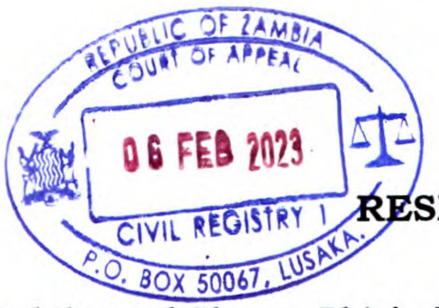
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL No. 257/2020**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

FIRST QUANTUM MINING AND OPERATIONS LIMITED **APPELLANT**

AND



SOLOMON SIAME **RESPONDENT**

Coram: Makungu, Ngulube and Sharpe-Phiri, JJA
On the 13th day of October, 2022 and on the 6th day of February, 2023

For the Appellant: Mrs M. Banda Mutuna & Ms. A. Nawa Nkonde both of Mweshi Banda & Associates.
For the Respondent: Mr A.M Musoka of Messrs Nhari Advocates

JUDGMENT

Makungu, J.A delivered the Judgment of the Court.

Cases referred to:

1. *Attorney General and the Movement for Multiparty Democracy v. Akashambatwa Mbikusita Lewanika, Febian Kasonde, John Mubanga Mulwila, Chilufya Chileshe Kapwepwe, Katongo Mulenga Maine SCZ Judgment No.2 of 1994*
2. *Savenda Management Services v. Stanbic Bank Zambia Limited SCZ Judgment No.10 of 2018*
3. *Chumbwe v. Mukata SCZ Judgment No.10 of 2015 (unreported)*
4. *Betty Kalunga (suing as Administrator of the Estate of the late Emmanuel Bwalya) v. Konkola Copper Mines PLC (2004) Z.R 40 (S.C)*
5. *Poly Technic Limited v. Howard Cooke CAZ Appeal No. 38 of 2018*

6. *O'Hill v. Kayel Shipping (1980) PNGLR 361*
7. *Smart Banda v. Wales Siame (1988-1989) ZR 81 (S.C)*
8. *Attorney General v. Mwanza and Another SCZ Appeal No. 203/2014*
9. *Kajimanga v. Chilemya SCZ Appeal No. 50 of 2014.*
10. *A van Der Walt Transport (Namibia) Limited v. Dar Farms & Transport Limited SCZ Appeal No. 187/2015*
11. *Kafuka Kafuka v. Ndalamei SCZ Appeal No. 80/2012*

Legislation Referred to:

1. *Mines and Minerals Development Act No. 11 of 2015*
2. *Occupational Health and Safety Act No. 36 of 2010*

1.0 INTRODUCTION

1.1 This appeal is against the Judgment of Mapani-Kawimbe J, of the High Court dated 31st August, 2020, allowing the respondent's claims for damages for pain and suffering, permanent incapacity and loss of prospective earnings. This was as a result of an accident which occurred whilst the respondent was cleaning the appellant's truck at the wash bay area within the appellant's premises.

2.0 BACKGROUND

2.1 On 9th April, 2018, the respondent who was the plaintiff in the lower court, instituted an action against the appellant (defendant in the Court below) by way of writ of the summons and statement of claim seeking in the main;

i. *General damages for negligence.*

ii. *Damages under the Mines and Minerals Development Act No. 11 of 2015.*

iii. *Interest and costs.*

3.0 PLAINTIFF/RESPONDENT'S EVIDENCE

3.1 The brief facts are that, the respondent was employed as a tipper truck operator in the appellant's roads division. On 2nd July, 2016, he took the tipper truck fleet no. RT 50, which was assigned to him to the wash bay for cleaning where he found a bus registration no. MV 282 parked in the bay without a driver but the keys were still in the ignition switch.

3.2 Thereafter, another tipper truck fleet no. RT 77 operated by Brian Kabeya entered the wash bay area via the exit. Brian Kabeya drove the bus (MV 282) out of the bay and requested another driver, Musonda Eric Mpundu to park his truck in its lot opposite the respondent's truck. As the respondent was washing the cab of his truck, Brian's truck rolled forward and trapped him between the two trucks thereby causing him serious injuries.

3.3 The respondent was immediately evacuated to various hospitals where he received in and outpatient medical care. He did not fully recover from the injuries and was eventually discharged from employment on medical grounds on 26th July, 2016.

3.4 The respondent's further evidence was that he suffered an open book pelvic fracture with vertical shear. At the time of the accident he was aged 32 years, and in good health. He was earning a net pay of K4,024.00 until he was relieved of his duties.

3.5 His disability was assessed at 65% by his doctors. That it was impossible for him to work again as he has lost the ability to find a job of a similar nature for the rest of his 33 years before retirement age.

3.6 The respondent stated that he had prospects of future advancement and increased earnings in gainful employment and has lost future earnings. That he has a wife, two children and 3 dependants to maintain.

3.7 The general damages were tabulated as follows: Pain and suffering and future pain and suffering K50,000.00, Loss of

amenities of life K100,000.00, permanent incapacitation K500, 000.00 and loss of prospective future earnings K200,000.00.

3.8 His contention in the Court below was that the appellant negligently caused the accident by failing to ensure a safe working environment. The particulars of negligence and breach of statutory duty were outlined as follows:

i. Failure by the Appellant's Mine management to maintain a safe working system at the washing bay. The system of parking vehicles facing each other was a risk to work men particularly the respondent.

ii. Failure by the appellant's driver of Tipper Truck No. RT 77 to properly judge the clearance distance between the respondent and Tipper Truck No. Rt 50.

iii. Failure by the appellant's driver of the said Tipper Truck to apply brakes in time or to steer or control the Tipper Truck to avoid trapping the respondent.

iv. Failure by the Appellant's Mine Officials to provide risk assessment for security purposes and ascertain the safety of any employee before allowing such employee to carry out

his duties regard being had to the fact that mining and construction is dangerous.

v. Failure by the Appellant's Mine superiors to ensure and enhance concerned appointed personnel to provide and implement standard procedures of parking and washing vehicles at the wash bay area to avoid unnecessary accidents to workers on duty.

vi. Failure by the Appellant's superiors to induct or train workers on how to work in a free and conducive environment regard being had to the fact that the scene of accident was potentially dangerous.

vii. Failure by the Mine officials to carry out safety precautionary measures such as risk assessment before permitting any person to commence working regard being had to the fact that mining and construction is dangerous.

viii. Delegation by the Appellant's Mine officials of their responsibilities to their subordinates without proper supervision.

ix. Failure by the Appellant's superiors to close that area pending the restoration of safe conditions.

3.9 Under cross examination, the respondent conceded that he did not choke the wheels of his truck. He stated that there were no choking blocks at the wash bay.

3.10 The report from the Mines and Safety department was prepared by PW2 after conducting a site investigation on 3rd July, 2016 in the presence of DW2. According to PW2, the appellant's controls at the wash bay were inadequate and a source of accidents. His findings established the following inadequacies:

a) A person was not specifically employed to man the wash bay and to ensure that wheels of trucks were choked after parking.

b) Information on safety or code of conduct at the wash bay was not displayed.

c) Drivers were expected to wash their trucks when the acceptable standard in the industry required competent personnel to undertake that task.

d) Anyone could access the wash bay at any time and the number of vehicles that could be parked in the wash bay was not known.

3.11 PW2 denied the allegation that PW1's truck rolled forward because it was parked on a decline of a slope with wheels that were not choked. However, he was unable to ascertain which truck rolled first.

4.0 DEFENDANT/ APPELLANT'S EVIDENCE

4.1 In its defence, the appellant stated that the **Mines and Minerals Development Act**[1] only applies to the mining division which carries out mining operations. It does not apply to the roads division whose primary operations are construction.

4.2 The appellant through its witnesses DW1 and DW2 alleged that the respondent contributed to the accident by going to the wash bay at 15:30 hours when he should have been working, as knocking off time was 17:00 hours. The respondent failed to follow the procedure for safety instructions at the wash bay. He had accessed the area from the exit unlike Brian Kabeya who used the entry point, which meant that he parked the truck in a gentle decline, in the wrong direction contrary to the appellant's parking and shut down procedure. That he did not apply the hand brake nor choke the wheels of his truck and it

consequently rolled forward and trapped him between the cabs of the two tipper trucks.

4.3 According to the appellant's witness, the wash bay allowed only one vehicle to be parked at a time. In this regard, it was conceded that since the respondent had parked his truck at the wash bay first, the accident would have been avoided if Brian had not parked his truck there at the time.

4.4 The appellant rejected PW2's report stating that the wash bay had adequate controls and precautionary measures to prevent accidents.

4.5 The appellant disputed that prior to the accident the respondent was healthy and happy and that his salary was K4,024.00.

4.6 It was alleged that the respondent refused to follow medical treatment paid for by the appellant. According to DW3, he lacked motivation and was inconsistent in attending physiotherapy sessions which could have helped him improve the range of movement in his leg. That he was generally uncooperative and therefore contributed to his poor state of health.

5.0 DECISION OF THE COURT BELOW

5.1 After considering the evidence, the trial Court formulated the primary question as; whether the plaintiff's accident arose from the defendant's failure to provide a safe working environment at the wash bay? In answering the question the trial Judge considered the following as secondary questions:

1. Whether the defendant owed the plaintiff a duty of care?
2. Whether the defendant breached the duty of care?
3. Whether the plaintiff's injuries resulted from the breach of duty owed by the defendant?
4. Whether the plaintiff is entitled to damages and interest as a result of the incident?

5.2 As regards whether the defendant owed the plaintiff a duty of care, the learned trial Judge found that a contractual relationship between the parties had been established. The appellant had demonstrated that it owed the respondent and its other employees a duty of care at the wash bay by instituting measures that ensured safe conditions, carrying out a risk assessment and identifying all possible risks. It also put in place safety training and routine safety talks.

5.3 The Judge found that the appellant had breached its duty of care to the respondent by failing to provide a safe working environment at the wash bay. For instance, there was also no signage of dos and don'ts at the wash bay area.

5.4 The claim of contributory negligence was rejected based on the fact that the appellant did not provide a safe environment for its employees.

5.5 The Judge was satisfied that the respondent's injuries resulted from the accident.

5.6 It was held that the respondent was entitled to damages which were specified. The respondent was awarded ZMW 200,000.00 as damages for pain and suffering, ZMW250,000.00 as damages for permanent disability and ZMW 340,000.00 as damages for loss of prospective earnings. In total, the award was ZMW 790, 000.00.

5.7 The claim for loss of amenities was dismissed due to lack of professional or expert evidence.

5.8 Interest was awarded at short term bank deposit rate from the date of the writ of summons to the date of Judgment and

thereafter at the Bank of Zambia current lending rate until final payment.

5.9 Costs were awarded to the respondent to be taxed in default of agreement.

6.0 GROUNDS OF APPEAL

6.1 The appellant advanced 9 (nine) grounds of appeal framed as follows:

1. ***The learned trial Judge erred in law when she failed to resolve the pleaded issues in the case, in particular when she discounted the evidence of the appellant's witnesses wholesale thereby denying the appellant its right to a fair hearing.***
2. ***The learned Judge erred in law when she found that the appellant had breached its duty of care to the respondent notwithstanding her acceptance of the evidence on record that the appellant had discharged its duty of care by carrying out risk assessment, developing procedures and conducting training to mitigate***

against the risks at the wash bay as set out in paragraph 5.12 at page J.22 of the judgment.

3. *The learned Judge erred in law when she failed to resolve the pleaded issues in the case, in particular when she did not decide on how the purported breach by the appellant of its duty to create a safe working environment through displaying signage of dos and don'ts at the wash bay area was a crucial factor to the respondents injury which was an essential element of the cause of action and was pleaded in paragraph 8 of the appellant's defence.*
4. *The learned trial Judge erred both in law and fact when she found that the appellant's wash bay had issues of safety based on the evidence of PW2 and that the wash bay was porous notwithstanding the evidence of the appellant's witnesses to the contrary.*
5. *The learned Judge erred in law when she found that the plaintiff did not contribute to the accident which caused his injury in paragraph 5.*

38 at page J34 of the judgment when the respondent admitted in cross examination that he did not chock the wheels to his truck in violation of the High-Pressure Wash Bay procedure, a fact memorialized in paragraph 3.4 at page J7 of the Judgment.

6. *The learned Judge erred in law when she made reference to a purported duty of care imposed on the appellant by the Occupational Health and Safety Act in paragraph 5.20 and 5.22 at pages J25 and J26 of the judgment which Act neither party had relied on.*
7. *The learned Judge erred in law when she awarded the respondent sums in excess of what was pleaded and in the absence of any proof to substantiate them or reasons therefore.*
8. *The learned trial Judge erred in fact when;*
    a. *She found that the truck driven by the appellant's former employee Brian Kabeya rolled down and injured the appellant when*

there was no evidence on record to support this finding.

b. *She discounted the evidence of DW2 on the basis that his evidence was based on the safety team's report which was prepared after PW2's report by which time the conditions in which the accident was perceived to have occurred had changed. This conclusion is unsupported by the evidence on record which shows that not only did DW2 arrive at the scene of the accident on the day it happened but he was also present when PW2 was conducting his investigations having physically facilitated it.*

c. *She did not find that the respondent contributed to the accident when he admitted not having choked the brakes to RT 50 when the uncontroverted evidence showed that he failed to engage the parking brake and parked RT 50 on a decline in violation of the*

appellant's safety procedures in which he had been adequately trained.

d. She did not attach adequate weight and/ or failed to consider the unchallenged evidence of DW3 which showed that the respondent failed to mitigate his injuries when he refused to co-operate with the medical staff engaged to assist with his recovery and prematurely terminated his physiotherapy sessions.

9. That the learned trial Judge erred in both law and fact when having warned herself against attaching absolute liability to the appellant if it was shown that there was another probable cause of the accident other than negligence in paragraphs 5.11 at page J22 of the judgment, she proceeded to attach absolute liability to the appellant in total disregard of the uncontroverted evidence of the negligence of the respondent.

7.0 APPELLANT'S HEADS OF ARGUMENT

7.1 The appellant filed heads of argument on 1st February, 2021. In brief, the submissions on ground one, were that parties to litigation must be given a fair hearing and equal opportunity to present their cases as guaranteed by **Article 18 (9) and 118 (1) of the Constitution**. Counsel submitted that the court ought not to have discounted DW2's evidence who visited the accident scene first and notified PW2. DW2 also actively participated in PW2's investigations. That according to DW2, PW1 had parked his truck on a decline without applying the park brake. This evidence was not objected to and the Judge should not have rejected it. On the other hand, the evidence of PW1 which the Judge relied on raises a lot of questions as he did not explain how Brian Kabeya moved the bus.

7.2 For this reason, the Judge should have evaluated the evidence of DW1 and DW2 considering that DW1 was at the wash bay when the accident happened instead of throwing it out in its entirety. She should have also assessed and evaluated PW1 and PW2's evidence to determine whether the accident occurred as

a result of Brian Kabeya driving his truck into him instead of RT 50 moving forward since he was parked on a gentle decline.

7.3 In support of ground 2, the appellant contended that it had discharged its duty of care to the respondent and that the accident was caused by his own breach of the safe working system that had been devised.

7.4 In advancing ground 3, it was submitted that it was important for the respondent to demonstrate what the alleged breach of duty of care was and for the Court to make a finding of fact supported by evidence on record that there was a causal link between the respondent's accident and the alleged breach of duty. However, the learned trial Judge relied on the evidence of PW2 to find that the appellant's wash bay had issues of safety. It was argued that PW2's report was not only speculative but also inconclusive, as he had concluded that the appellant's inadequate management controls were the cause without understanding the actual cause of the accident. That the evidence did not establish the particulars of negligence pleaded by the respondent.

7.5 On the other hand the appellant led evidence and produced documentary evidence to support its rebuttal of the respondent's claims.

7.6 Counsel contended that the Judge's unbalanced review of the evidence to the detriment of the appellant makes it unsafe and unjust to uphold her findings.

7.8 The arguments on grounds 4 and 5 were that where an employer is found to have breached its duty of care to its employee, the said breach should be the direct cause of the injury suffered by the employee. That an employer should not be punished for a breach that has no resulting effect. It was submitted that the trial Judge misdirected herself when she did not find that the respondent had contributed to the accident, contrary to the uncontroverted evidence on record which confirms that the respondent's actions were the direct catalyst of the accident.

7.9 That the trial Judge's decision that there was no evidence on record from which an inference that the respondent had contributed to the accident could be drawn amounted to a failure to give a balanced view of the evidence presented by the

parties. Reference was made to the case of **Attorney General and the Movement for Multiparty Democracy v. Akashambatwa Mbikusita Lewanika and four others,**[1] where the Supreme Court held that failure by the lower Court to give a balanced view of the evidence presented before it was a serious misdirection.

7.10 In arguing grounds 6 and 7, counsel submitted that the respondent did not adduce any documentary evidence to support the amounts sought as general damages during trial. The justification for the amounts was made in the respondent's final submissions. The Judge proceeded to award damages to the respondent without assessing any evidence in support and without any explanation. Counsel referred us to the case of **Savenda Management Services v. Stanbic Bank Zambia Limited**[2] where the Supreme Court took issue with a court giving monetary awards without providing justification for how the same were arrived at.

7.11 The gist of the arguments in ground 8 were that the trial Judge misapprehended the facts before her when she arrived at the conclusion that Brian Kabeya failed to observe the parking

range and his truck rolled forward and injured the respondent. It was argued that there was no evidence led by either party to support the assertion that there was a permissible parking range at the wash bay because it was designed to hold one vehicle. There was only one entrance but the respondent breached this rule and entered from the exit.

7.12 Counsel further submitted that the trial Judge ought to have considered DW3's evidence on the respondent's lack of willingness to cooperate with the team of doctors for his rehabilitation following the accident which reluctance should have been held against him in relation to the quantum of damages due to him.

7.13 In ground 9, counsel repeated the arguments under grounds 4 and 5 relating to the appellant's discharge of its duty of care by establishing a safe working system at the wash bay. It was further argued that the failure to display signs of dos and dont's at the wash bay was not the cause of the accident because the respondent would have behaved in the same manner even if the signs were exhibited. That there is no reason for the respondent

to find the signage a more compelling deterrent and reminder of the potential harm to be suffered than the routine safety talks.

8.0 RESPONDENT'S HEADS OF ARGUMENT

8.1 The respondent filed in heads of argument on 3rd March 2021. In opposing ground 1, it was submitted that the appellant was accorded its right to a fair hearing by the court below as the record will show that after it filed in a defence and bundle of documents, trial was set and the appellant called four witnesses and also had an opportunity to cross-examine the respondent's witnesses. Reliance was placed on the case of **Chumbwe v. Mukata**[3] where the Supreme underscored the importance of a trial judge evaluating evidence properly; the Supreme Court observed that:

> ***"…. An assessment or evaluation of evidence involves reviewing and analyzing evidence and giving reasons for accepting or rejecting it."***

8.2 Counsel disputed the appellant's assertion that the learned trial Judge discounted the evidence of the appellant's witnesses wholesale as the court looked at both sides of the case before

discounting the evidence of DW1to DW3 as to how the accident occurred for the reasons which were stated in the Judgment.

8.3 On ground 2, counsel relied on the case of **Betty Kalunga (suing as Administrator of the Estate of the late Emmanuel Bwalya) v. Konkola Copper Mines PLC**[4] where the Supreme Court held *inter alia* as follows:

> ***"Once it is established that an employer is in breach of statutory duty of care or common law duty of care towards his employee that necessarily should mean that the employer is liable for negligence."***

8.4 It was submitted that the appellant as the respondent's employer owed the respondent a duty of care at the wash bay. That there was overwhelming evidence on record that the appellant did in fact breach its duty of care to the respondent. The corrective action in the Inspector of Mines Report on page 89 of the Record of Appeal and the evidence of PW1 and PW2 confirms this position.

8.5 It was further submitted that at the material time, the wash bay had no personnel to implement standard parking procedures to

avoid unnecessary accidents to workers on duty especially that the appellant's rule was that only one truck could be at the wash bay at a time. That evidence from PW1, DW1 and DW2 revealed that at the material time it was the respondent's truck RT50 that was supposed to be at the wash bay and there was no attendant.

8.6 Counsel pointed out that the images of the wash bay in the appellant's bundle of documents appearing on pages 125 and 126 of the record of appeal shows that, the access was porous and the evidence of PW1, PW2 and DW1 confirmed that the appellant did not erect any notice board at the wash bay warning employees of dos and dont's when using the wash bay. That the failure by the appellant to erect warning signs amounted to breach of duty. To support this position, the case of **Poly Technic Limited v. Howard Cooke**[5] was cited, where it was held that failure to erect warning signs amounted to a breach of duty of care.

8.7 The respondent rebutted the appellant's assertion that the trial Judge accepted the evidence on record that the appellant had discharged its duty of care. The respondent submitted that the

trial Judge found that by carrying out a risk assessment, developing procedure and conducting training to mitigate against the risks at the wash bay the appellant demonstrated that it owed the respondent and other workers a duty of care as opposed to discharging its duty of care. That at no point did the Judge find that the appellant had discharged its duty of care.

8.8 On ground 3, it was submitted that the wash bay had no signage of dos and dont's displayed to guide employees on permissible and non-permissible activities while at the wash bay which would have guided the respondent and other employees. That the appellant's failure to maintain a safe working environment at the wash bay set in motion the chain of events that led to the accident.

8.9 On ground 4, counsel for the respondent disagreed with the appellant that the trial Judge found that the wash bay had safety issues based on the evidence of PW2. Counsel pointed out that the Judge made the finding that the wash bay had safety issues after assessing and evaluating the evidence of both parties and she stated the reasons why PW2's evidence informed her position. The trial Judge accepted the evidence of

PW2, DW1 and DW2 that on the material day, the appellant's wash bay had no attendant to supervise the washing of trucks and chocking of wheels. The images of the wash bay had no signs showing the entry/exit points, its holding capacity and dos and don'ts for the employees to observe.

8.10 The arguments against the 5th ground of appeal were that the trial Judge was on firm ground when she found that the respondent did not contribute to the accident which caused his injury. Counsel referred us to the case of **O'hill v. Kayel Shipping,**[6] in advancing the argument that the respondent did not contribute to the accident by failing to chock the wheels to his truck on the material day because there were no chocking blocks at the wash bay. Under the circumstances, the respondent's conduct was reasonable. Further, the respondent did not foresee the occurrence of the accident as he parked his truck on level ground with its hand brake engaged.

8.11 On ground 6, counsel submitted that the trial Judge was not restricted to the authorities cited by the parties in their submissions. Rather, a court is at liberty to undertake its own research on relevant authorities and discuss any relevant law

applicable to the issues raised by the parties. That since, **The Occupational Health and Safety Act**[2] is relevant law and is applicable to this case, the trial Judge was at liberty to refer to it even though none of the parties had cited it.

8.12 In arguing ground 7, counsel for the respondent stated that the respondent suffered pain and injury after the accident and this is confirmed by the medical certificate. Therefore, the respondent was entitled to damages for injuries taking into account the depreciation of the Kwacha as guided by the case of **Smart Banda v. Wales Siame.**[7] We were also referred to the case of **Attorney General v. Mwanza and Another**[8] on instances when the appellate court can interfere with an award of damages. Counsel contended that the damages awarded for pain and suffering and loss of prospective earnings were not inordinately high taking into account the plight of the respondent from the time of his injury, during and post treatment, his disability assessed at 65%, disfigurements, further suffering that consequently arose from the accident such as financial loss and the depreciation of the Kwacha over the years.

8.13 On ground 8, the respondent's counsel disputed the appellant's assertion that the learned trial Judge made a finding that Brian Kabeya failed to observe the parking range and his truck rolled forward and injured the respondent. According to counsel, this statement was merely a narration and deliberation of the respondent's view of the accident as opposed to a finding of fact. That the Judge cautioned herself against placing reliance on the evidence of DW2 as he was not an eye witness.

8.14 It was further submitted that the trial Judge was on firm ground by warning herself that the evidence of DW3 was of little consequence because she only met the respondent on one occasion and was therefore not in a position to conclude that the respondent lacked motivation for recovery.

8.15 In support of ground 9, counsel submitted that the trial judge addressed her mind to the fact that where an accident gives rise to an inference of negligence, the appellant could only escape liability if it was shown that there is another probable cause of the accident. That in the present case, the appellant did not adduce any material evidence before the lower court to prove that there was another probable cause of the accident other

than its own negligence to provide a safe working environment for the respondent. That the respondent cannot be faulted for not chocking his wheels because providing chocking blocks at the wash bay for trucks was not his duty but that of the appellant.

9.0 APPELLANT'S ARGUMENTS IN REPLY

9.1 The arguments in reply were a repetition of the main arguments.

10.0 OUR DECISION

10.1 We have considered the evidence on record and the arguments made by counsel on behalf of both parties. We shall deal with the grounds of appeal together as they are interlinked except ground 6 which we shall tackle separately. At the core of the grounds that we have compiled is the question of who was to blame for the accident between the appellant and the respondent. We shall begin by resolving the question whether the Judge failed to resolve the pleaded issues or whether she discounted the testimonies of the appellant's witnesses wholesale thereby denying the appellant its right to a fair hearing.

10.2 The record shows that the appellant was given an opportunity to defend its case as all the laid down procedures before and during trial were followed by both parties. At the close of the appellant's case, they filed in their submissions. A fair hearing entails that both parties are given their day in court and that is what transpired in this case.

10.3 Further, the lower court in its judgment took time to review and analyze the evidence of both sides. The fact that she chose to believe the evidence of the respondent over that of the appellant, did not make the trial unfair and did not entail that the appellant's evidence was discounted wholesale as the lower Court's judgment speaks for itself. We hold that the lower Court based its decision on the totality of the evidence on record after which it took a position.

10.4 Coming to the question whether the appellant breached its duty of care towards the respondent, it has already been established by the evidence that, by virtue of the respondent being the appellant's employee, the appellant owed him a duty of care while at the wash bay or anywhere in the business premises. As observed by the trial Judge the appellant had demonstrated the

duty of care owed by the appellant to its employees at the wash bay being to institute measures that ensured safe conditions, by carrying out a risk assessment and identifying all possible risks, developing procedure to avoid accidents and conducting training to mitigate against the risks of injury at the wash bay.

10.5 The record shows that investigations conducted by PW2 as an expert at the accident scene revealed that, the appellant did not create a safe environment at the wash bay. PW2's findings were that the appellant's controls at the wash bay were inadequate and a source of accidents. That the appellant failed to provide wheel chocks and failed to display signage of dos and dont's for users of the wash bay. Evidence from both the appellant and the respondent was to the effect that there was nobody present at the wash bay to ensure the implementation of standard parking procedures in order to prevent unnecessary accidents to workers on duty especially that the appellant's rule was that only one truck could be at the wash bay at a time.

10.6 The evidence of PW1, DW1 and DW2 was that at the material time, it was only the respondent's truck RT 50 that was supposed to be at the wash bay, but Brian's Kabeya's truck also

came through, contrary to the procedure of having only one truck at a time. We also note that the images of the wash bay in the appellant's bundle of documents did not show clear signs of which was the entry or exit.

10.7 In the premises, we cannot fault the trial Judge for finding that the appellant breached its duty of care to the respondent notwithstanding her acknowledgment of some of the measures put in place to prevent accidents at the wash bay. We say so because, if indeed the wash bay had adequate safety control measures as claimed by the appellant, PW2 would not have concluded in his report that the environment at the wash bay was unsafe due to inadequate safety control measures.

10.8 The appellant also contends that the Judge failed to resolve how the purported failure by the appellant to display signage of dos and don'ts at the wash bay area was a crucial factor to the respondent's injury. At J34 page 51 of the record of appeal, the Judge stated that, ***"There were no rules on safety (dos and don'ts) displayed at the wash bay and as I have already determined this facilitated the circumstances of an unsafe working environment."***

10.9 In the case of **Poly Technic Limited v. Howard Cooke**[5] cited by the respondents, we held that failure to erect warning signs amounted to breach of duty of care. The same applies to this matter.

10.10 We further uphold the trial Judge's finding that it was this failure that facilitated circumstances of unsafe working environment and was a causal factor of the respondent's accident. As PW2 had noted, failure to display the signage of dos and don'ts made the accident inevitable. We are further fortified by the case of **Betty Kalunga (Suing as Administrator of the Estate of the Late Emmanuel Bwlaya) v. Konkola Copper Mines PLC**[4] where the Supreme Court held that:

> ***"Once it is established that an employer is in breach of statutory duty of care or common law duty of care towards his employee that necessarily should mean that the employer is liable for negligence."***

11.11 Applying the preceding authority to the facts of this matter, we uphold the lower Court's finding that the appellant breached its statutory and common law duties of care towards the respondent and is consequently liable for negligence.

11.12 It is trite that in civil cases a matter is proved on a balance of probabilities. The case of **Kajimanga v. Chilemya**[9] refers. We further hold that the respondent had proved his case on a balance of probabilities. It is also trite law that a trial Judge's findings of fact should not be lightly interfered with as the Judge has the privilege of seeing the witnesses and examining their demeanor which the appellate court does not. See the case of **Kufuka Kafuka v. Ndalmei Mundia.** [10]

11.13 Coming to the appellant's argument that the respondent contributed to the accident, we are guided by the case of **O'Hill v. Kayel Shipping,**[3] where it was held *inter alia* that:

> ***"To successfully plead the defence of contributory negligence, the employer has 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."***

11.14 The appellant asserts that the particulars of contributory negligence are that; firstly, the respondent failed to take heed of

the appellant's parking and shut down procedure by entering the wash bay through the exit point. Secondly, the respondent failed to engage the hand break and to choke the wheels to his truck thereby exposing it to the risk of rolling forward. Thirdly, that he parked the truck on a gentle decline without engaging the break while cleaning the front of the truck.

11.15 The respondent admitted that he did not choke the wheels to his truck but gave an excuse that the appellant did not provide wheel chocks. The respondent further stated he had applied the hand break and denied parking his truck on a gentle decline.

11.16 It is our considered view that there was no independent evidence of which truck was parked on the gentle decline and which one moved first, as the only eye witness to the accident is the respondent who stated that Brian Kabeya's truck was the one parked on the gentle decline and moved first. The appellant disputes this as it alleges that the respondent's truck is the one that was parked on the gentle decline and that it rolled. PW2's investigations could not establish which truck moved first.

11.17 The appellant's evidence shows that only one vehicle was allowed in the bay wash at a time, and it is clear that the respondent parked there first.

11.18 We therefore take the view that if Brian Kabeya had stayed away, the accident would have been prevented. Be that as it may, applying the case of **O'Hill v. Kayel Shipping,**[6] *supra,* we accept that the respondent should take a share of the blame because even if he had engaged the hand break as he said, it is our considered view that, that could have prevented the truck from rolling but he knew or ought to have known that chocks are placed for safety in addition to setting the brakes and therefore he should have taken better care of his truck and himself notwithstanding that the wheel shocks were not available. The evidence is insufficient for us to make a finding as to which vehicle moved first.

11.19 We further hold that the fact that the respondent went to the wash bay around 15:30 hours, does not per se prove negligence, as in our view, he was still on duty within company premises.

11.20 All facts considered, we find and hold that the respondent is guilty of contributory negligence and the lower Court thus erred by rejecting the counter claim of contributory negligence. What needs to be determined now, is the extent of liability which each party should bear for the accident. The Supreme court in the case of **A van Der Walt Transport (Namibia) Limited v. Dar**

Farms & Transport Limited[10] quoting from **Halsbury's Laws of England, volume 34 at paragraph 76** gave the following guidance on apportionment:

> ***"Apportionment: In a case of contributory negligence, the damages recoverable by the plaintiff are to be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage. The court has regard both to the blameworthiness of each party and the relative importance of the acts in causing the damage (often called causative potency). An appellate court will be very reluctant to interfere with the apportionment of blame or damages by the trial judge, but it will do so if the trial judge has erred in principle, misapprehended the facts or made a clearly erroneous apportionment. A partially successful plaintiff is entitled to full costs on the usual rule that costs fallow the event."***

11.21 In light of the above authority, we take the view that the apportionment of liability should be 70% for the appellant and

30% for the respondent having regard to each party's blame worthiness and the causative potency.

11.22 Turning to the appellant's argument that the trial Judge awarded the respondent sums in excess of what was pleaded, we are guided by the case of **Savenda Management Services v. Stanbic Bank Zambia Limited,**[2] where the Supreme Court guided that when giving monetary awards, a Court should provide justification of how the sums were arrived at.

11.23 In the present case, from paragraph 5.42 to paragraph 5.59 of her Judgment, the learned trial Judge considered the detailed submissions made by counsel for both parties on the law relating to the various forms of damages claimed by the respondent.

11.24 From paragraph 5.60 to paragraph 6.4 the Judge applied the law cited by the parties and other authorities to the facts of the case and gave satisfactory reasons for her assessment of damages. We hold that the assessment was properly done and therefore the learned Judge cannot be faulted but for failure to apportion blame and liability.

11.25 Nevertheless, now that we have apportioned blame, we order that the appellant is liable to pay 70% of the total award with interest as ordered by the lower Court.

11.26 As regards the argument under the 6th ground of appeal, that the trial Judge erred when she made reference to the duty of care imposed on the appellant by the **Occupational Health and Safety Act**,[2] which was not relied upon by either party, we hold that the Court is at liberty to undertake its own research on relevant authorities and to apply the same to resolve any dispute between the parties. Since the said Act is relevant to the case, we hold that it was aptly referred to even though neither party had cited it.

11.0 CONCLUSION

11.1 In sum, the appeal partially succeeds as we have held that the appellant is liable for negligence that led to the accident at its business premises, in which the respondent suffered various injuries/damages. The respondent is also liable for contributory negligence at the rate of 30% of the sum total awards granted to him by the trial court. The appellant is therefore ordered to pay the respondent 70% of the total awards with interest as

ordered by the lower Court. The award for costs made by the lower Court has not been tampered with.

11.2 Since the appellant's win is not substantial, we award costs of the appeal to the respondent. The same should be agreed upon between the parties or taxed in default of agreement.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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P.C.M. NGULUBE
COURT OF APPEAL JUDGE

.....

N.A. SHARPE – PHIRI
COURT OF APPEAL JUDGE