



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII Civil Appeal 79 of 2004**

(Being an appeal from the judgment and decree of

Mrs. Grace Mmasi, SRM in Kilgoris SRMCC No. 21 of 2003)

SOUTH NYANZA SUGAR COMPANY LIMITED APPELLANT

VERSUS

JOSEPHAT TONGI ONDIGI RESPONDENT

JUDGMENT

In his plaint before the trial court the respondent alleged that he was employed by the appellant as a cane cutter. On 15th September, 2001 while cutting sugarcane using a panga, the same slipped out of his hands and cut him on his left hand. He alleged that the said accident was caused by the appellant's breach of statutory duty and negligence. Particulars of the alleged breach and negligence were set out in the plaint. He claimed general and special damages.

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 added that if it ever did the respondent was the author of the same in that he was negligent in his work.

During the hearing the respondent gave a brief testimony as to how the alleged accident occurred. He said that he was holding the panga on his right hand and he lost control of the same and he cut himself on the second left hand finger. He alleged that he had not been given any gloves. He further alleged that he had not been trained on how to cut sugarcane using a panga.

The appellant did not adduce any evidence. The trial court held that the respondent had proved his case on a balance of probabilities and awarded general damages in the sum of Kshs. 60,000/= and special damages of Kshs. 3,500/= on account of a medical report.

The appellant, being aggrieved by the said judgment, preferred an appeal to this court. The appellant's contention 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 injury sustained by the respondent as a result of the alleged accident.

When this appeal came up for hearing on 19th March, 2009, the respondent's advocate did not attend court. Therefore the appeal was unopposed.

Mr. Odhiambo for the appellant made brief submissions in support of the appeal 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. 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.

24/9/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Leteipa for Mr. Okongo for the appellant

Mr. Ogweni for Mr. Nyangosi for the respondent

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

D. MUSINGA

JUDGE.