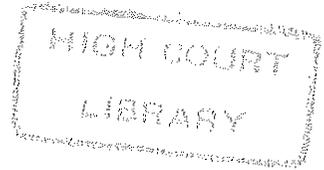




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REPUBLIC OF MALAWI  
**IN THE HIGH COURT OF MALAWI**  
 PRINCIPAL REGISTRY  
**PERSONAL INJURY CAUSE NUMBER 148 OF 2017**

**BETWEEN:**

- DOROTHY DAMIANO.....1<sup>ST</sup> CLAIMANT
- EDITH WILLIAM.....2<sup>ND</sup> CLAIMANT
- STEVERIA MAJIYA.....3<sup>RD</sup> CLAIMANT
- ROSE KACHASU.....4<sup>TH</sup> CLAIMANT
- ELIYETI TAIMU.....5<sup>TH</sup> CLAIMANT
- IDA ENOCK.....6<sup>TH</sup> CLAIMANT
- MARY BIZIWICK.....7<sup>TH</sup> CLAIMANT
- ELIFA JACKSON.....8<sup>TH</sup> CLAIMANT
- KATARINA BANDE.....9<sup>TH</sup> CLAIMANT
- MARY MUHAYE.....10<sup>TH</sup> CLAIMANT

**AND**

- ENOCK MASANJALA.....1<sup>ST</sup> DEFENDANT
- PRIME INSURANCE COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT

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

Mr. Chidothe- of Counsel for the Claimants

Ms. Chida- Court Clerk and Official Interpreter

## ORDER ON ASSESSMENT OF DAMAGES

### *INTRODUCTION*

The Claimants commenced this action claiming damages for pain and suffering, loss of amenities of life, disfigurement, special damages and costs of the action. Apparently, the claim arises out of an accident that took place on 29<sup>th</sup> June 2016 when they were passengers on board a motor vehicle registration number CZ2186 Toyota Hiace Minibus which was being driven by the 1<sup>st</sup> defendant from the direction of Mwanje turn-off heading towards Ndunde Trading Centre. Facts as discerned from the record indicate that the 1<sup>st</sup> defendant lost control of the said vehicle after passing Chimdimbo Bridge resulting in an accident. They are suing the 2<sup>nd</sup> defendant as the insurer of the said motor vehicle. The issue of liability was settled in favour of the claimants following a judgment by Honourable Justice Tembo on the 11<sup>th</sup> of February, 2021. The matter was referred to this court for assessment of damages which I must now consider. Before I proceed, I thought I should put it on the record that the defendants did not attend the assessment proceedings albeit having been served. There is on record a sworn statement of service to that effect.

### *THE EVIDENCE*

The Claimants, individually, through their witness statements which they adopted in court state that on 29<sup>th</sup> June 2016 they were passengers on board motor vehicle registration number CZ 2186 Toyota Hiace Minibus. They further indicate that the 1<sup>st</sup> Defendant who was the driver of the motor vehicle at the material time lost control of the said vehicle after passing Chimdimbo Bridge resulting in an accident. The motor vehicle was at the material time insured by the 2<sup>nd</sup> Defendant. The evidence further suggests that as a result of the accident the 1<sup>st</sup> Claimant, **Dorothy Damiano**, sustained a fracture of the right ankle, trauma of right limb and her degree of permanent incapacity was assessed at 50%. The 2<sup>nd</sup> Claimant, **Edith William**, sustained deep cuts above the right eye, a deep cut above the upper lip, a deep cut on the forehead and her degree of permanent incapacity was assessed at 45%. The 3<sup>rd</sup> Claimant, **Steveria Majiya**, sustained a painful neck, painful right shoulder, swollen and painful left thumb and the degree of permanent incapacity was assessed at 40%. The 4<sup>th</sup> Claimant, **Rose Kachasu**, sustained a fracture of right scapula bone, chest contusion, bruises on the right arm and her degree of permanent incapacity was assessed at 25%. The 5<sup>th</sup> Claimant, **Eliyeti Taimu**, sustained chest contusion, dislocation of right wrist joint and her degree of permanent incapacity was assessed at 15%. The 6<sup>th</sup> Claimant, **Ida Enock**, sustained a fracture of right arm, a cut wound on the neck and her degree of permanent of incapacity was assessed at 30%. The 7<sup>th</sup> Claimant, **Mary Bizwick**, sustained a deep cut on the lower right leg and her degree of permanent incapacity was assessed at 15%. The 8<sup>th</sup> Claimant, **Elifa Jackson**, sustained a chest contusion, bruised neck and right ankle and her degree of permanent incapacity was assessed at 10%. The 9<sup>th</sup>

Claimant, **Katarina Bande**, sustained a swollen right eye, multiple bruises on the head and her degree of permanent incapacity was assessed at 10%. The 10<sup>th</sup> Claimant, **Mary Muhaye**, sustained a painful leg, bruises, painful left hand finger and her degree of permanent of incapacity was assessed at 5%.

Such was the evidence on assessment of damages. I would like to thank Counsel representing the Claimants for the guidance as evidenced by the well-researched submissions filed in support of the assessment of damages herein in which several authorities have been cited. This court has given the submissions and the authorities counsel cited the most anxious consideration.

#### *THE LAW AND APPLICABLE LEGAL PRINCIPLES*

On the law and principles governing assessment of damages, it is trite that the purpose of awarding damages is to compensate the injured party as nearly as possible as money can do. That is to say, to place the claimant in a position he would be had he not suffered the damage or loss. This is what is termed the principle of *restitutio intergrum*. It is not possible to quantify damages with exactitude. However, courts use comparable cases as a guide in coming up with a reasonable quantum of damages. See the case of **Kalinda –vs- Attorney General (1992) 15 MLR 170 at p 172.**

#### *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) and **City of Blantyre vs. Sagawa**: [1993] 16(1) MLR 67 (MSCA). In **Sakonda vs. S.R. Nicholas**: Civil Appeal Cause No. 67 of 2013, it was highlighted that pain and suffering is attributable to the claimant's injury or to any necessary surgical operations and mental anguish.

The fundamental factor in assessing damages for pain and suffering was aptly put by the Supreme Court of Appeal in **Chidule vs. Medi**: Malawi Supreme Court of Appeal, Civil Appeal No. 12 of 1993, in which it was stated that in assessing damages for pain and suffering, the court must consider the pain which the particular plaintiff has suffered because the circumstances of the particular plaintiff are bound to have a decisive effect in the assessment of damages. The implication of this assertion is that, in principle and practice, each case must be dealt with according to its peculiar circumstances.

### *Loss of amenities of Life*

Loss of amenities is attributable to deprivation of the claimant's capacity to engage in some sport or past-time which he/ she formerly enjoyed. Basing on the case of **Kanyoni vs. Attorney General**: [1990] 13 MLR 169. It means that he is incapable of performing some activities he used to do. Damages for loss of amenities of life are therefore 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. **Poh Choo vs. Camden and Islington Area Health Authority**: [1979] 2 All ER 91.

### *Disfigurement*

Damages under the head of disfigurement are paid for the change in physical form of a person injured either as a result of the impact of the injury or its treatment, such as scar coming in as a result of surgical operation necessitated by the injury. It is a change in appearance but it is capable of limiting a person from doing certain things- see- **Francis Chikoti vs- United General Insurance Company Limited** Personal Injury Cause No. 730 of 2016. Justice Potani (as he was then) in the case of **James Chaika v NICO General Insurance Company Ltd** Civil Cause No. 909 said disfigurement is not a matter to be taken lightly and casually as it is something that one has to permanently live with.

### *COMPARABLE CASES*

In making assessment, this court is aware that an award for a similar injury should be comparable and should, to some extent, be influenced by amounts awarded in previous cases, either in the same or neighbouring jurisdictions. Counsel representing the claimants has cited the following cases for comparative purposes:

- **Christina Mande -v- Charter Insurance Company Limited** Personal Injury Cause no. 329 of 2016, wherein the Claimant sustained fracture of the right femur (inclusive of the knee joint), dislocation of the right hip joint, cut on the head and lost consciousness on the spot of the accident. On 11<sup>th</sup> January, 2017 the court awarded her the sum of **MK6, 300,000.00** being damages for pain and suffering and loss of amenities of life.
- **Abels Tembo and Maria Sibale Tembo –v- John Lameck and Jefule Daison t/a Malunga Transport and Prime Insurance Company Limited**, Personal Injury Cause No. 610 of 2017, wherein the 1<sup>st</sup> Claimant sustained the following injuries; an open fracture of the radius/ulna, lacerations on the left forearm, lacerations on the right wrist and lacerations on the right knee. On

16<sup>th</sup> October, 2018 he was awarded the sum of MK4,500,000.00 being damages under all heads for pain and suffering, loss of amenities of life and disfigurement.

- **Abels Sichila v Chimwemwe Luhanga and Nuswe Chirwa and Prime Insurance Company, Civil Cause No. 223 of 2016**, wherein the claimant sustained general body pains, bruises and lacerations on lower extremities, bruises on the left chest and reduced motor function of left upper limb. The court awarded a total sum of MK3,898,000.00 as damages for pain and suffering and loss of amenities of life and special damages. The award was made on 11<sup>th</sup> July 2018.
- **Robert Sande (minor suing through his grandmother and next friend of Joyce Banda) vs- Prime Insurance Company Limited Civil Cause No. 395 of 2011**, wherein the claimant sustained cut wound on the left leg and foot, bruises on the head, hand and leg. On or about 2<sup>nd</sup> October, 2013, the Plaintiff was awarded the sum of MK3,000,000.00 as damages for pain and suffering and loss of amenities of life.

#### *ASSESSMENT*

In making assessment, I must reiterate that the claimants testified as to the injuries they sustained. The testimony was not controverted as the defendants did not pitch up for the hearing on assessment of damages and the claimants' testimony was not subjected to cross-examination. Suffice to say, the assertions by the claimants indicates that the injuries range from minor to serious. In view of this, the court shall consider the injuries with respect to their gravity. I shall begin with the claimants whose predominant injury is at least a fracture. The evidence shows that the 1<sup>st</sup> Claimant sustained fracture of the right ankle, trauma of the right limb and percentage of incapacity of 50%. The 4<sup>th</sup> Claimant sustained fracture of right scapula bone, chest contusion bruises on the right arm and permanent incapacity of 25%. The 6<sup>th</sup> Claimant sustained a fracture of the right arm, cut wound on the neck and permanent incapacity of 30%.

Counsel for the claimants submits that the injuries the 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> Claimants sustained are similar in nature and gravity to those sustained by the claimants in *Christina Mande* and *Abels Tembo* cases. As already stated, the High Court awarded the sum of MK6,300,000.00 as damages for pain and suffering, loss of amenities of life and disfigurement on 11<sup>th</sup> January, 2017 in *Christina Mande* case and in *Abels Tembo* case the Court on 16<sup>th</sup> October, 2018 awarded the sum of MK4,500,000.00 as damages for pain and suffering, loss of amenities of life and disfigurement. Counsel is of the view that considering the two awards and the devaluation of the kwacha since the time the said awards were made, the sum of

MK6,000,000.00 would be reasonable as damages for pain and suffering loss of amenities of life and disfigurement each for the 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> Claimants.

There is no doubt that the 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> claimants in this case experienced pain and suffering when sustaining the injuries. I strongly hold the view that a fracture is an injury that cannot be treated lightly and must by all means attract a substantial award on damages. I take note that there are lamentations of persisting pain. Nonetheless, I observed with keen interest as each claimant walked into the chamber. None was still limping or showing signs of discomfort. None produced medical reports of subsequent visit to the hospital for further medical attention in view of the residual pain. In my considered opinion, this denotes complete recovery as stated in Rose Kachasu's medical report. Albeit the passage of time, I am of the view that going beyond the awards in the *Christina Mande* and *Abels Tembo* cases would be an overkill. I award the 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> claimants K4,500,000.00 each.

Another notable serious injury among the claimants involves deep cut wounds. The evidence shows that the 2<sup>nd</sup> Claimant sustained deep cuts above the right eye, a deep cut above the upper lip, a deep cut on the forehead and permanent incapacity of 45%. Further, the evidence shows that the 7<sup>th</sup> Claimant sustained a deep cut on the lower right leg and a permanent incapacity of 15%. Counsel for the claimants submits that these injuries are similar in nature but more serious to those sustained by the claimant in the *Robert Sande* case. As stated herein in *Robert Sande* the claimant sustained a cut wound on the left leg and foot, bruises on the head, hand and leg and the Court on 2<sup>nd</sup> October, 2013 awarded him the sum of MK3,000,000.00 as damages for pain and suffering loss of amenities of life and disfigurement. Counsel is of the view that considering this award and the fact that the kwacha has greatly depreciated since the date of this award the sum of MK4,500,000.00 and K4,000,000.00 would be reasonable as damages for pain and suffering, loss of amenities of life and disfigurement for the 2<sup>nd</sup> Claimant and 7<sup>th</sup> claimant respectively.

Having considered the nature and extent of the injuries suffered by the 2<sup>nd</sup> and the 7<sup>th</sup> claimants, this court finds that they suffered considerable pain resulting from the accident and the treatment they received. Nonetheless, upon appearing before the court to testify, they did not show the court any scar formation resulting from the deep cut wounds that they claimed to have suffered. In my opinion, the claim that the injuries beget disfigurement as well has not been sufficiently proved before this court. Much as the injuries bear some degree of resemblance with those in the *Robert Sande* case as submitted by Counsel for the claimant, I am at pains to go beyond the awards in *Robert Sande* case irrespective of the passage of time and the depreciation of the kwacha as submitted by Counsel. I shall award the 2<sup>nd</sup> and 7<sup>th</sup> claimants K2,500,000.00 each as damages under the heads claimed and proved.

Another notable injury among the injuries suffered by the claimants involves a dislocation. The evidence shows that the 5<sup>th</sup> Claimant sustained chest contusion, dislocation of right wrist joint and permanent of 15%. Counsel for the claimants submits that the injuries are less than and almost a third of the injuries the claimant suffered in *Christina Mande* case. In that case, the Claimant sustained fracture of the right femur, dislocation of the right hip joint, cut on the head and lost consciousness on the spot of the accident. On 11<sup>th</sup> January, 2017 the court awarded her the sum of MK6,300,000.00 00 being damages for pain and suffering and loss of amenities of life. Counsel submits that the sum of MK2,000,000.00 is reasonable as damages for pain and suffering, loss of amenities of life and disfigurement for the 5<sup>th</sup> Claimant.

The court is of the view that the injuries must have caused considerable discomfort and pain to the 5<sup>th</sup> claimant. However, as rightly pointed out by Counsel for the claimants the injuries cannot match up to the injuries in the *Christina Mande* case by far. I wish I had been referred to a far more similar case in terms of the gravity of the injuries. I am aware that it is difficult and almost impossible to find a case which is on all fours which the one subject of an assessment. In making assessment, this court is aware that an award for a similar injury should be comparable and should, to some extent, be influenced by amounts awarded in previous cases. Upon conducting my own research, I came across the case of **Welemu Banda v Prime Insurance Company Ltd Civil cause No. 98 of 2014** in which the predominant injury was a dislocation of the left knee. In that case, the claimant was awarded the sum of K2,400,000.00 for damages for pain and suffering and loss of amenities in June 2016. The case is slightly on an aggravated scale considering that it involves bruises and deep wounds as well. In view of this, I award the 5<sup>th</sup> claimant K1,500,000.00 as damages for pain and suffering and loss of amenities of life.

Lastly, the evidence shows that the remaining claimants sustained various injuries which would conveniently fall under the category of soft tissue injuries. They sustained pain in some body parts presumably resulting from the impact during the accident. There are lamentations of bruises here and there which I believe had completely healed considering that none of the claimants showed the court the telltale scars from the injuries. To be specific, the evidence shows that the 8<sup>th</sup> Claimant sustained chest contusions, bruised neck and right ankle and permanent incapacity of 10%. The 9<sup>th</sup> Claimant sustained a swollen right eye, multiple bruises on the head and permanent incapacity of 5%. The 10<sup>th</sup> Claimant sustained painful leg, bruises, painful left hand finger and permanent incapacity of 5%. The 3<sup>rd</sup> Claimant sustained a painful left thumb and permanent incapacity of 40%. Counsel for the claimants submits that the injuries are similar but less in gravity to those sustained by the claimant in *Abels Sichila* case. He thus proposes that the sum of MK1,800,000.00 would be reasonable as damages for pain and suffering, loss of amenities of life and disfigurement for the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Claimants and K900,000.00 for the 3<sup>rd</sup> claimant.

The court agrees with Counsel for the claimant in that much as the injuries suffered by the 3<sup>rd</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> claimants are soft tissue injuries, they are less in gravity compared to the *Abels Sichila* case cited for comparative purposes. This is coupled by the fact that the injuries have completely healed and have not left any scars. I strongly believe that disfigurement has not been proved in the circumstances of this case. It is only proper that the court should award the 3<sup>rd</sup> claimant K500,000.00 under all heads of damages claimed and proved and K1,000,000.00 each to the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> claimants under all heads claimed and proved.

Other than damages for personal injuries, the claimants also claim special damages being MK3,000.00 each for procuring a Police Report for each claimant. These being special damages, according to an established practice, they must be strictly proved. The Claimants have exhibited receipts that show that they each procured a Police Report at MK3,000.00. The said cost is also indicated on the Police Reports. Further to that, the general receipts tendered indicate different numbers showing that each claimant procured her own. I shall award the K3,000.00 each as prayed for. In total, the claimants are awarded K30,000.00 under this head.

#### *CONCLUSION*

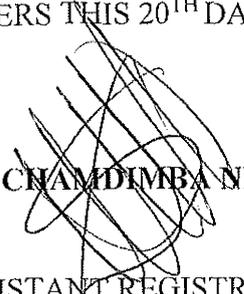
In summary, upon a thorough consideration of facts and circumstances of this case and upon an exhaustive consideration of the submissions by Counsel for the claimants in the light of the relevant and applicable law regarding damages for personal injuries and special damages that this court awards the claimants **K23,530,000.00** under all heads claimed and proved as follows:

- 1<sup>st</sup> Claimant Dorothy Damiano MK4,503,000.00
- 2<sup>nd</sup> Claimant Edith William MK2,503,000.00
- 3<sup>rd</sup> Claimant Steveria Majiya MK503,000.00
- 4<sup>th</sup> Claimant Rose Kachasu MK4,503,000.00
- 5<sup>th</sup> Claimant Eliyeti Taimu MK1,503,000.00
- 6<sup>th</sup> Claimant Ida Enock MK4,503,000.00
- 7<sup>th</sup> Claimant Mary Biziwck MK2,503,000.00
- 8<sup>th</sup> Claimant Elifa Jackson MK1,003,000.00

- 9<sup>th</sup> Claimant Katarina Bande MK1,003,000.00
- 10<sup>th</sup> Claimant Mary Muhaye MK1,003,000.00

The claimants are further awarded costs for the assessment of damages proceedings to be taxed if not agreed by the parties.

DELIVERED IN CHAMBERS THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2021



WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR