

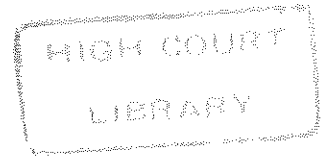


REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 421 OF 2020



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BETWEEN:

ELLEN KIMU CHIBADE.....CLAIMANT

AND

MR. ASANTE MILANZI.....1ST DEFENDANT

PRIME INSURANCE COMPANY LIMITED.....2ND DEFENDANT

CORAM: WYSON CHAMDIMBA NKHATA (AR)

Mrs. Z. Khan Msisha- of Counsel for the Claimant

Ms. Chida- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

The claimant suffered injury from an accident which took place on the 9th of April 2020 at or near Libanga's house along Zomba Jali road when she was hit by motor vehicle registration number BV6530 Toyota Probox. On the 24th of July 2020, she commenced these proceedings by writ of summons claiming damages for pain and suffering, loss of amenities of life, disfigurement and costs of this action. She is suing the 1st defendant as the driver of the motor vehicle in question and the 2nd defendant as the insurer of the said vehicle. The issue of liability was settled through a default judgment was entered in favour of the claimant on the 10th of November 2020. The matter was referred to this court for assessment of damages. This is the court's order on assessment of damages.

The matter came for assessment of damages on the 5th of January 2020. The defendants did not avail themselves for the hearing. There being evidence that they had been duly served, the court proceeded to hear the claimant who was the sole witness for her case. She adopted her witness statement and tendered a Medical Report and a Police Report marked "ECK1" and "ECK2" respectively. In her witness statement, she averred that as a result of the said accident, she sustained a fracture of the metatarsal, cut wound on the right hand and swollen legs. She was taken to the Hospital where she received treatment of among other things analgesics, suturing of the wound and application of back slab. She has a possibility of developing arthritis and his ability of performing sporting activities and do household chores has been affected. Her permanent incapacity was pegged at 10%. She obtained a Police Report and Medical Report at a cost of K13,500.00.

Such was the evidence adduced for the assessment of damages. Counsel for the claimant adopted her Skeleton Arguments as part of submissions in this matter. I must express my gratitude for the same 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 and losses 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.

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".

Be that as it may, 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.

In this case, the uncontroverted evidence indicates that the claimant sustained a fracture of the metatarsal, a cut wound on the right hand and swollen legs. Counsel for the claimant invites the court to consider the following cases:

Alfred Malumo v Bonface Jeremiah and Prime Insurance Company Limited, Personal Injury Cause Number 427 of 2019 (unrep), in which the court on the 21st of November 2019 awarded the sum of K5,613,500.00 as damages for pain and suffering and loss of amenities of life and disfigurement to the claimant who sustained a sprained left hip that also had a dislocation, painful hip on the left and calf, contusion of the legs, bruises on the legs and cut wound on the ankle and back.

Leonard Ndindi v Panjwani Issa, Tourism Investment Limited t/a Hotel Victoria and NICO General Insurance Company Limited, Personal Cause Number 971 of 2018 High Court Principal Registry (unreported) in which the court awarded the sum of K9,505,000.00 as damages for pain and suffering and loss of amenities of life for a claimant and disfigurement for a claimant who sustained a fracture of the right leg on the hip, femur, knee and tibia/fibula, fracture of the left leg on the hip, femur and tibia, closed fracture of the ulna, severe chest injury and multiple bruises and abrasions. The award was made on 9th January 2018.

Danken Kafa v G4S Security and Nico General Insurance Company Limited Personal Injury No. 517 of 2016 (unreported), in which the court on 30th April 2018 awarded the sum of K7,350,000.00 as damages for pain and suffering, loss of amenities of life and disfigurement to the claimant who sustained a fracture of the left leg, cuts on the head and cuts on both hands and general injuries.

Gedion Mhango v. Nico General Insurance, Personal Injury Cause No. 703 of 2016, High Court, Principal Registry (unreported) in which the claimant suffered a fracture on his right leg, serious cuts on the head, and cuts on the right hand side of the body and on the backside. That he was furthered admitted from the 15th January, 2016 to 13th April, 2016. A metal rod was inserted in the leg. In an award made on 31st January, 2017, K5, 000,000.00 was ordered as compensation for pain and suffering.

Stanley Chiwanda v Masha Missi and Prime Insurance Company Civil Cause No 92 of 2014 where the claimant sustained a closed fracture on the forearm, sprained knee joint and lacerated wound on the left hand. The court awarded him K7,400,000.00 for pain and suffering, loss of amenities and disfigurement. The award was made on the 27th of April 2017.

Friday Mtelera vs Prime Insurance Company Limited, Personal Injury Cause no. 530 of 2015, the claimant was awarded MK7,000,000.00 for damages for personal injuries. The claimant sustained fracture of the knee joint of the right leg, fracture of the right lower leg, fracture of the ankle of the right leg, a cut of the left leg and bruises on the right elbow. The award was made on 16th February, 2017.

Samuel Phiri vs Austine Mchere and Prime Insurance Company Limited, Personal Injury Cause No. 513 of 2019, in which the court awarded the claimant MK6,503,000.00 as damages for pain and suffering, loss of amenities of life and disfigurement to the claimant who sustained an open fracture of the right tibia and fibula. The award was made on 19th February, 2020.

Jamson Makwinja vs Edward Basikolo and Prime Insurance Company Limited, Personal Injury Cause No. 191 of 2019 (unrep), in which the court awarded the claimant MK5,807,000.00 as damages for pain and suffering, loss of amenities of life and disfigurement to the claimant who sustained an open fracture of the right tibia and fibula. The award was made on 28th February, 2020.

Christina Mande v Charter Insurance Ltd Co., Personal Injury Cause No. 329 of 2016, in which the claimant sustained a fracture of the right femur, dislocation of the right hip joint, cut on head and lost consciousness on the spot of the accident. He also sustained a sprained right hand and a cut on the left hand. The court awarded him the sum of K6,300,000.00 as damages for pain and suffering and loss of amenities of life. The award was made on 11th January, 2017.

Bonface Koloweka vs Bonface Jeremiah and Prime Insurance Company Limited, Personal Injury Cause No. 428 of 2019 (unrep), in which the court awarded the claimant MK8,213,500.00 as damages for pain and suffering, loss of amenities of life and disfigurement to the claimant who sustained multiple bruises, body contusion and fracture of the neck of the femur acetabulum and cut wound on the calf muscle. The award was made on 20th January, 2020.

Counsel for the claimant is of the view that the injuries herein are more serious as compared to those in the cases cited above and further that the Kwacha has lost value since the awards. She is of the view that in the circumstances of this case, the reasonable compensation would be K10,000,000.00.

Firstly, I should mention here that the claimant from her demeanour and deportment appeared to be a credible witness. I believe her in every aspect of her testimony. She frankly and truthfully spoke about her injuries, pain and suffering. Having considered the nature and extent of the injuries suffered by the

claimant, this court finds that she would have suffered considerable pain and suffering resulting from the accident and the treatment she received. Undoubtedly, she would have suffered discomfort, inconvenience and distress. Further, this court finds that the claimant has a partial permanent disability of 10% of her left leg due to the injury. However, in my judgment the claim of the claimant under the heads of injuries, pain and suffering, loss of amenities and disfigurement are grossly exaggerated. They all appear to be unreasonably exorbitant and disproportionate to the actualities.

At this juncture, it is pertinent to note that the quantum of damages awarded by the courts in cases of this nature must only be compensatory and nothing else. A closer look at the cited cases shows that for cases decided recently in 2020 awards such as K6,000,000.00 have been made where there is a double fracture of a tibia and fibula and in some cases being open fractures as well. In this case, the claimant sustained fracture of a metatarsal, a bone on the toe. Without intending to downplay the injuries sustained by the claimant, I am of the view that this is less serious as compared to injuries suffered in cases of **Jamson Makwinja, Christina Mande** and others cited above even upon taking into consideration the cut wound on the thigh and bruises on the arm.

In my estimation, this is a case in which K3,500,000.00 will be sufficient recompense for injuries that the claimant suffered and continues to suffer by reason of the accident. Judgment is accordingly entered in favour of the claimant in a sum of K3,500,000.00 under all heads of general damages claimed proved.

The claimant also prays K13,500.00 being special damages for obtaining a Police Report and a Medical Report. However, it is trite that special damages must be specifically pleaded and proved as required by the law – **Govati v Manica Freight Services (Mal) Limited [1993] 16(2) MLR 521 (HC)**. Essentially, a claimant who claims special damages must therefore adduce evidence or facts which give satisfactory proof of the actual loss he or she alleges to have incurred. In this case, it is evident from the Police Report itself that it was paid for and that K3,000.00 was actually expended for the same. However, there is no proof of payment with regard to the Medical Report as such, I shall therefore make no award on the same.

I therefore award the claimant a total K3,503,000.00 under all heads claimed and proved. The claimant is further awarded costs of the assessment hearing to be assessed if not agreed by the parties.

MADE IN CHAMBERS THIS 7TH DAY OF JANUARY, 2021


WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR