ELLIOT KWADIWA
versus
BIGBOY MUSEMWA

HIGH COURT OF ZIMBABWE
UCHENA & MWAYERAJJ
HARARE, 16 June 2015 and 15 July 2015

Civil Appeal

S.T Mazhata, for the appellant
Respondent : In person

MWAYERAJ: At the conclusion of the trial of the matter, the court *a quo* granted an order in favour of the respondent along the following terms:

1. Plaintiff's claim be and is hereby granted.
2. Defendant to pay $556-00 for Special damages and $3000-00 for general damages making a total of $3 556-00.
3. The defendant shall pay the costs of suit.

The court *a quo* made a finding anchored on the fact that the appellant assaulted the respondent causing injuries from which the appellant was hospitalised. It is against the finding of the court a quo that the appellant approached this court on the following grounds of appeal.

1. The learned magistrate erred in holding that the appellant was liable for the injuries suffered by the respondent when evidence led showed that being drunk the respondent brought the injuries upon himself.

   ALTERNATIVELY
2. The learned magistrate erred in her assessment of the damages and quantum payable by not placing due weight on the fact that the respondent had by his own drunken conduct caused injuries to himself.
3. The learned magistrate erred in awarding damages in the amount of $3 564-00 when from the evidence led it was apparent that being a mere gardener the appellant could hardly afford paying such an amount in relation to his earnings.

The appellant sought to have the respondent's claim dismissed and as the appeal unfolded the appellant sought to have the award for general damages reduced to $800-00.

The facts of this case are mostly common cause as discerned from the record of proceedings. It is not in dispute that the respondent was subjected to assault by the appellant. The latter paid an admission of guilty fine for the assault. Further it is apparent from the record of proceedings that the appellant suffered injuries on the eye as a result of the physical assault by the appellant. The respondent further suffered surgical injuries as he had to be operated on the eye and was admitted for about 9 days. The medical bills constituted special damage awarded $556-00 and are not in contention.

What falls for consideration in the appeal is the general damages awarded in the sum of $3 000-00. The respondent's initial claim per summons for general damages was $5000-00 The court *a quo* quantified the general damages after due consideration of the circumstances of the matter and assessment of damages principles. The question that begs of answers is whether or not the court *a quo* properly exercised its discretion. The appeal court is only duty bound to interfere with the decision of the court *a quo* where there is a gross misdirection on the part of the court *a quo*. The court *a quo* had opportunity to hear and assess evidence and from the record the following factors are clear. The respondent was hopelessly drunk when he was subjected to "severe" assault on the eye occasioning an eye operation. He preferred to be assisted by one Laurence and not the appellant. The appellant was un-provoked and appeared the aggressor when he subjected the defenceless respondent to assault. The court *a quo* in its reasoning was alive to the need to be conservative in awarding damages and was also alive to the interest of administration of justice. The court did not give a blind eye to the circumstances of both respondent and the appellant. As conceded by the appellant he was employed as a gardener and general hand in a law firm. The award cannot be termed out of reach or excessive. The court *a quo* actually weighed the circumstances of the matter and reduced the claim for general damages from $5000-00 to $3000. A downward reduction by $2000 given the nature of permanent injuries inflicted on the respondent cannot be viewed as a gross misdirection warranting interference by the appeal court. The respondent endured pain and suffering. He endured surgical pain during and after the eye operation and the injuries occasioned permanent disfigurement in the form of a scar and impaired vision. In assessing damages of necessity the duration and intensity of pain fall for consideration. The trial court assessed all these factors inclusive of nature of injuries and circumstances of the case and

came up with a befitting award. The test in assessment of damages is subjective as clearly stated by Professor G. Feltoe in A Guide to the Zimbabwean Law of Delict 3rd ed p 93. The case of *The Minister of Defence & Anor* v *Jackson* 1990(2) ZLR (1) SC at 8 is instructive on considerations for assessing damages. Guidelines enunciated therein include:

1. that since there is no scale to measure pain and suffering the quantum of compensation can only be determined by the broadest consideration
2. that the court has a duty to heed the effect to the decision may have upon the course of awards in future.
3. That no regard is paid to the subjective value of money to the injured person
4. Considerations of awards in other jurisdiction might not be an appropriate guide since guidelines in those jurisdictions, both principal and economic, are so different see also *Gwiri* v *Highfield Bef Pvt Ltd* 2010(1) ZLR p 160.

In *casu* the award by the trial magistrate cannot be said to be extravagant or granted in the abstract as to warrant interference. Due consideration to the circumstances of the case, injuries occasioned to a defenceless and helpless individual in a manner devoid of contributory negligence on the part of the victim certainly called for the award of damages. For pain and suffering due to injuries on the eye, surgical pain and permanent injury occasioned the award of $3000-00 given by the court *a quo* for general damages is fair. It is not in contention that the respondent incurred medical expenses hence the special damages award culminating in the total award of $3 556-00.

In the result the appeal lacks merit and must fail.

It is accordingly ordered that:

The appeal be and is hereby dismissed with costs.

UCHENA J: agrees ……

Gunje and Chasakara, appellant's legal practitioners