



REPUBLIC OF MALAWI  
**IN THE HIGH COURT OF MALAWI**  
PRINCIPAL REGISTRY  
**CIVIL CAUSE NUMBER 667 OF 2020**

**BETWEEN:**

FRAXON NSAMBA PAKUDYA (Suing through his brother  
and next friend JOHN WALLIS).....CLAIMANT

**AND**

ALLI KHUMAR.....1<sup>ST</sup> DEFENDANT

LIBERTY GENERAL INSURANCE COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT

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

Mr. Mwantisi- of Counsel for the Claimant

Mr. Machika-of Counsel for the Defendants

Ms. Chida- Court Clerk and Official Interpreter

**ORDER ON ASSESSMENT OF DAMAGES**

**INTRODUCTION**

The claimant was injured upon being hit by a motor vehicle which was being driven by the 1<sup>st</sup> defendant along the Zalewa – Balaka M1 road at Kadansana Village. By way of writ of summons, the Claimant commenced this action claiming damages for pain and suffering, loss of amenities of life, deformity/disfigurement, special damages and costs of the action. Subsequently, the writ was amended to include damages for loss of earnings and loss of earning capacity and damages for medical expenses, future medical expenses and nursing care. The issue of liability was settled during mediation whereby the defendants admitted liability and judgment was entered for the claimant against the defendants with a contributory negligence of 65% by the defendants and 35% by the claimant. The matter was referred to this court for assessment of damages which I must now consider.

## *THE EVIDENCE*

The first witness for the claimant was John Wallis. He adopted his witness statement in which he stated that as a result of the accident, the claimant lost consciousness and sustained a fresh cut wound on the head, bruises on the right hip, bruises on both arms, scar formation and developed a confusion state. He further avers that the claimant further developed a mental illness and/or insanity. He was taken to Lisungwi Community Hospital where he was admitted for two weeks. He tendered a Medical Report from Lisungwi Community Hospital marked "JW2". He further told the court that since the accident, the claimant developed a mental illness and/or insanity and that after the discharge from the hospital the claimant failed to take care of himself and was just wandering about. He was later institutionalised at Zomba Mental Hospital. He further stated that he paid MK3,000.00 for the Police Report as endorsed on the Police Report and MK21,000.00 for the medical report. He, therefore, claim damages for pain, suffering and loss of amenities of life, and deformity/disfigurement as well as MK3,000.00 and MK21,000.00 for Police Report and Medical Report respectively. He further testified that the claimant is also claiming damages for loss of earning capacity and future nursing care.

During cross examination, he stated that he is not a direct brother to the claimant but they are brothers because their mothers are sisters. He stated that the claimant was staying with his sister at Chikwekwe Village before the accident. He stated that before the accident the claimant was a normal functioning member of the village and he was not mentally unstable. The witness further stated that the claimant was admitted at the hospital for one week but he was not the one who was the guardian. He stated that the claimant was not just wandering about before the accident and that he started wandering about after the accident and that is when he was going from village to village and at times he could not be located for several days. All this wandering only started after the accident in issue.

PW2 was Dr Olive Liwimbi. She stated that she works at Zomba Mental Hospital and she issued a medical report upon being requested to do so by the court. She tendered the medical report. She stated that the Claimant was admitted at Zomba Mental Hospital for one and a half month, thus from around March to May 2021. The history of the Claimant was that he was hit by a running vehicle and sustained head injuries, he went missing for 6 months and that symptoms started appearing after being hit by the vehicle. She stated that the claimant had a diagnosis of major neuro-cognitive impairment which is a known consequence of head injury. She further stated that other common medical causes were ruled out during his admission and that he was later discharged on antipsychotics to control his psychotic symptoms.

During cross examination, she stated that she knew the history of the claimant and his condition through what she was told by the claimant's relatives. She testified that it is not correct to conclude that the

claimant had such condition for a long time. She stated that the claimant also had dementia, and if the claimant had the stated conditions since 1994 he would have been dead by now. During re-examination, she stated that the term neuro-cognitive impairment refers to injury caused or contributed by head injuries. She stated that there are numerous causes including medical causes. She stated that they ruled out the common ones and there are some causes that they did not rule out.

On their part, the Defendants paraded one witness, Murry Siyasiya who adopted his witness statement in which he stated that he is a private investigator and holds a qualification in Social Science which was tendered and marked "**KP1**". He testified that he was engaged by Liberty General Insurance Company Limited to investigate the history of the claimant who was alleged to be mentally ill and the same is attributed to the accident he was involved in on 14<sup>th</sup> March, 2020. He further testified that he carried out investigations and recorded a video from the close relatives of the claimant which showed that the claimant was already mad before the accident and that he travels around places including from Mwanza to Chingeni on foot. He tendered his report which was marked as "**KL2**".

During cross examination, he was shown a page in the report that he recorded that he started investigating the case after the mediator had entered judgment on liability to be shared 65/35 percentage and that following the ruling the lawyers started claiming that their client had developed mental illness as a result of the injuries he suffered in the accident. It was indicated that the judgment on liability was entered on 26<sup>th</sup> March, 2021. He was also shown the specially endorsed summons which were lodged with the court on 17<sup>th</sup> August, 2020 which showed that the particulars of injuries in the statement of case included: mental illness and/or insanity. He stated that the statements in his report would be defamatory if he had mentioned the names of the lawyers.

When he was referred to statement by Village Headman Chikwekwe he stated that in his opinion the statement means that the Claimant was mentally disturbed thus why he was walking long distances on foot because a sane person cannot do that. On the other statement by the other chief he stated what is said in that statement are attributes of mental illness even though those people are not certified doctors. He stated that if the other people are to come to court they will maintain that the Claimant was mentally ill. But he stated that when he went bank to the village to have the sister sign her statement she and the other people refused indicating that they were threatened with bewitchment by the people who are on the other side claiming to be the relatives of the Claimant.

Such was the evidence on assessment of damages. I would like to thank both Counsel 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 counsels 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, to say:

“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 the above statement 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.

## ***SUBMISSIONS AND 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. In this case, the parties make the following submissions:

### ***FOR THE CLAIMANT***

It has been submitted that the the claimant lost consciousness and sustained a fresh cut wound on the head, bruises on the right hip, bruises on both arms, scar formation with a confusion state. It is further submitted that the claimant developed a mental illness and/or insanity. He was taken to Lisungwi Community Hospital where he was admitted for two weeks. Counsel cites the following cases for comparison:

- **Nelson Dinyero vs Frazio Biziwelo & Nico General Insurance Company Limited**, Personal injury cause no. 192 of 1018, in which the claimant sustained a deep cut wound on the right knee exposing the patella, abrasion on the right thigh, scar formation and pain in the joints. The claimant was awarded MK6,500,000.00 for personal injuries. The award was made on 9<sup>th</sup> March, 2020.
- **Issah Idrissah vs Daniel Ndawala & Prime Insurance Company Limited**, Personal Injury Cause Number 67 of 2017, in which the plaintiff suffered a dislocation of the left hip, a cut on the forehead and another cut on the eyelid and multiple bruises on the leg. He was awarded MK4,900,000.00 damages for Personal Injuries on 11<sup>th</sup> March, 2019.
- **Rhoda Samson v Bester D. Thomson and General Alliance Insurance Limited**, Personal Injury Cause No. 1158 of 2013, in which the plaintiff sustained a sprained right shoulder and multiple bruises on the face and nose. On 28<sup>th</sup> April, 2015, the court awarded her the sum of MK2,400,000.00 as general damages.

- **Mirriam Makhuya v Peter Mvalo & Prime Insurance Company Limited**, Personal Injury Cause Number 931 of 2014, in which the plaintiff sustained several head injuries, swelling of the brain due to blood clots and experienced lapses of mental instability and she was not able to play with her friends as she used to. On 16<sup>th</sup> June, 2016 she was awarded MK5,000,000.00 general damages
- **Byson Kondowe v Joseph Bulla and Prime Insurance Company Limited** Civil Cause Number 62 of 2008, in which the plaintiff sustained paralysis and complete loss of neurological function of the lower limbs. He was awarded MK5,000,000.00 for pain, suffering and loss of amenities of life. He was further awarded MK12,000,000.00 for loss of future income. He was also awarded the sum of MK3,175,790.00 as expenses. The award was made on 14<sup>th</sup> January, 2009.

In the light of the above authorities, Counsel for the claimant is of the view that the claimant be compensated the sum of **MK20,000,000.00** damages for personal injuries being K9,000,000.00 for pain ad suffering and MK8,000,000.00 as damages for loss of amenities, deformity, disfigurement and future nursing care and MK3,000,000.00 damages for loss of earning capacity.

#### ***FOR THE DEFENDANT***

It is submitted on behalf of the defendant that according to the medical report from Lisungwi Community Hospital, the injuries sustained by the claimant included a fresh cut wound on the head (head injury with soft tissue injuries), bruises on right hip bruised on both arms while in the Police Report marked JW 1 the injuries sustained include deep cut wound on the head, cut wound on the forehead, bruises on right hip cheek, painful waist and bruises on both arms. Counsel cites the following cases for comparison:

- **Francis Majawa v Laurent Chimungu and United General Insurance Company Limited**, Personal Injury Cause Number 526 of 2017, the court in July 2018 awarded the claimant the sum of MK4, 020, 000.00 as damages having sustained fracture above the elbow joint of the left arm, multiple bruises, cuts on both legs and hands, head injury and was admitted in hospital for 13 days.
- **Alice Kachisi and another v United General Insurance Company Limited**, Personal Injury Cause Number 87 of 2017, the court in July 2017 awarded the 2<sup>nd</sup> claimant the sum of MK2, 000, 000.00 having sustained multiple bruises and head injury.
- **Mwajawa Mtambo and another v Charter Insurance Company Limited and 2 others**, Civil

**Cause Number 937 of 2013**, the court in October 2020 awarded the 1<sup>st</sup> claimant the sum of MK2, 750, 000.00 having sustained cut wound, swollen forehead, head injury, mild shaft contusion and general body pains.

- **Bernard Polepole v Prime Insurance Company Limited and another**, Civil Cause Number 601 of 2015, the Court in May 2021 awarded the claimant the sum of MK4,750,000.00 having suffered unconsciousness, head injury and hand injuries.

In view of the foregoing, Counsel representing the Defendants proposes that the Claimant be awarded MK3,500,000.00 as damages for pain and suffering, loss of amenities of life and deformity and disfigurement.

#### *DETERMINATION*

In determining the extent of the injuries suffered by the claimant, having heard both parties, the court established that it is not in dispute that the claimant sustained a fresh cut wound on the head, bruises on the right hip, bruises on both arms and scar formation. Basically, the bone of contention is whether the injuries or the accident led to mental illness on the part of the claimant. It is in evidence that after he was discharged from the hospital, the claimant failed to take care of himself and was just wandering about. He was later institutionalised at Zomba Mental Hospital. A doctor from Zomba Mental Hospital testified to this effect. Be that as it may, the defendants are of the view that the claimant suffered from mental illness prior to the accident.

The strength of the claimant's case lies, firstly, on the claimant's next of friend who avers that the claimant was a normal functioning member of the village and he was not mentally unstable. Most importantly, in my view, the claimant seeks to rely on the evidence from the doctor from Zomba Mental Hospital who testified that the claimant had a diagnosis of neuro-cognitive impairment which could be caused by a head injury among other factors. However, her testimony was not conclusive in as far as whether the claimant's mental illness was caused by the head injury occasioned by the accident herein. She testified that apart from the information that the hospital received from the relatives the hospital did not conduct any assessment outside the hospital and she further stated that the psychotic symptoms maybe a result of other factors.

On the other hand, the Defendants' witness states that upon investigations he found that the Claimant was already mentally ill on occurrence of the accident. He stated that he interviewed the relatives of the claimant who revealed that the claimant had been mentally ill many years before the accident. He submitted video recordings of his conversations with the claimant's close relatives in which they say that

the claimant was already mad before the accident and that he travels from Mwanza to Chingeni on foot. The defendant's witness emphatically stated that the witnesses would maintain this narrative even though coming to testify would prove tricky having been threatened. In a rebuttal, I had expected the claimant to insist on the said relatives to come and testify even through a subpoena as they did with the doctor from Zomba Mental Hospital albeit the said threats. On a balance of probabilities, based on the evidence on the record, I am of the view that it would not be safe to attribute the mental illness and/or insanity to the accident the claimant was involved in.

Based on the foregoing, the court is compelled to proceed with the injuries herein being a fresh cut wound on the head, bruises on the right hip, bruises on both arms and scar formation. Clearly, these are soft tissue injuries. Nonetheless, that does not make them less serious in nature. The claimant had to be admitted for two weeks at the hospital undergoing treatment for the same. The duration of the hospitalisation is an indication that the injuries were serious. In addition to that, it is not in dispute that the claimant lost consciousness upon being hit by the vehicle.

Having looked at the cases cited by both parties, I am of the view that the case of **Bernard Polepole v Prime Insurance Company Limited and Another** is much closer in intensity of the injuries with the case at hand. In that case, the claimant was awarded the sum of MK4,750,000.00 having suffered unconsciousness, head injury and hand injuries. The case was decided in the year 2021 which does not call for adjustments in order to take into consideration devaluation. However, in view of the circumstances obtaining in this case, I award the claimant K6,000,000.00 as general damages.

The claimant further claims damages for loss of earnings and loss of earning capacity and damages for medical expenses, future medical expenses and nursing care. Following the court's finding that the claimant's mental illness cannot be attributed to the accident herein, I am of the view that these claims are not tenable. As earlier stated, the proved injuries are soft tissue injuries which, observably, have healed. I must point out that I had an opportunity of seeing the claimant physically. There is nothing suggesting that the proved injuries shall require future medical expenses and or that the claimant now needs nursing care consequent of the injuries he sustained. Apart from that, it must be borne in mind that courts award for financial loss, either as general damages in form of loss of earning capacity, or financial loss as loss of earnings, where the victim has lost his job completely or his earnings have been reduced as a result of the new circumstances created by the injury. *see Kambwiri v Attorney General* [1991] 14 MLR 151 (HC). In the present case, it has not been demonstrated that prior to the accident the claimant was engaged in any economic activity which has now been disrupted by the injuries suffered. I make no awards under these heads.



Lastly, the Claimant is claiming special damages being the sum of MK3,000.00 for procuring a Police Report and MK21,000.00 for procuring a Medical Report. These being special damages, according to an established practice, they must be strictly proved. see **Zimpita and another v Okoyo Garage** [1991] 14 MLR 532 (HC). The Police Report shows that he had paid MK3,000.00 under General Receipt number 7746180 and it has a stamp showing that it was paid for. However, this is not the case with the Medical Report, there is no receipt tendered in support that it was paid for neither is there a reference of the General Receipt number and a stamp on the Medical Report indicating that it was paid for. I shall award K3,000.00 for the Police Report.

### *CONCLUSION*

Upon a thorough consideration of facts and circumstances of this case and upon an exhaustive consideration of the submissions by both Counsel in the light of the relevant and applicable law regarding damages for personal injuries that this court awards the claimant **K6,003,000.00** under all heads claimed and proved. Taking into consideration that the contributory negligence was apportioned 65% by the defendants and 35% by the claimant, the defendants shall pay **K3,901,950.00**.

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

DELIVERED IN CHAMBERS THIS 19<sup>TH</sup> DAY OF OCTOBER 2021

  
**WYSON CHAMDIMBA NKHATA**

ASSISTANT REGISTRAR