REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. 2 OF 2019

(Originally Kisii High Court Civil Appeal No. 69 of 2006)

SOUTH NYANZA SUGAR CO LTD.....APPELLANT

v

JOSHUA ONDIGO.....RESPONDENT

(Being an Appeal from the judgment and decision of the lower Court,

A. Ingutiah SRM (MR) dated 10.03.06 in the Original KISII CMCC No.

1436 of 2004 JOSHUA ONDIGO v SOUTH NYANZA SUGAR COMPANY LTD)

JUDGMENT

1. Joshua Ondigo (the Respondent) sued South Nyanza Sugar Co Ltd (the Appellant) before the Senior Resident Magistrates Court in Kisii, alleging breach of statutory duty of care/negligence.

2. In a Judgment delivered on 10 March 2006, the trial Court found the Appellant liable 90%. The Respondent was awarded general damages of Kshs 64,000/- and special damages of Kshs 3,500/-.

3. The Appellant was dissatisfied, and it filed a Memorandum of Appeal before the High Court in Kisii contending that:

> 1. The Learned trial Magistrate erred in law and fact in failing to find that the Plaintiff had failed to establish the fact that he was an employee of the Defendant.
>
> 2. The Learned trial Magistrate erred in law in failing to find that the Plaintiff was the employee of the independent contractor, a fact established by the Plaintiffs own evidence.
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> 3. The Learned trial Magistrate erred in law in failing to find that the Plaintiff's injuries were fictitious and fraudulent as the evidence by the Plaintiff himself was very suspect.
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> 4. The Learned trial Magistrate erred in law in holding that the Appellant liable when the evidence on record reveals that the Plaintiff had the full control of the panga he was using and had a duty to himself to be careful.
>
> 5. The Learned trial Magistrate erred in law in failing to find that the Plaintiff, having averred on oath that he chose to work without the safety gears which he knew was his right, he had by himself assumed the risk and this the doctrine of *volenti non fit injuria* applies to him fully.
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> 6. The judgment was against the evidence adduced and thus contrary to the law.
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> 7. The Learned trial Magistrate erred in law in failing to find that the Plaintiff had admitted the averments in the Statement of Defence.

4. On 24 January 2019, the High Court, citing lack of jurisdiction, transferred the Appeal to this Court.

5. This Court gave directions on 25 November 2020, leading to the Appellant filing its submissions on 21 December 2020 (should have been filed/served before 18 December 2020).

6. The Respondent filed its submissions on …… (should have been filed before 30 January 2021).

7. The Court has considered the record and the submissions. The Court will adopt the Issues as condensed by the Appellant in its submissions.

Role of this Court on first appeal

8. The role of a first appellate Court has been the subject of discussion in numerous decisions from the High Court and the Court of Appeal.

9. In ***Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates*** **(2013) eKLR**, the Court of Appeal stated as follows regarding the duty of a first appellate court:-

> **This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.**

10. The Court will bear the caution in mind.

Employment relationship

11. The Respondent had pleaded that he was an employee of the Appellant as a cane cutter.

12. In its Statement of Defence, the Appellant denied the existence of an employment relationship. In the alternative, the Appellant pleaded that the Respondent was employed by a third party.

13. During testimony, the Respondent stated that he was a cane cutter and used to receive his pay at Sony. The Court assumes Sony refers to South Nyanza Sugar Co Ltd. The Respondent also named his supervisor as one Julius Owiti.

14. During cross-examination, the Respondent testified that he was recruited by an agent from Sony whose name he did not know. However, he admitted that he had no document to show the Appellant employed him.

15. Pressed, the Respondent gave the name of two contractors as James and Odhiambo.

16. The Appellant called one witness. It was its Harvesting and Transport Supervisor. He stated that there was a harvesting contractor who employed and paid cane cutters. He denied that the Appellant ever employed the Respondent.

17. Under cross-examination, the witness accepted that he did not have a schedule of the Appellant's employees in Court and that the contractor who had been named by the Respondent was not in the Appellant's list of contractors. He denied that Julius Owiti was an employee of the Appellant.

18. The trial Court found that the Respondent had proved on a balance of probability that he was an employee of the Appellant because the Appellant had not produced records to show otherwise or substantiated that cane cutters were employed by third-party contractors.

19. On the state of the record, the Court agrees with the finding of the Trial Court on the existence of an employment contractual relationship between the Appellant and the Respondent.

20. The Appellant would have easily disproved the Respondent's oral testimony on a contractual relationship by substantiating the oral testimony that contractors employed cane cutters by producing copies of the contracts.

21. Although the Appellant referred to certain provisions of the Employment Act, 2007, the Court finds the Act inapplicable as it only commenced on 2 June 2008.

Breach of duty of care/negligence

22. The Appellant submitted that since there was no employment relationship between the Respondent and itself, it could not have had a corresponding duty of care to him.

23. The Appellant also urged that the instant case was one where the doctrine of *volenti fit non injuria* applied because the Respondent admitted he was using a faulty panga. Any injuries, the Appellant urged, were self-inflicted.

24. The Appellant called to its aid the Occupational Safety and Health Act. The Act commenced in October 2007 and cannot aid the Appellant's case.

25. The Court will now examine the submissions by the Appellant on lack of employment relationship and duty of care or liability and *volenti fit non injuria*.

26. It is not in dispute that the Respondent was a cane cutter and that the cane was being cut for the benefit of the Appellant, who had a

contract with farmers within its zone of operations.

27. In the view of the Court, the Appellant was under a duty to ensure a safe work environment for its employees and third parties present at the farm on its invitation as a *respondeat superior*. It had the responsibility and duty to ensure and control the third-party invitee/licensee's activities within the farm.

28. This was, therefore, a case of *joint tortfeasors*, and the Appellant may as well have sought indemnity from its contractor(s), if at all.

29. On the question of negligence, the Court has reviewed the evidence before the trial Court. The Respondent testified the machete slipped and cut my right knee…

> I blame the company. I was not given protective gear such as gloves, overalls, helmets and goggles. I was using a machete to cut sugar cane. It was not in good shape. The handle was bad. The handle was loose. I was careful and handled the machete properly.

30. The first thing this Court notes is that the Respondent did not disclose whether the machete was a tool of trade provided or issued to him by the Appellant.

31. Secondly, the Respondent did not create a nexus between the safety gear he mentioned and the injury to the right knee or how the safety would have mitigated an injury to the knee.

32. Thirdly, the Respondent did not disclose whether he had brought to the attention of the Appellant or any other party the fact that the machete he was using had a problem/was faulty.

33. In this regard, the Court will accept the defence proffered by the Appellant of *volenti non fit injuria*.

34. In the view of the Court, the Respondent's accident and injuries were the types contemplated by the Workmen's Compensation Act and not a cause of action for breach of duty of care/negligence under the common law.

35. The trial Court fell into error in finding the Appellant liable.

Conclusion and Orders

36. From the foregoing, the Court finds that the trial Court fell into error in finding the Appellant liable to the Respondent.

37. The Judgment is set aside and is substituted with an order dismissing the suit before the trial Court.

38. Each party to bear their own costs both before the trial Court and this Court.

Delivered through Microsoft teams, dated and signed in Kisumu on this 3rd day of March 2021.

Radido Stephen, MCIArb

Judge

Appearances

For Appellant Otieno, Yogo, Ojuro & Co. Advocates

For Respondent Khan & Katiku Advocates

Court Assistant Chrispo Aura