IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 2833 OF 2001

BETWEEN:

JOSEPH JOSHUA.....PLAINTIFF

and

ARKAY FOOTWEAR INDUSTRY.....DEFENDANT

CORAM: **HON. JUSTICE A.C. CHIPETA**
Gulumba, of Counsel for the Plaintiff
Msowoya, of Counsel for the Defendant
Nkhoma (Mrs), Official Interpreter
Rhodani, Official Recorder

JUDGMENT

The Plaintiff herein is Joseph Joshua. He was employed by Arkay Footwear Industry as a Machine Operator in a factory for making plastic shoes. On 5th March, 2001 in the course of work the Plaintiff's right hand got caught in the machine he was operating and got crushed. In consequence, when he was taken to the hospital, he lost four of his fingers to amputation. In the present action the Plaintiff ascribes negligence for this injury to his employer.

There are four particulars of negligence which the Plaintiff has pleaded in his statement of claim. These are, and I quote:

> *"(a) failing to promptly correct a defect in the machinery which necessitated the machine operator to use his hands to keep the Spew Injection nozzle open.*
>
> *(b) failing to provide a safer alternative to opening the Spew Injection nozzle with the bare hands.*
>
> *(c) failing to take any or any adequate measures for the protection of the Plaintiff as he operated the machine, (and)*
>
> *(d) failing to provide a sage system of work despite the obvious risk in the prevailing system."*

It is on account of these allegations that the Plaintiff accuses his employer of negligently causing him the injury herein. He thus seeks damages for pain and suffering, for loss of amenities, for loss of earning capacity, as well as special damages and costs of the action.

In its defence, the Defendant has admitted the employment relationship between itself and the Plaintiff as well as the occurrence of the injuries the Plaintiff has complained of. It has however outright denied the negligence the Plaintiff has attributed to it vis-à-vis the causation of the same. It is the Defendant's contention, in fact, that the Plaintiff is either wholly or largely to blame for the accident in which he sustained these injuries.

Arkay Footwear Industry avers that the Plaintiff was trained to operate the machine that injured him. Despite this training and in spite of operating instructions it claims that the Plaintiff omitted to press the safety brake of the machine before attempting to reach its nozzle area with his hand. On this basis the Defendant completely disputes liability.

Further, the Defendant has complained that the Plaintiff already lodged a claim against it in respect of this very injury under the workers Compensation Act. It is thus concerned that for no good reason the Plaintiff is not prosecuting that claim.

I apprehend it to be the purpose of pleadings in civil cases to define and limit issues that are in contention. See: Likaku vs Mponda [1984-86]11 M.L.R. 411. Going by the particulars of negligence as averred by the Plaintiff and as denied by the Defendant, I take it that the issues in contention in the case all revolve around the non-correction or delayed correction of a defect on the machine the Plaintiff was required to operate.

If I understand the Plaintiff's statement of claim correctly he is complaining that the machine he had to operate developed a defect that necessitated the use of his hands to keep its Spew Injection nozzle open, but that the Defendant did not readily correct that defect. Further the Plaintiff alleges that over and above this neglect, the Defendant did not provide any safer alternative to opening this nozzle with bare hands. He next accuses the Defendant of failing to take any or any adequate measures to protect him as he operated this defective machine. It is finally his assertion that the risk of operating this machine was obvious, but that despite this the Defendant did not provide a safe-system of work.

I heard evidence from a total of four witnesses in this case. Two of them, Joseph Joshua and Joshua Kazombe, testified as PWI and PWII on the Plaintiff's side of the case. The other two, Nixon Chauma, a Machine Operator still in the employ of the Defendant, and Black Juma, the Factory Manager, testified on behalf of the Defendant in the case. Apart from the oral testimony of all these witnesses, during the testimony of DW1, the Court took occasion to visit the current factory of the Defendant at Kidney Crescent near Ginnery Corner in town and the old factory building, at which the injury herein was sustained, situated at Chirimba. I

should highlight the fact that there being several shoe-making machines at this factory and the said machines having been moved and relocated from the Chirimba site to the new premises, it cannot be said that the Court actually saw and examined the very machine that injured the Plaintiff. All the same, however, I found it quite enlightening in the case to see how this type of machine actually operates.

Now, in a nutshell evidence has shown that the machine in issue is made in the form of a large round table with some twenty shoe moulds. It rotates but stops at what are known as "stations." "Stations" are places where the moulds on the upper part of the machine are directly aligned with counterpart moulds on its lower part. When a station has been reached plastic material is spewed into the moulds through the nozzle as the lower moulds of the machine are jerked up into the upper ones. The consequence is that the plastic material so injected into the moulds turns into shoes and they are then harvested therefrom as such.

Evidence has also shown that every now and then the Injection nozzle gets clogged with the plastic material that passes through it. At such points it becomes necessary to stop the machine and to lift the iron sheet cover on it to access the nozzle so as to remove the remains clogging it, before resuming production. There is a button switch within reach of the machine operator for stopping the machine, but evidence also indicated that lifting the iron sheet cover has the same effect. Evidence also made it clear that these switches operate to stop the machine whenever the rotating table has not yet reached a station. Once it reaches a station, injection will inevitably take place and the use of this switch or the lifting of the iron sheet cover is of no effect.

It was clear to me throughout as testimony was presented that the style of operation described above was the normal one for the type of machine under consideration. In regard to the particular machine the Plaintiff worked on the material day and got injured on, no evidence was presented to

show that it had a defect which the Defendant neglected to maintain or which necessitated any operation in a peculiar fashion.

It also became clear, even from the evidence of the Plaintiff himself, that the Plaintiff had some weeks of training on such type of machine before being entrusted with the job of operating it. Having joined the employ of the Defendant in 1999 and become a Machine Operator that very same year, the meaning is that, by the time he was sustaining this injury, the Plaintiff had almost two years of experience to his credit with using this type of machine. It cannot be said therefore that he was an amateur. Indeed evidence has also shown that the Plaintiff was well aware that when the moulds were already aligned, touching the table brake switch would not stop the jerk from coming up and compressing the moulds together for shoes to be manufactured. I noted also on the machine the court examined existence of written instructions warning the user against using it dangerously although the Plaintiff denied existence of any written instructions.

On his part, during cross-examination, the Plaintiff said he could not really explain how he got injured. He claimed that he did touch the switch to stop the machine, but that it did not stop the machine. DWI's evidence was that he was present the time the Plaintiff got injured. He was then only two to three metres away from the Plaintiff and is the one who immediately came to his rescue after the accident. He even took over operating the very machine in issue for the rest of the day and he said he observed no peculiar problem with its operation.

DWI corroborated the Plaintiff on point that he switched off the table brake switch. When he rushed to rescue the Plaintiff he said he saw this switch in the off position, but he also observed that by then the machine was already at a station. By then, per evidence, the switch the Plaintiff had used could not have stopped the jerk from moving up and he knew this. He then needed to have used a different switch

located higher up on the machine, which switch in the observation of DWI was still in the on-position. The witness saw the Plaintiff's hand trapped between the nozzle and the jerk and he had to rush to the main switch of the machine to change it from automatic to normal operation before he could lower the jerk to free the Plaintiff's hand.

As I heard this case I observed a marked shift in the way the case was presented from what I had anticipated. The record will bear me out if I say that contrary to the pleadings the Plaintiff did not really dwell on the defect his statement of claim averred. Rather he developed his case along the lines of the Defendant running long and tiresome shifts, its lack of provision of protective wear, and its alleged encouragement of short-cut styles of clearing of nozzles so as to achieve high daily production. To be quite sincere the case was highly obsessed with these accusations against the Defendant, as well as complaints that the factory building where this accident occurred was badly ventilated with windows high up on two walls only. With intense heat, as doors were normally closed, and plastic fumes filling the air, it was virtually suggested that workers as good as got drank and were thus liable to great danger in operating these machines which required accessing the nozzles, when clogged, by hand.

A comparison of the trend the evidence adopted with that suggested by the pleadings does not delay in revealing that the two are not compatible. It would thus not be far-fetched in the circumstances to say that the Plaintiff, at hearing stage, abandoned his case as pleaded and preferred to try and prove a type of negligence he had not averred against the Defendant. I am concerned that to allege that the injury herein was due to the Defendant's failure to rectify a defect in the machine the Plaintiff worked and its failure to provide safe means of operating it in the interim is not reconcilable with the allegation that overworking and putting the Plaintiff under stress increased his chances of injuring himself on the machine that operates in the same way for all other employees.

I have recalled to mind the holding of the Supreme Court of Appeal in Yanu-Yanu Company Limited vs Mbewe [1981-83]10 MLR 417 which is to the effect that a Court has no jurisdiction to determine a case on a point not at issue between the parties. I have accordingly wondered about this shift by the Plaintiff from one sort of negligence as pleaded to a totally different sort of negligence as testified on but not pleaded, and I have wondered whether I should follow him there. In battling with this quandary I have also considered Super Trade House vs Mazombwe [1981-83]10 MLR 89 where, inter alia, the Supreme Court again pointed out that a Court should not give judgment on facts that have not been pleaded.

With the guidance just alluded to I see no licence for abandoning the pleadings in the case and being attracted by evidence that goes off tangent from what was pleaded. It follows that the Plaintiff has failed to prove the case he brought to Court. Accordingly I dismiss his action with costs.

Pronounced in open Court this 22nd day of October, 2004 at Blantyre.

A.C. Chipeta
JUDGE