**JUDICIARY**
**IN THE HIGH COURT OF MALAWI**
**PRINCIPAL REGISTRY**
**PERSONAL INJURY CASE NO. 608 OF 2011**

**BETWEEN**

**SOSTEN ERNEST ..... PLAINTIFF**

**-AND-**

**FARMERS WORLD LIMITED ..... DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**
Mrs. Chijere, of counsel, for the Plaintiff
Mr. Theu, of counsel, for the Defendant
Ms. Annie Mpasu, Court Clerk

## JUDGEMENT

*Kenyatta Nyirenda, J.*

This is the Plaintiff's action for damages for assault and battery that led to the removal of his eye following being beaten by the defendant's guards when he was caught stealing in the defendant's farm in Machinga. The Defendant denies liability.

In terms of the Statement of Claim, the Plaintiff was at all material times a resident of Machinga District. The Plaintiff alleges that, on 9th July 2010, he was cutting down trees for firewood without permission at the Defendant's estate when the Defendant's guards apprehended him. It is further pleaded that the Plaintiff did not offer any resistance to the arrest but, nonetheless, the Defendant's servants or agents acting in the in course of their employment wilfully or negligently assaulted the Plaintiff severely and hit him on the eye leading to the rapture of his right eye.

The injuries suffered by the Plaintiff have been particularized as a ruptured right eye which was removed at the hospital. In conclusion, the Plaintiff claims (a)

damages for pain and suffering and loss of amenities, (b) damages for loss of earnings and earning capacity, and (c) costs of the action.

The Defendant filed a defence wherein it admits that the Plaintiff was at all material times a resident of Machinga District and that on 9th July, 2010 he was cutting down trees for firewood without permission at the Defendant's estate when the Defendant's guards apprehended him. Save for this admission, all other allegations of fact contained in the statement of claim have been traversed. It is further averred that (a) on the material day, the Plaintiff attempted to run away from the Defendant's servants or agents, (b) in the course of running away, the Plaintiff stumbled and fell on his own tools thereby injuring himself and (c) the Defendant's servants or agents took the injured Plaintiff to hospital by using the Defendant's means and resources.

The Plaintiff called one witness who was the Plaintiff himself. The Plaintiff adopted his witness statement and this constituted his evidence in chief. The material part of the witness statement is reproduced below:

> *"2. In the morning of 9th July 2010, I went into Demetar forest to make some charcoal and the land belongs to the defendant.*
>
> *3. Whilst there, I saw a group of guards working for Demetar who started chasing me. There were 10 or 11 of them. These were the defendants servants or agents and they were acting in the course of employment.*
>
> *4. As I was running away, I saw another guard in front of me. He threw a button stick at me. It hit me on the eye. I felt down injured. My eye was bleeding badly.*
>
> *5. The whole group descended on me and handcuffed me.*
>
> *6. They took me to Liwonde Police and the police took me to Liwonde hospital.*
>
> *7. The hospital referred me to QECH where my eye was removed."*

The Plaintiff tendered his Medical Report and it was marked as Exhibit P1.

In cross examination, the Plaintiff stated that when he saw the guards, he started running away and they chased after him. In the course of running away, he fell down. The following Q and A ensued regarding the alleged use of a baton stick:

> Q: If you were running away, how sure are you that you were hit by a baton stick?

A: I just saw that I was hit and I fell down

Q: If hit by something in the eye, you could not appreciate what the item was?

A: I knew it as a baton stick

Q: Is it not true that it was your own tools that injured you?

A: No! I do not know

In re-examination, the Plaintiff was asked to explain how he got injured and he said that "As I was running, there was a man on the right and then I realized that I was hit". When asked by Counsel Chijere why he thought that he was hit by a baton stick, the Plaintiff said that "It fell on the ground and I saw him. The things I carried fell way behind. I fell sitting down"

The Defendant called seven witnesses, namely, Emmanuel Mwatseteza (DW1), Wyson Batwel Gazandeya (DW2), Alinafe Zembere (DW3), Jackson Kholoche (DW4), Thenison Kantuwanje (DW5), Wisikesi Guzumu (DW6) and Timothy Webster Phiri (DW7). It has to be stated at the outset that the Court did not find the respective testimonies of DW3, DW6 and DW 7 to be material in that they all admitted that they were not present when the Plaintiff was injured.
DW1 adopted his witness statement as his evidence in chief. The substantive part of his statement is as follows:

*"2. On 9th July 2010, at about 6:30 a.m, 9 security guards from the farm including myself were required by the Farm Management to conduct our usual patrols at the farm and in all camps at the farm including Camp 4.*

*3. As we approached Camp 4, we noted some smoke rising from within the said camp.*

*4. Immediately, I advised my colleagues to surround the Camp particularly from where the smoke was emanating.*

*5. As we surrounded Camp 4 and advanced close to the place of the smoke, we saw a male person with a shovel in his hand preparing charcoal.*

*6. As we drew closer the plaintiff noted our presence and started running away with a shovel in his hand*

*7. As the plaintiff was running away, we started following him and ran after him.*

8. *As the plaintiff ran faster ahead of us carrying the said shovel, we saw him fall down and he lay on the ground.*

9. *We approached the plaintiff and lifted him up.*

10. *As we lifted the plaintiff we noted some blood near his right eye and such blood was slowly oozing from the said eye.*

11. *Considering the incident and the plaintiff's condition, we called Mr Gandazeya our immediate boss at the farm and informed him about what had happened and the plaintiff's condition.*

12. *Mr. Gandezeya advised us to bring the plaintiff to the office at the farm which we did.*

13. *At the office and in the plaintiff's presence, Mr Gandazeya asked us to explain what happened which we did.*

14. *Mr Gandazeya asked the plaintiff to confirm the version of facts as presented by us and the plaintiff told Mr Gandazeya that he fell down in the course of running and injured himself and confirmed that none of us the 9 guards were responsible for his injuries.*

15. *Subsequently Mr Gandazeya instructed us to take the plaintiff to Liwonde Police before he could be referred to hospital*

16. *After reporting the matter to Liwonde Police the Police arranged for the plaintiff to receive medical attention"*

During cross-examination, DW1 stated that he approached the Plaintiff from the back and that the Plaintiff fell some 10 metres away from him. He did not see which guard was in front of the Plaintiff when the Plaintiff fell down. He also stated that the shovel which the Plaintiff had carried while running away fell beside the Plaintiff. It was also evidence that the place where the Plaintiff fell had tree stumps [but none of the stumps had blood at that time].

DW1 concluded by stating that none of the nine guards accompanying him had a baton stick at that time. He also stated that he is not sure whether the Plaintiff sustained the injury before falling down or upon falling down.

The respective evidence in chief of DW4, DW5 and DW6 was similar to that of DW1. During cross-examination, DW4 stated that the shovel on which the Plaintiff had fallen on was very sharp and facing upwards. He also stated that at the time the Plaintiff was injured none of the guards accompanying him had a baton stick. It

was also his testimony that the Plaintiff fell down some 10 metres away from him and there were trees and grass between where he was standing and where the Plaintiff fell down.

During his cross examination, DW5 stated that the Plaintiff fell on the ground and not on the shovel. He also stated that apart from the 10 guards who were chasing the Plaintiff, there were other guards who were stationed at the ten camps within the forest. He added that the Plaintiff fell some 50 metres away from him. He also mentioned that the Plaintiff fell face down and the shovel lay beside him facing downwards. He finally stated that when they were chasing the Plaintiff, they did not make any noise because they did not want people from surrounding villages to hear.

During cross-examination, DW 6 stated that when they were chasing the Plaintiff they were shouting and one of the guards had a whistle which was being blown. He also stated that the Plaintiff did not fall on shovel but that when he fell down, the shovel lay beside him. He concluded his testimony by stating that he does not know what caused the Plaintiff to fall down as well as what injured the Plaintiff.

It is trite that a plaintiff has the burden of proving the elements of his or her lawsuit. In a civil case, like the present one, a plaintiff has to prove his or her case on a balance of probabilities. In the case of **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA)**, the Court observed as follows:

> *"Ordinarily, the law is that the burden of proof lies on a party who substantially asserts the affirmative of the issue. The principle was stated in the case of Robins v National Trust Co [1927] AC 515 that the burden of proof in any particular case depends on the circumstances in which the claim arises. In general, the rule is Ei qui affirmat non qui negat incumbit probatio which means the burden of proof lies on him who alleges, and not him who denies. Lord Megham, again, in Constantine Line v Imperial Smelting Corporation [1943] AC 154, 174 stated that it is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons. The judge said that the rule is adopted principally because it is but just that he who invokes the aid of the law should be the first to prove his case because in the nature of things, a negative is more difficult to establish than an affirmative. However, in a civil action the burden of proof may be varied by the agreement of the parties – see Bond Air Services Ltd v Hill [1955] 2 QB 417."*

It is the case of the Plaintiff that he has without doubt met the requisite standard imposed by law to prove negligence. The matter has been put in the Plaintiff's Final Submissions thus:

*"5.1 In the present case, the Plaintiff burden of proving on a balance of probabilities that he was injured by the Defendant's servant/agents.*

*5.2 The Defendant denies that its servant injured the Plaintiff, but contends that the Plaintiff was injured when he fell on his own tools while running away from the Defendant's servant/agents.*

*5.3 The evidence which was given by the Defendant, particularly the testimony of Emmanuel Mwatseteza, Thenison Kantuwanje and Wisikesi Guzumu is to the effect that the Plaintiff did not fall on any of his tools.*

*5.4 It is only Jackson Kholoche who testified that the Plaintiff fell on a shovel which he had carried while running away.*

*5.5 Mr. Kholoche's testimony is suspicious considering that the shovel which the Plaintiff to have fallen on is said to have been very sharp and facing upward but the Plaintiff only got injured on the eye.*

*5.6 If the Plaintiff indeed fell on the shovel as indicated by Mr. Kholoche, one would have expected that the Plaintiff would have sustained some cuts on his face.*

*5.7 It is therefore our submission that the Defendant's contention that the Plaintiff was injured when he fell on his own tools is not true.*

*5.8 Since the Plaintiff was not injured by his own tools, the most probable conclusion in the circumstances of the present case is that he was injured by one of the Defendant's servants who were in the forest.*

*5.9 The Plaintiff testified that while he was running away, he saw one of the Defendant's guards standing in front of him, who threw a baton stick at him which hit him on the eye as a result of which he fell down.*

*5.10 It is our submission that the Plaintiff was injured by either one of the guards who were chasing him and had surrounded him, or by one of the guards who were stationed on camps within the forest and had heard the shouting by the guards chasing the Plaintiff and had come to assist in catching the Plaintiff.*

*5.11 Since the Plaintiff was injured by the Defendant's servant (s) in the course of his/their employment, it is our submission that the Defendant is vicariously liable in battery to compensate the Plaintiff for the injuries and losses sustained."* - Emphasis by underlining supplied

On the other hand, the Defendant takes the position that the Plaintiff has failed to prove his allegation that he was a victim of assault and battery at the hands of the Defendant's guards. This is to be found at pages 13 and 14 of the Defendant's Final Written Submissions:

*"3.3.6 The analysis of the evidence by the Plaintiff in his submissions is with due respect faulty and marred with subjectivity.*

*(a) A review of the Plaintiff's own pleadings and evidence would support the view that regarding the circumstances of the plaintiff's injury , even the Plaintiff's evidence acknowledges that the Defendant's servants or agents' state of mind cannot be fairly described as intent on assault and battery and that such evidence starts with equivocations in the pleadings, proceeds with such equivocations by the Plaintiff in the witness box and ends with equivocations in the submissions.*

*(b) The Plaintiff describes the alleged defendant's guards conduct as WILFULL and/or NEGLIGENT in paragraph 4 of the statement of claim having purported to plead and endorse a case of assault and battery and tells the same story mismatching or confusing the defendant's guards state of mind at the material time.*

*(c) In civil battery and assault there is only one story to plead and tell reminiscent with intentional behaviour and not negligence.*

*3.3.7 A discussion of the circumstances of the injury obviously involves a baffling task of tackling the cause of the Plaintiff falling down generally and what injured the plaintiff on the right eye in particular. The evidence of the defendant best describes the Plaintiff falling in the course of running away in the shrubby forest clearly suggesting that the Plaintiff's injury arose from some other source other than the intentional act of any of the Defendant's guards chasing the plaintiff as he was running away to avoid capture as a trespasser.*

*3.3.8 It is in the least surprising that even at submission stage, the plaintiff has not yet recovered from the inevitable equivocations about the cause or source of the injury when he submits speculatively in paragraph 5.10 of his submissions.*

*3.1.9 We contend and submit on the Defendant's behalf that on the facts and applying the standard of proof on the balance of probabilities:-*

*(a) The plaintiff has failed to prove his allegations as required by law.*
*(b) On the balance of probabilities, the Defendant's version of events leading to the Plaintiff's injuries is more credible than that of the Plaintiff.*
*(c) There was no trespass to the person in the circumstances of this case to support any case of assault and battery as claimed by the Plaintiff."*

I have considered the evidence and the submissions herein. It is common ground that (a) the Plaintiff was on 9th July, 2010 cutting down trees for firewood without permission at the Defendant's estate when the Defendant's guards apprehended him, (b) the guards were the defendants' servants or agents and they were acting in the course of their employment and (c) the Plaintiff suffered an injury to his eye.

The main issue for determination has to do with the manner in which the Plaintiff sustained his injury. The case of the Plaintiff is that the one of the Defendant's

guards threw a baton stick at him which hit him on the eye and he fell down injured whereupon the other guards descended upon him and handcuffed him. On the other hand, the Defendant deny that its guards assaulted the Plaintiff but assert that the Plaintiff injured himself when, as he was running away from the guards, he stumbled and fell on his shovel which he had with him.

On the available evidence, I am inclined to find the Defendant's version of facts on the circumstances and cause of the Plaintiff's injury to be more probable than that of the Plaintiff. Firstly, it is significant to note that the Plaintiff does not deny that he had a shovel with him as he was running away from the guards. Secondly, and perhaps more importantly, the evidence by Defence witnesses that they did not have baton sticks on the material day went unchallenged. In fact, all the defence witnesses were consistent in stating that the baton sticks were bought well after the incident in question. Thirdly, by the Plaintiff's own submission, the evidence in support of the alleged assault and battery is so weak that the Plaintiff seeks to call upon the Court to speculate as to the real cause of the Plaintiff's injury: "Plaintiff was injured by either one of the guards who were chasing him and had surrounded him, or by one of the guards who were stationed on camps within the forest". This will not do. As was aptly observed by Lord Hoffman in **re B (Children) (FC), [2008] UKHL35**:

> *"If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."* – [Emphasis by underling supplied]

All in all, having carefully reviewed the evidence in this case, it is my finding that the Plaintiff has failed to establish, to the requisite standard, that the injuries that he sustained were caused by the Defendant's servants or agents. The Plaintiff's action is therefore abortive with costs to the Defendant.

Pronounced in Court this 14th day of June 2016 at Blantyre in the Republic of Malawi.

**Kenyatta Nyirenda**
**JUDGE**