



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

PERSONAL INJURY CAUSE NO. 177 OF 2017

BETWEEN

ADMSON PETER..... CLAIMANT

-and-

HENRY CHUMBU..... DEFENDANT

CORAM: THE HON. MR. JUSTICE D. MADISE
W. Kazembe Counsel for the Claimant
Mr. Masanje Counsel for the Defendant
M. Mbekeani Official Interpreter

Madise, J

JUDGMENT

1.0 Introduction

1.1 The Plaintiff commenced this action by a writ of summons claiming damages for personal injury allegedly due to the Defendant's negligence. The Plaintiff claims he was working for the Defendant at the time of the accident. The Defendant has disputed the claim on the basis that the plaintiff was a casual labourer and the Defendant has further denied being negligent. The matter went to trial on 22 May 2018 at Blantyre. This is the judgment of the Court.

2.0 The Facts

2.1 As per the Plaintiff on 20 November 2016 the Plaintiff and fifteen others were instructed by the Defendant and his agents to offload a metal cage from a truck. While performing this task, the said cage slipped and landed on the Plaintiff's right leg and foot. The Plaintiff was seriously injured down at the back on his ankle and he was rushed to Queen Elizabeth Central Hospital.

2.2 The Plaintiff claims the cage was too heavy and the Defendant could have used a folk lift or at least engage more men to perform the task. The Plaintiff claims that the Defendant was negligent and he seek damages for pain and suffering.

2.3 The Defendant on the other hand has disputed the allegations. The Defendant stated that 16 men were enough to off load the cage and that a folk lift could not have been used to perform this task. The Defendant claims they have offloaded similar cages in the past using fifteen men.

2.4 The Defendant claims this was an accident as the Plaintiff had forgotten to remove his leg as the cage was landing on the ground. That if the Plaintiff was alert enough he could have moved his leg away from the landing area and the accident could not have happened. This was the story as told by Henry Chumbu and his agent Frank Phiri who was supervising work on this day.

3.0 The Issues

There are four main issues for determination before me.

- 1) Whether the Plaintiff got injured while working for the Defendant.
- 2) Whether the injury was caused due to the Defendant's negligence.
- 3) Whether there was contributory negligence.
- 4) Whether damages are payable.

4.0 The Law

4.1 The burden and standard of proof in civil matters

In civil matters the above lies upon a party who asserts the existence of facts in issue. The burden of proof depends on the circumstances in which the claim arises. He who invokes the aid of the law must be the first to prove his case as in the nature of things, a negative is more difficult to establish than a positive.

4.2 The required standard in civil matters is on a balance of probabilities. 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. See Bonnington Castings Ltd vs. Wardlaw [1956] 1 AC 613 and Miller vs. Minister of Pensions [1947] 2 AU ER 372.

4.3 Negligence

4.3.1 "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." Blyth Vs Birmingham Water Works Co. (1856) 11 Ex 781-784.

4.3.2 Banda J, (as he was then called) stated in Nchizi Vs Registered Trustees of the Seventh Day Adventist Association of Malawi, 13 MLR 303 at 308:

"It is the duty of an employer or acting through his servant or agent to take reasonable care for the safety of his workmen and other employees in the course of their employment. This duty extends to safety of place of work, the plant and equipment and the method and conduct of work.

Briefly, the duty of the employer towards his servant is to take reasonable care for his servants' safety in all circumstances of the case. Alternatively the employer's duty is that he must not expose his employee to unnecessary risk or unreasonable risk."

4.4 Section 13 Occupational, Safety, Health and Welfare Act:

- 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 under sub section (1), the matters to which that duty extends included in particular – the provision of information, instruction, training and supervision.

4.5 Section 3 Employment Act

An employee means a person who offers his service under an oral or written contract of employment whether express or implied.

Section 25 Employment Act

Types of contract.

Unless otherwise provided by this Act, this part applies to all types of contracts of employment

- (a) A contract for an unspecified period of time

(b) A contract for a specific period of time

(c) A contract for a specific task

4.6 The Arguments

4.6.1 The Plaintiff has argued that he was an employee of the Defendant. That the law is clear as to the definition of an employee. According to section 25 Employment Act, an employee can be engaged for a specific task but still remains an employee under the law.

4.6.2 The Plaintiff has further argued that the specific task the Plaintiff and others were engaged to do was very dangerous and as the cage that was to be offloaded was very heavy and it needed more than 16 men to bring it to the ground. In that regard the Defendant was negligent.

4.6.3 On the other hand the Defendant has argued that the Plaintiff was a casual labourer who was not alert when the cage was coming to the ground. As a result his foot was placed at the landing spot of the cage. They have denied negligence and stated that this type of work had been done before without any incident.

5.0 The Finding

5.1 There is no dispute that the Plaintiff got seriously injured on 20 November 2016 while working for the Defendant. I now find that whether the Plaintiff was just assigned a specific task, he was still an employee of the Defendant for the minutes or hours he was performing the task of offloading the cage.

5.2 It is my finding that the said cage was very heavy and proper steps could have been taken to ensure a smooth performance of the task at hand. In my very considered view, the Defendant could have hired enough men more than 16 to

perform this task. The fact that the task had been performed in the past without any accident is neither here nor there.

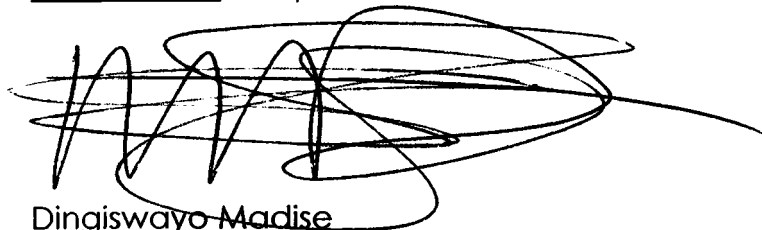
5.3 I therefore find that the Defendant further failed to supervise the work and give proper guidance to the men to avoid injury. If the Defendant and or his agent were alert they could have warned the Plaintiff to remove his leg. I therefore find that the Defendant and his agent violated section 13 (2) of the Occupational, Safety, Health and Welfare Act.

5.4 As a consequence, I find the Defendant liable for being negligent and must pay damages for the pain, suffering, loss and damage caused to the Plaintiff. I further grant him all the reliefs sought in the summons plus costs. The Plaintiff must take out summons for assessment of damages before the Registrar within 14 days.

5.5 when assessing damages, the learned registrar must take note of the fact that the Defendant did assist the Plaintiff immensely during his treatment and recovery.

It is so ordered.

Pronounced in Open Court on 19th June 2018 at Blantyre in the Republic.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Dingiswayo Madise
Judge