



REPUBLIC OF MALAWI  
**IN THE HIGH COURT OF MALAWI**  
PRINCIPAL REGISTRY  
**CIVIL CAUSE NUMBER 115 OF 2020**

**BETWEEN:**

MALITA BILLY.....CLAIMANT

**AND**

THE ATTORNEY GENERAL.....DEFENDANT

**CORAM: WYSON CHAMDIMBA NKHATA (AR)**

Mr. Ndhlovu- of Counsel for the Claimant

Ms. Chida- Court Clerk and Official Interpreter

**ORDER ON ASSESSMENT OF DAMAGES**

*INTRODUCTION*

Through a writ of summons, the Claimant commenced this action claiming aggravated damages for medical negligence of the defendant's servants or agents, damages for pain and suffering, damages for loss of amenities of life and costs of the action. Basically, the action emanates from a wrong diagnosis in which the claimant is found HIV positive and introduced to ARV treatment. She claims that consequent to this, she suffered itching eyes that turned red, dizziness, unnecessary rising body temperatures and change in skin from dark to darker. 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 suffered. This is the court's order thereto.

## *THE EVIDENCE*

When the matter for hearing on assessment of damages, the claimant was the sole witness for her case. The defendants did not attend trial. There being evidence that they had been duly served and no excuse for their failure to attend, the court proceeded to hear the claimant. Through her sworn statement the claimant testified that during the month of February 2017, she visited the antenatal clinic at Chimembe Health Centre in Blantyre, where the medical personnel acting in the course of their employment, advised her to undergo an HIV/AIDS test. After being tested, the claimant was found HIV negative. When she went again to Chimembe Clinic in May 2017, she was asked to undergo another HIV/AIDS test and she was found HIV positive. The claimant's blood samples were sent to Queen Elizabeth Central Hospital for screening. She was advised to be taking ARVs while waiting for the blood samples. On 3<sup>rd</sup> August 2017, when she went to Chimembe Clinic for further checkups, she was told that her results from Queen Elizabeth Central Hospital were found that she was HIV negative and she was advised to stop taking ARVs. The effects have now cleared following the discontinuation of the administration of the medicine.

Such was the evidence on assessment of damages. I would like to thank counsel for the claimant 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 uncontroverted evidence indicates that the claimant suffered itching eyes that turned red, dizziness, unnecessary rising body temperatures and change in skin from dark to darker. She still complains that the side effects are still coming forth to this day. In awarding damages for pain and suffering and loss of amenities of life, Counsel representing the claimant calls upon the court to consider the following cases:

- **Vaz v. Attorney General** Civil Cause No. 563 of 2004, in which the claimant was awarded the total sum of K3,400,000.00 for injuries that she suffered as a result of the professional negligence that she suffered in the hands of medical doctors at Machinga District Hospital. The award was made in September 2005
- **Chibwana v. Prime Insurance Company Limited** Civil Cause No. 1179 of 2009 in which an award of K6,500,000.00 was made for a cut wound on the left elbow that was not healing properly and severe head injuries. Hospitalized for 2 months out of which in a coma for 2 weeks. Could no longer walk, or sit on her own, mentally disturbed and could not talk. Relieved herself without the control of sphincter muscles and she should could no longer go to school. The award was made on 21 October 2009.

Counsel submits that taking account the nature of the injuries that the claimant suffered, the complications that came about and are still prevalent to this day, it is submitted that the sum of **K8,000,000.00** would be fair, just and reasonable to compensate the claimant for pain and suffering, loss of amenities of life and disfigurement or such other awards as this Honourable Court may deem appropriate in the circumstances.

*DETERMINATION*

It is not in contention that the Claimant was a victim of a false positive, which occurs when the test results indicate positive yet the person is HIV negative. The issue of liability having been settled through a default judgment, I will endeavor to focus on the losses suffered and proved consequent of the treatment she was introduced to. The defendants having failed to pitch up for hearing on assessment of damages, I will take it that the claimant suffered itching eyes that turned red, dizziness, unnecessary rising body temperatures and change in skin from dark to darker. Apparently, the effects have now cleared following the discontinuation of the administration of the medicine.

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 **K3,500,000.00** 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 21<sup>st</sup> DAY OF JUNE 2021

  
**WYSON CHANDIMBA NKHATA**

ASSISTANT REGISTRAR