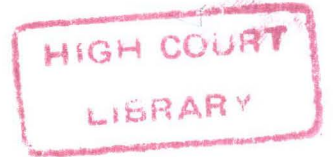




REPUBLIC OF MALAWI



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**PERSONAL INJURY CAUSE NO. 367 OF 2011**

**BETWEEN:**

**LASTON SILIYA.....CLAIMANT**

**AND**

**ALI PASELI.....DEFENDANT**

**CORAM: T. SOKO : Assistant Registrar**

Mr Dikiya : Counsel for the claimant

Mr Chidothe : Counsel for the defendant

N. Munthali : Official Interpreter

**ASSESSMENT ORDER**

**BACKGROUND**

The claimant herein commenced an action against the defendant on 18<sup>th</sup> May 2011, claiming damages for personal injuries, loss of amenities of life, K3, 000.00 as cost of police report and costs of the action. The facts are that the claimant was a conductor in a minibus registration number BLK 3407. On 22<sup>nd</sup> June 2010 at around 2pm he was involved in a road accident whilst working in the minibus owned by the defendant as a minibus conductor at Jokala Trading Centre. As a result of the accident, the claimant sustained a deep cut wound on the upper lip nose and left eye, deep cut wound on the left arm with deformed left 5<sup>th</sup> metacarpal finger and swollen elbow, deep cut on the corner of the mouth with no fracture. On 2<sup>nd</sup> April 2012, the Court entered a default judgment against the defendant having failed to file a defence.

## EVIDENCE

Hearing of assessment took place on 26<sup>th</sup> February 2019, 12<sup>th</sup> March 2019 and 3<sup>rd</sup> April 2019. The claimant adopted his witness statement as well as his supplementary witness statement where he stated that on 22<sup>nd</sup> June 2011, he was on a duty as a conductor in a minibus for the defendant registration number BLK 3407 Toyota Hiace traveling from Mangochi towards Blantyre. Due to over speeding, the driver lost control of the vehicle and swerved to the far right where the said motor vehicle fell on its body. The claimant stated that due to the accident, he suffered multiple injuries which included a deep cut on the upper lip, nose and left eye, deep wound on the left arm with deformed 5<sup>th</sup> metacarpi, deformed elbow and deep cut wound on the corner of the mouth. He said that following the injuries the claimant was admitted at Zomba Central Hospital from 22<sup>nd</sup> up to 30<sup>th</sup> June 2011 when he was discharged but with instructions to be going to Queen Elizabeth Central Hospital for continued check-up. He said he had been going to the hospital for the checkup until the year 2016. He said that he still experiences pain in the left arm that he is not able to carry anything heavy. He said he has a driving license which he obtained in the year 2016 but he has been having difficulties to find employment as he has difficulties driving a manual transmission motor vehicle. He produced and marked a driving license as part of evidence. He complained that the injuries have left him completely handicapped as he cannot move his shoulder properly. He said he moves his elbow with great difficulty and cannot bend her 5<sup>th</sup> metacarpi finger. He said he has scars on both left and right arms. The claimant further stated that the facial injuries left his face greatly disfigured due to the scars emanating from the injuries. He said he cannot do extraneous work as he used to and employment.

In cross examination, the claimant stated that he obtained a driving license in 2016. He said he fulfilled all the requirements and underwent examination on the road which he passed. He said he cannot be employed because of the way he looks. He said he did not have evidence that he applied for a job. He said he had no evidence that he was once refused to be employed. He said the scars are emanating from the accident.

The 2<sup>nd</sup> witness adopted his witness statement where he stated that on 22<sup>nd</sup> June 2011, he was on duty and the claimant came to the hospital seeking medical attention after he had sustained injuries from an accident that occurred on the same day. He said he attended to the claimant as aside his specialization. He said he also attend to general injuries especially those affecting him. He stated that he assessed the claimant's injuries and duly prepared a medical report detailing the injuries sustained in the accident by the claimant. He produced and exhibited the medical report and a copy of the redrafted medical report.



He said the claimant was hospitalized until 30 June 2011 when he was subsequently released from the hospital.

In cross examination the witness stated that he is a dental therapist. He stated that he had no evidence about his qualifications.

On the other hand, the defendant adopted his witness statement where he stated that he has never known the claimant till after the commencement of the proceedings. He stated that in all his mini buses he only employs drivers and he has never employed a conductor. He said he has never paid salary or remuneration to the claimant as his conductor for any reason. He said the claimant's averments that he was a conductor in his minibus were not true. He also stated that the claimant did not sustain injuries as alleged in court. He said the claimant has never come to the defendant at any point to tell him that he had sustained injuries.

### **SUBMISSIONS**

In submissions, Counsel for the claimant submitted that the claimant should be awarded a sum of K6, 000,000.00 in damages. Counsel cited the following comparable cases to substantiate the claim

**Gedion Mhango vs Nico General Insurance Co Ltd Personal Injury Cause No. 703 of 2016** where the claimant sustained a fracture of the leg and serious cuts on the head, cuts on the right hand side and the backside and scars on the fracture leg. The Court awarded the sum of K5, 000,000.00 as damages for pain and suffering inclusive disfigurement. Further, the court awarded the claimant a global sum of K700, 000.00 for loss of amenities of life.

**Owen Kayira and others vs Unusu Shaikh Personal injury Cause No. 1160 of 2013** where the claimant sustained a fracture of right tibia and fibula, internal injuries of the stomach, several cuts on both legs, deep cut wound on the left ankle and several bruises on the ribs. The Court awarded the claimant a global sum of K7, 200,000.00. **Mhango vs Nico General Insurance Co. Ltd** where the Court awarded the claimant a sum of K1, 000,000.00 as damages for loss of earning capacity.

On the other hand Counsel for the claimant submitted that the court should make no award of damages to the claimant on the grounds of his failure to prove the injuries he sustained during the accident that happened on 22<sup>nd</sup> June 2010 which is the subject of the action. Counsel stated that the claimant in his evidence in chief talked of the accident that took place on 22<sup>nd</sup> June 2011 and the medical officer also talked about the accident that took place in 2011. Counsel said the Court is supposed to determine issues raised in the pleadings. In

this regard, the claimant needs to bring evidence relating to injuries sustained in an accident that took place on 22<sup>nd</sup> June 2010. Counsel stated that the injuries that the claimant suffered arose from the different incident altogether as there is no way one would go to hospital in June 2011 for injuries sustained in June 2010.

Counsel stated that in the event that the Court decided to award damages it should award damages related to injuries contained in the pleadings. Counsel noted that the medical report did not include deformed left 5<sup>th</sup> metacarp finger. Counsel stated that the claimant if he is to be awarded damages it has to be K450, 000.00 as in **Hopeson Magasa and 10 Others vs The Attorney General and NICO General Insurance Co Ltd Personal Injury Cause No. 874 of 2012** where the 6<sup>th</sup> claimant sustained a cut wound on the supra orbital area of the left side of her head and deep bruises which left her with a permanent scar on the left cheek. The Court on 24<sup>th</sup> October 2014, awarded the claimant the sum of K300, 000.00 as damages for pain and suffering, loss of amenities of life and disfigurement. Counsel stated that the injuries in this case are similar to those sustained by the claimant in this matter.

#### **GENERAL LAW ON DAMAGES**

In assessing damages for personal injuries, the intention of the court is to compensate the injured party as nearly as possible as money can do. The principle is to put the plaintiff at the position he would have been if it would have not been for the tort committed. **See Namwiyo v Semu (1993) 16 (1) MLR 369.**

In calculating damages, therefore, the Courts consider, in monetary terms, the sum which will make good to the sufferer, as far as money can do, the loss he has suffered as a result of the wrong done. **See Admiralty Commisioners vs S.S Valeria (1992) 1 A.C. 242 at 248.**

**In Christina Mande vs Charter Insurance Co. Ltd Personal Injury Cause No. 329of 2016 the Court quoting Wright vs British Railway Board 1938 AC 1173, 1177 stated that:**

*'Non-economic loss.., is not susceptible of measurement in money. Any figure at which the assessor of damages arrives cannot be other than artificial and, if the aim is that Justice meted out to all litigation should be even handed instead of depending on idiosyncrasies of the assessor, whether Judge or Jury the figure must be basically a conventional figure derived from experience and from awards in comparable cases.'*

In the case of **City of Blantyre vs Sagawa** the court said the following:



*'It would appear to us that if the award is to be conventional, an award for a similar injury should be comparable and should, to some extent, be influenced by amounts awarded in the previous case, either in the same or neighboring jurisdictions. In citing previous awards the court should not lose sight of factors like devaluation of the currency since the awards were made.*

## **PAIN AND SUFFERING**

In 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 Mota Engil Limited and General Alliance Insurance Limited, personal injury cause number 178 of 2012 (unreported).**

In the **City of Blantyre vs Sagawa 1993 16 (1) MLR 67** the court quoted Kemp and Kemp volume II paragraph 1007 where it was stated 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.*

Page 831 of **Mc Gregor** on damages defines pain as the immediately felt effect on the nerves and brain of some lesion or injury to a part of the body, while suffering has been defined as the distress which is not felt as being directly connected with any bodily condition. Pain includes any pain caused by medical treatment or surgical operations rendered necessary by the injury inflicted by the defendant. 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 by disfigurement. **Also see Gedion Mhango vs Nico General Insurance Co. Ltd Personal Injury Cause No. 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 a result of the injury be curtailed. **See Lemon Banda and 19 others V Mota Engil Limited and General Alliance Insurance Limited, personal injury cause number 178 of 2012 (unreported).**

**Birkett L.J in Manley vs 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 removed and will never again

go upon his walking excursions- things of that kind- loss of amenities. *Mc Gregor on damages at Page 834* explains that loss of impairment of any one or more of the five senses is compensated under this head. Besides loss resulting from interference with the plaintiff's sexual life.

## **DISFIGUREMENT**

Disfigurement is concerned with change of looks of the individual. This may be scars, amputations and postures. *See Lemon Banda and 19 others V Mota Engil Limited and General Alliance Insurance Limited, personal injury cause number 178 of 2012 (unreported).* Damages for disfigurement are normally awarded as part of pain and suffering. They are awarded separately if the plaintiff has been ridiculed, lost his social status, or that his is in need of plastic surgery. *See Mary Kamwendo vs Stage coach Malawi Limited Civil Cause No. 840 of 1995.*

## **DETERMINATION**

In the present matter, the evidence of the claimant is clear that the accident took place on 22<sup>nd</sup> June 2011. It is also supported by the medical report which is clear that the claimant was admitted at zomba Central Hospital on 22<sup>nd</sup> June 2011 and discharged on 30<sup>th</sup> June 2011. In my mind, the claimant has proved that the injuries that he sustained emanate from the accident that took place on 22<sup>nd</sup> June 2011. I have also noticed that the defendant's evidence includes issues on liability and I must state that issues of liability were already settled when the Court entered a default judgment.

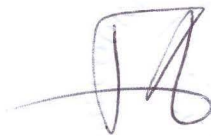
Counsel also raised that the injuries in the pleadings must relate with the injuries in the medical report. The hand written medical report is clear that the claimant sustained a deep cut on the upper lip, nose and left eye, deep wound on the left arm with deformed left 5<sup>th</sup> metacarp finger and swollen elbow. I do not understand counsel's argument when the medical report included the information that counsel states was not included. I therefore find that Counsel's argument does not hold water. The claimant was admitted for a week and the wounds were sutured. He was also given diclofenac. The medical report states that the wounds healed with big scars and the claimant showed the court the scars. His eye was affected and he complains of the itching now and then. I have looked at the authorities cited by Counsel for the claimant and find that they are excessive comparing with the injuries that the claimant herein sustained. I have also considered the authority cited by counsel for the defendant and noted two things. The claimant in Magasa sustained **one cut wound** and bruises whilst in the matter at hand the claimant sustained **two deep cut wounds** one on the face and

another on the left arm. Besides, the claimant in this matter also had a swollen elbow. I therefore find that the injuries sustained by the claimant in this matter were a bit serious than Magasa case.

With the foregoing, I award the claimant a sum of K2, 700,000.00 as damages for pain and suffering, disfigurement and loss of amenities of life. Special damages were not proved as required and damages there is no sufficient evidence to award damages for loss of earning capacity. The same was also not included in the pleadings.

Costs are for the claimant.

*Pronounced on this 30<sup>th</sup> day of May 2019*



**T. SOKO**

**ASSISTANT REGISTRAR**