

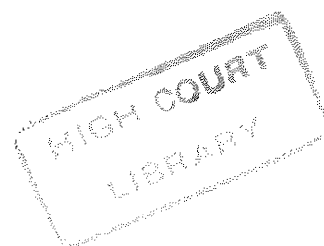


REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 945 OF 2015



**BETWEEN:**

ELINATA MAKOMBE.....CLAIMANT

**AND**

RICHARD NTHALA.....1<sup>ST</sup> DEFENDANT

ER BUS COMPANY.....2<sup>ND</sup> DEFENDANT

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

Mr. Mwabungulu- of Counsel for the Claimant

Mr. Amos- Court Clerk and Official Interpreter

**ORDER ON ASSESSMENT OF DAMAGES**

*INTRODUCTION*

The Claimant commenced this action against the Defendant claiming damages for pain and suffering, loss of amenities of life and costs of the action. Apparently, on 30<sup>th</sup> July, 2014 she boarded a bus travelling from Mzuzu to Blantyre via lakeshore. Upon arrival at Kanduli hills the driver of the aforesaid bus lost control and failed to negotiate a curve, causing the bus to swerve to the extreme offside of the road where it overturned and she suffered injury. She sued the 1<sup>st</sup> defendant as the driver of the said bus and the 2<sup>nd</sup> defendant as the owner of the bus. The record indicates that the matter was discontinued against the insurer of the said bus who was the 3<sup>rd</sup> defendant in view of the exhausted insurance policy limit. The issue of liability was settled in favour of the claimant through a judgment by Honourable Justice Tembo. 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 29<sup>th</sup> October 2021. The defendants did not avail themselves for the hearing albeit having been served with a notice of assessment. There being no excuse from the defendants the court proceeded to hear the claimant on assessment of damages. She was the sole witness for her 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, she sustained serious injuries which included a fracture and dislocation of cervical spine, cut wounds on left knee and both arms and weakness on both upper and lower extremities. She was taken to Mzuzu Central Hospital where she was treated. She was admitted for 3 weeks and a plaster of Paris was cast on her neck for 5 months. She exhibits a Medical Report marked “EM 2”;

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 and dislocation of cervical spine, cut wounds on left knee and both arms and weakness on both upper and lower extremities. 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:

- **Twaibu Mpinganjira vs Eniphant Tomato & Prime Insurance Company limited** Personal Injury Cause Number 206 of 2018, where the Plaintiff suffered a fractured distal radius on the left arm and fractured tibia on the right leg and bruises on the forehead and left leg. An award of **MK4,903,000.00** was made on 18<sup>th</sup> March 2019.

- **Vincent Kumbuyo v Prime Insurance Co Ltd Civil Cause No. 2027 of 2010** in which the plaintiff sustained a fracture on the right clavicle (shoulder), fracture of the left humerus (arm), fracture of the pelvis, fracture of the left tibia. He was awarded the sum of K3,500,000.00 on the 3<sup>rd</sup> of March 2011 for pain and suffering and loss of amenities of life.
- **Friday Mtelera versus Nenani Misolo and Prime Insurance Company Limited** Personal Injury Cause Number 530 of 2015 where the Plaintiff sustained a 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 on the left leg and a cut and bruises on the right elbow. The Plaintiff was also hospitalized for 27 days. This Court awarded the Plaintiff therein the sum of MK5,000,000.00 as damages for pain and suffering, loss of amenities and disfigurement.
- **Thomasi Matemba vs Richard Kalitendere and Britam Insurance Company Limited** Personal Injury Number 913 of 2016, in which the claimant sustained fracture of right tibia and fibula. The plaintiff was awarded the sum of MK 6, 000 000.00 for personal injuries. The award was made on 26<sup>th</sup> October 2017.
- **Zuze Bonjesi v Prime Insurance Company Limited** Civil Cause Number 488 of 2008 where the Plaintiff was awarded K7,000,000.00 as damages for pain and suffering and loss of amenities of life for a severe open fracture of the left tibia, massive wounds and cuts to the right leg.
- **Christina Mande v Charter Insurance Ltd Co.,** Personal Injury Cause No. 329 of 2016, in which the plaintiff sustained a fracture of the right femur, dislocation of the right hip joint, cut on head and lost consciousness on the spot of the accident. He also sustained a sprained right hand and a cut on the left hand. The court awarded him the sum of K6,300,000.00 as damages for pain and suffering and loss of amenities of life. The award was made on 11<sup>th</sup> January, 2017.
- **Rex Walala v Davison Chikuta and Prime Insurance Company Limited** High Court, Zomba District Registry, Personal Injury Cause Number 461 of 2011. The Plaintiff sustained an open fracture of the left tibia, bruises on the left arm and cuts on his face. This award was made on 20<sup>th</sup> March 2013 by the Assistant Registrar.

In view of these case authorities, it was therefore Counsel's submission that in the circumstances of this case, the reasonable compensation would be K10,000,000.00 for pain and suffering and loss of amenities of life.

## ASSESSMENT

The evidence is uncontroverted. The Claimant sustained a fracture and dislocation of cervical spine, cut wounds on left knee and both arms and weakness on both upper and lower extremities. There is a Medical Report which was tendered as part of evidence to substantiate the said injuries marked as exhibit "EM2". The Medical Report describes the injuries as very serious as they involve the spinal cord and the cervical cord. It is further stated that the claimant will take more than 5 years to start carrying heavy objects. She cannot participate in sporting activities and it will take long for her to resume doing household chores.

In making assessment, I have no doubt that the Claimant suffered severe pain warranting a substantial award under the head of pain and suffering. She was admitted for 3 weeks battling with recuperation and further to that she had to contend with a Plaster of Paris that was cast on her neck for 5 months. Indeed, there is no evidence that she continues to suffer from symptomatology related to her injuries or attendant pain and discomfort, disablement, and risk associated therewith. Nevertheless, this does not take away the fact that this was a life threatening injury which must be accorded the seriousness it deserves. The court also takes note that the Claimant was temporarily disabled during the period she was on Plaster of Paris. She could not carry heavy objects and the Medical Report indicates that the unfortunate condition would continue for more than five years. In my opinion, 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 she was able to perform for a protracted period.

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 alluding to fracture of the spinal cord and the cervical cord. If anything, the court shall place reliance on the issue of guidance on the aspect of the fracture. Observably, they all 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 2017. The court does not lose sight of the passage of time and the devaluation of the Malawi Kwacha. I strongly believe that K7,500,000.00 will adequately compensate the claimant for general damages.

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*.

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

DELIVERED IN CHAMBERS THIS 1<sup>ST</sup> DAY OF NOVEMBER 2021

  
**WYSON CHAMDIMBA NKHATA**

ASSISTANT REGISTRAR