



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 186 OF 1994

BETWEEN:

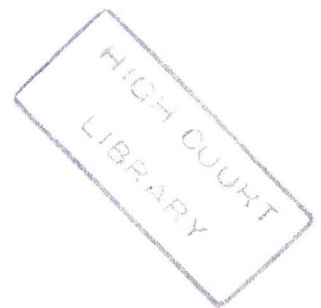
ASIMA NKAGULA PLAINTIFF

- and -

TERRAZO AND BUILDING Ltd. DEFENDANT

CORAM: CHIMASULA PHIRI, J

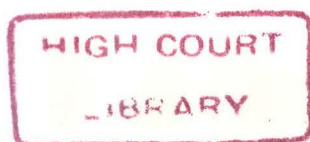
Mrs Kanyuka, of Counsel for the Plaintiff
Nkhono, of Counsel for the Defendant
Nguluwe/Mikanda, Official Interpreters
Mrs Khan, Recording Officer



J U D G M E N T

The plaintiff's claim is for damages in respect of personal injuries he sustained on 17th March 1993 whilst employed by the defendant as an operator of a concrete mixer. It is alleged that the accident was occasioned by reason of negligence on the part of the defendant, its servants or agent. The defendant is a building construction company and at the material time was engaged in the construction of Misesa Primary School in the City of Blantyre.

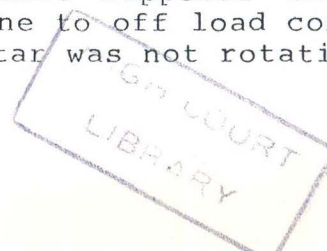
In giving his evidence the plaintiff stated that on the material day he reported for work and because the concrete mixer was out of order, the foreman advised the plaintiff to be mixing concrete with hands. Later the foreman ordered the plaintiff and his friends to start the faulty concrete mixer because the bosses wanted the job done quickly. The plaintiff alleges that since the mixer was faulty the foreman asked the plaintiff and other workers to push the mortar whilst the foreman himself tried to pull the drive belt. The foreman failed to pull the belt and Loudon Lenard also tried but failed too. Finally the plaintiff tried to pull the belt and it was at that time that the mortar started to rotate and the plaintiff's left hand fingers got trapped between the belt and the mortar. The plaintiff's last two fingers got amputated and the middle finger stiffened. The plaintiff screamed and somebody eventually switched off the mixer. The plaintiff was taken to Limbe Clinic and eventually Q E C H where he was admitted for 11 days. He states that he felt acute pain and there was a time he was unconscious. At the moment he is unable to do manual work and his incapacity has been assessed to be 60%. He is a man of little education who only did



up to standard 3. He went back to work after 2½ months but could not work on the concrete mixer again. They made him push a wheelbarrow but he failed. He was then discharged from service. At the time he was discharged his wages were K48.00 per fortnight. He says he is 25 years old. He was offered K3,207.60 under the workmen's compensation Act but he turned it down. The gist of his evidence is that he is now no longer employable due to the injury. He contended in the main that the defendant was negligent in failing to take any adequate precautions for the safety of the plaintiff while he was engaged on the concrete mixer. Further that the defendant was negligent in causing or permitting the plaintiff to use the said concrete mixer when the defendant knew or ought to have known that it was in a dangerous state of repair. Furthermore, the defendant was negligent in requiring the plaintiff to pull the belt of the concrete mixer with bare hands when the defendant knew or ought to have known that it was dangerous to do so. The plaintiff denied that he was negligent or contributory negligent himself.

The second witness for the plaintiff was Loudon Lenard who previously worked for the defendant during the time the plaintiff was also there. He said he too was an operator of the concrete mixer. He recalled that in March 1993 the mixer had a worn out drive belt and crank. He almost repeated what the plaintiff had stated in his evidence. He said on the material day they were instructed to stop making concrete using hands and resort to the mixer for quick finish of the assignment. He said that the motor was on but the drive belt was not moving hence no rotation of the mortar. He said the foreman tried to pull the belt but failed and next to try was himself who also failed. The third and last one was the plaintiff. In the process, with the pushing of the mortar the plaintiff was pulled to the crank and his left hand got pinned down to the mixer. This witness alleges that he switched off the machine and the plaintiff got a chance to free his trapped hand. The plaintiff was injured as stated above. He was taken to Limbe Clinic by the witness on a bicycle. From Limbe Clinic, the plaintiff was driven to Q E C H in a vehicle belonging to the defendant. At Q E C H, the plaintiff was admitted and the witness visited him once. In cross-examination he stated how he left the employ of the defendant company. The case for the plaintiff closed on that note.

The defendant called James Wingolo as its only witness. He works for Terrastone but was previously with Terrazo and Building Limited as a dumper driver. On the date when the plaintiff got injured, Wingolo was present. He explained and demonstrated how this particular concrete mixer operates. He stated that the foreman had directed the plaintiff to mix concrete using the concrete mixer. He facially recognised both the plaintiff and his witness though not by name. He said the plaintiff was an operator while the plaintiff's witness was an assistant on a lorry. He said that the accident happened when he was just coming back from where he had gone to off load concrete mix. He heard sound of motor but the mortar was not rotating. He checked



the mortar and discovered that there was little water only. He said the plaintiff pulled the drive belt under the machine to aid movement of the mortar. When the witness heard the plaintiff's loud cry, this witness rushed back to tell the foreman. A friend of the plaintiff switched off the engine. The name of that person is given as Simenti. The witness further stated that prior to this accident the concrete mixer had been serviced together with the dumper. He was adamant that it was not possible to make the mortar rotate by pulling the drive belt if there is no water inside the mortar tank. He said that on the day of the accident he did not see anyone pulling the drive belt. He said he advised the plaintiff against putting hands on the drive belt. He says the plaintiff was taken on a caterpillar to the hospital.

From the evidence from both parties there are some facts which are not in dispute. These facts are that the plaintiff was in the employ of the defendant Company as a concrete mixer operator. That on 17th March, 1993 an accident happened at Misesa resulting in amputation of two fingers on the left hand of the plaintiff and stiffening of the middle finger as well. The plaintiff is no longer in the employ of the defendant. The central issue in dispute is whether or not the accident happened due to negligence of the defendant or the negligence or contributory negligence of the plaintiff. The burden of proof is on the plaintiff to prove his allegation on a balance of probabilities. It is not for the defendant to prove that it was not negligent. Therefore if, when all the evidence, by whomsoever introduced, is in, the party who has this burden has not discharged it, the decision must be made against that party.

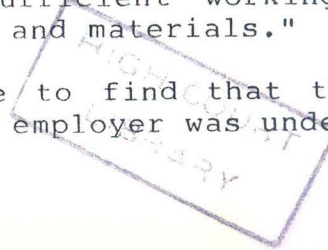
The English case of **Wilsons and Clyde Coal Co. - V - English** (1937) 3 ALL E R 628 at Page 641 Lord Wright quoted with approval the dictum of Lord Herschell in **Smith - V - Baker and Sons** (1891) A C 325 that

"it is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk."

This position is the same in Malawi as exemplified in **H. Q Chidule - Vs - Malawi Entrepreneur Development Institute (MEDI)** M.S.C.A Civil Appeal No. 12 of 1993 (Unreported) where Banda C.J. stated the duty as follows:-

"It was the duty of MEDI as the employer of the appellant to provide sufficient working conditions, sound and safe equipment and materials."

I have no problems therefore to find that the defendant, Terrazo and Building Limited as an employer was under a duty to



provide a safe working environment i.e. sound and safe equipment and materials so as not to subject its employees to unnecessary risks.

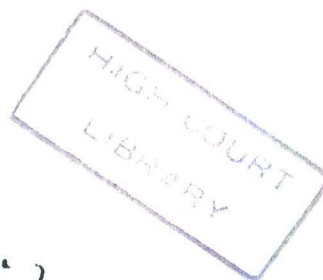
It follows therefore that I have to determine whether or not the concrete mixer was a safe and sound equipment. There is conflicting evidence from the parties. The plaintiff and his witness state that the mixer was faulty and fell into disuse until on this fateful day when it was found necessary to use it for quick finishing of the construction assignment. The defendant's witness says that the mixer had just been serviced a week prior to the accident and job cards were at the office. The issue turns to become one of credibility i.e. whose story should the court accept? The evidence of the plaintiff and his witness established that for some time the concrete mixer was not in use due to worn out drive belt and crank. According to these two witnesses they were actually working on the machine or at least the plaintiff was an operator of the same. The defendant's witness was a dumper driver. It appears odd that he took much more interest in the concrete mixer than anything else. One would even be misled into thinking that he too was the plaintiff's foreman. I have problems to convince myself that Mr Wingolo was a truthful witness. He contradicted himself on crucial aspects of the case. In one breath he states that the mortar was not rotating. When he checked inside he saw little water only. Then the plaintiff caught the belt under the machine to aid movement of the mortar. He heard cry of the plaintiff. This was evidence at the scene where the mixer is kept. Later in Court, this witness in cross-examination stated that he was not there when the plaintiff touched the belt and that he would not know what exactly happened. Mr Wingolo stated that the foreman was responsible for the determination as to whether or not the concrete mixer required service. It therefore follows that Mr Wingolo may not be the best person to state about the state of repair of the mixer. Counsel for the defendant urges the court to hold that the evidence of the plaintiff and his witness is contradictory on several points notably the number of tyres for the mixer. True there was contradiction on the number of tyres but the effect of the same does not become serious because the defendant's witness confirms that the plaintiff was the person who was operator of this machine.

Another evidence between the two parties which is in conflict relates to the mode of travel from the site in Misesa to Limbe Clinic. The plaintiff's version is that he was carried on a bicycle by PW2 while the defendant says a caterpillar was used. This again turns to be decided on the question of demeanour. The evidence seems to suggest that the plaintiff sustained a serious injury. If this is so, why did the caterpillar driver choose to go to Limbe Clinic when he could have easily driven to Q E C H. The stopping at Limbe Clinic is compatible with the explanation of the plaintiff and his witness. Naturally, a person on a bicycle would prefer to stop at any nearest clinic in view of time, distance and the energy it takes to cycle.

I would also wish to state that I find the defendant's witness evidence that he was well versed with the operations of this particular concrete mixer rather doubtful judging from his reaction when he heard the plaintiff screaming. Ordinarily he should have rushed to stop the motor. He instead rushed to inform the foreman. He came back and found that the machine had been switched off. He did not see Simenti switching it off. There is possibility that it could have been somebody although Simenti might have been present. The machine could have been switched by the plaintiff's witness as claimed in his testimony. I would prefer the version of PW2 to that of DW1 as to who switched off the engine.

In the light of these reservations I would respectfully reject the assertions made by the defendant's witness relating to the occurrence of this accident. Therefore, I only have to determine whether or not the evidence of the plaintiff and his witness establishes the defendant's negligence on a balance of probabilities. Given that the concrete mixer was faulty but nonetheless the foreman gave instructions that it be used and not only giving such instructions but himself taking the lead in pulling the drive belt, how on earth would the plaintiff refuse a lawful order issued in the course of his employment? The defendant's foreman was obviously negligent but he too was operating on superior orders. Furthermore, given the status of the plaintiff *Visa Vis* the defendant, there is no way he could have challenged the instruction without facing a dismissal or some disciplinary action. Therefore, the issue of the plaintiff being negligent or contributory negligent would not, in my view, arise. I am satisfied that the plaintiff has proved his claim. I order that damages be assessed by the Registrar. The defendant is condemned in costs of this action.

PRONOUNCED in Open Court this 22nd day of March, 1996 at Blantyre.



G. M. Chimasula Phiri

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JUDGE