



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CASE NO. 2 OF 2019

BETWEEN

MARRIAM MUHAMMED (Minor suing through Abdul Muhammed, next friend).....CLAIMANT

AND

MUSTAPHER LABANA.....1<sup>st</sup> DEFENDANT

PRIME INSURANCE COMPANY LIMITED.....2<sup>nd</sup> DEFENDANT

Coram: WYSON CHAMDIMBA NKHATA (AR)

Mr. Kanyika - of Counsel for the Claimant

Mr. Chankakala appearing on behalf of Mr. Ndhlovu- of Counsel for the Defendants

Mr. Chimtengo - Court Clerk and Official Interpreter

### ORDER ON ASSESSMENT OF DAMAGES

The claimant in this matter took out a writ of summons which was issued on the 14<sup>th</sup> of January 2019 against the defendants claiming damages for pain and suffering, loss of amenities of life, disfigurement, special damages and costs of the action. Apparently, the action follows an accident in which a motor vehicle driven by the 1<sup>st</sup> defendant hit the claimant who was crossing the road near Malosa ADMARC. She sues the 1<sup>st</sup> defendant as the driver of the vehicle in question and the 2<sup>nd</sup> defendant as the insurer of the said motor vehicle. The issue of liability was settled in favour of the claimant through a default judgment issued on the 24<sup>th</sup> of March 2020. The issue of the Defendant's liability having been settled

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Marriam Muhammed v Mustapha Labana & Another Civil Cause No. 9 of 2019

already by the said consent judgment, the duty placed upon this court was to determine the reasonable quantum of damages that would adequately compensate the claimant for the losses and damages suffered.

The matter came for assessment of damages on the 9<sup>th</sup> of July 2020. The evidence adduced indicates that on the 9<sup>th</sup> of October 2018, Marriam Muhammed, a minor, was involved in a road traffic accident at Malosa ADMARC. As a result of the said accident, the claimant suffered a fractured right humerus, severe head injury, multiple cuts on the face and on the head and multiple bruises on the face and on the head. She was attended to at Zomba Central Hospital. Meanwhile, as a result of the said injuries, she is still suffering from excessive pain and 20% permanent incapacity. She can only perform manual work with difficulties.

What came out during cross-examination is that the next of friend did not adduce evidence to show that the claimant was no longer performing well at school. She was not taken to the hospital for assessment to establish a possible link between the injuries and the poor performance at school. However, there was emphasis that the claimant was no longer a jolly kid as she used to be prior to the injuries.

Such was the evidence for the assessment proceedings. Counsel for the claimant adopted his Skeleton Arguments and closed the claimant's case. The defendants, on the other hand, did not parade witnesses. However, Counsel for the defendants filed submissions on assessment of damages. I must express my gratitude to both Counsel for the submissions which went a long way in informing the court on its decisions on the quantum of damages.

At this point, I must state that it is trite that a person who suffers bodily injuries or losses due to the negligence of another is entitled to recover damages. The fundamental principle which underlies the whole law of damages is that the damages to be recovered must, in money terms, be no more and no less than the claimant'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.

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 **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 claimant.

In this case, the claimant is said to have sustained a fractured right humerus, severe head injury and multiple cuts and bruises on the face and on the head. Counsel for the claimant called upon the court to consider the following cases:

**Redson Lucius vs. James Mkandawire and Citizen Insurance Company Limited Civil Cause Number 2442 of 2010**, the Plaintiff suffered head injuries and fractures of his right tibia and humerus, the court awarded him MK6,403,416.00 as damages for pain, suffering, loss of amenities of life as well as disfigurement and also for nursing future care. The award was made on 17<sup>th</sup> May 2011.

**Ethel Duncan vs Joseph Kamadzi and prime Insurance Company, civil case no 2016 of 2010**, where the plaintiff suffered a fractured right humerus, mild head injuries and multiple bruises and her permanent incapacity was rated at 30%. She was awarded K4,784,000.00 for pain and suffering and loss of amenities. The award was made on 28<sup>th</sup> July 2012.

**Praise Chitete (Minor, suing through Clara Nkhata, next friend) v Yotam M'dala and Prime Insurance Company Limited, Civil Cause Number 282 of 2014** where the claimant was hit by a motor vehicle and she sustained a fractured radius, fractured ulna and multiple bruises on the left hand. The claimant's incapacity was pegged at 25%, Plaster of Paris was applied and developed arthritis. The Assistant Registrar awarded her the sum of MK4,800,000.00 on 13 November 2014.

**Masautso Salima Attorney General Civil Cause No.1956 of 2007**, in which the plaintiff suffered open fracture on right femur and fracture of left ulna. He was awarded the sum of MK3, 600,000.00. The award was made on 14<sup>th</sup> November, 2007.

It was therefore Counsel's submission that in the circumstances of this case, the reasonable compensation would be K8,000,000.00 for pain and suffering, loss of amenities and disfigurement.

On the other hand, the defendant has invited the court to consider the following cases in its determination of damages herein:

**John Matemba v Tisunge Zuze & Prime Insurance Company Limited Personal Injury Cause No. 498 of 2017** in which the claimant suffered a fracture of the clavicle, sprained foot and had mild head injury.



His permanent incapacity was 25% and the court awarded her the sum of K2,000,000.00 as damages for pain and suffering and loss of amenities of life on the 5<sup>th</sup> of March 2019.

**Estery Thomasi (Minor suing through her sister and next of friend Alinafe Thomas Bakali) & Isaac Joseph v Prime Insurance Company Limited** Personal Injury Cause No. 152 of 2017 in which the claimant sustained a fracture of the right elbow joint, cuts and bruises on the face and both arms. The court awarded her the sum of K2,000,000.00 as damages for pain and suffering and loss of amenities of life. The award was made on 4<sup>th</sup> September 2017.

**Lyton Chimwaza v Reunion Insurance Company** Personal Injury Cause No.112 in which the claimant suffered the fracture of the radius and ulnar of the left arm and bruises on both elbows. The court awarded him the sum of K2,100,000.00 as damages for pain and suffering and loss of amenities of life on 8<sup>th</sup> January 2019.

Counsel is of the view that the cases cited above are to a greater extent consistent with the kind of injuries that the claimant suffered in this matter. He therefore moves the court to award the claimant K2,200,000.00 taking into consideration the comparable cases cited above and the circumstances of this case subject to the policy limit as was pleaded herein.

I have perused the medical evidence as to the injuries and the prognosis given in the medical report. I gave meticulous thought to the written submissions filed by both Counsel. I take note that the defendant challenges the degree of the injuries sustained by the claimant. It is contended that the claimant was given brufen as treatment and that there was no head examination or surgical operation that was carried out. Further to that, it is observed that the claimant was not put on Plaster of Paris to align the fractured right humerus. Essentially, Counsel is of the view that the foregoing casts doubt on whether the claimant indeed suffered a fractured humerus and severe head injury. He submits that much as Counsel for the defendant is not learned in matters of medicine that fall within the ambit of the officer who made the medical report in question, common sense can guide one that severe head injuries cannot be dealt with by just prescribing brufen.

In my considered opinion, the contentions by Counsel for the defendant are quite germane. The medical report indicates that the claimant suffered a fracture but on surgical treatment there is an unfinished statement which simply says "application of ...". Am not sure whether Counsel representing the claimant even noticed the same. That notwithstanding, the question perhaps that ought to be answered is whether that impeaches the assertion that the claimant sustained a fractured right humerus. Observably, Counsel concedes that these are matter within the ambit of the medical practitioner who prepared the medical report. I agree. Whether or not a fracture can be treated without a POP or that severe head injuries can



simply be treated by brufen is not for the court to speculate. The next of friend testified to that effect and it was not controverted in cross-examination. Counsel dwelt on failure by the next of friend to adduce evidence to support the assertion that he now performs poorly at school due to the accident. I am still convinced that the claimant was exposed to excruciating pain as a result of the injuries. I further take note that the claimant has healed considerable. The scars from the bruises complained of were barely visible. The issue of poor performance is neither here nor there for lack of supporting evidence.

Be that as it may, I am inclined to hold the view that the K2,200,000.00 as suggested by counsel for the defendants is on the lower side where a fracture is involved. In my opinion, the case of **Ethel Duncan** (supra) is much closer in intensity of the injuries than all the other cases cited. The claimant therein sustained a fractured right humerus, mild head injuries and multiple bruises and her permanent incapacity was rated at 30%. This is not far removed from the injuries sustained in this case. I take note that in that case, the claimant was awarded K4,784,000.00 in 2012 which is roughly 8 years ago. If anything, this court must consider scaling upwards in view of the economic realities arising from factors like devaluation.

Thus, upon a thorough consideration of facts and circumstances of this case, and upon an exhaustive consideration of the submissions by the claimant in the light of the relevant and applicable law regarding damages for the claimed heads herein, having also considered the fact that the devaluation of the kwacha, and further upon considering the degree of permanent incapacity of the claimant being 20%, this court is of the view that the appropriate and reasonable damages should be the sum of **K5,000,000.00** under all heads claimed and proved. She is awarded as such.

She is further awarded costs of these proceedings.

DELIVERED IN CHAMBERS THIS 28<sup>th</sup> DAY OF JULY 2020



WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR