



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

Personal Injury Cause Number 166 of 2021

**BETWEEN:**

**LUCKY NYIRENDA.....CLAIMANT**

**AND**

**AUDNEY KAMTENGANI.....DEFENDANT**

<b>CORAM:</b>	<b>CM MANDALA:</b>	<b>ASSISTANT REGISTRAR</b>
	Hassan:	Counsel for Claimant of Khonyongwa & Associates
	Salima:	Counsel for Defendant of ED Salima & Company
	Mauzauza:	Court Clerk

**ASSESSMENT OF DAMAGES**

**CM MANDALA, AR:**

**INTRODUCTION AND BACKGROUND**

This is an order for assessment of damages pursuant to a Default Judgment entered on 26<sup>th</sup> April 2021. The Defendants are liable for: damages for pain and suffering, damages for loss of amenities of life, damages for disfigurement, costs of obtaining the police and medical report, and costs of the action. The hearing on Assessment of Damages was conducted on 7<sup>th</sup> July 2021.

This matter arose from a road accident that occurred on 23<sup>rd</sup> November 2019 when the Defendant was driving along the Area 25A ring road and hit a motorcycle where the Claimant was a passenger.

**EVIDENCE**

The Claimant presented viva voce evidence to the court where they described the circumstances of the accident and the extent of their injuries. On 22<sup>nd</sup> November 2019, the Claimant was aboard a stationary motorcycle and preparing to start off for their destination. Prior to starting off, a car was driving in their direction, and it swerved off the road and hit the motorcycle that the Claimant was on. As a result of the accident, the Claimant broke their upper leg (right femur) and had more fractures just below the knee. The Claimant's humerus was broken, as well as other chest injuries. The Claimant lost a lot of blood and had to receive four (4) pints of blood at the hospital. The Claimant underwent surgery and tendered x-rays to the Court that showed that a metal rod had been inserted to support the broken limbs, specifically the broken leg. The Claimant's surgery lasted a whole day and the medical practitioners could not work on the broken shoulder due to the length of time the Claimant had been under local anesthetic. The Claimant will have to have additional surgery at Beit Cure Hospital, which was quoted at K500,000 and is not inclusive of hospitalization costs. The Claimant has been attending the Adventist Hospital and Daeyang Luke Hospital for follow-ups. The Claimant also lost a tooth and must see a Dentist. The Claimant requires dentures that costs K480,000. The Claimant is a Clinical Officer by profession but can no longer perform field work and major surgeries. The damaged left hand makes it difficult for the Claimant to perform surgeries. The Claimant adopted their witness statement in support of their viva voce evidence. The Claimant also tendered a police report and medical report as evidence.

In cross examination, the Claimant confirmed that the accident occurred on 22 November 2019, but they arrived at Kamuzu Central Hospital on 23 November 2019 after being referred from Daeyang Luke Hospital. The Claimant further confirmed that the medical report states the injuries as ‘multiple fractures on his right leg’, and cites 23 November 2019, 00:10 hours as the Claimant’s arrival time. The Claimant further confirmed having been treated at multiple hospitals. The initial surgery was conducted at Kamuzu Central Hospital but follow ups have been done at Adventist Hospital where there is a specific surgeon with better care. The Claimant submitted medical reports from the Adventist Hospital as well as Kamuzu Central Hospital. The report states that the Claimant is making progress and getting better. The Claimant confirmed that their situation was improving but not that they would fully recovery. The Claimant did not have quotations for the further treatment although they were initially treated at Kamuzu Central Hospital for free.

### 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.<sup>1</sup>

Perfect compensation for a Claimant is unlikely. The Claimant, however, is entitled to fair and adequate compensation.<sup>2</sup> Since it is difficult to assess damages involving monetary loss, courts resort to awarding conventional figures guided by awards made in similar cases and considering the money value. Lord Morris buttresses this contention in *West v Shepherd*<sup>3</sup> 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*<sup>4</sup>, 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*,<sup>5</sup> the Court states: “Where a claim relates to non-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.’

### 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 loss and the devaluation of the Kwacha would attract awards totalling K15,000,000.00 for pain and suffering, loss of amenities of life, and disfigurement and incapacitation of body parts. Counsel cited the following comparable awards to support their argument:

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<sup>1</sup> 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).

<sup>2</sup> *British Commission v Gourley* (1956) AC 185.

<sup>3</sup> *West v Shepherd* (1964) AC 326 at 346.

<sup>4</sup> [1996] MLR 486.

<sup>5</sup> Quoting from *HQ Chidule v Medi* MSCA 12 of 1993.

- ***Austin Julius v Rasika Gunawardena & General Alliance Insurance Limited*** Personal Injury Cause Number 316 of 2014 where the Claimant was awarded K2,500,000.00 multiple bruises on the right hand, sprained back, right shoulder, left hip, and painful leg. The award was made on 17<sup>th</sup> June 2015.
- ***Stanley Mpakati & Lunde Saizi v Rashid Jonas & Prime Insurance Company Limited*** Personal Injury Cause Number 279 of 2015 where the Claimants was awarded K2,400,000.00 and K2,100,000.00 respectively. The 1<sup>st</sup> Claimant sustained a traumatic deep cut wound, multiple bruises on the chest, sprained right elbow joint, and chest pains. The 2<sup>nd</sup> Claimant sustained a sprained lumbar area, sprained knee joint, sprained right thigh, and sprained right forearm. The award was made on 19<sup>th</sup> June 2015.
- ***Rhoda Samson (minor, suing through Samson Ramsi, next friend) v Besten D Thomson & General Alliance Insurance Limited*** Personal Injury Cause Number 1158 of 2013 where the Claimant was awarded K2,400,000.00 for a sprained right shoulder, and multiple bruises on the face and nose. The award was made on 28<sup>th</sup> April 2015.
- ***Annie Vitalio Keliassi v Richard Kapinga & General Alliance Insurance Company Limited*** Personal Injury Cause Number 137 of 2013 where the Claimant was awarded K4,000,000.00 for a moderate head injury, losing two upper teeth, an oblique fracture of proximal tibia and fibula of the right leg. The award was made on 19<sup>th</sup> March 2014.
- ***Virginia Makiyi v Tawina Chatchuka & Reunion Insurance Company Limited*** Personal Injury Cause Number 1043 of 2015 where the Claimant was awarded K5,000,000.00 for a fractured left tibia and fibula and multiple bruises on the chest. This award was made on 6<sup>th</sup> May 2016.
- ***Frank Vashco v Farook Haquin & Olympic Bakery*** Personal Injury Cause Number 1043 of 2015 where the Claimant was awarded K4,100,000.00 for a deep cut wound on the head, multiple facial bruises, and a cut wound on the right palm. This award was made on 10<sup>th</sup> March 2016.

#### SUBMISSIONS BY COUNSEL FOR THE DEFENDANT

Counsel for the Defendant filed written submissions which will be reproduced.

*‘Starting with pain and suffering, we shall adopt the case of **Austin Julius vs Rasika Gunawardena & General Alliance Insurance Limited**, cited at paragraph 3.1.4. in the Claimant’s skeleton arguments since it has similarities to the present matter. Similarly, we shall also apply the case of **Balekayo Christopher and 2 others vs L. Moyo trading as Supersink Bus Company**, Civil Cause No.161 of 2012 (unrep), where the court awarded a sum of MK2,500,000 damages for pain and suffering and MK500, 000.00 being damages for disfigurement. He had sustained a contusion of both shoulders with greenstick fractures of the clavicles, and other soft tissue injuries. In **Mabaso & Others –v- Kumwenda & Another**-Civil Cause No.242 of 2010 decided on 31<sup>st</sup> October 2012, the Plaintiff suffered multiple bruises and cuts on the right leg. The court awarded MK1, 000, 000.00. However, it will be noted that the injuries in the **Balekayo Christopher** case cannot be compared with the ones in the present case at any level because the injuries before us are less severe. It can only be concluded that the Claimant in the present case deserves a lesser award on this head of damage. We therefore submit that he be awarded **MK1, 500, 000** damages for pain and suffering. The Claimant claims that he is due to go for surgery at Beit Cure Hospital as well as teeth replants at Deeyang Luke Hospital. However, these claims are not supported by any documentary evidence i.e, referral letters and invoices on the possible medical costs to be incurred. Besides, these claims are not supported by the pleadings and therefore must be dismissed.*

*On loss of amenities of life, it can be seen that there is no single evidence to support this head of damage. The Claimant did not adduce evidence as to what he was doing before the accident took place. He did not give evidence as to how much he was earning before the accident took place and what it is that he has actually lost as amenities of life. It must also be noted that during cross examination, the Claimant admitted that he is recovering, and that there are chances he will fully recover as per the medical report. There having been no evidence in support, our submission is that this head of damage must fail.*

*On disfigurement, just as in the claim for loss of amenities of life, our view is that there is no evidence to support this. The Claimant’s witness statement as well as his own verbal testimony did not state as to whether the Claimant has suffered any disfigurement as a result of this accident. Even the Claimant’s skeleton arguments do*

*not explain as to what the nature of the Claimant's disfigurement is. On the authority of the **Hanicoock Bongozo** case cited above, we submit that this claim must fail'*

## 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 herein sustained '*fracture of the right femur and tibia, proximal humerus fracture, lost two upper teeth, wasted quadriceps, chest injury, and right floating knee*' as per the medical report. The medical report further states that the Claimant received the following treatment: '*he was taken to the OR where both right femur and tibia fractures were fixed using the standard SIGN nails. A couple of blocking screws were used on the proximal tibia for nail alignment. Left humeral fracture was managed non operatively*'

The Claimant's Counsel cited various awards ranging between K2,100,000.00 and K2,500,000.00 as an adequate award under this head. Counsel for the Defendant counter proposed the sum of K1,500,000.00.

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.

Counsel for the Claimant cited awards ranging between K4,000,000.00 and K5,000,000.00 as awards under this head. However, Counsel for the Defendant does not agree that the Claimant ought to receive anything under this head for lack of adequate evidence on how much the Claimant was making prior to the accident and what amenities have been lost.

The Claimant tendered a medical report that stated that the Claimant was '*NWB for 6 weeks to protect the fixation but was advised both active and passive ROM exercises of the right hip, knee, and ankle*' – as per the medical report tendered. Further, the Claimant stated in viva voce, that their life has been significantly altered because of the accident. The Claimant is a Clinical Officer by profession but can no longer perform field work and major surgeries. The damaged left hand makes it difficult for the Claimant to perform surgeries.

Based on the foregoing discussion, this court awards the sum of **K3,000,000.00 as damages for loss of amenities of life.**

### *Disfigurement/Deformity and Incapacitation of Body Parts*

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 lost two teeth and has a weakened arm that he cannot use well. Following the sentiments made in the *James Chaika Case* and considering the devaluation of the Kwacha since 2018, the Claimant is hereby awarded **K750,000.00 as damages for disfigurement.**

*Special Damages*

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. 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 Claimant do not meet this strict proof then special damages are not awarded – *Wood Industries Corporation Ltd v Malawi Railways Ltd* [1991] 14 MLR 516 and *Govati v Manica Freight Services (Mal) Limited* [1993] 16(2) MLR 521 (HC).

The Claimant herein was awarded damages being costs of obtaining medical and police reports. Though the Claimant specifically claimed special damages, they were not proved during trial and/or submissions. For these reasons, no award will be made under this head.

DISPOSAL

The Claimant is therefore awarded K2,000,000.00 for pain and suffering; K3,000,000.00 for loss of amenities of life, K750,000 as damages for disfigurement, and K0 as special damages. **The Claimant's total award is therefore K5,750,000.00 (five million seven hundred and fifty thousand kwacha).**

Costs of the action will be assessed by the Registrar if not agreed upon by the parties.

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 2<sup>nd</sup> day of August 2021 at the High Court, Civil Division, Lilongwe.



CM Mandala

**ASSISTANT REGISTRAR**