

THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO.801 OF 2018

BETWEEN

Cocolistics Mhango..... Plaintiff

And

Chimango Mhango.....1st Defendant

Prime Insurance Company Ltd.....2nd Defendants

CORAM:	<i>Madalitso Khoswe Chimwaza,</i>	<i>Assistant Registrar</i>
	<i>D. Silungwe,</i>	<i>Counsel for the plaintiff</i>
	<i>S. Mhango</i>	<i>Counsel for the 1st and 2nd defendants</i>
	<i>Matope</i>	<i>Court Clerk</i>

ORDER ON ASSESSMENT OF DAMAGES

Introduction:

This matter was set down for assessment of damages following default judgment dated 18th October, 2018 thereby settling the issue of liability.

Briefly the facts are that on or about the 17th July 2018, at about 18:00 hours the 1st defendant was driving motor vehicle Nissan Vanette minibus registration number RU 8053 from the direction of Chinyanga going towards Mhuju along the earth road with fee paying passenger on board including the claimant. Upon arrival at Mbulunji area soon after passing Khukuwu bridge, he so negligently drove the motor vehicle by over speeding whilst negotiating a right bend that he lost control of the vehicle and swerved to the extreme nearside where it overturned.

As a result of the accident the claimant suffered the following injuries fracture of the right clavicle, bruised shoulder, scars on affected parts and 15% permanent incapacity. The claimant was hospitalized at Rumphi District Hospital from 17th July to 20th July, 2018. He claims that he can no longer use his right hand

effectively as he cannot do heavy tasks using the hand. He can no longer do the farming that he used to do. He also said he was a builder and was earning K70,000-K100,000 per month, but he can no longer do that work.

damages for pain and suffering, loss of amenities of life, disfigurement damages for loss of earnings and earning capacity and special damages of K6000 for obtaining police and medical report.

A number of comparable case authorities were cited and this court is grateful to counsel and court will be referring to them when assessing the claims.

Counsel for defendant asked the court to consider two other cases arising from the same accident when assessing damages as they are all entitled to the K5,000,000.00 maximum liability of the insurer: These are the case of **Oswald Mkandawire vs Prime Insurance Civil Cause Number 763/18** and **George Mhango vs Prime Insurance Civil Cause Number 1154/18**.

Issue for Determination

How much should be awarded as damages to the plaintiff.

GENERAL PRINCIPLES ON DAMAGES

A person who suffers injury as a result of another's negligence is entitled to be compensated for the injury suffered by the negligent 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 arising from the tort. Such damages however cannot be quantified by any mathematical calculation as such the court relies on decided cases of a comparable nature for guidance. Sight must not be lost however, of peculiar facts of each case in order to avoid occasioning injustice by inflexible maintenance of consistency and uniformity (*D. Kwataine Malombe & Another vs. G.H. Chikho t/a Bec Line Minibus Civil Cause No. 3687 of 2001* (HC Unreported)).

1. 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 however for purposes of quantum the court does consider them together 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).

In the present matter Counsel insisted that the court should make separate awards on each head. Having considered comparable case awards like the case of *Banda and Ellen Banda vs Tutlas Fast save*, Civil cause No. 229 of 2016 in which the plaintiff suffered fractures of the thigh, traumatic amputation of the forearm an award of K7,000,000.00 was made for pain and suffering and loss of amenities of life.

In this case the claimant suffered a fractured right clavicle and bruises and for pain and suffering and loss of amenities of life the plaintiff is awarded a sum of K 2,000,000.00.

2. Damages for Disfigurement

Damages for disfigurement are awarded for permanent scars or deformity on the body of the plaintiff. The Plaintiff told the court that he has scars on the shoulder but they not visible. Looking at some comparable cases like *Mbalame v. Prime Insurance Co Ltd* Personal Injury Cause No. 244/2014 and *Chipala v. Prime Insurance Co Ltd* Personal Injury Cause No.472/2013 where in 2015 the court awarded the sum of K950, 000 for disfigurement. In both cases there was limb shortening. Counsel cited the case of *Triza Lunduka vs Zenengeya and United General Insurance Company Ltd*, Civil Cause No. 1144 of 2016, a plaintiff who was left with a shortened leg and scars, was awarded the sum of K1,500,000.00. The award was made recently in 2017. This court finds a sum of K500,000.00 would be reasonable in the present case. Therefore the plaintiff is awarded K500,000.00 for disfigurement.

3. Loss of earnings and earning capacity

Damages for loss of earning capacity, are awarded where the injuries suffered by the plaintiff results in the prospective loss of earnings or employability of the plaintiff. see case of *Tembo v City of Blantyre et al*, Civil Cause No. 1355/1994 (Unrep.) Principle Registry.

Loss of earnings is the total loss or actual reduction in the income of the claimant as a result of the injury suffered, while loss of earning capacity is the likely or prospective loss or reduction in the income of the claimant as a result of the injury suffered. *Kambwiri vs Attorney General* [1991] 14 MLR 151 (HC).

Manda vs Malawi Social Action Fund Civil Cause No. 756 of 2003 adapting from **McGregor on Damages**:

In calculating the loss of earning capacity courts have evolved a certain method. The amount of loss of earning is calculated by taking the figure of the plaintiffs present annual earnings less the amount, if any which he can now earn annually, and multiplying this figure by a figure which, while based upon the number of years during which the loss of earning power will last, and it is discounted so as to allow for the fact that a lumpsum will be given instead of periodic payments over years. These figures are known as multiplier and multiplicand and they can be adjusted either upwards or downwards to reflect inflation or other contingencies of life and taxation.

Multiplicand:

At the time of the accident the claimant was a farmer and a builder earning K70,000.00- K100,000 per month. After the injuries he can no longer do the farming and building which means he has suffered total loss of earnings. Counsel submitted that the multiplicand should be K70,000. There is no evidence to support the earning of K70,000 per month as a builder neither is there evidence

that the claimant was in continuous employment where he was getting this amount. This court has resolved to use the minimum wage which is K962.00 per day (K25,012.00 per month) in terms of Employment Act (Minimum wages) Amendment, Order 2017. This rate will be used for both as a farmer and a builder. This court will adopt the multiplicand of K25,012 per month.

Multiplier:

This is found by deducting the current age of the claimant at the time of the accident from the life expectancy. Counsel submitted that the court should use the age of 61.2 according to the **Population and Housing Census 2008, Analytical report Vol.2 (Mortality) published by National Statistical Office, August 2010** which puts exact life expectancies of a males and females at different ages. In the alternative he submitted that the court should use the life expectancy used in the case of **Lucy Chitsotso Chatayika vs Emmanuel Kaludzu and UGI** Civil cause No. 1146/2016 in which the court used the life expectancy of 61.2years.

In the present case the claimant was 36 years at the time of the accident. The court adopts the life expectancy of 61.2 which is rounded up to 60years therefore the multiplier in this case will be 24.

For loss of earning capacity the claimant is awarded:

$K25,012 \times 12 \times 24 = K7,203,456.00$

4. Special Damages

It is trite law that special damages must be strictly pleaded and proved. The plaintiff is claiming expenses incurred on medical report and police report amounting to K6,000.

ORDER

In summary the court has made the following awards:

Pain, suffering and loss of amenities of life K2,000,000.00

Disfigurement K500,000

Loss of earnings K7,203,456.00


Special damages K6,000

The total award made is **K9,709,456.00**. Plaintiff is awarded costs of the action to be assessed if parties do not agree.

Right of Appeal

Either party aggrieved by the decision of the Registrar has the right to appeal..

Made in chambers this 27th day of December, 2018


Madalitso K. Chimwaza (Mrs)

ASSISTANT REGISTRAR