



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
CIVIL CAUSE NO. 440 OF 2019
AND
IRC MATTER NO. 182 OF 2020
(CONSOLIDATED)**

(Before Justice Rachel Sophie Sikwese)

BETWEEN:

KASIYA.....CLAIMANT

AND

OG PAINTS LIMITED.....DEFENDANT

CORAM

HON. JUSTICE RACHEL SOPHIE SIKWESE

Chipembere F; Counsel for the Claimant

Phokoso; Counsel for the Defendant

Ms. Mithi; Official interpreter

Mutinti; Senior Court Reporter

JUDGMENT

Sikwese J

Introduction

1. This is a judgment in two cases involving the same parties that were consolidated following a case management discussion during the proceedings in civil cause 440 of

2019. It considers the Claimant's claim for damages in negligence arising from breach of statutory duty and common law tort of negligence and compensation for unfair dismissal initially brought in the Industrial Relations Court under IRC Matter No. 182/2020. For reasons given below the action is allowed.

Facts and procedural history

2. On 5 December 2019, the Claimant filed his claim for damages for pain and suffering, loss of amenities of life, deformity and disfigurement, earning capacity and costs of the action. The claim arose out of an occupational injury occasioned on 8 November 2019 in the course of pouring dry chemicals from a sack into a moving mixing pot for the production of paint. The Claimant's hand was caught by the moving propeller, wound around it and crushing it in the process. As a result of this accident about 37cm of the 67cm arm was crushed. The Claimant is left with a stump where his arm should be.
3. On 20 December 2019, the Defendant filed a defence denying liability and putting the Claimant to strict proof of the claims.
4. On 5 March 2020, the Claimant filed a claim in the Industrial Relations Court at Principal Registry claiming compensation for unfair dismissal. The Claimant was employed on 7 May 2019 as paint mixer, paint filler, batch and sticker maker and laboratory assistant (general duties) in the production. While the Claimant was on sick leave due to the injury described in paragraph 2, the Defendant terminated his services through a letter dated 7 January 2020. The reason for the termination was downsizing. At the time of termination, he was earning MWK50 000 per month.
5. On 19 March 2020, the Defendant filed a response to the claim in the IRC arguing that the claim for unfair dismissal was without merit, unfounded, vexatious and an abuse of process and that it should be dismissed.
6. On 17 November 2021, during a scheduling conference in the civil cause, the parties drew the Court's attention to the Industrial Relations Court ("IRC") matter. They agreed that the issue in the IRC was closely connected to the civil cause in that the dismissal was carried out during the period that the Claimant was on sick leave suffering from injuries caused in the course of his employment, the subject of the civil cause matter.

7. The Court directed under O.14, r. 2(4) Courts (High Court)(Civil Procedure) Rules, 2017, (“CPR”) that the case file from the IRC be transferred to the High Court pursuant to section 11(a)(vii) Courts (Amendment) Act, 2016 and that once transferred the file should be consolidated with the civil cause under O.6, r. 9 of the CPR and directed further that once consolidated the matters be set for a pre-trial conference on 7 December 2021 at 10.00 AM, pursuant to O.14, r. 4(1) of the CPR for Counsel to raise any matter arising from the consolidated files in preparation for trial.
8. On 5 September 2022, the Court heard three witnesses at the Defendant’s paint production factory.
9. On 6 September the Defendant filed a motion to amend the Defendant’s witness statement. It was granted.
10. On the same day, the matter continued to hearing stage, where two witnesses gave evidence on the unfair dismissal claim.

Evidence

11. This is a civil case and the principles of evidence are that the burden of proof lies on the party asserting the affirmative. The standard of proof is one on a balance of probabilities. Since both parties are represented, it is not necessary to dwell on this well established and trite legal point.
12. Four witnesses testified namely, the Claimant, the Defendant’s Mr. Arup Pal, Paint Factory Supervisor, Manager and the Machine Operator at the time of the accident (“DW1”), the Defendant’s General Manager, Mr. Salman Aziz (“DW2”) and Mr Amani Juwao the Defendant’s Paint Factory Worker, (“CW1”).
13. The Claimant adduced evidence through a witness statement and oral evidence where he was cross examined. The essence of his evidence was that it was the sole responsibility of the Defendant to provide a safe system of work. This could have been done by ensuring that the paint mixing machine was safe to use. The Defendant was the sole operator of the machine and on this occasion, he failed to operate it in a manner that could have avoided the injury by failing to switch off the machine while the

Claimant was pouring in the mixer. The Defendant was also negligent for distracting the Claimant while he was in the process of working on this delicate machine as a result, he lost concentration and control of the task at hand which led the propeller to suck in the sack of chemicals along with his hand into the machine crushing it instantly. Approximately, 35 cm of his arm from the elbow down to the hand was amputated. He has a stump where his arm and hand should be.

14. In cross- examination he said that he stood close to the machine to pour in the chemical because that was the only way that he could do the job properly. The raw materials had to go into the centre of the mixing pot where the propeller is. He did what he was expected to do and what he always did. He had by this time poured into the mixing pot contents from 31 bags and out the 32 bags. The bags weighed 25 kilograms each so that by this time he had lifted from the stand into the pot an equivalent of 775 kilograms. He insisted that he was distracted by DW1 who shouted at him while he was in the process of pouring in the raw materials.
15. While he was receiving treatment for this injury the Defendant without any discussion with the Claimant terminated his employment on ground of downsizing. The Claimant alleged that the reason for the termination was a mere sham meant to cover up an unfair termination. In cross examination he conceded that he was not in management position but he knew that his termination had nothing to do with downsizing as this was never mentioned to him prior to the termination. He only knew about it from the letter of his termination.
16. The Defendant gave evidence through the Factory Supervisor and Manager, who did not contradict the Claimant in as far the nature of the accident and the injury was concerned. His point of departure was that the Claimant caused the accident because he attempted to retrieve a sack from the machine while it was moving, against the operating procedures of the machine. He also said that a warning sign was placed in prominent place saying 'poopsa' meaning danger.

17. In cross- examination DW1 conceded that the machine is dangerous. That although he was standing right by the on/off switch of the machine he was too late in switching it off to avoid the accident. He also conceded that he was the only person who knew the technical operation of the machine. He further conceded that he spoke to the Claimant [he had to shout due to the noise of the machine] to warn him that the sack was getting sucked into the machine. He further conceded that it took a split second from the time the sack and hand were sucked into the machine such that it was too late to save the hand by switching off the machine. He said the machine is not meant to be covered when pouring in raw materials. He asserted that at the time of accident the machine was not operating at maximum speed.
18. The Defendant's General Manager, DW2, gave evidence to show that the termination was necessitated by the worsening financial position of the company. He had to let the Claimant and another employee from the same factory go because of low production due to elections and COVID-19 in 2019. In cross examination he conceded that he did not inform the Claimant about the financial position of the Company, he did not hear the Claimant's views, he did not produce any record to substantiate the allegations that the Company was in financial problems or that laying off the Claimant improved or mitigated the Company's financial situation. He asserted that the combined salary saved from laying off the Claimant and another colleague was minimal, it could not have affected the Company's finances.
19. It was also DW2's position that he was not aware whether the accident which happened in the course of employment was reported to the relevant government organ as required under the law. He did not compensate the Claimant for the injury under the relevant statutory provisions concerning workers compensation.
20. A third witness testified at the instance of the Court after the Defendant had sought to withdraw him. This witness Amani Juwao, CW1 said that he was opening and passing the sacks to the stand for the Claimant to lift and pour into the mixing pot. As he was bent over the 32nd sack opening it, he saw blood spluttered over him. When he looked up, he saw the Claimant's hand crushed. He did not see how it happened. He heard nothing. The next day he reported for work and business continued as usual. He said that the Claimant left employed and another colleague, but he did not know the reason

for the termination. He also stated that the Claimant and the colleague were later replaced, after a month or so, he was not very sure of the exact date. The rest of this witness' written testimony to the effect that he shouted at the Claimant not to put his hand in the machine was discredited for being self-contradictory and therefore unreliable.

21. The Court saw the machinery in operation and witnessed the reconstruction of the incident and at the end of the demonstration was left in no doubt that this was a dangerous machinery.

Considerations

22. The Court has read the parties' pleadings, witness statements and compared them with the evidence gathered on site and in cross examination and re-examination and has also considered the parties' final submissions. Below is the summary of the pertinent considerations.

Legal framework

What is the duty that an employer owes to an employee

23. The nearest similar case for refence on principles of the duty of care in employer/employee relationship is *Kachiwanda v Eastern Produce Malawi Limited*¹ holding that:

In respect of employment law, under the common law an employer is under a duty to afford the employee a reasonable system of work and employ measures for the reasonable safety of employees and not to expose them to unnecessary risk.

...

The employer must take reasonable care to maintain the plant and equipment in proper conditions, and the more complex and dangerous that machinery, the more frequent must be the inception.

...

What is required in each case is reasonable care according to the circumstances. The duty extends to the installation of machinery safety devices on dangerous machinery.

...

¹ [2008]MLLR, 494

In considering whether the employer is in breach of his duty of care consideration ought to be given to the nature of the employment.

...

In order to succeed in an action for damages against his employer a workman must show that his injuries were caused by the employer's breach of duty, the onus being upon the employee to establish both the breach and that the breach caused injury.

24. The common law principle of the duty of care owed to employees operating dangerous machinery is codified in the Occupational Safety, Health and Welfare Act, 1997 ("OSHWA") providing in section 35 that:

Every dangerous part of any moving machinery or component thereof shall be securely fenced, unless it is of such construction as to be safe to every person working on the premises as it would be if securely fenced:

Provided that, in so far as the safety of a dangerous part of machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this section shall be deemed to have been complied with if a device is provided which, in the opinion of the Director (of Occupational Health, Safety and Welfare), satisfactorily protects every person employed or working on the premises from coming into contact with the part.

25. The Defendant as employer failed in its duty of care by not taking measures that would have prevented the accident. According to the statutory requirements the measures included fencing the dangerous part of the paint mixing machine or providing a device that would protect the Claimant from getting injured in case of accident contact with the propeller. The fact that the machine was not meant to be covered is irrelevant because by its nature the machinery is dangerous and ought to be fenced or a device provided to ensure safety of the Claimant. It is also irrelevant that the machine was not operating at maximum speed at the time of the accident. The duty of care extended to the Claimant at all times while working at the machine.

Breach of duty of care

26. The Claimant pleaded both statutory breach of duty of care and common law negligence. The position at law is that conformity with a statutory duty is evidence that the common law has also been complied with.²
27. In other words, proof that the employer breached statutory duty is enough to prove breach of duty of care. It was proved in this case that the moving propeller that sucked raw materials down into the blade at the bottom of the 1000 litre mixing pot is dangerous part of machinery. In the case at bar, there was no contact between the propeller and the Claimant. The propeller came into contact with the sack in the Claimant's hand, that contact in a split second was enough to pull the Claimant's hand and wind it around the propeller crushing it instantaneously. The Defendant conceded that this was a dangerous part.
28. It follows from this finding that the Defendant was legally obliged under section 35 of the OSHWA to fence this part of the machinery. He did not. He also did not provide any proof that he had put in place a device that ensured the protection of the Claimant when operating the machinery. The Defendant breached a statutory duty to fence a dangerous part of machinery or in the alternative to provide a device that ensured protection of the Claimant when operating the machinery. The Claimant has proved his case that the Defendant owed him a duty of care and that he breached that duty of care causing him serious injury. Had the Defendant fenced the propeller or provided a device that would guard the Claimant from getting sucked into the machine the accident would have been avoided.
29. The Defendant's argument that the Claimant was trained to operate the machine safely is without merit. The evidence supported the Claimant's testimony that the only training he got was to lift a 25kg sack of raw materials and pour the contents as near as possible to the centre of the moving propeller. This is not training in machine operation.
30. Further, the Defendant's contention that the Claimant inserted his hand into the machine to remove a sack is not consistent with the evidence gathered on site. It is discredited.

² Ibid, Kachlwanda

The force of the propeller is such that had the Claimant put his hand in the machine his whole body would have been sucked in and crushed to mash.

Defence of contributory negligence

Legal framework

31. Where the Defendant pleads the defence of contributory fault as was the case in this matter, the Court is obliged to consider the defence in relation to the circumstances of the case, the nature of the work environment, conditions of work, the equipment, the nature of the employee, the task being performed among other factors. It was thus held in *Harris v Brights Asphalt Contractors Ltd*³ that:

What is all -important is to adapt the standard of what is negligence to the facts, and to give due regard to the actual conditions under which men work in a factory or mine, to the long hours and the fatigue, to the slackening of attention which naturally comes from constant repetition of the same operation...to the noise and confusion in which man works, to his preoccupation in what he is actually doing at the cost perhaps of some inattention to his own safety...The policy of the statutory protection would be nullified if a workman were held debarred from recovering because he was guilty of some carelessness or inattention to his own safety, which though trivial in itself threw him into the danger consequent on the breach by his employer of the statutory duty.

32. It is in evidence and it was observed during the demonstration of the operation of the machine that it makes loud noise, it is placed in a large warehouse where other employees perform other tasks simultaneously like cutting open the sacks and passing them on for feeding into the machine, clearing used sacks etc, at the time of the accident the Claimant had been lifting 25kg load of chemicals up to the mouth of the mixing pot which took 1000 litres, bend over a bit, stretch his arms vertically above the pot, then bend one arm horizontally to tilt the sack and methodically empty the contents of the sack as nearer as possible to the centre of the pot where the propeller rotating at 120 degrees immediately sucks up and rolls around the chemical to the base of the pot where the chemical is deposited onto a crushing blade.

³ [1953] Q.B. 617, at page 628-629 quoting Lord Wright in *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] A.C. 152

33. The Claimant had 32 bags of the same weight containing chemical to lift and deposit into the pot as described. At the material time he had been performing the above-described task repetitively 31 times, with the machine rolling and noisy, his eyes on the propeller until the Machine Operator, the Defendant's DW1 shouted to the Claimant that an inner layer of the sack was getting into the pot. It was at this point that the Claimant was distracted, lost attention, got the sack caught by the propeller which rolled the arm at 120 degrees severing it and depositing the cut off portion down the pot to be mashed by the blade.

34. In the words of Lord Wright, as quoted in Harris, under the described circumstances in paragraphs 32 and 33 above; the policy of the statutory protection would be nullified if a Claimant were held debarred from recovering because he was guilty of some carelessness or inattention to his own safety, which though trivial in itself threw him into the danger consequent on the breach by his employer of the statutory duty.⁴

35. Regarding the warning sign, it was first observed by the Court that the Claimant used a thumbprint to sign his documents. It was not established that the Claimant could read. In any event, the Claimant knew at all material times that the machine was dangerous and, therefore, "it would have been a work of supererogation to have acquainted him by means of notices of that which he already knew".⁵ In other words, the statutory duty to fence or provide a guarding device was not complied with by placement of a mere danger sign.

36. It is found that the Claimant was exposed to a risk he involuntarily endured under an obligation to perform the task that constituted his job. The Court finds him not guilty of negligence. The defence of contributory negligence fails and it is dismissed.

Liability in negligence (Nexus between breach of duty of care and damage suffered)

37. The burden of proof lies on the Claimant in a case alleging damages from negligence to show on a balance of probabilities that there is sufficient nexus or connection between the breach of duty of care and the damage suffered. The Claimant must give

⁴ Ibid, at page 629

⁵ Harris page 628

evidence to the satisfaction of the court that had the defendant acted differently and reasonably by not doing something which would harm others, the Claimant would not have suffered damage. In other words, the adverse consequences of the breach must be reasonably foreseeable as opposed to remote. The damage or injury suffered must be as a direct result of the breach of duty of care. It is only by fulfilling this requirement that the defendant shall be held liable in negligence⁶.

38. The Court finds that the Claimant has proved that had the propeller been fenced or a device provided to protect him from contact with it he would not have suffered the damages claimed. The evidence is clear that although DWI the Machine Operator, saw the sack in the Claimant's hand going down the moving machinery, he was not able to prevent the accident as the propeller moved too fast even though it was not at its fastest speed at the time. The Machine Operator was standing less than a metre away from the Claimant, he saw the events as they happened leading to the Claimant losing a limb due to negligence. The link between the breach of duty of care and the damages is clearly proved.

(1) Legal framework- Unfair dismissal

39. Section 61 of the Employment Act, 2000 provides that;

In any claim or complaint arising out of the dismissal of an employee, it shall be for the employer to provide the reason for the dismissal and if the employer fails to do so, there shall be a conclusive presumption that the dismissal was unfair.

40. Where the employer cites financial difficulties as the reason for dismissal, he shall be required to prove that assertion by adducing evidence to the satisfaction of the court that financial reasons were indeed the reason for the dismissal. The law does not provide what evidence is satisfactory under the circumstances therefore each case must be decided based on its facts and circumstances.

41. The evidence that an employer may adduce to prove redundancy or retrenchment due to financial difficulties includes financial statements and audited accounts. The employer must show that the redundancy or retrenchment was transparent. In this

⁶ Ibid, Chllinda, p. 146

regard, the employer must prove that the redundancy or retrenchment exercise was implemented systematically giving evidence of the criteria used to select the dismissed employee and not any other employee among other factors depending on the nature of the enterprise.⁷

42. In the case at hand, the Defendant made no attempt to adduce any facts to show the state of the Company's financial situation leading to the dismissal. The Defendant through DW2 made bare statements speculating that the general elections or the COVID-19 affected its financial standing. The Defendant made unsubstantiated statements that low production necessitated the reduction of staff. He adduced no record of the correlation between production before, during and after the Claimant's dismissal and the decision to dismiss to support his assertion.

43. The exhibit SA1 filed by DW1 purporting to be a statement of production statistics for the period in question showing a downturn in sales is of no evidential value. It is neither signed by its author nor authenticated.

44. The Defendant has failed to satisfactorily rebut the presumption that the dismissal was unfair. The Claimant's claim for unfair dismissal must succeed.

Decision

45. The Claimant has proved on a balance of probabilities that he was owed a duty of care and that the duty was breached resulting in him suffering damage. He is entitled to damages as claimed to be assessed. The Claimant has proved his case for unfair dismissal and entitled to remedies under the Employment Act.

Proof of injuries and incapacity

46. The evidence on injuries was corroborated by a medical report.

47. Some of the consequences of the injuries are that the Claimant's hand was amputated 37 cm up. He is deformed and disfigured.

⁷ Sikwese R.S. Labour Law in Malawi (4th edition) Lexis Nexis, South Africa, 2022]pages 243-244

Assessment of General Damages

48. The Court takes recognisance of and would have found it expedient to follow the Supreme Court of Appeal jurisprudence in *Nanchinga v Re-Union Insurance Company Ltd*⁸ that:

Where the matter proceeds to trial before a judge, the judge must assess damages and assessment of damages by the Registrar must be the exception⁹.

49. The Supreme Court of Appeal observed in that case that;

the court below- and it is a pervasive practice- refused to receive evidence on damages because the court wanted the Registrar to assess the damages. The practice protracts the trial and increases costs. It creates two trial hearings, one for liability and another for assessment. It creates two processes that require additional procedures before the Judge and the Registrar. It, consequently, requires separate time allocation. This is not concomitant with judicial management at common law and under the Civil Procedure Rules, 1998, as now the Courts (High Court) (Civil Procedure) Rules illustrate”.¹⁰

Direction to the Registrar to Assess Damages

50. This motivation notwithstanding; the rules of this court on powers and functions of the Registrar and the acquired considerable and relevant expertise in assessment of damages, it would be expedient to refer this matter to the Registrar under O.25, r.1(n) of the Courts (High Court)(Civil Procedure) Rules, 2017, to assess general damages. It is so ordered. The assessment should be set down and conducted within 30 days of this Direction.

Remedies for unfair dismissal

51. The Claimant was dismissed unfairly at the time when he needed support from his employer, the Defendant. He lost a limb. He was a general worker, therefore depended on his limbs to perform manual work. He was now left with one hand. The Court observed that this would affect his chances of securing alternative employment.

⁸ [MSCA Civil Appeal No. 5 of 2016 (unreported) SCA judgment delivered on 30 May 2018 (being High Court Personal Injury Cause No. 809 of 2011(unreported)

⁹ Ibid, p.2 of the manuscript

¹⁰ Ibid, p.2 of the manuscript

52. The Defendant is liable to place the Claimant in the position that he would have been had his services not be unfairly terminated. The Employment Act provides that an employee who is unfairly terminated shall be reinstated or reengaged in employment or compensated.
53. The Court has considered the circumstances of this case and find them the most egregious. The Defendant is ordered to reinstate the Claimant in his position as a general worker under section 63(1)(a) of the Employment Act. This is because as a general worker, the Claimant can utilise his mental and physical faculties including his one hand to perform duties such as cleaning, dusting, sorting and such other activities.
54. It is further ordered that the Claimant should be assigned to work in an office environment away from the machinery that injured him to avoid a trigger of his unfortunate accident and thereby cause him anxiety and mental anguish.
55. The effects of reinstatement are that the Claimant shall be treated in all respects as if he had not been dismissed. He shall be entitled to receive salary in arrears from date of termination to date of reinstatement which is the date of this judgment. The Claimant was receiving MWK50 000 at the time of the dismissal. The Court orders that in calculating the salary arrears the Defendant shall base the salary paid to the general workers at the Claimant's level as revised from time to time since the dismissal.
56. The order of reinstatement is with immediate effect.

Failure to report an accident

57. The Defendant informed the Court that he did not notify the relevant government organ about the accident which is a contravention of the OSHWA. It provides in section 66 that:

Where any accident occurs in a workplace which either (a) causes loss of life to a person employed in that workplace; or (b) disables or is capable of disabling any person from carrying out normal duties at which he is employed; written notice of the accident, in the prescribed form and accompanied by the prescribed particulars, shall forthwith be sent to the Director.

58. In total disregard of this requirement, the Defendant terminated the Claimant's employment without taking these statutory measures. A clear indication that the Defendant never intended at any time to report this accident. There are consequences for failure to comply with the provisions of OSHWA.
59. It is provided in section 85 of OSHWA that if any person dies or suffer bodily injury as a result of the occupier or owner of a workplace having contravened any provision of the OSHWA, the occupier or owner shall, without prejudice to any other penalty, be liable to a fine of MWK400 000 (after applying the conversion) and to imprisonment for twelve months, and the whole or any part of the fine may be applied for the benefit of the family of the deceased person or the injured person, as the case may be, as the court may order. This is a criminal penalty after conviction of the offence mentioned in section 85 and also in section 35 failure to fence a dangerous part of the machinery.
60. Since these proceedings did not arise from proceedings commenced under the Workers Compensation Act or the Occupational Safety Health and Welfare Act, the Court has no mandate to consider in this judgment any further than award damages for breach of statutory duty leading to negligence. The other aspects of the case fall under the jurisdiction of the Workers Compensation Commissioner and the Director of Occupational Safety Health and Welfare.
61. Similarly, under section 24(1) of the Workers Compensation Act, the employer may have committed an offence by failing to report the injury to the Workers' Compensation Trustee Board established under the Workers Compensation Act. It provides that:
- (1) Every injury arising out of and in the course of employment which results in
 - (a)...
 - (b) or is likely to result in some degree of permanent incapacity to a worker...
- and every injury or death of a worker from any cause whatsoever shall, within twenty-one days of the date when the injury occurred or the death occurs, be reported by the employer in the prescribed form to the Board.

- (2) An employer who without reasonable cause, fails to comply with the requirements of subsection (1) shall be guilty of an offence and liable to a fine of MWK400 000.

Order to serve the judgment on the Director of Occupational Health, Safety and Welfare and the Commissioner for the Workers Compensation Commission in the Ministry of Labour, Skills and Innovation

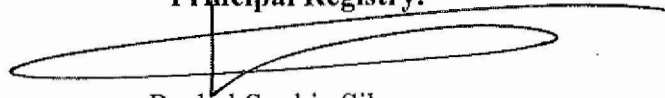
62. The Court orders that a copy of this judgment be served on the Director of Occupational Safety, Health and Welfare and the Commissioner for the Workers Compensation Commission as a referral for that office to take any measure under the law to ensure that the Defendant is held accountable for the violations of the OSHWA.

Costs

63. The Claimant is awarded costs of the action.

Pronounced in open Court this 12th day of May 2023, at High Court (Civil Division)

Principal Registry.

A handwritten signature in black ink, appearing to read 'Rachel Sophie Sikwese', is written over a horizontal line. The signature is fluid and cursive.

Rachel Sophie Sikwese

JUDGE