



HIGH COURT
LIBRARY

IN THE HIGH COURT OF MALAWI

LILONGWE REGISTRY

CIVIL DIVISION

CIVIL CASE NO. 502 OF 2018

BETWEEN:-

PATUMA NANCY SAINI.....1ST CLAIMANT
JAMES WITNESS.....2ND CLAIMANT

-AND -

HERMIS LOMORIWA.....1ST DEFENDANT
ATTORNEY GENERAL.....2ND DEFENDANT
REUNION INSURANCE COMPANY.....3RD DEFENDANT

Coram:

Brian Sambo, Assistant Registrar

Mr. P. Kambalame, of counsel for the Claimant.

Mr. Aristotle Mahonga, of counsel for the 2nd Defendant

3rd Defendant, absent and unrepresented

Mr. Matope, Court Clerk/Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

Introduction

On 3rd of November, 2021 the Claimant successfully obtained a default judgment against the 2nd Defendant, in respect of both Claimants, for the following;

Patuma Nancy Saini and another vs Reunion Insurance Company, Civil Cause No. 502 of 2019

- i. Damages for pain and suffering
- ii. Damages for loss of amenities of life
- iii. Damages for disfigurement
- iv. Damages for loss of earning and earning capacity
- v. Special damages for the Medical Report and the Police Report
- vi. Costs of action, and
- vii. For the 2nd Claimant only; damages for future medical care.

On 18th November, 2021 I heard evidence on assessment, interparte, and I now return to give my assessment of damages.

Brief Facts of the Case

On 8th February, 2019 around 11.30 hours, the 1st Defendant was driving motor vehicle registration number MP 2479 Foton Pickup, from the direction of Nselema going towards Ntaja. Upon arrival at Umbwa Trading Centre, he lost control of the motor vehicle because of overspeeding, and in the process it swerved to the extreme nearside of the road where it hit the two Claimants and another person who were sitting outside the road, on the dirt verge. As a result of the impact, the 1st Claimant sustained an open fracture of distal left fibula and tibia, wound on the ankle, multiple bruises, general body pains and she was unable to walk. Her permanent degree of incapacity was assessed at 28%. As for the 2nd Claimant, he sustained a fracture of pelvis, spinal injury, both of his legs became paralysed and was unable to walk, multiple bruises on his head and face, and his permanent degree of impairment was assessed at 50%.

Evidence on Assessment

Both Claimants testified in their case, and the 1st witness was Patuma Nancy Saini. She adopted her witness statement and tendered it as part of her evidence. In cross examination she told the court that she was doing business before the accident; she was selling fish. She said she was still selling fish after the accident to the extent that she had left her business consignment at the market as she was coming to court to give her evidence. She said it was not true that as a result of the accident she had stopped doing business. She said she obtained a loan facility from Micro-Loan Finance to boost her fish-selling business. She said, before the accident, she was making between MK400, 000.00 and MK500, 000.00 per month. She said she had evidence that she was admitted in the hospital for 10 days after the accident. She said she was still feeling pain, and one of her feet was now bigger than the other as a result of the injuries she suffered during the accident. She said, previously she was able to carry heavy buckets of water, and she was also able to cultivate her land by herself but now

she relied on others to do that for her because of pains. (Her feet were inspected by the court to appreciate the difference in size that she had stated. My observation was that the feet looked almost the same).

The 2nd Claimant also adopted and tendered his witness statement. In cross examination he told the court that he was able to read and write. He told the court that as he was coming to court to testify he had already cultivated his gardens and he was ready to plant. He said in par. 16 of his witness statement he told the court that he was unable to cultivate because it was his relatives who were helping him to cultivate. He said he had his own piece of land; about half an acre. He said he was into clothes-selling business. He said he was not completely healed, and he was still visiting the hospital for treatment. He said he had not brought medical evidence to show that he was not completely healed, and that he was still visiting the hospital. He said he was unable to attach his Health Pass Book because he was unable to speak at the time he was being taken to the hospital. He told the court that he lived in Machinga, and he came from there to give his evidence. He said he was unable to sit down for 3 hours. He said he was realizing a maximum of MK300, 000.00 per month, and MK500, 000.00 per day. By saying that he made MK300, 000.00 per month and MK500, 000.00 per day he thought counsel was asking him about his business capital. He said he did not know how to read but he knew how to count money. In re-examination he told the court that the truth was that he was making MK300, 000.00 per month before the accident.

Issues for Determination

The hearing was conducted in order to assess the appropriate level of damages payable by the Defendants to the Claimants.

Analysis and Determination.

Damages are the remedy for a victim of a wrong, and the wrongful party has to compensate the victim, in as far as money can, to be put back in the same position that the victim would have been if not for the wrong- **Elida Bello v. Prime Insurance Company Limited**, Civil Cause No177 of 2012 (unreported).

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- Ian Goldrein et al,

Personal Injury Litigation, Practice and Precedents (Butterworths, 1985) p8. See also **City of Blantyre v. Sagawa**, [1993] 16(1) MLR 67 (SCA).

In order to achieve consistency and uniformity, courts of law would also want to consider comparable judicial precedents.

In **Chrispin John vs Baba G. Construction Limited**, Civil Cause No. 760 of 2021, the court, on 20th December, 2021 awarded the Claimant MK4, 500,000.00 for an open fracture, loss of finger and laceration of his right hand. The degree of incapacity was assessed at 7%.

In **Yambitsani Follius vs Prime Insurance Company Limited**, Civil Cause No. 632 of 2020 this court made a total award of MK4,950,000.00 in which the Claimant sustained mild head injury, fracture of pelvis, laceration and swollen head, bruised right shoulder and bruised abdomen and his degree of incapacity was assessed at 30%.

In the instant case, the 1st Claimant sustained an open fracture of distal left fibula and tibia, wound on his ankle and multiple bruises whereas the 2nd Claimant sustained a fractured pelvis, spinal code and bruises on his head and face. These are indeed painful experiences for which they deserve compensation under this head.

Loss of Amenities of 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 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%.

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.

In the present matter the Claimants lost some considerable degree of amenities of life for a short time. They were not able to walk or work during the time they were nursing their wounds. Of course they were both still complaining of pains but the same were not supported by medical evidence. The 1st Claimant told the court, during cross examination that it was not true that she had stopped doing her fish-selling business. The 2nd Claimant told the court that he had already

cultivated his land. He only changed upon further cross examination that the land was cultivated by his relatives. I noticed he kept on changing his statements obviously showing that he was not prepared to tell the truth. Whatever the case there was no medical evidence to show that he was incapacitated from further enjoying his amenities of life. In these circumstances, what can be awarded to both under this heard are only nominal damages.

Disfigurement

Damages are paid under the head of disfigurement for the change in the 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. It is a change in appearance but it is capable of limiting a person from doing certain things as was observed by the court in the case of **Austin Julius v. Rasika Gunawardena and General Alliance Limited**, Personal Injury Cause Number 316 of 2014.

The evidence before me does show a minor disfigurement on the part of the 1st Claimant, only; one of her feet is slightly bigger than the other. I saw the difference. Her degree of incapacity was assessed at 28%. There is no clear deformity on the part of the 2nd Claimant suffice it to say that his degree of incapacity was assessed at 50%. Courts have always observed that a disfigurement is not in abstract; it is physical and everyone can see it. And moreover, it is not automatic that every person involved in a road accident sustains disfigurements. It is a fact that wounds and fractures can get completely healed without leaving any deformities. Admittedly, if there are any deformities easy to prove are scars but I did not see any of them on the Claimants and there was no medical evidence to that effect. However, I do not have jurisdiction to assume existence of evidence in support of certain facts. This is a court of law and its decision should be based on supported facts and the law.

Loss of Earnings and Earning Capacity

The Claimants are also claiming damages for loss of earnings and earning capacity. The 1st Claimant testified that he was making between K400, 000.00 and MK500, 000.00 per month from fish selling business. On his part, the 2nd Claimant said he was making MK300, 000.00 per month from his clothes-selling business. None of them brought evidence in support of their respective assertions. As it is, it is not known whether or not the Claimants were indeed into those types of businesses or were making such monthly turnovers. Nothing was proved or supported by evidence. To allege a fact is one thing and to prove it is another. In a court of law like this one proof is imperative. Otherwise, the

evidence on record show that both Claimants are now able to do what they used to do before the accident. The 1st Claimant is selling fish as she used to. She was admitted in the hospital for only 10 days, and if she had lost any earnings, which she has not proved, then it would be with respect to the 10 days that she stayed in the hospital. The 2nd Claimant, during cross examination told the court that he had already cultivated his gardens and she was only waiting for rains to plant his crops. The rational inference one could make is that if he is able to cultivate his fields there is no way he could fail to sell clothes as he used to. This shows that none of the Claimants has really lost earning capacity.

Damages for future Medical Care

The 2nd Claimant further demands damages for future medical care. During cross examination he told the court that he had no medical proof that he would need future medical care. Without medical evidence, it is difficult for me to believe that he would need further medical attention. Par. 19 of his Medical Report only talks about further medical examination. I do not think medical examination and medical treatment mean the same thing. The medical report should have explained the medical condition for which he would need further medical treatment. This was not done.

Special Damages

Each Claimant is requesting for re-imbursement of K6, 000.00 paid for the Medical Report and the Police Report. There is evidence that each spent so much on the reports. I award the re-imbursements.

Conclusion

In conclusion, considering all the circumstances of the case and the Claimant, the court hereby makes an award of **MK3, 506,000.00** to each of the two Claimants being damages covering all heads above. In total the Defendants shall pay **MK7, 012,000.00**. This whole amount is payable by the 2nd Defendant within 30 days from today.

Costs are for the Claimant and shall be assessed, separately if not agreed upon by the parties.

Made in chambers today Monday the 21th day of December, 2021.

Brian Sambo
Assistant Registrar

Patuma Nancy Saini and another vs Reunion Insurance Company, Civil Cause No. 502 of 2019