JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 406 OF 2013

BETWEEN

FYSON STOREY ..... PLAINTIFF

-AND-

EASTERN PRODUCE MALAWI LIMITED ..... DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Mwaungulu, of counsel, for the Plaintiff
Mr. Zambezi, of counsel, for the Defendants
Ms. Annie Mpasu, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

Introduction

This is the Plaintiff's action against the Defendant brought under common law for damages in respect of injuries that he suffered in the course of his employment as a labourer. It is alleged that the injuries were due to the negligence of the Defendant. The Defendant denies liability.

Pleadings

The Plaintiff was employed by the Defendant as a bag boy at the Defendant's Mini Tea Estate. The Plaintiff's work entailed loading wood in the Defendant's tractor registration number MJ2791/MJ 5228 (the tractor). It is the case of the Plaintiff that the Defendant knew or ought to have known that the Plaintiff's manual work necessitated the setting up of a safe system of work.

It is also pleaded by the Plaintiff that, on or about 22nd September 2011, the Plaintiff was giving directions to the driver of the tractor on where to pack so that the Plaintiff

could load wood on the tractor when the driver of the tractor lost control thereof and the tractor jolted and reversed with such force that it hit the Plaintiff and pinned him against the wall with the result that the Plaintiff sustained injuries.

The Plaintiff alleges that the injuries were occasioned due to the negligence of the Defendant or its servants or agents. The allegations of negligence have been particularized as follows:

> *"5.1 failing to set up and implement a safe system of work;*
>
> *5.2 failing to have regard to the safety of the Plaintiff in the circumstances;*
>
> *5.3 exposing the Plaintiff to unnecessary risks in the circumstances;*
>
> *5.4 Failing to swerve, brake, steer or maneuver the tractor as to avoid the accident*
>
> *5.5 Failing to keep the tractor in good repair or shape;"*

The Plaintiff states that he suffered loss and damage, particularized as (a) fracture of the left leg, (b) deep cut wound on the left foot, (c) loss of consciousness and (d) painful wrist and chest.

In conclusion, the Plaintiff claims damages for pain and suffering and loss of amenities of life, damages for disfigurement and/or deformity, damages for loss of earning capacity, special damages for medical report in the sum of K2,500.00 and costs of this action.

The Defendant filed a defence wherein it traversed the allegations of fact contained in the statement of claim. It is further averred that if the accident occurred as alleged, the same was wholly caused and/or contributed by the negligence of the Plaintiff, which has been particularized as follows:

> *"(i) Standing too close to a moving motor vehicle;*
>
> *(ii) Failure to notice the motor vehicle in time in order to avoid the said accident; failing to set up and implement;*
>
> *(iii) Failure to take precaution of his own safety."*

Evidence

Only one witness, namely, the Plaintiff, gave evidence. The Plaintiff adopted his witness statement and this constituted his evidence in chief. The material part of the Witness Statement is reproduced below:

"6. In September 2011 I was working for Mini Mini Estate as a labourer/bag boy.

7. I recall it was on 22nd September 2011 I was assigned to be loading wood onto a tractor for delivery at the Mini Mini Estate boiler;

8. We together with other workers loading wood onto the tractor. We finished loading at one spot but the tractor was not fully loaded and we moved to the next spot. On arrival at the second spot, I stood at the back and was giving directions to the tractor that was reversing the tractor. Whilst so directing the tractor, the driver lost control of the tractor which then jolted with such force that it hit the Plaintiff and pinned against the wall;

9. The tractor that hit me its registration number was MJ 279/MJ 5228 Horse and Trailer. I wrote this number on a piece of paper;

10. As a result of the impact, the Plaintiff sustained fracture of the left leg and left foot; deep cut wound on the left leg; painful chest and wrist. I exhibit a health passport marked FS to substantiate the injuries;"

The Plaintiff tendered his Health Passport as Exhibit P1 and his Medical Report as Exhibit P2.

In cross examination, the Plaintiff stated that he was employed to pack firewood within the factory. He denied being trained on how to pack the firewood. He, however, conceded that he performed the same job from January to September, 2011.

When asked by Counsel Zambezi to narrate how the accident happened, the Plaintiff stated as follows. On 22nd September 2011, he was with three other labourers. After they had finished loading firewood into a tractor trailer at one spot, they moved on to collect more firewood at another spot. At this spot, he stood behind the trailer of the tractor to give directions to the driver. The distance between the trailer and him was 1.5 km. He also stated that although the tractor was reversing, he stood at the same spot. He further said that he shouted at the driver to stop reversing but he remained standing at the same place as the tractor and trailer were reversing towards him.

The Plaintiff also told the Court that he was not employed to give directions to the tractor when it is reversing. In fact he was not trained to do that task. When asked by Counsel Zambezi about why he got the registration number of the tractor and trailer, he replied that he jotted it down because he wanted to rely on it later. The registration number was jotted down at around 7:00 am before he started work. He also stated that he wanted the registration number in case he was injured.

The Plaintiff admitted having previously lodged other personal injury claims with the Defendant. He was also conceded having worked for the Defendant at its Eldorado Estate under the name of Steward Storey. He also confirmed that while there he also lodged an injury claim before the Court. The Plaintiff further stated that he had commenced an action for damages for being injured on the cheek by a minibus mirror at Lichenya Bridge.

Finally, the Plaintiff confirmed that the medical report that he was relying on was sent to the labour office by the Defendant.

In re-examination, the Plaintiff said that he was giving directions to the tractor to park at the right place. He also confirmed that the tractor was "1.5 km" away from where he was standing. In further probing whether the Plaintiff understands how distance is measured, the Plaintiff answered in the affirmative and that he knows what constitutes "1 kilometer". He also affirmed that he jotted down the registration number of the tractor at 7:00 am and no one told him to jot it down. He also confirmed that he is Steward Storey and he sustained another injury in the eye.

The Defendant offered no evidence because the witness whose statement was already filed was sick and not available to testify viva voce.

Burden and Standard of Proof

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. That means that he or she must prove a fact and his or her damages by showing that something is more likely so than not, that is, 50.1% versus 49.9%. 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."*

The case of **Blyth v. Birmingham Waterworks Company (1856) 11 Ex Ch 781** is famous for its classic statement of what negligence is and the standard of care to be met. Baron Alderson made the following famous definition of negligence-

> *"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done"*

The essential elements of actionable negligence are (a) a duty to take care owed to the plaintiff by the defendant, (b) a breach of that duty, and (c) damage suffered by the plaintiff resulting from the breach of duty: see **Donoghue v Stevenson [1932] AC 562** quoted with approval by Justice Ndovi, as he then was, in **Kadawire v Ziligone and Another [1997] 2 MLR 139** at 144, **J. Tennet and Sons Limited v Mawindo 10 MLR 366**.

It, therefore, follows that in the present case the burden of proof is on the Plaintiff as the party who has asserted the affirmative to prove on a balance of probabilities that he suffered loss injury, harm and damage as a result of negligence on the part of the Defendant.

Submissions

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:

> *"**ANALYSIS OF THE LAW & FACTS***
>
> *The Plaintiff was signaling the driver of the Defendant's tractor.*
>
> *The driver lost control of the tractor, the tractor jolted with such force that it hit the Plaintiff, pinned him against the wall and the Plaintiff suffered injury.*
>
> *The driver of the tractor did not have regard to the safety of the Plaintiff. He reversed and caused the tractor to jolt with force and hit the Plaintiff. He failed to brake or slow down or avoid the collision with the Plaintiff.*
>
> *By the doctrine of res ipsa loquitor, the tractor was in the control and management of the Defendant's driver and in the absence of any explanation, the Defendant is liable by the said doctrine.*

The driver was, clearly, negligent and caused the accident. The Plaintiff suffered damage. The Plaintiff suffered crushed right index finger which was amputated. He also sustained a deep cut of the middle finger. He can no longer write properly. A medical report marked ***"FS"*** *substantiates his injuries.*

The Defendant is liable on the basis of vicarious liability as employer and also as owner of the tractor herein for the negligence of the driver of the tractor.

The Defendant is liable to compensate the Plaintiff for damages for pain, suffering and loss of amenities as well as MK2, 500.00 cost of medical report." - Emphasis by underlining supplied

Counsel Zambezi submitted that the Plaintiff had failed to prove his allegation that the accident was caused by the negligent driving of the tractor. This is to be found at pages 5 and 6 of the Defendant's Final Written Submissions:

"6.1 Under paragraph 1 of the statement of claim, the plaintiff alleges that he was employed at Minimini as a bag boy/labourer. Under paragraphs 4 and 6 of the plaintiff's statement of claim, the plaintiff merely alleged that the plaintiff's manual work necessitated the setting up and implementation of a safe system of work, or to have regard for the plaintiff's safety, or that it exposed the plaintiff to unnecessary risk. Through his witness statement and his testimony in court, the plaintiff has not led any evidence to demonstrate the alleged safe system that the defendant did not set up and/or implement. It is not enough to allege these matters; the plaintiff needs to prove them. The burden of proof lay upon the plaintiff to call evidence and prove the system of work that is safe and whether the defendant failed to set up such a system and/or implement it. The same is true of the other two allegations regarding exposure to unnecessary risk and failure to keep the tractor in good repair and shape.

6.2 Further, having submitted that the plaintiff has the onus to prove but failed to prove that the defendant failed to provide a safe system of work, the plaintiff, has again failed questions regarding competency of the driver, whether the tractor had any mechanical fault that the plaintiff was aware of or whether the task that he was performing was unsafe. He simply alleged that he told the driver to stop. The plaintiff did not state whether the driver heard his call to stop and ignored it. In the statement of claim, the plaintiff alleged that the tractor jolted and injured him. In Court, the plaintiff stated that he was watching the trailer moving towards him and he warned the driver to stop. The tractor would only jolt accidentally and not out of negligence.

6.3 Although the plaintiff denied being trained, during cross examination, he confirmed that he knows the defendant's Mr James Matewere as his Factory Supervisor and that he worked for the defendant from January 2014 to September 2014 before sustaining his alleged injury. The plaintiff led no evidence to support his assertion that he was instructed by the driver to guide him when he was reversing. It is submitted that accepting to help the driver as he was reversing when it wasn't part

of his job is volenti. The consequences thereof are his responsibility. The defendant's driver's experience was not attributed as the cause for the alleged collision. Nothing was said about his driving skills before and at the time of the occurrence of the alleged collision.

6.4 *It is further submitted that the defence through cross-examination demonstrated to the court that the plaintiff is not a credible witness in so far as the circumstances surrounding his alleged injury are concerned. It is also submitted that the plaintiff is an opportunist who would create an environment to get injured for the sole reason of compensation.*

6.5 *My Lord, the plaintiff has on other occasions before; changed his name, particulars of his village and T/A just to reflect a different personality before the defendant. Further, he has also sued the defendant for other alleged injuries. As if that is not enough, he could not explain the circumstances surrounding his injury involving the minibus at Lichenya Bridge. It is submitted that the plaintiff has the propensity of feigning an injury to get compensation from the defendant. He is an opportunist litigant. People like the plaintiff must be treated by the court with caution to avert abuse of the process of court.*

6.6 *The plaintiff failed to convincingly explain why he remained at one spot when he realised that the tractor was moving closer. In his own words, the tractor was "1.5 km from where he was standing". My Lord, even if he was mistaken on the distance estimates, he could not explain the reason behind his decision to remain at the same spot in the face of a clear risk (the moving trailer towards him).*

6.7 *The plaintiff is a 28 years old adult, capable of taking care of himself in the face of danger. The plaintiff's conduct is unreasonable and negligent. The court is urged not to compensate the plaintiff for his own misconduct. He was grossly negligent. Section 18 of the Occupational, Safety, Health and Welfare Act provides a mandatory duty on every employee while at a workplace to take reasonable care for the safety and health of himself and that of other persons who may be affected by his acts or omission. It is submitted that the manner in which the plaintiff acted in this case failed to take reasonable care for himself. It is further submitted that an employee who fails to care for his own safety in a safe system of work is guilty of negligence and cannot hold the employer liable for injuries that he suffers in consequence for the alleged failure to provide a safe system of work: See- the case of* ***Luka John v Agri Cola****,* ***Civil Cause Number 590 of 2005****, at p.10.*

6.8 *It is also submitted that the plaintiff's alleged injury was premeditated as shown through the taking down of the tractor and trailer registration numbers before the accident even occurred. It is on record that he jotted down the registration number at 7:00 am just before he started work. He stated "just in case I am injured". The time between the occurrence of the collision and the taking down of the registration number was a bare 1 hour difference. The plaintiff deliberately forced the driver to injure him so that he could secure compensation of himself and not that the driver was negligent in any way."*

Having watched the Plaintiff give evidence, I am inclined to agree with Counsel Zambezi that his evidence was very suspect. I was not impressed that he was telling the truth. He was evasive and uncooperative in cross-examination. Further, his explanation for some of his actions were hollow, fanciful and unacceptable. For example, he failed to explain why he remained motionless when he noticed that the tractor was nearing to where he was.

In any case, by the Plaintiff's own submission, the evidence in support of the alleged negligence is so weak that the Plaintiff seeks to call in aid the doctrine of res ipsa loquitur. Unfortunately for the Plaintiff, the same was not pleaded and, as such, he cannot be allowed to rely on it. As was aptly observed in **Chidzamkufa v. Nedbank Malawi Ltd (No.2) 2008 (MLR) Commercial Series**:

> *"If the Court were to do what the Plaintiff is asking for, it would be guilty of ignoring well settled principles of practice. It would render the whole essence of pleadings obsolete and/or nugatory. Such a practice would also create chaos and uncertainty on the kind of orders that will be made in the cases before our Courts. It is desirable that parties should walk out of our Courts with what they wanted when they came to Court. Likewise, it is desirable that the Defendants must be condemned on matters for which that have forewarned and given an opportunity to defend themselves through pleadings ..."* – [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, a case of negligence on the part of the Defendant for the injuries he sustained in the accident. The Plaintiff's action is therefore abortive with costs to the Defendant.

Pronounced in Court this 1st day of June 2016 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE