

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

PERSONAL INJURY CAUSE NO. 899 OF 2016

BETWEEN

ENERST MBAWALA CLAIMANT

-and-

CONFORZI PLANTATION LIMITED..... DEFENDANT

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

Madise, J

JUDGMENT

1.0 Introduction

1.1 The Plaintiff Ernest Mbawala took out a writ of summons against the Defendant on 22 November 2016 for personal injuries sustained during the course of employment. The Plaintiff claimed the injuries were caused due to the negligent acts of the Defendant. The Defendant filed a defence in which they have denied being negligent. They claimed the Plaintiff was injured by robbers because he was not so alert and the incident was a mere unfortunate event.

1.2 In the statement of claim the Plaintiff has particularized the negligence in the following terms:

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

1.3 As a result the Plaintiff was attacked by robbers who hacked his arm which resulted in amputation. Due to this incident the Plaintiff claimed he suffered loss in the following terms:

- a) The Plaintiff is unable to carry out manual work.
- b) The Plaintiff is unable to farm to feed his family.
- c) The Plaintiff has difficulties in carrying out household chores.
- d) The Plaintiff has lost the forearm.

1.4 The Plaintiff now seeks damages in the following fashion:

- a) Damages for pain and suffering.
- b) Damages for loss of amenities of life.
- c) Damages for disfigurement.
- d) Damages for loss of earning capacity.

- e) Special damages.
- f) Costs of this action.

1.5 In the defence which has been filed, the Defendant has denied all the claims put forward by the Plaintiff and puts the Plaintiff to strict proof.

2.0 The brief facts of the case

2.1 The Plaintiff stated in his witness statement that on 12 November 2016 he was injured while he was guarding a pine gum forest, which was close to where chickens are kept. A group of thugs who were more than ten in number arrived at the place he was stationed and attacked him. At the material time he was alone at the spot and he was seriously injured.

2.2 He was rushed to Thyolo District Hospital where his arm was amputated. He stated that the injuries occurred as the Defendant had failed to provide him protective equipment like a torch and whistle. The Plaintiff claimed the Defendant was negligent.

2.3 On the other hand Mr. Hastings Matuya a security guard for the Defendant stated that the Plaintiff was his work colleague. That as a security guard he and others were receiving constant training every Friday. The training included physical exercises and parades. That the Plaintiff had also received similar training.

2.4 On the material day he stated that he was assigned to guard the pine forest with the Plaintiff. They patrolled the forest up to around 11 pm. Moments later they heard a sound of a whistle coming from the direction of the khola where chickens were kept. The thieves started running away towards the forest. The

guards were then surrounded by the thieves as the latter thought the guards were following them. They then attacked the Plaintiff.

2.5 The other guards and the police who were guarding the chicken khola came to their rescue and started giving the Plaintiff first aid. In conclusion Mr. Matuya stated that at the time of the incident they were armed with panga knives, baton stick and a whistle. Unfortunately they did not have the opportunity to use their weapons.

2.6 The last witness for the Defendant was Goodwin Mwakanema the Human Resources Manager. He told the Court that the guards were attacked because they were not alert. That the guards including the Plaintiff were armed with panga knife, a whistle and a baton stick. In conclusion he told the Court that all guards were trained on how to perform their duties.

3.0 The Issue(s)

3.1 The main issue for determination before this Court is whether the injuries the Plaintiff suffered were as a result of negligence on the part of the Defendant or as a result of a breach of a statutory duty. If the answer is in the affirmative, whether the Defendant is liable in damages.

4.0 The Law

4.1 The burden and standard of proof

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 Anderson J, stated in Blyth vs. Birmingham Waterworks Co. (1856) 11 EX 781.

"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."

4.3.2 Here at home, Banda J (as he was then called) stated in Nchizi vs. Registered Trustees of the Seventh Day Adventist Association of Malawi (1990) 13 MLR 303

"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.

5.0 The Finding

5.1 There is no dispute that the Plaintiff was in the employment of the Defendant as a security guard when the accident happened. There is no dispute that he was assigned to guard a pine forest on 12 November 2016 together with another guards. There is no dispute that during the performance of his duties he was attacked by thugs. There is no dispute that as a result of these injuries his fore arm was amputated.

5.2 The Plaintiff claimed he was not provided with adequate protective wear. He has not named the type of wear he was supposed to receive. The Defendant has stated that the Plaintiff was provided with a panga knife and a whistle. The Plaintiff has stated that if he was given a torch he could have seen the thieves from afar. The Defendants claimed a torch was equally dangerous as it exposed the guards. I further find the evidence of the Human Resources Manager to be hearsay as he was not present to tell this Court that the guards were not alert.

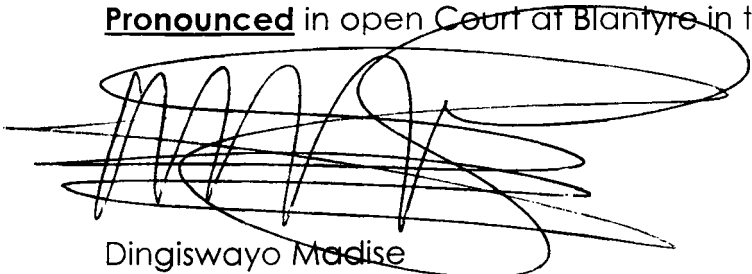
5.3 I have gone through the evidence, the law and the arguments in support and in opposition. In my considered opinion, I indeed find that a torch could have been given to the guards to enable them see what coming. I find as a fact that the guards including the Plaintiff were provided with a panga knife, a baton stick and a whistle. However the Defendant could have provided more men to guard the forest. Assigning only two men per spot was very inconsiderate and made the work of guarding the forest very dangerous.

5.4 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 or unreasonable risk."

5.5 I therefore find that according to the law and evidence, the Defendant was indeed negligent in failing to provide adequate men to guard the forest. I therefore, on a balance of probabilities find in favour of the Plaintiff. I grant him all the reliefs sought in the summons. He must take out summons for assessment of damages within 14 days.

I so order.

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



Dingiswayo Madise
Judge