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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 827 OF 2020

BETWEEN:

MULASA KANYASA

CLAIMANT

AND

PLEM CONSTRUCTION LIMITED

DEFENDANT

CORAM: JUSTICE M.A. TEMBO

Kamunga, Counsel for the Claimant
Mbvundula, Counsel for the Defendant
Mankhambera, Official Court Interpreter

JUDGMENT

1. This is this court's judgment following a trial of this matter on the claimant's claim for damages for pain and suffering, loss of amenities of life, disfigurement, loss of earning capacity and costs of obtaining a medical and a police report and costs of this action following his injury when he cycled into a heap of quarry stones that he alleges was negligently heaped on the road by the defendant road constructor. The defendant contested the claim.
2. In his statement of case, the claimant stated that at the material time the defendant was engaged in road construction works at Ngulura bridge along the Goliyati-Mangunda road in Thyolo district. He indicated that, in the course

of those works, the defendant heaped quarry stones on the road and thereby caused heavy road obstruction.

3. He then indicated that on 17th August, 2020 at about 03:35 hrs near Ngulura bridge along the Goliyati-Mangunda road whilst he was lawfully cycling along the said road he cycled against the heap of quarry stones and he was greatly injured and he believes he got injured due to the defendant's negligence.
4. He indicated the particulars of negligence, namely, causing or permitting the said road to be or to remain obstructed as aforesaid and thereby to be or to become or to remain a danger and a trap to persons lawfully using the said road; failure by the defendant to take any or adequate precautions whether by way of signage, guarding or lighting the same or otherwise to prevent the said heaps being or becoming or remaining a danger and a trap to persons lawfully using the said road; leaving the said heaps in the said road with no or no proper adequate fencing, guarding or lighting when they knew or ought to have known that it was a danger and a trap to persons lawfully using the said road and failure by the defendant to exercise any reasonable care towards persons lawfully using the said road when they knew or ought to have known that by reason of the said quarry heaps thereon it was in a dangerous condition. The claimant also indicated that as far as is necessary he shall rely on the doctrine of *res ipsa loquitur* by which negligence is implied from certain circumstances.
5. The claimant indicated the particulars of injuries that he suffered including cut wounds on the face among many others. He indicated that he is therefore entitled to the damages he is seeking.
6. On its part, the defendant denied the claimant's claim and indicated that it did not heap the quarry stones on the road herein with the intention of obstructing the road as alleged. It asserted that it put road signs and signals to regulate traffic and also to alert other road users of the ongoing construction works including cones and barricades. The defendant indicated that it is not guilty of negligence and that the incident herein was not as a result of its negligence as alleged by the claimant.
7. In the alternative, the defendant indicated that the accident if it happened it was caused by the claimant's negligence. It gave particulars of the negligence, namely, failure to observe the road traffic warning signs put in place to avoid

- the injury; cycling at an excessive speed thereby failing to stop, slow down or manage to control the [] cycle to avoid the occurrence of the accident herein.
8. The defendant denies the injury and loss suffered by the claimant and the reliefs sought by the claimant.
 9. The issue for determination before this Court is whether the defendant was negligent in the manner it heaped the quarry stones on the road herein causing injury to the claimant.
 10. The standard of proof in these civil matters is on a balance of probabilities as rightly noted by the parties. 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 its claim of contributory negligence on the part of the claimant. See *Nkuluzado v Malawi Housing Corporation* [1999] MLR 302 and *Miller v Minister of Pensions* [1947] All ER 372.
 11. The claimant testified and called two witnesses. The defendant called two witnesses in its defence. From the evidence adduced by the parties, the impression that this Court got is that indeed the defendant had heaped quarry stones during the construction of the road herein. However, the quarry stones were not heaped in the middle of the road but rather on the edge of the left lane of the road on which the claimant was cycling. This is what the claimant and his witnesses indicated in their witness statements and is also what the defendant's witness said. It is only during the trial that the claimant changed to allege that the quarry stones were heaped blocking the entire left lane of the road on which he was cycling. The evidence shows that the claimant knew of the road works on the road herein. There was however a serious contention between the parties about whether road signage was placed to warn people of the construction works on the road. It turns out that such signage was indeed put in place by the defendant but some of it was stolen by people.
 12. The evidence shows that the claimant herein cycled into the heap of quarry stone and got injured.
 13. Given that the claimant was cycling early in the morning at around 3.30 am the expectation of this Court is that he would cycle taking precautions that it was safe to do so. It can be safely concluded that the claimant did not see the heap of quarry stones and that this is why he ended up cycling into it. If it was during the day and on a straight stretch of the road as was the case herein one would wonder how the claimant would not see the heap of quarry. The time

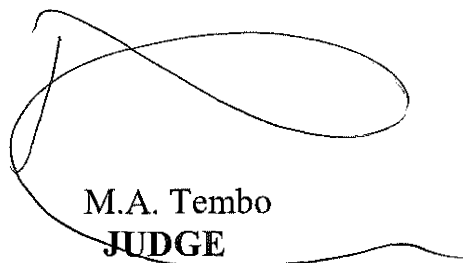
of the incident herein gives the presupposition that the claimant never saw the heap of quarry herein as it was not illuminated as he alleges. There is no evidence that the claimant had a front light on his bicycle to show his way ahead. No wonder he cycled into the heap of quarry. He did not take care or precaution in that regard.

14. The parties correctly submitted that on a claim of negligence, the claimant has to show that there was a duty of care owed to him, that the duty has been breached and that as a result of that breach of duty the claimant has suffered loss and damage. See *Kadawire v Ziligone and another* [1997] 2 MLR 134.
15. The claimant also correctly observed that in the case of *Ruo Tea Estate Limited and others v Mwalwanda* [2002-2003] MLR 198 (SCA) it was stated by the Supreme Court of Appeal that a person is under a duty to warn other road users of any obstruction that he has placed on the road, and if he fails to do so, he will be guilty of negligence. This Court further observes that in the same case it was indicated that where one party negligently places the other party in a situation of danger and that other party cannot avoid the danger, it is not contributory negligence if that other party fails to avoid the danger. The Supreme Court however indicated in that same case that the expression "contributory negligence" means that there has been some act or omission on the plaintiff's part which has materially contributed to the damage caused and is of such a nature that it may properly be described as negligence, only in the sense of careless conduct and not given its usual meaning.
16. With regard to the allegation of negligence on the part of the defendant, this Court agrees with the claimant therefore that on the facts, the defendant was negligent in that it placed the heap of quarry on the edge of the road usually used by cyclists but at the material time there were no warning signs of any sort as the same are said to have been stolen and not replaced. Simple things like reflective tape would have sufficed to warn road users like the claimant during the early hours of the morning that there was a heap of quarry dust in their way. This Court has no doubt that such warning measures would have persisted even with incidents of theft in the area which were alleged by the defendant.
17. On the other hand, this Court also agrees with the defendant that to a certain extent the claimant was guilty of contributory negligence on the facts herein. The claimant contributed to his own injury by his own omission in that he was

cycling in the early hours of the morning presumably without any front light to his bicycle. On that straight stretch of the road he surely would have seen the heap of quarry if he had a front light to his bicycle and perhaps applied some brakes and thereby reduce the impact herein. The facts in this matter are distinguishable from those in the case of *Ruo Tea Estate Limited and others v Mwalwanda* [2002-2003] MLR 198 (SCA) in which no contributory negligence was found against the respondent when the respondent motor cyclist landed in a ditch dug by the appellant across a road usually used by the respondent. In the present matter, we are dealing with a heap of quarry on the surface of the side of the road. The major cause of the incident herein however remains the defendant's conduct and the defendant has to bear more responsibility for the incident herein than the claimant.

18. The cause of the incident herein having been established, the doctrine of *res ipsa loquitur* has no application to aid a finding of negligence on the part of the defendant.
19. Upon a consideration of the circumstances, this Court holds that the defendant is liable up to 75 per cent and the claimant is responsible for the remaining 25 per cent. The defendant is therefore found liable for negligence to that extent.
20. The Registrar shall assess the damages on the stated contributory basis. The claimant is also awarded costs to be assessed on a similar basis. Both damages and costs shall be assessed if not agreed within 14 days.

Made in open court at Blantyre this 16th September, 2022.



M.A. Tembo
JUDGE