



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 239 OF 2015**

BETWEEN:

AYATU GANISHECLAIMANT

AND

RAFIA PEREIRA.....1st DEFENDANT

NICO GENERAL INSURANCE CO. LTD.....2nd DEFENDANT

CORAM

Mrs T. Soko : Assistant Registrar

Mr Hara : Counsel for the claimant

Mr Mwakhwawa : Counsel for the defendant

Ms Munthali : Court Clerk

ORDER ON ASSESSMENT OF DAMAGES

BACKGROUND

This is an order on assessment of damages following a Judgment by Honorable Justice Madise dated 8th November 2017. The Claimant is claiming for damages for pain and suffering, costs for replacement of the motor vehicle registration number TO 5346 Toyota Nadia Pearl Saloon and costs of the action. The facts extracted from the statement of claim aver that on 21st March 2015 the claimant was driving from the direction

of ESCOM house approaching towards Nados along Haile Selassie Road. Upon reaching Bombay Bazzar, the claimant was hit by a motor vehicle registration No. DA 1666 Toyota Hilux pick up which was coming from the opposite direction. As a result of the accident, the claimant sustained a deep cut on the head, painful chest, and dislocated leg, multiple bruises of the body, soft tissue injuries, painful right arm, painful left leg and wounds. Furthermore, the claimant suffered loss of his motor vehicle as the said vehicle caught fire.

EVIDENCE

In evidence, the claimant who was the sole witness adopted his witness statement where he explained that the incident took place on 21st March around 3:00 hours. The claimant produced and tendered a medical report as part of his evidence. The claimant also produced and tendered a copy of police report and a picture of the vehicle. The claimant bemoaned that he has been deprived the use of his motor vehicle from 21st March to this date. He said he used to hire taxis to get by with his life and businesses. He stated that his loss of use per month was approximately K450, 000.00 and K15, 000.00 per day being the lowest hiring fees for alternative vehicle use. The claimant produced and tendered copies of invoices and quotations the lowest being K2, 745,000.00. Further, the claimant stated that on 9th October 2015, he sourced a quotation for the 2nd hand Toyota Nadia to put him back in a position he was before the accident. He pointed that the value of the vehicle was K2, 300, 00.00. He produced and tendered a copy of the quotation from Victor Car Sellers. In cross examination, the claimant stated that he brought the vehicle which was involved in an accident in 2014 at the cost of K2, 500,000.00. The Claimant further stated that the current market value for the vehicle is K4, 500,000.00.

The defendants did not call any witness.

SUBMISSIONS

In submissions, Counsel for the Claimant submitted that a sum of K2, 745,000.00, K2, 300,000.00 and K7, 500,000.00 would adequately compensate the claimant in damages for loss of use, replacement of motor vehicle, pain and suffering and loss of amenities of life. Counsel cited a number of authorities to substantiate the claim and I appreciate the authorities cited by Counsel for the claimant.

On the other hand, Counsel for the defendant stated that the Claimant cannot be awarded damages for loss of use since it was not pleaded in the statement of claim. Further, the defendant stated that the claimant cannot be awarded cost of the new vehicle when there ought to be a pre accident value which he would have been entitled to. To add the defendant stated that the claimant did not plead special damages. The defendant

further stated that the medical report does not indicate the qualifications of the medical personnel that treated him and the assertion that the claimant has a problem of loss of memory ought to have been diagnosed by a neurosurgeon who could relate the loss of memory to the accident. The defendant prayed that the only damages that the Court should award are damages for pain and suffering. Counsel prayed that the sum of K800, 000.00 should be sufficient to compensate the claimant. Counsel also stated that each party must bear its own costs since the claimant has failed to prove other damages. Counsel cited a number of authorities to substantiate his arguments which have been useful.

GENERAL LAW ON DAMAGES

In assessing damages for personal injuries, the intention of the court is to compensate the injured party as nearly as possible as money can do. The principle is to put the plaintiff at the position he would have been if it would have not been for the tort committed. See *Namwiyo v Semu* (1993) 16 (1) MLR 369.

In calculating damages , therefore, the Courts consider, in monetary terms, the sum which will make good to the sufferer, as far as money can do, the loss he has suffered as a result of the wrong done. See *Admiralty Commisioners vs S.S Valeria* (1992) 1 A.C. 242 at 248.

In *Christina Mande vs Charter Insurance Co. Ltd Personal Injury Cause No. 329of 2016* the Court quoting *Wright vs British Railway Board* 1938 AC 1173, 1177 stated that:

'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.'

In the case of *City of Blantyre vs Sagawa* the court said the following:

*'It would appear to us that if the award is to be conventional, **an award for a similar injury** should be comparable and should, to some extent, be influenced by amounts awarded in the previous case, either in the same or neighboring jurisdictions. In citing previous awards the court should not lose sight of factors like devaluation of the currency since the awards were made.*

PAIN AND SUFFERING

In damages for pain and suffering, the court considers the physical experience of the nerves and mental anguish which comes as a result of the injury. See *Lemon Banda and 19 others V Mota Engil Limited and General Alliance Insurance Limited, personal injury cause number 178 of 2012 (unreported).*

In the *City of Blantyre vs Sagawa 1993 16 (1) MLR 67* the court quoted Kemp and Kemp volume II paragraph 1007 where it was stated that;

Pain is, it is suggested, used to describe the physical pain caused by or consequent upon the injury, while suffering relates to the mental element of anxiety, fear, embarrassment and the like.

Page 831 of **Mc Gregor** on damages defines pain as the immediately felt effect on the nerves and brain of some lesion or injury to a part of the body, while suffering has been defined as the distress which is not felt as being directly connected with any bodily condition. Pain includes any pain caused by medical treatment or surgical operations rendered necessary by the injury inflicted by the defendant. Suffering includes fright at the time of the injury and fright reaction, fear of future incapacity, either as to health, sanity or the ability to make a living, and humiliation, sadness and embarrassment caused by disfigurement. Also see *Gedion Mhango vs Nico General Insurance Co. Ltd Personal Injury Cause No. 703 of 2016 (unreported).*

COST OF REPLACEMENT OF A MOTOR VEHICLE

the position of the law is that where an item has been damaged and is in reparable state, the court will award as damages the cost of repairing the same whilst if it is beyond repair, the court will award the cost of replacing it as damages (see the cases of *Hara vs Malawi Housing Corporation, 16(2) MLR 527* and *Tea Brokers (Central Africa) Ltd vs Bhagat(1994) MLR 339.*)

DETERMINATION.

In the present matter, I have judiciously looked at the medical report which vividly indicates that the claimant suffered a deep cut wound on the scalp. There are no additional injuries in the medical report. The report shows that the claimant was sutured to facilitate healing and control bleeding. Additionally, the report described the pain that the claimant suffered as moderate. This means that the injuries suffered by the claimant are less serious than the ones cited by Counsel for the claimant in his authorities. Nevertheless, the Court noted that the medical report shows that the claimant suffers memory loss. Counsel for the defendant argued that it is uncertain if the same was diagnosed by the neurosurgeon. Be as it may be, the medical

report was produced after the claimant was examined by a medical personnel who dictated that problem in his examination and it is clear from the medical report that the claimant has a memory loss.

After considering the nature of the injuries sustained by the claimant, the arguments advanced by both counsel and the comparable cases I award the Claimant a sum of K2,000,000.00 damages for pain and suffering as pleaded by the claimant in the statement of claim.

Coming to the loss of use of the motor vehicle, the claimant did not make such pleading in the statement of claim I will therefore award no damages on that head.

On the cost of replacement of another vehicle the claimant stated that he bought a second hand motor vehicle at Victor Car Sellers at the price of K2, 300,000.00. The Claimant produced a quotation from Victor Sales to prove his claim. There is no evidence of the value of the vehicle before the accident but there is evidence that the vehicle got burnt and it could not be repaired. In the absence of that evidence the Court awards the amount indicated in the quotation which is K2, 300,000.00 as cost of replacement of the motor vehicle.

Costs normally follow the event and the Court has the discretion to award costs. I therefore award the claimant costs of the action.

pronounced in Chambers on the 31st day of July 2018



T. SOKO

ASSISTANT REGISTRAR