REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO 13 OF 2005

SOUTH NYANZA SUGAR CO. LTD …….. APPELLANT
-VERSUS-
SAMWEL OBARA NYAKEMORI ……... RESPONDENT
(Appeal from the Judgment and decree of Mr. Grace Mmasi Esq. The Senior Resident Magistrate, Kilgoris on the 20th December, 2004 in Kilgoris SRM CCC.No. 82 of 2002)
JUDGMENT

The respondent was the plaintiff in the Senior Resident Magistrate's court at Kilgoris in Civil Case Number 82 of 2002. In his plaint dated 23rd December, 2002, and filed in court on the same day through **Messrs Asati & Company Advocates,** he pleaded that at all material times he had been employed by the appellant as a casual worker. That on 2nd March, 2000 whilst in such employment cutting sugar cane in one of the appellant's fields, 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 that:-

"a. failing to make or to keep safe the plaintiff's place of work.
b. failing to provide of (sic) maintain safe means of access to the plaintiff's place of work.
c. employing the plaintiff without instructing him as to the dangers likely to arise in connection with his work or without providing him with any or any sufficient training in the work or without providing any adequate supervision.
d. failing to provide safe working system"

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 maintain or provide adequate or suitable appliances, to enable the plaintiff carry out his work".

The appellant filed a statement of defence through **Messrs Okongo & Co. Advocates** and denied that it had ever employed the respondent as a casual worker. The appellant further denied that the incident as alleged by the respondent ever occurred. Consequently, it denied the alleged breach of statutory duty and common law negligence attributed to it by the respondent and the particulars thereof set out in the plaint. Further and without prejudice to the foregoing, the appellant averred that the respondent never suffered any or any of the alleged and or purported injuries or at all, the suit was a sham and fraudulent and was a result of masterpiece of a fake claim and scheme aimed at extorting money in form of compensation from the appellant. Finally it averred that 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 causing the accident was solely in the exclusive control of the respondent and not in the appellant's at any time.

In his evidence before **Mrs. M'masi, SRM,** the respondent testified that on 2nd March, 2000 he was cutting sugar cane belonging to the appellant. He had been employed to cut cane as a casual labourer. He

was not given an employment card. As he cut the sugarcane the Panga stuck in the weeds and cut him. The panga he was using for the exercise belonged to the appellant. He blamed appellant for the injuries he sustained because he was not given gloves and gumboots. If he had gumboots, the panga would have cut them instead of him. He proceeded to Embakasi clinic for treatment. He tendered in evidence those treatment notes. Though there was a supervisor when the accident occurred, he never informed him of the incident. Later he was examined by **Dr. Ogando** at Kisii who prepared a medical report which report he tendered in evidence. He paid him Kshs. 1,500/= for service. He was issued with a delivery note for the appellant. That he was being paid wages by the appellant. The incident was just an accident. Otherwise he was attentive but weeds held on the panga. He had been trained on how to cut cane.

Under cross-examination he stated that he did not have employment card. The chaff held on to the panga and he cut himself. It was a mere accident that he cut himself. He conceded that he never reported the incident to the appellant neither did he fill workmen compensation form.

Thereafter the respondent summoned **Dr. Ezekiel Ogando** as a witness. He testified that he had examined the respondent on 27th March, 2003 and prepared a medical report. He tendered the same in evidence. He charged Kshs. 1,500/= for the service. Apparently, the respondent told him that the panga he was using cut him when he was harvesting cane. He was treated at Embakasi and had a cut on the right knee. During examination, he had an anterior scar of approximately 3cm.

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 the evidence adduced by the respondent and the doctor had not been rebutted. 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. She also granted the respondent costs and interest.

The appellant was aggrieved by the said judgment and preferred this 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 **Mr. Ochwang'i** holding brief for **Mrs. Asati**, both learned counsel. They agreed to canvass the appeal by way of written submissions amongst other directions sought. 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 uncontroverted 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 and used to be paid his wages by the appellant's employees who used to come to Nyamaiya in a vehicle and security officers. That evidence was neither unchallenged nor rebutted by the appellant. As a casual labourer, it is not expected that he would be issued with a formal letter of employment nor employment card 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 the respondent was an employee of the appellant.

There is no doubt at all that the respondent was injured as he worked in the appellant's sugar field. It was his case that the panga stuck in the weeds and in the process cut him. Had he been supplied with gumboots and gloves he may well have avoided the accident. Once again this evidence was neither controverted 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 Sony Company for the injuries I sustained. I was not given gloves and gumboots. If I had boots the panga would have cut the boots…."*** Just like the learned magistrate therefore I am also satisfied that the respondent on the unchallenged, uncontroverted and unrebutted evidence proved negligence both statutory and at common law against the appellant on a balance of probabilities.

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 and or disturb 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