



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY**

Civil Cause Number 169 of 2020

BETWEEN:

**GLORIA KALIPA (on behalf of SWEMA DZOOLE, a minor).....CLAIMANT
AND
THANDIWE KAPHAMTENGO.....1ST DEFENDANT
PRIME INSURANCE COMPANY LIMITED.....2ND DEFENDANT**

CORAM:	C MANDALA:	ASSISTANT REGISTRAR
	Ndalama:	Counsel for Claimant of Chris & Legal
	1 st Defendant:	Unrepresented (Absent)
	2 nd Defendant:	Unrepresented (Absent)
	C Zude:	Court Clerk

ASSESSMENT OF DAMAGES

CM MANDALA, AR:

INTRODUCTION AND BACKGROUND

This is an order for assessment of damages pursuant to a Judgment in Default that was issued on 21st May 2020. The Defendants are liable for: damages for pain and suffering, damages for loss of amenities of life, damages for disfigurement, damages for incapacitation of body parts, special damages for costs of obtaining police and medical report, and costs of the action. The hearing on Assessment of Damages was conducted on 19th November 2020.

This matter arose from a road accident that occurred on 12th October 2019 when the 1st Defendant was driving along the Kaunda Road when she hit the Claimant who was walking on the verge of the road towards Area 25.

EVIDENCE

Claimant's Evidence

The Claimant adopted their witness statement as evidence in chief. The witness statement states:

- 1) My name is **GLORIA KALIPA**, I am the Claimant and a litigation guardian in this matter and therefore competent to make this statement on behalf of **SWEMA DZOOLE**, a minor.
- 2) I verily recall that on or about 12th of October, 2019, at around 08:00hrs, the minor was hit by the 1st Defendant who was driving a motor vehicle registration number **MJ 1216 AUDI Q7**, along the Kaunda road. See attached copy of the **Police Report marked GK 1**.
- 3) Due to the accident, the minor suffered loss and damages which is evident in the following;
 - a. The minor sustained a fracture of the tibia and multiple bruises on the left foot.

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- b. The minor suffered from severe pain.
 - c. The minor was disfigured due to the scars the wounds left and incapacitated.
 - d. The hospital assessed the minor's incapacitation to be 24% (twenty-four percent) due to the scars she was left with and also her limitation to do day to day chores. See attached copy of the **Medical Report Marked GK 2**.
 - e. I incurred costs to obtain the Police and Medical Reports. These costs were about MK 15,000.00 (fifteen thousand kwacha).
- 4) I make this statement knowing that it will be used as evidence in the current matter and verily believe the contents to be true to the best of my knowledge.

In viva voce, the Claimant told the court that Swema is her child despite the different surnames. She confirmed that Swema was injured and that they were told at court that the bone was chipped ('inathetheka'). Swema was treated at ABC Hospital where she underwent an x-ray and POP application on 25th September 2019. The POP was removed at KCH on 7 November 2020. On the same day she had a physiotherapy session that caused her pain. She was in a lot of pain during this period. Eventually she want back to school, however, she often complains of pain in the leg after playing.

SUBMISSIONS BY COUNSEL FOR THE CLAIMANT

Counsel for the Claimant filed written submissions in support of the application. Counsel avers that the extremity of the Claimant's injury and the devaluation of the Kwacha would attract a total award of K7,015,000.00 as compensation. Counsel for the Claimant cited the following comparable awards in support:

- **Paul Matsimbe v Patricia Kapachira and another** – Civil Cause Number 585 of 2009 where the Claimant was awarded K2,000,000.00 for a wound on the left leg, cuts on the finger and lower lip on 26th June 2010.
- **Muhammad Mpulula and another v B Ali and others** – Personal Injury Cause Number 351 of 2013 where the Claimant was awarded K3,000,000.00 for cuts on the chest, ribs, right arm, bruises and swollen thigh on 12th February 2014.
- **Mauzu v Batson and Another** – Personal Injury Cause Number 77 of 2014 where the Claimant was awarded K800,000.00 as damages for disfigurement on 16th June 2017.
- **Chikumbutso Kamowa v Jimmy Chuiku and General Alliance Insurance Co Ltd** -Civil Cause Number 699 of 2018 where the Claimant was awarded K2,000,000.00 for disfigurement on 27th September 2019.
- **Robert Mose (suing as administrator of the estate of Zakaria Robert (deceased) and 5 others v Lyson Benjamin Chapo Prime Insurance Company Ltd & Symon Door** – Personal Injury Cause Number 350 of 2015 where the Claimant was awarded K3,300,000.00 for a fractured tibia of the left leg, cut on the lower chin and leg on 21st August 2016.

ASSESSMENT GUIDELINES

Damages for personal injuries are awarded for a Claimant's pecuniary and non-pecuniary losses. The pecuniary losses include the loss of earnings and other gains, which the Claimant would have made had they not been injured, and the medical and other expenses which accrue from care and after-care of the injury. The non-pecuniary losses include pain and suffering, loss of amenities of life and loss of expectation of life. The

principle underlining the award of damages is to compensate the injured party as nearly as possible as money can do it.¹

Perfect compensation for a Claimant is unlikely. The Claimant, however, is entitled to fair and adequate compensation.² Since it is difficult to assess damages involving monetary loss, courts resort to awarding conventional figures guided by awards made in similar cases and also taking into account the money value. Lord Morris buttresses this contention in *West v Shepherd*³ by stating: ‘*money cannot renew a physical frame that has been battered and shattered. All judges and courts can do is to award a sum which must be regarded as giving reasonable compensation.*’

The mode of assessment of damages requires the court to consider comparative awards of a similar nature. In doing so, regard must be had for fluctuations in the value of the currency. The court should make an award that is commensurate with the value of the currency at the time the award is made. In *Malamulo Hospital (The Registered Trustees) v Mangani*⁴, the Supreme Court states: “*It is, therefore, recognised by the courts that awards of comparable injuries should be comparable. This is done by looking at previous awards of similar cases and adjusting the award according to the fall of the value of the money.*” In *Tionge Zuze (a minor, through A.S. Zuze) v Mrs Hilda Chingwalu*,⁵ the Court states: “*Where a claim relates to non-monetary loss in respect of which general damages are recoverable it is not possible to quantify the loss in monetary terms with mathematical precision. In such cases courts use decided cases of a comparable nature to arrive at an award.*” In *Steve Kasambwe v SRK Consulting (BT) Limited* Personal Injury Cause Number 322 of 2014 (unreported), the High Court states thus: ‘*At times the court is faced with situations where the comparative cases have been rendered obsolete because of the devaluation of currency and inflation. It would not achieve justice if the court insisted on the same level of award as was obtaining in the previous cases. In such situation, when deciding the new cases, the court must take into account the life index, i.e. cost of living and the rate of inflation and the drop-in value of the currency. The court must therefore not necessarily follow the previous awards but award a higher sum than the previous cases.*’

COMPENSATION

The Claimant sustained a fracture of the tibia and multiple bruises.

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) 8 and *City of Blantyre v Sagawa* [1993] 16(1) MLR 67 (SCA).

The Claimant herein sustained a ‘fracture of the tibia and multiple bruises’ as per the medical report. She underwent an x-ray and POP application. She further endured a lot of pain when she underwent physiotherapy. The Claimant continues to feel this pain especially after playing with her friends.

¹ See *Cassel and Co v Broom* [1972] AC 1027. See also *Tembo v City of Blantyre and The National Insurance Co Ltd* – Civil Cause No. 1355 of 1994 (unreported).

² *British Commission v Gourley* (1956) AC 185.

³ *West v Shepherd* (1964) AC 326 at 346.

⁴ [1996] MLR 486.

⁵ Quoting from *HQ Chidule v Medi MSCA* 12 of 1993.

Counsel for the Claimant cited comparable awards of K2,000,000.00, and K3,000,000.00 – these were awards under all heads of damages made in 2010, and 2014 respectively. See: ***Paul Matsimbe and another v Patricia Kapichira and another, and Muhammad Mpulula and another v B Ali and others*** (cited above).

Based on this, this court awards the sum of K1,500,000.00 as damages for pain and suffering.

Loss of Amenities of Life

The expression ‘loss of amenities of life’ simply means loss of faculties of pleasures of life resulting from one’s injuries. Damages for loss of amenities of life are 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. See: ***Poh Choo v Camden and Islington Area Health Authority*** [1979] 2 All ER 910 and ***City of Blantyre v Sagawa*** [1993] 16(1) MLR 67 (SCA) at 72.

As a result of the accident, the Claimant has residual pain especially if she over exerts the leg, eg through playing. She is a young Claimant and will have to live with this loss for a large portion of her life.

Counsel for the Claimant cited comparable awards of K2,000,000.00, and K3,000,000.00 – these were awards under all heads of damages made in 2010, and 2014 respectively. See: ***Paul Matsimbe and another v Patricia Kapichira and another, and Muhammad Mpulula and another v B Ali and others*** (cited above).

Based on the foregoing discussion, this court awards the sum of K1,000,000.00 as damages for loss of amenities of life.

Disfigurement

In the matter of ***James Chaika v NICO General Insurance Co Ltd*** the High Court stated that ‘*Disfigurement is not a matter to be taken lightly and casually as it is something that one has to permanently live with.*’ In ***Nyirenda v Moyo and other***, the claimant was awarded the sum of K500,000.00 as damages for disfigurement in 2018.

The Claimant told the Court about the difficulties faced during over exertion. The medical report states that she will have limited ability to do manual work due to her injury.

Following the sentiments made in the ***James Chaika Case*** and considering the devaluation of the Kwacha since 2018, the Claimant is hereby awarded K500,000.00 as damages for disfigurement.

Special Damages

The law distinguishes general damages and special damages as follows – general damages are such as the law will presume to be the direct natural or probable consequence of the action complained of. Special damages, on the other hand, are such as the law will not infer from the nature of the course - ***Stros Bucks Aktie Bolag v Hutchinson*** (1905) AC 515. In determining the natural consequences, the court considers if the loss is one which any other claimant in a like situation will suffer – ***McGregor on Damages*** p23 para 1-036.

Special damages must be specifically pleaded and must also be strictly proved - ***Govati v Manica Freight Services (Mal) Limited*** [1993] 16(2) MLR 521 (HC). A Plaintiff 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. Where documents filed by the Plaintiff fail to meet this strict proof then special damages are not awarded – ***Wood Industries Corporation Ltd v Malawi Railways Ltd*** [1991] 14 MLR 516.

The Claimant herein was awarded special damages for costs of obtaining medical and police reports. No evidence was provided to the court to support this award. Special damages ought to be specifically claimed and proved. Though the Claimant specifically claimed special damages, they were not proved during trial and/or submissions. For these reasons, no award will be made under this head.

DISPOSAL

The Claimant is therefore awarded K1,500,000.00 for pain and suffering; K1,000,000.00 for loss of amenities of life; K500,000.00 for disfigurement and; K0 as special damages and costs of the action (to be taxed by the court). **The Claimant's total award is therefore K3,000,000.00 (three million kwacha).**

Each party is at liberty to appeal to the Supreme Court of Appeal within the requisite time frames. Leave to appeal is hereby granted.

Ordered in Chambers on the 22nd day of January 2021 at the High Court, Lilongwe.



C Mandala

ASSISTANT REGISTRAR