



IN THE HIGH COURT OF MALAWI

CIVIL DOVISUON

PRINCIPAL REGISTRY

PERSONAL INJURY CASE NUMBER 639 OF 2016

BETWEEN

WINESI JAILOSI.....CLAIMANT

AND

LUJERI TEA ESTATE LIMITEDDEFENDANT

Coram

Honourable Jack N'riva Judge

Claimant present and represented by Mr W Kazembe of counsel

Defendant represented by Messrs F Chikambuwa and L Ulaya

Ms D Mtegha Court Clerk

JUDGMENT

Introduction

The claimant, Mr Winesi Jailosi, was working for the defendant, Lujeri Tea Estate Limited, as a tea pruner. He, just like other employees, was using a knife to prune the tea; the knife he was using cut him on the left index finger. He sustained a deep cut. He argued that had the estate provided him with protective wear, the injury would not have taken place.

Because the defendant did not provide him with a protection and an injury resulted, the claimant commended this action against the defendant claiming damages for negligence.

The Issue

The question for determination is whether the claimant's injury would not have taken place had the defendant provided the claimant with protective wear.

The law

Tort of negligence: The Law

The law on negligence is premised on the prerequisite that one must owe another a duty of care toward another, not to do acts or omissions that would harm the other. One commits the tort of negligence when the person breaches that duty and the breach results into an injury on the other. Negligence is said to doing something which a reasonable man would not have done or omitting to do something which a reasonable would not have omitted to do: *Blyth v Birmingham Waterworks Co* (1856) 11 Ex781. One must do acts or omit to do acts that would lead to injury of another.

For the claimant to establish his case, in this case, the defendant must have had a duty to provide protective wear to its employees. The defendant must have failed to provide the protective wear. That failure must lead to the injury suffered by the claimant.¹ The test for the existence of duty of care is that of foreseeability: the injury must be foreseeable to the person on whom the duty is imposed: *Caparo Industrial v Dickman* [1990] 1 All ER 668.

Under the statute (Occupational Safety and Health Welfare Act), an employer owes an employee a duty of care to provide a safe working environment. The employer must not expose the employee to inherent danger to their lives and limbs and must provide suitable protective clothing. See sections 15 and 58 of the Occupational Safety, Health and Welfare Act. The employer is under further obligation to provide information, instruction, supervision and training to ensure that the employees' safety and health are guaranteed –(Section 65 of the Act).

Requirements of Evidence

The law casts the duty on the claimant to prove the allegations against the defendant on the claims. In this matter the claimant has to prove the elements of the tort. The claimant has to prove that the defendant had a duty to provide him with protection, as he alleges. Further, he has to prove that due to the non-provision of the protection, he suffered injury on his hand. The claimant has to

¹ *Donoghue v Stevenson* [1932] AC 562

prove the allegations on a balance of probabilities. See *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1941] 2 All E R 165 and *Miller v Minister of Pensions* [1957] 2 All E R 372.

In *Miller v Minister of Pensions*, Denning J said that if the scale tilts one way, the tribunal must decide in favour of that side; if not the court must give the party a benefit of doubt. The evidence must reach some level of cogency and must be more probable than not.

Evidence in the Court

The claimant's case is that he was injured because the defendant did not provide him with a protective wear namely gloves. He said if the defendant provided him with a glove, he would have ably handled the knife. In other words, he failed to ably handle the knife because he did not have a glove. Otherwise, with a glove, went the argument, he would not have injured his hand or the injury would have been minor.

In cross-examination, the witness said the employees were trained to use the knife. The training was without a knife. He said the knife they were using was so sharp that it could even cut through hard surfaces. He said the gloves are not made of steel; they are made of the raincoat-like stuff. He said a knife could not cut the glove.

Mr. Lingstone Lumwelo gave evidence on behalf of Lujeri Tea Estate Limited. The essence of his testimony was that tea estates do not provide gloves to tea pruners. He said the knives were slippery and using gloves would mean that the knife could slip off.

In cross-examination and re-examination, the witness said that the knife could even cut through a glove.

Analysis of the Evidence and Finding

On the facts and the evidence, the contention is whether providing pair of gloves would have led to no injury. The claimant argued that the gloves would have led to no injury. Alternatively, he argued that the injury would have been minimal. The defendant argued that the injury would have made no difference. They train the workers to be cautious when using the knives. He said they do not provide gloves because knives would slip if held with knives. Further, he said that the knife was sharp enough to cut a glove.

The claimant also testified that the knife could cut even hard surfaces. This was an indication that the knife was sharp. However, the claimant said that the knife could not cut a glove. This is contradictory. This is contradictory in two ways. First, if the knife could cut hard surfaces, one would ask why it could not cut a glove. Secondly, it is contradictory in the sense that in his evidence-in-chief, the claimant said that gloves could minimise the injury. This, in my judgement, was an recognition that the knife could cut the glove. The argument could be understood to mean that the injury could be minor. It becomes contradictory because the claimant turned around and suggested that the knife could not cut the glove.

The defendant, on the contrary, made assertions that it would have been dangerous to use the gloves when handling the knife. Listening to the two parties, the claimant has not satisfied me that the defendant had a duty to provide him with a glove. If the defendant owed the claimant a duty of care, such a duty was not, in my view, to provide him with gloves.

In *Nampinga v Conforzi Plantations Limited* Personal Injury Case 328 of 2009, this Court found that because the tea-cutting knife was so sharp, a glove was not enough to prevent a tea-pruner from sustaining a cut from a knife. The Court found that using a knife would prove even more dangerous as the knife could be slippery, and the glove could not even protect the claimant, in that matter, from the injury that he suffered.

From the evidence, it is apparent that the defendant was aware of the danger of using the knife, and the additional danger of using a glove. I am also convinced that the defendant instructed its workers the dangers of using the knife. I, therefore, do not find that the defendant breached its statutory duty of care.

Conclusion

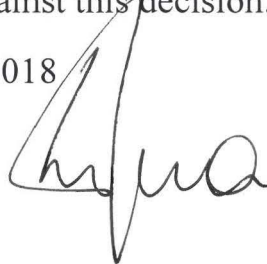
On the facts before me, and on the law on the subject, the claim for negligence of unsuccessful against the defendant. It is not convincing that the claimant's injury was as a result of failure by the defendant to provide gloves to him. It is not convincing that had the defendant provided him with gloves, the knife would not have cut his finger. The claimant has failed to prove that his injury was as a result of the defendant's failure to provide him with protective wear. The claim by the claimant is unsuccessful.

Costs

Costs are in the discretion of the Court.² I have doubts if the claimants would be able to meet costs of the defendant. In such instance I refrain from making an order of costs against the claimant.³ Each party will meet their costs.

The claimant has a right to appeal against this decision.

DELIVERED this 18th day of May, 2018

A handwritten signature in black ink, appearing to read 'J N'RIVA', is written over the text 'DELIVERED this 18th day of May, 2018'.

J N'RIVA

JUDGE

² Section 30 of the Courts Act, Order 31 of High Court Civil Procedure Rules

³ *Kasowa v National Bank of Malawi* [1996] MLR 445(SCA)