



REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL NO. 97 OF 2015

BETWEEN

**SOUTH NYANZA SUGAR COMPANY
LTD.....APPELLANT**

AND

**MAUREEN ATIENO NGERE administratrix of the estate MESHACK K.
MIGWASI...RESPONDENT**

(Being an appeal from the Judgment and Decree of Hon. P. Y. Kulecho, RM at the Chief Magistrates Court in Migori in Civil Case No. 510 of 2014 dated 30th April 2015)

JUDGMENT

1. The case before the subordinate court originated from the Sugar Arbitration Tribunal from where it was transferred after the repeal of the ***Sugar Act, 2001*** consequent upon the enactment of the ***Crops Act, 2013*** which led to the dissolution of the Tribunal.
2. The respondent claimed that the appellant failed to harvest the deceased's sugarcane crop namely plant and 1st ratoon crop causing him to suffer a total loss of Kshs. 523,900/- for the two crop cycles. The claim was based on a crop area of 1.3 Hectare (Ha.) at 100 tons yield per Ha. at a price of Kshs. 2,015 /=- per ton of sugarcane.
3. When the matter came up for directions before the Tribunal, the parties agreed to proceed for hearing by way of written submissions. After considering the submissions, the learned magistrate awarded Kshs. 294,504/- being the net value of the plant and 1st ratoon crop.
4. The appellant appeals against the judgment and decree based on the following grounds set out in the memorandum of appeal dated 18th May 2015 are as follows;
 1. *The learned magistrate erred in law and in fact in disregarding the defendant's expert witness evidence on expected tonnage hence arriving at the wrong tonnage.*
 2. *The learned magistrate erred in law and in fact by wrongly evaluating the evidence on record hence arriving at the wrong conclusion.*
 3. *The learned magistrate erred in awarding the Plaintiff a cost per tonne when the court found that there was no basis for the plaintiff's submissions.*
 4. *The learned magistrate erred in finding for the plaintiff what the plaintiff had not prayed for.*
 5. *The learned magistrate erred in law and in fact in failing to evaluate the duties of the parties in the Agreement signed between the parties*

6. *The learned magistrate erred in law and fact by failing to establish ownership of the suit land hence arriving at a wrong conclusion.*

5. As this is a first appeal, I am expected to review the evidence and come to an independent decision as whether or not to uphold the appeal having regard to the fact that I never saw or heard witnesses (see ***Selle v Associated Motor Boat Co. [1968] EA 123***).

6. The parties did not call oral or produce affidavit evidence to support their respective contentions. The appellant filed a statement of defence denying the respondent's claim hence there was a joinder of issue on all issues raised in the claim. In the absence of evidence, the learned magistrate could not make a determination of on the contested issues based on submission unless there were admissions in the pleadings or an agreed set of facts upon which the court was asked to adjudicate.

7. In the absence of admissions or agreed facts, the submission filed by the appellant could not be a substitute for evidence. In ***Douglas Odhiambo Apel & Another v Telkom Kenya Limited NRB CA Civil Appeal No. 115 of 2006 [2014]eKLR***, the Court of Appeal expressed the view that;

[W]e find that the learned judge was entirely correct in holding that at a formal proof requiring assessment of damages, a plaintiff is under a duty to present evidence to prove his case. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court.

The need for proof is not lessened by the fact that the claim is for special damages. Unless a consent is entered into for a specific sum, then it behooves the claiming part to produce evidence to prove special damages claims.

8. Although the manner of proceedings in the case was by consent of the parties, the case could not be determined in manner suggested. In the result and in the interest of justice, I allow the appeal to the extent that I set aside the judgment and decree. As both parties acted under a misapprehension of the law and procedure, the judgment and decree of the subordinate court is substituted with an order directing re-trial of the suit before any other magistrate other than Hon. P. Y. Kulecho, RM.

DATED and DELIVERED at MIGORI this 21st day of July 2015.

D.S. MAJANJA

JUDGE

Mr Odhiambo instructed by Otieno, Yogo and Company Advocates for the appellant.

Mr Marwa instructed by Kerario Marwa and Company Advocates for the respondent.