



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NUMBER 499 OF 2018

BETWEEN:

MATHEWS MALINDA (Minor suing through
MARTIN MALINDA, next friend).....CLAIMANT

AND

MOSES TAMBULA.....1ST DEFENDANT
PRIME INSURANCE COMPANY LIMITED.....2ND DEFENDANT

CORAM: WYSON CHAMDIMBA NKHATA (AR)

Mr. Phiri- 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, 16th June, 2018, the claimant was hit by a motor vehicle registration number NU9974 Toyota Hiace at or near Thondwe Trading Centre along the Zomba-Blantyre road as he was crossing the road from the right to the left. Consequent to which, the claimant suffered injury. Through a writ of summons issued on 22nd August, 2018, 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 by consent executed by the parties on 22nd July, 2021. Subsequently, the matter was referred to this court for assessment of damages which I must now consider.

THE EVIDENCE

The Claimant paraded his next friend as his witness. He tendered and adopted his witness statement in which he stated that on or about the 11th day of June, 2018, the Claimant was involved in a road traffic accident at or near Thondwe Trading Centre. As a result of the accident, the Claimant suffered the following injuries: fractured left tibia; fractured left fibula; fractured four teeth; traumatised eyes; blindness on both eyes; bruises at the back; bruises in the head; and bruises on the face. The Claimant was attended to and treated at Zomba Central Hospital. As a result of the injuries, he suffered the following loss and damage: excessive pain and suffering; 30% permanent incapacity; had to undergo POP application; had to endure and undergo iodine dressing; he has arthritis and was admitted in the hospital for 2 months. The Claimant took these proceedings against the Defendants in order to be compensated for the injuries, loss and damages he suffered due to the said road accident. There was no cross examination.

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 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, the uncontroverted evidence indicates that the claimant sustained a fractured left tibia; fractured left fibula; fractured four teeth; traumatised eyes; blindness on both eyes; bruises at the back; bruises in the head; and bruises on the face. 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:

- **Annie Vitalio Keliassi (Female) vs. Richard Kapinga and General Alliance Insurance Company Limited** Personal Injury Cause Number 137 of 2013, in which the plaintiff suffered moderate head injury, lost two upper teeth, oblique fracture of proximal tibia and fibula of the right leg, bruises of the knee joint and left elbow joint; facial swelling as well as severe deformation of the right leg. The court awarded her MK4,000,000.00 as damages for pain and suffering and loss of amenities of life and also disfigurement. The award was made on 19th March 2014.
- **Luciano Chipapi vs. Jimmy Napulu & Prime Insurance Company Limited** Personal Injuries Cause number 117 of 2014, in which the plaintiff suffered fractured left shoulder, fractured ribs,

dislocated arm, painful leg, soft tissue injuries and loss of memory as damages for pain and suffering and disfigurement. The claimant was awarded MK3,213,500.00.

- **Gerson Lemson vs. Ali Abdul Nur and Prime Insurance Company Limited** Civil Cause 846 of 2009, in which the Plaintiff suffered fracture on the right femur proximal to the hip joint and leg length discrepancy, the court awarded him MK1,604,500.00 as damages for pain and suffering, loss of amenities of life and for his disfigurement. The award was made on 24th March 2014.
- **Ethel Duncan and Joseph Kamadzi & Others vs. Prime Insurance Company Limited and W.B Mputa** Civil Cause Number 2016 of 2010, in which the Plaintiff suffered a fractured humerus, mild head injury and multiple bruises, the court awarded him MK4,784,500.00 as damages for pain and suffering and loss of amenities of life. The award was made on the 28th July 2012.
- **Austin Julius vs. Rasika Gunawardena & General Alliance Insurance Limited** Personal Injuries Cause Number 316 of 2014, wherein the court categorically emphasized the need for the courts to make a special award for disfigurement. The court in that case in awarding K700,000.00 for disfigurement stated that disability is a limitation to do certain things It is therefore imperative that disfigurement which is consequent to a wrongful act of another has to be compensated.

In view of the foregoing, Counsel representing the Claimant submits that the injuries in this present matter are more severe to the ones sustained in the comparable cases. Taking into account the devaluation of the Kwacha and the lapse of time since the awarding of the damages above, Counsel proposes that the award of MK25,000,000.00 would adequately compensate the plaintiff for pain and suffering, loss of amenities and disfigurement.

On the other hand, the 2nd defendant while acknowledging that the claimant suffered severe injuries to the extent of losing his sight, move the court to consider allowing the 2nd defendant to discharge its liability by paying up to the policy limit being K5,000,000.00. Counsel invites the court to have recourse to the case of **Chikwatu v Pearl Assurance Co. Ltd [1994] MLR 31 in which J. Tembo** at p.34 in which the plaintiff would only be allowed to recover from the insurer any amount not exceeding the amount covered by the policy, for which the person insured is liable to the plaintiff. Further to that, Counsel reminds this court that in the case of **Misheck Chipeta v Stephano Mikele & 2 Others Civil Cause No. 495 of 2017**, this Court discharged an insurance Company from the proceedings on the basis that the policy limit was exhausted.

It is on this background that the 2nd Defendant submits that in as far as it is concerned, it can only pay up MK5,000,000.00 which is the policy limit and the Claimant can claim the difference if any from the 1st Defendant.

DETERMINATION

In making assessment, I begin by pointing out that the injuries are not in dispute. The claimant sustained a fractured left tibia; fractured left fibula; fractured four teeth; traumatised eyes; blindness on both eyes; bruises at the back; bruises in the head; and bruises on the face. In a rare move, the defendants were quick to acknowledge the severity of the injuries and did not even bother to trouble the claimant with cross-examination. The court had an advantage of seeing the claimant in court to appreciate the extent of the injuries first hand. The Claimant lost his sight, apparently, he has developed hearing problems, has difficulties standing for a long time, and suffers memory loss due to the injuries. He has four teeth chipped off. The claimant was only 18 years old at the time of the accident. He is still at the prime of his youth and shall contend with the challenges that the injuries have thrust at him for the better part of his life.

Counsel representing the claimant has cited several cases for comparative purposes. The highest award is K4,000,000.00 made in March 2014. In my opinion, the injuries in the cited cases were not as severe as it is in this case. As such in considering the cited cases, the court ought to consider the gruesome circumstances obtaining in this case as well as the devaluation of the Kwacha. Thus, upon a thorough consideration of facts and circumstances of this case, and upon an exhaustive consideration of the submissions by both Counsel in the light of the relevant and applicable law regarding damages for personal injuries, I award the claimant **K15,000,000.00** under the heads claimed and proved.

Nonetheless, the court takes note of the submission by the 2nd defendant that they be allowed to discharge its liability by paying up to the policy limit being K5,000,000.00. It is trite that a third party can only claim damages from the insurance company to the extent of the policy limit. The law also provides that the rights of a third party cannot be greater than the rights of the insured. During the assessment proceedings, it was conceded on behalf of the claimant that the policy limit is MK5,000,000.00. On the strength of the said concession, the 2nd defendant had to disperse with parading a witness to prove the policy limit. Essentially, that the policy limit stands at MK5,000,000.00 was an agreed issue. I believe it would be unconscionable for the court to find otherwise.

CONCLUSION

The claimant is awarded **K15,000,000.00** as damages under heads claimed and proved. However, it was conceded that the policy limit is K5,000,000.00. 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 at liberty to proceed against the 1st defendant for the difference.

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 10th DAY OF AUGUST 2021



WYSON CHAMBI MRA NKHATA

ASSISTANT REGISTRAR