



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 113 OF 2018

BETWEEN

FRANCIS ODEGE OWUOR.....APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LTD.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. S. N. Makila, SRM dated 19th October 2018 at the Magistrates Court at Kisii in Civil Case No. 930 of 2004)

JUDGMENT

1. The appellant is aggrieved by the judgment of the subordinate court dismissing his claim. He challenges the decision based on his memorandum of appeal dated 12th November 2018 as follows;

1. The learned trial magistrate erred in law and in fact in not properly evaluating and appreciating the evidence so as to come to a conclusion that the appellant had not proved his case on a balance of probabilities.

2. The learned trial magistrate erred in law and in fact in according preferential treatment to the evidence led by the defence yet the same was completely or substantially at variance with plaintiff's case, the defence pleadings and the issue before court.

3. The learned trial magistrate erred in law in attributing to the appellant of a fictitious warning letter regarding a contract and service bills that were not in issue or the subject of this suit and thereby came to a wrong conclusion by denying the plaintiff compensation.

2. According to the plaint, the appellant was contracted by the respondent by an agreement dated 1st September 1995 to grow sugarcane on his land parcel; Plot 718D in field number 156 in Kadera Lwala Sub location measuring 0.6 Ha. He was assigned number 251269. The agreement would remain in force for a period of 5 years or until one plant crops and 2 ratoon crops of sugarcane were harvested, whichever period would be less. The appellant claimed that the respondent failed to harvest the sugarcane when it was ready for harvesting causing him to suffer loss equivalent to three crop cycles.

3. In its statement of defence, the respondent denied the appellant's allegations and put him to strict proof. In the alternative, it pleaded that its policy was not to cut or harvest poorly maintained cane and that the plaintiff failed to employ the recommended crop husbandry to the extent that the cane was overshadowed and dwarfed by weeds and totally destroyed hence it flatly refused to harvest the case. It added that the appellant had a duty to negate his own losses and was obliged to harvest and deliver the cane if indeed it was mature for harvest.

4. The appellant (PW 1) testified that he was a contracted farmer and he made a claim for the three crop cycles as his cane was not harvested so it dried up. In cross-examination, he told the court that he weeded the cane. He admitted that his cane got burnt after 24 months. The respondent's Senior Field Supervisor, Richard Muok (DW 1), confirmed that appellant was its contracted farmer. He relied on his witness statement and testified that the appellant's plant crop was harvested on 17th September 1999 and that no payment was made as the appellant's expenses were greater than the total cane value by Kshs. 5,079/- as evidence by the statement he produced. He stated that the 1st ratoon was abandoned by the appellant and under Clause 5 of the agreement it was entitled to suspend the agreement without notice if it is of the view that the next cane harvest would be insufficient to reimburse the respondent.

5. After hearing the case, the trial magistrate accepted the respondent's case and found that the respondent proved that it is the appellant who breached the agreement as he failed to weed the farm despite being informed by a warning letter. The court held that the plaintiff failed to prove his case and consequently dismissed it.

6. The core of the appellant's case before the trial court was that the respondent failed to harvest his cane. He produced an agreement dated 1st September 1995 in respect of Plot No. 718D and was given No. 251269. The agreement and a job completion certificate No. 47257 dated 1st December 1995 was issued to the appellant. The documents were produced without any objection from the respondent.

7. In his witness statement, which he adopted as his evidence, DW 1, stated that the appellant had a contract with the respondent dated 21st April 1996 which was to last for a period of 5 years in respect of Field No. 7A, Plot No. 282D measuring 0.13Ha. The appellant was given an account number 251307. The agreement produced by DW 1 was dated 15th September 1995 and it referred to Plot No. 282F located in Koderia Kwoyo. The other documents produced by DW 1 did not refer to the contract or account pleaded by the appellant. In addition, the letter written to the appellant informing him to start weeding referred to account no. 251307 in respect of the land located at Koderia Kwoyo.

8. Having carefully evaluated the respondent's evidence including the witness statement and documents as required by the first appellate court, I find that the documents produced by the respondent which the trial magistrate relied on to dismiss the appellant's case referred not only to a different parcel of land but also a different agreement. DW 1 did not make any attempt to relate the documents he produced to the appellant's case. I also note that one of the documents produced by the appellant was a demand letter setting out particulars of its claim. Nothing would have been easier than for the respondent, being custodian of the company records, to confirm that contract no. 252269 did not exist. Further none of the respondent's documents were not put to the appellant in cross-examination to verify or confirm its position. The inevitable conclusion is that the respondent did not meet the appellant's claim and in effect it remained uncontroverted. In the circumstances, I find and hold that trial magistrate failed to examine the evidence carefully and reached a conclusion that was inconsistent with the evidence on record.

9. The consequence of my finding is that the appellant's evidence was not controverted. Since the agreement between the appellant and respondent was for five years and the appellant failed to harvest the plant crop, it must bear the consequences of breach. I therefore find and hold that the appellant was entitled to damages for the three crop cycles as was held in **Martin Akama Lango v South Nyanza Sugar Company Limited KSM HCCA No. 20 of 2000 (UR)** that:

[The Contract] remains in force for a period of five years or until one plant and two ratoon crops are harvested on the plot.

To my mind what that means especially the last part is that one plant and two ratoon crops must be harvested in fulfillment of the obligation of the parties agreement When the Respondent failed to do the harvesting and waited for until the crop was burnt by arsonists, it was in breach of the terms of the agreement and had the trial magistrate correctly interpreted the provisions of the said agreement, she should have held that the respondent was in breach of the contract and liable to pay damages.

10. The appellant pleaded that his plot was capable of producing on 135 tons per Ha at a rate of Kshs. 1,730 per ton. He produced a report titled, "CANE PRODUCTIVITY SUB LOCATIONWISE" which show the yield per hectare for various sub-locations for the years 1995/96 and 1996/97. The report does not support the claim that the yield for Kadera Lwala Sub-location was 135 tons per Ha nor is its basis established. I have however looked at the entire evidence and have seen the respondent's Outgrower's Newsletter which shows the general yield for the plant crop with good and timely weeding as 60 tons per Ha and one with poor weeding as 50 tons per Ha. For the ratoon crop a good husbandry would yield 60 tons per Ha while bad husbandry would yield 30 tons per Ha. Doing the best I can, I would take the average and hold that the yield for the plant crop would be 75 tons per Ha and for the ratoon crop 45 tons per Ha.

11. Having reached the conclusions above, I find that the respondent was entitled to the plant and two ratoon crops as follows:

Plant Crop	0.6Ha X 1,730 X 75 ton per Ha = Kshs. 77,850.00
1 st Ratoon	0.6 Ha X 1730 X 45 ton per Ha = Kshs. 46,710.00
2 nd Ratoon	0.6Ha X 1730 X 45 ton per Ha = Kshs. 46,710.00
TOTAL	Kshs. 171,270.00

12. As regards interest, I note from the record that after the suit was filed on 10th August 2004 but was subsequently referred to the Sugar Tribunal established under the **Sugar Act (Repealed)**. The matter was not resolved by the Tribunal which was in due course abolished. The matter returned to court and was first fixed for hearing 21st July 2016 which is that date I shall adopt for the purpose of calculating the interest.

13. For the reasons I have set out, I allow the appeal and set aside the judgment and decree of the subordinate court and substitute it with a judgment for the appellant against the respondent for the sum of **Kshs. 171,279.00/-** together with interest at court rates from 21st July 2016 until payment in full. The respondent shall have costs in the subordinate court and costs of this appeal assessed to Kshs. 15,000/-

SIGNED AT NAIROBI BY

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KISII this 25th day of JULY 2019.

R. E. OUGO

JUDGE

Mr Oduk instructed by Oduk and Company Advocates for the appellant.

Otieno Yogo and Ojuro and Company Advocates for the respondent.