REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Civil Appeal 77 of 2004

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

VERSUS

WILSON ONGUMO NYAKWEBA ……RESPONDENT

(An appeal from the judgment and decree in the Senior Resident Magistrate's Court Kilgoris SRM CC NO.19 of 2003 by Mrs. Grace M masi, S.R.M)

JUDGMENT

The Respondent was the plaintiff in RMCC NO.19 of 2003 at Kilgoris. He filed the suit against the appellant and alleged that he was employed by the appellant as a sugar cane cutter.

He stated that on 29th July 2001, he was lawfully engaged in his work when the panga that he was using to cut the sugar cane accidentally cut him on the left mid-tibial part of the leg. He alleged that the said accident was caused by breach of statutory duty and negligence on the part of the appellant. He set out the particulars thereof in the plaint. He claimed general damages and special damages of Kshs.3500/= on account of a medical report.

The appellant filed a statement of defence and denied that the respondent was in its employment as a cane cutter. The appellant also denied that the alleged accident ever took place and further denied all the particulars of breach of statutory duty and negligence attributed to it by the respondent. In the alternative, the appellant averred that if at all the said accident did occur, the same was caused by the respondent's own negligence and set out the particulars thereof.

During the hearing, the respondent testified that on the material day he was cutting sugar cane when he accidentally cut himself with the panga that he was using. Thereafter he went to a local clinic where he was treated. He produced the treatment notes as an exhibit. Later he was examined by Doctor Ezekiel Ogando who prepared a medical report.

The respondent did not testify that he paid any money for examination and preparation of the said medical report.

The respondent blamed the appellant for not supplying him with gloves and gumboots. He alleged that the gloves would have enabled him to have a firm grip on the panga which he was using. He did not state that the appellant was under an obligation to supply such gloves and gum boots to cane cutters and neither did he demonstrate that he had ever requested to be supplied with the same. In his view, he did not contribute to occurrence of the accident in any way.

Doctor Ezekiel Ogando also testified and produced a medical report that he prepared upon examination of the respondent. He did not state that any money was paid to him for preparation of the medical report.

The appellant did not adduce any evidence to rebut that of the respondent. No reason was given for that.

The trial court was satisfied that the respondent had proved his case on a balance of probabilities and entered judgment for the respondent. It awarded general damages in the sum Kshs.60,000/=. No award was made for special damages as the claim thereof had not been proved.

The appellant was aggrieved by the said judgment and preferred an appeal to this court.

The following grounds of appeal were set out in the memorandum of appeal:

"***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 infact 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."

Mr. Nyambati for the appellant and Mr. Mudeyi for the respondent did not make any submissions during the hearing of this appeal. It was agreed by consent that they would adopt their respective submissions in **SOUTH NYANZA SUGAR COMPANY LTD. VS JOHN ONYANGO KAUSI HCCA NO.78 of 2004**.

This being the first appellate court, it is mandated 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 failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court has to state the correct position, see **PETERS VS SUNDAY POST LIMITED [1958] EA 412**.

In this case, the respondent testified that he was employed by the appellant as a cane cutter. He had been supplied with a sharp panga for doing his work. He had been doing that work since June 1997. He was therefore well experienced in his job as at the date of the alleged accident, 29th July 2001. He was in full control of that panga. The job he was doing was a manual one and did not require any specialized training. He admitted that he had personally sharpened the panga on the material day and he was aware that a sharp panga had to be used with caution. He stated:

"***It is me who was cutting cane and I cut myself.***

The panga [got] stuck in the twined roots when I raised it. I had not seen the roots. I saw the roots after the accident".

In view of that candid admission on the part of the respondent, how could he then blame the appellant for

the occurrence of the accident? In the circumstances, can the respondent argue that the appellant failed to provide him with a safe system of work? I do not think so. In **WINFIELD AND JOLOWICZ ON TORT,** 13 Edition page 203 the learned authors state as follows:

"**At common law the employer's duty is a duty of care and it follows that the burden of proving negligence rests with the plaintiff workman throughout the case. It has even been said that if he alleges a failure to provide a reasonably safe system of working, the plaintiff must plead and therefore prove what the proper system was and in what relevant respects it was not observed. It is true that the severity of this particular burden has somewhat been reduced, but it remains clear that for a workman merely to prove the circumstances of his accident will normally be insufficient."**

The respondent argued that the appellant failed to provide him with gloves and gumboots. He alleged that if he had gloves, he would have had a firm grip on the panga. However, from the explanation that he gave as to how the accident occurred, he did not lose grip of the panga. In any event, the respondent did not adduce evidence to show that the appellant was under a legal obligation to provide him with such gloves and gum boots. If indeed the appellant was under such an `obligation, it was the duty of the respondent to prove the same. **Section 107(1)** of the **Evidence Act** states as follows:

"**whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."**

Even assuming that the respondent was supposed to be supplied with gloves and gum boots by the appellant and the appellant had failed to do so, given the manner in which the accident herein occurred, I do not think that the respondent would have proved his case sufficiently. It would appear that even if he had put on gloves and worn the gum boots he would still have cut himself. In every case of alleged negligence, a causal link between the alleged injuries and the appellant's negligence, if at all, has to be established. In **STATPACK INDUSTRIES LIMITED VS JAMES MBITHI MUNYAO**, Nairobi HCCA NO.152 of 2003 (unreported), it was held as follows:

"**It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury.**

The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence.

An injury per se is not sufficient to hold someone liable."

From the foregoing, the respondent did not prove that the appellant was in any way to blame for the injuries that he suffered. The alleged breach of statutory duty and negligence on the part of the respondent was not established. The respondent was the author of his own misfortune and cannot blame the appellant. Consequently, I allow this appeal and set aside the judgment that was entered by the trial court and substitute there for an order dismissing the respondent's suit in the lower 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 open court in the presence of:

Mr. Nyambati for the appellant

N/A for the respondent

D. MUSINGA

JUDGE