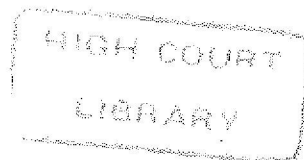




REPUBLIC OF MALAWI



IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NUMBER 109 OF 2020

BETWEEN

FESTON CHIRWA.....CLAIMANT

AND

EMILY KAMANGA.....1ST DEFENDANT

PRIME INSURANCE COMPANY LIMITED.....2RD DEFENDANT

CORAM: KAPASWICHE	: ASSISTANT REGISTRAR (AR)
Kambalame	: Counsel for the Claimant
Chapo	: Counsel for the Defendant
Mr. Kumwenda	: Clerk/ Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

BACKGROUND

This is my ruling on a claim for damages for pain and suffering; loss of amenities of life; disfigurement; damages for loss of earnings and earning capacity and costs of police and medical reports. This assesment of damages follows entering of a default judgment against the defendants on the 9th day of March 2020. Hearing of the matter was done on the 27th April 2021 and the matter was heard in the presence of both parties. In essence, the Claimant prayed for a total sum of MK24, 580, 016 .00 as total compensations for all the heads of the claims while the Defendants prayed that the Claimant be awarded MK1,500,000.00 as total compensation.

THE EVIDENCE

CASE FOR THE CLAIMANT

The Claimant testified as a lone witness on his part. He adopted his witness statement. His evidence was that on 7th January 2020 at around 08:00 hours, he was riding a bicycle from the direction of area 18 roundabout going towards Bingu National stadium along area 18 new road in the city of Lilongwe. A motor vehicle Nissan X-Trail driven by the 1st Defendant and insured by the 2nd Defendant was coming behind him going the same direction. Upon arriving at Bingu National stadium, the 1st defendant encroached on the left offside lane of the road at an excessive speed and the vehicle hit the Claimant. As a result of the impact of the accident, the Claimant sustained traumatic brain injury, deep cut in the head, bruises on the right leg, bruises on the right arm and scars on the affected parts and he was hospitalized for a day at Kamuzu Central Hospital. As a result of the accident. The Claimant stated that he still feels pain on his legs; frequent headaches; he ca no longer ride a bicycle and that he lost earnings for three months in which he could not work. He works as a security guard and gets a salary of MK35, 000.00. He was also doing a bicycle taxi business where he was earning between MK3, 000.00 to MK5,000.00 in a day. His permanent capacity was assessed at 25%. A medical report was tendered as evidence of the injuries suffered.

During cross-examination; the Claimant told this Court that it is true that he suffered traumatic brain injury but he explained that his problem is that he suffers frequent headaches and not that he has a mental illness. He also stated that as a security guard he works at night and sleeps in the day but he still finds time for the bicycle taxi business though he admitted that he did not have evidence of his business income.

CASE FOR THE DEFENDANT

The Defendant had one witness who filled a witness statement. The witness for the Defence happens to be a Legal Services officer for the 2nd Defendant. His evidence was that his job involves meeting with the insured or their drivers who come to report accidents involving vehicles insured by the 2nd Defendant and he does help the clients to fill Accident Report Form. He also meets with victims to confirm injuries suffered in accidents. The evidence from DW1 was that on or about the 24th day of April 2020 the 1st Defendant came to his office to give a report on the accident in question and according to the Accident Form Report from the 1st Defendant; the Claimant sustained bruises on the leg and a small cut in the head. On 27th April 2021, DW1 met the Claimant to assess the injuries that he suffered and the Claimant gave DW1 a health passport that was exhibited in this Court. The Claimant confirmed that the injuries that he suffered were a cut on the head, bruises on the legs and sprained right arm. The Claimant showed DW1 the injured parts which had scars and DW1 took pictures which he exhibited. Throughout the interaction the Claimant was of sound mind. DW1 stated further that the policy of insurance in question has a cover limit of MK5,000,000.00 for personal injuries.

The above presents a summary of the material evidence from the parties. The parties filed their final submissions for consideration by this Court.

THE LAW ON DAMAGES

The law generally provides that a person who suffers bodily injuries or losses due to the negligence of another is entitled to recover damages. The fundamental principle which underlines the whole law of damages is that the damages to be recovered must, in money terms, be no more and no less than the Plaintiff's actual loss. The principle was laid down in numerous case authorities more particularly by Lord Blackburn in the case of **Livingstone v. Rawyards Coal Company (1880) 4 AC 25** in the following terms:

“where any injury or loss is to be compensated by damages, in settling a sum of money to be given as damages, you should as nearly as possible get at the sum of money which will put the party who has been injured, or who has suffered loss, in the

same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.”

Be that as it may, it ought to be borne in mind that it is not possible to quantify damages for pain and suffering, loss of amenities and deformity as claimed in this matter with mathematical precision. As a result, courts use decided cases of comparable nature to arrive at awards. That ensures some degree of consistency and uniformity in cases of a broadly similar nature: See **Wright -vs- British Railways Board** [1983] 2 A.C. 773, and **Kalinda -vs- Attorney General** [1992] 15 M.L.R. 170 at p.172. As such this court will have recourse to comparable cases to arrive at the appropriate quantum of damages for the plaintiff.

SUBMISSIONS AND ANALYSIS

DAMAGES FOR PAIN AND SUFFERING

‘Pain’ is used to suggest physical experience of pain caused by consequent act upon the injury while ‘suffering’ relates to the mental elements of anxiety, fright, fear of future disability, humiliation, embarrassment, sickness and the like as was held in **City of Blantyre v. Sagawa** [1993] 16 (1) MLR 67 (SCA).

DAMAGES FOR LOSS OF AMENITIES OF LIFE

The head of loss of amenities of life is awarded to cater for loss of all things that the claimant used to be able to do, see and experience and that these things can no longer be seen or be done or be experienced due to the impact of the injury in question. In the case of **Mtika v Chagomerana t/a Trans Usher** (1997) 2 MLR 123, 126; the court explained loss of amenities of life in the following terms;

“there is loss known as the loss of amenities of life. This covers the loss caused by the injury in that the plaintiff will be unable to pursue the leisure and pleasures of life that he used to enjoy but for the injury”

DAMAGES FOR DISFIGUREMENT

Damages for disfigurement are awarded for some form of permanent scars or deformity left on the body of the victim as was held in the case of **Tabord v. David Whitehead and Sons (Mw) Ltd**, (1995) 1 MLR 297 (SCA).

DAMAGES FOR LOSS OF EARNINGS AND 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 a result of the injury suffered. See **Kambwiri v Attorney General (1991) 14 MLR 151 (HC) Tembo AR**, adapting from McGregor in *Damages*, 15th ed., At page 905 states as follows in **Manda v Malawi Social Action Fund Civil Cause No. 756 of 2003 (unrep)**:

“In calculating the loss of earning capacity the courts have evolved a certain method. 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.”

Multiplicand

The claimants’ incomes from their respective businesses will be used as multiplicand.

Multiplier

The multiplier is the difference between the average life expectancy in Malawi and the age of the claimant.

The INDEPTH model estimate of the life table for males and females in Malawi as at 2008, according to **Population and Housing Census 2008, Analytical Report Vol. 2 (mortality)** published by National

Statistical Office, August 2010, puts exact life expectancies of a male and females at different ages (see Table below).

Age	Male	Female
0	48.3	51.4
1	51.9	55.1
5	51.1	54.4
10	47.2	50.4
15	42.8	45.9
20	38.4	41.6
25	34.4	38.0
30	31.2	35.4
35	28.4	33.2
40	25.8	30.6
45	23.4	27.6
50	21.1	24.5
55	18.5	21.1
60	15.6	17.1
65	13.0	14.5
70	10.4	11.4
75	8.1	8.8
80	5.8	5.9

85	2.9	3.1
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Alternatively, in the recent case of **Lucy Chitsotso Chatayika v Emmanuel Kaludzu and United General Insurance Co. Ltd, Civil Cause No. 1146 of 2016 (unrep)**, the court put life expectancy in Malawi at 61.2 years.

Sometimes courts have taken the approach of determining loss of earning capacity in terms of percentage of the plaintiff's permanent incapacity. In **Makina v Sammy's Transport Ltd and another Civil Cause No. 89 of 2011 (unrep)**, the plaintiff's permanent incapacity was assessed at 45 percent. The court held that his loss earning capacity was 45 percent.

ASSESMENT OF THE FACTS AND COMPARABLE AWARDS

From the evidence before this Court; the injuries suffered by the Claimant are as presented by the Defence witness namely; a cut in the head, bruises in the legs and sprained right arm. The traumatic brain injury claim is not a valid claim when one considers the evidence before this Court. In the present case, the claimant prayed for a total sum of MK24, 580, 016.00 as a global sum of damages payable.

DAMAGES FOR PAIN AND SUFFERING, LOSS OF AMENITIES OF LIFE AND DISFIGUREMENT

The Claimant claimed a total of MK21, 000,000.00 on this item. Four comparable awards were cited in support of the claim. The first case was the case of **Emma Muniya v. Prime Insurance Company limited, personal injury cause no.344 of 2018**. In this case, the claimant sustained spinal injuries, muscle spasms to the Thoraco Lumbar spine and a fracture of the lateral malleolus on the left ankle with the result that the claimant has severe backache, walking difficulties, slurred speech, loss of memory and that she cannot do her normal duties like farming or cooking. The claimant was awarded a total sum of MK6, 163,500.00 for pain and suffering, loss of amenities of life and disfigurement on 21st January, 2019.

The second case was the case of **Chifundo Semba (Suing through next of kin Francis Semba) v Chinsinsi Chaluluka, Thengo and Prime Insurance Company Limited, personal Injury Cause Number 886 of 2016**. The claimant sustained severe head injury with lacerations. The motor function of the right side was affected and he had a right sided body weakness. He developed scars, problem with talking and walking, he forgets a lot. He has problems with his vision as he had cerebral visual

impairment. He requires special attention and to be examined regularly by medical personnel. The court awarded MK10,000,000.00 for pain and suffering, loss of amenities of life, disfigurement and MK2,500,000.00 for future medical care on 16th January, 2019.

The third case was the case of **Chifundo Pheluwa v Liberty General Insurance Company Limited, Personal Injury Cause No. 359 of 2018**. The claimant sustained a fracture of the left femur and severe head injuries. She was treated at Queen Elizabeth Central Hospital for 4 months. She could not walk properly, visit friends and family, attend prayers, and stopped going to school because of mobility problem. She had her brain scanned and had problems with her memory. The claimant was awarded a total sum of MK7,000,000.00 for the personal injuries, pain and suffering, loss of amenities of life and disfigurement on 12th December, 2019. The last case cited by the Claimant was the case of **Alefa Mkwate v. Kunje Suwedi and Prime Insurance Company Limited 2019 MWHC 120**.

The Claimant sustained Severe head injuries, fracture of tibia and fibula on the right leg leading to deformed and shortened leg, bruises and multiple cuts on the left leg. The claimant was failing to do normal household chores and had difficulties in walking. The claimant was awarded a total sum of MK6,000,000.00 for pain and suffering, loss of amenities of life and disfigurement on 25th March 2019. My immediate observation is that the comparable awards used by the Claimant do not relate to the injuries suffered by the Claimant in the present case. The Claimant's in the precedents suffered more than the present Claimant hence in will have to keep this in mind when considering the awards cited by the Claimant.

The Defendant cited two cases which I believe do relate well with the injuries suffered by the Claimant of the present case. The first case is the case of **Chikumbutso Paul (Suing through his father and litigation guardian Francis Paul) vs Prime Insurance Company Limited; Personal Injury Cause Number 747 of 2015** where the Claimant sustained occipital fracture on the head, two deep cut wounds on the head and blood oozing from the ear. He was awarded MK2,503,000.00 for pain and suffering; loss of amenities of life and disfigurement on 31st May 2018. The second case was the case of **Alick Manyamba v. Mc Donald Bengo & Prime Insurance Company Limited; Personal Injury Cause No. 566 of 2013**, where the Claimant sustained a deep cut on the forehead, cuts on the back, head and nose and multiple bruises. The Court made an award of MK1,150,000.00 for pain and suffering and loss of amenities of life on 12th June 2018. I have considered these two cases whilst bearing in mind the fact that the value of the currency has depreciated to a greater extent over the past four years. Having considered the circumstances of the present case, I proceed to award a sum of MK3,800,000.00 as total damages under this head.

**DAMAGES FOR LOSS OF EARNINGS AND EARNING CAPACITY AND FOR POLICE AND MEDICAL
REPORT**

The claim under this head has two elements; the claim for the lost earnings and future earning capacity. The Claimant lost pay for three months as a result of the accident and his monthly salary was MK35,000,000.00. The other claim relates to loss of money from his bicycle taxi business. The claim on how much the Claimant used to make in his business has to be considered in light of the fact that it is not backed with any evidence. The Claimant claimed MK3,570.016.32 on this item and the calculations have been based on this assumed income. In the circumstances of the present case; I proceed to allow MK1,000,000.00 as total damages payable under this head. I further award MK10,000.000 as costs of police and medical report.

FINDING

In view of the above discussion, this court is of the view that a global sum of MK4,810,000.00 will be sufficient recompense on all heads of claims made by the claimant. Judgment is accordingly entered in favour of the Claimant in the sum of MK4,810,000.00. The claimant is further awarded costs of this action.

MADE IN CHAMBERS THIS.....^{23rd} DAY OF JUNE 2022



ANTHONY PITILIZANI KAPASWICHE

ASSISTANT REGISTRAR