



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CASE NO. 593 OF 2017

BETWEEN

TENSANI KAPITO.....CLAIMANT

AND

UPILE MALIKEBU.....1st DEFENDANT

BRITAM INSURANCE COMPANY LIMITED.....2nd DEFENDANT

Coram: **WYSON CHAMDIMBA NKHATA (AR)**

Khan - of Counsel for the Claimant

Nanthuru – of Counsel for the Defendants

Chitsulo- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

This is the court's order on assessment of damages. The issue of liability was settled in favour of the claimant at mediation. The issue of the Defendant's liability having been settled already by the said judgment, the duty placed upon this court was to determine the reasonable quantum of damages that would adequately compensate the claimant for the losses and damages herein.

The claimant in this matter took out a writ of summons issued on the 18th of October 2017 against the defendant claiming damages for pain and suffering, loss of amenities of life, disfigurement, special damages and costs of the action. In his Statement of Case, he stated that on or about the 5th of October

2017 at around 07:10 hours, the 1st defendant was driving motor vehicle registration number 20 SC 12 Toyota Hilux Double Cabin insured with the 2nd defendant from the direction of Machinga heading towards Zomba City along Machinga-Zomba road. Upon arrival at or near Matawale Bus stop he hit the claimant who was crossing the road from the right hand side to the left hand side of the said road. It is against this background that she now claims damages for pain, suffering and loss of amenities of life, damages for disfigurement and costs of this action.

The matter came for assessment of damages on the 28th of August 2018. The claimant was the sole witness for her case. He adopted his witness statement in which re-iterated that he on or about the 5th of October 2017 at around 07:10 hours, the 1st defendant was driving motor vehicle registration number 20 SC 12 Toyota Hilux Double Cabin insured with the 2nd defendant from the direction of Machinga heading towards Zomba City along Machinga-Zomba road. He tendered a Medical Report which he marked "TK1". He further averred that he sustained a fracture of the right toes, wound on the hip, right leg and hand, sprained right hip and wound and contusion on the right leg. He was consequently taken to the hospital where he received treatment of painkillers, alignment of the toe bone and immobilized toe, suturing of the wounds and iodine application. He tendered a Medical Report which he marked "TK2".

In cross-examination, he stated that he was admitted for two days at Zomba. He further stated that the Medical report indicated that he was admitted on the 5th and discharged on the same 5th. He stated that he could not read English. He also stated that it is not true that he was dislocated on the hip. He stated that he was dislocated on the toe and the nail was removed. He further indicated that he was not sutured on any part. He stated that he goes to school and he is in Standard 8 and he is 19 years old. He also stated that he did not have problems going up the steps at the court building.

Such was the evidence for the claimant. The defendants on the other hand, did not parade witnesses. Counsel for the defendants adopted his Skeletal Arguments and made an application to amend the same in that when they were preparing the same they were guided by injuries in the Medical Report but after examining him they are now of the view that the injuries are not serious. In their prayer, they had asked for K3,000,000.00 as damages but they are now of the view that the same is too much. He therefore made an application to substitute with K1,300,000.00. On the other hand, Counsel for the claimant also adopted his Skeletal Arguments and added that the claimant was not able to differentiate between a fracture and a dislocation. He invited the court take heed of the evidence by the Medical Practitioner as depicted in the Medical report. It was his prayer that the claimant be awarded K9,000,000.00.

It is trite that a person who suffers bodily injuries or losses due to the negligence of another is entitled to recover damages. The fundamental principle which underlines the whole law of damages is that the damages to be recovered must, in money terms, be no more and no less than the Plaintiff's actual loss.

The principle was laid down in numerous case authorities more particularly by **Lord Blackburn** in the case of *Livingstone v. Rawyards Coal Company* (1880) 4 AC 25 in the following terms:

where any injury or loss is to be compensated by damages, in settling a sum of money to be given as damages, you should as nearly as possible get at the sum of money which will put the party who has been injured, or who has suffered loss, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

However, it ought to be borne in mind that it is not possible to quantify damages for pain and suffering, loss of amenities and deformity as claimed in this matter with mathematical precision. As a result, courts use decided cases of comparable nature to arrive at awards. That ensures some degree of consistency and uniformity in cases of a broadly similar nature: See **Wright -vs- British Railways Board** [1983] 2 A.C. 773, and **Kalinda -vs- Attorney General** [1992] 15 M.L.R. 170 at p.172. As such this court will have recourse to comparable cases to arrive at the appropriate quantum of damages for the plaintiff.

In this case, the claimant sustained a fracture on the right toes, wound on the hip, right leg and hand, sprained right hip and wound and contusion on the right leg. Counsel for the claimant called upon the court to consider the following cases:

Patricia Demesani Bannet v Isaac Lizimba and Bernard Pinda Jeremani Civil Cause Number 811 of 2011, where the plaintiff suffered a sprained right ankle, multiple bruises over the body and face. The court awarded the plaintiff K2,000,000.00 for the injuries suffered. The award was made on 20 July 2012.

Wisted Chileka vs Prime Insurance Company Ltd: Personal injury case number 247 of 2014 in which the plaintiff suffered a head injury, painful back and bruises on his leg and had problems when walking. Court on 26th June, 2014 awarded the plaintiff the sum of K3, 800,000.00 as damages for pain and suffering.

Praise Chitete (Minor, suing through Clara Nkhata, next friend) v Yotam M'dala and Prime Insurance Company Limited, Civil Cause Number 282 of 2014 where the Respondent was hit by a motor vehicle and she sustained a fractured radius, fractured ulna and multiple bruises on the left hand. The Plaintiff's incapacity was pegged at 25%, Plaster of Paris was applied and developed arthritis. The Assistant Registrar awarded her the sum of MK4,800,000.00 on 13 November 2014.

Joseph Danger v Prime Insurance Insurance Company Limited Civil Cause No. 1760 of 2010 in which the claimant sustained a fracture of the leg, deep cut wound on the knee, painful leg, bruises on

both arms and at the back and a cut wound on the forehead. An award of K6,500,000.00 was made on 18th of April 2013.

Chilembwe Phiri v General Alliance Insurance Limited, Personal Injury Cause Number 350 of 2012 (unrep) in which the court on the 19th of April 2013 awarded the sum of K7,000,000.00 as damages for pain and suffering, loss of amenities of life and disfigurement where the plaintiff sustained fractures on both legs.

Chibwana v Prime Insurance Company Ltd Civil Cause Number 117 of 2009 where on 21st October 2009 the Plaintiff was awarded the sum of MK6,500,000.00 as damages for personal injuries having sustained a cut wound on the left elbow that was not healing properly and severe head injuries.

It was therefore Counsel's submission that in the circumstances of this case, the reasonable compensation would be K9,000,000.00 for pain and suffering, loss of amenities and disfigurement considering that the awards in the cited case above were made some years back and our currency has continued to fall since that time.

On the other hand, Counsel for the defendants called upon the court to consider the following cases.

Hector Thom v Blantyre City Council and Charter Insurance Company Limited Civil Cause No. 949 of 2016 in which the plaintiff suffered the following injuries: fracture of the right ankle, the right leg was cast in a Plaster of Paris on the same to hold the bones together. He was admitted on the 10th October 2016 and discharged on the 14th of October 2016. He was awarded K2,000,000.00 for pain and suffering including disfigurement and K1,000,000.00 for loss of amenities of life. The award was made on the 9th of May 2018.

Jim Makungwa and Others v Transibiero Ltd and Prime Insurance Co. Ltd Personal Injury Case no. 119 of 2017 in which the 2nd plaintiff sustained multiple open fracture of the 2nd, 3rd and 4th toes on the right foot, a deep cut on the face, fracture of the maxilla, basal skull and loss of teeth. On the 2nd of February 2018, the court awarded him K5,000,000.00 damages for pain and suffering, loss of amenities of life and disfigurement.

Rebecca Mbwana v Attorney General Civil Case No. 1958 of 2009 where the court awarded the sum of K1,000,000.00 as damages for disfigurement for amputation of her leg.

As aforementioned, Counsel for the defendants had initially prayed that the claimant be awarded K3,000,000.00 under all heads claimed. After the hearing on assessment of damages, Counsel for the defendants was of the view that K1,300,000.00 would be reasonable compensation for the claimant for pain and suffering, disfigurement and loss of amenities.

I considered the relevant aspects of some of the precedents cited by the counsel and the submissions both written and oral. It would appear that there is a difference of opinion in the injuries suffered by the claimant particularly on the toe with regard as to whether it was a dislocation or a fracture. The claimant during cross-examination indicated that it was a dislocation however his Medical Report indicates that it was a fracture. Counsel for the defendants argued that it was not a fracture looking at the treatment that he was given for the injury. He pointed out that if it was a fracture the foot could have been cast on Plaster of Paris. Counsel was of the opinion that the court should disregard the Medical Report as it was not tendered by the person who had authored it. On the issue of the medical report, I must mention here that this court asked Counsel for the Defendant if he had issues with the tendering of the medical report before it was introduced into the record. Counsel for the defendant indicated that he did not have any problems and the court proceeded to mark the Medical Report "EXP1". Further, during cross-examination Counsel for the defendant took the claimant to task on the contents of the Medical for instance the claimants' dates of admission as well as the issue of the injuries on the toe and the hip. In my opinion, Counsel for the defendants had agreed that the medical report be accepted for its contents not just that it was made. I do not think it is proper for Counsel to challenge the admissibility at this stage when he had taken time to cross-examine the claimant on the contents of the Medical Report. I accept the Medical Report for the veracity of its contents and shall proceed on the understanding that the claimant suffered a fracture on the toe.

Be that as it may, I believe that K9,000,000.00 as prayed for by Counsel for the claimant is on the higher side. The authorities cited above bear other injuries other than a fracture aggravating the injuries further warranting the awards that were made. In any case, there are deliberate exaggerations that were teased out from the claimant. On paragraph 5 of his witness statement which he adopted in its entirety, he indicated that as a result of the injuries he will not be able to walk again. The court had an opportunity of seeing him in court. He was walking perfectly well. In his own admission as already stated he was able to walk up the steps at the court building with no problems at all.

All in all, I believe an award of K3,500,000.00 under all heads claimed and proved is sufficient recompense for the claimant for the injuries sustained. The claimant is also awarded K3,000.00 being special damages for the cost of obtaining a Police Report under GR. No. 4275364.

In summary, the claimant is awarded K3,503,000.00 as damages. The plaintiff is further awarded costs of this action to be taxed if not agreed by the parties.

DELIVERED IN CHAMBERS THIS 3rd DAY OF SEPTEMBER 2018



WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR