



THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO.1218 OF 2015

BETWEEN

Mercy Chande..... Plaintiff

And

Enock Ulalo.....1st Defendant

GPY Investments.....2nd Defendants

United General Insurance Company Ltd.....3rd Defendants

CORAM:	<i>Madalitso Chimwaza</i>	<i>Assistant Registrar</i>
	<i>K. Soko</i>	<i>Counsel for the plaintiff</i>
	<i>Nyambo</i>	<i>Counsel for the 1st and 2nd defendants</i>
	<i>Mpandaguta</i>	<i>Court Clerk</i>

ORDER ON ASSESSMENT OF DAMAGES

Introduction:

This matter was set down for assessment of damages following settlement of liability through an agreed judgment which was entered into by both parties on 13th November 2017.

Briefly the plaintiff was the only witness, She testified that she is working for the Malawi Police Service, based at Balaka Police Station as Sub Inspector. Her testimony was that as a result of the accident she has been left with a disfigured face due to huge scars, one deaf ear and an eye problem. She also has a permanent disfigurement whereby her leg has been shortened by 5cm and she walks with a limp and with the support of a walking stick.

Counsel for the plaintiff submitted that the plaintiff should be awarded the following sums as damages:

Damages for pain and suffering K5,000,000.00

Damages for disfigurement K6,000,000.00

Damages for loss of amenities of life K7,000,000.00

Damages for loss of earnings K1,500,000.00

Damages for loss of earning capacity K27,974,231.85

Damages for future medical care K1,072,281.00

Special damages representing costs for medical care K1,500,000.00

The total sum submitted is K50,000,000.00

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.

In her evidence the plaintiff admitted to have received K5,000,000.00 from the insurance company in 2017 which ought to be deducted from the final award but she failed to remember the amount she received from the Workers Compensation.

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 for pain and suffering that the plaintiff went through from the date of the accident and for the six months she was in and out of hospital undergoing surgeries **she is awarded a sum of K 3,500,000.00.**

2. Loss of Amenities of Life

On the loss of amenities of life the plaintiff is awarded a sum of **K2,500,000.00**

3. 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 she sustained scars on the head and hip and serious deformity of one leg which has been shortened by 5cm. The scars and the deformity are very visible and there is no question to the fact of disfigurement caused by the injuries suffered. She is entitled to damages for disfigurement. 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 K1,800,000.00 would be reasonable. Therefore the plaintiff is awarded **K1,800,000.00** for disfigurement.

4. Loss of Earnings

Loss of earnings involves the actual loss or reduction of income of the plaintiff as a result of the injury, whereas loss of earning capacity is the likely or prospective loss or reduction of earnings in future. In this regard, it means a plaintiff may suffer past or future loss.

It has been submitted that the plaintiff be awarded K1,500,000 as damages for loss of earnings only. This is for the reason that the plaintiff has not been able to go out into field work where she earns an extra income in form allowances as she would previously do. The Plaintiff told the court that at the time of the accident she used to earn K10,000 when she has gone to do field work.. Currently the rate has gone up to K15,000 per night. There is no indication as to how many times the plaintiff was going for field work in a month and for how many days, in order to assist the court in arriving at the lost earnings. What is clear however is that because of the injury she has been unable to earn an extra income. This court therefore makes an award of K1,500,000 as being reasonable for past loss of earnings.

5. Loss of 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.

In making submission for loss of Earning Capacity, plaintiffs counsel has used a monthly net pay of K140,285.00 which translates to an annual salary of K1,683,420.00. It is claimed that the plaintiff could have been promoted in the Malawi Police service in the course of her career and would have risen up through the ranks. For that reason the multiplicand should be adjusted by 15% and that gives the multiplicand of K 1,935,933.00

It was further submitted that in coming up with the multiplier, court should use the life expectancy for Malawians from the National Statistical Office or the UNDP. Currently this is at 55years. Since the plaintiff was 38years at the time of the accident that gives the multiplier of 17 years.

Therefore damages being claimed are K1,935,933.00 x17 =KK32,910,861.00 (which is adjusted downwards by 15% since the sum will be given as a lumpsum.

In the case of *Burgess vs Aisha Osman (No. 2)* 1964-66 ALR Mal. at page 508, Bolt J, Held that "in assessing an award of damages for personal injuries, loss of earning capacity and loss of prospects of promotion are important factors to consider...however the social status of the plaintiff is irrelevant. This is consistent with common sense that *evidence of loss of earning capacity and /or prospects of promotion must be an important factor in determining the appropriate award.* (emphasis supplied). The court held that there was not sufficient evidence that the plaintiff earning capacity had been impaired and no damages were awarded. In fact he had an increase in his salary after the accident than before the accident, and he had maintained his former job, therefore no loss of earning capacity was proved.

In the case of *Nangwiya vs Makwasa Tea Estates* [1993] 16(1) MLR 373, Mwaungulu (as he then was) provided a very helpful dictum on how to handle matters of this nature. He said:

When deciding on whether the plaintiff is entitled to loss of earning capacity where 'the plaintiff continues in the same employment and there is no reduction in the earnings, the court must consider whether there is a substantial, as opposed to a speculative, risk that the plaintiff would lose his job if he was thrown into the labour market. It must always be remembered that when things go tough, employers want to safeguard their interest. When that happens, they do not lay off employees who are able bodied. They lay off those who in some way are infirm or deficient."

See also the case of *Pastor Chancy Mchewere Banda & Faida Banda vs Raghavendra Poojay and General Alliance Insurance Ltd* Civil Cause No. 427/2016 in which Assistant Registrar Chirwa made no award as there was no sufficient evidence adduced by the plaintiffs proving loss of earning capacity.

According to the observation of the court during the hearing for assessment, the court noted that the plaintiff finds it difficult to walk properly and will not be able to do physical work as before as the medical report puts her incapacity at 38%.

Having seen her testify and observing her movements, the court will proceed on the understanding that the injury has not really affected her prospects of getting employment because currently she is still in employment, although she may not be able to perform to her full potential but the earning capacity has not been impaired. If anything, what has been impaired is her actual contribution and productivity to the institution. When a person is employed in the public service is deemed to have a stable job than when one is employed in a company where your continued stay in employment is based on your productivity and financial contribution to the profits of the company (output).

In the present case there is no evidence that the plaintiff had lost her job due to the injuries suffered instead she has maintained her job as a public servant in the Malawi Police. There is no evidence that her position has been reduced due to the injuries. There is no evidence that if she is to be promoted she must pass a physical test. This means if opportunities for promotion will arise she will be able to compete with others even in her current state.

With due respect to the plaintiff, this court considers that her evidence on this head amounts to no more than mere opinion and speculation and as such forms an unsatisfactory basis for an award of damages for loss of earning capacity. This head of loss of earning capacity is therefore not awarded.

6. Future Medical Costs

The plaintiff is also claiming a sum of K1,072,281 representing future medical costs since she still experiences pain and she still goes for physiotherapy. She emphasised that much of the expenses will be on transport expenses since she stays in Balaka and goes to Beit Cure in Blantyre using a hired vehicle. This court is of the view that a sum of **K1,072,281.00** is reasonable in the circumstances and it is awarded.

7. Special Damages

It is trite law that special damages must be strictly pleaded and proved. The plaintiff is claiming expenses incurred on medical bills, medicine, food and transport amounting to K1,500,000. In terms of proof the plaintiff has not demonstrated with evidence how the figure of K1,500,000 was arrived at since the receipts exhibited herein are less than K500,000.00. The only document with a huge amount exhibited was a quotation for K1,616,650.00 which has no accompanying evidence that it was finally paid. This court however does not undermine the fact that expenses were made and it is for this reason that a reasonable sum of **K800,000** is awarded as special damages in the absence of strict proof thereof.

ORDER

In summary the court has made the following awards:

Pain and suffering	K3,500,000
Loss of amenities of life	K2,500,000
Disfigurement	K1,800,000
Loss of earnings	K1,500,000
Future medical care	K1,072,281
Special damages	K 800,000

The total award made is K11,172,281. This will be reduced by K5,000,000 that was already paid by the Insurance company and received by plaintiff. The balance payable will be **K6,172,281.00**. 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 20th day of March 2018



Madalitso K. Chimwaza

ASSISTANT REGISTRAR