



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY**

Civil Cause Number 144 of 2019

BETWEEN:

YOYOLANI KAPINGASA (Suing on his behalf and

On behalf of NEHEMIYA KAPINGASA).....CLAIMANT

AND

THE ATTORNEY GENERAL (Kamuzu Central Hospital).....DEFENDANT

CORAM: C MANDALA: ASSISTANT REGISTRAR

Mkandawire: Counsel for Claimant of Blackstone Chambers

Maulidi: Counsel for the Defendant of the Attorney General's Chambers

C Zude: Court Clerk

ASSESSMENT OF DAMAGES

CM MANDALA, AR:

INTRODUCTION AND BACKGROUND

This is an order for assessment of damages pursuant to a Judgment in Default issued on 9th July 2020. The Defendants are liable for: damages for pain and suffering, damages for loss of amenities of life, damages for disfigurement, and costs of the action. The hearing on Assessment of Damages was conducted on 27th October 2020.

This matter arose from events occurring between 30th March 2018 and 5th April 2018. The Claimant took his son to Kamuzu Central Hospital for a broken arm. A temporary POP was placed on the arm, it eventually started to rot and had to be amputated.

EVIDENCE

The Claimant paraded two witnesses.

The first witness was the Claimant, Yoyolani Kapingasa, who lives at Chilinde 1. He adopted his witness statement as his evidence in chief. It states:

7) *My name is Yoyolani Kapingasa and I am the father and legal guardian of Nehemiya Kapingasa and am suing the Attorney General on his behalf because he is a minor.*

8) *My son Nehemiya Kapingasa was born on 7th September 2009.*

9) *On 29th March 2018 my son Nehemiya Kapingasa was pushed by his friend whilst playing and injured his left arm. On the same day I took him to Kamuzu Central Hospital for treatment.*

10) At Kamuzu Central Hospital, a temporary plaster of Paris (POP) was applied to his arm and the hospital clinician told us to come back on a Monday for a permanent one.

11) On the said Monday I went back to Kamuzu Central Hospital for the appointment and we were told that there were no doctors to attend to my son's injury and we were told to come back the following Friday.

12) Within the same week, I noticed that my son's arm had turned black and had started rotting, and it resulted into him losing the ability to use his arm.

13) On 5th April 2018, I took my son back to Kamuzu Central Hospital where I was told that my son's arm was gangrenous (rotting) and it needed amputation and was advised by the doctor on duty to come back the following day, 6th April 2018, for the operation.

14) On 6th April 2018 I went back to the hospital aforesaid with my son Nehemiya and his arm was indeed amputated above the elbow. Exhibited hereto and marked "YK 1" is a copy of the medical report.

15) My son was left-handed and since the amputation was effected on the left arm above the elbow, it left him with an enormous challenge as he had to learn how to write again using the right hand.

16) In addition, he is facing challenges in lifting objects, bathing and trying to do other things on his own since the amputation.

17) Further he has been disfigured forever and he would face enormous challenges in finding a marriage partner later in his life as a result of this disability occasioned by the negligence of the Defendant.

18) Sometimes he experiences some of the searing pains in the remaining part of the arm which has been the subject of amputation and he is living on pain killers.

19) My son was 9 years old at the time of the amputation and this trauma would be there for the rest of his life. Exhibited hereto and marked "YK 2" is a copy of a health passport book depicting his age.

20) Since the injury my son has never been compensated by the defendant hence I am claiming damages as follows on his behalf:

- a) damages for pain and suffering;
- b) Damages for loss of amenities of life;
- c) Damages for disfigurement; and
- d) Costs of this action.

21) I declare that this statement is true to the best of my knowledge and belief.

Mr Kapingasa told the court that his son is 11 years old. The amputation has really affected the Claimants' lives as Nehemiya cannot help with the farming and finding a relationship might be difficult for him. Nehemiya can no longer do household chores and has to be assisted with bathing. In cross examination, Mr Kapingasa told the court that Nehemiya has persistent pain in the amputated arm. Having explained this to the hospital, he was advised to give Nehemiya an egg and/or a painkiller for the pain to subside. Nehemiya goes to school and is in Standard 3, he was in Standard 2 when the incident happened. He is being taught to write again. He managed to advance classes so he is able to write again. Mr Kapingasa showed concern that his son might not be able to cultivate. He confirmed that people can earn a living outside farming, he could go to school, and get a job that fits his situation. He confirmed his concern that his son might not find a wife, even though he has seen persons with disabilities getting married in his lifetime.

Nehemiah Kapingasa was the second witness. The court conducted a *voire dire* examination and established that, despite his age, Nehemiya knew the distinction between honesty and falsehood and that he appreciated the importance of telling the truth. This is the premise upon which he took oath. Nehemiya told the court that his friends often tease him about his amputated arm. He responds by telling them that their comments are hurtful. He confirmed that his parents bathe him, that he does not farm, and he cannot carry things. He further stated that he does not have enough money for a prosthetic arm to be fitted. His father works as a guard at

Utatu Woyera Church and would have to buy the prosthetic arm in order for his arm to be replaced. In cross examination, he told the Court that he can write at school but with some difficulties.

SUBMISSIONS BY COUNSEL FOR THE CLAIMANT

Counsel for the Claimant filed written submissions in support of the application. Counsel avers that the extremity of the Claimant's injury and the devaluation of the Kwacha would attract a total award of K70,000,000.00 (seventy million kwacha) as compensation. Counsel for the Claimant cited the following comparable awards in support:

- ***Nsona v Lujeri Tea Estates*** – Civil Cause Number 857 of 2015 where the Claimant was awarded K27,000,000.00 for a left arm that was amputated below the elbow. This award was made on 26th May 2018.
- ***Chinsinga v Electricity Supply Corporation of Malawi*** – Personal Injury Cause Number 59 of 2018 where the Claimant was awarded K20,000,000.00 for pain and suffering, K5,000,000.00. for loss of amenities of life, and K5,000,000.00 for deformity and disfigurement, and K10,000,000 for loss of earning capacity. The Claimant in that case sustained burn wounds on the neck which exposed the tendons, serious injuries to the eyes which led to an operation, burn wound son the left earand shoulder. The Claimant was 40 years old and eventually had his left arm amputated.

ASSESSMENT GUIDELINES

Damages for personal injuries are awarded for a Claimant's pecuniary and non-pecuniary losses. The pecuniary losses include the loss of earnings and other gains, which the Claimant would have made had they not been injured, and the medical and other expenses which accrue from care and after-care of the injury. The non-pecuniary losses include pain and suffering, loss of amenities of life and loss of expectation of life. The principle underlining the award of damages is to compensate the injured party as nearly as possible as money can do it.¹

Perfect compensation for a Claimant is unlikely. The Claimant, however, is entitled to fair and adequate compensation.² Since it is difficult to assess damages involving monetary loss, courts resort to awarding conventional figures guided by awards made in similar cases and also taking into account the money value. Lord Morris buttresses this contention in ***West v Shepherd***³ by stating: '*money cannot renew a physical frame that has been battered and shattered. All judges and courts can do is to award a sum which must be regarded as giving reasonable compensation.*'

The mode of assessment of damages requires the court to consider comparative awards of a similar nature. In doing so, regard must be had for fluctuations in the value of the currency. The court should make an award that is commensurate with the value of the currency at the time the award is made. In ***Malamulo Hospital (The Registered Trustees) v Mangani***⁴, the Supreme Court states: "*It is, therefore, recognised by the courts that awards of comparable injuries should be comparable. This is done by looking at previous awards of similar cases and adjusting the award according to the fall of the value of the money.*" In ***Tionge Zuze (a minor, through A.S. Zuze) v Mrs Hilda Chingwalu***,⁵ the Court states: "*Where a claim relates to non-*

¹ See *Cassel and Co v Broom* [1972] AC 1027. See also *Tembo v City of Blantyre and The National Insurance Co Ltd* – Civil Cause No. 1355 of 1994 (unreported).

² *British Commission v Gourley* (1956) AC 185.

³ *West v Shepherd* (1964) AC 326 at 346.

⁴ [1996] MLR 486.

⁵ Quoting from *HQ Chidule v Medi MSCA* 12 of 1993.

*monetary loss in respect of which general damages are recoverable it is not possible to quantify the loss in monetary terms with mathematical precision. In such cases courts use decided cases of a comparable nature to arrive at an award.” In **Steve Kasambwe v SRK Consulting (BT) Limited** Personal Injury Cause Number 322 of 2014 (unreported), the High Court states thus: ‘At times the court is faced with situations where the comparative cases have been rendered obsolete because of the devaluation of currency and inflation. It would not achieve justice if the court insisted on the same level of award as was obtaining in the previous cases. In such situation, when deciding the new cases, the court must take into account the life index, i.e. cost of living and the rate of inflation and the drop-in value of the currency. The court must therefore not necessarily follow the previous awards but award a higher sum than the previous cases.’*

COMPENSATION

The Claimant’s left arm was amputated above the elbow after it became gangrenous.

Pain and Suffering

The word ‘pain’ connotes that which is at once felt upon the nerves and brain, be it related to the accident or resulting from medical treatment needed 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) 8 and **City of Blantyre v Sagawa** [1993] 16 (1) MLR 67 (SCA).

The Claimant herein sustained an injury on his left arm. A POP was applied by Kamuzu Central Hospital and eventually the arm became gangrenous leading to its amputation above the elbow. According to the Claimant’s medical records, he attended the hospital on four occasions for this ordeal: 1) 4th April 2018 for his initial consultation, 2) 6th April 2018 for the amputation, 3) 12th April 2018 for cleaning of the stump, and 4) 6th June 2018 for further consultations.

At the age of 9, the Claimant went through the pain of the fall initially, the pain from application of the POP that eventually became gangrenous, and pain from the amputation and follow ups. Nehemiya is now dependent on pain killers due to the pain he continues to feel. He further has to deal with humiliation, and embarrassment from his friends who tease him about the amputated arm.

Counsel for the Claimant cited comparable awards of K19,000,000.00 for all heads in made in 2018 and K20,000,000.00, for pain and suffering made in 2018. See: **Nsona v Lujeri Tea Estates, and Chinsinga v Electricity Supply Corporation of Malawi** (cited above).

In **Charity Luhanga v Attorney General** - Personal Injury Cause Number 146 of 2020, a 2020 decision, the Claimant was awarded K6,000,000.00 for pain and suffering after losing the use of her legs. Based on these awards, **this court awards the sum of K4,500,000.00 as damages for pain and suffering.**

Loss of Amenities of Life

The expression ‘loss of amenities of life’ simply means loss of faculties of pleasures of life resulting from one’s injuries. Damages for loss of amenities of life are 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. See: **Poh Choo v Camden and Islington Area Health Authority** [1979] 2 All ER 910 and **City of Blantyre v Sagawa** [1993] 16(1) MLR 67 (SCA) at 72.

As a result of this incident, the Claimant is dependent on his parents for everything. He can no longer do household chores, he cannot farm, and cannot bathe himself. The Claimant is of school going age, and he had to re-learn how to write with his right arm since his writing hand is the one that was amputated.

Counsel for the Claimant cited comparable awards of K19,000,000.00 for all heads in made in 2018 and K5,000,000.00, for pain and suffering made in 2018. See: *Nsona v Lujeri Tea Estates, and Chinsinga v Electricity Supply Corporation of Malawi* (cited above).

In *Charity Luhanga v Attorney General* - Personal Injury Cause Number 146 of 2020, a 2020 decision, the Claimant was awarded K2,500,000.00 for loss of amenities of life for losing use of her legs. Based on the foregoing discussion, **this court awards the sum of K2,500,000.00 as damages for loss of amenities of life.**

Disfigurement

In the matter of *James Chaika v NICO General Insurance Co Ltd* the High Court stated that ‘Disfigurement is not a matter to be taken lightly and casually as it is something that one has to permanently live with.’ In *Nyirenda v Moyo and other*, the claimant was awarded the sum of K500,000.00 as damages for disfigurement in 2018.

The Claimant has lost most of his left arm, it was amputated above the elbow. He has had to endure teasing and name calling from his peers at school which has been hurtful for him. Mr Kapingasa further lamented that Nehemiya would find it difficult to find a wife and to engage in farming.

Counsel for the Claimant cited comparable awards of K19,000,000.00 for all heads in made in 2018 and K5,000,000.00, for disfigurement and deformity made in 2018. See: *Nsona v Lujeri Tea Estates, and Chinsinga v Electricity Supply Corporation of Malawi* (cited above). The Court had further recourse to the matter of *Charity Luhanga v Attorney General* - Personal Injury Cause Number 146 of 2020, a 2020 decision, where the Claimant was awarded K3,000,000.00 for disfigurement for being confined to a wheelchair.

Following the sentiments made in the *James Chaika Case* and considering the devaluation of the Kwacha since 2018, the Claimant is hereby awarded K3,000,000.00 as damages for disfigurement.

DISPOSAL

The Claimant is therefore awarded K4,500,000.00 for pain and suffering; K2,500,000.00 for loss of amenities of life; K3,000,000.00 for disfigurement, and costs of the action (to be taxed by the court). **The Claimant's total award is therefore K10,000,000.00 (ten million kwacha).**

Each party is at liberty to appeal to the Supreme Court of Appeal within the requisite time frames. Leave to appeal is hereby granted.

Ordered in Chambers on the 22nd day of January 2021 at the High Court, Lilongwe.

C Mandala

ASSISTANT REGISTRAR