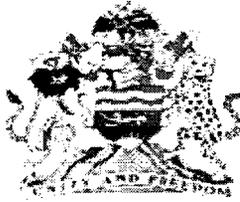


February

HIGH COURT  
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REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
PERSONAL INJURY CAUSE NO. 739 OF 2014

BETWEEN:

MWAIWAWO NANKUMBA .....1<sup>ST</sup> CLAIMANT  
EMMANUEL KAITANO..... 2<sup>ND</sup> CLAIMANT  
NYASA KAPALEPALE ( a minor by his next friend Colex Nankumba)..... 3<sup>rd</sup> CLAIMANT  
PATRICK CHALUNGAMA.....4<sup>TH</sup> CLAIMANT  
COLEX NANKUMBA.....5<sup>TH</sup> CLAIMANT

AND

SUMMY'S TRANSPORT.....1<sup>ST</sup> DEFENDANT  
PRIME INSURANCE COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT

CORAM

Mrs T. Soko : Assistant Registrar  
Mr Iman : Counsel for the claimant  
Naomi Munthali : Court Clerk

ORDER ON ASSESSMENT OF DAMAGES

BACKGROUND

This is an order on assessment of damages following a Judgment by Justice Kenyatta Nyirenda dated 16<sup>th</sup> February 2017. The four claimants are claiming for damages for pain and suffering and disfigurement, damages for loss of amenities of life, special damages as pleaded. The 5<sup>th</sup> claimant is claiming for value of

the killed cattle, value of the ox-cart, value of the damaged bicycle and loss of business or use of the ox- cart and bicycle. The Claimants are also claiming for the costs of the action.

The facts are that on 12<sup>th</sup> May 2014, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Claimants were passengers in an Ox-cart belonging to the 5<sup>th</sup> Claimant which was heading from the direction of Chikhwawa heading towards Nchalo. Upon reaching Bereu Trading Centre, the driver of the 1<sup>st</sup> defendant who was driving a Motor Vehicle Registration No. MZ 6962 which was insured by the 2<sup>nd</sup> defendant failed to control the Motor Vehicle and ended up hitting the ox- cart and bicycle that was in the ox- cart. As the result of the accident, the 1<sup>st</sup> claimant sustained bruises on the interior aspect of both knees, the 2<sup>nd</sup> claimant sustained a deep cut wound on the distal part of the leg about 5 cm long and bruises on the left elbow joint, the 3<sup>rd</sup> claimant sustained bruises on the left elbow, right leg and multiple cuts on the face and the 4<sup>th</sup> claimant sustained cut wounds on the face, general body bruises, severe abdominal pains due to blunt trauma to the abdomen.

## **EVIDENCE**

In evidence each claimant adopted his witness statement and tendered a medical report as part of evidence. In their witness statements, they explained that they were hit by the said Motor vehicle which had lost control due to over speeding. They explained their injuries to the Court.

The 5<sup>th</sup> Claimant stated that he received a message that his son had been involved in a serious car accident. Upon inquiring as to what happened he was told that his ox- cart and two cattle had been destroyed by a truck that hit the ox- cart. He stated that he purchased the ox- cart at the price of K250, 000.00 in 2010 and the Cattle at the price of K300, 000.00. The Claimant stated that he used to earn K60, 000.00 when he hired it to others for plowing. On a normal business, he could earn a sum of K10, 000.00 per day and sometimes cotton farmers would hire the claimant to carry cotton and the claimant could earn K50, 000.00. He did neither adduce any evidence showing that he purchased the Ox- Cart and the Cattle at that price nor did he adduce evidence to prove that he was earning such amount of money out of the business he was doing. He stated that he lost the receipts.

## **SUBMISSIONS**

In submissions, Counsel for the Claimants submitted that a sum of K2, 500,000.00 would rightly compensate the 1<sup>st</sup> claimant in this matter. Further, Counsel stated that a sum of K3, 000,000.00 would compensate the 2<sup>nd</sup> Claimant. Counsel proposed a sum of K2, 500,000.00 to compensate the 3<sup>rd</sup> Claimant. Besides, Counsel submitted that a sum of K3, 500,000.00 would compensate the 4<sup>th</sup> Claimant and the 5<sup>th</sup> Claimant would be

compensated with a sum of K5,000,000.00 for loss of use and business, K250,000.00 for the cost of the Ox-Cart and K600,000.00 for the cost of the Cattle.

## **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, the 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. 329of 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 Enqil 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 Enqil 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**

#### **SPECIAL DAMAGES**

The rule is well settled that special damages have to be specifically pleaded and strictly proved. See Phiri V Daudi 15 MLR 404. A plaintiff who claims special damages must therefore adduce evidence or facts which give satisfactory proof of the actual loss he or she alleges to have incurred. See Aias Chikanda vs Prime Insurance Co. Ltd Personal Injury Cause No. 1053 of 2010.

#### DETERMINATION

In the present matter, the medical report shows that the 1<sup>st</sup> claimant sustained bruises on the anterior aspect of both knees. The wounds were debrided and dressed. Further, the report shows that the wound healed with scars. The report assessed the degree of incapacity at 15% and stated that he will have limits to perform manual work. The medical report of the 2<sup>nd</sup> claimant states that he sustained a deep cut wound on the distal part of the leg about 5cm long and bruises on the elbow joint. The wound was debrided and he was given painkillers. The report shows that the wound healed with big permanent scars on the leg and elbow. The degree of incapacity was assessed at 20% and the claimant will be able to perform manual work with limitations. The medical report of the 3<sup>rd</sup> claimant shows that he sustained bruises on the elbow, right leg and multiple cuts on the face. The wounds were debrided and suturing was done. The report shows that the wounds were healed with multiple scars and persistent pain. The degree of incapacity was pegged at 20% and the report explained that the claimant will be able to perform his previous duties with limitations. The medical report of the 4<sup>th</sup> claimant shows that the claimant sustained cut wounds on the face and generalized body bruises. He also suffered from severe abdominal pains due to trauma. The wounds were treated with iodine dressing, suturing and he was given pain killers. The report also shows that the wounds healed with scars and the degree of incapacity was pegged at 30%. The report also stated that the claimant will be using clutches until the pain subsides. In Aisha Nicks vs General Alliance Insurance Co. Ltd Personal Injury Cause No. 540 of 2013, the Court on 31<sup>st</sup> July 2014 awarded a sum of K500,000.00 damages for pain and suffering and K150,000.00 damages for loss of amenities of life to a plaintiff who was involved in a road traffic accident and sustained a deep cut wound on the right shoulder, lacerations all over the face, soft tissue injuries on toes of both legs, bruises on both hands, soft tissue injuries on the wrist joint and painful right ankle joint. In the light of the above authority, authorities cited by Counsel for the claimant in the submissions which I do not need to restate, the nature of injuries and the devaluation of currency, I make the following awards:

1<sup>st</sup> claimant: K800, 000.00 damages for pain and suffering and disfigurement

K200, 000.00 damages for loss of amenities of life

2<sup>nd</sup> Claimant: K900, 000.00 damages for pain and suffering and disfigurement

K300, 000.00 damages for loss of amenities of life

3<sup>rd</sup> Claimant: K900, 000.00 damages for pain and suffering

K300, 000.00 damages for loss of amenities of life

4<sup>th</sup> claimant: K1, 200,000.00 damages for pain and suffering

K500, 000.00 damages for loss of amenities of life

I am convinced that the 5<sup>th</sup> claimant had an Ox- Cart and two cattle. I therefore make an award of K250,000.00 as the value of the Ox- Cart and K600,000.00 as the value of the Cattle. On the lost earning the claimant did not adduce any evidence substantiating that he was earning such amount of money per month. I therefore award the claimant a sum of K1, 500,000.00.

Costs normally follow the event. Therefore costs are for the claimants.

Pronounced in chamber on this 18<sup>th</sup> day of June 2018.



T. Soko

Assistant Registrar