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REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
PERSONAL INJURY CAUSE NO. 323 OF 2013

BETWEEN

STEVEN MWALE ..... CLAIMANT

AND

ALFRED MODRA..... 1<sup>ST</sup> DEFENDANT

PRIME INSURANCE CO. LTD.....2<sup>ND</sup> DEFENDANT

**CORAM: T. Soko: Assistant Registrar**

Mr Chidothe: counsel for the claimant

Mr Phiri: counsel for the defendant

N. Munthali: Court Clerk

**ORDER ON ASSESSMENT OF DAMAGES**

This is an order on assessment of damages pursuant to a judgment by Honourable Justice Tembo dated 7<sup>th</sup> March 2018. The claimant herein claims for damages for pain and suffering, loss of amenities of life, disfigurement, payment of the sum of K5,500.00 and costs of the

action. The facts aver that on or about the 9<sup>th</sup> day of December 2012, the 1<sup>st</sup> defendant was driving a motor vehicle registration number LA 3076 Toyota Hiace Minibus from the direction of Bangwe weaving heading towards Nguludi when upon arrival at Bangwe Day Secondary School, he swerved to the extreme near side of the road where it plunged into water drainage. As a result of the accident, the claimant sustained injuries.

On the date of assessment, the claimant adopted his witness statement where he stated that on 9<sup>th</sup> December 2012, he was involved in road accident involving the motor vehicle which he was aboard as it plunged into water drainage. After the accident, the claimant was rushed to Queen Elizabeth Central Hospital where he was admitted for two days. He explained that he sustained a fracture of index finger, deformed and stiffness of the index finger (2<sup>nd</sup> metacarpal), a cut wound on the index finger. His permanent incapacity was assessed at 10%. He stated that during his recuperation period, he could not enjoy visiting his family and friends, attend congregational prayers and have conjugal rights with his wife. He further stated that the finger was still stiff with the result that the same cannot be bent. The claimant produced and exhibited the medical report as part of evidence. When asked if he had anything to add on the evidence, he stated that he also sustained injuries on his hip the result which he could not exercise his conjugal rights.

In cross examination, the claimant stated that there were 14 passengers in the vehicle. He said he could not remember how many passengers got injured but some died. He confirmed having a fracture on his right index finger. he also confirmed having a hip injuries and he said it was a dislocation. He said he was laid off from work because his work involved writing which he could not do. He was the operation clerk at Ninkawa Transport.

The 2<sup>nd</sup> defendant (The insurer of the said motor vehicle) paraded one witness. He adopted his witness statement where he stated that the motor vehicle was insured by the 2<sup>nd</sup> defendant under insurance certificate number 1065312 according to the police report that the claimant obtained. He said there were several people who sustained bodily injuries and had their property damaged in an accident involving the Toyota Hiace Minibus LA3075 and they lodged claims for compensation as against the 2<sup>nd</sup> defendant as the insurer of the vehicle in question. He added that the insurance policy taken out by the owner of the minibus registration number LA 3076 contains exclusion clauses to do with the 2<sup>nd</sup> defendant's maximum limit of liability to compensate third parties in the event of death or bodily injuries

and property damage arising out of one event. He further stated that the liability is K5,000,000.00 for death or bodily injury and K1,000,000.00 for third party property damage arising out of one and same event. The claimant produced and exhibited a copy of the policy for the motor vehicle. He stated that the 2<sup>nd</sup> defendant's liability under the insurance policy covering the insured Toyota Hiace Minibus registration number LA 3076 is subject to the said insurance policy limit of liability in terms of death and or bodily injuries as contained in the insurance policy. He explained that the accident involving the minibus LA 3076 is subject to the said insurance policy limit of liability in terms of death and or bodily injuries as contained in the insurance policy. The defendant stated that the accident of the minibus LA 3076 having taken place in the year 2012 so far the 2<sup>nd</sup> defendant has exhausted its insurance policy liability limit for damages for bodily injuries and or death and property damage having paid over K5,000,000.00 in damages and costs to several claimants through various houses. He said in the circumstances, the 2<sup>nd</sup> defendant as the insurers of the Motor vehicle registration number LA3076 Toyota Hiace Minibus having exhausted its insurance policy to indemnify its insured by way of compensating all the claimants who sustained loss or damage to their person or property, has discharged its insurance contractual obligation and should not be held liable to pay further amounts in compensation exceeding the sum of K5,000,000.00 and K1,000,000.00 in damages for personal injury and or death and property damage respectively.

In cross examination the 2<sup>nd</sup> defendant explained that the exclusion clause would bind the party if they are part of the contract. He said the policy is supposed to be signed. He admitted that the policy which had been tendered was not signed. He admitted that the policy which he tendered was from 1<sup>st</sup> January 2015- 31<sup>st</sup> March 2015. The 2<sup>nd</sup> defendant stated that the effective date of the policy is from 23<sup>rd</sup> November 2012 -22<sup>nd</sup> November 2013. He said the accident took place on 9<sup>th</sup> December 2012. He admitted that the policy which he tendered was irrelevant in this matter. He said he could not confirm that the claimant was not given the policy.

The claimant also said the claim sheet was not signed. He said he did not bring to the Court the copies of the cheques that were paid to the claimants. He said he did not bring the number / details of the cases that were paid the cash.

In re-examination, he stated that the documents that he brought before the Court are usually not signed as they are issued in the system and the parties do not sign because the documents

are intended for internal use. He said the claim sheet had details which were correct the only problem was that the names of the parties were not indicated. He said the defendant does not keep the copies of the cheques but rely on the system to keep the number of cheques.

#### **PAIN AND SUFFERING**

It 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, embarrassment and sickness. See **City of Blantyre vs Sagawa (1993) 16(1) MLR 67 (SCA)**

#### **LOSS OF AMENITIES OF LIFE**

Loss of amenities of life is attributed to the deprivation of the claimant's capacity to engage in a past time activity which he formerly enjoyed. It embraces all that which reduces the plaintiff's enjoyment of life, his deprivation of an amenity of life whether he is aware of it or not. See **Kanyoni vs Attorney General (1990) 13 MLR 169 and Blantyre Sagawa (1993) 16(1) MLR 67 (SCA).**

#### **DISFIGUREMENT**

Damages are paid under this head for the change in physical form of a person injured either as a result of the impact of the injury or its treatment, such as a scar coming in as a result of a surgical operation necessitated by the injury.

In skeleton arguments Counsel for the claimant submitted that the claimant should be awarded a sum of K8,013,500.00 as damages for pain and suffering, loss of amenities of life, disfigurement and special losses. Counsel for the claimant cited the following authorities:

1. **Christina Mande vs Charter Insurance Co Limited Personal injury cause No. 329 of 2016** where the claimant sustained a fracture of the right femur, dislocation of the right hip joint, cuts on the head. On 11<sup>th</sup> January 2017, the Court awarded the claimant a sum of K6,300,000.00
2. **Lewis Mtawanga vs Jennifer Kamteme & Southern Region Water Board Personal Injury Cause No. 371 of 2011** where the claimant sustained a closed fracture on the right and left tibia and after undergoing x-ray examination, it was discovered that his legs were badly damaged. The Court awarded the claimant a sum of K5,500,000.00 as

damages for pain and suffering and loss of amenities of life. The award was made on the 3<sup>rd</sup> October 2013.

3. **Atupele Maele(a minor through her uncle and next friend, Saiti Idana) vs Prime Insurance Co. Ltd Civil Cause No. 164 of 2011** where the claimant sustained a fracture of the tibia/fibula of the left leg with a permanent incapacity of 35%. On 4<sup>th</sup> March 2014 the Court awarded the claimant the sum of K4,500,000.00 as damages for pain and suffering and loss of amenities of life and disfigurement.

In the present matter it is not in dispute that the claimant sustained a fracture. As a result, the claimant suffered pain and anguish. He could not enjoy the amenities of his life and lost a job due to the injuries that he suffered. The medical report that the claimant tendered before this Court shows that the claimant sustained a fracture of the index finger and cut wound on the index finger. The claimant healed with scars and deformity as the finger became stiff. Apart from the fracture of the finger and cut wound, there is no substantial evidence to prove that the claimant also sustained hip injuries. I therefore find that the claimant did not sustain hip injuries.

On the issue of Policy, the Policy which was tendered before this Court is dated 2015 belonging to OR Lattif whom I am sure was the owner of the motor vehicle which was involved in an accident in 2012. However, the policy that was exhibited in this Court by the 2<sup>nd</sup> defendant is not relevant in this matter. This is the accident that occurred in 2012 and I anticipated the 2<sup>nd</sup> defendant to produce a policy which was issued either in 2012 or prior to 2012. With the foregoing reason the argument of the 2<sup>nd</sup> defendant that they exhausted the policy does not hold water. The claim sheet that the 2<sup>nd</sup> defendant produced in this Court does not have sufficient evidence to make me believe that they paid out other parties who also claimed under the same policy. The sheet does not have the names of the parties who claimed damages and copies of cheques were not even produced. The 2<sup>nd</sup> defendant stated that they do not keep copies of cheques but in my view this information is imperative and keeping such records would be helpful on the part of the defendants. I therefore find the evidence of the 2<sup>nd</sup> defendant unsubstantiated.

I have considered the case of Mande which in my view is excessive as there were multiple injuries in that case than the one at hand. I have also considered the nature of the injuries sustained and the devaluation of currency. I therefore award a sum of K3,500,000.00 as

damages for pain and suffering and disfigurement and K800,000.00 as damages for loss of amenities of life. The K5,500.00 which the claimant claims has not been justified so I will not allow it. I total I award K4,300,000.00 as damages for personal injuries.

Costs are for the claimant.

Made on this 27<sup>th</sup> day of October 2020.

A handwritten signature in black ink, appearing to be 'T. Soko', written over a rectangular box.

T.Soko

Assistant Registrar