



REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
PERSONAL INJURY CAUSE NO. 848 OF 2015

**BETWEEN**

SMART NASIYAYA.....CLAIMANT

**AND**

NU CEMENT HARDWARE.....DEFENDANT

Coram: **WYSON CHAMDIMBA NKHATA (AR)**

Mwabungulu- of Counsel for the claimant

Alide-of Counsel for the defendant

Chimtengo- Court Clerk and Official Interpreter

**ORDER ON ASSESSMENT OF DAMAGES**

The claimant sues the defendant for personal injuries suffered in an accident that occurred on the 16<sup>th</sup> of October 2014 while in the course of employment. The claimant had alleged that on the material day, he was offloading bags of cement from one of the stacks in the defendant's storeroom when some of the bags of cement from the top of the stack fell off and hit him on the right leg and he was injured in the process. After full trial, the court apportioned blame between the parties with 40% to the claimant and 60% to the defendant. The matter was then referred to this court for assessment of the damages. This is the court's ruling thereto.

When the matter came for assessment of damages the claimant was the sole witness for his case. He adopted his witness statement in which he averred that as a result of the accident herein he sustained a mid-shaft fracture of the right femur. He was taken to Queen Elizabeth Central Hospital where he was treated. He was admitted from the 4<sup>th</sup> of October 2014 and discharged on the 25<sup>th</sup> of November 2014. He further avers that since the accident he can no longer work and perform his daily duties due to the injury such that he still feels extreme pain on his right leg whenever he walks a long distance. In cross-examination, he stated that he was born in 1973. He also stated that he was not drunk at the time of the accident. He stated that he sustained a fracture on thigh.

Such was the evidence adduced for the assessment proceedings. The defendant did not parade witnesses. Counsel sought 14 days within which he could file written submissions. The same was done. I must express my sincere gratitude to both parties for the illuminating submissions which went a long way in informing the court in its determination. As earlier alluded to, this court has been called upon to make an assessment of the damages that could compensate the claimant for the injuries he sustained.

This court is aware that 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 claimant'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.

That notwithstanding, 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.



In this case, the claimant sustained a fractured femur. Counsel for the claimant called upon the court to consider the following cases:

**Christina Mande v Charter Insurance Ltd Co.**, Personal Injury Cause No. 329 of 2016, in which the claimant sustained a fracture of the right femur, dislocation of the right hip joint, cut on head and lost consciousness on the spot of the accident. He also sustained a sprained right hand and a cut on the left hand. The court awarded him the sum of K6,300,000.00 as damages for pain and suffering and loss of amenities of life. The award was made on 11<sup>th</sup> January, 2017.

**Friday Mtelera versus Nenani Misolo and Prime Insurance Company Limited** Personal Injury Cause Number 530 of 2015 where the claimant sustained a fracture of the knee joint of the right leg, fracture of the right lower leg, fracture of the ankle of the right leg, a cut on the left leg and a cut and bruises on the right elbow. The Plaintiff was also hospitalized for 27 days. This Court awarded the Plaintiff therein the sum of MK5,000,000.00 as damages for pain and suffering, loss of amenities and disfigurement.

**Rex Walala v Davison Chikuta and Prime Insurance Company Limited** High Court, Zomba District Registry, Personal Injury Cause Number 461 of 2011. The claimant sustained an open fracture of the left tibia, bruises on the left arm and cuts on his face. This award was made on 20<sup>th</sup> March 2013 by the Assistant Registrar.

**Zuze Bonjesi v Prime Insurance Company Limited** Civil Cause Number 488 of 2008 where the claimant was awarded K7,000,000.00 as damages for pain and suffering and loss of amenities of life for a severe open fracture of the left tibia, massive wounds and cuts to the right leg.

**Kachasu and another v Peter Kondowe and another, civil Cause no. 320 of 2009**, in which the 1<sup>st</sup> claimant suffered a cut wound on head, closed fracture of right lower leg. He was awarded MK5,600,000.00 personal injuries. The award was made on 16<sup>th</sup> October, 2009 by Justice Kamwambe.

It was therefore Counsel's submission that in the circumstances of this case, the reasonable compensation would be K12,000,000.00 for pain and suffering, loss of amenities and disfigurement. Since the court apportioned 60% negligence to the defendant, it is their proposal that the claimant's quantum be K7,200,000.00.

On the other hand, the defendant through Counsel have invited the court to consider the following cases as comparable case law to injuries sustained herein:

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**Smart Nasiyaya v NU Cement Hardware** Personal Injury Cause No. 848 of 2015



**Monica Chisale Kawonga and Two Others v Prime Insurance Company Limited** Personal Injury Cause Number 850 of 2013, in which a claimant who suffered bruises on his face and swelling on the occipital head and supracondylar fracture of the right distal and ulna and a degree of permanent incapacity assessed at 12% was awarded K1,445,000.00 as damages for pain and suffering and K500,000.00 for loss of amenities. The claimant was also awarded K250,000.00 for disfigurement. The awards were made on the 23<sup>rd</sup> of July 2018.

**Margret Kachotsa (a minor, suing through Elena Andrew, her mother and litigation guardian) v Mandaliza Baison, Times Group & Nico General Insurance Limited** Personal Injury Cause No. 408 of 2018, in which the claimant sustained a fracture of the right tibia, epiphyseal injury and abrasions on the face, right knee, right calf and chest. The award of K3,200,000.00 was made on the 8<sup>th</sup> of May 2019.

**Omar Kamwendo v Gerald Tasaukadala & Prime Insurance Company Limited**, Personal Injury Cause Number 285 of 2017, in which the claimant who suffered two fractured bones of his right leg was awarded K4,150,000.00 as damages for pain and suffering. The award was made on 10<sup>th</sup> September 2019.

Counsel for the defendant is of the view that the claimant having suffered a fractured femur, the Omar Kamwendo case (supra) is more relevant despite that the claimant therein suffered a double fracture. Counsel is of the view that K4,150,000.00 is reasonable compensation and in the light of the 40% contributory negligence apportioned to the claimant, he ought to be awarded the sum of K2,460,000.00.

I have perused the medical evidence as to the injuries sustained by the claimant. I had the opportunity to observe the injury and the present physical condition of the claimant. I gave meticulous thought to the written submissions filed by both Counsel. I considered the relevant aspects of some of the precedents cited by the counsel. I am of the view that the claimant suffered serious injury. Clearly, the claimant had to contend with excruciating pain and suffering arising from the fracture. He had to endure considerable inconvenience with his arm cast on POP. I further take note that the injury still affects him as he can no longer do strenuous tasks.

On the part of the cited cases, I believe the case of **Kachasu and Another** (supra) is much closer in intensity of the injuries than the other cases. The dominant injury in that case is a closed fracture like in the case herein. The award was K5,600,000.00. I take into consideration that the award was made in 2009 which may no longer be in tune with economic realities. All in all, I believe an award of K6,000,000.00 under all heads

claimed and proved is sufficient recompense for the claimant for the injuries he sustained. Taking into consideration the 40% apportionment of blame upon the claimant, he is awarded K3,600,000.00.

The claimant is further awarded costs of the assessment proceedings.

DELIVERED IN CHAMBERS THIS 22<sup>nd</sup> DAY OF JULY 2020

  
WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR