REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 106 OF 2004

BETWEEN

CHARLES ABET……………………………………………………….……….APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LIMITED………...............……………...RESPONDENT

(An appeal arising from Judgment and Decree of Mr. Kariuki Mwaniki ESq. The Senior Resident magistrate in Migori SRMCC.NO. 336 of 2003 dated and delivered on 17th March, 2004).

JUDGMENT

1. The respondent was the plaintiff in **Migori SPMCC.NO. 339 of 2003**. He sued the appellant for both general and special damages, costs of the suit and interest on allegations that he had been injured while working for the appellant in the latter's premises. The respondent alleged that on or about the 18th February, 2003, while he was lawfully working as an employee of the appellant within the appellant's premises he sustained a cut wound on the left knee. The respondent attributed his injury to the negligence of the appellant's servants and/or its agents. The respondent alleged that the appellant did not take all reasonable measures to protect the respondent from injury as he (respondent) carried out his work.

2. The appellant filed its statement of defence and absolutely denied the respondent's allegation of statutory negligence against it. The appellant denied that there existed any contract of employment between it and the respondent. It also denied that the respondent was injured on the 18th February, 2003 as alleged or at all and denied all the particulars of negligence leveled against it. In the alternative, the appellant averred that if at all the respondent was injured, then such injury was caused by the respondent's own negligence as more particularly set out at paragraph 9 of the Defence. In the further alternative, the appellant averred that the doctrines of res *ipsa loquitor* and *volenti non fit injuria* applied in relation to the alleged accident. The appellant asked the trial court to dismiss the respondent's suit with costs.

3. During the hearing of the case the respondent, **Charles Nyapal Abet** gave a brief testimony in which he stated that he was employed by the appellant as a cane cutter as supported by delivery note marked as **P.Exhibit.1**. He said that on 18th February, 2003, he was working for the appellant as a cane cutter and that in the process of so working, he cut his left foot, that he was cut by the sharp panga which was issued to him by the appellant. Subsequently, he was treated at St. Mary's clinic as per the treatment sheet marked **P. Exhibit 2**. He complained that the appellant did not provide him with protective gear like apron and gloves.

4. The respondent was thereafter examined by **Dr. Aluda, PW2,** who told the court that the respondent had a pricked wound on the left leg. **Dr. Aluda** produced the report he compiled after examining the respondent-see **P.Exhibit.3** together with the payment receipt for kshs.1500/- as **P.Exhibit.4**. During cross examination, **Dr. Aluda** stated that y the time he saw the respondent on 28th June, 2003, the pricked wound had healed and there was only a scar.

5. The appellant called **Francis Abongo, DW1** as its witness. He stated that he was employed as the Transport and Harvesting Supervisor and that on 18th July, 2003; he was supervising the harvesting and transportation of cane from the nuclear estate plot No. 281 Ngonga site. DW1 stated that the respondent never made any report to him of an injury as was expected in case of injury. In cross examination, DW1 conceded that the appellant did not issue any protective gear to its cane cutters. He also stated that if indeed the respondent had been injured the report would have reached DW1 for purposes of filling forms for workmen compensation.

6. After carefully considering all the evidence that was placed before it the trial court found that the respondent had proved his case against the appellant on a balance of probabilities to the extent of 80%. The trial court accordingly entered judgment for the respondent as against the appellant on liability at the ratio of 80:20% in favour of the respondent. The respondent was awarded general damages of kshs.90, 000/- less 20% contribution, special damages of kshs.1500/- plus costs and interest at court rates.

7. The appellant was aggrieved by the judgment of the trial court and filed this appeal. The memorandum of appeal raises the following eight(8) grounds of appeal:-

1. The learned Trial Magistrate erred in both law and infact in failing to dismiss the respondent's claim against the Appellant with costs.

2. The Learned Trial Magistrate erred in both law and infact in holding that failure on the part of the Appellant to involve the Police Authenticated the respondent's otherwise fraudulent and fake claim.

3. The Learned Trial Magistrate erred in both law and infact in failing to hold that the Respondent having cut and injured himself could not turn to blame the Appellant for self inflicted injuries.

4. The Learned Trial Magistrate erred in both law and infact in holding that the Appellant is liable to the extent of 80% contribution for the self inflicted injuries which the respondent suffered.

5. The learned Trial Magistrate erred in both law and infact in awarding the sum of Kshs.72,000/- to the Respondent basically for self inflicted soft tissue injuries which amount is manifestly excessive in the circumstances.

6. The Learned Trial Magistrate erred in both law and infact in holding that the Plaintiff had proved his case on a balance of probabilities while no evidence was led in that regard.

7. The Learned Trial Magistrate erred in both law and infact in finding for the Respondent while infact no fault lies against the Appellant in the circumstances of this case.

8. The Learned Trial Magistrate erred in both law and infact in awarding costs of the suit to the Respondent.

8. The appellant prays that this appeal be allowed with costs and that the respondent's suit in the subordinate court be dismissed with costs.

9. This case is before me as a first appeal. As the first appellate court I am under a duty to reconsider and evaluate the evidence a fresh with a view to reaching my own decision in the matter. As the first appellate court however, there is need to exercise caution since I do not have the advantage of seeing and hearing the witnesses. See **Peters –vs- Sunday Post [1958] EA.412** and **Selle & another –vs- Associated Motor Boat Co. Ltd & others [1968] EA 123.** As the first appellate, I am also under a duty to weigh and

consider the judgment of the trial court.

10. I have now carefully reconsidered and evaluated the evidence afresh. I have also weighed and considered the judgment of the trial court. I have also carefully considered the written submissions filed on behalf of the appellant by the firm of **Okong'o, Wandago & Company Advocates**; together with the relevant authorities. **M/s Andambi Advocates** did not file any written submissions on behalf of the respondent despite being given the opportunity to do so as far back as 14th March, 2011.

11. After carefully considering all the above the issue that arises for determination is whether the respondent proved his claim against the appellant on a balance of probabilities. After considering all the evidence and the facts surrounding this case, I am not persuaded that the respondent proved his case against the Appellant on a balance of probabilities. It was argued by the appellant's counsel and I am persuaded by those arguments that the respondent did not establish a causal link between the injury he is alleged to have sustained and the appellant's negligence. Reliance was placed on a judgment of this Honourable court in **South Nyanza Sugar Company Limited –vs- Wilson Ongumo Nyakweba Kisii HCCA No. 77 of 2004** in which Musinga, J relied on the following passage from the judgment in **Statpack Industries Limited –vs- James Mbithi Munyao- Nairobi HCCA.NO. 152 OF 2003**(unreported) in allowing the appeal:-

"It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which on a balance of probability a connection between the two may be drawn. Not every injury, is necessarily as a result of someone's negligence. An injury per se is not sufficient to hold someone liable".

In the instant case, the respondent testified as follows:-

"On 18th February, 2003, I was cutting cane for the defendant. In the process I cut my knee …………………. I have sued the defendant for not providing me with protective clothing……………… I pray for compensation for the injuries and costs".

12. During cross examination, the respondent stated that he had worked for the appellant for 10 years. He also said that he was not given any protective gear and that the lack of protective gear is what led to him to be cut with the sharp panga which was issued to him by the appellant. He also stated that the panga got hold by the sugar cane. He denied cutting himself intentionally.

13. From the above evidence, I do not think that the appellant could be held accountable for the fact that the panga cut the respondent after being caught by the sugar cane. That was an eventuality that was in my considered view so remote that it could not have been foreseen by the appellant so as to make provision for it. The respondent was, from his own testimony, a seasoned cane cutter of 10 years standing and he was expected to know how to handle the only implement he had used for doing the same job of cane cutting for over 10 years. The question that must be considered now is whether in those circumstances, it can be argued that the appellant failed to provide the respondent with adequate and suitable appliances to enable the respondent carry out his work in safety; and whether in those same circumstances, it can be argued that the appellant failed to provide the respondent with a safe system of work. It is my humble view that both of these questions can be answered in the negative.

14.In **WINFIELD AND JOLOWICZ ON TORT, 13th Edition at page 203,** this is what the learned authors say about the issues at hand in this case:-

"At common law the employer's duty is a duty of care and it follows that the burden of proving negligence rests with the plaintiff workman through the case. It has even been said that if he alleges a failure to provide a reasonably safe system of working, the plaintiff must plead and therefore prove what the proper system was and in what relevant respects it was not observed. It is true that the severity of this particular burden has somewhat been reduced, but it remains clear that for a workman merely to prove the circumstances of his accident will normally be insufficient."

15. The respondent herein argued that if he had been given protective gear such as gumboots, he would not have cut himself. However the respondent's brief testimony does not show how the gumboots would have prevented the accident. The court takes judicial notice of the fact that gumboots do not usually cover the knee of the wearer, and without the respondent exercising due care for him, the gumboots would not have prevented the injury. In any event, the respondent did not adduce/evidence to show that the appellant was indeed under an obligation to provide him with such protective gear. The law requires that he who alleges must prove. See **section 107(1)** of the **Evidence Act**.

16. From the circumstances of this case therefore, I hold the considered view that with or without gumboots, the respondent still had a tough task of proving his claim against the appellant to the required standard. The respondent did not do so since he failed to establish a causal link between the injuries he alleged to have suffered and the appellant's negligence. See **Statpack's case**(above).

17. The upshot of what I have said above is that the respondent did not prove that the appellant was the one to blame for the injuries that he alleged to have suffered. In my considered view, if the respondent suffered any injury, he was the author of his own misfortune by failing to direct the panga properly as he cut the cane, a job he had done for 10 years. The respondent also failed to place evidence before the court to show that the appellant failed to take adequate precautions for the safety of the respondent and what those precautions were. The respondent also failed to adduce evidence to inform the court what "**a safe working place**" for a cane cutter would have been like.

18. In the premises, the appeal succeeds. The same is allowed with no order as to costs. Accordingly the judgment of the lower court is set aside, and the same is substituted with an order dismissing the respondent's suit with costs to the appellant.

19. It is so ordered.

Dated and delivered at Kisii this 20th day of January, 2012.

RUTH NEKOYE SITATI
JUDGE
In the presence of:-
Mr. Ochwangi for Odhiambo (present) for appellant
M/s Andambi (abnsent) for respondent
Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI
JUDGE.