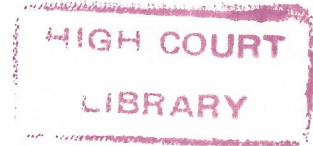


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The Judiciary

IN THE HIGH COURT OF MALAWI

CIVIL DIVISION

PRINCIPAL REGISTRY

PRIMARY INJURY CAUSE NUMBER 19 OF 2019

Between

MASTAFUL MASALA CLAIMANT

-and-

GEORGE MCHITUTU..... 1ST DEFENDANT

PRIME INSURANCE CO. LTD2ND DEFENDANT

CORAM: Austin Jesse Banda, Assistant Registrar

Mr. M'bwana, for the Claimant

None for the Defendants

Ms. F. Makhambera, Clerk/ Official Interpreter

Banda

JUDGMENT ON ASSESSMENT OF DAMAGES

Background

Mr. Mastaful Masala (“the Claimant”) commenced this proceeding against Mr. George Mchitutu (“1st Defendant”) who was driving a motor vehicle Toyota Hiace minibus registration number TO 7735 on the 24th of January, 2018, and Prime Insurance Company Limited (“the 2nd Defendant”) who were the insurers of the said motor vehicle at the said material time. The Claimant proceeded as such, on the ground that the 1st Defendant negligently drove the motor vehicle, on the said date, that the motor vehicle hit him and caused him injuries. The Defendants did not enter defence within the prescribed time and the Claimant obtained judgment in default of defence in which he was granted damages for pain and suffering, damages for loss of amenities of life, and damages for disfigurement/deformity and costs. The Court ordered that the Registrar should assess the damages. On the date of appointment with the Registrar, the 17th day of March, 2020, neither the Defendants nor their Counsel turned up, without any excuse whatsoever. I proceeded to hear the Claimant as such.

Evidence

Mr. Mastaful Masala was the only witness in the assessment hearing. He told the Court that on the 24th of January 2018, a motor vehicle driven by the 1st Defendant and insured by the 2nd Defendant hit him on Dalton road in Limbe, Blantyre. As a result, the Claimant said he suffered a serious injury to the muscle of his left arm. He was taken to Limbe Health Centre who further referred him to Queen Elizabeth Central Hospital (“QUECH”). At QUECH they amputated the arm above the elbow joint as it had developed a serious condition due to the severity of the injury. He tendered medical reports from both Limbe Health Centre and QUECH.

Mr. Masala further told the Court that he was using hands to move before as he has a disability and now he cannot do so. (I observed that he could do so with much difficulty as he moved into the chamber). He further said that he needs someone to push him on the wheelchair when he could use both hands for that purpose before the accident and eventual amputation of his arm. He cannot do any manual work as well as he could before the accident.

The Claimant prayed to be compensated for the injuries and also the sums that he paid for the police and medical reports, being K3, 000.00 and K21, 000.00 respectively. He attached the respective General Receipts, (“Exhibit MM4 and MM5”) respectively.

Issue

The issue before the Court is the amount of damages that the Claimant must be paid by the Defendants as damages pursuant to the Default Judgment.

Law and Facts

The starting point is that assessment of damages presupposes that damages have been proved and what remains is the measure of the amount of the damages- see the case of **Ngosi t/a Mzumbamzumba Enterprises v. Amosi Transport Co Ltd [1992] 15 MLR 370(HC)**. The rule is that the injured party has provided proof of the damage sustained prior to the assessment hearing- **Yanu Yanu Co v. Ltd v. Mbewe 11 MLR 405 (SCA)**.

According to **Livingstone v Raynards Coal Co. (1880) 5 App Ca 25 at 39**, the measure of damages, however, is that sum of money that will put the party which has been injured in the same position he/she would have been in if they had not sustained the wrong for which he/she is now getting his/her compensation or reparation

Damages in a case like this one, are not awarded to punish the defendant or tortfeasor, but to fully compensate the claimant of all the losses that he has suffered as a direct or consequential result of the defendant’s wrongful act or omission. In the case of **George Kankhuni v. Shire Buslines Ltd, Civil Case Number 1905 of 2002**, Katsala, J stated as follows:

“The law demands that the plaintiff, as far as money can do it, be put in the same position as if he has not suffered the loss. This is what is referred to as *restitution in intergrum*.”

It is not easy to quantify damages for losses that are not monetary in nature such as personal injuries. Courts as such use comparable cases as a guide to the quantification of applicable

damages, without losing sight of particularities in the individual case that the court is dealing with. See **Chipeta v. Dwangwa Sugar Corporation, Civil Cause No. 345 of 1998, High Court, Principal Registry (unreported)**.

The court will also consider factors such as passage of time since a particular comparable award was made, as well as currency fluctuations within the period between the case at hand and the comparable one- **Hon. Kennedy Kuntenga v. Attorney General, Civil Cause No. 2002 of 2002, High Court, Principal Registry, (unreported)**.

Pain and Suffering

The word 'pain' in 'pain and suffering' 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, as was stated in **Blantyre City v Sagawa [1993] 16 (1) MLR 67 (SCA)**, and as defined in Ian Goldrein et al, Personal Injury Litigation, Practice and Precedents (Butterworths, 1985) p8

The award of damages for pain and suffering depends upon the claimant's personal awareness of pain, and his capacity for suffering- see **Limpoh Choo v. Camden and Islington Area Health Authority [1980] AC 174 @ 183**.

In **H.Q. Chidule v MEDI M.S.C.A Civil Appeal No.12 of 1993**, the court said that in assessing damages for pain and suffering, the court must consider the pain which the particular plaintiff has suffered because the circumstances of the particular plaintiff are bound to have a decisive effect in the assessment of damages.

Deformity/ Disfigurement

Damages are paid under the head of disfigurement for the change in the physical form of a person injured either as a result of the impact of the injury or its treatment, such as a scar, amputations and postures, coming in as a result of surgical operation necessitated by the injury, as was observed in **Lemon Banda & 19 others v Mota Engil Ltd & General Alliance Insurance Ltd, Personal Injury Cause number 178 of 2012**.

In **Austin Julius v. Rasika Gunawardena and General Alliance Limited, Personal Injury Cause Number 316 of 2014**, it was stated that disfigurement is a change in appearance which is capable of limiting a person from doing certain things and should therefore not be taken lightly and casually as a person lives with the deformity for the rest of his life.

In **Zaina Chipala v. Dwangwa Sugar Corporation Civil Cause Number 345 of 1998, High Court, Principal Registry, per Chimasula, J**, it was held that money cannot renew a physical frame that has been battered and shattered. The courts must therefore award a sum that is regarded as reasonable compensation.

Loss of Amenities of Life

Damages are paid under the head of loss of amenities of life to compensate the claimant's deprivation of the pleasures of life, which amounts to substantial loss, whether the claimant is aware or not of that loss. See **City of Blantyre v. Sagawa [1993] 16(1) MLR 67 (SCA)**; **Kemp and Kemp, The Quantum of Damages, Vol. 1 (2nd Edition), 1961, p. 624.**

Comparable Cases

In **Peter Nsona v. Lujeri Tea Estate Limited, Civil Cause No. 857 of 2015, Principal Registry**, a Claimant who had an arm amputated for the negligence attributed to the Defendant was awarded K19, 000,000.00 damages for pain, suffering, disfigurement and loss of amenities of life. The award was made on 26th May, 2018.

In the case of **Richard Chinsinga v Electricity Supply Corporation of Malawi, Personal Injury Cause Number 59 of 2018, Principal Registry**, the Claimant was awarded damages of K20, 000,000.00 for pain and suffering, K 5,000,000.00 for loss of amenities of life and K5, 000,000.00 for deformity and disfigurement. The Claimant had severe burns from electrocution that led to an amputation of his arm among other injuries.

Determination

The evidence of the Claimant in this case is believable and uncontroverted, and as such it is taken wholesome for a fact. The Claimant had a serious muscle injury leading to a condition called compartment syndrome. This condition causes muscle and nerve damage that necessitated amputation. Looking at the cases that are comparable, the case of Richard Chinsinga clearly involved severe injuries than in this case. The Court making assessment even considered the Claimant to be lucky to be alive after that ordeal. The Peter Nsona case is more comparable to this one, in nature and extent of injuries.

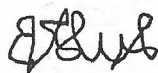
In the circumstances I award the Claimant **K13,000,000.00** for pain and suffering, **K4,000,000.00** for disfigurement and **K3,500, 000.00** for loss of amenities of life.

The Claimant is further awarded **K3, 000.00** cost of the police report exhibited, for which he obtained a General Receipt, ('MM4') and **K21, 000.00** that he paid for the medical report under a General Receipt ('MM5').

Conclusion

In conclusion, the Claimant is awarded a total sum of **K20, 524,000.00** as damages for the personal injury he suffered. He is also awarded costs for the assessment of damages which will be assessed by the Court if the parties will not reach a consensus.

Made this 23rd day of March, 2020.



Austin Jesse Banda

ASSISTANT REGISTRAR