

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 882 OF 1993**

HAMILTON MINGOLE.....PLAINTIFF

AND

LUJERI TEA ESTATE.....DEFENDANT

CORAM: MKANDAWIRE, J
Mhone of Counsel for the Plaintiff
Phoya of Counsel for the Defendant
Nkuna (Mrs), Official Interpreter
Mtchera, Recording Officer

JUDGEMENT

By his re-amended statement of claim the plaintiff is suing the defendant to recover damages for severe injuries and financial loss he suffered as a result of the defendant's negligence. The plaintiff also seeks general damages. It is pleaded in the alternative that the defendant was in breach of its statutory duty under the Factories Act as read with Factories (Electricity) Regulations made thereunder. The defendant denies liability.

It is common case that the plaintiff was employed by the defendant as an electrician. Among other things his duties involved replacing fuses on transformers. On 10th June 1992 he knocked off from work as usual. At about 6.30 p.m. that evening he went to Mr Mbera's house to repair a cooker. After repairing the cooker he set off for his home. But before he reached home he met Mr Dilla who was also an electrician. The plaintiff was more senior of the two. Mr Dilla told him that some fuses were burnt or blown off. These were the defendant's fuses. The plaintiff told the court that it was part of his routine job to replace fuses. The plaintiff and Mr Dilla then went to the factory to collect instruments for replacing fuses. At the factory they found Mr

Gulula, the Estate Manager who took them in a car and dropped them at the place where fuses were burnt. These fuses were on a transformer. As a matter of fact two fuses were involved. The plaintiff took sticks used in removing fuses. These were not ordinary sticks. These are made of fibre glass and specially designed for removing and replacing fuses on high voltage lines. These sticks do not conduct electricity. The sticks can be extended or contracted like an aerial and when fully extended they measure about 30 feet. Using these sticks the plaintiff removed one fuse and left it on the ground. He took a new wire and put it in the fuse, then using the same stick he replaced the fuse on the transformer.

It was the plaintiff's evidence that the second fuse was difficult. By using the stick he removed the fuse and put in a new wire as he did with the first. By then it was becoming dark. He then put the fuse on the stick and tried to replace it on the transformer. The exercise however proved difficult as it was getting dark. He then resorted to using a ladder on the pole. By using the stick he only succeeded in replacing the fuse on the lower part but failed on the upper. This was a long fuse. It was about one foot long. As he tried to fix it, it jumped and hit him. By this time there was electricity flowing because of the wire he had put in the fuse. The fuse fell near him and because of the high voltage the plaintiff was pulled. It was the plaintiff's evidence that he was pulled by the right hand. His left hand was holding the pole so he was pulled back wards and he fell down. During this exercise the plaintiff did not have any protective clothes as the defendant company did not have gloves. The plaintiff had worked without gloves for 4 years and the defendant was well aware of that.

When he fell down the plaintiff became unconscious. He gained consciousness as he was being taken from Lujeri Clinic to Mulanje Hospital. He was later transferred to Queen Elizabeth Central Hospital where he was admitted for about three weeks. He was injured in the ribs and his right hand was burnt. He also sustained injuries in the back. The plaintiff told the Court that the arm was completely burned so that it had to be amputated. He said he felt a lot of pain during the amputation. After this incident the plaintiff

could no longer work as an electrician and so he was changed to clerical duties.

In cross-examination the plaintiff said that it was not the normal procedure to switch off the line when replacing fuses. He said there were some lines they could switch off and others not. And as per standing instructions he could not switch off the line he was working on because it was leading to the factory. Switching off the line would mean stopping work at the factory. Such lines could only be switched off when repairing the lines themselves as for example when a cable is cut or a tree has fallen on the lines. It was the plaintiff's evidence that had he worn gloves he would not have met the fate.

There was one witness for the defence. He was Mr Rogers Tsoka. He was an assistant manager in the engineering department. Among other things he is responsible for the electrical section. He has, himself ever removed a fuse from a high voltage line. Mr Tsoka told the court that to remove and replace a fuse the normal procedure is to use the stick while one is standing on the ground. However in certain circumstances it is necessary for one to go up the line. In this case he would not be using the fuse stick. The court was further informed that where necessary there were some precautionary measures to be taken. These included, switching off the line, discharging the line or circuiting and earthing the line to the ground. However on a high voltage line there would still be voltage left on the line after switching off. It was Mr Tsoka's evidence that there were no written safety instructions because of the high level of illiteracy at the estate. Such instructions were therefore verbal. Mr. Tsoka told the court that the plaintiff as the longest serving and most experienced electrician was aware of the precautionary measures. It was Mr Tsoka's view that with his long experience the plaintiff must have become over confident and that is why he did not follow the precautionary measures. It was this negligence on the part of the plaintiff that caused the accident.

In cross-examination Mr Tsoka conceded that it was a requirement to provide gloves. However he was aware that the plaintiff had worked for four years without gloves. He said he did nothing about that situation. Mr Tsoka told the court that the defendant did not provide gloves so that the employees including the plaintiff were not confident. In his view providing the fuse replacing stick was enough.

In determining this matter I will start with the alleged statutory breach. Section 28 of the Factories (Electricity) Regulations provide as follows:

“Portable insulating stands or screens or insulating boots or gloves, or other suitable means shall be provided and used when necessary adequately to prevent danger, and such articles shall be periodically examined by an authorized person.”

Clearly the defendant was in breach of this regulation as no insulating gloves were provided. Mr. Tsoka conceded that there were no gloves. He said he was aware that the plaintiff had worked for 4 years without gloves. His explanation was that the provision of gloves would make the plaintiff and his workmates confident. I found this explanation to be totally unacceptable. As a matter of fact it is ridiculous. The evidence showed that whatever gloves were there were in tatters and could not be used. Good gloves were duly brought in after the accident. This was therefore a deliberate breach on the part of the defendant. I am inclined to agree with the plaintiff's submission that the defendant was more concerned with cost saving devices than with the safety of its employees. Whether this breach occasioned the accident is a matter to be dealt with later in the judgement.

I now wish to consider whether the defendant owed any duty to the plaintiff. It is elementary that at common law the defendant owed a duty of care to the plaintiff. Such duty involved the defendant providing a safe system of work so that the plaintiffs would not be exposed to unnecessary risk. If the defendant failed to do that he

would be guilty of negligence. The defendant would have breached his duty of care and if that breach caused the accident then the defendant would be liable. The case of **Speed-vs Thomas Swift and Company Ltd (1943) KB 557** underlines the duty of an employer to his employees. The duty of an employer is to provide a safe system of work and such system must be considered in relation to the circumstances of each particular job. The case shows that it may not be easy to define what would be a safe system of work in all situations. What is a safe system can only be determined in the light of the actual situation on the spot at the relevant time. It can not be disputed that in the present case the plaintiff was involved in an operation that was very dangerous. The defendant knew or ought to have known that the plaintiff was at great risk as he was called upon to work on a high voltage line. It was the duty of the defendant to provide such system as would protect the plaintiff from the risk. The defendant did provide a fuse stick but it is clear from the evidence that a fuse stick alone was not enough. There was need for gloves. The plaintiff had to be insulated from the high voltage. The defendant conceded that there were no gloves, at least there were no usable gloves. There were no written warnings and instructions. Written warnings and instructions came after the accident. The defendants's explanation was that providing gloves would make the plaintiff and his colleagues confident. The defendant further explained that there were no written warnings and instructions because of the high level of illiteracy. In placing these after the accident would it mean that the workers suddenly became educated. It is my finding that in not providing gloves and written warnings, the defendants was guilty of gross negligence. The defendant was also negligent in causing the plaintiff to work in the dark. The plaintiff said in his evidence that he had no difficulty in removing and replacing the first fuse. But the second fuse was difficult because by then it was dark. The defendant ought to have known that it was exceedingly dangerous to work in the dark. This made the operation even more dangerous and more risky. Did the defendant really consider that it was safe for the plaintiff to work in the dark and with bare hands on the high voltage line. It would be folly on the part of the defendant if he so believed. In conclusion I find that the defendant was in breach of his duty to the plaintiff. The

evidence clearly shows that the defendant was not concerned with the safety of its works.

The next question is to determine whether it was that breach that caused the accident. I have no doubt whatsoever in my mind that it was the defendant's breach that caused the accident. In his evidence the plaintiff said that when the fuse failed to be replaced, he was pulled because of the high voltage. It was the right hand that was pulled in the first place. This in my view clearly means that if the hands were in gloves he would not have been pulled and he would not have lost balance. The defendant seeks to rely on Section 71 (2) of the Factories Act which provides as follows:

“No person employed in a factory or in any other place to which any provisions of this Act apply shall wilfully and without reasonable do anything likely to endanger himself or any other persons.”

It is the defendant's case that the accident was directly caused by the plaintiff's wilful and groundless decision not to switch off the power before attempting to go close to the transformer. It is said that the plaintiff had breached section 71 (2). The plaintiff's explanation was that he could not switch off that line as it supplied power to the factory. They were not allowed to switch off lines that led to the factory as that would stop work at the factory. In not switching off the line the plaintiff was only carrying out the defendant's instructions. It is clear that the defendant was only thinking of profits and not safety for its workers. The defendant cannot now turn around and say that the plaintiff was negligent in not switching off the line. I find no fault on the part of the plaintiff. He was neither careless nor negligent. My finding therefore is that it was not the plaintiff who had caused the accident and he had not contributed to it. I find that it was the defendant who was wholly to blame.

I now come to the question of damages. In considering damages I will have to take into account the value of money. Since the accident the Kwacha has suffered several devaluations and I do not think I am

wrong in saying that the value of the kwacha has fallen more than 70%. A court is entitled to take into account the value of money in cases where damages are not quantified. This however does not mean that damages will go up in the same proportion as the devaluations.

The plaintiff had suffered serious injuries. He sustained burns on the right arm and rib cage and a bruise in the lower part of the ribs. These injuries are described in Exhibit P1. He was initially taken to Lujeri Clinic, then transferred to Mulanje District Hospital. Finally he was moved to Queen Elizabeth Central Hospital where he was admitted for three weeks. The plaintiff told the court that the right arm was amputated because it was completely burned. According to exhibit P2 the right arm was amputated just below the shoulder. He has suffered permanent incapacity assessed at 60%. It was the plaintiff's evidence that he felt a lot of pain. This cannot in any way be disputed. He must have gone through a huge amount of pain and suffering. Apart from the grave physical pain and suffering which he went through, there is also psychological suffering which he will experience through out his life. In the case of **Chilikumbuyo vs Stagecoach (Mw) Ltd.** The plaintiff's leg was amputated just below the knee and was awarded K25,000.00 for pain and suffering and loss of amenities. That was in 1992. In the present case, I have already described the pain and suffering he went through and the several devaluations of the Kwacha. I award the plaintiff K60,000.00 for pain and suffering.

I will not lump loss of amenities together with pain and suffering. I will consider it separately. In the case of **Stage Coach (Mw) Ltd vs Lynot Chisanga** MSCA Civil Appeal No 22 of 1999 the Supreme Court observed that it is better to treat loss of amenities separately. That Supreme Court case reviewed several cases dealing with awards of damages. The plaintiff in the present case was right handed. For his day to day life, he relied on this hand. It is now gone. He has had to learn how to feed himself using the left arm. Even every day things like bathing, washing going to the toilet are now a problem. He can no longer use the hand in house hold chores. Put simply, he will never enjoy life again. Things will never be the same again. In **Makono vs**

Attorney General Civil Cause No. 95 of 1989 K10,000.00 was awarded. In that case the plaintiff was a lawyer and he suffered various serious injuries. Let me perhaps observe that all the awards made in the cases referred to by the Supreme Court in the **Stage Coach (Mw) Ltd vs Lynot Chisanga** can no longer apply. Not that they were wrong awards but that the value of the Kwacha has fallen so much. Those cases can only be guidelines. I would award the plaintiff in this case K50,000.00.

I now move on to loss of earning capacity. The plaintiff had worked for more than 20 years as an electrician. That is the only job he knows. He cannot do it now as he was heavily relying on his right hand. After the accident he was moved to a clerical job. A thing he never did all his life. Certainly he had no chances of promotion in his new job as his output must have been minimal. These are now difficult days of financial austerity and retrenchments. If the plaintiff were to be retrenched, he would be useless on the labour market. In the **Lynot Chisanga** case K60,000 was awarded. In this case a sum of K160,000.00 would be adequate compensation.

In total the plaintiff is awarded K270,000.00 in damages. The defendant is condemned in the costs of this action.

Made in open Court this 28th day of May, 2001



M P MKANDAWIRE

JUDGE