

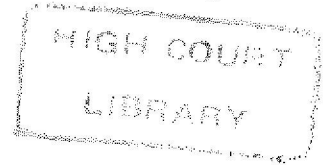


REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 907 OF 2019



**BETWEEN:**

THOMSON CHISENGA.....CLAIMANT

**AND**

ALLIE MUSTAFA..... 1<sup>st</sup> DEFENDANT

CHANGA KAUNDA.....2<sup>nd</sup> DEFENDANT

PRIME INSURANCE COMPANY LIMITED.....3<sup>rd</sup> DEFENDANT

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

Mr. T. Banda- of Counsel for the Claimant

Mr. G. Phiri – of Counsel for the Defendant

Ms. Chida- Court Clerk and Official Interpreter

**ORDER ON ASSESSMENT OF DAMAGES**

The claimant commenced these proceedings by writ of summons claiming damages for pain and suffering, loss of amenities of life, disfigurement, special damages and costs of this action. The Statement of Case indicates that the 3<sup>rd</sup> defendant was at all material times the insurer of motor vehicle registration number NB 4346 which was at all material times being driven by the 1<sup>st</sup> defendant. Apparently, the 2<sup>nd</sup> defendant was sued as the owner of the said motor vehicle. On the 24<sup>th</sup> November, 2018, the claimant was hit by the said motor vehicle as he was crossing the road at Ntafu Trading Centre along Chimwala-Mangochi road. Consequent to which, he suffered injuries. The issue of liability was settled through a consent order on

liability issued on the 22<sup>nd</sup> December, 2020. Subsequently, the matter came before this court for assessment of damages. This is the court's order on assessment of damages.

When the matter came for assessment of damages, the claimant was the sole witness for his case. He adopted his witness statement in which he averred that due to the impact he sustained severe head injuries, fracture on the right leg and bruises on both thighs and arms. He was initially at Mangochi District Hospital and he was transferred to Queen Elizabeth Central Hospital. He was admitted at QECH from the 26<sup>th</sup> November, 2018 and was discharged on the 16<sup>th</sup> January, 2019. He was unconscious for a week. He had to undergo a femur fracture operation and this was a painful operation and he developed a stiff knee and was unable to walk for seven months. He has also developed some numbness in the legs and whenever he walks a long distance he feels pain in the legs. He exhibits a Medical Report marked "TC1". Due to fractures in the legs, he used clutches for a year. During this period his mobility was restricted and he was not able to visit his friends, go to church and do so many other things that he was doing before the accident. As of now, he does not use clutches anymore but he walks with a limp as the left leg is now shorter than the right leg. He has scars on the forehead, right cheek, left cheek, right hand, right thigh, left thigh and on the waist. He was working for Mota Engil and was laid off because he cannot perform his work as a manual worker such being the case he is back in the village where he was. He further stated that he used to play football for Real Madrid Nancholi and now he can no longer do so. He added that he spent K3,000.00 to procure a Police Report and exhibits a receipt marked "TC2".

In cross-examination, he stated that he had not brought evidence to show that he has developed numbness, he has no proof he used to walk using crutches for a year and that he used to play football. There was no re-examination.

Such was the uncontroverted evidence on assessment of damages. I would like to thank counsel for the claimant for the guidance through his oral submission 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 generally provides that a person who suffers bodily injuries or losses due to the negligence of another is entitled to recover damages. The fundamental principle which underlines the whole law of damages is that the damages to be recovered must, in money terms, be no more and no less than the Plaintiff's actual loss. The principle was laid down in numerous case authorities more particularly by Lord Blackburn in the case of **Livingstone v. Rawyards Coal Company (1880) 4 AC 25** in the following terms:

where any injury or loss is to be compensated by damages, in settling a sum of money to be given as damages, you should as nearly as possible get at the sum of money which will put the party who has been injured, or who has suffered loss, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

Be that as it may, it ought to be borne in mind that it is not possible to quantify damages for pain and suffering, loss of amenities and deformity as claimed in this matter 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.

Firstly, in this case, the claimant is awarded damages for pain and suffering. Pain means the physical hurt or discomfort attributable to the injury itself or consequent upon it. It includes the pain caused by any medical treatment which the plaintiff might have to undergo. See **Sakonda v S. R. Nicholas** Civil Appeal Cause No. 67 of 2013. 'Suffering' on the other hand denotes the mental or emotional distress which the plaintiff may feel as a result of the injury. This includes but not limited to anxiety, worry, fear, torment and embarrassment. In **City of Blantyre v. Sagawa** [1993] 16 (1)MLR 67. 'pain' and 'suffering' were defined to suggest physical experience of pain caused by consequent upon the injury while "suffering" relates to the mental element of anxiety, fear, embarrassment and the like.

The claimant is also awarded damages for loss of amenities of life. In the case of **Kanyoni v Attorney General** [1990] 13 MLR 169, 171 the court held that loss of amenities of life must include the loss of all the things the claimant used to be able to do, see, and experience. Justice Mwaungulu (as he then was) in the case of **Mtika v. US Chagomerana t/a trans Usher (Zebra Transport)** [1997] 2 MLR 123, 126 explained that this head covers the loss caused by the injury in that the claimant will be unable to pursue the leisure and pleasures of life that he used to enjoy but for the injury.

Lastly, the claimant is claiming damages for 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.

The evidence adduced in this case, indicates that the injuries suffered by the claimant are severe head injuries, fracture on the right leg and bruises on both thighs and arms. Counsel for the claimant invites the court to consider the following cases with regard to damages for pain and suffering and deformity:

- **Davie Owen v Prime Insurance Company Limited** Personal Injury Cause No. 380 of 2015 in which the claimant sustained a fracture of the left distal femur and of the right tibia and fibula. An external fixator was applied on the right tibia and fibula. He also had cross K-wires applied on the left distal femur. The court awarded her the sum of K5,503,500.00 on the 25<sup>th</sup> of May 2018.
- **Joseph Chiyendawamba v Twande Mwangonde**, Civil Cause No. 394 of 2017, in which the court on 10<sup>th</sup> May, 2018 awarded the K6,000,000.00 for pain and suffering, loss of amenities and for disfigurement to the claimant who suffered two fracture of the left tibia and right fibula, cut wounds at the left elbow exposing joint and head injuries light nail put on left tibia. He was admitted from 8<sup>th</sup> to 29<sup>th</sup> of September, 2015.

Counsel for the claimant is of the view that the reasonable compensation would be K15,000,000.00 for pain and suffering, loss of amenities and for disfigurement. He submits that the injuries in this case are not too far from the cited cases.

In making assessment, I begin by pointing out that I had the opportunity to observe the aftermath of the injuries sustained by the claimant and his present physical condition. Having considered the nature and extent of the injuries suffered by the claimant, this court finds that he suffered considerable pain and suffering resulting from the accident and the treatment he received. Undoubtedly, he suffered discomfort, inconvenience and distress. The evidence indicates that during this period his mobility was restricted and he was not able to visit his friends, go to church and do so many other things that he was doing before the accident. As of now, he does not use clutches anymore but he walks with a limp as the left leg is now shorter than the right leg. He has scars on the forehead, right cheek, left cheek, right hand, right thigh, left thigh and on the waist. The defendants contend that he has failed to produce evidence that he used crutches for almost a year and that he suffered numbness. In my view, this does not take away the suffering he underwent during the injury, treatment and recuperation. Thus, upon a thorough consideration of facts and circumstances of this case, and upon an exhaustive consideration of the submissions by the claimant's

Counsel in the light of the relevant and applicable law regarding damages for the claimed heads herein, I award the claimant **K7,500,000.00** under all heads claimed and proved.

The claimant is further awarded costs for the assessment proceedings.

MADE IN CHAMBERS THIS 24<sup>TH</sup> DAY OF MAY, 2021

  
WYSON CHAMOTIRA NKHATA

ASSISTANT REGISTRAR