



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CASE NO. 692 OF 2019

**BETWEEN**

SHIRA FOMBE.....CLAIMANT

**AND**

JUSTIN MATIYA.....1<sup>st</sup> DEFENDANT

GENERAL ALLIANCE INSURANCE COMPANY LTD.....2<sup>nd</sup> DEFENDANT

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

Mr. Mwantisi- of Counsel for the Claimant

Mr. Kambale- of Counsel for the Defendant

Mr. Chimtengo- Court Clerk and Official Interpreter

**ORDER ON ASSESSMENT OF DAMAGES**

Through a specially endorsed writ of summons issued on the 21<sup>st</sup> of August 2019, the claimant commenced proceedings claiming damages for pain and suffering, loss of amenities of life, deformity, disfigurement and costs of the action. Apparently, the claim emanates from an accident which took place on the 23<sup>rd</sup> of April 2019, when a vehicle driven by the 1<sup>st</sup> defendant ran over the claimant's foot as she stood on the dirt verge. The Statement of case indicates that the 2<sup>nd</sup> defendant is being sued as the insurer of the vehicle in question. On the 14<sup>th</sup> of February 2020, the parties appeared before Honourable Justice Nriwa for mediation. Upon agreement, judgment on liability was entered against the defendants. It was further adjudged that damages be assessed by the Registrar if not agreed by the parties. Subsequently, this

court was called upon to determine the quantum of damages that would compensate the claimant for the losses suffered. This is the court's order thereto.

The matter came for assessment of damages on the 10<sup>th</sup> of March 2020. The claimant was the sole witness for her case. She adopted her witness statement in which she averred that on the 23<sup>rd</sup> of April 2020, she was involved in a road accident in which a vehicle ran over her foot. As a result of the accident, she sustained a fracture of the right foot, lost toe nails from the right foot and sustained bruises. It is her testimony that she was admitted at Queen Elizabeth Central Hospital for a day. She further averred that her leg was cast on POP for 8 weeks. She went on to add that since the accident she still feels pain on the injured foot and has been painkillers and she is unable to walk long distances. She produced x-rayed pictures for the court's inspection.

In cross-examination, she re-iterated that she stayed 8 weeks with a POP on her leg. She also re-iterated that she is still on medication which she collects from Mlambe Hospital. She stated that she collects the medicine from Mlambe Hospital because it is closer to where she stays. She stated that the orthopedician assisting her is a Muslim lady. In re-examination, she showed the court the foot where she got injured.

The defendants did not parade witnesses but Counsel undertook to file submissions within 14 days which he did. Counsel representing the claimant proceeded to adopt his skeleton arguments in support of the assessment proceedings and undertook to file supplementary skeleton arguments which he did. I shall revert to the submissions shortly. Suffice to say for now that this court is grateful to both Counsel for the enlightening submissions which went a long way in informing the court in arriving at the decision herein.

At this point, I must mention that 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 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.

With regard to personal injuries, the law further demands that courts must have regard to cases of comparable nature in order to award damages consistently but without losing sight of the injuries suffered



by the particular claimant in any given case. **Kalinda v Attorney General (1992) 15 MLR 170 and Chidule v Medi MSCA Civil Appeal No. 3633 of 2005 unreported.**

In this case, some of the cases cited by Counsel representing the claimant in his Skeleton Arguments were as follows:

**Zuze Bonjesi v Prime Insurance Company Limited** Civil Cause Number 488 of 2008 where the Plaintiff 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. The award was made on 17<sup>th</sup> July 2012.

**Louise Chakwantha v Prime Insurance Company Limited** High Court, Principal Registry, Civil Cause Number 2195 of 2010. The Plaintiff sustained a fractured left fibula bone, multiple soft tissue injuries and a swollen leg. A total sum of MK6,152,000.00 was awarded to the Plaintiff on 10<sup>th</sup> August 2012 by the Assistant Registrar.

**Rex Walala v Davison Chikuta and Prime Insurance Company Limited** High Court, Zomba District Registry, Personal Injury Cause Number 461 of 2011. The Plaintiff 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.

**Red Lucia v Prime Insurance Company Limited** Personal Injury Case No. 2442 of 2010, where the claimant sustained a fracture of tibia and humerous as well as head injuries. The court awarded the sum of K6,000,000.00 as damages for pain and suffering, loss of amenities and disfigurement.

In his supplementary skeleton arguments, with focus on deformity and disfigurement, Counsel for the claimant further cites the following cases:

**Henry Kausiwa v Stansand (CA) Limited** Civil Cause Number 211 of 2017 where the claimant was awarded K800,000.00 as damages under the head of disfigurement to the claimant who was not able to do carpentry business as before and could stand or walk for long and felt persistent headaches, pain in the back and both legs. The award was made on 21<sup>st</sup> November, 2017.

**Sam Banda v Prime Insurance Company Limited** High Court Civil Cause Number 306 of 2015 where the claimant sustained a painful right hip and left shoulder. He also had a scar formation on the right hip, elbow joint and left upper arm. He was awarded MK600,000.00 under the head of deformity and disfigurement on 4<sup>th</sup> September, 2017.

**Triza Banda v Frank Rodgers and Prime Insurance Company Limited**, Personal Injury Cause Number 178 of 2014, where the claimant was awarded K500,000.00 under the head of disfigurement. The claimant was unable to lift heavy objects and performed manual work with difficulty. This award was made on 26<sup>th</sup> October, 2017.

It is Counsel's submission that the claimant be awarded K1,000,000.00 under the head of disfigurement and K11,000,000.00 under the heads of pain and suffering and loss of amenities of life.

On the other hand, Counsel for the defendants is of the view that the case authorities cited by Counsel for the claimant are archaic. He further contends that Counsel deliberately cited archaic case authorities in order to factor in devaluation a thing which is not correct considering that devaluation has been fluctuating over the years and static for the past two years. He is of the opinion that the court should take into consideration the following cases:

**Chidoola v Peter Chilunga and Prime Insurance Company Limited personal Injury case number 488 of 2014**, in which the claimant suffered fracture of the distal right leg. The court awarded him K3,203,000.00 for pain and suffering, loss of amenities of life and disfigurement. The award was made on 19<sup>th</sup> July, 2018.

**Margaret Kachotsa v Mandaliza Baison & Others Personal Injury Cause No. 408 of 2018** in which the claimant suffered a fracture of right tibia epiphyseal injury and abrasions on the face, right knee, right calf and chest. She was awarded K2,500,000.00 for pain and suffering and disfigurement and K700,000.00 for loss of amenities of life. In total, the claimant was awarded K3,200,000.00 on the 8<sup>th</sup> of May, 2019.

**Bema v Moffat and Another Personal Injury cause No. 578 of 2019** in which the claimant suffered a fracture of the distal tibia in the leg. The court awarded K2,150,000.00 for pain and suffering and K950,000.00 for loss of amenities of life. The court further awarded K3,000.00 as a costs of obtaining a Police Report. In total, the claimant was awarded K3,103,000.00. The award was made on 10<sup>th</sup> September, 2019.

It is Counsel's submission that the claimant herein sustained a fracture of the right tibia only and that the injuries have relatively fully healed. He is of the view that K1,500,000.00 under all heads claimed would adequately compensate the claimant.



With all that at the back of my mind, I must begin my analysis by stating that I have carefully considered the evidence given as to the injuries. I had the opportunity to observe the injury on the right foot of the claimant to appreciate her present physical condition. I gave meticulous thought to the written submissions filed by both counsel. It is clear that the nature of the injury herein is not in dispute. For lack of brevity, let me re-iterate that the claimant sustained a fracture of the right distal tibia and lacerations on the second and third toes of the right foot. Upon injury the right foot was cast on POP for a period of 8 months. The accident occurred in April last year which is roughly almost a year ago but from what I saw in court, the claimant is not fully recovered. The leg looked swollen and discolored as compared to the other.

All in all, I am convinced that the injury caused excruciating pain and suffering to the claimant. It is a pity that it still does even after almost a year of the occurrence of the accident. She has to take painkillers but for the said accident. Apart from that, the injury seems to have caused her a lot of inconvenience since she had to stay for a protracted period with a POP on her right foot. She is now lamenting that she can no longer walk long distances consequent to the same. In my view, it would rather be insensitive to attempt to downplay the claimant's injury in whatever manner. The claimant has suffered deformity in an agonizing ordeal. This is an injury that must attract a substantial award.

Perhaps, before I proceed, I should address an issue raised by Counsel for the defendants in his written submissions. On paragraph 5.1, Counsel avers as follows:

*As pleaded in paragraph 6 of our defence, we wish to re-iterate, that the 2<sup>nd</sup> defendant is liable to the extent of the insurance policy contract it entered into with the insured. A copy of the same is attached for ease of reference. We wish to also bring to the attention of the court that another cause of action arising from the same accident and policy came to its rightful conclusion and the 2<sup>nd</sup> defendant paid the sum of K1,400,000.00 (see copies attached). We therefore emphasise that any award that this court is going to make in the exercise of its discretion should have this in mind. For fear of doubt, the 2<sup>nd</sup> defendant in this matter is liable to the maximum of K3,600,000.00 which is the balance on the policy.*

First of all, I observed that the said copy of insurance policy was not attached as alleged and neither was any document showing that another cause of action arising from the same accident was settled by the defendant. In addition to that, the defendant had an opportunity to parade witnesses to show the limit of their liability and how the same has already been reduced in this matter. They opted to forego this opportunity and only to bring up the issues in their written submissions knowing there will be no chance to test the veracity of the same through cross-examination. This smacks of a tactical ambush on the

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claimants which, in my view, is not a correct way of going about litigation. In the circumstances, I am compelled to give the statement a blind eye.

Thus, upon a thorough consideration of facts and circumstances of this case, and upon an exhaustive consideration of the submissions by the parties in the light of the relevant and applicable law regarding damages for the claimed heads herein, having also considered the fact that the devaluation of the kwacha and the economic realities, this court is of the view that the appropriate and reasonable damages should be the sum of **K6,800,000.00** under all heads of general damages claimed and proved.

The claimant also claims K21,000.00 for the cost of the Medical Report and K3,000.00 being cost of obtaining a Police Report. These being special damages, they must be specifically pleaded and proved as required by the law. The claimant, in this case, did not tender any evidence to prove that the sums she is claiming save for the Police Report which actually carries an endorsement that it was paid for. I am of the view that it is only proper that he is awarded K3,000.00 for the Police Report under this head.

In total the claimant is awarded **K6,803,000.00** under all heads. The claimant is further awarded costs for the assessment proceedings to be taxed if not agreed by the parties.

DELIVERED IN CHAMBERS THIS 31<sup>st</sup> DAY OF MARCH 2020

  
WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR