IN THE HIGH COURT OF MALAWI

MZUZU REGISTRY

CIVIL CASE NO. 240 OF 2015

BETWEEN:-

GENUINE KAUNDA..... PLAINTIFF

-AND -

RICHARD NTHALA.....1ST DEFENDANT
PRIME INSURANCE COMPANY.....2ND DEFENDANT

CORAM:

H.H. Brian Sambo, Assistant Registrar (Ag)

Mr. M. Banda, counsel for the Claimant

Mr. Chibwe and Mr. Gausi, of counsel for the Defendants

Miss Dorica Mhone, Court Clerk/Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

BACKGROUND

The present proceedings follow the judgment on liability by Hon Justice Dr. C.J. Kachale of the 6th of October, 2017. The judge found for the Claimant and ordered payment of damages by the Defendants to be assessed by my court. For the avoidance of doubt, what will be assessed are damages for pain and suffering, loss of amenities of life and disfigurement. Special damages were already assessed by the judge in his judgment on liability. In the interest of good case management, I do not need to repeat them.

BRIEF FACTS

The Claimant was on board a motor vehicle Registration Number BP 3396, Scania Bus, and the 1st Defendant was the one driving the said motor vehicle from Mzuzu heading towards Blantyre via Lakeshore road. There were several other passengers on board the same bus. The 1st Defendant was driving the motor vehicle at a very high speed, and upon reaching Kanduli Hills in the district of NkhataBay, he lost control of it and in the process failed to negotiate a sharp corner, and in the process the bus overturned and fell up-side-down. The Claimant got injured during the same accident.

EVIDENCE

During the Assessment proceedings, the Claimant testified. He adopted his Witness Statement (Marked PEX 1) as evidence in his matter. His Medical Report showed that the Claimant had;

i. Sustained a deep cut on his skull
ii. Sprain cervical spine
iii. Sustained cut wounds on his head

He was sutured and treated as an outpatient at Mzuzu Central Hospital for three months. His permanent total incapacity was rated at 15%. He further testified that, as a result of the accident, he had developed a problem of loss of memory. He also said that he was no longer playing football as he used to do before the accident. In cross examination, he told the court that the medical report did not say anything about loss of memory but he said he did not have the problem before the accident. He further said that the accident happened when he was 65 years of age, and being a policeman, he was into sporting activities, and that he was in the police football team. He said although he was then 71 years of age, he still nursed the desire to play football and do other sporting activities but he was being put off because of the injuries sustained during the accident.

Mr. Christopher Chikapa testified in defence, and in favour of the 2nd Defendant, Prime Insurance Company. He introduced himself as a Claims Assistant for the 2nd Defendant. He tendered a policy document (Marked DEX 1) and said it represented a contract between the motor vehicle owner and the insurer, Prime Insurance Company. He said, according to the policy document, the policy limit in this case was MK5 Million which was already paid to other Claimants involved in the same accident. He said that there were more than 30 people who got injured during the accident two of whom were paid compensation by the insurer out of the policy limit. He said, Mr. Laurent Saka received MK2, 777,000.00 compensation through the court while Mr. Damson Mapeto got MK2, 223,000.00

through his lawyers called Banda and Banda Company. He tendered payment vouchers and requisition documents in support of his payment evidence. He finally, told the court that since the policy limit was already reached, subsequent Claimants had to get their portions of compensation from the motor vehicle owner.

During cross examination, he told the court that he forgot to bring a copy of the Warrant of Execution by which Mr. Laurent Saka was paid his compensation through the court.

ISSUES

I think there are two main issues requiring my determination here, viz;

i. To assess the quantum of damages payable by the Defendants for pain and suffering, loss of amenities of life and disfigurement
ii. To determine whether or not the 2nd Defendant should benefit from the defence of policy limit.

ANALYSIS OF FACTS AND DETERMINATION

I have gone through the evidence adduced by the Claimant, and also submissions made by counsels from both sides. I had time to look at other comparable case law relevant to the present assessment, as well.

I will deal with these heads of damages separately. However, before I begin my assessment I feel obligated to point out that, the law, when it comes to cases of this nature requires that the victim should prove that he indeed incurred or suffered some damage and that the defendant was the cause of his injuries out of his negligence. Once that has been done, the duty remains with the court to assess the extent to which the victim should be compensated. This follows the cardinal principle of ***restitution in integrum*** which simply means to be compensated as far as money can do; the law will try to place the injured person in the same condition he was before the accident had happened. See **Black's Law Dictionary 9th Edition p1428**.

I appreciate the fact that unliquidated or general damages are difficult to assess. However, it has been held in **Raninger Simbeye vs. Chibowa & another,** Civil Cause No. 58 of 2012, that the only possible way to circumvent to these difficulties is to seek guidance from decided cases of a comparable nature. And that in doing so, the court bears in mind the devaluation of the Malawi Kwacha that has obtained since the awards in those comparable cases were made. Further, the courts also bear in mind the merits of each case to avoid occasioning injustice.

DAMAGES FOR PAIN AND SUFFERING

The definition of pain and suffering was given in the case of **Esnart Mpulula v Prime Insurance Ltd,** Personal Injury Cause number 108 of 2016, where the court stated that '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, embracement and sickness. In that case, the plaintiff fell on the ground when she was hit and had to be rushed to the hospital where her injured ankle was placed in plaster of Paris. For this, she was awarded, on 31st day of May 2017 compensation of up to **MK2, 000,000.00**. In **Javious Enerst v Steven Levison & Prime Insurance Company,** civil cause no. 92 of 2014, the plaintiff was awarded on 22nd March 2018, **MK6, 000,000.00** for sustaining fractured tibia of left leg, multiple bruises, multiple cuts on the upper and lower extremities and dislocated shoulder.

In **Mica Banda vs. Fabiano & others,** Civil Cause No. 82 of 2013, the court on 4th May 2018 awarded the plaintiff the sum of **MK3, 500,000.000** for sustaining Massive bruises on his scalp, Bruises on his face, back and posterior chest.

On 30th day of August 2018 the court in **Joseph Manyumba v Kondwani Phiri & Other,** Civil cause no. 533 of 2013, awarded the plaintiff the sum of **MK3 500 000.00** as damages for all heads on the fact that he sustained a dislocation of right elbow.

The Medical Report herein shows that the Claimant sustained a cut wound on his head which touched even his skull. It also shows that the Claimant suffered a sprain cervical spine. I believe the Claimant suffered great pain during and after the accident akin to the cases cited above. He also continued to experience agony during the time he was being sutured at the hospital. He told the court that he still felt pain on his injured head and also suffered loss of memory. I know that there is no medical evidence in support of loss of memory, but where there is medical evidence proving that the head was injured to the extent that a deep wound was inflicted and it had to be sutured, a benefit of doubt regarding some aftermaths that can cause loss of memory cannot be completely ruled out. Therefore, I feel that it will be just to award him **MK3, 200,000.00** as being damages for pain and suffering.

DAMAGES FOR LOSS OF AMENITIES OF LIFE

Loss of amenities of life is described as loss of faculties of pleasures of life resulting from one's injuries. See **Esnart Mpulula v Prime Insurance Ltd,** Personal Injury Cause number 108 of 2016. It is held that Damages following

this cause are only awarded for the fact that the plaintiff has been deprived of the pleasures of life which amounts to substantial loss whether the plaintiff is aware or not. See **Poh Choo v Camden and Islington Area Health Authority** (979) 2 All ER 910.

In the case of **Esnart Mpulula v Prime Insurance Ltd,** (Supra) the court awarded the plaintiff the sum of **MK650 000.00** because of the fact that she was injured on the leg and was failing to move on long distance and carrying heavy loads. Besides, she was young having the age of 15.

The Claimant complained that the accident took away his sporting pleasure. He said he used to play football and do other forms of sports but since the accident his health became poor to the extent that he could no longer participate in sporting activities. I know counsel for the defence, through their cross examination, wanted to establish that sporting activities were not for those well advanced in age. I have a contrary view; sports are meant for all ages; even football can be played by anybody; what would differ would be propensity and reason for partaking it. I believe that the Claimant would have been still able to play soccer at his age of 71 years. However, he may not have missed much at that age. At his age, he may have already enjoyed much of soccer. This is why I award him **MK700, 000.00** being damages for loss of amenities of life.

DAMAGES FOR DISFIGUREMENT

'Disfigurement' can simply be described as permanent physical deformity of the body. In **Ronaldo Likoloma vs. Iqbal Mahomed,** Civil Cause No. 870 of 2013 the plaintiff on 14th May 2017 was awarded the sum of **MK350 000.00** being damages for disfigurement out of dog bites that left a visible scarring.

In **Mica Banda vs. Fabiano & others, Supra**, the court awarded the plaintiff the sum of **MWK600 000.00** being damages for disfigurement on his head and other bodily parts.

In this case, the Claimant has 15% of permanent body incapacitation. I had the privilege of seeing the Claimant walk and sit in front of me. I could not say that his was a serious case of deformity. I know it is the head that was substantially touched; the open wound went up to his skull. Still more, I cannot equate him to the circumstances of the victims in cases above-cited. This is why I think **MK800, 000.00** would be sufficient payment being damages for disfigurement.

WHO IS LIABLE TO PAY THE ASSESSED DAMAGES?

The 2nd Defendant's evidence is to the effect that, although more than 30 passengers were injured in the accident, its liability to pay compensation has to

be dictated by the policy limit. So far, the policy limit was exhausted after paying two of the injured passengers. I have always had a problem with the issue of exhausted policy limits being raised during assessment proceedings, only. This goes down against the very verdict of liability entered by the judge. This is exactly what the 2nd Defendant purports to do; that while the judge says 'you are liable to pay damages' and they come before the registrar for a contrary verdict, 'you are not liable to pay damages'. It is my considered view that issues of policy limit should be raised in the initial pleadings with a view of allowing the presiding judge to equally make a decision on the same as well. This is what insurer did in the case of **Dyson Moyo v Prime Insurance Company,** Civil Cause No. 188 of 2015. In deciding the issue of policy limit, Madise, J was of the considered view that the insured had a good claim, still more, despite restrictive policy limits. For the avoidance of doubt, this is what the judge said,

> ***"...a plaintiff claiming directly against the insurer has a good claim notwithstanding any condition in a policy which purports to restrict the insurance of the person insured".***

It is my humble view that, much as the defence of policy limit remains relevant, to some extent, courts of law would still be willing to taste the reasonableness and honesty of the policy limit. Policy limits are, nonetheless, matters of contract, and courts of law have a duty to imply some terms in certain contracts in order to give them their reasonable and honest implications. According to Bowen, J, in **The Moorcock** [1889] 14 P.D. 64, **e**xpress terms do not constitute the whole contract. There may be times when the courts may imply terms into the contract (as a means of giving effect to the interest / intention of the parties). See **Liverpool County Council v Irvin** [1976] 2 All E.R. 39.

These terms may be implied by the courts or by statute. Courts may imply terms into a contract for a number of reasons. To give efficacy to the contract (make it workable) as a means to repair an intrinsic failure of expression of interest of the parties. Some contracts may be clear but there may be terms omitted inadvertently or poor or clumsy draughtsmanship to cover an incidental contingency and this omission can have the effect of negotiating the intention of the parties so the court will imply (a) term(s) into the contract to give effect to the intention of the parties. See **Colions v Hopkins** [1923] 2 K.B. 617. For instance, in **Lister v Romford Ice & Cold Storage** [1957] 1 All E.R. 25, the appellant Lister was employed by the respondents as a lorry driver. His father was his mate. While backing his lorry, he drive negligently and injured his father. The father sued the respondents, who were held vicariously liable for the son's

negligence. The respondents now sued the son, inter alia, for breach of contract. The House of Lords, in giving judgment to the respondent, held that there was authority for implying in the master's favour that the servant would serve him with good skill and fidelity and that he would use reasonable care and skill in the performance of his duties

I think, this is a typical scenario where the term to act out of good faith and more other terms have to be implied in order to give the true efficacy of the policy limit. For a bus that carried dozens of passengers to have a policy limit of MK5 Million was utmost unreasonable, and obviously out of bad faith on the part of the insurer. This is the policy limit that managed to cover only two casualties out of more than 30 passengers affected by the accident. If this is the way insurance companies would want to treat life and security of those travelling in motor vehicles, then there will be no for third party insurance policies any more.

The short of this is that liability to pay damages assessed in this case remains joint and several upon both Defendants.

CONCLUSION

In summary, the Claimant is awarded as follows:

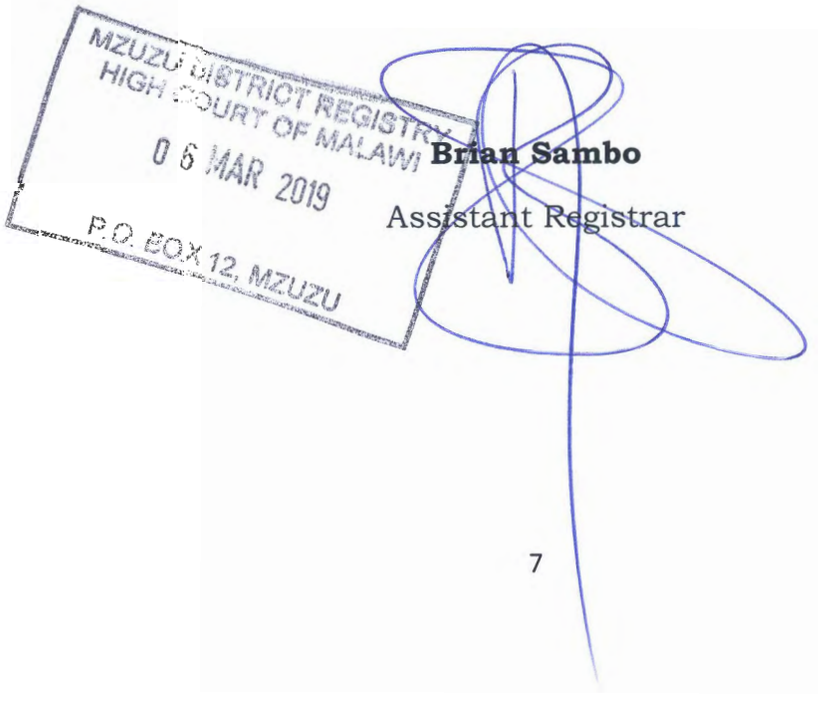
i. **MK3,200,000.00** being damages for pain and suffering

ii. **MK700,000.00** for loss of amenities of life

iii. **MK800,000.00** being damages for disfigurement

In total, the Defendants shall pay the sum of **MK4, 700,000.00**. This whole amount has to be paid within 7 days from today.

Made in chambers today Tuesday the 5th of March, 2019.



Brian Sambo

Assistant Registrar