



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**OF KISII**

**Civil Appeal 329 of 2005**

**SOUTH NYANZA SUGAR CO. LTD. ....APPELLANT**

**VERSUS**

**ATHENUS OKETCH NDURURU.....RESPONDENT**

**JUDGMENT**

The respondent was the plaintiff before the trial court. He stated in his plaint that on or about the 7<sup>th</sup> day of February, 2000, he was lawfully engaged in the course of his employment with the appellant as a sugarcane cutter when a panga he was using slipped out of his hand and cut him on his right leg. He sustained injuries as a result. He further 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.

In his evidence before the trial court, the appellant stated that on the material day he was cutting sugarcane using a sharp panga. The handle of the panga was loose. The panga slipped out of his hand and cut him on his right leg. He further stated that he had not been given gum boots, overalls and gloves. In his view, the panga would not have cut him if he was wearing gum boots at the material time. He alleged that his supervisor was one Mr. Omaiyo. He said that the said Omaiyo is a sub contractor of the appellant.

In cross-examination, the respondent said that he had no formal contract of employment with the appellant. He further stated that the defective panga was given to him by Mr. Omaiyo.

The appellant's witnesses did not testify in that case but it was agreed that the evidence of its two witnesses who had testified in **Kilgoris SRMCC No. 56 of 2004** as **DW1** and **DW2** be applied in this other case. The judgment in that

case gave rise to **Civil Appeal No. 325 of 2005, SOUTH NYANZA SUGAR COMPANY LIMITED –VS- CALEB ONYAMBU** which has already been heard and determined by this court.

**DW1, Mwangi Francis Abongo**, a Senior Harvesting and Transport Supervisor, testified that the appellant had engaged **Marcarious Babu Omaiyo, DW2**, as an independent contractor for purposes of harvesting its sugarcane. DW2 would then engage his own casual employees to undertake the appellant's work. It was the responsibility of DW2 to supply all the necessary equipment to his workers. There was no privity of contract between the appellant and the sugarcane harvesters as they were employees of DW2.

The evidence of DW1 was fully corroborated by that of DW2.

The learned trial magistrate held that the appellant did not produce any document to prove that DW2 was an independent contractor. He found in favour of the respondent and awarded him general damages in the sum of Kshs. 50,000/= plus special damages of Kshs. 3,500/= on account of a medical report.

Being aggrieved by the said judgment, the appellant preferred this appeal. It was contended, *inter alia*, that the learned trial magistrate erred in law and fact in failing to find that the respondent was not its employee. It was further stated that the learned trial magistrate erred in law in holding that the respondent had proved that the alleged accident occurred due to the appellant's negligence and/or breach of statutory duty.

During the hearing of the appeal, it was agreed by consent that the appeal be disposed of by way of written submissions that had been filed by parties. I have carefully perused the submissions.

Mr. Ogwenyo for the respondent urged the court to find that this appeal is incompetent because no certified copy of the decree appealed against had been filed together with the memorandum of appeal. No submissions were made regarding the issue as to whether the appellant was the respondent's employer or otherwise.

On the other hand, the appellant submitted that the respondent did not prove that at the time of the alleged accident he was in the appellant's employment. Further, the respondent did not prove any negligence and/or breach of statutory duty as against the appellant.

All the above issues were canvassed in considerable details in Civil Appeal No. 325 of 2005 (supra) where the facts were similar to those obtaining in this one. The advocates for the parties in the two appeals are also the same. In that appeal this court held, *inter alia*:

- **For purposes of an appeal a decree includes a judgment as stated under section 2 of the Civil Procedure Act.**
- **The appeal had been admitted notwithstanding that the provisions of order XLI rule 1A had not been complied with.**
- **During directions the issue of the certified copy of the decree was not raised.**
- **That counsel for the parties had agreed that the appeal proceeds to hearing.**
- **It would be prejudicial to the appellant to disregard the above directions and strike out the appeal for**

**lack of a certified copy of the decree appealed against.**

The holding in the aforesaid appeal as regards the competence of this appeal applies herein.

The court further held that there was no privity of contract between the appellant and the respondent. The learned trial magistrate misdirected himself in holding that the respondent was an employee of the appellant in total disregard of the evidence adduced by DW1 and DW2. See **OCHIENG –VS- AMALGAMATED SAW MILLS LIMITED** [2005] 1 KLR 151.

That finding applies with equal force in this appeal. Consequently, I allow this appeal and set aside the trial court's judgment and substitute therefor 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 the costs of this appeal.

**DATED, SIGNED AND DELIVERED AT KISII THIS 17<sup>TH</sup> DAY OF JUNE, 2010.**

**D. MUSINGA  
JUDGE.**

**Mr. Ogwen:** I pray for typed proceedings and judgment.

**COURT:** Typed proceedings and judgment to issue upon payment of the same.

**D. MUSINGA  
JUDGE.**