REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 304 of 2001

SILPACK INDUSTRIES LIMITED .....APPELLANT

AND

SAMWEL WAMBUA KIOKO .....RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Machakos (Mwera, J.) dated 14th July, 1999

In

H.C.C.SUIT NO. 195 OF 1996)

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JUDGMENT OF THE COURT

Silpack Industries Limited (the appellant) brought this appeal, against the decision of the superior court (Mwera, J.) dated 14th July, 1999, in High Court Civil Case No. 195 of 1996. In that suit Samwel Wambua Kioko (the respondent), impleaded the appellant for special and general damages, costs and interests, for injuries he sustained in the course of his employment with the appellant. Mwera, J. found for the respondent, assessed damages in the sum of Kshs.8500/= as special damages, and general damages as follows: -

(1) Kshs. 400,000 for pain and suffering.

(2) Kshs. 450,000 for loss of earning capacity.

He reduced from that award Kshs.137,720/= which had already been paid to the respondent under the Workman's compensation Act and 20% thereof as contributory negligence. The balance came to Kshs.546,688/= for which he gave judgment to the respondent with costs and interest and thus provoked this appeal.

There are seven grounds of appeal, but in the course of arguing this appeal Mr. Kaluma for the appellant, argued them together. In effect the argument in his submission was that the findings of the trial court on liability are at variance with the evidence, and on that basis he urged us to interfere with the decision of the superior court on the issue of liability and set aside the decision. He had no quarrel with the quantum of damages awarded, if the appeal was dismissed.

In **Selle and Another v. Associated Motor Boat Company Ltd and Others [1968] EA 123**, the Court of Appeal for East Africa, authoritatively, propounded what the duty of the Court is on a first appeal. Sir Clement De, Lestang V.P. rendered himself thus: -

"**.....this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially (sic) to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."**

It was conceded by both Mr. Kaluma for the appellant and Mrs. Mwangangi for the respondent, that determination of the respondent's case depended on the facts and circumstances under which the accident complained of happened. Evidence was adduced on that aspect by both the respondent and the appellant, and can be summarized as follows: -

The respondent was employed by the appellant as a machine operator. The machine he was operating was used for making cartons. The appellant was stationed at the end of the production line. His duty was basically to pick the finished product from the top of the part of the machine which was referred to as the "the board". This board was moving back and forth in the course of which it would convey the finished cartons. It was common ground that the movement of the board was metred and if a carton was not picked in time it would be conveyed back and the process would be repeated. Picking the cartons from the board was a manual process which the respondent performed with his bare hands.

The accident which gave rise to this litigation occurred on 29th January, 1995. The respondent reported on duty at 6 p.m. Electric light was on. He positioned himself at his usual place and commenced work. He had been operating the machine for a long time and so he was familiar with its operations. It was his evidence that on the material date he heard some strange sound from the machine and soon thereafter as he tried to pick a finished carton as before, his hand was sucked into the machine. It was cut. He was thereafter rushed to Matter Misericordiae Hospital where he was admitted for treatment. As a result of the accident he lost $^1/_3$ of his right forearm.

Mr. R.P. Shah, a Consultant Surgeon, later examined him. His opinion was that prosthesis was necessary for the respondent although in his view, it would not have any significant function. It would only be of cosmetic value.

A supervisor with the appellant, one **Joshua Sanzu Mbindyo** (DW2), testified for the appellant. He was then in charge of several machine operators who were then working for the appellant company. It was his evidence that he was not aware of any mechanical defect with the respondent's machine. He however, added that the machine could have had a defect when a strange sound was heard from it just before the subject accident but he could not say what the defect was. In his view, the respondent was injured by bad luck. He concluded his evidence thus: -

"**I had not recommended gloves because that is the system I got there. Gloves are not provided. Removing cartons from that moving board is done by bare hands as it gets to the measured point. If one does not remove it at a given time, the board begins to go back and probably plaintiff tried to get to it to accomplish his duty.**

Plaintiff had worked here for long. I cannot say if there was anything the defendant would do to prevent the accident. No, the very machine is still in place and on (sic) operation. When it was stopped temporarily it was to inspect it for repairs if anything had gone wrong. It is still working. Nothing was done to it since the accident."

Under cross-examination the witness stated that he was not aware of what the engineers found in relation to the condition of the accident machine. He conceded that there was no protection provided in

the area between the operator and the roller that staples the cartons' parts together, and that no implement was provided for removing the cartons from the production line.

In his judgment, Mwera, J found as a fact, inter alia, that the accident machine was metred and that the exercise of picking the cartons was :-

*"… **quite or fairly safe from where the plaintiff sat. If he did not remove the carton then the plank would begin the journey back with it. The Court was left with the impression that a carton arrived, the plaintiff did not remove it in time and the plank began moving back. In his attempts to retrieve it he stretched his arm along the plank to the point where the machine caught and injured him. DW1 alludes to something like that and it sounded plausible."***

We are of the view that it was on the basis of the foregoing findings that the learned trial Judge found the respondent 20% to blame for the accident. But what was the basis for finding the appellant 80% to blame for the same accident?

The respondent's case as pleaded in his plaint, was based on two main grounds. Firstly, it was averred that the appellant owed him a common law duty to provide a safe working environment. Secondly, that under the Factories Act, the appellant had a duty to fence off all transmission parts of its machines, to provide the appellant with protection gear and working equipment. The learned Judge set out arguments by both sides on those aspects of the case but he did not make any specific finding on them. We earlier reproduced the learned Judge's impression on the evidence, only to show that the respondent was not without blame in the matter. As regards the extent of the appellant's responsibility for the accident, the learned Judge rendered himself as follows:-

"***Probably the defendant would have done well for finished products to be dropped off or deposited on a non-moving part to be removed without any element of risk to people like the plaintiff behaved here."***

That is all the learned Judge said about the appellant's responsibility. We think he should have said more. Part of the appellant's defence was that it had fenced off all parts which needed fencing off. But the fact that the respondent was injured clearly shows that not all parts which needed fencing off were so fenced. We agree with the learned Judge that the respondent contributed to the accident. The explanation as to how the accident occurred shows that there was a moment of inattention on the part of the respondent. Such moment or moments of inattention were foreseeable and therefore called for preventive action.

The appellant's witness testified that the machine in question had been used the way it was for a long time, and he did not think there was anything the appellant could have done in the circumstances. It is not the Court's duty to surmise on the possible action the appellant or indeed any owner of a machine should have taken to obviate risk. The duty of the Court is to consider whether the machine was being operated in such a way as to expose its operator to risk. It was acknowledged by the appellant's witness that any delay by the Machine Operator to pick the finished product would cause the machine to transmit it back. He surmised that the respondent was hurt when he belatedly tried to pick the carton. Clearly therefore the risk was not remote. The delay by the respondent to pick the carton is not the one which created the risk. It only aggravated the existing risk.

That being the conclusion we have come to, it follows that we do not agree with Mr. Kaluma that the accident machine was reasonably fenced off to the extent that was necessary. Had that been so, the accident would not have happened. The situation was not such that the respondent either voluntarily or recklessly put his hand into the moving part of the machine. He stretched his hand to pick the finished carton. His hand was caught by the machine because he miscalculated. The appellant did not do enough to ensure that the operation of the machine was reasonably risk free.

We also think that, in the circumstances of this case the level of the respondent's contribution should have been higher than was assessed by the trial Judge. The respondent had been operating the machine in question for long. With his experience he substantially contributed to his accident. We reckon that 30%

would have been a fair apportionment for him.

In the result the appellant's appeal succeeds to the extent that its liability is reduced from 80% to 70%. The superior court judgment and decree is varied accordingly. The appellant shall have half the costs of the appeal.

Dated and delivered at Nairobi this 9th day of November, 2007.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

…….

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.