REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO 11 OF 2005
SOUTH NYANZA SUGAR CO. LTD
……..……. APPELLANT
-VERSUS-
PETER OBARA KERONGO ……..
…….……... RESPONDENT
(Appeal from the judgment and decree of Mr. Grace Matsi Esq. The Senior Resident Magistrate, Kilgoris on the 20th December, 2004 in Kilgoris SRM CCC.No. 79 of 2002)
JUDGMENT

The respondent was the plaintiff in the Senior Resident Magistrate's court at Kilgoris in Civil Case Number 79 of 2002. In his plaint dated 23rd December, 2002, and filed in court on the same date through **Messrs Asati & Company Advocates,** he averred that at all material times he had been employed by the appellant as a casual worker. On or about 8th February, 2000 whilst in such employment cutting sugar cane in the appellant's fields in Transmara, a Panga he was using slipped, and cut him on his left leg. As a consequence he suffered pain, loss and damage. He alleged that the said incident occurred due to the 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 him with any or any sufficient training in work or without providing any or any adequate supervision.
d. 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 working.
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 appliances, to enable the plaintiff carry out work safely".

The appellant filed a statement of defence through **Messrs Okongo & Co. Advocates** and denied that it had ever employed the respondent on casual basis. The appellant further denied that the incident as alleged by the respondent ever occurred. Consequently, it denied the alleged breach of statutory duty and or common law negligence attributed to it by the respondent and the particulars thereof set out in the plaint. The appellant in the alternative averred that if at all the respondent was injured as claimed, then he was solely the author of his own misfortune and or substantially contributed to the same by aiming the panga on his left leg instead of cutting cane, used dangerous implement without due care and attention to himself, cutting cane whilst absent minded at the same time, failing to report occurrence of the accident to the appellant, failing to seek treatment free of charge at its clinics, and finally, that the instrument that caused the accident was solely in the exlusive control of the respondent and not in the appellant's at any time.

In his evidence before **M'masi, SRM,** the respondent testified that on 8th February, 2000 he was cutting sugar cane at Ortoto in Transmara when the Panga belonging to the appellant and which he was using cut him on the knee. He then went to hospital and was treated. He tendered in evidence the treatment notes. He was also given a delivery note by his supervisor. It is issued by the appellant to a cane cutter for

purposes of emoluments. He tendered in evidence the same. Later he was examined by **Dr. Ezekiel Ogando** who prepared a medical report which report he tendered in evidence. He blamed the appellant for the accident on the ground that it did not give him protective attire like gumboots, gloves and an apron.

Under cross-examination he stated that he was employed by the appellant though did not know the officer who employed him. The panga got stuck in the chaff, slipped and cut him. The gumboots would have prevented him from being cut. Though his colleagues had been provided with such gumboots, he was nonetheless not given.

Thereafter the respondent summoned **Dr. Ezekiel Ogando Zoga** as a witness. **Dr. Zoga** testified that he had examined the respondent on 22nd March, 2003 and noted a scar on the anterior aspect of the left knee. His prognosis was that the respondent sustained soft tissue injuries which healed on conventional treatment. He tendered the medical report in evidence.

The appellant offered no defence.

Parties thereafter filed and exchanged written submissions. In a reserved judgment delivered on 20th December, 2004 the learned magistrate found for the respondent both on liability and quantum. She took the position that since the appellant offered no defence, the averments and evidence of the respondent was not rebutted sufficiently. Accordingly she entered judgment for the respondent as against the appellant on full liability and proceeded to assess general damages payable at Kshs. 50,000/= and Kshs. 1,500/= being special damages.

The appellant was aggrieved by the said judgment and preferred the appeal. Seven grounds were set out in the memorandum of appeal dated 26th January, 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 finding the appellant liable for the injuries allegedly suffered by the respondent without any evidenced (sic) being led in that regard.

2. The learned trial magistrate erred in both law and in fact in holding that the appellant was under both contract and statutory duty of care to the respondent when in fact there was no evidence led in that regard.

3. The learned trial magistrate erred in both law and in fact in holding that the respondent failed to prove any contractual employment relationship with the appellant.

4. 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 his own negligence (sic) the plaintiff was the author of his own misfortune.

5. The learned trial magistrate erred in law and in fact in failing to find that the respondent having injured himself, could thus not blame the appellant.

6. The learned trial magistrate erred in both law and in fact in failing to dismiss the respondent's suit with costs.

7. The learned trial magistrate erred in both law and infact in awarding to the respondent general damages in the excessive, unrealistic and exorbitant sum of Kshs. 50,000/= for basically soft tissues, self-inflicted injuries which the respondent allegedly suffered……..."

When the appeal came up for directions before me on 29th June, 2010, the appellant was represented by **Mr. Odhiambo** whereas the respondent was represented by **Ochwang'i** holding brief for **Mrs. Asati**, both learned counsel. They agreed to canvass the appeal by way of written submissions amongst other directions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them together with the 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 and credible evidence to buttress that assertion. Such evidence was in my view tendered. He tendered in evidence a delivery note issued to him by the appellant. That was evidence that the appellant had employed him. He was issued with the delivery note by a supervisor presumably also an employee of the appellant. The respondent stated that he was an employee of the appellant as a casual. That evidence was unchallenged by the appellant. As a casual labourer, it is not expected that he would be issued with a formal letter of employment as argued by the appellant. In the absence of evidence to the contrary unleashed by the appellant, I am satisfied just like the learned magistrate was that respondent was indeed an employee of the appellant.

There is no doubt at all that the respondent was injured as he worked in the appellant's sugar fields in Transmara. It was his case that the panga slipped and cut him. Had he been supplied with gumboots as others he may well have avoided the accident. Once again this evidence was uncontroverted and or rebutted. I see no reason why the learned magistrate should not have believed the respondent's story and acted on his evidence. He categorically stated in his evidence that: ***"I am blaming the company as they did not give me protecting attires (sic) like gumboots and gloves and apron. The panga would not have cut me on my knees."*** On the basis of all the foregoing, I am satisfied that the respondent proved negligence both statutory and common law on a balance of probabilities against the appellant.

With regard to quantum, the respondent gave particulars of injuries, loss and damage suffered as a result of the accident. PW2 testified and confirmed the injuries. They were soft tissue injuries. In those days, such injuries attracted the kind of award that was made by the learned magistrate. It was within the range. I see no reason to interfere or disturb the same.

The end result of this appeal is that the same is unmerited. Accordingly it is dismissed with costs to the respondent.

Judgment dated, signed and **delivered** in **Kisii** this 16th September, 2010.

ASIKE-MAKHANDIA

JUDGE