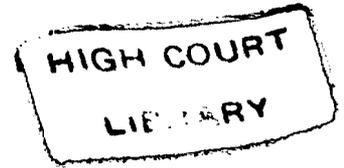


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REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 267 OF 2017

BETWEEN:

PATRICK MATHEWS.....CLAIMANT

AND

LAWRENCE MPUMIRA.....1st DEFENDANT

PRIME INSURANCE COMPANY LIMITED.....2nd DEFENDANT

CORAM

Mrs T. Soko : Assistant Registrar
Kalanda : Counsel for the claimant
Chipembere : Counsel for the defendant
Mrs Mkandawire : Court Clerk

ORDER ON ASSESSMENT OF DAMAGES

BACKGROUND

On 2nd May 2017, the Claimant took out summons against the defendants claiming damages for pain and suffering, damages for loss of amenities of life, damages for disfigurement and costs of the action. The facts of the case derived from the statement of claim aver that on 6th July 2012, the claimant was cycling from the direction of Chirimba going towards Mbayani together with his colleague Alick Thayo. Upon arrival at Injena

filling station, the 1st defendant who was driving a motor vehicle registration number MZ 9756 hit Alick Thayo who in turn hit the claimant. As a result of the accident, the claimant sustained a deep cut on the forehead and chest, wound on the right leg, sprained right arm, multiple bruises and chest pains.

EVIDENCE

On the date of hearing, the claimant appeared through a Legal Practitioner. In evidence, the claimant adopted his witness statement where he stated that on 25th December 2016, he was involved in a road traffic accident. The claimant explained that he lost consciousness on the spot and regained it after 3 hours. The claimant added that he sustained a fracture of the tibia on the right leg, lost one tooth, bruises on the right side of head and cuts on the lip. The claimant stated that he walked using crutches for two months and after that he walks with a limp. He explained that he cannot walk for a long distance and mostly he uses pain killers to ease the pains. The Claimant testified that he still feels pain on the upper and lower tooth when he is eating. The Claimant tendered a health passport and medical report as part of evidence.

ISSUES

The quantum of damages payable to the claimant

SUBMISSIONS

Counsel for the Claimant submitted that a total of K5, 000,000.00 would be adequate to compensate the claimant. Counsel cited a case of *Adin Chigwenembe vs Prime Insurance Company Limited Personal Injury Number 207 of 2013* where the claimant sustained a fracture of the right leg tibia and had an incapacity of 30%. The Court awarded the plaintiff K1, 000,000.00 damages for pain and suffering. The award was made on 27th September 2016. Counsel also cited a case of Gladys *Jonasi vs Prime Insurance Company Limited Personal Injury Cause Number 390 of 2012* where the plaintiff sustained a fracture of distal tibia and multiple soft tissue injuries. The Claimant was awarded a sum of Mk 2,000,000.00 damages for pain and suffering. The award was made on 9th May 2016. Lastly Counsel cited a case of *Razak Dickson (minor suing through his father and next of friend Muhammed Banda) vs Cuthebet Chiwaya , General Alliance Insurance Company Limited Personal Injury Case Number 825 of 2013* where the plaintiff sustained soft tissue injuries on the face, head and upper and lower extremities and lost two upper teeth. The Court awarded him a sum of K2, 000,000.00 damages for pain and suffering. The award was made on 4th January 2016.

GENERAL LAW ON DAMAGES

In assessing damages for personal injuries, the intention of the court is to compensate the injured party as nearly as possible as money can do. The principle is to put the plaintiff at the position he would have been in if it would have not been for the tort committed. See *Namwiyo v Semu (1993) 16 (1) MLR 369.*

In calculating damages, therefore, Courts consider, in monetary terms, the sum which will make good to the sufferer, as far as money can do, the loss he has suffered as a result of the wrong done. See *Admiralty Commisioners vs S.S Valeria (1992) 1 A.C. 242 at 248.*

In *Christina Mande vs Charter Insurance Co. Ltd Personal Injury Cause No. 329 of 2016 the Court quoting Wright vs British Railway Board 1938 AC 1173, 1177 stated that:*

'Non-economic loss... is not susceptible of measurement in money. Any figure at which the assessor of damages arrives cannot be other than artificial and, if the aim is that Justice meted out to all litigation should be even handed instead of depending on idiosyncrasies of the assessor, whether Judge or Jury the figure must be basically a conventional figure derived from experience and from awards in comparable cases.'

In the case of *City of Blantyre vs Sagawa* the court said the following:

'It would appear to us that if the award is to be conventional, an award for a similar injury should be comparable and should, to some extent, be influenced by amounts awarded in the previous case, either in the same or neighboring jurisdictions. In citing previous awards the court should not lose sight of factors like devaluation of the currency since the awards were made.'

PAIN AND SUFFERING

In damages for pain and suffering, the court considers the physical experience of the nerves and mental anguish which comes as a result of the injury. See *Lemon Banda and 19 others V Mota Engil Limited and General Alliance Insurance Limited, personal injury cause number 178 of 2012 (unreported).*

In the *City of Blantyre vs Sagawa 1993 16 (1) MLR 67* the court quoted Kemp and Kemp volume II paragraph 1007 where it was stated that;

Pain is, it is suggested, used to describe the physical pain caused by or consequent upon the injury, while suffering relates to the mental element of anxiety, fear, embarrassment and the like.

Page 831 of **Mc Gregor** on damages defines pain as the immediately felt effect on the nerves and brain of some lesion or injury to a part of the body, while suffering has been defined as the distress which is not felt as being directly connected with any bodily condition. Pain includes any pain caused by medical treatment or surgical operations rendered necessary by the injury inflicted by the defendant. Suffering includes fright at the time of the injury and fright reaction, fear of future incapacity, either as to health, sanity or the ability to make a living, and humiliation, sadness and embarrassment caused by disfigurement. **Also see Gedion Mhango vs Nico General Insurance Co. Ltd Personal Injury Cause No. 703 of 2016 (unreported).**

LOSS OF AMENITIES OF LIFE

Loss of amenities is concerned with loss of enjoyment of life. This follows from the fact that human beings enjoy certain activities which may as a result of the injury be curtailed. **See Lemon Banda and 19 others V Mota Engil Limited and General Alliance Insurance Limited, personal injury cause number 178 of 2012 (unreported).**

Birkett L.J in Manley vs Rugby Portland Cement Co. (1951) C.A No. 286 stated that there is a head of damage which is sometimes called loss of amenities, the man made blind by the accident will no longer be able to see familiar things he has seen all his life, the man who had both legs removed and will never again go upon his walking excursions- things of that kind- loss of amenities. **Mc Gregor on damages at Page 834** explains that loss of impairment of any one or more of the five senses is compensated under this head. Besides loss resulting from interference with the plaintiff's sexual life.

DISFIGUREMENT

Disfigurement is concerned with change of looks of the individual. This may be scars, amputations and postures. **See Lemon Banda and 19 others V Mota Engil Limited and General Alliance Insurance Limited, personal injury cause number 178 of 2012 (unreported).** Damages for disfigurement are normally awarded as part of pain and suffering. They are awarded separately if the plaintiff has been ridiculed, lost his social status, or that his is in need of plastic surgery. **See Mary Kamwendo vs Stage coach Malawi Limited Civil Cause No. 840 of 1995.**

DETERMINATION

In the present matter the medical report shows that the claimant sustained a fracture of the tibia right leg. Further, the report shows that the claimant lost one tooth and had cuts and bruises on the lip and right side of the head. The cut lips were sutured. He went for x-ray where it was found that the claimant had a fracture and a Plaster of Paris was fixed on the leg. The degree of incapacitation was assessed at 15%. The injuries as shown in the statement of claim were serious in nature.

Considering the nature of the injuries and the treatment that the claimant went through, considering the authorities cited by Counsel for the Claimant and current devaluations, the Court awards a sum of K4, 500, 0000.00 in all heads of damages.

The defendant will bear the costs for the claimant to be taxed by the Court if not agreed.

Pronounced in chamber on this ^{18th} day of May 2018.



T. SOKO

ASSISTANT REGISTRAR