REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO.55 OF 2005

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

THOMAS OMWANDO…….....……RESPONDENT

JUDGMENT

(Being an appeal arising from the Judgment and Decree of A.A INGUTYA. the Senior Resident Magistrate in KISII CMCC.NO. 95 OF 2004 DATED 27TH May, 2004)

The Respondent, filed suit against the appellant in the Chief Magistrate's court at Kisii vide plaint dated 29th January, 2004 claiming the following reliefs:-

"a) Special damages aforesaid

b) General damages to be assessed by this honourable court.

c) Costs of the (sic) incidental to this suit.

d) Interest on a, b, and c above at court rates

e) Any other relief that this honourable court may deem fit and just to grant…"

His case as set out in paragraphs 3, 4, 5, 6 and 7 of the plaint was that he was at all material times an employee of the appellant as a cane cutter. On or about the 26th January, 2002, while in the ordinary course of his said employment and whilst engaged in executing his duties, he injured his leg and as a consequence whereof he suffered pain, loss and damage. He blamed the appellant for the accident on the grounds that it failed to make or keep safe his place of work, failed to provide or maintain safe means of access to his place of work and employing him without instructing him as to the dangers likely to arise in connection with his work and without providing him with any or any adequate supervision. Further the respondent blamed the appellant for the injuries under the common law negligence and gave out the following particulars:-

"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 plaint, tackle or appliances to enable the said work to be carried out safety,

d. Providing unsafe plant and equipment for the plaintiff to use…"

As a result of the accident, the respondent sustained a deep cut wound on the right leg, with unsightly permanent ugly scar. He also suffered from persistent pain.

The appellant upon being served duly entered appearance and filed a statement of defence in which it denied having employed the respondent, any common law negligence, breach of statutory duty or breach of contract towards him or at all. It also pleaded that if the respondent was injured as alleged, it was on account of his sole negligence or in the alternative he significantly contributed to the same as more particularly set out in paragraph 9 of its statement of defence. Finally the appellant pleaded that the respondent's claim was absolutely fake and fraudulent, the injuries non-existent and that the claim had only been made to extort money in the form of compensation from the appellant.

At the hearing, the respondent testified that he used to work for the appellant. That in the process of cutting cane on 26th November, 2002 the panga slipped and cut him on the right leg. It had rained. He had no gloves as well as gumboots. Gloves would have helped. He went to **Moticho Dispensary** for treatment. He was treated and discharged. He then reported the accident to the clerk, one **Omweri**. He had a delivery note from the appellant showing that he was cutting cane on that day. Subsequent thereto he was examined by **Mr. Ogando** who prepared a medical report and charged him kshs.3,000/-.

Under cross-examination, he stated that he did not have a letter of appointment by the appellant. He joined the appellant in 1990 though and was dismissed on 8th January 2002. He stated further that though he was working at **Riinya** near Sony he went to **Moticho Dispensary** far away for treatment following the accident. In fact he walked for 2 hours to reach the dispensary. He did not also know that the appellant had a dispensary. He reported the accident to a supervisor by the name **James Misare** and a contractor **Misiani Omweri.** He was given the delivery note by **Omweri.** On 28th January 2002 he was at home when given the delivery note on 26th January 2002. Finally he conceded that he cut himself since he had not been given gloves and that he had not used the panga before. He had also not been given instructions as to how to cut cane. He denied that his claim was fictitious. He knew how to cut cane. That one needs gumboots, gloves and a good panga. He had never used gumboots or gloves before. He was in control of the panga. He conceded that he had cut himself deliberately. He had decided to work without protection gear aforesaid. He conceded that in the process he had put himself to risk. He was working for one, **Omaiyo** though.

Dr. Ezekiel Ogando Zoga also testified on behalf of the respondent. He had examined him on 4th January, 2002 and noted that he had sustained soft tissue injuries on left leg. He formed the opinion that the respondent had sustained soft tissue injuries that had healed with a permanent scar. Cross-examined he conceded that the injuries were three years old at the time of examination and that as per the history he had cut himself. The appellant called no evidence at all in rebuttal.

The learned magistrate having carefully evaluated the evidence tendered by both the appellant and respondent as well as their written submissions found for the respondent holding thus:

"Considering the evidence on record, while finding that the defendant breached its statutory obligation in failing to provide safety gear, (sic) I find also that the plaintiff failed to maintain a firm grip on the machete to ensure his own safety. I therefore apportion liability at 20:80 against the defendant.

On the issue of quantum, I am satisfied on the evidence here (sic) in that the plaintiff suffered the alleged injury. I assess general damages at Kshs. 60,000/= on 100% basis. I also award Kshs. 3,000/= being proven special damages.

In the upshot, I enter judgment for the plaintiff for Kshs. 48,000/= general damages together with Kshs. 3,000/= special damages as well as costs…"

It is against that judgment and decree that this appeal has been lodged. Seven (7) grounds have been

advanced by the appellant to fault the judgment and decree aforesaid. These are:-

"1. The learned Magistrate erred in both law and in fact in holding as he did that the respondent was an employee of the appellant while in fact no evidence was led in the regard.

2. The Learned Magistrate erred in both law and in fact in holding that the appellant was under statutory duty to provide to the respondent protective gear such as gloves, gumboots and helmet when in fact no such evidence was led in the regard.

3. The Learned Magistrate erred in both law and in fact in holding that breach of statutory duty to provide protective gear to the respondent on the part of the appellant caused the alleged accident, the subject matter of the suit in the court below.

4. The Learned Trial Magistrate erred in both law and in fact in holding that the respondent had proved negligence against the appellant on the balance of probability.

5. The Learned Trial Magistrate erred in both law and in fact in failing to hold that the respondent was the sole author of his own misfortune as he had the exclusive physical control of the only tool he was using, despite finding as a fact that the respondent was negligent in failing to hold a tight grip of the machete which as a consequence of respondent's own negligence slipped out of his own hands and allegedly cut him.

6. The Learned Trial Magistrate erred in both law and in fact in failing to dismiss the respondent's suit in the court below and in awarding damages in the sum of Kshs. 63,000/= against the appellant for self inflicted injuries which was both manifestly excessive in the circumstances.

7. The Learned Trial Magistrate erred in both law and in fact in holding that the appellant was 80% negligent to the respondent and that such negligence contributed to the extent of 80% to the respondent's alleged injuries."

When the appeal came up for directions, **Mr. Odhiambo** and **Mrs. Obaga,** learned counsel for the appellant and respondent respectively agreed to canvass the same by way of written submissions. Subsequently those submissions were filed and exchanged. I have carefully read and considered them alongside cited authorities.

As the case for the respondent hinged on employee/employer relationship, it was incumbent upon him to prove that fact. Did he do so? I think so on his uncontroverted evidence. He stated in evidence categorically that he had been employed by the appellant between 1990 and 2004. Further evidence of his employment by the appellant was production of a delivery note given to him by one, **Omweri.** The cane delivery note is not ideally evidence of employment. However the appellant did not offer any evidence to counter that assertion. This court can only rely on the evidence adduced before the trial court and which is on record. Yes the delivery note may or may not be evidence of employment. However it was up to the appellant to challenge that evidence by other credible and cogent evidence. It did not. Yet it has attempted to do so in its written submissions. That is fresh evidence from the bar that is inadmissible. The respondent too categorically stated that he was on duty on that day. That evidence too was unchallenged and or uncontroverted by the appellant. He asserted too that he was injured whilst on duty. That assertion was not rebutted either.

With regard to the circumstances leading to the accident, It was his evidence that it was raining and the panga he was using was slippery. He had not been provided with gloves that could have assisted him to have a firm grip and that if he had gumboots then the same could have protected his legs. There was no evidence from the appellant in rebuttal to all the foregoing. As correctly submitted by counsel for the respondent, the appellant did not offer any evidence to rebut the respondent's evidence and the same remained unchallenged.

On the whole, there was sufficient evidence to hold the appellant to account on liability.

With regard to the quantum I do not think that the sum awarded of Kshs. 60,000/= for pain, suffering and loss of amenities is so high as to warrant my interference. An appellate court does not interfere with quantum of damages simply because in its opinion the damages awarded are excessive. It only interferes if there is evidence that the damages have been assessed on wrong principles or are unreasonable. I do not discern such misgivings in the circumstances of this case. They were within the range that the courts used to award for soft tissue injuries such as were suffered by the appellant those days.

The result of the foregoing is that I find the appeal unmerited. Accordingly it is dismissed with costs to the respondent.

Judgment dated, signed and **delivered** at Kisii this 16th July, 2010.
ASIKE-MAKHANDIA
JUDGE.