



The Judiciary

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**PERSONAL INJURY CASE NUMBER 811 OF 2012**

**Between**

**TEXTEN KAMFOLOMA..... CLAIMANT**

**-and-**

**JIMMY KADUKA..... 1<sup>ST</sup> DEFENDANT**

**PRIME INSURANCE COMPANY LIMITED..... 2<sup>nd</sup> DEFENDANT**

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

Mr. N. Alide, for the Claimant

None present, for the Defendants

Mr. Mathanda, Clerk/ Official Interpreter

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Banda, Asst. Reg.

**ASSESSMENT ORDER**

**1. Background**

The claimant obtained judgment in his favour as against the first defendant. The judgment was made by the honourable Justice Chirwa, and was endorsed by the assistant registrar on 15<sup>th</sup> September, 2016. It was ordered that as against the 2<sup>nd</sup> defendant, the issue of liability should be determined by the registrar under Order 14A of the Rules of the Supreme Court. This order therefore, without the application under Order 14A of the Rules of the Supreme Court, pertains to the first defendant, unless and until there is a contrary order of the registrar under Order 14A of the Rules of the

Supreme Court. The defendants did not attend the assessment of damages hearing despite due service of the notice. The court proceeded to hear the claimant in their absence.

## **2. Facts**

The facts, for the purposes of the assessment hearing are obtained from the evidence of the only witness in the hearing, the claimant himself. Mr. Texten Kafoloma who told the court that he was injured when the motor vehicle in which he was a passenger, registration number KU 1326 Nissan Hard body, insured by the 2<sup>nd</sup> defendant and driven by the 1<sup>st</sup> defendant, collided with another vehicle. He said that from the incident he sustained an open fracture of the 5<sup>th</sup> metacarpal, deep cut wound on the little finger of the right hand. He said that he underwent treatment of analgesics and suturing at Queen Elizabeth Central hospital. He tendered a medical report, marked 'TK2'. The report shows that the little finger has since been deformed and that as a carpenter, the claimant would have difficulties to perform his job.

Texten Kamfoloma further said that he developed ugly scars on affected areas and he had the possibility of developing arthritis, his ability to perform his previous job and sporting activities had been seriously impaired, as the degree of permanent incapacity was assessed at 15%.

## **3. Issue**

The issue at this stage is the amount of damages applicable in the circumstances under the heads of pain and suffering, loss of amenities of life and disfigurement; and recovery of costs for obtaining medical and police reports.

## **4. Law and Facts Analysis**

Damages are the remedy that is open to a victim of the wrongful act of another. Courts do award damages not to punish the defendant but to fully compensate the claimant of all the losses she has suffered. In the case of **George Kankhuni v. Shire Buslines Ltd, Civil Case Number 1905 of 2002**, Katsala, J stated as follows:

“The law demands that the plaintiff, as far as money can do it, be put in the same position as if he has not suffered the loss. This is what is referred to as *restitution in intergrum*. ”

It is not easy to quantify damages for losses that are not monetary in nature such as personal injuries. Courts as such use comparable cases as a guide to the quantification of applicable damages, without losing sight of particularities in the individual case that the court is dealing with. See **Chipeta v. Dwangwa Sugar Corporation, Civil Cause No. 345 of 1998, High Court, Principal Registry (unreported)**. The court will also consider factors such as passage of time since a particular comparable award was made, as well as currency fluctuations within the period between the case at hand and the comparable one- **Hon. Kennedy Kuntenga v. Attorney General, Civil Cause No. 2002 of 2002, High Court, Principal Registry, (unreported)**.

#### Pain and Suffering

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.

#### Disfigurement

Damages are paid under the head of disfigurement for the change in the physical form of a person injured either as a result of the impact of the injury or its treatment, such as a scar coming in as a result of surgical operation necessitated by the injury. It is a change in appearance but it is capable of limiting a person from doing certain things as was observed by the court in the case of **Austin Julius v. Rasika Gunawardena and General Alliance Limited, Personal Injury Cause Number 316 of 2014**.

Potani, J, in the case of **Chingámba v. Deerless Logistics Limited Civil Cause No. 2888 of 2007**, 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. In **Zaina Chipala v. Dwangwa Sugar Corporation Civil Cause Number 345 of 1998, High Court, Principal Registry, per Chimasula, J**, it was held that money cannot renew a physical frame that has been battered and shattered. The courts must therefore award a sum that is regarded as reasonable compensation.

#### Loss of Amenities of Life

Damages are paid under the head of loss of amenities of life to compensate the 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)**; *Kemp and Kemp, The Quantum of damages, Vol. 1 (2nd Ed).*, 1961, p.624.2

#### Comparable Cases

In the case of **Charles Saidi Phiri v. Kalinga and Trans Rukuru Bus Service Civil Cause No. 531 of 2007, High Court, Lilongwe Registry (unreported)**, a claimant who had lost a figure and had two others damaged and had degrooving of the hand was awarded a sum of K 400,000.00 damages for pain and suffering and loss of amenities of life in an award made in November, 2007. The injuries in this case were more severe than the ones in the instant case. In the Charles Saidi case, there was a complete loss of figure. In this case there is a fracture leading to deformity. There was also damage to two fingers and degrooving. In this case we have a deep wound to one figure. It is also important to note that this award was made more than 10 years ago.

In an award made 18 years ago, the court made a compensation order of K 180,000.00 for pain and suffering for a fractured hand that could not be used as before. This is the case of **Duncan Chongo v. De Cabs Bus Services and NICO Limited, Civil Cause**

**Number 2847 of 2000.** This case is closer to the injury and effect to the current one but very far in time of the award.

Counsel for the claimant cited the case of **Selemani Paul vs. Holles Magombo and Prime Insurance Company Limited Personal Injury Cause Number 762 of 2015 (unreported)** where the claimant suffered a fracture of the 5<sup>th</sup> base metatarsal, multiple bruises on the head and chest and multiple cuts on the lower extremity. The court awarded the plaintiff K 2, 500,000.00 as damages for pain and suffering in an award made on 2<sup>nd</sup> February, 2016.

Counsel also cited the case of **Saidi Ali v. Prime Insurance Company Limited Personal Injury Cause No. 408 of 2012 (unreported)** where the plaintiff suffered a fracture of the 4<sup>th</sup> finger and 5<sup>th</sup> metacarpal and a deep wound. He was awarded the sum of K5, 000,000.00 as damages for pain and suffering On 26<sup>th</sup> October, 2015. This again was a more serious case in terms of the injuries sustained.

#### This Matter

In the instant matter, the claimant no doubt went through a lot of pain from the fracture of the metacarpal and the deep wound on the figure. He also experienced pain from the treatment and suturing. However, the comparable cases above were all more serious than the claimant's injuries here-in. For that reason, I make an award of **K785,000.00** for pain and suffering. I make a further award of **K550,000.00** for the deformity in the ugly scars that the claimant will live with for the rest of his life.

From the medical report, it is observed that the claimant is a carpenter and despite being an income earning occupation, carpentry is also an enjoyable art. He will no longer enjoy the art as he used to, given the deformity. He may not enjoy other amenities not specified in evidence, but nevertheless a loss, as well see- Kemp and Kemp, The Quantum of damages, Vol .1(2nd Ed)., 1961, p.624.2. I therefore make an award of **K680, 000.00** as damages for loss of amenities of life.

The claimant asked the court to make an award of special damages for the cost of police report and a medical report. There was no evidence of the medical report expense despite the report being available. I will award the cost of the police report as there is evidence that the report was paid for a sum of **K3,000** under a General Receipt number 756421.

**5. Conclusion**

The claimant is hereby awarded a total sum of **K 2, 018,000.00** (Two million, and eighteen thousand Kwacha only). The claimant is also awarded costs of the assessment hearing.

Made this 12<sup>th</sup> day of July, 2018.



**Austin Jesse Banda**

**ASSISTANT REGISTRAR**