IN THE COURT OF APPEAL FOR ZAMBIA **CAZ/08/268/2017**

HOLDEN AT LUSAKA **APPEAL NO. 144 OF 2017**

(*Civil Jurisdiction*)

BETWEEN:

ZESCO LIMITED **APPELLANT**

AND

ELIJAH NYONDO ***(Suing in his capacity as Administrator of the estate of the late WILSON SINYINZA)*** **RESPONDENT**

Coram: Chisanga, JP, Chishimba and Sichinga, JJA
On 24th April, 2018 and 4th September, 2018

For the Appellant: *Mr. K. Mweemba- In House Counsel*
For the Respondent: *Mr. D. Mazumba- Douglas and Partners*

JUDGMENT

SICHINGA, JA delivered the Judgment of the Court.

Cases referred to:

1. *Zulu v Avondale Housing Project Limited (1983 Z.R. 172).*
2. *Imperial Chemical Industries v Shatwell (1965) A.C. 656*
3. *Kapambwe v Maimbolwa and Attorney General (1981) ZR 127*
4. *Betty Kalunga (Suing as Administrator of The Estate of the late Emmanuel Bwalya) v Konkola Copper Mines Plc (2004) Z.R. 40*
5. *Smith v Baker & Sons (1891) A.C. 325*

Legislation referred to:

1. *Law Reform (Miscellaneous Provisions) Act, Chapter 74 of the Laws of Zambia*
2. *Fatal Accidents Act 1846 Parliament of the United Kingdom*

This is an appeal from the decision of the High Court dated 20th September, 2017 in which the High Court awarded the respondent herein general exemplary special damages under the ***Law Reform (Miscellaneous Provisions) Act***[1] and the ***Fatal Accidents Act***[2] arising out of a fatal accident on 31st January, 2014 in Lundazi in which Wilson Sinyinza (hereinafter called "the deceased") was electrocuted.

The brief facts of this case are that the deceased was employed by the appellant company as an assistant clerk on a monthly salary of K3, 560 and was entitled to 80% and 40% of the basic salary and service and housing allowance, respectively. The incident that gave rise to the respondent's claim was that on 31st January 2014, Management of the defendant company at Lundazi allegedly tasked the deceased to connect/install power at premises belonging to Mr. Ackson Mtonga and in the process, the deceased was electrocuted and died due to the negligence of the defendant's servants.

Particulars of negligence alleged were as follows:

i) *Assigning a person employed as assistant clerk marketing to install power;*

ii) *The ZESCO servant switching on power to the service cable at the pole when the deceased was working on the meter box of the customer Ackson Mtonga;*

iii) *Not taking any precautionary measures to ensure that before switching on power at the pole and the prepaid meter, no one would be put in danger.*

iv) *Not ensuring that the people assigned to do the work the deceased was doing are people employed to do that kind of a job.*

v) *The defendant's servants not taking reasonable care of safety that before switching power at the pole and the prepaid meter no one was working elsewhere on that line.*

vi) *Failure by the defendant to follow laid down procedure before switching on power at the pole and prepaid meter.*

The respondent contended that at the time the accused died, he was aged 23, had eight dependents including his mother, sister, three brothers, grandmother and two nieces, and had been accepted at Mansa Trades Institute to pursue Zambia Institute Chartered Accounts Technician Level.

Particulars of loss and damage claimed were; loss of expectation of life and loss of career prospects, all in the total amount of K1, 012, 640. The respondent generally claimed exemplary special damages under the ***Law Reforms (Miscellaneous Provisions) Act***[1] and the ***Fatal Accidents Act***[2] arising out of the said fatal accident.

In its defense, the appellant confirmed that the deceased was employed on a contract basis, the last of which was for a duration of 6 months, due to lapse on 28th February, 2014. The appellant denied assigning the deceased to connect power and contended that on the material day, the deceased was in fact assigned to market the Increased Access to Electricity Services Project ("IAESP") to prospective customers in Mwase area of Lundazi. Further, that the deceased voluntarily participated in the new connection works carried out at Samson Chigona Shop, Mwase market, despite being aware of the Management directive given on 14th January, 2014 to report any supervisor insisting on using unspecialized manpower on specialized jobs. The particulars of negligence were denied, and the appellant pleaded *volenti non fit injuria,* and stated that the respondent was not entitled to any of the reliefs claimed.

On the issue of whether or not the appellant owed the deceased a duty of care, the trial judge's answer was in the affirmative, on the basis that the appellant as an employer owed the deceased a legal duty of care to ensure the safety of the deceased whilst on duty, hence Management's undertaking, through the divisional director, of a routine tour to sensitize the appellant company's employees on safety measures, but that the bigger responsibility lay on the senior employees and/ or supervisors to ensure compliance. The trial judge also stated to this effect that the measure put in place to prevent employees from performing duties outside their scope were not adequate and this shortcoming led to the untimely death of the

deceased. Coupled with this was the fact that the cause of the accident according to the ZESCO report was poor supervision by one Andreck Phiri (hereinafter called "the Supervisor"), who assigned and did not supervise non-technical and unspecialized manpower to connect the new installation.

As to the question whether the defendant breached its duty of care resulting in the deceased being electrocuted and dying as a result, the trial court was of the view that although the Supervisor did not expressly assign the deceased to install power, it was clear that all the employees who went to Mwase on the material day worked as a group, and the said Supervisor therefore impliedly did assign the deceased to install power at Mwase. Further, it was found as a fact that it was because of the Supervisor's failure to supervise that Mabvuto connected the service cable to the the live circuit whilst the deceased was working by the roof where he was positioned.

On the defence of *volenti non fit injuria* claimed by the appellant, the trial court found that this had not been proved. In this regard, the trial court considered the appellant's argument that the deceased was aware that no employee should perform work outside their scope and that on the material day, the deceased was told by his colleague Simon not to take part in the specialized work. The trial court disregarded this evidence on the basis that everyone in the team was doing work beyond their scope and there was no evidence suggesting that Simon prevented the others from doing so. That was

unlikely that Simon only thought of stopping the deceased and in any case, he himself participated in doing the works for which he was not employed to do. In the same vein, pertaining to the issue of whether the deceased was wanting for contributory negligence in his death, the trial judge agreed with the submissions by the respondent's counsel that this claim was not pleaded and consequently, she declined to address her mind to it.

Having found the defendant liable, the trial court proceeded to assess the damages and awarded the sum of K561,480 as damages for loss of dependency; 75% of which was to be paid to the respondent's mother and 25% to his grandmother.

Dissatisfied with the judgment of the lower court, the appellant has now appealed before this Court, advancing the following grounds:

1. **The learned trial judge erred in law and fact when she held that the Defendant, through Andreck Phiri, assigned the deceased to install power at Mwase when there was no evidence supporting this finding;**

2. **The learned trial judge misdirected herself in law and fact in evaluating the evidence on record in an imbalanced way by only highlighting the alleged negligence of the Defendant but without also looking at the conduct of the deceased, the basis of which conduct the defence of *volenti non fit injuria* was based;**

3. **The learned trial judge erred in law, equity and fact when she declined to address the defence of contributory negligence when the evidence on record and her finding in the judgment reviewed that the deceased had been negligent.**

Under the first ground of appeal, the appellant submitted that the trial court's finding that all the employees who went to Mwase on the material day worked as one group, such that the supervisor did by implication assign the deceased to install power at Mwase is unsupported by evidence, as the evidence on record is to the effect that the deceased and Simon Phiri, as marketing agents, were assigned on the material day to go and look for clients. That the two were also told that they had to give physical directions to another group that was to connect electricity to houses. That despite the two groups having two different assignments, they were driven by DW2 in one vehicle due to shortage of transport.

Our attention was drawn to the testimony of PW2 to the effect that at the shop, the Supervisor instructed PW1 to climb the pole and connect the service line, which was within his scope of work, as rightly established by the trial court. The supervisor also instructed PW2 to install the prepaid meter at the house, which was also within PW2's scope of work. Having given these tasks to PW1 and PW2, the supervisor left the scene. In this regard, the appellant contended that there was no authority given to the deceased to join

PW1, PW2 and Ackim Ngwira in doing the job that he did, as evidenced by the testimony of several witnesses that no one told the deceased to climb the ladder, but that he did it on his own volition. On this premise, counsel for the appellant submitted that despite this overwhelming evidence, on the deceased's lack of authority to climb the ladder, the court overlooked it and instead held that the deceased was authorized by implication. It was counsel's submission that this finding is contrary to the evidence and it ought to be reversed in line with the guidance in the case of ***Zulu v Avondale Housing Project Limited.***[1]

With regards to the finding of the trial court that the deceased was assigned work by implication because he was working in a group with others, the appellant contended that the learned trial judge misapprehended the facts and failed to consider certain pieces of evidence, including evidence to the effect that there were two groups of employees who went to the shop at Mwase prior to the incident, namely marketing agents and technical persons who were responsible for installing meters and working on faults, but only the technical persons rightly did the job at the shop, while the marketing agents were just standing by. Counsel argued that before leaving the site, the supervisor assigned PW1, PW2 and Ackim Ngwira to do the work, but the deceased and DW1 decided to join the technical persons in doing work that was not part of their job description.

The appellant called in aid the case of ***Imperial Chemical Industries v Shatwell***[2] to advance the position that a plaintiff who aids or abets other employees in disobeying an employer's express instructions cannot be said to have been authorized by implication by the employer notwithstanding the fact that the employee is working in a group. In the portion of the aforementioned case to which our attention is drawn, it was stated in obiter as follows:

> ***"In the second, volenti non fit injuria is a complete defence if the employer is not himself at fault and is only vicariously liable for the acts of the fellow servant. If the Plaintiff invited or freely aided and abetted his fellow servants' disobedience, then he was volens in the full sense."***

With respect to the second ground of appeal, the appellant mainly repeats its arguments under the first ground relating to the alleged failure by the trial court to consider the actions of the deceased, save to add that the fact that the learned trial judge disbelieved DW1 on the point that he told the deceased not to climb the ladder did not void the evidence of PW1, PW2 and DW1's evidence that no one told the deceased to climb the ladder, and the learned judge should not have ignored this evidence.

The appellant has also raised issue with the trial court's finding as regards the meeting at which employees were warned against performing duties that were beyond their scope. The appellant

submits that the said finding is untenable as it appears to have been made on two assumptions that are not supported by evidence on record; namely that the deceased was assigned specialized work by the supervisor, and secondly that Andreck Phiri was the deceased's supervisor. On the first alleged assumption, the appellant submitted that this position is erroneous because there is no evidence that the deceased was assigned such work, and that on the contrary, the evidence suggests that the deceased assigned the work to himself. On the second assumption, the appellant submitted that the reasoning of the trial judge was that having been given work by the supervisor, the deceased would have had difficulties to refuse or complain to management, following management's directive to this effect. Reference is made to the evidence of DW1, DW2 and DW3 to the effect that the immediate supervisor of the deceased was Milton Hamobe.

It is the appellant's contention that by highlighting the alleged failings of the appellant at the expense of the evidence in favour of the appellant, the learned trial court was unbalanced. The case of ***Attorney General v Marcus Kampumba Achiume***[3] is cited in this regard, wherein it was held that:

> ***"An unbalanced evaluation of evidence where only the flaws of one side but not the other are considered is a misdirection which no trial court should reasonably make, and entitles the appeal court to interfere."***

On this premise, the appellant submitted that the fact that the deceased was enjoined a few weeks before his death to refuse duties outside his scope of work and he disregarded this instruction by undertaking duties on the material day without authority from the employer made him *volens* and the court would have arrived at this conclusion, had it been balanced.

The respondent filed heads of argument on 16th April 2018. In response to ground one, we were directed to the evidence of a defence witness to the effect that when they were installing power, there were three positions and each position needed two people, which brought the total number of people required to six. Based on this evidence, the respondent submitted that the six people who travelled to Mwase were to be positioned in those three positions. With the aid of the case of ***Kapambwe v Maimbolwa and Attorney General***[4], the respondent submitted that with the evidence alluded to above, the Court correctly made a finding of fact and therefore cannot fall on any of the circumstances in which we can reverse the findings of the Court below.

Under ground two, the respondent submitted that the defence of *volenti non fit injuria* cannot be relied on in this matter, as there is evidence on record from the testimony of DW3, who stated in cross examination that there was nothing wrong done by the marketing clerk that led to the demise of the deceased.

Our attention is drawn to the case of ***Betty Kalunga (Suing as Administrator of The Estate of the late Emmanuel Bwalya) v Konkola Copper Mines Plc***[5] in which it was held as follows:

> ***"The duty of care by employers to their employees has developed to the extent that there is virtually no room for volenti non fit injuria to apply in cases of negligence, where there is common law or statutory duty of care by an employer to his employee except where such doctrine has been pleaded."***

Further, the case of ***Smith v Baker & Sons***[6], held that:

> ***".....as between master and servant, volenti non fit injuria is a dead and dying defence. That I think is because in most cases where the defence would now be the decision on contributory negligence. "***

At the hearing of the appeal, the appellant abandoned ground three. Mr. Mweemba orally augmented the written submissions and stated that the evidence on record was to the effect that the supervisor only authorized PW1 and PW2 to conduct works on the material day, and the others were asked by their fellow employees to conduct works for which they were not trained, and there was therefore no evidence on which the trial court could rely to come to the conclusion that the deceased had been impliedly given works to do. We referred counsel to the fatal electrical accident report in the defendant's bundle of documents in the court below, where the

findings indicate that the supervisor allowed the deceased, a marketing clerk, to climb a ladder and insulate a live service cable knowing very well that this was not within his scope of work. To this, Mr. Mweemba's response was that this finding was to the effect that the employees were left unsupervised, and that the same report also states that the deceased climbed the ladder on his own free will. We were therefore urged to interfere with findings to the effect that the appellant had impliedly instructed the deceased to conduct tasks he was not trained to do, as per the case of ***Zulu v Avondale Housing Project Limited.***[1]

Under the second ground of appeal, Mr. Mweemba mainly repeated the written submissions to the effect that the trial judge ignored the evidence that the deceased climbed the ladder and commenced installation of electricity when he knew he was not trained for it. He argued that despite this evidence, the trial judge went ahead to award full damages to the deceased's estate as if he was not at fault.

In response to the oral arguments advanced by Mr. Mazumba, the appellant's counsel, the respondent's counsel submitted that it is clear from the evidence in the court below that when the appellant's employees went to connect power, they were seven in number, including the driver, and that the installation process comprised three positions; namely the pole, roof and shop, each requiring two people. On this premise, Mr. Mazumba submitted that even in the

absence of express evidence that the deceased was instructed, the installation process was clearly a six man job, and that although he was not forced to climb the ladder, he was assigned the task.

We requested Mr. Mazumba to comment on the case of ***Imperial Chemical Industries v Shatwell***[2] cited by the appellant, and his response was that *volenti non fit injuria* is a complete defence if the employer is not at fault, and that evidence in the court below shows that to a larger extent, it was the employer who was at fault.

In reply, Mr. Mweemba insisted that the case of ***Imperial Chemical (Supra)*** applied to this matter because the supervisor had left the site and the remaining employees, in disobedience of instructions, did work that was not assigned to them, and further that there was fault on the part of the deceased as he was the senior most employee on site.

We have considered all the evidence on record, the judgment appealed against, as well as the written and oral submissions advanced by both parties herein. The third ground of appeal having been abandoned, we will now proceed to determine the two grounds of appeal.

Under the first ground of appeal, the question for determination is whether, based on the evidence on record, it can be said that the deceased was assigned to install power. If we answer this question

in the negative, it then follows that we can exercise our discretion to reverse the finding of fact made by the trial judge, if it meets the requisite criteria.

It is not in dispute that at the time of occurrence of the subject incident, the supervisor was not at the site. This is confirmed by the evidence of PW1 and other witnesses. PW1 also testified that the supervisor instructed him to climb the pole and connect the service line, which was within his scope of work, and left the site after giving the instructions to do the installation.

On the other hand, the gist of the respondent's argument is that even in the absence of express evidence of the supervisor's instruction, it is clear that the installation having been a six man job, all the employees on the mission to connect power had a role to play. The implication of this view taken by the respondent is that even though the deceased was not instructed or assigned to climb the ladder, he was expected to. If this was indeed the position, we do not see how the supervisor could have expressly instructed PW1 to climb the pole and connect the service line if he expected or intended that anyone could do so. There is unchallenged evidence on record from the testimony of DW1 (Simon Phiri) that when DW1 advised the deceased not to climb the ladder, the deceased insisted, saying that he merely wanted to help to pull the cable. This, in our view, discredits the notion that the deceased was under an obligation to participate in the installation process.

The position taken by the trial court that everyone in the group was doing something beyond their scope is therefore not only speculative but erroneous. We find that this is a proper basis upon which we can reverse the lower court's finding that the deceased was impliedly tasked to climb the ladder and do the installation of power, as the trial judge clearly misapprehended the facts based on the evidence on record.

In rejecting the appellant's defence of *volenti non fit injuria*, the learned trial judge was of the view that the greater responsibility was on the senior employees and/ or supervisors to ensure compliance, and rejected the evidence of DW1 on the basis that it is unlikely that he thought of stopping the deceased, as he himself also participated in doing the works for which he was not employed to do. In our view the success or failure of the defence of *volenti* has nothing to do with whether or not the deceased was told by DW1 not to take part in the specialized work. On the contrary, the underlying factor is whether or not the employer was at fault, such that if the deceased freely aided and abetted his fellow servant's disobedience, then he voluntarily put himself in harm's way, which led to his eventual death.

The two competing interests here are; the supervisor's negligence of leaving the employees unsupervised versus the employee putting himself in harm's way, despite being aware that what he was doing

was outside the scope of his work, especially after the directive by management.

We hold the view that it was in recognition and/ or acknowledgment of its duty of care to employees that the appellant's management held the meeting and told all the employees not to perform tasks that they are not trained for. As such, it was no fault of the supervisor that the deceased decided, out of his own volition, to do that which he was neither instructed nor trained to do. On this premise, we find that the appellant successfully established its defence of *volenti non fit injuria.*

Having read the *ratio decidendi* of the judgment appealed against, we have no difficulty agreeing with the appellant that the trial court's evaluation of evidence was more favourable to the respondent, seeing as very little is said, if anything, about the blameworthiness of the deceased in the events that led to his eventual death. The court made mention of how measures put in place to ensure that employees were obeying management's directive not to do work beyond their scope. This does not mean that employees were at liberty to disobey instructions and this directive at the earliest opportunity when they were unsupervised. The meeting at which the directive was given was attended by employees and management/supervisors, and all were urged to be cautious. We are inclined to allow this ground of appeal.

In conclusion, we find merit in this appeal and accordingly allow it, with costs to the appellant to be taxed in default of agreement.

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F. M. Chisanga
JUDGE PRESIDENT

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F. M. Chishimba
COURT OF APPEAL JUDGE

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D. L. Y. Sichinga
COURT OF APPEAL JUDGE