



THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO.31 OF 2018

BETWEEN

Siyabu Nampinga..... Plaintiff

And

Tiyamike Kathewera.....1st Defendant

Prime Insurance Company.....2nd Defendant

CORAM:	<i>Madalitso Khoswe Chimwaza,</i>	<i>Assistant Registrar</i>
	<i>D. Silungwe,</i>	<i>Counsel for the Claimant</i>
	<i>E. Chapo</i>	<i>Counsel for Defendants</i>
	<i>Zude</i>	<i>Court Clerk</i>

ORDER ON ASSESSMENT OF DAMAGES

INTRODUCTION

This matter was set down for assessment of damages following a default judgment dated 13th November, 2018 thereby settling the issue of liability.

Briefly the facts are that on or about the 20th May, 2017 the 1st defendant was driving motor vehicle Suzuki Swift registration number LA 5470 from the direction of Dedza going towards Lilongwe along the Dedza/Lilongwe M! road. Upon arrival at Dilawo village near Nathenje Trading Centre she so negligently drove the motor vehicle that she left her lane and collided with motor vehicle Toyota Land Cruiser Ambulance registration number CK 3520 in which the claimant was riding as a passenger which was coming from the opposite direction in its left lane. As a result the claimant sustained fracture of the right leg and

bruises on the leg. The leg was cast in POP for five months. Currently he said he cannot wear shoes as the leg still swells if he has walked for long distance. He cannot run. In his witness statement the claimant said he used to do business of selling chickens at area 18 market but due to the injuries he is unable to do so. When cross examined by counsel for defendant on this piece of evidence he conceded that his failure to do chicken business was not as a result of the accident but that he had no money. Therefore if given capital he can continue the business. According to his medical report he has 30% permanent incapacity.

The claimant is now seeking damages for pain and suffering, disfigurement, loss of amenities of life loss of earning capacity and special damages of K17,000 for obtaining medical report.

Issue for Determination

How much damages should the claimant be awarded .

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 made submissions on separate heads to be awarded. 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.

The injuries in the present case are not of the same magnitude as the above case. The claimant sustained a fracture of the right leg and he endured five months of pain and discomfort with POP. He still experiences the swelling of the leg anytime he has put on shoes which is an indication that his quality of life has been impaired.

In this case for pain and suffering and loss of amenities of life the plaintiff is awarded a sum of **K 3,500,000.00**.

2. Damages for Disfigurement

Damages for disfigurement are awarded for permanent scars or deformity on the body of the plaintiff. 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 the injury suffered by claimant not to have left visible disfigurement and a sum of K500,000.00 would be reasonable. Therefore the plaintiff is awarded **500,000.00** 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. See *Kambwiri vs AG* [1991] 14 MLR 151 (HC)

In making submission for loss of Earning Capacity, plaintiff's counsel has asked the court to used the minimum wage since the actual earnings of the claimant are not known. It is claimed that before the injury the claimant used to do business of selling chicken which he has not been able to do since the accident. During cross examination he conceded that he cans till do the business provided he has capital for the same. This means he still has capacity to earn an income despite the injury.

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 claimant was an honest man who finds it difficult to wear shoes but can walk properly. He will be able to continue earning an income because the accident did not impair his earning capacity provided he get financial assistance.

With due respect to the claimant, this head of loss of earning capacity is therefore not awarded. The claimant is awarded loss of earnings from the time of the accident 20th May 2017 to date of judgement 27th December 2018 at the rate of minimum wage of K962.00 per day representing actual loss of earnings.

$K25012 \times 19 \text{ months} = K475,225.00$

The claimant is also awarded K6,000 special damages for obtaining police and medical reports

Order

The total award made is **K4,481,225.00**. as damages for pain and suffering and loss of amenities of life, disfigurement and loss of earnings. The claimant is also awarded costs of this action to be taxed if parties do not agree.

Any party aggrieved by this order of assessment has the right to appeal.

Made in Chambers this 27th December, 2018



Madalitso Khoswe Chimwaza (Mrs)

ASSISTANT REGISTRAR- LILONGWE REGISTRY