REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 340 OF 2005
(Being an appeal arising from the Judgment in the original Kilgoris SRMCC No. 98 of 2003 – Mr. Chepseba – SRM)

BETWEEN
SOUTH NYANZA SUGAR CO. LTD. ……..…….…. APPELLANT
VERSUS
DANIEL OBARA NYANDORO …… RESPONDENT
JUDGMENT

The respondent was the plaintiff in Kilgoris SRMCC No. 98 of 2003. He stated in his plaint that on 11th day of February, 2000, he was lawfully engaged by the appellant as a cane cutter and while harvesting sugarcane at Keiyan area, a panga he was using to cut sugarcane with 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. The particulars thereof included failing to take adequate precautions for his safety while engaged upon the said work, exposing him to risk of damage or injury which the appellant knew or ought to have known about and failing to provide him with gloves or other adequate equipment for his own safety. He claimed general damages and special damages, Kshs. 3,500/= on account of a medical report.

The appellant, in its statement of defence, denied that the respondent was its employee and further denied any knowledge of the alleged accident. The appellant further stated that if the alleged accident ever occurred the same was caused by the respondent's own negligence. It urged the court to dismiss the respondent's case with costs.

During the hearing the respondent testified that the panga which he was using slipped out of his hand and cut his left leg. He alleged that the panga handle was loose. The panga had been given to him by a contractor known as **P. Omayio**.

In cross examination, the respondent admitted that he did not have any appointment letter issued to him by the appellant. He only relied on a sugarcane delivery note issued by the appellant to a farmer known as **Tobiko Ole Naiyum**. The delivery note shows the name of P. Omayio as a contractor and also contained several names of cane cutters, among them the respondent.

The respondent also called **Dr. Ezekiel Ogando** who produced a medical report in respect of the injuries he had sustained. The appellant did not tender any defence.

The trial court held that the respondent had proved his case on a balance of probabilities and awarded judgment in the sum of Kshs.60,000/= as general damages plus special damages of Kshs. 3,500/= as well as the costs of the suit. Being aggrieved by the said judgment the appellant preferred this appeal.

The grounds of appeal were as follows:

> **"1. The learned trial magistrate erred in law and fact in failing to find that the plaintiff had failed to establish the fact that he was an employee of the defendant, which was his duty in law.**
>
> **2. The learned trial magistrate erred in law in failing to find that the plaintiff was the employee of the independent contractor, a fact established by the plaintiff's own evidence.**

3. **The learned trial magistrate erred in failing to find that the plaintiff's injuries were fictitious and fraudulent as the evidence by the plaintiff himself was very suspect.**

4. **The learned trial magistrate erred in law in holding the appellant liable when the evidence on record reveals that the plaintiff cut himself when he had the full knowledge of the dangers of his action and a duty to himself to be careful.**

5. **The learned trial magistrate erred in law in failing to find that the plaintiff having averred on oath that he chose to work without the safety gears which he knew was his right, he had by himself assumed the risk and thus the doctrine of *volenti non fit injuria* applies to him fully.**

5. **The judgment was against the weight of evidence adduced and thus contrary to the law.**

7. **The learned trial magistrate erred in law in failing to find that the plaintiff's suit having been a tort was filed out of time and without leave and was thus statute barred."**

Mr. Yogo for the appellant made brief submissions in support of the appeal. He urged the court not to depart from its earlier decision in **SOUTH NYANZA SUGAR CO. LTD. –VS- WILSON ONGUMO NYAKWEBA**, Civil Appeal No. 77 of 2004, where the facts before the trial court were similar to those obtaining in the case which gave rise to this appeal. In the above cited decision this court held that the respondent was the author of his own misfortune since he was in full control of the panga that he was using to harvest sugarcane.

In response, Mr. Ogweno for the respondent submitted that the appeal was bad in law because the appellant had not filed a certified copy of the decree appealed against. He further submitted that the appeal lacks merits.

Mr. Yogo submitted that under **section 2** of the **Civil Procedure Act**, for purposes of an appeal a decree includes judgment and since the judgment was before the court as well as the lower court file the appeal was competent. He added that unlike the position in the Court of Appeal, in the High Court there is no mandatory requirement of filing a Record of Appeal as long as the entire lower court record is available before the court. In Civil Appeal No. 325 of 2005, **SOUTH NYANZA SUGAR COMPANY LIMITED –VS- CALEB ONYAMBU**, Mr. Ogweno raised the same same argument as herein regarding competence of the appeal due to absence of the decree in the record of appeal. In the said appeal I held as follows:

"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 79B 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 8B before allowing the appeal to go to hearing, the judge should be satisfied that the following documents are on the record.

(a) The memorandum of appeal;
(b) The pleadings;
(c) The notice of the trial magistrate;
(d) The transcript of any official shorthand notes made at the hearing;

(e) All affidavits, maps and other documents whatsoever put in evidence before the magistrate;

(f) The judgment, order or decree appealed from and where appropriate, the order (if any) giving leave to appeal."

This appeal, as was the case in the above cited appeal, had been admitted to hearing before the provisions of **order XLI rule 1A**had been complied with. The respondent's counsel did not raise the issue of absence of the decree when the appeal came up for directions. **Section 2** of the **Civil Procedure Act** states that:

> **"…for purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up."**

In my view, it will amount to a miscarriage of justice for this court to strike out the appeal for the reason as advanced by Mr. Ogweno when the appeal had already been admitted and directions taken in presence of counsel for both parties. In any event, the lower court record is before this court and no prejudice will be occasioned to the respondent by reference to the same. In addition, it will be against the spirit of overriding objectives of the Civil Procedure Act as stated under **sections 1A** and **1B**for this court to summarily reject the appeal for want of a decree.

Turning to the merits of the appeal, the respondent was duty bound to prove that he was an employee of the appellant. He failed to do so. In cross examination, he admitted that he had been employed by an independent contractor by the name P. Omayio. The delivery note that was produced before the trial court clearly supports that position. In the circumstances, there was no privity of contract between the appellant and the respondent. On that ground alone, the respondent's case ought to have been dismissed.

Secondly, even if the respondent had been employed by the appellant, no negligence was established by the respondent against the appellant. The respondent was cutting sugar cane using a panga which he was in full control of. The panga slipped out of the respondent's hand and cut him on the left leg. In such circumstances the appellant could not be held liable for the respondent's injuries even if he was its employee. Consequently, this appeal is hereby allowed and the trial court 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 as well as of this appeal.

By consent of counsel for the parties this judgment shall also apply to **HCCA No. 330 of 2005, South Nyanza Sugar Company Limited –vs- Patrick Ochieng Matara**.

DATED, SIGNED AND DELIVERED AT KISII THIS 17TH DAY OF SEPTEMBER, 2010.

D. MUSINGA
JUDGE.

17/9/2010
Before D. Musinga
Mobisa – cc
Mr. Nyambati HB for Mr. Yogo for the Appellant
Mr. Oguttu HB for Mr. Ogweno for the Respondent
Court: Judgment delivered in open court on 17th September, 2010.

D. MUSINGA

JUDGE.