

A handwritten signature in black ink, appearing to be "Ulaya".

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**

PERSONAL INJURY CAUSE NUMBER 230 OF 2020

BETWEEN

GALISON RABSON

CLAIMANT

AND

CENTRAL HIGH SCHOOL

DEFENDANT

CORAM: JUSTICE M.A. TEMBO

Ngunga, Counsel for the Claimant
Ulaya, Counsel for the Defendant
Makhambera, 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 he fell from a ladder in the course of his employment with the defendant. 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* by which negligence is implied from a given set of facts.
2. The claimant asserted in his claim that he was employed by the defendant as a builder responsible for maintaining the defendant's buildings and infrastructure.
3. He asserted further that on 19th November, 2019, whilst in the course of his employment, he got injured at the defendant's premises. He indicated that on

- this particular day, he was assigned by the defendant to lay bricks on an old wall in order to renovate it. He indicated that he mounted a metal ladder and embarked on climbing the said ladder in order to gain height of the wall he was assigned to maintain. He asserted that the ladder lost balance and he fell and awkwardly landed on his right hand side and got injured in the process.
4. The claimant alleged that he got injured as a result of the defendant's negligence. He stated the particulars of negligence, namely, failure to provide adequate human resource (e.g. there was none to hold the metallic ladder at the time), failure to supervise him herein, deploying him to work on slippery floor yet he was using a metallic ladder, failure to set up and implement a safe system of work, failure to have regard to his safety and exposing him to unnecessary risk in the circumstances. He asserted that he would also rely on the doctrine of *res ipsa loquitur*.
 5. He added that he also got injured as a result of the defendant's breach of statutory duty. He gave particulars of the breach, namely, the defendant's failure to implement his safety, health and welfare as required under the Occupational Health, Safety and Welfare Act, the defendant's failed to provide systems of work that are safe and without risk to his health as per the Occupational Health, Safety and Welfare Act and failure to maintain a working environment for him that was safe and without risks to health and adequate safeguards pertaining to facilities and arrangements for his welfare at work.
 6. The claimant then asserted that as a result of his fall he suffered injuries, namely, fracture of the right neck of femur (intra capsular), fracture of the fifth metatarsal, multiple bruises and excessive body pains, shock and mental anguish. He therefore claimed damages for pain and suffering, loss of amenities of life, disfigurement, future nursing care, loss of earnings and excessive shock and mental anguish. He also sought K10 000 the cost of a medical report and costs of this action.
 7. 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, failing to exercise necessary skill, expertise and workmanship whilst working and particularly failing to use appropriate tools provided for safety including safety belts, exposing himself to hazard by

failing to wear protective gear provided, deliberately ignoring the safety instructions, failing to exercise due care and caution whilst climbing the ladders, failing to follow the right procedures for safety communicated to him by the defendant, conducting himself in such a manner that constituted a danger to himself and generally failing to observe the necessary precautionary measures.

8. The defendant added that at trial, it would show that at recruitment the claimant made representations and held himself out as an experienced person for the work for which he was recruited for, that the claimant was fully trained by it on how to do the job and that the defendant's metallic ladders are well serviced and maintained. The defendant 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 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.
10. As correctly observed by the parties in this matter, the standard of proof in these civil matters is on a balance of probabilities. 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 testified to prove his claim. Then the defendant called one witness in its own defence whose evidence was mostly hearsay as he did not witness the incident herein. After that, both parties made submissions on the evidence herein.
12. This Court visited the defendant's premises and heard the evidence of the parties at the place where the work was being done by the claimant at the time he fell from the ladder and got injured. From the evidence, the following facts were established.
13. The claimant had been doing brick work around the defendant's premises for two or three days when the incident herein happened. By the time of the incident herein, the claimant had been working as a builder doing similar work for four years. At the time of the incident herein, the claimant was in the company of another builder and a builder's assistant who had already gone up

the ladder and were working. The claimant was putting water on the wall to make it wet and prepare the wall for his work. It is this water that made the floor wet. The floor had plastic tiles. The claimant had earlier worked in one corner using the ladder with no incident. When the claimant moved the ladder to a different work area and tried to climb up the ladder that is when the ladder slipped and he fell. Had the claimant asked the builder's assistant to hold the ladder as he climbed up the said ladder, the ladder would not have slipped causing the claimant to fall. The claimant indicated that at the time he was climbing the ladder, the builder's assistant was giving materials to the other builder and was off the ground having climbed the ladder ahead of the claimant with the second builder.

14. The impression this Court got from the evidence is that the claimant was a sufficiently experienced builder who must have known how to handle the risk associated with climbing on the ladder in the circumstances herein and that he knew that the proper thing to do was to ask the builder's assistant to hold the ladder as he climbed up the said ladder to do work at a height. It also appeared that in his team, the claimant was some sort of supervisor whilst there was another overall supervisor who was not around then.
15. 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 *Kadawire v Ziligone* [1997] 2 MLR 134, 144.
16. 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 MLR 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....

17. The defendant then added that the duty of an employer is to take reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk. See *Smith v Baker* [1891] A.C. 325 at 362. And that the employer's duty is not an absolute duty. See *Winter v Cardiff R.D.C* [1950] 1 All ER 819. It also observed that the duty is to take reasonable care so as to carry on operations as not to subject persons employed to unnecessary risk. *Wilson & Clyde Coal Co. v English* [1938] A. C. 57. Further, that the duty is not to subject the employee to any risk which the employer can reasonably foresee and which he can guard against by any measure, the convenience and expense of which are not entirely disproportionate to the risk involved. See *Harris v Brights Asphalt Contractors* [1953] 1 QB 617.
18. The defendant then asserted that the law in all cases exacts a degree of care commensurate with the risk. See *Read v Lyons & Co. Ltd.* And that in some cases, where there is only a remote possibility of injury, no precautions need to be taken for "one must guard against reasonable probabilities, not fantastic possibilities". See *Fardam v Harcourt-Rivington* (1932) 146 L.T. 391. It added that if the risk is very slight, the defendant may have behaved reasonably though he did nothing to prevent the harm. See *Bolton v Stone* [1951] A. C. 850. And that the risk must be balanced against the measures necessary to eliminate it and the practical measures which the defendant could have taken must be considered. See *Harley v London Electricity Board* [1965] A.C. 778.
19. The defendant also noted that there is no legal duty on an employer to prevent an adult employee from doing work which he or she is willing to do. If there is a slight risk, it is for the employee to weigh it against the desirability or perhaps the necessity of employment. The relationship of a master and servant is not that of a schoolmaster and pupil. See *Latimer v AEC* [1953] A.C. 643.
20. Both parties then 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-

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.

21. 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.

22. The claimant then alluded to section 58 of the Occupational Safety, Health and Welfare Act which provides that:

Where in any work place, workers are employed in any process involving excess 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.

23. He also alluded to section 65 of the Occupational Safety, Health and Welfare Act which provides that:

(1) Every worker in a workplace shall be adequately and suitably—

- (a) informed of potential health hazards to which he may be exposed to at the workplace;
- (b) instructed and trained in the measures available for prevention and control and protection against health hazards at the workplace.

24. On the facts, the claimant submitted that the defendant was negligent and breached its statutory duty in that it did not provide enough human resource as there was no one to hold the ladder as he climbed the same. He added that the ground on which the metallic ladder rested was in fact wet. He also added that the defendant failed to provide protective wear such as safety boots, helmet and safety belts. The claimant also noted that he was under no supervision at the time of the incident.

25. On its part, the defendant submitted that the claimant has not provided evidence to the requisite standard to prove that his injury was due to the

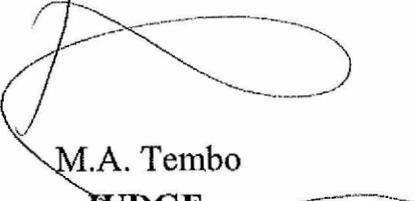
defendant's negligence or breach of statutory duty. And that this is clear from the following:

- a) The claimant's concession during cross-examination and re-examination that the accident could not have occurred if he had called for help from his colleagues.
- b) Contrary to the claimant's allegation that the defendant provided inadequate personnel for the assignment, the defendant provided two builders and an Assistant which reasonably were sufficient for the small job (as conceded by the claimant during cross-examination). Indeed, if the personnel were not adequate, one wonders (as conceded by the claimant during cross-examination) how the claimant was able to work for the first two days and from the morning up to lunchtime on the day of accident safely and without any problems.
- c) The claimant's allegation that the accident occurred because he had no supervisor stands on faulty grounds because during cross-examination the claimant conceded that having worked for a period of four years as a builder he knew what to do to take care for his safety. Further, the uncontroverted evidence of the defence shows that the claimant himself was a supervisor (foreman) and also that without being instructed started to do the job during lunch hour whilst the main supervisor for the project was at home for lunch.
- d) The claimant's allegation that the accident was due to the defendant's failure to implement the Safety, Health and Welfare of the claimant, to provide systems of work that are safe and without risk to the health of the claimant and to maintain a working environment for the claimant that was safe and without risks to health of the claimant also fails due to the reasons advanced in (a), (b) and (c). If the claimant had complied with his statutory duty as required under Section 18 of the Occupational Safety, Health and Welfare Act by simply asking help from his colleagues to provide support to the ladder whilst he was climbing, clearly and as admitted by the claimant during cross-examination the

accident could not have happened and the claimant could not have sustained the injury.

26. Having considered the evidence and the submissions of the parties above, this Court agrees with the defendant that the claimant was a sufficiently experienced builder that the defendant acted reasonably in taking the view that he would manage the slight risk of using the ladder in the circumstances herein. The risk was not unnecessary in the circumstances. See *Nchizi v Registered Trustees of the Seventh Day Adventist Association of Malawi* [1990] 13 MLR 303. The claimant therefore cannot claim that with his experience he required supervision to use the ladder herein. If anything, the claimant should have indeed asked the builder's assistant to help with holding the ladder safely while the claimant went up the said ladder after the claimant applied water to the wall in the course of work which made the floor wet. Section 18 of the Occupational Safety, Health and Welfare Act placed a duty on the claimant as an experienced builder to take precautions for his own safety in the circumstances.
27. This Court does not find that the alleged failure to provide protective clothing contributed to the incident herein at all as there is no evidence on that aspect from the claimant.
28. In the circumstances, this Court agrees with the defendant that, contrary to the submission by the claimant, as an experienced builder the claimant fell and got injured as a result of his own negligence in the circumstances of this case. He has failed to prove that negligence or breach of statutory duty on the part of the defendant was the cause of his fall and injuries. The claimant's claim is therefore fails with costs to the defendant.

Made in open court at Blantyre this 5th April, 2023.


M.A. Tembo
JUDGE