



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO.152 OF 2017

BETWEEN:

ESTERY THOMASI (Minor suing through her sister and next friend Alinafe Thomas
Bakali.....1st CLAIMANT
ISAAC JOSEPH2ND CLAIMANT

AND

PRIME INSURANCE COMPANY LIMITED.....DEFENDANT

CORAM

Mrs T. Soko : Assistant Registrar
Mr Masanje : Counsel for the claimant
Mr Chipembere : Counsel for the defendant
Ms Chimang'anga : Court Clerk

BACKGROUND

The matter herein was commenced through writ of summons dated 7th March 2017. The claimants claim for damages for pain and suffering, damages for loss of amenities of life, damages for disfigurement, special damages and costs of the action. The facts of the case are that on 28th June 2016, the claimants were passengers in a motor vehicle registration No. CK 447 Toyota Hiace which was coming from the direction of Nsanje going towards Blantyre. Upon reaching Bangula the driver of the motor vehicle lost control and hit the wall of a building. As a result of the accident the claimants sustained the following injuries:

1st claimant: Fracture of the right arm, deep cuts on the upper arm, cuts on the face, bruises, soft tissue injuries

2nd claimant: Soft tissue injuries, general body pains and fracture femur.

On 25th April 2017 a default judgment was entered by a court against the defendant. on 20th June 2018 the matter came for assessment of damages.

ISSUE

Quantum of damages to be payable

EVIDENCE

Evidence from the 1st claimant is that after the accident she was admitted at Kalemba private clinic and later on she was transferred to Nsanje District hospital for further treatment. She stayed in the hospital for a week. The claimant stated that diagnosis from the hospital revealed that she had sustained multiple soft tissue injuries, fracture on the left arm, deep cuts on the arm and face and general body pain. The claimant complained of pain and stated that she cannot do her household duties. She added that she was absent from school for four month as she was nursing her wounds. The claimant tendered a police and medical report as part of her evidence.

The 2nd claimant explained that he sustained a multiple soft tissue injury, fracture femur, painful ribs and general body pain. The claimant stated that he cannot walk for a long distance. He added that he cannot properly do farming activities. The claimant tendered a police and medical report as part of evidence. In cross examination the claimant stated that he sprained his leg. He said he struggles to cycle a bicycle.

Counsel for the claimant submitted that the 1st claimant must be compensation with a sum of K4, 000,000.00 whilst the 2nd claimant must be compensated with a sum of K3, 000,000.00. Counsel cited a number of comparable cases to substantiate the claim. I have read the authorities and I appreciate Counsel for the well-founded authorities.

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 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 Commissioners 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 neighbouring 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 of** comparable cases to substantiate his position.

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.** This means the plaintiff must produce evidence to prove the amount of special damages.

DETERMINATION

I have looked at the medical report of the 1st claimant. The report shows that she sustained a fracture of the right elbow joint, cut and bruises on the face and both arms. The wounds were dressed and she was given painkillers. The claimant was admitted for 6 days and the medical report rates the injury as serious. It means she went through severe pain accompanied with suffering. Unfortunately, the claimant will be unable to perform most chores. Further the claimant healed with scars which were not there before. **In Nyirenda vs Funsani and Another Civil Cause No. 2013 of 2007** the plaintiff suffered a fractured 2nd metacarpal bone of the right hand, fractured pelvis on the right side and multiple bruises. The Court awarded the plaintiff a sum of K1, 700,000.00 as damages for pain and suffering and loss of amenities of life. The award was made on 17th May 2011. In the light of above the Court awards a sum of K 2, 000,000.00 in all heads of damages.

The medical report for the 2nd claimant shows that the claimant sprained the right hip joint, traumatic right eye and painful nerve. He was given painkillers. Further the medical report shows that the claimant will have difficulties to perform his previous business since he still feels pain. I have considered the injuries suffered by the claimant and I award a sum of K 1, 800,000.00 in all heads of damages.

Costs are for the claimant.

Pronounced in chamber on this 4th day of September 2018.



T. SOKO

ASSISTANT REGISTRAR