



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 502 OF 2016

BETWEEN

EMILY KAMBAKADO (Suing on behalf of

DANIEL KAMBAKADO, A minor) CLAIMANT

-AND-

PRIME INSURANCE COMPANY LIMITED DEFENDANT

CORAM: HER HONOUR MRS E BODOLE, ASSISTANT REGISTRAR

Imaan, of Counsel for the Claimant

Mdzikawanda, of Counsel for the Defendants

Mrs. Chilemba, Court Clerk/Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

Introduction

The Claimant brought proceedings against the Defendant claiming damages for pain and suffering loss of amenities of life, disfigurement, special damages, and costs of this action. Judgment on liability was entered for the Claimant on 24th July, 2018. The matter has now come for assessment of damages.

The Evidence

The Claimant brought the proceedings on behalf of her son who is a minor who was aged 7 years at the time of the accident. The matter came for assessment of damages on 29th April, 2021 and the Claimant was the sole witness for the claim. The Defendant did not produce any witness.

The evidence before this Court is that on 29th January, 2016 at about 15:15 hours the when the driver of motor vehicle registration number ZA 1003 Honda pick-up drove the motor vehicle from the direction of Ndirande towards Chimseu. Upon arrival at or around Ndirande market, he hit the Claimant's son who was crossing the road from left to right. The motor vehicle was insured by the Defendant under insurance certificate number 130650072 valid from 4th January, 2016 to 3rd April, 2016.

As a result of the accident, the Claimant's son sustained multiple lacerations on the head, open fracture of the right clavicle and cut wounds on the back and abdomen. He was treated as an out-patient. The Claimant's son experienced pain both at the time of and after the accident.

As a result of the accident, the Claimant's son has significant dwindling academic performance. He could go as low as zero (0) score in class. School teachers even noted that something was not normal comparing to how he was performing before the accident. His academic performance falls in the category of those who need support. Reference was made to his academic report of 14th December, 2018.

The Claimant's son is always losing memory that it does not take long before he forgets what he is told. He is always so protective of his right shoulder as he still feels pain if someone exerts force on his right shoulder. He used to sleep on a bamboo mat (mphasa) but the doctors advised that he is still in pain and she had to procure a mattress for him to sleep on. She was also advised by the doctors not to shout, beat or surprise him in any way as these would further exacerbate his mental status.

During cross-examination, the Claimant stated that she had only tendered one school report and there was no earlier school report for comparison. The school report does not show that he needs support. The medical report shows that the Claimant's son was last taken to the hospital in 2016. She did not have proof that she has been taking him to the hospital from 2016 to-date.

The Claimant is claiming special damages in the sum of K3,000.00 and K10,000.00 for procuring Police and medical reports respectively.

Issue for Determination

The only issue in this matter is the appropriate measure of the quantum of damages that the claimant ought to be awarded in the circumstances.

Applicable Law

In assessing damages for personal injuries, the intention of the Court is to compensate the injured party as nearly as possible as money can do. The principle is to put the Claimant in the position he would have been if he did not suffer the injuries he is claiming damages for - *Halsbury's Laws of England* 3rd Ed. Vol. II p.233 para 400. This principle was further enunciated in *Livingstone v Raywards Coal* [1880] AC 25 at 39 where Lord Blackburn said:

'...where any injury is to be compensated by damages, in settling the sum to be given for reparation 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, in the same position as he would have been in had he not sustained the wrong for which he is now getting his compensation or reparation.'

Such damages are recoverable for both pecuniary and non-pecuniary losses. Pecuniary losses must be specially pleaded and proved while non pecuniary losses are assessed by the Court - *Mary Ntulungwa & 9 Others v Makandi Tea Estate* Personal Injury Cause No 844 of 2012

Damages cannot be quantified in monetary terms by use of mathematical formula but use of experience and looking at awards made in decided cases of similar nature - *Wright v British Railway Board* [1983]2 AC 773. In reaching the final award for damages through looking at similar awards made, the Court considers the time the awards were made and currency devaluation - *Kuntenga and another v Attorney General* Civil Cause No 202 of 2002.

As to claims for personal injuries, damages are always awarded under the headings of pain and suffering, loss of amenities of life and disfigurement.

Pain and Suffering

In damages for pain and suffering, the Court considers the physical experience of the nerves and mental anguish which comes as a result of the injury - *Lemon Banda*

and 19 others v Mota Engil Limited and General Alliance Insurance Limited
Personal Injury Cause Number 178 of 2012. In the *City of Blantyre v Sagawa* 16(1)
MLR the Court stated that:

“Pain is, it is suggested, used to describe the physical pain caused by or consequent upon the injury, while suffering relates to the mental element of anxiety, fear, embarrassment and the like.”

It is clear from the evidence that the Claimant’s son went through a lot of suffering and was in pain. He sustained multiple lacerations on the head, open fracture of the right clavicle and cut wounds on the back and abdomen. He was treated as an out-patient. He experienced pain both at the time of and after the accident.

Loss of Amenities of Life

Loss of amenities is concerned with loss of enjoyment of life. This follows from the fact that human beings enjoy certain activities which may as a result of the injury be curtailed - *Lemon Banda and 19 Others V Mota Engil Limited and General Alliance Insurance Limited* (supra).

It is the Claimant’s evidence that her son has significant dwindling academic performance. He could go as low as zero (0) score in class. School teachers even noted that something was not normal comparing to how he was performing before the accident. His academic performance fails in the category of those who need support. Reference was made to his academic report of 14th December, 2018.

She went on to testify that her son is always losing memory that it does not take long before he forgets what he is told. He is always so protective of his right shoulder as he still feels pain if someone exerts force on his right shoulder. He used to sleep on a bamboo mat (mphasa) but the doctors advised that he is still in pain and she had to procure a mattress for him to sleep on. She was also advised by the doctors not to shout, beat or surprise him in any way as these would further exacerbate his mental status. She, however, testified during cross-examination that she had only tendered one school report and there was no earlier school report for comparison.

This Court is of the view that with the evidence before it, it is difficult to ascertain the mental condition of the Claimant’s son before and after the accident. Moreover, the school report does not show that he needs support. The medical report shows that the Claimant’s son was last taken to the hospital in 2016. She did not have proof

that she has been taking him to the hospital from 2016 to-date. It is also difficult to ascertain his physical condition from 2016 to the time of hearing of this matter.

This Court is of the view that the claim for loss of amenities of life for assessment purposes has not been proved.

Disfigurement

Disfigurement is a limitation either physically or mentally for someone to do what any other person can do without reasonable accommodation. It is concerned with change of looks of the individual. This may be scars, amputations and postures - **Lemon Banda and 19 Others V Mota Engil Limited and General Alliance Insurance Limited** (supra). In *Ching'amba v Deerless Logistics Ltd* Civil Cause No. 2888 of 2007 the Court stated that disfigurement is not a matter to be taken lightly and casually. It is something that one has to live with permanently.

From the discussion above in the loss of amenities claim, this Court is of the view that there is no evidence to show that the Claimant's son has been disfigured.

Award of Damages

In *Javious Enerst v Steven Levison and Prime Insurance Company Ltd* Personal Injury Cause No. 231 of 2015 the Claimant sustained fractured tibia of the left leg, multiple bruises, multiple cuts on the upper and lower extremities and a dislocated shoulder. On 23rd March, 2018, he was awarded a sum of K6,000,000.00 as damages for pain and suffering, loss of amenities of life and disfigurement. In *Shadreck Fuduwick v James Balala Kachepa and NICO General Insurance Company Ltd* Personal Injury Cause No. 639 of 2018 the Claimant sustained right segmental femur fracture with spiral ends 2 degrees, soft tissue injury, bruises, general body pains and headache. He underwent open reduction and internal fixation, application of Plaster of Paris, and clutches to aid him whilst walking. The Claimant was still using clutches to aid him to walk. He was at high risk of developing arthritis. He was always in pain. He was admitted for 21 days and was treated as an out-patient for 6 days. He was awarded a sum of K6,000,000.00 as damages for pain and suffering, loss of amenities of life and disfigurement on 5th August, 2019.

It is clear that the injuries sustained by the Claimants in the above-cited cases are more than the injuries sustained by the Claimant's son in the present case. This

Court, therefore, awards him a sum of K2,500,000.00 as damages for pain and suffering.

Special Damages

Special damages are supposed to be pleaded and proved. There is no evidence to show that the Claimant expended the amount she is claiming for obtaining the medical report. If some money had been spent, that should have been shown to the Court. However, this Court is mindful of the fact that the Claimant had to travel to the hospital from home in order to obtain the medical report. Reasonable compensation for that is fair and just.

She is, therefore, awarded the sum of K4,000.00 as costs for obtaining the medical report and K3,000.00 as costs for obtaining the Police report.

Conclusion

The Claimant is awarded a total sum K2,507,000.00 as damages. She is further awarded costs of the proceedings to be taxed at a later date if not agreed by the parties. Each party is at liberty to appeal to the Supreme Court of Appeal within the requisite time frames.

Pronounced in Court this 4th day of August, 2021 at Blantyre.



EDNA BODOLE (MRS.)

ASSISTANT REGISTRAR