REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Civil Appeal 70 of 2004

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

VERSUS

NELSON OSITU ORAMINI …….. RESPONDENT

JUDGMENT

NELSON OSITU ORAMINI the respondent herein sued South Nyanza Sugar Co. the appellant before Kilgoris Resident Magistrate seeking general and special damages for injuries suffered while in cause of employment of the appellant. The trial magistrate found for the respondent and awarded shs.70,000/- as general damages and shs.3000/- as special damages. The appellant being dissatisfied with the judgment filed this appeal.

The Respondent told the court that on 24th March 2000 he was cutting sugar cane in a farm in Transmara. He had been employed by the appellant as a casual. He was using a panga and he cut his left thumb. He went for treatment and later in 2002 a report was prepared by DR. ONDIGO (Exh.2).

The appellant had filed a defence denying that there was any contractual relationship between him and the respondent. He denied liability.

In the alternative appellant pleaded that if the respondent got injured it was due to his negligence. Appellant however did not call any evidence.

Counsel for the appellant submitted that the trial magistrate erred in holding that there was a contractual relationship between the appellant and the respondent or that there was any statutory duty imposed on the appellant or an employee working in the field far from the factory.

The Respondent was doing manual work outside the factory.

He further submitted that the trial magistrate erred in holding that the appellant was liable for injuries suffered by the respondent.

Another issue raised was that the respondent did not file any reply to the allegations of negligence on his part raised by the appellant in his defence.

Mr. Mudeyi opposed the appeal and supported the judgment. He first stated that certified copy of decree was filed late. It was filed after one year.

That delay was inordinate. Secondly he said the evidence by the respondent was not challenged or rebutted. Appellant did not call any defence and as such facts testified on were not rebutted.

I have considered the rival submissions and the evidence adduced.

First I will deal with the issue of filing of copy of decree as raised by

Mr. Mudeyi.

Indeed when the appeal was filed on 12th February 2004 it was not accompanied by a certified copy of the decree. However a copy was filed before directions were taken. True one year had passed but that cannot be said to be inordinate delay. The court had not set out any time limit as provided for in Order 41 rule 1(2) CPR. However the decree was put on record before directions were taken and hearing commenced. With respect the appeal cannot fail on that score.

It is trite law that a party need to prove his claim on a balance of probabilities unlike in a criminal charge where prosecution is expected to prove its case beyond all reasonable doubts. A party however has to present facts which would lead to a conclusion in his favour. The trial magistrate did not seem to analyse the evidence adduced and state how he reached the conclusion that the respondent had proved his case even on a balance of probabilities. He only stated that the appellant did not call any evidence and went a heard to assess damages. She did not analyse the evidence on record and assumed that in absence of evidence from the appellant the case is proved. With respect this was an error on her part. The appellant had filed a detailed defence in which he denied any contractual relationship with the respondent or any liability for any injuries.

The magistrate needed to consider those issues against the evidence adduced. If she did so, she would have reached a very different conclusion.

In the first place as submitted the respondent did not file any reply to the defence denying particulars of negligence raised. The appellant had stated that the respondent was negligent. There was no reply denying those pleadings and the assumption is that they were admitted.

The other issue was that of contractual relationship. The appellant had denied employing the respondent. It was upon the respondent to prove that indeed he was an employee of the appellant in the face of that denial.

He did not tender anything to prove that a part from his general ascertain that he had been employed as a casual. There was no document, even payment slip to prove that or any other evidence from any other quarter.

One would have expected him to have something to show that he was indeed employed. What is even more interesting is his statement on cross examination that on being injured he never informed his employer about the injury. He never even claimed under the workman compensation Act.

His only claim arose when he went to court. That was not a behaviour of an employee. This should have raised doubts as to whether he was indeed employed or not.

The other issue is that of liability. Even the respondent was indeed an employee and was injured was the appellant liable for those injuries.

The answer to that should have been in the negative. In the first place the respondent states that he was the one who cut himself with a panga.

Thus the issue of negligence on part of the appellant do not arise.

One cannot cut himself and pass the buck to his employer.

Of course the respondent stated that he was not provided with groves and possibly that is why he cut himself. He was performing manual duty.

There was no evidence that he should have been provided with any protective gear. He was cutting cane and in his evidence he said he knew how to cut cane. I do concur with the holding of my brother in the case of MUMIAS SUGAR CO. LTD VS. SAMSON MUYINDA KAKAMEGA HCCC.NO.58 OF 2000 where the facts were very similar to this case.

The work the respondent was doing was manual and not mechanized.

He was in control of the Panga and therefore he had the duty to ensure that he did not cut himself.

The respondent had said the Panga he had was not good and the handle was bad. That would be no ground to hold the appellant liable.

In any case the respondent in cross – examination stated that the panga was his.

It had been provided for by the appellant but he had paid for it and it became his. He cannot therefore blame the appellant for the pangas as it was his.

As submitted the respondent was not working in a factory.

It was in an open field far from the factory. The provisions of The Factories Act therefore cannot apply.

All in all I find that the magistrate's judgment was not supported by the evidence on record. The respondent had not, even on a balance of probabilities, proved his claim. In the circumstances I allow the appeal and set aside the judgment and substitute it with one dismissing the respondents claim entirely.

The appellant will have the costs of this appeal and the costs in the lower court.

Dated 5th October 2006.

KABURU BAUNI

JUDGE

Delivered in presence of

cc. Mobisa

Mr. Otieno for Okongo for appellant

N/A for respondent.