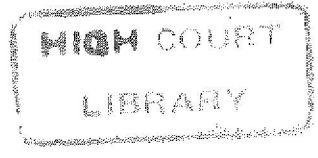


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REPUBLIC OF MALAWI  
**IN THE HIGH COURT OF MALAWI**  
PRINCIPAL REGISTRY  
**PERSONAL INJURY CAUSE NUMBER 147 OF 2020**

**BETWEEN:**

PATRICK NAPOSA.....CLAIMANT

**AND**

FELIX NOTA BANDA.....1<sup>ST</sup> DEFENDANT

PRIME INSURANCE COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT

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

Mr. Madula- of Counsel for the Claimant

Mr. Chisale-of Counsel for the Defendant

Ms. Chida- Court Clerk and Official Interpreter

**ORDER ON ASSESSMENT OF DAMAGES**

*INTRODUCTION*

On, 16<sup>th</sup> November, 2019, the claimant was run over by a motor vehicle registration number CA9182 at or near Zambezi Mission School along Chigwaja road. Consequent to which, the claimant suffered injury. Through a writ of summons issued on 19<sup>th</sup> February, 2020, the Claimant commenced this action claiming damages for pain and suffering, loss of amenities of life and costs of the action. He sued the 1<sup>st</sup> defendant as the driver of the motor vehicle in question and the 2<sup>nd</sup> defendant as the insurer of the said vehicle. The issue of liability was settled in favour of the claimant through a default judgment. 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 testified that after the accident he went to Queen Elizabeth Central Hospital where he was treated and diagnosed. He was admitted for 2 days. Upon being x-rayed and being scanned, the doctors informed him that he sustained a fracture on the right foot hence they had to cast his leg on Plaster of Paris which he had for one month and 2 weeks. He further testifies that as a result of the accident, he sustained a fracture of the third metatarsals of the right foot, painful right foot and 12 % permanent incapacity. In his oral, testimony he added that he cannot walk long distances and that he still feels pain and cannot work anymore.

In cross-examination, he re-iterated that he was treated at Queen Elizabeth Central Hospital. He stated that he was cast of Plaster of Paris for three times. He stated that he was on POP for 6 weeks. He stated that he still goes to the hospital for check-up. He was told to be doing physiotherapy and was given painkillers. He stated that he feels pains when he walks long distances and that he uses crutches. He stated that he did not use them on coming to court. He stated that he had left the x-ray images at home. He stated that he did not expect that they would be needed.

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.

### ***COMPARABLE CASES***

In this case, it is stated that the claimant sustained a fracture of the third metatarsals of the right foot, painful right foot and 12 % permanent incapacity. 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:

- **Atupere Maere (a minor through her uncle and next of friend, Saiti Idana) v Prime Insurance Company Limited**, Personal Injury Case No. 164 of 2011, in which the Claimant sustained a fractured tibia on the left leg, multiple bruises the right leg. The Claimant was awarded MK4,500,000.00. The award was made on 4<sup>th</sup> March, 2014.
- **Wilson Kamwendo v Reunion Insurance Company Limited** 913 of 2010, in which the Claimant sustained a fracture of the femur, fracture of the right knee, general body pains and suffering, loss of amenities of life and deformity. The Claimant was awarded MK5,750,000.00. The award was made on 15<sup>th</sup> May, 2012.
- **Lewis Mtawanga V Jenifer Kamteme & Southern Region Water Board Personal Injury Cause No. 371 OF 2011** in which the claimant suffered a closed fracture of right and left tibia. He was awarded the sum of K5,500,000.00 as damages for loss of amenities of life. The award was made on 3<sup>rd</sup> October, 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.

On the other hand, Counsel representing the defendants cite the following case authorities to be considered in assessing the quantum payable in this matter:

- **Kachisi and Another v United General Insurance Company Limited (Order on Assessment of Damages)** (Personal Injury Cause No. 87 of 2017) [2017] MWHC 134, in which the 1<sup>st</sup> Claimant sustained fractures of the 5th metatarsal, chest injuries, multiple bruises, scars, and severe chest pains. He was treated with painkillers and had plaster of paris applied. The Court awarded K1,850,000.00 as damages for pain and suffering and loss of amenities of life on 14<sup>th</sup> July 2017.
- **Lajabu v Kasitomu and Another** (Personal Injury No. 855 of 2014) [2017] MWHC 73, in which the Claimant sustained an open fracture on the first metatarsal, as well as multiple bruises on the right leg. He had a deep cut wound under his foot, bruises on his leg and a major sprain on top of the right foot. He was treated with painkillers and had plaster of paris applied. He was awarded K1,400,000.00 as damages for pain and suffering and loss of amenities of life on 20<sup>th</sup> June 2017.
- **Nyambo v Prime Insurance Company Limited** (Personal Injury Cause No. 306 of 2018) [2019] MWHC 32, in which the claimant sustained a fracture of the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> metatarsal of the left foot and soft tissue injury. He was treated with painkillers and had plaster of paris applied. The Court awarded K1,750,000.00 on 8<sup>th</sup> January 2019.
- **Paul Chamaza (on his own behalf and on behalf of the dependents of Ivy Chamaza, deceased), Elaon Dzuwa and Chifundo Mnenula v Edward Nyirenda and Prime Insurance Company Limited** Personal Injury Cause Number 383 of 2013 wherein the 3<sup>rd</sup> Claimant sustained multiple bruises on both knees and arms, contusion on the forehead and a sprained right shoulder. His incapacity as assessed at 13%. The court didn't award loss of amenities since there was no evidence to prove that the 3<sup>rd</sup> Claimant was not able to do some activities.

Counsel for the defendants submits that the Claimant has not adduced evidence to support his claim for loss of amenities of life. He, therefore, prays that a sum of MK800,000.00 be awarded to him for pain and suffering.

#### *DETERMINATION*

In making assessment, I begin by pointing out that the claimant claims to have had his foot run over by a vehicle which was being driven by the 1<sup>st</sup> defendant. He testifies that he sustained a fracture of the third metatarsals of the right foot and which exposed him to a painful right foot. Essentially, he wants the court

to believe that he suffered serious injury consequent to the accident herein. The defendants oppose the nature and the extent of the injuries. They submit that the claimant has not proved that he suffered a fracture. Their main contention is that he failed to produce the x-ray documents which he had admitted to be in his possession to prove the suffering of a fracture due to the accident. Further to that, they contend that he failed to bring the Doctor/Medical Officer who treated him or did the x-ray to prove that he sustained a fracture. They argue that the claimants have not proffered any explanation as to the failure to bring the documents or witness. They move the court to conclude that there was never a fracture suffered as a result of the accident herein. Ultimately, they submit that the only injury that should be considered for assessment of damages should be the painful right foot as indicated in the witness statement.

The impression that the court derives from the assertions by the defendants is that the court does not have sufficient material before it to determine the nature and the precise extent of the injuries no other evidence other than the Claimant's testimony having been made available to the Court to prove the existence of a fracture. The question this court ought to grapple with is whether the failure to tender x-ray photos means the claimant has failed to prove that he suffered a fracture. The converse is whether the court cannot rely on a claimant to truthfully attest to the injuries he or she suffered without authentication by a third party. I must begin by stating that there is no doubt that x-rays pictures serve as best evidence in proof of a fracture. However, I am of the considered opinion that the claimant can still prove that he sustained a fracture where the court is convinced that he is a credible witness. In this case, the claimant appeared to be a credible witness from his demeanor and deportment. I believe him on this aspect of his testimony. Observably, the defendants submit that the only injuries to be considered should the painful right foot which emanates from the same witness statement that they would wish to dismiss as hearsay evidence. In my opinion, the claimant frankly and truthfully spoke about the injuries he sustained. It would be unjust to draw an adverse inference from the failure to produce the x-ray documents and/or witness.

Having considered the nature and extent of the claimant's injuries, this court finds that he suffered considerable pain and suffering resulting from the fracture of the metatarsal and the treatment he received. The claimant laments that his foot was cast on POP for six weeks and the same had to be changed three times. It is quite evident that the injuries also affected him in a number of ways considering that his mobility had been affected. Observably, the accident occurred in November 2019, almost two years after the accident the foot is still swollen. One wonders if at he will regain his pre-accident state of being. I have no reason to disbelieve him in his lamentation that he can no longer walk long distances because he feels pain on the foot.

Counsel representing the claimant has cited three cases for comparative purposes. The cases involve at least a fracture being the prominent injury. The awards are bordering at K5,000,000.00 in the said cases

and the latest was decided in the year 2014. They submit that K10,000,000.00 would adequately compensate the claimant for the injuries he suffered. On the other hand, the defendants cite several cases involving a fracture of the metatarsal and the awards are bordering at K1,750,000.00 with the latest having been made in the year 2019. Counsel submits that K800,000.00 would reasonably compensate the claimant in this case. In my considered opinion, the award of K10,000,000.00 is rather on the higher side and K800,000.00 is not in tandem with the principle of *restitutio integrum*. 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 **K4,000,000.00** under the heads claimed and proved.

***Special damages***

It has also been submitted on behalf of the claimant that he be awarded K500,000.00 as special damages. The amount being claimed has not been particularised as to what the actual costs incurred were and neither has any proof of payment for the same been tendered. It goes without saying that the same being special damages, according to an established practice, they must be specifically pleaded and strictly proved. The claimant has done neither. Such being the case, the court makes no award on this part.

***CONCLUSION***

In total, the claimant is awarded **K4,000,000.00** as damages in this case. 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 10<sup>TH</sup> DAY OF AUGUST 2021

  
**WYSON CHAMDIMBA NKHATA**

ASSISTANT REGISTRAR