



**REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CIVIL CAUSE NUMBER 457 of 2019**

**BETWEEN:**

**JOSAM FOSSA.....CLAIMANT  
AND**

**THE ATTORNEY GENERAL (MINISTRY OF HEALTH –  
DEDZA DISTRICT HOSPITAL.....DEFENDANT**

<b>CORAM:</b>	<b>C MANDALA:</b>	<b>ASSISTANT REGISTRAR</b>
	S Utila & Mkoloma:	Counsel for Claimant
	Attorney General's Chambers:	Legal Practitioners for the Defendant
	C Mzude:	Court Clerk

**ASSESSMENT OF DAMAGES**

**INTRODUCTION AND BACKGROUND**

This is an order for assessment of damages pursuant to a Default Judgment issued on 1<sup>st</sup> August 2019. The Default Judgment was entered pursuant to Order 12 Rule 6 of the Courts (High Court) (Civil Procedure) Rules of 2017. The Defendant did not serve a response or a defence within 14 days after service of summons. The defendant is therefore required to pay the claimant damages for pain and suffering, loss of amenities of life, disfigurement; compensation for costs of increased expenses of health care and other out-of-pocket expenses; exemplary damages; costs of the action, and any other reliefs that the court may deem just.

**EVIDENCE**

Mr Jossam Fosa, aged 65 years, adopted a witness statement, signed and dated by himself on 4<sup>th</sup> September 2019. It states:

1. *My name is Jossam Fosa.*
2. *I hail from Guya village, Traditional Authority Chakhumbira in Ntcheu District.*
3. *I am a farmer.*
4. *I am the Claimant in this action, and I make this witness statement on my own behalf.*
5. *On the 17<sup>th</sup> of June 2018, as I was running errands I fell down and I was taken to Dedza District Hospital as a result of the fall.*

6. *I was admitted to the hospital during which I was prescribed painkillers for the pain I was enduring without any diagnosis as to the cause of the pain.*
7. *On 19<sup>th</sup> of June 2019, two days through the admission, I complained of leg pains to the doctor who came to do rounds and I suggested that I undergo an x-ray and the doctor said that they did not have a working x-ray machine at the hospital.*
8. *On the 23<sup>rd</sup> June 2018, despite the fact that no diagnosis or x-ray was done on my leg, the medical personnel suggested that I undergo a skeletal retraction procedure which I did.*
9. *However, my leg began to swell badly after the procedure, and it continued to swell uncontrollably.*
10. *After observing the continued swelling of the leg, my sister requested the doctors to refer me to Kamuzu Central Hospital owing to the fact that my condition was deteriorating.*
11. *On 1<sup>st</sup> July 2018, I was referred to Kamuzu Central Hospital for further treatment.*
12. *Whilst at Kamuzu Central Hospital, an x-ray was conducted and I was then advised that due to the delay in examining and treating the leg, it was in such a bad state that it had to be amputated.*
13. *On the 10<sup>th</sup> of July 2018, I had my leg amputated at Kamuzu Central Hospital through a surgical procedure in which I was given four pints of blood as I had lost too much blood due to the surgery.*
14. *My enjoyment of life has been irretrievably lessened that I no longer walk on my own without clutches and I can no longer spend time with my family as I used to such as playing with my children, as well as other basic things that I could properly perform.*
15. *I can no longer farm with just one leg and this has greatly affected my family's income because I was the breadwinner.*
16. *I continue to suffer severe pain and much emotional anguish.*
17. *I have been required to constantly and frequently visit the hospital, causing me to incur several medical and out-of-pocket expenses.*

In cross examination, the Mr Fosa told the court that he has a big problem. Mr Fosa can no longer lead a normal life in the village. He cannot go to the farm; he cannot take care of his children and he cannot do anything on his own. He has to rely on those around him. His child assists him to conduct even the most benign of tasks. As a result of his injuries, Mr Fosa had to move into his son's house as he could no longer live on his own.

Mr Fosa experiences pain and swelling in his leg. He said that at times it feels like the leg is there and it is very painful. In those circumstances, Mr Fosa has to go to the hospital for medication in order to get some relief for the pain.

Previously, Mr Fosa assisted the counsellor and he would travel long distances in order to perform his duties. He can no longer continue in this capacity because of his injuries.

Although he is not confined to a wheelchair, he has to use crutches permanently.

Mr Fosa lamented that he stayed in the hospital for five days without receiving appropriate medical care. He was finally attended to but the care that he received was not adequate. He was hospitalized at

Dedza District Hospital for two weeks. After the two weeks, his sister insisted that he should be transferred to another hospital as his condition was not improving. His ordeal began on 17<sup>th</sup> June 2018 and his leg was finally amputated on 10<sup>th</sup> July 2018. Mr Fosa avers that there was inadequate care at the hospital which ultimately resulted in the amputation of his leg.

#### 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 means he can no longer farm and cannot support his family. The injury could have been avoided but the medical personnel at Dedza District Hospital were negligent. The Claimant is disfigured, he has to learn to walk on one leg and has to use crutches for the rest of his life. In addition to the amputation of the leg, the Claimant had to undergo skeletal traction and had a plaster of paris applied.

Counsel for the Claimant cited the following comparable awards:

- *Peter v Mapunda and another* - Personal Injury Cause Number 521 of 2017 where the Claimant had her leg amputated from the knee. On 23<sup>rd</sup> July 2018, the court awarded her K20,000,000.00 as damages for pain and suffering, loss of amenities of life and disfigurement.
- *Jafali v Khupe and another* – Personal Injury Cause Number 48 of 2018 where the Claimant had their right leg amputated below the knee. On 14<sup>th</sup> July 2018, the court awarded the Claimant K14,333,000.00 as damages for pain and suffering, loss of amenities of life and disfigurement.
- *Anastanzia Elias v NICO General Insurance Company Limited* – Personal Injury Cause Number 117 of 2011 where the Claimant had their leg amputated below the pelvis. The court awarded the Claimant K15,000,000.00 as damages for pain and suffering, loss of amenities of life and disfigurement.

Counsel for the Plaintiff proposes a quantum of K20,000,000.00 for pain, suffering; K15,000,000.00 loss of amenities and MK5,000,000.00 for disfigurement as adequate compensation for the Plaintiff.

#### 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

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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.

to awarding 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 the following injuries: amputation of the right leg. The Claimant was hospitalized for over a month.

#### *Pain and Suffering and Loss of Amenities of Life*

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 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.

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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 Claimant's injuries are very serious. The Claimant stayed in the hospital for over two weeks without receiving adequate care. The Claimant's leg was swollen, and he was in unbearable pain. The Defendant's agents did not give him the appropriate care, and this caused his condition to deteriorate. The Claimant had to endure a lot of pain and was constantly apprehensive of what the result of his injuries would be. And indeed, his fears were substantiated when his leg was amputated. In the *Elias Case*, the Claimant sustained a crushed leg which was eventually amputated and bruises on the face and arms. The Plaintiff therein was awarded a global sum of MK15,000,000 as damages for pain and suffering, loss of amenities and disfigurement. In the present case, the Claimant sustained an injury that was not treated for over two weeks. This caused his condition to worsen over that period and he experienced immense pain during that period. The Claimant continues to experience phantom pain on that leg. The remaining part of the amputated leg becomes inflamed and can be very painful. The pain subsides with medication that is administered at the hospital. The Claimant is likely to continue to experience the pain as he does not know what causes the flares. For these reasons, the Claimant herein is awarded the sum of MK3,500,000.00 as damages for pain and suffering.

Further, the Claimant has now been confined to the use of crutches for his mobility. The Claimant cannot farm and is heavily dependent on his son. The Claimant had to move in with his son and is no longer living independently. The Claimant can no longer assist the Counsellor as he cannot travel long distances to fulfil his responsibility as the Counsellor's assistant. The Claimant's life has been altered substantially. He cannot live independently and has to depend on others in order to get by. For these reasons, the Claimant is awarded the sum of MK5,000,000.00 as damages for loss of amenities of life.

#### *Disfigurement*

In *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 this case, the plaintiff will most likely walk with a limp for the rest of his life which is not a pleasant thing.*'

The Claimant, in this matter, has to live with the deformity of an amputated leg. It is not a deformity that can be concealed, nor is it one that will improve with time. The Claimant's physical appearance has been permanently altered. In *Malimau v Mota Engil* the Claimant was awarded MK800,000.00 for deformity after amputation of the leg. Taking into account the passage of time and the devaluation of the currency, this court awards the sum of MK2,500,000.00 to the Claimant 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.

Special damages must be specifically pleaded and must also be strictly 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 fail to meet this strict proof then special damages are not awarded – *Wood Industries Corporation Ltd v Malawi Railways Ltd* [1991] 14 MLR 516.

The Claimant in this case is claiming compensation for the cost of increased expenses of health care and other out-of-pocket expenses arising from his injury. This is a very particular claim that would fall under the head of special damages. The Claimant ought to have provided evidence to show the court how much his health care expenses have increased and what the other out-of-pocket expenses were. The Claimant provided neither oral nor documentary evidence to show the court what the increased expenses were. As precedent states, special damages ought to be specifically proved. The Claimant provided no evidence and therefore did not satisfactory proof of the actual loss incurred. For these reasons, the Court will not make an award for increased expenses of health care and other out-of-pocket expenses.

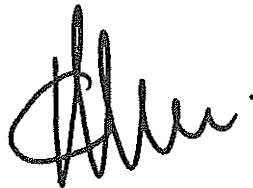
DISPOSAL

The Plaintiff is therefore awarded MK3,500,000.00 for pain and suffering, MK5,000,000.00 for loss of amenities of life, MK2,500,000.00 for disfigurement and costs of the action (to be taxed if not agreed).

Compensation totals a global sum of MK11,000,000.00 (eleven million kwacha).

Each party is at liberty to appeal to the Supreme Court of Appeal within the requisite time frames.

Ordered in Chambers on the 11<sup>th</sup> day of September 2019 at the High Court, Lilongwe.



C Mandala

ASSISTANT REGISTRAR