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IN THE HIGH COURT FOR ZAMBIA **2008/HP/943**
AT THE PRINCIPLE REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction**)**

BETWEEN:

JABES SIKAONGA **PLAINTIFF**

AND

KINGS PLASTICS LIMITED **DEFENDANT**

Before the Hon. Mrs. Justice A.M. Banda – Bobo on 7th day of April, 2016

FOR THE APPLICANT Mr. W.S. Kankondo with C. Muhango, Simeza Sangwa and Associates on behalf of Legal Resources Chambers, Lusaka

FOR THE DEFENDANT Mrs. M. Marabesa, Christopher Russell Cook & Co., Lusaka.

JUDGMENT

Cases used:

1. Zambia Railways Limited vs. Pauline S Mundia, Brian Sialumba [2008] ZR1 287.
2. Donoghue vs. Stevenson [1932] AC 562
3. General Cleaning Contractors Ltd vs. Christmas [1952] 2 All ER 1110
4. Wilsons and Clyde Coal Co Ltd vs. English [1937] 3 ALL ER 628 at 640
5. Grill vs. General Iron Screw Collier Co [1886] LR 1 CP 600, 612
6. Attorney General vs. Mpundu [1984] ZR 6
7. Cobbett-Tribe vs. The Zambia Publishing Company Ltd [1973] ZR 9
8. Industrial Gases Ltd vs. Waraf Transport Ltd and Mussah Mogeehaid [1997] ZR 6
9. Heaven vs. Pender [1883] 11 Q.B.D. 503

10. Grant vs. Australian Knitting Mills Ltd [1936] A.C. 85
11. Blyth vs. Birmingham Waterworks Co [1856] 11 Exch 781
12. Hall vs. Brooklands Auto Racing Club [1933] 1 KB 205
13. Frederick Kapalu vs. GBM Milling Ltd 2010/HP/391(unreported)
14. Gray vs. Stead [1992] 2 Lloyd's Rep 559
15. Osborne vs. L. and N. W. Railway [1888] 21 G.B. 2200.
16. Betty Kalunga (Suing as Administrator of The Estate of The Late Emmanuel Bwalya) vs. Konkola Copper Mines Plc [2004] Z.R. 40 (S.C.)
17. Perestrello e Companhia Ltda vs. United Paint Co Ltd [1969] 1 W.R.L 570 at 579

Legislation and other authorities used:

- Charlesworth on Negligence 4th edition, London, Sweet & Maxwell
- Workers Compensation Act No. of 1999
- Kemp & Kemp: The Quantum of Damages in personal Injury and Fatal Accidents Claims Vol.1, at p.1002.
- Murphy on Evidence 5th edition(1995) Universal Law Publishing

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The delay in the delivering of this judgment is deeply regretted.

By writ of summons supported by a statement of claim the plaintiff sought the following reliefs:

a) damages for permanent disfigurement/deformity, injuries and loss of four fingers

b) damages for pain and suffering

c) damages for mental distress, inconvenience and psychological injuries

d) aggravated damages as pleaded

e) special damages as pleaded above

f) interest

g) costs

h) any other relief the Court may deem fit

In his statement of claim the plaintiff claimed the following:

On or about 7th January 2008 the plaintiff was working in the defendant's factory as a Sorter when the night superintendent a Mr. Maqsued ordered him to unblock a blocked grinding machine. The plaintiff refused to unblock the machine and told the night superintendent that it was not the plaintiff's specialty to unblock the machine since he was a new employee. The night superintendent then forced the plaintiff to unblock the machine and threatened to dismiss him if he disobeyed the orders. He thereafter activated the machine while the plaintiff was cleaning the same.

As the plaintiff was forced to unblock the machine which he had never operated before, part of his left hand was severed by the machine. The defendant has since failed, refused and or neglected to compensate the plaintiff and refused to refer the matter to the Workers' Compensation Authority. As a result of the accident the plaintiff sustained injuries, pain, loss and damage.

Particulars of Injuries

1. Amputation of 3 fingers
2. Amputation of little finger

Particulars of Negligence

a) Forcing the plaintiff to operate a machine which he had never operated before.
b) Failing to take proper control of the machine so as to avoid an accident since the plaintiff was operating the machine for the first time.

That further, the plaintiff would, in the present case, rely on the following facts and conduct of the second defendant in his claim for aggravated damages:

i. the plaintiff is a young man aged 20 years and he has lost the effective use of his left hand.
ii. Refusing to sign papers so as to refer the matter to the Workers' Compensation Authority.
iii. Forcing the plaintiff to operate a dangerous machine for the first time without supervision.

Particulars of Special Damages

1. Cost of medicines
2. Transport to and from Hospital
3. Telephone Bills

In its defence, the defendant naturally denied all of the plaintiff's claims.

Both parties called witnesses in aid of their respective cases.

PW1 was Jabes Sikaonga 25, the plaintiff herein.

He testified that on 7 January 2008 while performing his duties as a sorter which included sorting plastic bags and containers upon their manufacture he was forced to unblock the defendant's grinding machine. He explained that he told the supervisor a Mr. Maqsud that he was ill qualified and new in the system and as such was not in a position to perform the exercise he was being ordered to perform. The witness testified that the supervisor threatened

him with dismissal if he did not comply with the order upon which PW1, even though this was not his job, was compelled to unblock the grinder for fear of losing his employment.

It would appear that the machine was switched off but a little after the witness commenced the operation to unblock the grinding machine and before he could finish, the supervisor without warning turned the grinding machine on again, leading to the severing of four fingers on the plaintiff's left hand. This caused him great pain. Upon realising that the plaintiff was injured, the supervisor switched off the machine and arranged for the plaintiff to seek emergency medical attention.

Continuing, the plaintiff told the court that he received no assistance during the subsistence of his treatment and that all the bills were taken care of by his family. The defendant in fact accused the plaintiff of being negligent.

The medical report issued showed that he had suffered 30 percent injury to his hand. He denied ever switching on the grinding machine and insisted that the aforementioned supervisor did. That in fact the said supervisor did not supervise him while he cleaned the machine in question.

Asked about the effect that the injury has had on his life, the plaintiff testified that he is restricted in the kind of work he can perform. He explained that he had not received any form of compensation from anyone including the Workers Compensation

Board as the defendant refused to report the injury to the Workers' Compensation Board.

The plaintiff prayed that the Court orders the defendant to compensate him for his injuries.

Under cross examination, the plaintiff repeated the description of his work routine but also added that at the time of the accident subject of these proceedings, he had only been employed for 4 months and was a casual worker. His version of what led to his fingers being severed was consistent with the one he had earlier given during examination in chief. He explained that before he started cleaning the machine, he switched it off and that the cleaning took some 30 minutes. That however, the supervisor who had left returned and without warning, switched the machine on even as the plaintiff's hands were in the machine. He told the Court that he was not aware that the machine had been blocked before and that he was picked from a group of Sorters to perform this task.

He repeated that his fellow work colleagues took him to the hospital because they were instructed to do so but that none of his superiors accompanied him. Asked about the date of issuance of the report the plaintiff said that though ideally the medical report should have been issued in January, it was issued sometime in March on one of his many review appointments with the doctor.

Asked about compensation, the plaintiff insisted that the accident had not been reported by his employers to the Workers' Compensation Board. While agreeing that he would do anything to

keep his job, he scoffed at the assertion that he could switch on the machine while his fingers were inside the same machine. He repeated that the supervisor switched on the machine leading to his injuries.

In re-examination the plaintiff explained that the incident happened around about 05:00 hours. That he switched the machine in question off; that his medical expenses were paid for by his family; that the defendant refused to compensate the plaintiff; that the injuries have made it difficult for him to work. Further, that prior to the injury he had hoped to pursue a course in mechanics. He clarified that his sole job was that of a Sorter. Asked about the size of the machine he said the same was not humongous with buttons on one side. On the material day, the witness reiterated, he worked on the other side of the said machine presumably where the buttons were not.

That was the plaintiff's case.

DW1 was Maqsud Kargul 35 supervisor at the defendant's plastic factory who testified that on the material day at about 05:30 hours, he was seated at his desk within the factory when he noticed the plaintiff running behind the factory which prompted DW1 to run after the plaintiff to find out what was happening upon which he realised that the plaintiff had had his fingers cut.

He explained that he could not observe anything from where he was standing. Further, that there were 9 workers and a total of 25 machines of which 7 were operational on the night in question.

According to the witness, the plaintiff said nothing when asked about what had happened.

DW1 explained that the machine in question was mounted against the wall and that the machine is operated from the front. The switch of the machine, it was said, was right in front of the machine. On the material day it would appear, the machine in question was not operational. He said the machine was not blocked and nobody was using it. He denied having given the plaintiff any instructions to unblock the machine. It was explained that the plaintiff had worked for the defendant as a general worker for 6 months before the accident.

Under cross-examination, DW1 repeated that he was employed by the defendant as a supervisor and that on the night in question, he was supervising 9 or so workers. The supervision according to the witness involved walking around the factory to ensure that both the workers and the machines were working properly. However, he agreed that he did not do the walking routine all the time.

Asked about how he communicated with his subordinates since he did not speak Nyanja he said the same was done through his assistant through whom he would relay instructions.

Regarding the state of the machine on the day in question the witness testified that the same was operational but off and that he did not give the plaintiff any instructions on the material day to do anything. According to him, there was no need to give instructions

as the work was shared between those in day and those in night shift.

DW1 confirmed that the plaintiff was employed as a Sorter by the defendant. He said he was surprised that the plaintiff went to operate a machine he was ill qualified to operate and that he came running towards him with an injured hand. That he was alone at the time of the accident. When referred to the letter on record dated 7 June 2008 he said he had not seen the same nor was he aware of the reply that was given by the defendants to the plaintiff's lawyers. He expressed ignorance about the letter saying that the plaintiff was cleaning at the time of the injury in question.

He conceded that he had not told the directors when asked that the plaintiff had suffered the injuries in question while cleaning the machine. That the same was not possible as he was nowhere near the machine but the door and so could not have perceived what had occurred.

Going on, DW1 insisted that the plaintiff was negligent as he ought not to have been cleaning the machine in question. He said this was so because he never gave the plaintiff instructions to clean the machine. Additionally, that he never communicated with the plaintiff or the other workers as he remained seated throughout the shift. While saying that workers that attempted to or performed duties they were not assigned were reprimanded, he conceded that the plaintiff was not because he never returned to work after the injury.

As to whether the injury was reported to Worker's compensation, the witness replied that he was ignorant regarding this.

In re-examination, the witness explained that the defendant became aware of the injury to the defendant after a report was made by a witness and another woman he could not mention by name.

DW2 was Amit Vyas, 48 who mentioned that he helped in ferrying the plaintiff to the University Teaching Hospital after he had been asked to do so by DW1. Further, that the Doctor in charge explained that the severed fingers could not be put back. He further told the Court of how he left some money with a colleague of the plaintiff who was taking care of him. Finally, that he had not known the plaintiff before the accident in question on the material day.

Under cross examination, DW2 reiterated that the plaintiff was bleeding and in pain on the material night and after the accident. While stating that the defendant had given him money for purposes of taking care of the plaintiff, he could not tell the Court how much this was nor could he say whether the same was sufficient for the purpose.

In re-examination the witness seemed to imply that the defendant did not actually give the plaintiff any money but reimbursed him for the money he had given the plaintiff in the wake of the accident.

The plaintiff's lawyers filed written submissions. There were no submissions from the defendant's counsel.

Plaintiff's counsel submitted that the issue falling for determination by this Court was whether the injuries sustained by the plaintiff were as a result of the defendant's negligence. As counsel saw it, the law relating to this issue was predicated on several themes namely, the essential elements required to prove negligence; existence of the duty of care; breach of duty; resulting damage; reliefs claimed; general damages; loss of amenities; special damages; aggravated damages; and vicarious liability. He discussed the themes in turn.

Beginning with the essential elements required to prove negligence counsel drew my attention to several well known authorities among them **Zambia Railways Limited vs. Pauline S Mundia, Brian Sialumba**[1].

Turning to the existence of the duty of care, counsel referred to the celebrated case of **Donoghue vs. Stevenson**[2] and based on it, submitted that the defendant as employer of the plaintiff was under a duty of care to provide for the safety of the plaintiff and to take reasonable care to avoid acts or omissions which could be foreseen to likely expose the plaintiff to unnecessary risk. This was further augmented by reference to **Charlesworth on Negligence 4th edition, London, Sweet & Maxwell at page 858.** Quoting the holding in **General Cleaning Contractors Ltd vs. Christmas**[3], it was argued that since the plaintiff was employed as a Sorter and worker in the defendant's factory with eight other employees, the defendant was expected to instruct the plaintiff on what must be

done in the execution of his duties and what steps needed to be undertaken in order to avoid accidents. This argument was augmented by reference to the holding in **Wilsons and Clyde Coal Co Ltd vs. English**[4]. According to counsel, the defendant was in breach of the duty to provide a safe system of work and render effective supervision. Counsel contended that given the foregoing, the defendant was liable to the plaintiff for the injuries caused.

Further, that the fact that the plaintiff who was a grade 12 school-leaver and an unskilled casual worker, to whom the knowledge of using a grinding machine cannot be imputed was instructed to undertake work with a dangerous machine imposed a higher standard of care in the defendant both in the layout of the work, and the steps to be taken to avoid accidents.

Counsel then turned to breach of duty and in submitting on this theme made reference to the case of **Grill vs. General Iron Screw Collier Co**[5].

Concerning the resulting damage and once again referring to the case of **Donoghue (supra)**, counsel asserted that the damage suffered by the plaintiff due to the defendant's failure to provide a safe system of work and effective supervision included; amputation of his 3 fingers and 1 little finger, loss of effective use of his left hand. The plaintiff also suffered excruciating physical pain, a permanent deformity, mental distress, inconvenience and psychological injuries. Further, that the plaintiff was put to expense in the amount of K1,500.00 in the form of medical and

related expenses and had been, as a consequence, unable to pursue his career in mechanics as the absence of the 3 fingers makes it impossible to do so.

Counsel then turned to reliefs claimed and said these included, as pleaded, general damages, aggravated damages and special damages. As respects general damages counsel explained that these related to pain and suffering, mental distress, inconvenience and psychological injuries. As regards loss of amenities counsel contended that the plaintiff in the present case was claiming for the loss of the effective use of his left arm and the deformity. It was explained that since the amputation of his fingers on the left hand side, the plaintiff had been unable to execute tasks that require the use of both hands.

On the theme of special damages counsel asserted that the plaintiff in line with the guidance in **Attorney General vs. Mpundu**[6] had specifically pleaded the amount of K1,500.00 which he urged this Court to grant.

On aggravated damages, counsel insisted that this was a proper case for the Court to order the payment of aggravated damages. He relied on the case of **Cobbett-Tribe vs. The Zambia Publishing Company Ltd**[7]. Counsel further contended that the fact that the defendant failed to comply with the provision in **section 88(1) of the Workers Compensation Act No. of 1999** and failed to render any financial assistance to the plaintiff made this a good case for such an order. Further, that an order of the sort sought would be

proper so far as is necessary to assist the plaintiff lead a near normal life. Here reference was made to **Kemp & Kemp: The Quantum of Damages in personal Injury and Fatal Accidents Claims Vol.1, at p.1002.**

Ending with vicarious liability and hinging his arguments on several cases including **Industrial Gases Ltd vs. Waraf Transport Ltd** and **Mussah Mogeehaid**[8], counsel submitted in the main that the defendant was vicariously liable for the tortuous acts of DW1.

This is a case which in every sense was borne out of unfortunate circumstances with preventable consequences. I start by noting that it is common cause that there was an employee-employer relationship between the plaintiff and the defendant. It is also common cause that on the material night/day the plaintiff reported in the normal way for his shift and his role as Sorter within the grand scheme of things relating to the defendant's operations. It is also common cause that on this night/day as on other nights, there was a supervisor who turned out to be DW1. Unfortunately at about 05:30 hours under circumstances which are hotly disputed, the plaintiff had four of his fingers on his left hand severed by a grinding machine belonging to the defendant.

It seems to me that at the core of this case is the need to determine whether the defendant was negligent as pleaded. All other claims I dare say, rise or fall on the resolution of this issue. I propose to start with a discussion of the law of negligence as it relates to the present case.

The *duty of care* as a legal concept traces its origins to the case of **Heaven vs. Pender**[9]**.** In the seminal case of **Donoghue vs. Stevenson (supra)** Lord Atkin quoted with approval the **Pender case (supra)** and in the process attempted to lay down a general principle relating to negligence cases. The peerless justice opined thus;

> **The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.** (emphasis added by Court)

The dicta at its very core imports two things namely 'foreseeability and proximity'. The former carries the idea of whether 'a reasonable man' would have foreseen damage in the present circumstances and the latter requires that there be legal proximity- a legal neighbourliness or relationship between the parties in question from which the law would customarily point a duty of care.

The dicta I dare say, is so wide as to cover any new cases of negligence once not covered before **Donoghue (supra)** and since. I venture to think that it in fact covers the cause of action in the present case. Implicit in Lord Atkin's '"*take reasonable care*" to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour' phraseology is a recognition of the

existence of a *duty of care.* According to **Charlesworth and Percy on Negligence (9th edition) at page19 para. 2-02,**

> **the word "duty" connotes the relationship between one person and another, imposing on the one an obligation, for the benefit of that other, to take reasonable care in all the circumstances.**

It follows therefore that whether a duty exists or not is a question not of fact but of law. Put another way, the law will provide no remedy in an action for negligence in instances including those where a person is as negligent as they come as long as there is no duty of care between the defendant and the victim of their negligence. The necessary predicate then to a finding in favour of the plaintiff is the existence of a legal duty. The case of **Grant vs. Australian Knitting Mills Ltd**[10] illustrates this point. In that case, Lord Wright observed:

> **All that is necessary as a step to establish the tort of actionable negligence is to define the precise relationship from which the duty to take care is deduced. It is, however, essential in English law that the duty should be established: the mere fact that a man is injured by another's act gives in itself no cause of action: if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right: if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists.**

It has been held in **Blyth vs. Birmingham Waterworks Co**[11] that

> **Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.**

As I understand the foregoing holding, a potential defendant will be negligent by falling below the standard expected from a reasonable person in a similar situation that is to say by doing either of two things: *(1) doing something which the reasonable man would not do or; (2) failing to do something which the reasonable man would do.*

The most widely accepted definition of a reasonable man is that found in **Hall vs. Brooklands Auto Racing Club**[12] where he was said to be *'the ordinary man'*, *'the average man'*, or *'the man on the Clapham omnibus'.*

In deciding if the defendant in the present case fell below the standard of the reasonable man, the Court has to adopt an objective approach in which the standard expected of this hypothetical man is one not coloured by his characteristics or weaknesses of the defendant. In the present case, it would make no difference if the defendant manufactured biscuits or motor vehicle spares. The concept of foreseeability alluded to earlier as being distilled from the **Donoghue case (supra)** entails that if the reasonable man could not foresee a harmful consequence of an action, then a defendant will not be negligent in failing to take precautions.

A further consideration is the likelihood of harm; the social usefulness of the act; the reasonableness of the precautions taken and whether the defendant acted in accord with the common practice of others. **(see: Frederick Kapalu vs. GBM Milling Ltd**[13]**)** On this last point it must be noted that this will only be strong

evidence of the lack of negligence by the defendant and not a bar to the court declaring a common practice to be negligent in itself. In **Gray vs. Stead**[14] a case emanating from the drowning of a fisherman on account of not having been supplied with a single chamber inflatable jacket, Geoffrey Brice Q.B. held in part:

> **In determining whether the employer had acted reasonably one was entitled to consider the ambit of published guidance and regulations available to him prior to the accident and practices within the industry...there was a duty on each employer of a fisherman on an inshore trawler to apply his mind to the safety of such a fisherman and not simply to follow convention and practice without further thought....** (emphasis added by Court)

I find as a fact that the plaintiff was a Sorter. His duties as I understood his testimony, included sorting plastic bags and containers upon their manufacture. On the material day he was forced to unblock the defendant's grinding machine. Despite explaining to the supervisor, DW1 that he was ill qualified and new in the system and as such was not in a position to perform the exercise he was being ordered to perform. The plaintiff's testimony that the DW1 threatened him with dismissal if he did not comply with the order which threat compelled the plaintiff to unblock the grinder for fear of losing his employment is one that was not destroyed by the defence. This I say because when DW1 who was the defence's star witness took to the stand not only did he contradict himself in his evidence but seemed not to have been fully aware of what was going on in the factory nor was he fully competent to supervise not only the plaintiff but the eight other

employees under him. He said in one breath that he saw the plaintiff running away after his injury and he ran after him and in the next, that the plaintiff ran towards him. The plaintiff could clearly not have done the two things at the same time.

There was more troubling testimony. DW1 said there was no need to give instructions to his subordinates. Further, that he could not say for sure how the plaintiff injured himself because he sat in the chair throughout the shift. This is indicative not only of a concocted story but of a person who was ill qualified to supervise the plaintiff and others placed under his supervision. Given the foregoing, one begins to see how after instructing the plaintiff to clean a machine in question he was ill qualified to clean, DW1 would come back and switch it on without first checking whether the cleaning by the plaintiff had already been performed. The defence provided pictures in evidence of the machine in question. What point they seemed keen to discount was that it was not possible for DW1 to have switched on the machine while the plaintiff was there as the Switch was right in front of the said machine. What was not explained by these pictures however, was the entire circuit by which the machine was switched on and off. If indeed this was the only switch available, it would mean that the plaintiff himself switched the machine on and intentionally introduced his left arm into the grinder or that, as the plaintiff testified, DW1 left the warehouse even as the plaintiff cleaned the machine and switched it on from the main without warning leading to the tragic injuries subject of these proceedings. I am disinclined

to follow the former as in my view, the latter is the more plausible explanation.

Further and interestingly, DW1 insisted that the plaintiff was negligent as he ought not to have been cleaning the machine in question. With due respect, there clearly was no evidence that this was so nor is there evidence to support the assertion that DW1 never gave the plaintiff instructions to clean the machine. Even more telling is the fact that DW1 never communicated with the plaintiff or the other workers as he remained seated throughout the shift. More curious is the fact that while saying that workers that attempted to or performed duties they were not assigned were reprimanded, the plaintiff was not because he never returned to work after the injury. Be that as it may though, no communication in writing was made to the effect that the plaintiff suffered the injuries due to his negligence because there was no such negligence on his part.

Plaintiff's counsel submitted and I agree, that the defendant as employer of the plaintiff was under a duty of care to provide for the safety of the plaintiff and to take reasonable care to avoid acts or omissions which could be foreseen to likely expose the plaintiff to unnecessary risk **(see: General Cleaning Contractors Ltd vs. Christmas(supra)**. It cannot be the case that an employee of the plaintiff's standing could work anywhere and anyhow without proper supervision as DW1 seemed to imply. Since the plaintiff was employed as a Sorter and worker in the defendant's factory with

eight other employees, it was only reasonable that the defendant would be required and by necessary implication was expected to instruct the plaintiff on what must be done in the execution of his duties and what steps needed to be undertaken in order to avoid accidents. This clearly was not done in the present case. It therefore follows that the defendant is liable to the plaintiff for the injuries caused. (see: **Wilsons and Clyde Coal Co Ltd vs. English (supra)**. As plaintiff's counsel correctly submitted, the defendant was in breach of the duty to provide a safe system of work and render effective supervision.

Here is a plaintiff who was a grade twelve and by his own admission was unfamiliar with the working of the grinding machine, a (dangerous machine to an unskilled man) who was left under the supervision of an equally unskilled and incompetent supervisor who in my view obfuscated the truth if only to cover his back and that of his employer in this case. I am of the considered view that the defendant acted unreasonably by not following the ambit of published guidance and regulations available to it prior to the accident and practices within the industry. I am of the further view that the defendant failed to apply its mind to the safety of the plaintiff by asking him to perform a task he was ill qualified to so perform and exposing him to the danger of possibly losing his life. The state of circumstances in the present case to my mind constituted a contingency against which a reasonable man could have provided.

As I have indicated already, the plaintiff was a grade 12 leaver and an unskilled casual worker. Logically, the knowledge of using a grinding machine cannot be imputed. That notwithstanding, he was, as already shown, instructed to undertake work with a dangerous machine. This act by the defendant imposed a higher standard of care both in the layout of the work, and the steps to be taken to avoid accidents. Here again, the defendant fell short.

It was intimated during cross-examination that the plaintiff volunteered in spite of knowing the danger that the grinder could do him harm as he was interested in workings of machines. This intimation it would appear is predicated on the fact that the plaintiff had indicated in his evidence that he had entertained the idea of one day becoming a mechanic. I disagree. In my judgment, the circumstances and facts of this case would not make me draw the conclusion that there was *volenti non fit injuria*. In **Osborne vs. L. and N. W. Railway**[15] Wills, J, said:

> **If the defendant's desire to succeed on the ground that the maxim volenti...is applicable they must obtain a finding of fact that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran impliedly agreed to incur it.**(emphasis added by Court)

Further, in **Betty Kalunga (Suing as Administrator of The Estate of The Late Emmanuel Bwalya) vs. Konkola Copper Mines Plc**[16] it was held *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.**(emphasis added by Court)

I can think of no better conclusion to draw from the evidence before me. The learned author of **Murphy on Evidence 5th edition(1995) Universal Law Publishing at page 89**states as follows:

> **the legal burden of proof as to any fact in issue in a civil case lies upon the party who affirmatively asserts that fact in issue, and to whose claim or defence proof of the fact in issue is essential.**

It follows that throughout the case of negligence, the plaintiff bears the burden of proving on the balance of probabilities that the defendant was negligent. I am of the firm view that the plaintiff herein managed to discharge his burden.

In view of the claim for aggravated damages, I am compelled to consider the attitude of the defendant to the accident. DW2 testified that he was asked to ferry the plaintiff to the hospital. It is DW2 and not the defendant that left the plaintiff with some money to care for his medical expenses and not the defendant. The defendant never visited the accused. The defendant did not pay for the plaintiff's expenses but instead chose to accuse him of being negligent when it is the defendant through its agent DW1 which was negligent. Nor did the defendant follow the law as provided under the circumstances. **Section 51(1) of the workers' compensation Act, 1999,** which provides:

> **If an accident or disease occurs to a worker arising out of and in the course of employment and result in the workers disablement or death, the worker, or if the worker dies that workers dependents shall be entitled to compensation in accordance with the provisions of this Act.**

DW1 was asked whether the steps stipulated in the foregoing were followed by the defendant and he was none the wiser. He could neither deny nor confirm this fact. The truth is he knew as did the defendant that the steps had not been followed. It was a general worker who had been injured and to the defendant, he was not worth the trouble. This indifferent callous attitude is one that must be nipped in the bud and which must incur this Court's displeasure. Further, **Section 6(1)** provides as follows:

> **Where any injury is caused or disease contracted by a worker by negligence, breach of statutory duty or other wrongful act or omission by the employee, or of any person for whose act or default the employer is responsible nothing in this Act shall limit or in any way affect any civil liability of the employer independently of this Act.**(emphasis added by Court)

The purview of the legislature and the language it employs in **section 6(1)** entails that even if the plaintiff had already gotten his claim (which he has not), he still will be, this judgment notwithstanding, at liberty to pursue his claim with the Workman's Compensation Board. This judgment is no bar to the said claim.

Going on I find as a fact that with respect to the damage suffered by the plaintiff due to the defendant's failure to provide a safe system of work and effective supervision included; amputation of his 3 fingers and 1 little finger, loss of effective use of his left hand. The

plaintiff also suffered excruciating physical pain, a permanent deformity, mental distress, inconvenience and psychological injuries. Further, that the plaintiff was put to, the record will show, expense in the amount of K1,500.00 in the form of medical and related expenses. He has been, as a consequence, unable to pursue his career in mechanics as the absence of the 3 fingers makes it almost impossible to do so.

Let me turn to the issue of special damages. According to the learned authors of **Charlesworth& Percy on Negligence para. 5-59 at page 363;**

> **special damage in this context, mean some specific item of loss, which the claimant alleges to be the result of the defendant's negligence in the case, although it is not presumed by law to have flowed from it, as a matter of course.**

I note from the pleadings as respects the matter of special damages that the same amounting to K 1,500.00 was specifically pleaded in line with the guidance given by the Supreme Court in **Attorney General vs. Mpundu (supra). (see also: Perestrello e Companhia Ltda vs. United Paint Co Ltd[17]).** I agree based on the evidence on record and the plaintiff's testimony that the plaintiff deserves to be compensated in this respect.

On aggravated damages, I agree that this is, as I shortly show, a proper case for the Court to order the payment of aggravated damages. A case that still stands as good law in this country on this topic is that of **Cobbett-Tribe vs. The Zambia Publishing Company Ltd. (supra)** The Court held inter alia in head note (iii):

(iii) While awarding compensatory damages a court can award aggravated damages where the court feels that the defendant's conduct merits it, and where awarded the essence of aggravated damages is that they are compensatory on the highest scale.

The defendant in the present case failed to comply with the provision in **section 88(1) of the Workers Compensation Act No. of 1999** and as noted earlier, failed to render any financial assistance to the plaintiff when they could have. This caused what may be termed additional humiliation and injury to the plaintiff. The only thing the defendant did was to order his evacuation to the hospital and reimbursement of DW2 because they had no choice. To award aggravated damages is not to punish the defendant but to compensate the plaintiff at a higher scale compared to other forms of damages, bringing him to the position he was in before the tort in question was committed so far as money can.

Turning to the contention as regards vicarious liability, I turn to a recent case, **Industrial Gases Ltd vs. Waraf Transport Ltd** and **Mussah Mogeehaid (supra)**. In that case, the appellant sought to avoid liability on grounds that its driver, who was negligent in relation to the accident, falsely pretended to possess a valid driver's licence, and such vitiated his employment and he should be regarded as not having been an employee. Resulting from a mistake, the High Court awarded damages for loss of total consignment of freight destroyed in the collision, whereas a reduced quantity only was lost. The value thereof was disputed on grounds that the freight was a donation and the respondents had lost

nothing. Insufficient evidence was produced as to the cost of repair and replacement, but the court estimated and awarded damages. It was held inter alia:

> **(i) As long as the wrong is committed by the employee in the course of his employment, the general rule is that the employer will be vicariously liable.**

The facts of this case do not lead me to a contrary conclusion. I hold that the defendant is vicariously liable for the tortuous acts of DW1.

In conclusion, in view of the foregoing and for the avoidance of doubt, I hold that the plaintiff has succeeded in all his claims as pleaded. Beyond that I make no other order. I refer the matter to the Deputy Registrar for assessment of damages.

Leave to appeal is granted.

DELIVERED AT LUSAKA THIS 7TH DAY OF APRIL, 2016.

MRS JUSTICE A.M. BANDA-BOBO
HIGH COURT JUDGE