



REPUBLIC OF MALAWI



IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NUMBER 670 OF 2020

BETWEEN

ELARD CHINGAPA (suing through HARRY

ELARD CHINGAPA, litigation guardian)..... CLAIMANT

AND

KINGSTONE WIZIMANI.....1ST DEFENDANT

PRIME INSURANCE COMPANY LIMITED.....2ND DEFENDANT

CORAM: KAPASWICHE	: ASSISTANT REGISTRAR (AR)
Kambalame	: Counsel for the Claimant
Kapinda	: For the Defence
Mwangosi	: Clerk / Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

BACKGROUND

This is a claim for damages for pain and suffering; loss of amenities of life; disfigurement; future nursing care; cost of police and medical report and costs of the action. The matter was commenced on the 3rd day of August 2020. On 26th August 2020, a default Judgment was entered on all the claims against the Defendants and the matter was referred for assessment of damages. This is my determination on the damages payable in the present case.

THE EVIDENCE

The evidence in the present case came from one witness namely Harry Elard Chingapa being a litigation guardian for the minor. He adopted his witness statement that was filed with the Court. His evidence was that on 8th February 2020 around 18:30 hours the minor was crossing the road from left to right. The 1st Defendant was driving motor vehicle from the direction of Mponela going towards Ntchisi along the Mponela/ Ntchisi road. Upon arrival at Mponela Trading Centre, he overtook another motor vehicle and in the process he hit the minor who was about to finish crossing the road from left to right. The injuries sustained by the minor were a deep cut wound and severe bleeding on the left frontal temporal bone, cut on the left ear, painful back and hip, loss of memory, persistent headaches and serious scars on the affected parts. The minor was treated at Mponela Rural Hospital where he was referred to Mtengowanthenega Hospital where he was admitted for two days. His permanent incapacity was assessed at 20%. PW1 stated that the minor still has persistent memory loss; he is no longer doing well in class as he used to; he has mental illness as he wonders about aimlessly and can no longer run errands as he used to and that he even relies on his mother to bath him.

In cross examination, PW1 stated that the minor got injured on the head, shoulder and leg as well as the back. He stated that after the accident, the minor was firstly taken to Mponela hospital and then to Mtengowanthenega hospital. He stated that the medical report tendered was stamped at Mponela hospital though the treatment was received at Mtengowanthenega. He admitted that the medical officer who prepared the medical report was based at Mponela hospital and was not the one who treated the minor as the minor was treated at Mtengowanthenega hospital. He stated that the Mponela medical officer was not paid any money to produce the medical report. He stated that the police report was prepared by the police officer who handled the matter and he is not sure of the injuries recorded in the police report but that what he knows is that the child had serious injuries.

The witness admitted that he has not brought evidence in court to prove that the minor is not performing well in class as compared to the period prior to the accident. He further stated that the

child has not been taken to any mental health facility on the alleged mental illness as a result of the accident. When Defence Counsel asked question to the minor, the minor told the Court that prior to the accident he repeated classes twice. The minor further stated that he is able to bath on his own though sometimes he feels pain especially when carry a bucket of water.

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 FUTURE NURSING CARE

Damages for future nursing care are awarded on the basis that one is entitled to recover for any care to be provided for by someone else as result of her injuries. See *Donnely v Joyce* (1973) 3 All ER. Two methods have been employed by courts in calculating this head of damages. The first one is to use the multiplicand/ multiplier method. See *Housecroft v Burnett* (1986) 1 All ER 332 and *Chibwana v Prime Insurance Co. Ltd Civil Cause No. 1179 of 2009 (unrep)*. The second method is to make a discretionary award. In *Harawa v Axa Bus Co. Ltd Civil Cause No. 1477 of 2008 (unrep)*, the plaintiff was unable to do laundry and other household chores and had to depend on a maid. Her permanent incapacity was assessed at 35 percent. The Court awarded a sum of MK500,000.00 for future nursing care.

DETERMINATION

Counsel for the Claimant filed skeleton arguments in support of the awards prayed for. On the other hand, Defence Counsel also filled his submissions on the appropriate quantum to be awarded in the present case. The filed documents have helped this Court to have a proper appreciation of the circumstances of the present case to reach at an appropriate quantum of damages payable to the minor.

The law on assessment of damages payable in personal injury cases emphasizes that damages should be paid to compensate the injury suffered reasonably. This means that the first step is to ascertain the actual injuries suffered by a claimant. In the present case, a medical report has been presented by the Claimant and the injuries sustained by the minor were said to be a deep cut wound and severe bleeding on the left frontal temporal bone, cut on the left ear, painful back and hip, loss of memory, and serious scars on the affected parts. These are the injuries contained in the medical report as well as the witness statement of the Claimant. The witness stated that as a result of the accident, the minor still has persistent memory loss; he is no longer doing well in class as he used to; he has mental illness as he wonders about aimlessly and can no longer run errands as he used to and that he even relies on his mother to bath him.

Based on the injuries as presented by PW1, the prayer from the Claimant in the skeleton arguments was that he be awarded a total sum of MK13,010,000.00. The breakdown of the prayed sum was as follows; MK5,000,000.00 for pain and suffering; MK3,000,000.00 for loss of amenities of life; MK2,000,000.00 for disfigurement; MK3,000,000.00 for future nursing care and MK10,000.00 for cost of police and medical report. It must be stated that in cross examination, the evidence of PW1 was wholly defeated. The only thing that stood out from his evidence was just the fact that the minor was indeed involved in a road accident. The medical report exhibited has no bearing in my determination of the matter as it was not prepared by the actual medical practitioner who treated the minor. As conceded by the witness, the actual examination and treatment of the minor occurred at Mtengowanthenega hospital but the medical report exhibited in this Court was prepared by a person from Mponela hospital. All the injuries stated in the witness statement are based on the medical report which has been found to be wanting by this Court. The police report indicates that the minor suffered soft tissue injuries.

During cross examination, all the alleged effects of the accident as stated in witness statement were rebutted. There was no proof for the minor's poor performance in school due as in actual fact the minor told the court that prior to the accident he repeated classes twice. This gives an indication that his poor performance in school is not as a result of the accident. The minor further stated that he is able to do errands and able even to bath on his own though sometimes he feels pain when carrying buckets. The precedents cited in the Claimant's skeleton arguments are based on the wrong assumptions of the purported injuries contained in the medical report. In the circumstances of the present case, the Court will award nominal sum of money to compensate the minor for the soft tissue

injuries suffered. I proceed to award a sum of MK900,000.00 as total damages on all the heads of claims herein.

The Court further awards a sum of MK750,000.00 as costs of the present action. The awarded sums should be paid within 14 days from today.

MADE IN CHAMBERS THIS 31ST DAY OF MARCH 2023



ANTHONY PITILIZANI KAPASWICHE

ASSISTANT REGISTRAR