

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**PERSONAL INJURY CAUSE NUMBER 498 OF 2020**

**BETWEEN**

**DYSON TIMOTHY**

**CLAIMANT**

**AND**

**NAMING'OMBA TEA ESTATES LIMITED**

**DEFENDANT**

**CORAM: JUSTICE M.A. TEMBO**

D. Mlauzi, Counsel for the Claimant

F. Chipembere, 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, resulting in amputation of a finger and fracture of two fingers, whilst he was working at the defendant's estate lifting a heavy log. The claimant claimed that the injury arose as a result of the defendant's breach of its statutory duties as an employer.
2. By his statement of claim, the claimant asserted in his claim that he was employed by the defendant as a labourer.
3. He asserted further that on 20<sup>th</sup> February, 2017, whilst in the course of his employment as a labourer and on instruction from the defendant's Captain, he was assigned with his coworkers to cut down a tree and make timber out of it.

He indicated that, however, looking at the size of the log, he and his coworkers advised the Captain to increase manpower to help lift the log. He asserted that the Captain did not increase the manpower.

4. He then asserted that as he was busy doing his job as assigned by the Captain, the log fell down and crushed his three fingers on his left hand. He then claimed that the defendant was at fault for the said accident due to the breach of its statutory duties contained in the Occupational Safety, Health and Welfare Act.
5. He indicated the particulars of the breach of the Act, namely, failing to provide adequate manpower to help in lifting the log as requested, failing to provide a safe working environment for the claimant, failing to provide the claimant with protective gear, failing to take reasonable care for the safety of the claimant and failing to provide and maintain a safe system of work.
6. He then indicated the particulars of his injuries, namely, amputation of the 3<sup>rd</sup> finger on the left hand, fracture of the 2<sup>nd</sup> and 4<sup>th</sup> fingers, post traumatic peripheral neuropathy and postsurgical pains followed by nausea and general body pains. He then elaborated his loss being the pain and suffering, loss of amenities of use of his lost finger, disfigurement due to the amputation and the medical costs. In the alternative, he sought compensation under the Workers Compensation Act.
7. He then claimed damages for pain and suffering, loss of amenities of life, disfigurement, K20 000 cost of a medical report, in the alternative damages under the Workers Compensation Act 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 labourer. It denied the allegations of breach of statutory duty herein. It also surprisingly denied being negligent though the same was never alleged. It asserted that the claimant got injured due to his own negligence, namely, his failure to adhere to strict safety measures when performing his duties, failure to follow general directions and instructions, failure to adhere to training on how to handle oneself around working station, failure to heed warnings, holding on to a falling log, placing his hand on the spot where the log will fall, failure to ensure his own safety, failure to put on protective gear and general carelessness.
9. The defendant therefore denied any liability to pay damages herein.

10. The issues for determination before this Court are whether the defendant is guilty of the alleged breach of an employer's statutory duty as alleged. Whether the claimant suffered the injury and loss claimed. And whether he is entitled to the damages and costs sought.
11. 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.
12. The claimant gave evidence to prove his claim and he had an additional witness. The defendant had two witnesses. Both parties made submissions herein.
13. From the evidence, the following facts were established. On the material day, the claimant was working at the defendant's estate in the company of two others. Their task was to cut logs into timber. In the process they would lift logs. They were supposed to lift a heavy log which the three of them knew was so big that they were unlikely to lift it.
14. According to the claimant, the reason why the three decided to lift the heavy log that injured the claimant is that the Captain, who had earlier been requested for extra manpower around work start time of 6.00 a.m. had delayed in bringing in that extra manpower until 8.00 a.m. The claimant's explanation for deciding to lift the very heavy log was that he feared that he would be reprimanded if he did not get on with the work from 6.00 a.m. to 8.00 a.m. when the incident herein happened, despite the log being too heavy for the three men to lift.
15. The defendant's Captain insisted that the claimant was sufficiently experienced as a wood cutter and that as such he should not have attempted to lift the heavy log without waiting for extra manpower.
16. It was also clear that the defendant never provided gloves to the claimant.
17. Both parties made submissions on the question of negligence, perhaps as a matter of routine in cases like the instant one that can be aptly described as 'run of the mill cases'. However, negligence was never part of the claimant's case and this Court is unable to consider the parties' submissions on negligence.

18. Both parties 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.

19. The defendant 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.

20. On the facts, the claimant submitted that the defendant breached its statutory duty to provide a safe working environment by compelling the claimant to attempt to lift the heavy log through failure to provide sufficient manpower timeously. And that the claimant acted as a reasonable employee in the circumstances after waiting for additional manpower for a number of hours.

21. On its part, the defendant contended on the contrary that the claimant acted unreasonably and negligently by attempting to lift the heavy log and creating a risky situation for himself.

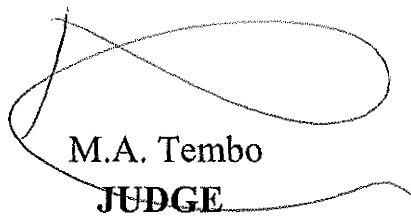
22. This Court has thought long and hard about the situation and is given to the impression that on the facts, it is the defendant which caused the claimant to

imperil himself as a reasonable employee. He had waited from 6.00 a.m. to 8.00 a.m. for additional manpower. The manpower never came notwithstanding that in the first place the defendant has to ensure sufficient manpower. In these circumstances, this Court agrees with the claimant that the defendant failed to provide a safe working system by leaving the claimant short of necessary manpower to start with and then delaying to respond to a call for such manpower resulting in the claimant fearing a reprisal if he stood idly by.

23. This Court is therefore satisfied that the defendant breached section 13 of the Occupational Safety, Health and Welfare Act as claimed by the claimant. In the circumstances, this Court is unable to agree with the defendant's contention that the claimant failed to act in accordance with 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.
24. Both parties submitted on the defendant's failure to provide gloves. This Court observes that the claimant's contention that the defendant failed to provide gloves would not persuade this Court to find that he is entitled to damages as a result. This is because the evidence of the claimant does not show how failure to provide gloves is connected to causing his injury.
25. The defendant attempted to resist the claim herein by contending that the medical reports showing the claimant's injury were hearsay as they were not tendered by the author of the same. In essence, showing that there is no injury proved. Whilst it may be that the medical reports are hearsay in so far as they are not tendered in evidence by the author of the same, at this stage the defendant's argument is superfluous considering that its own witnesses testified that the claimant got injured and they took him to hospital. The defendant cannot therefore blow hot and cold on the fact that the claimant got injured herein. It is clear even from the defendant's own evidence that the claimant got injured herein and that suffices for the purposes of findings at this stage. The issue of the extent of injuries will be interrogated further during assessment of damages.
26. The claimant clearly suffered injury and loss. He is therefore entitled to the damages claimed as a result of the defendant's breach of statutory duty as outlined herein. The Registrar shall assess the damages if not agreed within 14 days.

27. The claimant is also awarded costs of these proceedings to be assessed by the Registrar.

Made at Blantyre this 28<sup>th</sup> October, 2021.



M.A. Tembo  
**JUDGE**