Judges Secretary I

Negligence - the common law duty on employers to provide a safe working environment to their employees

Contributory negligence operates to reduce the quantum of damages

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 91 OF 1992

BETWEEN:

FRANCE KIMU.....PLAINTIFF

- and -

NCHIMA TEA ESTATES LIMITED.....DEFENDANT

CORAM: MTEGHA, J.
Mwafulirwa, of Counsel, for the Plaintiff
Chisanga, of Counsel, for the Defendant
Tsoka (Mrs), Official Interpreter
Maore, Court Reporter

J U D G M E N T

The plaintiff in this case is claiming damages arising out of an accident which occurred at the defendant's tea factory, due to the negligence of the defendant. The defendant has denied liability, saying that the accident was caused through the plaintiff's negligence.

The plaintiff in this case, France Kimu, was employed by the defendant in the defendant's tea factory when, on 14th April 1990, he met with an accident. By that time, he had worked in the factory for the defendant for four years, but he had worked on that particular machine for one year. According to the plaintiff, he was working on this machine on this day, receiving tea on a conveyor belt from the cutting machine. The conveyor belt was being driven by a chain. As he was working, some tea leaves had accumulated and it became necessary to remove the tea leaves. The machine was in motion, and as he removed the tea leaves, his fingers touched the machine and had a phalange on his little finger and two phalanges on the index finger of his left hand were cut off by the chain.

It was his evidence that, at that time, the chain was not guarded at all, i.e. there was no guard to cover the chain.

According to PW2, Kenneth Ephraim Luhanga, Senior Clinical Officer at Thyolo District Hospital, the plaintiff arrived at the hospital with his fingers already amputated; he cleaned the wounds and assessed the degree of incapacity, according to Government Chart, at 12%. It must be noted here that, at the request of the parties, the Court visited the factory and the two defence witnesses gave evidence while in the factory and the Court had the opportunity to see how the machine operates.

The evidence of Francis Chintali, DW1, Factory Manager, was that the machine in question, where the plaintiff was working, was installed in 1981 and since it was installed, there has never been an accident on that particular place. The plaintiff, according to this witness, when receiving tea on the platform delivered by a conveyor belt, must have put his fingers into contact with the chain which had a guard over it. This witness was not present when the accident occurred. It was this witness's evidence that, before employees commence work in the factory, they are instructed not to touch any machine while it is in motion and that if there is any fault with the machine, the fault must be reported to him or the mechanic, and the plaintiff was following these instructions, except on this day.

The second witness for the defendant was Rodness Chimenya, a **capitao**, employed by the defendant since 1976. It was his evidence that he was present when the accident occurred. According to this witness, the accident occurred when the plaintiff was trying to remove tea leaves from the machine while it was in motion. After the accident he took the plaintiff to Thyolo District Hospital. In cross-examination, this witness told the Court that if the guard was extended, it would have completely covered the chain and it would move properly.

What comes out clearly from this evidence is that the plaintiff was injured when he was removing tea leaves from the conveyor belt. This was so because his fingers got in touch with the chain which was driving the belt. According to the defendant's evidence, the chain was covered with a guard to prevent people from touching the chain. It is also quite clear from the evidence that the plaintiff was the first person to be injured on that machine since the machine was installed.

The question which the Court has to consider is this: Was the defendant, as master, in breach of its common law duty? The question of breach of statutory duty does not arise, since, as Mr Mwafulirwa has pointed out, he did not plead that duty.

At common law, the duty of an employer to his servants is to take reasonable care for their safety. **Lord Wright**, in the case of **Wilsons and Clyde Coal Co. -v- English (1938) AC 57, at p54**, described that duty as follows:

> "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 operations."

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 operations as not to subject those employed by him to unnecessary risk.

It has been said, therefore, that one of the duties owed by a master to his servant, or employer to employee, is to provide adequate plant and appliances and to maintain them in a proper condition, and this obligation to provide and maintan proper plant and appliances is a continuing obligation, although this obligation is not absolute. It has, therefore, been held that when a servant, who was employed to lubricate dangerous machinery, was injured due to the failure of the employer to maintain adequate fencing around the machinery, the employer was held liable - **Clarke -v- Holmes (1862) 7 H & N 937.** Similarly, in **Jones -v- Richards (1955) 1 WLR 444**, it was held that an employer was liable where no fencing was provided on a farm machinery.

It has been submitted by Mr Chisanga, in the instant case, that there is no evidence of negligence on the part of the defendant, because the machine on which the plaintiff as working was properly guarded, in that the chain which injured the plaintiff was properly guarded, i.e. covered, and if that chain was not properly guarded, several people would have been injured, since the machine was erected in 1981; but this was the first accident.

As I have pointed out earlier, the Court had opportunity to visit the factory and the machinery was put in motion for us to see. I am also aware that the evidence of DW1 and DW2, to the effect that the machinery was inspected periodically, is true. However, I observed that although there was a guard covering the chain which pulled the conveyor belt, it did not fully cover the chain. There was a gap between the chain and the conveyor belt, and this gap was wide enough to allow tea leaves to go inside; and it became necessary to remove the leaves which were stuck in there. The gap was wide, so that a workman could insert his fingers to remove the leaves. It is my view that, that situation created a danger to an employee. The defendant, in my view, failed to provide adequate fencing to prevent the plaintiff from coming into contact with a moving chain. The defendant was, therefore, negligent.

However, this is not the end of the matter. The defendant has pleaded contributory negligence, that the plaintiff had worked on the machinery for a long time, and that on several occasions they have issued instructions to all their employees that they should not touch moving parts of the machines.

I have heard the evidence on this aspect. It is quite clear that the plaintiff knew that the machinery was dangerous when it was moving. He has been working in the

factory for four years. There was certainly contributory negligence on his part, to the extent, I would say, of 25%. This action, therefore, succeeds to the extent of 75%.

I now turn to the question of damages. I have looked at the authorities cited to me by both Counsel. I would award a sum of K6,000.00 less 25%, which gives us a figure of K4,500.00. I enter judgment for the plaintiff in that sum.

The plaintiff has largely succeeded. I, therefore, award him the costs of this action.

PRONOUNCED in open Court this 16th day of July 1993, at Blantyre.

H M Mtegha
JUDGE