**REPUBLIC OF MALAWI**

**IN THE HIGH COURT OF MALAWI SITTING AT BLANTYRE**

**PRINCIPAL REGISTRY**

**CIVIL DIVISION**

**PERSONAL INJURY CASE NUMBER 418 OF 2013**

**BETWEEN**

**DANIEL KULIMA----------CLAIMANT**

**AND**

**HIPPO CHIVUNDI----------1st DEFENDANT**

**ALPHA SECURITY COMPANY LIMITED----------2nd DEFENDANT**

**CORAM:** His Honour Elijah Blackboard Dazilikwiza Pachalo Daniels, AR.

Mr. F. Zambezi, Counsel for the Claimant,

Miss, M. Chitwanga, Counsel for the defendants,

Mr. F. Mathanda, Clerk/Official Interpreter,

**JUDGMENT ON DAMAGES**

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1. The obvious fact remains; law is law, and so is pain a disturbance of the soul. But to the legal mind, when invited to do assessment of damages as is in this case, the mental faculties are in my view under duty to confine themselves to the principles of law and nothing less. As it were, when the judicial officer receives the invitation to assess what is the reasonable compensation in any given circumstance, he must configure his mind to the virtues of reasonableness, fairness and proportionality. Again, he must proceed consciously and jealously, regard being had to the social cost of his orders. As it were, it is not old for the judicial mind to swim in a pool of thoughts through an engagement of the mind with the precepts of law that are required for such an exercise. This is important so far as starving the spirit of confusion is concerned. I mean the one that leads to unreasonable and at times inadequate awards. Knowledge is the only antithesis of confusion. In fact, when it is properly managed and used to advance the dictates thereof and more so applied in context, the claimant awaits in hope and so does the defendant smell fairness in the judicial process.

As it were, it is thus mandatory in my view for a judicial officer to be deliberate with his books and indeed not to betray his appetite to learn from those of old. As it were, this is exactly the reason I interacted with the following cases which are very instructive on the law of damages: *PRM Mtika v U.S chagomera t/a Trans Usher Alias & Zebra Transport Civil Cause No. 812 of 1991. Tembo v City of Blantyre and National Insurance Company Ltd (1994) Civ. No. 1355* and a very forceful but slightly confusing case of *Sakonda vs SR Nicholas Ltd [2014] MWHC 452,* which in my view, Mwaungulu J (As he was then) settled the law. Thus, the quest for knowledge and application thereof, is an important requirement and temperament that the assessor must possess. But human mind is predictably misdirected by its unwillingness to cross fertilize itself with established principles of the discipline. I dare say that, the greatest asset for the assessor, is his knowledge which he must apply consciously and skilfully. When that knowledge includes his understanding of the latitude of his discretion, the assessor must warn himself to use his discretion sparingly. Instead, we allow compassion and or sympathy to misdirect our mind. That I decline to do.

2. Be that as it may, in the instant case, the claimant seeks the aid of the law by way of damages through this Court after he got involved in a car accident in which he sustained the following injuries: bilateral femur fracture, pelvic fracture, deploying of right anterior fibulas, resulting in footrope and foreshortening. Perhaps, it must be mentioned at the onset that to the legal mind, some of these medical nomenclatures are alien to our faculties and it is hard to visualise and or indeed relate with the nature of the injuries sustained as named, and indeed with the actual injuries sustained thereby awarding damages that may be astronomically higher and at times unreasonably inadequate because the mind cannot relate with the nature of the injuries sustained. That is indeed a recipe for unrealistic and disproportionate awards.

   This is why, this Court will for once attach to the order the relevant exhibits so that the injuries are put in context and are relatable to the mind of the Court and that the Court's order is seen to be premised on context and nothing academic. Be that as it is, I must say that by the judgment entered on liability on 18th November, 2022 by Hon. Justice Sikwese, this Court was invited to do assessment of damages. As it were, the claimant previously worked for Alpha security as a Trooper guard. He was involved in an accident which was caused by the negligence of the 1st defendant, who was in the employment of the 2nd defendant as a driver. The accident happened on 17th July, 2012 at the time that the claimant was on duty. In summary, there was a heavy collision of vehicles which forced the claimant herein to fall from the motor vehicle he was in.

   That said, when the claimant appeared before me, he intimated that he had sustained a fracture of the right leg, as a result, he can no longer walk properly. Furthermore, it was averred that having sustained the injuries herein, the claimant was admitted for three months at Queen Elizabeth Central Hospital. He received eight surgeries on his wounded leg. Resultantly, the claimant used clutches from 2012 to 2014. All this remained unimpeached facts during the assessment hearing. Moreover, it was further adduced that

metal rods were inserted in his wounded right leg in an effort to resurrect the leg. I mean, the record has it that the doctors took some part of his skin on his buttocks for skin grafting, which was done on the heavily wounded right leg. He must have felt excruciating pain indeed.

Ordinarily, that is no place where any person should be. Unfortunately, he exactly suffered that as it were. But today, he has come to this Court, so that the Court considers bringing him back to the position he was but for the accident in so far as money can do it. The invitation is indeed welcome, the claimant has his day in Court and I will use the law to answer his questions whichever they are. For me to answer those questions, the claimant has invited this Court to award him damages for pain and suffering, loss of amenities of life, damages for disfigurement, loss of future earning capacity, nursing expenses and special damages as were pleaded. Like earlier enunciated, because of the nature of the injuries and the need to appreciate the extent thereof, I have thus attached the tendered pictorial evidence in the exhibit section of this order and viewer discretion shall accordingly be advised.

3. Nonetheless, let me remind myself that this Court is bound by both the law and skill to deal with the matters before me meticulously and also, I must resist the temptation of making my award based on compassion because the claimant was seriously injured and it is only a natural consequence for the invitation of a sorry attitude to impair the judgement of the Court. As it were, lamenting on a similar worry, the Court in *Liesbosch [1949] AC 449* had the following to say:

> *"The tribunal must* ***assess the damages without regard to the personal attributes of the plaintiff****. It makes no difference whether he be* ***a*** *poor labourer or* ***a*** *highly paid professional man".* See also Gaban, *"Law of Damag*es" (1936) p 25.
>
> *(Emphasis Added)*

I warn myself to remember that, as a Court of law, it is not my duty to have regard to the nature and the economic status of the claimant. Certainly, the claimant has not come to Court to make a living from his injuries. That should not be the thinking of any Court. Indeed, the painful fact which every Court, junior and otherwise must maintain in my respectful view, is that damages are not a source of income. It is not for the Court to unjustly enrich a claimant nor is it for the Court to connive and or sympathize with the defendant to the detriment of the claimant. As it were, the earlier we understand this, the more reasonable the orders we will be making as it were. Hence, I shall only seek the aid of the law as I determine on what is the reasonable compensation in the circumstances. I mean, I must desist from making astronomical and unreasonably beyond the roof and or the ceiling awards. That, I refuse to do for we are Courts of law, and the law is loudly blind as it were and I must avoid opening the eyes of the law to what the Court feels. In summary, the principles are that the award must be fair, just, commensurate with the injuries sustained

and sufficiently adequate to put the injured party so far as money can place him, in the same position as if he had not been injured. I must repeat, the principle is not to bring him to a rather better position than he was before the injuries. That is not to be the case. In fact, every assessor must warn themselves to understand the dynamics of what is before them. If unsure, the assessor must be slow and seek wisdom from those of old. We must be careful because the orders we make, have a bearing on our young and painfully challenged and struggling economy.

As it were, Justice Mwaungulu (As he was then) in the case of *Sakonda v SR Nicholas (Supra)* lamented on the effect of skyrocketing awards made without regard to context in this way:

> *"...**it is necessary to examine the law** because of the extent of the divergence in Counsel's pecuniary and non-pecuniary awards. These prompted policy consideration. Awards cited and about one hundred and more examined to inform the decision demonstrate, even considering changes in the value of the money, discrepancies which are inconsistent with the High Court judges and the Supreme Court of Appeal awards. The awards **impact Insurance industry** and **threaten victim's prospect of compensation for the future**. Indirectly, **such awards increase costs and are a social cost on premium payers**."*
>
> *(Emphasis Added)*

The learned Judge Rtd, continued in his elaborate ruling which I think, all assessors of my kind must have an intellectual intercourse with to their own good, to pronounce that unreasonably higher awards and unreasonably inadequate awards do not achieve fairness of any kind. This is a rephrase of my understanding of the spirit of his writing, which understanding I hold to be correct. It is our duty to balance things when we are invited to make assessment of damages and or costs. Our orders must reflect an understanding of the economy we live in without losing sight to the need to adequately compensate victims of pain. I mean, different injuries must be treated differently. Bruises must not be juxtaposed with serious injuries and Courts must in my view ask themselves the question, why are they invited to make assessment of damages. Certainly, as it will become apparent, that invitation is not to enrich the claimant. We must make reasonable awards that are informed by the law and not sympathy. This I say, with greatest respect for I am at pains indeed.

Nevertheless, to achieve a reasonable award in the instant case, I will belabour myself to biblically follow the blind principles of law as will be applied to the facts now before me. Conclusively, this Court understands that the Court is under duty to justify the award that is it maketh. In fact, the thinking of this Court is that, the Court must not think of a number and then find the law to justify a figure randomly thought of. We must be methodical, systematic and predictable so far as is practicable. Thus, in articulating a similar persuasive sentiment, the High Court of Kenya in the case of *Nickson Kazungu Karisa & Another v*

*Isaac Solfa Muye [2020] eKLR* quoted with approval the decision of *CCCA Limited v Julius Jeffrey CA NO. 10 OF 2003 SVG* where the following forceful words of judicial wisdom were uttered in a manner as indicated below:

> *"It is, in my view,* ***a function of the Law*** *as far as possible,* ***to be predictable,*** *given the infinite variety of the affairs of humankind. In the context of damages for personal injuries, there are* ***certain principles which apply*** *and* ***there is a discretion which needs to be exercised.*** *In the case of pain, suffering and loss of amenity, that discretion could be wholly subjection and hence unpredictable, or it could be* ***precedent based,*** *that is to say, the trial judge, having considered all of the evidence led before him,* ***would take into account other awards within the jurisdiction and further afield.*** *Awards of similar injuries would be clearly very helpful in relating the claimant's injuries on a comparative scale.* ***This is not a precise science,*** *leaving much room for the trial Judges discretion."*
>
> *(Emphasis Added)*

4. It must be made clear, that this Court understands the cardinal rules and or principles to be followed in making an award of damages. As I understand the law, there is no award which is achieved with mathematical precision, an award however is not mutually exclusive to the mathematical terms such as proportionality, differentiation, interest and extent. See the case of *Tionge Zuze (a minor, through A.S. Zuze) v Mrs Hilda Chingwalu ((HQ Chidule v Medi MSFA No. 12 of 1993))*. I mean, an award will be excessive and manifestly unreasonable if it does not resemble closely to the injuries sustained. Mathematically speaking, the injuries must be directly proportional to the awards ordered. Put differently, the higher the gravity of the injuries sustained, the higher the award to be meted down. Courts are thus enjoined in my view to apply the law cunningly so that we avoid the perception that we only deduce the appropriate awards from the whims of the individual self, whose self is mostly not alien to feelings of sympathy, which in my view should not be anywhere near the tools of craft for the assessor. That is why we must stick to the settled principles of law. Again, it has always remained my view that, to arrive at an appropriate quantum; we must first appreciate the basis and the reason as to why we are making assessment of damages.

Thus, I repeat, the duty of the Court is not to help any claimant make money as a result of his injuries. That is certainly not the reason we order damages to be paid. I mean, it is not for the Court to help the claimant make profit from his injuries. Besides how some may comprehend this, but the basis of awarding damages still remains to bring back the injured person to the position he was before the injuries sustained so far as money can do it. Clearly, it is no business of the Court to make an award that over and above will in essence give the victim of pain an advantage beyond the status he had before the injuries were sustained. That is not the intendment of the law on damages. If it were so, the law would have been so unfair. Fortunately, the law is particularly not like that. It is always important

in my humble view for judicial minds to remember that. I think that still remains the good position of law. Therefore, in the instant case, my duty will be to arrive at a reasonable award that will achieve the purpose as herein enunciated.

As it were, I am invited today to make an award which predominantly is within the discretion of this Court. However, the Court has to be properly guided with the established principles that the Court ought to consider.

5. Hence, I had some personal encounter with the wisdom from my reading of the case of *Cornilliac v At. Louis TT 1965 CA 3* where the Court of Appeal (Trinidad and Tobago) had the following to enunciate:

> *"The consideration which ought to have been borne in mind in assessing the general damages were* ***the nature and the extent*** *of the injuries sustained, the* ***gravity of the resulting physical disability****, pain and suffering, loss of amenities, the* ***extent to which pecuniary prospects were affected****..."*
>
> *(Emphasis Added)*

I must pause a minute and commend Counsel for the claimant, it has always bothered the mind of this Court that many a time Counsel appears on a proceeding on assessment of damages as though they were appearing on a proceeding to answer again the question of liability. Clearly, there is a reason why under Order 12 Rule 19(1) Courts (High Court) (Civil Procedure) Rules 2017 (herein referred to as CPR 17) it is provided that an assessment of damages proceedings should be conducted just like a trial. Perhaps, I must echo this loudly that, to do a proper job at this level, Counsel has to bring before the Court evidence that shows the extent of the injuries sustained by his client, the degree of permanence and also showing the Court how the claimant is unable to do what ordinarily he could have been doing but for the accident and the injuries sustained. At this time, the question of whether there was an injury or not is not in issue.

At this level, the evidence must speak to the nature of the injuries and the extent thereof and the impact caused on the claimant. I have read the submissions of Counsel for the defendant, and I must say I do not agree with her submission where she seems to suggest that this Court is under duty to focus on the medical report not being transcribed. I say this because the issues of the contents of the medical report not being transcribed add nothing to the case now before me. In fact, I have no regard to the contents as it were for they are guilty of hearsay evidence. In absence of complying with Order 17 of the CPR 17, I am confident that I do not have to belabour myself with the arguments Counsel has made. I cannot sustain such arguments. The Court saw what it saw; that is the visible scars and obvious deformity on the right leg of the claimant. In any case, Counsel did not dispute in cross examination that indeed such injuries where as a result of the accident that occurred.

For a fact, a technicality will not redeem the day, today. I must decline the arguments of Counsel. I decline.
Like earlier stipulated, it would be old to think that at this level the Court is also answering a question like one on liability. Stipulating a similar point, the Court in *Bedford and Stanton v Crapper [1949] OWN. 266; 5 CED 338* had the following to say:

> *"...the question of the amount of damages that ought to be allowed to an injured person is* ***completely distinct from the question of apportioning fault*** *in negligence under any prevailing negligence legislation."*
>
> *(Emphasis Added)*

Certainly, that should not be how Counsel of any cadre must conduct these proceedings. There is thus an evidential burden put on the claimant to show the Court the extent of the injuries so that it logically follows how much Counsel submits to be the reasonable quantum. I must say, that is exactly what Counsel for the claimant did in this case as shown by the pictorial evidence that is herein attached and is part of this order for, they were accordingly tendered in evidence without dispute.

Moreover, as is required under section 32 of the Legal Education and Legal Practitioners Act 2018, Counsel is an officer of the Court, he is thus an integral part of the equation that leads to fair and reasonable awards made at assessment level. This, I think is hardly done than it is desired. But in the instant case, Counsel clearly understood in my view that at this level, a medical report not tendered in Court by the person who authored it, does not speak to the truthfulness of the injuries indicated thereunder because such evidence is guilty of being inadmissible hearsay evidence. See *Anita Nanchinga v Re-Union Insurance Ltd Civil [2018] MLR 427*. Indeed, a medical report can only speak to the fact of its existence when tendered by a person who did not author it. Consequently, it helps little when the Court is doing assessment of damages. With greatest respect, and like earlier alluded to, the duty is on Counsel who wants the Court to believe the extent of the injuries sustained and the degree of permanence thereof, and all issues that would inform the Court to make reasonable awards, to adduce evidence to that effect.

In this case, Counsel went on to bring with him pictures which were admitted in evidence without contradiction. Besides the evidence given *viva voce* and also the physical observation by the meticulous eyes of this Court, Counsel was able to show the Court the extent of the injuries and indeed even as they were fresh. Thus, one would but imagine the pain that the claimant felt. The evidence before me shows a bone very visible and the skin detached from the tibia of his right leg. I mean, the clear and manifestly disfigured leg refused to hide the extent of its damage. I must say, the Court saw the permanent deep scar that the claimant has as a result of the accident that happened, the pain and the suffering must have been excruciating indeed. That is, in my view, how the mind of the Court must be exercised at assessment level.

The point is, there must be evidence before the Court indicating the gravity of the injuries sustained. I mean it is not enough for a claimant to simply claim that I am not feeling well or that I cannot do this or that. Perhaps it becomes a routinely unreliable part of evidence without going a step further to demonstrate indeed that the person is ordinarily impaired by the injuries sustained to do what he or she could have been able to do but for the accident. I must say, the damage on the leg of the claimant was manifestly loud and that to hold otherwise would be a mockery to the calling that this Court values to the core of its judicial conscience. As it were, the claimant staggered his way to his seat, and ordinarily the leg has a huge part of it with little or fewer skin on it. Let me remind myself again, that I must pronounce the award that will of course not create the skin back as it were, but that so far as money can do, will be able to bring the claimant to the position he would have been but for the accident. In articulating the same principle of law, in the case of *George Kankhuni v Shire Buslines Limited Civil Cause No. 1905 of 2002*, the Hon. Katsala J (As he then was then) had the following to say:

> *"The law demands that the plaintiff [now claimant] **as so 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 "restitutio in integrum"."*
>
> *(Emphasis Added)*

I cannot agree more to the wisdom of the Court above. As it were, that is the duty that I have today. It is to use the comparable authorities in coming up with the award that will not necessarily bring the leg back to its natural state, but such an award that will closely bring him to the position of his natural state in so far as money will do it. In any case, that he cannot do what he could have ordinarily been doing, should be so obvious in the view of this Court. Like I said, there is evidence before me that shows permanent disfigurement on his right leg. There is above his right thigh also a deep scar that you would consider looking once and indeed not twice. The claimant was heavily injured and disfigured.

6. Clearly, less severe injuries should not be juxtaposed with serious injuries. In fact, we have a duty to treat different cases differently. That I only say in passing, but it is prudent to respectfully remind myself that so far as it is practicable, we need to be mathematically closer to accuracy when making our awards. This Court understands that the injuries from comparable cases need not to be the same per se, but the extent of the injuries must resemble so far as is possible. In fact, we have a duty to verify with the cases cited by Counsel on submissions. Hence, I had the opportunity to read the submissions of both Counsel and I entirely disagree with both proposals made by either Counsel. The reasons for such a conclusion will soon become apparent. Moreover, the Court must also take it upon itself to do research of its own and make an informed decision. We must, in my view, have parameters on which to base our awards on. Like in this case, I know for a fact that the permanent disfigurement will attract a rather higher award than any ordinary

disfigurement would. Thus, a similar conclusion was propounded in a Kenyan case of *Nickson Kazungu Karisa & Another v Isaac Solfa Muye (supra)* where it was articulated as follows:

> *"...Fracture or disfigurement that **goes to the skeletal body** of the injured **must** attract higher amounts of damages"*
>
> *(Emphasis Added)*

In the instant case, the plaintiff suffered no less, part of his skeletal fabric is seen on his right leg whose main bone is left with a slim skin meat and one can literally see the nomenclature or indeed the caricature of his tibia on his right leg. I am moved that considering that the injury exposed the skeletal fabric of the right leg, the award in this case must indeed be higher than what would have been the case if the injuries were less severe. Whilst at this, I must say that I have read all the cases cited as comparable by Counsel for the claimant. Whilst as they are on a point of the injuries sustained, they are not particularly useful with respect to making separate awards, the awards thereof were generally global ones. In that the Courts, awarded damages for pain and suffering, loss of amenities of life and damages for disfigurement as whole. That is particularly different from the manner in which Counsel has specifically submitted on each head. To this extent, I found the authorities cited to be of little help. But in principle they are valuable indeed. In any case, this should indeed be simply a matter of style. I will proceed to do the assessment in a bundle fashion and or isolated fashion, whichever will be convenient. Certainly, I will achieve the same goal in principle.

7. Be that as it may, this voyage must come to rest and I must now decide on one simple question now before me, which is, what would be the reasonable quantum that is proportional to the injuries sustained in this case? To answer this question, I must remind myself that I am not here to achieve an accurate award or an award which is calculated using an empirical formula of mathematics. However, like stipulated in the recent above, comparable cases must help this Court not to award amazingly surprising awards or manifestly inadequate and unrealistic awards. Again, by way of a reminder, it is no duty of this Court to at this level and for the purposes of these proceedings to issue awards that are punitive. That is not what the law has invited me to do. Courts must understand in my sacred view why we make awards on assessment. For a fact, the idea is not to punish the wrongdoer. See *George Kankhumi v Shire Buslines Limited (Supra)*

8. Clearly, the Court must divorce its mind from the thinking that this is an opportunity to offer money to the victims of pain. That is not the goal because if we miss the reason why we make assessments and what the awards should achieve, the dream to have uniform awards for similar injuries will remain an ambitious judicial fiction. That said, I must remind myself that the approach is critical, comparative and indeed contextual. That approach must be endowed in the application of the law to the facts. We must never think

of a quantum and then later support it with the law. The approach must be that the comparable cases when subjected to interrogation and critical analysis must lead the Court to a place where the Court will reasonably exercise its discretion.

9. In the instant case, the claimant has through Counsel argued that the sum of K78,000,000.00 (Seventy-Eight Million Kwacha Only) will be reasonable in the circumstances. On the other hand, the defendants have also submitted that a sum of K13,300,000.00 (Thirteen Million Three Hundred Thousand Kwacha Only) will be reasonable in the circumstances. As it were, the defendant has further submitted that since the claimant was already paid a sum of K7,750,000.00 (Seven Million Seven Hundred and Fifty Thousand Kwacha Only), then the Court should make the award within that region less the amount already paid to the claimant. I must wonder that both parties cited comparable cases and they have strangely arrived at different summation destinies. The duty is however mine to see which cases are a true reflection of the injuries that the claimant suffered in this case.

10. That said, I refuse the enticement of Counsel for the claimant, I understand the gravity of the pain caused, but I must also proceed to hold that it would be manifestly excessive for the Court to make an award as submitted by Counsel for the claimant. It is indeed disproportionate in amount. Such an invitation is hereby declined for the Court could be caught in unreasonableness if it were to make such an award. Indeed, the pain was excruciating but like I said, the intent is not to revenge through money, that is not the intent. Perhaps, we must admit that the law does not provide all the solutions, some solutions are spiritual, philosophical and indeed the law cannot pretend to be an answer to everything, thus we must remember that and remain guided so far as the law can take us. I do not agree with Counsel for the claimant that K78,000,000.00 (Seventy-Eight Million Kwacha Only) is the award I must give.

    Like I said, it would be against public policy for Courts to make strange awards that are manifestly devoid of the economic realities of our economy and those that are detached from the spirit of reasonableness. I mean, to appear as though we should not care in making our awards about the economy we live in, is judicial dishonesty because the person of the judicial officer clearly is part of the very society that is crippled with economic woes. There is a reason why judicial minds must learn and apply the knowledge gained from jurisprudence class. Such a course was never learnt to simply attain an academic qualification, but it was and is made to help us make realistic decisions. I mean contextual and informed orders must be the ones we should be dispensing from the bench as we balance the needs and the pain gone through by the claimants such as the one in the instant case and the economy we operate on. That indeed is my honest opinion.

11. As it were, this Court had a perusal of the case of *Violet Alfred v Christopher Dg Banda & Prime Insurance Company Limited Personal Injury Number 26 of 2021(Unreported)* where on 4th day of August 2021 a global award of K3,500,000 was awarded to the

claimant who suffered a fracture to the right leg, and had metal screws and metal plates put on the leg to hold the fractured place together for healing. Be that as it is, in the instant case, the injuries were severe and the record has it that it took two years for the claimant herein to walk without the aid of clutches. Further, the claimant herein was admitted to hospital for a period of three months unlike the cases cited to me by Counsel and also the case I have cited above. That should indeed persuade this Court differently. The times spent in the hospital and being on clutches for such a time, speaks to the gravity of the injuries that the claimant suffered. Consequently, it would be manifestly inadequate for me to award K3,000,000.00 for pain and suffering just like it would be grossly unreasonable to award a sum of K20,000,000.00 for pain and suffering as argued by Counsel for the claimant. In my view, considering the longevity of his time spent at the hospital and or his use of aids to walk for almost 2 years and also departing from the cited case above, a sum of K8,000,000.00 (Eight Million Kwacha Only) as damages for pain and suffering would be reasonable in the circumstances. Using clutches for almost 2 years could not be done without pain. It could not. Again, he had to endure a series of surgeries. The pain was excruciating. Hence my award.

12. Again, in the afore case the claimant was out of the K3,500,000.00 awarded K500,000.00 for loss of future earning capacity. Certainly, that will be on the lower side in the instant case, considering that the claimant herein is obviously limited in the things he can do to earn his living. Moreover, the claimant lost his job immediately after he sustained the injuries. I understand the law to be that on loss of capacity the Court must consider the chance or indeed the probability of losing the job or indeed a decrease in his earnings as a result of the injuries sustained. Where such a prospect is substantial, the Court must accordingly award damages under loss of earning capacity. That is exactly what happened in this case. See *Sakonda vs SR Nicholas (Supra)*. I must say that having read the submissions of both Counsel, I notice that they both agree that the minimum wage should be used against his annual salary multiplied again by the multiplier which is derived from the age of the claimant and having regard to the vicissitudes of life. Accordingly, Counsel for the claimant submits that 8 is the reasonable multiplier whilst as Counsel for the claimants submits that, the claimant was only 30 years old at the time of the accident and therefore, he submits that he had 30 years more of working before attaining statutory retirement age.

I must disagree with Counsel, because he seems to have not considered the fact that the claimant will be receiving a lump sum as it were. Again, it is only a question of chance that he might have continually worked as it were. That is why we reduce the years to pave way for eventualities of life. Ironically, at paragraph 4.3.15 of the claimant's submissions, Counsel seems to suggest that (K50,000,00*12*10) = K18,000,000.00. Certainly, the mathematics is not correct. Perhaps, Counsel intended to have 30 as a multiplier. Be that is it may, and unlike the 8 and 30 years preferred by both Counsel, in my view, the most reasonable multiplier which I must adopt is 10 years and not 8 or 30 years with the reasons articulated above. Therefore, on this head, the award of the Court will be calculated using the multiplier and multiplicand method. The quantum on this head is therefore calculated as follows: (K50,000,00(minimum wage) * 12(Months)* 10 (years)) = K6,000,000 (Six Million Kwacha Only). That is in my view reasonable in the circumstances.

13. Moreover, contrary to the submission of Counsel on nursing and care, in which he submits that a sum of K15,000,000 should be awarded, the view of this Court is that, that is not attainable. In fact, the submission of Counsel is premised on a case of *Luhanga v Attorney General (Malawi Police Service) Personal Injury Number 146 of 2020 (Unreported)* which I have read deep and within and I must say the case is far from being similar. For in that case, the claimant was paralyzed as a result of serious spine injuries and was made to use a wheelchair for all her days. Certainly, the claimant in this case is able to walk on his own. In any event, the Court awarded K20,000,000 over the head of nursing and care in that case because the claimant was permanently declared disabled (To use the exact language of counsel for the claimant in that case). Squarely, I do not think that Counsel has submitted correctly. On the other hand, and assuming that Counsel was correct in his submission, I must still hold that, I am not convinced that I must make any serious award over this head. The reason is, I personally saw the claimant in Court, it would be overstretching to argue that the claimant will need support or indeed special care all the days of his life. Yes, he has permanent scars and deformity, but the Court saw the once wounded right leg as being dry and healed as it were. I must be slow to agree with Counsel on this one.

    Again, I do not find the reasoning of Counsel for the defendant on this one to even change the mind of this Court. She submits that this Court must not make any award on this because the claimant has failed to show the Court the nursing need that is quantified. It must be known that under this head, the award can be discretionary so far as it was pleaded. It was pleaded in this case, and yes if there will be any need for any care then that will be minimal indeed. In any case, there is no material before me to demonstrate how much was spent in hospital so just like perhaps Counsel for the defendant argued, I must be slow to make any awards on nursing and care. Nonetheless, just like I hold the view that there will be if any, minimal need for future nursing and care, I should think it is reasonable to award a sum of K500,000.00 (Five Hundred Thousand Kwacha Only). On loss of amenities of life, I know for a fact that the claimant will be limited in the things he can do now which he enjoyed doing in the days of old. On this, my view is that a sum K3, 500, 000.00 suffices over this head. Ordinarily, this amount would have been less if the matter concluded earlier, but it has been almost ten years since the accident occurred. The value of the money is no longer what it used to be. Hence my award.

14. Before I consider the award on the last head of damages for disfigurement, let me call to duty the wisdom of Justice Potani (As he was then) in the case of *James Chaika NICO General Insurance Company Ltd Civil Cause No. 909 of 2007(unreported)* held that:

> *"...disfigurement is not a matter to be taken lightly and casually as it is something that one has to* ***permanently live with****."*
>
> *(Emphasis Added)*

    Coming to the instant case, I must say, that I had the opportunity to check the physical deformity that the claimant sustained, and I must say, that the exhibit part of this order only reflects a shadow of what I saw, he limped his way to his seat as he finished testifying. I mean the degree of permanence in the instant case cannot be overemphasised, the evidence

in the exhibit section speaks for itself. The claimant has now to live with the new reality of his life such that no amount of money would recreate the skin for his leg. Sadly, that is the permanent reality he will live with.

15. In any case I had the occasion to look at the case of *Magret Masangwi v The Attorney General (Ministry of Health-Queen Elizabeth Central Hospital) Personal Injury Cause No. 882 of 2020(unreported)* where my learned brother His Honour Msokera (As he was then) on 9th March, 2022 awarded a global sum of K47, 000,000.00 (Forty-Seven Million Kwacha Only) because of the gravity of the injuries and the consequences of the injuries that he considered in making such an award. I must be quick to observe that, although that case is different from this case, on the basis that in that case a uterus was taken off and the claimant had to face a new permanent reality of life. The reasoning of awarding higher awards on injuries that have a lasting impact on the life of any person injured, need not to be reemphasized. Like in this case, the claimant will live with his deformed right leg for the reminder of all his earthly days just like he will go join his ancestors with this physical deformity at the time he will respond to the call of his creator, the great unknown. That must be painful indeed.

16. As Exhibit DK 1 through DK 3 shows, the fracture on the tibia and right fibula is manifest as compared to the case of *Chilimbwe Phiri v General Insurance Company Personal Injury Cause No. 350 of 2012 (unreported)* where an award of K7,005,500.00 (Seven Million Five Thousand Five Hundred Kwacha Only) made on 19th April, 2013 to a claimant who suffered a fractured tibia and fibula on the right leg. I mean, that was an order handed down nine years ago, and although the quantum included damages for disfigurement, the thinking of this Court is that in this case, considering the gravity of the deformity, damages for disfigurement must be awarded separately, even though I could put them under pain and suffering.

17. Again, I examined the case of *Thomas Matemba vs Richard Kalitendele and Britam Insurance Co. Ltd Personal Injury No. 913 of 2016(unreported)* where in October, 2017 an award of K6,000,000.00 was awarded to a claimant who suffered a broken tibia and fibula and used clutches to stabilise. In the instant case, there is material before me unlike in the case above that the claimant herein used clutches for almost 2 years. The gravity of the injuries is clearly not the same as it were. The deep cut wound that has left his right tibia almost open cannot be enveloped in pain and suffering by way of damages. Truly justice would not be served if I were to proceed in that manner. Additionally, on 21st March 2021 the Court in the case of *William Mpata v Reverend Malani Mtonga & Prime Insurance Personal Injury Cause No. 428 of 2020 (Unreported)* made an award of K7,000,000.00 for all the heads of damages for the injuries closer to the ones sustained herein but obviously different in extent. Like said earlier, the nature of the deformity in the instant case, provokes my departure from awarding embedded awards. I must like earlier said, with reasons advanced order damages for disfigurement separately.

18. Furthermore, in the case of *Magret Zagwazatha v Attorney General Personal Injury No. 469 of 2013(Unreported),* the late Honourable Usiwa Usiwa (As he was then) awarded the sum of K14,000,000.00 (Fourteen Million Kwacha Only) on 13th day of June, 2017 to a

claimant who had suffered permanent disfigurement/deformity, and could no longer walk as her legs were deeply injured and always used the wheelchair. The claimant had a frustrated leg in that case and a direct impairment on the leg as it were. I have no different case before me. In fact, and of course unlike the 5 months that the claimant suffered in pain whilst in the hospital in that case, in the instant case, the claimant is said to have been in hospital for a period of 3 months. Further, it is averred that unlike in the case cited herein, the claimant in this case used clutches for a period of almost 2 years. That must have been a painful ordeal indeed. I must give regard to such a factor.

19. For a fact, the claimant cannot walk peacefully in the streets wearing shorts, the scars are too ugly that it may not be an exaggeration by him to feel shy as he does that. To take away the peace and comfort of any person is to take away something that cannot be replaced. is from the foregoing, that this Court considers a sum of K11,000,000.00 (Eleven Million Kwacha Only) as reasonable compensation for the permanent scars and deformity and or damages for disfigurement that the claimant suffered. The voice of Justice Potani (As he was then) in the case of *James Chaika v Nico General Insurance (Supra)* that deformity is something that the claimant will permanently live with and must not be taken lightly, echoes loudly in the mind of this Court hence my serious approach.

20. On special damages, I make no order for I have been unmoved by Counsel as to the proof of any special expenses. The law is settled, special damages must be pleaded just like they should be proved particularly. I do not see any material before me, perhaps it slept my mind but I have seen to proof of special damages. I decline to make any awards over this heard.

21. Consequently, this Court orders a global sum of K29,000.000.00 (Twenty-Nine Million Kwacha Only) as reasonable compensation in the circumstances. Suffice to note that, the claimant was already given K7,750,000.00 and that takes us to the sum of K21,250,000.00 (Twenty-One Million Two Hundred and Fifty Thousand Kwacha Only) which must be paid within 45 days from the date of this order.

22. For the purposes of these proceedings, I make no order on costs for they are within the discretion of this Court.

23. It is so ordered.

**MADE** in chambers this the 24th of December, 2022 at the High Court of Malawi Sitting at Blantyre Principal Registry.

Elijah Blackboard Dazilikwiza Pachalo Daniels

**ASSISTANT REGISTRAR**