**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**Civil Appeal 150 of 2006**

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

**VERSUS**

**JOEL OKECH OUMA……..RESPONDENT**

**JUDGMENT**

**(An appeal from the Judgment and decree of Mr. Wilson N. Kaberia Esq. Senior Resident Magistrate's court Kilgoris on the 30th May, 2006 in Kilgoris SRMCC no. 28 of 2003)**

On 14th February, 2003 through **Messrs Khan & Katiku advocates, Joel Oketch Ouma**, the respondent in this appeal filed a suit against **South Nyanza Sugar Company Limited**, the appellant herein in the Senior Resident Magistrate court at Kilgoris. The suit was for damages both special and general, costs and interest. The cause of action was founded upon alleged breach of statutory duty and or negligence on the part of the appellant towards the Respondent. It was claimed by the respondent that he had been employed by the appellant as a cane cutter. As such cane cutter, the appellant owed him the duty to take all reasonable precautions for his safety, not to expose him to risk of damage or injury which the appellant knew or ought to have known, to provide and maintain adequate and suitable measure to enable the respondent to carry out his work in safety and to provide a safe and proper system of working.

On or about the 28th January, 2000 the respondent whilst in the course of his employment aforesaid he sustained a cut on his left hand as he harvested sugar cane at Masai Mara. As a consequence he suffered pain, loss and damage. He blamed the injury on the appellant because it failed to keep safe his place of work, and or safe means of access and or employing him without instructing and training him as to the dangers likely to arise in connection with his work and

failing to provide adequate supervision. He also blamed the appellant for the injuries on the grounds of its negligence. That the appellant failed to take any or any adequate precaution for his safety, exposed him to the risk of damage or injury, failed to provide or maintain adequate or suitable plant, tackle or appliances to enable him work in safety, providing unsafe plant and equipment for the respondent and finally failing to provide the respondent with gloves or other suitable equipment to enable him carry out the work in safety.

As a result of the injuries sustained, he incurred expenses in treatment. Following treatment he caused a medical report to be prepared at a cost of kshs.3,500/-. On the basis of all the foregoing the respondent sought from the appellant compensation by way of General and Special damages, costs and interest.

On being served with the summons to enter appearance, the appellant through **Messers Okongo & Co. Advocates** filed a memorandum of appearance and subsequently a defence. In its defence the appellant denied all the allegations of breach of statutory duty as well as negligence and the particulars thereof attributed to it. In the alternative it argued that if at all the respondent was injured as claimed, then he was the author of his own misfortune and that he was utterly negligent in the manner he handled his tools of work. The particulars of negligence it attributed to the respondent were that he cut himself on his left hand instead of cutting sugarcane, failed to pay due care and attention to his work and failed to properly hold and use the panga.

The hearing of the suit eventually commenced before **Chepseba,** SRM on 17th May, 2005. The respondent testified that on 28th January, 2000 he was cutting sugar cane in Transmara District when he cut himself. He cut himself because the panga he was using in the exercise was defective as the handle was loose. Thus it slipped from his grip and cut him. He had not been given gloves by the appellant as required. If he had been given the gloves they could have helped him to have a good grip of the panga and therefore he would averted the accident. He had earlier asked for the gloves from one, **Omaiyo,** who told him to wait. Following the injury he was examined by **Dr. Ogando** who later prepared a medical report. He paid him Kshs.3,500/-. The injury on the left hand consisted of a cut but was stitched.

Cross-examined by **Mr. Gembe**, learned counsel then appearing for the appellant, he conceded that he had another case pending in court in which he had sued the appellant again for sustaining a cut on the leg. He had been employed by the said **Omaiyo** on 28th January, 2000. It was his first time to cut sugar cane though. He saw other people putting on gloves. However he could not wait for his turn as he thought that it was unnecessary to wait. He conceded that he cut himself by accident and even **Omaiyo** and the appellant did not know. He had held two sugar cane plants two feet above and as he cut them, the panga slipped upward. He did not know that the panga handle was defective. The gloves would have assisted him to hold the panga firmly even if it was defective. He further conceded that he had never used the gloves.

The respondent then called **Dr. Ezekiel Ogando Zoga** as his witness. However in unclear circumstances the case was taken over by **Mr. Kaberia, SRM**. **Dr. Zoga** examined the respondent on 29th October, 2002. He had sustained a cut on his left hand. He complained of some intermittent pain on the left hand. Having so examined, he concluded that the respondent sustained soft tissue injuries which had healed with a permanent scar. He prepared a medical report which he tendered in evidence. He charged Kshs.3000/- for the same.

Cross-examined, he stated he examined the respondent two years after the accident.

That then marked the close of the respondent's case. Thereafter parties adjourned the case to 11th October, 2005 for hearing of the defence. Come that date and again the appellant managed to have the suit adjourned. However the learned magistrate ordered that, that was going to be the last adjournment, going by the original record. Thereafter the record both original and typed does not show what transpired. The next thing on record is a judgment. It is not clear from the record how the decision to craft the judgment was arrived at. Was it by the court on its motion or not? One cannot tell. The last entry on record was on 30th March, 2006. The minute for that day shows that both counsel for the appellant as well as respondent were present. However the record is silent as to what transpired then. I find this rather strange considering the need for courts to keep proper record of proceedings.

Be that as it may, the learned magistrate delivered his judgment on 30th May, 2006. In that judgment, the learned magistrate sought to correct the omissions alluded to above. Apparently it had been agreed by consent on 30th March, 2006 when the case came up for defence hearing that the testimonies of **Leonard Oganga** and **Francis Abongo in Kilgoris SRMCCC. No. 51 of 2003** would be replicated in this suit as the evidence of the defence. **Leonard Oganga** was the field assistant with the appellant. His testimony was that cane cutters were casual labourers and were engaged by an independent contractor. His job was however to supervise them and fill delivery notes. **Francis Abongo** also testified along the same lines. That is, that the cane cutters were employees of an independent contractor and had no relationship whatsoever with the appellant.

In my view however, the decision to adopt the testimony of these witnesses from previous proceedings should have been on record. Further their said testimony should have formed part of the record of this appeal.

Anyhow the learned magistrate having carefully evaluated the evidence tendered by the respondent as well as the appellant reached the verdict thus:

> ***"……..I have considered the evidence and the submissions before me. I have also considered the pleadings. Although Mr. Bwana and Mr. Abongo (DW2) claim that the plaintiff was an employee of an independent contractor, no material was placed before the court to prove this. On the***

***contrary the evidence of Mr. Bwana shows that he supervises the cane cutters and actually fills the delivery notes.***

***So is the plaintiff an employee/servant of the defendant? In the case of <u>Mwanthu-vMbwana Construction Compan yLlimited 1991 KLP 190 Mr. Justice Wambiliangah</u> (as he then) held that the issue of whether or not a master servant relationship exists is a question of fact and the test is whether the alleged servant was under the control or bound to obey the orders of the alleged master.***

***In this case am convinced by the evidence of DW Mr. Bwana that the plaintiff was under his supervision and was bound to obey his orders. I therefore find that the plaintiff was indeed a servant of the defendant.***

***From the evidence on record I don't find the defendant negligent .The plaintiff who was in control of the panga cut himself when the same slipped from his hand cannot blame the defendant for his own negligence. However the claim by the plaintiff that the panga he was issued with was defective was not controverted by the defence. I therefore find that indeed the same was defective. I therefore find the defendant to have breached its statutory duty to supply the plaintiff with the right working implements therefore exposing him to unnecessary risk. Be that as it may, the plaintiff too must take some blame for proceeding to use a panga that he knew was defective thereby exposing himself to danger.***

***In the circumstances of this matter, I apportion liability at 50/% against the defendant.***

***On quantum, I find an award of Kshs. 70,000/= in general damages for pain and suffering to be proper recompense for his injuries. I therefore hereby award the same. I also award him Kshs. 3,500/= being costs of the medical report. The plaintiff is also awarded the costs of this suit, and interest….."***

The appellant was aggrieved by the said judgment. On 13th June, 2006, it lodged the instant appeal. It sought to impugn the judgment of the learned magistrate on the following grounds:-

***"1.*** The ***learned trial magistrate erred in both law and infact in***

***holding that the appellant owed both contractual and statutory duty of care to the Respondent when infact there was no evidence led in that regard.***

***2. The learned trial magistrate erred in both law and 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 infact 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 infact in failing to dismiss the respondent's suit with costs.***

6. ***The learned trial magistrate erred in both law and infact in awarding to the respondent general Damages (sic) in the excessive, unrealistic and exorbitant sum of Kshs. 70,000/= for basically soft tissue, self inflicted injuries which the respondent allegedly suffered."***

When the appeal came up for hearing before me on 8th March, 2010 **Mr. Odhiambo** and **Mr. Ogweno**, learned counsel for the appellant and respondent respectively agreed to canvass the same by way of written submissions. They subsequently filed and exchanged written submissions which I have carefully read and considered alongside cited authorities.

The case of **Selle** and **Another .V. Associated Motor Boat Company Ltd** and **others (1968) E.A. 123** sets out the jurisdiction and or mandate of this court on a first appeal. It is that this court has to treat the appeal from the trial court by way of a retrial and it is not bound to follow blindly the trial court's findings of fact if it appears either that it failed to take into account of particular circumstances or probabilities or if the impression of the demeanour of a witness is in consistent with evidence generally. In other words this court is required to reconsider and re-evaluate the facts and the law, the evidence adduced before the trial court and reach its own independent decision. In so doing this court is required to bear in mind that it neither saw nor heard the witnesses who testified and cannot therefore assess their demeanour. Due allowance should therefore be given in that regard.

The basis of the respondent's claim in the trial court was that he was an employee of the appellant and that he was injured in the course of his duties as such employee of the appellant. Had the appellant not breached its statutory duty towards him and or had the appellant not been negligent towards him he may well have not sustained the injuries. Before the trial court then, it was incumbent upon him to prove with credible evidence that he was indeed an employee of the appellant and that he was so injured whilst on duty. Did the respondent prove that he was an employee of the appellant? I do not think so. Nowhere in his evidence in chief does he testify as to his employment by the appellant. It is

only under cross-examination that he alludes to any such employment. He stated that was employed by one, **Omaiyo**. He did not however state the **nexus** between the said **Omaiyo** and the appellant. The evidence of **Leonard Oganga Owona** and **Francis Obongo** in Kilgoris SRMCCC No. 51 of 2003 and which was adopted in this case by consent of the parties was to the effect that the cane cutters and the respondent was one of them were casual labourers who were engaged by an independent contractor. He had no relationship at all with the appellant. This evidence was neither rebutted, challenged or countered by the respondent. Now if the respondent was not an employee of the appellant but rather independently contracted by one, **Omaiyo,** how then can he visit his misfortune on the appellant? In my view the respondent ought to have directed his woes if at all on the independent contractor. In the premises, there was no basis for the finding by the learned magistrate that the respondent was a servant of the appellant. A party is ordinarily bound by his pleadings. In this case, the respondent had categorically pleaded that he was an employee of the appellant. However from the evidence, it emerges that he was infact an employee of an independent contractor. Yes, the issue as to whether or not a master and servant relationship exists is a question of fact and the test is whether the alleged servant was under the control or bound to obey the orders of the alleged master. However in this case there is no evidence at all that the respondent was ever an employee of the appellant. The delivery notes tendered in evidence with the name of the respondent therein do not show that the respondent was infact an employee of the appellant. I am also certain that had he been such employee, the appellant would have been more than willing to assist him to pursue compensation under the then workmen's compensation Act.

Assuming however that the respondent had proved that he was an employee of the appellant, was the evidence tendered sufficient to hold the appellant to account for its alleged breach of statutory towards the respondent and or that it was negligent towards him? I do not think so either. The respondent was emphatic in his evidence in chief ***that "……I was to be given gloves by Sony (Defendant). We had Omaiyo. I told him to give me. He told me to wait……..."*** Apparently he did not see the need to wait for under cross-examination he ***stated "…….I was employed as a casual. The farm is far from home. I know how to cut cane using a panga. It was my first time to cut cane. I saw other people putting gloves. I saw it was not necessary to wait. I cut myself by accident…."*** Now if the respondent was told to wait for the gloves and did not do so and proceeded to start working without them and was thereafter injured, how can he then turn around and blame the appellant for failing to provide him with the gloves? Had he waited, he would have been given the gloves and since to him the gloves were the panacea of all his tribulations, he would not have sustained the injuries. In the circumstances if at all the respondent was injured, he can only blame himself for the misfortune and not the appellant. He was the author of his misfortune.

In any event, the appellant was engaged in manual labour of cutting sugar cane. That kind of work does not require any exceptional skill. Indeed the respondent seems to admit that much when he states that it was his first time to cut sugar cane and that he knew how to do so using a panga. If an employee is engaged in a job which is in the nature

of manual labour and which does not require any exceptional skill and gets injured and as in this case due to his own haste and failure to wait for the promised gloves, then I do not see how such an employee can hold his employer liable for the injuries either under statute or common law negligence. This same issue taxed or vexed **Waweru J** and **Kimaru J in Mumias Sugar Co. Ltd .V. Samson Muyinda, KAK HCCA. NO. 58 OF 2000(UR) and Wilson Nyanyu Musigisi .v. Sasini Tea & Coffee Ltd, KER.HCCA. no. 15 OF 2003** respectively. **Waweru J.** delivered himself thus in the Mumias sugar Co. Ltd case:- ***"…….the respondent's work for which he was engaged involved cutting sugar cane in an open field using a sharp panga. He would hold a cane in one hand and cut its lowest point with a panga in the other hand,. It was simple operation which the respondent had full command and control. It was surely his duty to ensure that he did not cut himself with the panga. No evidence was led that in that type of work there was reasonable necessity of any type of protective clothing or that the same were provided as a matter of course in a similar work elsewhere. There was no proof of hidden inherent danger in the operation of cutting down cane of which the appellant ought to have warned the respondent. To ensure that he did not cut himself with a panga was a matter that was particularly within the power and control of the respondent…….. "***

On his part **Kimaru J** delivered himself thus in Wilson Nyanyu Musigisi case after quoting **Waweru J** as aforesaid ***"……In this case the operation of the slasher was within the power and control of the appellant. He cannot blame anybody if he injured himself. The court wonders how the provision of gumboots by the respondent to the appellant would have changed the projection of the slasher which he had himself directed to his right leg albeit accidently….."*** The same situation obtains here. However, the respondent's position is compounded further by the fact that the panga was allegedly defective at the handle. Much as he claims that he did not know that the handle was defective, that cannot possibly be correct. That is the first thing he must have noticed when he picked or was given the panga. Infact there is no evidence at all as to where the panga came from. It may well have been his. There is no evidence at all that the panga was given to him by the appellant.

I have also my own doubts as to whether the respondent was really injured in this accident or indeed any other accident. I say so because in his own evidence, he stated that he never informed **Mr. Omaiyo** or anybody else about the accident. If the accident really happened as the respondent would want us to belief why was it so difficult to inform **Mr. Omaiyo** or even the management of the defendant? I am certain that the appellant was insured against this kind of risk. Through the workmen compensation scheme, the respondent would have been adequately compensated for the injuries if at all. Further it is instructive that following the alleged injuries, it was not until almost three years later that the respondent saw **Dr. Ogando Zoga** for the medical report. All this time he kept the appellant in the dark about the alleged accident. Further how come nobody else witnessed this accident. The circumstances of this case leads me to some irresistible conclusion that this was a fake claim calculated to fleece the appellant.

The respondent in his submission has raised the issue that the record of appeal is incomplete as it is difficult to tell whether the defendant closed its case or not. Without a complete record, it is the submissions of the respondent that the appeal is incompetent and ought therefore to be dismissed. My answer to this is two-fold. Directions under order XLI rule 8 were taken in the presence of counsel for the respondent. He was bound to but did not raise the issue of the record being in complete. He is barred from raising it now as it also too late in the day. To accede to his request now is tantamount to allowing him to benefit from his own mischief. Secondly, the respondent in the court below and in this court has throughout been represented by the same firm of Advocates. He cannot therefore claim that from the record could not make out whether the defendant gave evidence nor whether its case was closed. The respondent's counsel was present throughout those proceedings and knows very well what transpired. In any event, the judgment of the trial court has adequately dealt with that issue. It is therein stated ***"…….when the matter came up for defence hearing on the 30th day of March, 2006, it was agreed that the testimonies of Leonard Oganga Owona and Francis Abongo in Kilgoris SRMCCC.no. 51 of 2003 would apply to his matter…."*** Therein lies the answer to the respondent's submissions on the issue.

The upshot of the foregoing is that the respondent did not prove that he was an employee of the appellant and that the appellant was in any way to blame for his injuries if at all. Therefore there was no breach of statutory duty and negligence on the part of the appellant towards him. The respondent was clearly the author of his misfortune if at all and cannot blame the appellant. As a result, I allow the appeal and set aside the judgment and decree of the subordinate court and substitute therefor with an order dismissing the respondent's suit with costs. The appellant shall also have the costs of this appeal.

Judgment dated, signed and delivered at Kisii this 31st Day of May, 2010.

**ASIKE-MAKHANDIA**

**JUDGE**