IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 624 OF 2018

BETWEEN

JAMBO CHILINKHANDA **CLAIMANT**

AND

ROBRAY LIMITED **DEFENDANT**

CORAM: JUSTICE M.A. TEMBO

Lemucha, Counsel for the Claimant
Machika, 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 body as he was working at the defendant's factory. The claimant claimed that the injury arose as a result of the defendant's negligence or breach of its statutory duties as an employer. He also relied on the doctrine of *res ipsa loquitur* by which negligence is implied from certain facts.
2. The claimant asserted in his claim that he was employed by the defendant as a general worker based at the defendant's factory in Limbe. He indicated that the defendant is in the business of manufacturing cushions and mattress foams.

3. He asserted further that on 17th July, 2018, whilst in the course of his employment and on instructions from the defendant, he was pulling or offloading mattress foam blocks which were stacked up at a height of some metres from the factory floor. He indicated that as he was engaged on the said work, he was pushed by the mattress foam blocks and fell to the floor from the said height. He indicated that this occurred due to the negligence on the part of the defendant or its agents and servants.
4. He then indicated the particulars of negligence, namely, directing and requiring the claimant to pull and/or offload the mattress foam blocks at the said height when it was not safe to do so; failing to provide the claimant with any or adequate personal protective equipment whilst he was engaged upon the said work and exposing the claimant to a risk of damage or injury of which the defendant knew or ought to have known. So far as may be necessary, the claimant indicated that he would rely on the doctrine of *res ipsa loquitur* to establish negligence on the part of the defendant.
5. The claimant asserted in the alternative that the defendant was in breach of its statutory duty as an employer. He indicated the particulars of breach of statutory duty, namely, failing to take any or adequate precautions for the safety of the claimant while engaged upon the said work; failing to provide or maintain a system of work that was safe and without risks to health; failing to provide and maintaining a working environment for the claimant that was safe, without risks to health and adequate as regards facilities and arrangements for his welfare at work and directing and requiring the claimant to carry out work without providing him with suitable and adequate information, instruction and training.
6. The claimant then indicated the particulars of the various injuries that he suffered in this matter including head injuries, sprained left elbow, multiple cuts and bruises on the back, painful arm among others. He also indicated that he suffered special damage in the form of K10 500 he spent on getting a medical report. He therefore sought damages for pain and suffering, loss of amenities of life, disfigurement and medical expenses and special damages and costs of this action.
7. On its part, the defendant did not dispute in its defence that it had indeed employed the claimant as alleged. It denied the allegations of negligence and breach of statutory duty herein. it also denied that the mattress forms pushed

the claimant. It asserted that the claimant got injured due to his own negligence, namely, his failure to properly set his work place and properly position himself to move the mattress forms.

8. The defendant asserted denied the injuries allegedly suffered by the claimant. It therefore denied any liability to pay damages herein asserting that the claimant negligently injured himself.
9. The issues for determination before this Court are whether the defendant is liable for 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.
10. 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.
11. The claimant gave evidence to prove his claim. The defendant brought one witness in its defence. Both parties made submissions herein.
12. This Court visited the factory and heard the evidence there. From the evidence, the following facts were established.

1.0 On the material day in 2018, the claimant was working in the defendant's factory. In the course of his work, the claimant was instructed by his supervisor to go and pull out some blocks of mattress foams because the responsible employee was absent. The claimant went to pull out mattress foams from the lower floor and away from the upper floor where he had initially been working all day and where there was a gadget known as a lifter which he used for lifting and arranging the mattress blocks. There was some contention on the part of the defence in this regard in that the defendant's witness, the overall factory supervisor, said the he was told by the claimant's supervisor that in fact the claimant was not supposed to be at the lower floor where he met his fate but rather at the initial place at the upper floor where there was the lifter. Unfortunately, this Court is unable to believe the defendant's witness who was adducing hearsay evidence and as there was also no attempt by the defendant to follow the procedural requirements for reliance on hearsay evidence as required by Order 17 rule 55 of the Courts (High

Court) (Civil Procedure) Rules. Further, as noted by the claimant, as was observed by this Court in *Bauleni and 16 Others vs Siku Transport and Real Insurance Company Limited,* Personal Injury Cause Number 299 of 2014, where a material witness is available and is not called, it may be presumed that his evidence would be contrary to the case or interest of the party who failed to call him. The defendant has not called the claimant's supervisor who assigned him the fateful task herein and that calls for the requisite inference to follow.

13. On this point, this Court believes the uncontroverted evidence of the claimant that his supervisor sent him to work at the lower floor place to pull down mattress form blocks. These blocks were stacked at a considerable height close to the trusses of the factory that was approximately four metres from the floor. As he pulled the blocks from the top one pushed him off the stack and he fell to his injury on the factory floor.
14. The defendant's witness, the overall factory supervisor who was not present at the material time, attempted to show that in fact the claimant was there to steal the mattress foam blocks leading to his later dismissal in 2020. There is however clear evidence from the same overall supervisor that the dismissal of the claimant two years later had nothing to do with the incident in the present matter.
15. The evidence therefore shows that the defendant ordinarily used a lifter to arrange mattress foam blocks at the upper floor but required the claimant to go to the lower floor where the work involved climbing on the high stack of mattress foam blocks and pulling those blocks down. That system of work was perilous and put the claimant at risk of injury from a fall that was foreseeable and which eventually materialized on the material day. It matters not that the claimant did not ask the defendant to use a fork lift or ladder in the process because that is how the defendant arranged its system of work.
16. The claimant in his evidence then alleged that it was his first time to work at the high stack of mattress foam blocks and insinuated that he was not instructed in the same by the defendant. His evidence was however self-contradictory as he clearly explained how he would offload the blocks in such a way that he would create steps for climbing up the stack using hands and feet. It could therefore not be that this was his first time to work on the high stack of mattress foam blocks.

17. With regard to the injuries suffered by the claimant, the witness of the defendant, the overall factory supervisor, denied that the claimant got injured but said they took him to hospital where he was diagnosed with post traumatic pain. Clearly, this evidence of the overall factory supervisor is self-contradictory given that post-traumatic pain signifies that the claimant suffered injury as a result of the fall in this matter. The claimant therefore suffered injury since he had post-traumatic pain.
18. The defendant's initial submission was that each party is bound by its statement of case such that at trial it must be allowed to prove what is in the statement of case and not otherwise. See *Malawi Telecommunications Limited v S.R. Nicholas Limited,* MSCA Appeal Case Number 01 of 2011. It asserted that the claimant's statement of case did not specify which part of the factory floor he got injured in and that he must be assumed to have been injured at the upper floor place where the lifter was given that the factory floor is huge. And that therefore at trial he should not have been allowed to point to the lower floor as the place where he got injured. This Court is unable to agree with the defendant on this point. The defendant was fully aware that the claimant got injured on its factory floor. Its witness knew exactly which part of the factory floor was in question hence his evidence that the claimant was not supposed to be in the lower factory floor. It cannot therefore lie in the mouth of the defendant that the claimant's statement of case was deficient in particulars in this regard. The claimant provided sufficient particulars that he was injured on the factory floor and the defendant was clearly and sufficiently made aware of this aspect to put up its defence case accordingly. There is no fundamental variance between the claimant's statement of case and his evidence at trial in this regard. the objection of the defendant in this regard cannot be upheld.
19. The defendant also lamented that the claimant submitted that the claimant did not give sufficient particulars of the protective equipment that he was supposed to be provided in the circumstances and only introduced a helmet and harness in his evidence at the trial. This Court agrees that the claimant ought to have indeed provided the particulars as to the protective equipment that he required in this matter so that the defendant could meet the case. This specific particular of negligence and evidence adduced did not tally and therefore it may be prejudicial to allow the claimant proceed on the same as objected to by the defendant.

20. Both parties then 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 *Kadawire v Ziligone and another* [1997] 2 MLR 134.
21. 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....

22. 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.

23. The claimant also noted that section 58 of the Occupational Safety, Health and Welfare Act provides that where in any workplace workers are employed in any process involving excessive exposure to heat, cold, noise, wet or to any injurious or offensive substance, or any welding process, suitable protective clothing and appliances, including, where necessary suitable gloves, footwear, screens, goggles, ear muffs and head covering, shall be provided and maintained at no cost to the employee for the use of such workers as required by the Director.
24. He also referred to section 64 of the Occupational Safety, Health and Welfare Act which provides that

> (1) Where reasonable and practicable, mechanical appliances shall be provided and used for lifting and carrying loads in all workplaces; and
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> (2) No person should be employed to lift, carry or move any load which, by reason of its weight, is likely to injure his health or jeopardize his safety.

25. 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 requiring him climb on the high stack of mattress form blocks without a safe system of work put in place. The defendant contended that the work was routine and that the claimant ought to have discharged such work as a matter of common sense. This Court observes that requiring the claimant to climb the high stack of mattress form blocks using hands and feet at the lower floor was not a safe system of work. At the upper floor where a lifter was provided there was a safe system of work. It was reasonably foreseeable that there was a risk that the claimant would fall from the high stack of mattress foam blocks at the lower floor and the risk materialized because the defendant never provided a safe system of work there for handling the blocks. The claimant has therefore proved that the defendant breached its duty of care, and that as a result of the said breach the claimant fell to the floor and got injured resulting

in post-traumatic pain among others. See *Kadawire v Ziligone and another* [1997] 2 MLR 134. This Court does not find any evidence suggesting that the claimant caused his own injury due to his negligence herein.

26. Given that the cause of the injury is known to be negligence on the part of the defendant, the doctrine of *res ipsa loquitur* is not applicable in this matter.
27. In the alternative, with regard to the breach of statutory duty, this Court is satisfied that the claimant has proved that the defendant breached section 13 of the Occupational Safety, Health and Welfare Act in that it failed to ensure his safety and to provide a safe system of work. Requiring the claimant to climb the high stack of mattress form blocks using hands and feet was an unsafe system of work when it is considered that on the same factory floor the claimant provided a lifter for handling of the said blocks. The provision of a lifter where the claimant was injured would also have been reasonable as is required in section 64 of the Occupational Safety, Health and Welfare Act.
28. The allegation of negligence on provision of personal protective equipment has been objected to on account of the statement of case lacking sufficient particulars. It is also the view of this Court that the alternative reliance on section 58 of the Occupational Safety, Health and Welfare Act on protective equipment is not tenable on the facts of this case as the facts of this case are not among those stated in that section which require provision of protective equipment.
29. This Court observes in agreement with the defendant that, in his statement of case the claimant also stated that he was not provided with suitable and adequate information, instruction and training as required by Section 65 of the Occupational Safety, Health and Welfare Act, and that this is contrary to his evidence in general when he testified that he was required to be moving the mattress foam in layers to create step like structures to be used when climbing up the high stack of mattress foam blocks. Indeed, for someone without suitable and adequate information and instruction it would have been impossible for him to know that he was supposed to be moving the mattress foam blocks in layers. This alternative allegation of breach of statutory duty has therefore not been made out.
30. On the whole of the evidence, the defendant is liable for negligence as indicated in the foregoing premises and also in the alternative to have been in breach of its statutory duty as similarly indicated.

31. 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.
32. The claimant is also awarded costs of these proceedings to be assessed by the Registrar.

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

M.A. Tembo
JUDGE