



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA DISTRICT REGISTRY**  
**CIVIL APPEAL NO. 74 OF 2002**

**SLAPPER SHOE INDUSTRIES LTD.....APPELLANT/DEFENDANT**

**-VERSUS**

**NIXON WEKESA MASINDE.....RESPONDENT/PLAINTIFF**

**J U D G M E N T**

The appellant who had been injured in a factory owned by the respondent sustained injuries to the left thumb which was subsequently amputated sued the respondents for special damages of KShs.2,000/=, general damages and costs with interest. The trial Principal Magistrate found that the respondent was 15% liable and the appellant 85% liable for the accident. She assessed general damaged at KShs.260,000/= and special damages at KShs. 2,000/=.

The appellant appealed against the finding on contributory negligence and against the order on assessment of damages. For the appellant, it was contended that the apportionment of liability found against the appellant company by the learned trial principal magistrate was not supported by the evidence presented to court. It was further contended that in her finding of contributory negligence the trial principal magistrate had failed to direct herself as to some of the material evidence given on behalf of the appellant, that is, that the respondent in total disregard of safety regulations put his hand on a machine in motion which a prudent person could not risk in the circumstances. That the learned trial principal magistrate also failed to appreciate the fact that the respondent had worked for the appellant for a period of more than three years and that he was acquainted of the operations of the machines in the factory and that he was in full control of the machine which he knew to switch on and off. The appellant's counsel further submitted that the respondent was the author of his own misfortunes and that he was wholly to blame for the accident. That the question of provision of gloves or another helper could not have avoided the accident. The respondent breached the duty of care to himself and that at the very least the apportionment should have been assessed at 75% liability against the respondent and 25% liability against the appellant.

The appellant also contended that the award of KSh.260,000/= given by the trial learned principal magistrate as general damages less 15% contributory was excessive visa-vis the injuries suffered by the respondent and a figure of between KSh.100,000/= and KShs.180,000/= was suggested as the appropriate award acceptable by the appellant.

The Respondent opposed the appeal on the ground that the appellant had breached their duty of care to the respondent. The respondent submitted that he was forced to work alone on a splitting machine when the appellant company's regulations had provided that the splitting machine would be operated by two people at a time. That the respondent would not have been injured if his co-helper was present hence the respondent was exposed to danger. The Respondent also submitted to the effect that the appellant was substantially to blame and that the apportionment of the trial principal magistrate was just and fair. That the Respondent was not given protective devices, and that he was forced to do duties i.e. to remove wastes which he was not assigned. The respondent also justified the award of damages by the trial principal magistrate on the ground that she took care of interest and inflation prevalent in this country over a period of time.

The circumstances of the accident, so far as material, appear to have been as follows: the respondent was working in the appellant's factory feeding a splitting machine and inside the factory also was his supervisor. Normally the machine is operated by two people but it would appear that the respondent was

operating it alone, as his colleague had been given permission to be off duty at the material time of the accident. Some waste material got stuck in the machine and the same had to be removed. The respondent without switching off the machine attempted to remove the waste when the machine was in motion. It was at this particular moment that he got injured in the thumb which was later on amputated. The learned trial principal magistrate found that the appellants were 85% liable and the respondent 15% liable.

The issue which has to be decided by this court is whether the trial principal magistrate properly directed herself on the issue of apportionment of liability. It is trite law that courts must have regard to both causation and to relative blameworthiness of the parties when deciding on the issue of apportionment of liability. An apportionment made by a trial court will only be altered on appeal when it is clearly wrong or there has been an error in principle or mistake of fact. In this instant case, the respondent admits having worked for the appellant for over a period of three years. The respondent also admits that he was in full control of the machine. The respondent further admits that he put his hands on a machine in motion. The respondent knew he was operating the machine alone without gloves and that he also knew that it was prudent for him to switch off the machine before removing the waste. However he opted to take the risk by removing waste material from the machine in motion without switching off. In my opinion the general conduct of the respondent on this occasion gives the impression that he did not think of his duty of care to himself and I have no doubt that the plaintiff would not have suffered his injuries had he not been negligent himself. He was in my opinion guilty of greater or higher degree of negligence than the appellant. I would therefore state that the learned trial principal magistrate misdirected herself on the issue of apportionment in the light of evidence presented before her, hence her finding of contributory negligence was not supported by the evidence available.

While this court is reluctant to interfere with a finding of fact by the trial court, if it is shown that the finding is based on a substantial misdirection or non-direction, than it is the duty of this court to consider the evidence and reach its own conclusion in the matter. There has been a serious mis-direction in this case, and, on a review of the material evidence, and bearing in mind the fact that onus lay on the respondent, I do not think the learned trial principal magistrate's conclusion on the issue of contributory negligence can be supported. I am persuaded by the case quoted by Mr. S. Gor for the appellant of ***HENRY NYABUTO NYACHOTI =VS= SPIN KNIT LTD. ( unreported) NAKURU H.C.C.C. NO. 1462 OF 1993.*** The facts in that case are nearly similar to the facts in this case where the court stated:-

***“Though there were no instructions that workers should not put off machines to remove the material, it is clear that the plaintiff was aware of the procedure laid down so why did he ignore it? Why did the plaintiff opt to take to take the risk and place his hand inside a machine which was in motion – was there not a degree of care to be exercised by the plaintiff?”***

The plaintiff in the above quoted case was awarded 10% of the claim. The appellant's advocate also supplied this court with a copy of the judgment of ***R.B. BHANDARI*** as he then was in Mombasa ***H.C.C.C. No. 219 of 1982 HAJI ABDULLA MWASUMUNI =VS= A.R. KHAN*** in which similar facts to this appeal were advanced. The suit was dismissed on the ground that the plaintiff was the author of his own misfortunes. The plaintiff had put his hands on a machine in motion.

The other issue which arose for argument and decision in this appeal is the issue of assessment of damages. In my opinion I find that the learned trial principal magistrate correctly applied the principles in assessing general damages in this case. I will not therefore interfere with her finding in that issue.

In the final analysis therefore the appeal succeeds on the issue of apportionment of blame. Going by the material placed before me and the submissions made by both counsels I will allow the appeal by setting aside the apportionment found by the trial principal magistrate of 15% liability to the plaintiff (Respondent ) and 85% liability to the Defendant (appellant) and ***SUBSTITUTE*** with an apportionment of 60% liability to the plaintiff (Respondent) and 40% of liability to the Defendant (appellant). In the end, taking into account the apportionment of liability as stated above, the total general and special damages will be 40% KShs.262,000/= that is a sum of KShs. 104,800/=. As regards costs in the Principal Magistrate's Court, I think that these should now follow the event. Costs on this appeal will be settled on the basis of the apportionment of liability. The Defendant (appellant) is hereby ordered to pay the whole

of the plaintiff's (Respondent's) taxed costs in the Principal Magistrate's court.

**Dated at Mombasa this 18th day of March, 2003.**

**J.K. SERGON**

**J U D G E**