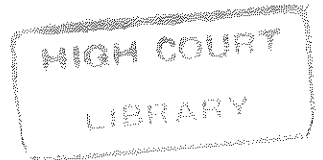




REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY



PERSONAL INJURY CAUSE NUMBER 138 OF 2020

BETWEEN:

DANIEL MAWAYA.....CLAIMANT

AND

MR. M. BANDA.....1ST DEFENDANT

PRIME INSURANCE CO. LTD.....2ND DEFENDANT

CORAM: WYSON CHAMDIMBA NKHATA (AR)

Mr. A. Mussa- of Counsel for the Claimant

Mr. Chikaonda- of Counsel for the Defendant

Mr. Chintengo- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

The claimant commenced these proceedings by writ of summons issued on the 11th of February 2020 claiming damages for pain and suffering, loss of amenities of life, disfigurement, special damages and costs of this action. The action emanates from an accident which took place on the 11th of May 2019 at Area 5 Junction at Machinjiri. Apparently, the 1st defendant who was driving motor vehicle registration number SA3608 Toyota Hiace hit the claimant as he was driving from the direction of Luwanda Machinjiri towards Limbe. The record shows that the 2nd defendant is sued by virtue of being the insurer of the motor vehicle in question. This is an order on assessment of damages following a Default Judgment entered by Honourable Justice N'riva on 1st of day July, 2020.

The matter came for assessment of damages on the 17th of November 2020. The claimant was the sole witness for his case. He adopted his witness statement and tendered a Medical Report and a Police Report. In his witness statement, he averred that as a result of the said accident, he sustained a fractured leg, bruises on the right leg and swollen tender and deformed right thigh. He testified that his fracture was retained with skin traction and a skeletal traction where an s-pin was inserted on proximal tibia big stones hanging on the leg. He has developed difficulties in walking and difficulties to proper range of motion with right leg externally rotated and shortened. He stayed in hospital for at least 2 months. The wounds were cleaned and sutured and he was given antibiotics. He has a possibility of developing arthritis. It was his evidence that now he walks with much difficulty, that his right leg is shorter than it was. He walks with a limp. He complains of post traumatic pain on the right foot and leg. In cross-examination, he stated that he is able to walk.

Such was the evidence adduced in this matter. Counsel for the claimant adopted his Skeleton Arguments as part of submissions in this matter. Counsel for the defendants undertook to file written submissions within 14 days. I must express my gratitude to Counsel for the submissions as they went a long way in informing this court in arriving at the decision herein. Suffice to say, the issue for determination is the quantum of damages that could reasonably compensate the claimant for the injuries suffered.

The law generally provides 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.

All in all, the court ought to take into consideration fairness in awarding damages. In **Pitt v Economic Insurance Co. Ltd** 1957 (3) SA 284 (D) at 287E it is stated that:

"The court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense".

In this case, Counsel for the claimant cited the following cases:

Filison Willard vs Benjamin Chipeta and Prime Insurance Company Limited Personal Injury Cause No. 759 of 2019 in which the claimant was awarded MK6,800,000.00 for damages for personal injuries. The plaintiff sustained fractured right ankle, deep cut wound on the scalp which needed 12 stitches, a cut on the eye, bruises on the shoulder, bruises on the right fingers.

Louse Chakwantha Vs Prime Insurance Company Limited Civil Cause No. 461 of 2011 in which the plaintiff was awarded MK6,150,000.00 for damages for personal injuries. The Plaintiff sustained fracture of the left fibula, multiple soft tissue injuries and swollen leg. The award was made on 10th August, 2012.

Kachasu and Another vs Peter Kondowe and another, Civil Cause No. 320 of 2009, the 1st claimant suffered cut wound on head, closed fracture of right humerus and open fracture of right lower leg. He was awarded MK5, 600, 000.00 for personal injuries. The award was made on 16th October, 2009 by Justice Kamwambe.

Rex Walala vs Davison Chikuta and Prime Insurance Company Limited, Civil Cause No. 461 of 2011, in which the claimant was awarded MK5, 000, 000.00 for damages for personal injuries. The plaintiff sustained fracture of the left tibia, bruises on the left arm and cuts on his face. The award was made on 20th March, 2013.

Cidreck White Vs Joseph Ndekwa and Prime Insurance Company Limited Personal Cause No. 360 of 2015, in which the claimant was awarded MK4, 505, 500.00 for damages for personal injuries. The plaintiff sustained fracture of the left arm, deep cut wound on the left shoulder, bruises all over the body. The award was made on 12th July, 2018.

Thomas Mitepa Vs General Alliance Company Limited Personal Injury Cause No, 73 of 2019, in which the Claimant suffered broken tooth, humerus fracture right hand, bruises on the right abdomen, sprained hip joint. On 21st day of August awarded the Claimant was awarded the sum of **MK 6,003,000.00** as damages for personal injuries.

Counsel for the claimant is of the view that the injuries herein are more serious as compared to those in the cases cited above and further that the Kwacha has lost value since the awards. He is of the view that in the circumstances of this case, the reasonable compensation would be K10,000,000.00 for damages for pain, suffering and loss of amenities of life and K4,000,000.00 for disfigurement.

Reaching this far, I take note that the injuries are not controverted. The claimant sustained a sustained a fractured leg, bruises on the right leg and swollen tender and deformed right thigh. Essentially, the issue is how has the injuries affected the claimant and how the injuries were dealt with in comparable cases. Looking at the nature of the injury and the surgical procedures that the claimant underwent, it leaves this court with no doubt that the claimant experienced pain and suffering. He continued suffering pain for some time thereafter and currently still

has pain. The court also takes note that the injuries have also distorted his wellbeing considering that his right leg was externally rotated and shortened. This is a deformity that has come but for the accident herein. He complains of post traumatic pain on the right foot and leg albeit that he is able to walk.

On the part of the cited cases, I take note that where the dominant injury is a fracture the awards range from K6,000,000.00 to K7,000,000.00. I respectfully opine that K14,000,000.00 even for a fracture is a bit on the higher side. I am fully aware that the basic principle behind award of damages is to put back the claimant to the position he was before the injuries sustained and not to punish.

Taking into consideration the facts and circumstances of the present case, and also having looked at and considered the comparable case authorities as cited by both counsel in similar heads of the claimant's claims in the light of the applicable law, I am of the view that the K8,500,000.00 would fairly compensate the claimant under the heads claimed and proved. The claimant is also awarded K24,500.00 being special damages for the cost of obtaining a Police Report and Medical Record. These being special damages they ought to have been strictly proved. In this case, there is no proof whatsoever that the Medical Report was paid for save for the Police Report which carries an endorsement that it was paid for and indicates that a receipt was issued. I award K3,000.00 for the Police Report. In total, the claimant is awarded **K8,524,500.00** as damages.

MADE IN CHAMBERS THIS 8TH DAY OF DECEMBER, 2020



WYSON CHAMDAMBA NKHATA

ASSISTANT REGISTRAR