REPUBLIC OF KENYA

HIGH COURT AT KISII

CIVIL APPEAL 173 OF 2003

(Being an appeal from the judgment and decree of

Mr. S.M.S. Soita, PM, in Kisii CMCC No. 737 of 2002)

SOUTH NYANZA SUGAR COMPANY LIMITED …… APPELLANT

VERSUS

LINUS MATARA GICHANA …………………………… RESPONDENT

JUDGMENT

The respondent filed a suit before the trial court and alleged that on the 12th day of February, 2000, while in the employment of the appellant as a cane cutter, he was stacking sugarcane when one of the stems fell on his left leg and injured him. He alleged that the said accident was caused by the appellant's breach of statutory duty as well as negligence. Particulars of the alleged breach of statutory duty and of negligence were set out in the plaint. Basically, he stated that the appellant had not provided him with gumboots. He claimed general damages as well as special damages of Kshs. 3,500/= on account of a medical report.

The appellant filed a statement of defence and denied that the respondent was its employee. The appellant further denied that the alleged accident ever took place and if at all it did, the respondent was to blame for the same due to his own negligence.

During the trial the respondent reiterated that on the material day he was stacking sugarcane and one of them fell and hit him on the left leg. Thereafter he was treated at Embakasi clinic. He blamed the appellant for the said accident, saying that he had not been provided with gumboots. He did not give any evidence to show that the gumboots were necessary for the kind of work he was doing or that he had requested for the same and the appellant had failed to provide him with the same.

In cross examination, the respondent stated that he did not go to the appellant's dispensary after the accident because it was far away and he was bleeding. He further stated that he was examined by **Dr. Okunga Wandera, PW1,** on 2nd October, 2002. PW1 said that he noticed that the respondent had a healed cut wound on his left leg which was about 3 centimeters long.

The appellant did not adduce any evidence in support of his defence. The trial court held that the respondent had proved his case and awarded him general damages in the sum of Kshs. 80,000/=. The claim for special damages was dismissed since it was not proved.

Being aggrieved by the aforesaid judgment, the appellant appealed against the same. However, the grounds of appeal as contained in the memorandum of appeal and particularly ground 4, were framed as

though the respondent had alleged that he cut himself with a panga while harvesting sugarcane for the appellant which was not the respondent's contention.

This being the first appellate court, it is mandated to review the evidence that was adduced before the trial court to determine whether the conclusions reached there should stand. If there is no evidence to support a particular conclusion, or if it shown that the trial court failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court has to state the correct position, see **PETERS –VS- SUNDAY POST LIMITED**[1958] EA 412.

The respondent alleged that he was an employee of the appellant but he did not produce any documentary evidence to that effect. He did not have any appointment letter and neither did he state the names of the people whom he was working with on the material day. It was therefore doubtful whether he was the appellant's employee. But assuming that he was a casual employee of the appellant and he was lawfully working for the appellant on the material day, did the respondent sufficiently prove that he was injured on the material day? And if he was injured as alleged, was the appellant to blame for the alleged accident?

The respondent said that after the alleged accident he was treated at Embakasi clinic and alleged that he had treatment notes issued by the said clinic. The treatment notes, though marked for identification, were not produced before the trial court.

The alleged accident occurred on 12th February, 2000 but there was no evidence that the appellant was made aware of the alleged accident until the respondent's suit was filed. Although the respondent alleged that he did not visit the appellant's clinic where its employees are treated free of charge because the clinic was far away, I find that explanation unsatisfactory. If indeed the respondent was injured in the course of his employment with the appellant, after getting initial treatment at Embakasi clinic, he ought to have visited the appellant's clinic for review and thereafter make a formal report to the appellant. That was not done. As earlier stated, the respondent did not state the name of even one person whom he was working with on the day of the alleged accident.

When the respondent saw Dr. Wandera nearly two years later, the doctor noticed a healed cut wound (a scar), on the left leg. He could not tell what had caused that scar. It is unlikely that a stem of a sugarcane could cause a cut wound. In my view therefore the alleged accident was not sufficiently proved.

But even if the respondent's explanation that a stem of a sugarcane fell on him and injured his right leg were to be accepted, no negligence or breach of statutory duty on the part of the appellant was proved. The respondent did not show how the appellant could have prevented the stem from falling on him since he was in full control of the stacking process. The respondent did not prove that the kind of job he was doing required gumboots. And even if he had been supplied with gumboots, unless he was diligent in his work a sugarcane could still fall on any part of his left leg. In short, the respondent's case was not proved to the required standard. In **STATPACK INDUSTRIES LIMITED –VS- JAMES MBITHI MUNYAO,** HCCA No. 152 of 2003 at Nairobi (unreported), it was held as follows:

"**It is trite law that the burden of proof of any fact**

or allegation is on the plaintiff. He must prove

causal link between someone's negligence and his

injury. The plaintiff must adduce evidence from

which, on a 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 *per se* is not sufficient to hold someone

liable."

From the foregoing this appeal must be allowed. The judgment by the trial court is set aside and substituted with an order dismissing the respondent's case with 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. Ogweno for Mr. Nyangosi for the respondent

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

D. MUSINGA

JUDGE.