



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

Civil Cause Number 429 of 2017

**BETWEEN:**

**GREM LIVINGSTONE CHIWEZA.....CLAIMANT**

**AND**

**PHOSTER KACHALI.....1<sup>ST</sup> DEFENDANT**

**PRIME INSURANCE COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT**

<b>CORAM:</b>	<b>C MANDALA:</b>	<b>ASSISTANT REGISTRAR</b>
	P Kambalame:	Counsel for Claimant of Silungwe Law Consultants
	E Chikwakwa:	Counsel for Defendant of KD Freeman & Associates
	Matope:	Court Clerk

**ASSESSMENT OF DAMAGES**

**CM MANDALA, AR:**

**INTRODUCTION AND BACKGROUND**

This is an order for assessment of damages pursuant to a Judgment on Liability entered on 27<sup>th</sup> March 2020. 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, K6,000 for the medical and police reports, and costs of the action. The hearing on Assessment of Damages was conducted on 20<sup>th</sup> January 2021. This matter arose from a road accident that occurred on 26<sup>th</sup> November 2016 when the 1<sup>st</sup> Defendant was driving a vehicle along the Lilongwe-Salima road. At/around Mchezi trading centre, the 1<sup>st</sup> Defendant swerved to the right side of the road where he hit the Claimant who was a pedestrian.

**EVIDENCE**

**Claimant's Evidence**

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

6. *I am Grem Livingstone Chiweza.*
7. *I stay at Mchezi.*
8. *I am 20 years old.*
9. *I am the Claimant in this action.*
10. *All the statements I make are within my knowledge.*
11. *On 26<sup>th</sup> November, 2016 at about 11:00 hours I was walking on the right hand side of the road on the far dirt verge at Mchezi Trading Centre.*
12. *The 1<sup>st</sup> defendant was driving motor vehicle Mercedes Benz saloon registration number CK 4676 from the direction of Kanengo going towards Salima.*

13. Upon arrival at Mchezi Trading Centre he overtook other motor vehicles and high speed such that he swerved to the extreme right dirt verge of the road where I was walking and hit me.
14. For further details of the accident, I sustained deep cut above the eye, deep cuts on the head and bruises on arms and legs.
15. As a result of the accident, I sustained deep cut above the eye, deep cuts on the head and bruises on arms and legs.
16. I was hospitalized on 26<sup>th</sup> November, 2016 and discharged on 29<sup>th</sup> November, 2016 at Kamuzu Central Hospital.
17. I have scars on the injured parts.
18. For further details of the injuries I suffered, I refer to a copy of medical report that I obtained marked "GLC 2."
19. I believe that the facts stated in this witness statement are true.

In cross examination, the Claimant told the court that he is feeling better although he notices a distinction in his behavior since the accident happened. The Claimant's hearing has also been affected since the accident.

#### 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 K4, 000, 000.00 as compensation. Counsel for the Claimant cited the following comparable awards in support:

- **Masina and others v Prime Insurance Company Limited**– Personal Injury Cause Number 2 of 2013 where the Claimant sustained a deep cut wound on forehead, lost one tooth, painful swollen legs, soft tissue injuries and a 10% permanent incapacity. On 19<sup>th</sup> October 2015, the Claimant was awarded K1,000,000.00 for pain and suffering and K800,000 for loss of amenities of life.
- **Mapemba v Prime Insurance Company Limited**– Personal Injury Cause Number 229 of 2012 where the Claimant sustained cervical injury, head injury, deep cut wounds on scalp and forehead, cut wound on right eye and upper mouth bruises on leg, ribs, and shoulder. On 28<sup>th</sup> April 2014, the Claimant was awarded a total sum of K3,200,000.00.
- **Wisted Chileka v Prime Insurance Company Limited** – Personal Injury Cause Number 247 of 2014 where the Claimant sustained a head injury, painful back and bruises on his leg and had problems when walking. On 26<sup>th</sup> June 2014, the Claimant was awarded K3, 800,000.00 for pain and suffering.

#### 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

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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.

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*<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.’

### COMPENSATION

The Claimant sustained a deep cut above the eye, deep cuts on the head and bruises on arms and legs.

#### *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).

According to the medical report, the The Claimant sustained a ‘deep cut wound above the eye, and in the ...bruises on arms and legs.’ The Claimant’s wounds were sutured as the treatment for the cuts. The Claimant further has the possibility of developing arthritis.

Counsel for the Claimant cited comparable awards of K1,000,000.00, and K3,800,000.00 as compensation for pain and suffering awarded in 2015 and 2014. See: *Masina and others v Prime Insurance Company Limited, and Wisted Chileka v Prime Insurance Company Limited* (cited above).

Based on this, this court awards the sum of K2,000,000.00 as damages for pain and suffering.

#### *Loss of Amenities of Life*

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<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.

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 states that the Claimant can only do manual work with difficulties and continues to feel pain on the affected areas. In cross examination, the Claimant told the court that he is feeling better although he notices a distinction in his behavior since the accident happened. The Claimant's hearing was also affected.

Counsel for the Claimant cited comparable awards of K800,000.00 as compensation for loss of amenities awarded in 2015. See: *Masina and others v Prime Insurance Company Limited* (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*

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. In the matter of *Austin Julius v Rasika Gunawerdana & General Alliance Insurance Limited* – Personal Injury Cause Number 316 of 2014 the court awarded the Claimant K700,000 for disfigurement.

Following the sentiments above, the Claimant is hereby awarded K650,000.00 as damages for disfigurement.

#### *Damages for Loss of Earnings and Earning Capacity*

Counsel for the Claimant submits that the Claimant ought to be awarded loss of earnings as the total loss or actual reduction in the income of the Claimant because of the injury suffered, and loss of earning capacity that is the prospective loss or reduction in income as a result of the injury suffered. Counsel proposes the use of the multiplicand and multiplier formula as is used in claims for loss of dependency. Counsel, based on his computations, proposes a total award of K4,998,022.00.

Unfortunately, Counsel bases his computations on sums that have not been proven to the court. The Claimant stated in viva voce that he made between K1,000.00 and K5,000.00 per day from the bicycle taxi business. Unfortunately, no documentation is provided to show this. This being an unliquidated claim, it ought to have been specifically proved, but this does not disentitle the Claimant from damages – see *Jumbe Jere v Moses Blessings & Prime Insurance Company Limited* – Civil Cause Number 785 of 2019. The Court will therefore award the sum of K100,000.00 as damages 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.

Special damages must be specifically pleaded and must also be proved - *Govati v Manica Freight Services (Mal) Limited* [1993] 16(2) MLR 521 (HC). A Plaintiff 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 do not meet this strict proof then special damages are not awarded – *Wood Industries Corporation Ltd v Malawi Railways Ltd* [1991] 14 MLR 516.

The Claimant here was awarded special damages for costs of obtaining medical and police reports. No evidence was provided to the court to support this award. Special damages ought to be specifically claimed and proved. 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; K1,000,000.00 for loss of amenities of life; K650,000.00 for disfigurement, K100,000.00 as damages for loss of earning capacity, K0 as special damages and costs of the action (to be taxed by the court). **The Claimant's total award is therefore K3,750,000.00 (three million seven hundred and fifty thousand 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 4<sup>th</sup> day of March 2021 at the High Court, Lilongwe.



C Mandala

**ASSISTANT REGISTRAR**