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**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE No. 173 of 2018**

BETWEEN:

BERNADITEE R. La ROUCHE.....CLAIMANT

AND

MWAIWATHU PRIVATE HOSPITAL LTD.....DEFENDANT

CORAM

Mrs T. Soko	: Assistant Registrar
Mr Kauka	: Counsel for the claimant
Mr Misanjo & Mr Mtonga	: Counsel for the defendant
N. Munthali	: Court Clerk

ASSESSMENT ORDER

Background

This is the order on assessment of damages following a judgment by Honourable Justice Madise which ruled in favour of the claimant. However, the judge found contributory negligence on the part of the claimant at 30%. The claimant's claim is for damages for general, aggravated and

exemplary damages for pain and suffering, disfigurement and loss of amenities of life, \$432.19 as expenses incurred in the United States of America, K60,000.00 as travel expenses to the defendant's hospital, interest of the expenses incurred in USA and travel expenses to the hospital at 3% above bank lending rate and party and party costs. The facts aver that on 18th July 2017, the claimant visited Mwaiwathu Hospital for a treatment after she felt unwell. She was attended by Dr Kayange who prescribed gentamycin injections for three consecutive days. The nurse administered the first injection through cannula. However, the claimant noticed a swelling on the area where the injection was administered. The 2nd and 3rd injection were administered but it turned out that the area where cannula was inserted became darker and blisters developed. On 30th July 2017, she went to see Dr Kayange but he was not available and on 31st July 2017 the claimant was seen by Dr Kumiponjera who recommended surgery. She then went to USA and Canada and upon returning in September she went to see Dr Kumiponjera again who recommended surgery again.

Evidence

On the date of assessment of damages, the claimant was the sole witness. She adopted her witness statement where she narrated what I have already stated above. She added that when she complained to the nurse about the pain around the area, the nurse told her that everything was okay and that's how it felt. Unfortunately, the situation got worse and at the end she was operated on by Dr Kumiponjera before flying out. She stated that since she had intended to go outside the Country, Dr Kumiponjera advised her to go to the emergency ward for dressing on the morning of the departure and then meet the Doctor for further treatment as soon as she arrived in the USA where she was traveling to. She stated that she visited Franciscan Hospital walk-in clinic. She stated that the Doctor gave prescriptions and instructed her and her son how to care for the wound. She continued to state that she proceeded to Canada where her daughter continued to dress the wound every other day as the USA doctor had instructed. She said when she came back, she met Dr Kumiponjera for another surgery. The claimant exhibited the picture of the wound. Counsel for the defendant made an objection to the admissibility of the pictures and stated that the same should be admissible on the fact that they were made. Counsel on the other hand stated that the documents are already part of the record and were already admitted during trial without objection.

She continued to explain that Dr Kumiponjera personally dressed her wound each time twice a week. She also stated that the wound was between 3 cm – 4cm long. She stated that in USA she

spent \$300 as the Doctors Bill, medication and dressings, Walgreens \$ 14.19, CVS/Pharmacy \$28.97 and \$ 88.43. The claimant stated that she is also claiming for charges made by MASM contributions for the treatment, travel to and from hospital and general damages. She said that throughout the treatment, she was under the impression that the hospital had accepted responsibility of this injury and she was receiving free hospital treatment. Unfortunately, it did not turn out like that as on the 16th September 2017, she was told at the reception to pay fee of K19,300.00 to see the doctor because he no longer had consultation fees due to the several visits. She therefore claimed K253,869.43. She said she made 12 visits to the hospital and claimed K60,000.00. She stated that she suffered stress and the children who were forced to look at the big hole to dress the wound. She stated that the healing was not yet complete. On 18th October, the Doctor removed the bandage. She stated that it would take at least 18 months for the tissue to heal properly.

In cross examination, she stated that the bandage was removed on 18th October 2018. She stated that Dr Kumiponjera told her that it would take more than 18 months for the wound to heal. She stated that the healing is ongoing. She said she did not have medical evidence that the healing is ongoing. She stated that the healing had healed externally not internally. She said she was still experiencing some problems on the wound but she had not gone to the hospital yet. She stated that the documents she produced were prescriptions from the hospital. She said she did not bring the receipt and she was not given the receipt. She confirmed that what she produced as evidence was a statement of account. She stated that it was her son who went to the pharmacy to buy the medicine. She confirmed visiting Mwaiwathu hospital 12 times. She stated that she went to MASM to show the claims that were made. She said on 18th October 2017, the doctor told her that the wounds had started showing the signs of healing.

In reexamination, Counsel stated that Dr Kumiponjera advised her to see the Doctor when she got to USA. She said Dr Kumiponjera told her that the medicines had gone into tissues and not veins. She said she visited the Doctors in USA. She said the Doctors prescribed medication. She stated that the medication that the Doctor in USA prescribed was similar to those that were prescribed in Malawi. She said her son is the one who bought the medication. She said she was advised that the tissues were damaged and that it would take time for the wound to recover.

On the other hand, the defendant paraded one witness Dr Kumiponjera who stated that he was the one who conducted the surgery on the claimant's arm on 31st July 2017. After the surgery, there was a small wound on the claimant's arm. He said the said wound was the normal wound that followed a surgery. He stated that after the surgery, he advised the claimant that there was a need for the wound to be taken care of. He stated that he informed her that she was supposed to be coming to the defendant's hospital for the wound to be treated. It was stated that the claimant informed him that she had pre-arranged a trip to the United States of America. He stated that she was set to leave 2 days after the day the surgery was conducted. He said he gave his professional advise to the claimant not to travel until the wound completely healed. The claimant insisted that she would still proceed on her trip. After noticing that the claimant still wanted to proceed with her trip, he advised her to seek further treatment as soon as she arrived in the USA. He stated that the claimant stayed in the USA for about 5 weeks. He said she travelled to Canada from the USA. He stated that the claimant reported back to the defendant's hospital on 4th September 2017 after she had come back from her trip. When he met the claimant, he was alarmed at how big the wound had gotten. He said it was clear to him that the wound was not properly treated when the claimant was outside of the country. He stated that considering the condition of the wound, he advised the claimant to be coming to the hospital twice a week where he made sure that he was personally attending to her. The claimant's wound was not in good condition when she returned to Malawi. He said he made him suggest a second surgery. After the second surgery and weekly visits to the defendant's hospital, the claimant's condition started to improve and she eventually healed. He stated that he last attended to the claimant and by that time the wound had completely healed. He said he would not have discharged the claimant from his care had it been that the wound had not healed. He said once the wound is closed, it means it has healed and the only thing that remains is the scar. He said it takes a couple of months for the scar to soften. He said he believed that if the claimant had listened to his advise and postponed the trip, the wound would have fully healed within two weeks after the surgery.

In cross examination, the defendant stated that tissue necrosis means the cells are dead. He confirmed that the claimant had necrosis. He said there was a possibility that several weeks would pass for the claimant to start showing signs of necrosis after administration of gentamicin. He said by the time he had seen the claimant, the process of necrosis had come to an end and she already had necrosis. He said he took pictures of the arm. He stated that it was not possible to tell the

measurement of the wound just by looking at the pictures. He also stated that the wound was not measured because it was small. He said sometimes pictures do exaggerate. He said the wound would have taken 4 weeks to heal but it is unpredictable since you look at various factors such as the age of the patient, health of the patient and other factors. He stated that in a person of elderly age, the wound takes long to heal. He said he did not know the age of the claimant. He confirmed performing the procedure of wound debridement. The defendant stated that when removing dead tissues sometimes the doctor is not sure whether the tissue will survive or not so those that seem to survive are left to check their progress of survival. He said the cells that were removed were already in the process of dying in the first occasion but were left to check if it would progress.

He said he would not say if the wound was properly managed or not because he did not know the qualification of the doctors in USA. He said the doctors who look after the wounds are qualified plastic surgeons. He admitted advising the claimant to have the wound dressed by the nurses since it was their works

In reexamination he stated that there was a gap between the 1st and the 2nd surgery because he thought some of the cells would recover.

In submissions, Counsel for the claimant submitted that the claimant should be compensated with a sum of K50,000,000.00 as damages for pain and suffering, loss of amenities of life and disfigurement. Counsel stated that the nature of pain and suffering undergone by the claimant is different from that suffered by the claimants owing to the fact that the claimant underwent two surgeries and the wound had existed for months which led her experience trauma. Counsel cited a case of Doreen Chatha vs Attorney General Civil Cause No. 412 of 2019 where the Court awarded K151,000,000.00. Counsel also cited the case of Lazalo Zinaukon vs Attorney General Civil Cause No. 857 of 2015.

On the other hand, Counsel for the defendant submitted that the claimant should be awarded a sum of K1000,000.00 as damages. Counsel cited a case of Laston Siliya vs Ali Paseli Personal Injury Cause No. 367 of 2011 where the claimant sustained a deep cut wound on the upper lips, nose and left eye. The Court on 23rd May 2019 awarded the claimant a sum of K2, 700,000.00 as damages for pain and suffering, disfigurement and loss of amenities of life. Counsel also cited Hopeson Magasa and 10 others vs Attorney General and Nico General Insurance Co. Ltd Personal Injury Cause No. 874 of 2012 where the claimant sustained a cut wound on the left side of her head and

deep bruised which left her with a permanent scar on the left cheek. She was awarded the sum of K300,000.00 as damages for pain and suffering, loss of amenities of life and disfigurement. The award was made on 24th October 2014. Counsel also cited a case of *Monica Chisale Kaonga vs Prime Insurance Co. Ltd Personal injury cause No. 850 of 2013* where the 3rd claimant sustained a deep cut wound on the right forearm and leg. Her degree of permanent incapacity was assessed at 21%. The claimant was awarded the sum of K1, 750,000.00 as damages for pain and suffering, loss of amenities of life and disfigurement. On special damages counsel contended that the only special damage that has been specifically pleaded and strictly proved are the expenses incurred in USA which are the sum of \$432. Counsel contended that the issue about travelling expenses and MASM contribution were not specifically pleaded therefore the Court should not award the said damages. On 70%/30% contributory negligence Counsel submitted that the claimant should thus be awarded K700,000.00 and \$302 respectively.

THE LAW

GENERAL LAW ON DAMAGES

In assessing damages for personal injuries, the intention of the court is to compensate the injured party as nearly as possible as money can do. The principle is to put the plaintiff at the position he would have been if it would have not been for the tort committed. *See Namwiyo v Semu (1993) 16 (1) MLR 369.*

In calculating damages, therefore, the Courts consider, in monetary terms, the sum which will make good to the sufferer, as far as money can do, the loss he has suffered as a result of the wrong done. *See Admiralty Commisioners vs S.S Valeria (1992) 1 A.C. 242 at 248.*

In Christina Mande vs Charter Insurance Co. Ltd Personal Injury Cause No. 329of 2016 the Court quoting Wright vs British Railway Board 1938 AC 1173, 1177 stated that:

'Non-economic loss..., is not susceptible of measurement in money. Any figure at which the assessor of damages arrives cannot be other than artificial and, if the aim is that Justice meted out to all litigation should be even handed instead of depending on idiosyncrasies of the assessor, whether Judge or Jury the figure must be basically a conventional figure derived from experience and from awards in comparable cases.'

In the case of *City of Blantyre vs Sagawa* the court said the following:

'It would appear to us that if the award is to be conventional, an award for a similar injury should be comparable and should, to some extent, be influenced by amounts awarded in the previous case, either in the same or neighboring jurisdictions. In citing previous awards the court should not lose sight of factors like devaluation of the currency since the awards were made.

PAIN AND SUFFERING

In damages for pain and suffering, the court considers the physical experience of the nerves and mental anguish which comes as a result of the injury. See Lemon Banda and 19 others V Mota Engil Limited and General Alliance Insurance Limited, personal injury cause number 178 of 2012 (unreported).

In the City of Blantyre vs Sagawa 1993 16 (1) MLR 67 the court quoted Kemp and Kemp volume II paragraph 1007 where it was stated that;

Pain is, it is suggested, used to describe the physical pain caused by or consequent upon the injury, while suffering relates to the mental element of anxiety, fear, embarrassment and the like.

Page 831 of **Mc Gregor** on damages defines pain as the immediately felt effect on the nerves and brain of some lesion or injury to a part of the body, while suffering has been defined as the distress which is not felt as being directly connected with any bodily condition. Pain includes any pain caused by medical treatment or surgical operations rendered necessary by the injury inflicted by the defendant. Suffering includes fright at the time of the injury and fright reaction, fear of future incapacity, either as to health, sanity or the ability to make a living, and humiliation, sadness and embarrassment caused by disfigurement. Also see Gedion Mhango vs Nico General Insurance Co. Ltd Personal Injury Cause No. 703 of 2016 (unreported).

LOSS OF AMENITIES OF LIFE

Loss of amenities is concerned with loss of enjoyment of life. This follows from the fact that human beings enjoy certain activities which may as a result of the injury be curtailed. See Lemon Banda and 19 others V Mota Engil Limited and General Alliance Insurance Limited, personal injury cause number 178 of 2012 (unreported).

Birkett L.J in Manley vs Rugby Portland Cement Co. (1951) C.A No. 286 stated that there is a head of damage which is sometimes called loss of amenities, the man made blind by the accident will no longer be able to see familiar things he has seen all his life, the man who had both legs removed and will never again

go upon his walking excursions- things of that kind- loss of amenities. *Mc Gregor on damages at Page 834* explains that loss of impairment of any one or more of the five senses is compensated under this head. Besides loss resulting from interference with the plaintiff's sexual life.

DISFIGUREMENT

Disfigurement is concerned with change of looks of the individual. This may be scars, amputations and postures. See *Lemon Banda and 19 others V Mota Engil Limited and General Alliance Insurance Limited, personal injury cause number 178 of 2012 (unreported)*. Damages for disfigurement are normally awarded as part of pain and suffering. They are awarded separately if the plaintiff has been ridiculed, lost his social status, or that his is in need of plastic surgery. See *Mary Kamwendo vs Stage coach Malawi Limited Civil Cause No. 840 of 1995*.

SPECIAL DAMAGES

It is a trite law that special damages have to be specifically pleaded and strictly proved. See *Phiri vs Daudi* 15 MLR 404.

DETERMINATION

In the present matter, the claimant herein suffered the injury due to gentamicin which was pumped into the skin instead of the veins. There is evidence that the area where the injection was administered became darker and a wound developed. I have looked at the pictures that were tendered as part of evidence and find that the wound was deep. However, there was an objection from the defendant not to admit the pictures to form part of evidence. Regarding this, my view is that the pictures were taken in the presence of the claimant and it is the claimant who is in the pictures not someone else. It means she owns the pictures and the it was not against the rule of hearsay evidence to tender the same as part of evidence. To add, I have checked the court record to find out if the similar objection was raised during the trial but found that it was not raised. The photographs together with all the relevant documents were tendered at trial to form part of the record. In that fashion, Counsel cannot raise the objection at this stage. I therefore overrule his objection and proceed to allow the pictures to form part of evidence. Looking at the wound, I find that what the claimant suffered was a deep wound which was small in extent as stated in the evidence of the defendant that he did not measure the wound because he considered it as a small wound. Be as it may, the claimant went through pain and

suffering as she had to undergo surgery twice and kept on visiting the hospital for the wound dressing. I have considered the case cited by Counsel for the claimant and find that the claimant in that case suffered excruciatingly as the foreign body was left in the claimant's body which led to her removal of uterus. In the present matter the claimant only sustained a deep wound. I have also considered the fact that the wound completely healed. The claimant stated that she still experiences some discomfort on the wound and the process of healing is ongoing but no evidence was adduced to show that the wound was not healed. Besides, the evidence of the defendant states clearly that the wound completely healed although with some scars. In **Victor Mataka vs Simeki Karonga and Prime Insurance Co. Ltd PI 243 of 2020**, the claimant sustained a deep cut wound on the cheek and the lip, bruises on the right hand and general body pains. The Court on 10th February 2020 awarded the claimant a sum of K2, 700,000.00 in all heads of damages. I have also considered the authorities cited by Counsel for the defendant and all the factors of the case and therefore award a sum of K3,000,000.00 as damages for pain and suffering, K1,000,000.00 as damages for loss of amenities of life and K2, 000,000.00 s damages for disfigurement. The traveling expenses were specifically pleaded and there is evidence that the claimant travelled to the hospital several times to have the wound dressed. I therefore award K60,000.00 for travelling expenses. I also award \$432.19 as the cost of buying medicine in USA. I decline to award the expenses for MASM contribution as the same have not been proved on the balance of probabilities and the same were not pleaded in the pleadings. On interest, the judgment is clear that the claimant has to be refunded what she spent and the judgment did not state that the same should attract interest. I therefore decline to award interest as claimed by the claimant. There is no justification to award aggravated and exemplary damages. The defendant as the judgment records should not be wholly blamed because the defendant was doing what it could to treat the claimant on the problem she presented.

On 70/30% contributory negligence, I award K4,200,000.00 as general damages, K45,000.00 as travelling expenses and \$302.533 as cost of buying medicine.

Costs are for the claimant.

Made on this 17th day of November 2021.


T. Soko

Assistant Registrar