

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**

PERSONAL INJURY CAUSE NUMBER 350 OF 2019

BETWEEN

JOSEPH KAMBA

CLAIMANT

AND

O.G. PLASTIC INDUSTRIES LIMITED

DEFENDANT

CORAM: JUSTICE M.A. TEMBO

N. Alide, Counsel for the Claimant
G. Mbendera, Counsel for the Defendant
Mankhambera, Official Court Interpreter

JUDGMENT

1. This is the decision of this Court following a trial of this matter on the claimant's claim for damages for the injury he suffered on his left wrist after the machine he was working on at the defendant's factory trapped his left arm. The claimant claimed that the injury arose as a result of the defendant's negligence and breach of its statutory duties as an employer. He also relied on the doctrine of *res ipsa loquitur*.
2. The claimant asserted in his claim that he was employed by the defendant as a machine operator in its business of manufacturing pipes and customizing the same.
3. He asserted further that on 2nd August, 2017, whilst in the course of his employment as a machine operator, he was ordered by the defendant's chief

executive officer to fix the pipe on the machine used for production. He indicated that in the process, the sensors of the machine stopped working and consequently the machine trapped his arm and caused him to suffer injury, pain, loss and damage.

4. He asserted that his injury was caused by the breach of statutory duty by the defendant in that the defendant failed to ensure the safety, health and welfare of all its employees including himself as required under section 13 of the Occupational Safety, Health and Welfare Act. He indicated further that the injury, loss and damage was caused by the negligence of the defendant in that it failed to take any adequate precautions for him while he was engaged upon the work, it exposed him to a risk of injury which it knew or ought to have known, it failed to provide protective gear and it failed to provide a safe working environment.
5. The claimant indicated that he would also rely on the doctrine of *res ipsa loquitur*.
6. The claimant then asserted that as a result of the trapping of his arm herein he suffered a fracture of the distal radius and ulna and a dislocated left wrist. And that he was admitted to the hospital for a few days and treated as an outpatient thereafter.
7. He then claimed damages for pain and suffering, loss of amenities of life, disfigurement, loss of earning capacity, cost of a medical report and costs of this action.
8. On its part, the defendant did not dispute in its defence that it had indeed employed the claimant as a machine operator. It denied the allegations of negligence and breach of statutory duty herein. It asserted that the claimant got injured due to his own negligence, namely, his failure to wear his protective clothing, failure to carry out his task as trained by the defendant, failure to take precautionary measures whilst carrying out his task and generally failing to take care of his own safety.
9. The defendant asserted that it provided a safe system of work, necessary training, protective wear and ensured that all health and safety regulations were complied with in line with the Occupational Safety, Health and Welfare Act.
10. The defendant therefore denied any liability to pay damages herein asserting that the claimant negligently injured himself.

11. The issues for determination before this Court are whether the defendant is guilty of the alleged negligence and breach of an employer's duty as alleged. Whether the claimant suffered the injury and loss claimed. And whether he is entitled to the damages and costs sought.
12. The standard of proof in these civil matters is on a balance of probabilities as rightly noted by the parties in this matter. And, the burden of proof lies on he who asserts the affirmative, in this case the claimant. The defendant bears the burden of proof on the allegation of contributory negligence. See *Nkuluzado v Malawi Housing Corporation* [1999] MLR 302 and *Miller v Minister of Pensions* [1947] All ER 372.
13. The claimant gave evidence to prove his claim. The defendant had two witnesses. Both parties made submissions herein.
14. This Court visited the factory and saw the operation of the machine on which the claimant got injured. From the evidence, the following facts were established.
15. On the material day, the claimant was working on the defendant's machine in the factory. In the course of his work, the claimant inserted a pipe that had to be customized with sockets on either side. The process involved placing the pipe in a space between a moving part that would mould the socket into the pipe and a part of the machine that was stationary. The pipe was short and required that the claimant hold the pipe in place whilst the moulding part of the machine moved in towards the other part of the machine.
16. The impression that this Court got was that the machine is meant to be operated by using a certain length of pipe that is automatically held by the machine and which guarantees the safety of the machine operators. The machine holds the appropriate length of pipe in place and the operator simply instructs the machine to do its work of socketing the pipes.
17. It appeared to this Court that whenever a job required an operator to socket a much shorter piece of pipe than the claimant, as a machine operator, had to control movement of the mould part of the machine to the exact length of the pipe he was holding so as to prevent the moving mould from crashing his hand as the mould moved into place to socket the one end of the pipe as the other end was lodged against the stationary part of the machine. The claimant as operator would control the precise mould movement by placing a metal against a sensor on the machine.

18. On the instruction given to the claimant on the material day, he had to make sockets to either end of a much shorter pipe that could not be held safely and automatically as per the machine design.
19. Whilst the claimant was holding the pipe in between the moving mould part and the stationary part, the mould part of the machine moved in and could not be stopped manually after placing a metal on a sensor. And as a result, the claimant's arm got trapped and crashed resulting in his injury.
20. The claimant asserted that the sensors were faulty and that he reported the same to management which worked to repair the same on several occasions.
21. The claimant also indicated that the defendant never provided him with gloves which would have offered him some protection in the course of his work on the machine herein.
22. He also asserted that he was never provided training on how to operate the machine. On this point, the defendants' witnesses indicated that in fact the claimant is the one who trained his colleagues on operation of the machine and that he had earlier received training on the operation of the machine. On this last point, this Court wishes to state that it found that the claimant was sufficiently experienced in the operation of the machine and evidence on the point suggested strongly that he in fact received some training on the same. As such, the claimant's claim on this aspect is untenable. He was able to explain the workings of the machine very well that he cannot claim to have insufficient knowledge in the operation of the machine. He was able to explain in great detail how double socketing of a short pipe was done.
23. The defendant's witnesses then indicated in their evidence to this Court that the machine in issue was never used to socket pipes of the short length on both ends as indicated by the claimant. However, the two witnesses appeared not to have been present when the instruction to socket the both ends of the short pipes was given to the claimant. The defendant's officer who gave the instruction to the claimant also did not appear to testify for the defendant. One of the witnesses who is a supervisor and was present in the factory at the time of the incident herein however confirmed the claimant's assertion that short pipes were being socketed as asserted by the claimant. He in essence contradicted his fellow defence witness, a machine operator, on that aspect and confirmed the claimant's assertion in that regard.

24. Both parties correctly agree on what constitutes negligence. In an action claiming negligence, the claimant must show that there was a duty of care owed to her, that the duty has been breached and that as a result of that breach of duty the claimant has suffered loss and damage. See *Mkandawire v Ziligone* [1997] 2 MLR 134, 144.
25. Both parties also correctly agree that, with regard to employers and their employees, the duty of care on the employer is as was stated in the case of *Nchizi v Registered Trustees of the Seventh Day Adventist Association of Malawi* (1990) 13 MRL 303, 308 where Banda J (as he was then) said:

It is the duty of an employer or acting through his servant or agents 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 the equipment and the method and conduct of work. Briefly, the duty of an employer towards his servant is to take reasonable care for his servant's safety in all circumstances of the case.

Alternatively, the employer's duty is that he must not expose his employees to unnecessary risk or unreasonable risk....

26. Both parties also correctly referred to the statutory duty of employers as provided in section 13 of the Occupational Safety, Health and Welfare Act which states as follows:

- (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 subsection (1), the matters to which that duty extends includes in particular-
 - a. the provision and maintenance of plant and systems of work that are safe and without risk to health;
 - b. arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transportation of articles and substances;
 - 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 egress from it that are safe and without such risks;

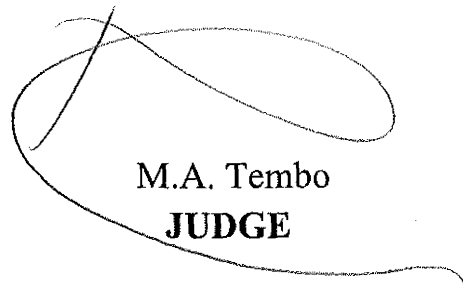
e. the provision and maintenance of a working environment for his employees that is safe, without risk to health, and adequate as regards facilities and arrangements for their welfare at work.

27. The parties also correctly noted that section 18 (a) of the Occupational Safety, Health and Welfare Act, places a duty on all employees to take reasonable care for their own safety and health.
28. On the facts, the claimant submitted that the defendant was negligent in that it breached its common law duty as an employer and imperiled the claimant by letting him operate on a machine whose sensors were faulty whilst he was socketing a short pipe that he had to hold with one hand whilst using the other hand to place a metal on a sensor to ensure that his hand never got crashed. He indicated that the whole operation was foreseeably risky.
29. The claimant raised an issue, during his submissions, that he should have been provided an assistant to help with managing the sensor blocking or holding of the short pipe, but this is an issue on which no evidence was led and was inappropriately raised in submissions.
30. The defendant insisted that it never breached its duty. It indicated that it had worked on repairing the alleged faulty sensors on the machine and had thereby discharged its duty. It essentially, indicated that socketing of short pipes on the machine was not foreseeably risky.
31. This Court agrees with the claimant and the defendant that the defendant had a duty to ensure that the claimant was working using a machine that was safe and not foreseeably risky. On the facts, the machine set up employed in this matter, whereby the claimant had to place a short pipe for the purpose of socketing it on both ends, was foreseeably risky. This is because the claimant was required to place one of his hands between the dangerous moving moulding part and the other stationary part of the machine as he held the short pipe, whilst relying on placing of a metal on a sensor using his other hand to protect his precariously placed hand. It was a disaster waiting to happen. Submissions by the defendant to the contrary, that the cause of the misfortune to the claimant was the claimant himself, are therefore untenable. The defendant placed the claimant in a foreseeably perilous position and the claimant eventually got imperiled.

32. In the end, this Court finds that the claimant has shown that there was a duty of care owed to him by the defendant, that the duty has been breached and that as a result of that breach of duty the claimant has suffered loss and damage in the form of the injury which he suffered herein. See *Mkandawire v Ziligone* [1997] 2 MLR 134, 144.
33. The claimant has shown that the defendant breached the duty of care owed by an employer that was stated in the case of *Nchizi v Registered Trustees of the Seventh Day Adventist Association of Malawi* (1990) 13 MRL 303.
34. This Court also agrees with the claimant's submission and finds that, on the evidence of the machine set up on double socketing of short pipes, the claimant has shown that the defendant breached its statutory duties. The defendant failed to ensure a safe working environment. The defendant was in breach of section 13 of the Occupational Safety, Health and Welfare Act. In the circumstances, the view of this Court is that the defendant cannot rely on section 18 (a) of the Occupational Safety, Health and Welfare Act, which places a duty on all employees to take reasonable care for their own safety and health. The defendant ought to have avoided using the machine to double socket short pipes using the setup of the machine that is foreseeably risky.
35. The defendant did not provide the claimant with gloves. That was a breach of both the common law duty and statutory duty on the part of the defendant to ensure the safety of the claimant. The defendant suggested that the claimant had a duty to ask for the said gloves but did not and hence assumed the risk of working without gloves. However, the duty to provide protective clothing, including gloves, rests with the defendant employer and the contrary argument cannot be made by the defendant in that regard. It however remains doubtful that the gloves would have prevented the sort of injury that the claimant was exposed to in the circumstances namely, the crashing of his hand. The failure to provide gloves therefore appears inconsequential in this matter.
36. The immediately foregoing notwithstanding, in the circumstances, the claimant's claims have been proved satisfactorily and the defendant is found liable for negligence and breach of statutory duty.
37. Given that the cause of the injury to the claimant is known, the claimant cannot rely on the doctrine of *res ipsa loquitur* which is usually relied upon to prove negligence where the facts sufficiently imply negligence under certain conditions.

38. The claimant clearly suffered injury and loss and is therefore entitled to the damages claimed. The Registrar shall assess the damages if not agreed within 14 days.
39. The claimant is also awarded costs of these proceedings to be assessed by the Registrar.

Made at Blantyre this 28th October, 2021.



M.A. Tembo
JUDGE