



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

Civil Cause Number 501 of 2019

BETWEEN:

**FRANK CHIMBALAMAKANDA.....CLAIMANT
AND
MADALITSO NYALAYA.....1ST DEFENDANT
PRIME INSURANCE COMPANY LIMITED.....2ND DEFENDANT**

CORAM:	C MANDALA:	ASSISTANT REGISTRAR
	Kambalame:	Counsel for Claimant of Silungwe Law Consultants
	Kapinda:	Counsel for Defendants of Wilkinson & Associates
	C Zude:	Court Clerk

ASSESSMENT OF DAMAGES

CM MANDALA, AR:

INTRODUCTION AND BACKGROUND

This is an order for assessment of damages pursuant to an Agreed Order on Liability issued on 7th October 2020 by Justice IC Kamanga (as she then was). 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, the sum of K80,000.00 being the cost of replacement of a damaged bicycle and of medical reports and police reports, and costs of the action. The hearing on Assessment of Damages was conducted on 12th April 2021.

This matter arose from a road accident that occurred on 20th March 2019 when the 1st Defendant was driving along the Likuni road and overtook five vehicles at high speed and hit the Claimant whilst he was turning right.

EVIDENCE

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

6. *I am Frank Chimbalamakanda of Kaluwa village, Traditional Authority Kamwendo, Mchinji.*
7. *I am 35 years old.*
8. *I am the Claimant in this action.*
9. *All the statements I make are within my knowledge.*
10. *On or around 19th March, 2019 at about 17:40 hours I was riding a bicycle on the left verge of the road from the direction of MDI going towards Vhinsapo along Likuni road. Upon arrival at Tovic junction, I gave a hand sign that I was turning right towards veterinary, and a coaster which was*

overtaking motor vehicles at high speed going the same direction hit me as I was in the process of turning right.

11. *For further details of the accident, I refer to a copy of the police report that I obtained marked “FC 1.”*
12. *I was taken to Bwaila Hospital where I was referred to Kamuzu Central Hospital where I was treated.*
13. *As a result of the accident, I sustained fracture of the right clavicle, bruises on the left elbow and left hip, and scars on the affected parts.*
14. *I still feel pain on my right shoulder whenever I am working.*
15. *I still feel pain on my left hip.*
16. *I can no longer lift any heavy object using my right arm.*
17. *I used to play bass guitar, I can no longer pluck the strings because of the pain I feel.*
18. *I used to work as a painter. I was laid off because of the injuries as I could no longer meet the targets set as I used to. I used to make around K7,500.0 per week. I also used to do part time job as well where I used to make around Mk30,000.00 – Mk40,000.00 per month. I am no longer working as a painter because of the injuries. I am now selling shoes where I make around MK1,000-MK1,500 per day.*
19. *My permanent incapacity was assessed at 25 percent.*
20. *For further details of the injuries I suffered, I refer to the copies of the medical report, health passport, radiology examination request from and x-rays marked “FC 2a, FC 2b, FC 2c and FC 2d” respectively.*

In cross examination, the Claimant confirmed his name and his age. He further confirmed that before the injuries he was a freelance painter with no fixed salary, but he made about K7,500.00 per week. The Claimant would receive the money from his boss named Mr Tazeem. No payslips were received when they were paid. The Claimant now sells shoes and can make up to K1500.00 per day. Aside from the painting, the Claimant also did freelance signage jobs. He made K30,000.00 to K40,000.00 per month. It was not a monthly job, he would work on the signage when jobs were available. The Claimant confirmed that the hospital pegged his incapacity 25% and the doctors made this assessment. The doctors were not available in the court to testify on his behalf.

In re-examination, the Claimant clarified that he would do piece jobs, and would not work when there are no jobs available. In a good month, he would do up to four piece jobs.

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.

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.

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-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 K10,0000.00 for pain and suffering, loss of amenities of life and disfigurement, and K5,460,000.00 as damages for loss of earnings and loss of earning capacity. Counsel cited the following comparable awards to support their argument:

- *John Matemba v Tisunge Zuze & Prime Insurance Company Limited* Personal Injury Cause Number 498 of 2017 where the Claimant was awarded K2,550,000.00 for pain and suffering, and loss of amenities of life and K1,000,000.00 for disfigurement for a fractured right clavicle, sprained right foot, bleeding from the ears, and mild head injuries. The award was made on 5th March 2019.
- *Jesse Felix v Davie Juma & Prime Insurance Company Limited* [2019] MWHC 26 where the Claimant was awarded K4,800,000.00 for pain and suffering and loss of amenities of life, and K1,000,000.00 for disfigurement for a fractured right clavicle, dislocated right shoulder, and tenderness of the left shoulder. The award was made on 16th January 2019.
- *Agness Katchowa v Edgar Mangulenje and Prime Insurance Company Limited* Personal Injury Cause Number 909 of 2014 where the Claimant was awarded K2,500,000.00 for pain and suffering, K1,000,000.00 for loss of amenities, and K500,000.00 for disfigurement for a fractured clavicle, sprained shoulder joint, deep cut wound on scalp, blunt chest injury, and bruises on left elbow. The award was made on 13 December 2018.
- *Malita Chathyoka and another v Banda and another* Civil Cause Number 484 of 2016 where the 1st Claimant was awarded K3,000,000.00 for pain and suffering and loss of amenities of life, and

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

⁴ [1996] MLR 486.

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

K500,000.00 for disfigurement for an ipsilateral acromioclavicular joint dislocation, multiple facial and body abrasions, and scapular trauma. The award was made on 16th May 2017.

COMPENSATION

The Claimant sustained a right fracture clavicle, bruised left elbow, and left hip.

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 a ‘*right fracture clavicle, bruised left elbow and left hip*’ as per the medical report. The Claimant did not undergo any surgical operations but did undergo an x-ray of the right shoulder.

The court had recourse to comparable awards cited by Counsel of K2,500,000.00, and K3,000,000.00– these were awards made in 2018, and 2017 respectively. See: *Agness Katchowa v Edgar Mangulenje and Prime Insurance Company Limited, and Malita Chathyoka and another v Banda and another* (cited above).

Based on this, this court awards the sum of K3,000,000.00 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.

As a result of the accident, the medical officer noted: ‘*scars on bruised areas, right shoulder pains, unable to lift heavy weights on the injured shoulder.*’ The Claimant still feels pain on the right shoulder when working, still feel pain on the left hip, can no longer lift any heavy object using the right arm, and can no longer pluck the strings of a bass guitar.

The court had recourse to comparable awards cited by Counsel of K1,000,000.00, and K3,000,000.00– these were awards made in 2018, and 2017 respectively. See: *Agness Katchowa v Edgar Mangulenje and Prime Insurance Company Limited, and Malita Chathyoka and another v Banda 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.

Both the Claimant and the medical report state that the Claimant has visible scarring where he sustained injuries. Following the sentiments made in the *James Chaika Case* and considering the devaluation of the Kwacha since 2018, the Claimant is hereby awarded K500,000.00 as damages for disfigurement.

Loss of Earnings and Loss of Earning Capacity

Loss of earnings is the total loss or actual reduction in the income of the claimant as a result of the injury suffered, while loss of earning capacity is the likely or prospective loss or reduction in the income of the Claimant as a result of the injury suffered – *Kambwiri v Attorney General* [1991] 14 MLR 151 (HC).

In assessment of damages for loss of earning capacity, the courts have developed a method for assessing the amount of pecuniary benefit that a plaintiff could reasonably expect to have earned. A claim for loss of earning capacity is grouped in the category of heads of pecuniary loss and includes future earning capacity. A Claimant can recover full compensation for the pecuniary loss that they anticipate suffering. *Pickett v British Rail Engineering* [1980] A. C. 136 at 168B-D states: “[b]ut, when a judge is assessing damages for pecuniary loss, the principle of full compensation can properly be applied.” See also *Ulemu Simoko v Attorney General* Civil Cause Number 755 of 2011.

The difficulty arises in quantifying the loss, to wit, the Supreme Court observed in *Nangwiya*: “Although it is difficult to come up with a mathematical formula, courts have regard to the Plaintiff’s earnings. Courts evaluate the chance. They then come with an award... Whatever the award, it must take into account that the award is global, and it will earn income for the period in which the plaintiff could have worked.”

In *Manda v Malawi Social Action Fund* Civil Cause Number 756 of 2003 (unreported), the Assistant Registrar gave guidance on calculating loss of earnings. It states: “The amount of loss of earning is calculated by taking the figure of the Plaintiff’s present annual earnings less the amount, if any, which he can now earn annually, and multiplying this figure by a figure which, while based upon the number of years during which the loss of earning power will last, is discounted so as to allow for the fact that a lump sum will be given now instead of periodic payments over years. The latter figure has come to be known as the multiplier and the former figure, the multiplicand... Further adjustment however has to be made to the multiplicand and multiplier on account of other factors like inflation, the so called contingencies of life, and taxation.”

The Claimant herein did not prove the amount that he made at the time of the accident. On his own admission, he was not given payslips and he often worked odd jobs that were not consistent. He did not have a fixed salary and relied on the odd jobs being obtained by one Mr Tazeem who he called his boss. Based on this, this court is guided by *Henry Kausiwa v Stansand (CA) Limited* Personal Injury Cause Number 211 of 2017 before the High Court’s Principal Registry; where the court awarded the sum of K250,000.00 on 21 November 2017 as damages for loss of earning capacity. The basis of the court’s award was described thus: ‘The plaintiff in the present case did not present evidence of his earnings before the accident that would assist the Court to compute what amounts he would have made if he had continued uninjured. I am faced, as it is, with real difficulty that I have little or indeed no material upon which to assess the loss of earning capacity.’

The Claimant is entitled to sum for loss of earning capacity but it cannot be quantified with mathematical precision. This court will therefore award the nominal sum of K500,000.00 as damages for loss of earnings and loss of 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).

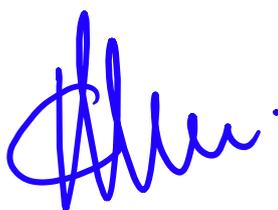
The Claimant herein was awarded special damages for replacement of a damaged bicycle, and costs of obtaining medical and police reports. Though the Claimant specifically claimed special damages, they were not proved during trial and/or submissions. For these reasons, no award will be made under this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

DISPOSAL

The Claimant is therefore awarded K3,000,000.00 for pain and suffering; K1,000,000.00 for loss of amenities of life; K500,000.00 for disfigurement, K500,000.00 as loss of earnings and loss of earning capacity, and K0 as special damages and costs of the action (to be taxed by the court). **The Claimant's total award is therefore K5,000,000.00 (five 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 7th day of May 2021 at the High Court, Civil Division, Lilongwe.



C Mandala

ASSISTANT REGISTRAR