HENRY MWAMBA
v
METAL FABRICATORS OF
ZAMBIA LIMITED

HIGH COURT
CHISANGA, J.
11th OCTOBER, 2011.
2005/HN/279

[1] Tort - Negligence - Whether defendant breached common law duty of providing a safe system of work.

This was an action for aggravated damages for personal injuries sustained by the plaintiff from electrocution while on duty in the ZAMEFA substation. The injuries are alleged to have been occasioned by the negligence of the defendant in failing to provide safe working premises, competent fellow employees, and a safe system of work. The plaintiff claimed damages for pain and suffering, and interest on the sums found due.

Held:

1. The defendant breached its common law duty by not ensuring that the system of work was safe.

2. It was incumbent on the defendant, given that the plaintiff was unqualified to ensure that the layout of the work was done in such a way that danger was eliminated.

3. It is a rule of law that an employer is liable for damage done by the fault or negligence of his servants acting in the course of their employment.

4. The defence of volenti, non fit injuria was not available to the defendant because it was not pleaded.

5. Considering that the plaintiff was working under supervision, and did not undertake the work on his own, but pursuant to qualified electricians instructions, his blame worthiness for not wearing suitable clothing could not exceed 5%. This is a just and equitable apportionment of blame worthiness in line with section 10(1) of the Law Reform (Miscellaneous Provisions) Act.

6. On the whole, the plaintiff proved on a balance of probability that he sustained the electrical burns on his hands and face, as a result of the defendant's failure to provide a safe system of work, and in making him work in that dangerous place without adequate protective clothing. And is 95% to blame for the injuries sustained by the plaintiff.

7. Order 18 of the Rules of the Supreme Court stipulates that a claim for exemplary damages must be specifically pleaded together with the facts on which the party pleading relies.

8. The evidence was that the defendant took some measures of protection by the clumsy insulation of the de-energised panel from the live one. Thus the facts of this case do not warrant the award of exemplary damages.

9. The plaintiff is entitled to general damages for the burns he suffered as a result of the defendant's negligence.

10. There is need for a trial Court to compute reasonable general damages and not simply convert the value of the English pound into the kwacha exchange rate value.

Cases referred to:

1. Paine v Colne Valley Electricity Supply Company Limited and Another [1938] 3 ALL E.R. 803.
2. Rookes vs Barnard [1964] A.C. 1129.
3. Hawkins v Ian Ross (Castings) Limited [1970] ALL E.R. 180.
4. Cassel and Company Limited v Broome and Another [1972] A.C. 1027
5. Kalunga v Konkola Copper Mines (2004) Z.R. 40.
6. Attorney General v Moyo (2007) Z.R. 267.

Legislation referred to:

1. Law Reform (Miscellaneous Provisions) Act cap 74 s.10(1).

Works referred to:

1. R.A. Percy, Charlesworth and Percy on Negligence, Fifth Edition (London, Sweet and Maxwell, 1971).
2. Kemp and Kemp The Quantum of Damages in Personal Injury and Fatal Accident Claims, Volume release 69, (London, Sweet and Maxwell, 1998).

J. Kabuka of Messrs J. Kabuka and Company for the plaintiff.
K. Msoni of Messrs J.B. Sakala and Company for the defendant.

CHISANGA, J.: By his statement for claim, the plaintiff averred that on 31st January, 2005, whilst on duty in the defendant's substation and carrying out some tasks assigned to him by other employees of the defendant, the plaintiff was electrocuted by reason of the said defendant's negligence in failing to provide safe working premises, competent fellow employees and a safe system of work.
The particulars of negligence alleged are that the defendant failed to provide a safe environment in PDIC by:
(i) allowing the plaintiff to work on or next to live electric panels without any or adequate safety precautions, protective clothing and any other prior warning of the great danger involved and risk to his life;.

(ii) installing an insulation barrier instead of a complete OTK stoppage to make the final installation of the emergency generator to the main panel;
(iii) failure to plan the work correctly thereby violating the most elementary rules of safety;
(iv) using a chassis punch in circumstances which required the use of a cutting torch; and
(v) assigning the plaintiff (a non-specialized casual worker without any knowledge or experience in electrical work) the task of tightening the chassis punch to allow a cable be introduced into an electric panel.

This caused the spanner to go under the insulating barrier, and touch a bar in the adjacent section which was not de-energized. As a consequence thereof, a spark flared into flames which engulfed the plaintiff, thereby electrocuting him. By reason of the negligence alleged, it is averred, the plaintiff suffered electric shock, immediate loss of consciousness and trauma, deep burns in both hands, lower parts of the arm burns on the face and body, permanent hypo pigmentation on the affected hands and continued pain in affected parts on the hands to date.The plaintiff has, based on the foregoing, claimed aggravated damages for personal injuries, damages for pain and suffering, as well as interest on the damages.

The defendant on its part, denied the particulars of negligence and averred that the defendant provided the plaintiff with protective clothing, and that adequate safety precautions were taken as a insulation panel was in place at the time of the accident. Further, the defendant provided a safety induction seminar to its employees relating to the use of protective equipment, and the dangers of working in the defendant's plant were well explained to the plaintiff. The defendant further averred that the nature of the work that was being conducted at the defendant's substation did not call for a complete OTK stoppage as doing so meant shutting down the whole plant. The installed insulation barrier was adequate and effective and it was not feasible and necessary to isolate 100%. The defendant averred that the plaintiff was not instructed to cut holes using a cutting torch and there were no instructions to use a chassis punch. The instructions to cut holes using a cutting torch, were given to a qualified welder and electrician.

The defendant alleged that the plaintiff did the act complained of in paragraph 3 (vi) on his own and in any event if the plaintiff had used protective clothing given to him by the defendant the damage being complained of could not have arisen.

At the hearing the plaintiff testified that in January, 2005, he was employed by the defendant as a casual worker. He used to slash and dig furrows. He worked for 8 months on casual basis. On 31st January, 2005, he reported for work at 07:00 hours, and worked in the substation known as OTK, an electrical substation within the ZAMEFA premises. He was with 3 electricians; Tresphord Mulenga, Chileshe Mulenga, and Phiri. The plaintiff was instructed to hold a shifting spanner which had no insulation tape.

He was directed to hold the bolt using the shifting spanner. The bolt touched a live cable, and he was electrocuted and burnt and fell into a furrow where there were cables. He sustained burns on both

hands and his face and was taken to the hospital where he was admitted for three weeks. Photographs were taken of the injuries, how he used to clean himself, and how he would hold the cotton wool with his elbows. He was hospitalized for three weeks, and did not go back to work upon being discharged. He asked the Court for compensation. He has not been employed since the accident, and informed the Court that when it is hot, he suffers pain in his hands, and sometimes feels as though his hands have stiffened. He asked the Court to award him damages.

Under cross-examination, the plaintiff stated that he had gone up to Grade 7 in his education, and that he was able to write his name and able to sign. He informed the Court that they were told how to safeguard themselves at work, and that if it was not safe, they had to safeguard themselves at work, and that if it was not safe, they had to safeguard themselves and had to put on helmets and gloves and glasses. They were told to wear gloves at all times. The gloves made of plastic would go up to the elbow while the cotton ones would cover the hand and wrist. On the fateful day, the plaintiff wore cotton gloves. The gloves were given after a month, and sometimes after a longer interval and they were informed that these gloves were for permanent workers. On the material date, he had cotton gloves and used them. The PVC gloves were damaged and when the plaintiff took them to the safety officer. Mr. Milambo, he was given the cotton ones. The cotton gloves he had were torn in between the fingers and after the accident, his workmate removed the gloves. On the fateful day, he was merely a helper. He had not medical report as to the incapacity he had as a result of the accident.

He acknowledged signing for the gloves as highlighted on the pages he was shown. He confirmed that he was given leather gloves and was told of the risk of working without wearing gloves and that they could be injured or die. He confirmed that they were taught to protect themselves against whatever they were working with, including shock and fire. He started working in 2004, and they were taken through a lot of seminars and inductions to avoid to avoid hazards.

He confirmed attending seminars and that he did attend a seminar on avoiding electrical hazards. He was aware of electrical tools and equipment used.

Under re-examination, he said he was merely a helper and a session of the training was for 5 to 10 minutes and after that they would be sent to work. They did not have any other training. They used to learn many things but the plaintiff was not able to grasp because persons teaching would be at a distance. He could not recall when he was last given gloves for January. He was not issued with any gloves in January.

On the material date he did not work alone but was following orders and what happened to him was as a result of following directions. He referred to a document at page 15 which showed that he attended Luanshya Copper Mine hospital, and was treated for severe burns. This marked the close of the plaintiff's case and the defence opned its case by calling Oncemore Ngonomo, the Production Manager in the defendant company.

He informed the Court that the was responsible for all engineering

work, maintenance as well as installations, and projects for ZAMEFA. His work entailed ensuring that all works done by ZAMEFA complied with all works standards. The company had rules and regulations which had to be complied with, whether maintaining a machine, producing a machine, or installing a cable. He testified that regardless of career path, all employees underwent a comprehensive safety induction programme, before they could carry out any assignment. The induction was done by training. Every assignment or every work had some inherent risks, so employees were trained to identify those risks and mitigate them. He testified that every assignment required a particular personal protective equipment. The induction my take two days if done on non-stop basis, and if done piece meal, it could take a week or more but no one could be assigned a job without going through safely training.

DW1 informed the Court that he knew the plaintiff very well, and that the plaintiff had a desire to pursue a course in electrical engineering. The medium of communication with Mr. Mwamba was in English. On 31st January, 2008, DW1 received a report that there had been an accident in the OTK plant, and that the accident involved the plaintiff. This occurred in a project that they had been working on in that plant to lay cables so that they could have emergency power supply to two casting machines.

DW1's findings were that the spark that resulted from the spanner that Mr. Mwamba was using dropped on the live electrical bus bars (rectangular piece of copper) carrying electricity as opposed to the normal cable. The spanner which Mr. Mwamba was using slipped from his hands, and feel on the bus bars. That was like taking a live wire, and connecting it to a piece of metal and that was what caused the spark.

After assessing the risk, the team had decided to put insulating boards as protection for the people who were working there. In the area where the risk was highest, they decided to make holes in the plates using gas torch. The instructions to the employees were that each employee need to have correct PPE equipment. For that particular job, the prescribed protective equipment were gloves, rubber or PVC. DW1 found that the plaintiff was not using any protective equipment. He went on to say that cotton gloves were not the correct protective clothing for the job. Each employee had the responsibility to guarantee the integrity of protective clothing. DW1 informed the Court that what caused the wounds was that the arcs were between the bus bar, and spanner. He went on to say that the plaintiff was issued with protective clothing and referred to the documents in the defendant's bundle of documents. DW1 testified that the plaintiff attended safety awareness induction, and in fact attended one on 14th January, 2005.

Under cross examination, DW1 confirmed that ZAMEFA was part of Phelps Dodge, and it was the company's goal to enhance safety. They strove to attain zero workplace injury. He confirmed that one of the electricians on the fateful day was Tresphord Chileshe, and he was made to write a report appearing at page 30 of the defendants bundle of documents. Mr. Besa was electrical foreman, and made the report at page 33 of the defendant's bundle of documents.

DW1 also confirmed that an electrician, Chileshe Mulenga was on duty that day and from his statement, the plaintiff was exposed to an uninsulated shifting spanner, and the substation was kept live

at the time the plaintiff was working. He stated that shutting down the power supply entailed shutting down ZAMEFA and that would be the end of the factory. When he was referred to page 35, he informed the Court that from the statements read, the accident was attributable to the plaintiff's use of an uninsulated spanner touching a live cable.

DW1 went on to say that the accident was reported to his supervisor at ZAMEFA, Mr. Louis Cottee was Managing Director sub Sahara Africa and Mr. Mathias Sanderval was the President. When referred to page 3 of the plaintiff's bundle of documents, DW1 conceded that the e-mail was sent on 31st January, 2005. He went on to say that the corporation had a robust safety policy, and there was a policy safety document. The defendant had strict adherence to the document at page 2 of the defendant's bundle of documents.

DW1 was of the view that isolating OTK was not the only fastest way to work on OTK, and that it was allowed to work on live circuits if mitigatory steps were taken to ensure the safety of people working in that area. When referred to page 1 of the plaintiff's bundle of documents, DW1 disputed its contents. He conceded that half an hour would not be sufficient to cover the subjects listed on 22nd January, 2004. He went on to say that a handyman receives instructions from one that is skilled.

In re-examination, DW1 elaborated that OTK was a plant, and not an individual plant or furnace. It had five melting furnaces and 4 holding furnaces. The work was to be done on one furnace, and the panel is in the plant. They could not paralize the whole pant, but could work on one panel. DW2 was Mulenga Chileshe, an electrician at ZAMEFA. He testified that in January, 2005, they were assigned to work at the substation, to connect cables from the substation to the generator sets. Before starting, they gathered to discuss how they would proceed and to see that each employee had personal protective equipment. These were leather, PVC, rubber gloves and safety glasses. The group included one electrical casual, Henry Mwamba. After making sure that everything was in place, they switched off the panel. They connected 2 cables, and while they were in the process to connecting the last cable, DW2 left and had walked for about 5 metres when he heard a bang which occurred in the substation. DW2 rushed there, and met Mwamba coming out of the substation but did not know that he was electrocuted, until he was informed by his workmates that Mwamba had been involved in the accident pertaining to the bang DW2 had heard. DW2 found a shift spanner which Mwamba had been using, and it was burnt in front. He informed the Court that they had worked with Mwamba on many occasions on that kind of assignment. He went on to say that it appeared like the spanner fell on live bars in a different compartment, because they had switched off the electricity where they worked from, and the voltage and current were in the next panel. He informed the Court that from his observation, the load that passed through bus bars was about 4000 amps or so, and if a person touched that current, he would die there and then.

The spanner was being used at the time to tie the glands to the cables. There was a distance between the place they were working, in and where there was current. The shifting spanner was not supposed to touch the bus bar because there was an insulation in between. Under cross-examination, DW2 said the plaintiff was not qualified, and that on 31st, there were three electricians and Mwamba

who was the spanner boy. They (electricians) were telling the plaintiff what to do, and where things were not well, they would work there themselves. The plaintiff was working on DW2's instructions. He confirmed that document No. 2 in the defendants bundle of documents was the policy document of the defendant, and it was not in conformity with the safety policy when accidents happened. He said that they are given protective clothing to protect themselves. On that day, Mwamba was neither wearing rubber gloves, nor leather gloves.

He testified that part of the substation was live. He confirmed having written the statement appearing at page 34 of the defendant's bundle of documents. He said it was not possible to switch off the substation. He went on to state that the plaintiff was supposed to put on gloves. Under re-examination, DW2 testified that if gloves get worn out, one had to get a replacement, and that it was up to each person working at that time to wear protective clothing.

If OTK was to be switched off, there would be a fire, and the machines they were using would be burnt. If they switched off electricity, they would expose the furnaces to damage, and fire would occur when the water pumps stop, meaning the presurised water which is supposed to circulate would make the pipe explode, and there would be a reaction between copper and water and a fire would ensue. He denied exposing the plaintiff to 380 volts because the area was barricaded by insulator sheet. He explained that the uninsulated spanner means it is insulated between, but is bare where it is used to tighten a bolt. The plaintiff was not instructed to tighten a live wire. It was a dead cable to be connected to a standby generator. The substation was kept live in the sense that the other furnaces were in process. The panel they were working in was completely dead, but the others were live. This witness marked the close of the defence case. Learned counsel for the plaintiff filed in written submissions, and I am indebted to counsel for the said submissions.

I have analyzed the evidence tendered in this action by the parties. It is common cause that the plaintiff was employed as a casual worker by the defendant. He was not a qualified electrician. It is further common ground that on the 31st January, 2005, the plaintiff, and three electricians, namely, Tesphord Mulenga, Chileshe Mulenga and Phiri, were assigned to work in the OTK substation. The electricians and in particular DW2 were instructing the plaintiff on what to do. He was working pursuant to their instructions.

It is not disputed that the place which the plaintiff and the electricians were working on, was next to a live panel and the live panel was insulated by insulation boards. It is a fact that apart from the panel in which the group were working, the rest of the substation was live. I accept the plaintiff's testimony that he was instructed to 'hold' a bolt using a shifting spanner, and that in the process of working as instructed, the plaintiff was electrocuted and burnt. That the plaintiff had the spanner is not disputed, and DW2's testimony confirms that the spanner was being used at the time to tie the glands to the cables. I find as a fact that the spanner was un insulated as can be gathered from the plaintiff's own evidence, and confirmed by the report at page 30 and 35 which DW1 conceded were made by the employees concerned on the fateful day. It is my further finding that the insulation barrier did not completely insulate the live cables in the next panel because had that been the position, the bolt would

not have come into contact with the live cable. From the testimony of DW2 that the spanner was being used to tie the glands, and the plaintiff's testimony that the bolt touched a live cable, I infer that contact between the bolt and the live cable ensued during the process of executing the work the plaintiff had been assigned to do. The plaintiff's evidence is that he wore cotton gloves. I accept this evidence especially that DW2 testified that before they started work they gathered to discuss how they would proceed, and to see to it that each employee had personal protective equipment. The group included the plaintiff, and after making sure that everything was in place, they switched off the panel. Since protective clothing was one item the group wished to ensure everyone had, they must have seen that the plaintiff wore cotton gloves before the group started work. I also accept the plaintiff's testimony that the said gloves were removed from his hands after he had been burnt.

The plaintiff's contention is that the defendant did not provide a safe environment in PDIC. It is the common law duty of an employer to provide his workers with a safe place of work. The employer is required not merely to warn against unusual dangers known to them, but also to make the place of employment as safe as the exercise of reasonable skill and care would permit. See Charlesworth on Negligence, fifth edition, paragraph 203 (supra). The issue I have to resolve is whether the defendant provided a safe environment by providing a safe system of work and protective clothing to the plaintiff. In other words, was adequate provision made for the carrying out of the job in hand under the general system of work adopted by the employer, or under some special system adopted to meet the particular circumstances of the case.

In the case at hand the panel in which the group were working was switched off. It was then insulated from the live one by boards. It was however not completely insulated or if it was, the insulation was inadequate, and did not prevent contact with the live cable in the next panel the system of work adopted on that day, that is, to switch off the panel in which the work was to be conducted, and insulate it by a barrier was not entirely safe as the possibility of contact with a live wire was not eliminated. And in fact contact was made with a live wire in the next panel.

It is therefore my finding that the system of work employed by the defendant on that day was not safe at all. An analogy of this case can be drawn to that of Paine v Colne Valley Electricity Co Col Ltd and Another (1),
where it was held inter alia that:

"……There was a breach of common law duty by the first defendant in that they did not provide their employee with a safe place in which to work…"

In the cited case, the first defendant as suppliers of electricity conveyed high voltage current to kiosks in which transformers were housed. These kiosks, which had been manufactured and supplied to the first defendant by the 2nd defendant were arranged in 3 cubicles. In one there was the transformer, in another switches and bus bars and in the third an oil switch. The cubicles were separated by insulating material, but in the particular kiosk in question the insulating material did not extend to the back of the cubicle, but left a space of about 6 inches. By reason of this faulty construction, a workman came into contact with the bus bar when it was live and was killed. The executrix of the workman sued

both the supply company, and the manufactures of the kiosk of breach of common law and statutory duty, and the Court held as stated above.

In the case at hand, the defendant breached its common law duty by not making the panel which the plaintiff was working completely safe. I now turn to consider the second particular of negligence. As earlier noted, DW2 testified that on the morning on which the plaintiff suffered the burns, DW2 and others including the plaintiff met before starting work in order to ascertain that everything was in place. Among the items looked into was whether everyone had protective clothing. After satisfying themselves that everything was in order, they started working. The plaintiff was working under the supervision of DW2, and the latter has indicated that he checked that the plaintiff wore protective clothing. I reach this conclusion on DW2's testimony that they checked whether everyone had protective clothing. As matters turned out, the protective clothing worn by the plaintiff was not protection against electrocution at all. DW2 informed the Court that the plaintiff worked under the supervision and order of DW2, and the other electricians. It is my finding that the defendant through its employees, the electricians under whose supervision the plaintiff was, allowed the plaintiff to work next to a live electric panel without adequate safety precautions.

The fact that the plaintiff who was a lowly educated and unskilled casual worker, to whom the knowledge of an electrician cannot be imputed was instructed to undertake work in a dangerous place imposed a higher standard of care in the defendants both in the layout of the work, and the steps to be taken to avoid accidents.
I am persuaded to take this view by the case of Hawkins v Ian Ross (casting) Ltd (3) In that case, it was held inter alia that:

"...(e) the fact that an unskilled labourer such as S with an imperfect knowledge of English was employed to carry molten imposed a higher standard of care on the defendant both in the layout of the work, and in the steps to be taken to avoid accidents."

An analogy of the cited case can be drawn to the case at hand in that the plaintiff was not well educated, and not a trained electrician. It was incumbent on the defendant, given that the plaintiff was unqualified to ensure that the layout of the work was done in such a way that danger was eliminated. A qualified electrician would perhaps have executed the work in such a way that danger was minimized. The installation of an insulation barrier instead of a complete OTK stoppage was not entirely safe as contact with a live wire was made, and the defendant was at fault in not having properly laid out the work. Had the OTK been switched off completely, the accident would not have occurred as it did as the next panel would have been de-energized, and contact with any cables in it would to have led to the plaintiff being burnt as he was. Having not ensured that the live panel was completely insulated, and having not ensured, through his supervisors, that the plaintiff had adequate protective clothing on, the defendant should have shut down power completely in the OTK. In its answer to the averment that the OTK should have been shut down completely, the defendant averred that a complete OTK stoppage meant shutting down the whole plant, and that it was not feasible and necessary to isolate 100%. If that position is accepted, it was incumbent on the defendant to ensure that the live panel was adequately insulated from the one in which the plaintiff was instructed to work, and that the plaintiff being an

employee under supervision, wore effective protective clothing. According to DW1, his findings were that the spark that resulted from the spanner that Mr. Mwamba (the plaintiff) was using dropped on the live electrical bus bars carrying the electricity. If DW1's explanation were to be accepted, the conclusion that had the panel been adequately insulated, or the OTK completely stopped, there would have been no contact with live cable is inescapable.

It is a rule of law that an employer is liable for damage done by the fault or negligence of his servants acting in the course of their employment. The failure to adequately insulate the panel or completely shut down the OTK culminated in the plaintiff being burnt, and the defendant was thereby negligent in failing to provide a safe system of work. The plaintiff wa not provided with a safe place in which to work.
The defence of volenti non fit injuria is not available to the defendant, as it was not pleaded by the defendant.

It was held in the case of Kalunga (suing Administratrix of the estate of the late Emmanuel Bwalya) v Konkonla Copper Mines (5), inter alia, that:

"the duty of care by employers to their employees has developed to the extent that there is virtually no room for volenti non fit injuria to apply in cases of negligence where there is common law or statutory duty of care by an employer to his employee except where such doctrine has been pleaded."

The defendant has led evidence, which I accept that the plaintiff attended seminars at which he with others were educated on how to avoid electrical hazards among other topics. The plaintiff in cross-examination conceded that they were told to wear gloves and hat if they did not they could be injured or die. The defendant has also produced a schedule showing that the plaintiff received protective clothing. It appears that he last obtained PVC gloves in July, 2004.

In his testimony, the plaintiff stated that he went up to grade 7, and had rudimentary knowledge of writing. DW1 insisted that the plaintiff was a form five school leaver. No evidence was adduced by the defendant to that effect. From my own observation the plaintiff did not strike me as an educated young man. I am prepared to accept his assertion that went only up to grade 7 in his education. Notwithstanding his level of education, he was sensitized on electrical hazards, and how to safeguard himself as he himself conceded in cross-examination. The defendant has in its amended defence averred that the plaintiff sustained the alleged injuries out of his own negligence. I do not, on the evidence, agree that the injuries, pain, and suffering sustained by the plaintiff were wholly occasioned by his own negligence. Here is a casual unskilled worker who was working pursuant to the instructions of his supervisors and he undertook the task he was assigned under the very eyes, so to speak, of his supervisors including DW2. His supervisors ought to have known better than to instruct him, while wearing cotton gloves, to 'hold' a bolt with an uninsulated spanner. Their competence is certainly questionable. The cause of the accident to the plaintiff were the instructions to 'hold' uninsulated spanner while wearing cotton gloves. It has not been established that the plaintiff who was not an electrician was aware that uninsulated spanner was a conductor of electrical current. Had he not been instructed to hold the uninsulated spanner while wearing cotton gloves, he would not have sustained

the burns. Considering that he was working under supervision, and did not undertake the work on his own, but pursuant to qualified electricians instructions, it is my view that his blame worthiness for not wearing suitable protective clothing cannot exceed 5%. This in my view is a just and equitable appointment of blame worthiness in line with section 10(1) of cap 74 of the laws of Zambia, being the Law Reform (Miscellaneous) provisions Act. The situation would have been different if the plaintiff had not been working under supervision, or been an expert in the field of electricity. I hold him blame worthy to the extent stated purely on the ground that he was told how to avoid electrical hazards. However, had he not been instructed to 'hold' the bolt with the shifting spanner whilst wearing cotton gloves, the accident would not have happened.

On the whole, the plaintiff has proved on a balance of probability that he sustained the electrical burns on his hands and face as a result of the defendant's failure to provide a safe system of work, and in making him work in that dangerous place without adequate protective clothing. The defendant was negligent and is 95% to blame for the injuries sustained by the plaintiff. It has been submitted that the plaintiff should be awarded exemplary damages and reference has been made to the case of Rookes v Barnard(2). This head of damages was not referred to as exemplary damages in the pleadings. Order 18 of the RSC stipulates that a claim for exemplary damages must be specifically pleaded together with the facts on which the party pleadings relies. It appears however that exemplary damages are sometimes referred to as aggravated damages, and on that ground, I will consider the claim. Learned counsel for the plaintiff's argument is that the defendant did not shut down the OTK substation because they did not want to lose production material in the furnaces.
In the case of Rookes v Barnard (2), referred to by learned counsel for the plaintiff, the categories in which exemplary damages could be awarded were laid down, and one of them is where a defendant's tortuous conduct was calculated to result in profit.

In the case of Cassell & Company v Broome and Another (4), Lord Morris of Borth-y-Gest had this to say on exemplary damages at page 1094:

“……There may be exemplary damages if a defendant has formed and been guided by the view that, though he may have to pay some damages or compensation because of what he intends to do, yet he will in some way gain (for the category is not confined to money making in the strict sense or may make money out if it to an extent which he hopes and expects will be worth his while. I do not think that the word 'calculated' was used to demote some precise balancing process. The situation contemplated is where
someone faces up the possibility of having to pay damages for doing something which may be held to have been wrong, but where nevertheless he deliberately carries out his plan because he thinks that it will work out satisfactorily for him. He is prepared to hurt somebody because he thinks that he may well gain by so doing even allowing for the risk that he may have to pay damages.”

In the instant case, DW1 stated in cross-examination that shutting down the supply entailed shutting down ZAMEFA, and that the copper would be lost and it would be a disaster. The focus was on the operations.
The evidence does not however, reveal that the defendant, through its employees was guided by the

view that thought it may have to pay damages or compensation, it would gain in some way. My view of the evidence is that the defendant took some measure of protection by the clumsy insulation of the de-energized panel form the live one. This effort, clumsy as it may have been, definitely dispels any suggestion of deliberate and total disregard for the plaintiff's safety. The evidence does not reveal that the defendant faced up to the possibility of having to pay damages, but nevertheless went ahead to imperil the plaintiff's life. My considered view is that the facts of this case do not warrant the award of exemplary damage, and I decline to do so.

As I see it, the plaintiff is entitled to general damages for the burns he suffered as a result of the defendant's negligence. I have had recourse to English authorities on award of damages in cases in which plaintiffs have suffered burns as reported in Kemp and Kemp: The Quantum of Damages, volume 3, in Personal injury and Fatal Accident Claims 1998 edition. Awards of damages have been in varying amounts. In 1984, the sum of £ 65, 000 was awarded a general damages and in subsequent years, the damages awarded up to 1996 were on average the said sum. This was for severe burns in which the plaintiffs were awarded general damages ranging from £ 25, 600 to £17, 500 form 1992 to 1998, while minor burns were awarded as little as £ 1, 000 general damages. The English pound had been devalued, and I am sure the value of those amounts would be much more if awarded now.

I have found no decided case in our jurisdiction similar to the instant scenario with which I can make comparisons in assessing the general damages for personal injuries as well as pain and suffering. I am mindful that in the case of Attorney General v Moyo (6), the Supreme Court reiterated the need for a trial Court to compute reasonable general damages, and not simply convert the value of the English pound into the

kwacha exchange rate value.

The plaintiff suffered 4% burns of the right upper limb, 3% left upper limb and 1% facial burns. He has remained with ugly permanent areas of hypo pigmentation on the hands. In the case of Belinfanties British Railway Board reported in Kemp and Kemp the quantum of damages Volume 3 Service Information at J3-024, the plaintiff had suffered flesh burns to face, neck, chest and hands amounting to C.5 percent of total body area and residual scarring was hardly noticeable. He was awarded the sum of £ 3000 for general damages. This was in 1984.

No doubt the pound has suffered inflation, and a plaintiff in similar circumstances would be awarded much more than the £ 3000 awarded then.

In the instant case the plaintiff suffered burns to his hands and arms and face and has been left with scars on his hands and arms. Though he testified that the feels some pain when it is hot, there was no medical evidence to support that claim. Although I have not come across awards for pain and suffering in the recent past in our jurisdiction to make comparisons with, and taking into account the guidance given in English cases I consider that a global sum of K 20, 000, 000 as general damages for personal injuries, pain, and suffering would be just recompense for the injuries suffered by the plaintiff.

The said damages will be reduced by 5% as I have found the plaintiff culpable in that percentage.

Interest is awarded on the damages at the average short-term deposit rate from date of summons, to date of judgment, and thereafter at the average lending rate as determined by the bank of Zambia. The plaintiff will have costs of this action to be agreed, and in default to be taxed.

Judgment for the plaintiff.