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REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NO. 350 OF 2017

BETWEEN

NORMAN WASHA.....CLAIMANT

AND

ILLOVO SUGAR MALAWI LIMITED.....DEFENDANT

CORAM: Hon Justice J N’riva, Judge
Claimant Present
Defendant Present
Counsel for the Claimant Mr L Mickeus
Counsel for the Defendant Ms B Mnyanga
Ms D Nkangala Court Official

JUDGMENT

Background

The claimant was employed by the defendant as an electrician at the defendant’s factory. On 25th November, 2016, the claimant was directed by his foreman to clear the cane yard motor control center panels which resulted into fire and as a result the claimant sustained severe injuries. The claimant argued that the injuries were as a result of negligence on the part of the defendant: the defendant knew or ought to have known that the claimant’s work necessitated the provision of protective gear.

Particulars of negligence

The claimant particularised the negligence as follows

- defendant's failure to provide a safe and health working environment
- defendant's failure to provide protective gear while on duty
- defendant's failure to take any adequate protection for claimant's safety while carrying out his duties.
- defendant's failure to take measures to ensure, promote and protect the safety of employees.

Defence

The defence, in denying liability, argued that

- it fulfilled duties provided safe work, protective and provided guidance and instruction and industrial healthy safety
- the injuries were caused by the claimant's own negligence
- the claimant ignored work instructions and standards practice which required him to switch off electrical appliance before working on it and working on a live electrical appliance using a conductor of electricity

The law on negligence

The law on negligence is premised on the requirement that one owes another a duty of care 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 be 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.

For the claimant to establish his case, in this case, the defendant must have had a duty to

- provide a safe and health working environment.
- provide protective gear while on duty
- to take any adequate protection for claimant's safety while carrying out his duties.

- to take measures to ensure, promote and protect the safety of employees.

He must further prove that the defendant failed to do all that and that that failure led to the injuries that he suffered. 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. It must be foreseeable that the breach in the duties alleged would lead to one foreseeing that an injury is inevitable.

Under the 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 and systems of work. 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. It is commonplace that a claimant has the burden of proving the elements of his or her claim. In a civil case, a claimant has to prove his or her case on a balance of probabilities. In *Commercial Bank of Malawi v Mhango* [2002-2003] MLR 43 (SCA), the Court observed as follows:

"Ordinarily, the law is that the burden of proof lies on a party who substantially asserts the affirmative of the issue. The principle was stated in the case of *Robins v National Trust Co* [1927] AC 515 that the burden of proof in any particular case depends on the circumstances in which the claim arises. In general, ... the burden of proof lies on him who alleges, and not him who denies. Lord Megham, again, in *Constantine Line v Imperial Smelting Corporation* [1943] AC 154, 174 stated that it is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons. The judge said that the rule is adopted principally because it is but just that he who invokes the aid of the law should be the first to prove his case because in the nature of things, a negative is more difficult to establish than an affirmative. However, in a civil action the burden of proof may be varied by the agreement of the parties - see *Bond Air Services Ltd v Hill* [1955] 2 QB 417."

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 testified that on 25th November 2016, his foreman directed him to clean cane yard motor control centre panels. He cleaned the first panel which was controlling water pump. After that, he went to work on second panel known as gantry panel, used to offload sugarcane from trucks. Immediately he opened the panel to switch off breaker, it burst into fire thereby leading to his injuries in the face and hands. He said the defendant failed to take adequate protection for his safety; exposed him to risk of injury which risk, they knew or ought to have known.

In cross-examination, the claimant said that that was his first day to work on motor control centre panel. He said he had a safety briefing earlier that day. One of the issues was to isolate energy before cleaning. He said he was given paint brush and soap wasters. He said he was given helmet, arch flash and safety boots. However, he said they were not adequate. He said he did not have training but only safety talks on how to work with live electricity in the factory. He said was aware on how to safely conduct the job. He further said in many ways Illovo told them about safety. He said they were supposed to be given arch flashes yearly but that year he was not given a new one (*i.e.* it was old). He said the arch flash caught fire because it was old.

On helmet, the claimant said it only covered the head and not the entire face. As of gloves, he said he was not given. He argued that if he had a pair, his hands would not have been burnt.

The defence paraded two witnesses. Mercy Msume and Herbert Ngwira.

Ms Msume testified that she was working with the claimant. She said that on the day in issue they had a safety briefing. After that they went to the workshop to clean the motor control centre cubicles. The claimant prepared to start work in the first cubicle. He proceeded to the second cubicle. At that point, she just saw

a spark and heard an explosion. She rushed to help the claimant out. She observed that he was burned.

She said they were provided with arch flash suit (to protect them from heat) and TAKE 5 guidelines (on precaution before they begin work).

In cross-examination, she said the claimant got injured in the cause of his employment. She said there was no supervisor. She said an old arch flash can catch fire because it is loose. She said the helmet only covered the head. She said the switch was modified after this incident.

In re-examination she said there was no fault in the motor centre. She said she did not know why the modification was done.

The second witness, Mr Ngwira, said he was the claimant's supervisor. He said on the day they conducted safety briefing warning the workers hazards on the job highlighting safety measures to be taken on the job.

As to the incident that led to the injuries that the claimant suffered, the witness said they conducted investigations. He said that he noticed that in the cubicle where the claimant was working, electricity was not isolated. That caused terminals to be short-circuited causing an electric flash. He said a thorough investigation found that the claimant ignored work instructed. He said the claimant started cleaning the panel without isolating power in the motor control centre. Further, the claimant was using an electricity conductor to clean the motor control centre. He said in the gantry crane panel the main switch and the breaker were in good condition and safe to use. The witness further stated that it was not correct that the panel sparked because it was opened before switching off. He said the panel flashed because the claimant was cleaning the panel using a paint brush that had a metal strip before isolating energy. He further said the defendant provided the claimant with necessary work equipment and protective wear. He was provided with an arch flash and work boots. He also had a helmet and safety gloves. He was also provided with TAKE 5 guidelines among other things. TAKE 5 required the claimant to take some time to identify all potential hazards of his job.

In cross examination, I must state at the outset, the witnesses seemed to me to be an unreliable witness. He was evasive and hesitant in giving answers to the

question counsel for the claimant posed. In my judgment, this was a witness who was meant to defend the defendant at any cost.

In some cases, his responses were unclear. Suffice to say that the witness said he was the claimant's supervisor. He said his duty was to supervise the claimant. He said he did not supervise each and every work that the claimant did.

In response to a question whether he was instructing the claimant on what to do he gave two answers: yes and no.

He admitted that the claimant suffered injuries. He said he was not present; he only heard about it. He said each panel had its switch which was intended to isolate power. He said a person did not have to open and switch it off. He said it was being switched off from the main isolator.

Finding of fact and law

The claimant's case is that he was injured because the defendant did not provide him with adequate protective gear. He said he was provided with arch flash suit, work boots and helmet. He said if the defendant provided him with adequate protective gear, he would not have suffered the injuries. He said the arch flash caught fire because it was old and loose. For the helmet, he said it only covered the head and that it could not protect the face. He said he had no gloves.

I find that the claimant proved on a balance of probabilities that he was given inadequate protective gear: that the arch flash was old and that the helmet only covered the head. He also had no gloves although Mr Ngwira insisted that they provided gloves. In my appreciation of the facts before me, it was more probable that the claimant had no gloves. In my judgment, the defendant would have done better on the provision of protective wear. Had that been the case, perhaps the injuries to the claimant would have been minimized a great deal.

The defendant argued that the injuries were as a result of negligence of the claimant. The defence evidence, however, falls short of showing how the claimant was negligent leading to the explosion. The claimant's side of the story is more convincing than that of the defendant. The main defence witness was Mr Ngwira. Ms Msume did not much dispute the assertions by the claimant. I remind myself that the burden of proof was on the claimant. I had issues, as I said before, with the evidence of Mr Ngwira. The evidence was unconvincing. It would be problematic to accept the evidence of Mr Ngwira.

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Decision

I find the claimant's assertion to be more convincing. I find that the claimant proved that the defendant failed to provide a safe and health working environment: the defendant failed to provide adequate protective gear to the claimant. Thus, one can say that the defendant failed to take adequate protection for claimant's safety while on duty or that it failed to take measures to ensure his safety. The claimant worked without supervision. This should be an important considering the assertion that this was the first day the claimant to work on the said panels. This comes out very clearly in the evidence of the claimant and unconvincing were the attempts by Mr Ngwira to refute that assertion. I am not convinced by the defence that it fulfilled duties to provide safe work, protective wear and that it provided guidance and instruction and industrial healthy safety; or that the injuries were caused by the claimant's own negligence. I fail to appreciate that the claimant ignored work instructions and standards practice, for the defence has hardly convinced this Court on that point.

On a balance of probabilities, I find that the claimant has proved that the defendant owed him a duty of care on safety. The defendant fell short of fulfilling that duty and that led to the claimant's injuries.

I, therefore, find the defendant liable for negligence.


Assessment of damages

Since the parties did not address the Court on damages, the parties are free to do so within fourteen days of this judgement.

Costs

I award costs to the claimant.

MADE the 8th day of September, 2020


J N'RIVA
JUDGE