REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 51 OF 2005

SOUTH NYANZA SUGAR CO. ……………………….APPELLANT

-VERSUS-

DANIEL OKINDO KIBARI …………………….………..RESPONDENT

JUDGMENT

The respondent filed suit against the appellant in the chief magistrate's court at Kisii through **Messrs Manwari & Co. Advocates** seeking damages both special and general, cost and interests. The suit was founded upon the fact that at all material times the respondent was an employee of the appellant as a cane cutter. As such the appellant owed him a duty of care to take all reasonable precautions for his safety whilst engaged upon his said work and not to expose him to risk of damage or injury of which it knew or ought to have known and to provide and maintain adequate and suitable plant and appliances to enable him to carry out his work safely, to take all reasonable measures to ensure that his work was safe from any danger and to provide and maintain a safe and proper system of work. In breach of the aforesaid, on or about 18th August, 2002, the respondent whilst in the ordinary course of his employment at the appellant's contracted fields North Giwangi sustained deep cut wound on the left index finger. As a result he suffered lost and damages. He therefore claimed damages on the basis aforesaid.

Through **Messrs Okong'o & Co. Advocates**, the appellant entered an appearance and filed a defence to the respondent's claim. Its defence in the main denied that the respondent was its employee, that an industrial accident occurred on 18th August 2002 and that it was as a result of breach of statutory duty on its part. Alternatively it averred that if at all such an accident occurred as alleged then the same was solely caused by and or substantially contributed to by the respondent's own negligence in that he deliberately cut himself so as to seek compensation and also deliberately refused to take care of his own safety. Finally, it pleaded that the respondent's claim was fake and fraudulent, the injuries were non-existent and that the claim had only been made to extort money from the appellant as compensation.

The respondent testified before **A. A Ingutya, SRM,** that on 18th August, 2002 as he pulled sugarcane on the ground in the course of his employment by the appellant his left hand was cut. He later went for treatment. Subsequently, he was examined by **Dr. Ogando** who prepared a medical report for which he paid Kshs. 4,000/=. As evidence that he was an employee of the appellant, he tendered in evidence a delivery note. Otherwise he was careful in his work and did not at all contribute to the accident nor did he intentionally cut himself.

Cross-examined, he stated that he should have been given gloves. However he conceded that none of his colleagues had been given such gloves. There was water where he was working. As he pulled the cane, he cut himself though the panga was not sharp.

He also called **Dr. Ezekiel O. Zoga** as a witness. It was his evidence that he examined the respondent on 1st May, 2003 and prepared a medical report which he tendered in evidence. The respondent sustained a cut on the left finger at Metarcapaphamgel joint.

In its defence the appellant through **Mr. Francis Abogo,** a harvesting supervisor testified that the respondent was not and had never been employed by the appellant. He was however an employee of **Daniel Ombacho**, a subcontractor. The respondent's injury was in any event not reported to the appellant. The appellant did not provide cane cutting implements. It is the subcontractor who does so. Thus the appellant was not responsible for providing gloves. With regard to the delivery note, the witness stated that it was given to show that sugar cane was transported to the factory.

Cross-examined, he maintained that it was the responsibility of the contractor to hire cane cutters. The cane cutters are trained before commencing work. It is the sub contractor who issued the

delivery note. The respondent was the sub contractor's employee. The appellant could not therefore have provided him with gloves. Further if the respondent had been injured as claimed his name would not be in the delivery note.

In a judgment dated and delivered on 31st March, 2005, the learned magistrate found that the respondent had proved his case on a balance of probability that he was an employee of the appellant and that he was injured in the course of his employment with the appellant. The learned magistrate then proceeded to assess the general damages awardable at Kshs. 50,000/= and Kshs. 3,000/= as special damages.

The appellant was aggrieved by the judgment and decree aforesaid. It therefore lodged the instant appeal setting up 6 grounds of appeal to wit:-

"1. The learned trial magistrate erred in both law and in fact in holding that the respondent was an employee of the appellant and in further holding that the respondent was injured in the cause of his such employment.

2. The learned trial magistrate erred in both law and in fact in failing to appreciate that the respondent had exclusive actual physical control of the machete, which allegedly injured him, and in failing to apportion the greater burden of liability on the respondent.

3. The learned trial magistrate erred in both law and in fact in holding that the appellant was 100% liable for the alleged accident by failing to provide the respondent with gloves, and in failing to hold that the respondent was the author of his own misfortune.

4. The learned trial magistrate erred in both law and in fact in deciding the case against the weight of evidence and in further failing to dismiss the respondent's suit in the court below for want of sufficient and or any proof with costs.

5. The learned trial magistrate erred in both law and in fact in holding that failure by the appellant to provide gloves to the respondent was the proximate cause of the respondent's alleged injuries.

6. The learned trial magistrate erred in both law and in fact in awarding damages both special and general in favour of the respondent in the absence of any proof or evidence that the appellant was under duty to provide gloves to the respondent."

When the appeal came up for hearing before me on 4th May, 2010, it was agreed that the same be canvassed by way of written submissions. However only the appellant subsequently filed its submissions. For reasons that are not apparent, the respondent failed completely to file his written submissions.

This being a first appeal, this court has a duty to re-examine and re-evaluate the evidence tendered before the trial court so as to reach its independent decision as to whether the judgment and decree of the learned magistrate should stand. See **Selle –vs- Associated Motor boat Co. Ltd (1968) E.A 123**.

In my view, the respondent completely failed to establish by credible evidence that he was employed by the appellant as a cane cutter. The mere fact that he was issued with a delivery note by the appellant is not itself perse evidence of employment. As categorically stated by **Francis Abogo**, the delivery note is used to show that sugar cane was transported to the factory and was issued by the sub-contractor. This evidence was hardly contested by the respondent. In the ordinary course of events, a delivery note cannot pass for evidence of employment. It only goes to show that something was delivered. The appellant had categorically denied in its statement of defence that the respondent was its employee. It therefore behoved the respondent to come up with clear evidence as to his employment by the appellant. A letter of employment and or other relevant document would have done the trick. The appellant was categorical that he respondent was an employee of an independent sub-contractor by the name of **Daniel Ombacho**. This evidence was once again not seriously challenged and or countered by the respondent. Considering all the foregoing and as correctly submitted by the appellant, the respondent failed to discharge the burden of proof bestowed upon him by section 107 (1) of the **Evidence Act**.

Even if I had found that the respondent was indeed an employee of the appellant I do not see how the appellant could have been liable for the injury sustained by the respondent. The respondent pleaded and advanced in evidence that he cut his left index finger with a panga as he harvested sugarcane. The respondent as conceded in his evidence was the one in control of the panga which according to him was not sharp. He owed himself the duty of care. The respondent was given a job to do which was manual in nature. He did it badly. I cannot see how the gloves could have prevented the accident. As stated in the case of **Statpack Industries Limited –vs- James Mbithi Munyao, NBI HCCA No. 152 of 2003**, it is trite law that the burden of proof of any fact or allegations is on the plaintiff. He must prove a casual link between someone's negligence and his injury. The plaintiff must adduce evidence from which on balance

of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury perse is not sufficient to hold someone liable.

The upshot of all the foregoing is that the respondent did not prove that he was an employee of the appellant. And even if he was such an employee, he did not prove sufficiently what was it that the appellant failed to do as to occasion the accident. Though the respondent pleaded breach of statutory duty of care towards him by the appellant, he failed to demonstrate what such duty entailed and in what respects it was not observed. It is not sufficient for the respondent to merely prove the circumstances of his accident. There must be a nexus between the accident and the appellant's negligence, statutory or otherwise.

The appeal is allowed with costs. The judgment and decree of the learned magistrate is set aside. In substitution I order that the respondent's suit be and is hereby dismissed with costs.

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

ASIKE-MAKHANDIA

JUDGE