



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL DIVISION**

Personal Injury Cause Number 838 of 2020

BETWEEN:

KETRINA CHIZONDA (mother suing on her own behalf

And on behalf of the beneficiaries and dependants of the estates of

MANUEL SIKALIOTI and PEMPHERO SIKALIOTI (deceased)).....1ST CLAIMANT

WILINESS JOSEPH (suing through

SELINA JOSPEH, mother and next friend).....2ND CLAIMANT

AND

PRECIOUS KAMBANI.....1ST DEFENDANT

BRITAM INSURANCE COMPANY LIMITED.....2ND DEFENDANT

CORAM:	CM MANDALA:	ASSISTANT REGISTRAR
	W Namasala:	Counsel for the Claimant of Wilberforce Attorney
	Defendants:	JB Suzi & Company
	C Zude:	Court Clerk

ASSESSMENT OF DAMAGES

CM MANDALA, AR:

INTRODUCTION AND BACKGROUND

This is an order for assessment of damages pursuant to a Consent Judgment entered in favour of the Claimants on 24th February 2021. The 1st Claimant was awarded damages for loss of expectation of life, and loss of companionship. The 2nd Claimant was awarded damages for pain and suffering, loss of amenities of life, and disfigurement. Both Claimants were also awarded K15,000.00 as special damages, and costs of the action.

The claim arose from an incident that occurred on 31st December 2019 along the Nkotakota – Salima road. The 1st Defendant was driving a vehicle insured by the 2nd Defendant and he lost control of the vehicle at/near Scheme Area 5. The vehicle swerved to the far-right dirty verge where it hit the Claimant’s children. The 1st Claimant lost her children because of the accident, while the 2nd Claimant, the third child, was injured by virtue of the accident.

EVIDENCE

The Claimants adopted their witness statements as their evidence in chief. This evidence was undisputed. The witness statements will be reproduced.

1st Claimant

1. **THAT** I am the 1st Claimant in this matter.

2. **THAT** on 31st December 2019 my sons were hit by a Motor Vehicle Registration Number BQ 3660 Toyota Carina Saloon at Scheme 5 Area in Salima.
3. **THAT** the said motor vehicle was speeding from the direction of Salima and heading towards Nkhotakota.
4. **THAT** while speeding the 1st Defendant lost control of the motor vehicle and swerved from his normal left lane to the far-right dirty verge where it hit my sons.
5. **THAT** instantly my sons lost consciousness.
6. **THAT** they were rushed to Salima District Hospital where they were pronounced dead upon arrival. Now shown and exhibited to me is a copy of the Death Reports marked **“KC.”**
7. **THAT** these deaths have caused untold misery in my life and at times I simply cry.
8. **THAT** as a result of these deaths, I am a lonely woman who has permanently lost company of her dear friends and children.
9. **THAT** I verily believe that the accident herein was wholly caused by the negligence of the 1st Defendant as he drove with excessive speed.
10. **THAT** at the assessment I will present myself to Court to testify of how much pain and suffering, I undergo each day as a result of the untimely deaths of my sons.
11. **THAT** I therefore seek damages for loss of companionship, expectation of life and special damages.
12. **THAT** I further aver that I am entitled to costs of this action.

2nd Claimant

1. **THAT** I am the 2nd Claimant in this matter.
2. **THAT** on 31st December 2019 my daughter was hit by Motor Vehicle Registration Number BQ 3660 Toyota Carina Saloon at Scheme 5 Area.
3. **THAT** my daughter was in company of Pemphero and Manuel Sikaliti who died on the spot as a result of the accident.
4. **THAT** the motor vehicle in question was driving at a high speed from the direction of Salima and heading towards Nkhotakota.
5. **THAT** owing to the careless driving, the 1st Defendant failed to control the motor vehicle and hit the children who were innocently walking on the right.
6. **THAT** the children were rushed to Salima District Hospital where I learnt the seriousness of injuries sustained by my daughter. Now shown and exhibited to me is a copy of medical report from Salima Hospital marked **“SJ.”**
7. **THAT** among other injuries, my daughter sustained a fractured leg and bruises on the face and neck.
8. **THAT** she was put in Plaster of Paris (POP) and was hospitalised for two weeks The POP was removed after a month.
9. **THAT** I verily believe that the accident herein was wholly caused by the negligence of the 1st Defendant as he drove with excessive speed.
10. **THAT** at assessment I will present myself to Court to testify as to how much pain and suffering my daughter underwent as a result of the accident.
11. **THAT** I instructed my lawyer to seek compensation on behalf of my daughter.
12. **THAT** I further aver that I am entitled to costs of this action.

SUBMISSIONS BY COUNSEL FOR THE CLAIMANT

Counsel for the Claimant filed written submissions in support of the application. Counsel avers that the extremity of the Claimants’ loss and the devaluation of the Kwacha would attract awards of: K18,600,024.96 for loss of expectation of life, and loss of dependency for the 1st Claimant, and K4,500,000.00 as damages for pain and suffering, loss of amenities, and disfigurement for the 2nd Claimant. Counsel cited the following comparable cases for the court’s consideration:

1st Claimant

- ***Charles Chokha v Robert Nyambalo & Prime Insurance Company Limited*** Personal Injury Cause Number 33 of 2017 where the Claimant was awarded K1,500,000.00 as damages for loss of expectation of life for losing a child aged 5 years. This award was made on 13th May 2018. The Claimant was also awarded K2,603,648.00 as damages for loss of companionship.
- ***Lastone Chidule (suing on his own behalf and on behalf of other dependants of Mphatso Chidule) v Escom Limited*** Personal Injury Cause Number 947 of 2015 where the Claimant was awarded K1,800,000.00 as damages for loss of expectation of life for losing a child aged 12 years. This award was made on 23rd May 2018.

On loss of companionship, Counsel for the Claimant based their computations on the multiplier and multiplicand approach. Counsel for the Claimant submits that the multiplicand to be used for the deceased should be K50,000.08 which is the monthly minimum wage applicable now. Counsel further submits that the court should use the multiplier of 39, based on the life expectancy of 63.7 years and a 1/3rd reduction as is the practice. Counsel made the following computations:

$$\begin{aligned} & \text{K50,000.08} \times 12 \times 39 \times \frac{2}{3} \\ & \quad \quad \quad = \underline{\underline{\text{MK15,600,024.96}}} \end{aligned}$$

2nd Claimant

- ***Jacquareen Manuel v Prime Insurance Company Limited*** Personal Injury Cause Number 551 of 2016 where the Claimant was awarded K4,800,000.00 as damages for pain and suffering, loss of amenities of life, and disfigurement for a fractured leg, multiple cuts on the face, both hands and both legs. The award was made on 19th June 2018.
- ***Patrick Mathews v Lawrence Mpumira & Prime Insurance Company Limited*** Civil Cause Number 267 of 2017 where the Claimant was awarded K4,500,000.00 as damages for pain and suffering, loss of amenities of life, and disfigurement for a fractured right tibia, bruises on the right side of the head, and cuts on the lip. The award was made on 18th May 2018.

ASSESSMENT GUIDELINES

Damages for personal injuries are awarded for a Claimant's pecuniary and non-pecuniary losses. The pecuniary losses include the loss of earnings and other gains, which the Claimant would have made had they not been injured, and the medical and other expenses which accrue from care and after-care of the injury. The non-pecuniary losses include pain and suffering, loss of amenities of life and loss of expectation of life. The principle underlining the award of damages is to compensate the injured party as nearly as possible as money can do it.¹ Perfect compensation for a Claimant is unlikely. The Claimant, however, is entitled to fair and adequate compensation.² Since it is difficult to assess damages involving monetary loss, courts resort to awarding conventional figures guided by awards made in similar cases and also taking into account the money value. Lord Morris buttresses this contention in ***West v Shepherd***³ by stating: '*money cannot renew a physical frame that has been battered and shattered. All judges and courts can do is to award a sum which must be regarded as giving reasonable compensation.*'

¹ See ***Cassel and Co v Broom*** [1972] AC 1027. See also ***Tembo v City of Blantyre and The National Insurance Co Ltd*** – Civil Cause No. 1355 of 1994 (unreported).

² ***British Commission v Gourley*** (1956) AC 185.

³ ***West v Shepherd*** (1964) AC 326 at 346.

The mode of assessment of damages requires the court to consider comparative awards of a similar nature. In doing so, regard must be had for fluctuations in the value of the currency. The court should make an award that is commensurate with the value of the currency at the time the award is made. In *Malamulo Hospital (The Registered Trustees) v Mangani*⁴, the Supreme Court states: “It is, therefore, recognised by the courts that awards of comparable injuries should be comparable. This is done by looking at previous awards of similar cases and adjusting the award according to the fall of the value of the money.” In *Tionge Zuze (a minor, through A.S. Zuze) v Mrs Hilda Chingwalu*,⁵ the Court states: “Where a claim relates to non-monetary loss in respect of which general damages are recoverable it is not possible to quantify the loss in monetary terms with mathematical precision. In such cases courts use decided cases of a comparable nature to arrive at an award.” In *Steve Kasambwe v SRK Consulting (BT) Limited* Personal Injury Cause Number 322 of 2014 (unreported), the High Court states thus: ‘At times the court is faced with situations where the comparative cases have been rendered obsolete because of the devaluation of currency and inflation. It would not achieve justice if the court insisted on the same level of award as was obtaining in the previous cases. In such situation, when deciding the new cases, the court must take into account the life index, i.e. cost of living and the rate of inflation and the drop-in value of the currency. The court must therefore not necessarily follow the previous awards but award a higher sum than the previous cases.’

COMPENSATION FOR 1ST CLAIMANT

Loss of Expectation of Life

Damages under this head are claimable by a Claimant where injuries suffered by him have reduced his expectation of life - *Flint v Lovell* [1935] 1 KB 354. The claim for damages under this head also survives the demise of the injured plaintiff and is thus available to the personal representative of his estate – *Nyirongo v United Transport (Mal) Ltd* [1990] 13 MLR 344. In assessing damages under this head, the thing to be valued is not the prospect of length of days but of a predominantly happy life – *Bentham v Gambling* [1941] AC 157. No regard must be had to the financial losses or gains during the period of which the victim has been deprived, as these damages are in respect of loss of life, and not of future pecuniary loss - *Bentham v Gambling* [1941] AC 157.

In determining what damages to award the Claimant for loss of expectation of life, current awards are considered to determine an appropriate amount of compensation. Counsel for the Claimant cited awards of K1,500,000.00, as damages for loss of expectation of life made in 2018. *Charles Chokha v Robert Nyambalo & Prime Insurance Company Limited*, and *Lastone Chidule (suing on his own behalf and on behalf of other dependants of Mphatso Chidule) v Escom Limited* (see citations above). Counsel submits that the 1st Claimant be awarded K1,500,000.00 for each child.

Considering the foregoing discussion and considering the passage of time and the devaluation of the Kwacha, this court believes an adequate award for the 1st Claimant under this head would be K2,000,000.00 as damages for loss of expectation of life for each child. The total award is **K4,000,000.000 as damages for loss of expectation of life.**

Loss of Companionship

On loss of companionship, Counsel for the Claimant based their computations on the multiplier and multiplicand approach. Counsel for the Claimant submits that the multiplicand to be used for the deceased should be K50,000.08 which is the monthly minimum wage applicable now. Counsel further submits that the

⁴ [1996] MLR 486.

⁵ Quoting from *HQ Chidule v Medi* MSCA 12 of 1993.

court should use the multiplier of 39, based on the life expectancy of 63.7 years and a 1/3rd reduction as is the practice. Counsel made the following computations:

$$\begin{aligned} & \text{K50,000.08} \times 12 \times 39 \times \frac{2}{3} \\ & = \underline{\underline{\text{MK15,600,024.96}}} \end{aligned}$$

This, however, seems to be the basis upon which courts award damages for loss of dependency. The 1st Claimant's pleadings do not contain the head of loss of dependency. The submissions appear to be providing for this under a different head. Damages for loss of dependency are awarded for a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of life – *Franklin v SE Ry* (1858) 3 H & N 211 at page 214. While loss of companionship is awarded for deprivation of the benefits of a family relationship such as the ability to parent, show love and affection, or have a sexual relationship – they are noneconomic damages – **Commission Working Paper 1979 (February) (England)**.

Loss of companionship, therefore, cannot be calculated with mathematical precision so a nominal sum is awarded. Based on the foregoing, the 1st Claimant is awarded K1,000,000.00 for loss of companionship from each son. The total award is **K2,000,000.000 as damages for loss of companionship**.

Special Damages

The law distinguishes general damages and special damages as follows – general damages are such as the law will presume to be the direct natural or probable consequence of the action complained of. Special damages, on the other hand, are such as the law will not infer from the nature of the course - *Stros Bucks Aktie Bolag v Hutchinson* (1905) AC 515. In determining the natural consequences, the court considers if the loss is one which any other claimant in a like situation will suffer – **McGregor on Damages** p23 para 1-036.

Special damages must be specifically pleaded and must also be strictly proved - *Govati v Manica Freight Services (Mal) Limited* [1993] 16(2) MLR 521 (HC). 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. Where documents filed by the Plaintiff fail to meet this strict proof then special damages are not awarded – *Wood Industries Corporation Ltd v Malawi Railways Ltd* [1991] 14 MLR 516.

The 1st Claimant herein was awarded special damages that were quantified as K15,000.00 As stated above, special damages ought to be specifically claimed and proven. The 1st Claimant herein did not provide any evidence of the expenses incurred. For these reasons, no award will be made under this head.

COMPENSATION FOR 2ND CLAIMANT

The 2nd Claimant sustained a fractured leg and bruises on the face and neck.

Pain and Suffering

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. See: *Ian Goldrein et al, Personal Injury Litigation, Practice and Precedents* (Butterworths, 1985) 8 and *City of Blantyre v Sagawa* [1993] 16(1) MLR 67 (SCA).

The Claimant herein sustained a 'closed fracture on the left leg, on the neck and bruises on the face' as per the medical report. The 2nd Claimant was admitted between 31/12/19 and 6/01/20 – a period of 7 days. The 2nd Claimant received the following treatment 'POP cast above knee x4/5 Pan 250g....'

The court had recourse to comparable awards cited by Counsel of K4,800,000.00, and K4,500,000.00 being awards made in 2018 as damages for pain and suffering, loss of amenities of life, and disfigurement. See: *Jacquareen Manuel v Prime Insurance Company Limited, and Patrick Mathews v Lawrence Mpumira & Prime Insurance Company Limited* (cited above).

Based on this, this court awards the sum of **K2,000,000.00 as damages for pain and suffering.**

Loss of Amenities of Life

The expression ‘loss of amenities of life’ simply means loss of faculties of pleasures of life resulting from one’s injuries. Damages for loss of amenities of life are awarded for the fact that the plaintiff is simply deprived of the pleasures of life, which amounts to a substantial loss, whether the plaintiff is aware of the loss or not. See: *Poh Choo v Camden and Islington Area Health Authority* [1979] 2 All ER 910 and *City of Blantyre v Sagawa* [1993] 16(1) MLR 67 (SCA) at 72.

As a result of the accident, the Claimant has ‘*deformed leg proximal the knee joint and intermittent neck pains.*’ The 2nd Claimant was four years old when the accident occurred and will have to live with this deformity and constant neck pain for some time.

The court had recourse to comparable awards cited by Counsel of K4,800,000.00, and K4,500,000.00 being awards made in 2018 as damages for pain and suffering, loss of amenities of life, and disfigurement. See: *Jacquareen Manuel v Prime Insurance Company Limited, and Patrick Mathews v Lawrence Mpumira & Prime Insurance Company Limited* (cited above).

Based on the foregoing discussion, this court awards the sum of **K1,500,000.00 as damages for loss of amenities of life.**

Disfigurement

In the matter of *James Chaika v NICO General Insurance Co Ltd* the High Court stated that ‘*Disfigurement is not a matter to be taken lightly and casually as it is something that one has to permanently live with.*’ In *Nyirenda v Moyo and other*, the claimant was awarded the sum of K500,000.00 as damages for disfigurement in 2018.

The 2nd Claimant’s medical report cited the following permanent disabilities: ‘*scars on the face, deformed leg proximal the knee joint and intermittent neck pains.*’ Her degree of permanent incapacity was pegged at 20%. Following the sentiments made in the *James Chaika Case* and considering the devaluation of the Kwacha since 2018, the 2nd Claimant is hereby awarded K750,000.00 as damages for disfigurement.

Special Damages

The law distinguishes general damages and special damages as follows – general damages are such as the law will presume to be the direct natural or probable consequence of the action complained of. Special damages, on the other hand, are such as the law will not infer from the nature of the course - *Stros Bucks Aktie Bolag v Hutchinson* (1905) AC 515. In determining the natural consequences, the court considers if the loss is one which any other claimant in a like situation will suffer – *McGregor on Damages* p23 para 1-036. A Claimant 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. Where documents filed by the Claimant do not meet this strict proof then special damages are not awarded – *Wood Industries Corporation Ltd v Malawi Railways Ltd* [1991] 14 MLR 516 and *Govati v Manica Freight Services (Mal) Limited* [1993] 16(2) MLR 521 (HC).

The 2nd Claimant herein was awarded special damages that were quantified as K15,000.00 As stated above, special damages ought to be specifically claimed and proven. The 2nd Claimant herein did not provide any evidence of the expenses incurred. For these reasons, no award will be made under this head.

DISPOSAL

Summary

The 1st Claimant is therefore awarded K4, 000,000.00 for loss of expectation of life, K2,000,000.00 for loss of companionship, K0 for special damages, and costs of the action (to be assessed by the Court). **The 1st Claimant's total award is K6,000,000.00 (six million).**

The 2nd Claimant is therefore awarded K2,000,000.00 for pain and suffering; K1,500,000.00 for loss of amenities of life; K750,000.00 for disfigurement, and K0 as special damages and costs of the action (to be taxed by the court). **The 2nd Claimant's total award is K4,250,000.00 (four million two hundred and fifty thousand kwacha).**

Each party is at liberty to appeal to the Supreme Court of Appeal within the requisite time frames. Leave to appeal is hereby granted.

Ordered in Chambers on the 10th day of May 2021 at the High Court, Civil Division, Lilongwe.

A handwritten signature in blue ink, appearing to be 'M. Mandala', is centered on the page.

CM Mandala

ASSISTANT REGISTRAR