



No 114

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 152 OF 2006

SOUTH NYANZA SUGAR CO. LTD APPELLANT

-VERSUS-

JARED BISERA OSITU RESPONDENT

JUDGMENT

(Being appeal from the judgment and decree of W. M Kaberia, SRM at Kilgoris SRMCCC.No. 10 of 2003)

The respondent was the plaintiff in the Senior Resident Magistrate's Court at Kilgoris in Civil Case no. 10 of 2003. In his plaint dated 20th January 2003 and filed in court on 22nd January 2003 through **Messrs Khan & Katiku advocates** he averred that at all material times he had been employed by the appellant as a cane cutter. He alleged that on 30th August 1999 whilst in such employment he was carrying harvested sugarcane to arrange in the stakes when he slid and fell down and as a result of which he sustained injuries. He claimed that the said incident occurred due to breach of statutory duty and common law negligence on the part of the appellant towards him. Particulars of breach of statutory duty pleaded were that the appellant:-

“ (a) Failed to make or to keep safe the plaintiff's place of work.

(b) Failed to provide or maintain safe means of access to the plaintiff's place of work.

(c) Employed the plaintiff without instructing him as to the dangers likely to arise in connection with his work or without providing (sic) with any or any sufficient training in work or providing any or any adequate supervision.

(d) In the premises failing to provide a safe system of work.”

What were the particulars of common law negligence attributed to the appellant by the respondent? They

were as follows:-

“(a) Failing to take any or any adequate precautions for the safety of the plaintiff while he was engaged upon the said work.

(b) Exposing the plaintiff to a risk of damage or injury of which they knew or ought to have known.

(c) Failing to provide or maintain adequate or suitable plant, tackle or appliances to enable the said work to be carried out safely.

(d) Providing unsafe plant and equipment for the plaintiff to use

(e) Failing to provide the plaintiff with suitable gloves or other adequate equipment to enable his (sic) to carry out the said work safely.”

The respondent therefore claimed general and special damages for the pain, loss and damage that he suffered as a result

The appellant filed a statement of defence through **Messrs Okongo & Co. Advocates** and denied that it had ever employed the respondent as a cane cutter. The appellant further denied that the incident as alleged by the respondent ever occurred. Consequently, it denied the alleged breach of statutory duty and common law negligence attributed to it by the respondent and the particulars thereof set out in the plaint. Further and without prejudice to the foregoing, the appellant averred that if at all an accident occurred as alleged then the same was solely caused by and or substantially contributed to by the respondent's own negligence and carelessness. It further pleaded that the alleged injury which the respondent suffered is one which ordinarily does not happen if proper care, attention and regard to one self is taken. Finally it pleaded that the action which allegedly caused the accident and inflicted the said injuries was in the exclusive and actual control of the respondent. The appellant therefore pleaded doctrine of **res Ipsa Loquitor**. The particulars of negligence attributed to the respondent were that:

- **Attempting to arrange cane without first ascertaining that he was standing on and supported by a firm ground.**
- **Attempting to arrange cane without due care and attention.**
- **Failing to pay due care, regard and attention to his safety.**

The respondent never filed a reply to the defence.

In evidence before **Mr. Chepseba**, Senior Resident Magistrate the respondent testified that on 30th May, 1999 he was cutting sugar cane at sector 4 when he slipped and fell as he was arranging a stake of sugarcane. As a result he was injured. He blamed the accident on the appellant as it had failed to provide him with gumboots or gloves. As evidence that he used to work for the appellant he tendered a delivery note. After the accident he was treated at nearby hospital. Later he consulted **Dr. Ogando** who examined him and prepared a medical report for which he paid Kshs. 3500/=. Under cross-examination he stated that he had been employed on contract by one, **Omaiyo** on or 30th august, 1999. It was not his first time to cut cane. Where he was staking the cane was watery and steep. He was working bare feet. He conceded that when it rains people stop working. However he did not stop working on that day. He did not know that one could fall if it was wet. He denied ever entering into a written agreement with **Mr. Omaiyo** on the terms of his work. The terms of employment were not fixed. He had been given the delivery note by **Mr. Omaiyo** before he got injured though it is supposed to be given after completion of work.

The next witness called for the respondent was **Dr. Ezekiel Ogando Zoga**. He examined the respondent and prepared a medical form for which was paid Kshs. 3000/=. It was his opinion that the respondent sustained a cut on the back which had healed well with a permanent scar though. That then marked the close of the respondents case. The hearing of the case was subsequently taken over by **Mr. W.**

M Kaberia RM, in unclear circumstances. For the defence, it would appear that parties agreed that the testimonies of **Leonard Oganga Bwana** and **Francis Abongo** in **Kilgoris SRM CCC No.51 2003** would be adopted in this case. It is therefore mischievous on the part of counsel for the respondent to plead ignorance as to what happened after the respondent closed his case. It is instructive that the firm that represented the respondent in the lower court is the same firm in this appeal. It must have been party to that arrangement. In any event it was open to it to object to the record of appeal being certified as being in order at the time the directions were given. It did not and it can only be on the basis that it was aware of the adoption of the said evidence. To dismiss the appeal on the above ground advanced by the respondent would be tantamount to allowing the respondent to benefit from his own mischief.

Francis Abongo testified that cane cutters were employees of an independent contractor and had no relationships with the appellant. **Leonard Oganga Bwana** was a field assistant with the appellant. He stated that cane cutters were casual workers who were engaged by an independent contractor and he only supervised them and prepared delivery notes.

The trial magistrate was satisfied that on the evidence on record the respondent had established his case to the required standard of proof. He however apportioned liability at 60/40% in favour of the respondent. He then awarded the respondent general damages in the sum of Kshs. 75,000/= and special damages of Kshs 3,500/= for a medical report despite the fact that **Dr. Ogando** testified that he charged and was paid only Kshs. 3,000/=.

The appellant was aggrieved by the said judgment and preferred an appeal to this court. Six grounds were set down in the memorandum of appeal dated 13th June, 2006 and filed in court on the same date. Those grounds were that:-

“1. The learned trial magistrate erred in both law and in fact in holding that the appellant owed both contractual and statutory duty of care to the respondent when in fact there was no evidence led in that regard.

2. The learned trial magistrate erred in both law and in fact in not holding that the respondent had failed to prove any contractual, or employment relationship with the Appellant.

3. The learned trial magistrate erred in both law and in fact in failing to hold that it was the Respondent’s responsibility to ensure that he did not cut himself with the panga, and that by his own negligence the respondent was the author of his own misfortune.

4. The learned trial magistrate erred in both law and in fact in failing to find that the respondent having injured himself, could thus not blame the Appellant.

5. The learned trial magistrate erred in law and in fact in failing to dismiss the respondent’s suit with costs.

6. The learned trial magistrate erred in both law and in fact in awarding to the respondent general damages in the excessive, unrealistic and exorbitant sum of Kshs. 70,000/= (sic) for basically soft tissues, self inflicted injuries which the respondent allegedly suffered.”

When the appeal came up for hearing before me on 2nd June 2010, the appellant was represented by **Mr. Odhiambo** whereas the respondent was represented by **Mr. Ogwen**, both learned counsel. They agreed to canvass the appeal by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them together with the several authorities cited.

The jurisdiction of the first appellate court, in an appeal was succinctly stated by the Court of Appeal in the case of **Peters Vs Sunday Post Limited (1958) E.A 412**. It was in terms that an appellate court has jurisdiction to review the evidence that was adduced before the trial court to determine whether the conclusions reached by the trial court can stand. If there is no evidence to support a particular conclusion or if it is shown that the trial court had failed to appreciate the weight or bearing of circumstances

admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to interfere with the decision.

In this appeal, the respondent testified that he was in the employment of the appellant. Since his claim was premised on employer/employee relationship, it was up to him to bring forth irrefutable evidence to buttress that assertion. Such evidence was in my view not tendered. The learned magistrate would appear to have shifted the burden of proof of that fact to the appellant. In his judgment he states that ***“although Mr. Bwana (DW1) and Mr. Abongo (DW2) claim that the plaintiff was an employee of an independent contractor, no material was placed before court to prove this. On the contrary, the evidence of Mr. Bwana shows that he supervises the cane cutters and he is the one who actually fills the delivery notes*”**. It is a Cardinal Principle of law of evidence that he who asserts must prove. It was up to the respondent to prove that he was an employee of the appellant. It was not obligatory for the appellant to discount such employment by evidence of whatever nature. The respondent tendered a delivery note handed to him by **Mr. Omaiyo** as evidence of employment by the appellant. A delivery note as I understand it, does not prove employment. In any event that delivery note was not given to him by the appellant and or its employee, but by one, **Mr. Omaiyo**. There is no evidence that the said **Omaiyo** was an employee of the appellant. If anything it would appear that he was in fact an independent contractor contracted by the appellant to hire on casual basis cane cutters.

The learned magistrate seem to have placed a lot of premium on the fact that DW1 used to supervise the cane cutters as evidence that those cane cutters must have been employed by the appellant. Nothing can be further from the truth. It is a matter of common notoriety that the appellant enters into contract with farmers for them to grow and sell mature sugar cane to it. It then provides the necessary farm inputs. When it comes to harvesting, it must have its man on the ground to ensure that the cane is properly cut and to secure its interest. Thus the presence of DW1 at the site must be seen in that light. It cannot therefore be said that by the mere fact that DW1 supervised the respondent and filled the delivery note, that confirmed that the respondent was an employee of the appellant. In any event that delivery note is for the benefit of the farm from which the cane has been cut.

There is evidence that one, **Omaiyo** who was an independent contractor to the appellant used to hire cane cutters. Indeed it does appear that the respondent was hired as such by the said **Mr. Omaiyo** although the terms of employment were not agreed. Now if the respondent had been hired by an independent contractor, how is the appellant liable? The respondent did not even join the said **Omaiyo** in the suit though aware of his relationship with him. Had he done so, then perhaps the appellant’s liability by way of vicarious liability would have attached.

The upshot of the foregoing is that the respondent did not prove that he was an employee of the appellant. Therefore the appellant did not owe him duty of care, statutory or otherwise. Nor was it negligent at common law towards him.

Even if it had been proved that the respondent was indeed an employee of the appellant, it is difficult to fathom how the appellant could be held liable for the accident. In his evidence he testified that he slipped and fell as he was staking the cane. That the ground was wet and slippery and they were required to stop work when it rained. He opted not to abide by the instructions and in the processes he injured himself. How then should the appellant be held to account for self inflicted injury by the respondent. The respondent also testified that if he had been issued with gumboots, the accident could well have been avoided. According to the respondent, had he been wearing the gumboots, they would have resisted the slip. However, from the manner the alleged accident occurred I doubt very much whether the gumboots would have been of any assistance. He slipped as he came across a steep slope. Further the respondent did not adduce any evidence to show that the appellant was under any obligation to provide the said gumboots. He did not say that the appellant had all along provided gumboots to him or other employees save for that day. Section 107(1) of the evidence act provides interalia:

“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 was a mandatory requirement, he ought to have proved the same with credible evidence. He did not do so.

What the respondent was involved in was manual work that did not require specialized training or instructions or close supervision. He was in control of his situation. No amount of training, supervision or instructions would have prevented him from slipping and falling. He had a duty to take care of his own safety. If at all he was injured as a result of the fall he was the author of his own misfortune.

At paragraph 10, 11, 12 & 13 of the defence, the appellant had pleaded negligence contributory or otherwise on the part of the respondent and gave particulars thereof. It also pleaded that the respondent's claim was fraudulent. Those averments met with no reply nor joinder from the respondent. In terms of order VI rule a(1) of the **Civil Procedure rules**, a party who fails to traverse matters of fact pleaded, is deemed to have admitted the same. The respondent did not traverse the negligence attributed to him. He must therefore be taken to have admitted the same. In the premises no liability should have attached on the appellant. See also **Mount Elgon Hardware V United Millers KSM C.A No. 19 of 1996 (UR)**. In the premises, the learned magistrate erred in apportioning liability as aforesaid.

Finally and according to the plaint the accident occurred on 30th August, 1999. However the claim was lodged in court on 22nd January 2003. This was way above the threshold of 3 years being a tortious claim much as the claim to is based on breach of alleged statutory duty and or contract. The suit as it were was thus time barred and ought not to have been entertained by court.

I therefore allow this appeal with costs and set aside the judgment that was entered by the trial court and substitute therefore with an order of dismissal of the respondent's suit before the subordinate court with costs. Had I dismissed the appeal I would not have been minded to interfere with the award of damages as I am convinced that it was within the range for those kind of injuries those days.

Judgment dated, signed and delivered at Kisii on this 30th June 2010.

ASIKE-MAKHANDIA

JUDGE