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REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CASE NO. 708 OF 2016

BETWEEN

FRANK ENOCK KAMBADYA.....CLAIMANT

AND

S.D. MHANGO.....1st DEFENDANT

BLESSINGS CHIBESAKUNDA.....2nd DEFENDANT

PRIME INSURANCE COMPANY LIMITED.....3rd DEFENDANT

Coram: **WYSON CHAMDIMBA NKHATA (AR)**

Kusiwa- of Counsel for the Claimant

Chisale-of Counsel for the Defendants

Chitsulo- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

The claimant commenced these proceedings by writ of summons which was issued on the 26th of August 2016. He was claiming damages for pain and suffering, loss of amenities of life and costs of this action. Apparently, the action emanates from an accident which took place on the 7th of December 2015 around Endongolweni area along Mzimba-Rumphi road. Following the parties' agreement, a judgment on liability was entered in favour of the claimant on the 25th of October 2017. The issue of the defendant's liability having been settled 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 herein. This is the court's order on assessment of damages.

The parties appeared before this court on the 8th of February 2018 for the hearing on assessment of damages. The claimant was the sole witness for his case. He adopted his witness statement and tendered a Medical Report and a copy of a Health Passport. In his witness statement, he averred that on the 7th of December 2015, he was involved in an accident. He was taken to Ekwendeni Hospital by a well-wisher where he was x-rayed and when the medical officers saw the severity of the injuries they referred him to Mzuzu Central Hospital. He had sustained a fracture of two left ribs, fracture of the left clavicle, haemorthorax, deep cut on the right leg, suffered permanent incapacity of 30%. He further averred that as a result of the fractured clavicle he cannot lift heavy objects and his left shoulder is deformed. It is his testimony further that after being discharged he went to Lilongwe where he received treatment for a period of 8 days at Deang Luke Hospital because he was having sleepless nights because of breathing difficulties and coughing. He was referred to Kamuzu Central Hospital where it was discovered that his condition was deteriorating. He made several visits to the hospital for check-up. On the 19th of January 2016, he was reviewed by a specialist and it was recommended that a drain be inserted on the left side of his chest and almost 3.5 litres of blood was drained. After being discharged on the 22nd January 2016, he had been undergoing reviews at the hospital until September 2016. In May 2016, during one of the reviews it was discovered that the fracture he had of the left clavicle had not healed properly and he was told that nothing could be done about it. He was told to stop riding a motor cycle which he usually used in his work.

In cross-examination he stated that he was travelling in a minibus and that there were other passengers as well who got injured. He stated that he was not sure how many were also injured and he was taken alone to the hospital. He stated that the injuries were worse immediately after the accident because internal bleeding. He stated that he could not say that he was now feeling better.

Such was the evidence for the claimant, Counsel for the defendants put before the court that they intended to parade a witness who happened to be an officer for the 3rd defendant to testify on the extent of liability on the policy of vehicle motor registration KA6374 Mazda Bongo Minibus. He further stated that there was a liability clause to the effect that the indemnity was to the maximum of K5,000,000.00 and this had been pleaded. He further stated that they wished to bring evidence to show how much had been paid already to other victims. He therefore prayed for 14 days to file a witness statement and exhibits. The matter was adjourned on the understanding that the defendants should file the said witness statement and the exhibits by 22nd February 2018. The same was not done by the given date. The claimant through

Counsel filed a certificate of non-compliance and moved the court to proceed with its ruling on assessment of damages which the court granted. I shall therefore proceed with the evidence so far on the record.

I must state that the law generally provides that a person who suffers bodily injuries or losses due to the negligence of another is entitled to recover damages. The fundamental principle which underlines the whole law of damages is that the damages to be recovered must, in money terms, be no more and no less than the Plaintiff'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 plaintiff.

I perused the medical evidence as to the injuries and the prognosis given by the medical experts. I had the opportunity to observe the injury and the present physical condition of the claimant. I gave meticulous thought to the written submissions filed by counsel for the claimant. I went through the precedents cited by the counsel. Some of the case cited are as follows:

Mayamiko Lipinga v Prime Insurance Company Limited Civil Cause No 2495 of 2009 where the Plaintiff sustained a fracture of the tibia bone, soft tissue injury to the right big toe and cut on the right big toe. He was awarded MK3,500,000.00. These awards were made on the 3rd of September 2012.

Muhammad Mpulula and Another v B. Ali and Others Civil Cause No 351 of 2013 where the Plaintiffs was awarded MK3,000,000.00 each for multiple cuts on the chest, ribs, right arm, bruises and swollen thigh. The award was made on the 12th of February 2014.

Charles Kamanga v Prime Insurance Company Limited Personal Injury cause No. 3011 of 2008 in which the claimant sustained a fracture of the left shoulder bone, deep cut wounds on the head. The court awarded her the sum of K2,500,000.00. The award made on the 30th of April 2009.

Foster Muleso and Khalamu Chiseche v Rasy Motors Civil Cause No. 1626 of 2010 in which the 2nd claimant sustained a fracture of the lower arm. An award of K2,200,000.00 was made on 7th of August 2012.

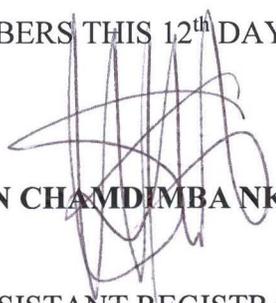
Steven Kazembe and Yusufu Chionya v NICO General Insurance Company Ltd Civil Cause No. 605 of 2011 where the 1st plaintiff was awarded K3,500,000.00 for the fracture of the humerus and soft tissue injuries. The 2nd plaintiff was awarded K2,500,000.00 for fracture of the ribs of the left side and chest pains. The award was made on the 31st of October, 2014.

It was therefore Counsel's submission that the injuries in the present case are more serious than in the cases cited above and further that the Kwacha has lost value since the awards. He is of the view that in the circumstances of this case, the reasonable compensation would be K9,000,000.00.

I take it that the injuries herein were serious. The claimant suffered two fractures which must have caused excruciating pain. I also take note that the injuries also led to internal bleeding and the claimant had to undergo further medical procedure to have the same extracted. Evidently, the injuries have left the claimant with a deformity. There is an elaborate narration of how the claimant frequented the hospitals seeking medical attention only to be told that he had not healed properly. I further take note that the claimant is lamenting that he can no longer lift heavy objects. I believe that this has dealt a heavy blow on his day to day living. With that in mind and upon a thorough consideration of facts and circumstances of this case, and upon an exhaustive consideration of the submissions by the claimant's Counsel in the light of the relevant and applicable law regarding damages for the claimed heads herein that I award the plaintiff K6,000,000.00 under all heads claimed and proved.

The plaintiff is further awarded costs to be taxed if not agreed by the parties.

DELIVERED IN CHAMBERS THIS 12th DAY OF ~~NOVEMBER~~ 2018


WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR