REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NUMBER 78 OF 2004

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

VERSUS

JOHN ONYANGO KAUSI …….....…….RESPONDENT

JUDGMENT

The respondent was the plaintiff in the Senior Resident Magistrate's Court Civil suit No.20 of 2003. In his plaint, he stated that he had been employed by the appellant as a cane cutter. He alleged that on 8th February, 2000 while cutting sugar cane, a sugar stump hit his leg as a result of which he sustained injuries. He alleged that the said incident occurred due to breach of statutory duty and negligence on the part of the appellant. Particulars of breach of statutory duty were pleaded as follows:

"***(a) failing to make or to keep safe the plaintiff's place of work.***

(b) failing to provide or maintain safe means of access to the plaintiff's place of work.

(c) employing the plaintiff without instructing him as to the dangers likely to arise in connection with his work or without providing [him] with any or any sufficient training in work or without providing any or any adequate supervision.

(d) In the premises failing to provide a safe system of work"

The particulars of negligence were set out as hereunder:

"***(i) failing to take any or any adequate precautions for the safety of the plaintiff while he was engaged upon the said work.***

(ii) exposing the plaintiff to a risk of damage or injury of which they knew or ought to have known.

(iii) failing to provide or maintain adequate or suitable plant, tackle or appliances to enable the said work to be carried out safely.

(iv) providing unsafe plant and equipment for the plaintiff to use.

(v) failing to provide the plaintiff with suitable gloves or other adequate equipment to enable his

(sic) to carry out the said work safely."

The respondent claimed general and special damages.

The appellant filed a statement of defence and denied that it had ever employed the respondent as a cane cutter. The appellant further denied that the incident as alleged by the respondent had ever occurred. Further, it denied all the particulars of breach of statutory duty and negligence as pleaded by the respondent.

Alternatively, the appellant averred that the respondent's injury was as a result of his own negligent conduct in that he attempted to arrange cane without first ascertaining that he was standing on and supported by a firm ground, attempting to arrange cane without due care and attention and in failing to pay due care, regard and attention to his safety.

In his evidence, the respondent testified that he had been employed by the appellant as a casual worker but was not given any identification document to that effect, only a number – 76. On the material day he was cutting cane when he was pricked by a stump on the left foot near the ankle. He blamed the appellant for failing to supply him with gumboots and gloves. He said that he had severally requested for gumboots but they had not been supplied.

After the accident he was treated at a local dispensary. Later he consulted Dr. Ondiko who examined him and prepared a medical report. The appellant alleged that he paid Kshs.3000/- for the medical for the report. However, no documentary evidence was produced in proof of the same. The treatment notes at Embakasi Dispensary as well as the medical report were produced as exhibits.

The appellant did not call any witness and neither did the appellant's counsel make any submissions.

The trial magistrate was satisfied that in the absence of any evidence from the appellant to rebut that of the respondent, the respondent had established his case to the required standard of proof. He awarded general damages in the sum of Kshs.50,000/= and special damages of Kshs.3,000/=.

The appellant was aggrieved by the said judgment and preferred an appeal to this court. Six grounds were listed down in the memorandum of appeal. They are as hereunder:

"***1 The learned trial magistrate erred in both law and in fact in holding that the Appellant owed both contractual and statutory duty of care to the respondent when in fact there was no evidence led in that regard.***

2. The learned trial magistrate erred in both law and in fact in not holding that the Respondent had failed to prove any contractual, or employment relationship with the Appellant.

3. The learned trial magistrate erred in both law and in fact in failing to hold that it was the Respondent's responsibility to ensure that he did not cut himself with the panga, and that by his own negligence the Respondent was the author of his own misfortune.

4. The learned trial magistrate erred in both law and in fact in failing to find that the Respondent having injured himself, could thus not blame the Appellant.

5. The learned trial magistrate erred in law and in fact in failing to dismiss the Respondent's suit with costs.

6. The learned trial magistrate erred in both law and in fact in awarding to the Respondent general damages in the excessive, unrealistic and exorbitant sum of Kshs.50,000/= for basically soft tissue, self inflicted injuries which the Respondent allegedly suffered."

Mr. Nyambati held brief for Mr. Okongo and made brief submissions in support of the aforesaid

grounds of appeal.

He argued that the respondent had not produced any document to prove that he was in contractual employment of the appellant and was therefore owed a duty of care.

In his view, the respondent had not proved his case on a balance of probabilities.

Counsel cited several authorities to buttress his submissions. He referred to: **SOUTH NYANZA SUGAR COMPANY LTD VS. ROBERT MATARA** HCCA NO.81 of 2004 at Kisii and **SOUTH NYANZA SUGAR CO. LTD VS NELSON OSITU ORAMINI**, HCCA NO.70 of 2004 at Kisii; I perused those authorities

but did not find them to be relevant because in both cases, the respondents, who were cane cutters in the appellant's employment, were accidentally cut by pangas which they were using. That was not the case in the matter herein.

Mr.Nyambati also submitted that the award of Kshs.50,000/= was excessive for the kind of injuries that the respondent suffered.

Mr. Mudeyi for the respondent submitted that the trial magistrate was right in holding that there was breach of duty of care by the appellant. The respondent testified that he was a casual worker and had not been given any identification document but he had been assigned a specific number, which he cited. He had repeatedly asked for gumboots but the appellant had not provided him with any. That evidence had not been rebutted by the appellant.

With regard to the award of general and special damages, Mr. Mudeyi submitted that it had not been demonstrated that the same were high or unreasonable. He urged the court to dismiss the appeal.

The mandate of a first appellate was well stated by the Court of Appeal in **PETERS VS SUNDAY POST LIMITED** [1958] E.A. 412. An appellate court has jurisdiction 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 is shown that the trial court had failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to decide.

In the present appeal, the respondent testified that he was a casual worker in the employment of the appellant. It is important to highlight his evidence during cross-examination.

He said he was employed by the appellant in February 2001. His code number was 76 of 2001. He said that he lost his employment card. He repeatedly told the court that he was injured on 10th May, 2001. In re-examination, he changed his mind and said that he was injured on 8th February, 2000 and not on 10th May, 2001. However, in his examination in chief he had stated that he was injured on 8th February, 2003. As per his plaint at paragraph 5, he was injured on 8th February 2000.

The learned trial magistrate said nothing about this glaring discrepancy regarding the date of the alleged accident. In her judgment, she referred to the date of the accident as 8th February, 2003 as per the respondent's evidence in his examination in chief.

It is trite law that parties are bound by their pleadings. The date pleaded in the plaint was 8th February, 2000. The plaint was never amended. The respondent's counsel was aware that there was a terrible mix up of dates and that is why in re-examining the respondent the date was stated as 8th February, 2000, yet according to the respondent's evidence, by that date he had not even been employed by the appellant. He was emphatic that he was employed by the appellant in February, 2001.

That being the case, if at all the respondent was injured on 8th February, 2000, he was not in the

appellant's employment at the time. The appellant could not therefore be held liable for the respondent's injuries.

There was no evidence to support the conclusion that was reached by the trial court, even in the absence of evidence from the appellant. I therefore allow the appeal and set aside the judgment that was entered by the trial court and substitute therefor an order of dismissal of the respondent's suit before the subordinate court. There will be no order as to costs.

DATED, SIGNED and **DELIVERED** at **KISII** this **22nd** day of April, 2008.

D. MUSINGA

JUDGE.

Delivered in the open court in the presence of:

Mr. Nyambati for the appellant

N/A for the respondent

D. MUSINGA

JUDGE