



IN THE HIGH COURT OF MALAWI
LILONGWE REGISTRY
CIVIL DIVISION
CIVIL CASE NO. 324 OF 2015

BETWEEN:-

YAMBITSANI FOLLIUS..... CLAIMANT

-AND -

SOKO MALUNGA.....1ST DEFENDANT

PRIME INSURANCE COMPANY LTD.....2ND DEFENDANT

Coram:

Brian Sambo, Assistant Registrar

Mr. P. Kambalame, of counsel for the Claimant

Mr. E. Chikwakwa, of counsel for the 2nd Defendant

Mr. G. Kumwenda, Law Clerk/Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

BACKGROUND

The present assessment follows a default judgment obtained by the Claimant on the 14th of August, 2020 against the 2nd Defendant for the following;

- a. Damages for pain and suffering.
- b. Damages for loss of amenities of life.
- c. Damages for disfigurement.
- d. Damages for loss of earnings and earning capacity
- e. Special damages

f. Costs of action.

Having heard the evidence on assessment, now the court resurfaces to provide its findings regarding the quantum of damages. Before we do so, brief facts of the underlying matter suffice.

BRIEF FACTS

On 20th October, 2019, the 1st Defendant was driving motor vehicle Registration Number NU 8761 Toyota Hiace Minibus from 6 Miles heading towards Nathenje along the Lilongwe-Dedza M1 Road. Upon arrival at Muli Warehouse, he encroached on the far left dirt verge of the road, at an excessive speed the result of which was that he hit the Claimant who was, at that time, travelling by a bicycle on the far left dirt verge of the road.

Following the impact, the Claimant sustained mild head injury, fracture of pelvis, laceration and swollen head, bruised right shoulder and bruised abdomen.

EVIDENCE DURING ASSESSMENT OF DAMAGES

The Claimant was the only witness in his case. Testifying as PW1, he first adopted and tendered his Witness Statement (Marked PEX1) and added that he was travelling by his bicycle on the far left dirt verge of the road when the 1st Defendant, who was driving the minibus at a high speed, missed the tarmac road and swayed off the road to where he was cycling thereby hitting him from behind. He said, as a result of the impact, he lost his consciousness. He further complained that he was still feeling pains on his chest and shoulder. He told the court that, as a result of the accident, he was unable to sit down for a long time due to painful pelvis, and that he had no much energy to work as he could no longer lift up heavy load. He said he was working as a garden boy before the accident but his boss laid him off because of underperformance due to severe body pains. The witness further tendered a Medical Report and a Police Report, marked PEX 1A and PEX 1B, respectively. Attached to his Medical Report were X-Ray Reports which showed fracture of his bones.

ISSUE

The hearing was conducted to assess the amount of damages payable by the Defendants for pain and suffering, loss of amenities of life, disfigurement, loss of earnings and earning capacity and special damages.

DETERMINATION

THE LAW ON DAMAGES

Damages are the remedy for a victim of a wrong, and the wrongful party has to compensate the victim, in as far as money can, to be put back in the same position that the victim would have been if not for the wrong- **Elida Bello v. Prime Insurance Company Limited**, Civil Cause No177 of 2012 (unreported).

PAIN AND SUFFERING

As regards 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- Ian Goldrein et al, Personal Injury Litigation, Practice and Precedents (Butterworths, 1985) p8. See also **City of Blantyre v. Sagawa**, [1993] 16(1) MLR 67 (SCA).

I am mindful that, in order to achieve consistency and uniformity, courts of law would also want to consider comparable judicial precedent.

In **Mr. Albert Kambova vs Prime Insurance**, Personal Injury Cause No. 99 of 2016, a total award of **MK3, 313,500.00**. This award was made by Hon Austin Jessie Banda, Assistant Registrar (as then he was) on 23rd of July, 2018.

In **Mica Banda vs. Fabiano & others**, Civil Cause No. 82 of 2013, the court on 4th May 2018 awarded the Claimant the sum of **MK3, 500,000.000** for sustaining massive bruises on his scalp, bruises on his face, back and posterior chest.

LOSS OF AMENITIES FOR LIFE

Loss of amenities embraces all that which reduces the Claimant's enjoyment of life; her deprivation of amenity whether she is aware of it or not.

In the case of **Manuel Paul v BT Ndawala and Prime Insurance Co Ltd**, personal injury cause no 251 of 2014, loss of amenities of life was calculated at the amount of K1,000,000.00 the Claimant whom was a minor and the degree of incapacity was at 15%.

In **Tambala v Jali and Prime Insurance co ltd** [2018], the claimant sustained a fracture and had scars due to some grafting done on him. He was awarded K1, 500, 000 for the loss of amenities of life.

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 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 as was observed by the court in the case of **Austin Julius v. Rasika Gunawardena and General Alliance Limited**, Personal Injury Cause Number 316 of 2014.

The evidence before me does not show any serious deformity on the part of the Claimant. If damages have to be awarded, they would be for the scars left on his body. I am mindful that there may be other disfigurements which may not be visible such as those where his pelvis bone got fractured but there is no evidence regarding this fact, and as a court, I am not permitted to make an award based on a mere assumption.

LOSS OF EARNINGS AND EARNING CAPACITY

The Claimant further prayed for MK5, 580,008.92 being damages for loss of earnings and earning capacity. He told the court that he used to work as a garden boy before the accident but lost his employment because of underperformance. He said, because of the injuries, he was not able to work properly or carry heavy load. I consider the suggested amount rather much on the higher side because no evidence with regard to his past employment life was adduced, and therefore it is difficult to make any award with regard to his claim for loss of earnings and earning capacity. Turning to the issue of loss of earning capacity, the Medical Report shows that the injuries were not permanent to the extent that the Claimant was not going to work again in order to earn some money. He did not lose any of his limbs or body parts. There is, currently no evidence that the body pains he is experiencing now would be for life or that the same would incapacitate his earning capacity. In these circumstances, what can be awarded under this head are also nominal damages.

SPECIAL DAMAGES

Generally, special damages are specifically pleaded and strictly proven. See **General Farming Limited v Chombo (1996) MLR 16**. I did not receive any evidence regarding special damages under this head, and so will not award anything.

PARTIES' SUBMISSION AND COURT'S OBSERVATION

In his submission, counsel for the Claimant prayed for a total award of **MK28, 580,008.92**. With due respect, I found this proposition to be much on the higher side considering the circumstances of the Claimant. The cases cited and attached by counsel were not a match to the circumstances of the present matter

at all. The Claimant herein is, considering the Medical Report attached, close to full recovering. He only spent 6 days in the hospital. He is able to do most of the things including walking, although he complains of pains. He did not lose any of his limbs or a body part. I believe the proposed amount should be reserved for worst cases; of course, which are yet to happen.

However, the Claimant still deserves substantial compensation. It is in the evidence that as a result of the impact, he lost his consciousness, he was still feeling pains on his chest and shoulder, he was unable to sit down for a long time due to painful pelvis, and that he had no much energy to work as he could no longer lift up heavy load. He added that he was working as a garden boy before the accident but his boss laid him off because of underperformance due to body pains; although the Claimant did not bring any evidence to prove this last fact.

Considering all underlying circumstances of this matter, I intend to make one full and final award in order to prevent issues of overcompensation. In **City of Blantyre v Sagawa** [1993] 16(1) MLR it was observed that although it is the practice to lump the heads together in awarding damages for personal injuries the court does not look at each of them before coming to a final figure. There is no arithmetic formula to an award for personal injury and one does not expect the awards to be the same. The circumstances differ and one should therefore expect reasonable differences in awards for similar injuries.

CONCLUSION

In conclusion, considering all the circumstances of the case and the Claimant, the court hereby makes an award of **MK 4, 950, 000.00** being damages covering all heads above. This whole amount is payable within 7 days from today.

Costs are for the Claimant and shall be assessed, separately if not agreed upon by the parties.

Made in chambers today Friday the 22nd day of September, 2021.

Brian Sambo
Assistant Registrar

