REPUBLIC OF KENYA

HIGH COURT AT KISII

CIVIL APPEAL 83 OF 2004

(Being an appeal from the Decree and judgment of

Mrs. Grace Mmasi, SRM in Kilgoris SRMCC No. 75 of 2002)

SOUTH NYANZA SUGAR COMPANY LIMITED …… APPELLANT

VERSUS

HENRY NYABUTO OKEMWA …… RESPONDENT

JUDGMENT

The respondent was in the employment of the appellant as a cane cutter. He stated in his plaint that on 12th March, 2000 while cutting sugarcane using a panga, the panga slipped out of his hands and cut him on his left leg. He alleged that the said accident was caused by the appellant's breach of statutory duty and negligence. He prayed for general damages and special damages amounting to Kshs. 4,500/= on account of a medical report (Kshs. 1000/=) and doctor's attendance charges (Kshs. 3,000/=).

The appellant filed a statement of defence and denied that the respondent was its employee on the aforesaid date. The appellant further denied that the alleged accident ever took place and if it ever did, that the respondent was the author of the same in that he was not diligent in his work.

During the hearing the respondent stated that on the material day at about 4.00 p.m. he was cutting sugarcane and the panga he was using became slippery and he lost control of the same. It cut him on his left leg. He said that the appellant should have supplied him with gloves and gumboots. In his view the gloves would have made his grip firm. He further alleged that he had not been trained on how to cut sugarcane.

In cross examination, the respondent stated that he was an experienced cane cutter, having been doing that job for about five years. He further stated that he had personally sharpened the panga and he was aware that he had to be careful when handling a sharp panga. He further conceded that he was in control of the panga.

The respondent was examined by **Doctor Morris Ajuoga, PW2,** on 15th April, 2003. PW2 prepared a medical report for which he charged Kshs. 1,500/=.

The appellant did not adduce any evidence.

The learned trial magistrate found that the respondent had proved his case on a balance of probability and awarded him general damages in the sum of Kshs. 50,000/= plus special damages of Kshs. 1,500/=.

Being aggrieved by the said judgment the appellant filed an appeal against the same. The appellant's main contention in the appeal was that the respondent did not sufficiently prove his case and therefore the learned trial magistrate erred in law and in fact in holding that the appellant was liable for the injuries sustained by the respondent.

Mr. Odhiambo for the appellant and Mrs. Asati for the respondent made brief submissions which I have taken into consideration.

This court had occasion to consider the same issues that have arisen in this appeal in **SOUTH NYANZA SUGAR COMPANY LIMITED –VS- WILSON ONGUMO NYAKWEBA**, Civil Appeal No. 77 of 2004 at Kisii (unreported). In that appeal the respondent was also an employee of the appellant and he was cutting sugarcane when the panga he was using slipped out of his hands and cut him on one of his legs. The respondent also alleged that he had not been given gloves and gumboots by his employer.

This court held as follows:

> "**..the respondent did not adduce evidence to show that the appellant was under a legal obligation to provide him with such gloves and gumboots. If indeed the appellant was under such an obligation, it was the duty of the respondent to prove the same. Section 107 (1) of the evidence Act states as follows:**
>
> > "**whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."**
>
> **Even assuming that the respondent was supposed to be supplied with gloves and gumboots by the appellant and the appellant had failed to do so, given the manner in which the accident herein occurred, I do not think that the respondent would have proved his**

case sufficiently."

The above holding aptly applies in this appeal. The respondent was in control of the panga and he knew that the panga was sharp. He ought to have been diligent in handling the same. He was an experienced cane cutter, having done that job for about five years. It was not shown that he required any special training for the kind of work he was doing. Even in the absence of any evidence having been adduced by the appellant, the respondent did not prove that there was any breach of statutory duty or negligence on the part of the appellant.

Occurrence of an accident in a place of work does not ***per se*** imply that the employer is to blame. Negligence and/or breach of duty must be sufficiently proved.

I allow this appeal and set aside the judgment that was entered by the trial court and substitute therefor and order dismissing the respondent's suit in the lower court. There will be no order as to costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 24TH DAY OF SEPTEMBER, 2009.

D. MUSINGA

JUDGE.

24/19/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Leteipa for Mr. Okongo for the appellant

N/A for the respondent

Court: Judgment delivered in open court on 24th September, 2009.

D. MUSINGA

JUDGE.