



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

PERSONAL INJURY CAUSE NO. 250 OF 2020

(Before Honourable Justice Mambulasa)

BETWEEN:

ELIAS WIZALAMU..... CLAIMANT

-AND-

ROYAL PRODUCTS LIMITED..... DEFENDANT

CORAM: HON. JUSTICE MANDALA MAMBULASA

Mr. Mapemphero Mtawa Manda, Advocate for the Claimant

Mr. Andrea Masangu Kapote Manda, Advocate for the Claimant

Mr. Cassius Omar Lyson Chidothe, Advocate for the Defendant

Mr. Obet Chitatu, Court Clerk

JUDGMENT

MAMBULASA, J

Introduction

- [1] The Claimant was at all material times employed by the Defendant as a machine operator at its factory at Chirimba Industrial Area in the city of Blantyre.
- [2] On or about 19th November, 2019 the Claimant was, in the course of his employment with and on instructions issued by the Defendant, removing some plastic material from a machine when his workmate, acting in the course of his employment with the Defendant, abruptly and without warning the Claimant, pressed a button and reactivated a machine whose rotating component caught the Claimant's right hand and pulled it to the machine which severely injured, crushed and amputated the forearm.
- [3] The accident was allegedly caused by the negligence and breach of statutory duty of the Defendant which is vicariously liable for the negligence of the Claimant's workmate who reactivated the said machine in the circumstances described above.
- [4] The particulars of negligence are that:
- 4.1 the Defendant failed to take any or any adequate precautions for the safety of the Claimant while he was engaged in carrying out his duties;

- 4.2 the Defendant exposed the Claimant to a risk of damage or injury of which it knew or ought to have known;
- 4.3 the Defendant failed to provide any or any safe or proper system of work; and
- 4.4 finally, the Defendant failed to provide any or any adequate training and instruction.

[5] The alleged particulars of breach of statutory duty are that:

- 5.1 the Defendant failed to provide and maintain plant and systems of work that were safe and without risks to health as required under the Occupational Health, Safety and Welfare Act; and
- 5.2 the Defendant also failed to provide and maintain a working environment for the Claimant that was safe, without risks to health, and adequate as regards facilities and arrangements for his welfare at work as required under the Occupational Health, Safety and Welfare Act.

[6] The Claimant alleges that by reason of the foregoing, he sustained injuries and has suffered loss and damage with the degree of permanent incapacity assessed at 65%.

[7] The alleged particulars of injuries are:

- 7.1 heamothorax resulting into the insertion of a chest drain;
- 7.2 chest trauma and chest pains;
- 7.3 pneumothorax; and
- 7.4 traumatic amputation of the right arm at the elbow joint.

[8] As a result of the injuries, the Claimant's right arm has been severely and permanently disfigured and he can no longer secure or maintain any gainful employment or occupation and has, therefore, lost his earning capacity.

[9] The Claimant is therefore claiming damages for pain and suffering, loss of amenities of life, loss of earnings capacity and costs of the action.

[10] The Defendant filed a Defence in which it denies that the injuries, loss and or damage were caused by its negligence and or breach of its statutory duty or that of its servant or agent and puts the Claimant to strict proof of each allegation.

[11] In the alternative, the Defendant pleads that the accident was wholly caused by the negligence of the Claimant.

[12] The alleged particulars of negligence are that:

- 12.1 the Claimant failed to exercise the necessary skill, expertise and workmanship whilst working at the Defendant's factory by

particularly failing to notify his workmates that he was on top of the machine and that it should not be turned on;

12.2 the Claimant exposed himself to a factory hazard by failing to wear or put on protective gear that was provided to him by the Defendant for his own safety;

12.3 the Claimant deliberately ignored the Defendant's safety instructions on how to do his work;

12.4 the Claimant failed to exercise due care and caution whilst working within the premises of the said factory;

12.5 he failed to follow the right procedure of safety communicated to him by the Defendant;

12.6 the Claimant conducted himself in such a manner that likely constituted a source of danger to himself or to other surrounding people; and

12.7 finally, the Claimant generally failed to observe the necessary precautionary measures.

[13] The Defendant also states that at the time of his recruitment, the Claimant made representations to the Defendant and held himself out to be an

experienced person for the work or position for which he was being recruited.

[14] Furthermore, the Defendant alleges that the Claimant was fully trained by the Defendant on how to do his job and that all the Defendant's machinery was well serviced and maintained.

Issues for Determination

[15] There are three issues that must be determined by this Court. These are:

15.1 Whether or not the accident, injuries, loss and damage suffered by the Claimant were caused by the negligence of the Defendant's employee?

15.2 Whether or not the accident, injuries, loss and damage were also caused by the negligence and breach of statutory duty of the Defendant? and

15.2 If the two issues above are answered in the affirmative, whether or not the Defendant ought to compensate the Claimant for the injuries, loss and damage that he suffered?

The Law

[16] It is trite learning that in civil matters, it is the claimant who bears the burden of proof. In *Commercial Bank of Malawi –vs- Mhango*¹ the Supreme Court of Appeal for Malawi observed as follows:

Ordinarily, the law is that the burden of proof lies on a party who substantially asserts the affirmative of the issue. The principle was stated in the case of *Robins –vs- National Trust Co.* [1927] A.C. 515 that the burden of proof in any particular case depends on the circumstances in which the claim arises. In general, the rule is: *Ei qui affirmat non qui negat incumbit probatio*, which means the burden of proof lies on him who alleges, and not him who denies. Lord Megham, again, in *Constantine Line –vs- Imperial Smelting Corporation* [1943] A.C. 154, 174 stated that it is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons. The judge said that the rule is adopted principally because it is but just that he who invokes the aid of the law should be the first to prove his case because in the nature of things, a negative is more difficult to establish than an affirmative. However, in a civil action the burden of proof may be varied by the agreement of the parties - see *Bond Air Services Ltd –vs- Hill* [1955] 2 Q.B. 417.

[17] It is also commonplace that the standard of proof in civil matters is on a balance of probabilities. In *Miller –vs- Minister of Pensions*² Denning J said:

That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: “We think it more probable than not,” the burden is discharged but, if the probabilities are equal, it is not.

¹ [2002-2003] MLR 43 (SCA).

² [1947] 2 All E.R. 372.

[18] Negligence is defined as an 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 that a prudent and reasonable man would not do.³

[19] In *Lochgelly Iron and Coal Co. Ltd –vs- McMullan*⁴ Lord Wright had this to say:

In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission; it properly connotes the complex concepts of duty, the breach, and damages thereby suffered by the person to whom the duty is owing.

[20] In order for the claimant to succeed against the defendant in an action alleging negligence, he or she must show or prove that: (a) there was a duty of care owed to him or her on the part of the defendant; (b) that there was a breach of that duty of care by the defendant; and (c) that he or she suffered loss and damage as a result of the breach of that duty of care. The decisions in a chain of authorities on this point include, *Donoghue (or McAlister) -vs- Stevenson*⁵ and *Gross -vs- The Registered Trustees of Banja La Mtsogolo*.⁶

³ *Blyth -vs- Birmingham Waterworks Co.* [1843-60] All E.R. 479-480 per Alderson, B.

⁴ [1934] A.C. 1 at 25.

⁵ [1932] All E.R. 1.

⁶ [1998] MLR 103.

[21] In *Innocent Mulogera –vs- Malawi Cotton Company*⁷ Potani J, as he then was, noted that:

Both at common law and under statute, an employer owes a duty of care to his employee... In this country, the statutory duty of care an employer owes his employee is provided for in the Occupational Health, Safety and Welfare Act [Cap 55:07] of the Laws of Malawi. Section 13(1) of the Act imposes a general duty of care on the employer... Therefore, both at common law and statute, the defendant, as an employer, owed a duty of care to the plaintiff, its employee. It is pertinent to note that statute also places a reciprocal duty on an employee to take reasonable care for his own safety.

[22] In *Nchizi –vs- The Registered Trustees of the Seventh Day Adventist Association of Malawi*⁸ the High Court stated as follows:

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. This duty extends to safety of place of work, the plant and 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. Therefore, where an employer has exercised all due care and yet a workman sustained injury through an inherent risk of employment he cannot recover damages against the employer because an employer is not liable in the absence of negligence.

⁷ Civil Cause No. 1595 of 2010 (High Court of Malawi) (Principal Registry) (Unreported).

⁸ [1990] 13 MLR 303, 308.

[23] The common law has from early times imposed a duty on an employer to take fitting care to see to it that employees do not suffer injury either in consequence of their personal negligence or through their failure to properly superintend and control the undertaking in which they and the employer are mutually engaged.⁹

[24] Since it is the duty of the employer to take reasonable care not to expose his employees to any unnecessary risk, he is under an obligation to provide effective supervision to ensure that reasonable safety precautions are carried out. Where, therefore, there is an obvious risk of injury unless a preventive safety device is used by the employee, the employer's duty extends not only to providing the device but also taking reasonable measures to see that his workmen use it.¹⁰

[25] The duty of an employer towards his servant is to take reasonable care for the servant's safety in all the circumstances of the case. It is also described as the duty of taking 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.¹¹

⁹ *Butler (or Black) –vs- Fife Coal Company Limited* [1912] A.C. 149. See also, *Winter –vs- Cardiff RDC* [1950] 1 All E.R. 819.

¹⁰ *Wilson and Clyde Coal Company Limited –vs- English* [1938] A.C. 57. See also, *Paris –vs- Stepney Borough Council* [1951] A.C. 367.

¹¹ *Paris –vs- Stepney Borough Council* [1951] A.C. 367 at 388. See also, *Smith –vs- Charles Baker & Sons* [1891] A.C. 325.

[26] Section 13 of the Occupational Health, Safety and Welfare Act,¹² 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 include 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 healthy 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.

¹² Cap. 55:07 of the Laws of Malawi.

[27] The law on contributory negligence is governed by section 12 (1) of the Statute Law (Miscellaneous Provisions) Act.¹³ It provides as follows:

Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that 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:

...

[28] In view of section 12 (7) of the Statute Law (Miscellaneous Provisions) Act, fault means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or which would, apart from this section, give rise to the defence of contributory negligence.

[29] To ascertain whether a claimant is guilty of contributory negligence, the court asks itself whether he was acting as a responsible man and with reasonable care.

[30] The foregoing was emphasized by Lord Denning in the case of *Davies –vs- Swan Motor Co., Ltd*¹⁴ when he said:

The real question is not whether the plaintiff was neglecting some legal duty, but whether he was acting as a responsible man and with reasonable care.

¹³ Cap. 5:01 of the Laws of Malawi.

¹⁴ [1949] 1 All E.R. 620 at 631.

[31] It is also trite law that where a witness is available and is not called to testify, it may be presumed that his evidence would be contrary to the case of the party who fails to call him.

[32] In *Maonga and others –vs- Blantyre Print and Publishing Co Ltd*¹⁵ the defendant failed to call the company secretary who wrote the letter of complaint to the police. It also failed to call the police officers who effected the claimant's arrest. All these witnesses were available.

[33] The court also quoted Banda J, as he then was, in the case of *Leyland Motors Corporation Malawi Ltd –vs- Mohamed*¹⁶as follows:

Failure to call a material witness to testify on a material point may damage the case of the party who failed to do so as that failure may be construed that the story is fictitious.

[34] The *dicta* in the *Maonga* and *Leyland* cases referred to above were quoted with approval by the Supreme Court of Appeal for Malawi in *BP Malawi Ltd –vs- NBS Bank Limited*¹⁷as follows:

¹⁵ 14 MLR 240.

¹⁶ Civil Cause No. 240 of 1983 (High Court of Malawi) (Principal Registry) (Unreported).

¹⁷ [2009] MLR 39 (SCA) at 46.

We think that the court was indeed entitled to attach significance to the absence of the company secretary, who was available to the appellant, to give evidence at the trial.

[35] Section 30 of the Courts Act¹⁸ provides that costs are in the discretion of the High Court. It provides as follows:

Subject to this Act, the costs of, and incidental to, all proceedings in the High Court, including the administration of estates and trusts, shall be in the discretion of the High Court; and the discretion shall be exercised in accordance with the practice and procedure provided in the rules of procedure made by the Chief Justice under section 67 of this Act.

[36] Order 31, rule 3 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 is couched in the following terms:

The Court has discretion as to-

- (a) whether costs are payable by one party to another;
- (b) the amount of these costs; and
- (c) when they are to be paid.

[37] When the Court decides to make an order on costs, then, the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party. This is clear from Order 31, rule 3 (2) of the Courts (High Court) (Civil Procedure) Rules, 2017.

¹⁸ Cap. 3:02 of the Laws of Malawi.

[38] There are exceptions to the general rule, where a successful party shall not always be entitled to have an order for costs against the unsuccessful party. For instance, where a successful party recovers no more than nominal damages, it may be ordered to pay the unsuccessful party's costs.¹⁹ The successful party may also not be entitled to costs where the issue on which a party succeeded is raised for the first time by amendment at a very late stage.²⁰

The Claimant's Case

[39] The Claimant told the Court that he was at all material times employed by the Defendant as a machine operator at its factory located at Chirimba Industrial Area in the city of Blantyre.

[40] The Defendant company is in the business of manufacturing plastic paper.

[41] The Claimant was assigned to an extruder machine but when the said machine was not running, the Defendant would reassign him to the recycling department.

[42] On 19th November, 2019 he was in the course of his employment with the Defendant carrying out tasks assigned to him by the Defendant in the said recycling department.

¹⁹ *Texaco Ltd –vs- Arco Technology Inc* (1989) *The Times*, 13 October 1989.

²⁰ *Beoco Ltd –vs- Alfa Laval Co Ltd & Anor* [1995] Q.B. 137.

- [43] He was stationed at a machine that recycles plastics. He would put some plastics in the machine. The plastics would in some instances get stuck on a rotating component of the machine and block the machine. In such circumstances, it was the Defendant's instruction that the machine had to be stopped by pressing a button. The rotating component would stop upon the pressing of the button.
- [44] The recycling machine frequently got blocked. The person manning the machine would then proceed to remove the stuck plastics after the machine has been switched off. After removing the plastics, the button would be pressed again and the component would resume rotating.
- [45] On the material day, he was operating the machine alongside one, Mr. Jonas Sakwata, a fellow employee of and who was also in the course of his employment with the Defendant, when some plastics got stuck on the rotating component of the machine.
- [46] Mr. Jonas Sakwata stopped the machine by pressing the button and the Claimant proceeded to remove the plastics that were stuck in the machine.
- [47] However, as he was still removing the plastics, Mr. Jonas Sakwata abruptly and without warning him, pressed the button again and the machine suddenly resumed rotation. In the process, his right arm was caught by the rotating component which pulled it towards the machine and he was severely injured as a result.

[48] Resultantly, the Claimant sustained a traumatic amputation of the right arm at the elbow joint, chest trauma, chest pains, haemothorax and pneumothorax.

[49] Mr. Jonas Sakwata stopped the machine again. The motor on the machine had to be unscrewed in order for the Claimant to free his hand. He said he was in excruciating pain as they unscrewed the motor for the hand to be freed or removed.

[50] The Claimant was subsequently taken to Queen Elizabeth Central Hospital (QECH) where he received medical treatment. He told the Court that he underwent a medical procedure known as “revision amputation”. He also received two pints of blood and a chest drain was inserted into his chest. He was admitted from 19th November, 2019 to 24th November 2019. Copies of his medical reports were given in evidence as proof of the injuries he sustained, the treatment he received, the procedures he underwent and the admission. They were marked, “EW 1” and “EW 2”.

[51] The Claimant explained that he now cannot use his right arm at all because of the injuries and the amputation. He said that he still feels a lot of pain on the affected arm/stump and he has to take painkillers every day to ease the pain. He cannot carry out heavy manual tasks nor lift heavy objects. He told the Court that he never had any of these problems prior to the injuries.

[52] The witness told the Court that he also has difficulties whenever he tries to exercise his conjugal rights. His right arm has also been very severely and

permanently disfigured. Again, he never had these problems before the accident.

[53] The permanent loss of the right arm, which was the dominant one, means that he can no longer secure any gainful employment or occupation befitting his limited academic achievements and as such, he has therefore, lost the capacity to earn.

[54] The Claimant can no longer engage in farming/gardening because he is no longer able to hold a hoe. As such, he is no longer able to grow his own crops for food for himself and his family and/or for sale for the rest of his life. Similarly, he never had these problems before he sustained the injuries.

[55] He now can no longer dress up on his own. He has to rely on others to help him do so. The Claimant told the Court that he never had this problem before he lost the use of the right arm due to the injuries he suffered in the accident.

[56] The Claimant now can no longer wash clothes or bath on his own. He cannot split firewood or perform any daily routine chores requiring the use of two hands. He never had these problems before sustaining the injuries.

[57] The accident and injuries would not have happened if one, Mr. Jonas Sakwata had forewarned him that he was about to press on the button of the machine.

[58] The accident would also not have happened if one, Mr. Jonas Sakwata had waited for him to finish removing the plastics from the machine before pressing the button to reactivate it.

[59] The accident and injuries would also not have happened if the machine the Defendant had assigned to him did not have the blockage and if the Defendant had maintained the machinery in such a state of repair and maintenance as to prevent the blockages.

[60] The Claimant would also not have been injured if the Defendant had so appropriately and adequately instructed one, Mr. Jonas Sakwata to take all necessary precautions, including ascertaining if it was safe to do so, before reactivating a machine from which a fellow employee was removing some plastic material and if they had ensured that he complied with such instruction and training.

[61] He therefore prayed that the Honourable court awards him damages for disfigurement, extreme pain, suffering, loss of amenities of life and loss of earning capacity arising from the very severe injuries which he suffered.

[62] The witness showed the Court the amputated arm. He also showed it the scar on his left side of the chest where a pipe had been inserted to drain blood therefrom and how the chest too, had become somewhat disfigured.

Cross Examination

- [63] Asked how far one, Mr. Jonas Sakwata was from where the Claimant was, he told the Court that he was at a distance of between 8 to 10 metres away. The Claimant said that he was on the board of the machine.
- [64] Quizzed again whether he was able to communicate, possibly with one, Mr. Jonas Sakwata, the Claimant told the Court that he was not able to, at that particular time.
- [65] Asked again how he knew that Mr. Jonas Sakwata was supposed to switch off the machine, he told the Court that he shouted as well as banging his arm on some metal.
- [66] The witness confirmed to the Court that he knew pretty well that it was extremely dangerous to put his arm in a machine that was working.
- [67] The Claimant informed the Court that there are people who repair and maintain the machine at the office and that he could only repair it himself if the machine had minor problems.
- [68] The witness said that at the time of the accident, the machine did not have a serious problem.
- [69] The Claimant told the Court that Mr. Jonas Sakwata was supposed to wait to be informed that he was done with the removal of the plastic material before switching on the machine again.

Re-examination

[70] The witness told the Court that he was well aware that it was very dangerous to insert a hand into the machine when it was still running. At the time he inserted his hand therein to remove the plastic material, the machine was not running. It had been switched off by one, Mr. James Sakwata.

[71] The Claimant informed the Court that he had authority to repair or remove the plastic material in the machine.

The Defendant's Case

[72] The Defendant called one witness, namely, Mr. Saidi Laston, who told the Court that he hailed from Jambo Village, Traditional Authority Mlumbe in Zomba District.

[73] He told the Court that in the year 2014, he was employed by the Defendant as an assistant machine operator. His work, among others, involved assisting machine operators in their work and cleaning the factory and machines.

[74] On or around 19th November, 2019 he was working in the factory together with two machine operators, namely, Elias Wizalamu and Jonas Sakwata. These two were operating a machine that manufactures plastic items. The two were putting on work suits, gumboots and gloves.

- [75] The witness told the Court that while he was working, he heard a scream from the Claimant and when he checked, he found that his hand had been trapped in the machine.
- [76] He said that Mr. Jonas Sakwata was at the switchboard at the time and he told him to switch off the machine. He explained that the switchboard is from where the machine is switched on or off.
- [77] The witness told the Court that Jonas Sakwata quickly switched off the machine and thereafter, they assisted the Claimant in getting his hand off from the machine.
- [78] When the Claimant's hand was off from the machine, they wrapped it with a work suit with a view to stop the blood that was still oozing. Immediately thereafter, he called his boss to inform him about the accident.
- [79] In no time, his boss came and, on his instructions, the Claimant was taken to QECH for medical attention.
- [80] The witness told the Court that the machine had no defects or problems at the material time of the accident. The Defendant always maintained the machines and ensured that they were in good working condition and safe for use.

[81] He went on to say that every time an employee is employed at their workplace, he is trained on his work. In the context of machine operators, they are trained on how to operate the machines. Every employee is also informed of the hazards associated with his work and how to guard against the same.

[82] To his knowledge, the witness told the Court, machine operators are informed and are always aware that they are not supposed to remove things in the machine with their hands or insert their hands in the machine whilst it is in operation.

[83] The Claimant breached this safety requirement by inserting his hand into the machine whilst it was in operation and with full knowledge that it was dangerous to do so.

[84] The witness told the Court that there was no other protective clothing that could have been provided to the Claimant to prevent the Claimant from sustaining the injuries that he did in the accident.

Cross Examination

[85] When asked to say when the accident occurred, the witness told the Court that he could not remember the date but confirmed nevertheless that he was in a different place within the factory at the time the accident occurred. He was burning safes there.

[86] The witness knew an accident had occurred after he heard a scream from the Claimant. He told the Court that he did not witness the events leading to the accident.

[87] He confirmed that the machine has buttons that one presses for it to stop or start running. He also told the Court that those buttons are at a switchboard.

[88] The witness informed the Court that the machine could not run on its own without someone switching it on. He said he found Mr. Jonas Sakwata at the switchboard when the accident occurred.

[89] He said he immediately rushed towards the machine after he heard a scream from the Claimant.

[90] The witness told the Court that it was correct that the Claimant put his hand in the machine while it was not running.

Re-Examination

[91] There was no re-examination of the witness by the Defendant.

Analysis and Application of the Law to the Facts

[92] The first issue to be determined by this Court is whether or not the accident, injuries, loss and damage suffered by the Claimant herein were caused by the negligence of the Defendant's employee, one, Mr. Jonas Sakwata?

[93] The Claimant told the Court that he was at all material times employed by the Defendant as a machine operator at its factory located at Chirimba Industrial Area in the city of Blantyre.

[94] On the fateful day, he was operating a recycling machine alongside his colleague, Mr. Jonas Sakwata, a fellow employee of the Defendant when some plastic material stuck in the machine.

[95] The said Mr. Jonas Sakwata stopped the machine to enable the Claimant remove the plastic material that had stuck in the machine.

[96] The Claimant then inserted his hand into the machine to remove the plastic material that had stuck in the machine. The Claimant told this Court that he had authority from the Defendant to repair or remove such plastic material from the machine.

[97] However, as not to be expected, and without warning the Claimant, Mr. Jonas Sakwata switched on the machine again while the Claimant was still removing the plastic material therefrom and as a result, the Claimant was severely injured.

[98] The Defendant disputed the Claimant's version of the story. Through its witness, Mr. Saidi Laston, it alleged that the Claimant inserted his hand into the machine while it was still in operation. As such, so the Defendant stated, the Claimant was wholly responsible for causing the accident and injury to himself. It denied liability and prayed that the action be dismissed with costs.

[99] In the view of this Court, the Claimant's version of the events is more probable than not for a number of reasons.

[100] First, this Court does not believe that a responsible person would deliberately insert his hand into a dangerous machine while it was still in operation/motion, unless he was high on something or on a suicide mission. The Defendant pleaded in its Defence that at the time of his recruitment, the Claimant made representations to the Defendant and held himself out to be an experienced person for the work or position that he was recruited for. Surely, an experienced and normal person cannot do what the Defendant attributed to the Claimant. The Defendant's version was clearly an afterthought that it came up with in a bid to exonerate itself from liability.

[101] This Court finds it as a fact that the Claimant only inserted his hand into the machine when it had been switched off by one, Mr. Jonas Sakwata. This was actually admitted by the Defendant twice. First, in paragraph 4 of its Defence, it pleaded as follows: In the alternative, the Defendant pleads that

the accident was wholly caused by the negligence of the Claimant himself as particularized below. Sub-paragraph 4 (a) on particulars of negligence is quite revealing. It states thus - failing to exercise the necessary skill, expertise and workmanship whilst working at the Defendant's factory by

particularly failing to **notify his workmate that he was on top of the machine and that it should not be turned on.** In any event, why would anybody in their right frame of mind turn on a machine without first ascertaining whether it was safe to do so? Mr. Jonas Sakwata had a duty to ensure that it was safe to switch on the machine. He should have checked with the Claimant. If the Claimant was incommunicado, as stated by the Claimant in cross examination, he was under moral and legal obligation to physically check out and satisfy himself that it was safe to switch on the machine. After all, him and the Claimant were only between 8 to 10 metres apart. That he did not do. He did not act as a reasonable man. Second, Mr. Saidi Laston told the Court in cross examination that it was correct that the Claimant had put his hand into the machine while it was not running, effectively, undoing his earlier testimony that he had done so, while the machine was still running.

[102] Second, Mr. Saidi Laston told this Court that Mr. Jonas Sakwata was indeed at the switchboard at the time the accident herein occurred. It will be recalled that the switchboard was the place where the buttons for switching on and off the machine were. It was Mr. Jonas Sakwata who switched the machine off for the Claimant to remove the plastic material. He is also the one who switched it on again, without forewarning the Claimant. He is also

the one who switched it off again after the Claimant had screamed and banged his hand on some metal or material. According to Mr. Saidi Laston, he told the Court that he found Mr. Jonas Sakwata at the switchboard immediately after the accident had occurred.²¹

[103] Third, the Defendant failed to call a material witness. The Claimant and the Defendant's witness, Mr. Saidi Laston informed the Court that the Claimant was working with Mr. Jonas Sakwata. The Claimant explained that it was Mr. Jonas Sakwata who switched on the machine as he was removing some plastic material from the machine. Mr. Saidi Laston told the Court that Mr. Jonas Sakwata was indeed at the switchboard at the time of the accident.

[104] It is apparent that Mr. Jonas Sakwata was a very material witness in this case. He was at the centre of negligence alleged by the Claimant. Sadly, Mr. Jonas Sakwata was never called as a witness for the Defendant. No reason was given to the Court as to why he was not called as a witness so that the Court could at least balance up the stories. It must therefore be presumed from the Defendant's inexplicable failure to call one, Mr. Jonas Sakwata that his evidence would have been contrary and fatal to the Defendant's case as the law states.²²

[105] Fourth, in cross examination, Mr. Saidi Laston told the Court that he did not witness the events leading up to the accident herein. He was at a different

²¹ See Paragraph 88 above.

²² n15, n16 and n17 above.

place within the factory burning safes.²³ He came to the scene after the accident had already occurred after he heard the Claimant scream. Accordingly, his evidence, especially, where it purports to explain how the accident occurred is clearly hearsay and is therefore inadmissible in this Court.²⁴

[106] In view of the foregoing, this Court therefore finds that the accident, injuries, loss and damage suffered by the Claimant were caused by the negligence of the Defendant's employee, Mr. Jonas Sakwata. Mr. Jonas Sakwata switched on the recycling machine while the Claimant was still removing plastic material from it. He did so without first ascertaining with the Claimant whether he had finished removing the plastic material. He also took no steps himself to check on the Claimant whether it was safe to switch on the machine. Mr. Jonas Sakwata owed the Claimant a duty of care. He breached that duty of care when he switched on the machine without warning the Claimant or taking steps to check on the Claimant whether it was safe to do so. The breach of that duty of care resulted in the loss and damage suffered by the Claimant, which damage has already been stated by the Claimant and will be highlighted towards the end of this judgment soon. This Court therefore has no qualms to hold that the Defendant is vicariously liable for the tort committed by Mr. Jonas Sakwata, who so acted in the course of his employment with the Defendant.²⁵

²³ See Paragraph 86 above.

²⁴ *Nanchinga –vs- Reunion Insurance Company Ltd* [2018] MLR 427 (SCA).

²⁵ It is settled law that a master is saddled with responsibility to a third party in the event that his or her servant commits a tort in the course of his employment. The servant himself or herself is

[107] The next issue for consideration is whether or not the accident, injuries, loss and damage suffered by the Claimant were also caused by the negligence and breach of statutory duty by the Defendant?

[108] There is nothing in the evidence that is before this Court that shows that the Claimant did not act as a responsible person and with reasonable care as to impute that he too was negligent or contributed to the occurrence of the accident herein. This Court has already found that the Claimant did not insert his hand into the machine while it was still in operation/motion. The Claimant is therefore not guilty of any contributory negligence as was alleged by the Defendant in its Defence and evidence.

[109] As was observed by the High Court in the case of *Nchizi (supra)*, it was the duty of the Defendant as an employer, or acting through its servants or agents, to take reasonable care for the safety of its workmen and other employees in the course of their employment. It is also trite that that duty extends to safety of place of work, the plant and equipment and the method and conduct of work.

also liable, and he or she, and their master are joint tortfeasors. In practice though, it is the master who is sued, since he is better able to pay the damages. The authority on this point, among many others, is *Clerk & Lindsell on Torts* 16th Edition (1989), London.

For vicarious liability to arise, three things must be established: a master-servant relationship; that the servant committed a tort; and that he or she did so in the course of his or her employment. The authority on this point, among many others, are *Stavely Iron & Chemical Co. Limited –vs- Jones* [1956] A.C. 627 and *Keppel Bus Co. Limited –vs- Sa'ad Bin Ahmad* [1974] 1. W.L.R. 1082.

[110] In this case, the Claimant told the Court that the recycling machine frequently blocked. The person manning the machine would have the machine switched off, remove the plastic material, and run it again.

[111] The Claimant stated that the accident and injuries would not have happened if the machine assigned to him did not have the blockage and if the Defendant had maintained the machinery in such a state of repair and maintenance as to prevent the blockages.

[112] The Defendant, through its witness, Mr. Saidi Laston, told the Court that the machinery was well serviced and maintained and that it had no defects or problems at the material time. It ensured that the machines were in good working condition and safe for use.

[113] It will be recalled that Mr. Saidi Laston told the Court that he was an assistant operator. His work involved assisting the machine operators in their work and cleaning the factory and machines.²⁶ No-where in his testimony did the witness tell the Court that his work involved maintaining the machines and ensuring that they were in good working condition and safe for use. Actually, in cross examination, the Claimant told the Court that there were other people at the office who repair or maintain the machines at the office. He did not mention Mr. Saidi Laston as one of the persons who maintained or serviced the machines. In other words, he was not a technical person who was well versed with issues of maintenance and service of the machines. Other than making a bare assertion in his testimony that the

²⁶ See Paragraph 73 above.

Defendant always maintained the machine and ensured that they were in good working condition and safe for use, his testimony was devoid of the content and scope of the maintenance and service that are carried out. It would have been ideal for the Court to hear from someone who does the actual maintenance and service of the machines for the Defendant, rather than, an assistant operator. For instance, the Court would have been interested to hear more about the frequency of the maintenance and service, what parts are replaced if any, how old the specific machine was, the last time that it was maintained and such other details.

[114] In the end, this Court is not satisfied on a balance of probabilities that the machine had no defects or problems at the material time or that it was always maintained and was in good working condition and safe for use. At a minimum, the Defendant's witness should have at least given in evidence, any such maintenance records, documentary or otherwise, to substantiate its claim. The failure to tender such records and give adequate information as described in the previous paragraph leads to one conclusion. The machines were not being maintained or serviced as alleged. Indeed, this amplifies the Claimant's assertion that the machine would frequently block because of not being maintained or serviced.

[115] Furthermore, the Defendant was at all material times under a legal obligation to ensure that the Claimant's workmate, Mr. Jonas Sakwata, was under such training and instruction as would ensure that he did not reactivate the machine in circumstances which would be a danger to the safety and wellbeing of the Claimant.

[116] Mr. Jonas Sakwata's reactivation of the machine whilst the Claimant was still removing the plastic material shows that the Defendant failed to ensure that he was under proper instruction and training and compliance. This sadly, resulted into the Claimant being severely injured.

[117] The totality of the evidence also shows that the Defendant failed to take any adequate precautions for the safety of the Claimant while he was engaged in carrying out his duties. The Defendant failed to provide a safe or proper system of work.

[118] Consequently, this Court finds and holds that the Defendant breached its statutory duty under the Occupational Health, Safety and Welfare Act. The Defendant failed to provide and maintain a working environment for the Claimant that was safe, without risks to health and adequate in the circumstances. It also failed to provide information, instruction, training and supervision in accordance with the law to ensure the safety and health at work of the Claimant.

[119] The last issue is whether the Claimant suffered loss and damage for which he has to be compensated by the Defendant.

[120] It is not in dispute that the Claimant suffered haemothorax which resulted into the insertion of a chest drain, chest trauma, chest pains, pneumothorax and a traumatic amputation of the right arm at the elbow joint.

[121] The Claimant was treated at QECH where he was admitted from 19th November, 2019 to 24th November, 2019. He received two pints of blood. He underwent a procedure known as revision amputation. He gave in evidence his medical reports that detail the nature of his injury as well as the treatment that he received. The Defendant did not challenge the medical reports. In fact, it could not as it arranged for his medical treatment there.

[122] Thus, this Court finds and holds that the Claimant suffered loss and damage for which he ought to be compensated by the Defendant.

Finding and Determination

[123] This action therefore succeeds in its entirety. The accident, injuries and loss and damage that occurred and suffered by the Claimant in this matter were as a result of negligence and breach of statutory duty on the part of both the Defendant and its employee. This Court awards the Claimant damages for pain and suffering, loss of amenities of life and loss of earning capacity.

[124] This Court also awards the Claimant costs of this action.

[125] Both damages and costs payable by the Defendant to the Claimant shall be assessed by the Assistant Registrar of the High Court of Malawi and Supreme Court of Appeal for Malawi.

[126] Any party that is dissatisfied with this judgment has the right to appeal to the Supreme Court of Appeal for Malawi after the assessment of damages that are payable in the matter has been had.²⁷

[127] Made in open court this 26th day of April, 2023 at Blantyre, Malawi.



M. D. MAMBULASA
JUDGE

²⁷ *JTI Leaf (Malawi) Limited -vs- Kad Kapachika*, MSCA Civil Appeal No. 52 of 2016 (Sitting at Lilongwe) (Unreported); *Aon Malawi Limited -vs- Garry Tamani Makolo*, MSCA Civil Appeal No. 16 of 2016 (Unreported) and *Toyota Malawi Limited -vs- Jacques Mariette*, MSCA Civil Appeal No. 62 of 2016 (Unreported).