



REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 917 OF 2016

**BETWEEN:**

YONA HENRY KAMANGAFISI JNR (Suing through  
YONA HENRY KAMANGAFISI SNR, next friend).....CLAIMANT

**AND**

SHADRECK GOLIATI.....1<sup>ST</sup> DEFENDANT  
PRIME INSURANCE COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT

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

Mr. Kanyika- of Counsel for the Claimant

Mr. Zikawanda- of Counsel for the Defendant

Ms. Chida- Court Clerk and Official Interpreter

**ORDER ON ASSESSMENT OF DAMAGES**

**INTRODUCTION**

On 4<sup>th</sup> August, 2016, Yona Henry Kamangafisi Jnr was hit by a motor vehicle registration number NE 6961 which was being driven by the 1<sup>st</sup> defendant from the direction of Balaka heading towards Salima. Apparently, upon arrival at Sanjani Village the 1<sup>st</sup> defendant hit the claimant who was pedal cycling in the process of overtaking him. Consequent to which, the claimant suffered injury. Through a writ of summons issued on the 1<sup>st</sup> of December, 2016, the Claimant commenced this action through a next of friend claiming damages for pain and suffering, loss of amenities of life, disfigurement and costs of the action. He sued the 1<sup>st</sup> defendant as the driver of the said motor vehicle and the 2<sup>nd</sup> defendant as the insurer of the same. The issue of liability was settled in favour of the claimant through a Consent Judgment executed by the parties on the 13<sup>th</sup> of March, 2019. Subsequently, the matter was referred to this court to determine the quantum of damages that would adequately compensate the claimant for the losses he suffered which I must now consider.

## *THE EVIDENCE*

Through his witness statement that he adopted in court, the Claimant's next friend testified that as a result of the accident, he sustained a fractured midshaft tibia and fibula, cuts on the scalp, cuts on the face, deep cut wound on the right knee, deep cut wound on the right shoulder, bruises on the upper lip, bruises on the right foot and painful right shoulder. He was treated at Balaka District Hospital in respect of the injuries he suffered. He exhibits a copy of the Medical Report marked as **YHK1** as evidence of the injuries which he sustained. He further testified that as a result of the said injuries, the minor, Yona Henry Chimangafisi, suffered excessive pain and suffering and 35% permanent incapacity. He testifies that he had to undergo and endure debridement, suturing and iodine dressing of the wounds. He has developed arthritis and can perform manual work with difficulties.

In cross-examination, he confirmed that the accident took place in 2016. He stated that the claimant was feeling well by now. He also stated that when one has a medical problem he goes to the hospital for medical attention. He confirmed that in the absence of medical reports indicating the current wellbeing of the claimant, the court could not appreciate the extent of the suffering. He also stated that he had not brought the x-ray photos to the court because it did not occur to him that they would be needed.

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 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*

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 claimant claims that he sustained fractures, dislocations, body pains and soft tissue injuries. 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:

- **Zuze Bonjesi vs. Prime Insurance Company Limited** Civil Cause Number 488 of 2011, in which the claimant suffered severe open fracture of the left tibia, massive wound exposing the bone and tendons and a deep wound on the right leg, the court awarded him MK7,000,000.00 as damages for the injuries. The award was made on 17<sup>th</sup> July 2012.
- **Chilimbwe Phiri vs. General Alliance Insurance Company** Personal Injury Cause Number 350 of 2012, in which the claimant suffered a fractured tibia and fibula on the right leg, a fracture and dislocation on the left ankle and head injuries. The court awarded him MK7,005,500.00 as

damages for pain and suffering and loss of amenities of life as well as disfigurement. The award was made on 19<sup>th</sup> April 2013.

- **Felista Kachaso vs Peter Kondowe and Another**, Civil Cause Number 320 of 2009, in which the claimant sustained a fractured humerus, fractured tibia and fractured pelvis. The court awarded her MK5,600,000.00 as damages for pain and suffering and loss of amenities of life. The award was made on 16<sup>th</sup> October 2009.
- **Jabes Wyson vs Attorney General and Nico General Insurance Company Limited** Civil Cause Number 843 of 2009, in which the claimant suffered a fracture on proximal right femur, fracture of left midshaft tibia, lost three front teeth and sustained several lacerations, the court awarded him MK6,500,000.00 as damages for shock, pain and suffering and loss of amenities of life. The award was made on 11<sup>th</sup> April 2011.
- **Redson Lucius vs. James Mkandawire and Citizen Insurance Company Limited** Civil Cause Number 2442 of 2010, in which the claimant suffered head injuries and fractures of his right tibia and humerus, the court awarded him MK6,403,416.00 as damages for pain, suffering, loss of amenities of life as well as disfigurement and also for future nursing care. The award was made on 17<sup>th</sup> May 2011.
- **Ibrahim Yassin vs. Kassim Binali and Prime Insurance Company Limited** Personal Injuries Cause Number 240 of 2014, in which the claimant suffered a deep cut wound on his left leg, multiple bruises on his legs, a shoulder dislocation and excessive body pains. The court awarded him the sum of MK2,800,000.00 as damages for pain and suffering and loss of amenities of life. The award was made on 13<sup>th</sup> June 2014.

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

On the other hand, Counsel representing the defendants argues that the claimant has not proved that he sustained a fracture and that he still feels pain. He cites the following cases for comparison purposes:

- **Julita Lombola v. Real Insurance Company Limited, Civil Cause No. 14 of 2010** the Claimant sustained a fracture of the right arm and lost 11 teeth. She was awarded MK1,550,000.00 as damages for pain and suffering and loss of amenities of life.

- **Francis Majawa v. Laurent Chimungu and another, Personal Injury Cause No. 526 of 2017,** the Claimant sustained a fracture of the left arm, bruises cuts and head injury. He was awarded MK2,150,000.00 as damages for pain and suffering and awarded MK1,020,000.00 as damages for loss of amenities of life.

The defendants pray that the Claimant be awarded MK1,000,000.00 as damages for pain and suffering, K500,000.00 as damages for loss of amenities and K200,000.00 as damages for disfigurement in the event that they are awarded.

#### *DETERMINATION*

In making assessment, I begin by pointing out that the evidence indicates that the claimant sustained a fractured midshaft tibia and fibula, cuts on the scalp, cuts on the face, deep cut wound on the right knee, deep cut wound on the right shoulder, bruises on the upper lip, bruises on the right foot and painful right shoulder. However, from the evidence before this Court, Counsel representing the defendants contends that the Claimant has now healed completely as there is no evidence to show the contrary. Further, Counsel points out that the claimant did not tender copies of X-ray scans to show that he sustained a fracture.

The impression that the court derives from the assertions by the defence is that the court does not have sufficient material before it to determine the precise extent of the injuries. The question this court ought to grapple with is whether the failure to tender x-ray photos means the claimant has failed to prove his injuries. 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's next of friend appeared to be a credible witness from his demeanor and deportment. I believe him on this aspect of his testimony. In my opinion, he frankly and truthfully spoke about the injuries the claimant sustained.

Essentially, this court finds that the claimant suffered considerable pain resulting from the accident and the treatment he received. The evidence indicates that the claimant still feels a lot of pain. I take note that the defendants argue that there is no evidence to prove that he still feels pain or that he has a medical problem arising from the accident. Just as the claimant was able to produce evidence that he suffered injury as a result of the accident herein, I believe he was duty bound to show the court that 5 years after the occurrence of the accident he still feels pain. The claimant could have produced Medical Reports detailing subsequent visits to the hospital. Clearly, pain and suffering lingering on after 5 years of the accident cannot simply be ignored just like that. I agree with the defendant that this aspect has not been proved.

Apart from that, the claimant claims damages for disfigurement. However, he did not show the Court any scars or any deformity which arose as a result of the accident. As stated above, disfigurement involves 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. Clearly, these are the telltales marks that the claimant must show in order to advance his or her case on disfigurement. This was not done in this case. I shall consider this in arriving at an award in this case.

Counsel representing the claimant has cited cases involving a fracture and other soft tissue injuries and the awards are bordering at K6,000,000.00 with the latest award having been made in the year 2014. In contrast, for more or less similar injuries, Counsel for the defendant has cited cases whose awards are bordering at K1,500,000.00. Unfortunately, I could not trace the cases for the court to check the years in which the awards were made. Suffice to say, considering the extent of the injuries and the cited cases, this court ought to have made an award bordering at K7,000,000.00. However, I am mindful of some aspects that have not been proved to the court's satisfaction with regard to the requisite standards.

#### *CONCLUSION*

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 **K4,800,000.00** 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 26<sup>th</sup> DAY OF JULY 2021

  
WYSON CHAMIDIMBA NKHATA

ASSISTANT REGISTRAR