REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL NO. 53 OF 2015

(FORMERLY KISII HCCA NO. 99 OF 2012)

BETWEEN

CONSOLATA ANYANGO OUMA …….... APPELLANT

AND

SOUTH NYANZA SUGAR CO. LTD …..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. D. K. Kemei, SPM at the Senior Principal's Magistrates Court in Migori in Civil Case No. 24 of 2008 dated 13th June 2012)

JUDGMENT

1. The appellant appeals against the judgment of the subordinate court dismissing her claim for damages for breach of contract. Although the respondent filed a defence denying the appellant's claim, counsel for the appellant admitted that the contract and terms thereof were not in dispute.

2. By a Growers Cane Farming and Supply contract dated 12th July 2004, the respondent contracted the appellant to grow sugar cane on her land parcel Plot No. 1373 in Field 58B Zone C in Kawere 2B Location measuring 1.6 Hectares. The contract was to run for a period of 5 years or until 1 plant crop and 2 ratoon crops of sugar cane were harvested from the plot transported to the factory and milled whichever period is less.

3. It was also agreed that within the period of 5 years or less, the plant crop and the two ratoon crops would be harvested at the ages of 22-24 months and 16 – 18 months after planting and subsequent harvesting respectively and that the respondent would be bound to purchase all the cane that was available for harvesting after maturity.

4. In her plaint dated 14th March 2008, the appellant claimed that the respondent breached the terms of the agreement by failing to harvest cane despite reminders that the cane was mature, that it failed to harvest cane after maturity and that it neglected and abandoned the appellant's plot after tying it to cane development for the entire contract period.

5. As a result of the breach, the appellant pleaded that she lost 160 tons in respect each crop cycle; the plant crop, the 1st and 2nd ratoon crops. She pleaded that the value of each crop was Kshs. 2,200/- per ton.

6. The appellant testified and called one witness to support her case. In her testimony, she summarized

her claim as follows;

> *I thereafter proceeded to maintain the 1st and 2nd ratoon crop but the Defendant Company failed to harvest them and they consequently go wasted in the fields inspite of making reports to the defendant Company. I subsequently instructed an Agricultural officer who visited the sugar cane field and assessed the damage caused …..*

7. In cross examination, PW 1 admitted that, *"My only claim against the Defendant Company is in respect of the 2nd ratoon crop."* Vincent Murunga Abonyo (PW 2), an agricultural expert, carried out a crop assessment. He calculated the appellant's loss as a result of the crop that had not been harvested as Kshs. 380,901.95/-.

8. Richard Muok (DW 1), a field supervisor with the respondent, testified on behalf of the defence. The thrust of his testimony was that the plant crop and the 1st and 2nd ratoons were harvested and the appellant paid in full. He stated that the respondent ploughed, harrowed, furrowed, supplied fertilizer and seed cane. He testified that the 211.372 tons of the plant crop was harvested on 28th March 2008 for which the appellant was paid Kshs. 331,587.55/-. The 1st ratoon crop harvested on 12th November 2009 yielded 109.9 tons for which the appellant was paid Kshs. 305,851.60/- and the 2nd ratoon crop yielding 100.8 tons was harvested on 2nd April 2011 and for which the appellant was paid Kshs. 308,110.65/-.

9. After considering the evidence, the learned magistrate held that the contract contemplated that the cane would be harvested within the agreed periods and that the 1st and 2nd ratoons, having been harvested outside the period contemplated, resulted in the respondent breaching the contract. The learned magistrate further held and concluded that although there was breach, the respondent harvested and paid the appellant in full for the three harvests hence the appellant's claim had been settled. He therefore dismissed the suit but ordered to respondent to meet the costs in view of the delayed harvesting.

10. The appellant contests the judgment on the basis of the memorandum of appeal dated 21st July 2012 which states as follows;

> *(i) That the Learned trial magistrate erred in law and fact in finding that the plaintiff did not have any claim against the defendant despite the weight of evidence.*
>
> *(ii) That the learned trial magistrate erred in law and in fact in finding that the plaintiff was not entitled to any compensation even after observing as a fact that the defendant was in breach of contract.*
>
> *(iii) That the learned trial magistrate erred in law and in fact in failing to appreciate adequately or at all that the evidence on record did support the plaintiff's claim for compensation and/or damages.*
>
> *(iv) That the learned trial magistrate erred in law and in fact by finding for the defendant against the weight of evidence on record.*

11. Counsel for the appellant, Mr Odingo, submitted that the trial court erred in that it did not consider the breach of contract which was admitted and the fact that the appellant was entitled to compensation which the appellant proved by producing expert evidence. Mr Kanyangi, counsel for the respondent, supported the conclusion made by the trial court that the claim had been settled. He submitted that there was no delay in harvesting as the same was done within the limits permitted by the contract and hence it was not liable for the late harvest.

12. As this is the first appeal, this court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**). In this regard, I have considered the pleadings, evidence and submissions and I find that the central issue in this case is whether there was breach of contract and if so,

whether and to what extent the appellant should be paid damages.

13. As regards the breach of contract, the learned magistrate found as follows;

> *Under the contract the last harvest if any should have been accomplished on or before the 12.7.2009. However from evidence of the Defendant's witness ratoon one was harvested on the 12.11.2009 while ratoon two was harvested on 2.4.2011. This clearly shows that the last two crop cycles were harvested outside the stipulated period of five years and there the defendant was in breach of contract.*

14. This finding was consistent with the evidence given by both PW 1 and DW 1 and since there was no cross-appeal on this finding, the finding that the respondent breached the contract is affirmed.

15. The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase *restitution in integrum* (see ***Kenya Industrial Estates Ltd v Lee Enterprises Ltd*** **NRB CA Civil Appeal No. 54 of 2004 [2009]eKLR**, ***Kenya Breweries Ltd v Natex Distributors Ltd Milimani*** **HCCC No. 704 of 2000 [2004]eKLR**). The measure of damages is in accordance with the rule established in the case of ***Hadley v Baxendale*** **(1854) 9. Exch. 341** that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see ***Standard Chartered Bank Limited v Intercom Services Ltd & Others*** **NRB CA Civil Appeal No. 37 of 2003 [2004]eKLR**). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see ***Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others***, **NRB CA Civil Appeal No. 192 of 92 (UR)** and ***Charles C. Sande v Kenya Co-operative Creameries Ltd***, **NRB CA Civil Appeal No. 154 of 1992 (UR)**).

16. The appellant's case was that she suffered a diminution of the value of her cane as a result of the late harvest. The appellant pleaded that she lost 160 tons per ratoon valued Kshs. 2,200/-. She relied on the report prepared by PW 2 who calculated the value of cane at Kshs. 2,200.00/- per tonne. For both ratoons, the expert estimated yield for her 1.6 Ha at 96 tons valued at Kshs. 247,104/- less harvesting, transport expenses and cess making a total of Kshs. 209,618/- for each ratoon.

17. Since the appellant admitted she was paid Kshs. 305,851.60/- for the 1st ratoon and Kshs. 308,110.65/- for the 2nd ratoon, it becomes readily apparent based on her expert evidence that she did not suffer any loss as a result of the respondent's failure to harvest her cane on time. In other words the value of cane proved by her expert witness was less than the amount she was paid.

18. I therefore agree with the learned magistrate that even though there was a breach of contract, the appellant did not prove that she suffered loss. Her cane was harvested and she was duly paid for it.

19. As a matter of record, I note that the respondent had filed **Migori High Court Civil Appeal No. 53 of 2015 (formerly Kisii Civil Appeal No. 109 of 2013)** being ***South Nyanza Sugar Company Limited v Consolata Anyango Auma***. The memorandum of appeal referred to another case and judgment and the appeal was marked as withdrawn with no order as to costs on application of the appellant in that case.

20. The appeal is dismissed with costs to the respondent.

DATED and **DELIVERED** at **MIGORI** this **25th day of June 2015.**

D.S. MAJANJA

JUDGE

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

Mr Kanyangi instructed by Okongo, Wandago and Company Advocates for the respondent.