No. 2955

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 107 OF 2004

SOUTH NYANZA SUGAR CO. LTD …….....……...……. APPELLANT

-VERSUS-

DANIEL ODEK MATOKA ……..…….....…… RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and Decree of the Principal Magistrate's Court at Migori, Hon. Kariuki Mwaniki in CMCC No. 335 of 2003 dated 17th March, 2004)

This appeal arises from the judgment and decree of **Hon. Kariuki Mwaniki,** Resident Magistrate at Migori dated 7th March, 2004. By the said judgment, the learned magistrate found the appellant liable to the respondent in general damages to the extent of 80% and assessed the same at kshs. 85,000/= less 20% contribution bringing it down to kshs. 68,000/= and kshs. 1,500/= special damages.

The respondent's suit in the subordinate court was premised on the alleged appellant's breach of statutory duty of care towards him. In his evidence in chief during the trial which I cannot decipher as the Record of Appeal and the original record of the trial court is incomplete. Going however by the judgment of the trial court, the respondent appears to have testified that he was an employee of the appellant. Whilst cutting sugar cane belonging to the appellant using a panga, it slipped and cut him on the hand. He was thereafter treated at St. Assal Medical Clinic. He was not given protective clothings like gloves. He was later examined by **Dr. Ajuoga** who prepared a medical report which he tendered. He paid kshs. 1,000/= for the service. He therefore prayed for compensation for the injuries and costs of the suit.

Since the evidence in chief of the respondent is indecipherable, I think it is only prudent that I reproduce in extenso the cross-examination of the respondent. That way, we may perhaps get an inkling of what the respondent may have said in his evidence in chief. He stated thus in cross-examination. ***"… This is my identity card. I have been employed by Sony since 1982. The contractor is an agent of Sony. His name is Abuka Ongalo. My letter of appointment got lost. P. Odhiambo was sacked. I was not working under him. The cane was burnt. It was on 16/2/2000. I was injured on 20/6/2002. 3 years have lapsed since I got injured. The weeds made me cut myself. The weeds did not burn…"***.

The respondent also caused **Dr. S. Aluda** to testify on his behalf. His testimony was that he examined the respondent on 27th June, 2003. He had been injured while on duty. He sustained a cut wound on the left finger. The injuries had healed at the time of examination. He prepared a medical report for which he was paid kshs. 1,500/= by the respondent.

On the other hand, the appellant's case was that the respondent was not its employee nor was he injured whilst in the course of employment with the appellant as claimed on the material day. Alternatively if such incident occurred then the same was solely caused by and or substantially contributed to by the negligence of the respondent. It also averred that the alleged injury which the respondent suffered was one, which ordinarily does not happen if proper care, due attention and regard to oneself is taken. Finally, it averred that the claim was absolutely fake and fraudulent, injuries non-existent and the claim had been made to extort money in the form of compensation from the appellant.

Francis Alungo, a senior harvesting and transport supervisor of the appellant testified that on 20th June, 2002 whilst at the nucleus estate received no report of injury claim from the respondent. Indeed he could not have received such a report as the respondent was not working for them. It was a standard requirement of the appellant that any cane cutter who injures himself had to report to him. He would then be taken to Sony medical centre for treatment. An accident report is then filed within 12 hours. There was no such accident nor report. He thus prayed for the suit to be dismissed.

The learned magistrate having considered the evidence adduced by both the appellant and respondent, found for the appellant holding that: ***"…Having considered the evidence herein, I find the plaintiff has been able to establish his case on a balance of probability. However to some extent he was negligent. I place contributory negligence at 20%. Having regard extent (sic) of injury and submissions filled herein. I enter judgment as follows:-***

a. General damages kshs. 85,000 less 20% = kshs. 68,000/-
b. Special damages kshs. 1,500/-
c. Cost of this suit…".

That holding triggered this appeal. Eight grounds of appeal were advanced to with:-

"1. The learned trial magistrate erred in both law and in fact in failing to dismiss the respondent's claim against the appellant with costs.

2. The learned trial magistrate erred in both law and in fact 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 in fact 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 in fact in holding that the appellant is liable to the extent of 80% contribution to the self-inflicted injuries which the respondent suffered.

5. The learned trial magistrate erred in both law and in fact in awarding the sum of kshs. 68,000/= 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 in fact 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 in fact in finding for the respondent while in fact no fault lies against the appellant in the circumstances of this case.

8. The learned trial magistrate erred in both law and in fact in awarding costs of the suit to the respondent…".

When the appeal came before me on 29th July, 2011 for directions, it was agreed amongst other directions that the appeal be canvassed by way of written submissions. As it turned out, only the appellant filed its written submissions. I have carefully read and considered them alongside cited authorities.

From the pleadings, if the respondent had to succeed in his claim, he was duty bound to prove that he was an employee of the appellant, that he was injured in the course of such employment and the accident and the injuries ensuing therefrom were as a result of breach of statutory duties owed to him by the appellant.

In my judgment, the respondent failed miserably to prove that he was an employee of the appellant as a cane cutter. No documentary evidence or otherwise was produced to prove such employment since the appellant had denied the same in its defence. The respondent too did not even call any of his co-workers to buttress his claim to employment. Ordinarily such an accident would have attracted a claim under the then **Workmen's Compensation Act**. If indeed the respondent's claim was genuine, how come he never lodged such a claim under the said **Act** with the appellant?

In abid to prove that he was indeed an employee of the appellant, the respondent tendered in evidence a delivery note issued by the appellant. As I have had occasion to state in the past, a delivery note perse is not evidence of employment. That delivery note is in respect of cane delivered from a particular cane farmer to the factory. It is a document which is for the benefit of the farmer and the appellant. It has nothing to do with whether or not the respondent was an employee of the appellant. It does not say that the cane cutter is an employee of the appellant. In any case, even in his own evidence under cross-examination, the respondent seems to suggest that he was infact an employee of an independent contractor to the appellant one, **Abuka Ongalo**. If that be the case, and it is likely, then the best person to whom the respondent should have addressed his claim, if at all it was genuine, should have been the independent contractor and not the appellant. The respondent having failed to establish his employee status with the appellant, the contractual and statutory duty of care owed to the respondent and pleaded in the plaint was not proved. The respondent did not therefore discharge the burden of proof bestowed upon him by section 107(1) of the **Evidence Act** especially where as the appellant as here, denied in its defence the existence of such relationship.

On liability the respondent pleaded and testified in evidence that he cut his left hand with a panga while harvesting sugarcane. It is common ground that the respondent was the one in control of the panga and he owed himself duty of care. Indeed, the respondent testified upon cross-examination that the weeds caused him to cut himself and that they had not been burnt. The question that arises then is, what was it that the appellant was required to do that it did not and which culminated in the alleged accident. The respondent did not testify to that fact. All that he said was that ***"…I was not given clothings like gloves***…". I do not see how clothings like gloves would have prevented the respondent from cutting himself with the panga. Could the protective clothings like gloves have controlled the way he swung or handled the panga? I do not think so?

In the case of **South Nyanza Sugar Company Limited –vs- Wilson Ongumo Nyakweba Kisii HCCA No. 77 of 2004**, **Musinga J.** observed thus: …..**In Statpack Industries Limited –vs- James Mbithi Munyao Nairobi HCCA No. 152 of 2003** (unreported) it was held as follows:-

"…It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove 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 as a result of someone's negligence. An injury perse is not sufficient to hold someone liable…".

In **Winfield and Jolcwicz** on Tort, 13th Edition page 203, the learned authors dealing with the employers duty towards an employee observed:-

"…At common law the employer's duty is a duty of care and it follows that the burden of proving negligence vests with the plaintiff workman throughout 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 aspects it was not observed. It is true that 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…".

From these authorities, what emerges is that the respondent was bound to establish the acts or omissions of the appellant that resulted in the accident, if at all. There must be a breach of duty of care. The respondent allegedly injured himself while cutting cane with a panga. It is instructive to note that the respondent had exclusive control of the panga. There was no way the appellant could have come between him and the panga. No amount of negligence can be attributed to the appellant in this case and in the circumstances. No evidence was adduced of any contractual obligation on the part of the appellant to provide the protective gear such as gloves as claimed by the respondent neither was there proof of duty to provide the same. There was no evidence that the respondent or any other cane cutter had ever been supplied with the gloves nor that he demanded for the same and was denied before he commenced cutting the cane. It was thus not established that the acts or omissions complained of the appellant created the situation resulting in the injury of the respondent. Furthermore, no evidence at all was led to show that in this type of work, there was necessity of providing protective devices like gloves, that the same were provided as a matter of course in similar work elsewhere. There was no hidden inherent danger in the operation of cutting cane of which the appellant ought to have warned the respondent of. To ensure that the respondent did not cut himself with a panga was a matter peculiarly within his sole and exclusive control. In any event, no explanation at all was given by the respondent as to how he came to cut himself.

The result of the foregoing is that I find the appeal merited. Accordingly it is allowed. The judgment and decree of the learned magistrate is set aside. In substitution thereof I order that the respondent's suit be dismissed with costs. The appellant shall have the costs of this appeal.

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

ASIKE-MAKHANDIA
JUDGE