



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL APPEAL CASE NO. 69 OF 2006**

**SOUTH NYANZA SUGA CO. LTD.....APPELLANT**

**VERSUS**

**JOSHUA ONDIGO.....RESPONDENT**

**(Being an appeal from the judgment and decision of the lower court, A. Ingutia SRM dated 10/03/06 in the original KISII CMCC No. 1436 of 2004)**

**RULING**

1. Through a plaint filed Chief Magistrate's Court on 3<sup>rd</sup> November 2004, the Respondent herein sought orders for special damages, general damages and costs after sustaining injuries while in the employment of the appellant. The respondent's case was that he was on 11<sup>th</sup> August 2001 employed by the appellant and while trying to cut sugarcane a panga he was using cut him on the anterior part of knee.

2. The appellant denied the respondent's claim through its defence filed on 1<sup>st</sup> December 2004, and a trial thereafter ensued that culminated in the Respondent being awarded general damages of Kshs 64,000/- and special damages of Kshs 3,500/- thereby precipitating the instant appeal. The appellant has raised 7 grounds of appeal which were the following grounds in his appeal:

- 1. The learned trial magistrate erred in law and fact in failing to find that the plaintiff had failed to establish the fact that he was an employee of the defendant, which was his duty in law.*
- 2. The learned trial magistrate erred in law in failing to find that the plaintiff was the employee of the independent contractor, fact established by the plaintiff's own defence.*
- 3. The learned trial magistrate erred in law in failing to find that the plaintiff's injuries were fictions and fraudulent as the evidence by the plaintiff himself was very suspect.*
- 4. The learned trail magistrate erred in law in holding the appellant liable when the evidence on record reveals that the plaintiff had the full control of the panga he was using and had a duty to himself to be careful.*
- 5. The Learned trial judge erred in law in failing to find that the plaintiff having averred on oath that he chose to work without the safety gears which he knew was his right, he had by himself assumed the risk and thus the Doctrine of volenti non fit injuria applied to him fully.*
- 6. The judgment was against the evidence adduced and thus contrary to the law.*
- 7. The learned trial magistrate erred in failing to find that the Plaintiff had admitted the averments in the statement of defence.*

3. Parties agreed to canvass the appeal orally at the hearing of the appeal. The appellant's grounds of appeal reveals that this court is being called upon to determine whether there existed an employer-employee relationship between the parties. This court has therefore to address its mind on whether it has jurisdiction to determine the issues raised in the appeal. In the case of **Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd (1989) KLR 1** Nyarangi, JA observed as follows:

*"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings*

*pending other evidence.” (Emphasis added)*

4. **Article 165 (3)** of the **Constitution of Kenya 2010** gives the High Court unlimited original jurisdiction in criminal and civil matters subject to clause (5). Clause (5) provides as follows:

*“(5) The High Court shall not have jurisdiction in respect of matters—*

*(a).....; or*

*(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”*

**Article 162 (2)** gave mandate to Parliament to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations. In compliance with article **162 (2)** the Employment and Labour Relations Court Act (herein after referred as “the Act”) was enacted. Section 12 of the Act has elaborately outlined the jurisdiction of the court. Section 12 (1) of the Act provides as follows:

*“The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—*

*a. disputes relating to or arising out of employment between an employer and an employee;*

*b. disputes between an employer and a trade union;*

*c. disputes between an employers’ organization and a trade union’s organization;*

*d. disputes between trade unions;*

*e. disputes between employer organizations;*

*f. disputes between an employers’ organization and a trade union;*

*g. disputes between a trade union and a member thereof;*

*h. disputes between an employer’s organization or a federation and a member thereof;*

*i. disputes concerning the registration and election of trade union officials; and*

*j. disputes relating to the registration and enforcement of collective agreements.”*

5. The appeal before me raises a dispute between an employer and employee to which this court is first called to determine if there existed an employer employee relationship. I find that the proper forum for determining the issues would be the Employment and Labour Relations Court as this court lacks jurisdiction to handle the instant appeal, I set aside the proceedings of 15<sup>th</sup> October 2018 and direct that it be placed before the Employment and Labour Relations Court at Kisumu for hearing and determination.

**Dated and delivered at Kisii this 24<sup>th</sup> day of January 2019.**

**R. E. OUGO**

**JUDGE**

**In the presence of;**

**Mr. Nyagwencha for the Appellant**

**Mr. Kimaiyo h/b for the Respondent**

**Rael Court clerk**