

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL CASE NO. 129 OF 2012

SISTI MARISHAY (suing as Next Friend

Of EMMANUEL DIDAS.....PLAINTIFF

VERSUS

- 1. THE BOARD OF TRUSTEE – MUHIMBILI
ORTHOPAEDIC INSTITUTE (MOI)...1ST DEFENDANT**
- 2. PERMANENT SECRETAR MINISTRY OF
HEALTH AND SOCIAL WELFARE.....2ND DEFENDANT**
- 3. ATTORNEY GENERAL.....3RD DEFENDANT✓**

JUDGMENT

MURUKE, J.

This is tortious matter, arising from medical negligence. The plaintiff Sisti Marshay, is suing the defendants as a next friend of Emmanuel Didas (victim), who was mentally and physically incapacitated as a result of negligence of the medical practitioners of the 1st Defendant, Muhimbili Orthopedic Institute, commonly known as **MOI**.

On 26th October 2007, the victim was involved in a road accident while riding a motorcycle at Morocco area, along Bagamoyo road, Dar es Salaam. He was rushed to the first defendant to which he was admitted. After X-ray, he was diagnosed to have broken muscled tendon of his patella. He was scheduled for operation of the swollen knee to remove blood clot. On 1st November, 2007 the victim was operated on the head instead of the leg, following 1st defendant nurse mixing files of **Emmanuel Didas** and another patient **Emmanuel Mgaya**. The Later was to be operated on his head but was operated on his leg.

As a result of the professional negligence, in question, the victims relatives wrote letter dated 2nd November 2007, a day after the unwanted operation, to the first defendant, requesting for official report of the victim's treatment. The first defendant replied the letter on 5th November 2007, assuring the relatives that, the matter was being handled by the first defendant's management on the directives of the Board of Trustee, and that, they would be availed with the report as soon as necessary details were ready.

Pursuant to the complained professional surgery, the first defendant formed a commission to investigate on the circumstances that led to the mixed surgeries of **Emmanued Didas** and **Emmanuel Mgaya**. A report was submitted to the

Minister responsible for health and social welfare. The plaintiff was interviewed in the course of the investigation. The findings of the inquiry submitted to the Minister did not avail satisfactory information, thus, a new independent probe team chaired by Professor William Mhalu, a neurosurgeon from Bugando Hospital, Mwanza was formed. The new probe team came up with a finding that, MOI medical practioners flouted professional procedures while performing their duties.

On 23rd November, 2007, the Minister for health and social welfare called press conference over the fatal twin operations of **Emmanuel Didas** and **Emmanuel Mgaya**. The Minister assured the public that the matter was being looked into seriously and that, the victims of the tragedy would be properly managed in India. Subsequent to the press release, the victims were referred to Indraprastha Apollo Hospitals in India for expert remedial management.

After treatment in India, Emmanuel Didas improved, but Emmanuel Mgaya died. Emmanuel Didas came back and remained at MOI for treatment and physiotherapy, until 2009 when he was discharged. The efforts to have the matter settled amicably failed, hence the suit.

In the instant suit the plaintiff claim for general damages of T.shs. 950,000 as follows:-

- (i) T.sh 9,125,000 being annual loss of income as on November 2009 and subsequent there after T.sh. 25,000 per day to the date of judgment.
- (ii) T.sh. 150,000 per month with effect from October 2010 to the date of judgment as pleaded at paragraph 19 of the plaint.
- (iii) Interest at court rate of 7% from the date of judgment, and costs of the suit.

On being served, the defendants refuted plaintiff's allegations, contending that Mr. Emmanuel Didas is physically and mentally fit, discharging his official duties in the employment of the first defendant. The defendants further averred that the plaintiff is not entitled to any compensation whatsoever because there is no physical nor mental deformity on his part. It was further stated that, plaintiff is a pensionable employee of the defendants and he cannot suffer any damages as a result of the said operation.

On the basis of the pleadings, the court with consultation of the parties endorsed three issues for determination, namely:-

- (i) Whether there was a professional negligence on the part of the first defendant as against the plaintiff.**
- (ii) If the answer to issue number one is in the affirmative, whether the plaintiff suffered any injuries there from.**
- (iii) To what relief are the parties entitled.**

On the hearing date, the plaintiff was represented by Cornelius Kariwa and Frank Killian of Kariwa & Co advocates at different times, while the defendants were represented by Benson Hosea learned State Attorney from the Attorney General Chambers. Plaintiff side paraded two witness, namely Sisty Marishay and Emmanuel Didas Marishay (the victim), who both tendered five exhibits in total. Defendants had one witness Mr. Aidan Omari Kipepe, an administrative officer of the first defendant, who tendered two exhibits.

Having summarized the pleadings it is now time to resolve the framed issue:-

Issue number one, whether, there was a professional negligence on the part of the first defendant as against the plaintiff. The answer to the issue is directly found on the

evidence of **PW1 Sisty Marishay** and **DW 1 Aidan Omari Kipepe** who both testified that there were professional negligence of the first defendant officers, who exchanged the file of Emanuel Didas with Emmanuel Mgaya. DW1 the only witness for the first defendant, told this court that what happened is human error. While being cross examined by Mr Frank Killian, counsel for the plaintiff, DW1 replied.

What happened is that, there were two patients with the same first name. Emmanuel Didas and Emmanued Mgaya. There was exchange of hospital documents. Document related to Emmanuel Mgaya was given to Emmanuel Didas, and those of Emmanuel Didas, were given to Emmanuel Mgaya. The problem was caused by nurses. It is very unfortunate that this happened. It is human error, nobody intended. Emmanuel Didas was operated on the head instead of Leg. While Emmanuel Mgaya was operated on the leg instead of the head. Emmanuel Mgaya was also taken to India for operation of his head, but the problem was too big. He died after operation. Emmanuel Didas, came back from India and was admitted at MOI for further observation administration of medicine and mostly for

physical exercises. All costs were covered by the Government. None of the relative paid any cost. After recovery, Emmanuel Didas was discharge from Hospital and stayed in the house at Muhimbili until 2009 when he was employed by the hospital. He then shifted, and he now resides outside the Muhimbili Hospital. He works in the workshop and he looks happy and he is doing very fine.

More answer to the issue is found in exhibit P4 which read as follows:

Re: Medical report for Emmanuel Didas Reg. No. B0013164/20yrs.

The above named was operated upon in a mistaken identity situation whereby he was mistaken to be suffering from large left laberal ventricular ependymona that crossed the midline. A left front parietal craniotomy was carried out and the left lateral ventricle opened. No Turmour was found but in view of the CT findings biopsies were taken from several locations. Later it was realized that this was the wrong patient. Post Operatively he developed right hemiplegia and aphasia. We are recommending referral abroad for neuropsychologic treatment and for speech therapy as he has shown some evidence of return of speech.

Dr. ADA Kinasha consultant Neurosurgeon

Exhibit P4 is clear with no ambiguity at all. The letter is written by first defendant Neurosurgeon consultant. In the letter, Emmanuel Didas was referred for further treatment in India. Such evidence has not been contradicted by defence witness. Having on records the evidence of PW1, PW2 and DW1, together with Exhibit P4, there is no doubt that, there was professional negligence on the part of first defendant in the course of treating Emmanuel Didas the (victim). **Thus, I have no hesitation to answer first issue in the affirmative.**

On the second issue as to whether, **the plaintiff suffered any damage there from**, issue number two as to whether, Emmanuel Didas Suffered any injuries, as the result of first defendant practitioners negligence, evidence is glaring.

According to the evidence of PW1 Sisty Marishay, **DW1 Aidan Omari Kipepe**, and in terms of exhibit **P4** and **P5**, Emmanuel Didas was operated at Muhimbili on 1st November 2007, and admitted to Indraprastha Appolo Hospital on 2nd December 2007. He was discharged on 12 January 2008 from Appolo and came back to MOI for administration of medicine and physiotherapy.

According to exhibit P5, a discharge Summary from Apolo hospital, assessment was done as follows.

At discharge he is conscious, oriented, verbalizing well, moving all four limbs, right. UL proximal 3+/5, distal 3/5 and right lower limb 3 + /5 and is haemodynamically stable.

According to exhibit P2 letter dated 28 July, 2008 from Executive Director Muhimbili Orthopedic Institute reference number CAB.145/165/01A/36, directed to Sisti Marshay (plaintiff) Emmanuel Didas was to be discharged from that date. Emmanuel, Didas (victim) was hospitalized for all this period.

Not only exhibit P5 but also exhibit P4 in particular part read as follows:

"Post operatively he developed right hemiplegia and Aphosia. We are recommending referrals abroad for neuropsychologic treatment and for speech therapy as he has shown some evidence of return of speech."

From exhibit P4, report written by 1st defendant, senior officer, Emmanuel Didas after operation had serious problems. He lost speech and he was unconscious. PW2 testified that after being

operated on 1st November 2007 he gained conscious while in India, admitted on 2nd December 2007.

Furthermore PW2 on injuries testified as follows:

All these started after operation of my head which was uncalled for. I cannot do my routine work, as used to do. I cannot even take bath on my own. My young brother has to assist me. I cannot wash my cloth, I cannot cook. I need assistance all the time. I have serious problem of paralysis on my right side. The whole of right side of my body is not functioning properly, because of paralysis. It is too heavy to carry.

This court had an advantage of seeing PW2 testifying, while in the following condition:- **One**, Speaking with difficulties. **Two**, could not connect long sentence. **Three**, he could speak fluent for more than 30 seconds. **Four**, he could sit upright. **Five**, While seating he inclined on the right side is paralyzed. **Six**, he could work properly. **Seven**, he has left leaping leg following being operated late due to mixed surgeries. **Eight**, he cannot handle his body fully, **Nine**, he seats in unbalanced position. **Ten**, he is shaking on the left leg as he speaks. From the evidence of **PW1, PW2** and in terms of **exhibit P4** and **P5** on the court records, There is no doubt that the victim suffered

serious injuries. Thus, issue number two is answered in the affirmative. This takes me to the third issue to what relief are the parties entitled.

Before I proceed on the right of the parties, I deem it necessary to explain in details types of damage in personal injury claims. The victim of a personal injury is entitled to two types of damage. These are **Pecuniary and Non-pecuniary damages.**

PECUNIARY DAMAGE

Pecuniary loss to which the claimant is entitled to damages is what may be termed direct financial loss occasioned to the claimant by the injury suffered. The damage for pecuniary loss is awarded to the claimant to compensate him for the damage suffered so as to restore him to the position in which he was before the injury. Pecuniary damage is awarded for the following:-

- (i) Medical expenses.**
- (ii) Loss of earnings, past or future loss.**
- (iii) Cost of future nursing and medical cares.**
- (iv) Cost of domestic help.**

- (v) Costs of necessary utilities**
- (vi) Loss of a profitable hobby.**
- (vii) Loss of value of the use of company car.**
- (viii) Cost of suitable accommodation or alteration to accommodation.**
- (ix) Cost of necessary utilities such as telephone or car for emergencies.**

It is important to discuss in a little more detail the assessment of damages under each of these heads in order to understand how our courts have applied the principles.

(i) Medical Expenses

Medical expenses incurred by the claimant up to the time of trial are compensable. Only reasonable expenses directly resulting from the injury can be recovered. These are claimed as special damages and must be proved specifically.

(ii) Loss of earnings

The claimants' loss of earnings as a result of his impairment may be categorized as current or actual loss. It is rather straight forward and presents little difficulty compared with the assessment of prospective or future loss.

(iii) Current Pecuniary Loss or Lost Earnings

Loss of earnings up to the time of trial usually is treated as special damages and must be proved specifically. Parties often agree by consent to the damage payable upon satisfactory proof. The claimants regular income which is ascertainable is calculated for the whole period of loss up to the time of trial. For example, if the claimant has lost his regular monthly earnings in the sum of T.shs.200,000 per months, for a period of 20 months, the actual or current loss of earning will be T.shs 200,000x20. Which is T.shs 4,000,000. Loss in overtime payments or allowances which can be ascertained, may be recovered in the same way. The objective of this award is to provide the claimant with the equivalent income he would have received for the period during which he was unable to earn due to the tortious act of the Defendant.

(iv) Prospective or Future Loss

Assessing the prospective or future pecuniary loss of a claimant is rather complicated. Where the claimant's injuries have resulted into far reaching disability and is likely to result into loss of future

earnings, the damage must be assessed to compensate the claimant for such a pecuniary loss.

(v) Lost Years'

The principle of lost years' in personal injury claims relate to claims for compensation for pecuniary loss where the claimants working life expectancy has been reduced by the injuries suffered resulting into prospective loss of earnings. The damage for lost years, is awarded for the whole pre-accident working life expectancy. The principles of assessing damages for the lost years was laid by the English decision of **Pickett v British Rail Engineering Ltd. (1980) A.C. 136.** Pickett brought action of damages for personal injuries he suffered in an accident. Before the case could be decided, he died of other causes and the award for lost years was made of the benefit of his estate. The principle laid down in this case is that a living plaintiff was entitled to damages for the lost years i.e., where his life expectancy has been reduced by injuries suffered resulting into loss of earnings. **The court of Appeal of Kenya in Zablon W. Mariga & Another V Morris Wambua Musila C.A. No 66 of 1982** approved the principles in the Picketts case and held that, it was applicable in Kenya as well. The claim for lost years in respect of a living plaintiff is

calculated in the same way as that of lost years for a deceased, under fatal accident. The multiplicand and multiplier formula is used in obtaining the lost income. The starting point in calculating the lost years is the ascertainment of the plaintiffs income at the time of accident which is applied against the multiplier which is the working life expectancy.

(vi) Loss of Earning Capacity.

Another aspect of damages for pecuniary loss that is important is damages for loss of **earning capacity**. Damages may be awarded to a Plaintiff who has not suffered any current actual loss of earnings but whose capacity to obtain the same remuneration in a competitive open market has been compromised by his physical handicap arising from the injuries suffered. The damages awarded in this type of cases is meant to compensate the plaintiff for the risk of future economic loss likely to result owing in the plaintiffs physical or mental handicap. It should be borne in mind that, in assessing this kind of damage, the multiplier/multiplicand formula cannot be used since the plaintiff is not suffering any current loss. The plaintiff's loss must be assessed on the probability of his loss owing to his handicap in the labour market. In the English

decision of Moeliker v. Al Reynolds and Co. Ltd. [1977], ALL E.R. 9 as follows:-

“in assessing damages under this head, the judge has to engage in a double speculation to measure, first, the plaintiffs chances of losing his job and then his chances, if he loses it, of getting other employment. He must turn his assessment of the two risks into a suitable number of pounds sterling “plucked from the air”.

Damages for loss of earning capacity is commonly awarded in respect of children or youths who have no actual earnings or current loss at the time of injury. The measure of damage in cases of loss of earning capacity is to award a global figure and this depends on the circumstances of each particular case.

(vii) Cost of future nursing and medical cares.

The Plaintiffs' future medical and nursing needs are established by medical evidence. Medical expenses in the cost of necessary medical equipment such as the cost of a wheel chair, cost of disposable used by paraplegic patients may be awarded to the plaintiff. Expert evidence must be produced to establish the current market cost of such equipment. The need for

professional nursing as opposed to help in house work is recommended in case of severe and grossly incapacitating injury such as paraplegia. The cost of future medical and nursing care is calculated, by applying the multiplier or period the plaintiff is expected to live. It is important to point out here, that it is only possible to prove that the plaintiff requires this nursing care if such care has been provided from the time of injury up to the date of trial.

In assessing damages for nursing care, the value of gratuitous help; rendered by relatives or well-wishers to the plaintiff will be taken into account. If a relative or family member gives up his employment or business in order to provide nursing care to a plaintiff, the measure of damage will be loss of earnings as a result of giving up his employment. Alternatively, the court on being satisfied of the loss, may make such a global award to the plaintiff so as to enable him to compensate the relative for the loss he has incurred in nursing him.

(viii) Cost of Domestic Help

Where the plaintiffs injuries are so severe as to result into incapacitation, that would require the help of a domestic

servant. The cost of such a service can be recovered in damages.

(ix) Cost of necessary utilities.

In some extreme case where the plaintiff's condition necessitates the use of additional utilities and facilities for emergencies such as a care other transport and installation of telephone, the court will award damages for such additional expenses.

(x) Loss of a Profitable Hobby

Where the plaintiff has lost or is unable to pursue a profitable hobby due to his injuries, he is entitled to compensation for such loss. It is important in such a situation, for the plaintiff to prove specifically his loss.

(xi) Loss of the Use of a Company Car

A plaintiff who has had the private use of a company car or car allowance prior to the accident may claim for damages for loss of the value of use of the car if he has been deprived of the use of such facility as a result of the accident. The value of the use of a private company car may be assessed by calling an expert to establish the cost of running a car of a similar cubic capacity. Courts often use a national figure to fix the value of

the use of a company car. Where plaintiff received a cash value for car allowance, he is entitled to damages for this loss. The plaintiff will be awarded the value of the car allowance he received prior to the accident which he had lost. A claimants' condition may also necessitate adaptation of his car to, for example, have automatic gears to suit his condition.

(xii) Cost of suitable Accommodation or Modification

In severe injury cases such as paraplegic victims, the need for new accommodation or modifications relevant to the conditions of the victim will attract an award in general damages to compensate the victim for the cost of such accommodation or modifications. In George vs Pinnock [1973] W.L.R. 118, it was held that, a badly disabled plaintiff might require specially constructed or modified accommodation and a whole range of appliances to make his life more tolerable. Architects and Surveyors may be called to assess the needs of such a victim and recommend the necessary modification or construction including its probable cost. This often involves modifications to doors, toilets and baths to suit the condition of the victim.

The pertinent issue is **whether the defendant should** be held liable to the full extent of the damage suffered by the plaintiff

where the injury was caused by someone or other incident altogether, but the plaintiff's condition has been worsened by negligence or act of the doctor who managed him. In one of the classical Kenyan cases in this subject, Justice T. Mbaluto in **ANNICE KHARIM v. DR EMURWORN & OTHERS MSA. H. C.C.C.** No. 456 of 1992 awarded the plaintiff general damages for pain and suffering in the sum of KShs. 2,850,469. The plaintiff sustained a fracture of the C7 cervical vertebra and paralysis in a road accident. She was immediately rushed to hospital for treatment and in order to determine the extent of her injuries. She had to undergo an X-ray test. The consultant radiologist (the first defendant) did not detect any fracture. The plaintiff was then flown to Nairobi where an emergency operation was done based on the X-ray reports by the first and second defendants. There was no improvement in the plaintiff's condition. Another x-ray was done where the fracture of the C7 was at last discovered. The injury was so extensive, with the fractured bone protruding in the spinal cord hence the paralysis to which the plaintiff was subjected.

According the evidence adduced at the trial, if the fracture had been detected during the first x-ray taken in Mombasa, the plaintiff would have been operated upon immediately and that

flying her to Nairobi was a further risk. The first operation carried out in Nairobi was also unnecessary if the surgeon had diagnosed the fracture, which he didn't. Due to the wrong diagnosis and negligent management the plaintiff's condition worsened hence the court held the defendants liable in damages for pain and suffering. The decision seems to suggest that even where the injury to the claimant was caused by some other accident, medical mismanagement could attract damages where the claimant's condition is worsened by the treatment given by the doctor.

According to the evidence of **PW2** which has not been contradicted by defence witness, it is crystal clear that, the plaintiff is a person of impaired movement, impaired speech in that he cannot connect his statement quickly. His right hand and leg are paralyzed. Right head side has been affected too. He cannot seat up right for long tended to lean. He line on the right side that was operated. The leg has been operated late following the confusion that resulted from mixed surgery. The only leg to assist the victim is the leaping leg. In totality, he is a person of impaired health. He cannot do normal routine work with his two legs. He cannot engage himself in his former work of motorcycle

repair. He cannot do any works that need his physical involvement.

From 1st November 2007 when the victim was wrongly operated, to 24 August 2009 when employed by 1st defendant it is a period of 21 months. All these period, the plaintiff was not working. Before the accident, he was motorcycle repairer, that is the reason of being employed as office attendant in the workshop of the 1st defendant. Before the accident, PW2 Emmanuel Didas told this court that, he was getting between 15,000 – 25,000 T.sh. per day without any proof. Defendants did not dispute that, he was motor cycle repair. For 21 months Emmanuel Didas did not earn anything. He lost the opportunity of earning following 1st defendant's employee's act. He is thus, entitled for special damages for the income he lost in 21 months. I will therefore base income of Emmanuel Didas on salary scale of Low earner in terms of Government Secular No. 2 of 2007 Ref. Number C/AC.46/205/01/100 dated 9th July 2007 as basis of computation.

	FROM	TO	SALARY RATE	INCREMENT	TOTAL SALARY	NO. OF MONTH	TOTAL
1	Nov-07	Jun-08	80,760	0	80,760	8	646,080
2	Jul-08	Jun-09	80,760	1,910	82,670	12	992,040

3	Jul-09	Aug-09	82,670	1,910	84,580	1	84,580
GRAND TOTAL						21	1,076,620

From 01/11/2007 - 24/08/2009 = 21 months
Total salary = 1,076,620 T.shs.

The amount of 1,076,620 T.shs is amount of money that the victim lost while hospitalized. Thus plaintiff is awarded 1,076,620 T.shs as loss of earning for 21 months while hospitalized.

According to the evidence of PW1 PW2, and DW1, the victim did not pay anything in terms of medical expenses. In terms of exhibit D2, the victim being employee of 1st defendant, he is entitled to free hospital treatment at appropriate grade. DW1 told this court that, Emmanuel Didas has health Insurance Card, that guarantees him to be treated at MOI hospital, the fact that was admitted by PW1 and PW2. Thus, he is not entitled for costs of future nursing, and medical cares.

According to the evidence of PW1 and PW2 which has not been contradicted by defence evidence, is that, Emmanuel Didas cannot live on his own. He testified that:-

All these started after operation of my head which was uncalled for. I cannot do my routine work, as used to do. I cannot even take bath on my own. My young brother has to assist me. I cannot wash my cloth, I cannot cook. I need assistance all the time. I have serious problem of paralysis on my right side. The whole of right side of my body is not functioning properly, because of paralysis. It is too heavy to carry.

From the evidence of PW2 above, Emmanuel Didas is the person that needs an assistant for his daily life while at home. Therefore he is entitled for the costs of domestic help. The current minimum wage salary, for domestic worker is T.shs 265,000/=. According to exhibit P2, latter dated 28 July 2008, when Emmanuel Didas was discharged was only 20 years. Time to retire compulsory is 60 years.

Time to retire 60yrs.

At discharge victim was20yrs.

Time before retirement is60 – 20 = 40yrs.

Salary x (years)

Minimum salary: 265,000/= x 40 years. = 10,600,000.T.sh.

There is 40yrs difference in which victim needs to be compensated for cost of domestic help.

Thus, in total I award, the victim Emmanuel Didas pecuniary damage as follows:-

- (a) **1,076,620 loss of earning for 21 months when hospitalized to the time when employed.**
- (b) **Costs of domestic help for 40 years that remained, before retirement, $40 \times 265,000 = 10,600,000$ T.shs.**

Total pecuniary damage is 11,676,620 T.shs.

Before proceeding with award of none pecuniary damage, I wish to visit several authorities under lying the principles.

NON PECUNIARY DAMAGE

None-pecuniary damage differs from pecuniary damage in the sense that there is no significant method of deciding what sum of money should be awarded as in pecuniary damages. This head of damage is awarded for pain and suffering and loss of amenities suffered by the plaintiff. The sum of money awarded by the court is what represents a reasonable compensation and such sum is awarded in a lump sum.

Damages for non-pecuniary lose are assessed by courts continuously due to the incidence of the fall of the value of money and inflation. The courts use previous decided cases for

similar injuries as a guide in arriving at a reasonable compensation. While no case of personal injury is exactly the same as the other, reference to previous decisions provides a systematic way of assessment based on the Common Law System of Judicial precedence. In the English decision of **Birkett v Hayes (1982) 2 All E.R. 710** the Court of Appeal in England held that the fall in value of money leads to a continuous assessment of these awards.

There are certain fundamental factors to consider in assessing damage for non-pecuniary loss. Lord Cockburn C.J. in **Philips v London and South Western Railway Company Ltd. 4 O.B.D. 406** enumerated the factors, as "these are the bodily injury sustained, the pain undergone, the effect on the health of the sufferer according to it's degree and probable duration as likely to be temporary to permanent, the expenses incidental to attempts to effect a cure or to lessen the amount."

Further, in **Rose v Ford (1937) A.C. 826 Lord Roche said.** In regard impaired health and vitality not merely as a cause of pain and suffering but as a loss of a good thing in itself. If a plaintiff has lost a leg., the court approaches the matter on the basis that he has suffered a serious physical deprivation no matter what his

condition or temperament or state of mind may be, past and prospective pain and discomfort increases the assessment....

Non pecuniary loss can be classified into two, as follows:-

(a) Pain and suffering

(b) Loss of amenities

Pain and suffering.

Damages for pain and suffering are awarded for the pain and suffering actual or prospects where the victim has been subjected to or may continue to suffer in his lifetime. This is assessed by looking at the severity of the injury suffered, the extent of recuperation or hospitalization and medical treatment undergone such as surgical operations undergone and to be undergone. The long term effect of the injuries on the plaintiff which is referred to as loss of expectation of life is also taken into account. This is the effect of injury on the plaintiff's expectation of a happy and normal life. These are cases where injury has drastically shortened the plaintiff life.

(b) Loss of Amenities

Damages for loss of amenities are awarded to a plaintiff for loss of ability to enjoy life to the full. This is the loss of bodily function and deprivation. These include deprivation such as;

- (i) Loss of sexual pleasure**
- (ii) Inability to walk**
- (iii) Inability to dance**
- (iv) Inability drive or ride a motor bike.**
- (v) Inability to read.**
- (vi) Inability to see or hear.**
- (vii) Inability to talk or the loss of speech power.**
- (viii) Facial disfigurement constituting cosmetic distress and social embarrassment.**
- (ix) Inability to pursue a sport or hobby once cherished by the plaintiff.**
- (x) Loss of consortium and *servitum*.**

Despite many pronouncement in the field, worldwide it still remains a challenging situation warranting sensitive as well as dispassionate exercise how to determine the incalculable sum in calculable terms of money in cases of personal injuries. In such assessment, neither sentiments nor emotions have any role. It has been stated in **Davies v. Powell Duffryn Associate**

Collieries Ltd 1942, AC, 601 that it is a matter of Pounds, shillings and Pence. There cannot be actual compensation for anguish of the heart or for mental tribulations. The quintessentially lies in the pragmatic computation of the loss sustained which has to be in the realm of realistic approximation. Therefore, court stipulates that there should be grant of "**just compensation**". Thus, it becomes a challenge for a court of law to determine "just compensation" which is neither a **bonanza** nor, **kidalipoo** and simultaneously, should not be a **Makida** play.

In **Jai Bhagwan v. Laxman Singh and others**, [1994] 5, SCC5 a three Judge Bench of India, while considering the assessment of damages in personal-injury-actions, reproduced the following passage from the decision by the House of Lords in **H. West & Son, Ltd v. Shephard**. [1963] 2 All ER 625.

The damages which are to be awarded for a tort are those which 'so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act and for all the natural and direct consequences of the wrongful act. The words 'so far as money can compensate' point to the impossibility of equating money with human suffering or personal deprivations. A money award can be calculated so as to make good a

financial loss. Money may be awarded so that something tangible may be procured to replace something else of like nature which has been destroyed or lost. But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common assent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.

In the said case reference was made to a passage from **Clerk and Lindsell on Torts** (16th Edsn.) which is apposite to reproduce as it relates to the awards for non-pecuniary losses:-

"In all but a few exceptional cases the victim of personal injury suffers two distinct kinds of damage which may be classed respectively as pecuniary and non-pecuniary. By pecuniary damage is meant that which is susceptible of direct translation into money terms and includes such matters as loss of earnings actual and prospective, and out-of-pocket expenses, while non-pecuniary damage includes such immeasurable elements as pain and suffering and loss of amenity or enjoyment of life. In

respect of the former, it is submitted, the court should and usually does seek to achieve restitution in integrum in the sense described above, while for the latter it seeks to award 'fair compensation'. This distinction between pecuniary and non-pecuniary damage by no means corresponds to the traditional pleading distinction between 'special' and 'general' damages, for while the former is necessarily concerned solely with pecuniary losses – notably accrued loss of earnings and out-of-pocket expenses – the latter comprises not only non-pecuniary losses but also prospective loss of earnings and other future pecuniary damage”.

In this regard, observations of Lord Denning M.R. in **Lim Poh Choo v. Camden and Islington Area Health Authority** (1979) 1 All ER 332 read thus:-

"The practice is now established and cannot be gainsaid that, in personal injury cases, the award of damages is assessed under four main heads; first, special damages in the shape of money actually expended; second, cost of future nursing and attendance and medical expenses; third, pain and suffering and loss of amenities; fourth, loss of future earnings”.

While having respect for the conventional determination, there has been evolution of a pattern, from time to time, has been kept in accord with the changes in the value of money. Therefore, in

the case of **Word v. James' (1965) 1 All ER 863** it has been expressed thus:-

"Although you cannot give a man so gravely injured much for his 'lost years', you can, however, compensate him for his loss during his shortened span, that is, during his expected 'years of survival'. You can compensate him for his loss of earnings during that time, and for the cost of treatment, nursing and attendance. But how can you compensate him for being rendered a helpless invalid? He may, owing to brain injury, be rendered unconscious for the rest of his days, or, owing to a back injury, be unable to rise from his bed. He has lost everything that makes life worthwhile. Money is no good to him. Yet judges and juries have to do the best they can and give him what they think is fair. No wonder they find it well nigh insoluble. They are being asked to calculate the incalculable. The figure is bound to be for the most part a conventional sum. The judges have worked out a pattern, and they keep it in line with the changes in the value of money".

While assessing the damages, there is a command to exclude considerations which are in the realm of speculation or fancy though some guess work or some conjecture to a limited extent is inevitable. Thus, some guess work, some hypothetical considerations and some sympathy come into play but, a significant one, the ultimate determination is to be viewed with

some objective standards. To elaborate, neither a tribunal nor a court can take a flight in fancy and award an exorbitant sum, for the concept of conventional sum, fall of money value and reasonableness are to be kept in view. Conceptual eventuality "just compensation" plays a dominant role.

The conception of "just compensation" is fundamentally concretized on certain well established principles and accepted legal parameters as well as principles of equity and good conscience. In **Yadav Kumar v. Divisional Manager, National insurance Company Limited and another, (2010) 10 SCC 341** a two-Judge Bench, while dealing with the facet of "just compensation" has stated thus:-

"It goes without saying that in matters of determination of compensation both the tribunal and the court are statutorily charged with a responsibility of fixing a "just compensation". It is obviously true that determination of just compensation cannot be equated to a bonanza. At the same time the concept of "just compensation" obviously suggest application of fair and equitable principles and a reasonable approach on the part of the tribunals and the courts. This reasonableness on the part of the tribunal and the court must be on a large peripheral filed".

In **Concord of India Insurance Co. Ltd v. Nirmala Devi (1979 4 SCC 369)** the court has expressed thus:-

"The determination of the quantum must be liberal, not niggardly since the law values life and limb in free country in generous scales.

In **Mrs. Helen C. Rebello and others v. Maharashtra State Road Transport Corpn. And another, AIR 1998 SC 3191** while dealing with concept of "just compensation", it was ruled that the word 'just' as its nomenclature, denotes equitability, fairness and reasonableness having large peripheral field. The largeness is, of course, not arbitrary; it is restricted by the conscience which is fair, reasonable and equitable; if it exceeds, it is termed as unfair, un reasonable, inequitable, not just. The field of wider discretion of the tribunal has to be within the said limitations. It is required to make an award determining the amount of compensation which in turn appears to be "just and reasonable", for compensation for loss of limbs or life can hardly be weighed in golden scales as stated in **State of Haryana Jasbir Kaaur and others** (2003) 7 SCC 484.

The issue of whether, Emmanuel Didas is entitled to non-pecuniary damage can be determined from the un contradicted

evidence of the victim, Emmanuel Didas PW2. His evidence flows as here under:-

I went to Muhimbili hospital I found my brother Sisty Marishay alone. He paid Taxi fare I was hospitalized. After the X-ray of my leg I was told that my leg needed operation on my knee. I stayed three days then I was operated. My brother Sisty Marishay was present at Muhimbili but he did not enter operation room. I did not know what happened until I found myself at India hospitalized. When I woke up I saw my brother Sisty Marshay. I asked my brother what happened, he was not telling me anything. He was telling me just relax I will tell you. After my recovery, then he explained to me the whole episode. At India, I was sleeping most of the time. I could not walk properly. I came back from India and stayed at MOI hospital for one year. Then they shifted me to another room nearby MOI, I stayed there for one year. They were giving me medicine and food. After the operation of the head I am now having following problems.

- (i) Severe headache all the time.**
- (ii) My right hand is paralyzed.**

- (iii) My right leg is paralyzed.**
- (iv) I work with difficulties all the time.**
- (v) I cannot speak for long time and fast, as I used to do.**
- (vi) After every two or three months I always get severe swelling of my head, on my right side.**

All these started after operation of my head which was uncalled for. I cannot do my routine work, as used to do.

- (vii) I cannot even take bath on my own. My young brother has to assist me.**
- (viii) I cannot wash my cloth, I cannot cook. I need assistance all the time. I have serious problem of paralysis on my right side. The whole of right side of my body is not functioning properly, because of paralysis. It is too heavy to carry. I wanted to marry but I cannot. Once I approach girls they don't accept me. They look at me for some minutes and then refuse. I feel very bad. They tell me that, I am sick they don't want to get married to me. I have serious problem of thinking my life after accident and operations. I cannot get fiancé to Marry. They refuse me openly. It is very painful.**

My life has changed very much. I feel very bad, that I am now useless person.

While being cross examined by Mr. Benson Hosea, State Attorney for the defendants he replied:-

I stayed at MOI hospital for more than two years. I was being treated and given food for free. Life was too official. Later, I shifted to Ilala, then to Buguruni. Life has changed. It is difficult to live alone. I must live with a person to assist me. I live with my young brother. In the past I tried to pay for maid. It is too expensive. I now work with MOI hospital. I took loan of 3,200 T.shs. I pay 110,000 from my salary. I bought motor cycle. I use it to come to work, with a driver. Then I go home alone. The Drive brings 5,500 per day. I left MOI 3 years ago or more I cannot remember well. Sometimes I forgot when I left there, but MOI officers know when I left. At MOI, I am at workshop as office attendant.

From the evidence above of PW2, the victim is complaining being refused by the girls he approaches to Marry. He is complaining of missing the enjoyment of all the incidence that flows from the relationship. It is worth insisting that

Consortium is an important amenity which spouses enjoy by virtue of the marriage relationship. The term consortium means living together as husband and wife with the enjoyment of all the incidence that flows from the relationship. This necessarily involves living together in a common matrimonial home and leading a common domestic life. Lord Reid in **Best v Samuel Fox and Co. Ltd. (1952) A.C. 719** defines it thus: "Consortium resemble ownership, for husband and wife enjoy a bundle of rights some hardly capable of precise definition".

When the right of a spouse to enjoy the consortium of the other is interfered with by a tortious act of another, a cause of action lies for damages against the tortfeasor by the spouse who has suffered damage. This principle of law was enunciated in **Oaklev v Waker (1977) 121 SOL J.619.** The plaintiff's wife deserted him because of a change in personality due to an accident caused by the defendant's negligence. It was held that this was a foreseeable consequence of the defendant's act.

In the Kenyan case of **Esther Awuor v Nairobi Bus Union Ltd NBI H.C.C.C. NO. 7354 PF 1984.** The plaintiffs husband who brought a separate action for damages for loss of Consortium was awarded Kshs.60,000 for loss of Consortium and *servitium* due to injuries suffered by his wife in a road traffic accident. The claim

for loss of consortium and *servitium* may be brought separately from the suit for damages for personal injuries by the injured spouse but in practice the two suits are consolidated.

Loss of consortium extends to loss of sexual pleasure between spouses arising out of the tortious act of another. It may be urged by analogy that, since marriage confers upon spouses the duty to consummate the marriage, supervening impotence or sexual incapacity in one spouse as a result of injury due to the tortious act of another, will give the affected spouse a right to sue the *tortfeasor* for damages for loss of Consortium.

In the English decision of **Dimmock v Miles (1969) C.A. 436, Sacks L.J.** said "the notional scales applied by judges when assessing damages in personal injury cases. There is only one, of the causes of such changes is the ever decreasing worth of monetary units". It is the factor of inflation which necessitates the practice of continuous assessment of damages in personal injury claims since there is a continuous fall in the value of money and the rise in retail price index for all consumer goods characterized by a general rise in the cost of living. This economic situation calls for a continuous assessment of damages so as to arrive at a sum that represents a reasonable compensation for the injuries suffered.

Evidence on records prove that, the instant plaintiff is now incapacitated as a result of the accident. PW1 evidence is that he will spent his life with incapacities. It is incapacity which has deprived the plaintiff the ability to work competently and flexibly for the remaining period of his life. He cannot be restored to the position he was before accident. He has been deprived of the ability to move freely, play, work flexibly, do whatever he can with his two legs. Plaintiff appeared in court and the court saw his condition. ***He testified while trying to position himself up right but he could not at different angles. His act of trying -to position his body in different angle was itself evidence of the incapacities which he has, and talked about.*** Definitely, this court is of conclusion that the plaintiff is a person with impaired Health. Taking all these factors together, mostly important that, whatever, compensation will not revert the plaintiff to the position he was before the episode.

The Plaintiff is in permanent employment of the 1st defendant according to evidence of DW1. In case of any termination for whatever reasons of the victim Emmanuel Didas, defendants shall pay him the salaries and other benefits for the remained period before attaining compulsory retirement age 60yrs.

I have considered, how this cause of action arose, I am satisfied that it is pure accident that 1st defendant employee did not intend. I have considered, 1st defendant willingness to employ Emmanuel Didas as part of his cure and of course income by way of salary. I have also considered costs incurred for treatment paid by defendants; and that, Emmanuel Didas is still in the employment of 1st defendant, I will therefore not order for the costs.

The Plaintiff has to live with the incapacitation for the remaining part of his life. Needless to say, the plaintiff is still attending clinic at MOI and he will continue attending in the future to mitigate the effect of injury and pains.

It is worthy to state that, this court while determining quantum of compensation, it has kept in view, **one**, the sufferings of the **Emmanuel Didas** which would include his inability to lead a full life, **two**, his incapacity to enjoy the normal amenities which he would have enjoyed but for the injuries. **Three**, his ability to earn as much as he used to earn or could have earned. **Four**, I have considered, pain and suffering he went through while hospitalized and continue for the rest of his life on his paralyzed part of the body. **Five**, I have considered his right of consortium which victim complained when he said, girls refuse him openly

because he looks sick. **Six,** I have considered whatever compensation will not revert plaintiff to the position he was before the episode.

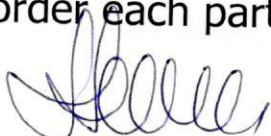
Thus, while computing compensation, the approach of the court has to be broad based. Needless to say, it would involve some guesswork, as there cannot be any mathematical exactitude or a precise formula to determine the quantum of compensation. In determination of compensation, the fundamental criterion of **"just compensation"** should be inhered. The Plaintiff is entitled to be compensated for pain and suffering. Accordingly I grant the amount of **88,323,380 T.sh.** for pain and suffering.

In the end, I thus, enter Judgment for the plaintiff.

- (a) 1,076,620 T.shs. for loss of income for 21 months.
- (b) 10,600,000 T.shs. for costs of domestic help.
- (c) 88,323,380 T.shs. for pain and suffering.
- (d) Interest on a, and c at 7% from the date of Judgment till fully satisfaction of decree.
- (e) In case of dismissal or termination, for whatever reason, defendant to pay plaintiff salaries and related benefits for the remained period of compulsory retirement.

(f) I have considered plaintiff employment by first defendant, thus, I order each party to bear own costs.



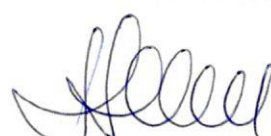

Z. G. Muruke

JUDGE

30/08/2017

Judgment delivered in the presence of plaintiff in person and Lidia Thomas, learned State Attorney for the defendants.




Z. G. Muruke

JUDGE

30/08/2017