



IN THE HIGH COURT OF MALAWI
MZUZU DISTRICT REGISTRY
CIVIL CAUSE NO 113 OF 2017

BETWEEN

ESMIE SIMWAKA... ..CLAIMANT

AND

JOSEPH NG'AMBI.....1ST DEFENDANT

LIVINGSTONE CHIPETA.....2ND DEFENDANT

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

Coram:

Brian Sambo, Assistant Registrar

Mr. C. Ghambi, of counsel for the Claimant

Mr. A. Gausi, counsel for the Defendants

Mr. B. Manda, Official Interpreter/ Court Clerk

ORDER OF ASSESSMENT OF DAMAGES

INTRODUCTION

The present assessment follows a judgment obtained by the Claimant on the 20th day of December, 2019 for damages for pain and suffering, loss of amenities of life, permanent disfigurement, special damages for the Medical Report and the Police Report, and costs of this action.

BRIEF FACTS

On the 11th of July, 2016, the 1st Defendant, Mr. Joseph Ng'ambi was driving a motor vehicle registration number LL 1801 Toyota Hiace Minibus owned by the 2nd Defendant, from Mzuzu heading towards Karonga Boma with 15 passengers on board. Upon arrival at Mwenelondo Area, the driver lost control of the motor vehicle and swerved to the right hand side of the road where he hit a tree and finally the vehicle overturned. As a result of the accident, the Claimant sustained fractured leg and dislocated elbow, a cut in the right eye and severe head injuries. She was admitted, first at Karonga District Hospital and then Mzuzu Central Hospital for the injuries; from 11th to 20th day of July, 2016. Consequentially, the 2nd Defendant is sued as an insurer of the said motor vehicle under **section 148 of the Road Traffic Act**.

Evidence

During the assessment hearing, three witnesses were brought in court. **PW1** was **Esme Simwaka**. She adopted and tendered her witness statement (marked PEX 1) as her evidence in chief. She told the court that after the accident she was found with swollen veins in her head. She became unconscious when the accident happened. She still felt pain in her waist and that she used eye glasses as a result of the injured eyes.

PW2 was **Blackmore Magawa**, a Medical Practitioner at Mzuzu Central Hospital. He testifying on behalf of the Claimant, he adopted and tendered his witness statement (marked PEX 2) as his evidence in chief.

During cross-examination he told the court that the victim had an eye problem; she had a swelling and her degree of incapacity was assessed at 30%. She also had elbow dislocation and her ligaments got relaxed leading to a health condition known as athrithitis.

On the defence, **DW1** was **Christopher Chikapa** testifying on behalf of the 3rd Defendant. He told the court he worked the 3rd Defendant, Prime Insurance Company. He also adopted and tendered his Witness Statement (marked DEX 1) as his evidence in-chief. Attached thereto were policy documents and payment requisitions. He testified that, according to the policy documents, the insurer could not be made to compensate the victim with an amount above the policy limit which was MK5 Million.

ISSUES

The hearing was conducted in order to assess the quantum of damages payable by the Defendants to the Claimant for pain and suffering, loss of amenities for life, permanent disfigurement and special damages.

DETERMINATION

Damages are the remedy that is open to a victim of the wrongful act of another. The wrongful party is the one responsible for compensating the victim. This is a way of trying to restore the position the victim would have been had the accident not happened. This is known as the principle of *restitutio in integrum*. Indeed, the principle guiding the award of damages is to compensate the injured party as nearly as possible as money can do. And in **Wright v Lodge and another Kerek v Lodge and others**, [1993] 4 All ER 299, it was held that

when a driver of a motor vehicle, who owes different duties of care to different road users, the questions of foreseeability, causation and remoteness would always arise in respect of different roads users affected by his negligence. Thus, if his vehicle is involved in an accident as a result of his own negligence, he is responsible for personal injuries as well as for subsequent events which would occur incidental thereto; arising from his negligence when driving his motor vehicle. See also **Bradford v Robinson Rentals Ltd**, [1967]1 All ER 276.

Among the claims are those for pain and suffering, loss of amenities of life and Permanent disfigurement. These are unliquidated or general damages and are difficult to assess. However, it has been held in **Raninger Simbeye vs. Chibowa & another**, Civil Cause No. 58 of 2012, that the only possible way to circumvent to these difficulties is to seek guidance from decided cases of a comparable nature. And that in doing so, the court bears in mind the devaluation of the Malawi Kwacha that has obtained since the awards in those comparable cases were made. Further, the court is also guided by the merit of each case as stated in **D Kwataine Malombe et al v GH Chikho, t/a Bec Line Minibus**, Civil Cause No. 3687 of 2001. Merit is considered when granting damages in order to achieve consistency and uniformity in cases of broadly similar nature.

DAMAGES FOR 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 incident while 'suffering' includes fright, fear of future disability, humiliation, embarrassment and sickness -**Ian Goldrein et al, personal injury Litigation, practice and precedents** (Butterworth's, 1985) p8.

In the case of **Mawiro v Bakuli and another** (order on assessment) Personal Injury Cause Number 14 of 2015, [2018] MWHC 39, damages for pain and

suffering were put at K2, 500, 000.00 for a claimant who sustained an open fracture of the tibia.

In the case of **Chidoola v Chilunga and Prime Insurance Co Ltd**, Personal Injury Cause No. 488 of 2014 [2018] the claimant was awarded a sum of K1, 450,000.00 for pain and suffering.

In the present case, the victim sustained a cut in the right eye, severe head injuries, fractured left leg and dislocated left elbow. The result of the treatment left her in a Plasters of Paris on the left leg and arm. It was also in her evidence that she suffered swollen veins in her head. She had stayed in two hospitals for 8 days. The pain associated with the injuries above-mentioned cannot be underestimated. Looking at the seriousness of the impact and also in consideration of the comparable case law, I award the Claimant the sum of **K2 600,000.00** being damages for pain and suffering.

LOSS OF AMENITIES FOR LIFE

‘Loss of amenities’ embraces all that which reduces the Claimant’s enjoyment of life; her deprivation of amenity whether she is aware of it or not.

In this case of **City of Blantyre v Sagawa**, [1993] 16(1) MLR it was said that loss of amenities for life is calculated to compensate the Claimant’s deprivation of the pleasures of life which amounts to substantial loss whether the claimant is aware or not of that loss. That although it is the practice to lump the three heads together in awarding damages for personal injuries the court does not look at each of them before coming to a final figure. There is no arithmetic formula to an award for personal injury and one does not expect the awards to be the same. The circumstances differ and one should therefore expect reasonable differences in awards for similar injuries.

In **Tambala v Jali and Prime Insurance co ltd**, [2018], the claimant sustained a fracture and had scars due to some grafting done on him. He was awarded K1, 500, 000 for the loss of amenities of life.

On 6th March 2019, In **Chrissy Tomas v Chimbalinga and Prime Insurance**, Personal Injury cause (order of assessment) No 570 of 2016 the court awarded K 1 000 000.00 as damages for loss of amenities of life.

In 2019 the court In **Issah Idrissah v Daniel Kennedy Ndawala and Prime Insurance Company Litimed**, Personal Injury Case (Order of Assessment) No 67 of 2017, awarded the plaintiff MK1 500 000.00 damages for loss of amenities of life.

In the case of **Manuel Paul v BT Ndawala and Prime Insurance Co Ltd**, Personal Injury Cause No. 251 of 2014, loss of amenities of life was calculated at the amount of K1, 000,000.00 the Claimant whom was a minor and the degree of incapacity was at 15%.

The injuries in this case have created limits in the life of the Claimant as she will now be restricted to do other things which she could have done if not for the accident. She is now using eye grasses because of the accident. In these circumstances, I award the Claimant the sum of **MK1, 000,000.00** being damages for loss of amenities of life.

DAMAGES FOR DISFIGUREMENT

Disfigurement is the change in Physical form of a person injured either as a result of the Impact of the Injury or its treatment, such as a scar coming in as a result of surgical operation necessitated by the injury. Further it is capable of limiting a person from doing certain things. See **Austin Julius v Rasika Gunawardena and General Alliance Limited**, Personal Injury cause no. 316 of 2014.

In **Ching'amba v Deerless Logistic limited**, Civil Cause No. 2888 of 2007, Potani J stated that disfigurement was not something to be taken lightly or casually as a person lives with deformity for the rest of his life.

In **Issah Idrissah v Daniel Kennedy Ndawala and Prime Insurance Company Limited**, Personal Injury Case (Order of Assessment), the court awarded MK1 000 000.00 as damages for disfigurement.

In this case, as a result of the accident, the Claimant became myopic and was using eye glasses. She also had difficulties in walking and had multiple body scars from the wounds emanating from the same accident. All these disfigurements are on her body. I therefore award her **MK2 400 000.00** as damages under this head.

SPECIAL DAMAGES

Special damages are those damages which a person incurs as a result of the defendant's negligence that are ancillary but in nexus to the defendant's wrongful action or omission. The actual loss arising out of the injury that are quantifiable at the outset. See **Manuel Paul v BT Ndawala and Prime Insurance Co Ltd**, Personal Injury Cause No. 251 of 2014. The claimant has to prove that he or she incurred such costs and they have to be strictly proved in court.

In this case the Claimant spent **MK6, 000.00** on Medical Report and Police Report. I have seen the stamps on them proving payment and originality of the same. This is what is payable by the Defendants.

COSTS

It is a settled law that cost follow the event. The successful litigant is compensated for the troubles faced in pursuing his or her matter in a court of law.

CONCLUSION

In summary the Claimant is awarded as follows;

- i. **MK2,600,000.00** being damages for pain and suffering
- ii. **MK1,000,000.00** being damages for loss of amenities for life
- iii. **MK2,400,000.00** being damages for disfigurement
- iv. **MK6, 000.00** being special damages.

In total, the Claimant will recover a total sum of **K6, 006, 000 .00** payable by the Defendants within 7 days from today.

The 3rd Defendant, Prime Insurance Company was already removed as a party by consent, on 22nd June, 2020. It means all the damages herein shall be shouldered by the 1st and the 2nd Defendants.

This order supersedes the one made on the 18th of August, 2020 which did not take into account the fact that the insurer was already excluded by the said consent. This is an error the court is capable of correcting under Order 10 as read with Order 23 Rule 10 (2) of the Courts (High Court) (Civil Procedure) Rules, 2017 and also under the court's own inherent jurisdiction.

Costs are for the Claimant and shall be assessed by the court if not agreed by the parties within 14 days.

Made in chambers today Tuesday, the 1st of September, 2020.


Brian Sambo
Assistant Registrar