



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NUMBER 599 OF 2020

BETWEEN:

JULIUS KATHUMBA (Minor suing through his father
and litigation guardian FADUWECK KATHUMBA).....CLAIMANT

AND

FANUEL NAPHIMBO.....1ST DEFENDANT

PRIME INSURANCE COMPANY LIMITED.....2ND DEFENDANT

CORAM: WYSON CHAMDIMBA NKHATA (AR)

Mr. Mwantisi- of Counsel for the Claimant

Mr. Tembo – of Counsel for the Defendant

Ms. Chida- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

INTRODUCTION

On 3rd May, 2020, the claimant was hit by a motor vehicle at or near Goliati Trading Centre along the Malowa – Goliati road. Consequent to which, the claimant suffered injury. Through a writ of summons issued on 4th August, 2020, the Claimant commenced this action through his father and litigation guardian claiming damages for pain and suffering, loss of amenities of life, disfigurement and costs of the action. He sued the 1st defendant as the driver of the motor vehicle in question and the 2nd defendant as the insurer of the said vehicle. The issue of liability was settled in favour of the claimant upon the parties' agreement during mediation on 10th March, 2021 before Honourable Justice N'riva. Subsequently, the matter was referred to this court for assessment of damages which I must now consider.

THE EVIDENCE

Through his witness statement that he adopted in court, the Claimant's litigation guardian testified that as a result of the accident, his son lost consciousness, had deep bleeding cuts over his proximal forehead, bruises over right side of the face and distal forehead, bruised right posterior shoulder, bruised left anterior lateral left hip, bruises over left lateral wrist, bruised left elbow both palms and left lateral thigh, bruised both knees on lateral aspects and bruised both feet interiorly and severe head injury. He was taken to St Joseph Nguludi Hospital where he was treated and admitted for four days. He tendered a Medical Report marked "FK 2". He further averred that since the accident his son has nasty scars over his face and most parts of his body, he is deformed, and he is unable to attend school due to his condition.

Viva voce, he added that the child is still not feeling well. He stated that the child is now mental disturbed. He explained that he sometimes stripes off his clothes and walks about naked apart from causing trouble to his friends. He paid MK3,000.00 for the Police Report and MK21,000.00 for the Medical Report. He, therefore, claims damages for pain, suffering and loss of amenities of life, and deformity/disfigurement as well as MK3,000.00 and MK21,000.00 for Police Report and Medical Report respectively.

In cross-examination, he stated that he did not have a medical report to the effect that the child is now mentally disturbed.

Such was the evidence on assessment of damages. I would like to thank 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 damages with exactitude. 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

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.

Loss of amenities of life

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.

Disfigurement

Damages under the head of disfigurement are paid for the change in physical form of a person injured either as a result of the impact of the injury or its treatment, such as 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- see- **Francis Chikoti vs- United General Insurance Company Limited** Personal Injury Cause No. 730 of 2016. Justice Potani (as he was then) in the case of **James Chaika v NICO General Insurance Company Ltd** Civil Cause No. 909 said disfigurement is not a matter to be taken lightly and casually as it is something that one has to permanently live with.

COMPARABLE CASES

In this case, it is stated that the claimant sustained deep bleeding cuts over his proximal forehead and multiple bruises such as over right side of the face, distal forehead, right posterior shoulder, left anterior lateral left hip, over left lateral wrist, left elbow both palms, left lateral thigh, both knees on lateral aspects and both feet interiorly and severe head injury. It is also stated that he lost consciousness during the accident. 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:

- **Nelson Dinyero v Frazio Biziwello & Nico General Insurance Company Limited**, Personal Injury Case No. 192 of 2018, in which the Claimant sustained a deep cut wound on the right knee exposing the patella, abrasion on the right thigh, scar formation and pain in the joints. The Claimant was awarded MK6,500,000.00. The award was made on 9th March, 2020.
- **Taona Violet Msiska v Madalitso Banda and Consolidated Mining Industries** Civil Cause Number 178 of 2016, in which the Claimant sustained a large cut on the right leg and above the right knee where some nerves were cut off and the bone exposed, ear lobe was cut off, multiple wounds on the face, and headaches and bodily pains. The Claimant was awarded MK5,800,000.00. The award was made on 3rd June, 2018.
- **Austin Yohane v Felix Kanthalo and Prime Insurance Company Limited**, Personal Injury Cause No. 512 of 2014, in which the Claimant sustained a displaced hip, dislocation on the right ankle joint, lacerations from above to the lower side of the ankle joint, a cut on the right thumb and could not stand for long. He was awarded MK5,505,500.00. The award was made on 11th May, 2018
- **Shira Fombe v Justin Majiya & General Alliance Insurance Company Limited**, Personal Injury Case Number 692 of 2019, in which the Claimant sustained a fracture of the right foot, lost toe nails on the right foot and sustained bruises. She was awarded MK6,803,000.00. The award was made on 31st March, 2020.
- **Zuze Bonjesi v Prime Insurance Company Limited**, Civil Cause No. 488 of 2011, in which the Claimant was awarded MK7,000,000.00 for a fracture of the left tibia and deep cut wound on the right leg. The award was made on 17th July, 2012.
- **Louise Chakwantha v Prime Insurance Company Limited**, Civil Cause No. 461 of 2011, in which the Claimant was awarded MK6,150,000.00 for damages for personal injuries. The Claimant sustained fracture of the left fibula, multiple soft tissue injuries and swollen leg. The award was made on 10th August 2012.
- **Rex Walala v Davison Chikuta and Prime Insurance Company Limited**, Civil Cause No. 461 of 2011, in which the Claimant was awarded MK6,500,000.00 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.

In view of the foregoing, Counsel representing the Claimant prays for the award of M10,000,000.00 for damages for pain, suffering and loss of amenities of life and for disfigurement.

DETERMINATION

In making assessment, I begin by pointing out that injuries that have been proved include a deep cut wound on the forehead and various bruises all over the claimant's body. The court had an advantage of seeing the pictures that were taken during the claimant's recuperation and to physically see the scars on the forehead and other parts of the body parts. It is the alleged issue of mental disturbance that the court is ready to discount. It is stated that the claimant sometimes stripes off his clothes and walks about naked. In my considered opinion, this is a serious situation that the father ought to have sought medical assistance which could have in turn been tendered as part of evidence. The omission makes it hard if not impossible for the court to conclude that the claimant is now mentally challenged consequent of the accident herein. Suffice to say, during the hearing the claimant did not strike the court as mentally challenged. He was composed and was able to follow instructions as his father was asking him to show the court the injuries he sustained.

All the same, having considered the nature and extent of the injuries suffered by the claimant, this court finds that he suffered considerable pain and suffering resulting from the accident and the treatment he received. It is quite evident that the injuries also affected him in a number of ways. In his testimony, he indicates that he was not able to go to school due to the injuries. On disfigurement, while it is not extreme, I take note that he is young and is to live for the larger part of his life, everything held constant, with an obnoxious scar printed over his forehead, a rather conspicuous place so to say.

Counsel representing the claimant has cited several cases for comparative purposes. Some of the cases cited did not provide viable guidance considering that they involved at least a fracture and other soft tissue injuries which is not the case in this matter. Such cases are the **Shira Fombe case**, **Zuze Bonjesi, Rex Walala case**, and the **Louise Chakwantha case**. The court takes note that the cases of **Taona Violet Msiska** and that of **Nelson Dinyero** are much closer in comparison even though they have aggravating elements like an exposed patella in one and cut off nerves in the other. Observably, they all indicate awards bordering at K5,500,000.00 and they are quite recent having been decided in 2020 and 2018 respectively.

Thus, upon a thorough consideration of facts and circumstances of this case, and upon an exhaustive consideration of the submissions by Counsel for the claimant in the light of the relevant and applicable law regarding damages for personal injuries, I award the claimant **K5,500,000.00** under the heads claimed and proved.

Special damages

It has been submitted on behalf of the claimant that there were costs incurred in procuring the Police Report and the Medical Report being MWK3,000.00 and MWK21,000.00 respectively. These are special damages. It is trite that according to an established practice, they must be strictly proved. The court takes note that the Police Report which was tendered carries an endorsement that it was paid for and indicates that a receipt was issued. However, there is nothing to that effect pertaining to the medical report and neither was a receipt tendered to prove that it was paid for. I therefore award **K3,000.00** for the Police Report.

CONCLUSION

In total, the claimant is awarded **K5,503,000.00** as damages in this case. However, it was conceded that the policy limit of K5,000,000.00 was pleaded by the 2nd defendant. Such being the case, the extent of the 2nd defendant's liability on damages in this matter shall be limited to the same. 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 2ND DAY OF AUGUST 2021


WYSON CHAMDIMA NKHATA

ASSISTANT REGISTRAR