



REPUBLIC OF MALAWI  
**IN THE HIGH COURT OF MALAWI**  
PRINCIPAL REGISTRY  
**PERSONAL INJURY CAUSE NUMBER 113 OF 2019**

**BETWEEN:**

MABVUTO CHITIKA.....CLAIMANT

**AND**

MRS. MTUWICHE NAMWAZA.....1<sup>ST</sup> DEFENDANT

PRIME INSURANCE COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT

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

Mr. Ngwata- of Counsel for the Claimant

Ms. Sawerengera-of Counsel for the Defendant

Mr. Amos- Court Clerk and Official Interpreter

**ORDER ON ASSESSMENT OF DAMAGES**

*INTRODUCTION*

On 24<sup>th</sup> April 2018, the claimant was on board motor a motor vehicle which was being driven from the direction of Balaka heading towards Dedza along Ntcheu-Dedza M1 road by the 1<sup>st</sup> Defendant and insured by the 2<sup>nd</sup> Defendant. Apparently, upon arrival at or near Dzoole village, the 1<sup>st</sup> Defendant suddenly stopped the said vehicle in the middle of the road consequent to which the claimant was hit by another motor vehicle heading towards the opposite direction and he sustained injuries. He commenced this action against the Defendant herein claiming damages for pain and suffering, loss of amenities of life, disfigurement and costs of the action. The issue of liability was settled in favour of the claimant through a default judgment on 23<sup>rd</sup> of April, 2019 before Honourable Justice Tembo. Subsequently, the matter was referred to this court for assessment of damages which I must now consider.

## THE EVIDENCE

Through his witness statement that he adopted in court, the Claimant testified that as a result of the accident, he sustained severe head injury, open multi segmental fractured left tibia and fibula, gustilio (severity) type 3B with other multiple body lacerations, bruises and lumber sacral soft tissue trauma. He was taken to the hospital where he received treatment of, among other things, analgesics. He was given fluids ceftriaxone, flucloxacillin, metro and pethidine, application of debridement (systematic) and wash out, application of ex-fixators and application of fracture retention and skin graft. He exhibits a Medical Report marked as “MC 2”. He further indicated that he has healed with leg length discrepancy, leg varus deformity, post traumatic pain due to osteophytosis manifestation and hip pains due to trendenberg gait. He also stated that he lost conscious for 48 hours during the accident. He also stated that he has now developed a possibility of developing arthritis on the ankle and syndysmosis. His limb was shortened by 1.5 centimetres, his ability to do sporting activities and household chores has been affected and he has suffered permanent incapacity of 35%. He exhibits a copy of the Medical Report marked as “MC 3”. He proceeded to show the Court the exact areas of his body that had been affected.

In cross examination, he stated that he went to the hospital for treatment but did not bring any x-ray documents to Court. He stated that he could walk without the aid of crutches. He further stated that he was taken to Kamuzu Central Hospital in Lilongwe unconscious even though the accident occurred between Ntcheu and Balaka. In re-examination, he stated that he did not bring x-rays because they were in the custody of the 2<sup>nd</sup> Defendant and that this was as a result of some settlement discussions that the parties had had.

Such was the evidence on assessment of damages. I would like to thank 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**. The Court will also consider factors like

passage of time when the award was made, as well as the value of the kwacha at the time of making the award.

### ***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.

## COMPARABLE CASES

Basically, it is not possible to quantify such damages 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 claimant. In this case, the claimant claims to have sustained severe head injury, open multi segmental fractured left tibia and fibula, gustilio (severity) type 3B with other multiple body lacerations, bruises and lumber sacral soft tissue trauma. Counsel representing the claimant calls upon the court to consider the following cases for comparison:

- **Daya Billy vs Samuel Lunyala and Prime Insurance Company Limited, Personal Injury Cause No. 561 of 2018**, where the court awarded the sum of **MK9,000,000.00** to the Claimant who sustained an open left femur fracture and open fracture of the left leg, multiple bruises on the forehead and severe muscle spasm at the lumbar spine. He underwent x-rays, wound debridement, nailing of the left femur and external fixator application implant. As a result of the accident, he developed chronic osteomyelitis of the left leg, and had his limb shortened by 3cm. The award was made on 4<sup>th</sup> January, 2021.
- **Yohane Samuel and vs Prime Insurance Company Limited, Personal Injury cause Number 955 of 2016** where the Claimant sustained a fracture of the right leg, fracture of the left arm, deep cut wound on the hip, head, left shoulder and the right leg, and multiple bruises. He was admitted for over two months and had metal rods put in his leg. The court on 25<sup>th</sup> January 2021 awarded the Claimant the sum of **K8,000,000.00** for a pain and suffering, loss of amenities of life, and disfigurement.

In view of the foregoing, Counsel representing the Claimant prays for an award of **MK13,000,000.00** for damages for pain and suffering, loss of amenities of life and for disfigurement.

On the other hand, Counsel for the defendants called upon the court to consider the following cases for comparison with the case herein:

- **Steve Nasongole v Unitrans Malawi Limited and Prime Insurance Company Civil Cause No. 898 of 2010 (HC) (Unreported)** where the plaintiff sustained a fracture of the right arm (right humerus), open wound on the left leg, the arm was put in Plaster of Paris and was permanently

incapacitated at 16%. The court awarded K2,000,000.00 for pain and suffering, K1,000,000.00 for loss of amenities of life on the 20<sup>th</sup> February, 2017.

- **Charles Kambendera v Daniso Qongwani and Prime Insurance Company** Civil Cause No. 178 of 2018 (HC) (Unreported) where the plaintiff sustained a fracture of the right wrist joint and pain on the said wrist joint. The court awarded the plaintiff the sum of MK1,500,000.00 for pain and suffering, K250,000.00 for loss of amenities of life and K1,250,000.00 for disfigurement on the 6<sup>th</sup> March, 2019.
- **Lawrence Nohito v Imran Muhammed** Civil Cause No. 940 of 2015 in which the plaintiff suffered fracture of the left humerus and experienced headaches and dizziness. The claimant also had scars and weakness on his left arm resulting in difficulty in lifting heavy objects. He was awarded K2,000,000.00 for pain and suffering including disfigurement and K1,000,000.00 for loss of amenities of life. The award was made in 2018.
- **Francis Vekete v J.E. Nkhoma and Prime Insurance Company Limited** Personal Injury Cause No. 209 of 2012 in which the plaintiff suffered fracture of the left tibia, bruises on the right shoulder, head and arms. He was awarded K2,886,000.00 for pain and suffering, loss of amenities and disfigurement. The award was made on 24<sup>th</sup> October, 2014.

In view of the foregoing, Counsel representing the defendant prays that the claimant be awarded MK3,500,000.00 for damages for pain and suffering, loss of amenities of life and for disfigurement.

#### *DETERMINATION*

The evidence emanating from the claimant indicates he sustained severe head injury, open multi segmental fractured left tibia and fibula, gustilio (severity) type 3B with other multiple body lacerations, bruises and lumber sacral soft tissue trauma. Counsel representing the defendant seems to challenge the fact that the fracture of tibia and fibula has been duly proven before the court, the claimant having failed to produce the x-ray pictures. The claimant stated that the documents were given to the defendant in the course of settlement negotiations. This was not controverted and I find it problematic to hold it against him. A visual assessment in court affirmed the injuries he claims to have suffered. He had scars on the areas that he mentioned even where he claims to have suffered a fracture. Nonetheless, the scar on the head was barely visible negating the seriousness of the injury he purported to have suffered on the head and there is no mention that the injury was of the nature of a concussion which would otherwise not be discernible by scars.

Under the head of pain and suffering, it is my considered opinion that the injuries as outlined above exposed the claimant to excruciating pain during the occurrence of the accident as well during recuperation. Other than that, the evidence indicates that he was subjected to painful medical and surgical procedures as he underwent thorough washout, debridement and skin grafting. In my opinion, the procedures necessitated in themselves are an indication that the wounds were very serious. I agree with Counsel representing the defendants in that eventually the claimant healed. In his own assertion, he managed to walk to court and in fact without an aid of crutches. On the part of deformity, the claimant laments that he has healed with leg discrepancy and that his limb shortened with 1.5 centimetres. Other than that, the Claimant has a permanent scar and his bodily functions have been impaired at 22%. There is no doubt that the injuries modified the physical integrity of the claimant. He will live with the scars and the shortened limb for the rest of his life. 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.

Lastly, under the head of loss of amenities, the defendants contend that the claimant did not provide any proof of being incapacitated to the extent of failing to participate in sporting activities and household chores. However, in examination in chief, the claimant lamented that he has developed problems with his sexual performance. Observably, this was not controverted. In the case of **Kanyoni v Attorney General** [1990] 13 MLR 169 (HC) it is stated that loss of amenities of life has to do and has to include the loss of all the things the claimant used to be able to do, see, and experience. As it stands it shall be without basis to dismiss the claim under this head.

Turning to cases cited for comparison, Counsel representing the claimant has cited two cases for comparative purposes. The cases involve at least a fracture and other soft tissue injuries which in my view is the case herein. Observably, the awards were K8,000,000.00 and K9,000,000.00 and both cases were decided in the year 2021. On the other hand, Counsel representing the defendants cited several cases wherein the predominant injury is a fracture and the awards range from K2,886,000.00 to K4,500,000.00. The latest was decided in the year 2019. In view, of the foregoing, I must state that each case must be decided on its merits.

This court takes note that in this case the claimant suffered a fracture compounded with several multiple lacerations that have left scars here and there on his body not to mention the residual deformity. In the light of the cited cases, I believe the K13,000,000.00 submitted by the claimant is on the higher and most definitely the K3,500,000.00 submitted by the defendant is on the lower side. I award the claimant K7,000,000.00 under all heads claimed and proved.

### ***Policy limit***

In their submissions, the defendants assert that the 2<sup>nd</sup> Defendant's policy limit is MK5,000,000.00. Apparently, the assertion aims at limiting the amount to be paid by the 2<sup>nd</sup> Defendant in an event that this Court made an award exceeding the said amount. The assertion is purportedly premised on the application of the policy limit under section 144(1) of the Road Traffic Act which makes it not mandatory for a policy of insurance to cover the liability in respect of a total sum in excess of the prescribed amount or the policy limit. Thus, going by the said provision, they contend that the 2<sup>nd</sup> defendant is under no obligation whatsoever to settle any amount in the excess of K5,000,000.00.

Counsel representing the claimant while agreeing with the Defendant's understanding of section 144 (c) (i) of the Road Traffic Act, contend that the policy limit has not been proved. They do not agree that the suggested amount of K5,000,000.00 is the policy limit because neither is that amount stated in that provision, nor is there evidence of that amount before this Court. Counsel further points out that the same is not even on any record of the Court, be it in the Defence or list of documents both of which were filed out of time hence the matter proceeding on to assessment based on a default judgment.

Generally, the law is clear on the application of policy limit. Section 144 of the RTA makes it not mandatory for a policy of insurance to cover liability in respect of a total sum in excess of the prescribed amount or the policy limit. Regulation 19(1) of the Road Traffic (Insurance) Regulations under the Road Traffic Act provides that the maximum limits of liability required in respect of third party insurance cover shall be as set out in the Schedule. The said schedule provides that in respect of death or bodily injury for any one claim or a series of claims arising out of one event, the maximum limit of liability for third party insurance cover shall be K5,000,000.00. Essentially, this is a matter of the law. The least the court has to do is to take judicial notice irrespective that the defendants fell short of indicating the same in their defence.

### ***CONCLUSION***

It is 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 **K7,000,000.00** under all heads claimed and proved. The 2<sup>nd</sup> defendant's liability shall be to the extent of the policy limit which is **K5,000,000.00**.

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 20<sup>TH</sup> DAY OF NOVEMBER 2021



**WYSON CHAMDIMBA NKHATA**

ASSISTANT REGISTRAR