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REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CASE NO. 610 OF 2017

BETWEEN

ABELS TEMBO.....1ST CLAIMANT

MARIA SIBALE TEMBO.....2ND CLAIMANT

AND

JOHN LAMECK.....1ST DEFENDANT

JEFULE DAISON t/a MALUNGA TRANSPORT.....2ND DEFENDANT

PRIME INSURANCE COMPANY LIMITED.....3RD DEFENDANT

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

Kalua- of Counsel for the plaintiff

Tandwe- of Counsel for the defendant

Chitsulo- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

Through a writ of summons that was issued by the court on the 12th of December 2017, the claimant commenced these proceedings claiming damages for pain and suffering, loss of amenities of life, special damages and costs of this action. This is the court's order on assessment of damages pursuant to a judgment by Honourable Justice Tembo entered in favour of the claimant on the 19th of June 2018. The issue of the Defendant's liability having been settled by the said judgment, the duty placed upon this court

was to determine the reasonable quantum of damages that would adequately compensate the claimants for the losses and damages herein.

The parties appeared before this court on assessment of damages on the 5th of September 2018. The 1st claimant adopted his witness statement in which he averred that on the material day he was a passenger in a vehicle registration number RU922 Toyota Sienta being driven by Patrick Sibale. They were travelling from Blantyre going to Mpherembe to attend a funeral. Upon arrival at Yosefe Village at Kasungu the motor vehicle they were travelling in collided with a motor vehicle registration number CK Isuzu KB which was coming from the opposite direction as it overtook another vehicle. As a result of the accident, his son Ulunji Tembo who was 8 months old sustained injuries and was pronounced dead on arrival at Kaluluma Health Centre in Kasungu. He sustained an open fracture of the radius/ulna, lacerations on the left forearm, lacerations on the right wrist and lacerations on the right knee. He further tendered a Medical report, Police Report and a Death Report which the court marked EXP1, EXP2 and EXP3 respectively. In cross-examination he indicated that he works for World Vision International as a District Programs Manager since 2014.

The 2nd witness was Maria Abeles Tembo. She also tendered her witness statement which by and large re-iterated the events as outlined by the 1st witness. She however indicated that she sustained a fracture of the pelvis, painful left hip and chest pains. She explained that she has recovered but she still feels pain on her waist and she cannot walk long distances as she used to. She further indicated that she is a Teacher and now she cannot stand for a long time. She added that she still goes to the hospital and she has a schedule that she follows for her check-ups. In cross-examination she re-iterated that she is a Teacher at Chirimba Primary School and has been teaching for the past 6 years.

With this evidence, the claimants closed their case. The defendants on the other hand, opted not to parade witnesses but indicated that they had agreed with Counsel for the claimant that the Insurance Policy with regard to the 3rd defendant was for a maximum of K5,000,000.00 with respect to death and bodily injury. The same was confirmed by Counsel for the Claimants. I must add that both parties filed written submissions which gratefully I must acknowledge that they went a long way in informing the court in its decision.

With that, 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 such matters 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 claimants.

In the present matter, Counsel for the claimant is proposing that this court should consider making an award of K10,000,000.00 as damages for pain and suffering and loss of amenities with regard to the 1st claimant, Abeles Tembo. As aforementioned, the 1st claimant sustained an open fracture of the radius/ulna, lacerations on the left forearm, lacerations on the right wrist and lacerations on the right knee. It is further indicated that he was admitted from the 4th of May 2017 to 22nd of May 2017. Metal pins were inserted in his leg to hold the fractured bones together. Counsel for the claimant cites the following cases:

Ethel Duncan vs Joseph Kamadzi and prime Insurance Company, civil case no 2016 of 2010, where the plaintiff suffered a fractured right humerus, traverse mid shaft with radical palsy, mild head injuries and multiple bruises and her permanent incapacity was rated at 30%. She was awarded K3,000,000.00 for pain and suffering and loss of amenities and K700,000.00 for disfigurement. The award was made on 28th July 2012.

Owen Kayira and 2 others v Unusu Shaikh Personal Injury Cause Number 1160 of 2013 where the Plaintiff was awarded K2, 500,000.00 on 1st July 2014 being damages for a head injury, multiple soft tissue injuries over the head and lost consciousness on the spot.

Nellie Manda v Prime Insurance Company Limited Civil Cause Number 619 of 2009 where the plaintiff sustained a fracture of the left upper arm, deep wound on the right thigh, bruises on the lower leg and deep cut wounds on the left thumb, left index finger and left middle finger and was awarded MK6,500,000.00 for pain and suffering and loss of amenities of life on 25th April 2012.

On the other hand, Counsel for the defendants contends that the claimants have not adduced evidence to support their claim for loss of amenities of life and that they are in fact able to continue with their normal jobs. He therefore prays that a sum of K2,000,000.00 be awarded for the 1st and the 2nd claimant. He thus cites the following cases:

Felix Juwawo and 4 Others v Joseph Kadzayekha, W. A. Nguluwe and Prime Insurance Company Limited Personal Injury Cause Number 15 of 2013 wherein the 5th claimant sustained a bilateral fracture of malleora, extensive abrasions on the left arm and face and deep cut wound on the left arm. The court awarded him the sum of K2,000,000.00 on the 27th of October, 2017.

Leonard Danger v Lackson Mwikale and Prime Insurance Company Limited Personal Injury Cause Number 40 of 2016 wherein the claimant sustained a fracture of the right arm, fracture of the right thumb and multiple bruises on the right elbow, left arm and at the back of the head. The court awarded him K2,500,000.00 as damages for pain and suffering on the 16th of November, 2017.

Paul Chamaza (on his own and on behalf of the dependant of Mrs Ivy Chamaza (deceased), Elason Dzuwa and Chifundo Mnenela v Edward Nyirenda and Prime Insurance Company Ltd. Personal Injury Cause number 1165 of 2010 in which the 2nd plaintiff sustained soft tissue injuries, deep cut wound on the shoulder, multiple bruises on the left arm and cut on the left leg. He was awarded the sum of K650,000.00 as damages for pain and suffering. The 3rd plaintiff sustained multiple bruises on both knees and a concussion to the forehead and sprained right shoulder. His degree of incapacity was assessed at 13% and was awarded K850,000.00. These awards were made on 22nd April 2016.

From the evidence before me, I take it that the 1st claimant suffered serious injuries. In my considered opinion, an injury that involves an open fracture is a serious injury. I cannot help but say the same must have exposed the 1st claimant to excruciating pain. Clearly this is an injury that has inconvenienced the plaintiff in a number of ways and still does as it were. In my view, based on the evidence that is before me and considering the plaintiff's injury in light of the applicable law, the sum of **K4,500,000.00** will be fair and reasonable compensation under all heads claimed and proved.

Further, Counsel for the claimants is proposing that this court should consider making an award of K15,000,000.00 as damages for pain and suffering and loss of amenities with regard to the 2nd claimant Maria Sibale Tembo. As aforementioned, the 2nd claimant sustained fracture of the pelvis, painful left hip and painful chest. She was hospitalized from the 4th of May 2017 to 18th May 2017. She is feeling better but cannot walk for a long time. Counsel for the claimant states that they have not come across case authority on the fracture of the pelvis however he thus cites the following cases still more for guidance:

Anastanzia Elias v NICO Insurance Company Limited Personal Injury Cause Number 117 of 2011 (unrep) in which the plaintiff lost use of her hand and one of her legs was amputated below the pelvis. The plaintiff was awarded K15,000,000.00 as damages.

Felista Kachaso vs. Kondowe and others [(Civil Cause No. 320 of 2009) (unreported)], in which the plaintiff suffered a big cut wound at the back of the head, a closed fracture of the right humerus, and an open fracture of the right lower leg. As a result of the injury to the head, the plaintiff became forgetful. She was initially awarded K7, 500, 000.00 in damages but this was reduced to K5, 600, 000.00 on appeal. The reduced award was made on 16th October, 2009.

Joseph Danger v Prime Insurance Insurance Company Limited Civil Cause No. 1760 of 2010 in which the claimant sustained a fracture of the leg, deep cut wound on the knee, painful leg, bruises on both arms and at the back and a cut wound on the forehead. An award of K6,500,000.00 was made on 18th of April 2013.

On the other hand, as aforementioned, Counsel for the defendants contends that the claimants have not adduced evidence to support their claim for loss of amenities of life and that they are in fact able to continue with their normal jobs. He therefore prays that a sum of K2,000,000.00 be awarded to the 2nd claimant.

In my view, the 2nd claimant equally sustained a serious injury. I believe the same must have caused excruciating pain. I further take note that the same has now affected her wellbeing. She indicated that she can no longer walk long distances. Indeed, she can still perform her duties as a teacher but clearly not in the same way as she used to. She lamented that she cannot stand for a long period which presumably is something she needed for her job. I was of the view however that the K15,000,000.00 proposed by Counsel for the claimant is far on the higher side. The **Anastanzia Elias** case (supra) involves amputation below the pelvic area which is not the case herein. Nevertheless, the K2,000,000.00 suggested by Counsel for the defendants is slightly on the lower side. In the case of **Kachasu and another vs Peter Kondowe and another, civil Cause Number 320 of 2009**, the 1st Plaintiff sustained a fractured pelvis, humerus and open fracture of the right lower leg was awarded K5,600,000.00. I take note that in this case there were other fractures as well and that the award was made in the year 2009. With the devaluation of the Kwacha, I believe K5,000,000.00 would adequately compensate the 2nd claimant.

On the claim for loss of expectation of life and loss of dependency in view of the death of the Ulunji Tembo, there is no indication that one of the claimants was claiming on his or her behalf and on behalf of the estate of the deceased. Observably, Counsel for the claimants did make amendments along the way

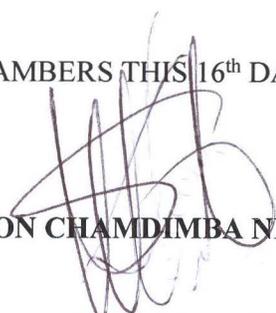
but this was left the way it is. I wish to join Counsel for the defendants in that this claim cannot be maintained as such I make no award on the same.

In summary, therefore, the courts awards the damages as follows:

- K4,500,000.00 being damages for pain and suffering and loss of amenities for Abeles Tembo.
- K5,000,000.00 being damages for pain and suffering and loss of amenities for Maria Sibale Tembo.

In total, the claimant is awarded K9,500,000.00. They are further awarded costs for the assessment proceedings.

DELIVERED IN CHAMBERS THIS 16th DAY OF OCTOBER 2018



WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR