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REPUBLIC OF MALAWI
MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
CIVIL CAUSE NO. 272 OF 2019

(Before the Honourable Mr. Justice D. Madise)

BETWEEN

PETROL MAULANACLAIMANT

AND

MAKANDI TEA AND COFFEE ESTATES LIMITED.....DEFENDANT

CORAM: Honorable Justice D. Madise
Mr. P. Kalanda of Counsel for the Claimant
Mr. N.B Banda of Counsel for the Respondent
Mr. Mathanda Official Interpreter

Madise J,

JUDGMENT

Introduction

1. By a writ of summons the Claimant dragged the Defendant to Court claiming damages for negligence. The Claimant claimed that he was employed by the Defendant as a tea Plucker. That on or about 23 November, 2018, he was assigned to pluck tea at Delule Estate garden No. 11 and in the process of doing his work he fell into a hole on the ground and he got injured. He stated the hole was dug for purposes of planting gravelia trees which are used to shed tea trees from sunlight.
2. The Defendant denied the claim and called on the Claimant to prove his case. They stated that it was the duty of the Claimant to prove his injuries and further show that the said injuries were caused due to the Defendant's negligence. The Defendant pleaded contributory negligence.

Facts

3. Petrol Maulana told the Court in chief that he was employed by the Defendant as a general worker and tea Plucker. That on 3 November, 2018, he was assigned to work on Delule Estate number 11. That in that Estate there were holes which were dug for purposes of growing grevillea trees. That some of the holes were not filled with soil.
4. That in the process of working he fell into one of the holes and injured himself. As a result of the injuries he strained his right knee, had dislocation of the right leg, painful right leg, failure to walk properly and a swollen right leg. He told the Court that he

had been in pain for a month. He tendered in evidence exhibit PM which particularized the alleged injuries.

5. In cross/re examination he told the Court that Mr. Kamoto was the Manager on that day and Chimwang'a was the captao. That the holes for planting grevillea trees which are planted together with tea trees were not filled with soil and the said holes were not visible as they were covered by tea trees and leafs. He stated that it was the duty of the Defendant to cover those holes on the ground. That after the injury he was taken to Delule, Thunza then Thyolo hospital and a medical report was prepared by a doctor.
6. The second witness for the Claimant was Lawrence Maşauli. He told the Court that on 8 November, 2018 he was on duty at Estate No. 11 together with the Claimant. He then heard him shout for help. He rushed to the scene and found the Claimant crying with his leg in one of the holes which were dug in the estate. The Claimant was badly injured and he could not walk by himself. He was carried by ambulance to the hospital.
7. In cross/re-examination he told the Court that on the material day he was working at Delule estate garden No. 11 and while working he heard the Claimant calling for help and he went to find out what was wrong. That marked the end of the Claimant's story.
8. In defence the Defendant called Yafeti Yotamu a certification officer for the Defendant. His duties included investigating all accidents and looking at the general welfare of the workers. He denied that the Claimant was injured while working on Estate No. 11. He denied the existence of Estate No. 11. That he conducted

research and discovered that the Claimant was not an employee of the estate.

9. The witness told the Court that the holes for planting grevillea trees are very conspicuous and a person can easily see them since they are dug in an open area and not in the tea trees. That there were designated areas for planting the grevillea trees and the workers were similar with those sites.
10. In cross/re-examination he told the Court that had not brought to Court the records which showed that the Claimant was not an employee of the Defendant. He stated that the Claimant was to blame for the injuries as he failed to take care of his own safety. That marked the close of the defence.

The issues

There are four main issues for determination before me.

- (1) Whether the Claimant was employed by the Defendant
- (2) Whether he was injured in the course of employment
- (3) Whether the injuries were caused due to the Defendant's negligence.
- (4) If the answers to the above are in the affirmative whether damages are payable.

The law

The burden and standard of proof.

11. The burden of proof rests on the one who wants the court to believe a set of given facts. He who alleges must prove. The standard is on the scales of probabilities. The law demands, that the tribunal must say we think it more probable than not then the burden is discharged, but where the probabilities are evenly balanced, the burden is not discharged. See judgment of Denning J in Miller vs. Minister of Pension [1947] All ER 372

What is negligence?

12. The best definition of negligence was given by Baron Alderson in Blyth vs. Birmingham water works (1856) 1 Ech 781 at 784.

"Negligence is the omission to do something which a reasonable man would, guided upon those circumstances which ordinarily regulate the conduct of human affairs do or doing something that a prudent man would not do"

13. The tort demands that a defendant must owe the claimant a duty of care and there must be a breach of such a duty which result in the claimant suffering damage. See Banda vs. Southern Bottlers Ltd Civil Cause No. 558 of 2010 (High Court) (unreported). For a better understanding of the tort of negligence read Winfield and Jolwicz on tort 14 Ed page 78.

14. On duty of care Lord Atkin stated in Donoghue vs. Stevenson (1932) AC, 562 as follows:-

“A person’s neighbors are those persons who are closely and directly affected by any act that I ought reasonably to have them in contemplation as being affected when in directing my mind to the acts or omissions which are called in question”.

The maxim *res Ipsa loquitur* sums up the law on negligence”

The arguments.

15. The Claimant argued that the Defendant owed him a duty of care and that on 3 November 2018 there was a breach of that duty. That the incident of a duty is decided by the court as a question of law but the court may inform its mind by evidence as to the relationship of the parties and the dangers likely to arise in given circumstances. They cited *Minikwas Employers liability* (9th Ed p. 27). The Claimant stated that under common law, the employer had a duty towards his employee to take reasonable care for his safety.

16. The Defendant on the other hand stated that the Claimant must show that the Defendant owed him a duty of care and that the injuries were caused due to a breach of that duty. According to the Defendant there was contributory negligence on the part of the Claimant as the holes were visible enough and he would have avoided them. In conclusion the Defendant argued that the Claimant had failed to show that he was employed by the

Defendant and that the Defendant did not have Estate No. 11 and in any event the Claimant wholly caused the accident.

The Finding

17. The Claimant told the Court that he was employed by the Defendant as a general worker at Delule Estate garden No. 11. The Claimant brought a witness who confirmed his version of events on how he got injured on 3 November, 2018. The Defendant has disputed the fact that the Claimant worked for the Defendant. They have not led any evidence to substantiate their claim in rebuttal. No records have been brought to Court and no witness was called to confirm this. On a balance of probabilities I find that the Claimant was indeed employed by the Defendant on 3 November, 2018 working at Delule Estate Garden No. 11.

18. Looking at the evidence presented before me I further find that the Claimant was injured while on duty after his leg fell into a hole which was dug by the Defendant for purposes of planting grevillea tress. I find based on the evidence that the holes were not visible in order to be avoided as they were covered by the tea leaves. I find that the Defendant had a duty to mark all the unplanted holes with pegs to alert workers of the dangers underneath the tea branches. Alternatively the holes were supposed to be planted with trees and immediately covered with soil after they were dug.

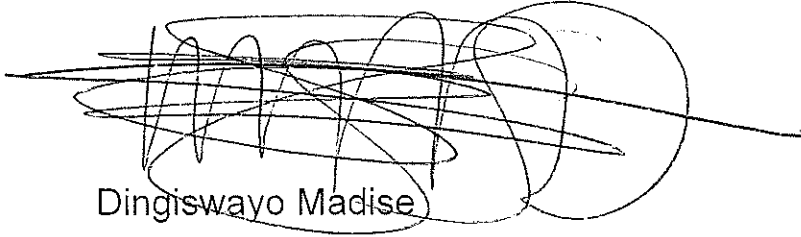
19. This was not done and I find that the Defendant owed the Claimant and other workers a duty to alert them of the dangers the

holes paused. I refuse to accept the argument that the holes were visible enough to be seen and alleging that the Claimant fell into the hole due to his own negligence. The Defendant owed the Claimant a duty of care in ensuring that there was a safe working environment. By failing to do the needful the Defendant breached that duty and they must pay damages.

20. On a balance of probabilities I find no evidence of contributory negligence on the part of the Claimant. The accident was wholly caused by the Defendant. Let me mention here that there is no law which states that a medical report must be prepared within a certain period of time. Whether a report is issued immediately after the accident or a later in time is neither here nor there and it is of no consequence whatsoever.
21. The most important thing is for the medical officer to write what he had witnessed when the claimant visited the hospital. The court looks at the totality of the evidence, the events leading to the accident, the accident itself and the treatment received and the damage caused coupled with pain and suffering.
22. In these premises I'm convinced on a balance of probabilities that the Claimant got injured while in the Defendant's employment and that the accident was caused due to the negligent acts of the Defendant. I therefore find in favour of the Claimant and I award him costs of this action.

I so order

Pronounced in open Court at Blantyre in the Republic on 26
July, 2021.



Dingiswayo Madise

Judge