

Library

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 1022 OF 2019

BETWEEN

ERICK RACKES

CLAIMANT

AND

ATOMIC HARDWARE WAREHOUSE

DEFENDANT

CORAM: JUSTICE M.A. TEMBO

Mwandira, Counsel for the Claimant
Juma, 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 personal injuries he suffered after the gate to the defendant's premises fell on him. The claimant claimed that the injury arose as a result of the defendant's negligence and breach of its statutory duty 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 an Assistant Supervisor.
3. He asserted further that on 8th August, 2019, whilst in the course of his employment, he got injured at the defendant's premises at Namiwawa in Blantyre. He claimed that at the material time he was intending to go inside

- the defendant's premises through the main gate and after he had opened the smaller pedestrian gate the entire heavy main gate fell on him and injured him.
4. The claimant asserted that he got injured because of the defendant's negligence. He gave particulars of negligence, namely, failure by the defendant and its agents to install a gate stopper which could have allowed the heavy gate to remain firm and hooked while closed; failure by the defendant and its agents to ensure that the gate stopper was installed having known prior to the incident that there was no gate stopper; admission of negligence by the defendant in that the defendant fixed the gate stopper soon after the claimant's injury and failure by the defendant to implement all necessary measures to ensure that the gate was in good order to prevent the same from falling against the claimant.
 5. The claimant also alleged that he got injured as a result of the defendant's breach of statutory duty. He gave particulars of the breach, namely, that the defendant was in breach of section 13 (2) (a) of the Occupational Safety, Health and Welfare Act due to failure to make sure that the work environment and place of the claimant was safe and secure by ensuring that the gate stopper was installed to avoid causing injury to the claimant.
 6. He also indicated that as far as may be necessary, he would rely on the doctrine of *res ipsa loquitur* which entails that the mere occurrence of the injury is sufficient to imply negligence on the part of the defendant herein.
 7. The claimant then asserted that as a result of the gate falling on him he suffered injuries including dislocated backbones and right shoulder, among others. He therefore claimed damages for pain and suffering, loss of amenities of life and disfigurement. The claimant also sought damages for deformity which this Court views as a duplication as that is covered under the head of disfigurement. See *Lamwa v Attorney General* [1997] 1 MLR 286 (HC). He also claimed that he suffered loss of earning capacity at the rate of K50 000 per month. He also sought the costs 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. It however 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 exercise necessary skills and due care whilst opening the gate, his failure to take safety precautions to ensure

his own safety while opening the gate and conducting himself in such a manner likely to constitute a source of danger to himself.

9. The defendant asserted that, without prejudice to its defence, in the event of being found liable it would also rely on the fact that it insured its employees for work related injuries and that the claimant can recover under the Workers Compensation Act for his injuries. This Court wishes to point out that this aspect as raised by the defendant is not a valid defence on a claim of negligence or breach of statutory duty. The claimant is entitled to sue, independently of the Workers' Compensation Act, where the employer is alleged to be guilty of negligence. See section 63 of the Workers' Compensation Act. And this Court's further understanding is that the insurance is meant to cover such claims.
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 testified and also called another witness to prove his claim. The defendant had three witnesses. Both parties made submissions herein.
14. This Court visited the warehouse and saw the gate in question and heard the evidence there. From the evidence, the following facts were established.
15. On the material day, the claimant was entering the defendant's gate. The main gate is composed of two independent gates that open by sliding away from the middle of the gateway. On the right side of the gate where the claimant got injured there is a small pedestrian gate embedded in the gate for vehicles. As the claimant had entered via the pedestrian gate and he was about to go further into the defendant's yard, the gate behind him became unhinged from its frame at the top and fell on him causing him injury.

16. The impression this Court got from the evidence is that the right hand side gate fell on the claimant because it was not properly secured on the top end. The design of the gate is such that it slides on a rail on the floor. The two gates open by sliding outwards from the centre. They close by sliding inwards and meet at the centre. Each gate moves by sliding inwards and outwards from the centre of the gate. The top part of each gate is meant to be secured by a hook as the gate moves along the rail so that it does not collapse as happened herein. The evidence of Mr Badin, the defendant's engineer is quite illuminating on this point.
17. According to Mr Badin, the gate in question had been fitted about four months before the incident herein. By then, the hook placed at the top of each gate and that is meant to secure the gate to the frame at the top had not been fitted. That hook was only fitted after the claimant suffered his fate herein. That hook is meant to secure the gate so that it does not collapse whilst it slides as happened herein. In fact, there was also another piece of safety design of the gate which is a stopper placed on the ground rail at the middle of the gate that stops the gate just in time as it slides to the centre so that the gate does not collapse out of its frame. Mr Badin stated that the gate can still go over such a stopper if pushed with enough force and still get out of its frame since the stopper is made small to avoid damaging vehicle tyres but to serve its purpose of stopping the gate roller in the rail.
18. This Court was left with no doubt from the evidence that the gate herein collapsed on the claimant because of a design flaw in that the hook that was meant to secure the gate to its frame had not been fitted. Mr Badin was categorical that this hook was only fitted after the incident in which the claimant got injured herein.
19. In terms of submissions, 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.
20. 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....

21. 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.

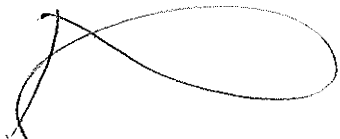
22. The defendant also correctly noted that section 18 (a) of the Occupational Safety, Health and Welfare Act, places a duty on all employees to take reasonable care for their own safety and health.

23. 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 a gate with a design flaw to be operated in the circumstances.
24. The defendant insisted that it never breached its duty. It indicated that in fact it is the claimant who caused the gate to fall on him by tampering with the said gate and using force when opening and closing the pedestrian gate on the bigger gate.
25. This Court agrees with the claimant and the defendant that the defendant had a common law duty to ensure that the gate did not pose a risk of injuring the claimant employee in the course of his employment. However, given that the gate had a design flaw which led it to fall out of its frame, the defendant imperiled the claimant by operating such a gate. This Court is not convinced at all that the claimant interfered with the gate beyond the application of normal force to open and close it.
26. In the end, this Court finds that the claimant has shown that there was a common law 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.
27. 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.
28. This Court also agrees with the claimant's submission and finds that, on the evidence of the flawed gate set up, the claimant has shown that the defendant breached its statutory duty. The defendant failed to ensure the provision and maintenance of plant and systems of work that are safe and without risk to health. The defendant was in breach of section 13 (2) (a) 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 flawed gate set up herein.
29. 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.

30. Contrary to the defendant's submissions, this Court does not find any evidence to suggest that the claimant contributed or caused the gate to fall out of its frame in this matter. There is therefore no contribution to causation of the injury and loss on the part of the claimant herein.
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 1st April, 2022.



M.A. Tembo
JUDGE

