



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

HIGH COURT CIVIL APPEAL NO 5 OF 2016

ELIAS OCHIENG KONYANGO.....APPELLANT

VERSUS

SOUTH NYANZA SUGAR COMPANY.....RESPONDENT

(An appeal from the judgment and decree of D.K. Kimei (CM) in Migori CMCC No 4 of 2015 delivered on 23rd Dec. 2015

JUDGMENT

1. **ELIAS OCHIENG KONYANGO** (the appellant) has filed this appeal contesting the decision where he had sued for damages arising from the failure by **SOUTH NYANZA SUGAR COMPANY** (the respondent) to harvest cane which he had planted in consequence of a non-contracted cane agreement entered into on 10th September 2004 was dismissed for want of proof.
2. It was the appellant's case that after the cane matured; the respondent discriminately harvested other farmers' cane but ignored his crop and unreasonably refused to grant him consent to dispose of the cane to other buyers.
3. The appellant stated that he had planted cane on a field measuring 0.5 Ha and expected a yield of 100 tonnes at a price of Ksh. 500/= per ton for one crop cycle, which could have earned him a total of Ksh 125,000/-
4. The respondent denied liability and stated on a without prejudice basis that if there was any loss suffered then the appellant authored his own misfortunes by failing to properly maintain his crops r to the required standards to warrant the same being harvested by the Respondent. And he is therefore stopped from visiting his misfortunes on the respondent.
5. It was the appellant's case that the contract was only for one harvest which was to be carried out between 15th January 2005 to 22nd January 2005. The appellant adopted the contents of his statement dated 16th March 20015 where he stated that he expected a yield of 40 tonnes from his plant crop and at the time the price per ton ranged between Ksh2000/--3000/- In this regard he relied on the South Nyanza Sugar Company Ltd price list which had been in use from 1998. He was agreeable to harvest charges of ksh 210/- per ton and transportation charges of Ksh 399/- per ton (totaling to Ksh 24360 being deducted from any award the court would make.
6. The respondent's witness **RICHARD MUOK (DW1)** in adopting his filed statement confirmed that there was a contract between them, but he was insistent that the cane was harvested on the exact dates pleaded and the appellant was fully paid his dues. He explained that the appellant was given an advance

payment of Ksh 55,000 and later on another payment of Ksh 18,734/75 cts. The witness relied on the computer extracted statement of accounts to support the position

7. Although the appellants counsel argued that the document was an afterthought and that the issue about harvest being carried out had never been brought to the appellant's attention, the trial magistrate held that the appellant's plant crop had been harvested and paid for. The trial magistrate held that the statement contained details regarding the delivery of the cane and was persuaded that the cane had indeed been harvested

8. In contesting these findings the appellant stated that failed to consider and evaluate the evidence, thereby reaching a wrong decision. Further, that the trial magistrate failed to take into account the fact that the respondent did not produce any evidence to rebut the claim that the cane was not harvested. He also pointed out that the

9. The appeal proceeded ex-parte after the respondent and its counsel failed to attend the hearing. **MR. JURA** submitted on behalf of the appellant that the appellant's evidence was not impeached as no cross-examination was done. He faulted the statement of accounts which the trial relied on saying it was a computer generated extract yet statements of accounts are usually generated from the farmers.

10. Counsel submitted that the respondent's witness did not produce any records such as the weigh bridge ticket which would confirm that the cane was harvested, transported and weighed. Further that there was no job completion certificate to confirm that the cane had been harvested and weighed-therefore there was no basis for believing the Respondent's counsel.

11. There was no dispute that the parties had entered into an agreement requiring the appellant to plant cane on his 0.5 Ha field which would be harvested by the respondent once. Since it was also not disputed that the appellant infact had cane growing on his field what proof was there that the cane had been harvested ad transported from the field?

12. The statement of account relied on was a computer generated document which could have been created for any other farmer and the appellant's name inserted. Indeed the proof that the cane had been harvested would have been demonstrated by the standard weigh bridge ticket or a job completion certificate.

13. Surely the company cannot come up with a computer printed document in which the appellant had no in-put and claim that they harvested the cane and made payments. If the payments were made by cash as suggested in the document then I would expect that the appellant signed a document to acknowledge receipt of the money, yet nothing of the sort was presented to the court.

14. The appellant had proved that he planted cane and there was no evidence confirming that the same had been harvested and paid for, and the computer generated statement was in my view pure hot air to hoodwink the court. The trial court erred in dismissing the claim and the judgment thereto be and is hereby set aside.

15. From the evidence the crop was planted on a 0.5 Ha field and the agreement estimated a yield of 40 tonnes . The schedule of sugar cane prices produced by the appellant was not contested and I therefore use it as a guide in determining the then prevailing sugar cane prices for December 2004 when the cane was due for harvest was Ksh 1800/- per ton and this is worked out as follows:

$$0.5 \times 40 \times 1800 = 36,000/-$$

I decline to deduct the harvest and transport charges as there is no evidence that such events ever took place.

16. Consequently the appellant is awarded the sum of **Ksh 36,000 /-** (**Thirty six thousands shillings only**) **plus interest from the date of filing suit.** The respondent shall bear the costs of the appeal

Written and dated this 20th day of February 2017 at Homa Bay

H.A.OMONDI

JUDGE

Delivered and dated this 20th day of February, 2017 at Migori

A.C.MRIMA

JUDGE