



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

Personal Injury Cause Number 282 of 2018

**BETWEEN:**

**DICKSON MAGOMBO.....CLAIMANT  
AND  
THE ATTORNEY GENERAL (MALAWI POLICE SERVICE).....DEFENDANT**

**CORAM: CM MANDALA: ASSISTANT REGISTRAR**

W Namasala: Counsel for Claimant of Wilberforce Attorneys

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

C Mzude: Court Clerk

**ORDER ON ASSESSMENT OF DAMAGES**

**CM MANDALA, AR:**

**INTRODUCTION AND BACKGROUND**

This is an order for assessment of damages pursuant to a judgment entered by Hon Justice Chinangwa on 7<sup>th</sup> May 2021. In this Judgment, the Defendant was ordered to pay the Claimant damages for pain and suffering, damages for loss of amenities of life, damages for false imprisonment, exemplary and punitive damages, and costs of the action.

The Claimants commenced the present action on 19<sup>th</sup> November 2018 based on events that occurred on 22<sup>nd</sup> June 2018 when the Claimant was arrested at his home in Area 36. The Claimant was in police custody for 1 day and was subjected to torture while in police custody.

**EVIDENCE**

The Claimant adopted their witness statement as part of their evidence in chief. It states:

1. ***THAT*** I am the Claimant in this matter, and I am aged 32 years.
2. ***THAT*** it was on 22<sup>nd</sup> June 2018 at around 6 o'clock in the morning when 2 Police Officers in civilian came knocking on my house in Area 36, Kandikole area.
3. ***THAT*** the two informed me that I was wanted by some people who were parked by the roadside.
4. ***THAT*** by the roadside I was met by 7 other people of whom 4 were police officers, 2 were Asians and a black woman.
5. ***THAT*** I was welcomed by a question from one of the Police Officers who wanted to know if I knew the woman who was with them, and I confirmed knowing her.
6. ***THAT*** I have known the woman as a sister to a friend and at no time have I ever been in any other special relationship with her.

7. **THAT** I was informed by the Police Officers that the woman was arrested in Ntcheu following her escape to that side having stolen money in dollar currency from her employer's residence, an Asian, in area 2 Lilongwe.
8. **THAT** I was further informed that I was being arrested because the woman told them that I was the one keeping the stolen money on her behalf.
9. **THAT** I informed them that I had no idea of the said money, nevertheless, I was taken to Area 3 Police Station where I was beaten in pursuit to have me confess.
10. **THAT** I was beaten three different times for a duration close to 20 minutes each time by the 6 Police Officers who arrested me.
11. **THAT** a stinky, dusty, and dirty sock was stuffed into my mouth to muffle my cry while I was being beaten with boots and burglar bars.
12. **THAT** noting my misfortune while I was in custody, my relatives went to Ntcheu where they brought with them mother to the woman who implicated me. This woman told the Police that the money was being kept by her husband and that I was not involved in any way.
13. **THAT** indeed father to the woman who implicated me came the following day with a bag full of money and as such I was later released that day. Now shown and exhibited to me is a copy of a bail bond marked "DM 1".
14. **THAT** by this time I was in great pains and my relatives, and I insisted that I be referred to the hospital for treatment. For some time, the Police Officers refused to give me the referral letter but reluctantly they did upon being instructed by a senior officer. I was treated at Bwaila District Hospital. Now shown and exhibited me is a copy of a medical report marked "DM 2."
15. **THAT** among the treatment given to me, I was bandaged around the right elbow following a dislocation of bones around that area. I was also given some drugs which I took for two weeks. In addition, I was advised to have a bed rest during the period I was taking medication.
16. **THAT** I was in constant pains, and it took me a month for me to properly recuperate and return to my normal day to day activities.
17. **THAT** as a result of the arrest, I suffered physical pain, emotional distress, and my esteem in society was lowered as I was looked upon as a criminal.
18. **THAT** I believe that I suffered in the manner I did because the Police Officers failed to properly apply their mind as they were guided by self-interest in their desperate attempt to please the Asian complainant rather than to professionally investigate the matter.
19. **THAT** as a result of this lapse in professionalism, I suffered so much physical pain for the assault occasioned by the police officers.
20. **THAT** at assessment I will present myself to Court to testify as to how much pain and suffering I have undergone as a result of the incident.
21. **THAT** I therefore seek damages for pain and suffering; loss of amenities of life; disfigurement, false imprisonment, and exemplary and punitive damages.
22. **THAT** I further aver that I am entitled to costs of this action.

In viva voce, the Claimant explained his ordeal to the Court. At 7am on the day of arrest, the Claimant was guided into room by five police officers. Whilst in the room, the Claimant was told to lie down and was beaten with a burglar bar. As they were beating him, they told him to tell the truth about the money. At 10am, the Claimant was taken again and was told to prepare for the second phase. The Claimant was told to lie down on the floor. This time he was tied with a string and was, again, beat with a burglar on his hands and buttocks by four police officers. At 11, the Claimant was taken to a cell, and beaten a third time. Again, a burglar bar was used. This time, the Claimant was severely beaten on the arm to the extent that the bone on the arm was splintered 'inathetheka' and had to be placed in a cast upon his release. The Claimant could not sit or sleep after the beatings and was in a lot of pain.

In cross examination, the Claimant told the Court that he is a businessperson who sells tyres. The Claimant had his cell phone at the time of his arrest. He confirmed that there were five police officers beating him at a time and he spent one night in police custody. The Claimant confirmed the details in paragraph 11 of his witness statement. The Claimant was released from police custody on 22<sup>nd</sup> June 2018. The Claimant's left elbow was placed in cast. The medical report submitted does not detail the cast. The Claimant explained that he no longer works as he used to. He is back at work after one month of recovery but there is a difference with the way he worked before. The Claimant confirmed that the witness statement clearly states what happened to the Claimant while in police custody.

In re-examination, the Claimant confirmed that he was beaten by different police officers on the three separate occasions. The Claimant was in police custody for two days – he was arrested in the morning, spent one night, and was released the next day, in the evening. The Claimant's arm becomes painful when he works and sometimes swells.

### THE LAW ON ASSESSMENT OF DAMAGES

The High Court in *Ngosi t/a Mzumbamzumba Enterprises v H Amosi Transport Co Ltd* [1992] 15 MLR 370 (HC) set the basis for assessment of damages:

*'Assessment of damages.....presupposes that damages have been proved. The only matter that remains is the amount or value of the damages.'*

The rule is that prior to assessment, the injured party has provided proof of damage sustained – *Yanu-Yanu Co Ltd v Mbewe* (SCA) 11 MLR 405. Even in the face of difficulties in assessing damages, the Plaintiff is not disentitled to compensation – *Mkumuka v Mphande* (HC) 7 MLR 425.

The cardinal principle in awarding damages is '*restitutio in integrum*' which means, in so far as money can do it, the law will endeavour to place the injured person in the same situation as he was before the injury was sustained – *Halsbury's Laws of England* 3<sup>rd</sup> Ed. Vol. II p.233 para 400.

This principle was further enunciated in *Livingstone v Raywards Coal Co* (1880) 5 App Cas 25 at 39, where Lord Blackburn said:

*'...where any injury is to be compensated by damages, in settling the sum to be given for reparation you should as nearly as possible get at the sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been in had he not sustained the wrong for which he is now getting his compensation or reparation.'*

The law distinguishes general damages and special damages as follows – general damages are such as the law will presume to be the direct natural or probable consequence of the action complained of. Special damages, on the other hand, are such as the law will not infer from the nature of the course - *Stros Bucks Aktie Bolag v Hutchinson* (1905) AC 515. In determining the natural consequences, the court considers if the loss is one which any other claimant in a like situation will suffer – *McGregor on Damages* p23 para 1-036.

Special damages must be specifically pleaded and must also be strictly proved - *Govati v Manica Freight Services (Mal) Limited* [1993] 16(2) MLR 521 (HC). A Claimant who claims special damages must therefore adduce evidence or facts which give satisfactory proof of the actual loss he or she alleges to have incurred. Where documents filed by the Plaintiff fail to meet this strict proof then special damages are not awarded – *Wood Industries Corporation Ltd v Malawi Railways Ltd* [1991] 14 MLR 516.

Although perfect compensation is impossible, what the claimant should get is fair and adequate compensation - **British Commission v Gourley** (1956) AC 185. Since it is difficult to assess damages involving monetary loss, courts resort to awarding conventional figures guided by awards made in similar cases and taking into account the money value. Lord Morris buttresses this contention in **West v Shepherd** (1964) AC 326 at 346 where he states: *'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 court bears in mind the sentiments laid out in **Steve Kasambwe v SRK Consulting (BT) Limited** Personal Injury Cause Number 322 of 2014 (unreported):

*'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

### *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) 8 and **City of Blantyre v Sagawa** [1993] 16(1) MLR 67 (SCA).

The Claimant's medical report contains the following observations: *'the aforesaid client was injured while in police cell and has sustained traumatic wounds of lower extremities and sprained elbow joint of left arm limiting his working ability.'* In viva voce, the Claimant explained his ordeal to the Court. At 7am on the day of arrest, the Claimant was guided into room by five police officers. Whilst in the room, the Claimant was told to lie down and was beaten with a burglar bar. As they were beating him, they told him to tell the truth about the money. At 10am, the Claimant was taken again and was told to prepare for the second phase. The Claimant was told to lie down on the floor. This time he was tied with a string and was, again, beat with a burglar on his hands and buttocks by four police officers. At 11, the Claimant was taken to a cell, and beaten a third time. Again, a burglar bar was used. This time, the Claimant was severely beaten on the arm to the extent that the bone on the arm was splintered '*inathetheka*' and had to be placed in a cast upon his release. The Claimant could not sit or sleep after the beatings and was in a lot of pain.

Counsel for the Claimant cited the following awards in support:

- **Austin Yohane v Felix Kanthalo & Prime Insurance Company Limited** Personal Injury Cause Number 512 of 2014 [2018] MWHC 24 where the Claimant was awarded K4,900,000.00 for pain and suffering, loss of amenities of life and disfigurement for a displaced hip at the back, a dislocated ankle joint and lacerations on the leg. The award was made on 11<sup>th</sup> May 2018.
- **Javious Ernest v Steven Levison and Prime Insurance Company Limited** Personal Injury Cause Number 231 of 2015 where the Claimant was awarded K6,000,000.00 for a fractured left tibia, multiple bruises, multiple cuts on the upper and lower extremities and a dislocated shoulder. The award was made on 22<sup>nd</sup> March 2018.

- *Chibwana v Prime Insurance Company Limited* Civil Cause Number 117 of 2009 where the Claimant was awarded K6,500,000.00 for a cut wound on the left elbow and head injuries. The award was made on 21 October 2009.

Counsel for the Defendant cited the following award in support:

- *Malonda v Attorney General* Civil Cause Number 914 of 2019 where the Claimant was awarded K3,500,000.00 for pain and suffering, K1,000,000.00 for loss of amenities of life, and K1,000,000.00 for disfigurement after being shot by a drunk police officer whilst at work.

Counsel for the Claimant cited various awards but the closest to the current facts is the *Chibwana Case* (cited above) The injuries sustained by the Claimant therein a cut wound on the left elbow and head injuries are closest to those sustained by the Claimant herein, namely traumatic wounds of the lower extremities and a dislocated elbow. Counsel for the Defendant cited the Malonda Case where the Claimant was awarded K3,500,000.00 after being shot in the buttock. The injuries sustained by the Claimant herein can be distinguished thus. Based on the extent of the Claimant's injuries and previous awards, this court awards the sum of **K2,000,000.00 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.

The medical report tendered by the Claimant contained the following observation: '*traumatic wounds of lower extremities and sprained elbow joint of left arm limiting his working ability*'. In viva voce, the Claimant explained that the affected arm becomes painful when he works and sometimes swells.

Counsel for the Claimant cited the following award in support:

- *Chibwana v Prime Insurance Company Limited* Civil Cause Number 117 of 2009 where the Claimant was awarded K6,500,000.00 for a cut wound on the left elbow and head injuries. The award was made on 21 October 2009.

Counsel for the Defendant cited the following award in support:

- *Malonda v Attorney General* Civil Cause Number 914 of 2019 where the Claimant was awarded K3,500,000.00 for pain and suffering, K1,000,000.00 for loss of amenities of life, and K1,000,000.00 for disfigurement after being shot by a drunk police officer whilst at work.

The Claimant is a businessperson who sells tyres. The Claimant states that his arm is painful when he works, and sometimes swells which affects his business. It should be noted that this incident occurred in 2018 and considerable time has lapsed since the injuries were sustained. While he has recovered in some respects, the residual pain in the arm shows that his quality of life has been affected. Based on this, this court awards the sum of **K1,000,000.00 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.

Counsel for the Defendant cited the 2020 award in *Malonda v Attorney General* (cited above) where the Claimant was awarded K1,000,000.00 for disfigurement after being shot by a drunk police officer. The Claimant in this case sustained injuries to the lower extremities and a dislocated elbow. Following the sentiments made in the *James Chaika Case* and the award made in *Malonda v Attorney General*, **the Claimant is hereby awarded K1,000,000.00 as damages for disfigurement.**

#### *False Imprisonment*

Damages on a claim for false imprisonment are awarded to a Claimant for loss of dignity, mental suffering and discomfort among others, suffered by the Plaintiff. The court also considers the duration of the incarceration – *Munthali v Attorney General* [1992] 16(2) MLR 646 and *Mausa and Mausua v The Attorney General and Inspector General of Police High Court*, Civil Cause Number 373 of 2003.

As cited above courts resort to awarding conventional figures guided by awards made in similar cases and considering the money value.

Counsel for the Claimant cited the following awards in support:

- *Jacinta Bello v Attorney General* Personal Injury Cause Number 232 of 2016 [2019] MWHC 114 where the Claimant was awarded K4,500,000.00 after spending 4 days in police custody. The award was made on 12<sup>th</sup> August 2019.
- *Shepherd Mumba v Director of Anti-Corruption Bureau* Civil Cause Number 182 of 2015 [2016] where the Claimant was awarded K1,500,000.00 after spending nine and a half hours in police custody The award was made on 25<sup>th</sup> May 2016.

Counsel for the Defendant cited the following awards in support:

- *Chimwemwe Kalua v Attorney General* Civil Cause Number 490 of 2012 where the Claimant was awarded K2,000,000.00 for false imprisonment after spending 7 hours in police custody.
- *Llewelyn Kalua v Attorney General* Civil Cause Number 49 of 2017 where the Claimant was awarded K3,000,000.00 after spending 5 days in a police cell.

It is now settled law that the length of detention (time) is not the only thing that the court considers when assessing damages in matters of false imprisonment. As cited above the court considers injury to liberty – loss of time considered from a non-pecuniary viewpoint, injury to feelings – indignity, mental suffering, disgrace, and humiliation. The Claimant herein was detained for 2 days, over 48 hours. The awards cited by both Counsel range between K1,500,000.00 and K4,500,000.00 for between 7 hours and 5 days in police custody. The Claimant herein spent 2 days in police custody. This court therefore awards the Claimant **K2,000,000.00 as damages for false imprisonment.**

#### *Exemplary and/or Punitive Damages*

Exemplary damages often called punitive damages are awarded when the defendant's wilful acts were malicious, violent, oppressive, fraudulent, wanton or grossly reckless. The purpose of these damages is to punish the defendant for outrageous conduct and/or to reform or deter the defendant and others from engaging in conduct like that which formed the basis of the lawsuit.

Exemplary/Punitive damages ought to be specifically pleaded and proved - *Andrew Mwachunda v Attorney General* Civil Cause Number 1627 of 2003.

The powers and functions of the police are provided under Section 153 of the *Constitution*. It states in part (emphasis provided by the Court):

1. *The Malawi Police Force shall be an independent organ of the executive, which shall be there to **provide for the protection of public safety and the rights of persons in Malawi according to the prescriptions of this Constitution and any other law.***
2. *The Malawi Police Force shall enjoy **only such powers as are necessary for the protection of rights under this Constitution and the maintenance of public safety and public order** in accordance with the prescriptions of this Constitution and the law.*

Additionally, section 4 of the *Police Act* [Cap 13:01] of the Laws of Malawi provides for the general functions of the police service. It states (emphasis provided by Court):

*(1) The Police Service shall be employed in and throughout Malawi for—*

***(a) the prevention, investigation and detection of crime;***

***(b) the apprehension and prosecution of offenders;***

***(c) the preservation of law and order;***

***(d) the protection of life, property, fundamental freedoms and rights of individuals;***

*(e) the due enforcement of all laws with which the Police are directly charged;*

*(f) the exercise or performance of such other powers, functions, and duties as are conferred on the Police by or under this Act or any other written law or as may by law be exercised, performed, or otherwise discharged by the Police.*

Further, section 34 (4) of the *Police Act* provides for the general duties and powers of police officers. It states (emphasis provided by the court):

*(1) Every police officer shall exercise such powers and perform such duties as are conferred or imposed on a police officer by or under this Act or any other written law and as are by law conferred or imposed on police officers.*

*(2) Every police officer shall—*

*(a) obey all lawful directions in respect of the execution of his office which he may from time to time receive from any competent authority;*

*(b) serve, and be willing to serve, at any station to which he may be assigned; and*

*(c) promptly obey and execute all orders and warrants lawfully issued by a competent authority.*

*(3) It shall be the duty of every police officer to—*

*(a) collect and communicate intelligence affecting the functions, powers and duties of the Police;*

*(b) prevent the commission of offences and public nuisances;*

*(c) detect crime and bring offenders to justice; and*

*(d) apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient grounds exist.*

*(4) Every police officer shall be deemed to be on duty at all times and may at any time be detailed for duty in any part of Malawi.*

The Code of Disciplinary Conduct is provided in the schedule of the Police Act. Some of the prescribed offences, quoted for our purposes, against disciplinary conduct are (emphasis provided by the court):

*5. A police officer commits an offence against discipline who—*

*(a) offers or uses unwarrantable personal violence to any person in his custody;*

*(b) ill-uses or ill-treats any person in his custody.*

In the matter of **Thomas Malonda v Attorney General (Malawi Police Service)** Civil Cause Number 914 of 2019 (Assessment of Damages delivered on 1<sup>st</sup> June 2020), this court made observations on the conduct of police officers. The sentiments in that decision are adequately fitting for this matter. The court stated:

*‘One of the leading cases on police use of force is **R v. Cheuka and others** Criminal Case Number 73 of 2008. The case concerned the shooting of a lorry driver in the back during a police chase. The lorry collided with a minibus killing two passengers instantly. There was no evidence that the lorry driver was armed or that he posed a threat to the life of either the police officers or surrounding persons. The police officer responsible for the shooting was found guilty of three counts of manslaughter. This decision considers the limits on the legitimate use of firearms by the police as governed by the Police Act prior to its amendment by Act 12 of 2010, the substantive provisions were unchanged. In the matter of **Achuthan and another (on behalf of Banda and others v Malawi)** (2000) AHRLR 144 (ACHPR 1995), the African Court of Human and Peoples Rights found that shootings by police officers in Malawi are a violation of Article 4 of the African Charter that provides for the right to life.*

*As can be seen, Malawi has a long history of excesses by the Police Service, from a one-party state to the current multiparty dispensation. Successive governments have used the police to fulfil political agendas. In addition, there are constant reports in the news containing accounts of pillage, rape, and outright extortion by police officers. All the while the officers themselves are unaccountable and the police service, as a whole, is unaccountable. These are not acts committed within the course of duty. Investigations into police officer misconduct are hardly ever conducted by the Police Service itself. Accountability has been left to individuals, well-wishers, and non-governmental organisations. Even where there is overwhelming evidence of misconduct, officers are merely transferred to another duty station. Essentially a transfer of the problem so it can rear its ugly head elsewhere, transferring malaise. This is one concern.*

*Where civil suits are concerned, the law requires that the attorney general be the one answerable for acts of government officers, this merely perpetuates unaccountability and malaise in government officers and offices. If public officers were held personally accountable for their wanton recklessness, maliciousness, and oppressive behaviour we might just have a better standard of public officers, an accountable public service, an accountable police service in this case, that does, in fact, ‘provide for the protection of public safety and the rights of persons in Malawi according to the prescriptions of this Constitution and any other law’ – section 153 of the **Constitution**.*



*In the matter at hand, the police officer, through his actions violated numerous constitutional provisions such as the right to life,<sup>1</sup> and the right to human dignity.<sup>2</sup> Not only were Constitutional provisions not upheld but also statutory provisions governing the Malawi Police Service such as Section 44 of the **Police Act** that deems that discharging a firearm without just orders or cause is an offence against discipline. Not only were statutory provisions violated but also international law and standards.’*

In the matter at hand, the Police Officers violated numerous constitutional provisions such as the right to life,<sup>3</sup> the right to human dignity,<sup>4</sup> and the prohibition of torture or any other forms of cruel, inhuman, and degrading treatment or punishment.<sup>5</sup> As well as breaching their own Code of Conduct as provided under the Schedule to the Police Act.

This Court had recourse to Reprieve’s ***Submission to the Accountability for Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Thematic Report of the Special Rapporteur on Torture to GA76 – submitted in May 2021. The relevant parts are quoted thus:***

*‘Torture is prohibited under the Constitution of Malawi<sup>6</sup>, as well as through Malawi’s various international law commitments, including the Convention Against Torture. Malawi’s constitution explicitly incorporates international law prohibitions on cruel, inhuman, and degrading treatment or punishment under section 19(3) of the Constitution, and Articles 7 and 10 of the ICCPR.*

*Despite this, contrary to international law<sup>7</sup> domestic law in Malawi does not explicitly prohibit the imposition of the death penalty in torture-tainted proceedings. Furthermore, evidence obtained through torture is frequently relied upon by prosecutors and judges in criminal matters despite its inherent unreliability and the fact that it is a grave violation of international human rights law<sup>8</sup>. This conflict is facilitated by conflicts in the law, set out below.*

*Section 19(3) of the Constitution of Malawi prohibits the use of torture or cruel, inhuman and degrading treatment or punishment. The standard in Section 19(3) is complemented by Section 44 of the same, which bars the State from derogating from torture or any other forms of cruel, inhuman and degrading treatment or punishment. The Malawian Constitution also prohibits the use of forced confessions under Section 42(2)(c) and protects the right to a fair trial under Section 42(2)(f), which include the right to silence at Section 42(2)(f)(iii) and the right against self-incrimination at Section 42(2)(f)(iv). Malawi further has various international law commitments against the use of torture or cruel, inhuman and degrading treatment or punishment such as the Convention against Torture<sup>9</sup> and the African Charter on Human and Peoples’ Rights<sup>10</sup>.*

*However, notwithstanding the foregoing constitutional and international provisions, Section 176 of the Malawian Criminal Procedure and Evidence Code (CP & EC) currently permits the use of forced confessions as the Courts have interpreted Section 176 as to treat all evidence obtained through torture*

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<sup>1</sup> Section 16 of the Constitution

<sup>2</sup> Section 19 of the Constitution

<sup>3</sup> Section 16 of the Constitution

<sup>4</sup> Section 19 of the Constitution

<sup>5</sup> Section 19 (3) of the Constitution

<sup>6</sup> Section 19 of the Constitution

<sup>7</sup> Article 6(2), International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, entered into force 22 December 1993; Article 15, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, entered into force 11 June 1996.

<sup>8</sup> Supra.

<sup>9</sup> Ratified by Malawi on 11 June 1996, Article 2.

<sup>10</sup> Ratified by Malawi on 17 June 1989, Article 5.

*as admissible, including forced confessions. Malawi therefore does not explicitly prohibit the use of evidence obtained through torture. Prosecutors and judges, despite its inherent unreliability and the fact that it is a grave violation of international human rights law, frequently rely upon the same. Various High Court judgements have interpreted the application of Section 176 differently, and the case law on this provision is inconsistent and contradictory<sup>11</sup>.*

*Another legal challenge in Malawi is the lack of comprehensive provisions addressing torture under the Penal Code of Malawi. The law does not expressly criminalise mental or psychological torture, and it is silent in cases where torture is used to obtain confessions/information.'*

This court finds that the police officers tortured the Claimant intentionally and without cause. Punitive damages are awarded for wilful acts by a defendant that are malicious, violent, oppressive...or grossly reckless. As per ***Rookes v Barnard***, this court finds that the Police Officer's actions were '*oppressive, arbitrary and an unconstitutional action by a servant of the Government.*' This Case can be distinguished from the ***Malonda Case*** (cited above) as in that case, the Police Officer was drunk and shot the Claimant whilst drunk. In this case however, the Claimant was tortured on three different occasions by at least five police officers at a time. The Police Officers herein tortured the Claimant continuously, and in a group, without any of them feeling any remorse and stopping the torture. This court's lamentations in the ***Malonda Case*** still hold true, it is time for police officers to be held personally liable for such gross misconduct, individual police officers should be liable for criminal prosecution, and personal responsibility for the payment of awards of damages such as these. The representative actions against the Attorney General while great in principle, lead to rampant impunity within the police service. Based on this discussion, and the distinction from the ***Malonda Case***, **the Claimant is hereby awarded K30,000,000.00 for exemplary and/or punitive damages.**

#### DISPOSAL

The Claimant is therefore awarded K2,000,000.00 for pain and suffering; K1,000,000.00 for loss of amenities of life; K1,000,000.00 for disfigurement and K30,000,000.00 as exemplary/punitive damages and costs of the action (to be taxed). A total of K34,000,000.00 (thirty-four million kwacha).

Costs of the action will be taxed if not agreed.

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

Ordered in Chambers on the 5<sup>th</sup> day of August 2021 at High Court, Lilongwe Registry.



CM Mandala

**ASSISTANT REGISTRAR**

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<sup>11</sup> See ***The Republic v Chinthiti*** Criminal Case No. 17 of 1997, ***Palitu and Others v Republic*** Criminal Appeal No. 30 of 2001 [2001] MWHC 43 (19 September 2001), ***Thomson Fulaye Bokhobokho and Another v The Republic*** Criminal Appeal No. 10 of 2000 [2001] MWSC 5 (17 October 2001), ***The Republic v Humphrey Elia & Another*** Criminal Case No. 164 of 2018 (2019) MWHC 77 (26 April 2019).