



**REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CIVIL DIVISION  
Civil Cause Number 557 of 2020**

**BETWEEN:**

**ELIYA PHIRI.....CLAIMANT  
AND  
GIFT MALOYA BANDA.....1<sup>ST</sup> DEFENDANT  
PRIME INSURANCE COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT**

<b>CORAM:</b>	<b>CM MANDALA:</b>	<b>ASSISTANT REGISTRAR</b>
	Kambalame:	Counsel for Claimant of Silungwe Law Consultants
	E Chikwakwa:	Counsel for Defendant of Wilkinson and Associates
	Kumwenda:	Court Clerk

**ASSESSMENT OF DAMAGES**

**CM MANDALA, AR:**

**INTRODUCTION AND BACKGROUND**

This is an order for assessment of damages pursuant to an Order made by this Court, by agreement of the parties, on 8<sup>th</sup> April 2021 entering judgment on liability against both Defendants with 15% contributory negligence to the Claimant. By this order, the 2<sup>nd</sup> Defendant's liability was limited to the sum of K5million in accordance with the insurance policy. The Defendants are liable for: damages for pain and suffering, damages for loss of amenities of life, damages for disfigurement, damages for loss of earnings and earning capacity, K7,500.00 as damages costs of obtaining police and medical reports, and costs of the action. The hearing on Assessment of Damages was conducted on 10<sup>th</sup> June 2021.

This matter arose from a road accident that occurred on 29<sup>th</sup> January 2020 when the 1<sup>st</sup> Defendant was driving along the Nkhotakota-Salima road when he lost control of the motor vehicle and swerved to the far-left dirt verge of the road where he hit the Claimant who was a pedal cyclist on the far-left verge of the road going in the same direction.

**EVIDENCE**

The Claimant adopted their witness statement as their evidence in chief. The relevant parts are reproduced below:

6. *I am Eliya Phiri of Majomeka village, Traditional Authority Mwanza, Salima.*
7. *I am 23 years old.*
8. *I am the Claimant in this action.*
9. *All the statements I make are within my knowledge.*
10. *On or around 21<sup>st</sup> September 2019 at about 06:00 hours I was a pedal cyclist from the direction of Nkhotakota going towards Salima on the far-left dirt verge of the road along the Nkhotakota /Salima*

road. The 1<sup>st</sup> defendant was driving motor vehicle Mitsubishi mini cab going the same direction. Upon arrival at Lingadzi bridge, the 1<sup>st</sup> defendant lost control of the motor vehicle and left the main road and encroached on the far-left dirt verge of the road at excessive speed where he hit me.

11. For further details of the accident, I refer to a copy of the police report that I obtained marked “EP 1”.
12. I was taken to Salima District Hospital where I was admitted for five days. Thereafter, I was treated as an outpatient for ten days.
13. As a result of the accident, I sustained open fracture of the metatarsal on the right foot, bruises on the left knee, bruises on the head, bruises on the left shoulder and serious scars on the right foot, left shoulder and left knee.
14. I still feel pain on my right foot.
15. I can no longer play football as I used to do.
16. I can no walk for a long distance without feeling pain.
17. I can no longer do manual work.
18. I walk with a serious limp when I walk for a long distance.
19. I used to work as a casual labourer at Green Belt Limited. I used to make around MK21, 000.00 per fortnight. I can no longer do the work because of the injuries.
20. My permanent incapacity was assessed at 25%.
21. For further details of the injuries I suffered, I refer to the copy of the medical report and Health Passport marked “EP 2a and EP 2b” respectively.

In cross examination, the Claimant confirmed that the signature on the witness statement was theirs and that it is like the signature on their ID. The Claimant had however lost their National ID. The accident occurred on 19 September 2019 and the Claimant has not been able to trace their ID since then. The Claimant further confirmed that some of the injuries mentioned in paragraph 13 of the witness statement are not stated in their medical report. The Claimant’s health passport only mentions the fractured leg. The doctor did not explain the 25% permanent incapacity stated in the medical report. The Claimant, however, explained that it meant that the Claimant struggles with 25% of the work but can do 75% of the work properly. The Claimant had not brought any evidence to show that they were a casual laborer at the Green Belt Limited and that they made K21,000.00 per fortnight.

In re-examination, the Claimant showed the Court the injuries they sustained – the Court noted a big scar on the right foot, visible scars on the left knee, and shoulder. The Claimant also sustained injuries in the head, but the scars had been covered by hair.

### 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

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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.

*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 K28,700,009.12 for pain and suffering, loss of amenities of life, disfigurement, loss of earning capacity, and police and medical reports. Counsel cited the following comparable awards to support their argument:

- ***Chimwemwe Shaba v Levie Njikhoo and another*** Civil Cause No. 989 of 2018 where the Claimant sustained open fracture of the metatarsal of his left foot and cut wound on his right eyebrow. He was awarded MK5, 000, 000.00 for pain and suffering, loss of amenities of life and MK700, 000.00 for disfigurement on 13<sup>th</sup> February 2019.
- ***Lucy Misomali v Natasha Khomba and another*** Civil Cause No. 596 of 2017 where the Claimant sustained fracture metatarsal of her left ankle. Her leg was put in a plaster of Paris for four weeks. She could no longer walk without the aid of clutches. She was awarded MK5, 000, 000.00 for pain and suffering, loss of amenities of life and MK600, 000.00 for disfigurement on 1<sup>st</sup> July, 2019.
- ***Ronnex Fole v Walitsa Farm*** Personal Injury Cause No. 17 of 2015 (unrep) where the Claimant sustained crush injuries on the left foot and fractured third and fourth metatarsals. He developed septic arthritis and osteomyelitis. His leg was deformed and could not walk without an aid of a walking stick. He could not perform any manual work. He was awarded MK10, 000, 000.00 for the personal injuries on 12<sup>th</sup> November 2015.

#### 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

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

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

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 injuries were explained thus: '*the patient sustained open fracture metatarsal on the right foot and bruises on the left knee*' as per the medical report. The medical report further states that the Claimant received the following treatment: '*debridement under local anesthesia then suturing.*' Further observations were that '*the patient has a big scar on the right foot and left knee. He also experiences pain on the right ankle suggestive of posttraumatic arthritis*'.

Counsel for the Claimant cited two awards of K5,00,000.00 made in 2019 for pain and suffering, and loss of amenities of life – see *Chimwemwe Shaba v Levie Njikho and another* and *Lucy Misomali v Natasha Khomba and another* (cited above). 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 further observations that were as follows: '*the patient... also experiences pain on the right ankle suggestive of posttraumatic arthritis*'. The Claimant's permanent incapacity was pegged at 25% and he explained that he struggles with 25% of the work but can do 75% of the work properly.

Counsel for the Claimant cited two awards of K5,00,000.00 made in 2019 for pain and suffering, and loss of amenities of life – see *Chimwemwe Shaba v Levie Njikho and another* and *Lucy Misomali v Natasha Khomba and another* (cited above). Based on the foregoing discussion, 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.

The medical report tendered by the Claimant contained further observations that were as follows: '*the patient has a big scar on the right foot and left knee*'. In re-examination, the Claimant showed the Court the injuries they sustained – the Court noted a big scar on the right foot, visible scars on the left knee, and shoulder. The Claimant also sustained injuries in the head, but the scars had been covered by hair.

The Claimant's Counsel cited previous awards of K700,000.00, and K600,000.00 for disfigurement – see *Chimwemwe Shaba v Levie Njikho and another* and *Lucy Misomali v Natasha Khomba and another* (cited above). Following the sentiments made in the *James Chaika Case*, the *Chimwemwe Shaba Case*, and the *Lucy Misomali Case* and considering the devaluation of the Kwacha since 2018, the Claimant is hereby awarded **K750,000.00 as damages for disfigurement.**

### *Loss of Earnings and Earning Capacity*

Courts award loss of earnings for future income where they find that the Claimant can no longer earn their pre-accident rate of earnings. Calculations are made based on the annual figure, the age of the Claimant, their working lifespan, and prospects of losing employment or reduced earnings in the future: *Tembo v City of Blantyre* – Civil Cause Number 67 of 2013. In the matter of *Namate.v Mr Latif & Prime Insurance Company Limited* – [2018] MWHC 663 the Claimant was awarded the sum of K5,040,000 for loss of future earnings. The Claimant in that case was aged 33 and could have potentially worked for the next 22 years. The court adopted a multiplier of 6 years while taking into consideration that the Claimant would be receiving a lump sum and might not have worked for 22 years longer.

Counsel for the Claimant herein submits that the Claimant earned an average income of K50,000.08 per month based on current minimum wage and is aged 23 years. Counsel further submitted that a multiplier of 38 be used based on the life expectancy of 61.2 pegged by the Court in *Lucy Chitsotso Chatayika v Emmanuel Kaludzu and United General Insurance Co. Ltd*, Civil Cause No. 1146 of 2016 (unrep). The computations were therefore,  $(K50,000.08 \times 12 \times 31) \times 25\%$  (permanent incapacity) = K5,728,800.00.

Counsel for the Claimant did not submit evidence of the Claimant's earnings. The Claimant was involved in piecework and could not have been making minimum wage per month. Based on this, this court adopts an average income of K20,000.00 per month.

The computations for loss of earnings and earning capacity are thus:

$$\begin{aligned} & (K20,000.00 \times 12(\text{annual income}) \times 31 (\text{multiplier})) \times 25\% \\ & \quad = \underline{\underline{K1,860,000.00}} \end{aligned}$$

The Claimant is hereby awarded the sum of **K1,860,000.00 for loss of earnings and earning capacity.**

### *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 K7,500.00 as the cost of medical and police reports. Though the Claimant specifically claimed special damages, they were not proved during trial and/or submissions. However, there is a specific amount contained in the judgment that didn't require assessment by the Court. For these reasons, **the Claimant is awarded K7,500.00 under this head.**

### DISPOSAL

The Claimant is therefore awarded K2,000,000.00 for pain and suffering; K1,000,000.00 for loss of amenities of life, K750,000 as damages for disfigurement, K1,860,000.00 for loss of earnings and earning capacity, and K7,500.00 as damages for cost of medical and police reports. The Claimant's total award is therefore K5,617,000.00.

However, the Claimant was 15% contributorily negligent (K842,625.00) so that reduces **the award payable to K4,774,375 (four million seven hundred and seventy-four thousand kwacha)**. The 2<sup>nd</sup> Defendant will shoulder the full sum as it is within the insurance policy limit.

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

A handwritten signature in blue ink, appearing to be 'CM Mandala', written in a cursive style.

CM Mandala

**ASSISTANT REGISTRAR**