



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NUMBER 213 of 2015

BETWEEN:

JUSTIN MAKWANGWALA.....PLAINTIFF

AND

HENDERSON VAN GUILDER.....1ST DEFENDANT

JUSTICE KATIKA t/a MCHINJI BOYS.....2ND DEFENDANT

PRIME INSURANCE COMPANY LIMITED.....3RD DEFENDANT

CORAM:	CM MANDALA:	ASSISTANT REGISTRAR
	AM Malijani:	Counsel for Plaintiff
	Banda & Associates:	Legal Practitioners for the 1 st and 2 nd Defendants
	M&M Global:	Legal Practitioners for the 3 rd Defendant
	Chitsulo:	Court Clerk

ORDER ON ASSESSMENT OF DAMAGES

INTRODUCTION AND BACKGROUND

This is an order for assessment of damages pursuant to a Consent Order on liability issued on 1st December 2016 by the Honorable Assistant Registrar, Her Honor Kanthambi. In this order, judgment was entered for the Plaintiff against all Defendants; damages were to be agreed by the parties failing which to be assessed by the Court; the 3rd Defendant's liability was limited to the maximum policy limit of K5,000,000.00 and costs to be agreed between the parties, failing which to be taxed by the Court. This court will proceed to determine the quantum of damages to be awarded to the Plaintiff.

EVIDENCE

Mr Justin Makwangwala told the Court that he was employed before he sustained the injury and that he is now unemployed. At that time, Makwangwala was working for Top Range as a security guard. He made K20,000.00 per month but did not have evidence to that effect as they would receive their salaries by hand. The Plaintiff adopted his witness statement as part of his evidence and it states:

*I am **JUSTIN MAKWANGWALA** of c/o Ndunde CCAP School, Private Bag 72, Chiradzulu, in the Republic of Malawi and state as follows:*



1. *I am an adult.*
2. *I am the Plaintiff in this matter and brought this matter in my own right.*
3. *On or about 14th April, 2013 I was a pedal cyclist riding a bicycle from the direction of Kamba robots heading towards Kapeni Robots.*
4. *A motor vehicle Scania Truck Reg. No. BLK 3272 driven by the 1st Defendant was coming from the opposite direction.*
5. *Suddenly, after crossing Naperi Bridge, the said motor vehicle left its lane on the left and hit me on my side on the other side of the road.*
6. *As a result of the accident I suffered very serious and despicable injuries. I sustained a crushed right leg leading to amputation of the leg. I also suffered an open fracture of the right humerus. I have a wrist drop. I was admitted to Queen Elizabeth Central Hospital twice from 14th April to 1st July 2013 and also from 9th January to 28th January 2014. It was during my second admission that my right leg was amputated after it had developed an infection in the bone. My permanent incapacity was assessed at 75%. I exhibit hereto a copy of a medical report marked "JM1". (see copy of medical report)*
7. *As a result of the accident, I lost the right lower leg and I cannot walk without the aid of clutches. My right arm has also been deformed and I cannot do any work. I am permanently crippled and physically disfigured and disabled. I cannot do any work and I have been rendered totally incapacitated.*

In his oral evidence, the Plaintiff explained the injuries that he sustained. He told the Court that he sustained injuries on his head – the scalp and received stitches. The Plaintiff had trouble with the wounds and the Court noted visible scarring on the scalp and hair loss around the scar.

The Plaintiff also sustained a fracture on his right hand. The Court noted visible scarring and severe deformity of the hand. The bone broke and could not meet as it healed. The doctors wanted to place metal rods in order to straighten the arm but decided against it since the vein in the arm had been severed anyway, and placing the rods would not have any effect on functionality of the arm. The bone grew on top of the other bone. The court saw the scarring and could see the protruding bone on the Plaintiff's arm.

The Plaintiff's left knee also sustained an injury and the scar was visible. The Plaintiff cannot kneel on the injured knee, and any contact with the knee startles the plaintiff and causes him pain.

The Plaintiff also fractured his right leg and metal rods were placed in order for it to heal. As the bone was growing back into place, the rods were removed and the leg was placed in a Plaster of Paris. On the Plaintiff's final check-up at the hospital he was told that he had developed an infection in the leg and that his leg would be amputated. The leg was amputated in December.

Since the Plaintiff sustained the injury he has not been able to find employment to support his family. He also withstands a lot of pain every single day and this brings him down because he cannot do anything for himself. The Plaintiff's evidence was not opposed.

SUBMISSIONS BY COUNSEL FOR THE PLAINTIFF

Counsel for the Plaintiff filed written submissions in support of the application. These submissions laid out the comparable awards which I will discuss subsequently. I should commend Counsel for the Plaintiff for the copies of the judgments that he furnished to the court.

ASSESSMENT GUIDELINES

Damages for personal injuries are awarded for the plaintiff's both pecuniary and non-pecuniary losses. The pecuniary losses include the loss of earnings and other gains, which the plaintiff would have made had he not been injured, and the medical and other expenses to which he is put as a result of the injury. The non-pecuniary losses include pain and suffering, loss of amenities of life and loss of expectation of life. The principle underlining the award of damages is to compensate the injured party as nearly as possible as money can do it. See **Cassel and Co v Broom** [1972] AC 1027. See also **Tembo v City of Blantyre and The National Insurance Co Ltd** – Civil Cause No. 1355 of 1994 (unreported).

In the case of **Tionge Zuze (a minor, through A.S. Zuze) v Mrs Hilda Chingwalu**, Nyirenda AR, cited the case of **HQ Chidule v Medi MSCA** 12 of 1993 where it was stated that; *"in assessing damages for pain and suffering, the court must consider the pain which the particular plaintiff has suffered because the circumstances of the particular plaintiff are bound to have a decisive effect in the assessment of damages...Where a claim relates to non-monetary loss in respect of which general damages are recoverable it is not possible to quantify the loss in monetary terms with mathematical precision. In such cases courts use decided cases of a comparable nature to arrive at an award."*

In the case of **Malamulo Hospital (The Registered Trustees) v Mangani** [1996] MLR 486 (SCA), it was stated that: *"It is, therefore, recognised by the courts that awards of comparable injuries should be comparable. This is done by looking at previous awards of similar cases and adjusting the award according to the fall of the value of the money."*

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.'

The Plaintiff is claiming damages for pain, suffering and loss of amenities of life; damages for deformity damages for loss of future earnings; special damages as pleaded, cost of obtaining a prosthetic leg and its maintenance and costs of the action.

This court will not make an award for the special damages and cost of prosthetic leg and its maintenance as no evidence was led to prove the same. 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.

Counsel for the Plaintiff submitted numerous comparable awards for the court to use. The court will only highlight the citations whose copies were provided to the court. These are:

- *Anastazia Elias & Lanjesi Watson (suing as father and next friend of Yohane Watson, a minor) v Mulli Brothers Limited* High Court, Zomba District Registry, Civil Cause Number 389 of 2011 where the 1st Plaintiff sustained a crushed leg, amputation of the right leg and bruises on the face and hands. The Plaintiff was awarded the sum of MK10,504,500.00 as compensation being the balance on the sum arrived at by the court after payment by the insurance of the maximum money under the policy. The total sum awarded was MK15,504,500.00.
- *Stanford Malimau v Mota Engil* High Court, Principal Registry, Civil Cause Number 206 of 2011 where the Plaintiff sustained a comminute fracture (where a bone is broken, splintered or crushed), the leg was amputated 10cm below the knee, wound was stitched and dressed with bandages. The Plaintiff went to the hospital after four days and spent three days in hospital. He was discharged 10 days later. After the injury, the plaintiff uses clutches, cannot walk long distances, cannot ride a bicycle and cannot farm. The Assistant Registrar awarded him MK10,000,000.00 for pain and suffering and loss of amenities of life and MK800,000.00 for deformity on 17th June 2011.

Counsel for the Plaintiff proposes a quantum of MK20,000,000.00 for pain, suffering and loss of amenities and MK5,000,000.00 for disfigurement as adequate compensation for the Plaintiff.

COMPENSATION

The court notes that Counsel for the Plaintiff selected cases where the injuries sustained were similar to those sustained by the Plaintiff in the present matter. For this, I am indebted to Counsel for citations that are on the point while acknowledging that no two cases can be exactly the same.

The Plaintiff sustained the following injuries: a crushed right leg leading to amputation of the leg, open fracture of the right humerus, a wrist drop. The Plaintiff was admitted to Queen Elizabeth Central Hospital twice from 14th April to 1st July 2013 and also from 9th January to 28th January 2014 – a total of 95 days (over 3 months). During the second admission, the right leg was amputated.

Permanent incapacity was assessed at 75%. After the accident, the Plaintiff cannot walk without the aid of clutches. The right arm has also been deformed and he cannot do any work.

Pain and Suffering and Loss of Amenities of Life

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 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.

As stated the Plaintiff claims a total sum of MK25,000,000.00 for the injuries.

In this case, the Plaintiffs injuries are very serious. The Plaintiff was subjected to long stays in the hospital and had to withstand some painful procedures. It cannot be doubted that the Plaintiff had to endure a lot of pain and was constantly apprehensive of what the result of his injuries would be. And indeed, his fears were substantiated when his leg was amputated and his arm could not be repaired nor could it function. In the *Elias Case*, the Plaintiff therein sustained a crushed leg which was eventually amputated and bruises on the face and arms. The Plaintiff therein was awarded the sum of MK15,504,500.00 as damages for pain and suffering. In the present case, however, the Plaintiff sustained more serious injuries than those sustained by the Plaintiff in the *Elias Case*. For these reasons, the Plaintiff herein is awarded the sum of MK5,000,000.00 as damages for pain and suffering

Further, the Plaintiff has now been confined to the use of clutches for his mobility, he cannot go back to work as a security guard and therefore has no source of livelihood. Further, the plaintiff cannot walk and has to depend on other people to help him on a daily basis. He is dependent on painkillers as he is in constant pain on a daily basis. This also affects the Plaintiff mentally and he stated that he spends a lot of time thinking about his injuries and his lost ability to support his family. The Plaintiff is therefore awarded the sum of MK3,000,000.00 as damages for loss of amenities of life.

Deformity

Counsel for the Plaintiff cited *James Chaika v NICO General Insurance Co Ltd* (cited above) where 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.' The Plaintiff was awarded the sum of MK300,000 for disfigurement.

The court in this matter appreciates the deformity and disfigurement that the Plaintiff herein will have to live with. His leg was amputated, and his hand is severely deformed. He has no use of his fingers on that hand and has terrible scarring on that hand as well, further the Plaintiff has scars on his other leg, face and scalp. There are a lot of visible defects that can be seen by a person who merely looks at the Plaintiff. In line with the award made in **Malimau v MotaEngil** (cited above) of MK800,000.00 for deformity after amputation of the leg, this court believes the sum of MK1,000,000.00 will adequately compensate the Plaintiff for the disfigurement he has to live with.

DISPOSAL

The Plaintiff is therefore awarded MK5,000,000.00 for pain and suffering, MK3,000,000 for loss of amenities of life, MK1,000,000.00 for disfigurement and costs of the action (to be taxed if not agreed).

Compensation totals a global sum of MK9,000,000.00.

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

Ordered in Chambers on the 23rd day of February 2017 at Chichiri, Blantyre



CM Mandala

ASSISTANT REGISTRAR