

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
(Civil Jurisdiction)

2002/HK/547

BETWEEN:

FRED KAPYA SINKALA (Suing as Administrator of the late PATSON KAPYA) PLAINTIFF

AND

BRUCE MINING LIMITED 1ST DEFENDANT
KONKOLA COPPER MINES PLC 2ND DEFENDANT
HELEN BRUCE (MARRIED WOMAN) 3RD DEFENDANT

Before the Honourable Mrs. Justice R.M.C. Kaoma in Open Court on this 24th day of April, 2013

For Plaintiff: Mr. S.A.G. Twumasi - Kitwe Chambers

For 1st and 3rd Defendants: No Appearance

For 2nd Defendant: Mr. E.C. Banda, SC - ECB Legal Practitioners

J U D G M E N T

Cases referred to:

1. Wilsons & Clyde Coal v English (1938) A.C. 57
2. McDermid v Nash Dredging and Reclamation Co. Limited (1987) 2 ALL E.R. 878
3. Latimer v AEC Limited (1952) 2 QB 701
4. Rose v Plenty (1976) 1 W.L.R. 141
5. Scott v London and St Katherine Docks Co. (11865) 3 H. & C. 596
6. Gee v Metropolitan Railway (1873) L.R. 8 Q.B. 161
7. Cassidy v Ministry of Health (1951) 2 K.B. 343
8. Barkway v South Wales Transport Co. Limited (1950) 1 ALL E.R. 392
9. Lloyde v West Midlands Gas Board (1921)1 WLR
10. Pannett v McGuineess (1972) 3 ALL E.R. 137
11. Richardson v Stephenson Clarke Ltd (1969) 3 ALL E.R. 705
12. Vellino v Chief Constable of the Greater Manchester Police (2002) 1WLR 218
13. Pitts v Hunt (1990) 1 Q.B. 24 Pitts v Hunt (1990) 1 Q.B. 24
14. Clunis v Camden and Islington Health Authority (1998) 3 All E.R. 180
15. Hewison v Meridian Shipping Services Pte Ltd (11)

Legislation and other works referred to:

1. Fatal Accidents Acts 1846 to 1959
2. Law Reforms (Miscellaneous Provisions) Act 1934
3. Occupiers Liability Act 1957
4. Occupiers Liability Act, Cap 70
5. Guide to the Mining Regulations, mining regulations 218, 806, 808 and 811

6. Mines and Minerals Development Act 2008, section 123
7. Clerk and Lindsell on Torts, 9th Edition at pages 151 and 170
8. Charlesworth and Percy on Negligence, 11th Edition at page 233
9. Street on Torts, 12th Edition Oxford University Press 2007 page 314
10. Employer's Liability (Defective Equipment) Act 1969
11. Theft Act 1968, section s. 6

On 31st December, 2002 the plaintiff issued a writ and statement of claim against the two defendants claiming (a) damages as a result of the negligence of the 1st defendant as the deceased's employers and the 2nd defendant as owners of the mine; (b) damages under the Fatal Accidents Acts 1846 to 1959 for the benefit of the widow and the children of the deceased; (c) damages under the Law Reform (Miscellaneous Provisions) Act 1934 for the benefit of the estate of the deceased; and (d) interest on any amount found due and costs. The particulars of negligence were set out in paragraph, 4 sub-paragraphs 1 to 4 of the statement of claim. On 23rd January, 2003 the first defendant by counsel of MNB Legal Practitioners filed the defence at pages 6 to 7 of the Bundle of Pleadings. They deny that the deceased was their employee and aver that he was unknown to them and they did not authorise him to undertake any task at Konkola Copper Mines on their behalf including going underground. On 10th February, 2003 the second defendant by its legal counsel entered the defence at pages 10 to 11 of the same Bundle. They deny the allegations in the statement of claim and aver that the deceased was not a legitimate employee of the first defendant; that he was trespassing on their premises; and they did not owe him any duty of care.

On 1st October, 2010 one Helen Bruce was joined to the proceedings as third defendant. I was informed that the first defendant had ceased carrying on business. Helen Bruce and Christopher Bruce were said to be Directors of the company. In his submissions Mr. Twumasi has referred to Christopher Bruce as third defendant, but it is quite clear that the latter was not joined to the proceedings because there was information that he had died. I indicated that I could only join him to the proceedings upon confirmation that he was alive, but the confirmation never came. By then MNB Legal Practitioners were no longer acting for the first defendant. They had taken over conduct of the matter on behalf of the second defendant.

On 17th November, 2011 the plaintiff filed an amended statement of claim. The only major addition is the particulars of negligence alleging failure to maintain the ladder or the same being hazardous and dangerous for use. This matter suffered a lot of delay especially at the instance of the plaintiff. Trial finally commenced on 19th July, 2012. I heard evidence from only two witnesses called by the plaintiff. The plaintiff is PW1. He is a miner with the second defendant and the elder brother to the deceased, Patson Kapya. According to him the deceased was employed by the first defendant. He said that on 15th July, 2002 around 04.00 hours in the morning, the deceased went underground at 2200 level at No. 1 Shaft at KCM in Chililabombwe. On 16th July, 2002 he was informed by the deceased's wife that the deceased had not returned from work. He went to the plant. At the check point he asked about Mine No. 3143, which according to the wife was the deceased's mine number. He was told by a checker for the first defendant that the person with that mine number had knocked off.

He told the checker that the person had not knocked off because they had not seen him. Nonetheless he went home, and started asking other persons who said they had not seen the deceased. He returned to No. 1 Shaft and told the checker that he had not found his relative, so he must be at the plant. He was advised to go and check at the cap lamp plant where they get lights from. There he was told that the person had come out and he found his cap lamp. They went back to the check point and found that his number was crossed out meaning that he had knocked off. They went to see the shift boss, Mr. Mubanga and a Mr. Manda both employees of the first defendant. They found that the same number was crossed off or ticked meaning that the deceased was out.

PW1's evidence is further that when someone goes underground, the date is circled and that the same number was scratched off to show that the person was still underground and they wondered how the number appeared twice. They decided to check at the cap lamp plant again. They found that one lamp was out, but another lamp was not out and that one person was working at 2200 level and the other one at 2600 level. From there they went to the first defendant's offices within the plant for the second defendant.

According to PW1, Mr. Mubanga told him that they had understood the problem and asked for more time, but he was told to go and check for the person in the compound as he might be there. They checked the whole compound. They also checked for the deceased in Chingola and Mufulira, but they did not find him. On 17th July, 2002 they went back to the plant. They saw the second defendant's mine manager Mr. J.J. Tembo who was surprised that he was not informed. PW1 was asked to go back later. He returned in the afternoon. Mr. Tembo told him that he was organising a search party. The search party went down, but resurfaced after only one hour. The family was not happy and they went back to see Mr. Tembo. According to PW1 Mr. Tembo told them that they had searched underground, but the person was not there, so they should leave the plant and search in the compound as he might be socialising somewhere. They continued the search in the compound.

On 27th July, 2002 they were informed by an unnamed young man that he had seen a gumboot that had dropped in the mine. Shortly after that mine police went to ask them to go and see if it was their relative. They went underground in the company of Mr. Tembo, Mr. Mubanga, Shaft Shift boss Ghost Mulenga, Mr. Musaya and Isaac Simpamba. He said instead of going to 2200 level where the deceased worked, they went to 400 level. They found the deceased's body in a decomposed state. He identified the body as that of his missing brother. He asked how the deceased was found there when he was told that he had surfaced. Photographs were taken as shown at pages 1 to 4 of the plaintiff's Bundle of Documents. The body was taken to the hospital. The doctor confirmed that it was decomposed. A postmortem examination was conducted and the postmortem report at page 1 of the plaintiff's Supplemental Bundle of Documents was issued. The cause of death was head injury due to fatal mine accident.

He said that there was an investigation into the death of his brother by the Inspector of Mines and that the report at pages 1 to 6 of the second defendant's Supplemental Bundle was issued. The report showed that the deceased sneaked away from work and was using the ladders to go to the surface. He said as a miner he knows that the ladders are used to go to the surface and he saw them when they went to 400 level.

He said at page 2 of the report, the inspector observed that the ladders were dangerous and according to the mine rules the second defendant had placed the ladders. He said at the time of his death, the deceased was 37 years old; he was married with three children aged 14, 12 and 10 years. He said he did not know his brother's earnings and that he is claiming damages for negligence against the defendants. He said the second defendant had engaged the first defendant to work at the mine, so the second defendant should maintain the ladders as owners of the mine.

When asked by Mr. Banda, SC, he admitted that his brother had worked for the second defendant, but had been declared redundant in 1999 and was working for the first defendant, a subcontractor of the second defendant. He agreed that the first people he contacted when his brother missed were the checkers for the first defendant, but he said the cap lamp checkers were mixed. He said Mr. Mubanga and Mr. Manda were working for the first defendant while Mr. Smart Kalezi was the mine police overall boss. He admitted that the mine accident report indicated that the deceased did not have a proper mine number; he was using E. Mwape's number and that it was not clear as to who employed his brother. He accepted that from the report his brother sneaked away from work at the beginning of the shift and that this was a serious offence.

He agreed that they catch a cage from the cage shaft and that from the report the cage was not working and that the deceased decided to use the ladder to surface. He accepted that from 2200 level to 400 level the deceased had climbed 1800 levels, but said if the ladders were okey he could have surfaced. He reiterated that KCM should have maintained the ladder because if the lifts are not working one can use a ladder. He said the ladders were in pieces.

In re-examination he said the second defendant provides the cap lamps, but when distributing the first and second defendants would distribute to their respective employees. He said the letter at page 6 of the defendant's Bundle shows that the deceased was not dubiously employed by Goeffrey Manda. He said also that the report at page 2 says that the ladders were too dangerous to use to travel.

Smart Mufuiinda Kalezi is PW2. He is the Chief Inspector of Mines under Mine Safety Department in the Ministry of Mines. He holds a degree in mining engineering and has worked for fifteen years in the Department. His duties are to inspect works in the mines and explosive factories and to supervise inspectors of mines and explosives. He also investigates facilities at mines as well as ordinary accidents and dangerous occurrences. He confirmed that in July, 2002 he investigated the accident at No. 1 shaft involving the deceased. He compiled the report at pages 1 to 6 of the second defendant's Supplemental Bundle of Documents. He also recorded the witness statements at pages 3 to 24 of the first defendant's Bundle. He said Stanslous Kapyra was working in conjunction with the deceased. He found that the deceased was employed by the first defendant. Stanslous Kapyra worked in the same section.

He said on the material date the deceased was working underground in the first defendant's section. According to the statements he got from the deceased's supervisors, the deceased sneaked away from work. He went to the shaft station to wait for the cage to take him to surface, but there was some problem on the cage and it was being worked on, so it was not available. The deceased decided to use the ladderway to surface. On his way up, he met with an accident in the ladderway. He slipped and fell into a shaft compartment where there are water and air pipes. He hit himself on the pipes and hung there. He was looked for, for many days, but was not seen until the cage which takes the ore from the ground to the surface disturbed the pipes and he got dislodged and fell to a shaft station below. There was a smell in the whole area because the body was decomposing. That was how the deceased was discovered.

It is PW2's evidence that the first defendant tried to deny that they employed the deceased, but there were two Kapyras in the same section and they were using the same mine number. According to him it appeared like the personnel officer from the first defendant was benefiting because the statements were conflicting. He confirmed that the first defendant was a subcontractor of the second defendant; but he said it is the mine manager's responsibility to see that the contractors run their sections smoothly and safely and that mine managers are employed by the mine owners.

He said he went underground with mine manager, Francis Imasiku, using the same ladderway. The ladderway was not in a good state; it was terrible, support timbers were almost falling and some of the runners or steps were missing. PW2 is positive that the ladderway was not maintained and was rarely used. However, he said the ladderway was an escape in case there was anything which disturbed the cage way or it was blocked or disturbed due to some occurrences. He said the mine owner was supposed to maintain the ladderway and that miners were supposed to use the ladderway either to go down or to go to the surface if the cage was not operational.

He testified that in his report at page 5 of the second defendant's Supplemental Bundle, under mining regulation 218 (1), he referred to the mine manager of the second defendant. He said the deceased's name did not reflect where miners mark when they go underground and when they surface. He was of the view that the mine manager did not do his duty. However, he said the mine manager might not have known that the deceased was working for the first defendant or was underground because the first defendant was hiding the names of this employee. He said that he found a system in place by the mine to show how many miners under the contractors had gone down and how many had surfaced; but the deceased's name was not reflecting on the list. He said it is possible for someone to go underground and for the mine not to detect the person and that in this case they were using the same mine number. He said the mine system was porous, meaning the first defendant was able to employ two people under the same number which the second defendant should have detected and counterchecked the number of people going down against the names, which they were not doing.

When asked by Mr. Banda, SC, he agreed that the deceased was an employee of the first defendant, an independent contractor, but who was under the supervision of the mine manager. He insisted that the deceased was using E. Mwape's mine number. He said the deceased finished his task early, he decided to surface using the ladderway as the cage was being worked on. He stated that if one finishes work early or gets permission from the supervisor he can surface; and that miners leave the underground as soon as they finish their task. He denied that miners wait to surface together.

He agreed that in his report he indicated that the deceased sneaked away at the start of the shift which was not in order. He admitted that the deceased met his death while doing a wrongful act at work. He accepted that you cannot control someone who sneaks away when you are on the surface and, that if you meet with an accident you cannot blame your supervisor. He said the ladderway seemed not to have been used because it was in a bad state and was the only ladderway from 2200 level. He said he would not be surprised if there are two of three exists from that level. He accepted that there is a haulage way which connects to shaft 3, but said it is a long, long way. He said it is not permitted for two miners to use the same mine number and that this was a fraud from which the personnel officer for the first defendant was benefiting.

When shown the report at page 4 of the second defendant's Bundle of Documents, he said he gave those reasons to the police because the case was difficult for him. He confirmed that the dubious activity was at the hands of Mr. Manda, personnel officer of the first defendant. He concluded that the first defendant did not conduct its affairs in a proper manner and that the only lapse on the part of the second defendant was that the system could be penetrated. He admitted that there was a system of ticking/checking-in and ticking/checking-out, but it was difficult for the second defendant to know about the deceased. He said Mr. Manda had employed the deceased, but he did not include him on the system of checking in and checking out. He agreed that the second defendant was a victim of the fraud by Mr. Manda.

In re-examination he said in his report he referred to some impossibilities such as the cap lamp battery, boots being found somewhere else and yet the deceased's feet were intact and there being no odour, which was strange. He said there are a lot of responsibilities in the mine and that the major ones should go to the mine owner; but there are some responsibilities over which the mine manager could not have control. He reiterated that the deceased sneaked out, that the ladderway was dangerous and unsafe, that people were using it in desperate moments and, that it is a requirement of mining regulations that the ladderway should be there and that it should be maintained. This in brief is the plaintiff's case.

The second defendant relies on PW2's evidence that it had also intended to call. I have received written submissions from counsel for the plaintiff and the second defendant. I shall refer to the submissions in my judgment when necessary. On the evidence it is a fact that the second defendant is the owner of Konkola Copper Mines at Chililabombwe and that the second defendant subcontracted the first defendant to operate at the said mine. It is a fact that as a subcontractor, the first defendant had employees engaged to work underground at the said mine. It is not in dispute that the deceased, Patson Kapya had once worked for ZCCM Konkola Division but was declared redundant on 22nd February, 1999. I accept that on 15th July, 2002, the deceased went underground on duty at 2200 level and did not surface. A report was made to the first defendant, his alleged employer. Records were checked at the first defendant's checkpoint which showed that the person of mine number 3143 had surfaced. The initial check at the cap lamp plant also showed that the person with that mine number had surfaced. I accept that on 17th July, 2002 a search party went underground to look for the deceased, but he was not found. PW1 was told to look for the deceased in the compounds. There is no dispute that the deceased was found on 27th July, 2002 after his decomposed body was dislodged when a skip that was taking ore to surface disturbed a pipe on which the deceased had fallen.

I think that the first question to determine is whether the deceased was employed by the first defendant. As I have already said the first defendant's defence is that it never employed the deceased, that mine No. 3143 belonged to E. Mwape, that the deceased was unknown to them and, that the company did not authorise him to undertake any task on its behalf including going underground. As submitted by both learned counsel, the first defendant did not participate in the trial, so there is no direct evidence to substantiate its defence. Helen Bruce too did not attend the trial or file any defence. However, there is evidence by PW1 that the deceased was employed by the first defendant. The witness statement of Geoffrey Manda, section boss for the first defendant, at page 13 of the first defendant's Bundle of Documents also shows that Geoffrey Manda employed the deceased on 11th July, 2002 as a jackhammer driller and he gave him mine number 3143 belonging to Mr. E. Mwape.

The statement also shows that Geoffrey Manda employed Mr. E. Mwape earlier than the deceased and had given him the same mine number 3143. His explanation for giving one mine number to two people was that he had no register book which was at the company office in Nchanga and that he used his memory and did not phone Nchanga to know the next mine number to be given. In the statement he said the confusion at the check point about Mr. E. Mwape not complying by checking-out procedure due to Mr. P. Kapya's behaviour was being reported to his counterpart, Mr. A.M. Mubanga, so he could not know that he had given the same number to two people. The statements at pages 7, 11, 13, 16, 20 and 24 of the same Bundle all indicate that the deceased was employed by the first defendant; that he was introduced to fellow workers; and that he worked well with them on 13th July and 14th July, 2002.

As submitted by State Counsel, the oral and documentary evidence of PW2 is that the deceased was not properly employed by Geoffrey Manda. In the statement at page 4 of the second defendant's Bundle of Documents and in his observations on the incident at page 4 of the second defendant's Supplemental Bundle, PW2 indicated that the deceased did not go through the right channels to get his job with the first defendant.

The first reason he gave is what is contained in the witness statement of Geoffrey Manda that the mine number the deceased was using belonged to E. Mwape who had been employed on an earlier date and that in defence Mr. Manda said he did not have a register book handy, he used his memory, which to PW2 is unconventional and unacceptable. The second reason is that the deceased did not attend the induction at the training school as per standard procedure. Stanslous Kapya did the induction from 6th July to 8 July 2002. A memorandum written by KCM on 5th July, 2002 and the course attendance register prepared by the training school and signed for by the training school instructor, Mr. M.N. Muyatwa, and by all the inductees present attested to that fact. The third reason PW2 gave was that the deceased did not apply for the job through the personnel offices as per standard procedure. Stanslous Kapya applied for the job on 12th June, 2002, but when he reported for work on 9th July, 2002, he was told that there was no labour request from KCM yet and that he had to wait. All this is not disputed.

Further, the witness statement of Idah Munkombwe, the recruitment officer, at page 17 of the same Bundle indicates that she delegated her duties to G. Manda, a personnel officer when she went on leave on 5th July, 2002. She returned on duty on 13th July. On 15th July, 2002 she requested Mr. Manda to surrender the list of the people he had employed in her absence. He did not do so. He said the papers were not in order. He submitted the list on 16th July. On the list there was E. Mwape with mine No. 3143. On the same day she learnt that there was a mix-up on the mine number; it was for two different men, one of them was the deceased. From her statement there was no mention or record in their books concerning the deceased. She outlined the procedure used to employ any person in the company which procedure was not followed.

It is quite clear to me that the deceased did not go through the right channels to get his job with the first defendant. He did not apply for the job or undergo induction as per standard procedure. His name did not appear in the first defendant's records and he was not in the second defendant's system. I am satisfied from PW2's evidence that the deceased was employed dubiously by Geoffrey Manda on 11th July, 2002 as jackhammer driller. He was introduced to fellow workers. He worked underground in the first defendant's section on 13th, 14th and 15th July, 2002 when he met his death.

In my judgment where an act which is authorised by an employer is performed by the employee in a wrongful and unauthorised manner, the employer remains liable. The recruitment officer delegated her duties to Mr. Manda on 5th July, 2002 when she went on leave. When she resumed duties on 15th July, 2002 she asked him to surrender the list of the people he had employed in her absence. I believe that Mr. Manda had authority to employ in the absence of the recruitment officer, but when he employed the deceased he did so in a wrongful and unauthorised manner. He did not only follow the laid down procedure. He committed a fraud from which he was benefitting personally. Obviously the deceased was aware of the arrangement as he did not apply for the job or undergo training. I believe that the deceased knew that the mine number he was given belonged to E. Mwape. Therefore, it cannot be true as put by the plaintiff that the deceased's mine number was given to somebody else.

Clearly it was E. mwape's mine number that was given to the deceased. In my view both the first and second defendants were victims of the fraud by Mr. Manda and the deceased. I find that the deceased was employed by the first defendant through Geoffrey Manda, but dubiously and fraudulently. The deceased did work underground which may have benefited the first defendant, but legally speaking the deceased was not authorised by the defendants to undertake any task underground on their behalf as his employment by Mr. Manda was tainted with illegality which I cannot condone. In these circumstances it is questionable whether the defendants owed the deceased any duty of care as an employee.

I turn to the principal argument made by Mr. Twumasi that there was negligence on the part of the first and second defendants, in giving two persons the same mine number thus making it impossible to re-verify that all employees underground surfaced and failing to take any adequate precautions to ensure that one number is not given to two employees; and that the act of giving two persons the same mine number resulted in delay in the rescue of the deceased although this rescue will not have achieved much. He contends that there was negligence on the part of the first and third defendants and that the second defendant as owners of the mine owed a duty of care to the deceased.

The second defendant avers that there was no negligence on their part to warrant the award to the plaintiff of the claimed damages; that the deceased was an employee of the first defendant, an independent contractor engaged to carry on development works at their mine. State Counsel acknowledges that the fact that there was a relationship of owner and independent contractor between the second and first defendants would under normal circumstances place the former in a position where it would owe a duty of care to any such worker legitimately in such place. But he contends that the duty does not extend to persons taken into such places in contravention of mining norms or in a fraudulent manner. He submits that the deceased's dubious employment by Mr. Manda as revealed by PW2's evidence point to negligence and/or recklessness on the part of the agent or servant of the first defendant which does not extend or point to negligence on the part of any agent or servant of the second defendant.

In order to establish negligence, a plaintiff must prove that the defendant had a duty to the plaintiff; he breached that duty by failing to conform to the required standard of conduct; his negligent conduct was the cause of the harm to plaintiff; and plaintiff was, in fact, harmed or damaged. Clearly negligence is conduct that falls below the standards of behaviour established by law for the protection of others against unreasonable risk of harm. A person has acted negligently if he or she has departed from the conduct expected of a reasonably prudent person acting under similar circumstances. It is trite that an employer is liable at common law if an accident is due to his own act or default. This is the employer's personal liability to employees in respect of harm suffered at work. The employer may also be liable for breach of duty imposed by a statute; or vicariously for acts of his employees done in the course of employment. But the common law duty is owed to employees only and not visitors or independent contractors; this is covered by occupier's liability.

The employer's duties derived from common law include provision of competent staff (staff should be selected carefully, have training to meet the requirements of their job, and be supervised where necessary); provision of safety measures at place of work, proper plant, equipment and appliances (failure to provide adequate safety equipment may result in liability for negligence). But the employer does not warrant the safety of his tools and appliances nor does he incur liability for negligence of his employees. The duty of care obliges the employer to procure plant and equipment from a reputable source, inspect them and regularly maintain them. There is also the duty to provide safe and proper system of working which is an outgrowth of *Wilson & Clyde Coal v English* (1). This duty will normally apply in a system of working which is regular or routine and includes the physical lay-out of the job, the sequence in which the work is to be carried out, where necessary the provision of warnings, notices and the issue of special instructions and the need to modify or improve the system as appropriate. It is not enough to just provide a safe system of work; the employer should also take reasonable steps to ensure that it is complied with. An employer may still be liable for torts resulting from an employee failing to comply with the safe system of work [See *McDermid v Nash Dredging and Reclamation Co. Limited* (2)].

I have indicated in my judgment that the common law duty is owed to employees only and not visitors or independent contractors who are covered by occupier's liability. The English Occupiers Liability Act 1957 was adopted in Zambia under Cap 70 which abolished the distinction between licensees and invitees or even persons who are under contract and called them all lawful visitors. These include persons permitted by the occupier to enter the premises and persons who enter by implied terms (s. 6(1)). The term occupier denotes a person who has sufficient control over premises and relates to one who has a duty to those who lawfully come onto the premises. In practical terms therefore it means an owner in possession is definitely an occupier. Section 3 (2) of Cap 70 introduced a common duty of care for all the visitors. It is a duty to take such care as in all circumstances of the case will be reasonably necessary for the purpose for which the visitor has entered the premises.

The question whether the occupier has fulfilled his duty depends on the facts of each case. He is however free to extend, restrict, modify or, exclude liability to any visitors by agreement or otherwise. However, the employer should take such steps as are reasonable in the circumstances to provide a safe work place. This is only breached if the employer has been negligent. In *Latimer v AEC Limited* (3) a heavy rain storm flooded a factory and made the floor slippery. Occupiers of the factory did all they could to get rid of the water and make the factory safe, but the plaintiff fell and was injured. He alleged negligence that the occupiers did not close the factory. It was held that the occupiers were not liable. The risk of injury did not justify the closing down of the factory.

Having set out the law, I turn to the question of issuance of the same mine number to two people. Mr. Twumasi has argued that the second defendant had not put in place a proper and effective mechanism to ensure that only those authorised could go underground; that it was the ultimate duty of the second defendant to do that; and that since they did not put in place a proper mechanism then they were negligent as owners of the mine. As I see it this argument relates to provision of safe and proper system of working.

I accept that it is not permitted for two miners to use the same mine number. Nevertheless, the evidence has clearly established that the deceased was not properly employed by Mr. Manda and that he did not go through the right channels to get his job with the first defendant. I have referred to the witness statement of Idah Munkombwe wherein she outlined the procedure used to employ any person in the first defendant, which procedure was not followed by Mr. Manda when he employed the deceased. I have accepted that Mr. Manda was benefitting from that dubious and fraudulent arrangement, of which the deceased was aware as he was involved.

I agree with PW2 that under mining regulation 218, it is the mine manager's duty to ensure that there is in force a system to enable a determination to be made of the number of persons in the underground working at any time and that the mine system was porous because the mine owners should have detected that the first defendant was able to employ two people under the same mine number. In his words the mine manager did not do his duty. Be that as it may, PW2 accepted that the mine manager may not have known that the deceased was employed by the first defendant or that the deceased was underground because the employer, the first defendant was hiding the names of the deceased. PW2 agreed that there was a system in place by the mine to show how many miners under the contractor went down and surfaced except for the deceased, whose name was not reflecting on the list. He conceded that it is possible for someone to go underground and for the mine not to detect that person.

I find this case to be distinguishable from *Wilson & Clyde Coal v English (1)* where the plaintiff was injured at the defendant coal mine while travelling through the pit at the end of a day shift. He was crushed when the haulage plant was set in motion. The haulage equipment should have been stopped during travelling time. The defendant employers claimed that they had discharged their duty of providing a safe system of work by appointing a competent and qualified manager. It was held that an employer owed a personal and non-delegable duty to an employee and that the employer could not avoid their duty to provide a reasonably safe system of working by delegation to a competent employee. In that case the plaintiff was legally employed and the duty of care was clear.

I find it hard to accept that the second defendant was negligent since they did not put in place a proper mechanism to ensure that only persons who had requisite permission to go underground did so. It is obvious that the system was there, but it was manipulated by Mr. Manda who was even hiding the names of the deceased. The second defendant was not required to device a foolproof system. The only lapse on their part was that the system could be penetrated. Admittedly the second defendant was a victim of the fraud by Mr. Manda. The blame falls squarely on Mr. Manda and the deceased himself. In fact from PW2's evidence what Mr. Manda did was criminal which forced him to report the matter to the police. I am not persuaded that the second defendant is guilty of negligence relating to the issuance of one mine number to two people.

I think that where a prohibited act is performed in furthering the employer's business; it is usually within the course of employment. In *Rose v Plenty* (4), a milk man employed a boy aged 13 to help him on his milk round despite his employer's express instructions not to do so. Due mainly to the milkman's negligent driving the boy was injured. The employers were held liable. Lord Denning said the driver was still within the course of employment despite the express prohibition because he was still acting for the master's purposes, business and benefit. In the present case, I am satisfied that allocating the same mine No. 3143 to E. Mwape and the deceased made it impossible to re-verify the surfacing all the underground workers and I am prepared to say that the first defendant failed to take adequate precaution to ensure that one number was not given to two employees. However, I would be reluctant to hold the 1st and 3rd defendants as employers of the deceased liable for the criminal acts of Mr. Manda who was benefitting personally from the fraudulent arrangement. The deceased brought this upon himself.

On the particulars of negligence under paragraph 4 (2) alleging failure and refusal to mount a rescue operation immediately, had Mr. Manda not given one mine number to two people, the first defendant would have realised, on 15th July, 2002 itself that the deceased had not surfaced. On 16th July, 2002 when PW1 reported to the checker for the first defendant, that the deceased had not knocked off, the first defendant would have been alerted to the danger that the deceased may have been left underground.

At the check point the number was crossed out meaning that the deceased had knocked off. PW1 saw the shift boss Mr. Mubanga and Mr. Manda (whom I believe had employed the deceased). Again they found that mine No. 3143 was crossed out. In all sincerity Mr. Manda ought to have known that this was the person he had employed dubiously and fraudulently only five days earlier and the one he gave the mine number for E. Mwape. Mr. Manda could not plead ignorance over what had happened. There is unclear evidence that the same number was scratched off to show that the person was still underground which prompted them to check at the cap lamp plant where they found that one lamp was out, but another lamp was not out. It seems to me that it was discovered then that one person was working at 2200 level and the other one at 2600 level. Surprisingly even after that discovery the two asked for more time and told PW1 to search for the deceased in the compound. It was only on 17th July, 2002 after PW1 reported to the first defendant that he had not found the deceased in the compounds, that a report was made to Mr. Tembo an employee of the second defendant, who in fact showed surprise that he was not informed. On the same date Mr. Tembo sent a search party underground, but the deceased was not found. Clearly no further search was undertaken until 27th July when the deceased's decomposed body was found.

I am convinced that it was the deceit by Mr. Manda, of giving the deceased the mine number for E. Mwape that made the first defendant to believe that the deceased had surfaced. The same reason made them to fail or refuse to mount a rescue operation immediately. In my judgment the blame again falls squarely on Mr. Manda and the deceased. I would be reluctant to find negligence on the part of the first defendant. As for the second defendant, no negligence can attach because a search party was sent underground when Mr. Tembo was informed that the deceased was missing. The deceased's family may not have been happy that the search party was underground for one hour only, but the deceased was not found on 2200 level where he was assigned to work. In his report at page 5 of the second defendant's Supplemental Bundle and in the statement at pages 4 and 5 of the second defendant's Bundle of Documents, PW2 had suspicion over the death of the deceased.

He even suggested that the body may have been planted in the compartment from somewhere else where mud can be found underground. Nonetheless, PW2's investigation revealed that the deceased decided to use the ladder way to surface and that on his way up, he met with an accident; he slipped and fell into a shaft compartment where there are water and air pipes and he hit himself on the pipes. The matter was reported to the police. But there is no evidence of what the police discovered. PW2's suspicions have remained unsubstantiated.

I want to turn now to the plaintiff plea of *res ipsa loquitur*. It is accepted that a plaintiff may prove his case through circumstantial evidence where there is no direct evidence of how the defendant acted. In such a case the doctrine of *res ipsa loquitur* is involved. The doctrine allows a plaintiff to prove negligence on the theory that his injury could not have occurred in the absence of negligence. The facts of the accident itself may give rise to a *res ipsa loquitur* inference if the following three conditions are met: (i) the defendant must have had sole control of the thing that caused the damage; (ii) the accident could not have occurred without lack of proper care; (iii) there is no other direct evidence of what caused the accident.

In *Scott v London and St Katherine Docks Co.* (5), the plaintiff who was standing near the doorway of the defendant's ware house, was struck when several bags of sugar fell from a hoist. The defendant's employees had been using a hoist nearby to load sugar. It was held that in establishing liability on the part of the defendant there must be reasonable evidence of negligence, but if the three conditions above apply "...it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

To establish if the defendant has control of the situation which caused the damage, the test is whether outside interference was likely. In *Gee v Metropolitan Railway* (6), the plaintiff fell from a local train when the door flew open a few minutes after it had left the station. This was held to be evidence of negligence on the part of the railway company.

For *res ipsa loquitur* to apply it must also be shown that the accident could not have occurred without negligence. In *Cassidy v Ministry of Health* (7) the plaintiff went into hospital to have treatment for two stiff fingers. On leaving hospital he had four stiff fingers and a useless hand. It was held that this should not have happened if due care had been used and the doctrine applied. Further for *res ipsa loquitur* to apply there must be no evidence of the actual cause of the accident. In *Barkway v South Wales Transport Co. Limited* (8) the plaintiff was travelling as a passenger in the defendant's bus. He was killed when a tyre burst and the bus veered across the road and went over an embankment. It was established that the cause of the accident was a defect in one of the tyres which might have been discovered beforehand. It was held that as the cause of the accident was known *res ipsa loquitur* did not apply. But the defendant's negligence was established on the facts.

In this case the plaintiff relies upon the facts as evidence of negligence on the part of the defendants, their servants and agents that the deceased as an employee could be left underground without any adequate provision. Mr. Twumasi contends that the estate of the deceased is entitled to damages on the basis of *res ipsa loquitur*. He has referred to a statement of Justice Megaw L.J. in *Lloyde v West Midlands Gas Board* (9) which I do not find necessary to recite. He has urged that the mere happening of the accident "speaks for itself" that there was negligence on the part of the mine owners. He has urged that there is proof that the death of the deceased is unexplained; that in the ordinary course of things, the death could not have occurred, save for negligence on the part of the second defendant's servants or agents for not maintaining the ladderway; and that the evidence provides that it is only the fault of the servants and agents of the second defendants which caused the death. For me the issue to decide is whether the defendants were negligent in leaving the deceased underground.

Much as I agree that the circumstances of the death are not very clear, it is apparent that the cause of the accident and death is known. I have already made the point that according to the finding by PW2 the deceased was working underground. He sneaked away from work and went to the shaft station. Unfortunately the cage was not available.

The deceased decided to use the ladderway. On his way to surface he met with an accident. Apparently he slipped and fell into a shaft compartment where there are water and air pipes. He hit himself on the pipes and hung there. PW2 said that the ladder was not in a good state, it was terrible, support timbers were almost falling and, some of the runners or steps were missing. In his report at page 2 of the second defendant's supplemental Bundle of Documents, he indicated that the ladderway was actually hazardous and dangerous to use for travelling, the timber partings separating the ladderway from the skip and cage ways were missing in most places and, flying stones from the skips kept on falling through into the ladderway whenever a skip passed.

The defendants have not challenged the findings by PW2. Apparently the second defendant has remained mute over the state of the ladderway. However, the cause of the accident and the death of the deceased are explained. The postmortem report in the plaintiff's Supplemental Bundle of Documents indicates the cause of death as head injury due to fatal mine accident. The deceased suffered multiple fractures of the skull, left perital bone was missing and some small parts of skull were found separated. From these injuries it is possible that the deceased may have been injured by flying stones. Moreover, from the nature of the injuries suffered by the deceased, it is very likely and highly probable that he died instantly, so the question of being left underground without any adequate provision does not arise. The second defendant as owners of the mine had control of the ladderway where the accident occurred and it is clear that the ladderway was not maintained, there was lack of proper care. However, the plaintiff has not proved that the deceased died because he was left underground without any adequate provision. I conclude that *res ipsa loquitur* does not apply.

Mr. Twumasi has argued in the alternative that there were direct acts and omissions which made the second defendant liable such as the state of the ladderway. He says the ladderway was an escape in case there was anything which disturbed the cage way or it was blocked or disturbed due to some occurrences. He submits that the mine owner was supposed to maintain the ladderway and that miners were supposed to use the ladderway either to go down or to go to the surface if the cage was not operational.

On the other hand State Counsel contends that the plaintiff has not specially pleaded any particulars of negligence as against the second defendant, a further indication that there was no negligence. He has urged that the particulars of negligence as pleaded are more as against the employers of the deceased who have not defended this action.

In my view the particulars of negligence as pleaded in paragraph 4 of the amended statement of claim that the deceased remained underground until he was discovered dead on or about the 27th day of July, 2002 related to the servants and/or agent of the first and second defendants. The particulars of negligence in sub-paragraphs (1) to (4) also related to both defendants. In sub-paragraph (5) in particular, the plaintiff has alleged failure to maintain the ladder or the same being hazardous and dangerous for use. This relates specifically to the second defendant as owners of the mine. Therefore the argument by State Counsel that the plaintiff has not specifically pleaded any particulars of negligence as against the second defendant cannot stand. However, I have already dealt with the argument by the plaintiff that it was the ultimate duty of the second defendant to ensure that only persons who had requisite permission to go underground did so and that since they did not put in place a proper mechanism they were negligent as owners of the mine. I have found the second defendant not liable.

Nonetheless, Mr. Twumasi submits that the failure by the second defendant to maintain the ladder was negligence on their part, their agents and servants and that they are all guilty in negligence. He has referred to the Guide to the Mining Regulations and urged that the second defendant's defence that the deceased was not entitled to be in the mine and that his employers did not authorise him should fail because they engaged the first defendant, and were aware at all times that individuals such as the deceased would be in the mine and they ought to have taken care of all of them and not have defective equipment such as the ladder. He cites *Pannett v McGuineess* (10) which dealt with the liability of an occupier to trespassers. He submits that the second defendant owed a duty to all employees and that the common duty of care required them to take such care as in all circumstances to see that all the workers were safe. He says that their major fault is the non maintenance of the ladderway which led to the deceased's death.

Counsel has also referred to section 123 of the Mines and Minerals Development Act 2008 which provides for strict liability for any harm or damage caused by mining or mineral operations and compensation or any person to whom the harm or damage is caused. But he acknowledges that the Act may not apply strictly to this case. The simple reason is that the accident occurred well before the enactment of the Act.

As I have said State Counsel accepts that the fact that the relationship between the second and first defendants was that of owner and independent contractor would place the former in a position where it would owe a duty of care to any such worker legitimately in such place, but this duty does not extend to persons taken into such places in contravention of mining norms or in a fraudulent manner. He contends further that any duty of care which could have ordinarily been exercisable by a person in authority over the deceased was negated or ended when the deceased left the work area and went on a frolic as stated by PW2 in his viva voce evidence and in his report.

From the introduction to the Guide to the Mining Regulations, it is clear that the booklet has been prepared for the general guidance of officials and employees in the Copper Mining Industry of Zambia by amalgamating the Mining Regulations 1971 (SI No. 107 of 1971) with the Mining (Amended) Regulations 1973 (SI No. 95 of 1973). Regulations 806, 808 and 811 referred to me by Mr. Twumasi read as follows:

“806. There shall be provided a sufficient number of ladderways and travelling ways permanently maintained and kept free from obstruction to enable every person to leave every part of a mine:

Provided that this regulation shall not apply to a ladderway which is temporarily out of use for the purpose of repair but proper precautions shall be taken for the safety of every person underground at that time.

808. Every ladder used in ladderways shall:

- (a) be securely fastened in position;
- (b) be of good construction, free from patent defect and of adequate strength for the purpose for which it is used;
- (c) Be maintained in good repair
- (d) Not be fixed in an overhanging position
- (e) Project at least one metre above the mouth of every shaft, winze, or other excavation and above every landing place in which it is installed except when strong hand rails are fixed at such mouth or landing place; and
- (f) Have a level and firm footing

811. (1) No person shall carry or cause another to carry any drill, tool or any loose material on any ladderway which may interfere with his safe passage excepts so far as may be necessary in executing repairs.

(2) Any person carrying an object in a ladderway shall ensure that such object is carried in such a manner that it cannot be reasonably expected to drop down the ladderway.”

I have already said that the defendants have not challenged the findings by PW2 over the state of the ladderway. I have also said that the employer must take reasonable care to provide safe premises and plant for his workers and that the provision of defective equipment will constitute breach of this duty. There is also a duty not merely to provide the equipment, but also to maintain it [*Wilson & Clyde Coal Co. Ltd v English* (1)]. I have referred to the common duty of care for all the visitors which is a duty to take such care as in all circumstances of the case will be reasonably necessary for the purpose for which the visitor has entered the premises and that these include persons permitted by the occupier to enter the premises and persons who enter by implied terms. I have no doubt that the first defendant had a non-delegable duty to provide safe plant and equipment or that the second defendant as occupier had the statutory duty to provide and to maintain the ladderway. However, although the employer's duty is personal and cannot be discharged by entrusting it to a competent delegate, fault must still be proved for negligence liability to be imposed [*Richardson v Stephenson Clarke Ltd* (11)]. In this case I can safely say that the defendants were at fault for failing to maintain the ladderway, the deceased was injured and he died.

For me the question is whether the defendants as employer and occupier are absolved of liability to the deceased in respect of harm suffered whilst he was using the ladderway to surface by applying the defence of *ex turpi causa*. State Counsel says common law generally extends liability on a defendant when the cause of injury to a plaintiff is attributable to the plaintiff's own negligent conduct, that is, plaintiff the wrong doer. He says the maxim applies here. He has cited from Clerk and Lindsell on Torts, 9th Edition at page 170 where he says it is stated:

“Where it is found that the sole effective cause of the relevant damage is the claimant's own conduct, he recovers nothing because he fails to establish causation.”

He has also relied on *Vellino v Chief Constable of the Greater Manchester Police* (12) where he says it was held as follows:

“To suggest that the police owe a criminal the duty to prevent the criminal from escaping and that the criminal who hurts himself while escaping can sue the police for breach of that duty, seems to me self-evidently absurd...”

State Counsel contends that the deceased met his death as a result of doing an unlawful or wrongful act as confirmed by PW2’s report; that he was sneaking away from the work place and wanted to go to surface without approval or permission of any of his supervisors. He has also cited a text from Charlesworth and Percy on Negligence, 11th Edition at page 233 which he says illustrates instances where the defence of “plaintiff the wrongdoer” has succeeded. It reads:

“Where a worker employed in repairing a house which he knew to be damaged by a blast, was injured by a collapse of a floor, where scaffolding was moved, contrary to the foreman’s explicit orders, while the claimant purposely remained on top of the platform for the ride along, where a claimant purposely struck an expected shell with sledge hammer although he had recognised what it was...”

From my understanding the maxim *ex turpi causa non oritur action* simply means that the courts will not assist a plaintiff who has been guilty of illegal conduct. *Ex turpi causa* is also known as the “illegality defence”, since a defendant may plead that even though, for instance, he broke a contract, conducted himself negligently or broke an equitable duty, nevertheless a claimant by reason of his own illegality cannot sue. The learned author of *Street on Torts*, 12th Edition Oxford University Press 2007 illustrates at page 314 that the best that can be offered by way of a description of this defence is this:

“Where C seeks to assert a claim in tort against D, D may have a defence against C if either (i) C’s claim arises out of, or is closely connected with a criminal or flagrantly immoral act on C’s part, or (ii) D’s tort arises out of the self-same wrongdoing on C’s part.”

Of course, in *Vellino v Chief Constable of Greater Manchester Police* (12) cited by State Counsel, the claimant attempted to escape from police custody by jumping from a window of his second floor flat. As a result of the fall he suffered brain damage and tetraplegia and claimed negligence on the part of the arresting officers, alleging that they had stood idly by and let him jump.

The Court of Appeal held that the maxim *ex turpi causa non oritur action* made the claim untenable because the defendant had to rely on his own criminal conduct in escaping lawful custody to found his claim. In *Pitts v Hunt* (13), on their way back from a disco at which they had both consumed large amounts of alcohol, the plaintiff encouraged the defendant to drive his motorbike in a reckless and dangerous fashion. The defendant was killed and the plaintiff, who was a pillion passenger, was badly injured. It was held that the defendant's own criminal and disgraceful conduct gave rise to a successful defence of the *ex turpi causa*. In *Clunis v Camden and Islington Health Authority* (14) the plaintiff who had a history of mental illness, killed a stranger in a violent attack after he had been discharged into the care of the defendant. He claimed that they were negligent in failing to treat him with reasonable care and skill. In holding that *ex turpi causa* applied, the Court of Appeal said a plaintiff who had been convicted of a serious offence could not, on the ground of public policy, sue a health authority in negligence in failing to treat him properly, thereby preventing him from committing the offence.

Furthermore, in *Hewison v Meridian Shipping Services Pte Ltd* (15) Mr. Hewison had epilepsy and needed anti-convulsant drugs. He concealed his illness so that he could do offshore work with the employer, as a crane operator. The employer was responsible for a workplace accident, contrary to Employer's Liability (Defective Equipment) Act 1969, whereby he was struck in the head by a gangway. He started to suffer from seizures even on medication. He was dismissed and he could get no further work at sea. He submitted that despite his failure to declare his illness, which it was conceded, amounted to obtaining a pecuniary advantage by deception contrary to s. 6 of the Theft Act 1968, it would be an affront to public conscience, were he denied a remedy for the employer's negligence and breach of statutory duty. He argued that without the accident his epilepsy would not have been heightened, he would have remained at sea and would not have suffered a considerable loss of future earnings. It was common ground that the case was not strictly one involving *ex turpi causa*, because Mr. Hewison did not have to rely upon his illegal act in order to prove the essential elements of negligence. The defendant undoubtedly owed him a duty of care, it had breached that duty and he had suffered damage as a result.

But in relation to his claim for loss of future earnings, future board and lodging and loss of congenial employment, he did have to rely upon the fact that he would have perpetuated his illegal act so as to continue to be employed by the defendant in the future. The Court of Appeal examined whether the issue of public policy prevented a claimant from recovering damages when the claim was based on an unlawful act and held that the test was one of degree: is the claim, or the relevant part of it, based substantially, not merely or insignificantly, upon the unlawful act? Tuckey LJ and Clarke LJ held that he could recover no damages for future loss of earnings. The principle from *Clunis v Camden and Islington Health Authority* (14) applied, so that a claimant cannot rely on an unlawful act to enable recovery in tort. Though a claim itself is not barred, loss attributable to an illegal act is. His offence under the Theft Act was an essential part of his future employment at sea. It was added that the court would not deny restitution if the illegality was collateral or insignificant, but it rejected the notion that recovery should be allowed merely because denial might affront "public conscience"

In the present case also the question is whether the plaintiff's claim or the relevant part of it is based substantially and not therefore collaterally or insignificantly on an unlawful act. There is unchallenged evidence by PW2, an independent expert witness who conducted an investigation following the death of the deceased that the latter's employment with the first defendant was coloured with fraud. In addition he sneaked away from work at the beginning of the shift. It is not clear why he sneaked away. PW1 has accepted that this was a serious offence. It is accepted that the deceased met his fate while doing a wrongful act at work. Admittedly the decision to go the ladderway was the deceased's own. Quite clearly the first defendant had a personal duty to provide safe premises and plant for employees and there was failure by the second defendant to maintain the ladderway as provided in regulation 808. But according to PW2 the ladderway was rarely used. On the whole of the matter, I am persuaded that the plaintiff can recover no damages because of the fraud or deceit or illegality in the manner the deceased was employed by Mr. Manda. I am convinced that the plaintiff's claim or the relevant part of it is based substantially on an unlawful act on the part of the deceased which was not collateral.

Even if I agreed with Mr. Twumasi's argument that the sole effective cause of the death of the deceased was not his own conduct of sneaking away from his job or his decision to use the ladderway to surface, the deceased cannot benefit from his unlawful conduct and the illegality of his employment with the first defendant. The deceased should not have been in the first defendant's employment in the first place. The right person who applied for the job and attended training was Stanslous Kapya. The defendants were not aware of the deceased. He was not allowed to be underground by the second defendant and they did not owe him a duty of care. Moreover, he sneaked away from work and was on a frolic when he met his death. In my view *Hewison v Meridian Shipping Services Pte Ltd* (15) applies to this case. So does *ex turpi causa*. It follows that the defendants are not liable in negligence to the deceased's estate.

As submitted by State Counsel when the claim fails in negligence, the claim under the Fatal Accidents Act 1846 to 1959 and the Law Reform (Miscellaneous Provisions) Act 1934 must also fail. State Counsel also contends that the plaintiff who is the personal representative of the deceased did not produce letters of administration in order that a determination can be made as to compliance with section 3(b) of the Law Reform (Miscellaneous Provisions) Act which requires any action proceeding for the benefit of a deceased estate to be commenced within six months of letters of administration being obtained. I agree that the plaintiff did not produce letters of administration. But it is not disputed that he is the administrator of the estate of Patson Kapya who died on 15th July, 2002. The action was commenced on 31st December, 2002, five months after the death of the deceased. It is clear to me that section 3(b) of the Act was complied with. However, I conclude that the plaintiff is not entitled to damages as claimed and I dismiss all of the plaintiff's claims. On the facts of this case each party shall bear own costs.

Delivered in Open Court at Kitwe this 24th day of April, 2013

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R.M.C. Kaoma

JUDGE