

JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO. 370 OF 2013

BETWEEN:

LYTON NANGA.....PLAINTIFF

AND

PRIME INSURANCE COMPANY LIMITEDDEFENDANT

CORAM: K. BANDA, ASSISTANT REGISTRAR

Mr. Khan, Counsel for the plaintiff

Mr. Mpaka, Counsel for the defendants

Mr. Chitsulo- Court Clerk

ORDER ON ASSESSMENT

INTRODUCTION

This is an order on assessment resulting from judgment of the Honourable Justice Potani dated 30th March,2017. The honourable judge found for the plaintiff and therefore settled the question of liability. As to claims, the plaintiff claimed damages for pain and suffering, loss of amenities of life and disfigurement. He also claims special damages in the sum of MK6,000.00 used to pay for police and medical reports.

BRIEF BACKGROUND

Briefly the background is that on 30th November,2013, Mr Mathanki Chiwaula aged 36 driving a motor vehicle registration number CZ 4824,Toyota Hiace Minibus from the direction of Liwonde heading towards Balaka, at Kalambo village hit the plaintiff, at the time a pedal cyclist who was turning to the right. At the time of the accident he was aged 52. As a result of the accident, the plaintiff sustained multiple bruises and a cut on the head and fracture on the Tibia and fibula on the right leg.

EVIDENCE

The first witness for the plaintiff was the victim himself. He adopted his witness statement in its entirety under oath marked as exhibit PW1. Attached to his exhibit were the police and medical reports marked as exhibits PW 2 and PW 3 respectively. The court was then shown the particulars areas of the injuries and scars resulting from the same.

In his own words PW1 stated that he had a cut on the head where the bicycle handle cut through and entered his head. He also showed the court the right leg where he suffered the fracture and had a plaster of paris (pop). And equally he showed the court the lacerations on both hands on the outer part. He explained that he still feels pain in the rib region of the right side of his body and that as such he is unable to sleep on that side.

I must indicate that the absence of the doctor who prepared this report at trial does not in any way stop me in fulfilling my duty in the presence of other adequate pieces of evidence. This court had similar scenario in *Margret Nkhwazi v Daniel Kilembe and two others*, Personel Injury Cause No. 644 of 2010. Where defence counsel raised an objection on the basis as the one before us here. I will not therefore belabor myself on this. The pieces on the alternative evidence suffices.

In cross examination the major issue was the same of none availability of the doctor who authored the medical report to testify. The defence further did not present their case as they informed the court that the judgment was entered in their absence which ever that means and stated that they had instructions to ask the trial judge for a re-trial. No evidence was however presented to support this statement. In passing I must state that I find this to be of an effect to these proceedings.

APPLICABLE PRINCIPLES OF LAW ON ASSESSMENT OF DAMAGES

The policy of the law on damages generally is, if money can do it, to afford the victim fullest compensation so as to bring the victim to the position before the wrong. See. *Chidule v Medi* (1993) M.S.C.A. And as per Lord Blackburn in *Livingstone v Rawyards Coal Co.* (1880) 5 App. Cas. 25 at 3.

In essence compensation for damages in this instance is not meant to be punitive. According to Holmes J statement in *Pitt v Economic Insurance Company Ltd* (3) SA 284(D) 287E-F compensation;

“...must be fair to both sides-it must give compensation to the plaintiff, but must not pour out largesse from the horn of plenty at the defendants expense”

The test should be what a particular society would deem fair and in the words of Lord Devlin, in *West v Shephard*[1964] A.C.326 at 357, this would be such as would allow a wrong doer

“to hold up his head among his neighbours and say with their approval that he has done the fair thing”

Again the awards must show a measure of some level of internal consistency within a particular society such as our country Malawi. However I am mindful that it is not easy to maintain consistency and achieve fairness to both the victim and the defendant unless the court awards damages on the basis of comparable awards in cases of similar nature. Lord Diplock in *Wright v British Railway Board* (1938) AC.1173, 1177, states the law this way:

“Non-economic loss...is not susceptible of measurement in money. Any figure at which the assessor of damages arrives cannot be other than artificial and , if the aim is that justice meted out to all litigation should be even-handed instead of depending on idiosyncrasies of the assessor , whether judge or jury, the figure must be basically a conventional figure derived from experience and from awards in comparable cases.”

It must be noted however that this the court will do without losing site of the fact that even though money can compensate to an extent, the truth remains that it cannot exact the experience to remain as it was before the event giving rise to the action. According to Lord Morris(as he then) in *West v Sheppard*[1964] AC 326:

“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.”

Maintenance of the value of money is a factor to be considered to ensure that the wrongdoer does not gain an advantage over the victim. Mwaungulu J (as he then was) in *George Sakonda v S R Nicholas*, Civil Appeal Number 67 of 2013(HC) (PR) (unrep) commented on this need to maintain value of money on assessment so that the plaintiff does not lose out. This is what the learned judge stated:

“Moreover, conventional awards must factor inflation and value of money changes. Awards made at a higher value of the money and low inflation cannot compare to similar awards at lower value of money and high inflation. Victims stand to lose; wrongdoers stand to gain. Courts must therefore regard money value and inflation.”

And in *Tembo v City of Blantyre* (1994) Civil Cause No.1355 (HC) (PR), the learned Mwaungulu J (as he then was) expressed his position explicitly on views to the contrary in this style;

“...any other view involves the necessary implication that the victims of personal injuries should bear a reduction in the level of their compensation as the value of money falls though there is no rational justification for such reduction”

Damages for pain and suffering and loss of amenities of life.

As to defining pain, it is suggested that “pain” is the immediately felt effect on the nerves and brain of some lesion or injury to a part of the body and “suffering” is distress which is not felt as being directly connected with any bodily condition. See. *Mc. GREGOR ON DAMAGES* at. 1289 paras. 35-213.

As such for purpose of damages, pain encompasses any pain caused by medical treatment or surgical operation carried out due to the injury caused by the defendant whilst “suffering” may include fright at the time of incident, fear of future incapacity as to health or indeed the ability to make a living. It also includes humiliation, sadness and embarrassment caused by disfigurement. *Mc. GREGOR ON DAMAGES* (supra).

The fundamental factor in assessing damages for pain and suffering was aptly put by the Supreme Court of Appeal in *Chidule v Medi*, to say:

“In assessing damages for pain and suffering, the court must consider the pain which the particular plaintiff has suffered because the circumstances of the particular plaintiff are bound to have a decisive effect in the assessment of damages”

The implication of the above statement is that, in principle and practice, each case must be dealt according to its peculiar circumstances.

As to loss of amenities of life, the same concentrates on the curtailment of the plaintiff's enjoyment of life by his inability to pursue the activities he pursued before the injury. See. *Manley v. Rugby Portland Cement Co.*(1951)C.A. per Brickett L.J reported in Kemp and Kemp, *The Quantum of damages*, Vol .1 (2nd Ed),, 1961,p.624.2 And see also Mwaungulu J in *Mtika v US Chagomerana t/a Trans Usher(Zebra Transport)*[1997] MLR 123,126.

It must also be stated that the amount to be awarded for this head of damages cannot be quantified in monetary terms by use of mathematical formula but as per Lord Morris in *Wright v British Railway Board* (supra), by use of experience and guidance affordable by awards made in decided cases of a broadly similar nature.

In the matter before us here, it is no doubt that the plaintiff was in pain and continues to do so. This is pain endured at the time of accident, during and after of treatment. His evidence that the metal handle cut into his head was not contested. Further his evidence that he is no longer able to do things he used to do was also not contested. Currently he has continuous pain on side each time he sleeps and can not do with comfort. This entails continuous pain. As such I am minded that the award I must give should not only cover the present pain but also other conditions whatsoever that may arise later. And the fact that the same is done once and in a form of a lump sum, I take considerable caution to ensure that I do not under compensate or over compensate.

In that regard, before proceeding I address my mind to what counsel gave to me. Counsel cited several authorities of comparable nature which included: *Kitilesi Saidi v Alfred Rajab and Prime Insurance Company Limited*, Personal injury Cause No. 98 of 2014 where the plaintiff was awarded the sum of MK 4,500,000.00 as damages for pain and suffering and loss of amenities of life. this award was made on 18th December,2016. In this case the plaintiff had sustained an open fractured fibula and tibia as well as cut wounds on the face.

Counsel also cited the case of *Clement Bello v Prime Insurance Company Limited*, Civil No. 611 of 2013 delivered on 9th June,2015. In that case the plaintiff was awarded MK4,000,000.00 being damages for pain and suffering and loss of amenities of life. In this case the plaintiff suffered a fractured left arm, deep cut on the leg, traumatic wound on frontal head and severe chest pain.

Having gone through these cases and other various authorities comparable in nature to the facts of the case herein, I am mindful that these are all judgments of officers who share the same jurisdiction with me and that as such none is binding on me. In my view I find the extent of the damages in the cases cited more less at par with the ones cited by the plaintiff and therefore I award the sum of MK 4,500,000.00 as damages for pain and suffering and loss of amenities of life.

Damages for disfigurement

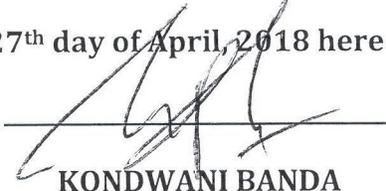
It is trite law that where any part of the body is disfigured as a result of tortious act, the court is entitled to award damages for disfigurement: *Mwasinga v Stagecoach*(1993)16(1) MLR 363.

The plaintiff was a normal person with the right posture. He now has a disfigurement. I have not lost site of the fact that at the time of the accident the plaintiff was already way advanced in age. I am however not oblivious of the fact that people age differently but an accident causing disfigurement such as this has the potential of cascading biology process

that leads to early loss of the potential of a long healthy life. I therefore award the sum of MK 500,000.0 to take care of this.

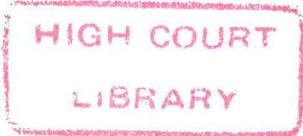
In conclusion and for the avoidance of doubt, the plaintiff is awarded the sum of **MK5,006,000.00**. as damages for pain and suffering and loss of amenities of life plus damages for disfigurement and costs of police and medical report.

Ordered in chambers this 27th day of April, 2018 here at Blantyre in the Republic.



KONDWANI BANDA

ASSISTANT REGISTRAR



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NO. 2 OF 2017

**(Being Criminal Case No. 27 of 2017 In The Senior Resident Magistrate Court
Sitting at Blantyre)**

BETWEEN:

MACLEAN

MULIKHA.....APPELLANT

AND

THE REPUBLIC.....RESPONDENT

CORAM: THE HON. JUSTICE MR S.A. KALEMBERA

Mr Chitsime, Principal State Advocate, of Counsel for the Respondent

Mr Chipeta, of Counsel for the Appellant

Mrs Chanonga, Official Interpreter

JUDGMENT

Kalembera J

The Applicant appeared before the Senior Magistrate Court at Blantyre charged with two Counts of Abduction contrary to section 136 of the Penal Code and the offence of Defilement contrary to section 138 (1) of the Penal Code. The particulars of the offence in the 1st Count alleged that McLean Mulikha from 2nd January 2017 up to 3rd January 2017 at Chirimba Township in the City of Blantyre, unlawfully took away and detained Loveness Senga, unmarried girl of 14 years of age out of possession, and against the will of her parents having lawful care of her.

And in the 2nd Count alleged that McLean Mulikha at the same time and place as stated in the 1st Count had unlawful carnal knowledge of a girl under the age of 13 years of age. He was convicted on his own pleas of guilty and sentenced to 9 years imprisonment with hard labour. Being dissatisfied with his convictions and sentence, the Appellant, appeals against both his convictions and sentence.

The Appellant has filed the following grounds of appeal:

1. The lower court erred in entering guilty pleas, and convicting the Petitioner thereon, when the Petitioner clearly stated that he did not understand the consequences of pleading guilty.
2. The lower court erred in proceeding to enter pleas of guilty, convicting and sentencing the unrepresented Petitioner in such circumstances without first informing the Petitioner of his right to legal representation.
3. The lower court erred in sentencing the Petitioner to a global 9 years IHL in the circumstances without specifying to which count the said years applied. The sentence is wrong in principle.

This being an appeal from the subordinate court, I am mindful that it is trite that such appeals be dealt with by way of rehearing, that is, I must look at and analyze all the evidence in the court below. However, the Appellant having pleaded guilty in the lower court, there was no evidence from witnesses.

The main issues for the court's determination are the following:

1. Whether the lower court erred in entering guilty pleas, and convicting the Petitioner thereon, when the Petitioner clearly stated that he did not understand the consequences of pleading guilty.
2. Whether the lower court erred in proceeding to enter pleas of guilty, convicting and sentencing the unrepresented Petitioner in such circumstances without first informing the Petitioner of his right to legal representation.
3. Whether the lower court erred in sentencing the Petitioner to a global 9 years IHL in the circumstances without specifying to which count the said years applied. The sentence is wrong in principle.

In the first ground of appeal the Appellant contends that the lower court erred in entering guilty pleas, and convicting the Petitioner thereon, when the Petitioner clearly stated that he did not understand the consequences of pleading guilty. I have gone through the lower court record and I do agree that the Appellant, when asked, stated that he did not understand the consequences of pleading guilty. Section 251(2) of the Criminal Procedure and Evidence Code (CP&EC) stipulates as follows:

“If the accused admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him and he may be convicted and sentenced thereon:

Provided that before a plea of guilty is recorded, the court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit without qualification the truth of the charge against him.”

The Appellant having said that he did not understand the consequences of his guilty plea, the learned magistrate went on to explain to him the consequences of a guilty plea. That is, that the court would go on to convict him outright on his own plea of guilty. The Appellant answered in the positive that he had heard the learned magistrate’s explanation, and that he wished to maintain his guilty plea. Thus, the Appellant’s plea on the first count cannot be faulted. And as regards the second count, when the charge was read over to the Appellant, he pleaded guilty, and also pleaded guilty to all the elements of the offence. He also conceded that he understood the consequences of his guilty plea. When a guilty plea was entered, he admitted as correct the narrated facts. Following that the court convicted him. The appeal on the first ground therefore fails and is hereby dismissed.

In the second ground of appeal the Appellant contends that the lower court erred in proceeding to enter pleas of guilty, convicting and sentencing the unrepresented Petitioner in such circumstances without first informing the Petitioner of his right to legal representation. In the matter at hand I do agree with counsel for the Appellant that the Appellant was facing a very serious charge of defilement. Ordinarily then, an accused person facing such a serious charge must be legally represented, and if he cannot afford counsel the State must provide him with

counsel at the State's expense –section 42(2)(f)(v) of the Constitution. Further, he must be informed of his right to legal representation.

However, the court will, among other things, consider whether absence of legal representation led to a miscarriage of justice. In the case of **Nthala and Others v The Republic [2000-2001] MLR 356 at p.359**, while accepting that the Constitutional right of the appellants to legal representation was breached, the Supreme Court of Appeal had this to say:

*“Turning to the decision of the High Court which resulted in the conviction of the appellants for murder, it is clear to us that the jury accepted the prosecution’s story that the deceased was the victim of mob justice at the hands of the appellants. They must have rejected the appellants’ story that the deceased burnt himself when he entered a pit latrine while carrying fire. In the light of the evidence which was adduced during trial, we do not think that the decision by the jury to convict the appellants was unreasonable or unsatisfactory.....**We are of the view that although failure by the State to provide the appellants with a legal practitioner to defend them constituted a breach of their right to fair trial, that fact alone, did not result, on the facts of this case, in a miscarriage of justice.**”*
(emphasis supplied)

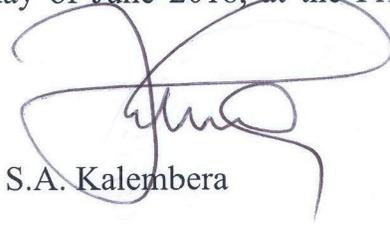
In the matter at hand it does not appear on the record that the Appellant was informed of his right to legal representation; and none was provided to him. Thus his right to legal representation was breached. However, did that occasion a miscarriage of justice? Despite lack of legal representation the Appellant managed to take plea despite the court explaining to him the consequences of his guilty plea. He maintained his guilty pleas. The learned magistrate guided him throughout the plea taking stage. Thus, there was no miscarriage of justice. Consequently the second ground of appeal too must fail, and it is hereby dismissed.

In the third ground of appeal the Appellant contends that the lower court erred in sentencing the Petitioner to a global 9 years IHL in the circumstances without specifying to which count the said years applied. The sentence is wrong in principle. I must agree that indeed the learned magistrate erred in law. Each charge must have its own sentence in the wake of convictions. It was therefore wrong to impose one sentence for convictions on two counts. The learned magistrate ought

to have specified separate sentences for the offence in each count and not one global sentence for both counts. As a reviewing Judge I did point out that anomaly and ordered that within 21 days the learned magistrate must re-sentence the Appellant and impose separate sentences on each charge. However that was taken by this appeal. Thus, the appeal must succeed on this ground.

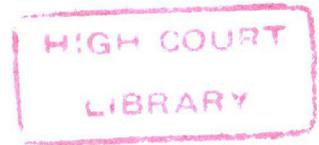
All in all, the appeal partially succeeds on the third ground of appeal and is upheld on that ground; whereas the appeal fails on the first and second grounds of appeal and consequently dismissed on those grounds. I therefore set aside the sentence imposed on the Appellant, and I further direct that Appellant be brought before any other competent magistrate to be properly re-sentenced.

PRONOUNCED this 26th day of June 2018, at the Principal Registry, Criminal Division, Blantyre.

A handwritten signature in blue ink, appearing to read 'S.A. Kalembera', is written over a faint circular stamp.

S.A. Kalembera

JUDGE



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NO. 1003 OF 2015

BETWEEN

MADALITSO SIWAKWE PLAINTIFF

AND

PRIME INSURANCE COMPANY LIMITEDDEFENDANT

CORAM : HER HONOUR MRS. BODOLE, ASSISTANT REGISTRAR

Kaluwa, of Counsel for the Plaintiff

Maliwa, of Counsel for the Defendant

Ms. Kazembe, Court Clerk

ORDER ON ASSESSMENT OF DAMAGES

Introduction

The plaintiff brought proceedings against the defendant claiming damages for pain and suffering, loss of amenities of life, disfigurement, special damages and costs of the action. Judgment by consent was entered by the parties on 11th October, 2017. The Court then proceeded to make an award on special damages as pleaded. The matter has now come for assessment of damages.

The Evidence

On 4th September, 2015 the plaintiff was hit by a motor vehicle registration number KK 3205 Tata bus near Somba Trading Centre along Machinga/Zomba road. The bus was insured by the defendant.

As a result of the accident the plaintiff sustained injuries. According to the medical report the plaintiff sustained dislocation of the left shoulder, multiple cut wounds on the left shoulder, left forearm, left hip, right foot, left leg and bruises on the left shoulder. The wounds were sutured and dressed with iodine. The surgical procedure of reduction of dislocation was performed on him.

The plaintiff has developed scars on the left shoulder, left lower leg running from the knee going down to the middle lower leg, and under the foot in the middle of the foot.

The plaintiff has been going for physiotherapy at Kachere Rehabilitation. He is unable to walk long distances as the leg swells and he feels pain. He is able to do his job as a businessman. The plaintiff's permanent incapacity has been assessed at 22%.

General Law on Damages

A person who suffers bodily injuries due to the negligence of another is entitled to the remedy of damages. Such damages are recoverable for both pecuniary and non-pecuniary losses. The principle underlying the award of the damages is to compensate the injured party as nearly as possible as money can do it – **Elida Bello v Prime Insurance Co. Ltd** Civil Cause No. 177 of 2012 (unreported).

The damages cannot be quantified in monetary terms by use of a mathematical formula but by use of experience and guidance afforded by awards made in decided cases of a broadly similar nature – **Wright v British Railway Board [1983] 2 AC 773**. The court, however, considers the time the awards were made and currency devaluation – **Kuntenga and Another v Attorney General** Civil Cause No. 202 of 2002.

The non-pecuniary head of damages include pain and suffering, loss of amenities of life and loss of expectation of life. These are assessed by the court. Pecuniary loss must be pleaded and proved - **Renzo Benetollo v Attorney General and National Insurance Co. Ltd** Civil Cause No. 279 of 1993 (HC).

Pain and Suffering

Pain and suffering is attributable to the plaintiff's injury or to any necessary surgical operations and mental anguish such as that suffered by a person who knows that his expectation of life has been reduced or who being severely incapacitated, realizes the condition to which he has been reduced – **Sakonda v S.R. Nicholas** Civil Appeal Cause No. 67 of 2013.

It is clear from the evidence that the plaintiff suffered great pain and is still suffering. He sustained dislocation of the left shoulder, multiple cut wounds on the left shoulder, left forearm, left hip, right foot, left leg and bruises on the left shoulder. Reduction of dislocation was done and the wounds were sutured and dressed with iodine. He had to undergo physiotherapy at Kachere Rehabilitation. He is unable to walk long distances as he feels pain and the leg swells.

Loss of Amenities of Life

Loss of amenities is attributable to deprivation of the plaintiff's capacity to engage in some sport or past-time which she formerly enjoyed – **Kanyoni v Attorney General** [1990] 13 MLR 169. It means that he is incapable of performing some activities he used to do.

It is clear from the evidence that the plaintiff is unable to enjoy life as he used to. He is unable to walk long distances due to the pain he feels in his leg and his leg swells.

Deformity/Disability

Disability is a limitation either physically or mentally for someone to do what any other person can do without reasonable accommodation. In **Ching'amba v Deerless Logistics Ltd** Civil Cause No. 2888 of 2007 the court stated that

disfigurement is not a matter to be taken lightly and casually. It is something that one has to live with permanently.

The plaintiff has scars on the left shoulder, left lower leg running from the knee going down to the middle lower leg and a big scar under the foot. He will have to live with these scars which have disfigured his body.

Award of Damages

In **Owen Kayira and 2 Others v Unusu Shaikh** Personal Injury Cause No. 1160 of 2013 the 2nd plaintiff sustained a head injury and multiple soft tissue injuries over the head. The court awarded him a sum of K2,500,000.00 on 1st July, 2014. In **Norah Malichi (A Minor by her father and next friend, Henry Malichi v Prime Insurance Company Limited)** Civil Cause No. 2613 of 20009 the plaintiff sustained a fracture of the left tibia, cut wound on the scalp, bruises on the face and swollen head. The court awarded him a sum of K4,500,000.00 for pain and suffering and loss of amenities of life on 29th May, 2012.

The injuries suffered by the plaintiff in the present case is in between the injuries suffered by the plaintiffs in cases cited above. He sustained cut wounds on different parts of his body and a dislocation of the left shoulder. He sustained no fracture. I, therefore, award the plaintiff a sum of K1,300,000.00 as damages for pain and suffering, K800,000.00 as damages for loss of amenities of life, and K800,000.00 as damages for disfigurement. I award the plaintiff costs of the assessment proceedings.

Conclusion

In conclusion, the plaintiff is hereby awarded a total sum of K2,900,000.00 and costs of the assessment proceedings.

Pronounced in court this 18th day of February, 2018 at Blantyre.



EDNA BODOLE (MRS)

ASSISTANT REGISTRAR