



**IN THE HIGH COURT OF MALAWI**

**LILONGWE REGISTRY**

**CIVIL DIVISION**

**CIVIL CASE NO. 615 OF 2019**

**BETWEEN:-**

**MANUEL CLEMENT..... CLAIMANT**

**-AND -**

**TIMOTHY MALUWA.....1<sup>ST</sup> DEFENDANT**

**PRIME INSURANCE COMPANY LTD.....2<sup>ND</sup> DEFENDANT**

**Coram:**

**Brian Sambo, Assistant Registrar**

Mr. P. Kambalame, of counsel for the Claimant

Mr. E. Chikwakwa, of counsel for the 2<sup>nd</sup> Defendant

Mr. G. Kumwenda, Law Clerk/Official Interpreter

**ORDER ON ASSESSMENT OF DAMAGES**

*Manuel Clement vs Timothy Maluwa and Prime Insurance Company Limited, Personal Injury Case No.*

*615 of 2019*

## **BACKGROUND**

The present assessment follows a summary judgment that was entered against the Defendants on the 17<sup>th</sup> of March, 2021 for the following;

- a. Damages for pain and suffering.
- b. Damages for loss of amenities of life.
- c. Damages for disfigurement.
- d. Damages for loss of earnings and earning capacity
- e. Special damages
- f. Costs of action.

Having heard the evidence on assessment, now the court comes to give its findings regarding the amount of damages. Before we do so, let me give a brief account of the attendant facts of the matter.

## **BRIEF FACTS**

The facts of this case are simple enough. On 20<sup>th</sup> February, 2019, at about 17.55, the 1<sup>st</sup> Defendant was driving motor vehicle Registration Number BV 6032 Toyota Sienta from the direction of Monkey Bay heading towards Mangochi Boma. Upon arrival at Njereza Junction, he encroached on the far dirt verge of the road, at an excessive speed the result of which was that he hit the Claimant who was, at that time, travelling by a bicycle on the far dirt verge of the road.

Following the impact, the Claimant sustained open fracture of right tibia and fibula, multiple bruises, his right leg was shortened by 2 cm, severe deformity of the leg, and his permanent degree of incapacity was assessed at 45%.

## **EVIDENCE DURING ASSESSMENT OF DAMAGES**

During assessment hearing, the Claimant was the only witness in his case. Testifying as PW1, he first adopted and tendered his Witness Statement (Marked PEX1) and added that he was travelling by his bicycle on the far dirt verge of the road when the 1<sup>st</sup> Defendant, who was driving motor vehicle Registration Number BV 6032 Toyota Sienta at a high speed, missed the tarmac road and swayed off

to where he was cycling thereby hitting him. He said, as a result of the impact, he sustained open fracture of right tibia and fibula, multiple bruises, his right leg was shortened by 2 cm, severe deformity of the leg, and his permanent degree of incapacity was assessed at 45%. The witness further tendered a Medical Report and a Police Report, marked PEX 1A and PEX 1B, respectively. Attached to his Medical Report were X-Ray Reports which showed fracture of his bones.

During cross examination, he told the court that he could not remember, properly the exact date he was placed on the hospital admission but that he was there for two months. He said it was true that the Medical Report was showing admission from 29<sup>th</sup> February, 2019 to 5<sup>th</sup> March, 2019; which was about 14 days. He said the medical personnel might have made a mistake in computing time that he was on admission at the hospital. He admitted that the Medical Report was not showing that he was on POP for 4 months despite his Witness Statement containing that. He said before the accident he was collecting and selling firewood but he was no longer able to do so, and that the condition had negatively affected his daily livelihood as he was unable to fend for himself. He said he was using hands to pick firewood but he still needed health legs to travel to the forest and pick firewood.

## **ISSUE**

The hearing was conducted to assess the quantum of damages payable by the Defendants under the above-stated heads.

## **DETERMINATION**

### **THE LAW ON DAMAGES**

Damages are the remedy for a victim of a wrong, and the wrongful party has to compensate the victim, in as far as money can, to be put back in the same position that the victim would have been if not for the wrong- **Elida Bello v. Prime Insurance Company Limited**, Civil Cause No177 of 2012 (unreported).

### **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- Ian Goldrein et al, Personal Injury Litigation, Practice and Precedents (Butterworths, 1985) p8. See also **City of Blantyre v. Sagawa**, [1993] 16(1) MLR 67 (SCA).

I am mindful that, in order to achieve consistency and uniformity, courts of law would also want to consider comparable judicial precedent.

In **Yambitsani Follius vs Prime Insurance Company Limited**, Civil Cause No. 632 of 2020 this court made a total award of MK4,950,000.00 in which the Claimant sustained mild head injury, fracture of pelvis, laceration and swollen head, bruised right shoulder and bruised abdomen and his degree of incapacity was assessed at 30%.

In **Mr. Albert Kambova vs Prime Insurance**, Personal Injury Cause No. 99 of 2016, a total award of **MK3, 313,500.00**. This award was made by Hon Austin Jessie Banda, Assistant Registrar (as then he was) on 23<sup>rd</sup> of July, 2018.

### **LOSS OF AMENITIES FOR LIFE**

Now, loss of amenities embraces all that which reduces the Claimant's enjoyment of life; her deprivation of amenity whether she is aware of it or not.

In the case of **Manuel Paul v BT Ndawala and Prime Insurance Co Ltd**, personal injury cause no 251 of 2014, loss of amenities of life was calculated at the amount of K1,000,000.00 the Claimant whom was a minor and the degree of incapacity was at 15%.

In **Tambala v Jali and Prime Insurance co ltd** [2018], the claimant sustained a fracture and had scars due to some grafting done on him. He was awarded K1, 500, 000 for the loss of amenities of life.

There are a number of amenities the Claimant may not enjoy as a result of the accident. It is in the evidence that one of his legs was rendered shorter than the other by 2 cm.

### **DISFIGUREMENT**

Damages are paid under the head of disfigurement for the change in the physical form of a person injured either as a result of the impact of the injury or its treatment, such as a 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 as was observed by the court in the case of **Austin Julius v. Rasika Gunawardena and General Alliance Limited**, Personal Injury Cause Number 316 of 2014.

The evidence before me does show a deformity on the part of the Claimant, to the extent that his leg was shortened by 2 cm.

### **LOSS OF EARNINGS AND EARNING CAPACITY**

The Claimant further prayed for MK5, 580,008.92 being damages for loss of earnings and earning capacity. In his evidence he told the court that he used to gather and sell firewood, and he was making some money to earn a living. Regarding his earning capacity, it was not demonstrated in his evidence how his earning capacity was reduced by the accident. The shorter leg may still enable him to go to the forest and gather some firewood, in my view. However, he still deserves compensation.

### **SPECIAL DAMAGES**

Generally, special damages are specifically pleaded and strictly proven. See **General Farming Limited v Chombo (1996) MLR 16**. I did not receive any *Manuel Clement vs Timothy Maluwa and Prime Insurance Company Limited, Personal Injury Case No.*

evidence regarding special damages under this head; there are no payment receipts or anything to do with payment, either at the hospital or at the police, and so will not award anything.

### **CONCLUSION**

In conclusion, considering all the circumstances of the case and the Claimant, the court hereby makes an award of **MK4, 900,000.00** being damages covering all heads above. This whole amount is payable within 7 days from today.

Costs are for the Claimant and shall be assessed, separately if not agreed upon by the parties.

Made in chambers today Friday the 4<sup>th</sup> day of October, 2021.



**Brian Sambo**  
**Assistant Registrar**