NO. 160

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 211 of 2007

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

VERSUS

ANDREW OTIENO OYUGA.....RESPONDENT

JUDGMENT

(An appeal from the Judgment and decree of Mr. David Kemei Esq. Senior Resident Magistrate's court Rongo

dated 1st November 2007 in Rongo SRMCC no. 81 of 2006

On 9th February, 2006 through **Messrs Khan & Katiku advocates, Andrew Otieno Oyuga**, the respondent in this appeal filed a civil suit against **South Nyanza Sugar Company Limited**, the appellant herein in the Senior Resident Magistrate's court at Rongo. The suit was for damages both special and

general, costs and interest. The cause of action was founded upon an alleged breach of statutory duty and or common law negligence on the part of the appellant towards the Respondent. It was claimed by the respondent that he had been employed by the appellant as a cane cutter. As such cane cutter, the appellant owed him the duty to keep and maintain a safe and proper system of work, not to expose him to any risk of damage or injury which it knew or ought to have known and to provide and maintain adequate and suitable measures to enable the respondent to carry out his work in safety.

On or about the 21st August, 2005, the respondent whilst carrying out his assigned duties of harvesting sugar cane sustained a cut on the left index finger. As a consequence he suffered pain, loss and damage. He blamed the injury on the appellant because it breached its statutory duty towards him as 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 or employing him without instructing and training him as to the dangers likely to arise in connection with his work and failing to provide him with any or any sufficient training or adequate supervision, keeping, maintaining or permitting his place of work to be hazardous and generally failing to provide a safe system of work. He also blamed the appellant for the injuries on the grounds of common law negligence. That the appellant had failed to take any or any adequate precautions for his safety, exposed him to the risk of damage or injury, of which it knew or ought to have known, failed to provide or maintain adequate or suitable plant, tackle or appliances to enable him work in safety, providing unsafe plant and equipment for the respondent, failing to take any or any adequate measures to ensure that he was not hurt and finally failing to provide the respondent with appropriate protective gear such as gloves and overalls.

As a result of the injuries sustained, he incurred expenses in treatment. Following such treatment he caused a medical report to be prepared at a cost of kshs.6,500/-. On the basis of all the foregoing the respondent sought from the appellant compensation by way of General and Special damages, costs and interest.

On being served with the summons to enter appearance, the appellant through **Messers Omwenga and Company Advocates** filed a memorandum of appearance and subsequently a defence. In its defence the appellant denied that the respondent was its employee, all allegations of breach of statutory duty as well as common law negligence and all the particulars thereof attributed to it. It further denied the occurrence of the accident on the said date and in the manner alleged. In the alternative it argued that if at all the respondent was injured as claimed, then he was solely and or materially to blame. The particulars of negligence it attributed to the respondent were given. Finally the appellant raised the defence of ***volenti non fit injura***.

The hearing of the suit eventually commenced before **D. Kemei, SRM** on 12th September 2006. **Dr. Ezekiel Ogando** testified on behalf of the respondent that on 29th May, 2006, he examined him as he claimed to have been injured as he harvested cane. He had sustained injury on the left index finger. After physical examination he prepared a medical report for which he charged the respondent Kshs. 6,500/=. Under cross-examination, he stated that the injuries had healed with a scar. The injuries were of soft tissue in nature but could not tell where the respondent had sustained them.

The respondent testified that on 21st August, 2005, whilst cutting sugarcane having been employed by the appellant as a casual in 1998, he was injured. He would be issued with receipts by the appellant showing that he had cut the sugarcane. He would also sign a record called “Bill” that was kept by the appellant. On the material day he cut his left finger with a panga. He had not been issued with working tools. The sugar cane had not been burnt as well as the weed. He was assigned the job by the appellant’s supervisor called **Samuel**. Following the injury, he was treated at Awendo Health Centre. He reported the accident to his supervisor. Later he saw **Dr. Ogando** who prepared a medical report.
Cross-examined he stated that he was in possession of the panga. He blamed the appellant for not providing him with gloves. However he conceded that since he started working for the appellant, gloves had never been issued to him.

The appellant called **Ronald Masese** as a witness. He was its field assistant. He knew the respondent as a cane cutter having been hired by a contractor. The contractor is usually alerted of any injury sustained by workers he had hired. Further the appellant did not provide protective gear.

Cross-examined he stated that contractors were paid by the appellant and then pays his hired workers. Their medical facility caters for its permanent employees only. They do not issue any protective gear to cane cutters. However it issues such gear to its permanent staff. The appellant did not pay can cutters directly.

The learned magistrate having carefully evaluated the evidence tendered by the respondent as well as the appellant reached the verdict thus:

"I have considered the evidence presented by plaintiff and defendant as well as the submissions by their respective advocates. The following issues are necessary for determination namely;

1. ***Whether or not plaintiff was an employee of defendant.***

2. ***Whether or not plaintiff was injured while in the course of his duty.***

3. ***Liability***

4. ***Quantum***

As regards the first issue the plaintiff claimed he was an employee of the defendant and was assigned code number 12 and was issued with a delivery note. The defendant on the other hand maintained plaintiff was an employee of an independent contractor and had nothing to do with him. However the defendants witness admitted that the plaintiff was one of the casual cane cutters but hired by a private contractor. The defendant did not call the private independent as a witness or produced the contract agreement. The delivery note issued to the plaintiff emanated from the defendant and the person issuing and authorizing same was an employee of the defendant charged with the responsibility of ensuring that the crop was properly harvested. This leaves no doubt that the plaintiff was an employee of the defendant. Regarding the second issue the plaintiff claimed that he sustained injuries and was treated at Awendo Health Centre and was later examined by Dr. Ezekiel Ogando. The defence has submitted that the treatment note was not produced and hence claim should be dismissed.
However I note that the said treatment note was identified in court and defendant cross examined plaintiff thereon. The said document was relied upon by the doctor while compiling his report which was produced as an exhibit. I find failure to produce treatment note is not fatal since the same had been introduced and plaintiff cross examined at length regarding the same. Standard of proof in civil cases is one of balance of probability and the issue to be concerned with is whether or not the plaintiff is believed to be speaking the truth. I have no doubt that the plaintiff sustained injuries.
On liability the plaintiff blamed the defendant for failing to clear the weeds and not providing him with protective gear. The defendant on the other hand maintained that the work did not entail any risks and no protective clothing issued to casual workers. Both counsels submitted two authorities namely:

1. ***African Highlands –vs- Collins Ontweka Kencho C.A No. 38 of 2002.***

2. ***Wilson Nyanyu –vs- Sasin Teal Limited Kericho HCCC 15 of 2003.***

I have considered both authorities decided by the same court at Kericho High Court and find that the said court gave different decisions. For instance in the first case the court held that an employer had a duty to ensure safe system of working for its workers while the latter case the court held that the employer is not liable when it comes to manual labour. In the absence of another authority from the court of appeal, I find both decisions are binding and persuasive. I shall take the first authority and find the defendant was under a duty to provide safe system of work for its casual workers for instance providing them with protective gear such as hand gloves and gumboots. However since the plaintiff

was in full control of the panga which cut his hand, I find he also had a duty to take care of himself. Consequently I attribute liability to him in the ratio of 40% while defendant shoulders the remainder.
Finally on the question of quantum counsel for the plaintiff submitted thereof and relied on in the authority in Florence Wairimu –vs- Tom Juma NBI HCCC NO. 3644 of 1990 and suggested general damages of Kshs. 12,000/=. Defendant's counsel did not submit an authority on quantum. I have considered the said authority and find plaintiff suffered severe tissue injuries as compared to those of the plaintiff herein. The said decision was made several years ago and incidence of inflation should be considered. I find an award of Kshs. 90,000/= would be adequate as general damages for pain and suffering. This sum now subjected to 40% contribution comes to a net sum of Kshs. 54,000/=. In conclusion I find the plaintiff has established his case against defendant on balance of probabilities. Consequently judgment is entered for the plaintiff against the defendant for Kshs. 54,000/= together with costs and interest…".

The appellant was aggrieved by the said judgment. On 13th June, 2006, it lodged the instant appeal. It sought to impugn the judgment of the learned magistrate on the following grounds:-

"1.That the learned trial magistrate erred in law and fact in holding the appellant wholly liable contrary to the evidence on record.

2. That the learned trial magistrate erred in law and in fact by failing to hold that the evidence on record did not support the pleadings thus the respondent's claim did not lie.

3. That the learned trial magistrate erred in law and fact making a finding in favour of the respondent whilst the evidence adduced did not support such a finding.

4. That the learned trial magistrate erred in law and fact making a finding that "the operation of the panga was within the power and control of the respondent."

5. That the learned trial magistrate erred in law and fact in failing to consider the fact that the respondent was not an employee of the appellant.

6. That the learned trail magistrate erred in law and fact in failing to make a finding that "failure to produce the initial medical treatment chits proved fatal for the respondent as he was therefore not able to prove his case on a balance of probability as required.

7. That the learned trial magistrate erred in law and fact in making an award for damages for alleged injuries when the evidence tendered in support of the same was purely hearsay evidence which was not even corroborated.

8. That the learned trial magistrate erred in law and fact in failing to take into account the appellant's submissions and authorities cited before arriving at his judgment/decision.

9. That the learned trial magistrate erred in law and fact that the damages awarded to the respondent was excessive putting into consideration the injuries that the respondent has sustained.

10. That the learned trial magistrate's decision, albeit being a discretionary one, was plainly wrong…".

When the appeal came up for hearing before me on 31st May, 2010 **Mr. Otieno** and **Mr. Gichana**, learned counsel holding briefs for counsels for the appellant and respondent respectively agreed to canvass the same by way of written submissions. They subsequently filed and exchanged written submissions which I have carefully read and considered alongside cited authorities.

The case of **Selle** and **Another .V. Associated Motor Boat Company Ltd** and **others (1968) E.A. 123** sets out the jurisdiction and or mandate of this court on a first appeal. It is that this court has to treat the appeal from the trial court by way of a retrial and it is not bound to follow blindly the trial court's findings of fact if it appears either that it failed to take into account of particular circumstances or probabilities or if the impression of the demeanour of a witness is in consistent with evidence generally. In other words this court is required to reconsider and re-evaluate the facts and the law, the evidence adduced before the trial court and reach its own independent decision. In so doing this court is required to bear in mind that it neither saw nor heard the witnesses who testified and cannot therefore assess their demeanour. Due allowance should therefore be given in that regard.

The basis of the respondent's claim in the trial court was that he was an employee of the appellant and that he was injured in the course of his duties as such an employee. That had the appellant not breached its statutory duty towards him and or had the appellant not been negligent towards him under common law he may well have not sustained the injuries. Before the trial court then, it was incumbent upon him to prove with credible and cogent evidence that he was indeed an employee of the appellant and that he was so injured whilst on duty. Did the respondent discharge that twin burden? I think so.

From the record, it is apparent that the appellant's witnesses knew him as a casual cane cutter. He had been hired in 1998 and assigned a code number 12. He also used to sign a record called B"III" that was kept by the appellant. All these evidence was not seriously challenged and or rebutted. All that the appellant and its witnesses said was that the respondent had been employed by an independent contractor. However no evidence was adduced to support that contention. The name and details of such contractor were in the possession of the appellant if ever there was one. The appellant would easily have availed the same to the trial court. It did not, meaning therefore that no such contractor existed and if at all he existed his evidence may well have been adverse to the appellant. The appellant recognized the delivery note issued to the respondent and admitted that it emanated from it. On the whole therefore I am satisfied just as the learned magistrate was that the respondent was an employee of the appellant.

Was he injured in the course of employment? I think so. There is unrebutted evidence of the respondent being at the medical facility on the same day of accident. The authenticity of the treatment notes aforesaid was not challenged. Further I do not think that the respondent would deliberately injure himself for purposes of seeking monetary compensation. The appellant alluded to an allegation by one, **Julius Onami** as having claimed that the respondent was not injured at all. That **Julius Onami** was however not called as witness. Thus his allegation merely remains that; a mere allegation, and in any event hearsay! Further, it is on record that the appellant does not keep a record of injured persons but only deals with emergency ones where first aid is administered. Though the appellant has a medical facility, it however only caters for the permanent staff. The respondent was however a casual worker. That being the case, the appellant cannot categorically say that no accident occurred involving the respondent based on the records from its medical facility.

Was the evidence tendered sufficient to hold the appellant to account for its alleged breach of statutory duty towards the respondent and or that it was negligent under common law towards him? I do not think so. The respondent was emphatic under cross-examination ***"Yes I have worked with the defendant since 1998…….. Yes gloves have never been issued".*** Yet again under cross-examination by the respondent, the appellant's only witness stated ***"Yes we do not issue any protective gear to cane cutters. Cane cutting is not a dangerous activity ….."*.** For over along period of time, the respondent has been cutting cane without any protective gear. There is no evidence that he asked for such gear and he was denied. In any event there is no evidence that whereas other cane cutters had been given the protective gear, the respondent was discriminated against and denied the same. Nor was there evidence that such gear was mandatory for this kind of trade. In a nutshell, the respondent did not provide evidence to show that the appellant was under duty, either contractual, statutory or under common law to provide him with the gloves. If anything he conceded that the appellant never made such provision.

In any event, the appellant was engaged in manual labour of cutting sugar cane. That kind of work does not require any exceptional skill. This was not the first time he was cutting sugar cane. He had been engaged in that trade for well over 15 years. If an employee is engaged in a job which is in the nature of manual labour and which does not require any exceptional skill or specialized training and gets injured by a panga that is under his absolute control then I do not see how such an employee can hold his employer liable for the injuries either under statute or common law negligence. There is no suggestion that the panga was defective and or that it had been issued to him by the appellant and that the appellant had instructed him as to how to swing it. The issue of employers liability in similar circumstances taxed or

vexed **Waweru J** and **Kimaru J in Mumias Sugar Co. Ltd .V. Samson Muyinda, KAK HCCA. NO. 58 OF 2000(UR) and Wilson Nyanyu Musigisi .v. Sasini Tea & Coffee Ltd, KER.HCCA. no. 15 OF 2003** respectively. **Waweru J.** delivered himself thus in the Mumias sugar Co. Ltd case:- ***"…….the respondent's work for which he was engaged involved cutting sugar cane in an open field using a sharp panga. He would hold a cane in one hand and cut its lowest point with a panga in the other hand,. It was simple operation which the respondent had full command and control. It was surely his duty to ensure that he did not cut himself with the panga. No evidence was led that in that type of work there was reasonable necessity of any type of protective clothing or that the same were provided as a matter of course in a similar work elsewhere. There was no proof of hidden inherent danger in the operation of cutting down cane of which the appellant ought to have warned the respondent. To ensure that he did not cut himself with a panga was a matter that was particularly within the power and control of the respondent…….. "***
On his part **Kimaru J** delivered himself thus in **Wilson Nyanyu Musigisi** case after quoting **Waweru J** as aforesaid ***"……In this case the operation of the slasher was within the power and control of the appellant. He cannot blame anybody if he injured himself. The court wonders how the provision of gumboots by the respondent to the appellant would have changed the projection of the slasher which he had himself directed to his right leg albeit accidently….."*** The same situation obtains here. The upshot of all the foregoing is that though the respondent proved that he was an employee of the appellant and was injured in the course of employment, he was however unable to prove that the appellant was in any way to blame for his injuries if at all. Therefore there was no breach of statutory duty and or common law negligence on the part of the appellant towards him. The respondent was clearly the author of his own misfortune if at all and cannot blame the same on the appellant. As a result, I allow the appeal and set aside the judgment and decree of the subordinate court and substitute therefore with an order dismissing the respondent's suit with costs. The appellant shall also have the costs of this appeal.

Judgment dated, signed and **delivered** at Kisii this 16th Day of September, 2010.

ASIKE-MAKHANDIA

JUDGE