

# Geofrey Kameko V Illovo Sugar Malawi Limited

## Personal Injury Cause Number 399 of 2020

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<b>Court:</b>	High Court of Malawi
<b>Registry:</b>	Civil Division
<b>Bench:</b>	Honourable Justice Allan Hans Muhome
<b>Cause Number:</b>	Personal Injury Cause Number 399 of 2020
<b>Date of Judgment:</b>	January 09, 2025
<b>Bar:</b>	Mr Wesley Ishmael, of Counsel for the Claimant Mr Mwai Kalua, of Counsel for the Defendant

### Head Notes

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**Law Of Torts** - Negligence - Duty of care - Employer owes both a common law and statutory duty of care to employees - Occupational Safety, Health and Welfare Act (Cap. 55:07)

**Law Of Torts** - Negligence - Causation - Onus of proof - Claimant must prove, on a balance of probabilities, a direct causal link between the Defendant's negligence and the injury.

**Law Of Evidence** - Medical report - Hearsay rule - Medical reports are not conclusive without the testimony of the author to confirm the findings.

**Damages** - Personal injury - Claim dismissed - Claimant failed to prove a direct link between the alleged negligence and his illness.

## Summary

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The Claimant sought damages for personal injury from the Defendant, his former employer, alleging negligence and a breach of statutory duty under the *Occupational Safety, Health and Welfare Act*. The Claimant, who had worked in the Defendant's power house from 1995 until his medical retirement in 2015, contended that his exposure to hazardous materials such as asbestos, fibreglass, and toxic fumes caused him to develop a throat illness. He was diagnosed with a left vocal cord nodule in 2012, which progressed to the point where he required a medical procedure that left him unable to speak properly. The Claimant argued that the Defendant failed to provide a safe working environment and adequate personal protective equipment.

The Defendant denied the claims, presenting three witnesses who testified that the company had a fully functional safety department, that asbestos was contained, and that the alleged hazardous materials were known to cause lung problems, not the throat cancer suffered by the Claimant. The Defendant's company medical officer testified that the Claimant's illness was not causally linked to his work environment. The Court was tasked with determining whether the Claimant had proven, on a balance of probabilities, that the Defendant's negligence or breach of statutory duty caused his injury.

The Court dismissed the Claimant's claims in their entirety. The Court held that while an employer owes a duty of care to its employees, the Claimant had failed to establish a direct causal link between the Defendant's actions or omissions and his throat illness. The medical reports submitted as evidence were considered insufficient, as they were subject to the hearsay rule and did not explicitly state the cause of the illness. The Court found that there was no direct evidence to support the Claimant's

assertion and that the Defendant's evidence, which was largely uncontroverted, indicated that the hazardous materials cited by the Claimant cause lung, not throat, issues. The Court ordered the Claimant to pay the costs of the action.

## Legislation Construed

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*Occupational Safety, Health and Welfare Act (Cap. 55:07)*

## Judgment

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1. The Claimant was employed by the Defendant around 1995 and retired on medical grounds in 2015. He was working in the power house where temperatures could reach 60 degrees Celsius. He was also handling hazardous materials such as asbestos, fibre glass and bagasse. About 2012, the Claimant was diagnosed with left vocal cord nodule which was associated with hoarseness of voice as particularised in the medical report exhibited as GK 1. In 2014, the Defendant was advised to transfer the Claimant to another department with less noise per exhibit GK 2. At that time, the Claimant's level of incapacity stood at 5% per exhibit GK 3 and by 2020, the level of incapacity had increased to 30% per exhibit GK 1. The Claimant was transferred to the front section and later to the planning section in 2015. Presently, the Claimant can no longer speak properly as he has a hole on his neck due to a medical procedure.

2. The Claimant alleged that due to the Defendant's negligence and breach of statutory duty, as provided for under the Occupational, Safety and Welfare Act, Cap. 55:07 of the Laws of Malawi (Act), he has suffered injury and claims damages under various heads and costs of this action. The Defendant denies all the claims.

3. During trial, the Claimant adopted his witness statement adding that his job in the power house was risky as he was exposed to asbestos, fibre glass, toxic fumes and bagasse. He adopted exhibits GK 1 to GK 5. As earlier stated, the Claimant has permanent injury to his vocal cords due to the medical procedure he underwent. He could be heard with difficulty, however, the Court and parties' Counsel assisted each other in deciphering what the Claimant was communicating. In cross-examination, he maintained that he was not trained on safety upon employment but much later in 2006. He admitted receipt of personal protective equipment such as overalls, gumboots and a helmet but that there was no mouth covering or a special suit. He agreed that his illness was to do with the throat and not lungs. He also admitted that there was no relationship between asbestos, fibre glass, toxic fumes and bagasse and his throat illness. That there was nothing in the medical reports as to the cause of his throat injury and that the authors of the reports were not called to testify. He admitted having refused to undergo a second medical operation as it was life threatening. In re-examination, he maintained that he was exposed by the Defendant to a dangerous working environment, hence the injuries.

4. The Defendant called three witnesses, the first one was John Malekano, the Defendant's Safety, Health, Risk and Quality Officer. He joined the Defendant in 2000 when he found a fully functional safety department which ensured compliance with the Act. He could not testify as to the Claimant's working conditions before the year he joined the Defendant. He did not attach forms signed by the Claimant for the personal protective equipment nor notice board notices on safety. He admitted that the power house was noisy but there were no fumes but steam, only. In re-examination, he explained that the Defendant's record retention period was five years hence he could not produce older documents.

5. The second witness was Kinford Nzutha, the Defendant's Factory Engineering Manager, who was supervising the Claimant. He joined the Defendant in 2002. He testified that the power house has 4 turbines which generate electricity for the factory and the Claimant was responsible for maintaining the turbines. Asbestos was only used to insulate pipes and there were a number of measures to protect the workers from getting into contact with asbestos. In cross-examination, he agreed that the power house was noisy and temperatures were high but that there were no fumes. He accepted that he could only testify in relation to the period that he was in employment when he knew that the Claimant was given personal protective equipment.

6. The last witness for the defence was Dr Albert Mkumbwa. He joined the Defendant in 1998 as the company medical officer. He was responsible for day to day patient care; public health and occupational health care to the Defendant's employees. In the case of the Claimant, he referred him to an expert on Ear, Nose and Throat who established that the Claimant had cancerous nodules on his vocal cords. That there was no causal link between the cancer and the conditions of the Claimant's work. The asbestos in the power house was not disturbed in any form and that it takes 30 or more years to develop cancer of the lungs from exposure to asbestos and not throat cancer. Throat cancer may be caused by a number of factors including vocal abuse; yelling; smoking and infections. That asbestos; fibre glass; toxic fumes and bagasse all cause lung problems and not throat cancer.

7. In cross-examination, he admitted that he is not a cancer specialist but had capabilities, as a general practitioner, to diagnose and refer a patient to a specialist like he did with the Claimant. He disagreed that the Defendant was negligent by

transferring the Claimant to the planning section after 12 months, as the Claimant was transferred earlier to the front office from the power house.

8. At close of trial, the Court received written submissions from Counsel, for which the Court is grateful. The standard of proof in civil matters is on a balance of probabilities and the burden of proof lies on he who asserts the affirmative, in this case the Claimant: see *Commercial Bank of Malawi v Mhango* [2002-2003] MLR 43 (SCA).

9. Negligence has been defined as the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The Defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done: see *Blyth v Birmingham Waterworks Company* (1856) 11Ex Ch 781. The essential elements of actionable negligence are (a) a duty to take care owed to the Claimant by the Defendant, (b) a breach of that duty, and (c) damage suffered by the Claimant resulting from the breach of duty: see *Kasawire v Ziligone and Another* [1997] 2 MLR 139.

10. The Court has perused the cases cited as well as the Act. In *Innocent Mulogera v Malawi Cotton Company*, Civil Cause No. 1595 of 2010 (High Court of Malawi) (Principal Registry) (Unreported), Potani J, as he then was, noted that:

Both at common law and under statute, an employer owes a duty of care to his employee... In this country, the statutory duty of care an employer owes his employee is provided for in the Occupational Health, Safety and Welfare Act [Cap 55:07] of the Laws of Malawi. Section 13(1) of the Act imposes a general duty of care on the employer... Therefore, both at common law and statute, the defendant, as an employer, owed a duty of care to the plaintiff, its employee. It is pertinent to note that statute also places a reciprocal duty on an employee to take reasonable care for his own safety.

11. The Court has analysed the evidence before it and forms the opinion that the Claimant has failed to prove his case on a balance of probabilities. Courts have previously held that causation requires more than speculation; it must be supported by evidence demonstrating how the Defendant's actions or omissions led to the harm: see *Lihoma v Anchor Industries* Personal Injury Case Number 254 of 2014.

12. There is no direct evidence linking the Claimant's illness to the working conditions. The uncontroverted evidence from the Defendant is that asbestos; fibre glass; toxic fumes and bagasse all cause lung problems and not throat cancer. The medical reports, admitted in evidence subject to the hearsay rule, are not specific on the cause of the Claimant's throat illness. The throat illness can be caused by many factors and so this Court is unable to conclude that the Claimant's illness emanated from the Defendant's negligence.

13. The Claimant's claims are therefore dismissed in their entirety, with costs.

