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REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NUMBER 795 OF 2020

BETWEEN:

DAN KANANJI.....CLAIMANT

AND

NOEL ZIGOWA.....1ST DEFENDANT

NICO GENERAL INSURANCE COMPANY LIMITED.....2ND DEFENDANT

CORAM: WYSON CHAMDIMBA NKHATA (AR)

Mr. A. Mussa- of Counsel for the Claimant

Mr. W. Kalua- of Counsel for the Defendant

Ms. Chida- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

INTRODUCTION

Through a writ of summons, the Claimant commenced this action claiming damages for pain and suffering, loss of amenities of life, disfigurement and costs of the action. Basically, the action emanates from a road accident which occurred on 16th September, 2019 in which the 1st defendant's insured who was driving motor vehicle registration number LL7975 from the direction of Limbe heading towards Thyolo hit the claimant who was crossing the road at Cassa Dona Maria. The issue of liability was settled in favour of the claimant through a default judgment. Subsequently, the matter was referred to this court to determine the quantum of damages that would adequately compensate the claimant for the losses he suffered which I must now consider.

THE EVIDENCE

When the matter came for hearing on assessment of damages, the Claimant testified that due to the accident he suffered serious injuries such as a fracture of the malleolus bone (left ankle), deep cut wound on the left eye, soft tissue injuries and excessive body pains. His left ankle was cast on Plaster of Paris and he was on weight bearing for six months. His wound was sutured and dressed. He further testified that he is having difficulties in walking and difficulties to proper full range of motion. He has developed residual scars on the affected area and that since the accident, he still feels severe pain on his ankle. He cannot walk for long distances due to the severe pain that he feels on his ankle.

In cross-examination, he stated that he signed his witness statement a year after the occurrence of the accident. He stated that he went to the hospital twice after the date his Medical Report was prepared but did not have documents to prove that he made the two visits. He stated that he went back to the hospital because of the pain he feels when he stands for a long time. He stated that he has a cut wound on the occipital. He stated that the said injury was not included on his Medical Report.

In re-examination, he stated that he has a Health Passport that indicates that he went back to the hospital after his first visit.

Such was the evidence on assessment of damages. I would like to thank both counsel for the guidance as evidenced by the well-researched submissions filed in support of the assessment of damages herein in which several authorities have been cited. This court has given the submissions and the authorities counsels cited the most anxious consideration.

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 fully damages for loss of dependency and loss of expectation of life. 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**. The Court will also consider factors like passage of time when the award was made, as well as the value of the kwacha at the time of making the award.

Pain and suffering and loss of amenities of life

Pain means the physical hurt or discomfort attributable to the injury itself or consequent upon it. It includes the pain caused by any medical treatment which the plaintiff might have to undergo. **See Sakonda v S. R. Nicholas** Civil Appeal Cause No. 67 of 2013. ‘Suffering’ on the other hand denotes the mental or emotional distress which the plaintiff may feel as a result of the injury. This includes but not limited to anxiety, worry, fear, torment and embarrassment. In **City of Blantyre v. Sagawa** [1993] 16 (1)MLR 67. ‘pain’ and ‘suffering’ were defined to suggest physical experience of pain caused by consequent upon the injury while “suffering” relates to the mental element of anxiety, fear, embarrassment and the like. On the other hand, in the case of **Kanyoni v Attorney General** [1990] 13 MLR 169, 171 the court held that loss of amenities of life must include the loss of all the things the claimant used to be able to do, see, and experience. Justice Mwaungulu (as he then was) in the case of **Mtika v. US Chagomerana t/a trans Usher (Zebra Transport)** [1997] 2 MLR 123, 126 explained that this head covers the loss caused by the injury in that the claimant will be unable to pursue the leisure and pleasures of life that he used to enjoy but for the injury.

COMPARABLE CASES

In this case, the claimant claims that he sustained a fracture of the malleolus bone (left ankle), deep cut wound on the left eye, soft tissue injuries and excessive body pains. In awarding damages for pain and suffering, loss of amenities of life and disfigurement, Counsel representing the claimant calls upon the court to consider the following cases:

- **Filison Willard Vs Benjamin Chipeta and Prime Insurance Company Limited Civil Cause. 759 of 2019** in which the Plaintiff was awarded MK6,800,000.00 for damages for personal injuries. The plaintiff sustained fractured right ankle, deep cut wound on the scalp which needed 12 stitches, a cut on the eye, bruises on the shoulder, bruises on the right fingers.
- **Louse Chakwantha Vs Prime Insurance Company Limited Civil Cause No. 461 of 2011** in which the plaintiff was awarded MK6,150,000.00 for damages for personal injuries. The Plaintiff sustained fracture of the left fibula, multiple soft tissue injuries and swollen leg. The award was made on 10th August, 2012.
- **Kachasu and Another vs Peter Kondowe and another, Civil Cause No. 320 of 2009**, in which the 1st Plaintiff 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.

- **Rex Walala vs Davison Chikuta and Prime Insurance Company Limited, Civil Cause No. 461 of 2011**, in which the plaintiff was awarded MK5, 000, 000.00 for damages for personal injuries. The plaintiff sustained fracture of the left tibia, bruises on the left arm and cuts on his face. The award was made on 20th March, 2013.
- **Cidreck White Vs Joseph Ndekwa and Prime Insurance Company Limited Personal Cause No. 360 of 2015**, in which the plaintiff was awarded MK4,505,500.00 for damages for personal injuries. The plaintiff sustained fracture of the left arm, deep cut wound on the left shoulder, bruises all over the body. The award was made on 12th July, 2018.
- **Thomas Mitepa Vs General Alliance Company Limited Personal Injury Cause No, 73 of 2019**, in which the Claimant suffered broken tooth, humerus fracture right hand, bruises on the right abdomen, sprained hip joint. The Registrar Honourable Mangawa Makhaira (the Late) on 21st day of August awarded the Claimant the sum of MK6,003,000.00 as damages for personal injuries.

In view of the foregoing, Counsel representing the Claimant prays for the award of MK8,000,000.00 for damages for pain, suffering and loss of amenities of life and MK4,000,000.00 for disfigurement.

On the other hand, Counsel for the defendants calls upon the court to consider the following case authorities as comparable awards for ankle fractures:

- **Damison Watson V Kingsley Sendema And Prime Insurance Personal Injury Cause Number 335 Of 2016** in which the claimant suffered a fractured right ankle, bruises on the scalp of the head, and bruises on the right foot and the injuries were assessed at 18% incapacity. The Court awarded K3.5 million for pain and suffering, loss of amenities of life and disfigurement. The award was made on 14th October, 2020.

Counsel submits that the injuries in this cited case were more serious than the ones in the case before this court as shown by the assessed incapacity and thus included loss of amenities of life and disfigurement. He contends that in the present case the claimant has no assessed incapacity at all.

- **Chitimbe V Malamba, Prime Insurance and Ocean Car Hire Pi Cause 295 Of 2017**, in which the claimant suffered a fracture of the ankle which needed a number of surgeries and was hospitalized for a period of 41 days twice and was in three P.O.Ps from 15th May, 2017 to 27th October, 2017, a period of almost 6 months (26 weeks) after which she went back to hospital in November, 2017 for 28 days. At the time of the assessment, a year after the accident, the claimant was in crutches because of the fracture. The claimant was awarded K3.5 million in October, 2018 for pain and suffering, loss of amenities of life as well as disfigurement.

Counsel argues that this was more serious than the injuries herein as the claimant before this court does not need crutches and only spent 6 weeks on P.O.P.

- **Alia Mataka (A Minor) V Killie Issah and Prime Insurance Company Limited – Pi Cause Number 662 Of 2017**, in which the Claimant, a minor, suffered a fracture of the ankle and was placed in P.O.P for 4 weeks. The Court awarded her K2.5 million Kwacha in an award made on 14th October, 2019.

It is Counsel for the defendant's submission that comparable cases, as cited by the defence show that damages will range from K2,500,000.00 to K3,500,000.00 (for the most serious ankle fractures requiring use of crutches). Counsel is of the view that these injuries are closer to the K2,500,000.00 threshold but considering that there was no loss of amenities of life or disfigurement, he submits that an award of K2,000,000.00 would be sufficient.

DETERMINATION

The evidence before this court indicates that the Claimant suffered a fracture of the malleolus bone (left ankle), deep cut wound on the left eye and body pains. Observably, both parties in their submissions extenuate the fact of the fracture as the predominant injury suffered by the claimant. I take note that his leg was cast on POP for 6 weeks. It is clear that the injuries exposed the claimant to pain and suffering. Further to that, I take note that despite that the claimant sustained the said injuries in the year 2019, the claimant's left ankle is still swollen. Judging from the period that has elapsed since the occurrence of the accident, I have doubts if the left ankle will assume its pre-accident state. Respectfully, I disagree that disfigurement has not been proved in this case. On the other hand, I am compelled to believe the claimant in his lamentation that he cannot walk long distances and stand for long periods of time. I take this as an impairment of the things that the claimant was able to do prior to the accident. In my humble opinion, the

fact that there was no incapacity assessed does not take away loss of amenities of life where it is clear that the claimant is no longer able to do what he was able to do prior to the injuries he sustained.

Turning to the case authorities cited, the defendants are of the view that the cases cited by the claimant are incomparable. Counsel for the defendant has made an endeavor to distinguish the cases by demonstrating that some of the cases involve injuries where the court has made awards far less than what the claimant is claiming on more or less similar injuries. Further to that, Counsel wants the court to believe that the injuries in some of the cases are not comparable with the injuries in the case herein. On the other hand, Counsel representing the claimant maintains that the cases they cited are relevant. He argues that if the defendants' approach were to be followed then there could be a specific amount to be awarded for a particular injury. He submits that it is a basic principle that a limb has no price tag.

It is necessary at this stage to repeat what has oft been said that each case must be decided on its facts without losing sight of comparable cases. It is also worth noting that it is difficult to come across two cases that are in all fours. Essentially, comparable cases are primarily there to offer guidance. That is why the court has to assess the extent of injuries. In **Bay Passenger Transport Ltd v Franzen** 1975 (1) SA 269 (A) at p274 the Court summarised the proper approach to be followed as follows:

"Comparable cases, when available, should rather be used to afford some guidance in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous and broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. All the same time it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and the sequelae may have been either more serious or less than those in the case under consideration."

In this case, on the fracture of the malleolus bone (left ankle), Mr Mussa cited the case of **Filison Willard Vs Benjamin Chipeta and Another**. The court awarded K6,800,000.00; it was a global award incapable of analysis. I, however, agree with Mr Kalua that the injuries in that case were much, much more pronounced than they are in this case. I have already said that I am aware that there were other injuries in this case apart from the fracture *to wit* soft tissue injuries. The next case cited by counsel for the claimant is **Louis Chakwantha v Prime Insurance Company Limited**. There, MK6,150,000.00 was awarded on 10th August, 2012 for a fracture of the left fibula and various other soft tissue injuries. Somehow, I do not agree with the defendant that this case is not comparable in the circumstances. Counsel for the defendant

referred to **Chitimbe v Malamba and Others** where claimant was awarded K3,500,000.00 in October, 2018. The claimant had sustained a fracture of the ankle which needed a number of surgeries and was hospitalized for a period of 41 days twice and was in three P.O.Ps. I agree with Mr. Kalua that the injuries were far more serious in this case than in the case herein. Looking back in retrospect, I would say that was a very conservative award. I would find it difficult to apply it today. The same applies to the other case referred to by counsel for the defendants.

Upon a thorough consideration of facts and circumstances of this case, and upon an exhaustive consideration of the submissions by the both counsel in the light of the relevant and applicable law regarding damages for pain and suffering, I award the claimant **K4,500,000.00** under these heads.

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 12th DAY OF JULY 2021


WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR