

The Respondent blamed the Appellant for the accident when he said:
“ I blame the company because I was not given gear like boots.”

It cannot therefore be argued that the Appellant was not blamed. As an employer, the Appellant has a contractual duty under common law to provide a safe working environment and systems to his employee. This is an implied term of the contract imposing a legal duty on the Appellant. The nature of duty of a sugarcane cutter is such that he is exposed to hurting himself with the cane cutting tool on the legs, hands or any other part of the body. The Appellant had a legal duty to provide protective gear including hand gloves and boots. An employee must not be working in a factory in order to be provided with protective clothing. The provisions of the Factories Act were not invoked herein. The claim is a common law one of negligence and breach of contract.

DW1 said that the company provided workers with protective gear. However, he produced no records to show that the Plaintiff was allocated with boots or any other protective clothing.

In his plaint the Respondent alleges negligence against the Appellant under common law. The Respondent has established that the Appellant exposed him to risk by failing to provide a safe working environment and by omitting to provide protective gear. Had the Respondent worn boots, the injury on his toe would not have occurred.

The magistrate attributed part of the negligence on the Respondent and condemned him to bear 30% liability. The Respondent was satisfied with this finding because he did not appeal against it. However, I find that it was based on the wrong principles. The fact that the Respondent had worked for the appellant for over 30 years and had never hurt himself did not form a legal basis for condemning him to bear liability during that one incident when he was hurt. The apportionment of liability was therefore wrong.

I have looked at the decision of my brother Judge H. Waweru that it is not necessary to provide a sugarcane cutter with protective clothing. I beg to differ with that decision. A sugar cane worker is exposed to risk in his job where he is using a sharp panga or a sharp cane cutter. The employer is under a duty to mitigate those risks by providing protective gear. This is notwithstanding that the sugarcane cutter has a duty to take care of himself as he carries on his duties.

I am satisfied that the magistrate's court correctly found that the Respondent had proved his case on the balance of probabilities against the Appellant. I set aside the apportionment of liability of 70:30 between the parties and find the Appellant fully liable.

I have looked at the medical report of Dr. Nyamogo. The cut on the left big toe was the only injury sustained. The injury healed well within a short period. The award of Ksh.60,000/= was on the higher side in the year 2007 when the case was determined. I set aside the award and substitute it with Ksh.30,000/=. The special damages award of Ksh.1,500/= remains undisturbed. The Appellant will pay the costs of this appeal and those of the lower court.

**F. N. MUCHEMI
JUDGE**

Dated, Delivered and Signed at Bungoma this 2nd day of November, 2010. In the presence of Mr. Wattanga for the Appellant and Mr. Luchivia for Kulecho for the Respondent.

**F. N. MUCHEMI
JUDGE**