



THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO.1070 OF 2015
BETWEEN

Kelvin Banda..... Plaintiff

AND

Gift Gerson..... 1st Defendant

General alliance Insurance Co. Ltd.....2nd Defendant

CORAM: *Madalitso Khoswe Chimwaza* *Assistant Registrar*
 Taumbe, *Counsel for the plaintiff*
 Respondents not present but duly served with notice
 Mpandaguta *Court Clerk*

ORDER ON ASSESSMENT OF DAMAGES

Introduction:

This is an order for assessment of damages following a summary judgment entered in favour of the plaintiff on 15th March 2017. The plaintiff commenced action against the defendants claiming damages for pain and suffering, loss of amenities of life disfigurement special damages and costs of the action.

The brief facts are that on or about 15th June 2015, around 7:30hours the 1st defendant was driving a motor vehicle freight liner Reg No. SA4105/BL 8111 along Chendawaka road from the direction of Kanengo- Area 25 heading towards Kanengo Puma Filling station. Upon arrival at Nankhaka river he hit a motor vehicle Reg. No. TO1637 Toyota Stallion being driven by Mr. Nelson Kamwana who was driving towards the same direction in the queue. As a result this vehicle rolled and hit another vehicle Reg no. BR 9694 Toyota Platz driven by Mr. Aggrey Gama which also hit another vehicle Reg. No. BP 950 Toyota Hilux driven by Mr. Sterdom Phiri.

The plaintiff was a passenger in the vehicle Reg No. TO 1637 Toyota Stallion pick up. As a result of the accident the plaintiff sustained bruises on the forehead and multiple cut wounds in the head.

Issue for determination

What is the quantum of damages to be awarded

The Law on Damages

In tort, remedies for damages are available to a person who suffers injury as a result of negligence of another party. Such damages are awarded to compensate the plaintiff in so far as money can do (see *Nakununkhe v Paulo Chakhumbira and Attorney General Civil* cause no.357 of 1997 (Unreported). As was held in the case of *Namwiyo v Semu et al* [1993] 16 (1) MLR 369, in awarding compensation, the court attempts to put the plaintiff in the position he would have been but for the injury or damage arising from the tort.

It is trite law however, that it is impossible to use money to restore to a condition of a physical wholeness of a person who has grievous personal injury. However courts award a sum which is regarded as giving a fair and reasonable compensation. *Zaina Chapala vs dwwangwa Sugar Corporation Civil Cause No. 435 of 1998*.

The non-percuniary heads of damages are pain and suffering, loss of amenities of life, disfigurement and loss of expectation of life. Generally it is difficult to equate money to pain and suffering and loss of amenities and any arithmetic calculations to establish the exact sum of money which would represent such a thing as pain and suffering which a person has undergone by reason of the accident. It is for this difficulty that the courts award conventional sums for pain and suffering and loss of amenities of life. See in *Fuhri vs Jones* (1979)AC 199.

For this reason courts tend to look at comparable case law. In the case of *Richard Kalunga vs Ben Phiri & Prime Insurance Co. Ltd*, Civil Cause No. 4165 of 2005, Kamwambe J. stated as follows:

“ courts tend to look at damages awarded in similar cases so as to maintain a semblance of consistence there ought to be evidence adduced to indicate that the present case has similarity to the previous one referred to. It is not enough just to say in both cases the plaintiff sustained a fracture on the femur. One should go further to say in both cases it was the right femur involved which was the most active leg and that the plaintiff was in plaster of paris for almost six months... the tendency to refer to cases which suits your claim just for the sake of it without stating how the cases are similar should be discouraged.”

Pain and Suffering and Loss of amenities of life

Pain is used to suggest physical experience of pain caused by and consequent upon the injury while suffering relates to the mental elements anxiety, fear, embarrassment and the like. On the other hand, loss of amenities of life embraces all that which reduces the plaintiff's enjoyment of life, his deprivation of amenity whether he is aware of it or not (See *City of Blantyre v Sagawa* [1993] 16 (1) MLR 67). In *Kanyoni v Attorney General* [1990] 13 MLR 169, 171 the court held that loss of amenities of life must include the loss of all the things the claimant used to be or to do, see, and experience-they need not be of leisurely nature at all. In the case of *Manley v Rugby Portland Cement and Company* [1950] No 286 (reported in Kemp and Kemp, “Quantum of Damages,” Volume 1 2nd edition 1961 at p.2640) Birkett, LJ had this to say:

"There is a head of damages which is sometimes called loss of amenities; the man-made blind by accident will no longer be able to see familiar things he has seen all his life, the man has both legs removed will never again go upon his walking excursions, things of that kind-loss of amenities."

Although pain and suffering and loss of amenities for life are distinct heads courts mostly do consider them together for purposes of quantum and make a single award under those heads. (See *Henry Manyowa v. Phiri and Prime Insurance Co. Ltd* Personal Injury Cause No. 139/2012; *Andrew Katola v. Prime Insurance Co Ltd* Civil Cause No. 2807/2009).

Comparable cases:

Counsel cited the cases of *Malichi vs Prime Insurance Ltd* Civil cause No. 2613/2009 in which the court awarded a sum of K4,500,000.00 to the plaintiff in 2012 who suffered a fracture of the left tibia, cut wound on scalp and bruises on face with swollen head.

In the case of *Manyowa vs Phiri and Another* Civil cause No. 139 of 2012, the court awarded K2,800,000.00 for pain suffering and loss of amenities of life in 2013 to the plaintiff who suffered an open fracture of the left tibia and head injuries.

In the case of *Kayira vs Nomanda and another* Personal injury case No. 1909/2010 the court awarded for pain and suffering and loss of amenities of life a sum of k2,500,000.00 in 2011 to a plaintiff who suffered a fractured right femur.

Reverting to the case at hand the plaintiff suffered bruises on the forehead and multiple cut wounds in the head. The cited cases the plaintiffs had suffered more than the plaintiff in the present matter therefore they are not exactly similar. The condition of the plaintiff is not as grievous as in the cited case authorities. However the court will consider the time when those awards were made and the devaluation of the Malawi Kwacha.

For pain and suffering and loss of amenities of life the plaintiff is awarded K3,000,000.00. For disfigurement the plaintiff is awarded K800,000. The plaintiff is also awarded the cost for police report and medical report in the sum of K6,000.00.

Order:

Therefore the court makes a total award of K3,806,000.00 plus costs of this action to be taxed if not agreed by the parties.

Right of Appeal

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

Made in Chambers this 9th day of November, 2017



Madalitso K. Chimwaza

ASSISTANT REGISTRAR