



NO.340

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII

CIVIL APPEAL NO. 64 OF 2005

**SONY SUGAR COMPANY
LIMITED.....APPELLANT**

-VERSUS-

**ZACHARY OMWANDO
NYANSIMORA.....RESPONDENT**

JUDGMENT

(Being an appeal arising from the judgment of Hon. Principal Magistrate Mr. soita delivered on 15th march, 2005

in civil suit no. 1020 of 2003 in the Chief magistrate's court at Kisii)

The outcome of this appeal will turn on the technical and procedural aspects of lodging or mounting a successful appeal. The appeal arises from the judgment of the learned magistrate in Kisii **CMCCC No. 10203 of 2003** delivered on 15th march, 2005. In the plaint filed by the respondent, he averred that he was an employee of the appellant as a cane cutter and that it was a term of his contract of employment with the appellant that the appellant would take all reasonable measures and precautions for his safety whilst engaged in such employment . On or about 29th January, 20002 , while in the course of the appellant's employment cutting sugarcane, he cut his left leg as a consequence of which he suffered pain, loss and damage. To the respondent the said accident was occasioned by a breach of the statutory duty and negligence on the appellant's part as particularized in paragraphs 6 & 7 of his plaint. He therefore prayed for General damages, costs and interest.

The appellant in his defence denied ever employing the respondent and therefore owed no duty of care towards him. It further denied that the accident, if at all, was occasioned by its negligence or breach of statutory duty. In the alternative the appellant pleaded that if the accident occurred, the respondent was the sole author of the misfortune due to his own negligence as particularized in paragraph 6 of the its defence. It therefore sought the dismissal of the respondents suit in its entirety.

The learned magistrate having listened and evaluated the evidence of the respondent alone as the appellant offered no evidence, and the written submissions on record, reached the verdict that the appellant was liable to the respondent to the extent of 90% . In other words he apportioned to the respondent 10% contributory negligence. The learned magistrate then awarded the respondent Ksh. 80,000/= general damages less 10% contribution bringing the amount to Kshs. 72,000/= plus costs and interest.

Aggrieved by the judgment, the appellant lodged this appeal on 9 grounds to wit:

1. ***“.....The learned trial magistrate erred in law and fact in failing to appreciate that the mere occurrence of an accident will not impel a finding of negligence unless the plaintiff proved that the defendant was the sole author and cause of the accident.***
2. ***That the learned trial magistrate failed in law and fact and in failing to find that the plaintiff did not tender any evidence to support his allegation that he was in the employment of the defendant on or around 29th January, 2002***
3. ***The learned trial magistrate in the circumstances erred in law and fact by entering judgment against the defendant at 90%:10% liability when there is evidence that the plaintiff was in full control of his actions and/or omissions.***
4. ***That the learned trial magistrate erred in law and fact by finding that the lack of defence witnesses was sufficient evidence to hold the appellant liable.***
5. ***The learned trial magistrate erred in law and fact in holding that the defendant had proved his case on the balance of probabilities.***
6. ***The trial magistrate erred in law and fact by misapprehending evidence in material aspect as to the plaintiff's injuries and so arrived at a figure which was inordinately high, excessive and erroneous in the circumstances.***
7. ***The learned trial magistrate erred in law and fact in holding that the defendant had breached any statutory obligation to the plaintiff while a sugar cane field is not included in the definition of a 'factory' in the factories Act.***
8. ***The learned magistrate erred in law and fact in failing to appreciate that the defendant had no control over the plaintiff's acts or omissions in cutting cane.***
9. ***The learned magistrate erred in law and fact in failing to appreciate that the respondent had cut the cane for sometime without incident, and that there was no inherent danger in cutting of the cane that the defendant knew of but failed to warn the respondent of.....”***

When the appeal came up for directions, both the appellants and respondent agreed amongst other directions that the appeal be canvassed by way of written submissions. Such submissions were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

However, as I stated at the beginning of the judgment, the determination of the appeal will turn on the technical and procedural aspects of the same. Those aspects were raised by the respondent in his submissions. Those submissions were served on the appellant but elicited no response at all. The only assumption I can make is that the issues were legal, so weighty and settled that the appellant had no response at all to the same.

The first issue raised is that under order **XLI rule 1 (a) of the Civil Procedure rules**, a certified copy of decree or order appealed against must be filed together with the memorandum of appeal or at the earliest opportunity possible after the filing of memorandum of appeal. This is a mandatory requirement whose failure to comply renders the appeal fatally defective and incompetent.

This appeal was filed on 14th April, 2008 much as there is a decree in the record of appeal that decree is not certified. Secondly, the said decree is purportedly signed by a Deputy Registrar of the Chief Magistrate's court at Kisii. There is no such office in the Chief Magistrate's court at Kisii. The office of the Deputy Registrar is found in the High Court and Court of appeal. Therefore the Deputy Registrar cannot have jurisdiction in that capacity to sign decrees or orders of the subordinate court. Ordinarily the decrees or orders of the subordinate court are signed and certified by the trial magistrate. The decree as signed is therefore a nullity.

In a nutshell there is no decree. The one in the record of appeal is fatally defective and nullity. It renders the entire appeal incompetent. The appeal is consequently struck out with costs to the respondent.

Judgment dated, signed and delivered at Kisii this 17th January, 2011.

ASIKE-MAKHANDIA

JUDGE