REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

CIVIL APPEAL 117 OF 2003

COSMO PLASTICS LIMITED …….. APPELLANT

AND

STEPHEN KIAMBA NZUVA ……...……..…….. RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at

Nairobi (Gacheche, J) dated 23rd September, 2002

in

H.C.C.C. No. 1373 of 2000)

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JUDGMENT OF THE COURT

The appellant, Cosmo Plastics Limited, owned several printing machines at its factory premises in Nairobi. The respondent, Stephen Kiamba Nzuva, was at the relevant time an employee of the appellant and was working as a fitting machine operator. By the time he appeared in the superior court he was 39 years old. He had joined the appellant company in July 1995. On 2nd September 1999, he reported on duty as usual and was allocated machine No. 5 – a six column machine. He worked on that machine from 8.00 a.m. till 11.00 a.m. when his supervisor removed him from that machine and sent him to work on machine No. 2, a four column machine known to the workers there as P2. He was required to fix a roller on that machine. He said in evidence that though that type of machine is normally operated by two people – an operator and his assistant - on that day he was directed to operate it alone without an assistant. After he fitted the printing material, he switched on the machine and it started to print. The machine was one metre away from the wall and there was a passage to the operator side where the starters were located. There was a pin attached to two rotating shafts which drove the machine. Those pins should normally be inside the shafts which rotate, but on this occasion, that was not so. Whoever serviced the machine had fixed a four inch metal in place of the pins. This four inch metal was protruding. About ½ hour after the respondent started operating the machine, he moved from the loading side to the other side of the machine to see the finished printout. As he did so, his overall was caught by the protruding metal and the rotating machine pulled him and his hand was pulled into the rotating metal. The top pin rotated on his shoulder while the middle pins rotated around the elbow. The machine kept on rotating for sometime with his hand pinned inside the machine. He shouted for help and two colleagues, Geoffrey Mulili Wambua (PW 2) (Geoffrey) and one Peter Mwangi together with others answered his call for help. They removed him from the machine. He was rushed to Nairobi West Hospital where he

was admitted for treatment from that date, 2nd September 1999 till 11th September 1999. He was operated upon before he was discharged from that hospital. The appellant thereafter referred him to Kenyatta National Hospital. Later at Kenyatta National Hospital, his hand developed gangrene and that had to be removed before an operation for grafting which was done on 28th September 1999. He was eventually discharged from Kenyatta National Hospital on 22nd November 1999. But because the employer did not pay hospital bill, he was detained at the hospital till 22nd December 1999 when, after his wife's cousin pledged his vehicle log book for vehicle KSY 978 as security for hospital bill was he released from the hospital. That bill was Kshs.213,000/=. After release from the hospital, the respondent continued to attend occupational therapy clinic. Thereafter, the respondent's services with the appellant continued till December 2001 when his services were terminated. He made efforts to get employed elsewhere but he was not successful. At one time a certain company employed him as a casual worker but when it discovered that his hands could not perform, his services with that company were terminated after he had worked for only one week. In a plaint dated 7th July 2000, the respondent sued the appellant in the superior court at Nairobi seeking judgment to be entered against the appellant for:

"**(a) General damages for pain suffering and loss of amenities.**

(b) Provision of future medical care.

(c) Specials as prayed in paragraph (a) hereof.

(d) Loss of actual earnings to the date of trial and loss of future earning capacity.

(e) Costs and interest".

The appellant in a defence dated 18th September 200 denied the respondent's allegations and pleaded further and in the alternative that the injuries complained of (if any) were solely caused by or substantially contributed to by the respondent's own negligence and it cited nine particulars of the respondent's negligence, each of which the respondent in his reply to the defence denied. After pleadings closed, the suit was set down for hearing before the superior court (Gacheche J.). The respondent gave evidence and called two other witnesses, whereas the appellant did not call any evidence, but its counsel cross-examined the respondent and his witnesses and put in written submissions at the close of the hearing of the case. The learned Judge in a considered judgment apportioned liability at 70% for the appellant and 30% contributory negligence. In short, the superior court found that the respondent's negligence portion was 30%. Having done so, the court then considered damages and awarded the respondent Kshs.800,000/= as general damages for pain and suffering; Kshs.450,000/= for future medical care; Kshs.217,500/= for special damages of which Kshs.213,000/= was to be paid directly to Kenyatta National Hospital against the hospital bills incurred by the hospital for treatment of the respondent and Kshs.1,620,000/= for loss of future earning capacity. The superior court also awarded interest on the same awards at court rates and costs of the suit and interest thereon. Thus, the total awarded sum was Kshs.3,087,500/= less 30% contribution. The total payable was Kshs.2,158,450/= of course less Kshs.213,000/= to be paid directly to Kenya National Hospital aforesaid.

The appellant felt aggrieved by that judgment and hence this appeal premised on nine grounds as follows:

"**1. The learned Judge erred in law and fact in finding that the respondent had suffered loss 80 – 90% loss of his right hand in the absence of any medical evidence to this effect.**

2. The learned Judge erred in failing to hold that the respondent was solely and/or substantially responsible for the accident in question despite the evidence by PW 2 that the respondent was aware that the machine was faulty but decided to operate the same nonetheless.

3. The learned Judge erred in awarding the respondent the sum of Kshs.800,000/= for general damages for pain and suffering despite the fact that the plaintiff's injuries were basically soft tissue

in nature.

4. The learned Judge erred in applying a multiple and of Kshs.10,000/= (sic) in assessing the quantum of damages payable to the respondent for loss of earning capacity despite the fact that there was absolutely no basis for doing so.

5. The learned Judge erred in applying a multiplier of 15 years in assessing the quantum payable to the respondent for loss of earning capacity despite the fact that the respondent was not rendered totally incapacitated.

6. The learned Judge having applied wrong principles erred in assessing the respondents loss of earning capacity at Kshs.1,620,000/=.

7. The learned Judge erred in relying on Dr. Odongo's medical report to assess the cost of future medical operation at Kshs.450,000/= despite having had the benefit of reading Dr. Patel's report.

8. The learned Judge erred in applying wrong principles of law in arriving at the judgment the subject of this appeal.

9. The learned Judge erred in totally failing to appreciate the submission by the appellant's advocates".

In his submissions before us, Mr. Konyango, the learned counsel for the appellant, abandoned the fifth ground of appeal. He argued the second ground of appeal maintaining at first that the subject machine was in proper condition but it was the way the respondent operated the machine that resulted into the accident and that being so, the respondent was solely responsible for the accident and so the appellant was not liable. When his attention was drawn to the recorded evidence, he reconsidered his position and concluded that the appellant was to some extent liable but he contended that the apportionment of 70% for the appellant to 30% for the respondent on liability was not proper. He suggested a ratio of 60% to 40%. Having addressed us thus on liability, Mr. Konyango then submitted that the learned Judge did not apply the proper legal principles in assessing the damages in respect of each head of damages and thus arrived at erroneous assessment.

On his part, Mr. Kironji, the learned counsel for the respondent supported the learned Judge's findings and conclusions on both liability and damages. He contended, on damages, that as the appellant did not annex the vital medical reports in the record of appeal, the court would find it difficult to have an informed view on the complaints raised by the appellant.

We have carefully considered the record before us, the submissions by both counsel on the rival points both of facts and law as this is a first appeal as well as the judgment of the superior court and the law as we are bound to do in law – see the case of **Selle vs. Associated Motor Boat Co. Ltd. (1968) E.A 123.**

First on liability, the evidence on record was adduced by the respondent and one other witness, Geoffrey Mulili Wambua (PW2). As we have stated, the appellant did not offer any evidence. The respondent in his evidence stated concerning the relevant machine and the working condition:

"**The machine is one meter away from the wall, there is a passage to the operation side where the starters are located. As I moved to see the printed work, my overall sleeve was caught by a pin which is attached to two rotating shafts which drive the machine. There are three joints to the shafts which are attached by the pins. Pins should be inside the shafts which rotate. Whoever had serviced the machine had fixed a four inch metal which was protruding because they did not have pins. When my overall was caught, the machine which was rotating pulled me and my hand was pulled inside the rotating metal. The top pin rotated to my shoulder, the middle pins rotated around the elbow".**

And in cross-examination, he said:

"**I had worked with machine No. 2 on previous occasions. I had operated it for ½ hour before the accident happened. When I moved to operate P2, it was at a stand still. It was switched on when I moved to operate it. No. I had not noticed the protruding pin. The pin only rotates when the machine is on. I had operated it before. I did not notice the pin, I did not notice any defect. My overall was caught as I turned to check the end product of the machine. I never saw the pin. It was while I was at the hospital that the other operators told me exactly what happened. It was Geoffrey Mulili who told me what happened. ……. The machine cannot move without the pin. It was the wrong size of pin. ……..**

If I had an assistant, I would not have sustained these serious injuries. He would have switched the machine off immediately. The supervisor knew that I required an assistant. I did not request for an assistant".

Geoffrey Mulili Wambua (PW2) said in evidence as follows:

"**He was operating a Flexo machine. We called it P2. I knew that machine. The plaintiff was caught by a pin which had been inserted in the register, but it was protruding. It should have been a short pin. The pin was noticeable as it was below the register. It was not easily noticeable. In my opinion, had the pin been of the right size, the accident could not have occurred".**

And in cross – examination, Wambua stated:

"**Yes, I had notice (sic) that the pin was longer than required. It was a mistake. No. I did not inform him that the machine had a defect. …….. No, the P2 machine did not have any mechanical problem. It was not possible for one to see the pin when the machine was rotating. One had to stop the machine to be able to see it".**

The evidence given by the respondent and supported as it was by Wambua who actually handed over the subject machine to the respondent at 11.00 a.m. on that fateful day, part of which we have reproduced above, makes it abundantly clear that the machine had a metal or a different pin of a different size longer than the normal pin inserted on to it which was concealed but was not sealed off to stop it from injuring the workers. It is also abundantly clear that the respondent was not made aware of that different and apparently dangerous pin. It is also correct, as the learned Judge did find, that the respondent, though not informed of the new development on the machine, also had the duty to exercise diligence and to carry out his own checking including inquiring from Wambua the condition of the machine before he started working on it. All these considered together leave only one conclusion and that is that the appellant failed in its duty to ensure that the subject machine was sound and that whatever pins or metals were inserted fitted the required size and were properly concealed as required by the Factories Act Chapter 514 Laws of Kenya. It further failed to ensure that the appellant was properly alerted on the abnormal pin or metal that was fitted on to the machine and which had extra protrusion and was hidden such that the protruding part could not be seen except with extra care. We would have felt, under those circumstances, a liability percentage over 70% against the appellant would have been warranted, but as the difference between the assessment by the superior court and what we would have felt fair is so small, we cannot say that the superior court came to a wrong decision on that aspect. We will thus, not interfere with the apportionment of 70% against the appellant and 30% against the respondent. It will stand. Thus the appeal on liability has no merit.

The next aspect we need to discuss is the award for damages. As we have stated, the learned Judge of the superior court awarded Kshs.800,000/= for pain and suffering and Kshs.450,000/= for future medical operation which we think was an award for future medical care as pleaded in the plaint and not for future medical operation as the award was termed by the learned Judge. These awards were the subject of complaint in the first, third and seventh grounds of appeal. The learned Judge, in her considered judgment relied on the medical reports that were availed to her at the trial to guide her to the conclusions she arrived at in her judgment. She, for instance, awarded Kshs.800,000/= as damages for pain and

suffering stating in her judgment as follows:

"**I have taken into account, the nature of injuries that were sustained by the Plaintiff. They were serious, and he still nurses extensive ugly scars which are cosmetically unsightly".**

We have not had the advantage of seeing the respondent, but even worse, we have not had the advantage of perusing the medical reports by Dr. Odongo and Dr. Patel to be able to analyse the same, re-evaluate them and come to our own independent conclusion on the same. This is because the record before us does not contain the two important reports that the superior court relied on for its decision. Indeed, no medical report or any medical document was included in the record of appeal. These documents, which were produced in the superior court, were important documents for the informed decision of this appeal. Their exclusion from the record is, in our view, fatal on the question of the damages under consideration and as will be apparent, even for the decision on the other awards of damages. How can we conclusively and with any precision decide on the award for pain and suffering when we have no medical report to enable us see what injuries the doctors said the respondent suffered and compare the same with the conclusions made on the same by the learned Judge if both doctors' reports are not before us? It would be an impossible task and no fairness can be claimed in regard to such a decision. In the absence of the medical reports, we have no alternative but to accept the learned Judge's decision on the awards for pain and suffering. The extent to which future medical care will be necessary equally cannot be deliberated upon sensibly without the same medical reports. We will not interfere with those awards. Special damages awarded at Kshs.217,500/= was not a target of any complaint. It will stand.

The last award of Kshs.1,620,000/= for loss of future earning capacity was the target of fourth, fifth and sixth grounds of appeal. The fourth ground complains against application of a multiple of Kshs.10,000/= in assessing the quantum of damages in respect of that head; the fifth ground says that a multiplier of 15 years in assessing damages should not have been used whereas the sixth ground is that wrong principles were applied. The respondent was 39 years in September, 2002. He was certainly younger when the accident took place. He was at the time of the accident employed by the appellant and he continued working with the appellant after the accident but not for long. In December 2001 his services were terminated. He said in evidence that he did not know why his services were terminated and the appellant did not offer any reasons as to why his services were terminated. After his services were terminated, he tried to get employment but he could not get any job and even when he was employed as a casual worker by one employer, that employment did not go beyond one week. He attributed all these to his incapacity to work as a result of the injuries incurred in the accident. That in effect meant that he was no longer able to earn the same salary he had been earning prior to the accident and soon after the accident when the appellant as his employer continued engaging him for a short time. In our view, the loss in respect of the matter before us was loss of future earning capacity as was rightly pleaded by the respondent in his plaint. In the case of **Mumias Sugar Company Limited vs. Francis Wanalo – Civil Appeal No. 91 of 2003**, this Court was faced with a case which was to an extent similar to the one before us except that in that case the respondent was an apprentice who was undergoing an apprenticeship for a fixed period of four years and upon the expiry of the apprenticeship the respondent left the company so that he was not an employee of the appellant and his future earnings could not be ascertained as he was in fact not in employment and on a salary when the accident took place. He was on what we may call allowance but which had a definite date of expiry. Again in that case the loss of earning capacity was claimed as part of general damages as at the time of his trial, the respondent was not working as his apprenticeship had expired by affluxion of time. This Court in that case set aside the damages awarded on that head and substituted a lump sum of Ksh.500,000/= stating that the award of Ksh.2,016,000/= was grossly so high that it amounted to an erroneous estimate of the loss. In this case, the appellant employed the respondent at the time of the accident at a salary of Ksh.8,121/=, house allowance of Ksh.965/= and overtime at an average of Ksh.7,500/=. The appellant dismissed him in December 2001, after the suit was already filed about ½ year back. In those circumstances, to say he was not employed at the time of the trial and so to deny him damages for loss of future earnings would, in our view, mean that the appellant would be reaping from its own act of dismissing the respondent before the hearing of the case. The learned Judge was, in our view, plainly right in applying a multiplicant of Ksh.10,000/= as indeed the respondent was, while working for the appellant, earning just about that income. Indeed if one were to

consider future salary increments as well as inflation which is ever with us, that amount of Ksh.10,000/= would appear to have been on the lower side. He was 39 years and would have normally retired at the age of 55, so that a multiplier of 15 years was not, in our view, unfair.

The sum total of all the above is that we see no merit in the entire appeal which must be and is hereby dismissed. The respondent will have costs of this appeal.

Dated and delivered at Nairobi this 7th day of December, 2007.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR