



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Personal Injury Cause Number 87 of 2017



BETWEEN:

ALICE KACHISI.....**1ST PLAINTIFF**

KELVIN BALUTI, a minor, by **ALICE KACHISI**, his mother and next friend.....**2ND PLAINTIFF**

AND

UNITED GENERAL INSURANCE COMPANY LIMITED.....**DEFENDANT**

CORAM: **Ms. CM MANDALA: ASSISTANT REGISTRAR**
 Mr Mzumara: Counsel for Plaintiff
 United General Insurance Co Ltd: Defendant
 Mr PW Chitsulo: Court Clerk

ORDER ON ASSESSMENT OF DAMAGES

INTRODUCTION AND BACKGROUND

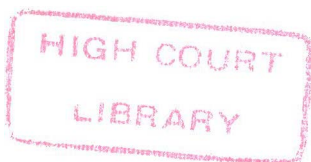
This is an order for assessment of damages pursuant to a default judgment entered on 10th March 2017 by the Honorable Assistant Registrar. It was adjudged that Defendant pays the Plaintiff damages for pain and suffering, damages for loss of amenities, damages for loss of earning capacity, damages for disfigurement, K13,500.00 being cost for police report and medical reports and costs of the action.

The Plaintiff commenced the present action on 2nd February 2017 claiming damages for pain and suffering, loss of amenities, loss of earning capacity, disfigurement, K13,500.00 being cost for police report and medical reports and costs of the action. The claim arose from a road accident that occurred on 4th January 2017 when the Defendant’s insured was driving along Robert Mugabe Highway and upon arrival at Bangwe Secondary School he hit the Plaintiffs as they were walking on the sidewalk.

EVIDENCE

The Plaintiff, Alice Kachisi, comes from Phalombe and lives in Bangwe where she is a hairdresser. She tendered her witness statement as her evidence in chief after it had been amended. The witness statement stated as follows:

1. *I am the 1st plaintiff in this matter and Kelvin Baluti is the 2nd Plaintiff who sues through me and therefore I am competent to make this statement.*



2. *I am a hairdresser and used to work at Naomi's salon in Limbe. My salary was K17,500.00 per month and because of this accident I lost my job and I am jobless.*
3. *On the 4th of January 2017, at around 12:00 hours, I went to pick my kid, the 2nd Plaintiff from school, (Tip top nursery.) On our way home, while walking on the extreme near side of the road and having arrived at Bangwe Secondary School, we were hit by a vehicle registration number LA 9229 belonging to the Defendant.*
4. *We sustained a lot of injuries and were taken to QECH where we got admitted for 1 day for treatment and we have been outpatients till now.*
5. *I sustained the following injuries*
 - a. *Fractures of the 5th metatarsal*
 - b. *Chest injuries*
 - c. *Multiple bruises*
 - d. *Disfigurement (scars)*
 - e. *Severe chest pains*
6. *My child the 2nd plaintiff sustained the following injuries*
 - a. *Multiple bruises*
 - b. *Head injury*
7. *I have chances of developing arthritis. I feel pain to the chest and the leg. I can no longer do business as before and my ability to do household chores and any manual job has been compromised.*
8. *I now tender the Police and Medical reports marked AK1 and AK2 respectively as part of my evidence.*
9. *The 2nd plaintiff feels post traumatic headache. Attached herewith are the Police and Medical Reports marked AK3 and AK4 respectively.*
10. *I state the above verily believing the same to be true to the best of my knowledge, information and belief.*

Dated this 24th day of March 2017

(signed)

ALICE KACHISI

The 1st Plaintiff tendered two police reports, however, the court will disregard them as the police report bears evidence to liability and not to injuries sustained by a Plaintiff.

The 1st Plaintiff tendered a medical report from Queen Elizabeth Central Hospital marked AK2 in the assessment bundle. It stated: "Age: 24. Date admitted to hospital: 04-01-2017, date discharged from hospital: 05-01-2017; Treated as an outpatient from: 05-01-2017 to Now; Nature of injuries: 'fracture base of fifth metatarsal, blunt chest injury and multiple bruises' Name of the doctor who attended the above-named person: 'Orthopedic team'. All clinical analyses made: 'Head to toe full physical examination done.' Medical treatment offered: 'pain killers.'; Surgical operations performed were 'wound cleaning and dressing, Plaster of Paris applied' Results: 'on treatment non-weight bearing'

Possibility of developing arthritis: *Likely*. Has the limb shortened? *'No'* Permanent incapacity: *likely*; *The patient will be able to perform previous job and manual work with difficulty."*

The 1st Plaintiff also tendered a medical report marked AK4 which states: "Age: 3. Date admitted to hospital: 04-01-2017, date discharged from hospital: 05-01-2017; Treated as an outpatient from: 5-01-2017 to; Nature of injuries: *'multiple bruises and mild head injury'* Name of the doctor who attended the above-named person: *'Orthopedic team'*. All clinical analyses made: *'Head to toe full physical examination done.'* Medical treatment offered: *'pain killers.'*; Surgical operations performed were *'wound cleaning and dressing'* Results: *'Improved'* Possibility of developing arthritis: *No*. Has the limb shortened? *'No'* Permanent incapacity: *likely*; Further remarks: *Likely post traumatic ... behavior change."*

SUBMISSIONS BY COUNSEL FOR THE PLAINTIFF

Counsel for the Plaintiff filed written submissions for the Court's consideration, he cited the following comparable awards (Court selected only those that were comparable to the facts herein):

- ***Chilembwe Phiri v General Alliance Insurance Company Limited*** Personal Injury Cause Number 350 of 2012 where the Plaintiff was awarded K7,000,000.00 on 19th April 2013 as damages for pain and suffering and loss of amenities of life for a fracture between the ankle and knee on the right leg, a fracture and dislocation on the left ankle and head injuries.
- ***Rose Chipala v Prime Insurance Company Limited*** Personal Injury Cause Number 472 of 2013 where on 13th October 2015 the Plaintiff was awarded the sum of MK4,950,000.00 as damages for pain and suffering, loss of amenities and disfigurement for a fracture of the right femur, swollen right ankle and bruises on the face.

Counsel for the Plaintiff submitted that MK3,500,000.00 be awarded to the 1st Plaintiff for pain and suffering, loss of amenities and loss of earning capacity and MK700,000.00 be awarded for disfigurement. A further submission was made that the 2nd Plaintiff be awarded MK1,000,000.00 for pain and suffering and loss of amenities of life and MK700,000.00 be awarded for disfigurement.

THE LAW ON ASSESSMENT OF DAMAGES

The High Court in ***Ngosi t/a Mzumbamzumba Enterprises v H Amosi Transport Co Ltd*** [1992] 15 MLR 370 (HC) set the basis for assessment of damages:

'Assessment of damages.....presupposes that damages have been proved. The only matter that remains is the amount or value of the damages.'

The rule is that prior to assessment, the injured party has provided proof of damage sustained – ***Yanu-Yanu Co Ltd v Mbewe*** (SCA) 11 MLR 405. Even in the face of difficulties in assessing damages, the Plaintiff is not disentitled to compensation – ***Mkumuka v Mphande*** (HC) 7 MLR 425.

The cardinal principle in awarding damages is '*restitutio in integrum*' which means, in so far as money can do it, the law will endeavour to place the injured person in the same situation as he was before the injury was sustained – **Halsbury's Laws of England** 3rd Ed. Vol. II p.233 para 400 .

This principle was further enunciated in **Livingstone v Raywards Coal Co** (1880) 5 App Cas 25 at 39, where Lord Blackburn said:

'...where any injury is to be compensated by damages, in settling the sum to be given for reparation you should as nearly as possible get at the sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been in had he not sustained the wrong for which he is now getting his compensation or reparation.'

The law distinguishes general damages and special damages as follows – general damages are such as the law will presume to be the direct natural or probable consequence of the action complained of. Special damages, on the other hand, are such as the law will not infer from the nature of the course **Stros Bucks Aktie Bolag v Hutchinson** (1905) AC 515. In determining the natural consequences, the court considers if the loss is one which any other claimant in a like situation will suffer – **McGregor on Damages** p23 para 1-036.

Special damages must be specifically pleaded and must also be strictly proved - **Govati v Manica Freight Services (Mal) Limited** [1993] 16(2) MLR 521 (HC). A Plaintiff who claims special damages must therefore adduce evidence or facts which give satisfactory proof of the actual loss he or she alleges to have incurred. Where documents filed by the Plaintiff fail to meet this strict proof then special damages are not awarded – **Wood Industries Corporation Ltd v Malawi Railways Ltd** [1991] 14 MLR 516.

Although perfect compensation is impossible, what the plaintiff should get is fair and adequate compensation - **British Commission v Gourley** (1956) AC 185. Since it is difficult to assess damages involving monetary loss, courts resort to awarding conventional figures guided by awards made in similar cases and also taking into account the money value. Lord Morris buttresses this contention in **West v Shepherd** (1964) AC 326 at 346 where he states: '*money cannot renew a physical frame that has been battered and shattered. All judges and courts can do is to award a sum which must be regarded as giving reasonable compensation.*'

The court bears in mind the sentiments laid out in **Steve Kasambwe v SRK Consulting (BT) Limited** Personal Injury Cause Number 322 of 2014 (unreported):

'At times, the court is faced with situations where the comparative cases have been rendered obsolete because of the devaluation of currency and inflation. It would not achieve justice if the court insisted on the same level of award as was obtaining in the previous cases. In such situation, when deciding the new cases, the court must take into account the life index, i.e. cost of living and the rate of inflation and the drop-in value of the currency. The court must therefore not necessarily follow the previous awards but award a higher sum than the previous cases.'

COMPENSATION

The Plaintiffs were hit as they were walking on the side of the road. The 1st Plaintiff sustained a fracture base of fifth metatarsal, blunt chest injury and multiple bruises while the 2nd Plaintiff sustained multiple bruises and mild head injury.

Pain and Suffering

The word 'pain' connotes that which is immediately felt upon the nerves and brain, be it directly related to the accident or resulting from medical treatment necessitated by the accident while 'suffering' includes fright, fear of future disability, humiliation, embarrassment and sickness. See: ***Ian Goldrein et al, Personal Injury Litigation, Practice and Precedents*** (Butterworths, 1985) 8 and ***City of Blantyre v Sagawa*** [1993] 16(1) MLR 67 (SCA).

The Plaintiffs herein were walking on the side of the road when they were hit by the Defendant's insured. This must have caused some shock to the Plaintiffs as they were on the sidewalk where pedestrians do not expect to get hit by cars. Further, the Plaintiffs sustained injuries that required them to spend a night at Queen Elizabeth Central Hospital (QECH) for treatment. The 1st Plaintiff had to have her wounds cleaned and a plaster of Paris applied in order to treat her fracture. While the 2nd Plaintiff, who is only three years of age, sustained multiple bruises and mild head injury. The 2nd Plaintiff, because of his youth, must have experienced a lot of pain and considerable discomfort and confusion pursuant to the accident.

For these reasons, this court believes the sum of **MK1,500,000.00** as damages for pain and suffering will adequately compensate the 1st Plaintiff and the sum of **MK1,000,000.00** will adequately compensate the 2nd Plaintiff.

Loss of Amenities

The expression 'loss of amenities of life' simply means loss of faculties of pleasures of life resulting from one's injuries. Damages for loss of amenities of life are awarded for the fact that the plaintiff is simply deprived of the pleasures of life, which amounts to a substantial loss, whether the plaintiff is aware of the loss or not. See: ***Poh Choo v Camden and Islington Area Health Authority*** [1979] 2 All ER 910 and ***City of Blantyre v Sagawa*** [1993] 16(1) MLR 67 (SCA) at 72.

The medical report states that the 1st Plaintiff has the possibility of developing arthritis and that the 1st Plaintiff is likely to be permanently incapacitated but could not determine the extent. The medical report further states that the 1st Plaintiff would be able to perform her previous job and manual work with difficulties. Ergo, the 1st Plaintiff will be able to perform tasks. The Plaintiff did not explain the impact of the injuries through her oral evidence however, she states through her witness statement that she has chances of developing arthritis, she feels pain to the chest and leg and she can no longer do business as before. Merely stating that she can no longer do business as before and that her ability to do household chores and any manual job has been compromised is not enough. A Plaintiff must clearly express how her life has been affected and not just ride on the injury as a reason not to apply herself as she did before. This court does not doubt that the 1st Plaintiff has lost some amenities, however, there is not enough

evidence as to how much. For these reasons, the 1st Plaintiff will be awarded the sum of **MK350,000.00** as damages for loss of amenities of life.

The 2nd Plaintiff received a similar diagnosis in terms of permanent incapacity as well as a diagnosis that the 2nd Plaintiff was likely to experience post traumatic behavioural change. This is something that the 2nd Plaintiff will have to live with for the rest of his life having acquired the said ailment at such a youthful age. For these considerations, the 2nd Plaintiff is awarded the sum of **MK1,000,000.00** for loss of amenities of life.

Disfigurement

In the matter of **James Chaika v NICO General Insurance Co Ltd** - the Honourable Justice Potani stated that *'Disfigurement is not a matter to be taken lightly and casually as it is something that one has to permanently live with. In this case, the plaintiff will most likely walk with a limp for the rest of his life which is not a pleasant thing.'* In this case, the Plaintiff was awarded the sum of MK300,000.00 for disfigurement.

The court was not given a chance to inspect the Plaintiffs on the areas where they were injured nor was any oral or written evidence adduced to show the extent of the disfigurement that the Plaintiffs sustained. It will therefore be difficult for the court to make an award under this head as no evidence was adduced to prove that the Plaintiffs were disfigured as a result of the accident. No award will be made under this head.

Loss of Earning Capacity

In assessment of damages for loss of earning capacity, the courts have developed a method for assessing the amount of pecuniary benefit that a plaintiff could reasonably expect to have earned. This, understanding that a claim for loss of earning capacity is grouped in the category of heads of pecuniary loss; and this includes future earning capacity. In this regard, the plaintiff can recover full compensation for the pecuniary loss that she anticipates to suffer. As Lord Scarman put the matter to rest in **Pickett –v- British Rail Engineering** [1980] A. C. 136 at 168B-D, “[b]ut, when a judge is assessing damages for pecuniary loss, the principle of full compensation can properly be applied.” See also **Ulemu Simoko v Attorney General** Civil Cause Number 755 of 2011

In the present case, the plaintiff has not proved how much she was earning before the accident, or indeed what she is earning at present. No evidence was led to show that the injuries sustained by the Plaintiff would indeed result in loss of earning capacity save for a vague statement contained in the Plaintiff's witness statement – *'I can no longer do business as before and my ability to do household chores and any manual job has been compromised.'* This gives very little to no guidance to the court as to the effect of the injury on the Plaintiff's earning capacity. And, as Mwaungulu rightly observed in **Nangwiya**:

“The next hurdle is to quantify the loss. Although it is difficult to come up with a mathematical formula, courts have regard to the plaintiff's earnings. Courts evaluate the chance. They then come with an award. The plaintiff's earnings are K946-00 per annum after deducting tax. He is twenty-four. He would be in employment up to the age of fifty-five years. Whatever the award, it must take into account that the award is global and it will earn income for the period

in which the plaintiff could have worked. I award the plaintiff the sum of K3 000-00 for loss of earning capacity.”

The plaintiff in the present case did not present evidence of her earnings before the accident that would assist compute what amounts she would have made if she had continued uninjured. I am faced, as it is, with real difficulty that I have little or indeed no material upon which to assess future earning capacity. In the present case, and given the authorities, I am content to award MK250, 000.00 as damages for loss of earning capacity.

Special Damages

Cost of police and medical reports are special damages and must be specifically pleaded and proved as required by law – ***Govati v Manica Freight Services (Mal) Limited*** [1993] 16(2) MLR 521 (HC). A Plaintiff who claims special damages must therefore adduce evidence or facts which give satisfactory proof of the actual loss he or she alleges to have incurred.

The Default Judgment entered specifically states that the sum of MK13,500.00 be awarded to the Plaintiffs being special damages for the Police and Medical Reports. This court therefore awards the sum of MK13,500.00 as special damages for the acquisition of Police and Medical Reports.

DISPOSAL

The 1st Plaintiff is therefore awarded MK1,500,000.00 being damages for pain and suffering, MK350,000.00 for loss of amenities of life and K250,000.00 being damages for loss of earning capacity and nothing for disfigurement and MK13,500.00 being special damages. The 1st Plaintiff's total award is MK2,113,500.00.

The 2nd Plaintiff is awarded MK1,000,000.00 as damages for pain and suffering and MK1,000,000.00 as damages for loss of amenities of life. The 2nd Plaintiff's total award is MK2,000,000.00. Costs to be taxed.

Each party is at liberty to appeal to the Supreme Court of Appeal within the requisite time frames.

Ordered in Chambers on the 14th day of July 2017 at Chichiri, Blantyre



CM Mandala

ASSISTANT REGISTRAR