



The Judiciary

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**PERSONAL INJURY CAUSE NUMBER 706 OF 2016**

**Between:**

**JUSTEN SEUNDA..... CLAIMANT**

**-AND**

**WYSON MACHINJIRI.....1<sup>ST</sup> DEFENDANT**

**C.CHITSULO.....2<sup>ND</sup> DEFENDANT**

**PRIME INSURANCE COMPANY LIMITED.....3<sup>RD</sup> DEFENDANT**

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**CORAM: Texious Masoamphambe, Deputy Registrar**

*Mr. Kusiwa*, of counsel for the Claimant

*Mr. Chikaonda*, of counsel, for the Defendants

*Ms. D .Mtegha*, Clerk/ Official Interpreter

**ORDER ON ASSESSMENT OF DAMAGES**

***Background***

This order on assessment of damages follows the consent order entered against the defendant by Honourable Justice Potani on 30<sup>th</sup> October, 2017. Defendant's liability was pegged at 70%, and the Claimant is to bear the remaining 30%. The claimant's claim is for damages for pain and suffering, loss of amenities of life, and the costs for the action.

***Evidence***

The facts derived from the witness statement are that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were at all material times, driver and owner of motor vehicle Registration number **BT1095**, Mazda Bongo Minibus, respectively. On or about the 29<sup>th</sup> October, 2015, the 1<sup>st</sup> defendant was driving the

said motor vehicle from the direction of Total Filling Station joining Churchill Road in Limbe when, upon reaching at or around Puma Filling Station, he hit the claimant who was lawfully walking on the pedestrian path on the right side of the road from the direction of Kapenga Butchery towards Illovo Roundabout. Due to the accident, the claimant sustained fracture on the metatarsals of left foot. He was treated at Queen Elizabeth Central Hospital. He was put in Plaster of Paris for a period of three months. He still feels pain on left foot. This makes it difficult for him to carry out business. His permanent incapacity is assessed at 15%. At the time of assessment, he could not walk long distances as the foot was aching and swelling. He finally told the court that as a result of the accident, he stopped doing his business as a shoe seller.

### ***Issue***

The only issue in this matter is the appropriate quantum of damages that the claimant ought to be awarded in the circumstances.

### ***The Law***

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 Claimant in the position he would have been in if he did not suffer the injuries he is claiming damages for: **Halsbury's Laws of England 3<sup>rd</sup> Ed. Vol.II p.233 para 400**. This principle was further enunciated in **Livingstone v Raywards Coal (1880) Case 25 at 39**, where Lord Blackburn said:

*'...where any injury is to be compensated by damages, in settling the sum to be given for reparation 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, in the same position as he would have been in had he not sustained the wrong for which he is now getting his compensation or reparation'.*

Such damages are recoverable for both pecuniary and non-pecuniary losses. Pecuniary losses must be specially pleaded and proved, while non pecuniary losses are assessed by the court: see **Mary Ntulongwa & 9 Others v Makandi Tea Estate, Personal Injury Cause No 844 of 2012**.

Damages cannot be quantified in monetary terms by use of mathematical formula but use of experience and looking at awards made in decided cases of similar nature: **Wright v British Railway Board [1983]2 AC 773**. In reaching the final award for damages through looking at similar awards made, the court considers the time the awards were made and currency devaluation: **Kuntenga and another v Attorney General, Civil Cause No 202 of 2002**.

As to claims for personal injuries, damages are always awarded under the headings of pain and suffering, loss of amenities of life and disfigurement.

### ***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 Motal Engil Limited and General Alliance Insurance Limited, Personal Injury Cause Number 178 of 2012(unreported)**.

In the **City of Blantyre v Sagawa 1993 16(1) MLR at 72**, the court quoted **Kemp and Kemp** volume 11 paragraph 1007 where it was suggested 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 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: see **Gideon Mhango v Nico General Insurance Co Ltd Personal Injury Cause 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 result of the injury, be curtailed: see **Lemon Banda and 19 Others V Motal Engil Limited and General Alliance Insurance Limited, Personal Injury Cause Number 178 of 2012 (unreported)**.

**Birket 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 amputated and will never again go upon his walking excursions – things of that kind -loss of amenities. **McGregor on Damages** at pages 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 Plaintiff's sexual life.

#### *Comparable Cases*

In the Case of **Anesi Kabuya v James Malata and Prime Insurance Company Limited, Personal Injury Cause No. 778 of 2018**, the Claimant's claim was for pain and suffering, loss of amenities of life and disfigurement as a result of the accident, she sustained multiple fracture of patella and multiple bruises on the head and right elbow. She suffered permanent incapacity of 20%. The court awarded her **K5,000,000.00** for damages under all heads. The award was made on 15<sup>th</sup> July, 2019.

**K5,000,000.00** was awarded for pain and suffering, loss of amenities of life and disfigurement on 21<sup>st</sup> April, 2020 in the case of **Isaac Jimu v Prime Insurance Company Limited, Personal Injury Cause No. 415 of 2015**. In that case, the claimant suffered the fracture of left femur as a result of the accident. He was in hospital for one and half months. A metal rod was inserted in his leg to facilitate the healing process of the bone and the leg.

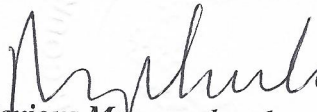
In the case of **Clement Yona v Kumbukani Winiko and Prime Insurance Company Limited Personal Injury No. 367 of 2018**, as a result of accident, the claimant sustained a fracture of the mid shaft of the tibia on the right leg, multiple cuts and bruises at the back. He was, on 16<sup>th</sup> April, 2019 awarded **K4,600,000.00** for damages for pain and suffering, loss of amenities of life and disfigurement.

#### *Conclusion*

In the case at hand, due to the accident, the claimant sustained fracture on the metatarsals of left foot. He was treated at Queen Elizabeth Central Hospital. He was put in Plaster of Paris for a period of three months. He still feels pain on left foot. This makes it difficult for him to carry out business. His permanent incapacity is assessed at 15%. At the time of assessment, he could not walk long distances as the foot was aching and swelling. He finally told the court that as a result of the accident, he stopped doing his business as a shoe seller. But there is no proof that

he was selling shoes. Defendant's liability is pegged at 70%. The claimant negligently contributed 30% towards his injuries. It is the considered view of this court that, in the absence of contributory negligence, **K4,000,000.00** would have adequately compensated the claimant for pain and suffering and loss of amenities of life. Consequently, I award the claimant the sum of **K2,800,000.00**, which is **K4,000,000.00** less 30%, as damages for both heads of claims. Costs are for the claimants.

Pronounced in chamber this Friday, the 24<sup>th</sup> day of April, 2020.

  
**Texious Maseamphambe**  
**DEPUTY REGISTRAR**