased husband Boyd Kabaso. Her testimony was that at the time of the accident, her late husband, aged 39, was a businessman and at the time was engaged in importing goods from South Africa and supplying to Zesco. She referred to invoices in the affidavit in support which are in the name of a company limited by shares called Bonymas Investments Limited which PW4 claimed was owned and run by the deceased.

10.1 She added that he was the bread winner who took care of her and their three children who at the time were aged 28, 12, 7 and 4. He also had another dependent

and his aged mother. PW4 produced receipts to show that the children were in school.

10.2 After the accident, the deceased was rushed to a hospital in Zimbabwe where he later died. She added that she did not receive any assistance from the appellant. The appellant only transported the body from Zimbabwe to Kitwe. She did not produce any receipts for funeral expenses. Her affidavit disclosed that they spent K12,000.00 on funeral expenses but receipts were not produced.

11. PW5, Grace Chitalu (44), testified that she sustained a serious head injury which left a bad scar on her forehead. Due to trauma, she experienced hormonal imbalance resulting in an irregular menstrual pattern and she eventually ceased to menstruate. As a result, doctors informed her that she cannot have children.

11.1 In cross examination, PW5 conceded that although she stated in her oral evidence that she lost business, she did not mention this fact in her affidavit earlier filed into court. She also accepted that she did not bring any evidence from a gynecologist to support her claim

regarding loss of menstruation. All she had was a receipt of K134.00 for a treatment she underwent without any particulars of the treatment.

11.2 PW6, Jumbe Haisule (49), gave evidence that he was a cross border business man who lost US$3,000.00 at the accident scene. He produced forex receipts to show that he had purchased US$3,000.00 on 24th September 2008, 28th September 2008 and 14th October 2008.

11.3 After the accident, he sustained an abrasion and cut injury on his right forearm with a 5% permanent disablement as shown by his medical report. He organized his transfer from Kadoma (Zimbambwe) to UTH (Zambia) and met all the expenses himself. He did not receive any assistance from the appellant. He did not produce any receipts to show the expenses incurred at UTH.

12. PW7, Paggie Kangira (38), narrated that he was a transporter and farmer. His medical report showed that he sustained a fractured left forearm, right hand injury and left forearm degloving wound.

12.1 After the accident, he was bedridden from 2008 to 2010. He was admitted in hospital on 12th October, 2008 and discharged on 24th October, 2008. After being discharged he had doctors' appointments every two days on his hand where he had plates implanted in 2009. The pain resurfaced in 2012 through to 2016 when his elbow was operated on because it was collecting pus.

12.2 Although, he accepted that the appellant met some of the expenses, such as transport from Zimbabwe to Zambia, he did not produce any receipts to support the expenses he claimed he personally incurred.

13. PW8, Florence Kalunga (28), later testified as PW11 because initially she had no letters of administration to represent the estate of her mother the late Racheal Mushimpika who died from severe head injury as a result of the accident. Her evidence was that the deceased died on the spot leaving 6 children aged 19, 16, 13, 11 and 7. The deceased was also supporting her biological mother who had high blood pressure.

13.1 The deceased was an entrepreneur who earned an estimated income of K10,000.00 per month. When cross examined, PW11 said her father worked as a warrant officer in the Zambia Air Force (ZAF). ZAF paid for the funeral expenses.

13.2 She said did not know whether the appellant paid for embalming and transporting the body back to Zambia.

14. PW9, Samson Kazonga (32), testified on behalf of his deceased uncle Lazarous Banda who died in 2012. Prior to death, the deceased had his right arm amputated and suffered a 68% permanent disablement.

14.1 PW9 claimed that he used to work with his uncle and he knew that his uncle had US$7,000.00 which was lost at the accident scene. The affidavit in support exhibited receipts for purchase of forex made between 23rd September and 30th September 2008. However, PW9 did not have any police report to show that the deceased lost money.

14.2 PW9 further testified that his uncle was in and out of hospital before his death four years after the accident. PW9 did not produce any Medical report to confirm this assertion. He only produced a receipt for K50.00 from UTH for medical expenses. During cross examination, PW9 disclosed that his uncle died of Malaria four years after the accident.

15. PW10, Chaola Ngwira (39) sustained a laceration on both elbows and left arm and a fractured humerus and wrist. He suffered a 20% permanent disablement as evidenced by the medical report form.

15.1 He was admitted at a hospital in Zimbabwe for one week. He was then transferred to UTH at appellant's expense. He was admitted in UTH for another week and later Chingola Mine Hospital where he spent another two weeks. After being discharged, he attended physiotherapy because he was unable to walk. As at trial date, he had been to South Africa twice for skin grafting on both his hands and left side of the face. The appellant did not pay for any of his medical bills. He exhibited the air tickets and receipts

in respect of the trips to South Africa for treatment which he personally paid for.

15.2 Post accident, he testified that he can no longer travel long distances and has had to engage a domestic worker to carry out his household chores.

15.3 He also claimed that he lost US$3,500.00, SAR2,600.00 and ZMW400.00 cash, and a bag of clothes worth K1,100.00 at the accident scene.

16. At the close of the trial, the respondents' Counsel informed the DR that they would rely on affidavit evidence for Clara Nsofwa, Cosam Silwimba, Gilbert Katwamba and Majouba Jumaine who were unable to attend trial as they were out of jurisdiction.

The appellant's case

17. For its part, the appellant called two witnesses.

17.1 DW1, Martin Ngwenya Mogano, testified that at the time of the accident, he used to work for the appellant as Assistant Operation Manager. When the accident occurred, he was sent on the ground to attend to the problem. He started at Kadoma Hospital where he paid

about US$2,000.00 for the victims' medical bills. Eight victims were transferred to Harare due to inadequacy of facilities at Kadoma. Of the eight, seven were discharged leaving Chaola Ngwira (PW10) who had a broken spine. All the patients who were discharged were flown to Zambia on Zimbabwe Airways including Chaola Ngwira (PW10) who could only be flown after organizing a special bed.

17.2 The police went to the accident scene and recorded statements from the victims. There were statements that the victims had lost some properties. Chaola Ngwira had the entire SAR2,600.00 in his purse, intact. DW1 had borrowed SAR600.00 from Chaola Ngwira but gave it back at the airport when he was being flown to Zambia.

17.3 Despite insisting that he paid for all the medical bills for all the victims in Zimbabwe, DW1 had no receipt to prove his allegation. He maintained that he handed over all documentation to the appellant.

18. DW2, Dorothy Simmons Rumsey, an executive director in the appellant's company, testified that all travel

arrangements from Zimbabwe to Zambia were made by the appellant for all the victims. For Racheal Mushimpuka who died on the spot, the appellant also paid for the casket, embalming and transporting the body back to Zambia. Similarly, Boyd Kabaso's body was airlifted to Lusaka and transported by bus from Lusaka to Kitwe. She referred to a receipt from Air Zimbabwe, receipts from private hospitals and food as proof of the support rendered. All other passengers who did not have serious injuries were brought back to Zambia by road.

18.1 When the victims were taken to UTH, DW1 visited them and bought IV drugs, wound dressing material, bandages and antiseptic solution. In addition, DW1 assigned two nurses to attend to the victims to clean and dress their wounds, at the appellant's expense.

DW2 said she only heard about victims losing cash at the accident scene for the first time in court. All the victims were taken to UTH conscious and able to communicate clearly.

IV **Consideration of Evidence and Decision of the DR**

19. After evaluating the evidence, the DR awarded the respondents damages totaling K2,850,260.00 broken down as follows:

20. **Boyd Kabaso**

(a) Loss of expectation of life	K200,000.00
(b) Pain and Suffering	K250,000.00
(c) Loss of Business income	K200,000.00
(d) Funeral expenses	K20,000.00
Total	**K670,000.00**

21. **Racheal Mushimpuka**

(a) Loss of expectation of life	K200,000.00
(b) Loss of Business income	K50,000.00
(c) Funeral expenses	K20,000.00
Total	**K270,000.00**

22. **Grace Chitalu**

(a) Pain and suffering	K10,000.00
(b) Loss of amenities	K30,000.00
(c) 10% Permanent disability	K20,000.00
(d) Loss of future earnings	K20,000.00
(e) Medical expenses	K6,000.00
Total	**K86,000.00**

23. **Lazarous Banda**

(a) Pain and suffering	K10,000.00
(b) Loss of amenities	K100,000.00
(c) 68% Permanent disability	K100,000.00
(d) Purchase of US$3,000	K30,000.00
(e) Loss of business	K1,000.00
Total	**K331,000.00**

24. **Ngwira Chaola**

(a) Pain and suffering	K100,000.00
(b) Loss of amenities	K50,000.00
(c) 20% Permanent disability	K40,000.00
(d) Loss of Business	K1,000.00
Total	**K191,000.00**

25. **Mwelwa Musonda**

(a) Pain and suffering	K60,000.00
(b) Loss of amenities	K40,000.00
(c) 30% permanent disability	K50,000.00
(e) Loss of business	K1,000.00
Total	**K131,000.00**

26. **Lydia Chimata**

(a) Pain and suffering	K40,000.00
(b) Loss of amenities and Job in Swaziland	K10,000.00
Total	**K50,000.00**

27. **Nelia Bweupe**

(a) Pain and suffering	K100,000.00
(b) Loss of amenities	K100,000.00
(c) 80% Permanent disability	K150,000.00
(d) Lost cash US$5,000	K50,000.00
(e) Loss of business	K1,000.00
Less medical bills paid by appellant	K1,000.00
Total	**K400,000.00**

28. **Jumbe Haisule**

(a) Pain and suffering	K60,000.00
(b) Loss of amenities	K2,000.00
(c) Lost cash	K20,000.00
(c) 5% Permanent disability	K10,000.00
(d) Loss of business	K1,000.00
Total	**K93,000.00**

29. **Paggie Kangira**

(a) Pain and suffering	K100,000.00
(b) Loss of amenities	K50,000.00
(c) 30% permanent disability	K50,000.00
(d) Loss of business	K1,000.00
Less medical expenses paid by appellant	K3,740.00
Total	**K197,000.00**

30. **Cosam Silwimba**

(a) Pain and suffering	K60,000.00
(b) Loss of amenities	K5,000.00
(c) 15% Permanent disability	K15,000.00
Total	**K80,000.00**

31. **Majouba Jumaine**

(a) Pain and suffering	K100,000.00
(b) Loss of amenities	K100,000.00
(c) 72% permanent disability	K150,000.00
Total	**K350,000.00**

32. **Gilbert Katwamba**

(a) Loss of business (nominal damages)	K1,000.00

33. The DR ordered interest to accrue on the amounts assessed at the current Bank of Zambia lending rate from the date of the High Court Judgment i.e on 7th August 2014, until full and final payment.

V **The Appeal**

34. Dissatisfied with the decision of the DR, the appellant appealed on three grounds couched as follows:

1. ***The Court's award of damages was wholly erroneous and inordinately high;***

2. ***The court below inadequately and wrong in principle awarded damages amounting to K2,870,260.00 with interest; and***
3. ***The Court misapprehended the law on evidence when she awarded damages solely on Affidavit evidence notwithstanding the fact that some of the respondents gave no oral testimonies.***

VI **The Arguments**

35. The appellant filed into court heads of argument dated 30th April, 2019.

36. As regards grounds one and two, it was submitted that the DR erred in law and fact when she awarded damages of K2,870,260.00 with interest from 7th August 2014 until full payment. Counsel submitted that this award of damages was excessive and wrong both in principle and law. The Court was referred to the case of **Zambia Publishing Company Limited v Pius Kakungu**[1] where it was held that the Court will interfere with the quantum of damages awarded by a trial court if the trial court applied the wrong principle, or misapprehended the facts.

37. Counsel then argued as follows in respect of each of the respondents:

38. It was argued the damages awarded to the estate of Boyd Kabaso totaling K670,000.00 were excessive and not supported by evidence.

38.1 For loss of expectation of life, it was argued that the DR found at page J26 that the claim of K100,000.00 was modest and accepted it. However, in the final award she made an award for K200,000.00 under the same head. Despite that contradiction, the final amount awarded was erroneous as it was excessive and not supported by evidence.

38.2 For pain and suffering captioned ***'pain endured before death'***, it was submitted that the award of K250,000.00 was inordinately high. Counsel cited the case of **Zambia State Insurance Corporation and another v Andrew Muchili (Administrator of the estate of the late Nelson Chinene[2])**. Particular reference was made to page J54 where the Supreme Court held that ***"any award for pain and suffering should reflect its extent and duration. It is unlikely that any substantial award can be made where the deceased died within hours of the injury."*** That court then substituted the award of K10,000.00 with

K100.00 stating that awards for pain and suffering in this country have been suggested by the apex court to relate to a figure of around K200.00 to K300.00 per week. In addition, the case of **Administrator of the late Amos Sinoya and another v William Manda**[3] was cited that ***"the correct approach is to apportion a weekly tariff and then multiplying that by the period of admission only".*** Counsel also referred to **Simon Allen et al "Guide to Damages"3rd edn 1-2** that ***"...the level of damages will depend upon the duration and intensity of the pain and suffering."***

38.3 In view of these authorities, it was submitted that the deceased, Boyd Kabaso, died within a few hours of the accident rather than days. The DR did not show how she arrived at the figure awarded to reflect the extent and duration of pain and suffering endured by the deceased or that the amount awarded was based on a weekly rate. Therefore, the award of K250,000.00 is so high and erroneous.

38.4 Concerning the award of K200,000.00 for loss of income, counsel argued that the award is not

supported by evidence to prove that the deceased was engaged in business at the time of his death and lost that income.

38.5 Regarding funeral expenses, counsel argued that the DR erred when she awarded K20,000.00 without taking into account the expenses incurred by the appellant despite her finding on page J29 that the appellant transported the body from Zimbabwe to Zambia. In addition that, there was no proof of these expenses to warrant an award of them as special damages. The case of **Andrew Tony Mutale v Crushed Stone Sales Limited**[4] was cited as authority that a claim which is not supported by evidence ought to fail.

39. **Racheal Mushimpuka**

It is argued that the award of K200,000.00 for death was erroneous. Counsel relied on the Supreme Court decision in **Konkola Copper Mines Plc and another v John Mubanga Kapaya (Administrator of the estate of the late Geoffrey Chibale) and another**[5] that ***"an award for loss of expectation of life is generally a small sum".*** He urged us to set aside the award of K200,000.00.

39.1 Relying on the authority of **Andrew Tony Mutale v Crushed Stone Sales Limited**[4], counsel maintained that the award for funeral expenses of K20,000.00 was erroneous as it is unsupported by evidence. The DR also overlooked the fact that the appellant embalmed the body and transported it from Zimbabwe to Zambia. The court should have taken this assistance into account including the help rendered by ZAF when making the award.

40. For Grace Chitalu (PW5), Lazarous Banda (PW9), Ngwira Chaola (PW10), Mwelwa Musonda (PW1), Lydia Chimata (PW2), Nelia Bweupe (PW3), Jumbe Haisule (PW6) and Paggie Kangira (PW7), the appellant submitted on the following awards as follows:

40.1 The various amounts for pain and suffering awarded to the above respondents be set aside as they were contrary to the Supreme Court decision in **Zambia State Insurance Corporation and another v Andrew Muchili (Administrator of the estate of the late Nelson Chinene**[2]**)** case that the award should reflect the extent and duration of suffering. The awards were also against the

Caroline Anderson v Anderson[6] case that the amount for pain and suffering ran from the date of the accident and hospitalization to discharge, on a weekly basis.

40.2 The awards for loss of amenities were unjustified as the respondents did not suffer injury, that precluded them from enjoying life or performing everyday tasks particularly PW5, PW2, PW6, PW7 and PW10 (who have since recovered). PW9 who later died of malaria, was awarded K100,000.00 for loss of amenities which is inordinately high.

40.3 Learned counsel maintained that the various amounts for permanent disability are too high compared to some of the injuries suffered and the percentage of disability. PW5 and PW7 only suffered 5% and 10% permanent disability and the amounts of K20,000.00 and K10,000.00 were excessive as the DR did not consider the guidance in **Ruston v National Coal Board**[7]. PW7 only suffered a cut on his right arm and PW5 only had face lacerations. Equally PW10 and PW1 failed to prove they had suffered 20% and 30% permanent disability, respectively.

40.3.1 The rest even though they suffered permanent disabilities (PW9 68%), (PW3 80%) the awards of K100,000.00 were excessive.

40.4 Furthermore that, the various K1000.00 awards for loss of business were not proved and should be quashed.

40.5 In concluding arguments in grounds one and two, counsel submitted that this Court has a duty to interfere with the awards and reduce damages so far as they have been shown to be erroneous. Counsel added that an award of damages should not serve as a form of punishment to the erring party.

41. On ground three, the appellant's counsel contended the lower court's approach to rely solely on affidavit evidence for respondents that gave no oral evidence was wrong. It was submitted that the order contained in the High Court Judgment dated 7th August 2014 was clear that the medical report and other documentary evidence on record which described the injuries sustained by the victims had to be individually explained by supporting oral evidence.

41.1 Thus, the DR erred when it awarded damages to Cosam Silwimba, Majouba Jumaine and Gilbert Katwamba who did not adduce any oral evidence, contrary to the trial Judge's order. Counsel distinguished the case of **Zambia Postal Services Corporation v Saxon Mulambya and 40 others**[8] with the present case stating that the present case had a specific order made by the High Court Judge which the DR was obliged to follow. Counsel also referred us to the case of **King Farm Products Limited and Mwanamuto Investments Limited v Dipti Sen**[9] to the effect that the DR cannot vary, amend or modify a final judgment made by a Judge in open court.

42. In conclusion, the appellant's counsel implored us to interfere with the decision of the DR and quash the damages awarded to Cosam Silwimba, Majouba Jumaine and Gilbert Katwamba for failure to comply with the order of the trial Judge.

The respondent's arguments

43. The respondents' counsel filed heads of argument dated 3rd June 2019.

44. In response to grounds one and two, it was submitted that the DR was on firm ground when it awarded damages amounting to K2,870,260 with interest from 7th August 2014 until full payment. The awards are not wrong in principle and law and they are reasonable. Counsel relied on the case of **Duncan Sichula and another v Catherine Chewe**[10] to support this assertion.

45. For Boyd Kabaso it was submitted that the DR was on firm ground when she awarded K670,000.00 as damages to Boyd Kabaso's estate. It was not excessive and was backed by documentary and oral evidence.

45.1 Counsel drew the Court's attention to the case of **Mukula Highway Transport v Chiwala and another**[11] in which the Supreme Court upheld the sum of K180,000.00 for pain and suffering. Comparing this case to the present case, counsel argued that the

award of K250,000.00 to Boyd's estate for pain and suffering was justified.

45.2 For loss of income, counsel submitted that the award of K200,000.00 was justified because the deceased's widow proved that the deceased was a business man who used to supply goods to Zesco.

45.3 Furthermore, that it is immaterial that the respondent did not provide receipts for funeral expenses. Counsel cited the case of **Kabwe International Transport Limited and Madison Insurance Company Limited v Mathew Njelekwe**[12] where the Supreme Court illuminated that ***"in as much as the respondents did not produce receipts for various expenses, it was a well-known fact that funeral expenses incurred must be awarded."*** Hence the award of K20,000.00 as funeral expenses was reasonable and justified.

46. For Racheal Mushimpuka it was submitted that the DR did not err when she awarded K200,000.00 damages for pain and suffering. To support this argument, counsel relied on the case of **Millet v MC Managle**[13] quoting Lord Diplock as follows:

> ***"My Lords, the purpose of an award of damages under the Fatal Accidents Act is to provide the widow / widower and other dependents with capital sum which with prudent management will be sufficient to supply them with material benefits of the same standard and duration as would have been provided for them out of the earnings of the deceased had he / she not been killed by the tortious act of the respondent..."***

Hence the beneficiaries of the estate of the late Racheal are entitled to sufficient damages to allow them to live the way they would; had the tortious act not occurred.

46.1 Regarding funeral expenses Counsel relied on the **Kabwe International Transport Limited and Madison Insurance Company Limited v Matthew Njelekwa**[12] case cited above, and argued that the award of K20,000.00 should be upheld. Also, that the help rendered by the ZAF is expected of employers and guided by the deceased's conditions of service and cannot affect the award of damages.

47. For Grace Chitalu (PW5), Lazarous Banda (PW9), Ngwira Chaola (PW10), Mwelwa Musonda (PW1), Lydia Chimata (PW2), Nelia Bweupe (PW3), Jumbe Haisule (PW6) and Paggie Kangira (PW7), it is argued that the

various awards of K10,000.00 for pain and suffering were correct and reasonable.

47.1 The Court was referred to **Charlesworth and Percy on Negligence paras 5-82, 5-84 and 5-86 at pages 373 to 375** to demonstrate that there are certain difficulties associated with assessing damages for pain and suffering, among them, that it is difficult to quantify loss in monetary terms and that no perfect compensation can be given. Additionally, that in **Rose v Wiley**[14], Birkeft LJ stated that ***"the question for this Court is whether this figure was too wrong that it was the duty of the Court to interfere with it."*** Counsel also referred to **Mukula Highway Transport v Chiwala and another**[11] quoting the Supreme Court as follows:

> ***"As much as we agree with the principle in Reuben Nkomanga v Dar Farms International Limited that for pain and suffering a weekly rate should be applied, in the current case and in view of the injuries suffered, we do not consider the sum awarded to be excessive or unconscionable as the amount is not so outrageously high so as to justify our intervention."***

Counsel also made reference to the case of **Augustine Kapembwa v Danny Maimbolwa and Attorney General**[15]

where the court awarded K500.00 damages for minor injuries.

47.2 For loss of amenities it was submitted that Grace Chitalu (PW5) suffered grievous disability as a result of the accident. Her monthly periods have completely stopped such that she cannot have children. She also suffers constant headaches as a result of the forehead injury she sustained. PW9 and PW3 had an arm each amputated and the awards of K100,000.00 were reasonable.

47.3 PW10, PW1, PW6 and PW7 all suffered same form of loss of amenities as a result of the accident and the awards were justified. The **oxford definition** of loss of amenities was quoted thus:

> ***"loss or reduction of a claimant's mental or physical capacity to do things he used to do, suffered as a result of personal injuries."***

Our decision in **Reba Industrial Corporation Limited v Nicholas Mubonde**[16] where we awarded K150,000.00 for loss of amenities was cited to justify the awards of loss of amenities.

48. For permanent disability awards, the respondents' counsel submitted that PW9 and PW3 suffered 68% and 80% permanent disability and the awards of K100,000.00 were justified.

48.1 PW1, PW10, PW5, PW6 and PW7 equally suffered permanent disability with percentages ranging from 5% to 30%, the various awards were justified. The case of **Fair v London North Western Railway**[17] was relied upon that:

> ***"In assessing the compensation, the Court should take into account two things; first, the pecuniary loss (plaintiff) sustains by accident; second, the injury he sustains in his personal or physical capacity of enjoying life. When they come to the consideration of the pecuniary loss, they have to take into account not only his present loss but also his incapacity to earn a future improved income."***

VII **The hearing**

49. At the hearing, Mr. Zulu, who appeared for the appellant relied on the heads of argument which he briefly augmented by relying on the recent Supreme Court decision in **CR Holdings Limited and Cassius Rumsey v Jennipher Lintini (Administratrix of the Estate of Amrah Doran Lintini)**[18] which followed the 2004 case

of **Konkola Copper Mines Plc and another v John Mubanga Kapaya (Administrator of the estate of the late Geoffrey Chibale) and another** supra, that damages for loss of expectation of life are conventionally low. Learned counsel opined that this is because a price tag or monetary value cannot be attached to value of life. Counsel amplified that the Supreme Court guided on the mechanisms for calculating an appropriate award by looking at previous awards and taking into account the devaluation of the Kwacha. The Supreme Court found that from 2004 when the **Konkola Copper Mines Plc and another v John Mubanga Kapaya (Administrator of the estate of the late Geoffrey Chibale) and another**[5] case was decided and K5,000.00 was awarded for loss of expectation of life, the Kwacha had devalued three times as at October 2019. It arrived at this after considering that the value of the Kwacha to the dollar in 2004 was K4,600 and in 2019 it was K13,000.00. Accordingly K15,000.00 was awarded in 2019 for loss of expectation of life.

49.1 As regards pain and suffering, counsel urged us to follow the Supreme Court decision in **Reuben Nkomanga v Dar Farms**[19] that a weekly rate should apply. According to counsel the Supreme Court in the **Mukula Highway Transport v Chiwala and another**[11] case indicated that a weekly rate is applicable for pain and suffering as held in **Reuben Nkomanga v Dar Farms**[19] but in **Mukula Highway Transport v Chiwala and another**[11] it observed that due to the extent of the injuries and permanent disability, scarring and treatment involved which included several surgical procedures, the lump sum awarded by the court below was not wrong nor excessive. In addition counsel urged us to consider that in **Chilufya Kunsensela v Astridah Mvula**[20] case K3,000.00 was awarded in 2014 for pain and suffering for a period of six months hospitalization. Counsel surmised that in *casu* a weekly rate of K150.00 to K200.00 would be appropriate considering the periods of hospitalization.

49.2 Regarding the estate of Boyd Kabaso, counsel argued that the invoices exhibited were not for Boyd Kabaso

but for Bonymas Investments Limited. Yet, there was no proof that the late Boyd was a shareholder in that company and whether it was making any profits nor were dividends paid. The award of K200,000.00 was therefore made without legal or factual basis.

49.3 Mr. Ndhlovu who appeared for the respondents relied on the heads of argument in response filed on 3rd June, 2020.

VIII **Considerations and Decision**

50. We have reviewed the evidence and the law on the tort of negligence arising from fatal accidents which cause personal injuries and death.

51. As stated in our decision in **Reba Industrial Corporation Limited v Nicholas Mubonde**[16], the following damages for personal injuries are due to a victim of an accident:

51.1 Pain and suffering: damages are awarded for pain which the claimant feels consequent to an injury both in the past and into the future. As held in several cases like **Zambia State Insurance Corporation and another v Andrew Muchili (Administrator of the estate of**

the late Nelson Chinene[2]) the level of damages will depend upon the duration and intensity of the pain and suffering. And, when a deceased dies within hours of the injury causing death, the award for pain and suffering must reflect both the extent and duration of the pain and suffering. Where a person dies instantly there is no award given for pain and suffering.

51.2 In **Mukula Highway Transport v Chiwala and another[11]** in upholding the trial court's award of K180,000.00 for pain and suffering, the Supreme Court took note of the reckless driving of the appellant's driver and the injuries which led to loss of arm of PW1, with 70% disability, 10% facial disfigurement and 30% total pain during the trauma. Furthermore, that in its earlier decision in **Reuben Nkomanga v Dar Farms[19]** the permanent disability was only 30% and a weekly rate for pain and suffering as opposed to a lump sum was applicable. In *casu*, the respondents suffered divers injuries and levels of permanent disability ranging from 5% to 80%. We are alive to Mr. Zulu's arguments

at paragraph 49.1 that the weekly rate be applied in *casu*.

51.3 Guided by these decisions we are of the considered view that depending on each of the victims' injuries and period of hospitalization, we would determine whether a lump sum or weekly rate is applicable. We are fortified by **H. West and Son Limited v Shephard**[21] that so far as possible comparable injuries should be compensated by comparable awards. Furthermore, it is trite that where a victim dies instantly or within hours of the accident no damages are awarded under this head or nominal award is given as argued by the appellant's counsel at paragraph 38.3 of this Judgment.

51.4 In light of the above we find that the DR misdirected herself when she awarded K250,000.00 to the estate of Boyd Kabaso for pain and suffering. He did not die instantly but was briefly admitted. The DR found that he died a day after the accident.

51.5 In the circumstances we set aside the award of K250,000.00 which is not only inordinately high but

is wrong in principle as he died shortly after the accident. We opine that in the late Boyd's case a weekly rate would be more appropriate.

We are alive to Mr. Zulu's submission that we should follow the cases of **Administrator of the late Amos Sinoya and another v William Manda**[22] and **Zambia State Insurance Corporation and another v Andrew Muchili (Administrator of the estate of the late Nelson Chinene**[2]**)** that an award of pain and suffering should be between K200-K300 per week. And that to calculate the depreciation of the Kwacha we should follow the latest Supreme Court decision in **CR Holdings Limited and Cassius Rumsey v Jennipher Lintini (Administratrix of the Estate of Amrah Doran Lintini)** supra.

51.6 We note that no medical report was exhibited but the police report page 322 of the record of appeal that his condition was serious as he sustained lacerations on the head, right hand and a torn ear. The widow PW4 testified at page 358 of the record of appeal, lines 9-12 that the doctor told her that he was in pain, became unconscious and he died as she was preparing to go

and see him. We find that he did endure pain and suffering for that period. To calculate the weekly rate, we consulted the Bank of Zambia where we obtained a Summary Exchange Rate Data for Bank of Zambia mid rates which is showing the exchange rate of the Kwacha to the USD from August 1993 to August 2020. The **Zambia State Insurance Corporation and another v Andrew Muchili (Administrator of the estate of the late Nelson Chinene[2])** was decided in 1989, we are of the considered view that it would be just for us to use the Kwacha to Dollar exchange rate of 1993 which is 4 years after that case decided K200-K300 as the weekly rate.

51.7 As of August 1993 the Kwacha to USD exchange rate was 0.462 which we round off to 0.5. The exchange rate in August 2020 was 18.72 which we round off to 19. We find that the Kwacha has depreciated by 38 times and taking K200.00 as the weekly rate in 1993 today it works out to K7,600 per week. We accordingly award K1,200.00 as the amount for pain and suffering

for the late Boyd Kabaso for the day he suffered before he died.

52. Regarding the other respondents: the following lost their arms Nelia Bweupe (PW3) and Lazarous Banda (represented by PW9). They were hospitalized for one month and one and a half month respectively. We are of the considered view that following the formula above, the lump sums awarded are appropriate considering the injuries which included amputation of the arm and the period of hospitalization. In light of this we cannot fault the DR for awarding K100,000.00 for pain and suffering to PW3 and PW9. The award is not inordinately high or hopelessly low.

53. PW1, PW2, PW5, PW6, PW7 and PW10 suffered divers injuries and some were hospitalized. PW1 Mwelwa Musonda was not admitted in hospital but suffered fractured deep leg laceration and was treated at UTH. PW2 Lydia Chimata was also not admitted but treated at UTH for deep laceration on the leg and arm which took four months to heal. We opine that in this instance the weekly rate is appropriate. Although

there was no hospitalization, we note that the injuries were quite serious and obviously affected their daily lives.

53.1 Therefore, following the formular in the 2019 case of **CR Holdings Limited and Cassius Rumsey v Jennipher Lintini (Administratrix of the Estate of Amrah Doran Lintini)**[18] and the K200 per week in 1993, we do not find the awards inordinately high and wrong in principle. We find the awards of K40,000.00 for pain and suffering to be justified as the injuries for PW1 and PW2 are comparable. Thus we set aside K60,000.00 for pain and suffering for PW1 and we do not disturb the award of K40,000.00 for PW2. PW5 was awarded for pain and suffering K10,000.00, she was not admitted but suffered injuries on the forehead. We uphold this award, it is not inordinately high. PW6 was awarded K60,000.00, yet he only suffered an abrasion and cut on his right arm. We find K60,000.00 to be on the high side. There was no evidence of hospitalization or period he took to heal. We award the weekly rate of K7,600.00.

53.2 PW7 and PW10 were both awarded K100,000.00 for pain and suffering. PW7 was hospitalized for two weeks and injured his hand, leading to plates being implanted. Years later he underwent an operation to remove pus from the same hand. PW10 was admitted initially for a week then re-admitted in UTH for another week, Chingola Mine Hospital for two weeks and had to travel to South Africa for treatment. He, among others suffered injuries to his hand. Considering the length of hospitalization, treatment and injuries suffered (see paragraphs 12, 12.1 and 15 and 15.1) and in light of the foregoing, we are of the considered view that a lump sum be awarded. However, we find K100,000.00 awarded by the DR to be on the high side. We substitute with K50,000.00.

54. For loss of amenities according to the authors of a ***'Guide to Damages'*** these are awarded for reduction in the ability of the claimant to perform everyday tasks and enjoy life and it does not matter whether the claimant is conscious or not of the affect upon his or her life. These can include interference with hobbies

and pastimes, loss of a skill or craft, a reduction in marriage prospects or interference with a claimant's sex life.

54.1 PW1, PW2 and PW6 did not adduce any evidence to prove that as a result of the injuries their lives were affected. We therefore set aside the awards of K40,000.00, K10,000.00 and K2,000.00 respectively for loss of amenities. PW2 did not prove she had a job in Swaziland to entitle her to K10,000.00. PW5 failed to prove her claim that as a result of the injuries, her periods were affected and she cannot have children but she suffered a scar. According to the authors of ***'Guide to Damages'*** scarring suffices as loss of amenities. However, the evidence in *casu* is unclear whether the scar was permanent and DR did make any findings in this regard. We therefore, set aside the award of K30,000.00 for loss of amenities. PW7 and PW10 suffered serious injuries to their hands and testified that they need help due to constant pain.

54.2 We note the argument by the respondents that in **Reba Industrial Corporation Limited v Nicholas Mubonde**[16] we

awarded K150,000.00 for loss of amenities. We must state that the respondent therein suffered 100% permanent disability and ended up on a wheelchair for life, would probably never marry and his body was crushed by a truck as he lay underneath trying to repair it. His circumstances cannot compare to PW7 and PW10 who only suffered injuries to their hands. We award PW10 K5,000.00 and PW7 because of the implants K8,000.00 for loss of amenities.

54.3 As for PW3 and PW9 who lost their arms we would substitute the K100,000.00 awards with K20,000.00 we note that in the **Mukula Highway Transport v Chiwala and another**[11] case no separate award was given for loss of amenities for amputation of the arm.

55. Turning to the awards for permanent disability, we note that according to the medical reports the respondents suffered as follows; PW1 30%, PW3 80%, PW5 10%, PW6 5%, PW7 30%, PW9 68% and PW10 20%.

55.1 According to **Black's Law Dictionary**, a permanent disability is a mental or physical illness or a condition

that affects a major life function over the long term. It could be as severe as the loss of an eye or as moderate as a broken leg that healed leaving the inability to walk on grossly uneven surfaces.

55.2 Apart from PW3 and PW9 who lost an arm each and PW7 who had implants fixed in his arm, the rest of the respondents even though they suffered permanent disability, according to the medical reports have since recovered.

55.3 We are therefore duty bound to interfere with the awards. For PW3 and PW9 the DR awarded K150,000.00 and K100,000.00 respectively. We note that they both lost an arm. We find K100,000.00 to be an appropriate award. We therefore uphold K100,000.00 for PW9 and set aside K150,000.00 for PW3 and substitute with K100,000.00. The DR did not elucidate why K150,000.00 was awarded for PW3.

55.4 We would still award for the rest even though they have recovered since their medical reports which showed that they suffered permanent disability were accepted and not objected to by the appellant. PW1 for

30% permanent disability for the period he was nursing his injuries we set aside K50,000.00 and substitute with K10,000.00. PW5 for 10% permanent disability we set aside K20,000.00 and substitute with K2,000.00, PW6 5% permanent disability we award K1,000.00, PW7 30% we award K10,000.00, PW10 20% permanent disability we award K5,000.00.

56. We note that the DR did not award the respondents for loss of future earnings or prospective earnings except PW5 which award was unwarranted. (see paragraph 56.2). The respondents were instead awarded various amounts for loss of business as ordered by the High Court.

56.1 The DR awarded everyone K1,000.00 for loss of business (except Boyd Kabaso's estate and Racheal Mushimpuka's estate. We shall deal with the estates later).

In awarding K1,000.00 for loss of business the DR followed the finding by the trial Judge that most of the respondents were aboard the Scania bus enroute to South Africa for business. The DR noted that they

failed to prove loss of business and awarded nominal K1,000.00 each. The appellant has appealed against the K1,000.00 awards for loss of business to PW1, PW3, PW6 and PW7. As aforestated, this was in line with the Judgment of the High Court that loss of business be awarded for those who were travelling for business. We opine that the DR was at large to either dismiss the claim for loss of business or to award nominal damages. The nominal award was not wrong in principle and we uphold it as they testified that they were travelling for business which fact the trial Judge accepted.

56.2 PW5 was awarded K20,000.00 for loss of future earnings. No explanation was given how the DR arrived at this award of K20,000.00. PW5 gave her occupation at trial as a Civil Servant employed at UTH as a records clerk. She was therefore in gainful employment and did not suffer any loss of prospective future earnings given her injuries were not fatal as to incapacitate her for life.

56.3 She did not adduce any evidence to show that she was not paid her salaries during the period that she was nursing her wounds. And, her medical certificate (at page 333 of the record of appeal) shows that she could resume duties within a month. The award was therefore wrong in principle and is accordingly set aside.

56.4 We note that the court below referred to our Judgment in **Reba Industrial Corporation Limited v Nicholas Mubonde**[16] where, in addressing the arguments that loss of future earnings and permanent disability were not pleaded and DR erred to award, we held that damages for loss of future earnings and for pain and suffering, loss of amenities and permanent disabilities are awarded even if not specifically pleaded. We must clarify that even though they can be awarded without being specifically pleaded, the same still need to be proved, like any other claim, by adducing evidence. In **Reba Industrial Corporation Limited v Nicholas Mubonde**[16] we equally noted that the same were let in evidence without objection. For instance, in *casu*, evidence was

adduced that PW5 suffered 10% permanent disability so loss of future earnings had to be proved as well.

57. Turning to the estates of late Boyd Kabaso and late Racheal Mushimpuka, the DR awarded K200,000.00 and K50,000.00 respectively for loss of business. We are inclined to set aside these awards as they were not proved. No evidence was adduced to prove that the deceased lost business opportunities in those amounts as a result of the accident.

57.1 We would therefore set aside the awards of K200,000.00 and K50,000.00 and substitute with an award of K1,000.00 each as nominal damages.

58. We must however, state that the estates of the two deceased are entitled to damages for loss of expectation of life under the **Law Reform (Miscellaneous Provisions) Act** and loss of dependency for the estate under the **Fatal Accidents Act**. We note that the two estates claimed for damages under the **Fatal Accidents Act** but not for the **Law Reform (Miscellaneous Provisions) Act.** Since evidence on loss of dependency was let in without objection, we will therefore award the estates

for loss of dependency as well. The DR awarded K200,000.00 and K100,000.00 for loss of expectation of life respectively. The appellant appeals against the quantum for being excessive.

58.1 In its recent decision in **CR Holdings Limited and Cassius Rumsey v Jennipher Lintini (Administratrix of the Estate of Amrah Doran Lintini)**[18] the Supreme Court awarded K15,000.00 for loss of expectation of life setting aside the K135,000.00 awarded by the DR. In so doing, the Supreme Court referred to its earlier decisions in **Konkola Copper Mines Plc and another v John Mubanga Kapaya (Administrator of the estate of the late Geoffrey Chibale) and another**[5] and **Litana v Chimba and another**[22] that awards for loss of expectation are conventionally low.

58.2 The Supreme awarded K15,000.00 after taking into account the rate of the local currency (Kwacha) against the United States Dollar (USD) in 2004, when it awarded K5,000.00 for loss of expectation of life in the **Konkola Copper Mines Plc and another v John Mubanga Kapaya (Administrator of the estate of the late**

Geoffrey Chibale) and another[5] case. The Kwacha in 2004 averaged K4,600.00 to USD1. The Supreme Court observed that at time of its Judgment in October, 2019 it was approximately K13,000.00 to USD1, which was approximately three times more from 2004. The Court concluded that as the devaluation of the Kwacha against the USD since 2004 was three times the K5,000.00 awarded then in **Konkola Copper Mines Plc and another v John Mubanga Kapaya (Administrator of the estate of the late Geoffrey Chibale) and another**[5], K15,000.00 was an appropriate award in the **CR Holdings Limited and Cassius Rumsey v Jennipher Lintini (Administratrix of the Estate of Amrah Doran Lintini)** [18].

58.3 Guided by this case and considering the Kwacha is now approximately K20,000.00 to USD1, meaning it's five times more what it was in 2004, we award K25,000.00 for loss of expectation of life for both estates.

58.4 Under the **Law Reform (Miscellaneous Provisions) Act**, the estates are also entitled to funeral expenses. The

DR awarded both estates K20,000.00. However, PW8/PW11 testified that Zambia Airforce (ZAF) where her father works catered for the funeral expenses of her mother Racheal Mushimpuka. We are therefore, inclined to allow the appeal and set aside the award of K20,000.00 funeral expenses awarded to the estate of Racheal Mushimpuka. It is trite that funeral expenses are special damages which have been incurred by the claimant which in this case they were not.

58.5 As for the Boyd Kabaso estate we find the award of K20,000.00 as funeral expenses to be justified, even though there were no receipts. The award is not excessive we uphold it. Though not claimed, it was let in evidence without objection.

59. As for loss of dependency, it was held in the **Litana v Chimba and another**[23] case, supra that:

> ***"a claim under the Fatal Accidents Act is a claim on behalf of the dependants for loss arising to them out of the death of the deceased. This actually takes the form of an award in respect of loss of the anticipated earnings of the deceased."***

And in **Konkola Copper Mines Plc and another v John Mubanga Kapaya (Administrator of the estate of the late Geoffrey Chibale) and another**[5] that:

> ***"What constitutes damages for loss of dependency must be given to each specific dependant according to the dependency."***

59.1 According to the authors of ***"Guide to Damages"***, the dependency claim invariably includes a claim for loss of earnings/pension/other income, but may also include claims in respect of the loss of care and services of a spouse or parent. To determine the loss of dependency we must have regard to the age and needs of the dependents who are surviving spouse, children and parents or others who were being looked after by the deceased. In the **Konkola Copper Mines Plc and another v John Mubanga Kapaya (Administrator of the estate of the late Geoffrey Chibale) and another**[5] case, which was followed in **CR Holdings Limited and Cassius Rumsey v Jennipher Lintini (Administratrix of the Estate of Amrah Doran Lintini)**[18] the Supreme Court illuminated that the factors to consider in assessing loss of dependency are possibility of the deceased, if

he had not died: dying early; the dependants dying early, the possibility of the widow remarrying, and the ages of the minor dependants.

59.2 Additionally that, the period of dependency for the surviving spouse is the deceased's life expectancy: the period during which he would have been able to provide the dependency, or, if shorter, the dependent spouse's life expectancy or the period during which she or the children would have continued to be dependent on the deceased victim.

59.3 To determine the loss of dependency we must also identify the multiplier and multiplicand.

59.4 The multiplicand which is the income of the deceased must be determined. Regarding the late Boyd Kabaso who was self-employed was running a company Bonymas Investments Limited. Invoices were exhibited to PW4's affidavit in support to show that the company used to supply Zesco Limited with assorted items.

59.5 We note the arguments by Mr. Zulu, during the hearing of the appeal that, there was no proof that the deceased was a shareholder in the company or that the company was profit making or if any dividend had been paid to him. We must state that our perusal of the record of appeal, reveals that these issues were not raised at trial and are being raised for the first time on appeal. It is trite law that issues not raised at trial cannot be raised on appeal. Furthermore, the appellant did not object to the documents at trial and let them in evidence. We therefore, do not fault the DR for relying on these documents and accepting that the late Boyd Kabaso owned the company.

59.6 Be that as it may, we note that the invoices exhibited are for the months of February 2007 and April 2008 only. This makes it difficult for us to determine the multiplicand. In the **CR Holdings Limited and Cassius Rumsey v Jennipher Lintini (Administratrix of the Estate of Amrah Doran Lintini)**[18] case, the Supreme Court acknowledged that where the deceased was on a monthly salary it is easy to determine the

multiplicand. It was also observed that ***'McGregor on Damages'*** espouses the view that a Judge can depart from the conventional method of computing the award where there are improbables in the case.

59.7 It was observed that in the case of **Stanley v Saddique**[24] which raised such improbables it was competent for a Judge to award a lump sum. Accordingly, we would award K200,000.00 for loss of dependency same amount the DR awarded for loss of business. We found the amount not inordinately high or hopelessly low to warrant an increase or decrease.

59.8 However, we are duty bound to award the K200,000.00 according to the degree of dependency of each of the dependents being the widow, his mother and the children. We must first deduct K25,000.00 awarded for loss of expectation of life from the K200,000.00 bringing it to K175,000.00 as the award for loss of dependency. Following the **Konkola Copper Mines Plc and another v John Mubanga Kapaya (Administrator of the estate of the late Geoffrey Chibale) and another**[5] case we award 5% of K175,000.000 to the

widow, 5% to deceased's mother and 90% to the children to be shared according to their needs, those who are still school going or in primary school to get more.

59.9 As for Racheal Mushimpuka's estate we note that she was a businesswoman. However, based on the inadequate information it is difficulty to calculate the multiplicand. We award the lump sum of K50,000.00 for loss of dependency (same amount awarded by the DR as loss of business.) We deduct K25,000.00 awarded for loss of expectation of life, bringing the total award to K25,000.00 which must be shared between the dependants. We are alive that the widower worked for ZAF and so the children and himself were not totally dependent on the deceased.

The K25,000.00 to be shared as follows 5% to the widower and 95% to the children according to the degree of dependency.

60. We note the appellant's arguments that whatever monies the appellant spent on the respondents should be deducted. However, the difficulty is that the

appellant did not provide proof of the actual amounts spent. The appeal is therefore unsuccessful in this regard. We find merit in grounds one and two to the extent indicated.

61. On ground three which is against the DR's decision to award the respondent who did not testify orally, we are inclined to allow it. We note that the trial Judge ordered the respondents to substantiate their claims of injuries by giving *viva voce* evidence at assessment. It was wrong for the DR to go against this order. Ground three is allowed.

IX **Conclusion**

62. In conclusion, we have found merit in the appeal, the awards stand as follows:

62.1 **Late Boyd Kabaso (represented by PW4)**

Loss of expectation of life	K25,000.00
Pain and suffering	K1,200.00
Loss of dependency	K175,000.00
Loss of Business	K1,000.00
Funeral expenses	K20,000.00
Total	**K222,200.00**

62.2 **Late Racheal Mushimpuka (represented by PW8/ PW11)**

Loss of expectation of life	K25,000.00
Loss of dependency	K25,000.00
Loss of Business	K1,000.00
Funeral expenses	Nil
Total	**K51,000.00**

62.3 **Grace Chitalu (PW5)**

Pain and suffering	K10,000.00
Loss of amenities	Nil
10% permanent disability	K2,000.00
Loss of future earnings	Nil
Medical expenses (no appeal)	K6,000.00
Total	**K18,000.00**

62.4 **Lazarous Banda (PW9)**

(a) Pain and suffering	K100,000.00
(b) Loss of amenities	K20,000.00
(c) 68% Permanent disability	K100,000.00
(d) Purchase of US$3,000	K30,000.00
(e) Loss of business	K1,000.00
Total	**K251,000.00**

62.5. **Ngwira Chaola (PW10)**

(a) Pain and suffering	K50,000.00
(b) Loss of amenities	K5,000.00
(c) 20% Permanent disability	K5,000.00

62.2 **Late Racheal Mushimpuka (represented by PW8/ PW11)**

Loss of expectation of life	K25,000.00
Loss of dependency	K25,000.00
Loss of Business	K1,000.00
Funeral expenses	Nil
Total	**K51,000.00**

62.3 **Grace Chitalu (PW5)**

Pain and suffering	K10,000.00
Loss of amenities	Nil
10% permanent disability	K2,000.00
Loss of future earnings	Nil
Medical expenses (no appeal)	K6,000.00
Total	**K18,000.00**

62.4 **Lazarous Banda (PW9)**

(a) Pain and suffering	K100,000.00
(b) Loss of amenities	K20,000.00
(c) 68% Permanent disability	K100,000.00
(d) Purchase of US$3,000	K30,000.00
(e) Loss of business	K1,000.00
Total	**K251,000.00**

62.5. **Ngwira Chaola (PW10)**

(a) Pain and suffering	K50,000.00
(b) Loss of amenities	K5,000.00
(c) 20% Permanent disability	K5,000.00

(d) Loss of Business	K1,000.00
Total	**K61,000.00**

62.6. **Mwelwa Musonda (PW1)**

(a) Pain and suffering	K40,000.00
(b) Loss of amenities	Nil
(c) 30% permanent disability	K10,000.00
(e) Loss of business	K1,000.00
Total	**K51,000.00**

62.7. **Lydia Chimata (PW2)**

(a) Pain and suffering	K40,000.00
(b) Loss of amenities and Job in Swaziland	Nil
Total	**K40,000.00**

62.8. **Nelia Bweupe (PW3)**

(a) Pain and suffering	K100,000.00
(b) Loss of amenities	K20,000.00
(c) 80% Permanent disability	K100,000.00
(d) Loss of business	K1,000.00
(d) Lost cash US$5,000	K50,000.00 (no appeal)
Less K1,000.00 medical bills paid by appellant which she admitted	
Total	**K271,000.00**

62.9. **Jumbe Haisule (PW6)**

(a) Pain and suffering	K7,600.00
(b) Loss of amenities	Nil
(c) Lost cash	K20,000.00
	(No appeal)
(d) 5% Permanent disability	K1,000.00
(e) Loss of business	K1,000.00
Total	**K29,600.00**

62.9. **Paggie Kangira (PW7)**

(a) Pain and suffering	K50,000.00
(b) Loss of amenities	K8,000.00
(c) 30% permanent disability	K10,000.00
(d) Loss of business	K1,000.00
Less medical expenses paid by appellant	K3,740.00
Total	**K69,000.00**

Grand total	**K1,063,800.00**

62.10 Grand total for all the awards has reduced from K2,870,260.00 to K1,063,800.00.

62.11 The amount of K1,063,800.00 to be paid with interest at short term deposit rate from date of writ to Judgment, and thereafter at the current bank lending rate as determined by Bank of Zambia until payment in full. We order each party to bear own costs in this Court.

M.M. KONDOLO, SC
COURT OF APPEAL JUDGE

F.M. CHISHIMBA
COURT OF APPEAL JUDGE

J.Z. MULONGOTI
COURT OF APPEAL JUDGE