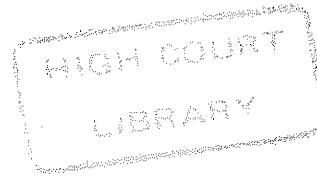


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REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 769 OF 2020

(Before Hon Justice D. Madise)

BETWEEN

PRESCOT NKHOLI.....CLAIMANT

- AND -

CAPITAL OIL REFINING INDUSTRIES LIMITED.....DEFENDANT

Coram. Hon Mr. Justice D. Madise

Mr. Thembako Banda for the Claimant

Ms. Amasi for the Defendant

Mr. F. Mathanda Clerk

JUDGMENT

Madise, J

Introduction.

1. The claimant commenced this action which is premised on the tort of negligence. He is claiming against the defendant the following reliefs as per the statement of case.

Damages for pain and suffering;

Damages for loss of amenities of life;

Damages for disfigurement; and

Costs of action.

2. The defendant has denied the claim in the defence on the basis that the claimant was not instructed to go into the tank to clean it. In the alternative they have pleaded contributory negligence. They have called on the claimant to prove his case.

The Facts

3. The claimant **Prescot Mukholi** stated in chief and in cross examination that on the material day on 8th July 2020 he was working with two other employees upon instructions from Anile an Indian boss. They were sent to a sewerage in Chigumula to empty a tank which was filled with sludge a waste produce from the production of cooking oil. The other two employees were not injured but he was. That they did not only used valves to drain the sludge but they also removed it with buckets to throw it out when there was no pressure for it to go into the valves. He stated that it was quicker to use the valves and not the buckets. He stated that brushes were used and his colleagues also used the brushes. That after draining the sludge they then entered the tank to finish the rest.
4. He then entered the tank to empty the sludge using the pale by passing it on to his colleagues who were on top. After entering the tank it was very hot and he decided to remove the work suit to have some fresh air. This how the sludge landed of his body and injured him. He said that he was supposed to go into the tank to finish the job. He stated that if he had only used the valves to drain the sludge he would not have sustained his injuries but because he went in he sustained the injuries.
5. That the information about the circumstances of his injury were in the Police Referral Letter and the Health Passport. That the photos that he exhibited have no dates to show when they were taken. The sludge was not hot but there was acid in the sludge. In re-examination the issue of draining and removing came about

because, they used valves first and then the brushes and later they got in. That marked the close of the claimant's case.

6. The defendant paraded two witnesses. The first was **White Silver** from the defendant's company. He stated in chief and in cross examination that on the material day Anile was the head of department. He stated that the sludge is at room temperature and is not injurious. That protective gear such as boots, work suit and gloves are provided despite that the work was not harmful just to make sure that if anything happens the workers should be protected. That the pales that are kept in the vehicle are for their cleaning after they finish removing the sludge.
7. That the sludge may remain in the tank floor and they push the same using brushes while positioned on top of the tank. When the sludge on the tank floor hardens the workers are advised to take it back to the factory so that hot sludge is added. He stated that on the material day he was not present at the dumpsite. He stated that he was in court to explain what instructions and procedures are given in regard to the sludge. The claimant was instructed to get into the tank. He said that he does not know why he got in. he was not taken for disciplinary hearing.
8. The second to testify was **Lawrence Muhamba**. He told the court that he had been at the dump site. That the claimant and other colleagues were provided with proper protective gear including gumboots for their safety. He stated that sludge is a by-product of cooking oil. It has no chemicals as the same are added at the end of refinery. No chemicals are used in pressing where the sludge is produced. That sludge is not harmful that is the reason why he stated that the claimant was injured somewhere else.
9. The defendant then summoned Macleod Tsokota from the defendant's company. After taking oath and giving his full names he adopted his witness statement. A moment later he raised his hand and he told the court that he wanted to disown his statement because he was forced by counsel to make it. I will return to the conduct by the counsel later on. That marked the close of the defendant's case.

The Issues

10. There are six main for determination before me

Whether or not the claimant was at the material time employed by the Defendant;

If so, whether or not the claimant was injured in the course of his employment on 8th July 2020;

If so, whether or not the cause of the injury was due to the defendant's negligence;

If so, whether or not the claimant suffered damage thereof; and

If so, whether or not the claimant negligently contributed to the injuries he sustained.

Whether damages are payable

The law

11. The burden and standard of proof in civil cases

It is trite law that in civil cases, such as the one at hand, the burden of proof rests on the party who asserts the affirmative. In the case of Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA), at page 45 h – I, Msosa JA then delivering the judgment of the Court said:

"The burden of proof lies on the party who asserts the truth of the issue in dispute. If the party adduces sufficient evidence to raise a presumption that what is claiming is true, the burden shifts to the other party, who will fail unless sufficient evidence is adduced to rebut the presumption. The court makes its decision on the "balance of probabilities", and this is the standard of proof required in civil cases".

12. I have said before in Joseph Jonathan Zinga v. Airtel Malawi Limited, Civil Cause No. 74 of 2014 (Mzuzu District Registry) (unreported),

"In civil matters there are two principles to be followed. Who is duty bound to adduce evidence on a particular point and what is the quantum of evidence that must be adduced to satisfy the court on that point? The law is that he who alleges must prove. The standard required by the civil law is on a balance of probabilities. Where at the end of the trial the probabilities are evenly balanced, then the party bearing the burden of proof has failed to discharge his duty. Whichever story is more probable than the other carries the day".

[Emphasis added]

Also see Miller v. Minister of Pensions [1947] 2 All ER 372 (KBD)

Negligence as a tort

13. 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"

14. 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.

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

"A person's neighbours 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"

Negligence of an employer to his employee

16. To succeed in an action for the tort of negligence, a claimant must show that a defendant owed him a duty of care, that a defendant breached that duty of care and that, as a result thereof, a claimant suffered loss and damage.

In Makala v. Attorney General [1998] MLR 187 (HC) at p 190, Ndovi, J., said:

"It has been held, and this is the law, that for an action in tort (of negligence) to succeed, the plaintiff must show that-

A, there is a duty of care owed to him;

B, that duty has been breached; and

C, that as a result of that breach he has suffered loss and damage".

17. In the case of Nchizi v Registered Trustees of the Seventh Day Adventist Association of Malawi [1990] 13 MLR 303 (HC), at p 308 e – g, said:

"It is the duty of an employer or acting through his servants or agents to take reasonable care for the safety of his workmen and other employees in the course of their employment. His duty extends to safety of place of work, the plant and equipment and 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"

18. Section 13 (1) of the Occupational Safety, Health and Welfare Act ("the Act"), provides:

"It shall be the duty of every employer to ensure the safety, health and welfare at work of all his employees".

Section 18 (a) of the Act, reads:

*"It shall be the duty of every employee while at a workplace__
to take reasonable care for the safety and health of himself and that of other persons
who may be affected by his acts or omissions; and"*

19. Section 65 of the Act places an obligation on the part of an employer to give his employee safety instructions in the performance of his duties. It reads, *inter alia*:

*"(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,"*

The Claimant's Submissions

20. *Whether or not the claimant was employed by the Defendant.*

The claimant submitted that the defendant in its defence made no comments on whether the claimant was employed by the defence, both **DW1** and **DW2** in their respective Witness Statements testified to the effect that the claimant was at the material time employed by the defendant. They thereby supported what the claimant told this Court in his Witness Statement that he was the defendant's employee at the material time.

21. *Whether or not the claimant was injured on 8th July 2020, while in the course of his employment.*

That although the defendant in its defence denied that the claimant got injured on 8th July 2020 and put the claimant to strict proof thereto, **DW1**, at **paragraph 12** of his

Witness Statement, stated that he received a report from the claimant that he (the claimant) *"had been injured as he was burnt with the sludge he was sent to dispose"*.

22. That furthermore, in his accident report to the Human Resource, **DW1** stated that, Mr. Tsokota, who was the supervisor of the team, (that comprised the claimant, John Kabambe and Macleod Tsokota), told **DW1** that the claimant got injured the day they went to drain the sludge at Chigumula. That on the other hand, **DW2** at **paragraph 10** of his Witness Statement stated that he received a report on 10th July 2020 that *"the claimant had reported that he was burnt with sludge. I was told the alleged incident occurred on 8th July, 2020..."*

23. The claimant submitted that the testimonies of **DW1** and **DW2** corroborated what **PW1** pleaded in his Statement of Claim and subsequently testified in his Witness Statement as well as in cross examination by Counsel for the defendant, that he got injured on 8th July 2020 whilst in the course of his duties.

24. *Whether or not such injury was caused by the negligence of the Defendant.*

That from **paragraph 21** to **paragraph 26** of his Witness Statement, the **PW1** asserted that the injury was caused by the negligence of the defendant or its agents or servants. He listed 3 grounds or particulars of negligence.

25. *Blame (a): devising unsafe system of work*

That the claimant blamed the defendant or its agents or servants for devising a system of work which was dangerous, namely, of letting the claimant getting inside the tank to remove the remaining sludge and clean it, **DW1** having admitted in cross examination by Counsel for the claimant that sludge was a dangerous substance that could injure someone. The Claimant, stated at **paragraphs 8** and **9** of his Witness Statement that he was instructed by the defendant's servant, Anile, an Indian, *"to drain the sludge from the tank and clean it inside using brushes"* that were provided to him and his colleagues by the defendant.

26. That although **DW1** conceded in cross examination that Anile was and/or is the defendant's employee, the defendant failed to call him as a material witness to dispute the **PW1's** assertion that he (Anile) instructed the claimant to remove the sludge and clean inside the tank. That instead, the defendant called **DW1**, who, in **paragraphs 8** to **11** of his Witness Statement, stated that he instructed Mr Macleod Tsokota, who

was the supervisor of the claimant and John Kabambe, to drain the sludge using valves and long brushes to push the sludge to the valves.

27. That however, both Mr. Anile and Mr. Macleod Tsokota, as material witnesses, were not called to dispute what PW1 told the Court that instructions came from Anile and corroborate what DW1 alleged that he gave instructions of how to drain the sludge to Mr. Macleod Tsokota respectively. That in our jurisdiction, it is a well settled principle of common law that failure to call a material witness gives the Court a presumption that the witness would have given evidence adverse to the person calling him. He cited Mpungulira Trading Ltd v. Marketing Services Division [1993] MLR 346 (HC) at page 351. That therefore, the Defendant having failed to call these 2 material witnesses to discredit the claimant's assertions, his testimony "is more probable than the other" and should accordingly "carry the day", as per Joseph Zinga case *supra*.

28. That the defendant, while they brought the tank to the Court for its inspection, the defendant dismally failed to demonstrate how the pushing of the sludge was being done as one stood "by the tank with a support and lean towards the top open of the tank and push it with long brushes to the valves with force" (See paragraph 11 of the Witness Statement of DW1. Again, it dismally failed to bring the alleged "long brushes" for the Court's inspection. The law is trite. It is that "he who alleges the affirmative must prove it. The standard required by the civil law is on a balance of probabilities". No such proof was ever carried out by the defendant.

29. That coming to DW2, his testimony was primarily hearsay for he not only told the Court that he was told about the claimant's injury, but also failed to tell the Court the person who told him about the injury. Thus in the case of Subramaniam v. Public Prosecutor [1956] 1 WLR 965 (PC), Mr De Silva, delivering the judgment of the Court, said:

"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and admissible when it is proposed to establish by evidence, not the truth of the statement, but the fact that it was made". [Emphasis added]

30. That the above principle has been applied in numerous cases in our jurisdiction, for instance, in the case of Mchawa v. National Bank of Malawi Ltd [1991] 14 MLR 266 (HC) at page 275 a-b, which was decided by Mtegha J. (as he then was)

Blame (b): failure to provide suitable protective wear

31. That the claimant, at **paragraph 23** of his Witness Statement, asserted that the defendant failed *"to provide me with proper and suitable wear which should have covered my skin, such as plastic wear, which would not let the sludge reach my skin but, instead, slip on such plastic wear"*. Not even an iota of evidence was tendered by the defendant to contradict this assertion by the claimant. He submitted the defendant conceded to it.

32. Blame (c): failure to address the dangerous modus operandi of draining and cleaning inside the tank by getting into it

That under **paragraphs 23 to 26** of his Witness Statement, the claimant testified that he and 2 other colleagues, namely, Macleod Tsokota and John Kabambe, had at one time gone to sewerage at Chigumula to drain the sludge with the defendant's health officer, Mr Maiputa. While there, the claimant and his colleagues complained to Maiputa about how they were being exposed to risks of injury in the performance of their duties, *"especially of getting inside the tank to drain and clean the remaining sludge"*. They asked him to take them pictures as they got inside the tank to drain or remove the sludge and show the pictures to management.

33. That notwithstanding taking such pictures on his mobile phone and presenting the pictures and reporting to management, the defendant did nothing to address the claimant's complaints. This piece of evidence was neither disputed in the Witness Statements of **DW1** and **DW2** nor was Mr Maiputa called, as a material witness, to deny the claimant's assertions. In the premises, he submitted that the defendant conceded what the claimant told the Court in this regard.

34. *Whether or not the Claimant negligently contributed to sustaining the injury.*

The defence of contributory negligence. That contributory negligence, as a defence, is satisfied where a claimant fails to take reasonable care for his own safety. He cited Davies v. Swan Motor Co (Swansea) Ltd [1949] 1 All ER 620 at page 632. That if so properly established, it only reduces damages recoverable to a degree that the court thinks just and equitable. On the other hand, on the issue of liability for the accident, the law still attributes it to the Defendant.

35. Section 12 of the Statute Law (Miscellaneous Provisions) Act, provides, *inter alia*:

1) *Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person, a claim in respect of the damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage....."*

36. That in its Defence, at **sub-paragraphs 8.1 to 8.5**, the defendant alleged that the claimant was wholly or partly contributory negligent. It pleaded 5 particulars of negligence. As the law stands, the defendant was duty bound to adduce evidence on each of those points. That the issue on contributory negligence is not about the claimant getting into the tank. He did. The issue is "*Who told him to get inside? Was it by his own choice or by what he was instructed to do by the Defendant or its agents or servants?*" That the respectful answer is that his getting into the tank was by the instructions of the defendant or its agents or servants. In this regard he reiterated what was submitted under **sub-paragraphs 5.3.3 to 5.3.10** and **sub-paragraphs 5.3.16 to 5.3.18** herein above.

37. In conclusion he stated that it cannot be said that the claimant was contributorily negligent when he faithfully followed his master's instructions in the performance of his duties. Consequently, the claimant was not contributorily negligent in any way. He submitted that the defendant has failed to prove the pleaded particulars of contributory negligence against the claimant and that the claimant has proved his case against the defendant, on a balance of probabilities, and that the cause of action and the claims he makes against the defendant must be upheld with costs.

The Defendant's Submissions.

38. The defendant submitted as follows. What is negligence? In *Fyson Storey vs. Eastern Produce Malawi Limited*, Civil Cause No. 406 of 2013, (HC) (unreported) the court applied with approval the definition of negligence in *Blyth vs. Birmingham Waterworks Company* (1856) 11 Ex Cha 781 as follows:

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to

that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done."

39. That the essential elements of actionable negligence are (a) a duty to take care owed to the claimant by the defendant, (b) a breach of that duty, and (c) damage suffered by the claimant resulting from the breach of duty. See Fyson Storey vs. Eastern Produce Malawi Limited (Supra).

That contributory negligence arises where the Plaintiff fails to take ordinary and reasonable care for his own safety. See; Khomba vs. Malawi Railways Ltd [1993] 16(1) MLR 205, 211. See also; Bisiketi vs. Ruo Tea Estates Ltd [1992] 15 MLR 26.

40. That in Davies vs. Swan Motor Co. Ltd [1949] 1 All ER 620,631 Lord Denning as he was then stated that in determining whether the claimant was guilty of contributory negligence the real question is not whether the claimant was neglecting some legal duty but whether he was acting as a responsible man and with reasonable care.

41. That in establishing contributory negligence as a defence the law is that its existence does not depend on any duty by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed by his want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the Plaintiff's claim, the principle involved is that, where a man is part of author of his own injury, he cannot call the other party to compensate him in full. See: YanuYanu Bus Company Limited vs. Mbewe [1984-86] MLR 405.

42. That it is a statutory duty for every employer to take all practicable measures to ensure safety of the employees. See Section 13 of Occupational Safety, Health and Welfare Act which provides 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—*

- (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 connection 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 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;*
 - (e) *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.*
- (3) *Except in such cases as may be prescribed, it shall be the duty of every employer to prepare and as often as may be appropriate, revise a written statement of his general policy with respect to the safety and health at workplace of his employees, and the organization and arrangements for the time being in force for carrying out that policy, and to bring the statement and any revision of it to the notice of all of his employees.*

41. That however, it should be noted that an employee at a work place has a duty to take reasonable care for the safety and health of himself and that of other persons who may be affected by his acts or omissions; and as regards any duty or requirement imposed on an employer or any other person by the Occupational Safety, Health and Welfare Act, to cooperate with the employer or other person so far as is necessary to enable that duty or requirement to be performed or complied with. See Section 18 of the Occupational Safety, Health and Welfare Act

43. That in Wilsons and Clyde Coal Co. vs. English [1937] 3 All ER 628 the court defined the employer's common law duty to his employee(s) as the provision of a competent staff of men, adequate material, and a proper system and effective supervision. System of work was defined in Speed vs. Thomas Swift & Co [1943] K.B. 557, 563-564, per Lord Greene M.R as follows:

"...it includes...or may include according to circumstances, such matters as the physical layout of the job - the setting of the stage, so to speak - the sequence in which the work is to be carried out, the provision in proper cases of warnings and notices, and the issue of special instructions. A system may be adequate for the whole course of the job or it may have to be modified or improved to meet the circumstances which arise; such modifications or improvement appear to me equally to fall under the head of system."

Assessment

44. That it is crystal clear in the Statement of Case that the Claimant was instructed to drain the sludge from the tank. It is also established that draining is done through pipes and not buckets. It is not indicated anywhere in his pleadings that a bucket was used to remove the sludge from the tank. It is a trite principle of law that a claimant must give evidence to that which he pleaded. See Fyson Storey vs. Eastern Produce Malawi Limited, Civil Cause No. 406 of 2013

"If the court were to do what the plaintiff is asking for, it would be guilty of ignoring well settled principles of practice. It would render the whole essence of pleadings obsolete and/or nugatory. Such a practice would also create chaos and uncertainty on the kind of orders that will be made in the cases before our courts. It is desirable that parties should walk out of our courts with what they wanted when they came to court. Likewise, it is desirable that the Defendants must be condemned on matters for which that have forewarned and given an opportunity to defend themselves through pleadings."

45. They argued and submitted that the defendant was not given an opportunity to defend themselves through pleadings against the story in the claimant's testimony that the buckets were used to remove the sludge. It is noted that after confirming that the draining was through the valves, the claimant later struggled to bring in the issue of buckets which is clearly seen that it is an afterthought. It was clearly explained by DW 1 that the buckets that were present in the vehicle were for storing water for the workers to clean themselves afterwards and this testimony was never disputed.

46. That DW 1 further explained that when the sludge is low after draining through the valves, the workers were instructed to use the brushes to push the sludge to the valves. He clearly explained that the sludge that would not be drained may remain

in the tank and they would take it back for them to add hot sludge on top for easy draining on another day. At inspection of the tank one would see that the tank was made in a way that it had stands but the floor is cylindrical for easier draining. This was one way of providing pressure for it to go down. **DW 1** emphasized that his instructions to the claimant and the other workers was to drain the sludge through the valves and not to remove it. This is also in line with the claimant's pleadings where no buckets have been mentioned.

47. That in addition, **DW 2** clearly explained how sludge is produced. He emphasized that no chemical is used in its production and it only comes out when the soya meal is being pressed before refinery. This was contrary to the testimony by the claimant who stated that he was burnt with acid in the sludge. It was never stated how the acid is found in the sludge. That it should be noted that the accident is alleged to have happened in July and the claimant is mentioning in paragraph 21 summer season which usually starts in August or thereabout. There would not be intense heat in on 9th July if we go by the Malawian weather. This point to the fact that the Claimant is exaggerating his story.

48. That in the premises, the defendant submitted that the claimant was not injured as alleged as the same can be seen from the inconsistencies in his testimony. If indeed the Claimant was injured, it is submitted that, the Claimant wholly contributed to the same as he was never allowed to get into the tank and that the sludge is not injurious. It follows that Claimant had a duty to take care of himself and that the Defendant discharged its duty of care under the Occupational Safety, Health and Welfare Act and under common Law. The defendant prayed to this court that the Claimant's claim herein be dismissed with costs.

The Finding

49. The claimant commenced this action seeking damages for personal injury suffered while in the employment of the defendant. The claimant testified what had happened on the material day. Without much labour I find as a fact that the claimant was on duty of the day the injuries were sustained. The evidence before me which has not been discredited is that he was assigned together with his colleagues to go and remove sludge from the tank being waste from the oil the defendant had produced. The evidence before me is clear that after the valves had been opened to drop out the waste some sludge remained and the claimant had been instructed to physical enter

the tank to push the remaining waste into the valves with brushes and later remove the remaining waste using pales and finally clean the inside of the tank.

50. The defendant told the court lies that the pales were designed to be used by the workers to clean themselves after emptying the tank. Why did they need to clean themselves when only valves were to be used to empty the tanks? It is my finding that the water pales were being used to physically empty and clean the inside of the tanks with brushes by actually entering the tank to perform this task. These were the instructions from the defendant. I do not agree with the defendant that the claimant had contributed to his injuries. How else was he going to push the remaining sludge into the valves and later clean the tank if not by entering inside?

51. I'm mindful that in establishing contributory negligence as a defence the law is settled that its existence does not depend on any duty by the claimant/injured party to the party/defendant sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the court that the injured party did not in his own interest take reasonable care of himself and contributed by his want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the claimant's claim, the principle involved is that, where a man is part of an author of his own injury, he cannot call the other party to compensate him in full. I cite with authority the case of YanuYanu Bus Company Limited vs. Mbewe [1984-86] MLR 405.

52. I'm in agreement with the claimant that the workers did not only use the valves to drain the sludge but they also removed it with buckets to throw it out when there was no pressure for it to go into the valves. Section 65 of the Act places an obligation on the part of an employer to give his employee safety instructions in the performance of his duties. It reads, *inter alia*:

"(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;

There is no evidence before me to show that the workers including the claimant were told how best to remove the sludge to avoid injury. The witness who could have explained to the court about this did not attend court. Anile who allegedly gave the instructions to the claimant did not give evidence to dispute PW1's assertion that he (Anile) instructed the claimant to remove the sludge and clean inside the tank.

53. The law is clear about material witnesses not attending court. It is settled law in this Republic that failure to call a material witness gives the Court a presumption that the witness would have given evidence adverse to the person calling him and the case of *Mpungulira Trading Ltd v. Marketing Services Division* [1993] MLR 346 (HC) at page 351 is the authority. The defendant did not assist the court nor did they assist themselves.
54. I do not agree with the defendant that the sludge was at room temperate. I inspected the tank when it was brought to court. This waste was not at room temperature by looking at the entire size of the tank and the entry point on top. It was very obvious that the waste got heated up by the time it was being disposed of at the sewerage in Chigumula. The claimant told the court when he entered the tank it was so hot. I have seen the pictures which were taken of the fresh wounds the claimant suffered. They look like burns caused by fire. The claimant stated that he was burnt with acid in the sludge. Since no test was done on the sludge we will never know what exactly caused those burns. But one fact remains that the claimant was injured in the course of duty. I have seen the report from the police and from the hospital which have narrated the event of the day and the injuries suffered.
55. The third witness who disown his witnesses stated that he was forced to write whatever he wrote discrediting the claimant by counsel for the defendant. After taking oath he decided to tell the truth and disowned his witness statement. I did not give counsel an opportunity to defend herself of the allegations which were made in open court. However if it is true that counsel forced the witness to lie then that is an act of misconduct. It is within my powers to censure counsel. If and I repeat if what the witness said is true I warn counsel not to repeat this again.
56. I'm fortified with the provisions of the law in Section 13 of Occupational Safety, Health and Welfare Act which provides that it is the statutory duty for every employer to take all practicable measures to ensure safety of the employees which provides in general that
- (1) *It shall be the duty of every employer to ensure the safety, health and welfare at work of all his employees.*
57. Based on the available evidence before me and the law of negligence I find on a balance of probabilities that the claimant has made out his case and he must succeed.

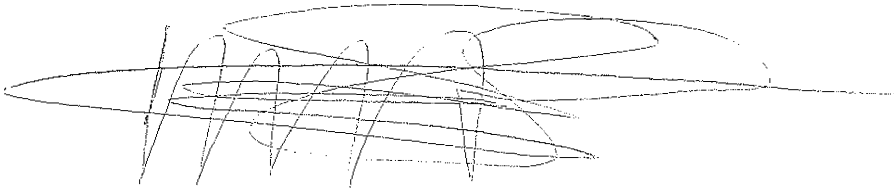
He must take out summons for assessment of damages before the Registrar within 14 days.

Costs

Costs are awarded at the discretion of the court meaning that they are the exclusive preserve of the court but they normally follow the event. I ward the claimant costs of the action.

I so order

Pronounced in open Court at Blantyre in the Republic on 11 August 2022

A handwritten signature in dark ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Dingiswayo Madise

Judge