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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1317 OF 1994

BETWEEN

F. D. MUGONYA — 1ST. PLAINTIFF

M. ABRAHAM — 2ND PLAINTIFF

And

ESCOM — DEFENDANT

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CORAM. **NDOVI, J.**
Chirwa,of counsel for the two Plaintiffs
Limbe, of counsel for the Defendant
Khan (Mrs.), Recording Officer

JUDGMENT

NDOVI J. The basic facts of this case which are not in dispute can be shortly stated. On or about the 26th day of April, 1994, the house in which the first plaintiff stayed as a tenant and which belonged to the second plaintiff caught fire as a result of the alleged negligence of the defendant and/ or its employees, agents, or servants.

The fire is alleged to have resulted in the 1st plaintiff's loss of MK22,814.14 worth of property.The second plaintiff in a separate action filed a statement of claim. He claimed for the sum of MK33,945.00 being damages for the destruction of the house and for the sum of MK200 per month lost rentals for an alleged negligence of the Defendant in respect of the same burnt house to which the first action relates. It was therefore decided, rightly so in my view , to consolidate the two actions in terms of Order 15 r. 9 of the Rules of Supreme Court.The first plaintiff was at all material times a tenant of one M.Abraham at Naotctha Location in Blantyre District. While the second plaintiff was at all material times the owner and landlord of the same house at the said Naotcha Location, in Blantyre District.

The defendant is a public corporation engaged in the business of supplying electric power to residential houses, industrial and other premises in the country. On or about the 26th day of April, 1994 the 2nd plaintiff's house caught fire as a result of the alleged negligence of the defendant and or its employees agents or servants aforesaid. The fire resulted in the loss of the 1st plaintiff's property and extensive destruction of the second plaintiff's said house, loss of rentals at MK200 per month from the date of the said fire.

It was averred on behalf of the plaintiffs that the defendant and or its employees, agents or servants cut out power to the house without warning or informing the plaintiffs. Thereafter, that is, after 4 days, the defendant restored power to the house negligently and without prior notice

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thereby causing severe arcing and sparks along the overhead line and down to the connecting line to the plaintiff's house, causing severe destruction to the same. It is further averred that the defendant failed to take any or any proper control or at all, to ensure that the plaintiff's house was not destroyed. The defendant also failed to take all reasonable care and effective measures whether by inspection, examination or otherwise of the power line, to ensure that there was or would be no risk of fire arising from electric fault. Alternatively, the plaintiffs plead and rely on the doctrine of res ipsa roquitor (that the thing speaks for itself). They also claim interest on the sums claimed and costs of this action.

The defendant vigorously and rigorously denies any blaimworthiness or any negligence and puts the plaintiffs to strict proof of the negligence alleged. It is also denied on its behalf that the house caught fire and puts the plaintiffs to strict proof on this point and the fact that it was negligent or at all. Further, the defendant puts the plaintiffs to strict proof as to loss and damage both of which are vehemently denied.

After a full trial, that is, after listening to the evidence of the witnesses called by both sides, Mr. Limbe, of counsel for the defendant moved the court to visit the scene. On the court's part, it is appropriate to hasten to add that, it was physically confirmed that the house had been destroyed by fire.What remained to be proved by other evidence was whether the fire in question emanated from the defendant's wires and power and secondly the nature and extent of the destruction occasioned.

Mr. Chirwa, for the plaintiffs called some six witnesses. The first witness was Felix Dorwis Mugonya who told the court that he stayed in the house in question as a tenant of Mr. M. Abraham from February, 1993 to 26th April, 1994. He had gone to Balaka on that fateful day. Upon his return, he found to his dismay, that the house had caught fire during his absence at around 10 a. m.His property had been destroyed or burnt to ashes. He went to report the incident to the police.He was requested to itemize all the lost property. He also reported to the City of Blantyre so they could help to put the fire out. Mr. Peter Pettit, the City Engineer, had submitted his expert report dated 3/6/94 :Ext.D3 , following his inspection and findings. The first plaintiff stated that when he submitted his claim for compensation, the defendant denied any liability. He further contended that although this was a semi-detached house , the other side was not affected because one of the ESCOM personnel cut the wire quickly enough to arrest the spread of fire. This court has deliberately avoided inclusion of his evidence as to the cause of fire because that would be hearsay evidence. Hearsay evidence be cause the witness was away to Balaka on duty when the fire accident occurred.

PW2, Radson Isaac Dimba stated that he works for Blantyre City Fire Brigade.That on 26th April, 1994, he had a team of fire-fighters to extinguish fire at a house at Naotcha in the City of Blantyre. The team succeeded in extinguishing the fire after an hour. He thereafter submitted a report which he by reason of protocol, merely initialed. It was tendered in evidence as Ext. P.1. His studies included some electrical subjects.

PW3, Mrs. Dona Mkandawire who was the next door neighbour in the semi-detached house in question observed that, the cause of fire had been a power failure for three to four days. That when the fire was restored, she further observed, sparks and then fire ensued at the entry point

of power into the plaintiff's house.She deposed to the fact that she was the one who summoned the ESCOM personnel who were working nearby. She confidently asserted that one of them run to cut off the wire carrying power to the house in question. In her layman's observation, she testified to the fact that an electrical fault caused sparks that ignited plastic tubes and insulators thereby causing the fire.

The above witness, in the court's view, merely explained her observations and never claimed any stamp to expertise in any electrical matters. In other words, she never claimed any professional knowledge but only gave factual evidence as she had observed it. I found her to be a witness of truth. Her evidence was not dented by cross-examination. This court accepts as factual and not opinion evidence, as the defence counsel would like this court to believe. The question of expert evidence in electrical matters does not come into it. I reject Mr. Limbe's submission on this point. The authorities cited, namely, **D.P.P. -vs- Msosa 7ALR(M) 128** and **Luwembe-vs-Republic Cr. App. No.58 of 1974 (Malawi-unreported)** on that point are unfortunately irrelevant and are not applicable at all. That unless an expert establishes his skill and or experience in the field in question, his opinion should be excluded. However this court finds as a fact that PW3's evidence was neither opinion nor expert evidence. It was merely observation by an eye witness.

The other very pertinent person who actually witnessed the incident is PW4, Mrs. Mugonya, the wife of the 1st plaintiff. She stated that she was just few meters away from the house.She was washing clothes when she suddenly saw sparks on the power line to their house. Immediately the house caught fire. The people around came to assist in putting the fire out. An ESCOM personnel ran there and cut off the live wire.She like PW3, merely explained her observation.The capacity to observe an incident does not require expert knowledge. It is not scientific. In this court's informed view, that needs only a keen sense and a good deep capacity to perceive detail. There is no question of expert evidence here. She never even begun to attempt to give one. I find as a fact that what she gave was factual evidence resulting from her ordinary witness's capacity to observe. I found her to be very composed and truthful witness untrammeled by any emotion at all, in spite of the fact that the property that was destroyed belonged to the family. She effectively, in my view, corroborated evidence of PW3.

The 5th witness was Mrs. Abraham. She confirmed that the 1st plaintiff, PW1, and PW3, Mrs. Mugonya are tenants of the house in question. The evidence of this witness is important only to that extent that the property which was burnt must have belonged to the people who occupied the house. She never pretended to know the cause of the fire because she was not present when the fire broke out and devastated their house.

It must be stressed that the evidence from the plaintiffs to the effect that there were some ESCOM personnel working in the vicinity has not been controverted. Equally, the evidence that an ESCOM personnel ran to cut off the wire that carried power to the house which is what prevented the fire

from spreading to the other half of the semi-detached house, has not been challenged. I accept this evidence as truthful.

The defendant called only one witness, namely, Mr. Chamama, the so- called expert witness. In his own words, he is a mere technician. He is not an electrical engineer. The court takes judicial notice that ESCOM employees include many electrical engineers including the General Manager or the Chief Executive. The witness could only boast of a technician's certificate to his credit, and his experience was only as an installation inspector. I do not accept him as an expert with plenty of practical experience and expertise. In any case when he arrived at the scene, he found the Distribution Board and Meter Switch had already been removed. He stated that he had noticed that fire originated from the bedroom. Indeed when the court was moved to visit the scene, it was in fact observed that the entry point of the live wire carrying power into the house was at the bedroom side. He conceded that the fire had indeed originated from that room and that it was the most impacted part of the house.

His evidence was that he formed the impression that the fire originated from the bedroom. On inspection, he found PVC conduit pipes had melted away leaving bear wires touching but the wires were not broken. The melting was along the roofing beams. He observed ash from burnt paper and cloth. That there were metal pieces which looked like remains of a stove. He also explained the workings of electricity by the aid of a diagram Ext. DI. What is clear from this so-called expert witness is that all those things he mentioned above were never demonstrated by samples of pieces that he may have collected as an expert. It is surprising that the alleged remains of a stove were not collected nor exhibited. He never even cut a small piece of conduit pipe, let alone the bare wires that he actually observed at the scene. This puts a great gloss on his expertise and only helps this court to come to the conclusion that his expert evidence is suspect. In my observation, his demeanour in the witness box was as suspect as his evidence. He was very evasive and I do not believe his testimony. His diagram impressive though it may have been, it does not subtract nor derogate from what the eye-witnesses actually saw. I believe and prefer the testimony of the eye-witnesses to that of this witness. What he described in the diagram cannot carry any weight in the absence of the Distribution Board and the Meter Switch, which items he concedes he did not find nor examine. The court is left in the dark as to what the impact of the sparks was on these items. Do we know whether they were faulty or not ? No one, whether expert witness or this court, can tell on something which was never examined by either. What is certain though is, that there are eye-witnesses who saw the sparks from the defendant's poles carrying power in the live wires to the entry point at the bedroom of the house in question. This point was clearly vindicated by the witnesses. I accept their evidence which I prefer to that of the so-called expert who faired very badly in cross- examination .

The counsel for the defendant urges this court to accept the fact that the missing of the Distribution Board and the Meter Switch is suspicious, and should be taken fully into account. Yes, the court has taken this fully into consideration. The ESCOM personnel as well as other people were at the scene almost immediately.Anyone could have taken the items.The owners of the house, the tenants , other people or the ESCOM personnel had the opportunity to do so. The fact that they are missing is indeed acknowledged, but as to who took them remains speculative. It could be any of the four groups of people mentioned above. Be that as it may, it does not change the scenario that the sparks observably were from the poles of ESCOM through the live wire to an entry point at the bedroom of the house in question .

The explanation of conduit pipes melting at 1,600 voltage is not convincing. The expert did not

explain what are the temperatures and effect of the ordinary fires which resulted from the sparks . While the cause of fire was electrical, as I find as a fact, the impact of fire from wood, clothes and paper on the conduit pipes was not explained by the expert. I therefore attach no weight to that argument by the expert and as submitted by the counsel for the defendant. It was observed that the semi-detached houses had their own separate and distinct Distribution Board and Meter Switch. The court was not addressed on whether those other gudgets in the adjacent house had been examined and had not tripped. The argument that the other house should also have caught fire is mere speculative and fanciful. I do not accept it. No witnesses ever professed any knowledge, clalmed any expert evidence, nor laid any claim to expertise. I find the argument that unless one establishes one's skill and proven experience in electrical matters one cannot be believed as baseless . I exclude that argument as both gratuitous and superfluous. I therefore expunge the cited authorities from my consideration because the expert opinion in relation to an ordinary witness does not arise at all .

The defendant had denied the plaintiffs' claim in its entirety. The plaintiffs allege that on 26th day of April, 1994 the house caught fire during the time the defendant's servants agents or employees were working at a nearby transformer. This has not been controverted. That the house caught fire is mutually agreed. In fact the Inspector went to the scene and confirmed that the house was destroyed by fire. What is also significant is that the defendant never called any other witness even in the face of a serious assertion that an ESCOM personnel rushed to the scene and cut off the wire carrying power to the house in question.The expert never touched on that issue. It is therefore admitted. If it is admitted the failure to call any other witness does not auger well on the defendant's part. Who could have defended the case better and more effectively than the worker who rushed to cut the live wire carrying power to the house or who was present at the material time ?

Mr . Chirwa for the plaintiffs argued that fire, according to Mr . Chamama , must have been caused by other source than electrical source. However, in cross- examination the expert failed to identify this other sourse. He further argued that the fire was caused by the negligence of the defendant's employees, agents or servants who were working on the nearby transformer. He stated that in law , negligence can be inferred from what actually happened. The first question to be considered is whether the defendant owed the plaintiffs a duty of care. Secondly, to be taken into account is the question whether such duty of care, if it existed, was breached. Finally, on whether as a result of such breach, the plaintiffs have suffered loss and damage which can be said to have been caused by the defendant, Mr. Chirwa had cited the case of **Lochgell Iron & Coal Company-vs- M'millan (1934) AC 1 at p. 25** per Lord Wright and that of **The Wagon Mound (No. 1) (1961) A C 388 at p. 425,** where it was stated that the tort of negligence is committed when damage, which is not too remote, is caused by the breach of a duty of care by the defendant to the plaintiffs, perhaps in what might be very pertinent in this case, within the neighbour principle as propounded in the often cited case of **Donoghue -vs- Stevenson (1932) A C 562:** where Lord Atkin L J stated that the rule that you are to love your neighbour becomes in law, you must not injure your neighbour. And the lawyer's question, who is my neighbour, receives a restricted reply :-

> " *You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your*

> *neighbour . Who , then is my neighbour ? The answer seems to persons who are so closely and directly affected by my act that I ought reasonably*
> *to have them in contemplation as being so affected when I am directing my mind* to *the acts or omissions which are called in question . ''*

The court must determine whether there was sufficient proximity between the plaintiffs and the defendant according to Lord Atkin's above formula.If the answer is in the affirmative, the court will find a duty of care. The other plank held onto by Mr. Chirwa was the doctrine of res ipsa loquitur (the thing speaks for itself). The doctrine is dependent on the absence of explanation . Whether the negligence is to be inferred or not the doctrine will apply if three conditions are satisfied : (a) the thing that inflicts the damage must have been under the sole management and control of the defendant (b) the event must be such that it would not have been occasioned without negligence (c) there must have been no evidence as to why or how the event took place: see **Birchell-vs- Bibby & Sons Limited (1953) 1AER 163** and **Bennett-vs-Chemical Construction (GB) Limited (1971) 1WLR 1571 .** The electric power which caused the fire was under the defendant's sole control . The fire would not have started if there was no negligence as was indicated by the plaintiffs in evidence. No evidence has been adduced to rebut the presumption of negligence. The evidence that short - circuit cannot cause fire because power returns to source has been disproved by the evidence of an electrical engineer in the **Kumkwawa Case supra**. at page 8 of this judgment .

Even if this court found that the plaintiffs had failed to prove negligence, which they have successfully proved, negligence could have been inferred from the facts of this case on the basis of the doctrine of res ipsa loquitur aforesaid. That there was want of due care on the defendant'spart : see Erle, C. J .In the case of **Scott- vs -London & St. Katherine Docks (1865) 3 H & C 596 at 601** where he said :

> *" there must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servant and the accident is such as in the ordinary course of things does not happen if those who have management use proper care, it affords reasonable evidence in the absence of explanation by the defendants, that the accident arose from want of care. "*

Mr . Chirwa, therefore, argued that in the case before this court, no satisfactory explanation as to the cause of fire was advanced. I accept that argument. The only explanation was that probably the cause of fire was a stove. That too was only speculative and had effectively been discredited According to **Hepple & Matthews** in their Book on Tort it is stated that (a) reasonable foresight of harm to the plaintiff is said to be the first ingredient of a duty of care. Reasonable foresight of harm is also part of the test for breach of duty of care. Finally, reasonable foresight of a kind or type of harm is as part of the test for determining the extent of the consequences for which the defendant should pay. (b) Proximity is used in determining the existence of duty of care , especially different degrees of closeness will apply to different kinds of claim. The ESCOM personnel, it was argued, were working in close proximity to the house in question. Obviously, they owed the plaintiffs duty of care that they or their properties are not harmed or damaged . (

c Risk is sometimes used as a short-hand description of the foreseeability test in relation to the standard of care, e. g., a person who accumulates explosives on his premises risks explosion .

It is argued that there is a difference between what the law of tort is trying to achieve and what it in fact achieves. One should avoid conceptual approach, i.e., from the laws internal logic to law as it actually operates in society. Here the court starts from the premise, is there a duty ? Is the defendant in breach of duty or what formula is to be applied to the assessment of damages ? What is the effect of granting or denying the plaintiff compensation ? The primary function of the law of tort is compensation for harm. This is functional approach, but ask yourself the question, which are the main interests ? They are both personal and property interests. Of course, all compensation is pecuniary in the sense that the harm to the interest affected must be translated into money terms . That is why there is denial of such liability. The law merely attempts to protect interests. The courts have said that there have to be no liability without fault. Conversely, where there is fault the courts will compensate the victim who has proved such fault to the satisfaction of the court . Emphasis now is on negligence. That is why there is corresponding emphasis which has come to rest on the compensatory aims of the law .

In the present case, the workers, like in the case of **D . E . Kumkwawa- vs -Eectricity Supply Commission Of Malawi :**Civ. Cas. No. 237 of 1990, i.e., the defendant's personnel, were working in close proximity to the house in question.In such situations by tort rules, damage caused by fault either intentionally or through lack of standard of care of the reasonable man is recoverable . At page 4 of the above case near the bottom of paragraph one, I quote :

> *" It was further his evidence (expert's) in cross - examination that although electricity is refracted back to the source, if there is short - circuit , the point where there is short - circuit might ignite if there is inflammable material."*

The above proves that the fire could have been started by short-circuiting. Secondly, the present case can be distinguished from the one cited above. The court was moved to the scene and it was shown where the pole was situated previously. The spot was only about 3 meters away from the house, whereas in the **Kumkwawa Case ante.** the house was about 1 km away from the pole . Thus in the present case proximity imposed higher duty of care on the part of the defendant. The third point is that sparks were seen at that place long before this incident. The servants, agents or employees of the defendant were actually working there. One had even responded to the call to arrest the spread of fire by cutting the live wire that brought power to the house. The pole had, after this incident, been removed further away from the house. It was about 20 to 25 meters away . A clear recognition and acknowledgment of the fault. There was no evidence to the effect that sparks were being experienced again in the locality. While there was some evidence that circuit-breaker was not serviceable in the above cited case and that the duty to do so rested squarely on the University in Zomba, the present case never revealed such evidence. All in all, from the evidence before this court, the plaintiffs have adequately discharged the burden placed on them by showing that there was duty of care on the defendant vis-a-vis the plaintiffs. This duty of care was breached, resulting in loss and damage to the plainttiffs .

The nature of hazard, e.g., sparks, cutting off of electricity or black out for 4 days and then

suddenly reconnecting power, the proximity of the pole to house, all these severally or together posed the type of hazard that had actually been occasioned . This is the risk that the Commission would run. The causes of fire would be sparks from short-circuit, flash of lightning, tree falling on the wires, accidental severance of the cable due to negligence of someone or other . When the fire happens, it may cause serious damage both to people and or their property. Where the Commission is negligent in cutting off electricity supply and causes actual damage physical or property, the damage can be recoverable : **Baker-vs-Crow Carrying Company Limited (1960) 1 February (unreported) p . 223 in Hepple & Matthews , " Tort Case Materials** ' , 4th Edition referred to by Buckley L. J., in **SCM - vs - Whittal (1971) 1 Q.B.** at 356 : where it was held that any economic loss truly consequential on the material damage can be recoverable. In **British Celanese Limited-vs-A. H. Hunt (Capacitors) Limited (1969) 2 AER 1252** it was held that such losses are foreseeable and direct consequences of the defendant's proven or admitted negligence or of a reasonably foreseeable damage or direct failure in the duty of care. The defendant apparently failed to disprove cause and effect even on a balance of probabilities. It could not be shown that the defendant did not owe the plaintiffs a duty of care nor that the damage was too remote. The plaintiffs in this court's view convincingly proved that they were owed a duty of care and that the damage was not remote but rather it was direct. **Edmund Davies L. J.** in the above case held that " financial loss was recoverable because it was a direct consequence of the breach of duty. The plaintiffs suffered foreseeable recoverable damage. " at p. 329. So too, the second plaintiff in the present case , is entitled to recover financial loss by way of rentals he should have earned .

This court must answer the questions, who caused the fire ? Who is liable ? The person liable for the damage caused by fire is he who starts the fire or causes it to be started by his servants , agents, employees or independent contractors: **Black- vs - Christ Church Finance Company (1894) A C 48.** The Electricity Supply Commission of Malawi in the present case, are in that regard liable .

In the case of **Fletcher-vs- Bradford City Football Club (1983) Limited reported 23rd February (1987)** a case involving fire accident. The fire was caused by the negligence of the defendants, their servants, agents or employees. Failing to take any or any adequate steps to prevent or reduce the risk of accidental outbreak of fire in the stand constituted negligence. They were held liable for the fire that ensued and caused loss of life. The question was what was the cause of action and therefore what did the plaintiffs have to prove in order to succeed against the defendants ? They had to prove elements of negligence and causation or causality .In that case, the court found that the club was liable for being at fault although the directors had not been intentionally or callously indifferent. The other question was, what are the other sources of compensation ? Usually it is the insurance. The commission in the present case has been proved to have been negligent. It or its insurance should therefore pay the compensation . The plaintiffs succeed and should be paid the sums prayed for including costs for this action . I however agree that although iron sheets have been charred and clearly damaged, the number proved was not as claimed. It will therefore be reduced to those actually counted when the court was moved to the scene i.e.12 sheets instead of 16.The calculation of the resulting quantum on that head and costs will be done by the Registrar .

Let me turn to the question of the interests applied for . What are the merits of such claims ? The

case of **Talbord-vs - David Whitehead & Sons (Malawi) Limited Civ. Cas .No .11 of 1988 (unreported)** was cited with approval by Tembo J in **Suleman-vs -National Insurance Company Limited Civ . Cas . No . 1086 of 1995** at page 13 where Chatsika J A had this to say :

> *" the applicant claims interest on the damages we have awarded in this matter. It is to be observed on this aspect that section 11 of the Courts Act, confers jurisdiction on the High Court to award interest , but as was stated by this Court in **Gwembere-vs-Malawi Railways Limited 9 MLR 369** , this jurisdiction is confined to the cases of debt , as distinct from damages. Interest on damages e.g. damages awarded for personal injuries, like in the instant case, is by statute, namely, the Law Reform (Miscellaneous Provisions) Act, 1934 . That statute is, however, not applicable to Malawi. In short, we find that the applicant's claim for interest in circumstances of this case is untenable, and must fail . "*

Mr Justice Tembo stated as follows :-

> *" Let me point out that I am bound by this decision. "*

I must equally state that I am bound by the above authorities because the claims for interests in the instant case, do not relate to a debt at all but to all damages . In the United Kingdom , interest is recoverable on damages : **Wentworth-vs -Wiltshire C C (1993) 2 AER 256 .** This is not the case in Malawi . The English cases are merely persuasive here . They do not bind us especially where they are in direct conflict with our law.. So we cannot follow them in such circustances.

In conclusion , the plaintiffs have succeeded on claims for damages in regard to the destroyed property belonging the first plaintiff and replacement for the destruction of the house in question belonging to the second plaintiff , and the lost rentals which the second plaintiff would have earned. I so order . Costs for the plaintiffs will be taxed by the Registrar .

Pronounced in open Court at Blantyre this 16th day of January, 1997.

L . B . T . NDOVI

JUDGE