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REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CASE NO. 9 OF 2018

BETWEEN

ISHMAEL GOWELO.....CLAIMANT

AND

ABDUL STEPHEN KANYOZA.....1st DEFENDANT

PRIME INSURANCE COMPANY LIMITED.....2nd DEFENDANT

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

Kapoto- of Counsel for the Claimant

Chisale- of Counsel for the Defendant

Chitsulo- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

INTRODUCTION

On the 3rd of April 2017, the claimant suffered injury upon the motor vehicle he was driving was hit by a motor vehicle that was being driven by the 1st defendant as he tried to avoid a vehicle that had broken down on the road. The vehicle that was being driven by the 1st defendant was insured by the 2nd defendant. On the 22nd of March 2018, the claimant through a writ of summons sued the defendants claiming damages for pain and suffering, loss of amenities of life and costs of this action. On the 13th of November 2018, judgment on liability was entered in favour of the claimant upon the defendants' failure to appear for

mediation before Honourable Justice Potani. 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. This is the court's order on assessment of damages.

EVIDENCE

The matter came for assessment of damages on the 22nd of January 2019. The claimant was the sole witness for his case and the only witness paraded in this matter. He adopted his witness statement in which he stated that on the 3rd of April 2017 at around 5:00hours the 1st defendant was driving motor vehicle registration number BU8524 Toyota Hiace Minibus from the direction of Liwonde heading towards Zomba with passengers on board including himself when upon arrival at or near Jokala Trading Centre he pulled his motor vehicle to the offside lane trying to avoid a breakdown vehicle in front of his nearside lane and collided with motor vehicle registration number MG971 Toyota Corolla Saloon. He exhibits a copy of a Police Report marked "IG1".

It is his testimony that a result of the said accident he sustained a fracture of the 10th rib on the right side of the chest. He was taken to the hospital where a CXR examination was done and he was offered Diclofenac. He exhibits a copy of the Medical Report marked "IG2". He further averred that as a result of the said accident he experiences chest pains and he cannot lift heavy objects and his ability to perform manual work has been seriously compromised. He now has a possibility of developing arthritis and his degree of permanent incapacity was assessed at 25 %.

In cross-examination, he stated that he is a farmer. He stated that the accident took place at Jokala in Zomba on the 3rd of April 2017. He also stated that the fracture was discovered upon being x-rayed. He did not bring the x-ray pictures. He was given diclofenac and a lotion to apply on the injury. He did not go through any medical procedure. The doctor said his rib just cracked. He experienced a lot of pain on the ribs. The x-ray was done at Queen Elizabeth Central Hospital. He was given painkillers which he still takes up to now.

SUBMISSIONS BY THE PARTIES

On his part, Counsel for the Claimant adopted his skeletal arguments as his final submissions in this matter in which he re-iterated the injuries sustained by the claimant. He further invited the court to have recourse to the following case authorities.

- **Matias Fadi and Another v Prime Insurance Co Ltd Civil Cause No. 1269 of 2010** in which K4,500,000.00 was awarded for a fracture of the tibia, cut wound on the scalp, bruises on the face and swollen head.
- **Kitilesi Saidi v Alfred Rajab and Prime Insurance Company Limited** Personal Injury cause No. 98 of 2014 in which the claimant sustained an open fracture fibula as well as multiple cut wounds on the. The court awarded her the sum of K4,400,000.00 as damages for pain and suffering and loss of amenities on the 18th of December 2016.
- **Clement Bello v Prime Insurance Company Limited** Civil Cause Number 611 of 2013 where the plaintiff sustained a fracture of the left arm, deep cut on the leg, traumatic wound on the frontal head and severe chest pains and was awarded MK4,000,000.00 for pain and suffering and loss of amenities of life on 25th April 2012.

It was therefore Counsel for the claimant's submission that in this case a reasonable compensation would be K5,000,000.00 for pain and suffering and loss of amenities considering the current value of the Kwacha.

On the other hand, Counsel for the defendants in his submission challenges various aspects of the claimant's case. He avers that the claimant through the pleadings and evidence available sustained injury to the chest. The medical report which was authored by an undesignated clinician does not demonstrate as to what examination was done to arrive at the alleged injury. He contends that it does not comply with the requirement that it must contain the Malawi Medical Council Registration information of the medical practitioner who authored. He submits that the medical report is not credible and this court should not have regard to it. He further submits that without credible evidence the claimant only sustained a painful chest and nothing more. He also avers that although the value of the Kwacha has devalued the amount requested by the claimant is excessive and exorbitant for a person who sustained soft tissue injuries only.

On comparable cases, Counsel is of the view that each case must be decided depending on its circumstances. He therefore cites the following cases:

- **Arnold Mdala v Prime Insurance Co. Ltd Personal Injury Case No. 3456 of 2015** where the claimant suffered an open fracture of the left tibia and fibula, multiple cut wounds on the head, left ear and shortening of his leg by 1.5cm. The claimant had great risk of developing arthritis and had inability to do household chores and manual work. He was awarded K1,700,000.00 as damages for pain and suffering and loss of amenities of life. This award was made on the 3rd of May 2016.

- **Felix Juwawo and 4 Others v Joseph Kadzayekha, W. A. Nguluwe and Prime Insurance Company Limited Personal Injury Cause Number 15 of 2013** wherein the 5th claimant sustained a bilateral fracture of malleora, extensive abrasions on the left arm and face and deep cut wound on the left arm. The court awarded him the sum of K2,000,000.00 on the 27th of October, 2017.
- **Leonard Danger v Lackson Mwikale and Prime Insurance Company Limited Personal Injury Cause Number 40 of 2016** wherein the claimant sustained a fracture of the right arm, fracture of the right thumb and multiple bruises on the right elbow, left arm and at the back of the head. The court awarded him K2,500,000.00 as damages for pain and suffering on the 16th of November, 2017.

Counsel is therefore of the considered view that an award not exceeding K2,000,000.00 would represent a conventional fair sum and will adequately compensate the claimant in the circumstances of this case.

ISSUES FOR DETERMINATION

As earlier alluded to, this court has been called upon to make a determination on the quantum that would reasonably compensate the claimant for the damages and losses suffered.

THE LAW

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.

DISCUSSION

It is not in dispute that the claimant suffered injury in this matter. Observably, it is the extent of the injury that that has been challenged. The claimant alleges that he sustained a fracture of the 10th rib. He substantiates his claim with a medical report which also indicates that he indeed sustained a fractured rib. The defendants express incredulity over the stated injuries. They contend that the medical report does not comply with the requirement that it should contain the Malawi Medical Council Registration information for the medical practitioner who authored it. They move the court to disregard the said medical report on that basis. They conclude that in the absence of credible evidence, the claimant suffered soft tissue injuries on the chest.

The question that I had to deal with is whether the absence of the Malawi Medical Council Registration information impeached the credibility of the medical report. To begin with, I thought the defendants would have provided the court with basis for this requirement in form of a law, regulation or directive. This has not been done and yet the defendants wish place reliance on it. Perhaps, it is good practice to accompany the medical report with the said information but in the circumstances of this I do not think it is proper for the court to ignore it. In any case, if the defendants had issues with the medical report they would have made an application to subpoena the medical practitioner and cross-examine him on the same. What is being raised now is more like ambushing the other party.

On the other hand, the medical report was meant to substantiate the claim by the claimant. On his own, the claimant testified as to the injuries he suffered. The question is whether the court should not believe his evidence assuming there was no other evidence to buttress what he said. I believe this depends on the credibility of the claimant as witness. Frankly, the claimant did not give the court any reason to doubt his testimony. He did not try to evade the truth in any way even where it proved adverse to his case. He told the court that he did not undergo any medical surgery and that he did not bring the x-rays. I believe this witness and I find that he suffered the injury he claims.

I have seen the authorities cited by both parties. Unfortunately, none of the authorities give a guidance on fracture of a rib(s). They are basically concerned with fractured of bones on limbs. The cases cited by Counsel for the claimant give a range of K4,500,000.00 to K4,000,000.00 with the latest decided in the year 2016 while the cases cited by Counsel for the defendant give a range of K2,500,000.00 to K2,000,000.00 with the latest decided in the year 2017. It is true that each case must be decided based on its circumstances. In this case, the claimant states that he is a farmer and the injury has affected his ability

to lift heavy objects and has also compromised his ability to do manual work. To some extent, his livelihood has been affected. Also bear in mind that he suffered pain and still does. On the other hand, the fact that he was not admitted is an indication that the injury may not have been that grave.

DETERMINATION

From the foregoing analysis, the damages awarded to the plaintiff can be summarised as follows:

1. The sum of K3,500,000.00 as damages for injuries sustained.
2. The plaintiff is further awarded costs for the assessment proceedings.

MADE IN CHAMBERS THIS 12th OF FEBRUARY, 2019



WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTR