

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

SCZ/8/311/2013

BETWEEN:

GILBERT CHIKOTI

APPELLANT

AND

ZESCO LIMITED

RESPONDENT

CORAM: Hamaundu, Kaoma and Kajimanga JJS

On 2nd March 2021 and 24th March 2021

For the Appellant: Mr. K. F. Bwalya of Messrs KBF & Partners

For the Respondent: Mr. P. Mulenga, In-house Counsel

JUDGMENT

Kajimanga, JS delivered the judgment of the court

Cases referred to:

1. *Donoghue v Stevenson* [1932] AC 562
2. *R v Bateman* [1925] All ER 48
3. *Hedly Byrne & Co v Heller & Partners Ltd* [1963] 2 All ER 594
4. *R v Mackinnon and Others* [1958] 3 W.L.R. 688
5. *Mutambo v The People* (1965) Z.R. 15
6. *Victor Namakando Zaza v ZESCO Limited* (2001) Z.R. 107
7. *Zambia Railways v Pauline S. Mundia and Another* (2008) 1 Z.R. 287
8. *Re Wrightson* [1908] 1 Ch.799
9. *Barclays Bank Zambia (Plc) v Zambia Union of Financial Institution and Allied Workers* (2007)

Legislation and other Material referred to:

1. *Zambia Electricity Act Chapter 433 of the Laws of Zambia, Section 26*
2. *ZESCO Limited By-Laws 2000*
3. *Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia, Section 10*
4. *Bryan A. Gardner, Black's Law Dictionary, 8th Edition (St. Paul, Minneapolis)*

Introduction

- [1] This is an appeal from the judgment of the High Court (Kabuka, J as she then was) dated 30th September 2013 which dismissed the appellant's claim against the respondent for negligence.
- [2] The appeal examines whether a power utility company can be held liable under the tort of negligence where a customer's house is gutted by fire on account of the absence of a surge arrestor in the customer's meter box. It also discusses whether the responsibility of ensuring that protective devices are installed at the premises lies with a power utility company or a customer.

Background to the appeal

- [3] The brief facts leading to this appeal are that the respondent, a power utility company was supplying power to the appellant's house situated at Plot 441a/303 Ngwezi Road, Roma in Lusaka. On 6th September 2008, there was loss of power to the

appellant's house. When the power was restored, there was a power surge experienced in the electrical system, in consequence of which the appellant's house was gutted by fire. Aggrieved by the turn of events, the appellant commenced proceedings against the respondent in the court below.

Pleadings

[4] By a writ of summons issued against the respondent dated 9th October 2008, the appellant sought the following relief:

- [4.1] *Damages for negligence;*
- [4.2] *Compensation for loss and suffering;*
- [4.3] *Interest;*
- [4.4] *Costs.*

[5] The appellant alleged that after the disruption of power supply to his house, it was gutted by fire when power was restored and he lost all his household goods including his academic, professional, and marital documents. He contended that on account of witnessing the entire incident, he and his family suffered mental and emotional trauma. Further, that the fire was caused by negligence on the part of the respondent, in that it failed to fulfil its duty of care in regulating electrical power and ensuring it was safely transmitted to its customers.

Consequently, he suffered loss and damage as follows:

Cost of rebuilding the house:	K1,925,258,451.00
Cost of replacing household goods lost:	K1,050,000,000.00
Cost of architect's fees for valuation of damage:	K39,284,969.00
(All sums unbased)	

- [6] For its part, the respondent denied the claim and contended that the fire that destroyed the house originated from within the house, beyond the metering point. As such, the appellant was solely responsible for the fire. The respondent asserted that investigations conducted by it revealed that the house lacked the required protective equipment in form of surge arrestors, which protect property in the event of an unforeseen power surge.
- [7] According to the respondent, the power line and transformer supplying power to the appellant's house also supplied 87 other customers. However, none of the other customers were in any way affected by the power surge, thereby showing that the fault originated and was confined only to the appellant's house which did not have the surge arrestors. That the respondent's investigations also revealed that another significant factor

which contributed to the fire was that prior to the restoration of the power supply, an electrical appliance had been left on in the appellant's house. The respondent accordingly denied the appellant's assertions that all electrical sockets were switched off.

Evidence of the parties in the court below

[8] PW1 was the appellant's son. His evidence was that around 11:00 hrs on 6th September 2008, he was outside with his father repairing cracks in the boundary wall when power was disrupted. Around 15:00hrs, he heard the siren at the nearby ZAMTEL building go off, signaling the restoration of power supply to the house. At that moment, he was asked by his father to fetch a glass of water from the kitchen. PW1 then walked to the house but when he opened the kitchen door, he was engulfed by a thick cloud of black smoke and could barely breathe. He immediately ran back to alert his father that the house was on fire, following which he also informed his mother about the fire by phone.

[9] The appellant was PW2 who testified that after PW1 informed him of the fire, he rushed to the house but could not enter it as it was engulfed in smoke. He then immediately phoned the fire brigade and the respondent company. It was his testimony that due to frequent cuts in power supply generally, he had developed a habit of switching off all sockets whenever there was no power. On the fateful day, he had gone to the MCB and switched off all the sockets, before going outside the house. Around 15:00 hours, the sirens went off and the generator from the nearby ZAMTEL telephone exchange also stopped vibrating, signaling the restoration of power. At this point, he looked up and discovered that the overhead power line supplying power from the pole was burning, starting from the pole itself right up to the roof of his house. Since the electricity connections in the house stretched across the inside of the roof top, the shackles and the part of the roof collapsed.

[10] The appellant explained that it had taken him 5 years from 1991-1996 to build the house. He had complied with the Council By-Laws requiring that there must be inspection and an occupation certificate before a house could be occupied.

After applying for power supply in 1996, ZESCO inspected the electrical installations and wiring of the house and were satisfied that all the necessary requirements were met for a single-phase power supply. In 1999, he upgraded the electrical installation of his house to three phases. ZESCO again had the wiring and all electrical gadgets duly inspected, certified them okay and a three phase power supply was installed.

- [11] According to the appellant, these precautions only confirmed that the wiring, MCB and their capacities were evaluated at least twice within a period of 12 years and certified as being appropriate by ZESCO. From 1991 to 6th September 2008 (the fateful day), everything was working perfectly, and no problem was experienced in the house to suggest that the wiring was faulty. The appellant testified that the fire that burnt the house came from the overhead ZESCO cable running from the pole right through the roof. His unwavering position was that everything in the house was switched off. Further, that the fact that the meter box remained intact only goes to confirm that the problem did not emanate from inside the house. According to him, the fire erupted when the surge of the power failed to pass

through the meter box and was diverted to the roof. He stated that if the earthing was poor the meter box could have been burnt.

[12] PW2, however, confirmed that it was his responsibility as a customer to have protective devices to guard against power surges and that this was the reason he had the earthing in the meter box. He also confirmed seeing the white switches for the ZESCO meter in a tripped position but denied that the tripping meant that there was a problem in his house. He went on to confirm that none of the other 87 customers' houses fed on the same line were burnt. He further confirmed that after installation of three phase electricity, between 1999 and 2008, he did not have the wiring of the house checked.

[13] PW3 was the appellant's wife. Her evidence was in most part similar to that of her husband. She added that the day after the fire, some ZESCO employees went to the house to check for earthing and they confirmed having found it. According to PW3, there was a distribution box located near the house which frequently emitted some banging noise. Despite this noise, they never experienced any electrical fault in the house.

- [14] DW, an electrical engineer, was the sole witness for the respondent. His evidence was that ZESCO's analysis of what could have caused the fire disclosed that one of the minimum protections required by ZESCO, the surge arrestor, was missing from the appellant's meter box. Instead, the meter box only had 3 circuit breakers. However, the surge arrestor was supposed to be inside the meter box, wired in together with the 3 circuit breakers and connected to the earth so as to provide minimum protection whenever there was high voltage in the system, which could be as a result of surges caused by switching on and off of electric power supply or due to lightning.
- [15] DW explained that the air between the contacts in the surge arrestor ionizes and diverts the excess voltage or surge to the ground, through the earth rod. This leaves the installation on normal voltage and the customer receives normal voltage. The surge arrestor protects households or other electrical appliances in the home. In this case, however, the surge arrestor was not installed, and it is the customer's responsibility to install all such protective devices.

- [16] According to DW, when there is insulation breakdown in the electrical system, no surge arrestor and an over voltage occurs through switching on the power supply, a fire can breakout. It can also erupt due to insulation breakdown because of deterioration in the wiring of the system. The deterioration can also be as a result of the age of the insulation itself or on account of exposure to adverse weather conditions. That over voltage results in insulation failure and the consequence is a fire which in this case melted the insulation. He stressed that without the over voltage which occurred, there would not have been a fire in this case.
- [17] He stated that the respondent's findings after investigations disclosed that the appellant's house was fed from a transformer, GMT 1016 and there were 87 other customers fed from the same transformer, from whom no complaint was received.
- [18] DW also explained that the 3 circuit breakers protect the circuit beyond them up to the wiring in the house. In this case, the fact that the circuit breakers were found in a tripped state shows that there was a fault beyond them and indicated that there was a short circuit in the house. He stated that the responsibility of

ZESCO as a utility company providing electricity ends at the meter and all the protection that is in issue in this case was after the meter.

- [19] DW pointed out that the meter was unaffected by the fire because it started internally from inside the house. That this was the reason why the meter which is plastic, was not even scotched. He stated that if the fault was before the meter, it would have been a ZESCO fault. In that event, the breakers would have been found in an upright position, the fuses at the ZESCO transformer GMT 1016 would have blown and there would have been complaints from other customers in the area for loss of supply. It was his evidence that once ZESCO certifies that the wiring is fit and the house is connected onto electricity supply, it is still the responsibility of the customer to ensure that the wiring remains in perfect condition and that the protective devices are also working. The frequency of checking is up to the customer and a period of 9 years as in this case, from 1999-2008, would not guarantee safe operation of the installation.

- [20] DW went on to explain that it is the fire which started from inside the house that burnt the roof and extended to the cable that was anchored there. If the fire had started from the pole, the witness stated, the cable from the pole which goes to the meter box could have burnt the plastic meter box first but the meter box remained intact. DW stated that although there were no pictures showing the cable from the pole to the house taken at the time, the cables were found still connected and were only isolated by ZESCO electricians. He confirmed that if there was over voltage and the cable from the pole to the house had weak insulation it would burn and further confirmed that the ZESCO cables were burnt. He, however, maintained that the burning was from inside the roof whilst the cable that was burnt was resting on top of the roof.
- [21] DW's evidence also disclosed that although he did not personally visit the house, the engineers who went there after the fire found that the wiring left was sufficient to enable them assess its condition before the fire. Their investigations revealed that apart from the customer's deterioration of internal wiring in the house and the absence of surge arrestors, they could not

find anything else that could have caused the fire. However, he had no evidence to show that there was deterioration of the wiring in the house. Neither did ZESCO employees pick up any electrical appliance that could have been left on. On the 3 circuit breakers that were found in a tripped position, DW explained that tripping can be triggered by short circuit when insulation fails and the wiring is worn out. In this case, however, it was triggered by the high voltage in the ZESCO system. He further confirmed that even with good insulation, with high voltage, the insulation can still fail. This is the reason why there must be surge arrestors installed.

- [22] DW further testified that although ZESCO owns the meter, the box and the rest of the installation belong to the customer. He said that in the application forms for power supply which ZESCO signs with its customers, installation of the surge arrestor is mandatory. That although the application form relating to this case was not brought to court, it was in ZESCO's possession, as the same is returned to them after the customer fills in the required information.

Consideration of the matter by the lower court

[23] After considering the evidence and arguments by the parties, the learned trial judge found that the appellant's house was insulated without surge arrestors and therefore, he had not put in place all the necessary protective devices to ensure that his electrical installation was adequately protected against power surges. That in the absence of the surge arrestor, the high voltage or surge triggered by restoration of power could not safely be diverted to the earth. Thus, it erupted into the fire which burnt the appellant's house and property. Further, that the tripping of the 3 circuit breakers which were found in a tripped position was triggered by the high voltage in the ZESCO system and this pointed to a fault beyond the meter into the appellant's house. That this was the reason why the meter was left intact and any faults after the meter are the responsibility of the customer, the appellant in this case.

[24] She also found that the fire started inside the appellant's house, rose to the roof, and consequently burnt the ZESCO cables hanging over the said roof. That for this reason, the fire was confined to the said house, leaving the houses of 87 other

customers supplied with power from the same line and transformer unaffected.

- [25] The learned trial judge further found that the appellant did not lead any evidence of negligence on the part of the respondent which could be said to have caused the fire that gutted his house. She accordingly held that the appellant had not established his case and the action was consequently dismissed.

The grounds of appeal to this Court

- [26] Aggrieved with this decision, the appellant has launched an appeal to this court on the following grounds:

- [26.1] *The trial judge erred in law and fact when she found that the appellant did not put in place all the necessary protective devices which it was his responsibility to do in order to ensure that his electrical installation was adequately protected against power surges without considering the fact that the precautions pertaining to protective devices, wiring and their capacities were evaluated at least within a period of 12 years and certified okay by ZESCO;*
- [26.2] *The trial judge erred in law and fact in her interpretation of the provisions of section 18 of the ZESCO by-laws which provide that "...the responsibility ends at the point where it delivers electricity to the meter" without considering the fact that the*

proportion of power supplied from the source affects cables differently.

- [26.3] *The trial judge erred in law and in fact when she held that the fire started internally from the appellant's house and in the natural course of the event, rose to the roof and consequently, burnt the ZESCO cables hanging over the said roof and that the fire then spread outwards towards the pole line without considering that the restoration of power supply sparked the fire.*
- [26.4] *The trial judge erred in law and fact when she rejected the appellant's evidence that liability in negligence arose from the failure of the appellant's duty to give sufficient notice and warning and also the failure to carry out regular inspections on its cable lines.*
- [26.5] *The trial judge misdirected herself in fact and erred in law by analyzing the defence of the respondent on hearsay evidence of DW.*

The arguments presented by the parties

- [27] In support of ground one, the learned counsel for the appellant, Mr. Bwalya, submitted that the trial judge erred at law as she did not consider the ZESCO inspection report of 1999 which was carried out as a pre-requisite for the supply of a three phase electricity to the premises. That the fact that a good inspection report was thereafter produced by the engineers of ZESCO can be attributed to the subsequent supply of three phase

electricity to the premises.

- [28] This position, counsel contends, negates the assertion that surge arrestors are a primary requirement. Had it been the case, the report should have indicated such requirement as a priority requirement for protection against any up surge in power supply. He referred us section 26 of the Electricity Act, Chapter 433 of the Laws of Zambia which provides that:

"The operator of an undertaking or any person authorized in writing may at any reasonable time enter any premises to which electricity is or has been supplied by the operator in order to inspect transmission lines, fittings, meters and apparatus and for the purposes of ascertaining the quantity of the electricity consumed..."

- [29] Counsel argued that on the authority of this provision, ZESCO entered the appellant's premises in 1999 in order to ascertain whether the premises were suitable for the increased supply of electricity from single to three phase supply. The engineers from ZESCO then produced a report which formed the basis upon which three phase electricity was supplied to the property. The said report, it was argued, should have indicated that the appellant must install surge arresters in the MCB for the regulation of power supply from the main pole supply line into

the house. That the fact that ZESCO did not produce this report shows that their engineers were satisfied with the electrical installations in the MCB minus the surge arresters as being capable of sustaining three phase electricity supply.

- [30] It was his contention that since ZESCO experts would never have recommended any connection of electricity minus its approval, there is need for such experts to exercise reasonable care and skill. Where such care and skill is not exercised, the respondent ought to be held liable in negligence and the case of *Donoghue v Stevenson*¹ was cited in support of this argument.
- [31] Counsel submitted that it was negligence on the part of the respondent not to use all reasonable known means to keep electricity harmless. The respondent in this case, through their agents omitted to bring to the attention of the client that surge arresters were a primary necessity and proceeded to recommend connection without surge arresters. He argued that in the judgment of the court below, the learned trial judge acknowledged that a surge arrester provides minimum protection in the event of an unforeseen power surge caused by over voltage or lightning. Further, that it works in a way which

ensures that when there is high voltage in the electrical system, it diverts 'the excess voltage' or 'surge' to the ground, through the earth rod. This, he contended, is important in that it protects the customers' property and therefore omitting to recommend the installation of this device by a professional is a negligent act.

- [32] According to counsel, if this device is so crucial as to render the appellant negligent for not ensuring that he had installed it, is it not fair also to find the respondent liable for not notifying the appellant of its importance and the need to install it? As the appellant is not an electrician nor does he work for ZESCO, it is unfair to expect him to know that he had to install this specific device when the experts did not bother to tell him to do so. In support of this argument, counsel relied on the cases of *R v Bateman*² and *Hedley Byrne & Co v Heller & Partners Ltd*³.
- [33] Counsel acknowledged that while surge arresters are a primary necessity to upsurges, this was not brought to the appellant's attention at the time the connection was done. The appellant relied on the advice of ZESCO agents who recommended connection of electricity after determining that all the

precautions pertaining to the protective devices, wiring and their capacities were okay and this was evaluated at least twice within a period of 12 years.

- [34] He contended that the contentious issue is whether this advice was fair, reasonable and given with competent degree of skill and care. In this case, counsel argued, there was an omission on the part of the respondent for having neglected to advise the appellant that surge arresters are a primary necessity of upsurge. He referred us to the case of *R v Mackinnon and Others*⁴ in support of this argument.
- [35] It was counsel's contention that in the present case, a fact which was omitted was the need for surge arresters. That the recommendation for connection of electricity to the appellant's house without surge arresters is material. Further, that due to negligence in this case, care and skill was not exercised in recommending connection of power to the appellant's house and it can be concluded that the recommendation was misleading, false and deceptive. The respondent was therefore negligent in its omission to the appellant and as a result caused significant loss to him.

- [36] In arguing ground two, counsel submitted that in the lower court's judgment, the learned trial judge relied on and construed literally the provisions of section 18 of the ZESCO by-laws which provide that "responsibility ends at the point where it delivers electricity to the meter". However, counsel contended, the provision expressly deals with the responsibility and not liability. He argued that when ZESCO delivers its electricity to the meter, it does not mean that the liabilities or damage caused by the flow of electricity after the meter extinguish and rest in the property owner as the law is silent on that.
- [37] It was his contention that cables, circuit breakers or any insulation devices of the same kind cannot be said to be affected by high voltage power the same way. This is because every high voltage of electricity has a different effect on any insulation device whether cable, circuit breaker or surge arrester hence, the proposition that the 87 other houses supplied with power from the same line and transformer as the appellant's house were not affected, has no firm grip in this case. That the learned trial judge affirmed this assertion and observed that it is

common cause that when a power surge occurs, sometimes even with good insulation, the insulation can fail.

- [38] In support of ground three, counsel began by referring us to the trial court's judgment where the learned trial judge stated that:

"I accordingly further find, that this fire started internally from the plaintiff's house and in the natural course of the event, rose to the roof and consequently, burnt the ZESCO cables hanging over the said roof then spread outwards towards the pole line".

- [39] It was submitted, however, that the learned judge rejected the theories advanced by ZESCO in its defence where it alleged that the fire was caused by internal wiring of the house whose insulation had deteriorated and that an electrical appliance was left on which could have triggered the fire. Yet these theories, according to counsel, were the basis upon which ZESCO denied its liability for any loss incurred in a fire created by an upsurge in electricity supply to the property. That the rejection of these two theories meant that the defence of ZESCO was broken down and could no longer stand. Thus, there was no basis for the learned trial judge to find for the respondent.

- [40] Counsel added that there was no evidence leading to the fact that the fire started from inside the house. Neither was evidence

led by the respondent to show that there was an actual fault in the house which, as a result of high voltage, caused fire which burnt down the appellant's house. Further, there was no evidence to show any relation between the fault and the fire. As there was no evidence leading to the finding that the fire started internally, counsel argued, the learned judge should have ruled in favour of the appellant.

- [41] In arguing ground four, counsel submitted that in her judgment, the learned judge rejected the appellant's evidence that liability in negligence arose from the failure of the respondent's duty to give sufficient notice and warning and also the failure to carry out regular inspections on its cable lines.
- [42] He contended that liability in negligence in this case arose from the failure by the respondent to give sufficient warning and also the failure to carry out regular inspections on its cable lines. Further, that the respondent's cable from the pole of the main supply line was weak and this is where the fire came from and spread to the appellant's roof. According to counsel, the learned trial judge relied on the testimony of DW who stressed the fact that a fire can erupt due to insulation break as a result of

deterioration in the wiring of the system. Further, DW stressed that the deterioration can also be as a result of age of the insulation itself or on account of exposure to adverse weather conditions. Therefore, it was submitted, if the respondent contends that its responsibility ends at the point where it delivers electricity to the meter, it cannot escape liability of maintaining the cable that delivers power to the house.

- [43] In support of ground five, counsel submitted that in her judgment, the learned trial judge misdirected herself when she relied on hearsay evidence of DW who contended that if the fault was before the meter, it would have been a ZESCO fault; the breakers would have been found in an upright position; the fuses at the ZESCO transformer GMT 1016 would have been blown; and there would have been complaints from other customers in the area for loss of supply.
- [44] We were then referred to the lower court's judgment where the learned judge stated:

"The tripping of the 3 circuit breakers found in a tripped position was triggered by the high voltage in the ZESCO system which pointed to a fault beyond the meter into the appellant's house. This was the reason

the meter was left intact and any faults after the meter are the responsibility of the customer".

[45] Counsel contended that it is for the above reason that the learned judge found that the fire started internally. However, counsel argued, DW confirmed in cross-examination that he did not personally visit the house, entailing that whatever evidence he tendered into court was hearsay. Relying on the case of *Mutambo v The People*⁵, he submitted that the evidence of DW was admitted into evidence as to the truth of what was contained in them, making this evidence hearsay which should not be admitted in courts of law. Accordingly, he urged us to find for the appellant.

[46] On behalf of the respondent, Mr. Mulenga submitted in response to ground one, that placing the appellant's premises on supply did not automatically mean the respondent assumed the responsibility to warn the appellant of the need to install protective equipment as the premises were not wired by the respondent but by someone of the appellant's choosing.

[47] Thus, the appellant cannot shift the responsibility to be warned when the case of *Victor Namakando Zaza v ZESCO Limited*⁶ put

all consumers of electricity on notice as to their responsibility to have protective equipment. As the appellant was represented, his counsel had the responsibility of advising him on the position of the law in relation to this. That the appellant insisting on a warning is an attempt to shift the responsibility which sat on the appellant's electrician.

[48] In response to ground two, it was submitted that the lower court was on firm ground in its interpretation of section 18 of the ZESCO By-laws. According to the respondent's counsel, the use of the term 'responsibility' within the body of the law refers to liability. This, he contended, is because section 18 falls under the heading "*Liability for damage to Corporation apparatus*".

[49] Counsel relied on section 10 of the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia which provides as follows:

"When a written law is divided into parts, titles or other subdivisions, the fact and particulars of such divisions and subdivisions shall, with or without express mention thereof in such written law, be taken notice of in all courts and for all purposes whatsoever".

[50] Furthermore, we were referred to the following definition of

'responsibility' in Black's Law Dictionary:

"...to say that someone is legally responsible for something often means only that under legal rules he is liable to be made either to suffer or to pay compensation in certain eventualities..."

- [51] Accordingly, counsel submitted that the term 'responsibility', if construed in line with the heading in part IV of the By-laws, clearly refers to liability. He argued that the lower court did not make any comment on liability for damage caused by the flow of electricity as alleged by the appellant, but merely stated that "*any faults after the meter are the responsibility of the customer*".
- [52] It was his contention that although the court below did not specify whether the damage related to the respondent's property, it clearly referred to faults which related to the apparatus of the corporation if interpreted in line with section 18 of the By-Laws. Therefore, counsel argued, the second ground of appeal is a misapprehension of the lower court's findings.
- [53] In response to ground three, counsel for the respondent submitted that the evidence leading to the fact that the fire started inside the house was in fact led in the lower court and

is recorded at page J8 of the judgment as follows:

"He [DW] testified on ZESCO's analysis of what could have caused the fire, disclosed one of the minimum protection required by ZESCO, the surge arrester was missing from the plaintiff's meter box".

[54] Further, at page J9 the learned trial judge stated that:

"[DW] referred to doc. 22 again and explained, the three circuit breakers protect the circuit beyond or after "themselves" going to the wiring in the house. In this case, the fact that the circuit breakers were found in a trip state, shows there was a fault beyond "them" thereby pointing to a fault from inside the house".

[55] That the learned trial judge also stated the following at page J10 of the judgment:

"[DW] referred to doc. 22 a photograph showing a meter remained intact after the inferno and pointed out, the fact that this installation was unaffected by the fire, was because the fire started internally from inside the house. This is why the meter, which is plastic, was not even scorched."

[56] He argued that the foregoing extracts from the lower court's judgments clearly show that evidence was led to the effect that the fire started from inside the appellant's house. Furthermore, there was documentary evidence referred to which substantiated DW's testimony.

[57] As to the contention that the learned trial judge should have

ruled in favour of the appellant because no evidence was led on the finding that the fire started internally, counsel submitted that the mere stating of facts does not entitle a litigant to a judgment in his/her favour as the party that alleges must prove their case. Reliance was placed on the case of *Zambia Railways v Pauline S. Mundia and Another*⁷.

- [58] In response to ground four, it was submitted that the lower court did not reject the appellant's evidence that the respondent failed to warn the appellant on surge arresters and to carry out inspections on its cables. Instead, it merely determined that the evidence was insufficient to prove the respondent's alleged negligence.
- [59] Counsel pointed out that no evidence on the respondent's alleged failure to give sufficient warning and to carry out inspections on the cables was presented in the lower court but only in the appellant's submissions. Neither were these matters pleaded. Relying on the cases of *Re Wrightson*⁸ and *Barclays Bank Zambia (Plc) v Zambia Union of Financial Institution and Allied Workers*⁹, he argued that the appellant is precluded from raising the same on appeal.

[60] In response to ground five, counsel submitted that the appellant should have objected to the production of DW's evidence as and when it was adduced to the court but neglected to do so. In support of this argument, he relied on Order 5 rule 21 of the High Court Rules which provides as follows:

"In every case, and at every stage thereof, any objection to the reception of evidence by a party affected thereby shall be made at the time the evidence is offered:

Provided that the Court may, in its discretion, on appeal, entertain any objection to evidence received in a subordinate court, though not objected to at the time it was offered".

[61] It was also argued that although the lower court's record shows that DW confirmed that he did not personally visit the house, the issue relating to the admissibility of DW's evidence should have come up as and when the evidence was being presented by the witness. However, there is no record of any objection in the record of appeal nor has the appellant attempted to show that an objection was made when DW gave his evidence.

[62] That notwithstanding the foregoing, it is clear that the basis of the lower court's decision was primarily that the appellant did not provide sufficient evidence and as such did not discharge the burden of proof. We were accordingly urged to dismiss the

appeal.

[63] At the hearing, Mr. Bwalya briefly augmented the appellant's heads of argument. The sum and substance of his oral augmentation was that the respondent owed a duty to the appellant and that duty arose at the point when the respondent inspected the appellant's house but failed to warn or advise him on the need to install a surge arrester after seeing that none had been installed in the meter box. Mr. Mulenga's brief response was that according to his understanding, the respondent's inspection entails checking the requirements in terms of the point where power can be connected, not to determine the status of the wiring or that the fittings are okay as ordinarily, the respondent would not even know about the type of wiring.

Decision of the Court

[64] We have considered the record of appeal, the judgment appealed against and the arguments advanced by the parties.

[65] In our view, at the heart of this appeal and the critical issue for our determination is, whether the respondent is liable in damages for negligence on account of the fire that erupted at

the appellant's house following the disruption and restoration of power supply by the respondent.

- [66] It is trite law that to succeed in an action for negligence, a claimant must prove that he was owed a duty of care; that that duty was breached; and that he/she has sustained loss or harm because of the breach of duty alleged.
- [67] In this case, the appellant argues that the respondent, through its agents, acted negligently by omitting to inform the appellant of the importance of surge arresters and proceeded to recommend the connection of power supply to his premises without a surge arrester. This stems from the lower court's finding that the appellant had not put up the necessary protective devices to ensure that his electrical installation was adequately protected against power surges. The appellant contends that before arriving at this finding, the lower court should have considered the two inspections conducted by the respondent which certified the precautions concerning protective devices, wiring and their capacities as acceptable.
- [68] Regulation 18 of the Electricity (Supply) Regulations is

instructive. It provides that:

"A consumer shall not be relieved of any liability or responsibility for inspecting, testing or maintaining in a safe condition his own installation by virtue of any obligation to inspect or test placed on an undertaker, a person authorised by him or an electrical inspector by these Regulations".

[69] Further, section 16 of the ZESCO By-Laws states as follows regarding the inspection and testing of installations:

"16.(1)....

(2)

(3) *No suit, prosecution or other legal proceedings shall lie against the Corporation or any employee of the Corporation for anything done in good faith in respect of testing a consumer's installation or for any loss or charge which may be caused by fire or by an accident arising from the state of the installation.*

(4)

(5) *When the consumer's installation is connected on to the Corporation's network, the use of such installation is at the consumer's own risk..."*

[70] From the foregoing provisions, it is clear that despite any inspections that may have been conducted by the agents of the respondent, the appellant still bore the responsibility for maintaining his electrical installation in a safe condition. Such maintenance includes ensuring that the installation was sufficiently protected against power surges by installing a surge

arrester. Negligence, therefore, cannot be imputed on the respondent for its purported omission to notify the appellant of the importance of installing a surge arrester as no such duty of care was owed by the respondent to the appellant. An argument was advanced by Mr. Bwalya that since the appellant was neither an electrician nor worked for ZESCO, it was unfair to expect him to know that he had to install a surge arrester. The view we take is that for that very reason, common sense would have counselled the appellant to engage an electrician and not to transfer his responsibility to the respondent. As aptly argued by Mr. Mulenga, the appellant's insistence on a warning or advice from the respondent is an attempt to shift the responsibility which was on the appellant's electrician.

- [71] The undisputed facts before the trial judge show that the appellant's house was insulated with 3 circuit breakers, which after the fire, were found in a tripped position. The finding of the lower court was that the tripping of the circuit breakers pointed to a fault in the appellant's house beyond the meter as the meter was left intact. Further, that the fire must have started from inside the house and that is why it was confined to

the appellant's house only and did not affect 87 other houses powered from the same transformer. We also regret Mr. Bwalya's argument that the circuit breakers were found in a tripped position because the appellant had switched them off.

- [72] Counsel for the appellant contends that there was no evidence leading to the fact that fire started from inside the house. We do not agree. As aptly submitted by Mr. Mulenga, evidence to that effect was led in the court below as recorded at pages J8, J9 and J10 of the judgment of the trial judge and it is reproduced in paragraphs 53, 54 and 55 of this judgment and we need not repeat it here. It is that evidence which informed the trial judge's finding, and rightly so, that the fire started from inside the house. In light of this finding by the lower court which we agree with, the appellant's evidence that the fire could not have started from inside the house because he switched off all the sockets on the fateful day is untenable. We also reject Mr. Bwalya's argument that the circuit breakers were found in a tripped position because the appellant had switched them off.

- [73] In the case of *Wilson Masauso Zulu v Avondale Housing Project*

Limited³, we held that:

"Before this court can reverse findings of fact made by a trial judge, we would have to be satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make."

[74] In the present case, we do not find any justifiable grounds to interfere with the findings of the learned trial judge. As we see it, a duty of care could only have arisen in this matter if the respondent was responsible for faults beyond the meter. Section 18 of the ZESCO By-laws is as clear as crystal. It provides that:

"(1) The Corporation's responsibility ends at the point where it delivers electricity to the meter.
(2) The consumer shall be responsible for the safe keeping of motors and other electrical apparatus, service lines and fittings belonging to the corporation placed on his premises." (Emphasis added)

[75] Accordingly, as rightly found by the learned trial judge, any faults after the meter were the responsibility of the appellant as a customer. The appellant, however, contends that in interpreting section 18 of the ZESCO By-laws, the learned trial judge did not take into consideration the fact that the proportion of power supplied from the source affects cables

differently. In our view, the provisions of section 18 of the ZESCO By-laws are quite clear. They do not make provision for the respondent's responsibility to extend beyond the delivery of electricity to the meter and the section does not give any exceptions in its application.

- [76] As there is no evidence to show that a duty of care was owed by the respondent to the appellant, we conclude that on the facts of this case, the respondent cannot be held liable in damages for negligence. Worst of all, we note from the appellant's pleadings that other than particulars of the alleged loss and damage, the appellant omitted to give particulars of the alleged negligence. We consider this omission to be fatal. In view of this conclusion, it is otiose for us to consider the other arguments raised by the appellant in support of this appeal as no useful purpose will be served.
- [77] The upshot of this conclusion is that the judgment of the lower court is upheld. This appeal is accordingly dismissed for lack of merit. Costs follow the event and to be taxed in default of agreement.



E. M. HAMAUNDU
SUPREME COURT JUDGE



R. M. C. KAOMA
SUPREME COURT JUDGE



C. KAJIMANGA
SUPREME COURT JUDGE