



The Judiciary

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 282 OF 2017

Between:

JAMES TANAPOSI1st CLAIMANT

MARTIN MWAMADI (Suing on his own behalf and on behalf of

Tipaseni Mwamad).....2nd CLAIMANT

-and-

YASIN DAUDI 1st DEFENDANT

PRIME INSURANCE COMPANY LIMITED2nd DEFENDANT

CORAM: Texious Masoamphambe, Deputy Registrar

Miss H. Kamoto, for the Claimant

Mr A. Ndlovu, for the Defendants

Ms. Makhambera, Clerk/ Official Interpreter

ORDER ON ASSESSMENT DAMAGES

Background

The matter comes for assessment of damages following a consent judgement that was entered against the defendants for damages. The claimants were involved in an accident on or about 10th March, 2017, near/along Jokala Trading Centre. The accident was occasioned by the negligent driving of the 1st defendant of motor vehicle number **BK 8483**, which was insured under Prime Insurance Company Limited, the 2nd defendant herein.

The claimants sustained several injuries as a result of the accident and therefore claim damages under the heads of; Pain and Suffering: Loss of Amenities of Life: Disfigurement and Special Damages. The claimants also claim costs for this action. However, the policy limit for the 2nd defendant is **K5,000,000.00**, and the parties agreed that if the damages exceed the same, the remainder is to be paid by the 1st defendant.

On 4th February, 2020, the matter came before this court for assessment of damages, wherein, counsel for the claimants brought to the attention of the court that there seemed to be a breach of **Order 33(1) sub. rule (2)** of the Court by the defendant and therein questioned whether the defendant had a right of audience in the court. The provision states that where there is a change of legal practitioner, the party or legal practitioner shall file with the court a notice of the change and shall serve the notice on each party to the proceeding.

Counsel for the defendant raised a defence that they had filed a notice of change of legal practitioners but the court file did not contain the same nor were the claimants served with the same. Counsel for the defendants showed the court the notice of change of legal practitioner in their file but the said notice did not have any court stamp thus lacked evidence of filing and service. Therefore, since counsel for the defendant failed to show evidence of service notifying the claimant and the court that there was a change of legal practitioners representing the defendants, the court ruled that the said Counsel for the defendants did not have a right of audience and was asked to leave the court therein. The matter proceeded without representation on the defendant's side.

Evidence

Counsel for the claimants first paraded the first witness, Mr. James Tanaposi, the 1st claimant, who adopted his witness and tendered it as evidence to be used together with the attached police and medical reports. The same were marked "**JT 1**" and "**JT 2**", respectively. The 1st claimant told the court that he was then feeling better but was still experiencing pain. He could not carry

heavy objects, was experiencing dizziness and was feeling tired easily that he could not walk long distances. According to his medical report and witness statement that were attached, the 1st claimant sustained a cut wound on his left hand. Permanent incapacity was assessed at 5%.

The second witness was the 2nd claimant himself. His testimony was that he was appearing on his own behalf and on behalf of his daughter, a minor, who was also present in court at the time of assessment. He adopted the witness statements and were tendered in the present matter as part of his evidence, including the attached police and medical reports. The same was marked “MM 1” and “MM 2” respectively.

The 2nd claimant told the court that the child sustained a swollen face and swollen lips. He further stated that the child was still experiencing headaches. On his part, he said that he was still having migraines and was experiencing pain so such that he could not work for a relatively longer time. The medical report for the minor showed that she suffered 10% permanent incapacity as a result of the injuries she sustained. As for the 2nd claimant himself, his medical report showed that he suffered a mild head injury and his incapacity was assessed at 5%.

Issue

The only issue for determination at this stage of the proceeding is the amount of damages that must be paid to the claimants as compensation for the injuries they suffered.

Analysis of Fact, Law and Determination

Damages are a remedy that is given to victims of a tortious is open to a victim of a wrongful act of another. However, courts award damages not necessarily to punish the defendant, but to fully compensate the claimant for all the losses that he has suffered as a direct or consequential result of the wrongful act or omission by the defendant. In the case of **George Kankhuni v. Shire Buslines Ltd, Civil Case Number 1905 of 2002**, Katsala, J stated as follows:

“The law demands that the plaintiff, as far as money can do it, be put in the same position as if he has not suffered the loss. This is what is referred to as restitution in intergrum.”

It is not easy to quantify damages for losses that are not monetary in nature such as personal injuries. Courts, therefore, use comparable cases as a guide to the quantification of applicable damages, without losing sight of particularities in the individual case that the court is dealing with. This was propounded in the case of **Chipeta v. Dwangwa Sugar Corporation, Civil Cause No. 345 of 1998, High Court, Principal Registry (unreported)**.

The courts also consider factors such as passage of time since a particular comparable award was made, as well as currency fluctuations within the period between the case at hand and the comparable one. The case in point is **Hon. Kennedy Kuntenga v. Attorney General, Civil Cause No. 2002 of 2002, High Court, Principal Registry, (unreported)**.

In the present case, the claimants prayed for compensation for damages for pain and suffering, loss of amenities of life, disfigurement, and special damages.

Pain and Suffering

According to **Ian Goldrein et al, Personal Injury Litigation, Practice and Precedents (Butterworths, 1985) p8**, 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*.

The award of damages for pain and suffering depends upon the claimant's personal awareness of pain, and his capacity for suffering. This was said in the case of **Limpoh Choo v. Camden and Islington Area Health Authority [1980] AC 174 at 183**.

Loss of Amenities of Life

Damages are paid under the head of loss of amenities of life to compensate the claimant's deprivation of the pleasures of life, which amounts to substantial loss, whether the claimant is aware or not of that loss. The case in point is **City of Blantyre v. Sagawa [1993] 16(1) MLR 67 (SCA)**. You may also look at **Kemp and Kemp, The Quantum of Damages, Vol .1(2nd Ed). 1961, p.624.2**.

Disfigurement

Damages are paid under the head of disfigurement for the change in the physical form of a person injured either as a result of the impact of the injury or its treatment, such as a 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 that he did before. This was observed by the court in the case of **Austin Julius v. Rasika Gunawardena and General Alliance Limited, Personal Injury Cause Number 316 of 2014**.

In addition, courts state that disfigurement is not something to be taken lightly and casually as a person lives with the deformity for the rest of his life, as per Potani, J in the case of **Chingámba v. Deerless Logistics Limited Civil Cause No. 2888 of 2007**.

In **Zaina Chipala v. Dwangwa Sugar Corporation Civil Cause Number 345 of 1998, High Court, Principal Registry, Chimasula, J**, held that money cannot renew a physical frame that has been battered and shattered. The courts must therefore award a sum that is regarded as reasonable compensation.

Special Damages

The claimants also pray for special damages. According to the case of **Govati v Manica Freight Services (Mal) Limited [1993] 16 (2) MLR 521 (HC)**, these are losses that a claimant undergoes in the course or incidental to the wrongful action or omission of the defendant and are only recoverable when the claimant specifically pleaded for them and actually proved them. This includes attaching receipts of costs incurred while procuring a medical or/and police report.

I award the claimants the sum of **MK 3,000.00** each, as special damages for the procurement of a police report. There is nothing to prove the expense of the medical reports and I therefore make no award on that.

Comparable Cases

Counsel for the claimant submitted the following authorities as comparable cases for their prayers.

For the 1st Claimant, they cited the case of **Harold Andsen v Rodrick Alumenda & Prime Insurance Company Limited, Civil Cause Number 211 of 2015**, where the plaintiff suffered multiple cuts on his right knee, left foot and back and the court awarded him the sum of **K 2,000,000.00** for pain and suffering, loss of amenities of life and disfigurement. The award was made on 24th April, 2015.

Counsel also cited, on the same, the case of **Gift Maulidi v Chikondi Kuwani and General Alliance Insurance Limited Civil Cause Number 247 of 2015**, where the court on 30th June, 2015, awarded the plaintiff the sum of **K2,000,000.00** as damages for pain and suffering and loss of amenities of life. In the case, the plaintiff sustained multiple bruises on the right and left knee joint, painful right arm, chest pains, painful back, as well as a deep cut wound on the right shoulder.

In light of the foregoing as precedence, counsel prayed for **K3,000,000.00** for the 1st claimant.

For the 2nd defendant, Mr. M. Mwamadi, who sustained a mild head injury, prayer was made for the sum of **K 3,000,000.00**, where counsel cited the case of **Ethel Duncan and Joseph Kamadzi & Others v Prime Insurance Company Limited and W.B Mputa Civil Cause Number 2016 of 2010**, where the plaintiff suffered a fractured humerus, mild head injury and mild head Injury and multiple bruises, the court awarded him **K4,784,500.00** as damages for pain and suffering and loss of amenities of life. The award was made on 28th July 2012.

For the minor, who sustained a swollen face and swollen lips, and still experiences mild headaches, counsel cited the following cases while praying that the minor be awarded the sum of **K 3,000,000.00**;

In Zalimba Misomali v Alex Kamgogo and Prime Insurance Company Limited Personal Injury Cause Number 389 of 2012, where the plaintiff suffered head injuries and multiple bruises on the face and knees, the court awarded him the sum of **K2,200,000.00** as damages for pain and suffering and loss of amenities of life. The award was made on 10th September, 2015.

In Medson Muhike Junior (Minor suing through Medon Muhike Senior, next friend) v Harold Tehale & Prime Insurance Company Limited, Personal Injury Cause Number 757 of 2015, the plaintiff sustained head injuries and abrasions on the shoulder, the court awarded him the sum of **K 2,500,000.00** as damages for pain and suffering and loss of amenities of life. The award was made on 25th January, 2016.

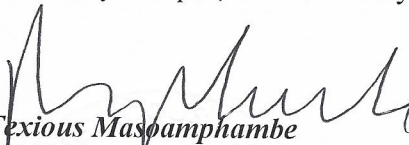
Determination

It is my finding that in this instant case the injuries are less serious than in the cases cited by counsel. However, the cases to a certain extent are comparable to the injuries sustained by the claimants. For this reason, taking into consideration the time factor and devaluation, the facts of the case for each claimant and the authorities cited, the court has made the following awards for the claimants: *1st Claimant*: **K2,800,000.00**; *Minor*: **K 2,500,000.00** and *2nd Claimant*: **K 2,800,000.00**. These sums cover all three heads of damages in respect of each claimant. As I said above, I also award **K3,000.00** special damages.

Conclusion

The claimants are hereby awarded a total sum of **K 8,109,000.00**. This is inclusive of special damages.

Made in chambers this Monday, the 20th day of April, 2020 at Blantyre.


Texious Masamphambe
DEPUTY REGISTRAR