REPUBLIC OF KENYA

IN THE HIGH COURT

AT MIGORI

CIVIL APPEAL NO. 88 OF 2015

BETWEEN

WALTER MUGA GUYA.....APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LTD.....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. 511 of 2014

***dated 30th April 2015*)**

JUDGMENT

1. The Sugar Arbitration Tribunal established under ***Sugar Act, 2001*** was dissolved after the enactment of the ***Crops Act, 2013***. This case in the subordinate court was therefore transferred from Tribunal for determination by the court.

2. The appellant's claim against the respondent was for loss suffered as a result of the failure by the respondent to harvest his sugarcane grown on his property measuring 6.0 Hectares (Ha.). He claimed damages for three crop cycles amounting to Kshs. 4,500,000/- based on the land area, a yield of 100 tons of sugarcane per Ha. at price of Kshs. 2,500 per ton. The respondent denied the appellant's claim and put him to strict proof.

3. The appellant called testified and called a witness, Paul Simo, who produced a crop yield assessment report. The respondent did not call any witnesses. After considering the evidence and submissions, the learned magistrate made an award of Kshs. 666,145/- for the plant crop which was the net amount after deducting the estimated harvest and transport charges and two debit advice notes.

4. Mr Marwa, learned counsel for the appellant, adopted the grounds set out in the memorandum of appeal as part of his argument. The memorandum of appeal dated 18th May 2015 states as follows;

> *1. The learned magistrate erred in law and in fact when she failed to evaluate the evidence and pleadings thereby reaching a wrong conclusion on the number of cycles to be awarded to the appellant.*

2. The learned trial magistrate erred in law and in fact by awarding the appellant only plant crop yet the appellant pleaded, proved and submitted for the 3 cycles, i.e., the plant crop, 1st ratoon and 2nd ratoon.

3. The learned magistrate was biased against the appellant.

5. On his part, Mr Odhiambo, learned counsel for the respondent, submitted that the cane was never harvested hence the claim could not be awarded. He further submitted that the report produced by the appellant was very specific on the yield per hectare. He contended that the contract of the parties was subject to maintenance.

6. As this is a first appeal, I am duty bound 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**).

7. The appellant testified and called an expert witness. The appellant testified the he was a contracted farmer and that the respondent did not harvest the plant crop hence he was denied the opportunity to harvest the 1st and 2nd ratoons. He stated that the value of cane at the time was Kshs. 2,500 per ton. He further admitted in cross-examination that the respondent would have harvested and transported the cane and deducted its costs from his proceeds. Paul Simo, the expert witness, testified that the estimated yield on the property measuring 4.3 Ha. was estimated at 518 tons per Ha.

8. The respondent did not call any witnesses and the appellants claim remained unchallenged. I agree with the respondent that there was a failure by the learned magistrate to award damages for the 1st ratoon which the appellant submitted that it was entitled. Is the appellant entitled to the 1st and 2nd ratoon?

9. I agree with the learned magistrate that the value of each cycle was Kshs. 1,075,000/- based on a land area of 4.5 Ha with a yield of 100 tons per Ha. and a price of Kshs. 2,500 per ton as pleaded in the statement of claim. As the amount would be subjected to deductions for transport and harvesting charged, I would accept the learned magistrates position that these would be a quarter of the gross sum making a total of Kshs. 825,000/=. Although the learned magistrate took into account some debit advice notes from the respondent, the same were not proved by the respondent.

10. As to whether to award the appellant the value of the 1st and 2nd ratoon, I note that from the appellant testimony, the plant crop would be ready for harvest in the year 2006 and the 1st and 2nd ratoons would be ready after about the 16th to 18th months. The suit was filed in the year 2009 by which time the proceeds from the 2nd ratoon would not be due. As the appellant had a duty to mitigate his loss and did so by filing suit, I would only award the value for the plant crop and 1st ratoon which would amount to Kshs. 1,650,000/-. I also note that in its submissions before the Tribunal, the appellant only made submissions in support of the plant crop and 1st ratoon.

11. I therefore allow the appeal, set aside the judgment and decree of the subordinate court and substitute the same with judgment for Kshs. 1,650,000/- with interest thereon in favour of the appellant.

12. The appellant shall have the costs of this appeal and of the subordinate court.

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

D.S. MAJANJA

JUDGE

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

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