



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 576 OF 2017

BETWEEN:

TAMARA KABOWA

CLAIMANT

AND

MOTA ENGIL ENGENHARIA CONSTRUCAO AFRICA, SA DEFENDANT

CORAM: JUSTICE M.A. TEMBO

Phokoso, Counsel for the Claimant

Mtonga, 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 aggravated and exemplary damages for the injury to her dignity as a woman, emotional and psychological trauma among others as a result of the negligent failure of the defendant to curb her sexual abuse at the hands of one of its officers who was her senior.
2. The defendant accepted being employer of the claimant but denied being negligent.
3. The claimant asserted in her statement of claim that she was at the material time employed as a Time Keeper by the defendant which is itself a construction company.

4. She asserted that in September, 2016, the defendant's General Foreman, Joaquim Carvalho proposed to be in a relationship with her which she refused. She asserted further that after her refusal, Joaquim Carvalho started to use his authority to sexually abuse her by touching her private parts forcefully whenever she boarded his motor vehicle.
5. She asserted that she reported this issue to the defendant but nothing changed and the defendant continued to let Joaquim Carvalho drive with the claimant. She asserted that on 23rd November, 2016, Joaquim Carvalho asked the claimant to go with him for routine inspection of projects and he drove towards Lutchenza. She stated that just after Thyolo Secondary School, Joaquim Carvalho started to sexually caress her and she reported this to the defendant the same day but no step was taken to curb the continued harassment.
6. She then asserted that on 28th November, 2016, Joaquim Carvalho ordered her to go with him to Bolopiti which was one of the defendant's working site. She stated that in the course of that trip, Carvalho sexually harassed her by undressing and ordering her to caress his manhood, which she refused. She added that he attempted to undress and kiss her.
7. She asserted that she was sexually abused by Joaquim Carvalho due to the defendant's breach of duty. She particularized the breach as failure/negligence to take steps to curb Joaquim Carvalho 's habit, failure to protect her from sexual harassment, failure to provide a safe and conducive working environment to her, and breach of duty to provide safe place of work and safe systems of work.
8. She then stated that, as a result of the defendant's breach of its duties as an employer, she suffered damage, namely, injury to her dignity as a woman, emotional and psychological trauma, fear to work with male colleagues in employment set ups and degradation of her being and confidence.
9. She therefore claimed exemplary damages for breach of employer's duty, aggravated damages for negligence in failure to curb Joaquim Carvalho's behavior towards her and costs of this action.
10. On its part, the defendant essentially denied that Joaquim Carvalho proposed to the claimant or did any of the alleged conduct that the claimant complained about. It alternatively asserted that if indeed Joaquim Carvalho did any of the things complained about then it cannot be held liable as this was not done in

Joaquim Carvalho 's course of employment or in exercise of his discretion as General Foreman. In the further alternative, the defendant asserted that it was neither notified of the conduct complained about nor did it receive a complaint from the claimant and therefore had no opportunity to address the alleged unwanted behavior. It also alternatively asserted that the conduct complained about was engaged in consensually between the claimant and Joaquim Carvalho and the claimant never lodged a complaint about the said conduct.

11. The defendant then denied that the claimant suffered the damage claimed and her entitlement to damages. It added alternatively that, if any damage was suffered it cannot lead to exemplary damages as there were no circumstances warranting such damages. It also alternatively asserted that the claimant cannot sustain a claim of negligence or employer's liability without suffering physical injury.
12. The issues for determination before this Court are whether the defendant is guilty of the alleged negligence in not taking action to curb the alleged unwanted conduct of Joaquim Carvalho. Whether the claimant suffered the damage claimed. And whether she is entitled to the damages and costs sought.
13. 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 she who asserts the affirmative, in this case the claimant. See *Nkuluzado v Malawi Housing Corporation* [1999] MLR 302 and *Miller v Minister of Pensions* [1947] All ER 372.
14. The claimant testified to prove her claims in this matter. The defendant also offered evidence in its own defence.
15. It is the claimant's undisputed testimony that she was employed by the defendant as a Time Keeper on the Thyolo-Thekerani-Muon-Makhanga Road project, with the responsibility of recording hours worked by the defendant's employees at work sites. She testified that due to the nature of her job she had to go to all sites for this road construction to log the hours worked by the defendant's employees.
16. She stated that as such she had to go to the various work sites with her then immediate boss, Joaquim Carvalho, to do her job. She added that she would use the same vehicle with him when ordered to do so and embark on her duties.

17. She stated that in September, 2016, Joaquim Carvalho proposed to be in a relationship with her and she rejected that. She stated that after her rejection of the proposal, Joaquim Carvalho started to use his authority to sexually abuse and harass her.
18. The claimant then detailed the sexual abuse and harassment that she claims she suffered at the hands of Joaquim Carvalho. She stated that he would forcefully start touching and fondling her private parts, waist and breasts whenever she boarded his vehicle en-route to construction sites for her time keeping duties. She also stated that he would make vulgar and explicit comments of how he would fuck her so hard and such would make her realize how good he was. She stated that during one incident he opened his zipper, took out his penis and demanded that she suck it.
19. The claimant stated that she complained to the defendant through some officers in its chain of command such as Mr. Maleta, Mr. Maliseni, Ms. Chipo and Mr. Mkwanda about Joaquim Carvalho's abuse but nothing happened and the defendant continued to let him drive with her to construction sites.
20. She then indicated that Joaquim Carvalho was her immediate boss and the vehicle they used was the only one assigned for purposes connected to her duties and she felt that refusal to board that vehicle would constitute insubordination so she complied to board the vehicle under protests which the defendant ignored.
21. She stated that things became so bad on 23rd November, 2016, when Joaquim Carvalho asked her to go on routine inspection of the road projects and he drove towards Luchenza. She explained that after Thyolo Secondary School Joaquim Carvalho forcibly pulled up her skirt exposing her and started sexually caressing her. She stated that she was shocked and started to struggle as she tried to stop him. She said upon arrival at the first site she demanded to be let out and went to report the sexual harassment to Ms Chipo one of the defendant's supervisors but the defendant continued assigning her with Joaquim Carvalho despite being aware of what she was going through and without any step being taken to curb the continued sexual abuse and harassment.
22. She then asserted that barely a week later, on 28th November, 2016, Joaquim Carvalho ordered her to go with him to Bolopiti which was a construction site. She stated that in the course of the trip he sexually harassed her again. She

indicated that he undressed himself to his knees and ordered her to caress his penis which he had taken out of his underwear. She stated that she refused. She stated that he then locked the car and parked it and attempted to forcibly undress her and kiss her. She indicated that as she was putting on a pair of jeans trousers he took out a six gear knife and tried rip the trousers apart.

23. She explained that she fought back, whilst crying the whole time, until when he realized that what was happening in the vehicle would attract attention then he stopped and he drove the remainder of the distance to Bolopiti. She stated that upon arrival at Bolopiti she went straight to report this incident of sexual abuse and harassment to the site supervisor Mr Mkwanda. She then explained that whilst at that site, the site junior supervisor and other administrative staff told her that she was wasting her time trying to report to the defendant the sexual harassment since cases of sexual abuse and harassment by the defendant's employees Jose Silva and Joaquim Carvalho in particular were rampant but the defendant does not act on them.
24. She then asserted that it was better to report the issues to police. She noted that one of the defendant's supervisors later wrote an internal incident report regarding the harassment of yet another female employee in which the exact sentiments were expressed and it is exhibited as TK1.
25. She stated that she reporting her sexual abuse and harassment to senior administrative officials of the defendant but nothing was done and she then reported to David Chise who was the overall Project Supervisor who casually told her to write a report but took no intermediate action. She said she wrote a report to David Chise dated 1st December, 2016 which is exhibited as TK2. She added that nothing was done until Joaquim Carvalho's contract ended and the defendant let him leave the country.
26. She then asserted that the defendant failed to protect her by negligently failing to take steps to curb the behavior of Joaquim Carvalho having been aware of the same for four months as is shown in exhibit TK2. She added that the defendant failed to provide her a safe and conducive work environment, a safe place of work.
27. She stated that consequently, she suffered injury to her dignity as a woman, emotional and psychological trauma. And that to date she has a damaged psyche and has fear to work with male colleagues in employment set ups. She

further stated that he being and confidence as a woman was grossly damaged and degraded. She therefore sought compensation from the defendant.

28. During cross-examination, she reiterated that she reported the sexual abuse to Mr Mkwanda. She added that after her 1st December, 2016, report to David Chise she still was assigned to ride in Joaquim Carvalho's vehicle and he continued to touch her. She stated that she thought after her report to David Chise he would stop Joaquim Carvalho from going to the work sites with her. She stated that she did not report this incident again as she felt she was not being assisted on previous reports. She also stated that she put this in her evidence in chief. She also stated that she did not report to police.
29. She declined knowledge of another employee popularly known as Kamuzu.
30. She then stated that she knew a certain gentleman from Mangochi who was her boyfriend. She denied that it is her boyfriend who lodged the sexual abuse complaint to Mr Mkwanda.
31. She then stated that she does not know how long Joaquim Carvalho worked at the defendant before he left. She however stated that he was not around after the Christmas break of 2016 when she reported back to work in January, 2017. She added that she worked for the defendant up to 2018. And her that she had a new General Foreman.
32. She then stated that Joaquim Carvalho did not injure her physically.
33. She then stated that she knows the disciplinary process of the defendant whereby an employee is called for a hearing. she however said she did not know that Joaquim Carvalho resigned. She also stated that David Chise was the top most boss above Joaquim Carvalho at Thyolo but she did not know if David Chise had other bosses in Lilongwe.
34. During re-examination, she stated that she did not report to David Chise immediately as he was the top most boss and because she was satisfied that she had reported to her immediate supervisors Mr. Maleta and Mr. Mkwanda to whom she was ordinarily reporting to. She said she expected them to report to David Chise. She added that she was therefore satisfied that the defendant knew of her problem in issue herein.
35. She then stated that she reported to David Chise because Mr. Mkwanda told her to do so. She added that David Chise told her to write the report after she said she would report to police. That marked the end of the claimant's evidence.

36. The defendant brought two witnesses, namely, David Chise and Mr. Mkwanda.
37. David Chise testified that in 2016 he was Site Manager of the road project alluded to by the claimant herein. He confirmed that 1st December, 2016, he received an oral complaint from the claimant that she had been receiving unwanted sexual advances from Joaquim Carvalho who was a General Foreman for the defendant on the road project in issue herein.
38. He stated that after considering the seriousness of the complaint by the claimant, he advised the claimant to put the complaint in writing. He added that he got the written complaint on the same day, 1st December, 2016. He said this was eight days after the incident complained of happened. This complaint is the same exhibited by the claimant and he marked it as exhibit DC1.
39. He then stated that by the time he got the claimant's written complaint the defendant had resigned from the defendant. He attached the resignation letter in Portuguese as exhibit DC2 with translation in English and affidavit of accuracy as exhibit DC 3 and DC4 respectively.
40. He explained that his investigations revealed that Joaquim Carvalho resigned on 21st November, 2016. He noted that the claimant alleges the harassment occurred on 23rd November, 2016. He then asserted that there is a high probability that Joaquim Carvalho had acted improperly because he had resigned from the defendant's employment.
41. He then elaborated that according to Joaquim Carvalho's letter of resignation, he was supposed to finish service of notice on 21st December, 2016. But however, that after the claimant had lodged her complaint to him and investigations were being conducted, Joaquim Carvalho left Malawi on 10th December, 2016 without fully serving his notice. He then attached a copy of Joaquim Carvalho's air ticket as exhibit DC5. He noted that this air ticket was issued on 6th December, 2016 which is about five days after he got a written complaint from the claimant.
42. He then asserted that sexual harassment and any other disgraceful and improper behavior are expressly prohibited at the defendant. He noted that paragraph 13 (i) of the defendant's conditions of service provides that disgraceful and improper behavior would result in summary dismissal. He attached a copy of the said conditions of service as exhibit DC6.

43. He then stated that this was the first time anyone had lodged a sexual harassment claim concerning Joaquim Carvalho and that this sort of behavior by Joaquim Carvalho came as a shock to the defendant's management.
44. He then indicated that after the claimant had lodged her complaint, he made sure that she did not work with Joaquim Carvalho again. He observed that, in any event, Joaquim Carvalho left the defendant's employment in about a week after the complaint was lodged.
45. He elaborated that from 1st December, 2016, when the claimant had lodged her complaint with him, she continued to work for the defendant with no problems whatsoever until January, 2018 when her contract with the defendant ended. He exhibited the claimant's end of contract letter as DC7.
46. He then stated that Joaquim Carvalho's conduct was against the law and was not at all connected to his duties as a foreman. He added that the defendant's management was not aware of Joaquim Carvalho's sexual advances towards the claimant until the claimant informed management through him on 1st December, 2016.
47. During cross-examination, he confirmed that he was the top most officer of the defendant on the road project herein. He clarified that his job indirectly involved receiving complaints from staff members because not all complaints came to him but went to site supervisors that are junior to him.
48. When referred to the security officer's report TK1 of 23rd March, 2017 about another incident involving a female worker whose ears were pulled by the defendant's Mr. Jose he said that document did not say the defendant did not do anything on the claimant's earlier complaint.
49. He indicated that he did not check whether the claimant never worked with Joaquim Carvalho after the claimant's complaint to him and after he insisted he directed as such.
50. He then stated that fellow employees would not know that Joaquim Carvalho had resigned because this was not publicized. He then stated that Joaquim Carvalho would be responsible for his own individual conduct and that the defendant would only be responsible in relation to conduct concerning his work.
51. During re-examination, he clarified that he received complaints from staff indirectly because the defendant has the Human Resources Department that receives complaints and only serious complaints are referred to him. He

reiterated that he did not recall receiving the claimant's complaint before 1st December, 2016.

52. He asserted that there were two teams at the project herein one led by Mr. Mkwanda and one led by Joaquim Carvalho. He stated that the claimant was under Mr. Mkwanda and that Joaquim Carvalho's team had a time keeper popularly known as Kamuzu. He then asserted that, as such, the conduct complained of by the claimant cannot be connected to Joaquim Carvalho's work.
53. He referred to exhibit TK1 and stated that he was aware of this report and observed that it did not involve the claimant or Joaquim Carvalho. He added that the security officer who authored exhibit TK1 ought to have investigated Joaquim Carvalho and issued a report that should have been approved by him. He added that this was done and that the security officer could not say that nothing was done about the claimant's complaint.
54. The second witness for the defendant, Mr. Mkwanda, stated that in 2016 he was a foreman for the defendant on the road project in this matter. He explained that on 24th November, 2016, he was informed by the claimant that she had been harassed by Joaquim Carvalho who was also a foreman but senior to him. He elaborated that the claimant informed him that Joaquim Carvalho was trying to touch her private parts and was doing some other unwanted sexual advances.
55. He then stated that since Joaquim Carvalho was his senior he told the claimant that the issue was too big for him and advised her that it would be better if she reported to David Chise. He indicated that the claimant reported to David Chise on 1st December, 2016, which was eight days after the incident. He indicated that after days after that Joaquim Carvalho stopped reporting for work and eventually left Malawi.
56. He asserted that, as far as he is concerned, the claimant was not harassed again by Joaquim Carvalho after the issue was reported to David Chise.
57. During cross-examination, he stated that as foreman he had some authority over juniors and they could bring their complaints to him which he could take to management. He added that the claimant was his junior and would come to him with complaints. He however stated that his receipt of complaints did not mean that management received such complaints. He clarified that this depended on the complaint.

58. He then stated that he got a sexual harassment complaint from the claimant at the hands of Joaquim Carvalho but he never witnessed the events complained about. He added that if he had witnessed the same he would have done something.
59. He clarified that after the claimant's issue was reported he only saw that Joaquim Carvalho left
60. During re-examination, he stated that he had no authority over Joaquim Carvalho and could not deal with issues concerning his seniors. And that he advised the claimant to report Joaquim Carvalho at the office. And that he got the claimant's complaint at the time he was at a work site where he was working with the claimant in the afternoon. He added that the claimant told him the incident happened the previous day around 5.00 p.m.. He also added that at that time the claimant did not appear in danger and Joaquim Carvalho was not present.
61. 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.
62. 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 vs 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....

63. The claimant also correctly referred to the statutory duty of employers as indicated in section 13 of the Occupational Safety, Health and Welfare Act

which states that it shall be the duty of every employer to ensure the safety, health and welfare at work of all his employees.

64. The contention of the claimant is that the defendant's officers, including Mr. Mkwanda and David Chise received complaints from the claimant but did not act on them until Joaquim Carvalho left. Further that, even the defendant's security officer in exhibit TK1 observed the attitude of the defendant's officers when it came to complaints by female employees.
65. She submitted that the defendant's conduct displayed negligence and also failure in its statutory duty to provide a safe work place for her as a female employee.
66. On the other hand, the contention of the defendant is that it was neither negligent nor did it breach its duty as employer to provide a safe work place because it was not aware of the conduct of Joaquim Carvalho until the same was reported to David Chise. It added that it took action immediately the matter reached David Chise and so cannot be taken not to have done nothing or to have been negligent or in breach of its duty at employer.
67. This Court observes that the claimant clearly indicated that she reported not only to Mr. Mkwanda who advised her to report to David Chise but she also earlier reported the issue herein to other supervisors such as Mr. Maliseni and Ms. Chipo. These other officers have not been called to testify on behalf of the defendant despite the fact that the letter of complaint to David Chise by the claimant clearly documented such reporting of incidences of sexual abuse and harassment since September, 2016 to those other officers apart from Mr. Mkwanda.
68. This Court is aware that a failure to call such a witness must raise a presumption that any such witness would testify adversely to the party which fails to call such witnesses. See *Mpungulira Trading Ltd v Marketing Services Division* [1993] 16 (1) MLR 346.
69. This Court having considered all the circumstances of this matter concludes, in agreement with the claimant, that the defendant breached its statutory duty and indeed failed to ensure the safety and welfare of the claimant by failing to have in place an effective system for dealing with complaints such as the one that the claimant made to the various supervisors of the defendant who, in the words of Mr. Mkwanda, had a duty to escalate such complaints to management depending on the seriousness of the complaints. The defendant

cannot be heard to say that it only came to know about the issue when the issue was reported to David Chise. It ought to have had an effective system for handling complaints such as those made by the complainant. By not having an effective working system to handle sexual abuse complaints, the defendant got the complaints through Mr. Maliseni and Ms. Chipo but nothing was done while the exposure of the claimant to sexual abuse and harassment during the defendant's work set up continued unabated by the defendant.

70. If the defendant had an effective working system for sexual abuse complaint handling the abuse of the claimant at the hands of Joaquim Carvalho would have been arrested earlier than after several months. The defendant therefore breached its duty as employer under section 13 of the Occupational Safety, Health and Welfare Act to ensure a safe work place.
71. In the foregoing premises, this Court having considered the elements of negligence as stated in the case of *Mkandawire v Ziligone* [1997] 2 MLR 134, finds similarly that the defendant had a duty to act on the claimant's complaint but failed to act on the same and was negligent on account of the conduct of its various officers who got the claimant's complaint but never escalated it upwards in the chain of command until the last time when Mr. Mkwanda escalated the issue to David Chise several months into the sexual abuse in issue. This was as a result of lack of an effective system for dealing with such complaints especially when they involved some senior foremen like Joaquim Carvalho.
72. This Court is also fortified in its view of account persuasive authority in the case of *Bradford-Smart v West Sussex County Council* [2002] EWCA Civ 7 to the effect that on a claim of negligence involving sexual abuse the claimant must show that the defendant owed a duty of care to the claimant, failed in that duty, the claimant suffered loss as a result and that loss was reasonably foreseeable consequence of defendant's conduct.
73. The claimant has shown that the defendant owed a duty of care to the claimant and failed in that duty. What is being disputed by the defendant is whether the claimant suffered loss as a result. However, the loss if proved would be a reasonably foreseeable consequence of defendant's conduct. Otherwise, the defendant should have effectively dealt with the sexual abuse that was perpetuated in the course of work herein before the lapse of several months.

74. Given the lack of an effective system for dealing with sexual abuse and harassment complaints, it is not surprising that there was a document from the defendant's own security section, marked as TK1, lamenting the state of affairs at the defendant's organization with regard to handling of sexual abuse complaints of female employees at the defendant.
75. This Court therefore rejects the contention by the defendant that the acts of sexual abuse and harassment were isolated and not connected to the work of the defendant's Joaquim Carvalho. It is the finding of this Court that such offensive conduct was carried out in the course of Joaquim Carvalho's work, it was reported to the defendant who in breach of its obligations as an employer let it go on for months before taking effective remedial action.
76. The defendant contended that the claimant cannot sustain a claim to damages on a negligence claim where there is no physical injury. It stated that non-physical injuries are not actionable on a negligence claim. It alluded to the writing in Clerk and Lindsell on Torts, 16th edition at paragraph 10-9 where the learned authors posit that no damages are recoverable for mere mental distress unaccompanied by physical injury, but that if damages are due for physical injury, the sum awarded may include something by way of compensation for mental distress. The defendant also referred to the case of *Lynch v Knight* (1861) ER 822 on the same point.
77. It observed further that the claimant did not in fact prove that she suffered the injuries that she claimed she suffered, namely, psychological trauma, degradation of self as a woman and fear to work with men in work set ups. It asserted that the claimant worked with the defendant's new male General Foreman until her contract terminated in 2018 without any problem. It therefore contended that the claimant did not prove the injuries that she claimed but also that the said injuries are not actionable on a claim of negligence since there is no physical injury.
78. The claimant on the other hand contended on the contrary that although she never suffered physical injury she suffered psychological trauma which is more serious than physical injury and that she is therefore entitled to damages. The claimant referred to an American case of *Hettick and Bryant v Federal Express* whose citation was not provided but is from a Superior Court, Santa Clara County, California in which female claimants were compensated following sexual harassment that was not arrested by the defendant despite

being reported. The defendant observed that this American case was decided under a specific statute on workplace harassment which is not applicable in this matter, namely, the Fair Employment and Housing Act.

79. This Court wishes to agree with the defendant and state that citation of foreign cases must be done with care. The claimant cannot rely on a case authority that was decided under a specific foreign statute without explaining its persuasive authority in Malawi by reference to statutory provisions that are materially the same. There is no explanation why the American case authority is applicable here and this Court is not persuaded by the same as submitted by the defendant.
80. This Court agrees with the defendant and observes that in an action for negligence, as the present one, the claimant seeks to protect personal interest from damage. Further, there is need for the claimant to show 'damage' in order to succeed. So that the tort of negligence is 'damage' based. See Jenny Steele, *Tort Law: Texts and Materials* (2014) at 39.
81. This Court has considered the views expressed in the authorities cited by the defendant on how a claim of negligence is non actionable where there is no physical injury and observes that on the contrary other non-physical injuries are compensated in damages where negligence is the cause of action.
82. Considering that the claimant did not address this aspect, to arrive at justice, this Court took a lot of its time to do its own survey on the subject and is persuaded by the authoritative reading provided by the learned author Jenny Steele, *Tort Law: Texts and Materials* (2014) at 304 and 305, where it is said that:

There is indeed a wide range of cases in which there is recognized to be a duty not to cause psychiatric damage to the claimant, contradicting any general perception that such damage by its very nature constitutes a 'problem'. In addition to the cases mentioned by Brooke LJ in the valuable summary above, we may add the recognized duty of a school to protect its pupils against bullying (*Bradford-Smart v West Sussex County Council* [2002] EWCA Civ7); the duty of an employer not to expose employees to bullying by fellow employees (*Waters v Commissioner of Police for the Metropolis* [2000] 1 WLR 1607); the duty of a doctor toward a patient (*Re Organ Retention Litigation* [2005] QB 506); the duty of a solicitor to conduct a client's defence with due care (*McLoughlin v Jones* [2002] 1 QB 1312, psychiatric

injury after a period of imprisonment); and the duty of a prison to safeguard the well-being of a vulnerable prisoner.

83. This Court also had time to consider what was said in *Waters v Commissioner of Police for the Metropolis* [2000] 1 WLR 1607 by Lord Hutton who stated that:

I consider that a person employed under an ordinary contract of employment can have a valid cause of action in negligence against her employer if the employer fails to protect her against victimization and harassment which causes physical or psychiatric injury. This duty arises both under the contract of employment and under the common law principles of negligence.

84. In view of the foregoing persuasive authorities on the subject, this Court rejects as unjust the defendant's proposition from authorities it cited that where a person makes a claim of negligence then she cannot sustain the action if there is no physical injury claimed. A claimant can clearly sustain a claim of negligence alleging psychiatric injury in the absence of physical injury as is the case in the present matter.

85. This Court next considers whether the claimant has proved that she suffered psychiatric injury herein. The defendant contended that the claimant has not proved that she suffered psychological trauma as a consequence of the repulsive actions of Joaquim Carvalho.

86. This Court is of the view that for the claimant, as a woman, to have endured the abuse detailed herein it is more probable than not that she suffered psychological trauma that hurt her emotionally, apart from the other things the claimant indicated. The psychological trauma that the claimant suffered herein, though not analyzed by a psychiatric medical practitioner, appears more probable than not in this Court's view to have caused the claimant psychiatric injury. This finding cannot be undone by the defendant's submission that the claimant worked without any problem with a replacement supervisor at the defendant's workplace. If that were the case, the claimant would not have taken up this matter.

87. This Court is also convinced that the psychiatric injury suffered by the claimant was reasonably foreseeable in the circumstances of this matter where the claimant reported the abuse to the defendant's supervisors and the

defendant for months let the claimant ride in the same vehicle with Joaquim Carvalho who kept abusing the claimant.

88. In the final analysis, this Court finds that the claimant has proved her claim to damages arising out of the foreseeable injury that she suffered as a result of the defendant's negligence and breach of duty as employer. The defendant is found liable and judgment is entered for the claimant who is awarded damages.
89. The claimant sought exemplary damages and the defendant contended that the damages due herein cannot be on the scale of exemplary damages as defined in the case of *Rookes v Barnard* [1964] A.C. 1129 which restricts scenarios where such can be awarded to cases of oppressive, arbitrary or unconstitutional conduct by government, cases where the defendant seeks to profit from the impugned conduct and where a statute expressly authorizes the award of exemplary damages. This Court agrees with the point made by the defendant that the conduct herein does not fit that to which exemplary damages are restricted to and there is no statute allowing the same. The claimant's claim for exemplary damages there does not succeed.
90. The claimant's claim for aggravated damages however succeeds. This is considering that she was left to suffer for several months after initially reporting the offensive conduct to the defendant. Ordinary compensatory damages will not be enough in the circumstances. The damages must be assessed on an aggravated basis to cater for the exacerbated distress occasioned to the claimant for the duration she suffered continued abuse having initially reported the offensive conduct herein to the defendant. Psychiatric evidence must be adduced in this regard.
91. The claimant is also awarded costs of these proceedings.
92. Damages and costs shall be assessed by the Registrar, if not agreed by the parties within 14 days.

Made at Blantyre this 20th February, 2021.

M.A. Tembo
JUDGE