



Republic of Malawi

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**PERSONAL INJURY CAUSE NUMBER 578 OF 2017**

**Between**

**DANKEN BEMA .....CLAIMANT**

**-and-**

**MR. JOHN MOFFAT ..... 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. Mwaungulu, for the Claimant

Mr. Phiri, for the Defendants

Ms. Galafa, Clerk/ Official Interpreter

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Banda

**JUDGMENT ON ASSESSMENT OF DAMAGES**

**Background**

By the order of Honourable Justice John Chirwa endorsed by the court on 14<sup>th</sup> June, 2019, judgment on liability was entered against the defendants, following mediation. The defendants were ordered to pay damages to the claimant, which damages were to be assessed by the Registrar. The defendants were also ordered to pay costs. The claimant brought this proceeding claiming for damages for pain and suffering, loss of amenities of life, cost of police and medical report respectively and costs of the action. The facts derived from the Statement of Claim aver that the 1<sup>st</sup> defendant was the driver of motor vehicle registration number NU4863 Toyota Hiace Minibus and the 2<sup>nd</sup> defendant was the insurer of the said motor vehicle. On or about the 4<sup>th</sup> July, 2016, the 1<sup>st</sup> defendant was reversing the motor vehicle aforesaid at or near Nthukwa

Bus Stage in order to drop passengers and in the process, he caused or permitted the same to hit the claimant who was standing along the road. Due to the accident, the claimant sustained a fracture of distal tibia in the left leg. I heard the parties for the purposes of assessment of damages.

### **Evidence**

The only witness was the claimant himself who adopted his witness statement, and tendered a police report and a medical report. It was his evidence that due to the accident; he sustained a fracture of distal tibia in the left leg. The claimant said he was taken to Queen Elizabeth Central Hospital where he was admitted for two days. The claimant stated that he has not completely healed since he still feels pain inside the leg when he walks. In cross examination, the claimant stated that he sustained a closed fracture and that he was put in plaster of Paris for about three months. He said he is feeling pain inside the leg when he walks. He further said that the motor vehicle that hit him was not damaged in the accident.

### **Issue**

The only issue in this matter is the amount of damages payable to the claimant by the defendant.

### **The Law**

#### **General Law on Damages**

The law provides that a person who suffers body injuries or losses due to the negligence of another is entitled to recover damages from that person. As to the measure of damages, the general rule is highlighted in the speech of Lord Blackburn in **Livingstone v Raywards Coal Co (1880) 5 App Case 25 at 39**, where Lord Blackburn said:

*“Where any injury is to be compensated by damages, in settling the sum to be given for reparation 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, in the same position as he would have been in had he not sustained the wrong for which he is now getting his compensation or reparation”*

Damages to be awarded in personal injury claims are categorised into two, thus general and special damages. General damages are awarded for injuries that are a direct result of the action complained of: see **Esnart Mpulula v Prime Insurance Company Limited, Personal Injury Cause No 108 of 2016**. Special damages on the other hand, are those awarded not as a direct



consequence of the act complain of: see **Stros Bucks Aktie Bolag v Hutchinson (1905) AC 515**. Special damages must be specifically pleaded and strictly proved: see **Govati v Manica Freight Services (Mal)Limited (1993) 16 (2) MLR 521**.

A claimant who claims special damages must therefore adduce evidence or facts which give satisfactory proof of actual loss he or she alleges to have incurred. Where documents filed by the Claimant fail to meet this proof then special damages are not to be awarded: see **Wood Industries Corporation Ltd v Malawi Railway Ltd [1991] 14 MLR 516**.

As it is difficult to ascertain the extent of damages to be awarded in each and every case, the Court is guided by the figures awarded in similar cases: **Wright v British Railway Board [1983] 2 AC 773**. However, in new cases the court needs to consider currency devaluation and inflation. This was observed in **Steve Kasambwe v SRK Consulting (BT) Limited, Personal Injury Cause Number 322 of 2014(unreported)**

*“at times the court is faced with situations where comparative cases have been rendered obsolete because of the devaluation of currency and inflation. it would not achieve justice if the court insisted on the same level of award as was obtaining in the previous cases. in such situation, when deciding the new cases, the court must take account into account the life index i.e. cost of living and the rate of inflation and the drop in value of the currency”.*

Damages for personal injuries are generally awarded under heads, as in this proceeding, the following are the heads: pain and suffering and loss of amenities of life and special damages as pleaded.

#### Pain and Suffering

In awarding 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 Motal Engil Limited and General Alliance Insurance Limited, Personal Injury Cause No 178 of 2012(unreported)**. In the **City of Blantyre v Sagawa 1993 16(1) MLR** the court quoted Kemp and Kemp Volume 11 paragraph 1007 where it was suggested 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.”*

pain caused by medical treatment or surgical operations rendered necessary by the injury inflicted by the defendant whilst 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 disfigurement: see **Gideon Mhango v Nico General Insurance Co Ltd Personal Injury Cause 703 of 2016(unreported)**.

#### Loss of Amenities of Life

Loss of amenities is concerned with loss of enjoyment of life. This follows from the fact that human beings enjoy certain activities which may as result of the injury be curtailed: see **Lemon Banda and 19 Others v Motal Engil Limited and General Alliance Insurance Limited, personal injury cause number 178 of 2012 (unreported)**.

Birket L.J in **Manley v Rugby Portland Cement Co. (1951) C.A No. 286** stated that there is a head of damage which is sometimes called loss of amenities, the man made blind by the accident will no longer be able to see familiar things he has seen all his life, the man who had both legs amputated and will never again go upon his walking excursions – things of that kind -loss of amenities. **McGregor on damages at pages 834** explains that loss of impairment of any one or more of the five senses are compensated under this head, besides loss resulting from interference with Plaintiff's sexual life.

#### Comparable Cases

In the case of **Charles Mauzu v. Wild Batson and Prime Insurance Personal Injury Case no. 77 of 2014** a claimant sustained fractures of tibia and fibula on both legs, had multiple wounds on the right shoulder and the face, and deep cut wounds on the left and right leg. He was awarded K1,000,000.00 for pain and suffering, and K800,000.00 for deformity. The order of those awards was made on 16<sup>th</sup> June, 2017.

On 19<sup>th</sup> July, 2018 the High Court made an award of K1, 450,000.00 for pain and suffering and K 750,000.00 for deformity to a claimant who had sustained a fracture of the distal right leg and had been put in a Plaster of Paris and had difficulties to carry on manual work after the injury. This is the case of **Chidoola v. Chilunga and Prime Insurance, Personal Injury Cause No. 488 of 2014**.

### **The Award**

The medical report shows that the claimant had a fracture of distal tibia on the left leg. The report is clear that the claimant's injuries were serious and he suffered pain due to the injuries and the treatment that he went through. Be that as it may, I find that the cases cited by the claimant were more serious in nature and extent of injuries and hence the pain, suffering and loss of amenities in those cases. Having considered comparable cases in light of time of the awards and extent of damage, I find an award of K2,150,000.00 for pain and suffering, and K950,000.00 for loss of amenities. I award the claimant K3,000.00 for the cost of a police report which was paid under General Receipt No. 2698576. I make no award on the cost of the medical report as there is no evidence of such loss by the claimant.

### **Conclusion**

The claimant is awarded a total of **K 3, 103,000.00** as compensation for the personal injuries he suffered. The defendants are ordered to pay costs of the assessment hearing.

Made this 10<sup>th</sup> day of September, 2019.



**Austin Jesse Banda**

**ASSISTANT REGISTRAR**