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IN THE HIGH COURT OF MALAWI

PRINCIPAL CIVIL REGISTRY

PERSONAL INJURY CAUSE NO 644 OF 2016

BETWEEN

MELENIA NAISON.....CLAIMANT

-AND-

EASTERN PRODUCE MALAWI LIMITED.....DEFENDANT

CORAM: THE HON MR. JUSTICE D. MADISE

Mr. W. Kazembe, Counsel for the Claimant

Mr. F.J. Zambezi, Counsel for the Defendant

Mr. Mike Mbekeani, Official Interpreter

Madise, J

JUDGEMENT

1.0 Introduction

1.1 On 2nd September, 2016 the claimant in this matter commenced these proceedings by way of a writ of summons against the defendant claiming damages for personal injury sustained in the course of employment. The defendant has denied the claim and has called on the claimant to prove his case.

1.2 In his statement of claim the claimant has stated the particulars of negligence as follows.

- a) Failure to provide protective wear to the claimant.
- b) Failure to provide a safe working environment to the claimant.
- c) Subjecting the claimant to unsafe work environment.
- d) Not putting in place a proper system to ensure that the claimant is working in a secure environment.

1.3 Particulars of injuries

- a) Sustained a cut wound on her right lower leg.
- b) Suffered incapacity of 10%

1.4 Particular of loss

- a) The claimant has difficulties carrying out manual work
- b) The claimant is unable to farm to feed her family.
- c) The claimant has difficulties in walking.

1.5 The Damages

- a) Damages for pain and suffering.
- b) Damages for loss of amenities of life.
- c) Damages for loss of earning capacity.
- d) Special damages and costs of the action.

2.0 The Facts

- 2.1 The claimant was working for the defendant at Grenoch Estate in Mulanje. On 9th November, 2015 the claimant was working in the tea field when a tree stump pierced the claimant causing a deep cut wound on the lower part of the right leg.
- 2.2 The claimant was rushed to the hospital for treatment which included stitching. The claimant stated that she got injured because the defendant did not provide her with protective wear like gumboots to protect her lower legs. In this regard, she stated that the defendant was negligent and she wants damages for pain and suffering. Only the claimant testified in this matter. That marked the end of the claimant's case
- 2.3 Mr. Peter Selewani stated that he works for Eastern Produce as Head Capitao at Grenoch Tea Estate. He stated that on the material day the claimant was applying fertilizer when she got injured by a tree stump. He told the court that there are a lot of tree stumps in the tea fields. He admitted that the best way to protect workers was to give them gum boots. He however stated that only workers who spray chemicals are given gum boots. He denied that the defendant was negligent and did not cause the injuries suffered by the claimant.
- 2.4 The story as narrated by Mr. Peter Suleman was repeated by Rhoda Chimimba and Mr. Henderson Jamali two laborers who also work at the Tea Estate. The three witnesses for the defence all agreed that there were a lot of tree stumps in the tea field and that many are hidden underneath by the tea branches. The three witnesses all stated that only workers who spray chemicals are given gum boots. That marked the end of defence's evidence.

3.0 The Issues

3.1 There are basically four issues for determination before this court.

1. Whether the defendant owed the claimant a duty of care
2. Whether the defendant was negligent
3. Whether the claimant contributed to his own injuries.
4. Whether the damages are payable.

4.0 The Law

4.1 The burden and standard of proof in civil matters is this. He/she who alleges must prove and the standard required by the civil law is on a balance/scales of probabilities. The principle is that he who invokes the aid of the law should be the first to prove his case as in the nature of things, a negative is more difficult to establish than an affirmative.

4.2 As Denning J, stated in Miler vs. Minister of Pensions [1947] 2 A II E.R. 372.

If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not

4.3 Similarly the degree of probabilities will depend upon the subject matter. When a civil court is deciding on a charge of fraud, it naturally follows that a higher degree of probability is required than when deciding an issue of negligence. However the standard does not reach as high as that required in a criminal court which is beyond a reasonable doubt.

4.4 The general principle is that the court must require a degree of probability which suits the occasion and is commensurate with the law and facts.

4.5 Section 13 Occupation Safety, Health and Welfare Act states as follows:

13 Duties of employers

- (1) it shall be the duty of every employer to ensure the safety, health and welfare at work of all his employees
- (2) without prejudice to the generality of an employer's duty extends subsection (1), the matters to which that the duty extends includes in particular _
 - c. the provision of information, instruction, training and supervision in accordance with section 65 to ensure the safety and health at work of his employees;
 - d. as regards any place of work under the employer's control, the provision of maintenance in a manner that is safe and without risks to health, and the provision and maintenance of means of access to and exit from it that are safe and without such risks
 - e. the provision and maintenance of a working environment for his employees that is safe, without risk to health, and adequate as regards facilities and arrangement for their welfare at work.

4.6 Section 65 of the Occupational safety and Health and Welfare Act

States as follows: -

- (1) Every worker in a work place shall be adequately and suitably-
 - a. Informed of potential health hazards to which he may be exposed to at the workplace;
 - b. Instructed and trained in the measures available for prevention and control and protection against health hazards to which he may be exposed to at the workplace.
- (2) All information, instruction and training referred to in subsection (1) shall be given in a language understood by the worker, and written, oral, visual and participative approaches shall be used to ensure that the worker assimilates the information, instruction or training, as the case may be.
- (3) Specialized instruction and training shall be given to

- (a) drivers and operators of lifting appliances, transport vehicles, earth moving and materials handling equipment and plant, steam boilers and machinery equipment of specialized or dangerous nature;
- (b) workers engaged in the erection and dismantling of scaffolds;
- (c) workers engaged in excavations, of shafts, earthworks, underground works or tunnels;
- (d) workers handling explosive or engaged in blasting operations;
- (e) workers in compressed air, coffer dams and caissons;
- (f) workers engaged in the erection of prefabricated parts or steel structural frames of tall structures;
- (g) workers handling hazardous substances;
- (h) such other specialized categories of workers as by the director by notice in the Gazette.

4.7 Section 58 of the Occupational Safety Health and Welfare Act states that: -
Protective clothing and appliances

Where in any workplace workers are employed in any process involving excessive exposure to heat, cold, noise, wet or to any injurious or offensive substance, or any welding process, suitable protective clothing and appliances, including, where necessary suitable gloves, footwear, screens, goggles, ear muffs and head covering, shall be provided and maintained at no cost to the employee for the use of such workers as required by the Director.

4.8 What is Negligence?

The law on negligence was well settled by Lord Alderson who gave perhaps the best description of the definition of negligence in the case of Blyth vs. Birmingham Water Works Company (1856) Ex. 781 at 784.

Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinary regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do.

4.9 Negligence as a tort has four requirements namely:

1. The existence in law of a duty of care which the law attaches liability to carelessness.
2. Breach of the duty of care by the defendant.
3. A casual connection between the defendant's careless conduct and the damage.
4. That the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote.

4.10 Once this is established the next question is to consider whether the defendant is liable in damages and for how much.

4.11 Lord Atkins LJ when he decided Donoghue vs. Stevenson (1932) AL 562. Stated as follows

Who then in law is my neighbor? Neighbors are people who are so closely and directly affected by any act that I ought reasonably to have them in contemplation as being so affected when I'm directing my mind to the acts or omission which are called in question

4.12 Looking at the evidence before me, can it be said that the defendant was negligent and caused the claimant's injuries? Did then defendant owe the claimant a duty of care? Can it be said boldly and without hesitation that the defendant breached that duty of care which resulted in the injuries the claimant sustained? Lastly can it be said that as a result of that breach the

claimant suffered pain and damage to her lower leg and amenities of life? Lastly are damages payable in this matter?

5.0 The Finding

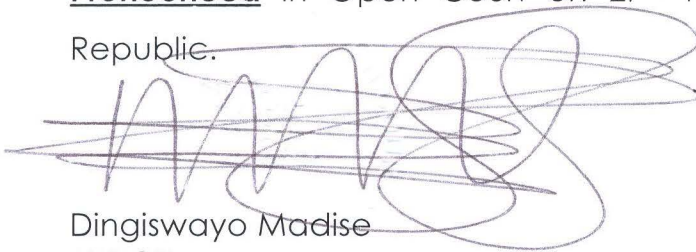
- 5.1** There is no dispute that the claimant was working for the defendant at the material time. There is no dispute that while applying fertilizer in the tea fields she got injured by a tree stump. There is no dispute that she suffered pain as a consequence. The question before me is whether the injuries were sustained due to the negligent acts of the defendant.
- 5.2** The defendant has admitted that the claimant was not given gumboots to protect her lower legs. The defendant has admitted that only workers that were spraying chemicals were given gumboots. In my considered opinion and looking at the totality of the evidence and the applicable law, I find that the defendant did not adequately protect their workers who were exposed to these dangerous tree stumps.
- 5.3** The defendant ought to have known that the tree stumps were likely to cause injuries to the workers. The defendant could have given the claimant in particular a pair of gumboots. If this was done she could not have suffered these injuries. By failing to provide this particular protective wear the defendant had violated the law and specifically the Occupation Safety, Health and Welfare Act.
- 5.4** On a balance of probabilities I find the defendant liable in damages for negligence. However, I disagree with claimant that she is unable to work due to the injuries suffered. I have seen the medical report and I saw the dry wound in Court. It is not true that there was loss of amenities of life. I disagree that incapacity is at 10%.
- 5.5** I therefore award the claimant damages for pain and suffering and none for loss of amenities of life. I further award special damages for the medical and police reports and medical treatment. Costs are awarded at the discretion

of the court much as they follow the event. The claimant is therefore awarded costs of this action.

The claimant must take out summons for assessment of damages before the learned Registrar within 14 days.

I so order.

Pronounced in Open Court on 27th November, 2018 at Blantyre in the Republic.

A handwritten signature in purple ink, consisting of several overlapping loops and horizontal strokes, positioned over the text 'Dingiswayo Madise'.

Dingiswayo Madise
JUDGE