JUDICIARY
IN THE HIGH COURT OF MALAWI
CIVIL DIVISION
PRINCIPAL REGISTRY
PERSONAL INJURY CASE No. 95 OF 2015

BETWEEN:

ROBERT THOMSON..... CLAIMANT

-AND-

LUJERI TEA ESTATE..... DEFENDANT

CORAM: THE HONOURABLE JUSTICE JACK N'RIVA
Counsel for the Claimant, Mr. Kamowa
Counsel for the Defendant, Mr. Ulaya
Mrs. D Mtegha, Court Clerk and Official Interpreter

JUDGMENT

The claimant was working for the defendant. His work involved chopping firewood. One day, while he was working, a piece of chisel, which he was using to cut the wood, broke and pierced his left thigh.

He commenced this case against the defendant claiming that his injury was as a result of the defendant's negligence.

This being a civil case, the onus lies on the claimant to prove, on a balance of probabilities, the claim against the defendant. In this case, the claimant is claiming negligence. He, therefore, has to prove that the defendant owed him a duty of care, that the defendant breached that duty and that, as a result, he suffered injuries: *Donoghue v Stevenson* [1932] A C 562. As the Court stated in *Kalambo v National Bank of Malawi* [1997] 1 MLR 421, one has a responsibility to take

precaution to avoid acts and omissions which he or she reasonably foresee as to likely to cause harm to others- *Donoghue v Stevenson.*

The claimant was the sole witness in the case. He testified that on 24th April, 2014, in the morning, his instructor advised him, and another co-worker, to chop firewood using a hammer and a chisel. He said that the chisel was defective. He said the chisel broke, thumped up and pierced his left thigh. The thigh got cut in the process. He said the defendant only provided him with a pair of overalls as protective gear.

In cross-examination, he said he used the chisel on previous occasions. He said he could not tell whether the chisel was defective. He further said he felt that if the defendant provided him with protective wear, he would not have suffered the injury. He said he wished he had protective wear like gloves, gumboots, goggles and helmet. He said such items would have protected him from the injury he suffered.

In re-examination, he said if he had put on an apron, the chisel would not have hit him.

In a nutshell, the claimant alleged that the defendant failed to provide him with a protective wear and that they gave him a defective chisel.

Therefore, the question is whether on the evidence, on the balance of probabilities, the claimant has proven his assertions. Has he proved, in relation to the allegations I have isolated, that the defendant owed him a duty of care? If so did the defendant breach the duty?

Pausing here, it is not in dispute that the claimant suffered injuries. Being an employee, we cannot dispute that the defendant owed him a duty of care to ensure that he does not get injured in the course of his employment. In the context of the claimant's claim, the defendant owed him a duty to provide him with a working environment free from foreseeable injuries.

In this particular context, the defendant owed the claimant a duty to provide him with perfect machinery and protective wear. The aim is to protect an employee from foreseeable harm.

In this particular context, the defendant owed the claimant a duty to provide him with perfect machinery as well as protective wear to protect him from foreseeable harm.

It is worth emphasising that the standard required from the duty-bearer is that of foreseeability. The question is, of course, not whether a defendant foresaw the harm. It is the question of whether the defendant ought to have foreseen that the occurrence as reasonably arising from his or her acts or omissions.

Putting this claim in a specific spectrum, the claimant alleged that the tool he was using was defective.

Going through the evidence, it is not convincing that his supervisor gave him the chisel well-knowing that it was defective. In his own evidence, the claimant said that he had previously used the chisel on other occasions and he could not say whether it was defective.

I, therefore, do not find as a fact that the defendant provided the claimant with a defective chisel. The next question is whether the claimant's injury was a result of non-provision of protective wear.

The evidence is that a chisel broke and hit the claimant's thigh. The claimant argued that provision of an apron would have prevented the incident. I must state that I am not convinced that the apron would have prevented the injury. I am also not convinced that the defendant would have foreseen that an injury of the kind that happened would have arisen due to absence of an apron. Arguably, an apron could be an important protective wear to the claimant, he cannot say that the claimant's injury was as a result of its absence.

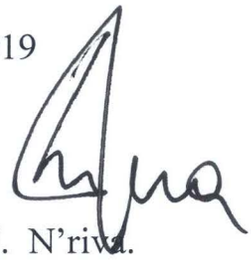
I also dismiss this aspect of the claim by the claimant. In cases of this nature, one has to establish a nexus between the act or the omission and the injury. See Mbvundula J in *Thom Saizi Lihoma v Anchor Industries (Soap Division)* Personal Injury Case Number 254 of 2014.

In conclusion, the claimant has failed to prove that his injury was due to the defendant's negligence. He has failed to prove breach of duty on the part of the

defendant. He has failed to prove breach of duty on the part of the defendant. He has failed to prove that the defendant knowingly provided him with a defective tool. He had also failed to prove that he would not have been injured had the defendant provided him with protective wear.

Therefore, I dismiss the claimant's claim against the defendant. Each party shall meet its costs.

Pronounced this 19th day of February, 2019



J. N'riva.

JUDGE