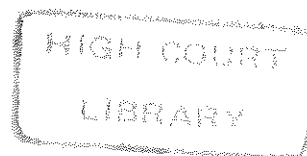


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REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 955 OF 2016

BETWEEN:

YOHANE SAMUEL.....CLAIMANT

AND

PRIME INSURANCE COMPANY LIMITED.....DEFENDANT

CORAM: WYSON CHAMDIMBA NKHATA (AR)

Mr. Mauya- of Counsel for the Claimant

Mr. Chikaonda-of Counsel for the Defendant

Ms. Chida- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

The claimant suffered injury from an accident which took place on the 16th of June 2016 at Mgawi Village along Balaka-Salima road when he was hit by motor vehicle registration number BR590 Toyota Dyna. On the 14th of December 2016, he commenced these proceedings by writ of summons claiming damages for pain and suffering, loss of amenities of life, disfigurement, loss earning capacity, cost of replacing his bicycle and costs of this action. He is suing the defendant as the insurer of the said vehicle. The issue of liability was settled through an order striking out the defence on the 30th of May 2017 by the Honourable Registrar Nriwa (as he was then). Subsequently, the matter came before this court for assessment of damages. This is the court's order on assessment of damages.

The evidence adduced for assessment of damages which is basically uncontroverted indicates that as a result of the said accident, the claimant sustained a fracture of the right leg, fracture of the left arm, deep cut wounds on the hip, head, left shoulder and the right leg and multiple bruises. Due to the seriousness of the injuries, he was taken to Kamuzu Central Hospital where he was admitted for over 2 months and as part of treatment and he was put metal rods in the leg. After his discharge, he still visits the hospital to date as he frequently feels a lot of pain. Prior to the accident, he used to ply his trade as a *kabaza* operator which he can no longer do now due to fracture of the leg and metal rods put in the leg. This has made him lose earnings. Due to the injuries, he is permanently disfigured and can no longer walk properly. He showed the court the scars sustained due to the fractures. He added that he used to make K50,000.00 per day.

Such was the evidence adduced for the assessment of damages. Counsel for the claimant adopted his Skeleton Arguments as part of submissions in this matter. I must express my gratitude for the same as they went a long way in informing this court in arriving at the decision herein. Suffice to say, the issue for determination is the quantum of damages that could reasonably compensate the claimant for the injuries and losses suffered.

The law generally provides that a person who suffers bodily injuries or losses due to the negligence of another is entitled to recover damages. The fundamental principle which underlines the whole law of damages is that the damages to be recovered must, in money terms, be no more and no less than the Plaintiff's actual loss. The principle was laid down in numerous case authorities more particularly by Lord Blackburn in the case of **Livingstone v. Rawyards Coal Company (1880) 4 AC 25** in the following terms:

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

All in all, the court ought to take into consideration fairness in awarding damages. In **Pitt v Economic Insurance Co. Ltd 1957 (3) SA 284 (D) at 287E** it is stated that:

"The court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense".

Be that as it may, it ought to be borne in mind that it is not possible to quantify damages for pain and suffering, loss of amenities and deformity as claimed in this matter with mathematical precision. As a result, courts use decided cases of comparable nature to arrive at awards. That ensures some degree of consistency and uniformity in cases of a broadly similar nature: See **Wright -vs- British Railways Board** [1983] 2 A.C. 773, and **Kalinda -vs- Attorney General** [1992] 15 M.L.R. 170 at p.172. As such this court will have recourse to comparable cases to arrive at the appropriate quantum of damages for the plaintiff.

In this case, Counsel for the claimant invites the court to consider the following cases with regard to damages for pain and suffering and loss of amenities of life:

Zuze Bonjesi vs Prime Insurance Company Limited, Civil Cause No. 488 of 2011, in which the claimant was awarded MK7, 000,000.00 for damages for personal injuries. The claimant sustained severe open fracture of the left tibia and deep wound on the right leg. The award was made on 17th July, 2012.

Jack Pangani v Real Insurance Company Limited, Personal Cause Number 235 of 2012 (unreported) in which the court awarded the sum of K7,500,000.00 as damages for pain and suffering and loss of amenities of life for a claimant who sustained a fracture of on the leg and had had a metal rod placed in the leg. His incapacity was put at 30%.

Mavuto Luka v Prime Insurance Company Limited Personal Injury No. 91 of 2013 (unreported), in which the court on 22nd July 2014 awarded the sum of K6,500,000.00 to the claimant who sustained a fracture.

In the view of the foregoing case authorities, Counsel for the claimant submits that the claimant suffered a combination of the injuries being two fractures and other serious injuries. He further submits that the claimant to date cannot walk properly and can hardly do anything on his own. He therefore opines that the sum of K10,000,000.00 would fairly compensate the claimant under this head.

On damages for disfigurement, Counsel for the claimant invites the court to consider the following cases:

Macloud Makunganya v Prime Insurance Company Limited, Civil Cause No. 3 of 2009 (Zomba District Registry), in which the court having awarded the claimant other heads of damages, further awarded him K700,000.00 for disfigurement which constituted a lump on the thigh and a scar.

Elida Bello v Prime Insurance Company Limited Civil Cause No. 177 of 2012 in which the court awarded the sum of K1,000,000.00 as damages for disfigurement.

Jack Pangani v Prime Insurance Company Limited (supra), in which the court awarded the sum of K1,000,000.00 to the claimant for disfigurement.

Counsel for the claimant submits that in the present case, the disfigurement suffered by the claimant is very serious. His posture when walking has changed. Counsel is of the view that K2,000,000.00 would fairly compensate the claimant.

On the other hand, Counsel for the defendant submits that the Claimant has fully recovered from the injuries as he stated in his evidence that he now does other jobs. Counsel is of the view that that a sum of K2,500,000 would be adequate damages for pain and suffering, loss of amenities of life and disfigurement, taking into account the awards in the cases stated below:

Peter Mkandawire vs Prime Insurance Company Ltd Personal Injury Cause No. 180 of 2014 (Zomba District Registry) (unreported), in which the claimant sustained a fracture on the left knee, multiple bruises on the face and three teeth were loosened. He was hospitalized for 10 days and his incapacity was put at 30%. On 11th August, 2015, the High Court awarded him a sum of K2, 500,000 for pain and suffering and loss of amenities of life.

Martha Chipelesa vs Prime Insurance Company Limited Personal Injury Cause No. 331 of 2013 (Zomba District Registry) (unreported) in which the claimant suffered injuries to her spinal cord and was on palliative care. She was hospitalized for 8 months and had to undergo physiotherapy for some time. On 18th April, 2017, the High Court awarded her K1,000,000.00 as damages for pain and suffering.

I had the opportunity to observe the aftermath of the injuries sustained by the claimant and his present physical condition. Having considered the nature and extent of the injuries suffered by the claimant, this court finds that he suffered considerable pain and suffering resulting from the accident and the treatment he received. I take note that his treatment involved insertion of metals in the leg. Undoubtedly, he suffered

discomfort, inconvenience and distress. The defendant argue that he has healed and yet the claimant can no longer walk properly. In any case, this does not take away the suffering he underwent during the injury, treatment and recuperation.

In my estimation, this is a case in which K8,000,000.00 will be sufficient recompense for injuries that the claimant suffered and continues to suffer by reason of the accident. Judgment is accordingly entered in favour of the claimant in a sum of K8,000,000.00 under all heads of general damages claimed and proved.

The claimant also claims damages for loss of earning capacity. It is trite that where the court finds that the claimant can no longer earn his pre-accident rate of earnings, it should award damages for loss of earning capacity. The same is calculated based on the annual figure and taking into account the age of the claimant and his working life span. It also takes into account the usual working contingencies and also taxation. Courts also assess the prospect of losing employment or reduced earnings in future - **Tembo v. City of Blantyre Civil Cause Number 1355 of 1994, High Court Principal Registry (unreported)**. Justice Mwaungulu, as he was a judge of the High Court then, in the case **Sakonda v. S.R. Nicholas Ltd, Civil Appeal Cause No. 67 of 2013, High Court Principal Registry (Unreported)** suggests that for loss of income, the real loss must be ascertainable and hence calculable for purposes of the award of damages, whilst a court can make an award for loss of earning capacity where the loss is not ascertainable.

In this case, the evidence indicates that the Claimant used to ply his trade as a *kabaza* operator which he can no longer do now due to fracture of the leg and metal rods put in the leg. He laments that he was making about K50,000.00 per month. Counsel for the claimant submits that in the case of **Tapiwa Luhanga v Real Insurance Company Limited Civil Cause No. 12 of 2015** the claimant suffered a fracture of the hip. She was awarded K7,900,000.00 for loss earning capacity. In the present case, Counsel is of the view that K5,000,000.00 would fairly compensate the claimant under this head.

The defendant, however, submits that the Claimant did not prove his claim for loss of earning capacity. They contend that he merely made assertions on his earnings without offering proof. It is true that the claimant did not adduce evidence to show his pre-accident earnings. However, I had in mind that being a *Kabaza* operator there is little or no likelihood that documentation like receipts, tickets or anything of that sort are kept. Be that as it may, loss of earnings ought to be awarded where the court finds that the claimant can no longer earn his pre-accident rate of earnings. In this case, it is not in dispute that the claimant can no longer ply his trade as a *kabaza* operator. However, he is still able to do other things. Essentially, he still has the capacity to earn. What is not clear is whether whatever he is still able to do is in a position to earn him his pre-accident earnings. The evidence does not indicate what he has now resorted to making it

difficult to determine if the accident has dealt a blow on his pre-accident earnings. I would therefore make a nominal award of K500,000.00.

Lastly, the claimant claims the cost of replacing a bicycle. He prays for an award of K30,000.00 representing the average price of a bicycle. The defendant is of the view that this claim must fail considering that the claimant did not furnish the court with proof of the cost of the bicycle. I wish to agree with the defendant on this regard. Certainly, it is not enough to say the price is a representation of the average price of a bicycle. At the minimum, where receipts are no longer traceable, the claimant ought to have obtained a quotation which I believe was not a tall order. I am compelled not to make an award under this head for lack of proof.

In summary, the claimant is awarded K8,000,000.00 as damages for pain and suffering, loss of amenities of life and disfigurement. He is also awarded K500,000.00 as damages for loss of earning capacity. In total, the claimant is awarded K8,500,000.00. That notwithstanding, the court takes note that the parties were in agreement on the import of the policy of insurance to the issue of liability in this matter. I therefore order that the defendant should pay damages to the extent of the insurance policy limit.

The claimant is further awarded costs for the assessment.

MADE IN CHAMBERS THIS 25TH DAY OF JANUARY, 2021



WYSON CHAMBIMBA NKHATA

ASSISTANT REGISTRAR