



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NUMBER 187 OF 2019

BETWEEN:

CREAMSON NYIRENDA.....CLAIMANT

AND

UNITED GENERAL INSURANCE COMPANY LIMITED.....DEFENDANT

CORAM: WYSON CHAMDIMBA NKHATA (AR)

Mr. Ndhlovu- of Counsel for the Claimant

Mrs. Namonde – of Counsel for the Defendant

Ms. Chida- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

INTRODUCTION

On 3rd May, 2020, the claimant was hit by a motor vehicle at or near Goliati Trading Centre along the Malowa – Goliati road. Consequent to which, he suffered injury. Through a writ of summons issued on 4th August, 2020, the Claimant commenced this action through his father and litigation guardian claiming damages for pain and suffering, loss of amenities of life, disfigurement and costs of the action. He sued the 1st defendant as the driver of the motor vehicle in question and the 2nd defendant as the insurer of the said vehicle. The issue of liability was settled in favour of the claimant upon the parties' agreement during mediation on 10th March, 2021 before Honourable Justice N'riva. Subsequently, the matter was referred to this court for assessment of damages which I must now consider.

THE EVIDENCE

Through his witness statement that he adopted in court, the Claimant testified that as a result of the accident, he suffered excruciating back pain, painful hip, sprained right knee, torn ligaments of the said right knee and osteophytes. He further stated that he was put on Plaster of Paris for a period of over 10 weeks. He still uses crutches to aid him in walking. He stated that he still feels severe pain when waking up from a place he sat and when waking up from sleep. He stated that the pain on the said right knee, the back and the hip is recurrent and that he survives on pain killers to relieve himself as he was advised by medical personnel. He also stated that as a result of the said injuries, he has a difficult life now as he cannot do exercises nor carry heavy objects as he used to.

In cross examination, the claimant stated that the injury to the hip was not captured in the medical report. He stated that the doctor was not going to be paraded as a witness. He admitted that the Police Report indicated that the accident was minor. He stated that he was born in 1949. He stated that it was not normal for a person of this age to experience body pains. He added that the pictures are not dated. He stated that the photographer was not going to testify.

In re-examination, he stated that the hip injury was not captured in the medical report but however, it became a challenge to him as the pain on the back around the waist with coordination of the right knee resulted also in pain on the said right hip.

Such was the evidence on assessment of damages. I would like to thank both Counsel for the guidance as evidenced by the well-researched submissions filed in support of the assessment of damages herein in which several authorities have been cited. This court has given the submissions and the authorities counsels cited the most anxious consideration.

THE LAW AND APPLICABLE LEGAL PRINCIPLES

On the law and principles governing assessment of damages, it is trite that the purpose of awarding damages is to compensate the injured party as nearly as possible as money can do. That is to say, to place the claimant in a position he would be had he not suffered the damage or loss. This is what is termed the principle of *restitutio intergrum*. It is not possible to quantify damages with exactitude. However, courts use comparable cases as a guide in coming up with a reasonable quantum of damages. See the case of **Kalinda –vs- Attorney General (1992) 15 MLR 170 at p 172**. The Court will also consider factors like passage of time when the award was made, as well as the value of the kwacha at the time of making the award.

Pain and suffering

Pain means the physical hurt or discomfort attributable to the injury itself or consequent upon it. It includes the pain caused by any medical treatment which the plaintiff might have to undergo. See **Sakonda v S. R. Nicholas** Civil Appeal Cause No. 67 of 2013. 'Suffering' on the other hand denotes the mental or emotional distress which the plaintiff may feel as a result of the injury. This includes but not limited to anxiety, worry, fear, torment and embarrassment. In **City of Blantyre v. Sagawa** [1993] 16 (1)MLR 67. 'pain' and 'suffering' were defined to suggest physical experience of pain caused by consequent upon the injury while "suffering" relates to the mental element of anxiety, fear, embarrassment and the like.

Loss of amenities of life

In the case of **Kanyoni v Attorney General** [1990] 13 MLR 169, 171 the court held that loss of amenities of life must include the loss of all the things the claimant used to be able to do, see, and experience. Justice Mwaungulu (as he then was) in the case of **Mtika v. US Chagomerana t/a trans Usher (Zebra Transport)** [1997] 2 MLR 123, 126 explained that this head covers the loss caused by the injury in that the claimant will be unable to pursue the leisure and pleasures of life that he used to enjoy but for the injury.

Disfigurement

Damages under the head of disfigurement are paid for the change in physical form of a person injured either as a result of the impact of the injury or its treatment, such as scar coming in as a result of surgical operation necessitated by the injury. It is a change in appearance but it is capable of limiting a person from doing certain things- see- **Francis Chikoti vs- United General Insurance Company Limited** Personal Injury Cause No. 730 of 2016. Justice Potani (as he was then) in the case of **James Chaika v NICO General Insurance Company Ltd** Civil Cause No. 909 said disfigurement is not a matter to be taken lightly and casually as it is something that one has to permanently live with.

COMPARABLE CASES

In this case, it is stated that the claimant suffered excruciating back pain, painful hip, sprained right knee, torn ligaments of the said right knee and osteophytes. In awarding damages for pain and suffering, loss of amenities of life and disfigurement, Counsel representing the claimant calls upon the court to consider the following cases:

- **Luwiza James v. Prime Insurance Company Limited** Civil Cause No. 1216 of 2009 the plaintiff sustained a fracture of the right femur and knee cap, a deep cut on the right eyelid and

lost consciousness on the accident spot. The court awarded her the sum of K5, 000, 000.00 for pain, suffering and loss of amenities of life. The award was made on 12th October 2012.

- **Felista Kachaso v. Peter Kondowe, Blue Bird Motel & Nico General Insurance Company Limited Civil Cause No. 320 of 2009**, the plaintiff sustained a closed fracture of the right humerus and an open fracture of the right lower leg near the ankle. The court awarded her the sum of K5, 600,000.00. The award was made on 16 October 2009.
- **Joseph Danger v. Prime Insurance Company Limited Civil Cause No. 1760 of 2010** the plaintiff sustained fracture of tibia, deep cut wound on the knee, bruises on arms, bruises at the back and cut wound on the forehead. An award of K6, 500, 000.00 was made for pain, suffering and loss of amenities of life on 18th April 2013.
- **Owen Lyson Kayira, Getrude Kayira and Alice Nkhana v. Mr Unusu Shaikh Personal Injury Cause No. 1160 of 2013** the 1st plaintiff sustained a fracture of the right tibia and fibula, internal injuries in the stomach, several cuts on both legs, deep cut wound on the left ankle and several bruises on the ribs. The court awarded him the sum of K7, 200, 000.00 for pain, suffering and loss of amenities of life. The award was made on 1st July 2014.

In light of the above comparable case authorities and the inflation of the currency since these decisions were made, Counsel submits that the sum of K11,500,000.00 would be fair, just and reasonable to compensate the claimant for pain and suffering and loss of amenities of life arising from the said accident that he suffered herein.

On the other hand, Counsel representing the defendants proposes that the Court should award the Claimant K2,000,000.00 as damages. she cites the following cases for comparison:

- **Holman Chigwenembe v Muslim Future Horizon Association**, Civil Cause 1203B of 2015 the Court awarded the Claimant for a right sprained knee, blunt trauma of the right forearm and laceration of the abdomen a total of K2,000,000.00 on 22nd January, 2021.
- **Emma Muniva v Prime insurance company Limited Personal Injury Case No. 344 of 2018** the Court awarded the Claimant K2,850,000.00 as damages for a more serious case where she suffered lateral malleolus fracture, severe backache among other injuries. The award was made on 21st January, 2019.

Counsel further submits that from the dates these awards were made to this date, the kwacha has not depreciated much, hence the proposed sum above.

DETERMINATION

The claimant is alleging that he sustained excruciating pain on the back and around the waist, painful hip, sprained right knee, torn ligaments of the right knee and osteophytes. The right leg was put in a Plaster of Paris for a period of 10 weeks. He states that he has now difficulties in walking as he uses crutches to aid him and cannot do exercise or lift heavy objects as he used to. Counsel representing the claimant that it was very apparent during the assessment of damages that the accident has left an indelible mark on the claimant's life as he is still using crutches to aid him in walking despite the length of period since the accident happened. He points out that the claimant does not have the same physical frame that he had before the accident.

The defendants while not disputing the fact that the Claimant sustained injuries argue that there is no reliable evidence of the fact that the injuries were as serious as the Claimant is claiming them to be. Firstly, Counsel points out that the claimant agreed with the indication in the Police Report that the accident was minor. Further, Counsel submits that the hospital also substantiated this by providing the Claimant only pain killers to relieve his pain. She also points out that the Health Passport on the day of the accident indicated that the Claimant had suffered a sprain of the knee and a backache.

With another breath, the defendants contend that the Court accepted the documents and were tendered subject to rule against hearsay, however, if a party fails to call a material witness, who is available to prove a fact, it is assumed that the only reason why such a witness was not called was because his evidence would be adverse to the party who should have called him. They further submit, correctly in my opinion, that an unexplained failure to call a material witness substantially reduces the weight of the party's evidence in all circumstances *see Mpungilira Trading Ltd v. Marketing Service Division*[1993] 61(1) MLR 346. Counsel is of the view that the best person to comment on the injuries sustained by the Claimant is Junier C Kazembe the one who wrote the medical report or Mr. Kamoto being the person who treated him first.

From the foregoing sentiments, it is clear that the defendants seek to impeach the testimony of the claimant using the contents of the Police Report and those of the Medical Report. At the same time, the defendants in their submissions have gone at length chastising the claimant for seeking to rely on the documents in question having not been tendered by the officers who authored them. Essentially, they move the court to draw an adverse inference from the same against the claimant while they too seek to rely on the same

impugned evidence. It all boils down to a selective application of the principle being applied. I found this problematic.

I take note that the defendant in fact is of the view that since the medical report has been impugned then the claimant has not proved his injuries as such the court should not make any awards. I wish to state categorically that much as the consequence of this failure is reduction to the weight to be attached to the medical report, it does not follow that the injuries have not been substantiated. The claimant testified as to the injuries he suffered. The question is whether he was truthful or not. In the case of **Mwasinga v Stagecoach (Mal) Ltd** [1993] 16(1) MLR 363 (HC) Justice Mwaungulu (as he was then) dealing with a similar situation held:

There is no medical report on most of the things raised, but that does not discount the plaintiff's testimony on what she is experiencing at the moment.

In the case of **Mhango v Mhango (2)** [1993] 16(2) MLR 617 (HC) Unyolo J. (as he was then) reacting to a contention that the court should ignore a medical report on the ground that it was only a photocopy stated that:

I would on this aspect repeat what I have just said above, that I think that the petitioner was a witness of truth. Further, I have no reason to doubt the authenticity of the copy medical report, and indeed the fact of injury can be proved without a medical report.

I am aware that many a time, claimants do fall into error by making exaggerations in a bid to make a convincing case that would fetch a substantial compensation. However, the overall impression which the claimant made on me was that he was a truthful witness. In this case, I believe the claimant on the issue of the hip injury. In fact, he stated that the vehicle that caused the accident pressed him against his car by the waist. Essentially, it is not only the knee that suffered injury as the defendants would like the court to believe. The court takes note that he was in Plaster of Paris for 10 weeks. The period with which he had to contend with the POP does not speak to a minor injury as it were. The claimant came into the courtroom trudging with clutches in a manner that did not smack of pretence. Attributing all this to old age is an uncalled-for attempt to unduly downplay the extent of the injuries suffered by the claimant.

All the same, having considered the nature and extent of the injuries suffered by the claimant, this court finds that he suffered considerable pain and suffering resulting from the accident and the treatment he received. It is quite evident that the injuries also affected him in a number of ways. In his testimony, he indicates that he has a difficult life now as he cannot do exercises nor carry heavy objects as he used to.

Counsel representing the claimant has cited several cases for comparative purposes. All of the cases cited did not provide viable guidance considering that they involved at least a fracture and other soft tissue injuries which is not the case in this matter. I still note that the awards in cases involving injuries of such severity were boarding around K6,000,000.00 with the latest award made in 2014. Obviously, in arriving at the award in this case the court ought to consider the two factors which are the severity of the injuries and the devaluation of the Kwacha. On the other hand, the court has taken note of the cases cited by Counsel for the defendant. The case of **Holman Chigwenembe** is not far removed in the intensity of injuries as it is this case. I take note that the court awarded K2,000,000.00 in the year 2021. The other case is that of **Emma Muniya**. This case involves a fracture which makes it not so much of a viable case authority. Thus, upon a thorough consideration of facts and circumstances of this case, and upon an exhaustive consideration of the submissions by both Counsel in the light of the relevant and applicable law regarding damages for personal injuries, I award the claimant **K4,000,000.00** under the heads claimed and proved.

CONCLUSION

In total, the claimant is awarded **K4,000,000.00** as damages in this case. The claimant is further awarded costs for the assessment of damages proceedings to be taxed if not agreed by the parties.

DELIVERED IN CHAMBERS THIS 11TH DAY OF AUGUST 2021


WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR