



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



CIVIL CAUSE NUMBER 922 OF 2019

BETWEEN:

ELISON MALAKI MPOKONYOLA (Suing Through
 MALAKI MPOKONYOLA, litigation guardian).....1ST CLAIMANT
 MALAKI MPOKONYOLA.....2ND CLAIMANT

AND

MABVUTO CHIWALE.....1ST DEFENDANT
 PRIME INSURANCE COMPANY LIMITED.....2ND DEFENDANT

CORAM: KAPASWICHE : ASSISTANT REGISTRAR (AR)

Kambalame : Counsel for the Claimant

Kapinda : Counsel for the second defendant

Zude : Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

BACKGROUND

This is a claim for damages for pain and suffering; loss of amenities of life; disfigurement; damages for future nursing care, damages for loss of earnings and earning capacity and special damages for

cost of police and medical reports. This assessment of damages follows the entering of a summary judgment on the 27th day of March 2020. The application was supported by a witness statement deponed by the 2nd claimant who also happens to be the litigation guardian of the 1st claimant. Skeleton arguments were also filled and the claimants in essence are claiming a total of MK33, 037, 000.00 as total compensation for all the heads of the claims.

THE EVIDENCE

There are two witness statements in the present matter; one for the 1st claimant and another for the 2nd claimant both being sworn by the 2nd claimant as he is the father as well as the litigation guardian for the 1st claimant. The accident in question occurred on the 11th day of May 2019 at about 15:00 hours. On the material day, the first defendant was driving motor vehicle Nissan Tilda registration number CK 9895 from the direction of Area 25C going towards Lilongwe TTC along Rea 25 ring road in the city of Lilongwe. The 2nd claimant was a pedal cyclist carrying his son the 1st claimant as a pillion passenger going the same direction. Upon arrival at the housing junction the 1st defendant overtook the claimant and turned left without giving way to the claimant and without even indicating that he was turning left and he was in excessive speed which resulted into a collision.

Following the accident; the 1st claimant sustained a fracture in the right femur, fracture of the right clavicle, painful right knee, bruises on the back, the right chest wall and the head and scars on the affected parts. He was taken to Area 30 health center where he was referred to Kamuzu Central Hospital and was admitted from 11th of May, 2019 to the 3rd day of June 2019. Thereafter, he was treated as an outpatient for a month. The permanent incapacity of the 1st claimant was assessed at 40%. He still has frequent headaches and fever, he still feels pain on his right leg and walks with serious limp and he has a serious deformity on the right leg. He can no longer do household chores and he is no longer going to school due to the injuries suffered. He was a standard 1 pupil at Liwera primary school. A medical report, health passport book and police report were attached as evidence of the injuries suffered by the 1st defendant who was six years old at the material time.

The facts of the accident in relation to the 2nd claimant were the same facts as those stated for the 1st claimant. The only difference is on the injuries suffered by the 2nd claimant. The injuries sustained by the 2nd claimant are painful right forearm, bruises on the right forearm, painful right leg and scars on the affected parts. His permanent incapacity was assessed at 15%. He told this court that he still have pain on his back, legs and right arm. He also has a serious deformity of the right hand small

finger. The 2nd claimant is a farmer and an employee for a Mr. Mussa and earns a salary of MK60, 000 per month and due to the accident he could not work for two months. He attached his medical report as well as police report for this court's appreciation.

ISSUES

The only issue before me is as to what quantum of damages is reasonable to compensate the claimants.

THE LAW ON DAMAGES

The law generally provides that a person who suffers bodily injuries or losses due to the negligence of another is entitled to recover damages. The fundamental principle which underlines the whole law of damages is that the damages to be recovered must, in money terms, be no more and no less than the Plaintiff's actual loss. The principle was laid down in numerous case authorities more particularly by Lord Blackburn in the case of **Livingstone v. Rawyards Coal Company (1880) 4 AC 25** in the following terms:

“ where any injury or loss is to be compensated by damages, in settling a sum of money to be given as damages, you should as nearly as possible get at the sum of money which will put the party who has been injured, or who has suffered loss, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.”

It is a principle of award of damages that the damages must be just, fair and reasonable and the meaning is that damages must not be too excessive and not too moderate as was held in the case of **Warren and another v King and others [1963] 3 ALL ER 521 at page 526**.

Be that as it may, it ought to be borne in mind that it is not possible to quantify damages for pain and suffering, loss of amenities and deformity as claimed in this matter with mathematical precision. As a result, courts use decided cases of comparable nature to arrive at awards. That ensures some degree of consistency and uniformity in cases of a broadly similar nature: See **Wright -vs- British Railways Board [1983] 2 A.C. 773**, and **Kalinda -vs- Attorney General [1992] 15 M.L.R. 170 at p.172**. The comparable awards to be used should be, as nearly as possible, the most recent ones. As such this

court will have recourse to comparable cases to arrive at the appropriate quantum of damages for the plaintiff.

SUBMISSIONS AND ANALYSIS

DAMAGES FOR PAIN AND SUFFERING AND LOSS OF AMENITIES OF LIFE

It is well settled that pain, suffering and loss of amenities of life are three distinct and separate heads of damages. The Supreme Court of Appeal in the case of **City of Blantyre v. Sagawa** [1993] 16 (1) MLR 67 (SCA) distinguished the three heads of damages in the following terms;

‘Pain’ is used to suggest physical experience of pain caused by consequent act upon the injury while ‘suffering’ relates to the mental elements of anxiety, fright, fear of future disability, humiliation, embarrassment, sickness and the like as was held in. On the other hand, loss of amenities of life embraces all that which reduces the plaintiff’s enjoyment of life, his deprivation of amenity whether he is aware of it or not.’

In assessing damages for pain and suffering, the requirement is that the court must consider the pain which a particular plaintiff suffered because the circumstances of the particular plaintiff are bound to have a decisive effect in the assessment of damages as was held in the case of **HQ Chidule v. Medi MSCA CA 12 of 1993**. 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 –they need not be of leisurely nature at all.

DAMAGES FOR DISFIGUREMENT

Damages for disfigurement are awarded for some form of permanent scars or deformity left on the body of the victim as was held in the case of **Tabord v. David Whitehead and Sons (Mw) Ltd**, (1995) 1 MLR 297 (SCA). In the case of **Jumbe and Others v. United Transport (Mal) Limited** [1992] 15 MLR 164, at page 167 (HC) where the court stated as follows;

“.....At the end of the day, however, the Chief Justice had to consider the effect of those injuries on a saleslady. In that regard, therefore, the plaintiff’s situation must be considered in the light of the impression it is going to leave, not only on her suitor or suitors, but others who, for

all sorts of reasons, will be tempted to look at her face. In that regard the injuries she has sustained are likely to be consequential.”

DAMAGES FOR LOSS OF EARNINGS AND EARNING CAPACITY

Loss of earnings is defined as total loss or actual reduction in the income of the claimant as a result of the injury suffered, while loss of earning capacity is the likely or prospective loss or reduction in the income of the claimant as a result of the injury suffered. In **Manda v Malawi Social Action Fund Civil Cause No. 756 of 2003 (unrep)**, the court stated as follows;

“In calculating the loss of earning capacity the courts have evolved a certain method. The amount of loss of earning is calculated by taking the figure of the plaintiff’s present annual earnings less the amount, if any, which he can now earn annually, and multiplying this figure which, while based upon the number of years during which the loss of earning power will last, is discounted so as to allow for the fact that a lump sum will be given now instead of periodic payments over years. The latter figure has come to be known as the multiplier and the former figure, the multiplicand.....Further adjustment however has to be made to the multiplicand and multiplier on account of other factors like inflation the so called contingencies of life and taxation”

Multiplicand

It was submitted that the claimant’s incomes from respective businesses will be used as multiplicand.

Multiplier

The multiplier is the difference between the average life expectancy in Malawi and the age of the claimant.

In the alternative, the recent case of **Lucy Chitsotso Chatayika v Emmanuel Kaludzu and United General Insurance Co. Ltd, Civil Cause No. 1146 of 2016 (unrep)**, the court put life expectancy in Malawi at 61.2 years. In some cases, courts have taken the approach of determining loss of earning capacity in terms of percentage of the plaintiff’s permanent incapacity. In **Makina v Sammy’s Transport Ltd and another Civil Cause No.89 of 2011 (unrep)**, the plaintiff’s permanent incapacity was assessed at 45 percent. The court held that his loss was 45 percent.

SPECIAL DAMAGES

The law provides a distinction between general damages and special damages. General damages are damages that the law will presume to be the direct natural or probable consequence of the action complained of. On the other hand, special damages are damages that the law will not infer from the nature of the cause as was held in the case of **Stros Bucks Aktie Bolag v Hutchinson (1905) AC 515**. The legal requirement is that special damages must be specifically pleaded and must also be strictly proved as was held in the case of **Govati v Manica Freight Services (Mal) Limited [1993] 16(2) MLR 521 (HC)**. A plaintiff claiming special damages must adduce evidence giving satisfactory proof of actual loss that he or she alleges to have incurred. Where documents filled by the plaintiff fail to meet this strict proof then special damages are not awarded as was stated in the case of **Wood Industries Corporation Ltd v Malawi Railways Ltd [1991] 14 MRL 516**.

The proof does not always have to be documentary. The Supreme Court of Appeal in **Knight Frank and another v Steven Aipira Achanje t/a Mvumba Investments MSCA, Civil Appeal No. 38 of 2000 (unrep)** considered the question of proof of special damages. It was held that while documentary evidence might provide the best evidence, the requirement that special damages must be strictly proved does not mean that the plaintiff must always produce receipts or other documentary evidence in support of his case and that there is no rule of law which requires a party to adduce such evidence in order to prove a civil case.

DAMAGES FOR FUTURE NURSING CARE

These damages are awarded on the basis that one is entitled to recover for any care to be provided by someone else as a result of her injuries as was stated in **Donnelly v Joyce [1973] 3 All ER**. Two methods have been employed by courts in calculating this head of damages. The first one is by using the multiplicand/ multiplier method as was the case in **Chibwana v Prime Insurance Co.Ltd Civil Cause No. 1179 of 2009 (unrep)** while the second one is for the court to make a discretionary order. Two cases were cited as examples of comparable awards. The first case was that of **Harawa v Axa Bus Co. Ltd Civil Cause No. 1477 of 2008 (unrep)** where the claimant was unable to do laundry and other household chores, and had to depend on a maid. Her permanent incapacity was assessed at 35 percent and the court awarded a sum of MK500, 000.00 for future nursing care. In **Chifundo Semba**

v Chinsinsi Chaluluma, Personal Injury Cause No. 886 of 2016 (unrep), the claimant required special care provided by the parents or a person employed for the purpose. The claimant also required to be examined regularly by medical person and also needed a special school. The court awarded him MK2, 500,000.00 for future nursing care.

ASSESSMENT OF THE FACTS AND COMPARABLE AWARDS

Both parties made their proposals on what amounts they deem to be reasonable considering the injuries suffered by the claimants in the present case and the comparable awards in cases of similar injuries.

First applicant

As highlighted in the evidence; the injuries suffered by the first claimant were as follows; a fracture in the right femur, fracture of the right clavicle, painful right knee, bruises on the back, the right chest wall and the head and scars on the affected parts. He was taken to Area 30 health center where he was referred to Kamuzu Central Hospital and was admitted from 11th of May, 2019 to the 3rd day of June 2019. Thereafter, he was treated as an outpatient for a month. His permanent incapacity was assessed at 40%. He still has frequent headaches and fever, he still feels pain on his right leg and walks with serious limp and he has a serious deformity on the right leg. He can no longer do household chores and he is no longer going to school due to the injuries suffered. He was a standard 1 pupil at Liwera primary school.

Damages for pain and suffering, loss of amenities of life and disfigurement

The claimant cited a total of six case authorities under this head. I have gone through all the authorities cited but I will only highlight the first three as they are very similar to the injuries suffered by the 1st claimant in the present case. The first one was the case of **Kabambe v. Bakunukize and another Civil Cause No. 1116 of 2015 (unrep)**. In this case, the claimant sustained open fracture of left femur, closed fracture of wrist, serious cut wound on right eye brow and bruises on leg and face. The fractured femur did not heal properly with visible protrusion on fractured site. The leg was shortened by 1.5cm and his permanent incapacity was assessed at 40 percent. He was awarded MK4, 500,000.00 for pain and suffering, MK6, 000,000.00 for loss of amenities of life and MK4, 500,000.00 for disfigurement and the order was made on the 29th September 2017.

The second case was that of **Thokozani Mponda v Thomson Kantukule and another Personal Injury Cause NO. 63 of 2016 (unrep)**. In this case the claimant sustained fracture of the right femur and right

tibia and fibula, fracture metatarsal of the right foot, joint fracture clavicle, sprain of the right shoulder, multiple lacerations on the lip. The claimant was awarded MK7, 500,000.00 for pain and suffering and loss of amenities of life and disfigurement and this order was made on 14th January 2019. The third case is the case of **Jesse Felix v Davie Juma and Prime Insurance Company Limited [2019] MWHC 26**. The claimant sustained a fracture on the right clavicle, dislocation of the right shoulder and tenderness of the left shoulder. The claimant was awarded a total sum of MK4, 800,000.00 for pain and suffering and loss of amenities of life and MK1, 000,000.00 for disfigurement and MK13, 500.00 as special damages and the award in question was made in 2019.

On the basis of the authorities cited, the prayer was that the 1st claimant be awarded a sum of Mk10, 000,000.00 for pain and suffering; MK5, 000,000.00 for loss of amenities of life and MK4, 000, 000 for disfigurement. The defence argued that the amount under this head should be MK2, 000,000.00. They cited two cases in support of their position. The first case was that of **Estery Thomas and another v Prime Insurance Company Limited, Personal Injury Cause No.152 of 2017, HC, Principal Registry (unrep)**. In this case, the second claimant sustained fracture of the femur, soft tissue injuries and general body pains and the court awarded a sum of MK1, 800, 000.00 as damages for pain and suffering, loss of amenities of life and disfigurement. I will not go into the second case cited as the injuries suffered are not comparable to the injuries suffered by the first claimant. It is also my observation that the injuries sustained in the Estery Thomas case are not to the extent of those suffered by the 1st claimant of the present case. The 1st claimant was only six years old at the material time and the injuries included two fractures; one in the right femur and another in the right clavicle. The other injuries were painful right knee, bruises on the back, the right chest wall and the head as well as scars on the affected parts. Having considered all the circumstances of the present case, it is my view that a sum of MK6, 000,000.00 is a reasonable compensation for damages of pain and suffering, loss of amenities of life and disfigurement. I will, therefore, allow a sum of MK6, 000, 000 under this head.

Damages for future nursing care

The claimant still has frequent fever and headaches that still needs regular medical care. The prayer was for an amount of MK4, 000,000.00 as future nursing care. The defence argued that there is no clear evidence justifying the payment of future nursing care and they argued that the court should award a nominal sum of MK300, 000.00 under this head. In my view, damages for future nursing care are payable in the present case. This is because these damages are awarded on the basis that one is entitled to recover for any care to be provided by someone else as a result of her injuries as was

stated in **Donnelly v Joyce [1973] 3 All ER**. Looking at the consequences of the accident on the life of the first claimant; it is very clear that there is a great need for someone to be providing care and support to the first claimant. Considering the precedents cited by the claimant on this head; it is my view that a sum of MK1, 500, 000.00 is reasonable compensation under this head and I allow MK1, 500, 000.00.

Special damages

The claim here is for a sum of MK8, 000. 00 for medical and police report. The defence did not challenge this prayer and I proceed to allow it.

The total allowed for the first claimant is therefore a sum of MK7, 508, 000.00

Second claimant

The injuries suffered by the 2nd claimant were painful right forearm, bruises on the right forearm, painful right leg, bruises on the right leg and scars on the affected parts. He stills feels pain on his back, legs and right arm and he has serious deformity of the small finger of the right hand.

Damages for pain and suffering and disfigurement

The claimant cited three cases as comparable awards in relation to the injuries suffered by the 2nd claimant. I will highlight two of the cases though I have gone through all the three cases cited. The first case was the case of **Albert Kambova v Shadreck Shombe and Prime Insurance Company Limited, Personal Injury cause No. 99 of 2016 (unrep)**. In this case, the claimant sustained bruises and wounds on the left arm, right elbow, both knees and on the head. The claimant was awarded MK3, 313,500.00 in July 2018. The second case was the case of **Andrew v Prime Insurance CO. Ltd, Personal Injury Cause No. 479 of 2012 (unrep)**, the plaintiff suffered soft tissue injuries, multiple bruises and abrasions. He had 10% permanent incapacity. He was awarded MK1, 700, 000.00 for pain and suffering and loss of amenities of life and the order was made on 2nd June 2014. The defence proposed MK400, 000.00. Having considered the injuries suffered by the 2nd claimant and the comparable cases cited, I award a sum of MK2, 500, 000.00 as damages for pain and suffering, loss of amenities of life and disfigurement.

Damages for loss of earnings and earning capacity

The claimant claimed MK3, 024, 000.00 under this head. The defence opposed this prayer and proposed a sum of MK180, 000 as the earning that the second claimant lost for three months that

he was unable to work due to the impact of the accident. It was argued that the assessment of the hospital concluded that the second claimant is able to do manual work and that his body parts affected by the injury are able to function properly as before. It was argued that there is no proof to suggest that he will be disadvantaged on the open labour market. I do agree with the submission of the defence with respect to this head of damages. The only reasonable award under this head is the earnings that the 2nd claimant lost for the three months that he was unable to work. He then resumed his normal work and resumed earning. There is no justification for an award of more than MK180,000.00 in my view. I, hereby, allow an amount of MK180,000.00 under this head.

Special damages

The claim was for a sum of MK5,000.00 as cost for the medical report. The defence did not object and I will allow the said MK5,000.00

Total damages payable to the 2nd claimant comes to MK2,685,000.00

FINDING

In view of the above discussion, this court is of the view that MK7,508,000.00 will be sufficient recompense for all heads of claims made by the 1st claimant while a total sum of MK2,685,000.00 is a reasonable sum to compensate the 2nd claimant. The claimant is further awarded costs of this action.

MADE IN CHAMBERS THIS 26th DAY OF APRIL, 2021



ANTHONY PITILIZANI KAPASWICHE

ASSISTANT REGISTRAR