



REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
PERSONAL INJURY CASE NO. 656 OF 2019

**BETWEEN**

FLORA MSENDEMA.....CLAIMANT

**AND**

PRIME INSURANCE COMPANY LIMITED.....1<sup>st</sup> DEFENDANT

JOSEPH TIMM.....2<sup>nd</sup> DEFENDANT

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

Mr. Kamunga - of Counsel for the Claimant

Mr. Phiri- of Counsel for the Defendants

Mr. Chimtengo - Court Clerk and Official Interpreter

**ORDER ON ASSESSMENT OF DAMAGES**

The claimant in this matter took out a writ of summons which was issued on the 16<sup>th</sup> of August 2019 against the defendants claiming damages for pain and suffering, loss of amenities of life, disfigurement, special damages and costs of the action. Apparently, the action follows an accident in which a motor vehicle driven by the 2<sup>nd</sup> defendant hit the claimant and injuring her in the process. She sues the 1<sup>st</sup> defendant as the insurer of the said motor vehicle. The issue of liability was settled in favour of the claimant this court was appointed to determine the reasonable quantum of damages that would adequately compensate the claimant for the losses and damages suffered.

The evidence adduced for the assessment of damages emanated from the claimant herself. Through her sworn statement she indicated that on the 18<sup>th</sup> of April 2019 while collecting gate passes from mini-buses she was hit by motor vehicle registration number BLK3855 Nissan Vanette minibus at GET Auto Parts along Browns road between Blantyre Bus Stands and Victoria Hotel. Apparently, the minibus wanted to escape payment of the gate pass. As a result of the said accident, the claimant avers that she suffered a fractured the left distal radius, heavy bleeding from the left lower arm, sprained left hip, cut wounds on the left thigh and bruises on the left lower leg. She further indicates that she was placed on POP for 2 months, currently she is not able to use the left arm. She also avers that she can no longer have sexual intercourse due to painful back, sprained hip and painful waist. Since the accident, he has been having difficulties in sustaining his daily life as she can no longer do any gainful work and has not been able to sustain his family. She used to work with Blantyre City Council but left employment due to his inability to work.

What came out during cross-examination is that claimant sustained a closed fracture, dislocation of the hip and bruises which have now healed. She denied having sustained a fracture of the left knee.

Such was the evidence for the assessment proceedings. Counsel for the claimant adopted his Skeleton Arguments and closed the claimant's case. The defendants, on the other hand, did not parade witnesses. However, they filed written submissions on assessment of damages. I must express my sincere gratitude for the same.

At this point, I must state that it is trite that a person who suffers bodily injuries or losses due to the negligence of another is entitled to recover damages. The fundamental principle which underlies 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.

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 claimant.

*Damages for Pain and Suffering*

The claimant has been awarded damages for pain and suffering. The Supreme Court of Appeal in the case of **City of Blantyre v. Sagawa** [1993] 16 (1) MLR 67 stated that pain is used to suggest physical experience of pain caused by and consequent upon the injury while suffering relates to the mental elements anxiety, fear, embarrassment and the like. In this case, the claimant claims to have sustained a fractured left distal radius, heavy bleeding from the left lower arm, sprained left hip, cut wounds on the left thigh and bruises on the left lower leg.

The defendants through Counsel challenge the assertion. It is contended that she did not suffer a fracture of the left knee following her denial in cross-examination. Further to that, the defendants move the court to ignore the issue of the sprained hip considering that it was not pleaded. It is quite interesting to note that the claimant pleaded fractured of the left distal radius only to deny it in court and she did not plead a sprained hip only to place more emphasis on the same in examination in chief. I will agree with Counsel for the defendants that the established injuries in this matter are a closed fracture to the left arm and bruises to leg.

With regard to comparable cases on pain and suffering, Counsel for the claimant called upon the court to consider the following cases:

**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.

**Florence Kaning'a v Malawi Housing Corporation and Esther Mtenje, Civil case no. 1339 of 2007**, where the plaintiff suffered a fractured of the left leg which resulted into amputation of the leg below the knee and a fractured right leg. She was awarded K12,185,420.00 being K9,000,000.00 for pain and suffering and loss of amenities and K1,500,000.00 for disfigurement, K1,679,920.00 special damages for procuring a prosthesis and K5,500.00 for procuring a Medical Report and Police Report. The award was made on 3<sup>rd</sup> June 2014.



It was therefore Counsel's submission that in the circumstances of this case, the reasonable compensation for pain and suffering would be K10,000,000.00.

On the other hand, Counsel representing the defendant is of the view that K2,500,000.00 would adequately compensate the claimant. He therefore moves the court to consider the following cases should the court be minded to make an award for compensation to the claimant:

**Grace Malekano v Prime Insurance Company Limited and John Bamusi** Civil Cause Number 3911 of 2016 where the claimant sustained two fractures on the left upper leg and metal rods inserted in the leg. He was awarded K1,800,000.00 as damages for pain and suffering and loss of amenities of life on the 2<sup>nd</sup> of October 2017.

**Felix Juwawo and 4 Others v Joseph Kadzayekha, W. A. Nguluwe and Prime Insurance Company Limited Personal Injury Cause Number 15 of 2013** wherein the 5<sup>th</sup> claimant sustained a bilateral fracture of malleora, extensive abrasions on the left arm and face and deep cut wound on the left arm. The court awarded him the sum of K2,000,000.00 on the 27<sup>th</sup> of October, 2017.

I have considered the evidence as to the injuries proffered by the claimant. I had the opportunity to observe the aftermath of the injuries sustained by the claimant and his present physical condition. There is no doubt that she sustained serious injury albeit being a closed fracture. She must have been exposed to a lot of pain and suffering. The case of **Florence Kaning'a** above which the claimant seems to have placed much reliance on involves fracture of the left leg which led to amputation and also fracture of the right leg. Clearly injuries in that case are far more serious than in the case herein.

I am inclined to hold the view that the K10,000,000.00 as suggested by counsel for the claimant is on the higher side where a closed fracture is involved. In my view, 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 encompasses other heads such as disfigurement. I am of the view that an award of K4,000,000.00 would adequately compensate the claimant for pain and suffering.

#### Loss of Amenities

The claimant has also been awarded damages for loss of amenities of life. In the case of **Kanyoni v Attorney General** [1990] 13 MLR 169, 171 the court held that loss of amenities of life must include the loss of all the things the claimant used to be able to do, see, and experience. His Lordship Honourable Justice Mwaungulu (as he then was) in the case of **Mtika v. US Chagomerana t/a trans Usher (Zebra**



**Transport)** [1997] 2 MLR 123, 126 explained that this head covers the loss caused by the injury in that the Plaintiff will be unable to pursue the leisure and pleasures of life that he used to enjoy but for the injury. In this matter, the claimant complained that her hip injury has led to her failure to have sexual intercourse due to a painful back. She also lamented that she cannot perform chores like washing and she has to hire another person to do it for her. The issue of the sprained hip has already been dealt with above. The claimant did not plead injuries to her back, hip and waist. The same seem to have just been introduced during examination in chief. This is a fundamental departure from the injuries specified in her pleadings. Perhaps, what is worth considering is the issue of failure to do chores due to the arm injury. Counsel for the claimant proposes K10,000,000.00 as damages for loss of amenities. I am of the view that its on the higher side and I award the claimant K1,500,000.00 under this head.

#### Deformity and disfigurement

The claimant also been awarded damages for deformity and disfigurement. A perusal of the skeleton arguments relied upon by the claimant indicates that he wants the same to be treated as two distinct heads. I see no reason to do so. In my considered opinion, the two have the same connotation. Suffice to say, damages under the head of disfigurement are paid 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 scar coming in as a result of surgical operation necessitated by the injury. It is a change in appearance but it is capable of limiting a person from doing certain things- see- **Francis Chikoti vs- United General Insurance Company Limited** Personal Injury Cause No. 730 of 2016.

Under this head, Counsel for the claimant cites the case of **Rabecca Mbwana vs Attorney General, Civil Cause No. 1958 of 2009** where the court awarded the plaintiff the sum of K1,000,000 for deformity. Counsel proposes a sum of K5,000,000.00 as damages for deformity in this case.

He also cites the case of **Chikondi Namate v Latif and Prime Insurance Company Limited** Personal Injury Cause No. 533 of 2013 where the plaintiff was awarded K21,385,500.00 as damages for pain and suffering, disfigurement, loss of income, loss of earning capacity, future treatments and recovery for costs of medical and police report. The award was made on the 2<sup>nd</sup> of July 2018.

In this matter, Counsel therefore proposes K5,000,000.00 as damages for disfigurement. Having considered the cited cases, I am of the opinion that K2,000,000.00 would adequately the claimant under this head.



### Loss of earning capacity

Under this head, Counsel for the claimant contends that the claimant herein has not been able to sustain her day to day life as a result of the accident herein since she can no longer undertake gainful employment. In the case of **Kambwiri v Attorney General** [1991] 14 MLR 151 (HC) Justice Mwaungulu as he was then stated that in addition to the non-pecuniary losses of pain and suffering and loss of amenities, courts award for financial loss, either as general damages in form of loss of earning capacity, or financial loss as loss of earnings, whether the victim has lost his job completely or his earnings have been reduced as a result of the new circumstances created by the injury. The evidence in the matter herein indicates that the claimant was working for Blantyre City Council and had to stop because of the injuries she sustained as a result of the accident herein. Nevertheless, the claim for loss of earning capacity is not supported by the pleadings. The issue has been introduced at assessment of damages stage. It is trite law that each party is bound by its pleadings. I agree with Counsel for the defendant that the claim be ignored.

### Conclusion

Counsel for the claimant prays that the claimant be awarded K10,000,000.00 as damages for pain and suffering, K10,000,000.00 for loss of amenities, K5,000,000.00 for deformity, K5,000,000.00 for disfigurement, K10,920,000.00 for loss of earning capacity and K13,000.00 as special damages giving a total of K40,933,000.00. However, upon a thorough consideration of facts and circumstances of this case, and upon an exhaustive consideration of the submissions by Counsel in the light of the relevant and applicable law regarding damages for the claimed heads herein that I make the following awards:

Damages for pain and suffering	K3,000,000.00
Damages for loss of amenities of life	K2,000,000.00
Damages for deformity and disfigurement	K2,000,000.00
Loss of earning capacity	-

In total, the claimant is awarded K7,000,000.00. She is further awarded costs of the assessment proceedings to be taxed if not agreed by the parties.

DELIVERED IN CHAMBERS THIS 3<sup>rd</sup> DAY OF AUGUST 2020

WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR