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REPUBLIC OF MALAWI
MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO. 657 OF 2016

BETWEEN:

PATULANI CHILAKALAKA.....CLAIMANT

-and-

MAKANDI TEA AND COFFEE ESTATE..... DEFENDANT

Coram: His Lordship Justice Jack N'riva
Mr. W. Kazembe of counsel for the claimant
Mr. Chibwe of counsel for the defendant
Mrs. Mtegha Court Clerk and Official Interpreter

JUDGMENT

1. INTRODUCTION

The defendant, Makandi Tea and Coffee Estate, is an estate based in Thyolo District. The claimant was working for the estate as a security guard.

By his writ of summons, the claimant claims for damages for personal injuries sustained at the defendant's workplace at Thyolo in the course of duty. The claimant was badly injured and lost his left eye and sustained also some serious cut wounds on the right eye and the right hand. He alleges negligence on the part of the defendant. The defendant denies being negligent at all or as alleged by the claimant.

Particulars of negligence

The claimant stated the particulars of negligence of the defendant as follows:

- Failure to provide protective equipment to the claimant.
- Failure to provide a safe working environment to the claimant.
- Subjecting the claimant to unsafe work environment.
- Not putting in place proper systems to ensure that the claimant is working in a secure environment.

2. FACTS

The claimant was employed as a guard by the defendant. On or around 15th May, 2015 as he was on night duty, a team of thugs evaded the defendant's workplace and attacked him. After this attack, the claimant was seriously injured. The claimant exhibited his medical report which was issued at Queen Elizabeth Central Hospital.

3. ISSUES FOR DETERMINATION

- Whether or not the defendant is guilty of negligence as alleged.
- Whether or not the defendant is guilty of the breach of statutory duty also as alleged.

4. THE LAW

What has to be proved on a balance of probabilities is that the negligence of the defendant caused the injuries that the claimant suffered by way of not providing the claimant with safety working devices and failing to provide a safe working environment to him. The further assertion is exposing the claimant to a risk of injury by subjecting him to unsafe work environment and failing to put proper systems to ensure that the claimant has a secure environment.

The claimant is claiming both under common law negligence which encompasses breach of duty to take care, and, secondly, under statute known as breach of statutory duty to take care of an employee.

To prove negligence, it must be shown that:

- a. The defendant owed a legal duty of care towards the claimant.
- b. The defendant breached that duty and

- c. claimant suffered damage or loss as a result of the breach. [*Donoghue v Stevenson* [1932] A.C 562.]

Every person must take reasonable care to avoid acts or omissions which he or she can reasonably foresee to be likely injure persons within reasonable contemplation. To prove breach of statutory duty;

Under the Occupational Safety, Health and Welfare Act, No.21 of 1997 an employer owes a duty of care to his employees to provide safe place of work and safe system of work. Section 13(1) of the Act provides:

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

Under section 13(2) of the Act the duties on the employer include:

- (a) Arrangements for ensuring safety and absence of risks of health in connection with the use, handling, storage and transportation of articles and substance.
- (b) The provision of information, instruction, training and supervision in accordance with section 65 to ensure the safety and health at work of his employees.

Section 65(1) of the Act states that:

“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 the prevention and control protection against health hazards at work place”.

According to *Blyth v Birmingham Water Works Company* (1856) 11 Ex.781 explaining the common law position, one breaches a duty of care or is negligent when he omits to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or does something which a prudent and reasonable person would not do.

In *Winter v Cardiff R.D.C* [1950] 1 All ER 819,823 Lord Mac Dermott said that at common law, the employer’s duty is not absolute; it is for the Plaintiff to prove the

breach. This means that if the workman cannot prove negligence, an action based upon breach of the employer's personal duty must fail.

An employer is liable for breach of statutory duty where there is failure to provide safety devices, training and instructions to employees. Failure to supervise the employees on the conduct of their work is also a breach of duty. On a balance of probabilities, the Court must be convinced of failure to comply with the safety standards as provided for in the Occupational, Safety, Health and Welfare Act.

5. ANALYSIS

(A) DID THE CLAIMANT SUFFER THE ALLEGED INJURIES, LOSS AND DAMAGE?

Much as the defendant has denied that the claimant suffered injuries, there is sufficient evidence before this Court that the claimant was injured whilst working for the defendant.

What is in contention, however, is whether the said injuries were sustained as a result of the defendant's breach of its duty of care.

(B) WAS THERE A DUTY OF CARE OWED TO THE CLAIMANT BY THE DEFENDANT?

It is not in dispute that the claimant was employed by the defendant as a security guard. Therefore, there is no doubt that the defendant owed the claimant a duty of care. It is, in the premises, the finding of this Court that there was a duty of care owed to the claimant by the defendant. The duty was to provide the claimant with a safe working environment by, among others, providing the claimant with protective equipment.

(C) WAS THE DEFENDANT IN BREACH OF THAT DUTY?

(i) Failure to provide protective equipment to the claimant.

According to the claimant's own testimony, he had worked for the defendant for about 4 years and that he had been trained to work as a guard. Furthermore, the defendant continued conducting mini-trainings for the guards. The claimant continued to say that the training they did was just '*pelete*' ['parade'] and other

things. He claimed that he was not trained in using equipment because there was no equipment supplied and that on that particular night, he did not have any protective equipment.

This was rebutted by the defendant's witnesses. The first defence witness testified that the defendant provides the workers with equipment like panga knives and baton sticks. He further said that the workers are taught how to use the equipment without injuring their attacker. He insisted that the claimant on that particular night was equipped with a panga knife. The second defence witness told the court that on the day in question, he gave the claimant a panga knife.

I am of the view that it is more probable that the defendant does provide protective equipment to its workers. Whether the claimant had a panga knife or not on that particular night is immaterial at this stage because in his own testimony, the claimant stipulated that he never saw the thugs coming, he just realized that they were surrounding him whilst armed. In his own words, he told the court that he found it difficult to fight them despite his training and he even doubted if he could have succeeded if he had that panga knife as the thugs were many. The claimant also suggested that the defendant should have provided guns or/and shock sticks. The Court is also of the view that these would not have assisted the claimant in any way considering the situation he was in.

(ii) Failure to provide a safe working environment to the claimant.

(iii) Subjecting the claimant to unsafe work environment.

Employers have a duty to provide a safe working environment to the claimant and not to subject employees to unsafe work environment.

On these two points, both parties quoted the case of *Nchizi vs Registered Trustees of the Seventh Day Adventist Association of Malawi* (1990) 13 MLR 303 where the Court 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 work, the plant and the equipment and the method and conduct of work. Briefly, the duty of 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...".

In *Redson Khanyera v Eastern Produce Malawi Limited* Personal Injury Cause 842 of 2014 (unreported). Where the court held that:

"Upon a careful examination of the evidence before it, this Court is not inclined to find on a balance of probabilities that the defendant had in the circumstances of this case breached its duty of care. Firstly, quoting the case of *Withers v Perry Chain Co. Ltd* [1961] 1 WLR 1314 at 1320 where it was said that 'there is no legal duty upon an employer to prevent an adult employee from doing what which he or she is willing to do.' The plaintiff in this case being an adult employee who was willing to work as a guard in a forest, both during the day and night, it would, in the premises, be unreasonable to saddle the case of *Nchizi*. Where an employer has exercised all due care and yet a workman sustained the injury through the inherent risk of employment he cannot recover damages against the employer because an employer is not liable in the absence of negligence. The nature of the job of a security guard has an inherent risk in that one can be attacked even if one is well equipped or armed."

The fact is that the duty of a security guard is inherently dangerous. The claimant knew the risk of the job he was taking. He even said it in his cross-examination that he understood what the nature of his job entailed and that it was expected to meet those kinds of things *i.e.* being injured. Therefore, I do not agree that the defendant did not provide a safe working environment to the claimant thereby subjecting him to unsafe work environment. Furthermore, it is on record that the guards are advised not to expose themselves and have to hide where necessary. There were assertions that some of the thugs were ex-employees of the defendant who definitely knew these protocols at the estate and used that to their own advantage.

(iv) Not putting in place proper systems to ensure that the claimant is working in a secure environment.

It is on record that the defendant has a rapid response team which always acts during emergency. The guards as well are placed in groups of two so that they can watch each other's backs. Both parties do not dispute this. According to the second defence witness, some guards are chosen to patrol various areas on the premises. Further, that there is a fulltime patrol which goes around 8 times per night. Some guards are even equipped with radios so that they can inform each other if there is an

emergency. Therefore, to state that the defendant did not provide proper systems to ensure a good working environment cannot be correct.

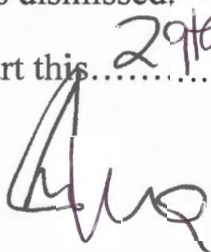
In so far as the duty of an employer towards his servants is to provide a safe system of working in the operation the servants are to carry out, it is the considered view of this Court that the defendant had sufficiently discharged that duty.

It is, in the premises, the finding of this Court that the defendant was not in breach of its duty of care.

6. CONCLUSION

On a balance of probabilities this court is convinced that there was no failure by the employer to comply with the safety standards as provided for in the Occupational Safety, Health and Welfare Act. Further, the defendant owed the claimant a legal duty of care. I do not find that the defendant did not breach this duty. The claimant has failed to prove both statutory breach of duty and common law negligence giving rise to the injuries, as such, this claim is dismissed.

PRONOUNCED in open court this ^{29th}..... day of June, 2018.



J N'RIVA

JUDGE