No. 2818

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 214 OF 2006

SOUTH NYANZA SUGAR CO. LTD …… APPLICANT

-VERSUS-

OMWANDO OMWANDO…..……. RESPONDENT

JUDGMENT

(Being an Appeal from the Judgment and Decree of the Principal Magistrate's Court at Kisii, Hon. S.M. S. Soita in Kisii CMCC No. 24 of 2047 delivered on the 21st day of July, 2006

This is an appeal from the Judgment and decree of **Hon. Soita P.M.** delivered on the 21st July, 2006 in **Kisii CMCC No. 24 of 2004**. In the judgment, the Magistrate held that the appellant was 80% liable in negligence as against 20% for the respondent and awarded the respondent Kshs.80,000/- as general damages.

The appellant was aggrieved by the judgment and decree aforesaid. Consequently through **Messrs L.G.M. Menezes** Advocate, it lodged the instant appeal on six grounds to with:

"1. THAT the Learned trial Magistrate erred in Law and in fact by erroneously awarding excessive damages to the respondent herein against the weight of the evidence.

2. THAT the Learned trial Magistrate erred in Law and in fact in holding the Appellant liable for the injuries sustained by the respondent herein and thus apportioning the same in the ratio of 20:80 as against the Appellant.

3. THAT the Learned trial Magistrate erred in Law and in fact in failing to consider that the respondent herein was a manual labouror who did not require any exceptional skill in his work and thus holding the Appellant liable under statute and/or common Law.

4. THAT the Learned trial Magistrate erred in Law and in fact in failing to consider that the operation of the instrument namely, Panga, which injured the respondent herein was in the respondent's power and full control and hence his being injured in the circumstances.

5. THAT the Learned trial Magistrate erred in Law and in fact in failing to consider the evidence by the Appellant and hence finding and holding it liable.

6. THAT the Learned trial Magistrate erred in Law and in fact in holding that the respondent was the employee of the Appellant when in fact he was employed by an independent contractor…".

When the appeal came up for directions on 22nd March, 2011, parties agreed amongst other directions that the appeal be canvassed by way of written submissions. Subsequently, parties filed and exchanged written submissions which I have carefully read and considered alongside cited authorities.

During the trial in the subordinate court, the respondent's case was that at all material times, he was an employee of the appellant as a cane cutter. As a term of the said contract of employment, the appellant was expected to take all reasonable precautions for his safety while he was engaged upon such work, not to expose him to risk or injury which it knew or ought to have known, to provide and maintain adequate and suitable means to enable him carry out his work in safety and or to provide a safe and proper system of working.

However on or about 5th September, 2002, whilst the respondent was engaged in cutting cane, the panga he was using cut him causing him to sustain injuries to the right leg as a consequence of which he suffered pain, loss and damage. To the respondent, the said accident was occasioned by the breach of statutory duty on the part of the defendant, its servants or agents towards him. Alternatively the said accident was caused by reason of the negligence and or breach of duty and or breach of the said contract of employment.

As evidence that he was employed by the appellant, the respondent tendered in evidence, delivery note in the name of the appellant issued to him. It was his evidence that while working, the panga slipped and injured his right leg. He was thereafter treated at Muticho Dispensary. Subsequently, he was examined by **Dr. Ajuoga** who prepared a medical report. He paid him Kshs.3,000/- for the service. He therefore prayed for general and special damages.

Cross examined, he stated that apart from the delivery note, he had nothing else to show that he worked for the appellant. The panga slipped as it had rained. According to the respondent, had it not rained, the panga would not have slipped. He blamed the appellant for the accident since it had not issued him with gloves and boots. He had asked for them and was informed that they would be brought. He knew one, **Omweri**. He was a sub-contractor. He was his supervisor. Otherwise he was employed by the appellant.

The respondent then called **Dr. P.M. Ajuoga** as his witness. He is a consultant surgeon. He examined the respondent on 15th October, 2003 following an industrial accident on 5th September, 2003. He concluded that the respondent had sustained soft tissue injuries without permanent disability. He prepared a medical report for which he was paid Kshs.3,000/-.

On the other hand, the appellant's case during the trial was that the respondent was not its employee. And even if he was, at no time was there any contract of employment between them for it to provide and maintain adequate and suitable measures to enable him carry out his work in safety and or to provide a safe and proper system of working. Alternatively, it averred that if the respondent was injured, on the said day or any other day, then such injury was solely caused by his own negligence. Finally, it contended that it would otherwise rely on the doctrine of ***"volenti non fit injuria".***

It appears from the record that the parties agreed before the trial court that the evidence of DW1, **Francis Abong'o in CMCC No. 23 of 2004,** would be adopted as evidence in the case with amendments only as to the court file. This was on 24th April, 2006. I have combed through the entire record of appeal and I have not come across that evidence. It appears that the appellant did not include that evidence in the record of appeal. Accordingly, this court is not in a position to appreciate what that evidence was all about with regard to the respondent's case.

In a rather skimpy superficial and one page judgment, the trial Magistrate held ***"…I have carefully appraised the evidence on record. On a balance of probabilities, I believe the plaintiff was injured. He produced a delivery note in the name of the defendant bearing his name. The contractor was never enjoined as a party. I hold the defendant liable. I will however apportion liability at 80% to 20% in***

favour of the plaintiff. In view of the injury sustained and considering that it healed well, I will assess general damages at Kshs.80,000/- which will work down to Kshs.64,000/-. The plaintiff has exhibited a receipt for Kshs.3,000/- in support of the specials. I will award this sum…"

I do not think that, the judgment as crafted by the learned Magistrate really qualifies for a valid judgment. Ordinarily and in law a judgment should deal with issues raised and should not be scanty. A judgment must comply with the mandatory provisions of order 21 rule 4 of the **Civil Procedure Rules** which provide that a judgment in a defended suit shall contain a concise statement of the case, points for determination, the decision thereon and reasons for such decision. In the circumstances of this case, it cannot be said from the extract of the judgment I have set out above the trial magistrate complied with this mandatory provisions of the law. The trial magistrate by not setting out points for determination and reasons for his decision contrary to the aforesaid provisions of the law abdicated his judicial responsibility. As a judicial officer he was under a duty to state in writing the reasons which made him arrive at a particular decision on liability and the apportionment thereof. It could not have been done in vacuo. Any judgment that does not contain the aforesaid essential ingredients is not a judgment and an appellate court will frown at such a judgment and indeed impugn it as I hereby do. This ground alone would have been sufficient to dispose of the appeal.

What then should the appellate court do in such circumstances? Section 78 of the **Civil Procedure Act** sets out the powers of an appellate court and these are to determine a case finally; or remand the case or frame the issues and refer them for trial; or take additional evidence or require such additional evidence to be taken; or order a new trial. Of course in the circumstances of this case, the order that would have best commended itself to me would have been for an order for retrial. However considering the pleadings, the evidence and the law, such an order will be in futility.

The respondent's case was based on negligence and breach of statutory duty. That as a result of the foregoing, the panga he was using to cut the sugar cane slipped from his hands and cut him. What was it that the appellant was required to do or failed to do so as to prevent the slipping of the panga from the respondent's hands? I cannot think of any. According to the respondent, the panga slipped because it had rained. The appellant had no control over the rain. The respondent held the panga, controlled its swing and knew very well that after the rains, the panga would become slippery and therefore had to be extra careful in handling it so that it could not slip. I do not see how being given gloves and boots would have stopped the panga from slipping. The respondent did not adduce any evidence that in this kind of trade, boots and gloves are ordinarily required. From the manner the alleged accident occurred, I doubt very much whether the gloves and gumboots would have been of any assistance to the respondent. The respondent was just careless and reckless. Further the respondent did not adduce any evidence to show that the appellant was under any obligation to provide gloves and gumboots. He did not say that the appellant had all along provided them with the same save for that day. Section 107(1) of the **Evidence Act** provides interlia ***"…whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist…".*** If the respondent was aware that provision of gumboots and gloves by the appellant was a mandatory requirement, he ought to have proved the same with credible evidence. Again, if he knew that the aforesaid gear was required for his own safety, why did he start on the job without them? No doubt this was a classic case of volenti non fit injuria.

What the respondent was involved in was manual work that did not require specialized training, instructions or close supervision. He was in control of his situation. No amount of training, supervision or instructions would have prevented the panga from slipping from his hands if he handled it carelessly as he seems to have done in this case. He had a duty to take care of himself. If at all he was injured as a result of the panga slipping from his hands, he was the sole author of his own misfortune.

It is trite law that a casual link between one's negligence and a claimant's injuries must be established. This is how **Visram J** (as he then was) delivered himself on the issue ***"…coming now to the more important issue of "causation", it is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a casual 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 a result of someone's negligence. An injury perse is not sufficient to hold someone liable for the same…". And in **Halisbury's Laws of England 3rd Edition Volume 28 at pages 27-28,** the learned authors have stated ***"…liability attaches only to negligence which is either the sole effective cause of an injury or is so connected with it as to be a cause materially contributory thereto. Although a plaintiff may be able to trace even a consequential connection between an injury and the negligence of another, the law does not necessarily attach liability to the person who has been negligent. In other words the plaintiff must prove that the defendant was negligent and that his negligence caused or materially contributed to the accident…".*** I entirely agree with and endorse these sentiments. The respondent in this case did not lead any evidence to show that the appellant was negligent in failing to prevent the slip of the panga from his hands. The learned Magistrate too had no basis upon which he would have arrived at the apportionment of liability as he did. In any event, in holding the appellant 80% liable, the trial magistrate failed to give reasons for his decision. He was expected to subject the evidence tendered to comprehensive and exhaustive analysis before arriving at his decision on apportionment of liability. This he did not do with the consequence that the decision was made in vacuo.

I therefore allow the appeal with costs. I set aside the judgment and decree of the trial court and substitute therefor with order dismissing the respondent's suit with costs. Had I dismissed the appeal, I will not have been minded to interfere with the award of damages as I am persuaded that they were within the accepted range for those kinds of injuries at the time.

Judgment dated, signed and **delivered** at Kisii this 30th day of May, 2011.

ASIKE-MAKHANDIA
JUDGE