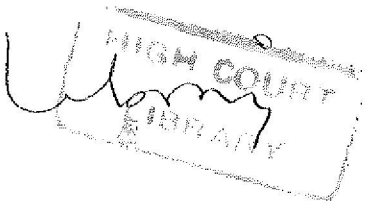

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 685 OF 2018

BETWEEN

PETER NKHUNDA **CLAIMANT**

AND

LINDE FARM **DEFENDANT**

CORAM: JUSTICE M.A. TEMBO

Kalanda and Kusiwa, Counsel for the Claimant
Chayekha, Counsel for the Defendant
Mankhambera, Official Court Interpreter

JUDGMENT

1. This is the decision of this Court following a trial of this matter on the claimant's claim for damages for the injury he suffered when his arm got amputated by a livestock feed milling machine belonging to the defendant, his employer, as a result of the alleged negligence and breach of an employer's statutory duty by the defendant in failing to ensure a safe system of work and other breaches.
2. The defendant accepted being employer of the claimant but denied being in breach of its statutory duties or being negligent as alleged. It asserted that the claimant got injured due to his own negligence.
3. The claimant asserted in his claim that on 18th March, 2016 he got injured at the defendant's farm at Lunzu in Blantyre. He asserted that he suffered a deep

traumatic amputation of his right arm. He attributed his injury to the defendant's negligence and breach of statutory duty.

4. The claimant asserted that he believes he got injured due to the negligence of the defendant and due to its breach of its statutory duty as alleged.
5. He asserted the particulars of the defendant's negligence and breach of statutory duty to be failure to set up and implement a safe system of work for the claimant, failure to provide the claimant with a safe place of work, failure to provide the claimant with adequate instructions in how to perform his work, failure to provide the claimant with adequate training and supervision, failure to provide the claimant with safe plant and equipment, failure in all the circumstances to take reasonable care for the safety of the claimant and exposing the claimant to unnecessary risk of injury.
6. He then asserted that by reason of the foregoing he suffered loss and injuries. He stated the injury to be traumatic amputation of his right arm. He then stated the particulars of loss to be K10 500 cost of a medical report.
7. He then claimed damages for pain and suffering, loss of amenities of life, disfigurement, cost of a medical report and costs of this action.
8. On its part, the defendant asserted in its defence that it had indeed employed the claimant as a general worker. It however denied the allegations of negligence herein and breach of statutory duty and asserted that the claimant got injured due to his own negligence. It stated particulars of the claimant's negligence as using a hand to remove grass which was stuck while the machine was in motion, failure to first switch off the machine before removing or attempting to remove the grass, failure to comply with instructions as to safety in operating the machine, failure to comply with general instructions of work on the machine and deliberately putting himself in danger by inserting his hand into the machine while the machine was in motion.
9. The defendant also asserted that all its employees were sufficiently trained by the supplier of the livestock feed milling machine, on the proper usage of the machine and that the claimant deliberately acted contrary to the training. The defendant therefore denied any liability to pay damages herein asserting that the claimant deliberately or negligently injured himself.
10. The issues for determination before this Court are whether the defendant is guilty of the alleged negligence and breach of an employer's duty as alleged.

Whether the claimant suffered the injury and loss claimed. And whether he is entitled to the damages and costs sought.

11. The standard of proof in these civil matters is on a balance of probabilities as rightly noted by the parties in this matter. And, the burden of proof lies on he who asserts the affirmative, in this case the claimant. The defendant bears the burden of proof on the allegation of contributory negligence. See *Nkuluzado v Malawi Housing Corporation* [1999] MLR 302 and *Miller v Minister of Pensions* [1947] All ER 372.
12. The claimant gave evidence to prove his claim. The defendant had three witnesses.
13. The claimant's case that is undisputed is that he was working for the defendant as a caretaker of animals and feed miller at the defendant's farm. He stated that the defendant bought a feed milling machine around January, 2015 for preparing feeds for cattle and pigs. The other part of his evidence is in contention.
14. He indicated, by his witness statement, that by the date of the accident he had used the machine herein twice.
15. This Court visited the site where the livestock feed milling machine is. It observed, as indicated by the claimant, that this machine has an opening through which grass is fed. There is a tray that has a cover attached in front of the opening. Then the grass is pulled inside the machine by some clamps which push the grass onto some sharp cutters which cut the grass up into some small pieces which are thrown out through another opening and fall on the ground and are collected and fed to the livestock.
16. The claimant stated that on a date that he could not recall, the machine developed a fault and the manufacturer was called to rectify the said fault. He stated that in fact the manufacturer of the machine sent a technician to rectify the fault. He explained that the technician removed the tray and cover to the opening of the machine and did his work after which he did not replace the tray cover. He then stated that, as a result, the grass was being fed directly into the clamps in front of the machine.
17. He then stated that on 18th March, 2015 he was working at the livestock feed milling machine with his colleague. He stated that his colleague was handing him grass and he would feed it into the machine. He then explained that whilst he was feeding grass into the machine, as it was in motion, his hand got caught

by the clamps which pulled his hand into the sharp cutters which sliced his hand into pieces before throwing them through the machine outlet.

18. He then explained that his colleague switched off the machine and helped him to go to the hospital. He stated that he was hospitalized on 18th March, 2015 and got discharged on 30th March, 2015. He tendered a medical report and explained that he suffered amputation of his right arm.

19. He then asserted that he got injured because of the absence of the tray cover which served the purpose of receiving grass and protecting the claimant from the clamps and other moving parts of the machine. He asserted further that it was the duty of the defendant to see to it that the tray cover was always in place on the machine. He asserted that, by allowing him to work on the machine with the tray cover removed, the defendant exposed him to unnecessary risk and an unsafe system of work.

20. The claimant then filed a supplementary witness statement in which he asserted that the machine stayed for two months without being installed at the farm once it was delivered. He stated that the defendant then sent a technician who installed the machine who instructed the claimant on how the machine was to be operated to prepare livestock feed.

21. He then stated that on the first day he wanted to operate the machine on his own it could not start. He stated that he notified the owner who sent a technician to check on the machine. He explained that the technician came to the farm and worked on the farm and reminded him how to operate the machine and also how to fix certain problems such as grass stuck in the machine and cleaning the machine.

22. He asserted that the technician then removed the machine opening cover such that grass had to be fed directly to the clamps and he stated that the technician advised that this helps the machine to work faster adding that this was also done at another farm called Zalewa Farm.

23. He reiterated that on the two occasions he had used the machine the owner of the farm was not present.

24. He then stated that he dropped out of secondary school in Form 1 and that he had never worked on a machine like the livestock feed milling machine. He added that previously he worked as a houseboy. He then stated that despite the foregoing, he is not dumb to deliberately remove grass from the machine using bare hands when it was in motion.

25. He then stated that, after his hand got amputated, the defendant appointed him supervisor of his colleagues as he cannot operate the machine. He added that another person was employed to operate the machine. He asserted that prior to his accident there was no supervisor.
26. During cross-examination, he stated that the clamps would pull the grass on their own into the machine. He then stated that as he was putting grass his hand accidentally touched the clamps and it was pulled inside the machine. He stated that the problem was that the cover was off that is why his hand went to the clamps. He then stated that he was pushing the grass with his two hands towards the machine and his hand ended up touching the clamps. He agreed that it was not necessary to push the grass towards the machine clamps and that what he did was not necessary.
27. During re-examination, he stated that he was standing next to the tray and was putting grass into the machine just next to the clamps. And that this was not how he had demonstrated earlier. He stated that that was how he was taught to feed the grass into the machine. That marked the end of his evidence.
28. The first witness for the defendant was Joe Lindeire. He stated, in his witness statement, that he owns the defendant farm and indeed purchased the livestock feed milling machine herein.
29. He explained that prior to purchasing the machine herein he had purchased another one and had it placed at his Zalewa Farm where it was operated satisfactorily without accidents after the operator was trained by the supplier. He explained further that this led him to purchase the machine in question.
30. He asserted that after he got the machine herein, indeed the supplier trained the operators on its use. He asserted further that he knew that the operators were trained to switch off the machine before removing any grass stuck inside it.
31. He then stated that at the time of the accident herein, the cover at the opening of the machine had been removed. He stated that however, the grass cutting blades are inside the machine and that for one to reach those blades one has to extend the hand inside the machine.
32. He then asserted that, contrary to instructions, the claimant attempted to remove grass from the machine using bare hands while the machine was in motion and that he got injured as a result. He therefore denied being negligent.

33. During cross-examination, he stated that one need not stand close to the machine when feeding grass so that he is not too close to the clamps. He also stated that if one touched the clamps while the machine was in motion one would get injured.
34. He then stated that the cover on the opening of the machine was not meant to protect operators but rather to make sure grass was not all over the place. And that even when the cover is off there is no risk in working with the machine. He added that it is safe without a cover. He then changed to say that it was not safe to operate the machine and feed grass into it without the cover. He added that without a cover it was easy for hands to reach the clamps. He accepted that the clamps are dangerous and were supposed to be covered. And that without the cover there was no safety precaution put in place.
35. He however said that it was not the technician who removed the cover and he was not aware that the cover had been removed.
36. He stated that he usually bought grass and his employees rarely went out to cut the grass. He added that he set the working hours for his employees between 7.00 a.m and 4.30 p.m.
37. During re-examination, he stated that it was not necessary to be close to the clamps when feeding grass into the machine. He then stated that the clamps are not very exposed to the hands if you are standing at the proper position. He asserted that the claimant was not standing at the proper position as per the training instructions, even with the roof positioned just above the head above the machine.
38. He accepted that if machine is in motion and one touched the clamps then one would get injured. He reiterated that the safe thing to do is to switch off the machine and remove whatever is stuck in it. He insisted that in the present case, the claimant did not follow instructions.
39. The next witness for the defendant was Eddie Msisha. In his witness statement, he stated that he is employed by CAMCO as a technician. And that he is the one who installed the machine herein after installing another one at Zalewa Farm. He stated that he trained the operators at both farms and gave them safety tips. He pointed out that he told operators never to try to remove anything while the machine is in motion but to first switch it off.
40. He then stated that he was surprised to learn that the claimant got injured considering that the machine has never had an injury record. He asserted that

for a person to get injured he must have inserted his hand inside the part of the machine that houses cutters and that it was dangerous to remove anything while the machine was in motion.

41. He then asserted that from the design of the machine, the defendant did not expose the claimant to danger or unsafe work environment.

42. During cross-examination, he stated that he worked as a general fitter since 1997. He stated that he had the machine installed in two hours' time. He stated that he came to the defendant's farm on several occasions. He explained that he installed the machine on the first day. Then he came back after seven days to commission the machine after concrete was dry.

43. He confirmed that if that whenever there was a problem with the machine he would be called in. He added that one time he came to service the machine.

44. He then stated that he trained the claimant and other employees on operation and how to remove grass stuck inside machine but that they were not allowed to open the engine.

45. He then acknowledged the dangers associated with the machine. He stated that he told the operators not to touch the clamps as they would get injured and that this is why he told them to switch off machine before removing grass stuck inside the machine. He asserted that the told operators to remove grass stuck after using spanners to open the machine cover or from underbelly of machine. And then to restart the machine.

46. He then stated that with the machine tray cover on, it is not possible for operator of machine to touch the clamps when feeding grass into machine. He also said it depended on where operator was standing. He added that the tray cover is meant to ensure grass was fed into machine smoothly and was necessary.

47. He then said that clamps were not to be exposed without the tray cover. He added that the clamps are dangerous and that if one put a hand there it would be sucked in. He however stated that it did not occur to him that an operator would put a hand on the clamps. He stated that his safety tips instruction did not cover this aspect of touching clamps. He also stated that he was not there when the claimant got injured.

48. During re-examination, he stated that it was not necessary to touch the machine when feeding in grass. He clarified that during training he told

claimant not to touch any moving parts of machine but to stop the machine first.

49. He then explained that the machine has two guards one for the clamps and another for the cutters. And that there is a tray and cover that held the feed into the machine. He added that there is no moving part in the tray. He added further that the guard for the clamps was never removed.

50. He stated that he told the operators to work in pairs with one to be on guard to stop the machine. And that the feeder would stand in front of the machine and that once grass reached the clamps it would be sucked into the machine.

51. The third witness for the defendant was Gift Kapolo who stated, in his witness statement, that he had worked for the defendant for about 12 years, as a general worker. He explained his duties to include cleaning the farm, feeding livestock as well as making animal feed.

52. He then stated that he used to work with the claimant and was present when the claimant got injured. He added that he was the one giving grass to the claimant to feed into the machine and that the claimant was the supervisor.

53. He explained that when the livestock feed milling machine was installed the technician who installed it trained them no how to use it. He stated that the claimant was trained first as supervisor then he was also trained. He asserted that he was instructed on how to operate the machine, how to remove grass stuck in the machine and how to clean the machine. He added that when removing stuck grass and when cleaning the machine, it had to be switched off.

54. He then stated that on the material day, as he was giving grass to the claimant to feed into the machine tray, the claimant signaled to him to stop. He explained that he then saw the claimant try to remove grass which was stuck close to where the cutters are housed. He explained further that the claimant did not switch off the machine and the machine sucked his had in and his arm got injured.

55. He asserted that the tray where they put the grass has a cover but that at the material time the cover had been removed by the technician. And that, in fact, they had been using the machine without the tray for a number of months.

56. He then stated that, from what he saw, the cause of the injury to the claimant was not the absence of the tray but the fact that the claimant attempted to remove the grass with his hand and without switching off the machine. He

observed that this was contrary to their instructions. He therefore blamed the injury on the claimant.

57. During cross-examination, he explained his work schedule that started at 7.00 a.m. He explained his chores that included cleaning the farm. And that he would mill grass from around 9.00 am and finish around 10. 00 a.m. He added that they would then go for tea to boost their concentration. Later he would go for lunch at noon and come back to work between 2.00 p.m and 4.00 p.m. He also stated that they would cut grass and mill it.

58. He then stated that on the material day they followed the same routine and starting milling grass around 9.00 a.m. He explained that the livestock feed machine is noisy when in motion. He explained further that they would hear each other since they were close to each other but would also use signals to stop the machine.

59. He then stated that the tray cover that had been removed herein was meant to protect the operator. He added that if the tray cover was on one had to deliberately make effort to touch the clamps. He also said they did not remove grass from the clamps but from the underbelly of the machine.

60. He then stated that he had gone to counsel for the claimant's offices and had said he had agreed to testify for the claimant but did not agree to the truth of the claimant's statement. He insisted that he testified on how the claimant got injured.

61. He then explained how he stood in front of the machine to feed in grass. And that he would have to go near clamps if the tray was off but that one need not bring hands near the clamps in that case. He asserted that they were told the clamps were dangerous and would injure hands.

62. He then stated that on the material day the claimant stood in front of the machine and that he stood a meter behind. He then stated that the claimant was taller and he could not see properly at the clamps when the claimant stood in front of him.

63. He was shown the statement he signed at the claimant counsel's office and said it was different from the one he tendered in evidence.

64. During re-examination, he stated that he did not take the oath when he gave a statement to counsel for the claimant but did at trial.

65. He then stated that the day the claimant got injured the tray was there but the tray cover was not there. He insisted that he saw how the claimant got injured.

He insisted that grass got stuck on the clamps and the claimant said he would remove the grass at the clamps and he went and switched off the machine. That marked the end of the evidence of the defendant.

66. Both parties correctly agree on what constitutes negligence. In an action claiming negligence, the claimant must show that there was a duty of care owed to her, that the duty has been breached and that as a result of that breach of duty the claimant has suffered loss and damage. See *Mkandawire v Ziligone* [1997] 2 MLR 134, 144.

67. Both parties also correctly agree that, with regard to employers and their employees, the duty of care on the employer is as was stated in the case of *Nchizi v Registered Trustees of the Seventh Day Adventist Association of Malawi* (1990) 13 MRL 303, 308 where Banda J (as he was then) said:

> It is the duty of an employer or acting through his servant or agents to take reasonable care for the safety of his workmen and other employees in the course of their employment. This duty extends to safety of place of work, the plant and the equipment and the method and conduct of work. Briefly, the duty of an employer towards his servant is to take reasonable care for his servant's safety in all circumstances of the case.
> Alternatively, the employer's duty is that he must not expose his employees to unnecessary risk or unreasonable risk....

68. Both parties also correctly referred to the statutory duty of employers as provided in section 13 of the Occupational Safety, Health and Welfare Act which states as follows:

> (1) It shall be the duty of every employer to ensure the safety, health and welfare at work of all his employees
> (2) Without prejudice to the generality of an employer's duty under subsection (1), the matters to which that duty extends includes in particular-
> a. the provision and maintenance of plant and systems of work that are safe and without risk to health;
> b. arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transportation of articles and substances;
> c. the provision of information, instruction, training and supervision in accordance with section 65 to ensure the safety and health at work of his employees;

d. as regards any place of work under the employer's control, the provision of maintenance in a manner that is safe and without risks to health, and the provision and maintenance of means of access to and egress from it that are safe and without such risks;

e. the provision and maintenance of a working environment for his employees that is safe, without risk to health, and adequate as regards facilities and arrangements for their welfare at work.

69. The claimant also referred to section 35 (1) of the Occupational Safety, Health and Welfare Act which provides that every dangerous part of any moving machinery or component thereof shall be securely fenced unless it is of such construction as to be safe to every person working on the premises as it would be securely fenced.

70. The claimant observed that a dangerous part of machinery is the part a reasonable foreseeable cause of injury to anybody acting in a way in which a human being may be reasonably be expected to act in circumstances which may be reasonably expected to occur. See *Close v Steel Co. of Wales Ltd* [1962] 2 ALL ER 953. He added that deliberate acts that may be foreseen, such as putting a hand into the machine contrary to express orders, must be taken into account. *Smith v Chesterfield and District Co-operative Society Ltd* [1953] 1 ALL ER 447.

71. The claimant then observed that the words 'securely fenced' has been interpreted to mean that no part of a person or clothing of any person working on the machine or passing near it can come into contact with it. Additionally, that it means erection of a barricade to prevent any employee from making contact with the machine. *John Summes & Sons Ltd v Frost* [1957] 1 ALL ER 870.

72. Both parties then referred to section 65 (1) of the Occupational Safety, Health and Welfare Act which provides that every worker shall be adequately and suitably informed of potential hazards to which they may be exposed at the work place, instructed and trained in measures available for prevention of such hazards.

73. The claimant contended that the defendant owed him a duty of care by reason of the employment relationship. He submitted that the clamps were a dangerous part of the livestock feed milling machine that had not been securely fenced considering that the tray cover was removed and further that

the machine was operated for months without the tray itself by the time of the claimant's injury herein.

74. He contended that in the circumstances the defendant not only breached his common law duty as employer not to expose him to unnecessary risk and was therefore negligent but also breached his statutory duty under section 13 (2) (a) of the Occupational Safety, Health and Welfare Act to ensure the provision and maintenance of plant and systems of work that are safe and without risk to health.

75. The claimant also contended that the defendant also breached section 65 of the Occupational Safety, Health and Welfare Act by not instructing the claimant adequately on the dangers of the clamps as admitted by the technician. He also observed that during training the tray and cover for feeding grass into the machine was attached. However, during operation of the machine the cover and the tray itself were detached from the machine.

76. He then contended that he got injured as a result of the defendant's negligence and breach of statutory duty as specified above, in that in the end the claimant got exposed to the dangerous clamps that were not securely fenced and as he was uninstructed of such danger and his hand got amputated.

77. It then correctly submitted that an employee has a duty to ensure his own safety at work in terms of section 18 (a) of the Occupational Safety, Health and Welfare Act.

78. The defendant accepted the claimant's contention that it owed a duty of care to the claimant both at common law and statute having employed the claimant.

79. The defendant pointed out that the issue for determination was whether it had breached the common law and statutory duty leading to the damages claimed by the claimant. It then submitted on the breaches particularized by the claimant.

80. It first submitted on the claimant's allegation that there was failure to set up and implement a safe system of work for the claimant, failure to provide the claimant with a safe place of work and failure to provide the claimant with safe plant and equipment. The defendant submitted the way the machine was set up is that clamps would guide the grass inside to the cutters. It submitted that both the clamps and the cutters had covers which provided necessary protection to the claimant operator making the machine safe.

81. The defendant also submitted that it was demonstrated, that it was not necessary for the operators to come close to the clamps or grass cutters. It also pointed out that the grass used was admittedly tall so there was no need to come close to the machine. Further, that removal of grass stuck was from the underbelly of the machine. From the foregoing, the defendant submitted that it had a safe system of work.
82. The defendant observed that the claimant stressed the fact that the tray for feeding grass into the machine had its cover removed and that this made the system unsafe. The defendant contended that the tray cover was meant to keep the grass in the tray and not necessarily to cover the clamps which had their own cover. It added that with or without a tray cover the claimant was not supposed to come close to the machine near the clamps. The defendant therefore submitted that removal of the tray cover did not make the machine unsafe. And that the claimant failed to prove the particulars of negligence and breach of duty on this head.
83. The observation of the claimant was that the tray for feeding grass into the machine was said to have been removed in addition to the tray cover itself. And that obviously this made the machine unsafe given that there was direct exposure of the clamps despite the alleged covers being there which the claimant observed were not really covers as such.
84. The defendant then submitted on the allegation by the claimant that there was failure to provide the claimant with adequate instructions on how to perform his work and failure to provide the claimant with adequate training and supervision. The defendant contended that from the evidence the claimant was provided adequate training as elaborated by the technician. And that the claimants were advised not to touch any moving parts of the machine herein. The defendant contended further that lack of supervision was not the cause of the injury herein. The defendant submitted that this particular of negligence was not made out.
85. The defendant then submitted on the allegation that there was a failure in all the circumstances to take reasonable care for the safety of the claimant. The defendant contended that this particular of negligence was too general and lacks specificity. It contended further that in fact with the training it provided the claimant, the safety of the claimant was ensured and this particular of negligence was not made out.

86. On the allegation of exposing the claimant to an unnecessary risk of injury, the defendant submitted that the machine was safe given that all moving parts were covered and the claimant was well trained in operating the machine. And that therefore, the defendant did not expose the claimant to an unnecessary risk of injury.
87. The defendant then contended that the claimant got injured by his own actions in trying to remove grass from the clamp with his hand while the machine was in motion contrary to the instructions given. And that this was negligence and contrary to section 18 (a) of the Occupational Safety, Health and Welfare Act.
88. The claimant retorted that the allegation that the claimant used his hand to remove grass from the clamps was unreliable. He observed that the claimant's co-worker who made that allegation could not see what happened in front of the claimant as demonstrated at the site of the machine given that the claimant is a taller person and blocked the view of the front of the machine from the co-worker. The claimant also stated that the co-worker gave two contradictory statements in this matter which makes it him someone whose evidence is not credible.
89. The claimant then contended that he was merely inadvertent in his actions as he fed grass into the machine and was not negligent as contended by the defendant. He pointed out that the machine required a lot of concentration when in use in terms of feeding in grass and that the removal of the tray and its cover heightened the risk posed to the claimant as work progressed and as a human being his concentration naturally got lower.
90. He noted that it has been held that inadvertence is not to be equated to negligence. For instance, in *John Summes & Sons Ltd v Frost* [1955] 1 ALL ER 870, a skilled man held a piece of metal too close to a grinding wheel and was exonerated from blame.
91. This Court has considered what it saw at the site where the livestock feed milling machine stands at Lunzu. The machine was started and a demonstration was made to mill some grass. The observation of this Court was that this machine was a dangerous machine to be operated with a lot of caution. The machine was designed the way it was designed for a specific reason. The machine has a tray for feeding grass into it which is covered. The grass is grabbed by the clamps that are at the front end of the machine to which

the tray is attached. Then the clamps suck in the grass towards the cutters which cut the grass which is then sent out through an exit.

92. The important point, as submitted by the claimant, is that the machine was modified in that the technician is said to have removed the cover. The co-worker of the claimant went as far as saying that the tray itself was also removed for months. That was a modification from the design of the machine. This Court agrees with the claimant that, contrary to the assertion of the defendant, this modification was consequential.

93. The consequence is that the clamps were now exposed and were not fenced securely by the top cover of the tray. The clamps pulled the grass into the machine, fast, as far as this Court observed during the demonstration. And the cover of the tray would in the process help, in this Court's view, to prevent exposure of the claimant to the clamps since the cover also covered access to the clamps. Removal of the tray cover removed cover or a screen from access to the clamps. It made it possible for the clamp to pull the claimant's hand in as he pushed the grass towards the clamps which would otherwise not be the case had the cover of the tray been left on the machine as per the design of the machine. This Court does not therefore agree that the tray's purpose was only to make sure grass was in place. In fact, if grass was meant to be in place by reason of the cover as submitted by the defendant then it follows that removing of the cover affected the way grass was to be handled which imperiled the claimant herein.

94. The defendant's proprietor in fact acknowledged that it was not safe to operate the machine and feed grass into it without the cover. He added that without a cover it was easy for hands to reach the clamps. He accepted that the clamps are dangerous and were supposed to be covered. And that without the cover there was no safety precaution put in place.

95. This Court agrees with the claimant's observed that a dangerous part of machinery is the part a reasonable foreseeable cause of injury to anybody acting in a way in which a human being may be reasonably be expected to act in circumstances which may be reasonably expected to occur. See *Close v Steel Co. of Wales Ltd* [1962] 2 ALL ER 953. And that that deliberate acts that may be foreseen, such as putting a hand into the machine contrary to express orders, must be taken into account. *Smith v Chesterfield and District Co-operative Society Ltd* [1953] 1 ALL ER 447.

96. This Court agrees further with the claimant's observation that the words 'securely fenced' has been interpreted to mean that no part of a person or clothing of any person working on the machine or passing near it can come into contact with it. Additionally, that it means erection of a barricade to prevent any employee from making contact with the machine. *John Summes & Sons Ltd v Frost* [1957] 1 ALL ER 870.

97. In the foregoing circumstances, this Court agrees with the claimant that, by modifying the machine by removing the tray cover, as stated by its own witness, the defendant failed to securely fence the dangerous clamps herein as submitted by the claimant. This Court agrees that the defendant failed to comply with section 35 (1) of the Occupational Safety, Health and Welfare Act which provides that every dangerous part of any moving machinery or component thereof shall be securely fenced unless it is of such construction as to be safe to every person working on the premises as it would be securely fenced.

98. It is not surprising that the clamps herein easily ended up sucking the claimant's hand into the cutters thereby amputating the same. On the contrary, it would take deliberate effort for someone to get his hand to the clamps with the tray cover on.

99. In view of the foregoing, this Court finds that the defendant not only breached his common law duty as employer not to expose the claimant to unnecessary risk and was therefore negligent but also breached his statutory duty under section 13 (2) (a) of the Occupational Safety, Health and Welfare Act to ensure the provision and maintenance of plant and systems of work that are safe and without risk to health.

100. This Court therefore concludes that the claimant has proved satisfactorily that there was failure to set up and implement a safe system of work for the claimant, failure to provide the claimant with a safe place of work and failure to provide the claimant with safe plant and equipment.

101. This Court next considers the allegation by the claimant that there was failure to provide him with adequate instructions on how to perform his work and failure to provide the claimant with adequate training and supervision.

102. This Court finds contrary to the defendant's contention that from the evidence it is clear that the claimant was not provided adequate training as elaborated by the technician. Although indeed that the claimant and his co-

worker were advised not to touch any moving parts of the machine herein, and this included the clamps, the claimant was never trained on how to operate the machine with the tray cover removed which exposed him to the clamps in the process. He was trained on operation of the machine in the state it was before modification. The technician in fact admitted not advising on this aspect of dangers of clamps given that the tray cover was removed. This Court however agrees with the defendant's contention that lack of supervision was not the cause of the injury herein. The defendant's submission that this latter particular of negligence has not been proved is therefore well taken.

103. Upon consideration of the statement of case this Court finds that the defendant cannot be held to have breached section 65 (1) of the Occupational Safety, Health and Welfare Act which provides that every worker shall be adequately and suitably informed of potential hazards to which they may be exposed at the work place, instructed and trained in measures available for prevention of such hazards because this was not specifically mentioned as an alleged breach in the claimant's statement of claim.

104. On the next two alleged breaches alleged by the claimant, namely, that there was a failure in all the circumstances to take reasonable care for the safety of the claimant and that the defendant exposed him to an unnecessary risk of injury, this Court finds that, contrary to the defendant's submissions, it has been proved satisfactorily that the modification of the machine by the defendant meant that the defendant failed to take all reasonable care for the claimant's safety and exposed him to unnecessary risk of injury.

105. The point is that apart from exposing the claimant to the clamps by removing the tray cover, the defendant also trained the claimant with the cover on but expected him to operate without the cover on. In all the circumstances, the defendant failed to take care for the safety of the claimant. By its offending actions alluded to here, the defendant exposed the claimant to unnecessary risk of injury. The defendant should have left the machine to be operated the way it was designed, without modification, given that this machine is a dangerous machine that needs care in the course of operation.

106. This Court has considered the assertion by the defendant that the claimant was negligent by failing to care for his own safety in that he used his hand to removed grass stuck on the clamps. This assertion is based on the

evidence from his co-worker who was present at the time of the incident herein.

107. This Court agrees with the claimant and finds that this co-worker's evidence is not credible. Firstly, he was unable to demonstrate at trial how he saw the claimant reach out to use his hand on the clamps to remove grass that was stuck there. It was clear that the claimant was taller than the co-worker and his line of site to the clamps area was impeded such that he could not say satisfactorily that the claimant was using his hand to remove grass from the clamp. Secondly, this Court agrees with the claimant that this co-worker signed two contradictory statements on how the claimant got injured and this casts doubt on his credibility. In one he stated that the claimant used his hand on the clamp and it got sucked in whereas in the other he stated that the claimant was pushing grass towards the clamp and then his hand got sucked into the clamp.

108. This Court formed the impression that, as submitted by the claimant himself, he was merely inadvertent in his actions as he fed grass into the machine and that he was not negligent as contended by the defendant. Having seen a demonstration at the machine, this Court agrees with the claimant's submission that the machine required a lot of concentration when in use in terms of feeding in grass and that the removal of the tray and its cover heightened the risk posed to the claimant as work progressed and as a human being his concentration naturally got lower.

109. This Court is persuaded that the claimant's inadvertence herein should not to be equated to negligence as held in *John Summes & Sons Ltd v Frost* [1955] 1 ALL ER 870, in which a skilled man held a piece of metal too close to a grinding wheel and was exonerated from blame.

110. In the end this Court finds that the claimant has shown that there was a duty of care owed to him, that the duty has been breached and that as a result of that breach of duty the claimant has suffered loss and damage in the form of the amputation that he suffered herein. See *Mkandawire v Ziligone* [1997] 2 MLR 134, 144.

111. The claimant has shown that defendant breached the duty of care that was stated in the case of *Nchizi v Registered Trustees of the Seventh Day Adventist Association of Malawi* (1990) 13 MRL 303.

112. The claimant also shown that the defendant breached his statutory duties.

113. In the circumstances, the claimant's claims have been proved satisfactorily and the defendant is found liable for negligence and breach of statutory duty.

114. The claimant clearly suffered injury and loss and is therefore entitled to the damages claimed. The Registrar shall assess the damages if not agreed within 14 days. The claimant is also awarded costs of these proceedings.

Made at Blantyre this 24th February, 2021.

M.A. Tembo
JUDGE