



**REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
PERSONAL INJURY CAUSE NUMBER 981 of 2018**

**BETWEEN:**  
**MRS LINESS CHIKAPA.....CLAIMANT**  
**AND**  
**IBRAHIM AYATU.....1<sup>ST</sup> DEFENDANT**  
**PRIME INSURANCE COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT**

<b>CORAM:</b>	<b>CM MANDALA:</b>	<b>ASSISTANT REGISTRAR</b>
	Mbwana:	Counsel for Claimant of Roberts & Franklin Law Consultants
	Chikwapa:	Counsel for Defendants of KD Freeman & Associates
	C Zude:	Court Clerk

**ASSESSMENT OF DAMAGES**

**INTRODUCTION AND BACKGROUND**

This is an order for assessment of damages pursuant to a Consent Order. The Parties agreed that judgment is entered for the Claimant and that damages would be assessed by the Registrar. Defendants are liable for: damages for pain and suffering, damages for loss of amenities of life, damages for disfigurement, the sum of MK6,000.00 being damages for cost of medical and police reports and costs of the action. The hearing on Assessment of Damages was conducted on 12<sup>th</sup> February 2020.

This matter arose from a road accident that occurred on 22<sup>nd</sup> August 2018 when the 1<sup>st</sup> Defendant was driving from Salima to Balaka. He lost control of the motor vehicle, MH 1208, he hit a bridge guard and entered the Claimant.

**EVIDENCE**

**Claimant's Evidence**

1. My name is Liness Chikapa of Malimba village, Traditional Authority Kalonga in Salima district in the Republic of Malawi and I am full of age and a Malawian citizen.
2. I am the Claimant in these proceedings, and I am familiar with the facts relevant to this matter.
3. On the 22<sup>nd</sup> August 2017 at about 0400 hours, I was travelling in a minibus registration number MH 1208 Toyota Hiace along Salima-Balaka M5 Road in the Republic of Malawi.
4. The said motor vehicle registration number MH 1208 Toyota Hiace was being driven by the 1<sup>st</sup> Defendant and insured by the 2<sup>nd</sup> Defendant at the material time.
5. Upon arrival at Liwadzu bridge, the 1<sup>st</sup> defendant failed to negotiate a corner and consequently hit a bridge guard.
6. I verily believe that the said accident was solely caused by the negligence of the 1<sup>st</sup> Defendant driver who, among other things, over speeding in the circumstances, careless driving and failing to manage or control the said motor vehicle so as to avoid the accident.
7. The Police Report also blames the 1<sup>st</sup> Defendant for the accident. I refer to the police report marked "LC 1".
8. As a result of the accident, I sustained a fracture on the right arm, bruises on the face, bruises on the knees, severe body pains and her degree of permanent incapacitation was assessed at 32%. I refer to the medical reports marked "JK 2".
9. Further, since the accident, I still feel pains, I have scars and there is severe pain on my right arm.
10. I experienced a lot of pain and suffering at the time and even after the accident until now.
11. I have not been compensated by the Defendants for the injuries that I sustained during the said accident.
12. I believe that the facts stated in this witness statement are true.

The Claimant identified the medical report in support of his witness statement which was marked MN1. It states: “Name – Iness Chikapa, Age – 37, Treated as an outpatient from 22/17 to 5/10/17, Outpatient number – 737/17, Nature of injuries – fracture distal radius with antero lateral displacement, Name of doctor who attended patient – Steve Mwanyongo, if surgical operation were performed, please state the nature – manipulation under anaesthesia and below knee POP cast, permanent incapacity – 32%, He/she is fit/ manual work – but with limitations, he/she will be able to continue with his/her previous job as a business lady but with limitations in her right wrist/ for arm.”

In her oral testimony, the Claimant told the court that although she is feeling better, she cannot stretch her hand and cannot wear heavy clothes. The Claimant stated that she was admitted to the hospital for two days while she was awaiting treatment. She then clarified that she was not admitted but that she visited the hospital on two occasions before she was treated. She confirmed that she was treated as an outpatient in accordance with the medical report. The Claimant told the court that her arm was fractured. She had had to undergo an x-ray, but she didn’t have the pictures. She showed the court where the fractures occurred by pointing at her left arm and just above the left wrist. The fractured arm was treated by application of a POP. She concluded by telling the court that she sold tomatoes before the accident and that she continues to do so now.

#### SUBMISSIONS BY COUNSEL FOR THE CLAIMANT

Counsel for the Claimant filed written submissions in support of the application. Counsel avers that the extremity of the Claimant’s injury and the devaluation of the Kwacha would attract a global award of K8,000,000.00 as compensation. Counsel for the Claimant cited the following comparable awards in support:

- **Fole v Walitsa Farm** – Personal Injury Cause Number 17 of 2015 where the Claimant sustained a crushed left foot, fracture of 3<sup>rd</sup> & 4<sup>th</sup> metatarsals, developed arthritis and osteomyelitis and had 40% permanent incapacity. On 12<sup>th</sup> November 2015 she was awarded K10,000,000.00 for pain and suffering, loss of amenities of life, disfigurement and loss of earning capacity.
- **Selenje et al v Prime Insurance Company Limited** – Personal Injury Cause Number 345 of 2012 where the 1<sup>st</sup> Claimant sustained a fractured left clavicle, bruises on shoulder, left and right knee joints and right upper arm. On 10<sup>th</sup> June 2014 the Claimant was awarded K2,000,000.00 for pain and suffering, loss of amenities of life and disfigurement.
- **Lujere v Prime Insurance Co Ltd** – Personal Injury Cause Number 197 of 2014 where the Claimant sustained fractured right clavicle, deep cut wound on right orbital arm, sprain on right knee, bruises on right foot and a 20% permanent incapacity. On 29<sup>th</sup> September 2015, the Claimant was awarded K2,000,000.00 for pain and suffering and loss of amenities of life; and K900,000.00 for disfigurement.
- **Mkandawire v Sattar et al** – Personal Injury Cause Number 137 of 2015 where the Claimant sustained a fractured left femur, painful and swollen right leg and 35% permanent incapacity. On 7<sup>th</sup> August 2015 the Claimant was awarded K2,500,000 for pain and suffering, K700,000 for loss of amenities and K800,000 for disfigurement.

#### ASSESSMENT GUIDELINES

Damages for personal injuries are awarded for a Claimant’s pecuniary and non-pecuniary losses. The pecuniary losses include the loss of earnings and other gains, which the Claimant would have made had they not been injured, and the medical and other expenses which accrue from care and after-care of the injury. The non-pecuniary losses include pain and suffering, loss of amenities of life and loss of expectation of life. The principle underlining the award of damages is to compensate the injured party as nearly as possible as money can do it.<sup>1</sup>

Perfect compensation for a Claimant is unlikely. The Claimant, however, is entitled to fair and adequate compensation.<sup>2</sup> Since it is difficult to assess damages involving monetary loss, courts resort to awarding conventional figures guided by awards made in similar cases and also taking into account the money value.

<sup>1</sup> See *Cassel and Co v Broom* [1972] AC 1027. See also *Tembo v City of Blantyre and The National Insurance Co Ltd* – Civil Cause No. 1355 of 1994 (unreported).

<sup>2</sup> *British Commission v Gourley* (1956) AC 185.

Lord Morris buttresses this contention in *West v Shepherd*<sup>3</sup> by stating: 'money cannot renew a physical frame that has been battered and shattered. All judges and courts can do is to award a sum which must be regarded as giving reasonable compensation.'

The mode of assessment of damages requires the court to consider comparative awards of a similar nature. In doing so, regard must be had for fluctuations in the value of the currency. The court should make an award that is commensurate with the value of the currency at the time the award is made. In *Malamulo Hospital (The Registered Trustees) v Mangani*<sup>4</sup>, the Supreme Court states: "It is, therefore, recognised by the courts that awards of comparable injuries should be comparable. This is done by looking at previous awards of similar cases and adjusting the award according to the fall of the value of the money." In *Tionge Zuze (a minor, through A.S. Zuze) v Mrs Hilda Chingwalu*,<sup>5</sup> the Court states: "Where a claim relates to non-monetary loss in respect of which general damages are recoverable it is not possible to quantify the loss in monetary terms with mathematical precision. In such cases courts use decided cases of a comparable nature to arrive at an award." In *Steve Kasambwe v SRK Consulting (BT) Limited* Personal Injury Cause Number 322 of 2014 (unreported), the High Court states thus: 'At times the court is faced with situations where the comparative cases have been rendered obsolete because of the devaluation of currency and inflation. It would not achieve justice if the court insisted on the same level of award as was obtaining in the previous cases. In such situation, when deciding the new cases, the court must take into account the life index, i.e. cost of living and the rate of inflation and the drop-in value of the currency. The court must therefore not necessarily follow the previous awards but award a higher sum than the previous cases.'

#### COMPENSATION

The Claimant sustained the following injuries: a fracture on the right arm, bruises on the face, bruises on the knees, severe body pains and her degree of permanent incapacitation was assessed at 32%

#### *Pain and Suffering*

The word '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, embarrassment and sickness. See: *Ian Goldrein et al, Personal Injury Litigation, Practice and Precedents* (Butterworths, 1985) 8 and *City of Blantyre v Sagawa* [1993] 16(1) MLR 67 (SCA).

The Claimant's medical report informs the court that she was anaesthetised, and had a cast applied below the knee. She showed the court where the fractures occurred by pointing at her left arm and just above the left wrist. She was treated as an outpatient for some time before she was fully recovered. Based on this, this court awards the sum of K1,000,000.00 as damages for pain and suffering.

#### *Loss of Amenities of Life*

The expression 'loss of amenities of life' simply means loss of faculties of pleasures of life resulting from one's injuries. Damages for loss of amenities of life are awarded for the fact that the plaintiff is simply deprived of the pleasures of life, which amounts to a substantial loss, whether the plaintiff is aware of the loss or not. See: *Poh Choo v Camden and Islington Area Health Authority* [1979] 2 All ER 910 and *City of Blantyre v Sagawa* [1993] 16(1) MLR 67 (SCA) at 72.

As a result of the accident, the Claimant cannot stretch her hand and cannot wear heavy clothes. Her life has been significantly altered by the accident in this way. However, she has been able to return to her trade of selling tomatoes albeit with some difficulty due to the effects from the injury. Based on this, this court awards the sum of K500,000.00 as damages for loss of amenities of life.

<sup>3</sup> *West v Shepherd* (1964) AC 326 at 346.

<sup>4</sup> [1996] MLR 486.

<sup>5</sup> Quoting from *HQ Chidule v Medi* MSCA 12 of 1993.



*Disfigurement*

In the matter of **James Chaika v NICO General Insurance Co Ltd** the High Court stated that 'Disfigurement is not a matter to be taken lightly and casually as it is something that one has to permanently live with.' In **Nyirenda v Moyo and others**, the claimant was awarded the sum of K500,000.00 as damages for disfigurement in 2018.

Following that award and considering the devaluation of the Kwacha since 2018, the Claimant is hereby awarded K650,000.00 as damages for disfigurement.

*Special Damages*

The law distinguishes general damages and special damages as follows – general damages are such as the law will presume to be the direct natural or probable consequence of the action complained of. Special damages, on the other hand, are such as the law will not infer from the nature of the course - **Stros Bucks Aktie Bolag v Hutchinson** (1905) AC 515. In determining the natural consequences, the court considers if the loss is one which any other claimant in a like situation will suffer – **McGregor on Damages** p23 para 1-036.

Special damages must be specifically pleaded and must also be strictly proved - **Govati v Manica Freight Services (Mal) Limited** [1993] 16(2) MLR 521 (HC). A Plaintiff who claims special damages must therefore adduce evidence or facts which give satisfactory proof of the actual loss he or she alleges to have incurred. Where documents filed by the Plaintiff fail to meet this strict proof then special damages are not awarded – **Wood Industries Corporation Ltd v Malawi Railways Ltd** [1991] 14 MLR 516.

The Claimant herein was awarded damages the sum of MK6,000.00 as special damages. There is no indication on file of what the K6,000.00 covered nor are there receipts to prove whether the money was spent and how it was spent. Special damages ought to be specifically claimed and proved and the Claimant herein failed to do either. For these reasons, no award will be made under this head.


DISPOSAL

The Claimant is therefore awarded K1,000,000.00 for pain and suffering; K500,000.00 for loss of amenities of life; K650,000.00 for disfigurement and; K0 as special damages and costs of the action (to be taxed by the court).

Compensation totals of K2,150,000.00 (two million, one hundred and fifty thousand kwacha).

Each party is at liberty to appeal to the Supreme Court of Appeal within the requisite time frames.

Ordered in Chambers on the 1<sup>st</sup> day of June 2020 at the High Court, Lilongwe.



C Mandala

**ASSISTANT REGISTRAR**

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