



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO. 393 OF 2016

BETWEEN

HARRY MALIKEBU.....CLAIMANT

AND

ECRESS CHOIPA.....1ST DEFENDANT

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

Coram: **WYSON CHAMDIMBA NKHATA (AR)**

Mr. Hussein - of Counsel for the Claimant

Mr. Kalua – of Counsel for the Defendant

Mr. Chimtengo - Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

The claimant, by writ of summons issued on the 26th of May 2016, commenced proceedings against the defendant seeking damages for pain and suffering, loss of amenities of life, disfigurement and costs of the action. Upon failure by the defendants to enter defence within the required period, a judgment on default was entered in favour of the claimant on the 5th day of September, 2016. This court was appointed to assess the said damages to compensate the claimant for the losses suffered. This is the court's order on assessment of damages.

The matter came for assessment of damages on the 27th of October 2020. The claimant adopted his sworn statement in which he averred that on or about 8th May, 2015, he was involved in a road accident at Thom Gate along Ntchalo-Chikwawa Road when he was hit by a motor vehicle bearing registration number BS 6603 TATA Lorry which was at the material time being driven by the 1st Defendant and insured by the 2nd Defendant. He tendered a copy of a Police Report Marked "EXP1". He further stated that soon after the accident herein, he was rushed to St. Monfort Hospital where having seen his condition, officers at the facility referred him to Chikwawa District Hospital. At Chikwawa District Hospital, he was admitted for almost three months. Thereafter, he was referred to Queen Elizabeth Central Hospital as there was a need to have a metal rod fixed and/or inserted internally on his right femur. The said rod was indeed fixed. The rod is still on his femur up to date.

As a result of the accident herein, he sustained a fracture of the right femur; dislocation of the right shoulder; deep cut at the back; and his degree of permanent incapacity was assessed at 35%. He tendered a copy of the Medical Report marked EXP2. He indicated that during the recuperation period he could not enjoy amenities of life such as visiting family and friends; attending congregational prayers; and having conjugal rights with his wife. Meanwhile, he still experiences persistent pain on the right knee; difficulty in flexing the right knee and backache.

Basically, such was the evidence adduced for the assessment proceedings. Both parties undertook to make submissions with Counsel for the Defendant indicating that he wanted to address the issue of policy limit. The court therefore adjourned the matter for the ruling which I must now consider.

The law in this case demands 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.

It is a well-settled law that pain, suffering and loss of amenities of life are three distinct and separate heads of damages. The Supreme Court of Appeal in the case of *City of Blantyre v. Sagawa* [1993] 16 (1) MLR 67 distinguished the three heads of damages in the following terms:

Pain is used to suggest physical experience of pain caused by and consequent upon the injury while suffering relates to the mental elements 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.

On the other hand, damages are paid under the head of disfigurement is 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.

However, 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 **Kalinda -vs- Attorney General** [1992] 15 M.L.R. 170 at p.172. In this case, Counsel for the claimant called upon the court to consider the following cases:

Christina Mande vs Charter Insurance Company Limited Personal Injury Cause No. 329 of 2016, in which the claimant sustained a fracture of the right femur, dislocation of the right hip joint, cuts on the head. On 11th January, 2017, the court awarded her the sum of MK6,300,000.00.

Counsel for the claimant is of the view that the injuries herein are more serious as compared to those in the cases cited above and further that the Kwacha has lost value since the awards. He is of the view that in the circumstances of this case, the reasonable compensation would be K8,000,000.00.

Reaching this far, there is a preliminary issue which needs to be dealt with before proceeding with the assessment of damages. In his closing remarks, Counsel for the defendants was of the view that damages be assessed with due consideration of the insurance policy limit. Observably, the issue of liability was settled through a default judgment which does not allude to the insurance policy limit. A perusal of the record indicates that the position was not challenged by the defendants save for now that the matter has come for assessment of damages. The question that arises is whether the judgment having been entered under such terms which do not provide a limitation clause on policy limit and without any objections from the 2nd Defendant, should the 2nd Defendant be allowed to raise the same at this stage of trial.

In the case of **Genuine Kaunda vs- Richard Nthala and Prime Insurance Company** Civil Case Number 240 of 2015, the Court declined to consider the issue of policy limit and the exhaustion of the Harry Malikebu v Ecess Choipa & Another Personal Injury Cause No. 393 of 2016

same on assessment of damages when it reasoned that the same has to be considered by the trial judge before the matter reaches an assessment stage. The Court stated:

“The 2nd Defendant’s evidence is to the effect that... its liability to pay compensation has to be dictated by the policy limit. I have always had a problem with the issue of exhausted policy limits being raised during assessment proceedings, only. This goes down against the very verdict of liability entered by the judge. This is exactly what the 2nd Defendant purports to do; that while the judge says ‘you are liable to pay damages’ and they come before the registrar for a contrary verdict, ‘you are not liable to pay damages’. It is my considered view that issues of policy limit should be raised in the initial pleadings with a view of allowing the presiding judge to equally make a decision on the same.”

It is clear that without a stipulation of policy limit on the judgment giving rise to the assessment proceedings, the issue of policy limit is misplaced and of no effect to the proceedings that are before this Court. This is for a simple reason that this Court is only tasked with assessing damages payable. All other issues, if any, do not concern it. Indeed, in the case of **Chrissy Chioko vs- Prime Insurance Company Limited** Personal Injury Cause Number 359 of 2016, the Court stated:

“In the present matter, my task is to assess damages to be recovered by the claimant. Assessment of damages is basically a process of ascertaining the compensation that the claimant should receive in respect of the injuries that she sustained. It means my duty is to determine how much the claimant deserves to receive. It means the question of limits of liability does not arise at this point.”

In another case, **Black Luwayo vs Adam Msimuko and 2 others** Civil Cause Number 1262 of 2009, the Court said;

“I should point out at the onset that our task herein is to assess damages sustained and recoverable by the plaintiff. In my view the question of limits of liability does not arise at this point. That issue is between the defendants as it arises out of the policy insurance... I therefore will ignore the limit of liability evidence in assessing the damages herein.”

With the foregoing, I am of the view that the position is clear and it is to the effect that the policy limit ought to have been dealt with during determination of liability. At this point, the issue is res judicata and this court is functus officio. I am compelled to ignore the issue of policy limit.

On the issue of quantum of damages, the uncontroverted evidence indicates that the claimant sustained a fracture of the right femur; dislocation of the right shoulder; deep cut at the back; and his degree of permanent incapacity was assessed at 35%. It leaves this court with no doubt that the claimant in this case experienced pain and suffering when sustaining the injuries. The court also takes note that the injuries have also distorted his wellbeing. He has a metal rod inserted on his right femur and he can no longer walk long distances among other things that he can no longer do. This is a deformity that has come but for the accident herein. I also take note of the long period that he stayed at the hospital undergoing treatment. He stayed in hospital for over three months. Clearly, a lot of his undertakings came to a standstill which may have affected his livelihood.

I agree with Counsel for the claimant that the injuries herein are similar to those sustained in **Christina Mande vs Charter Insurance Company Limited(supra)**. In that case, the claimant also sustained a fracture of the right femur, dislocation and cut wounds. He was awarded her the sum of MK6,300,000.00 on the 11th January, 2017. Taking into consideration the facts and circumstances of the present case, depreciation in the value of our currency and the applicable law, I am of the view that the K7,000,000.00 would fairly compensate the claimant under the heads claimed and proved.

The claimant is also praying for K13,500.00 being special damages for the cost of obtaining a Police Report and Medical Report. However, these being special damages they ought to have been strictly proved. In this case, there is no proof whatsoever that the Medical Report was paid for save for the Police Report which carries an endorsement that it was paid for and indicates that a receipt was issued. I award K3,000.00 for the Police Report.

In total, the claimant is awarded K7,003,000.00. He is further awarded costs for the assessment proceedings to be taxed if not agreed by the parties.

DELIVERED IN CHAMBERS THIS 27th DAY OF NOVEMBER 2020

WYSON CHAMPIMBA NKHATA

ASSISTANT REGISTRAR