IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

2015/HP/0010

BETWEEN:

PATSON SAKALA **PLAINTIFF**

AND

HEINRICH'S SYNDICATE LTD **1ST DEFENDANT**
HEINRICH'S BEVERAGE **2ND DEFENDANT**

BEFORE THE HONORABLE MRS. JUSTICE P. C. M. NGULUBE IN CHAMBERS

FOR THE PLAINTIFF : **Ms Mwansa, Messrs EBM Chambers**

FOR THE DEFENDANT : **Mr Tembo, Messrs Tembo Ngulube and Associates**

J U D G M E N T

Cases cited

1. **Bradford v Robinson Rentals Limited (1967) 1 ALL ER 267**
2. **Kalunga (suing Administratrix of the estate of the late Emmanuel Bwalya) v Konkola Copper Mines (2004) Z.R. 40**
3. **O'Hill v Kayel Shipping [1980] PNGLR 361**
4. **Brady (Inspector of Taxes) v Group Lotus Car Cos plc and another [1987] 2 ALL ER 692**
5. **Wilsons and Clyde Coal Co Ltd v English [1938] AC, 110**
6. **Wilson v Tyneside Window Cleaning Co [1958]2 QB 110 @124**
7. **K.B. Davies and Company (Zambia) Limited v Musunu Appeal number 181 of 2006**

Legislation cited

1. **The Factories Act, Chapter 441 of the Laws OF Zambia**

Other Materials referred to:

1. **Halsbury's Laws of England, 4th Edition**
2. **Mark Lunney, Ken Oliphant, Tort Law, Texts and Materials, 2nd Edition**

The Plaintiff commenced this matter by way of Writ of Summons claiming the following reliefs;

1. Compensation for personal injuries suffered as a result of an accident.
2. Damages for consequential loss suffered as a result of the discharge from employment.
3. Any relief the Court may deem fit.
4. Interest
5. Costs

In the accompanying Statement of Claim, the Plaintiff averred that on 12th October, 2012 while he was in the employ of the Defendant Companies as a machine operator, he experienced a fault with one of the grinding machines. On checking the machine, he discovered that the machine had been blocked by a mesh. He thus proceeded to switch off the grinding machine so as to fix it.

That as he was fixing the machine, the machine rota started running, as a result, his right hand which was inside the machine sustained injuries and four of his fingers were amputated.

The Plaintiff alleged that the Machine was switched on by one of the Defendants' employees who he could not identify as the switch for the machine was almost three metres away. As a consequence of the accident, the Plaintiff

suffered fifty percent disability as per medical reports dated 5th December, 2012 and 21st November, 2013. Further that despite the accident not being attributed to the fault of the Plaintiff, he was discharged from work on medical grounds.

The Plaintiff thus pleaded that it was wrong and unjust for the Defendant Companies to refuse and/or neglect to compensate him with respect to injuries sustained during the course of his employment and while on duty, more so that the accident was caused by one of the employees of the Defendant Company.

By way of defence, the Defendants denied the Plaintiff's allegations and averred that the Plaintiff attempted to work on the machine while it was still running which action was contrary to the Defendant's safety rules displayed both at the main switch as well as on the granulator machines. According to its safety precautions known to the Plaintiff, no repairs were to be carried out on the granulators unless the main insulator (MCB) was switched off. That no one was to open the granulator housing without switching off the main supply.

That there were safety precautions pertaining to the switching off and on of the grinding machines which were displayed above the switch to avoid accidents. The safety precautions were itemised as follows;

1. all circuit breakers are numbered[switch them off]

2. disconnect welding sockets

3. all emergency/unit switch are on the machine body [press them/release].

The Defendants averred that the only reasonable inference to be drawn is that the Plaintiff did not switch off the machine and that the accident was caused by the Plaintiff's own negligence.

Further that the Defendant Companies contribute to Workmen's Compensation Fund to ensure its employees were paid for injuries sustained during working hours and that the Plaintiff was in receipt of such compensation from the Workmen's Compensation Fund Control Board. That there was no further duty on the Defendant to compensate the Plaintiff.

At trial, the Plaintiff gave evidence on oath by stating that he had worked for the Defendant Companies for 4 years. On the day of 12th October, 2012 at 08 45 hours, while working on a machine, it developed a fault in that the sieve got blocked. Upon reporting the fault to his supervisor, the Plaintiff was advised to fix the machine.

That he first switched off the main switch of the machine which was about four metres away, and then proceeded to dismantle the machine by removing the sieve. That it took him forty- five minutes to fix the sieve and upon successfully fixing it, he proceeded to mount it back on the machine. That as he was mounting the sieve, the machine started running and as a result, it cut off four of his fingers.

The Plaintiff testified that his supervisor issued an accident report in respect of the incident and it indicated that the machine was totally off when the Plaintiff was working on it but had been tampered with.

As per medical report produced in the Plaintiff's Bundle of Documents, the Plaintiff lost four fingers on his right hand. The Plaintiff referred to the Permanent Disability Report and the Report from the Medical Board which indicated that the Plaintiff was unable to carry on with the usual work. That thus his employment was terminated on medical grounds.

The Plaintiff stated that he received K3, 000 from the Company as terminal benefits and K2, 700 from AON Pension Scheme. He complained that Workers Compensation Fund only paid him a monthly amount of K137 which was not

enough for his family's livelihood and that he was unable to work due to his disability.

Under Cross Examination, the Plaintiff averred that he was entitled to receive payment from Workers Compensation Fund for life. That his disability had been caused by the Defendant's machine while working with a Moses Phiri and Bernard Chikwete. He admitted not knowing who switched on the machine because he had his back towards the switches.

The Plaintiff maintained that he followed the safety instructions by switching off the grinding machine at the main switch and that the machine did not have a start button.

In Re-examination, the Plaintiff stated that when he started working on the machine, it was off. That it was not possible for the machine to run on its own and someone must have switched it on.

At the close of the Plaintiff's case, the Defendants moved the Court to the site of the accident, a recycling plant belonging to the Defendants and one witness was examined on site. Edwin Nyambe, the Protection Supervisor in the Defendant company testified that the plant was used for recycling "used maheu bottles". The recycling process included grinding the used bottles to produce new material.

He stated that the plant had safety instructions which included wearing of protective clothing as well as guidelines. That the grinding machines used in the plant had three points of switching on and off. The first point was the main circuit breaker (MCB), thereafter, isolation of power cable from the main socket and finally the emergency unit switch on the machine. That the three switching points were essential in preventing injury as well as ensuring safety of the machine. The said safety instructions were inscribed on the grinding machines and on the walls of the plant.

The witness demonstrated the switching off and on of the grinding machine and maintained that the grinding machine only ran upon switching on all the three points.

He stated that on the material day, the Plaintiff worked on machine number 9 which had since been dismantled and was in the process of being removed from the plant. It thus had no power cable nor the emergency switch button. The witness just indicated where the switch and the sieve of the machine were supposed to be located had the machine been functional.

The witness stated that in any given shift, the plant would have three employees and on that particular day, the Plaintiff was working on the grinding machine with one other employee. Further that had the Plaintiff followed the safety guidelines, he would not have suffered injury and that the Defendant Companies was not to blame.

Under Cross Examination, the witness demonstrated the position that the Plaintiff could have assumed when working on the grinding machine on that day. He stated that it was not possible for one to work on the machine while it was running. He admitted that Machine number 9 was not in the state that it was on the day of the incident but maintained that the procedure on switching on and off was standard.

Further that the Defendant Companies provided protective gloves to their employees.

Final written submissions were filed by the Plaintiff , where he contended that according to **Bradford v Robinson Rentals Limited (1967) 1 ALL ER 267**, the Defendant had a duty to provide safe working premises, competent fellow employees and a safe system of work. That failure to ensure such precautions makes an employer amenable and liable in negligence. That the Defendants breached their common law duty when they did not ensure that no other

employees would cause injury to the Plaintiff by turning on the machine while the Plaintiff was working on it.

Relying on **Kalunga (suing Administratrix of the estate of the late Emmanuel Bwalya) v Konkola Copper Mines (2004) Z.R. 40**, it was submitted that the defence of volenti non fit injuria was not available to the Defendant.

Further relying on the case of **O'Hill v Kayel Shipping [1980] PNGLR 361** and **section 10 (1) of the Law Reform (Miscellaneous Provisions) Act Chapter 74 of the Laws of Zambia**, it was submitted that to successfully plead the defence of contributory negligence, the employer had the onus of satisfying the Court that the employee was negligent in the sense that he acted in a manner so unreasonable as to put himself in the domain of the injury which was foreseeable to him and actually suffered.

The Plaintiff submitted in sum that the facts presented a case of breach of common law duty to provide a safe system of work and that the Plaintiff had proved his case on a balance of probabilities.

In response, the Defendant submitted that there were set parameters in the common law duty of care and that to be successful, the Plaintiff must prove on a balance of probabilities, that the breach of duty caused, or materially contributed to, his injury.

It was contended that the Plaintiff did not adhere to the safety precautions set by the employers and therefore, the accident was caused by his own negligence.

Relying on **Brady (Inspector of Taxes) v Group Lotus Car Cos plc and another [1987] 2 ALL ER 692**, it was submitted that the Plaintiff lamentably failed to discharge the burden of proof in relation to the allegations that the emergency button was placed after the accident happened and that some "mystical person" must have switched on the Grinding Machine.

Further that the Defendants had no further duty to compensate the Plaintiff as the Plaintiff was receiving compensation from the compensation Fund Control Board.

I have carefully considered the pleadings, the evidence and the submissions made by both parties. The undisputed facts are that the Plaintiff 's four fingers were severed by the granulator machine in the Defendants' plant as he was repairing the machine. The dispute however lies in whether the accident was caused by the negligence of the Defendants, in that, as contended by the Plaintiff, an unknown employee switched on the machine while the Plaintiff was working on the machine. The Plaintiff alleges that the Defendants did not provide a safe working environment for him by ensuring that no other employee would switch on the machine while he was working on it on that particular day. The Defendants on the other hand contend that the Plaintiff had not adhered to the precautionary measures put in place to prevent such accidents and that had he followed the said precautionary measures, he would not have been injured.

At common law, an Employer has a duty of care towards his employees. This common law duty is equally incorporated in statute law. Such as **section 37 of the Factories Act**, which stipulates that every place of work shall so far as is reasonably practicable be kept safe.

The **Learned Authors of the Halsbury's Laws** have stated the extent of an Employer's duty as follows;

"It is the duty of every employer to ensure, so far as reasonably practicable, the health, safety and welfare at work of his employees."

In the case of **Wilsons and Clyde Coal Co Ltd v English [1938] AC, 110**, Lord Wright stated the employer's duty as being,

"threefold, the provision of a competent staff of men, adequate material and a proper system and effective supervision."

In the latter case of **Wilson v Tyneside Window Cleaning Co [1958]2 QB 110 @124**, Parker LJ restated it simply as follows,

"it is no doubt convenient when one is dealing with any particular case, to divide that duty into a number of categories; but for myself I prefer to consider the master's duty as one applicable in all circumstances, namely, to take reasonable care for the safety of his men."

When an employer fails to uphold this duty of care and failure results in the injury to an employee, liability for such injuries falls squarely on the Employer. The Learned Authors of Tort Law, Text and Materials have stated that,

"Employer's liability is not strict, it requires fault on the part of some person, whether the employer personally or the delegate engaged to do the task in question. Accordingly, liability cannot arise if both the employer and the delegate take all reasonable care."

The Supreme Court of Zambia has given guidance on how to approach matters of this nature in **Betty Kalunga (suing as Administrator of the Estate of the late Emmanuel Bwalya v Konkola Copper Mines Plc (2004) Z.R. 40 (S.C.)** by stating that-

"At the end of the day, the Court must send a signal to the employers to ensure safe working conditions to employees. We make these remarks against the background that there is no hard and fast rule which has been laid down. In such circumstances, each case must be taken and looked at individually."

With this aid of the law, for the Plaintiff's claim to succeed, I must satisfy myself that there was fault on the part of the Defendants which resulted in the accident. The Plaintiff's evidence was that he switched off the machine at the Main Circuit Breaker as the particular machine did not have other switches. This was in direct contravention of the laid down instructions. The Instructions required the Plaintiff to switch off the Machine at three points, that is, at the

Main Circuit Breaker, isolating the cable from the main socket and switching off the emergency button on the machine itself. The Plaintiff alleged that the particular machine did not have an emergency button and therefore he only switched it off at the main circuit breaker.

He equally made no mention of isolating the particular cable of the machine from the main socket. Thus, apart from merely asserting that the machine did not have the emergency button, the Plaintiff did not provide any evidence to substantiate the allegation. I find it difficult to accept that the machine could only be switched off at the main circuit breaker in the face of there being no evidence to prove this fact. I am so guided by **K.B. Davies and Company (Zambia) Limited v Musunu Appeal number 181 of 2006** , the Supreme Court stated as follows;

> ***"Where there is a lacuna in the evidence, the trite position of the law is that the lacuna should be resolved in favour of the party who is not responsible for that lacuna and in this case, it is the defendant."***

Even if the Plaintiff's assertion is accepted, it is apparent from the evidence that the Plaintiff did not isolate the cable of the particular machine when he switched it off at the main which also indicates his disregard of the safety Instructions.

Having had the occasion to view the operations of the Granulator Machines when the Court was moved to site, it was clearly established that unless all the three switches were on, the machine would not run. I thus find that while the Plaintiff switched off the Machine at the Main Circuit Breaker, he did not isolate the power cable of the machine nor switch off the emergency button.

Notwithstanding, it was an accepted fact that at the time that the Plaintiff started repairing the machine, it was off and further that for the Machine to run, it had to be switched on. It is clear that it would not have been the

Plaintiff as he was positioned 3 metres away from the Main Circuit Breaker. The Accident Reports produced in both the Plaintiff's and the Defendants' bundles indicate that the findings revealed that an unknown employee had switched on the machine while the Plaintiff was trying to fix the sieve.

This in my view does not aid the Plaintiff's case for the simple reason that had the machine been switched off at all the three points, the intervening act of an unknown employee of switching on the machine at one point would not have resulted in the machine running. The Plaintiff appears to be at the centre of his misfortune by his failure to follow the laid down guidelines of switching off the machine at all the three points.

Therefore, on the totality of the evidence, I do not see any fault on the part of the Defendants nor that the Defendants failed to uphold their duty of care towards the Plaintiff which ultimately resulted in the accident.

Based on the foregoing, the Plaintiff's case fails and costs to the Defendants to be taxed in default of agreement.

Dated this 7th June, 2016

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P. C. M. NGULUBE
HIGH COURT JUDGE