



IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO. 504 OF 2016

BETWEEN

Chada Yada (a minor suing through her Father and next friend Hamisi Kazembe Yada).....Plaintiff

AND

Prime Insurance Company Ltd Defendant

CORAM: *Madalitso Khoswe Chimwaza, Assistant Registrar*
C. Mhone, Counsel for the plaintiff on a brief
Mpandaguta, Court Clerk

ORDER ON ASSESSMENT OF DAMAGES

Matter was set down for assessment of damages following a summary judgment obtained on 26th August 2016. The defendants were served with the notice of assessment on 19th September, 2017 but they did not appear and no excuse was given for such failure. The assessment is therefore based on the plaintiffs' uncontroverted evidence. The plaintiff invited one witness only.

Brief Facts:

According to the witness statement of the plaintiff which he adopted in its entirety, he told the court that it was on or about the 15th day of March 2016 at about 06:55 hours, when motor vehicle Reg No. MN 2185 Toyota Hiace was negligently driven, managed or controlled from the direction of area 3 heading towards Likuni, along the Likuni road that upon arrival at Ching'onga it hit the plaintiff who was crossing the road from the offside to the nearside verge of the road.

As a result the plaintiff sustained multiple cuts on both legs, bruises on right arm and general body injuries. She sustained a tibia fracture on the right leg and was applied POP below the knee. She therefore claims damages for pain, suffering and disfigurement, damages for loss of amenities of life damages for earning capacity, special damages for medical and police reports.

The defendants were sued by virtue of being the insurers of the said vehicle under certificate of insurance number 130584818 valid from 18/9/2015 to 27/6/2016.

GENERAL PRINCIPLES ON DAMAGES

A person who suffers injury as a result of another's negligence is entitled to be compensated for the injury suffered by the negligent party. Such damages are awarded to compensate the plaintiff in so far as money can do (see *Nakununkhe v Paulo Chakhumbira and Attorney General Civil* cause no.357 of 1997 (Unreported). As was held in the case of *Namwiyo v Semu et al* [1993] 16 (1) MLR 369, in awarding compensation, the court attempts to put the plaintiff in the position he/she would have been but for the injury arising from the tort. Such damages however cannot be quantified by any mathematical calculation as such the court relies on decided cases of a comparable nature for guidance. Sight must not be lost however, of peculiar facts of each case in order to avoid occasioning injustice by inflexible maintenance of consistency and uniformity (*D. Kwataine Malombe & Another vs. G.H. Chikho t/a Bec Line Minibus* Civil Cause No. 3687 of 2001 (HC Unreported).

PAIN AND SUFFERING AND LOSS OF AMENITIES OF LIFE AND DISFIGUREMENT

Pain is used to suggest physical experience of pain caused by and consequent upon the injury while suffering relates to the mental elements of anxiety, fear, embarrassment and the like. On the other hand, loss of amenities of life embraces all that which reduces the plaintiff's enjoyment of life, his deprivation of amenity whether he is aware of it or not (See *City of Blantyre v Sagawa* [1993] 16 (1) MLR 67). In *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 or to do, see, and experience-they need not be of leisurely nature at all. In the case of *Manley v Rugby Portland Cement and Company* [1950] No 286 (reported in Kemp and Kemp, "Quantum of Damages," Volume 1 2nd edition 1961 at p.2640) Birkett, LJ had this to say:

"There is a head of damages which is sometimes called loss of amenities; the man-made blind by accident will no longer be able to see familiar things he has seen all his life, the man has both legs removed will never again go upon his walking excursions, things of that kind-loss of amenities."

Although pain and suffering and loss of amenities for life are distinct however for purposes of quantum the court does consider them together and make a single award under those heads. (see *Henry Manyowa v. Phiri and Prime Insurance Co. Ltd* Personal Injury Cause No. 139/2012; *Andrew Katola v. Prime Insurance Co Ltd* Civil Cause No. 2807/2009).

Counsel for the plaintiff gave some comparable awards for cases of injury of similar nature to that of the plaintiff which have been very useful in guiding the court to come with a just and reasonable award.

In the present case the plaintiff who was 11 years old at the time of the accident suffered multiple cuts on both legs, a bruise on the right arm, general body injuries, and a fracture of the tibia on the right leg. She has developed post traumatic arthritis of the proximal joint and her degree of incapacity was rated at 35%. This court is of the view that a reasonable award of damages would be in the region of K3,000,000 for pain and suffering and loss of amenities of life, and K800,000 for disfigurement.

LOSS OF EARNING CAPACITY

This head of compensation refers to total loss or reduction in the income of the plaintiff as a result of the accident suffered (See *Kambwiri vs Attorney General* [1991] 14 MLR 151. It is pecuniary loss that is loss which is past, present or future and which is capable of being quantified, subject to it being not too remote. Loss of earnings is categorized into two: past loss and future loss. Past loss refers to loss from date of accident or injury to date of assessment. In the present matter the plaintiff is a minor of school going age she had not yet started earning a living.

In the case of **Mwasinga vs Stagecoach (MW) Ltd**, [1993] 16(1) MLR 363 (HC) Mwaungulu as he was Registrar, then stated that the practice of the courts has been to award lowly for loss of earning capacity for two reasons:

There are no problems if the applicant is an adult and is already working and earning a living at the time of the accident. The problem arises when the victim is an infant... because at that age it is very difficult to assess a child's skills and abilities with a view to ascertaining his possible achievement and thereby determine the possible loss of earnings...The award is made before the child has started earning.

This court has noted that it is dealing with a claim for loss of earnings capacity. There is no evidence that the plaintiff's earning capacity will be impaired as a result of the injuries. The procedure in claiming such loss of earnings is that the losses should be specifically pleaded with all sufficient particulars and proved by the party. The duty of the court is just to see if the claim has been substantiated. Therefore the court will make a minimal award of **K400,000.00** on this head

Special Damages

The plaintiff is also awarded just and reasonable damages for police and medical reports in the sum of K6,000,00 as there was no evidence to prove payment of **K8,000.00** these being special damages.

ORDER

The plaintiff is awarded a global sum of **K4,208,000.00**. and costs of these proceedings to be taxed if parties do not agree.

Right of appeal

Either party aggrieved by the award of this court has the right to appeal.

Made in Chamber this.....28.....day ofDec.....2017



Madalitso Khoswe Chimwaza

ASSISTANT REGISTRAR