REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO 151 OF 2006
SOUTH NYANZA SUGAR CO. LTD ….....
…….. APPELLANT
-VERSUS-
JOHN OKETCH KERONGOSI …….....
……... RESPONDENT
(Appeal from the judgment and decree of Mr. Wilson Kiberia Esq., The Senior Resident Magistrate, Kilgoris on the 23rd May, 2006 in Kilgoris SRM CCC.No. 12 of 2003)

JUDGMENT

The respondent was the plaintiff in the Senior Resident Magistrate's court at Kilgoris in Civil Case Number 12 of 2003. In his plaint dated 20th January 2003 and filed in court on 22nd January, 2003 through **Messrs Khan & Katiki Advocates** he averred that at all material times he had been employed by the appellant as a casual worker. He alleged that on 9th February, 2000 whilst in such employment chopping sugar cane, a Panga he was using cut his left hand as a result of which he sustained injuries and as a consequence he suffered pain, loss and damage. He alleged that the said incident occurred due to breach of statutory duty and or common law negligence on the part of the appellant towards him. Particulars of breach of statutory duty pleaded against the appellant were:-

"a. Failing to make or to keep safe the plaintiff's place of work.
b. Failing to provide or maintain safe means of access to the plaintiff's place of work.
c. Employing the plaintiff without instructing him to the dangers likely to arise in connection with his work or without providing (sic) with any or any sufficient training in work or without providing any or any adequate supervision.
d. In the premises failing to provide 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, suffering and loss of amenities.

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 as well as 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 in the alternative averred that if at all the respondent was injured as claimed, then he was the author of his own misfortune and that he was utterly negligent in the manner he handled his tools of work. The particulars of negligence attributed to the respondent by the appellant were:

"a) He cut himself on his left leg instead of cutting sugarcane for which he had been employed.
a) Failed to pay due care (sic) attention to his work.

b) Failed to properly hold and use the panga which essentially was his only tool of work."
The respondent never filed a reply to the defence.

In his evidence before **Mr. Chepseba,** SRM the respondent testified that on 9th February, 2000 he was cutting sugar cane when in the process he cut himself on the hand. The panga handle was defective. He had not been provided with gloves by one, **Omaiyo**, the supervisor. He had requested for the same but was told that none were available. However, he proceeded with the work. He blamed the accident on the appellant as it had failed to provide him with gloves. The gloves would have prevented the accident. As evidence that he used to work for the appellant he tendered a delivery note. After the accident he reported to **Omaiyo**, who refused to assist him whereupon he proceeded to Embakasi clinic where he was treated and discharged. 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 could not remember when he was employed. He knew how to cut cane though not trained. That he knew the panga was defective. Nonetheless he elected to use the same without being forced. He had been given the panga by **Omaiyo** and he was in control of the same. He conceded as well that he was under duty to take care of himself. He also conceded the discrepancy between the treatment notes and the medical report as to where he had been injured. He also conceded not having filled workmen compensation forms.

Thereafter the respondent summoned **Dr. Ezekiel Ogando Zoga** as a witness. However, at this point in time the case had been taken over by **Mr. W. M Kaberia RM** in circumstances which are unclear from the record. **Dr. Zoga** testified that he had examined the respondent on 12th November, 2002 who had sustained a cut wound on the left hand. His prognosis was that the respondent sustained a deep cut wound on the left hand that had healed with some slight flexion deformity. He tendered the medical report in evidence.

For the defence, it would appear that parties agreed that the testimonies of one, **Leonard Oganga Bwana** and one, **Francis Abongo** in **Kilgoris SRMCCC No. 51 of 2003** should be adopted in this case. It is therefore mischievous on the part of counsel for the respondent to feign ignorance as to what happened after their client had 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 therefore have been party to that arrangement. In any event it was open to the respondent to object to the record of the appeal being certified to be 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 will 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 relationship 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 on behalf of the appellant.

The trial magistrate was satisfied on the evidence on record that the respondent had established his case to the required standard against the appellant. He however apportioned liability at 50%/50% against both parties. He then awarded the respondent general damages of Kshs. 75,000/= and special damages of Kshs. 3,500/=.

The appellant was aggrieved by the said judgment and preferred this appeal. Six grounds were set down in the memorandum of appeal dated 13th June, 2006 and filed in court on the same date. Those grounds are 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 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. 75,000/= for basically soft tissue, self inflicted injuries which the respondent allegedly suffered."

When the appeal came up for hearing before me on 28th June, 2010, the appellant was represented by **Mr. Odhiambo** whereas the respondent was represented by **Ogweno**, 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 a first appellate court in an appeal was succinctly enunciated 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 fourth irrefutable evidence to buttress that assertion. Such evidence was in my view not tendered and was infact totally lacking. In deed the respondent himself could not even tell when he was employed by the appellant. 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 up to the appellant to discount such employment by evidence of whatever nature. The respondent tendered a delivery note 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. Apart from the foregoing he had nothing to show that he was employed by the appellant. It appears that he was hired to do the work by one, **Mr. Omaiyo**. However, there is no evidence that the said **Omaiyo** was an employee of the appellant. If anything it would appear that he was infact an independent contractor, contracted by the appellant to hire ***albeit*** 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 contracts with farmers from time to time for them to grow and sell mature 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 mere fact that the DW1 supervised the respondent and filled the delivery note, that confirmed that the respondent was an employee of the appellant.

There is evidence that one, **Omaiyo** who was an independent contractor used to hire cane cutters. Indeed it does appear that the respondent was hired as such by **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 bother to enjoin 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 come into play or focus.

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

understand or fathom how the appellant could be held liable for the accident. In his evidence he testified that the panga slipped and cut him. The respondent had the control of the said panga. The same had been given to him by **Omaiyo** and not the appellant. He knew it was defective but nonetheless proceeded to work with it without being forced to. He had a choice to refuse to work with a defective panga. Why then should the appellant be held to account for self inflicted injury by the respondent. The respondent also testified that had he been issued with gloves the accident could well have been avoided. According to the respondent, he agreed to start work without them. He knew that they were not available. In any event even if he had been wearing the gloves could they have prevented the accident? I do not think so. From the manner the alleged accident occurred, I doubt whether the gumboots or gloves could have been of any assistance. He did not say that the appellant had all along provided the said gloves to him or other employees save for that day. Section 107 (1) of the evidence act provides intelia:- ***"…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 respondent was aware that provision of gloves was 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 instructions or close supervision. The respondent himself concedes that much. He was in control of the situation. No amount of training supervision or instructions could have prevented him from the accident, in my view. He had a duty to take care of his own safety if at all he was injured. He was thus the author of his misfortune.

At paragraph 9, 10, 11, 12 and 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 9 (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 **Mount Elgon Hardware Ltd VS United Millers Kisumu C.A No. 19 of 1996 (UR).** The learned magistrate therefore erred when he purported to apportion liability at 50% each between the appellant and respondent. There was no basis legal or otherwise for that finding.

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 otherwise dismissed the appeal, I would not have interfered with the damages award as they were reasonable and within awards for soft tissues injuries at the time.

Judgment dated, signed and **delivered** in Kisii this 30th June 2010.

ASIKE-MAKHANDIA

JUDGE