No. 178

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 71 OF 2005

SOUTH NYANZA SUGAR CO.....APPELLANT

-VERSUS-

DANIEL O. OMWORO.....RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and decree of Mr. Ingutia SRM dated 21st April, 2005, in the Kisii CMCC No. 1105 of 2003)

The respondent's suit in the Chief Magistrate's court at Kisii against the appellant and which is the subject of this appeal was founded on negligence at common law and breach of statutory duty of care towards him as pleaded in the plaint. It was his case that he was at all material times an employee of the appellant as a cane cutter. On or about 16th August, 2006 whilst in the course of his said employment, his right leg was cut as a consequence of which he suffered pain, loss and damage. To him the said accident was occasioned by a breach of statutory duty as well as common negligence on the part of the appellant, its agents and or servants towards him. He gave the particulars of breach of statutory duty as well as common law negligence. The particulars of injuries sustained as a result of the accident were also given as deep cut wound on the right leg. The respondent therefore sought from the appellant general damages, costs and interest.

The appellant's defence was that the respondent was not its employee, the occurrence of the accident, the injuries sustained by the respondent as a result, common law negligence, breach of statutory duty and the particulars thereof were all denied by the appellant. Alternatively, the appellant pleaded that if the respondent was ever employed as alleged, then he was employed by a third party. Otherwise the respondent was a phantom plaintiff, fictitious, imagined whose suit should be dismissed with

costs. Finally, it pleaded that the suit was statute barred.

The case came up for hearing before **A. A Ingutia, SRM**. In his very short evidence in chief, the respondent testified that on 16th August, 2002, he was at Ayore harvesting cane. In the process he cut himself on the left leg with the panga. He went to Motichio dispensary where he was treated. In support of the fact that he was an employee of the appellant, he tendered in evidence a delivery note. Later he was examined by **Dr. P. M. Ajuoga** who prepared a medical report. He blamed the appellant for the accident on account of its failure to provide him with gumboots. Upon cross-examination, he stated that one, **Omweri** was his supervisor. In fact he was the contractor. The respondent also called **Dr. P.M Ajuoga** who testified and produced the medical report.

In its defence, the appellant called its transport and harvesting supervisor, **Joseph Abuga**. He testified that cane cutters are hired by contractors. The appellant is not involved in assigning work for the cane cutters nor does it employ them. The delivery note was given to the respondent by the contractor and not the appellant. Cross-examined, he maintained that cane cutters are employed by contractors though he had nothing to show to court in prove of the fact.

The learned magistrate having evaluated the evidence on record was satisfied that the respondent's claim had been proved on the balance of probability. She therefore entered judgment for the respondent on both liability and quantum. She apportioned liability at 20%/80% in favour of the respondent. On damages she award Kshs. 80,000/= less 20% contribution bringing it down to Kshs. 64,000/=. She also awarded special damages of Kshs. 3,000/=.

Unhappy with the results aforesaid, the appellant lodged the instant appeal. It challenged the findings of the learned magistrate aforesaid on 7 grounds to wit:-

"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, which was his duty in law.

2. The learned trial magistrate erred in law in failing to find that the plaintiff was the employee of an independent contractor as shown by the plaintiff is own exhibits.

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 raised all the suspicion.

4. The learned trial magistrate erred in law in holding the appellant 80% liable when the evidence on record reveal that the plaintiff who had full control of the panga he was using cut himself.

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 thus the doctrine of volenti no fit injuria applied to him in full.

6. Having stated in his evidence on oath that there was nothing the defendant could have done to stop him from injuring self, the learned trial magistrate was duty bound to find that the accident was inevitable and not blamable on the defendant.

7. The judgment was against the evidence adduced and thus contrary to the law".

When the appeal came up for hearing before me on 2nd July, 2010, **Mr. Nyachae**, learned counsel appeared for the respondent whereas **Mr. Nyambati**, learned counsel held brief for **Mr. Otieno** for the appellant. They agreed to argue the appeal by way of written submissions subsequently they filed and exchanged the same which I have carefully read and considered alongside cited authorities.

This appeal shall be determined on a very narrow and technical aspect; whether there is a competent appeal before this court. Order XLI rule 1A of the **Civil Procedure rules** provides that a certified copy of decree or order appealed from must be filed together with the memorandum of appeal failing which it should be filed thereafter as soon as possible. The decree is a compulsory document for any appeal to be legitimate in terms of Order XLI rule 1A of the **Civil Procedure rules**. Failure to file it either with the memorandum of appeal or subsequently renders the appeal incompetent and liable to be struck out in limine.

This appeal was filed on 25th April, 2005. The memorandum of appeal was not accompanied by a certified decree. Neither was it included in the record of appeal. Upto and including the time of the hearing of the appeal, the appellant had not availed such a decree. I have also looked at the original record of the trial magistrate. It is evident that the appellant never extracted the decree appealed from.

This issue was raised in the written submissions of the respondent which I believe were served on the appellant. I would therefore have expected some sort of reaction from the appellant on the same. However none was forthcoming. If anything, the appellant seems to have given the issue a wide berth. There can only be one rational explanation; the appellant had no legitimate answer to the submission. It matters not that the appeal was admitted for hearing by **Gacheche J.** on 14th March, 2007, on the assumption that the record was in order. It is however instructive that on that day it was only counsel for the appellant who was present. Who knows had the respondent or his counsel been present, they may have objected to the directions being given on the material day on account of want of a certified decree in the record of appeal. His failure to alert the judge that the decree appealed from had not been filed cannot therefore be visited on the respondent.

In the result and for the foregoing reasons, I am satisfied that the appeal is incompetent for want of a certified decree in the record. Accordingly it is struck out with costs to the respondent.

Judgment dated, signed and **delivered** at **Kisii** this 16th September, 2010.

ASIKE-MAKHANDIA

JUDGE