



**REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
Personal Injury Cause Number 608 of 2020**

**BETWEEN:**

**GLADYS JAMES (a minor suing through JAMES BANDA**

**Her father and next friend).....CLAIMANT  
AND**

**CHILUNGAMO MPITAPITA.....1<sup>ST</sup> DEFENDANT**

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

<b>CORAM:</b>	<b>C MANDALA:</b>	<b>ASSISTANT REGISTRAR</b>
	G Mapemba – Chikopa :	Counsel for Claimant of Winlaw & Nda
	1 <sup>st</sup> Defendant:	Unrepresented (Absent)
	2 <sup>nd</sup> 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 issued on 28<sup>th</sup> August 2020. The Defendants are liable for: damages for pain and suffering, damages for loss of amenities of life, damages for disfigurement, special damages of MK 15,000.00, and costs of the action. The hearing on Assessment of Damages was conducted on 18<sup>th</sup> November 2020.

This matter arose from a road accident that occurred on 25<sup>th</sup> July 2018 when the 1<sup>st</sup> Defendant was driving towards Dowa Boma when he lost control of the vehicle and hit the Claimant who was crossing the road.

**EVIDENCE**

In viva voce, the Mr Banda told the court that he had sent his daughter, Gladys, to buy some pastry. Whilst there he was informed that she had been hit by a speeding car and that she had been taken to the hospital. Mr Banda found Gladys at the hospital where he found that her right leg was injured just above the ankle and other parts of the same leg also had wounds. The court examined the three scars on the right leg. Gladys told the court that the scars give her a burning sensation when she walks long distances.

Mr Banda further told the court that Gladys was very intelligent, but she is now struggling in school and had to repeat a class. Since the accident occurred, she often complains of body aches and pain in the leg. Gladys does not sleep well and often wakes up during night. Mr Banda expressed great concern with how she is faring in school.

### 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 K5,500,000.00 as compensation. Counsel for the Claimant cited the following comparable awards in support:

- ***Felista Kachaso v Peter Khondowe and others*** – Civil Cause Number 320 of 2009 where the Claimant was awarded K5,600,000.00 for multiple fractures and a cut wound on the head.
- ***Aaron Amosi and another v Lanjesi Lile and Prime Insurance*** – Personal Injury Cause Number 133 of 2013 where the Claimant was awarded K4,000,000.00 for pain and suffering, K2,000,000.00. for loss of amenities of life, and K1,000,000.00 for disfigurement when sustained fractures on both legs, dislocation of the right shoulder and post traumatic arthritis. The award was made on 24<sup>th</sup> February 2014.
- ***Veronica Kavamba v Prime Insurance Company Limited*** – Civil Cause Number 2158A of 2008 where the Claimant was awarded K4,000,000.00 for a fractured tibia and bruises in the back. The award was made in 2011..
- ***Louise Chakwantha v Prime Insurance Company Limited*** -Civil Cause Number 461 of 2011 where the Claimant was awarded K6,150,000.00 for a fracture of the left fibula, multiple soft tissue injuries and a swollen leg. The award was made on 10<sup>th</sup> August 2012.
- ***Swahili Lumbe v James Waluya and Prime Insurance Company Limited*** – Civil Cause Number 152 of 2011 where the Claimant was awarded K6,005,500.00 for cuts on the head and arm, and lost speech ability. This award was made on 26<sup>th</sup> October 2012.

### 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.<sup>1</sup>

Perfect compensation for a Claimant is unlikely. The Claimant, however, is entitled to fair and adequate compensation.<sup>2</sup> 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***<sup>3</sup> 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***<sup>4</sup>, the Supreme Court states: "*It is, therefore, recognised by the courts*

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<sup>1</sup> 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).

<sup>2</sup> ***British Commission v Gourley*** (1956) AC 185.

<sup>3</sup> ***West v Shepherd*** (1964) AC 326 at 346.

<sup>4</sup> [1996] MLR 486.

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**,<sup>5</sup> 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 fibula.

#### *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 ‘painful and swollen right leg, x-ray showed fracture (broken) tibia and fibula (bones of the leg)’ as per the medical report. She underwent an ‘x-ray, reduction (correction of deformity) and application of POP’. She was treated with both oral and intravenous pain killers. To date, the Claimant experiences pain after strenuous activities.

Counsel for the Claimant cited comparable awards of K5,600,000.00, K4,000,000.00, K4,000,000.00, K6,150,000.00 and K6,005,500.00 – these were awards under all heads of damages made in 2014, 2011, 2012, and 2012 respectively. See: **Felista Kachaso v Peter Khondowe and others, Aaron Amosi and another v Lanjesi Lile and Prime Insurance, Veronica Kavamba v Prime Insurance Company Limited, Louise Chakwantha v Prime Insurance Company Limited, and Swahili Lumbe v James Waluya and Prime Insurance Company Limited** (cited above).

Based on this, this court awards the sum of K2,500,000.00 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.

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<sup>5</sup> Quoting from **HQ Chidule v Medi MSCA** 12 of 1993.

As a result of the accident, the Claimant has residual pain especially if she overexerts the leg, e.g. through playing. She is a young Claimant and will have to live with this loss for a large portion of her life. She also has a risk of developing arthritis.

Counsel for the Claimant cited comparable awards of K5,600,000.00, K2,000,000.00, K4,000,000.00, K6,150,000.00 and K6,005,500.00 – these were awards under all heads of damages made in 2014, 2011, 2012, and 2012 respectively. See: *Felista Kachaso v Peter Khondowe and others, Aaron Amosi and another v Lanjesi Lile and Prime Insurance, Veronica Kavamba v Prime Insurance Company Limited, Louise Chakwantha v Prime Insurance Company Limited, and Swahili Lumbe v James Waluya and Prime Insurance Company Limited* (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 the Claimant has a possibility of developing arthritis due to the slight deformity of the tibia.

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 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 do not meet this strict proof then special damages are not awarded – *Wood Industries Corporation Ltd v Malawi Railways Ltd* [1991] 14 MLR 516.

The Claimant here 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 K2,500,000.00 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 K4,000,000.00 (four 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 22<sup>nd</sup> day of January 2021 at the High Court, Lilongwe.



C Mandala

**ASSISTANT REGISTRAR**