



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 561 OF 2018



Library

BETWEEN:

DAYA BILLYCLAIMANT

AND

SAMUEL LUNGALA1ST DEFENDANT

PRIME INSURANCE COMPANY LIMITED2ND DEFENDANT

CORAM: WYSON CHAMDIMBA NKHATA (AR)

Mr. Alide- of Counsel for the Claimant

Mr. Chikaonda- of Counsel for the Defendant

Ms. Chida- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

The claimant commenced these proceedings by writ of summons claiming damages for pain and suffering, loss of amenities of life, disfigurement, special damages and costs of this action. The action emanates from a road traffic accident involving motor vehicle registration number 019 MG 1002 Toyota Land Cruiser which was coming from the direction of cape Maclear heading towards Monkey Bay. The accident occurred at Kankhande escarpment when the Claimant was riding from the opposite direction. The 1st defendant is sued by virtue of being the driver of the motor vehicle in question while the 2nd defendant is sued by virtue of being the insurer of the said motor vehicle. The issue of liability was settled in favour of the claimant during mediation. This is an order of assessment of damages thereto.

When the matter came for assessment of damages, the claimant adopted his witness statement in which he averred that as a result of the said accident he sustained an open left femur fracture and open fracture of the left leg, multiple bruises on the forehead and severe muscle spasm at the lumbar spine. He was taken to Mangochi District Hospital where he underwent X-rays, wound debridement, sign nailing of the left femur and external fixator application implant and full blood count. He was also offered the treatment of painkillers and antibiotics and he was admitted to the hospital for a month. He exhibits a copy of the Medical Report marked as "DB2". Further, as a result of the said accident, he has Chronic osteomyelitis of the left leg, his left limb was shortened by 3cm consequent which he now has unsteady gait. He has post traumatic pain, my ability to perform manual work, sporting activities and household chores has been seriously compromised, he has a possibility of developing arthritis and his degree of permanent incapacity has been assessed at 45%. To procure the police and medical reports, he paid the sum of K13,500,00. He exhibits hereto a copy of the General Receipt for the procurement of the Police Report marked "DB3". He therefore, commenced these proceedings claiming damages for pain and suffering, loss of amenities of life and disfigurement, the sum of K13,500.00 for the procurement of the Police and Medical Reports and costs of this action. There was no cross-examination.

Such was the evidence adduced in this matter. Counsel for the claimant adopted his Skeleton Arguments as part of submissions in this matter. I must express my gratitude to Counsel for the submissions as they went a long way in informing this court in arriving at the decision herein. Suffice to say, the issue for determination is the quantum of damages that could reasonably compensate the claimant for the injuries suffered.

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 Plaintiff'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 plaintiff.

All in all, the court ought to take into consideration fairness in awarding damages. In **Pitt v Economic Insurance Co. Ltd** 1957 (3) SA 284 (D) at 287E it is stated that:

"The court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense".

In this case, the claimant sustained an open left femur fracture and open fracture of the left leg, multiple bruises on the forehead and severe muscle spasm at the lumbar spine. Essentially, the issue is how the said injuries have affected the claimant and how the injuries were dealt with in comparable cases. Counsel for the claimant cited the following cases:

Foster Kasokota v Davis Simenti & Prime Insurance Co Ltd, Personal Injury Cause Number 371 of 2011 (unreported), in which the Court on 11th December, 2012 awarded the sum of MK3,900,000.00 as damages for pain and suffering and loss of amenities of life in respect of the Plaintiff who sustained a fracture of the pelvis and a dislocated left shoulder.

Matias Fadi & Another v Prime Insurance Company Limited, Civil Cause Number 1269 of 2010 (unreported), in which the Court made an award of K4,500,000.00 for a fracture of the tibia, cut wound on the scalp, bruises on the face and swollen head.

Kitilesi Saidi v Alfred Rajab and Prime Insurance Company Limited Personal Injury Cause Number 98 of 2014 (unreported), in which the claimant sustained an open fractured fibula and tibia as well as multiple cut wounds on the face. The court awarded him the sum of K4,500,000.00 as damages for pain and suffering and loss of amenities of life. The award was made on 18th December 2016.

Clement Bello v Prime Insurance Company Limited Civil Cause Number 611 of 2013 (unreported), in which the claimant suffered a fractured left arm, deep cut on the leg, traumatic wound on frontal head and severe chest pains. The court awarded him the sum of K4,000,000.00 as damages for pain and suffering and loss of amenities of life. The award was made on 9th June 2015.

Francis Madeya v Aboobakar Seedat and Real Insurance Company Limited and Halls Cars Limited Personal Injury Cause No. 626 Of 2014 (unreported), in which the plaintiff herein suffered a fracture of the right thigh. Pieces of glass entered into his eyes and he also suffered cuts in both hands. He was admitted in hospital for 23 days and His leg was shortened by 2cm and he walks with a limp. The Court on 7th June, 2016 awarded him the sum of K5,000,000.00 as damages for pain and suffering and loss of amenities of life.

It was therefore Counsel's submission that considering the nature of the injuries sustained by the Claimant and taking guidance from the decided cases cited herein and considering the depreciation our currency has recently suffered, the sum of K12,000,000.00 would adequately compensate him under all heads of damages.

Reaching this far, the uncontroverted evidence indicates that the claimant sustained two open fractures on his left foot. It leaves this court with no doubt that the claimant underwent excruciating pain and suffering when sustaining the injuries. He continued suffering pain for some time thereafter and currently still has pain. The court also takes note that the injuries have also distorted his wellbeing as his left limb was shortened by 3cm. He has a metal rod inserted in his leg. He laments that he now has an unsteady gait and cannot run. The claimant can no longer walk long distances. There is scar development where the bone protruded. These are deformities that have come but for the accident herein. It has caused a profound impact on his productivity and working ability and will continue to do so in future. The claimant lamented that he can no longer engage in economic activities as he used to do. He lamented that he used to do business but he now depends on relatives. I believe this puts him at a disadvantaged position in as far as supporting his family is concerned.

I have seen the cited cases. They range from K4,000,000.00 to K5,000,000.00 in awards for more or less similar injuries. The cases were decided during 2010 to 2015. However, I respectfully opine that K12,000,000.00 even for a double fracture is a bit on the higher side. I am fully aware that the basic principle behind award of damages is to put back the claimant to the position he was before the injuries sustained and not to punish. Taking into consideration the facts and circumstances of the present case, and also having looked at and considered the comparable case authorities as cited by both counsel in similar heads of the claimant's claims in the light of the applicable law, I am of the view that the K9,000,000.00 would fairly compensate the claimant under the heads claimed and proved.

The claimant is also praying for K13,500.00 being special damages for the cost of obtaining a Police Report and Medical Report. However, these being special damages they ought to have been strictly

proved. In this case, there is no proof whatsoever that the Medical Report was paid for save for the Police Report which the claimant exhibits a receipt as proof of payment for the same. I award K3,000.00 for the Police Report.

In total, the claimant is awarded K9,003,000.00. He is further awarded costs for the assessment proceedings to be taxed if not agreed by the parties.

MADE IN CHAMBERS THIS 4TH DAY OF JANUARY, 2021



WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR