



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

Personal Injury Cause Number 1053 of 2010

BETWEEN:

AIAS MECKSON CHIKANDA.....CLAIMANT
AND
PRIME INSURANCE COMPANY LIMITED.....DEFENDANT

CORAM: A KANTHAMI: ASSISTANT REGISTRAR

Mr C Kalua: Counsel for the Plaintiff of Messrs Golden & Law

Mr M Mmeta: Counsel for the Defendant of Messrs M&M Global Law Consultants

Ms J Chilimampunga: Court Clerk

ORDER ON ASSESSMENT OF DAMAGES

INTRODUCTION AND BACKGROUND

This is an order for assessment of damages pursuant to an order delivered on 22nd June 2015 by the Honorable Justice K Nyirenda. The Defendant was found liable and judgment entered in favour of the Plaintiff.

The Plaintiff commenced the present action on 20th May 2010 claiming damages for pain, suffering and loss of amenities of life, special damages and costs of the action. The claim arose from a collision between the Defendant's insured and the Plaintiff along the Blantyre/Zalewa road. The Plaintiff sustained a cut on the forehead, several cuts on the left knee, bruises on the lower legs and a fracture of two ribs.

EVIDENCE

The Plaintiff, Aias Meckson Chikanda, identified and adopted his witness statement as his evidence in chief. It states:

NAME : *Aias Meckson Chikanda*

HOME ADDRESS : *Kuyamba Vilage
T/A Makwangwala
Ntcheu*

POSTAL ADDRESS : *Matindi Private Academy
PO Box 5211
Limbe*

AGE : *34 years*

PHONE : *0999 440 576
0995 780 880
0888 440 576*

I, **AIAS MECKSON CHIKANDA**, state as follows:

1. It was on 1st August 2009 when I boarded a minibus from Lilongwe to Blantyre. When we reached a place called Kaphikamtama, a cyclist who was heading the same direction was hit by a minibus.
2. The minibus fell on its side and move don for about 10 meters and then rolled three times whereby both the minibus and the bicycle got damaged extremely.
3. I sustained a cut on the forehead, several cuts on the left knee, and bruises on the lower legs (both legs). I also sustained a fracture of two ribs.
4. I have not healed. I have severe chest pains, recurrent headache and blurred vision. I am unable to see far and I was recommended by a doctor to purchase glasses which were quoted at K15, 500.00. Sometimes I experience protruding of the anus.
5. I work as a teacher at Matindi Private Academy. Now I work with difficulties because when I raise up my hand to write on the board, I feel pain in the chest, I cannot read properly because of the recurrent headache and blurred vision.
6. As a result of my problems, the number of subjects has been reduced and also the number of the students I teach have been reduced. My salary is the same.
7. I want to be compensated for the injuries and I instruct Messrs Golden & Law to claim the compensation on my behalf.
8. I attaché hereto copies of the police and medical report marked as "AMC1" and "AMC2" respectively.

I make this statement knowing it to be true to the best of my knowledge, information and belief.

Dated this 01st day of July 2010

Signed: *(signed)*

AIAS MECKSON CHIKANDA

The Plaintiff tendered a medical report in support. It states: "Age – 34 years; Date admitted to hospital: 01/08/2009 & 22/09/2009 respectively; in-patient number - 060053 & 016183 respectively; date of discharge from hospital - 4/08/2009 & 25/09/2009; treated as an outpatient from hospital - yes from 7/08/2009 & 27/09/2009 respectively; out-patient number - 27124; Nature of injuries - Bruises + abrasions and fracture of 2 ribs; name of doctor who attended the above named person - W Kamiyambo; mention all clinical analyses - CYR (chest x-ray), hemoglobin, Bt; medical treatment offered - bed Oxacillin + (*Illegible writing*); if surgical operations were performed please state the nature - N/A; what are the results - N/A; is there possibility of developing arthritis - N/A; has the limb shortened (whether applicable) - N/A. Degree of permanent incapacity - 10% (ten per cent). Assess his/her degree of permanent incapacity - 15%; He will be able to perform his previous job. How serious are the injuries in relation to the following a) Sports - N/A, b) Reading - N/A, c) Household chores - N/A; He/she is required for further examination - No" The Report was stamped by the Senior Medical Officer at Mlambe Hospital.

In his viva voce evidence, the Plaintiff told the court that he was injured in his ribs and has residual pain from the injury. The injured area becomes inflamed (swollen) when he sleeps. The Plaintiff also developed eye problems and had to start wearing spectacles to aid his sight. The Plaintiff sometimes bleeds from the injured area at least 3 or 4 times a year. The Plaintiff develops headaches after speaking for a long time.

In cross examination, the Plaintiff confirmed that he did not author the medical report as it was written at the hospital. The Plaintiff is not a doctor. The Plaintiff could not remember the exact date when the medical report was authored, only that it was authored in June 2010. The medical report did not indicate the date when the report was authored. The medical report was authored by a person called Jermana who is a medical doctor and he signed the medical report.

SUBMISSIONS BY COUNSEL FOR THE PLAINTIFF

Counsel for the Plaintiff cited what he opined were comparable awards in the matter at hand. The following awards were cited:

- **Thokozani Josamu & Luka Mandevu v Prime Insurance Company Limited** Civil Cause Number 1534 of 2010 where the 1st Plaintiff was awarded MK2,000,000.00 on 4th April 2015 having sustained a cut wound on the knee, bruises on both hands, back injury, bruises all over the body and cut wounds on the head and hand.
- **Owen Kayira and 2 others v Unusu Shaikh** Personal Injury Cause Number 1160 of 2013 where the 2nd Plaintiff was awarded MK2,500,000.00 on 1st July 2014 having sustained a head injury, multiple soft tissue injuries on the head and was admitted to Kamuzu Central Hospital for one day.
- **Joseph Danger v Prime Insurance Company Limited** Civil Cause Number 1780 of 2010 where the Plaintiff was awarded MK6,500,000.00 on 18th April 2013 having sustained a fractured leg, deep cut wound on the left knee, bruises on both arms, the back, cut wound on the forehead and a painful right leg.

Counsel for the Plaintiff further submitted that the Plaintiff was admitted at Mlambe Hospital for five days. He had to stay home for 3 weeks after being discharged but was being treated as an outpatient. The Plaintiff was readmitted for 7 days as his chest had swollen. One and a half months after the second discharge, the Plaintiff was readmitted for 3 more days because his chest was still swollen and he was still in serious pain. The Plaintiff continued taking medication for two more years. The Plaintiff could no longer discharge his duties as a teacher because of the injuries he sustained and was eventually dismissed.

Counsel for the Plaintiff submitted that an award of K8, 500,000.00 for pain and suffering and loss of amenities of life would be fair and reasonable in the circumstances.

SUBMISSIONS BY COUNSEL FOR THE DEFENDANT

The medical report

The medical report before you is only evidence to the extent that it was probably made on some unknown date. However, it is not evidence as to the contents thereof. See **Mpungulira Trading Limited v Marketing Services Division** [1993] 10 MLR 346.

In **Wisiki Abasi v Nico General Insurance Company Limited** Civil Cause No 760 of 2007, H/H Kalembera opined as follows:

I will not therefore use the medical report having been tendered by a person who did not author it and indeed the law is very clear that a document that is tendered by a person who did not prepare it is admissible only in so far as it was made and not admissible as proof of what it states, and that the contents are inadmissible as hearsay.

The court should disregard the contents of the medical report for not only being inadmissible but also an attempt to derail the course the justice. The date and year for the medical report is unknown. There are disparities between the medical report and the *viva voce* evidence; for instance:

- i. Paragraph 7 of the witness statement states that the plaintiff was admitted in hospital for 5 days and then later readmitted for 7 days and finally readmitted for 3 days; in contrast paragraphs 2 and 4 of the alleged medical report shows admissions of 4 days each namely from 1/08/09 to 4/08/09 and 22/09/09 to 25/09/09.

- ii. Paragraph 7 of the witness statement alleges that the plaintiff continued to take medication for 2 years; in contrast, paragraph 10 of the alleged medical report states that the plaintiff was not required for further examination.

Causal link between the plaintiff's injuries and the plaintiff's other infirmities

The alleged injuries in the statement of claim are a cut on the forehead, several cuts on the left knee, bruises on the lower legs and a fracture of two ribs.

Your Honour, a medical report in personal injury cases is not an ordinary document. It forms part of the pleadings. In terms of Order 18, rule 12 RSC, it has to be attached to the statement of claim. A medical report is the foundation/pleading upon which the evidence will be led. A plaintiff is not at liberty to adduce evidence outside the scope of the medical report. In other words, assessment proceedings should not be used as an opportunity to be compensated for all infirmities of life not connected to the cause of action.

The plaintiff, through his amended witness statement, is alleging blurred vision which now requires glasses. He further claim to experience the protruding of the anus. He does not stop here, he alleges that he can neither raise up his hand nor speak continuously. See paragraphs 8 and 9 of plaintiff's witness statement. There is no expert medical opinion to link the plaintiff's above noted infirmities to the cause of action in this matter.

Furthermore, internal injuries may not be visible to the naked eye. For instance, there are no x-rays before the court to support the claim for fracture of two ribs. The naked eye cannot see two fractured ribs!

The importance of the medical report cannot be overemphasized. The court cannot be dragged into a circus or a frolic of its own to assume as a fact that the plaintiff is experiencing blurred vision and protruding of the anus as a result of the bruises and cuts suffered herein. The plaintiff affirmed that he is not a medical doctor. It is a matter of opinion privileged to a medical practitioner to ascertain that the plaintiff's infirmities arose from the cuts and bruises suffered in this case. We therefore submit that the plaintiff has failed to prove any causal link between the injuries and his infirmities.

Regrettably, the quantum payable is clearly nominal damages.

Cost of medical report

There is no receipt acknowledging payment and receipt of monies being in respect of the cost of the medical report.

Cost of police report

There is no evidence of payment or receipt of any monies n respect of a police report.

Damages for pain and suffering and loss of amenities

There is no ascertainment of the injuries in the absence of proof of the contents of the medical report. Therefore, the court should not defy the requirement for a medical report as a condition precedent to assessment of damages. To do otherwise, would regrettably lead the court into a realm of speculation which would not only be offensive to the course of justice but also to the defendant.

Counsel for the Defendant cited two comparable awards:

- **Lemoni Banda & 19 others v Mota Engil & General Alliance Insurance Limited** Personal Injury Cause No 178 of 2012 where the 6th Plaintiff was awarded MK850,000.00 for pain and suffering and loss of amenities of life on 18th September 2014 after sustaining two fractured left ribs, soft tissue injury on the right thigh and a broken tooth.
- **Aisha Nicks (minor suing through her mother and next friend, Mary Misomali) v General Alliance Insurance Company Limited** Personal Injury Cause No 540 of 2013 where the plaintiff was awarded MK650, 000.00 for pain and suffering and loss of amenities of life on 31st July 2014 after sustaining a deep cut wound on the head, right shoulder, bruises, lacerations and soft tissue injuries.

Counsel for the Defendant prayed for an award of MK700, 000.00 as damages for pain and suffering and loss of amenities of life.

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 Plaintiff alleges that he sustained a cut on the forehead, several cuts on the left knee and bruise on both legs (the lower legs) and two fractured ribs.

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 Plaintiff alleges that he sustained the foretasted injuries. The medical report states that the Plaintiff sustained bruises and abrasions and two fractured ribs. The medical report further states that the Plaintiff was treated by way of chest x-ray, hemoglobin and BT. The chest x-ray report was not tendered before court and Counsel for the Defendant raised issue with the same. Further, the x-ray would have been the best proof of the chest injuries and the fractured ribs. The Plaintiff alleges that he also sustained or experiences protruding of the anus but this was not reiterated in his viva voce evidence nor does the medical report support this assertion.

The Plaintiff also told the court that he was admitted to the hospital on several occasions. Counsel for the Plaintiff stated, through submissions, that the Plaintiff had been admitted on 3 different occasions; immediately after the accident the Plaintiff was admitted at Mlambe Hospital for five days; some time later the Plaintiff was readmitted for 7 days as his chest had swollen and finally one and a half months after the second discharge, the Plaintiff was readmitted for 3 more days because his chest was still swollen and he was still in serious pain. The medical report however, states two occasions when the Plaintiff was admitted; from 01/08/2009 to 04/08/2009 and 22/09/2009 to 25/09/2009. In each of these instances, the Plaintiff was admitted for 3 days. This court finds that the Plaintiff was admitted twice for a total period of 6 days as stated by the medical report.

This court finds that the Plaintiff sustained bruises and abrasions in the form of a cut on the forehead, several cuts on the left knee and bruises on both lower legs. The Plaintiff was admitted on two occasions after the accident from 01/08/2009 to 04/08/2009 and 22/09/2009 to 25/09/2009; totalling 6 days.

In describing the accident as well as the treatment he had to undergo, it is clear that the Plaintiff endured immense pain and suffering resulting from this accident. This was compounded by the admissions to hospital and his continued treatment as an outpatient until 27/01/2010 as stated by the medical report.

For these reasons, this court believes an award of **MK600, 000.00** would adequately compensate the Plaintiff herein in damages for pain and suffering.

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.

Through his witness statement the Plaintiff explains the effect of his injuries on his life at the time of hearing:

"I have not healed. I have severe chest pains, recurrent headache and blurred vision. I am unable to see far and I was recommended by a doctor to purchase glasses which were quoted at K15, 500.00. Sometimes I experience protruding of the anus.

I work as a teacher at Matindi Private Academy. Now I work with difficulties because when I raise up my hand to write on the board, I feel pain in the chest, I cannot read properly because of the recurrent headache and blurred vision.

As a result of my problems, the number of subjects has been reduced and also the numbers of the students I teach have been reduced. My salary is the same."

In his viva voce evidence, the Plaintiff told the court that he was injured in his ribs and has residual pain from the injury. The injured area becomes inflamed (swollen) when he sleeps. The Plaintiff also developed eye problems and had to start wearing spectacles to aid his sight. The Plaintiff sometimes bleeds from the injured area at least 3 or 4 times a year. The Plaintiff develops headaches after speaking for a long time.

It is clear that the injuries sustained have had a severe impact on the Plaintiff's life as it is today. As time passes, the resultant effects of any injury subside and the Plaintiff returns to some semblance of normalcy in his life. It must also be noted that the Plaintiff's employer took his issues into account and responded by reducing his workload without reducing his pay. Although, the reduction in classes and resultant workload might have demoralized the Plaintiff by making him feel incapacitated. The court takes into consideration the fact that the Plaintiff has difficulties when he sleeps.

For these reasons, this court awards the Plaintiff **MK450, 000.00** as compensation for loss of amenities of life.

Special Damages

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. 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).

The Plaintiff did not provide any evidence to substantiate these claims so the court cannot make an award without supporting evidence.

This court therefore awards nothing as special damages.

DISPOSAL

The Plaintiff is therefore awarded MK600, 000.00 being damages for pain and suffering, MK450, 000.00 for loss of amenities of life and nothing for disfigurement special damages.

The Plaintiff's total award is MK1, 050,000.00.

Costs to be taxed, if not agreed.

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

Ordered in Chambers on the 10th day of January 2018 at the Chichiri Courthouse, Blantyre


A Kanthambi

ASSISTANT REGISTRAR