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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 922 OF 2019

BETWEEN

SANKHULANI PATHERETU

CLAIMANT

AND

O.G. PLASTIC INDUSTRIES LIMITED

DEFENDANT

CORAM: JUSTICE M.A. TEMBO

Kapoto, Counsel for the Claimant
Chipembere, 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 injury he suffered on his leg after he fell, after putting a suction pipe into a bag of materials that was stuck on top of another bag, in the course of his work on the defendant's factory floor. The claimant claimed that the injury arose as a result of the defendant's breach of its statutory duties as an employer. He alternatively, claimed that the defendant was negligent and that he also relied on the doctrine of *res ipsa loquitur* by which negligence is implied from certain circumstances. The defendant contested the claim.
2. In his claim, the claimant asserted that on 12th August, 2017, at around 21.00 hrs whilst in the course of his employment as a machine operator, he was

ordered by the defendant's agent or servant to put a pipe on top of bags in order for the machine to pull in raw materials. He indicated that he used a ladder to climb to the top and that when he was coming down the ladder when he was done, he slipped and fell.

3. He asserted that his injury was caused by the breach of statutory duty by the defendant in that the defendant failed to ensure the safety, health and welfare of all its employees including himself as required under section 13 of the Occupational Safety, Health and Welfare Act. He indicated further that, in the alternative, the injury, loss and damage was caused by the negligence of the defendant in that it failed to take any adequate precautions for him while he was engaged upon the work, it exposed him to a risk of injury which it knew or ought to have known, it failed to provide protective gear and it failed to provide a safe working environment.
4. The claimant indicated that he would also rely on the doctrine of *res ipsa loquitur*.
5. The claimant then asserted that as a result of the fall herein he suffered loss and damage, namely, fracture of the distal tibia and fibula, has possibility of developing arthritis and he suffered permanent incapacity put at 18%. He indicated that he also suffered special damages in the sum of K10 500 that he spent on obtaining a medical report.
6. He therefore claimed damages for pain and suffering, loss of amenities of life, disfigurement, loss of earning capacity, cost of a medical report and costs of this action.
7. On its part, the defendant denied the allegations of breach of statutory duty and negligence herein. It asserted that the claimant got injured due to his own negligence, namely, his failure to heed the defendant's warning as to the dangers of using ladders unaided and/or without support, failure to heed his supervisor's instructions and warnings and failure to take appropriate care for his own safety and particularly was in a rush to finish the tasks. The defendant also indicated that it would rely on the doctrine of *res ipsa loquitur* to prove negligence on the claimant's part.
8. The issues for determination before this Court are whether the defendant is guilty of the alleged breach of an employer's statutory duty as alleged or alternatively of negligence. Whether the claimant suffered the injury and loss claimed. And whether he is entitled to the damages and costs sought.

9. 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.
10. The claimant gave evidence to prove his claim. The defendant brought one witness in its defence. Both parties made submissions herein.
11. After the trial but before judgment, the claimant applied that he be allowed to amend his statement of case. In his statement of case he had indicated that he had in fact fallen from a ladder that he had climbed on when he put the suction pipe in the bag of materials. The claimant sought to amend his statement of claim to the effect that in fact he never used a ladder but that he climbed on a bag of materials in order to insert the suction pipe onto another bag of materials that was stuck on top of another bag. This Court reserved its decision on that application.
12. Essentially, the claimant indicated that the evidence as adduced by both parties at the trial clearly shows that no ladder was in fact used on the material day and that he should therefore be allowed the amendment so that the matter be adjudicated on the true facts and that he correct the drafting mistake in the statement of case. The defendant opposed the application saying it came late in the day after the defence closed its case and also that the amendment goes to the root of the claimant's case and hence would be prejudicial to the defendant as it changes the entire case.
13. Both parties agree that an amendment to a statement of case can be made to correct a mistake or defect, among others, as allowed under Order 7 rule 23 (1) of the Courts (High Court) (Civil Procedure) Rules. There is no limit as to the time when such an amendment can be made except that permission of the court must be sought if the amendment is sought to be made after the close of the statement of case. As noted by the claimant, indeed cases decided under the old Rules of procedure offered guidance that amendments could be made anytime so long as there is no prejudice to the opposing party that may not be compensated in costs, among others. See *Kachingwe and others v Malawi Housing Corporation* [2013] MLR 98. The current Rules of procedure also enjoin this Court, when deciding to amend a statement of case after closure of

the same, to consider whether another party would be prejudiced in a way that cannot be remedied by awarding costs, extending time for anything to be done or adjourning the proceedings. See Order 7 rule 23 (3) of the Courts (High Court) (Civil Procedure) Rules.

14. This Court has considered the fact that the amendment seeks to correct a mistake in the statement of case so that it is made clear that in fact the claimant never used a ladder but instead climbed on one bag in order to reach the third bag of materials that was stacked on top of a second bag of materials. The evidence at trial clearly disclosed this set of facts. This Court is of the view that it should allow the amendment as it is of the view that the defendant will not be prejudiced at all with the amendment beyond the costs it incurred attending to the claimant's application. The claimant is not fundamentally changing his case to the detriment of the defendant at all. The amendment is accordingly allowed with costs to the defendant.
15. This Court visited the factory and received the evidence on the operational area where the claimant met his fate. From the evidence, the following facts were established.
16. On the material day, the claimant was working on the defendant's factory floor. In the course of his work, the claimant inserted a suction pipe from a machine into a bag of raw materials. The bag of raw materials was stacked on top of a second bag of materials. For him to get up and insert the suction pipe he climbed on top of another separate bag of materials that was placed next on the side of the two bags of materials. When he was done and was getting down, the claimant slipped and fell. The claimant suffered a fracture of his leg.
17. The impression that this Court got from the evidence as adduced is that the claimant was routinely performing the task of placing the suction pipe on to the bag of materials stacked on top of the other bag. And further, that the claimant would climb the other bag of materials and get down from it by holding the tough handles of the materials bag. The claimant was therefore required to use common sense to take care of his own safety as he climbed the materials bag and came down from the same as the materials bag's top stood at a height of approximately between a metre and one metre and a half from the ground from the floor at most. This Court was given to the impression that the claimant may have been reckless in getting down from the plastic bag as

suggested by the defendant's witness who demonstrated how the routine climbing up and getting down from the materials bag is usually done. The defendant's witness indicated that the claimant jumped off the materials bag on his way down. It is indeed surprising how the claimant ended up getting injured in the circumstances.

18. Both parties then made submissions and correctly referred to the statutory duty of employers as provided in section 13 (1) of the Occupational Safety, Health and Welfare Act which states it shall be the duty of every employer to ensure the safety, health and welfare at work of all his employees.
19. The defendant then 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.
20. Both parties also 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.
21. 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....

22. On the facts, the claimant submitted that the defendant breached its statutory duty by not ensuring the safety of the claimant by providing him with a ladder and gum boots. He submitted that if he had worn gum boots and used a ladder he would not have fell and got injured as happened in the circumstances. The

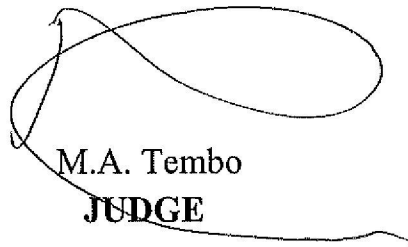
claimant argued that on the same facts as indicated the defendant was alternatively liable for negligence in that he put the claimant at a reasonably foreseeable risk of falling.

23. On its part, the defendant contended that in the circumstances of the present matter, the claimant ought to have conducted himself in such a manner that he took care of his own safety and health by getting down from the materials bag with care in the course of his routine work of placing the suction pipe into the materials bag.
24. This Court observes that given the set up for placing the suction pipe, and in particular the height at the top of the materials bag that the claimant routinely climbed being between one metre and one and a half metre, it came as a surprise to this Court that the claimant failed to use the tough handles of the materials bag to safely get up and down the said bag as he always did routinely many times before the incident in the present matter. The impression that this Court was left with is that the claimant did not use common sense to safely execute the routine climbing down from the materials bag and therefore was negligent. The set up herein is not such as would absolutely have required the use of a ladder. There is no evidence as to how the putting on of gum boots would have averted the claimant's fall. The fall appears to have been occasioned by the manner in which the claimant climbed down from the bags material. If he had held the tough handles of the bag he surely would not have slipped and fell.
25. In the circumstances, this Court is unable to agree with the claimant that he fell because the defendant breached its statutory duty or that it was because the defendant was negligent. The claimant failed to act with common sense to ensure his own safety.
26. The defendant was therefore not in breach of section 13 of the Occupational Safety, Health and Welfare Act. In the circumstances, the view of this Court is that the defendant correctly relied 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 was also not in breach of its common law duty as an employer as outlined in the case of *Nchizi v Registered Trustees of the Seventh Day Adventist Association of Malawi* (1990) 13 MRL 303.

27. Given that the cause of the injury to the claimant is known, neither party can 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.

28. The claimant's claim therefore fails in its entirety with costs.

Made in open court at Blantyre this 16th September, 2022.



M.A. Tembo
JUDGE

