



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CASE NO. 222 OF 2017

BETWEEN

WILLARD MAKOKA.....CLAIMANT

AND

GEORGE MCHIMIKA.....1ST DEFENDANT

UNITED GENERAL INSURANCE COMPANY LIMITED.....2ND DEFENDANT

Coram: **WYSON CHAMDIMBA NKHATA (AR)**

Khan- of Counsel for the plaintiff

Mzembe- of Counsel for the defendant

Chitsulo- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

Through a writ of summons that was issued by the court on the 3rd of April 2017, the claimant commenced these proceedings claiming damages for pain and suffering, loss of amenities of life, disfigurement, special damages and costs of this action. This is the court's order on assessment of damages pursuant to a consent judgment entered by the parties in favour of the claimant. The issue of the Defendant's liability having been settled by the said judgment, the duty placed upon this court was to determine the reasonable quantum of damages that would adequately compensate the claimants for the losses and damages herein.

The parties appeared before this court on assessment of damages on the 19th of September 2018. The claimant was the sole witness for his case. He adopted his witness statement in which he averred that on the material day he was cycling his pedal cycle and was hit by motor cycle registration number NU8294 Yamaha DT which was by ridden by the 1st defendant. He further averred that as a result of the accident he sustained a fracture of the medial malleolar, deep cuts on the head and multiple soft tissue injuries. He was consequently taken to Zomba Central Hospital where he was applied Plaster of Paris and sutured below the knee. He tendered a Police Report which the court marked EXP2. He further tendered x-ray photos which the court marked EXP3. He also stated that because of the injuries, he has a possibility of developing arthritis and his ability to do sports has been affected. He also stated that his permanent incapacity has been pegged at 10%. He therefore claims compensation for the injuries from the defendants and K13,500.00 being cost of procuring a Police Report and a Medical Report.

In cross-examination, he stated that the accident occurred on the 24th of February and the same was indicated on the statement of case and his witness statement. He stated that he fell on the ground and people help him up as he could not walk. He was helped unto a motor cycle and taken to the hospital. He stated that police gave him a letter to go the police and that the police saw the injuries that he had sustained. He further stated that at the hospital he was sutured on the head and given medicine. He was cast on Plaster of Paris and visited the hospital again after a month. He got the Medical report on the 3rd of March and was escorted by a lawyer whom he cannot tell whether he was an agent or not. He stated that he was a Junior Certificate of Examinations holder and had written the witness statement himself. He did not know what the medial malleolar was. He stated that he was given Declofenac. He stated that he did not have general receipts for the medical report and the police report.

With this evidence, the claimants closed their case. The defendants on the other hand, opted not to parade witnesses and both parties undertook to file written submissions which they did. I must acknowledge that the submissions went a long way in informing the court in its decision. Suffice to say for now that as aforementioned this court has been called upon to determine the quantum of damages in the circumstances.

With that, I must state that the law generally provides that a person who suffers bodily injuries or losses due to the negligence of another is entitled to recover damages. The fundamental principle which underlines the whole law of damages is that the damages to be recovered must, in money terms, be no more and no less than the Plaintiff's actual loss. The principle was laid down in numerous case authorities more particularly by **Lord Blackburn** in the case of *Livingstone v. Rawyards Coal Company* (1880) 4 **AC 25** in the following terms:

where any injury or loss is to be compensated by damages, in settling a sum of money to be given as damages, 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 loss, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

However, it ought to be borne in mind that it is not possible to quantify damages for pain and suffering, loss of amenities and deformity as claimed in such matters with mathematical precision. As a result, courts use decided cases of comparable nature to arrive at awards. That ensures some degree of consistency and uniformity in cases of a broadly similar nature: See **Wright -vs- British Railways Board** [1983] 2 A.C. 773, and **Kalinda -vs- Attorney General** [1992] 15 M.L.R. 170 at p.172. As such this court will have recourse to comparable cases to arrive at the appropriate quantum of damages for the claimants.

In the present matter, Counsel for the claimant is proposing that this court should consider making an award of K8,000,000.00 as damages for pain and suffering, loss of amenities and disfigurement. The proposal is with respect to the fracture of the medial malleolar, deep cuts on the head and multiple soft tissue injuries. Counsel for the claimant thus cites the following cases:

Patricia Demesani Bannet v Isaac Lizimba and Bernard Painda Jeremani Civil Cause Number 811 of 2011, where the plaintiff suffered a sprained right ankle, multiple bruises over the body and face. The court awarded the plaintiff K2,000,000.00 for the injuries suffered. The award was made on 20 July 2012.

Wisted Chileka vs Prime Insurance Company Ltd: Personal injury case number 247 of 2014 in which the plaintiff suffered a head injury, painful back and bruises on his leg and had problems when walking. Court on 26th June, 2014 awarded the plaintiff the sum of K3, 800,000.00 as damages for pain and suffering.

Praise Chitete (Minor, suing through Clara Nkhata, next friend) v Yotam M'dala and Prime Insurance Company Limited, Civil Cause Number 282 of 2014 where the Respondent was hit by a motor vehicle and she sustained a fractured radius, fractured ulna and multiple bruises on the left hand. The Plaintiff's incapacity was pegged at 25%, Plaster of Paris was applied and developed arthritis. The Assistant Registrar awarded her the sum of MK4,800,000.00 on 13 November 2014.

Friday Mtelera versus Nenani Misolo and Prime Insurance Company Limited Personal Injury Cause Number 530 of 2015 where the Plaintiff sustained a fracture of the knee joint of the right leg, fracture of the right lower leg, fracture of the ankle of the right leg, a cut on the left leg and a cut and bruises on the

right elbow. The Plaintiff was also hospitalized for 27 days. This Court awarded the Plaintiff therein the sum of MK5,000,000.00 as damages for pain and suffering, loss of amenities and disfigurement.

Joseph Danger v Prime Insurance Insurance Company Limited Civil Cause No. 1760 of 2010 in which the claimant sustained a fracture of the leg, deep cut wound on the knee, painful leg, bruises on both arms and at the back and a cut wound on the forehead. An award of K6,500,000.00 was made on 18th of April 2013.

Chilembwe Phiri v General Alliance Insurance Limited, Personal Injury Cause Number 350 of 2012 (unrep) in which the court on the 19th of April 2013 awarded the sum of K7,000,000.00 as damages for pain and suffering, loss of amenities of life and disfigurement where the plaintiff sustained fractures on both legs.

Chibwana v Prime Insurance Company Ltd Civil Cause Number 117 of 2009 where on 21st October 2009 the Plaintiff was awarded the sum of MK6,500,000.00 as damages for personal injuries having sustained a cut wound on the left elbow that was not healing properly and severe head injuries.

On the other hand, Counsel for the defendants is of the view that the claimant's action herein must fail on the basis that he has failed to prove his damages as his testimony and documents cannot be relied upon. He contends that the same are riddled with inconsistencies and untruths. In support of this, he calls upon the court to consider that the claimant lied in asserting that he authored the witness statement when in fact he did not even know what the meaning of the term *medial malleolar*. He further states that the claimant lied that he was treated by one doctor when in fact the documents he tendered indicated that he was treated by several doctors. He therefore motivates the court to consider the case of **Makwakwa v Nyirenda and Another** (2016) MWHC 536 where the court cites with approval the averments in **Kassam v Lusitania** (1984-1986) 1 MLR 327 by Justice Kambalame stating that:

where a plaintiff claims damages, for him to justify an award of substantial damages, he must satisfy the court both on fact of damages and as to its amount. If he fails to satisfy the court of these, his action is bound to fail.

Nonetheless, Counsel for the defendants is of the view that should the court find that the claimant proved his damages then the court should consider the following cases which he believes are more comparable with the case herein than the cases cited by Counsel for the claimant. He thus cites the following cases:

Aisha Nicks(minor suing through her mother and next of friend, Mary Misomali) v General Alliance Insurance Company Limited Personal Injury Cause No. 540 of 2013 where the plaintiff was

awarded K650,000.00 for pain and suffering and loss of amenities on the 31st of July 2014 after sustaining a deep cut wound on the head, right shoulder, bruises, lacerations and soft tissue injuries.

Kwengwere v Citizen Insurance Company Limited Civil Cause No. 2042 of 2010 where the plaintiff was awarded K300,000.00 for pain and suffering and loss of amenities of life. In this case, the plaintiff sustained soft tissue injuries to her right shoulder, left knee and left leg.

Kamenya v Chitawo and Another, Civil Cause 374 of 2013 where an awarded of K700,000.00 was given for bruises on the left ankle, painful back and left leg. The award was for pain and suffering and loss of amenities of life. This was in 2013.

Patricia Demesani Bannet v Isaac Lizimba and Bernard Painda Jeremani Civil Cause Number 811 of 2011, where the plaintiff suffered a sprained right ankle, multiple bruises over the body and face. The court awarded the plaintiff K2,000,000.00 for the injuries suffered. The award was made on 20 July 2012.

With the foregoing, the question is whether the claimant has proved the damages he is claiming to have suffered. I agree with Counsel for the defendants that his testimony was riddled with inconsistencies and untruths. The claimant tendered documents for instance a medical report which were intended to buttress the injuries he suffered nevertheless during cross-examination it could be noted that he could say one thing while the documents indicated another. Notably, he vehemently denied having been sutured below the knee when the medical report actually indicated that he was sutured below the knee. The claimant indicated that he was given one type of medication when the Health Passport indicated another. All the same, there is still evidence indicating that the claimant sustained a fracture. He tendered a Health Passport which was further supported by x-ray pictures. Essentially, there is still evidence supporting the injuries he is claiming to have suffered. In all fairness, I do not believe this a case the court should make a nominal award as prayed for by Counsel for the defendants. I therefore make a nominal award of K4,500,000.00.

On special damages, it is trite law that they must be specifically pleaded and proved (Refer also to the case of **Phiri v Daud [1992] 15 MLR 404**). The claimant claims the cost of obtaining the medical report and the police report. He stated that he did not have general receipts for the medical report and the police report. To the satisfaction of the court, these special damages have not been proved by the claimant as there are no receipts and some documents from the hospital proving the same and I make no award on the same.

The claimant is granted costs for the hearing on assessment of damages.

DELIVERED IN CHAMBERS THIS 16th DAY OF SEPTEMBER 2018

WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR