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REPUBLIC OF MALAWI  
**IN THE HIGH COURT OF MALAWI**  
PRINCIPAL REGISTRY  
**PERSONAL INJURY CAUSE NUMBER 166 OF 2021**

**BETWEEN:**

TONNY NTHEMWE.....CLAIMANT

**AND**

RICHARD TEARS.....1<sup>ST</sup> DEFENDANT

ESCOM LIMITED.....2<sup>ND</sup> DEFENDANT

NICO GENERAL INSURANCE COMPANY LIMITED.....3<sup>RD</sup> DEFENDANT

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

Mr. Mzumara- of Counsel for the Claimant

Mr. Chasera-of Counsel for the Defendant

Ms. Chida- Court Clerk and Official Interpreter

**ORDER ON ASSESSMENT OF DAMAGES**

*INTRODUCTION*

The Claimant commenced this action against the Defendants claiming damages for pain and suffering, loss of amenities of life, disfigurement, loss of earning capacity, special damages and costs of the action. Apparently, on 11<sup>th</sup> February, 2021, while heading to Soche, he was hit by a motor vehicle that was being driven by the 1<sup>st</sup> defendant at the material time and he is suing him on that regard. He sued the 2<sup>nd</sup> defendant as the employer of the 1<sup>st</sup> defendant and the 3<sup>rd</sup> defendant is sued as the insurer of the motor vehicle in question. The issue of liability was settled in favour of the claimant during mediation on 25<sup>th</sup> February, 2021 before Honourable Justice Tembo. 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 as a result of the accident, he sustained a fracture of the left clavicle, a fracture of the superior pubic remi, huge wounds on the back, multiple bruises on the right hand, multiple bruises on the ankle, severe pain on the left shoulder, severe pain on the hip, had to use an arm rest support for the fracture of the left clavicle. He was admitted from 11<sup>th</sup> February, 2021 to 12<sup>th</sup> February, 2021 at Queen Elizabeth Central Hospital for treatment. He still goes for check-ups on affected areas and observation. He further avers that his ability to do sports is compromised. He cannot run or walk properly. He cannot stand for long. He was dependable to his family before the accident but not anymore. He has been disfigured with scars on the shoulders, ankle and right hand. In his viva voce testimony, he stated that he comes from Soche East and works at a shop that sales cement. He further stated that he packs cement in motor vehicles of customers and assists customers to pack goods bought from the shop. The Claimant further showed his injuries to the Court through pictures that he had taken when he was injured. The Claimant stated that he stopped working since he cannot carry cement and cannot stand for so long.

In cross-examination, he confirmed that the only injuries he sustained are those contained in the medical report he exhibited in this witness statement. He further confirmed that he only suffered a fracture of the pelvis, a fracture of the left clavicle, cut wound on the right waist, friction wounds on the back, abrasions on the right shoulder and bruises on the right hand and ankle. The Claimant confirmed that the only treatment that he received from the hospital was for wound dressing. He further confirmed that he has not gone for any physiotherapy after being discharged from the hospital.

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.**

### *Pain and suffering*

The word “pain” 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: **Ian Goldrein et al, Personal Injury Litigation, Practice and Precedents** (Butterworths, 1985) and **City of Blantyre vs. Sagawa**: [1993] 16(1) MLR 67 (MSCA). In **Sakonda vs. S.R. Nicholas**: Civil Appeal Cause No. 67 of 2013, it was highlighted that pain and suffering is attributable to the claimant's injury or to any necessary surgical operations and mental anguish.

The fundamental factor in assessing damages for pain and suffering was aptly put by the Supreme Court of Appeal in **Chidule vs. Medi**: Malawi Supreme Court of Appeal, Civil Appeal No. 12 of 1993, to say:

“In assessing damages for pain and suffering, the court must consider the pain which the particular plaintiff has suffered because the circumstances of the particular plaintiff are bound to have a decisive effect in the assessment of damages”.

The implication of the above statement is that, in principle and practice, each case must be dealt with according to its peculiar circumstances.

### *Loss of amenities of Life*

Loss of amenities is attributable to deprivation of the claimant's capacity to engage in some sport or past-time which he/ she formerly enjoyed. Basing on the case of **Kanyoni vs. Attorney General**: [1990] 13 MLR 169. It means that he is incapable of performing some activities he used to do. Damages for loss of amenities of life are therefore awarded for the fact that the plaintiff is simply deprived of the pleasures of life, which amounts to a substantial loss, whether the plaintiff is aware of the loss or not. **Poh Choo vs. Camden and Islington Area Health Authority**: [1979] 2 All ER 91.

### *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, Counsel representing the claimant calls upon the court to consider the following cases for comparison:

- **Horris Jamamusi (a minor through Hellem Martferd, his litigation guardian vs. NICO General Company Limited** Personal Injury Cause No. 304 of 2017 wherein the Claimant sustained fracture of the right shoulder bone, serious cut wound at the back of the head, serious cut wound on the right arm, soft tissue injuries on the affected areas, multiple bruises and general body pains. On 6<sup>th</sup> May, 2020, the court awarded the Claimant the sum of MK5,000,000.00 being damages for pain and suffering.
- **Rita Exton vs. Christopher Emmanuel and Prime Insurance Company Limited** Personal Injury Cause Number 394 of 2015 wherein the Claimant sustained a broken shoulder, collar bone, ribs, cut on the fore head and dislocated knees. On 5<sup>th</sup> March, 20219, the court awarded the Claimant the sum of MK6,500,000.00 as damages for pain, suffering, loss of amenities of life and disfigurement.
- **Zuze Bonjesi vs. Prime Insurance Company Limited, High Court Principal Registry** Civil Cause Number 488 of 2011 wherein the claimant sustained fracture of the left tibia, a big wound exposing the bone, exposing the tendons, a deep cut wounds on both legs. On 17<sup>th</sup> July, 2012, the court awarded Plaintiff the sum of MK7,000,000.00 a damages for pain and suffering.
- **Jack Panganani vs. Real Insurance Company Ltd,** Civil Cause No. 235 of 2012 wherein the claimant suffered a fracture in the leg and had a metal rod in the leg and the degree on incapacity was assessed at 30%. On 21<sup>st</sup> December, 2012, the court awarded the sum of MK7,500,000.00 for pain, suffering and loss of amenities of life.
- **Mavuto Luka vs. Prime Insurance Company Limited** Civil Cause Number 91 of 2013 wherein the claimant suffered a fracture on the right leg, a deep cut wound on the right cheek, a deep cut on the upper lip and other cuts on the lower elbow and right leg. Furthermore, the injuries resulted in serious pains, permanent disfigurement and inability to do some basic chores. His permanent incapacity has been pegged at 30%. On 5<sup>th</sup> July, 2018, the court awarded the claimant the sum of MK8,500,000.00 as damage for pain, suffering, loss of amenities of life and disfigurement.

- **Virginia Makiyi vs. Tapiwa Chatchuka and Reunion Insurance Company Limited** Personal Injury Cause Number 393 of 2015 wherein sustained a wit, fractured left tibia and fibula and multiple bruises on the chest. Her permanent incapacity was 30% and she spent over three weeks in hospital, she was in Plaster of Paris (POP) and an external fixator was applied. On 6<sup>th</sup> May, 2016 the Court awarded the claimant the sum of MK5,000,000.00 as damages for pain and suffering and loss of amenities of life.
- **Davie Owen vs. Jacob Chikoya and Prime Insurance Company Limited** Personal Injury Cause Number 380 of 2015 wherein the claimant sustained two fractures on the right tibia and fibula and left distal. A Plaster of Paris (POP) was applied on the affected areas from 6<sup>th</sup> August, 2014 to 23<sup>rd</sup> September, 2014. On 25<sup>th</sup> March, 2018, the court awarded the claimant the sum of MK5,500,000.00 as damages for pain, suffering and loss of amenities of life.
- **Chairty Luhanga vs. The Attorney General (Malawi Police Service)** Personal Injury Cause Number 146 of 2020 wherein the claimant sustained a fracture of the clavicle, fracture of the ribs and complete paralysis on both legs. On 16<sup>th</sup> October, the court awarded the sum of MK6,000,000.00 as damages for pain and suffering.
- **Kambadya vs. S.D Mango and Others** Personal Injury 708 of 2016 wherein the Claimant sustained a fracture of the left ribs, fracture of the left clavicle, hemothorax and deep cut wound on the right leg. He suffered 30% incapacity due to the injuries. Due to the injuries, the Claimant could not execute manual work and has a deformed left shoulder. On 12<sup>th</sup> November, 2018, the court awarded the claimant the sum of MK6,000,000.00 as damages for pain, suffering, loss of amenities of life and disfigurement.

In view of the foregoing, Counsel representing the Claimant prays for an award of MK10,000,000.00 for damages for pain and suffering and loss of amenities of life and K2,000,000.00 for disfigurement.

On the other hand, Counsel representing the defendants while acknowledging that the Claimant in this case suffered a fracture of the pelvis, a fracture of the left clavicle, cut wound on the right waist, friction wounds on the back, abrasions on the right shoulder and bruises on the right hand and ankle cites the following case for comparison purposes:

- **Grivin Charles Lundu v Prime Insurance Company** Personal Injury Cause No. 903 of 2014 wherein the Claimant sustained a dislocation of the right foot, painful swollen right leg, a deep cut on the right foot, dislocation of the right shoulder, fracture of the right clavicle, deep cut on the

forehead, multiple bruises on both knees and hands. The Court on 22<sup>nd</sup> May, 2017 awarded the Claimant MK2,900,000.00 as damages for pain and suffering, loss of amenities of life and disfigurement.

- **Jesse Felix v Davie Juma and Prime Insurance Company** Personal Injury Cause No. 247 of 2014 wherein the Claimant sustained a fracture on right clavicle, dislocation of the right shoulder, tenderness of the left shoulder and right hand wrapped in bandage for 3 months. The Court on 16<sup>th</sup> January, 2019 awarded the Claimant the sum of MK4,800,000.00 as damages for pain and suffering.
- In **Trifonia Kaisi v Veramo Mukomera & Prime Insurance Company Ltd Personal Injury Cause No. 482 of 2014** wherein the Claimant sustained multiple cuts on the chest, legs and both elbows, sustained bruises on the face, has permanent disfigurement scars and experienced residual shoulder pain. The Court on 9<sup>th</sup> June, 2016 awarded the Claimant MK1,800,000.00 as damages.

Counsel representing the defendant is of the view that MK3,500,000.00 would be enough to compensate the claimant for the damages suffered.

#### *DETERMINATION*

When the matter came for hearing on assessment of damages, the Claimant confirmed that he sustained a fracture of the pelvis, a fracture of the left clavicle, cut wound on the right waist, friction wounds on the back, abrasions on the right shoulder and bruises on the right hand and ankle. There is no doubt that the claimant in this case experienced pain and suffering when sustaining the injuries. He continued suffering pain for some time thereafter and currently still has pain although to a lesser degree. He will live with unsightly scars to various parts of his body since the accident as seen from the pictures that were exhibited in court. In addition, he suffered orthopedic injuries which impacted negatively on his amenities of life. In his lamentation he cannot walk, run and stand for long. This has dealt a massive blow to his way of earning a living which involved loading bags of cement in vehicles. I believe this is an endeavor which demands a steady physic. This court is convinced that he suffered serious injuries attracting a substantial compensation.

In making assessment, this court is aware that an award for a similar injury should be comparable and should, to some extent, be influenced by amounts awarded in previous cases, either in the same or neighbouring jurisdictions. Counsel representing the claimant has cited several cases for comparative

purposes. The cases involve at least a fracture and other soft tissue injuries. Observably, they all indicate awards in the region of K7,000,000.00. The court, however, takes into consideration that the latest of the cited cases was decided in the year 2017. On the other hand, the court takes note of the divergent particulars of injuries and the nature and extent of general damages awarded in the cases cited on behalf of the defendant where fractures are featured. Much closer in intensity of the injuries to the case herein is the case of **Jesse Felix (supra)** in which the court awarded K4,800,000.00 in the year 2019. The court does not lose sight of the passage of time and the devaluation of the Malawi Kwacha. Suffice to say, the amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending on the court's view of what is fair in all the circumstances of the case.

### *CONCLUSION*

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 that this court awards the claimant **K7,000,000.00** under all heads claimed and proved.

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 23<sup>RD</sup> DAY OF AUGUST 2021

  
**WYSON CHAMBUMBA NKHATA**

ASSISTANT REGISTRAR