IN THE HIGH COURT OF MALAWI, BLANTYRE

PRINCIPAL REGISTRY

CIVIL CAUSE NO.427 OF 1986

BETWEEN:

TITHOKOZE MALINKI AN INFANT ..... IST PLAINTIFF

IRENE KUMSINDA (FEMALE) ..... 2ND PLAINTIFF

AND

CITY OF BLANTYRE ..... DEFENDANT

Coram: MTEGHA, J.

Saidi, Counsel for the Plaintiffs
Msisha, Counsel for the Defendant
Mkumbira, Official Interpreter
Phiri, Court Reporter

J U D G M E N T

This action is brought on behalf of the first plaintiff, Tithokoze Malinki, now aged 14 years by his mother Irene Kumsinda, the second plaintiff as next friend, claiming damages for personal injuries suffered by the said Tithokoze Malinki and certain expenses incurred by his mother. This action is brought in negligence, and the negligence alleged by the plaintiffs is that the defendants, being the municipal authority of the City of Blantyre, and owners of a refuse dumping pit where the accident occurred, were negligent.

On 23rd June, 1984 Tithokoze Malinki, then aged 11 years 9 months, together with three other boys, including his younger brother, went to a refuse dumping site owned and managed by the defendants near Kwacha Conference Centre in the City of Blantyre. They went there in order to look for wires with which to make toy motor cars. When Tithokoze saw some wires, he rushed to get them, but to his horror, his feet sunk into hot ashes and he was severely burnt up to the middle of his lower legs. He was hospitalised for a period of three weeks, and discharged. However, some problems developed on his feet and went back for another three weeks.

The negligence alleged against the defendants is that the defendants were negligent in leaving the refuse pit unattended although they knew or they ought to have known that young children habitually visited the site in search of bits and pieces with which to play with, and that they failed to prevent the first plaintiff from getting

into the site. Further, it was alleged that by leaving the refuse pit to burn at such a place which was unguarded or fenced, they created a dangerous situation, and finally, it was alleged that there were no adequate notices to warn both adults and children that the site was dangerous.

The defendants have denied negligence on the basis that the first plaintiff ignored signs to keep away from the site, he sneaked onto the site to avoid being noticed by the defendants' servants or agents and he had no authority to enter the site. Further, the defendants alleged that the second plaintiff failed to supervise or adequately supervise the movements of Tithokoze; failed to prevent him from visiting the refuse dumping site which is located in a remote area from residential area.

I will now evaluate the evidence which is before me. The first witness for the plaintiffs was Dr. King, a surgeon at Queen Elizabeth Central Hospital. His evidence is not in dispute at all. It is to the effect that he examined and treated the first plaintiff and that his disability, according to his report which was marked Exhibit P1, was 2% and that the child walks normally. The evidence of the second plaintiff, the mother of the first plaintiff, is also not very much in dispute. She told the court that on the material day, Tithokoze and his brother disappeared from the house soon after breakfast, only to be told later that morning that Tithokoze had been burnt. She went to see him and found that the boy had certainly been badly burnt on both legs. She took him to hospital where he was admitted for a period of three weeks, then discharged. He was readmitted to hospital for a further three weeks. During all this time she incurred certain expenses as reflected by Exhibits P2 - P9, as well as transport to and from hospital. This evidence is largely undisputed. However, she went on to say that she went to the defendants' dumping site; she noticed that the place was not fenced and that there were no guards and that both children and adults were picking up bits and pieces of rubbish, and she came clearly to the conclusion that the place is a health hazard; it was smelling, there were flies and in general the site was revolting. She denied to have allowed Tithokoze to go to the dumping pit. The third witness for the plaintiff was Tithokoze himself. He told the Court that in June, 1984, when he was just over 11 years old, he, together with other boys went to the refuse dumping site belonging to the City of Blantyre to collect wires with which to make toy motor cars. He had gone there on two other occasions and this was his third occasion. When they arrived there, they found people collecting iron sheets, cotton wool and other things. There were also other children and women, some were mad and others normal. When he went in he saw some wires. He rushed to get the wires, but as he did so, he stepped on some ashes which appeared to be spent but in actual fact they were hot. He sank into these ashes and got very badly

burnt; the ashes did not appear to be hot at all. He felt severe pains and he was crying as he went home. He went to hospital where he was admitted for three weeks. He again stayed in hospital for three weeks. His legs still give him trouble; he cannot wear shoes all the time because his legs hurt. He further testified that when he went there there was no watchman, and no one chased them.

In cross-examination the plaintiff said that he did not go straight to his mother after the accident because he was afraid of her as she would never have allowed him to go there; that there was a wire fence which was broken, and that he went inside alone leaving his friends outside, and that after the accident he ran away, not because he was chased but because he was crying. He further stated that there were many people, not only employees of Blantyre City, but women and men who were not properly dressed.

The fourth witness was also a boy by the name of Wells Chirombo. He told the Court that on this particular day he and the first plaintiff and other boys went to the refuse dumping site at Kwacha where Tithokoze got burnt. They go there in order to collect wires and metals. They had been there on three occasions; there was no gate at the site and they found both children and adults on the site. Nobody chased them away or stopped them from entering the site; he did not see any watchman; that there was no sign on the road saying "refuse please keep away"; he denied to have seen the sign post. This then was the evidence for the plaintiffs.

The first witness for the defendants was Jackson Frank Gulaye, of the Health Department of the City of Blantyre. He is Health Inspector. His evidence was to the effect that he was responsible for the refuse dumping site. Vehicles from the City Council and all over Blantyre collect refuse and take the refuse to the dumping site which was formerly a quarry and has been abandoned. The City Council got this site in order to fill it. At first the site was fenced and there was a wire gate, but the fence was stolen and damaged. Many people, including children were going to the site, and in 1984 there were 14 employees at the site, including a watchman. The duties of the watchman included, inter alia, chasing unauthorised people from the site including children. He further went on that they have a considerable problem with intruders, to such an extent that sometimes they have to call in police to assist. There are signs both at the bottom and top of the pit which warn members of the public that the area is a dangerous one; however, he went on, these signs are vandalised from time to time. If there is fire at the site, the fire is extinguished by hosepipe or by the fire brigade from the City Council. In cross-examination he admitted that the site should have been fenced, but that it is expensive to

do so. He further stated that one watchman is not adequate although other employees assist him. Under pressure from the defence counsel, the witness admitted that there had been occasions when employees at the site have themselves been burnt, for example, Mr. Lusaka had been burnt twice.

The second witness for the defence was Louis Beni Chirambo, cleansing foreman at the site. His duties included supervision of employees at the site. In 1984 he was at the site supervising 15 people including one Lusaka, who was a signal man, and Pipe Kaufa, now deceased, was the watchman. As was stated by DW1, this witness experienced some trouble with intruders at the site. Children would come, chased, would also sneak back on the site. This was mostly on Saturdays and Sundays. On this material day he did not see the child being burnt, but only saw him running away together with his friends, crying; but this was in the afternoon. (This was clearly incorrect). He further testified that the fence was pulled down sometime ago.

The third witness for the defendant was Lusaka Mwanyali, a signal-man based at the site. His job was to signal vehicles for both the City and the public which went there to dump the refuse. In his capacity as a signal-man he also used to assist the watchman chasing intruders away including children. He testified to the effect that elderly people are more troublesome than children.

On the material day he saw four or five children at the site. He then saw a UTM vehicle and he signalled it into the pit to off-load tyres when he heard a child crying and running away with his friends. Nobody followed the children because they thought children were playing and that was that. In cross-examination he admitted that two people had been burnt at the site including himself twice. The child was the third person to be burnt. No one can tell that the ashes, which appear to be cool, are in fact very hot. The fence at the site was damaged since 1974.

The fourth witness was John Asibu, who testified that he was employed at the site; he has problems with intruders at the site. He chases them, but they come back including children. At the site he was once injured by a metal. The site is a dangerous one.

Asani Kachoka was a watchman. His duties included looking after the City's property such as shovels and to chase away people who go there unauthorised; he is assisted by other employees. he was not there when the present accident took place.

Finally, the last witness, Nyirenda, Assistant City Engineer, testified that he is responsible for the refuse dumping site only in relation to the structural work. The fence which was erected there was vandalised; to fence the

pit area would cost K13,120.00 and to fence the whole site would cost K68,170.00, and that the City had no money to do so. He further went on to state that even if the fence was erected, the City had no means to ensure that the fence would not be vandalised again.

This then is the evidence for both the plaintiffs and the defendants. I must now draw some inferences from this evidence. The Court also went to visit the scene. I have also drawn some conclusions from that visit.

It is not disputed at all that the defendants are the owners of the refuse dumping site situated at Kwacha Conference Centre - which is about 1½ miles from the Chinyonga residential area. It originally was a quarry, and the defendants acquired it in order to fill it. The pit itself is 820 metres in perimeter and the whole area is 4,261 metres in perimeter. There are two roads leading to the site. One road leads from the top and another one from the bottom i.e. where the Chinyonga residential area is situated.

At this site vehicles belonging to the City of Blantyre, and those belonging to various industrial organisations, go there to dump waste - domestic waste, plastics, hospital disposals, chemicals, metals, wires, tyres and ashes. There are employees of the City of Blantyre who assist in directing vehicles and levelling the refuse and covering it up. The position, is therefore, that the site itself is a dangerous area. Originally, the area was fenced, but unfortunately the fence was vandalised, and since then, the defendants have never erected a fence again because of costs. For some reasons, the place attracts members of the public, mainly paupers and children. The elderly people who go there are interested in picking up bits and pieces of waste such as iron sheets and foodstuff. For children, the place is very attractive because it is a source of picking up bits and pieces with which to play with and in particular, wires, with which they make toy motor cars.

On the 23rd June, 1984, Tithokoze, then aged about 11 years 9 months, together with three other friends went to the site. In the course of picking up some wires, he sank into hot ashes and had his legs burnt. He was treated at the hospital and the permanent injury assessed by Dr. King is 2% - mainly affecting the pigmentation of the skin on his lower legs and feet. The defendants, throughout their operation, did not allow intruders to go there, because the site was very dangerous and a health hazard. To prevent people from going there, they employed a watchman, whose duties, among others, included chasing intruders from the site, and when they fail to do so police assistance is called in. However, it was the evidence of Tithokoze and Wells that on the three occasions when they had been there, no watchman or any other of the defendants' employees ever chased them. I see no reason to disbelieve this evidence.

I hold that on this particular day nobody chased away these boys from the site. I am fortified in my conclusion by the fact that when we went to the site, there were people who were not obviously employees of the defendants; and I certainly did not see any activity on the part of the defendants' employees chasing the intruders away. It would appear, therefore, that at times people were chased away from the site, but that at other times they were not. It also appears that no signs were erected warning people, whether in English or Chichewa. Indeed, the sign I saw was put there on that very day when we went to visit the scene - which, in any case, could not be regarded as a sign post - written on a plank in chalk. This shows that whenever the proper signs were erected, if indeed they were erected, they were never replaced even if such absence of sign posts were known to the defendants through their servants.

In these circumstances, could it be said that the defendants are liable? Clearly, members of the public, including Tithokoze, when they entered the site they were trespassers. Did the defendants owe any duty of care to them - were defendants negligent? These are the questions which I have to answer. In the case of Robert Addies and Sons Colliers Limited vs Dumbreck, (1929) AC 358, 371 Lord Dunedin described a trespasser as the one

> "who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to."

Clearly, from the evidence, Tithokoze was a trespasser. Formerly the owner of land or premises was not liable to a trespasser except if he injured a trespasser intentionally or recklessly. He was not liable to a trespasser in negligence. Thus, in Proctor vs British Northrop (1937) 81 SJ 611 a plaintiff girl of 9 years was trespassing on vacant land. She fell into a hole. It was held that the defendants were not liable. Similarly in Walder vs Hammersmith Corporation (1944) 1 ALL ER 490, a boy aged 11 years entered into an air-raid shelter where he played with an electric cable. He was electrocuted. It held that the corporation was not liable. The law, however, recognised that child trespassers could succeed if there was an allurement on the defendants' land or premises. Thus, in Hughes vs Lord Advocate (1963) ALL ER 705, HL, two boys, aged 8 and 10 were injured when they played with lit paraffin lamps left at an open manhole, the House of Lords held that the defendants were liable because the lamps were an allurement. But the law has changed by the case of British Railways Board vs Herrington (1972) AC 877. In that case, a boy aged 6 years was seriously burnt by a live rail. He had been playing in a field open to the public and frequented by children. As he was playing, he went through a gap in a fence adjoining an electrified railways track owned by the

appellants, the fence having been detached from the ground. The fence had been like this for some time and even elderly people used the gap as a short cut across the line. The appellants did nothing to repair the gap despite the fact that they were aware that children had been seen on the line. It was held by the House of Lords that they were liable in negligence despite the fact that they were not reckless and that they were not intentional - negligence would suffice.

I will pause here to consider both counsel's submissions.

Both counsel have submitted that the Occupiers Liability Act of the UK does not apply here. I concur with this view. Mr. Msisha, while admitting that Herrington's case has established a new liability in respect of trespassers, he says this case can be distinguished from the present case on the facts. He submits that in the instant case the refuse site is removed from ordinary playing grounds for children; the site was not an allurement to children, but a repellant to everybody. The factors which must be taken into account by the Court are the age of the child, size of the site, location of the site and so on. In the present case, Mr. Msisha submits the site is in a remote area, the child was aware of the danger because he knew his mother could not have allowed him to go there. There was no allurement. Taking into account all these factors, no duty of care was owed to the first plaintiff, and in any case the duty, if any, was discharged because the defendant took all possible measures including chasing the plaintiff boy away from the site. Further, the defendants have raised the question of "volenti non fit injuria."

On the other hand, Mr. Saidi for the plaintiffs has submitted that Herrington's case is applicable here. Firstly, the defendants had actual knowledge that children had a habit of playing at the site, and all witnesses testified to the effect that the site was a dangerous one and the danger of the work being carried on there, and the plaintiff boy, aged 11 years failed to appreciate the danger. More so, Mr. Saidi submits, even the defendants employees were, at one time or another, burnt on the site. Moreover, there were no warning notices. In any case, Mr. Saidi submits, the defendants took no trouble to chase people away as can be evidenced by the fact that when we went to visit the scene there were women and children on the site. Further, he submits there were wires on the site, which were an allurement to children despite the fact that the site was revolting.

I will now turn to the law relating to an occupiers duty of care towards a trespasser. This, as can be seen, has already been stated above. For an occupier to be liable towards a trespasser, it appears, from the speaches and

decision of Herrington's case that two circumstances must be particularly relevant. The courts must first consider the seriousness of the danger, and the type of trespasser who goes on to the land. The authorities indicate that an occupier must take greater care for the safety of trespassers who are children than adults, because children are less careful than adults who will "roam and explore." Thus in Southern Portland Cement vs Cooper (1974) AC 623 an occupier dumped quarry spoil around the base of a pole which was carrying high density electricity cable. This spoil had accumulated around the pole so that from the top of the hip the cable came within easy reach of the cable. A boy of 13 climbed on to the hip and touched the cable. he was severely burnt. The occupier knew that children used to trespass the dumped quarry spoil. It was held that the occupier was liable - for he had knowledge of the danger. Similarly in Pannet vs P.M. McGuiness (1972) 29 BS 59. In that case contractors were demolishing a warehouse adjoining a public park in a densely populated area

> "where many children played, particularly after school hours. When the workmen had almost completed demolition work and taken down the boarding they made a bonfire for the rubbish before knocking down the walls. Three workmen were on duty to feed and control the fire and to lookout for trespassing children who often came on the site and were as frequently chased off. On that afternoon the infant plaintiff aged five, who had trespassed on the site before and had on a number of occasions been chased off by workmen came on to the site from the park and shortly afterwards was seen running down the road with his clothes and hair on fire."

It was held that the defendants were liable by reason of their workmen's failure to keep a proper lookout. They were in breach of the duty of care owed to the trespassing child, having regard to his age, nature and situation of the site, the creation of an allurement and knowledge that frequently children trespassed onto the site.

> "Nothing in the most recent formulation of the duty owed to a trespasser supported the view that previous warnings to the trepassing child or chasing him off the site were sufficient to absolve the occupiers from liability."

Again, the same principle was applied in the case of Harris vs Birkenhead Corporation and Another (1975) 1 WLR 379. In that case the plaintiff, who was aged 4 years wandered from a playground into the house occupied by the defendants. The defendants were to demolish the house, but had not yet "bricked it up" to prevent vandals and children. Vandals had damaged the house and took off a glass from the window of an upper storey floor. The child went there and fell off, resulting into severe brain damage. It was held that the defendants were liable because they knew that there was an empty house which could be dangerous and children were playing there and

> "since the plaintiff's accident was one that a humane person excercising common sense could have expected or prevented."

However, there are other authorities which point to the contrary; for example, the case of Penny vs Northampton Borough Council (1974) LGR 733 where the court refused to hold the council liable to a child who was injured while he was playing at a rubbish tip. The reasons which their Lordships advanced were that repairing the gaps in the fence would have been futile since children would and could have in any case entered the site, the fencing round the whole area would have been expensive and in any case the site was less dangerous, (my underlining).

This then is the law. Where does Tithokoze Malinki stand? He was aged slightly over 11 years when the incident happened; he was with his friends when he went to the site and got burnt; he had been there three times; no watchman ever chased him. The site is dangerous as evidenced by all witnesses; warning signs were erected when and if the defendant so desired; the fence which was erected around the site was damaged; no repairs were carried out; and the defendant had no plans to erect a new fence. The defendant knew that children and even adults went to the site in order to scavenge for bits and pieces which had been disposed there. Tithokoze and his friends were particularly interested in wires with which to make toy motor cars; the site was an allurement. Defendants efforts to chase off intruders were ineffective; so they left the intruders to get in on their own volition. Were the defendants liable? In my considered opinion, taking into account the totality of the evidence, and weighing the evidence on a preponderance of probability, I am of the view that they were negligent and liable. They knew that the site attracts people, including children. They were aware that the site was dangerous, both to adults and children; no efforts were made to repair the fence; chasing away children was not effective. They should have foreseen that their negligence would cause some injury. I hold them liable. I also reject that the second plaintiff failed to supervise the first plaintiff. The plaintiff knew

he would not be allowed by his mother to go there; but he sneaked out; such conduct is expected from children of the first plaintiff's age. There is no contributory negligence on her part - children would be expected "to roam and explore." Further, the defence of "volenti non fit injuria" does not apply. It cannot be said that Tithokoze appreciated the danger at the site. All what he was interested in was to get wires to make "motor cars".

The plaintiffs therefore succeed and I give them judgment with costs.

I will now turn to the question of damages.

Before a court can award damages it becomes necessary to examine the injury suffered by the plaintiff. To do so medical evidence is relied upon. In the present case there was no surgery; the burns healed with dressings and ointment provided by the hospital and his mother. He had lost pigmentation on the lower part of his legs and he has some pains when he wears shoes; as he grows up, he will be wearing long trousers and socks. The scars will not be visible. However, no doubt he had suffered great pain. His mother also suffered pecuniary loss. She spent some money on transport to and from hospital; she bought some medication; she paid hospital bills. General incapacity was assessed at 2%.

Both counsel have referred me to some authorities in Kemp and Kemp, Quantum of Damages V2 Paragraph 4 - 111 to 4 - 301. I have looked at the authorities and they have been of great assistance to me. For pain and suffering and general damages I award the first plaintiff the sum of K3,000.

I award the second plaintiff the sum of K512.50 special damages comprising of K362.50 hospital charges and medical expenses (Exhibits P2-P9) and K150 transport.

All in all I give judgment for the plaintiffs in the sum of K3,512.50 plus costs of this action.

PRONOUNCED in open Court this 16th day of January, 1987 at Blantyre.

H.M. Mtegha
JUDGE