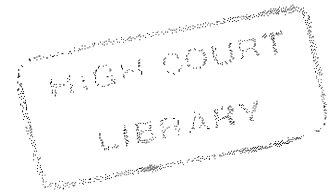




REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI



PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 652 OF 2020

BETWEEN:

ELIZABETH KHOVA GEORGE.....CLAIMANT

AND

FATCHI HAJAPI.....1ST DEFENDANT

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

CORAM: WYSON CHAMDIMBA NKHATA (AR)

Mr. Mwandira- of Counsel for the Claimant

Mr. A. Chibayo-of Counsel for the Defendant

Mr. H. Amos- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

INTRODUCTION

The Claimant's was injured in a road accident on 25th September, 2019. She was hit by motor vehicle registration number NE 5947 Nissan Caravan Mini Bus driven by the 1st defendant and insured by the 2nd defendant. She sustained fracture of the left arm, cut on the lip, bruises on the left knee tibia and fibula of the left leg. Consequently, she commenced this action against the Defendant claiming damages for pain and suffering, loss of amenities of life and costs of the action. The issue of liability was settled in favour of the claimant through a consent judgment executed before Honourable Justice Chigona. The matter was referred to this court for assessment of damages which I must now consider.

THE EVIDENCE

The matter came for assessment of damages on the 4th November 2021. The claimant was the sole witness for her case. She adopted her witness statement and tendered a Medical Report and a Police Report. In her witness statement, she averred that as a result of the impact she sustained a fracture of the left arm, a cut on the lip, lost three teeth and suffered bruises on the right knee. She was taken to Queen Elizabeth Central Hospital where she was treated as an out-patient. Her left arm was cast in a Plaster of Paris (POP) from 2nd October, 2019 and was removed on 14th November, 2021. She exhibits a Medical Report marked “EKG 2” to substantiate the injuries. She lamented that she still feels pain on her left leg. She further avers that she paid MK3,000.00 for the Police Report as endorsed and shown on the Police Report. Since the accident, she felt pain on her left arm whenever she was doing chores. She also stated that she was involved in the business of selling river sand. In court, she showed the court where she lost the teeth and a scar on the knee where she said she sustained a bruise.

In cross-examination, she re-iterated that she sustained a fracture. She stated that she left her x-ray pictures at the court. She added that she still does her business in which she sells sand. She stated that she is 59 years old. She stated that prior to the accident she had already lost one tooth. She added that the other teeth were firm. She stated that she still goes to fetch sand because she leaves alone and has nothing she can do for a livelihood. She stated that she gave all her documents to her lawyers. She stated that she did not author the Police Report and the Medical Report and neither did she parade the authors. There was nothing in re-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 AND APPLICABLE LEGAL PRINCIPLES

On the law and principles governing assessment of damages, it is trite that the purpose of awarding damages is to compensate the injured party as nearly as possible as money can do. That is to say, to place the claimant in a position he would be had he not suffered the damage or loss. This is what is termed the principle of *restitutio intergrum*. It is not possible to quantify damages with exactitude. However, courts use comparable cases as a guide in coming up with a reasonable quantum of damages. See the case of **Kalinda –vs- Attorney General (1992) 15 MLR 170 at p 172.**

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. See: **Ian Goldrein et al, Personal Injury Litigation, Practice and Precedents** (Butterworths, 1985) and **City of Blantyre vs. Sagawa**: [1993] 16(1) MLR 67 (MSCA). In **Sakonda vs. S.R. Nicholas**: Civil Appeal Cause No. 67 of 2013, it was highlighted that pain and suffering is attributable to the claimant's injury or to any necessary surgical operations and mental anguish.

The fundamental factor in assessing damages for pain and suffering was aptly put by the Supreme Court of Appeal in **Chidule vs. Medi**: Malawi Supreme Court of Appeal, Civil Appeal No. 12 of 1993, that in assessing damages for pain and suffering, the court must consider the pain which the particular plaintiff has suffered because the circumstances of the particular plaintiff are bound to have a decisive effect in the assessment of damages. The implication of the statement is that, in principle and practice, each case must be dealt with according to its peculiar circumstances.

Loss of amenities of Life

Loss of amenities is attributable to deprivation of the claimant's capacity to engage in some sport or past-time which he/ she formerly enjoyed. Basing on the case of **Kanyoni vs. Attorney General**: [1990] 13 MLR 169. It means that he is incapable of performing some activities he used to do. Damages for loss of amenities of life are therefore awarded for the fact that the plaintiff is simply deprived of the pleasures of life, which amounts to a substantial loss, whether the plaintiff is aware of the loss or not. **Poh Choo vs. Camden and Islington Area Health Authority**: [1979] 2 All ER 91.

Disfigurement

Damages under the head of disfigurement are paid for the change in physical form of a person injured either as a result of the impact of the injury or its treatment, such as 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- see- **Francis Chikoti vs- United General Insurance Company Limited** Personal Injury Cause No. 730 of 2016. Justice Potani (as he was then) in the case of **James Chaika v NICO General Insurance Company Ltd** Civil Cause No. 909 said disfigurement is not a matter to be taken lightly and casually as it is something that one has to permanently live with.

SUBMISSIONS AND COMPARABLE CASES

In this case, the claimant claims to have suffered a fracture of the left arm, a cut on the lip, lost three teeth and suffered bruises on the right knee. Counsel for the claimant cited the following cases:

- In **Raphael Lungu vs Prime Insurance Company** Civil Cause no. 2024 of 2010, the claimant suffered fracture of the distal humerus, open fracture of radius and ulna. He was awarded the sum of MK5,000,000.00. The award was made on 17th July, 2012.
- In **Kachasu and another vs Peter Kondowe and another, Civil Cause no 320 of 2009**, the 1st claimant suffered cut wound on head, closed fracture of right humerus and open fracture of right lower leg. He was awarded MK5,600,000.00 for personal injuries. The award was made on 16th October, 2009 by Justice Kamwambe.
- In **Nellie Manda vs Prime Insurance Company Limited**, Civil cause no. 619 of 2009, the claimant was awarded MK6,500,000.00 for damages for personal injuries. The claimant sustained fracture of the left upper arm, deep wound on the left limb. The award was made on 25th April, 2012.
- In **Red Lucia vs James Mkandawire and Citizen Insurance Company Limited**, Civil cause no. 2442 of 2010, the claimant was awarded MK6,000,000.00 for damages for personal injuries. The claimant sustained fracture of the tibia and humerus as well as head injuries.

In view of these case authorities, it was therefore Counsel's submission that in the circumstances of this case, the reasonable compensation would be K12,500,000.00 for pain and suffering and loss of amenities of life.

ASSESSMENT

As alluded to, the Claimant pleads that she suffered a fracture of the left arm, a cut on the lip, lost three teeth and suffered bruises on the right knee. There is a Medical Report which was tendered as part of evidence to substantiate the said injuries marked as exhibit "EKG2". However, the line of questioning by Counsel for the Defendant on the same seemed to be aimed at evoking the rule against hearsay in that the claimant could not rely on a document she did not for its contents. Basically, that is what the law says as such the court ought to proceed on the premise that the said documents were tendered subject to the rule against hearsay evidence. I must hasten to add, however, that in this case, the nature of the injuries did

not require the contents of the Medical Report to be substantiated. The Claimant showed the court the places where she lost the three teeth and the scars where sustained bruises. In any case, she struck me as a truthful witness and I have no reason not to believe that she also suffered a fracture of the left arm. I shall take it that the injuries have been proved.

In making assessment, I have no doubt that the Claimant suffered severe pain warranting a substantial award under the head of pain and suffering. Further to that, it is indicated that he continues to suffer from symptomatology related to the injuries. The court also takes note that the Claimant was temporarily disabled during the period her arm was cast on Plaster of Paris. The inconvenience caused thereby cannot be ignored. In particular, there was and there still is some restriction in the level of physical activities she was/is able to perform subsequent to the injury. She lamented that she sells sand as part of her livelihood and continues to do so albeit with difficult because that is her only source of income and does not have support. Other than that, the court takes note of the residual scars on the ankle and the loss of three teeth.

In awarding general damages in this instance, I take note that the judgments the claimants is relying on, are not mirror images of the current case. However, the cases still present a guide involve a fracture on the arm. I am mindful of the fact that previous judgments are used only as a guide when determining general damages and that the facts in the cited judgments bear in the minimum some similarity with the facts of the current matter and are, as such, helpful. In the circumstances of the present matter I have, however, to consider that the claimant apart from sustaining a fracture lost three teeth and may have to rely on dentures which may render partial assistance and possibly restore her facial aesthetic self. From the skeleton arguments, I have seen that counsel for the claimant has submitted that the appropriate quantum would be K12,500,000.00 as general damages. Much as I agree with the claimant's assertion that the value of the kwacha has greatly lost value for the past years, I am of the view that the proposed quantum is on the higher side taking into consideration all the circumstances of the case, and awarding such would be, in my view, awarding the claimant with more than she actually lost and this will be unfair to the defendant and again contrary to the principle of *restitutio intergrum*. I, as a result, am of the opinion that the fair and reasonable amount for compensation of the claimant for general damages is the amount of K8,000,000.00.

Special damages

The claimant is also praying for K13,500.00 being special damages for the cost of obtaining a Police Report and a Medical Report. 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 carries an endorsement that it was paid for and indicates a receipt was issued. I award K3,000.00 for the Police Report.

CONCLUSION

Upon a thorough consideration of facts and circumstances of this case and upon an exhaustive consideration of the submissions by both Counsel in the light of the relevant and applicable law regarding damages for personal injuries that this court awards the claimant **K8,003,000.00** under all heads claimed and proved. As indicated under the consent order on liability, the 2nd defendant's liability shall be to the extent of the policy limit which is K5,000,000.00.

The claimant is further awarded costs for the assessment of damages proceedings to be taxed if not agreed by the parties.

DELIVERED IN CHAMBERS THIS 15TH DAY OF NOVEMBER 2021


WYSON CHAMDIMBANKHATA

ASSISTANT REGISTRAR