REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 61 OF 2016

CORAM: D. S. MAJANJA J.

BETWEEN

SOUTH NYANZA SUGAR COMPANY LTD.....APPELLANT

AND

PHOEBY ATIENO ODUARA.....RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon. J. Njoroge, PM*

at the Chief Magistrates Court in Kisii in Civil Case No. 1123 of 2004

***dated 1st September 2004*)**

JUDGMENT

1. In 1994, the parties entered into an Outgrowers Cane Agreement in which the respondent was to cultivate sugar cane for a period of 5 years or until the plant crop and 2nd ratoon crops were harvested whichever period shall be less on her plot measuring 0.5Ha. It was not disputed that the appellant harvested the plant crop but did not harvest the 1st ratoon crop.

2. After hearing the case, the trial magistrate held that the appellant had not given any reasonable explanation for why it failed to harvest the 1st ratoon crop. The respondent was awarded Kshs. 94,400/- being the value of the 1st and 2nd ratoon less harvesting and transport charges made up as follow:

Amount for 1st ratoon (0.5Ha x 100 x 1553/-) Kshs. 77,650.00

Less harvesting charges (210/- x 50) (Kshs. 10,500.00)

Less transport charges (399/- x 50) (Kshs.19,950.00)

Net amount due Kshs. 47,200.00

3. At the hearing of this appeal, counsel for the appellant raised two issues for consideration. First, that the respondent failed to plead and prove special damages as required as her claim was one for breach of contract. Second, following the breach, it was the duty of the respondent to mitigate her losses hence the trial magistrate erred in failing to take this into account in assessing the final award due to the respondent.

4. It is trite law that special damages must be pleaded with particularity and proved (see ***Dharamishi v Karsan* [1974] EA 41**, ***Maritim & Another v Anjere [1990-1994] EA 312 and Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd* [2013] eKLR**). *In order to prove the actual loss, the respondent is required to plead the area of the sugar crop, the yield which is expressed as the amount of cane harvested per hectare and the price per ton of sugar cane. Although inelegantly set out, these elements are set out in* paragraphs 5, 6 and 7 of the amended plaint. The respondent contended that she lost 47 tons of cane from her farm measuring 0.5 Ha at Kshs. 1,730/- per ton. I therefore reject the appellant's contention that the claim was not pleaded.

5. As to the issue of proof of special damages, I find that the area of the crop was not in issue. As regards the yield, the appellant purported to rely on the Yield Assessment Report prepared by Kenya Sugar Research Foundation to demonstrate the yield. This report was not produced in evidence but referred to in submissions. It was thus not admitted and could not be relied upon. She did not mention or state the yield she expected in her testimony. The appellant's witness, Richard Muok (DW 1) adopted his witness statement which showed that the plant crop yield for the area where the respondent's farm was situated was 63.42 tons per hectare for the plant crop and 42.35 tons per hectare for the ratoon crops.

6. The trial magistrate used a yield of 100 tons per hectare which was not supported by the evidence. Since the appellant's assessment was not disputed, I find that the yield per hectare was 43.35 tons per hectare for the ratoon crop. The trial magistrate adopted the price per ton proposed by the appellant, that is Kshs. 1553/-. The respondent did not support the price per ton pleaded in the amended plaint by any evidence although it is clear that she was entitled to some money under the contract less the harvesting and transport charges which were also not disputed. I would add that it is not a requirement of the law that the plaintiff must prove the precise amount claimed in the plaint to success.

7. Having analysed the evidence afresh I find that the trial magistrate erred in calculating the respondent's loss. The loss is **Kshs. 19,991.11** made up as follows:

Amount for 1st ratoon (0.5Ha x 21.176 x 1553/-) Kshs. 32,886.33

Less harvesting charges (210/- x 21.176) (Kshs. 4,446.00)

Less transport charges (399/- x 21.176) (Kshs. 8,449.22)

Net amount due Kshs. 19,991.11

8. The next question is whether the trial court erred in failing to take into account the respondent's duty to mitigate damages. The law regarding mitigation of damages was summarized in by Viscount Haldane, LC., in ***British Westinghouse Electric and Manufacturing Company v Underground Electric Railways Company of London Limited*** **[1912] AC 673** as follows:

> *The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this principle is qualified by a second, which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him claiming any part of the damage which is due to his neglect to take such steps.*

9. What is reasonable for a plaintiff to do in mitigation of their damages is not a question of law, but one of fact dependent on the circumstances of each particular case, the burden of proof being on the defendant (see ***African Highland Produce Limited v Kisorio*** **[1999] LLR 1461 (CAK)**). In this case the appellant did not demonstrate how the respondent was to mitigate her loss given that she had been contracted by the respondent to grow and sell sugarcane to it for 5 years. She could not sell or dispose of the sugar elsewhere and the appellant did not demonstrate how she could mitigate her loss. I therefore find that the she was entitled to damages for the 1st and 2nd ratoon crop amounting to **Kshs. 39,982.22**.

10. For the reasons I have set out herein, I allow the appeal and now make the following orders:

(a) The judgment be and is hereby set aside and substituted with a judgment for **Kshs. 39,982.22** together with interest from the date of filing the amended plaint in the subordinate court.

(b) The respondent shall have costs of the case before the trial court.

(c) There shall be no order for costs for this appeal.

DATED and DELIVERED at KISII this 12th day of October 2018.

D.S. MAJANJA

JUDGE

Mr Odero instructed by Okong'o, Wandago and Company Advocates for the appellant.