

The Judiciary

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**PERSONAL INJURY CAUSE NUMBER 850 OF 2013**

**Between**

**MONICA CHISALE KAONGA..... 1<sup>ST</sup> CLAIMANT**

**ADRIAN KAONGA (an infant suing through his mother and next friend, Monica Chisale Kaonga. ....2<sup>ND</sup> CLAIMANT**

**FLETCHER WHITE..... 3<sup>RD</sup> CLAIMANT**

**-and-**

**PRIME INSURANCE COMPANY LIMITED..... DEFENDANT**

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**CORAM: A.J. Banda, Assistant Registrar**

Ms. U. Kambwiri, for the Claimant

None present, for the Defendant

Mr. Mathanda, Clerk/ Official Interpreter

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Banda, Asst. Reg.

**ASSESSMENT ORDER**

**Background**

The three claimants commenced this proceeding against the defendant who was sued as an insurer of motor vehicle registration number BR 7967 Toyota Hiace minibus in which they were passengers. They claimed that the driver was negligent and that he lost control of the vehicle that it ended up hitting a tree and they sustained injuries. The claimants sued seeking damages for: pain and suffering; loss of amenities of life; disfigurement; loss of earning capacity; and special damages for medical treatment and fees for police and medical reports, and costs of the proceeding.

On 18<sup>th</sup> December, 2015, the honourable Justice Tembo made an order that judgment on liability was entered in favour of the claimants. He further directed that damages be assessed by the registrar, and that costs were for the claimants. The claimants filed a notice of appointment with the registrar for the assessment of damages. The initial appointment was adjourned. The claimants served the notice of adjournment on the defendant's legal practitioners on file, Destone and Company. There is a return of service on file. Despite service, the defendant or their counsel were conspicuously missing on the date and time of hearing without any explanation. The court proceeded to hear the claimants.

### **Evidence**

The claimant paraded two witnesses. The first one was Monica Chisale Kaonga. In her statement adopted under oath, she told the court that she was a passenger in a minibus that was driven at an excessive speed, for which reason the driver lost control and the vehicle hit a tree and injured her and her son Adrian Kaonga who was a year old on the day, the 4<sup>th</sup> day of June, 2013.

Monica Chisale Kaonga said that she sustained a fracture of the left malleolar, a deep cut on the posterior shoulder and scratch wounds on both hands. She said the degree of permanent incapacity was assessed at 30%. As for Adrian, the next of friend said the infant sustained bruises on his face and swelling on the occipital head and supracondylar fracture of the right distal radial ulna. His degree of permanent incapacity was assessed at 12%. She attached medical reports for herself and the infant.

The second witness was Fletcher White, the third claimant. She told the court that she sustained a deep cut wound in the accident, on the right forearm and leg. Her degree of permanent incapacity was assessed at 21%. She exhibited the medical report she obtained from the hospital.

### **Issue**

The only issue at this stage is the amount of damages that the claimants must be paid by the defendant as compensation for the injuries and losses arising out of the negligence of the defendant's insured.

### **Analysis of Law and Fact**

Every victim of a tortious act is entitled to be compensated by the tortfeasor. The level of damages must be adequate enough to put the victim, as far as money can, in the same position that the victim would have been had the wrongful act not been done to him- **Namwiyo v. Semu and Others [1993] 16(1) MLR 369**. It is impossible to come up with an amount of money that fully compensates a non-monetary loss, with mathematical precision, like is the case with personal injuries. As result, to achieve certainty and consistency of awards in like cases, courts



use awards in comparable cases as a guide, without losing sight of specific losses suffered by a particular claimant. See **Chipeta v. Dwangwa Sugar Corporation, Civil Cause No. 345 of 1998, High Court, Principal Registry (unreported)**. Courts also take into account the rise or fall of value of the currency over the period of time that has passed between a comparable case and an instant one- **Paulo v. Mwakabanga [1991] 14 MLR 409**.

In the instant matter, the first two claimants had fractures. There were other injuries. The third claimant had a deep cut wound on the fore arm and another on a leg. They are looking for damages for pain and suffering caused from the injuries. The word pain connotes that which is immediately felt upon the nerves and brain, be it directly related to the accident or resulting from medical treatment necessitated by the accident, while suffering includes fright, fear of future disability, humiliation, embarrassment and sickness- Ian Goldrein et al, *Personal Injury Litigation, Practice and Precedents* (Butterworths, 1985) p8.

The claimants also pray for damages for disfigurement. Disfigurement refers to changes in the physical bodily frame that has been caused by the injuries in an accident. In the case of **Chingamba v. Deerless Logistics Limited Civil Cause No. 2888 of 2007**, Potani, J stated that disfigurement was not something to be taken lightly and casually as a person lives with the deformity for the rest of his life.

Damages are paid under the head of loss of amenities of life to compensate a claimant's deprivation of the pleasures of life, which amounts to substantial loss, whether the claimant is aware or not of that loss. See **City of Blantyre v. Sagawa [1993] 16(1) MLR 67 (SCA)**.

In the case of **Raphael Lungu v Prime Insurance Company Ltd, Civil Cause No. 2024 of 2010**; an award of MK5,000,000.00 for a fractured distal humerus open fracture of radius and ulna. The award was made on the 17th May, 2012.

In the case of **Alice Kachisi and Kelvin Baluti v. United General Insurance PI cause Number 87 of 2017**, the 2<sup>nd</sup> plaintiff who was only three years old at the time of the accident was compensated by K 1, 000,000.00 as damages for pain and suffering for multiple bruises and mild head injuries. This award was made on 14<sup>th</sup> July, 2017. The plaintiff was also awarded K1,000,000.00 for loss of amenities of life, as there was a fear of behavioural change due to the trauma caused by the accident.

In **Malisewo v. Charter Insurance Company Ltd, Civil Cause No. 915 of 2012**, the claimant was awarded K1, 500,000.00 as damages for pain and suffering and K800,000.00 as damages for disfigurement. In that case the claimant suffered a wound on his head, fracture of the left tibia, soft tissue injuries, and bruises.



In the case of **Gedion Mhango v. Nico General Insurance, Personal Injury Cause No. 703 of 2016, High Court, Principal Registry (unreported)** the plaintiff suffered a fracture on his right leg, serious cuts on the head, and cuts on the right hand side of the body and on the backside. That he was further admitted from the 15th January, 2016 to 13th April, 2016. A metal rod was inserted in the leg. In an award made on 31<sup>st</sup> January, 2017, K 5, 000,000.00 was ordered as compensation for pain and suffering.

Looking at the comparable cases, some which are more serious than the injuries here, some which were made long time back and others closer in time, and considering the injuries suffered by the three claimants here I make the following awards;

**K2, 200,000.00** for pain and suffering to the 1<sup>st</sup> claimant, Monica Chisale Kaonga, **K1,455,000.00** the 2<sup>nd</sup> claimant who is a minor, Adrian Kaonga, and **K850,000.00** for the third claimant, Fletcher White as damages for pain and suffering. The first two claimants had fractures that must have caused unbearable pain but also suffering as to the fear of a serious deformity. Their injuries, for the fractures, were more serious than that sustained by the third, who suffered a deep cut.

I have found as a fact that the minor claimant was healed. He is still an infant and that must have played a good part in his healing. In my opinion he may not suffer much by way of loss of pleasures of life. I award **K1,000,000.00** to the first claimant, **K 500,000.00** to the second claimant and **K700,000.00** to the third claimant respectively, for loss of amenities of life.

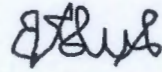
I award **K600,000.00** to the first claimant, and **K250,000.00** to the second claimant and **K200,000.00** to the third claimant under the same head respectively.

I make no award under the head of loss of earning capacity as there was no proof of such loss in the evidence of the claimants despite pleading the same in the statement of claim.

### **Conclusion**

The 1<sup>st</sup> claimant is hereby awarded a total sum of K3, 800,000.00, the 2<sup>nd</sup> claimant is awarded a total of K2, 205,000.00, and the third claimant is awarded a total sum of K1, 750,000.00 as compensation for their respective injuries and losses in the accident that was caused by the negligence of the defendant's insured. The defendant will also pay costs incurred by the claimants for the assessment, which will be assessed if the parties do not agree on the amount.

Made this 23<sup>rd</sup> day of July, 2018.



**Austin Jesse Banda**  
**ASSISTANT REGISTRAR**