REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
OF KISII

Civil Appeal 325 of 2005

(Being an appeal from the judgment and decision of the lower court, Mr. Chepseba, SRM, dated 2/11/2005 in the original Kilgoris SRMCC No. 56 of 2004)

SOUTH NYANZA SUGAR CO. LTD. …… APPELLANT

VERSUS

CALEB ONYAMBU ……. RESPONDENT

JUDGMENT

The respondent stated in his plaint that on/or about 20th day of March 2000 he was lawfully engaged in the course of his employment with the appellant. While harvesting sugarcane using a panga the same slipped and cut him on his left leg as a result of which he sustained injuries. He alleged that the said accident was caused by the appellant's breach of statutory duty and negligence. He claimed general and special damages.

The appellant filed a statement of defence and denied that the respondent was ever its employee. The appellant also denied any knowledge of the alleged accident. The appellant further denied that the alleged accident was caused by its breach of statutory duty or negligence.

During the hearing the respondent testified that the panga he was using to cut the sugarcane with slipped out of his hands because its handle was defective. The nature of the defect was not stated. He further alleged that he had not been provided with gloves and gumboots.

In cross-examination, the respondent testified that he had been employed as a casual worker by a person known as **Omayio** but he was being paid by the appellant.

The appellant testified through **Mwangi Francis Abongo (DW1)**, a Senior Harvesting and Transport Supervisor. DW1 told the trial court that the appellant had engaged an independent contractor for purposes of harvesting its sugarcane. The independent contractor engages his own casual employees. It is the responsibility of the independent contractor to supply all the necessary equipment to his workers. The appellant does not supply gumboots and gloves as

it does not directly concern itself with the work of sugarcane harvesting. He added that if the respondent had any claim the same ought to have been directed against the independent contractor and not the appellant.

MARCARIOUS BABU OMAIYO, DW2, said that in 1998 he was engaged by the appellant as an independent contractor to harvest the appellant's sugarcane. It was his responsibility to recruit cane cutters. The contract provided that the appellant would not be responsible for any injury occasioned to his employees. He added that the cane cutters are paid by the farmers from the proceeds of their sugarcane.

DW2 denied that on the material day the respondent was in his employment.

The learned trial magistrate held that the respondent was an employee of the appellant and that on the material day he was in the appellant's employment when the said accident occurred. He further held that the accident occurred because the respondent had not been provided with any protective gear and proceeded to award him general damages in the sum of Kshs. 60,000/= plus special damages of Kshs.3,500/= on account of a medical report.

Being aggrieved by the said judgment, the appellant preferred this appeal.

Mr. Otieno for the appellant submitted, ***inter alia,*** that the respondent did not prove that he was an employee of the appellant. The appellant had adduced sufficient evidence to the effect that it had contracted DW2 as an independent contractor for provision of casual labourers who would be engaged in sugarcane harvesting.

Counsel further submitted that even if the respondent had been an employee of the appellant, he had not sufficiently proved that the alleged accident was occasioned by negligence on the part of the appellant. Furthermore, if the respondent's suit was based on negligence, it ought to have been filed within three years from the date of the alleged accident which was on 20th March, 2000 but the suit was filed on 9th November 2004. It was therefore time barred.

In response, Mr. Ogweno for the respondent submitted that the agreement that was produced by DW2 did not have the common seal of the appellant and was therefore not valid. In any event DW2 was not a party to the said agreement.

Counsel further submitted that the appellant had not filed the decree appealed against and as such the appeal is a nullity. He urged the court to dismiss the appeal with costs.

In reply, Mr. Otieno submitted that the agreement that was referred to by DW2 was produced by consent.

With regard to the issue of absence of a decree, Mr. Otieno submitted that the appeal had been admitted to hearing way back on 28th November 2006. When the appeal came up for directions the issue of decree was not raised by the respondent's counsel. He further submitted that for purposes of an appeal a decree includes a judgment as stated under **section 2** of the **Civil Procedure Act**. He added that no prejudice had been occasioned to the respondent by failure to file a formal decree and since the appeal had been argued on its merits, the court should render a judgment on the merits of the same.

I will begin by disposing of the issue of the decree. **Order XLI rule 1A** requires the appellant to file a certified copy of the decree or order appealed against together with the memorandum of appeal. Where the decree is not so filed the same should be done as soon as possible. Without the certified copy of the decree a court cannot consider whether to reject the appeal summarily under **section 79 B** of the **Act** or to admit the same. **Rule 8A** of **order XLI** states that after the refusal of a judge to reject the appeal under **section 79B** of the **Act**, the Registrar shall notify the appellant who shall serve the memorandum of appeal. Thereafter the appeal is set down for directions before a judge in chambers. It is important to note that under **Rule 8 B** before allowing the appeal to go to hearing, the judge should be certified that the following documents are on the court record:

(a) the memorandum of appeal.

(b) the pleadings.

(c) the notes of the trial magistrate.

(d) the transcript of any official shorthand or notes made at the hearing.
(e) all affidavits, maps and other documents whatsoeverput in evidence before the magistrate.
(f)the judgment, order or decree appealed from and where appropriate, the order (if any) giving leave to appeal.

It is unfortunate that the appeal was admitted to hearing when the provisions of **order XLI rule 1A** had not been complied with. When the appeal came up for directions before Muchelule, J. on 5th October 2009, Mr. Odhiambo for the appellant and Mr. Nyangosi for the respondent agreed by consent that the record of appeal was proper and that the appeal ought to proceed to hearing before a single judge. I therefore presume that counsel for the parties agreed by consent that the appeal be heard notwithstanding the fact that the certified copy of the decree appealed against had not been filed by the appellant. In the circumstances, it will be prejudicial to the appellant if this court were to disregard the consent that was recorded on 6th October 2009 and hold that the appeal is incompetent for lack of a certified copy of the decree appealed against. Ordinarily, that document ought to have been filed before the appeal was admitted to hearing and the learned judge should also have ascertained that it was on record when directions were taken. For these reason I will not strike out the appeal for want of a certified copy of the decree.

Turning to the merits of the appeal, the respondent was duty bound to prove that he was an employee of the appellant. The appellant specifically denied that the respondent was in its employment. In cross examination, the respondent admitted that he had no contract of employment with the appellant. He further admitted that he had been employed by DW2 who was an independent contractor engaged by the appellant.

DW1 testified that the appellant did not involve itself in the task of harvesting its sugarcane. It always engaged private contractors. That evidence was not challenged. In **OCHIENG –VS- AMALGAMATED SAW MILLS LTD.** [2005] 1 KLR 151, it was held that an independent contractor is not an employee of a company and to determine whether one is an independent contractor or not, the extent of control of the work that is being done ought to be considered. Where a person who is engaged by an independent contractor suffers an injury in the course of his duty,

he cannot sue the principal who engaged the independent contractor. His right of action, if at all, is as against the independent contractor.

There was no privity of contract between the appellant and the respondent. The learned trial magistrate clearly misdirected himself in holding that the respondent was an employee of the appellant.

But even if the respondent was an employee of the appellant, he did not prove that the alleged accident was occasioned by breach of any statutory duty or negligence on the part of the appellant. The respondent was cutting sugarcane using a panga which he was in full control of. Although he alleged that the handle of the panga was defective, he did not substantiate how the alleged defect, if at all, caused the panga to slip out of his own hand.

All in all, I am satisfied that the learned trial magistrate erred in law and in fact in finding for the respondent. This appeal must therefore succeed. The trial court's judgment is set aside and substituted therefor with an order dismissing the respondent's suit before the subordinate court. The respondent shall bear the costs of the suit in the subordinate court as well as of this appeal.

By consent of counsel for the parties, this judgment shall apply to the following appeals that are pending before this court:

HCCA NOS. 59 OF 2005, 331 OF 2005, 337 OF 2005, 338 OF 2005 and **339 OF 2005.** It is so ordered.

DATED, SIGNED AND DELIVERED AT KISII THIS 15TH DAY OF APRIL, 2010.

D. MUSINGA

JUDGE.

Mr. Ogweno: I pray for certified copies of the proceedings and judgment for purposes of appeal. I shall pay for the same.

D. MUSINGA
JUDGE.