IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 236 OF 1995

DONALD MZUNGA

VERSUS

PLASTIC INDUSTRIES LIMITED

CORAM: TWEA, J.

Jumbe (Mrs), of Counsel for the Plaintiff

Absent, of Counsel for the Defendant

Kaundama, Court Clerk

JUDGMENT

The plaintiff brought this action claiming damages for the injury he sustained due to the negligence of the defendant. The defendant denies any negligence and in the alternative pleaded that, the plaintiff contributed to this negligence.

Both parties called witnesses to prove their case. It is in the evidence and not disputed that the defendant are a plastic shoe manufacturer who have a factory at the Ginnery Corner Industrial site in the City of Blantyre. The plaintiff was employed by the defendant and was engaged as a machinist two days after being employed. Among his duties, the plaintiff was required to remove molten rubber waste from the machine which moulded the plastic shoes. The evidence has it that this was done with bear hands. Both parties agree that on 15th September 1993, the jack which presses the mould crushed the plaintiff's left hand and crushed his fingers. As a result of this accident part of the plaintiff's left hand had to be amputated. This Court had occasion to observe the plaintiff and noted that although the left arm was intact, the hand no fingers, only some sort of stub remained for the left hand.

The plaintiff contended that it was the duty of the defendant as his employer to provide adequate and safeplant and appliances, safe place of work and a safe system of work. It was the plaintiff's evidence that he was not trained on how to use the machine. He told this court that he worked on the machine after observing the former operator for three days. I must mention here, that the defendant submitted and it was their evidence, that this was "on the job" training for the plaintiff. I will come back to this later.

The plaintiff pleaded that the defendant was in breach of its common law duty as masters. The statutory duty of the defendant therefore is not relevant. The common law duty of an employer was annunciated in the case of **France Kimu Vs Nchima Estate Ltd.** civil cause No. 91 of 1992 (Unreported) where the judge followed the case of **Wilson and Clyde Coal Co. Vs English (1938) A.C.** 57 at page 54, that:

"I think the whole course of authority consistently recognises a duty which rests on the employer and which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm or a Company, and whether or not the employer takes any share in the conduct of the operations".

The learned judge, Mtegha J, as he was then, went on to say that:

"The duty, therefore, of an employer towards his servants is to take reasonable care for their safety, regard being had to the circumstances of the case, so as to carry on his operation as not to subject those employed by him to unnecessary risk".

In this case, the machine which this Court saw in operation was of considerable antiquity. The evidence suggests that it was 31 years old. This was not really disputed. By its design, according to the evidence, it was not supposed to accumulate waste, and therefore it was not provided with any guard against touching the jack. It was also in evidence, by both sides, that the machine accumulates waste due to age and faults. The defendant also gave evidence that when waste accumulates it causes the machine to operate at a slower rate and to eventually stop. The defendant contended that the plaintiff was required to remove the waste when the machine stops. I don't accept the defendant evidence on this point. I prefer the evidence of the plaintiff that, he was required to remove the waste while the machine was in motion and not to allow it to accumulate, or to stop the machine because the defendant's order was that such operations reduced production. This court observed that the machine was indeed operated that way when, it visited the scene. There was no guard provided to protect the operator from injury.

There was evidence that there had been a similar accident on this machine before and that after both accidents officials from the labour office visited the factory and advised the defendant to modify the machine in order to prevent injury to the worker. This had never been done even at the time this court visited the scene. I find that the defendant was aware of the risk of injury to the machine operator and did nothing to mininise or remove the risk. The defendant failed it its duty to provide proper appliance, and this is a continuing duty. I find, further, that the defendant did not provide safe work place, or safe system of work for their machine operator. On a balance of probability I find that the defendant was negligent.

The defendant pleaded contributory negligence. It was submitted that the plaintiff having had "on the job training" as they put it and having been instructed not to remove

the waste when the jack is up, the plaintiff had been guilty of contributory negligence.

I have considered the evidence. This accident happened about three months after the plaintiff came in to the employ of the defendant. He was a new man. Further, he had no formal instructions on the working of the machine. He carried out his work in the way he had observed saw his predecessor carry it out. This involved this element of risk. He had contributed nothing to the modu operandi, he cannot be guilty of contributory negligence see **Barcock Vs Brighton Corporation (1949) 1 All E.R. page 251.** The ground of contributory negligence cannot therefore succeed and I dismiss it.

I find that the injury to the plaintiff was caused wholly by the negligence of the defendant, and I therefore give judgment to the plaintiff as prayed.

The plaintiff had, in his submission, alluded to the quantum of damages, but I reserve this to be assessed by the Registrar, regard being had to the fact that the plaintiff continued to be in the employ of the defendant for a consideration length of time after the accident.

Costs to be for the plaintiff.

Pronounced in open Court this 25th day of October 2000 at Blantyre.

E.B. Twea

JUDGE