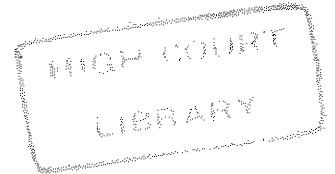


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IN THE HIGH COURT OF MALAWI

CIVIL DIVISION

PRINCIPAL REGISTRY

PERSONAL INJURY CASE NUMBER 5955 OF 2015

BETWEEN

EVISON MAKWANGWALA.....CLAIMANT

AND

ATC LIMITED.....DEFENDANT

Before Justice Jack Nriwa Judge

Mr Domasi for the claimant

Mr Masanje for the defendant

Clerk: Ms Nkangala

JUDGMENT

Opening remarks

1. This is a fairly old case. The claimant commenced this matter in 2015. The summons for directions was heard on 3rd November 2015. The record shows that the matter was transferred to this Court in June 2018. I set down the matter in February 2019. It seems the matter has had its own problems. My record shows that I have heard the claimant three times. On 7 June 2019, counsel for the defendant asked for the matter to be heard at the scene. I heard the claimant and we adjourned the matter for us to go to the scene to have the cross-examination of the claimant.
2. On the new date of hearing, the matter failed to take place at the scene, it appears that, much as I did not record the reason for the postponement, we failed to locate the place where the defendant was located. The matter was

adjourned to another date and it was adjourned again at the instance of the defendant. The matter was reheard and adjourned for judgement. I am not sure why the matter came here again. Be that as it may, when the matter was called again for hearing on 8th December 2021, we heard the claimant and the defendant sought an adjournment one more time. Then we adjourned the matter again to 4 April 2022, when the defendant sought one more adjournment but I dismissed the application on the ground that during the previous adjournment it was agreed that this was the last adjournment.

3. It should also be taken into account that at one point, I dismissed the defendant's defence; it was restored later.
4. I have given this background for a reason that will come clear at the end of this judgement.

The claim

5. The claimant was a machine operator at the defendants mill at Maone Park, Blantyre. The basis of his case is an injury that occurred while he was operating the machine on 27th May, 2015. The claimant alleges that the injury was due to negligence of the defendant.
6. The claimant provided the following as the particulars of the alleged negligence:
 - a) Failure to provide a guard to the machine to avoid the claimant's hand getting caught and injured
 - b) Failure to put up signs against the danger of limbs of workers getting caught and injured by the conveyor
 - c) Failing to take any or adequate precaution for the safety of the claimant when he was engaged upon the said work
 - d) Exposing the claimant to risk of damage or injury of which the defendant knew or ought to have known
 - e) Failing to provide or maintain a safe and proper system of working for the claimant
 - f) Failure to provide adequate safety devices or measures to protect the claimant when he was engaged upon the said work
 - g) Giving the claimant improper instructions when he was carrying out said work
 - h) Failing to advise the claimant of the appropriate time to feed the machine with the materials
 - i) Failure to switch off the machine when the claimant's hand was hooked

The claimant further alleged that the defendant breached common law and statutory duty towards employees

The allegation on that point was that the defendant failed to provide safe plant and equipment, training and properly guarding machinery as required by common law and under sections 13, 35, 58 and 65 of Occupational Safety Health Welfare Act

Evidence

7. Only the claimant testified on three occasions. I will take his third instance of testimony for on that occasion he was cross examined and re-examined. During examination he stated that he had been employed by the defendant as a general and unskilled labourer having no special skill related to what the defendant produces. He further stated that when he was employed, he was assigned to the post of sheet handler, where he would be collecting process sheet.
8. He then gave testimony as to the procedure for operating the machine. The machine which he called the grinder was not working in isolation. it worked together with a roller and a hot plate. Materials from the grinder were made into a sheet in the roller then taken by a conveyer belt to the hot plate. The roller and the conveyer belt were independent machines but their starting point was the grinder, therefore in this matter his main point of focus was the grinder. He was taught how to open the mouth of the grinder using the control buttons
9. The grinder was always running and there were people in the factory working day and night. It had two parts which were engine control containing the motorised engine and control buttons and the grinder containing a rod and a feeder with a lid.
10. It was the claimant's testimony that raw materials known as EVA or scrap were fed into the machine using its mouth. Chemicals were then added to the materials. The addition of the chemicals, coupled with grinding process, caused the materials to overflow and the mouth of the machine used to become littered with unprocessed materials. In order to have a well processed and desired product, the defendant told them to clear the mouth of the machine to ensure that all the materials were under the lid to be processed. After being satisfied that the raw materials were processed, they would then offload them by pressing the offload button where they were taken to subsequent stages of slippers production.
11. He went on to narrate how the accident took place. In his narration, he went to work on 27th May 2015. As expected, he found the machine running and took materials and put them into the mouth of the machine. He then started the grinding process and added chemicals. The materials overflowed and he started the way with a brush. While doing this the lid went up and he got

hooked to the lid.it happened so fast that he could not avoid the occurrence. In his testimony he also pointed out that it was wrong for the defendant to be asking employees to be cleaning the machine with bare hands and with just a brush considering that this was the most dangerous part of the machine. He went on to state that, if the machine was guarded and he had been given special apparel when dealing with the machine, it would have been safe.

12.As a result of the accident, he said, he sustained

- a. degloving wound
- b. open fracture of the first metatarsal
- c. burns in the face
- d. burns on the left shoulder

- e. He said as a result he
- f. underwent extreme pain
- g. lost a thumb
- h. was subjected to abridgement skin graft and amputation
- i. suffered 35% permanent incapacity
- j. developed a big scar
- k. was hospitalised
- l. was unable to work
- m. incurred expenses

13.In cross-examination, the claimant stated that the machine operated upon pressing a button and on the day of the accident he was the only one operating the machine. He was shown a picture of the machine and he confirmed that that was the setting of the machine. He confirmed the question posed by counsel for the defendant regarding where the operator sat and where the mouth of the machine was. He confirmed that there was a distance of two metres between the operator and the machine. He further confirmed that when one presses the button, the lid goes up.

14.In further cross-examination, he denied that his complaint was that the machine was faulty. He further denied that one had to clean the machine when it was closed. Rather, the cleaning was done through the mouth. It was his testimony that opening the machine meant that the lid would go up. He also confirmed that on the material day he was aware that he would clean the machine following the standard procedure.

15.He retaliated that on the material day, he was the only one on duty. He started cleaning the machine when it was closed before it got opened in the process. He admitted that there was a warning sign not to put hands in the

- machine while it was on. He saw the warning sign although he did not know what it meant as he was not taught what it meant.
16. He told the court that he went as far as standard 8 and that he knows what a hand is and what it means to put a hand into something. He confirmed that he had indicated the part of the machine that crushed his hand. He was then referred to paragraph 4 of his statement of case which just stated that the machine crushed his hand and to paragraph 17 of his witness statement which stated that he was hooked by the lid.
 17. He confirmed being trained to operate the machine, the grinder and its buttons. He stated that he was also trained on cleaning of the machine. He repeated that the machine had to be covered when it was operating. There were down and upwards movements and when the machine was being opened, the lid opened upwards slowly. He was injured when the machine was covered or closed. He went on to state that he only showed injuries on the right hand and that other injuries were minor.
 18. In re-examination, he affirmed that he had a scar because he was burnt. He reaffirmed that the machine was always hot and that the lid moves slowly when it is normal. However, when he was cleaning it moved fast. He said that he was not given gloves. He restated that they were told to close the lid when putting materials. He also restated that due to force, things come out and therefore, one has to clean the lid with a brush. He said that when cleaning some parts had to be opened and to do so they had to open the lid and the back cover.
 19. He clarified what he meant by 'the machine' to be the lid. This was seemingly in response to the question about which part of the machine injured him as he gave different versions from the statement of claim and witness statement. He also restated that he was the only one present. He affirmed that the lid opened on its own even though it did not usually open its own.

Law

NEGLIGENCE

Common law

20. The claim in the matter is on negligence. At common law, negligence, in basic terms, is failure to behave with the level of care that someone of ordinary prudence would have exercised under the same circumstances. The behaviour usually consists of actions or omissions when there is some duty to act. Feinman, Jay. (2010). *Law 101*. New York: Oxford University Press. The primary factors to consider

in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm. Four elements are required to establish a prima facie case of negligence:

1. the existence of a legal duty that the defendant owed to the claimant
2. the defendant's breach of that duty
3. claimant's sufferance of an injury
4. proof that defendant's breach caused the injury Owen, David G. (Summer 2007). "The Five Elements of Negligence". *Hofstra Law Review*. **35** (4): 1671.

Statutory law

21. The Occupational Safety Healthy Welfare Act imposes duties on every employer to ensure the safety, health and welfare of employees at the place of work. The matters to which that duty extends include:
 - a) the provision and maintenance of plant and systems of work that are safe and without risks to health;
 - b) arrangements for ensuring safety and absence of risks to health in connexion 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
 - e) 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;
 - f) the provision and maintenance of a working environment for his employees that is safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.

22. It is the duty of every employer to prepare and revise a written statement of his, her or its general policy with respect to the safety and health at workplace of his employees, and the organization and arrangements for carrying out that policy. The duty extends to bringing the statement and any revision of it to the notice of all of his employees. See section 13.

23. Section 65 provides that

All parts and working gear whether fixed or movable, including the anchoring and fixing appliances, of every lifting machine shall be of good construction, sound material, adequate strength and free from patent defect, and shall be properly maintained.

(2) All parts and gear referred to in subsection (1) shall be thoroughly examined, at least once in every period of twelve months, or after any modifications or extensive repairs or within a shorter period, by a person approved for the purposes of this section by the Director by certificate in writing.

24. Section 58 provides that

(1) Every dangerous part of any machinery, other than prime movers and transmission machinery shall be securely fenced:

Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with the part.

(2) Any part of a stock-bar which projects beyond the head-stock of a lathe shall be securely fenced.

25. Section 35 imposes the duty on employers to deal with imminent dangers at the place of work.

Burden of proof

26. In civil matters, he who alleges must prove on a scale of probabilities in civil matters he who alleges must prove on a scale of probabilities. The balance of probability standard means that a court is satisfied a fact or event occurred if the Court considers that, on evidence, the occurrence of the fact or event was more likely than not. The claimant must prove, in this case, that he suffered injuries at the instance of negligence on the part of the defendant.

Finding of the Court

27. I have outlined the particulars of negligence that the claimant made against the defendant. I have also given the evidence including cross-examination and re-examination.

28. It is not in doubt that the claimant got injured by machinery belonging to the defendant while working for the defendant.

As pointed out earlier, the claimant raised the following ground of negligence:

1. Failure to provide a guard to the machine to avoid the claimant's hand getting caught and injured.
2. Failure to put up signs against the danger of limbs of workers getting caught and injured by the conveyor.
3. Failing to take any or adequate precaution for the safety of the claimant when he was engaged upon the said work.
4. Exposing the claimant to risk of damage or injury of which the defendant knew or ought to have known.
5. Failing to provide or maintain a safe and proper system of working for the claimant.
6. Failure to provide adequate safety devices or measures to protect the claimant when he was engaged upon the said work.
7. Giving the claimant improper instructions when he was carrying out said work.
8. Failing to advise the claimant of the appropriate time to feed the machine with the materials.
9. Failure to switch off the machine when the claimant's hand was hooked.
10. Breach of common law and statutory duty towards employees.

29. The tenth ground is generally labelled breach of common law and statutory duty on employers. Grounds 1-9 seem to outline the statutory duties on the employees. At common law, all the claimant was supposed to do was to prove breach of duty. Otherwise, it is not in dispute that such duty existed. As for the grounds 1-9, most of the grounds were generic and there was no specific evidence to support such claims. Of course, somewhere, the claimant claimed that the defendant had to provide some apparel when dealing with the machine. This, just like the allegation of fencing the machine, was made without specifically stating how that could be.

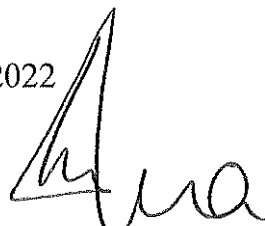
30. The other allegation was that there were no signs for danger to limbs yet in cross-examination, the claimant accepted that there were such signs. He alleged that he was not told the appropriate time to feed the machine. Yet that was inconsistent with what he said in the evidence. As to the failure to switch off the machine when his hand was hooked, the evidence was that he was the only one in the factory. It would be unfair to expect the defendant to switch off the machine in such a scenario.

31. The claimant's evidence falls short of showing how negligent the defendant was. He claimed that he was not sent to do the job that was doing but in cross-examination, he agreed that he was trained to do the job what he was doing. It was also apparently claimed that the machinery was faulty but in cross-examination he said that it was not his complaint that the machinery was fault. In short, the evidence fails to show how the defendant was negligent. In all this this court finds that the claimant has failed to establish on a balance of probabilities the negligence on the part of the defendant.

Costs and closing remarks

32. Order 31(3) of the Courts (High Court) (Civil procedure) Rules provides that the Court has discretion as to whether costs are payable by one party to another. In subrule (2), where the Court decides to make an order about costs, the unsuccessful party shall be ordered to pay the costs of the successful party.
33. However, according to subrule (3) Notwithstanding that general rule, the Court may make a different order about costs.
34. Subrule (4) provides that in deciding what order, if any, to make about costs, the Court shall have regard to all the circumstances, including the conduct of all the parties. Conduct of parties has been defined, among others, to include conduct before, as well as during, the proceeding and the manner in which a party has pursued or defended his case. See subrule (5).
35. In the opening remarks I gave the history of the matter in this Court. The matter has taken long at the instance of the defendant. I find the conduct of the defendant to be deplorable. I believe that it was unnecessary to take the time we have spent on this case. For that reason, much as the claimant is unsuccessful, I order that the defendant to meet the cost that the claimant has incurred in this matter.

DELIVERED the 3rd day of June, 2022



J N' RIVA

JUDGE