



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NUMBER 842 OF 2020

BETWEEN:

HENRY OLANDO (minor suing through his mother
and litigation guardian YASINTA CHIMBALU).....CLAIMANT

AND

CHIMWEMWE LIFA.....1ST DEFENDANT

PRIME INSURANCE COMPANY LIMITED.....2ND DEFENDANT

CORAM: WYSON CHAMDIMBA NKHATA (AR)

Mr. Mwabungulu- 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

The Claimant, a minor suing through his mother, commenced this action against the Defendant claiming damages for pain and suffering, loss of amenities of life and costs of the action. Apparently, on 22nd July, 2020 he was hit by a motor vehicle registration number BV 8324 at or near Nyambadwe Events Gardens along Sanders Road. He sued the 1st defendant as the driver of the said motor vehicle and the 2nd defendant as the insurer of the same. The issue of liability was settled in favour of the claimant through an order by Honourable Justice Tembo after mediation. The matter was referred to this court for assessment of damages which I must now consider.

THE EVIDENCE

The matter came for assessment of damages on the 13th November 2021. The claimant's mother was the sole witness for the claimant's case. She adopted her witness statement and tendered a Medical Report and a Police Report. In her witness statement, she averred that due to the accident, her son sustained a fracture of the left ankle and bruises on the right and at the back. He was taken to Queen Elizabeth Central Hospital where he was treated. He was not admitted. His leg was thereafter cast in Plaster of Paris ("POP"). She exhibits a Health Passport and Medical Report marked "YC2" and "YC3" to substantiate the foregoing. She further stated that as a result of the accident, her son's leg was disfigured and shortened. She added that her son now walks with a limp and feels pain whenever he walks a considerable distance.

In cross-examination, she re-iterated that her son is disfigured and that his leg was shortened. She stated that she was given the x-ray pictures but did not bring them to court because they were taken by the 1st defendant. She stated that her son was cast on POP twice. She explained that at first he had the POP for a week and then for a month. He stated that her son goes to school but walks with difficulty. She added that she sends him on errands but not on long distances. She stated that her son attended physiotherapy for a month.

Such was the evidence adduced in this matter. Counsel for the claimant adopted his Skeleton Arguments as part of submissions in this matter. I must express my gratitude to Counsel for the submissions 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 suffered.

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, 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 the 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 this case, the uncontroverted evidence claimant sustained a fracture of the left ankle and bruises on the right and at the back. Essentially, the issue is how has the injuries affected the claimant and how the injuries were dealt with in comparable cases. Counsel for the claimant cited the following cases:

- **Paul Mateyu vs Muntaz Hamdani and Prime Insurance company Limited**, Miscellaneous Civil Case No. 109 of 2016 wherein the Plaintiff sustained a fractured pelvis and was awarded MK6,880,000.00. The award was made on 30th July 2018.
- **Louise Chakwantha vs Prime Insurance Company Limited**, Civil Cause No. 461 of 2011, wherein the claimant was awarded MK6,150,000.00 for damages for personal injuries. The claimant sustained fracture of the left fibula, multiple soft tissue injuries and swollen leg. The award was made on 10th August, 2012.
- **Rex Walala vs Davison Chikuta and Prime Insurance Company Limited**, Civil Cause No. 461 of 2011, wherein the claimant was awarded MK6,500,000.00 for damages for personal injuries. The claimant sustained fracture of the left tibia, bruises on the left arm and cuts on his face. The award was made on 20th March, 2013.
- **Friday Mtelera vs Prime Insurance Company Limited**, Personal Injury Cause no. 530 of 2015, wherein the plaintiff was awarded MK7,000,000.00 for damages for personal injuries. The plaintiff sustained fracture of the knee joint of the right leg, fracture of the right lower leg, fracture of the ankle of the right leg, a cut of the left leg and bruises on the right elbow. The award was made on 16th February, 2017.
- **Thomasi Matemba vs Richard Kalitendere and Britam Insurance Company Limited** Personal Injury Number 913 of 2016, wherein the plaintiff sustained fracture of right tibia and fibula. The plaintiff was awarded the sum of MK6,000,000.00 for personal injuries. The award was made on 26th October 2017.
- **Zuze Bonjesi vs Prime Insurance Company Limited**, Civil Cause No. 488 of 2011, wherein the plaintiff was awarded MK7,000,000.00 for damages for personal injuries. The plaintiff sustained severe open fracture of the left tibia and deep wound on the right leg. The award was made on 17th July, 2012.
- **Christina Mande vs Charter Insurance Company Limited**, Personal Injury Cause no. 329 of 2016, wherein the plaintiff was awarded MK6,300,000.00 damages for personal injuries. The plaintiff sustained fracture of the right femur, (inclusive of the knee cap), dislocation of the right hip joint, cuts on the head and lost consciousness on the spot. The award was made on 11th January, 2017.

- **Kachasu and another vs Peter Kondowe and another, Civil Cause no 320 of 2009**, wherein the 1st claimant suffered cut wound on head, closed fracture of right humerus and open fracture of right lower leg. He was awarded MK5,600,000.00 for personal injuries. The award was made on 16th October, 2009 by Justice Kamwambe.

In view of these case authorities, it was therefore Counsel's submission that in the circumstances of this case, the reasonable compensation would be K10,500,000.00 for pain and suffering, loss of amenities of life and disfigurement.

ASSESSMENT

The evidence indicates that the Claimant sustained a fracture of the left ankle and bruises on the right and at the back. There is a Medical Report which was tendered as part of evidence to substantiate the said injuries marked as exhibit "CM2". Apparently, the claimant was cast on POP twice. It was also submitted that his leg has been shortened although this did not come out clear during cross-examination. The claimant could not substantiate the shortening and neither did he have a limp as he walked about when he was showing the court the injuries.

In making assessment, I have no doubt that the Claimant suffered severe pain warranting a substantial award under the head of pain and suffering by virtue of the fracture that he sustained. He suffered pain during the occurrence of the accident and had to battle with recuperation with a Plaster of Paris applied on his leg twice. Indeed, there is no evidence that he continues to suffer from symptomatology related to the injuries or attendant pain and discomfort, disablement, and risk associated therewith. I am aware of the lamentations that he cannot walk long distances but there is nothing indicating that he received further medical attention save for the said painkillers that he is being given by his mother. I believe if it was serious it could have compelled the parent to seek further medical attention. All the same, during recuperation, it goes without saying that the Claimant lost out on those amenities of life normally associated with the injuries as set out above. In particular, there was a severe restriction in the level of physical activities he was able to perform.

Turning to the issue of awards, Counsel representing the claimant has cited several cases for comparative purposes. The cases involve at least a fracture and other soft tissue injuries in some cases. However, none of the cases are specifically on the fracture of the left ankle. If anything, the court shall place reliance on the issue of guidance on the aspect of the fracture. Observably, the cases indicate awards in the region of K6,000,000.00. The court, however, takes into consideration that the latest of the cited cases was decided in the year 2018. The court does not lose sight of the passage of time and the devaluation of the Malawi Kwacha.

From the skeleton arguments, I have seen that counsel for the claimant has submitted that the appropriate quantum would be K10,500,000.00 as general damages. Much as I agree with the claimant's assertion that the value of the kwacha has greatly lost value for the past years, however the proposed quantum is on the higher side taking into consideration all the circumstances of the case, and awarding such would be, in my view, awarding the claimant with more than she actually lost and this will be unfair to the defendant and again contrary to the principle of *restitutio intergrum*. I strongly believe that K7,500,000.00 will adequately compensate the claimant for general damages.

Special damages

The claimant is also praying for K13,500.00 being special damages for the cost of obtaining a Police Report and a Medical Report. These being special damages they ought to have been strictly proved. In this case, there is no proof whatsoever that the Medical Report was paid for save for the Police Report which carries an endorsement that it was paid for and indicates a receipt was issued. I 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 Counsel in the light of the relevant and applicable law regarding damages for personal injuries that this court awards the claimant **K7,503,000.00** under all heads claimed and proved. The 2nd defendant's liability shall be limited to the insurance policy limit being K5,000,000.00 as per the consent order executed by the parties.

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 6TH DAY OF DECEMBER 2021



WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR