



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
Personal Injury Cause Number 146 of 2020

BETWEEN:

CHARITY LUHANGA.....CLAIMANT

AND

THE ATTORNEY GENERAL (MALAWI POLICE SERVICE).....DEFENDANT

CORAM:	CM MANDALA:	ASSISTANT REGISTRAR
	G Chembezi:	Counsel for Claimant of GD Liwimbi & Partners
	Mahonga:	Counsel for Defendant of Attorney General's Chambers
	C Zude:	Court Clerk

ASSESSMENT OF DAMAGES

INTRODUCTION AND BACKGROUND

This is an order for assessment of damages pursuant to a Consent Judgment entered on 7th October 2020. The Defendant is liable for: damages for pain and suffering, damages for loss of amenities of life, damages for disfigurement, damages for loss of earnings of future income, damages for future treatment (future nursing care), the sum of K17,000 being the cost of medical and police reports, and costs of the action. The hearing on Assessment of Damages was conducted on 7th October 2020.

This matter arose from a road accident that occurred on 18th August 2018 when a motor vehicle that the Claimant was travelling in overturned and caused injury to the Claimant. The Claimant was travelling in a vehicle being driven by a fellow police officer, the Defendant's agent, who was driving while in the course of employment.

EVIDENCE

Claimant's Evidence

The Claimant adopted their witness statement as evidence in chief. The witness statement states:

I, CHARITY LUHANGA of care of Post Office Box 1781, LILONGWE STATE as follows:

- 1. I am a police officer of the rank of Sub Inspector in the Malawi Police Service and my service number is 1353. As of 18th August 2018, the date of the accident which has given rise to these proceedings, I was working in the Road Traffic Department stationed at Central Region Police Headquarters.*
- 2. On 18th August 2018, in the normal course of our patrol duties as police road traffic officers, I was travelling in motor vehicle registration number MP 2430 with my fellow colleagues along the M1 road. The vehicle was being driven by a fellow police officer, Mr Hastings Mazera.*
- 3. Upon arrival at Mazengera Turn-Off, the vehicle overturned, and I was severely injured. The accident was caused by the negligence of the driver of the vehicle who was the defendant's agent in the course of employment. I hereby attach a copy of a police report as **exhibit CL1**.*
- 4. As a result of my injury, I was admitted in hospital for a total of 5 months both at Kamuzu Central Hospital and later Kachere Rehabilitation Centre from 18th August 2018 to 10th January 2019.*
- 5. I was born on 13th January 1979, meaning I was 39 years old at the time of the accident.*
- 6. Due to the accident I suffered the following injuries:*

- 6.1 Wedge compression fracture at thoracic bone number 10 which left me totally paralysed from the pelvic region down to the lower limb; i.e. I have a complete spinal cord injury;
- 6.2 Fracture of the clavicle;
- 6.3 Fracture to the ribs;
- 6.4 Complete paralysis of both legs
7. As a result of the above-mentioned injuries, I have suffered the following permanent conditions:
 - 7.1 Complete paralysis and numbness of my body from the pelvic region down to the lower limb;
 - 7.2 Due to the paralysis mentioned above, I have lost control of my stool and urine to the extent that I use diapers and catheters;
 - 7.3 I have persistent back pains and feel heat on the area around my damaged spine, rib and clavicle reducing my ability to perform duties and leaving me in great discomfort;
 - 7.4 I have difficulties in breathing due to intercostals muscle weakness caused by my injury;
 - 7.5 My permanent degree of incapacity is 100% such that I will never be able to continue with household or manual work;
 - 7.6 Because of my paralysis I am condemned to a wheelchair as I can no longer walk or stand up; I hereby attach a copy of my medical report from Kamuzu Central Hospital as **exhibit CL2** and from Kachere Rehabilitation and Training Centre as **exhibit CL3**.
8. Since suffering the above-mentioned injuries, my life has never been the same for the following reasons:
 - 8.1 As already indicated above, I constantly live in pain as the areas around my damaged spine, rib and clavicle continue hurting, reducing my ability to perform duties and leaving me in great discomfort;
 - 8.2 I have medically been certified as a disable person and have suffered the embarrassment of being labelled as such. I have to suffer the humiliation of wearing diapers and being pushed around on a wheelchair as if I am a baby. On many occasions I have been prevented from accessing buildings which are not disability friendly. In addition, since I cannot control my stool and urine, I have had to endure the humiliation of passing my stool at several gatherings such as church and family meetings;
 - 8.3 In addition, I have lost enjoyment of amenities of life as follows: I cannot enjoy sex to the extent that a man who wanted to marry me, left me due to my condition; I no longer do my favorite sporting events such as jogging, basketball and swimming; I no longer comfortably attend my fellow women's activities such as lake trips, bridal and kitchen parties, I cannot do laundry and or proper cooking like before. Finally, in the event of becoming pregnant, I have been advised that I will not be able to feel the pregnancy and have a bond with my child.
 - 8.4 I have been disfigured. I used to be a strong able-bodied woman, doing road traffic patrols for long hours and doing my personal businesses, but now I am crippled. My body structure has changed as I am getting bigger on the upper side of my body and thinner on the lower body due to continued sitting with my condition.
 - 8.5 Further, I have lost future earnings both as a police officer and as an individual. As a police officer, the best I can do is sit down and work in the office:
 - (i) I will no longer have opportunities of being hired as a police officer to provide security to public or private entities. When I was physically fit, I could be hired to provide services such as (i) escort Reserve Bank of Malawi cash, (ii) providing security in weddings and other events, (iii) providing security during lectures and examinations and many more. On average I was getting K35,000 per month in allowances thereby supplementing my income;
 - (ii) My injury has reduced my chances of being in the Malawi Police Service. Being a security agency where fit officers are required, I do not see myself, a cripple, being welcomed to continue working in the Malawi Police Service for

a long time. I also do not see any chances of getting promoted. I will therefore most likely get stuck on my rank and salary of K148,000 for. Along time to come.

(iii) *When I was fit, I was also doing business (general dealer), travelling to Tunduma and Kiera in Tanzania to buy items for sale to people. I could make K200,000 profit per month. But due to my condition, my business has been curtailed.*

8.6 I will still need future treatment and nursing care as follows: I will have to constantly be going for clinical reviews due to my condition; I am supposed to be taking pain killers to ease my pain; I will have to constantly be replacing my wheel chair and finally, I will need a well-paid assistant (maid) to be managing me especially in relation to helping me wear diapers and insertion of catheter as well as household chores.

9. I therefore pray to the court to award me the damages and costs prayed for in this court

The Claimant told the Court, viva voce, that she resides at police lines C-company opposite the Lilongwe CCAP Church. The Claimant is yet to resume working since she had the accident. She is negotiating for an accessible house and offices so that she can resume work. In cross examination, the Claimant told the Court that she is still employed and on the payroll. The doctors have told her that she can only walk by the Grace of God, for now she should continue with physiotherapy and maybe she might walk again. The Claimant further told the court that she cannot control her stool and urine and has to use a catheter and diapers. It has been two years since the accident, and she does not see any improvement in the urine and stool control. The Claimant is hopeful that she will continue her employment with the Malawi Police Service, and she will continue negotiating the same with her employer. The Claimant received K6,000,000 in April as Workers Compensation but the amount was too small. The calculations were based on her salary and at the time she was a Sergeant. With reference to future nursing care, she is hoping to get further treatment in Cape Town, South Africa where her brother lives since the hospitals might be better there. In re-examination, she told the court that the hospitals have told her that the extremities of her injuries do not provide any possibility of her ever walking again.

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 Claimant's injury and the devaluation of the Kwacha would attract a total award of K34,420,000.00 as compensation. Counsel for the Claimant cited the following comparable awards in support:

- ***Namate v Mr Latif & Prime Insurance Company Limited*** – [2018] MWHC 663 where the Claimant was awarded K5,040,000.00 for loss of earning capacity.
- ***Harawa v Axa Bus Company Limited*** – Civil Cause Number 1477 of 2008 where the Claimant was unable to laundry and other household chores and had to depend on a maid. She was awarded K500,000 for future nursing care.
- ***Chifundo Semba v Chinsinsi Chauluka*** – Civil Cause Number 886 of 2016 where the Claimant required special care provided by parents or someone employed for the purpose, frequent medical examination and special schools. The Claimant was awarded K2,500,000.00 for future nursing care.
- ***Sakonda v SR Nicholas*** – [2014] MWHC 452 where the Claimant sustained paraplegia following a fractured spine. The Claimant lost permanent control of the lower limbs and could not walk, stool or urinate. On 26th September 2014, the Claimant was awarded K2,400,000.00 for pain and suffering and loss of amenities of life; K1,618,174 for future nursing care and K500,000 for disfigurement.
- ***Emma Muniya v Prime Insurance Company Limited*** – Personal Injury Cause Number 344 of 2018 where the Claimant sustained spinal injuries, muscle spasm to the thoracic lumbar spine and a fracture of the lateral malleolus on the left ankle and had continued sever backache, difficulty walking, slurred

speech, memory loss and could no longer farm or cook. On 21st January 2019 the Claimant was awarded K2,850,000 for pain and suffering; K1,800,000 for loss of amenities of life; and K1,500,000 for disfigurement.

- **Margaret Zagwazatha v The Attorney General** - Civil Cause Number 469 of 2013 where the Claimant sustained fractured ribs, pneumothorax, neurological deficiencies of the lower limbs, fracture and dislocation of the spine, fracture of the left arm, right knee dislocation with torn ligaments and hypostatic pneumonia. On 13th June 2016, the Claimant was awarded about K14,000,000.

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.*'

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.*'

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.

⁴ [1996] MLR 486.

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

COMPENSATION

The Claimant sustained fractures to the spine, rib, and clavicle. The Claimant spent over five months in two different medical institutions. She can no longer walk, has to use a wheelchair, cannot control her stool and urine, can no longer enjoy sex, has difficulties breathing and has 100% permanent incapacity. The Claimant cannot perform manual work, cannot carry out business as she used to, cannot participate in sporting activities, and will require continuous medical and nursing care.

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 has faced four stages of pain and suffering. The first is the pain of the injury itself. As per the medical report (Exhibit CL2), the Claimant sustained ‘*wedge compression fracture thoracic, fracture clavicle and fracture ribs, loss of control of both urine and stool, and unable to stand and walk.*’ The second stage of pain and suffering was from the length of her stay in hospital spanning five months, from 18th August 2018 to 10th January 2019, during which she had to endure physiotherapy, and diaper and catheter changes. The third stage of pain and suffering has been the reality of never being able to walk again, and not controlling her stool and urine. The final stage of pain and suffering subsists to date in the form that she cannot walk and has to depend on other people for her daily needs, including the intimate acts of excretion.

Counsel for the Claimant cited comparable awards of K2,400,000.00, and K2,850,000.00 for pain and suffering made in 2018. See: *Sakonda v SR Nicholas* and *Emma Muniya v Prime Insurance Company* (cited above). These awards were made some time ago and the Court ought to adjust the amounts to take into account inflation.

Based on this, **this court awards the Claimant the sum of K6,000,000.00 (six million kwacha) 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.

The Claimant tendered Exhibit CL3, a medical report from Kachere Rehabilitation and Training Centre that lists the Claimant’s deficits as: ‘*paralysis of the lower limbs which has left her unable to walk (meanwhile she is wheelchair bound). Incontinent both stools and urine (currently she uses diaper and catheter). On and off backache.*’ The Claimant told the Court viva voce that it had been two years since the accident, and she does not see any improvement in the urine and stool control. Although the Claimant is hopeful that she will continue her employment with the Malawi Police Service, she is worried that she might not get promoted and will have to be confined to a desk job. Further, the Claimant can no longer enjoy activities that she once enjoyed, such as sport, attending events, conducting her businesses, sex and, possibly, having a child.

Exhibit CL2 classified the Claimant’s injuries as ‘serious’. This is clearly a very challenging situation, never being able to walk again. The amenities that have been lost cannot be quantified and go to the core of things

that are considered valuable by every human being, such as being independent, not relying on others for every single task, and controlling one's excrement.

Counsel for the Claimant cited comparable awards of K2,400,000 for pain and suffering, and K1,800,000 for loss of amenities of life made in 2014 and 2019 respectively. See *Sakonda v SR Nicholas* and *Emma Muniya v Prime Insurance Company* (cited above). These awards were made some time ago and the Court ought to adjust the amounts to take into account inflation.

Based on the foregoing discussion, **this court awards the sum of K2,500,000.00 (two million five hundred thousand kwacha) 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 Claimant is now confined to a wheelchair. She can no longer enjoy sex, sport and can no longer depend on herself. Her disfigurement is fully visible at the moment you look at her and cannot be disguised by clothes or anything else. All can clearly see that she cannot walk and is wheelchair bound. The Claimant told the court that this causes her great embarrassment.

Following the sentiments made in the *James Chaika Case* and considering the devaluation of the Kwacha since 2018, **this Court awards the Claimant K3,000,000.00 (three million kwacha) as damages for disfigurement.**

Damages for Loss of Future Income

Counsel for the Claimant argues that Courts award loss of earnings for future income where they find that the Claimant can no longer earn their pre-accident rate of earnings. Calculations are made based on the annual figure, the age of the Claimant, their working lifespan, and prospects of losing employment or reduced earnings in the future: *Tembo v City of Blantyre* – Civil Cause Number 67 of 2013. Counsel further cited *Namate.v Mr Latif & Prime Insurance Company Limited* – [2018] MWHC 663 where a Claimant was awarded the sum of K5,040,000 for loss of future earnings. The Claimant in that case was aged 33 and could have potentially worked for the next 22 years. The court adopted a multiplier of 6 years while taking into consideration that the Claimant would be receiving a lump sum and might not have worked for 22 years longer.

The Claimant in this matter was aged 39 years when the accident happened. If we adopt the retirement age of 60 years, then the Claimant had about 21 years of employment before the accident occurred. Taking into account that a lump sum will be awarded and is likely to be invested then the multiplier ought to be reduced to account for this. This Court could adopt a multiplier of 10. In her current position, the Claimant receives a salary of K148,000. Based on the computations made in the *Namate v Mr Latif et al Case*, the award due to the Claimant would be:

$$\begin{aligned} &\text{Annual income (K148,000 x 12) x Multiplier (10)} \\ &\text{K1,776,000 x 10} \\ &= \text{K17,760,000} \end{aligned}$$

However, due regard must be had to the fact that the Claimant is still in the employ of the Malawi Police Service. So, these computations would be erroneous at best.

The income that has been lost by the Claimant is that from her personal businesses and the occasional paid engagements such as providing security at events, escorting Reserve Bank of Malawi cash, among others. Therefore, computations should be made based on these. The Claimant told the court that she would make up to K200,000 profit per month from her businesses and K35,000 per month from provision of security to public or private entities. Unfortunately, there is no proof of the same. This being a claim for special damages, it ought to have been specifically proved, the Claimant did not meet this threshold. This court will not make any award under this head.

Damages for Future Treatment (Future Nursing Care)

Counsel for the Claimant argues that Courts award damages for future treatment where a Claimant has not fully recovered. Counsel cited two methods that have been used by the court, the multiplicand/multiplier method and the discretionary award. See *Chibwana v Prime Insurance Co Ltd* – Civil Cause Number 1179 of 2009 and *Harawa v Axa Bus Company Limited* – Civil Cause Number 1477 of 2008. For the present case, Counsel submitted comparable awards to the tune of K5,040,000 made in July 2018, and K14,000,000 made in June 2016: *Namate.v Mr Latif & Prime Insurance Company Limited* – [2018] MWHC 663 and *Margaret Zagwazatha v The Attorney General* - Civil Cause Number 469 of 2013.

This court notes that the *Namate v Mr Latif Case* is not similar to the matter at hand. In that case, the Claimant sustained a deep cut in the leg and has difficulty walking. While in the *Margaret Zagwazatha Case*, the Claimant therein lost all function in the legs, was confined to a wheelchair and needed a helper. The *Zagwazatha Case* is more similar to the case herein.

Exhibit CL 3 from Kachere Rehabilitation & Training Centre contains the following recommendations for the Claimant: ‘Wheelchair (which she has), a pair of splints (to help her during exercise while standing as home programmed)given a chance, conducive environment and disability friendly environment, she can discharge her duties diligently and perfectly.’ Additionally, Exhibit CL3 states ‘Charity needs physiotherapy twice in two weeks at any nearby hospital/rehabilitation Centre to maintain the achieved areas.’ The Claimant told the Court that she needs constant help with everything. She is confined to a wheelchair and has stool and urine incontinence. She requires someone to help her with the wheelchair, household tasks, changing diapers and catheters and a range of other tasks. In addition, the Claimant is hoping to get further treatment in Cape Town, South Africa where her brother lives since the hospitals might be better there.

Taking into consideration the award of K14,000,000 in the *Zagwazatha v The Attorney General Case*, the time that has passed since 2016 when the award was made, the inflation that has occurred in Malawi since then and the extent of the treatment and nursing care that the Claimant will require, this Court awards the Claimant **K20,000,000 (twenty million kwacha) for future treatment and nursing care.**

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 Claimant herein was awarded the sum of K17,000 being the cost of medical and police reports. No evidence was provided to the court to prove that this amount was indeed spent. Special damages ought to be specifically claimed and proved. Though the Claimant specifically claimed special damages, they were not proved during trial and/or submissions. For these reasons, no award will be made under this head.

DISPOSAL

The Claimant is therefore awarded:

- K6,000,000.00 (six million kwacha) for pain and suffering;
- K2,500,000.00 (two million five hundred thousand kwacha) for loss of amenities of life;
- K3,000,000.00 (three million kwacha) for disfigurement and;
- K0 (zero) for loss of future income,
- K20,000,000 (twenty million kwacha) for future treatment and future nursing care,
- K0 (zero) as special damages, and
- costs of the action (to be taxed by the court).

The Claimant's total award is K31,500,000.00 (thirty-one million five hundred thousand kwacha).

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

Ordered in Chambers on the 16th day of October 2020 at the High Court, Lilongwe.



C Mandala

ASSISTANT REGISTRAR