



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NO. 249 OF 2020

BETWEEN

THOKOZANI BANDA (Minor, suing through ESNART NTOKOMA, next friend..... 1<sup>ST</sup> CLAIMANT

AND

RICHWELL KHAUYA..... 1<sup>ST</sup> DEFENDANT

PRIME INSURANCE CO. LTD ..... 2<sup>ND</sup> DEFENDANT

CORAM: T. Soko, Assistant Registrar

Mr Kanyika, of counsel for the claimant

Mr Chikaonda, of counsel for the defendant

E. Chimang'angae, Court Clerk

### ORDER ON ASSESSMENT OF DAMAGES

The claimant claims for damages for pain and suffering, loss of amenities of life and disfigurement, special damages and costs of the action. The facts aver that on or about the 25<sup>th</sup> day of December 2019, the 1<sup>st</sup> defendant was driving a motor vehicle registration number

NU 9374 Toyota vitz saloon from the direction of Chingeni heading towards Ntcheu. The vehicle was insured by the 2<sup>nd</sup> defendant under insurance certificate number 131837790 valid from 8<sup>th</sup> /11/2019 – 07/11/2020. Upon arrival at or near Balaka Market Trading Centre, the driver of the motor vehicle lost control of it and hit the claimant who was walking on the right hand side of the road from opposite direction. On 20<sup>th</sup> October 2020, a judgment on liability was entered against the defendants.

In evidence next friend Esnart Ntokoma adopted the witness statement where she stated that the claimant sustained a fractured distal tibia, cut wound on the medial aspect exposing bone and swollen and painful right leg. She was attended to and treated at Balaka Hospital. A police and medical report were tendered as part of evidence.

In cross examination, Ntokoma stated that the claimant after being discharged from treated as an outpatient and the last time she had visited the hospital was in January 2021. She stated that the claimant was able to attend school although her leg was not completely healed.

In submissions, Counsel for the claimants submitted that the claimant should be awarded a sum of K6,500,000.00 in all heads of damages. Counsel cited a number of comparable authorities which I will consider later. Counsel for the defendants did not file submissions.

It is a trite law that in Civil Cases the burden of proof rest upon he who asserts the affirmative. The standard of proof is that on balance of probabilities. It was stated in Miller vs Minister of Pension (1942) All ER 372 that the degree is well settled. It must carry a reasonable degree of probability not so high as is required in a criminal case. If the evidence is such that the tribunal can say: We think it more than not, the burden of proof is discharged, but if the probabilities are equal it is not. See Miller vs Minister of Pensions and also Mr Lipenga(Administrator of the Estate of Janet George) vs Prime Insurance Co Ltd Civil Cause No. 2306 of 2004.

The general principle on which damages are assessed is that “damages due either for breach of contract or tort are damages which, so far as money can compensate will give the injured party reparation for the wrongful act.” See Admiralty Commissioners Vs S.S. Valeria (1922) AC 242 at 248.

## **PAIN AND SUFFERING**

It connotes that which is immediately felt upon the nerves and brain, be it directly related to the accident or resulting from medical treatment necessitated by the accident, while suffering includes fright, fear of future disability, humiliation, embarrassment and sickness. See *City of Blantyre vs Sagawa (1993) 16(1) MLR 67 (SCA)*

## **LOSS OF AMENITIES OF LIFE**

Loss of amenities of life is attributed to the deprivation of the claimant's capacity to engage in a past time activity which he formerly enjoyed. It embraces all that which reduces the plaintiff's enjoyment of life, his deprivation of an amenity of life whether he is aware of it or not. See *Kanyoni vs Attorney General (1990) 13 MLR 169 and Blantyre Sagawa (1993) 16(1) MLR 67 (SCA)*.

## **DISFIGUREMENT**

Damages are paid under this head 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 a scar coming in as a result of a surgical operation necessitated by the injury.

In the present matter, I have carefully looked at the evidence presented by the claimant. I have also considered the submissions by Counsel for the claimant and the authorities cited in the submissions. I have found that the claimant sustained an open fracture of distal tibia, swollen and painful right leg and wound on medial aspect of leg exposing bone as stated in the evidence. The wounds were debrided and she was given a painkiller. The degree of incapacity was pegged at 40%. The medical report states that the claimant will have difficulties to participate in sporting activities and even perform household chores. I have considered the case of *Virginia Makiyi vs Tavina Chatchuka and Reunion Insurance Co. Ltd Personal Injuries Cause No. 392 of 2015* where the claimant suffered a fractured left tibia and fibula and multiple bruises on the chest. The Court awarded her a sum of K5,000,000.00 as damages for pain and suffering and loss of amenities of life. The award was made on 6<sup>th</sup> May 2016. In Makiyi case, the degree of incapacity for the claimant was pegged at 30%. The injuries that the claimant sustained in the present matter are more serious than the ones in Makiyi

case. In the light of the foregoing, I award the claimant a sum of K5,500,000.00 in all heads of damages. Special damages were not proved so I decline awarding the special damages.

Costs are for the claimants.

Made on this 19<sup>th</sup> day of April 2021.



**T.Soko**

**Assistant Registrar**