No. 166

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO 14 OF 2005

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

-VERSUS-

WILSON ONYONI ORAMINI .....RESPONDENT

(Appeal from the judgment and decree of Mr. Grace Matsi Esq. The Senior Resident Magistrate, Kilgoris

on the 20th December, 2004 in Kilgoris SRM CCC.No. 83 of 2002)

JUDGMENT

The respondent was the plaintiff in the Senior Resident Magistrate's court at Kilgoris in Civil Case Number 83 of 2002. In his plaint dated 23rd December, 2002, and filed in court on the same date through **Messrs Asati & Company Advocates,** he pleaded that at all material times he had been employed by the appellant as a casual worker. On 25th February, 2000 whilst in such employment harvesting sugar cane in the appellant's fields in Transmara, a Panga he was using slipped, and cut him on the thumb of the left hand. As a consequence he suffered pain, loss and damage. He alleged that the said incident occurred due to the breach of statutory duty and or common law negligence on the part of the appellant towards him. Particulars of breach of statutory duty pleaded against the appellant were that:-

"a. failing to make or to keep safe the plaintiff's place of work.

b. failing to provide or maintain safe means of access to the plaintiff's place of work.

c. employing the plaintiff without instructing him to the dangers likely to arise in connection with his work or without providing him with any or any sufficient training in work or without providing any or any adequate supervision.

d. failing to provide safe system of work"

What were the particulars of common law negligence attributed to the appellant by the respondent? They were as follows:-

"a) failing to take any or any adequate precautions for the safety of the plaintiff while working.

b) exposing the plaintiff to a risk of damage or injury of which they knew or ought to have known.

c) failing to maintain or provide adequate or suitable appliances, to enable the plaintiff carry out his work safely……".

The appellant filed a statement of defence through **Messrs Okongo & Co. Advocates** and denied that it had ever employed the respondent as a casual worker. The appellant further denied that the incident as alleged by the respondent ever occurred. Consequently, it denied the alleged breach of statutory duty and common law negligence attributed to it by the respondent and the particulars thereof set out in the plaint. Further and without prejudice to the foregoing, the appellant averred that if at all an accident occurred as alleged then the same was solely caused by his own negligence and carelessness. The appellant pleaded further that the suit was a sham and fraudulent and is a result of masterpiece of fake claim and scheme aimed at extorting money in form of compensation from the appellant. The appellant pleaded further that if at all the respondent was injured as claimed, then he was solely the author of his own misfortune and or substantially contributed to the same by aiming the panga on his left leg instead of cutting cane, used dangerous implement without due care and attention to himself, cutting cane whilst absent minded at the same time, failing to report occurrence of the accident to the appellant, failing to seek treatment free of charge at its clinics and finally, that the instrument causing the accident was solely in the exlusive control of the respondent and not in the appellant's at any time.

In his evidence before **M'masi, SRM,** the respondent testified that he was employed by the appellant in 1999. He was given a delivery note by a contractor called Omaiyo. On 25th February, 2000 at about 11.00a.m. he was injured as he cut sugar cane at Nyamiobo. The panga he was using cut him on the left hand and back of the palm. He did not inform the supervisor as he was absent. The panga got stuck in the cane and in the process cut him. He then went for treatment at Embakasi. He tendered in evidence the treatment notes. He blamed the accident on the appellant since it did not issue him with protective gear such as gloves and gumboots. He had also not been given any training on how to cut cane. Later he was examined by **Dr. Ezekiel Ogando** who prepared a medical report which report he tendered in evidence. He was charged Kshs. 1,500/= for the service which he paid.

Under cross-examination, he stated that he was employed by the appellant in 1999 through a contractor, **Omaiyo** who was also a supervisor. He was injured when the panga was held by the sugarcane. He knew how to cut sugar cane but had cut himself accidentally.

Thereafter the respondent summoned **Dr. Ezekiel Ogando Zoga** as a witness. **Dr. Zoga** testified that he had examined the respondent on 27th March, 2003 at Kisii District Hospital. He noted that the respondent had a cut wound on the left thumb. His prognosis was that the respondent sustained soft tissue injuries which had healed with a permanent scar. He was paid Kshs. 1,500/= for the service. He tendered the medical report in evidence as well as a receipt for Kshs.1,500/= paid to him as aforesaid.

The appellant offered no defence.

Parties thereafter filed and exchanged written submissions. In a reserved judgment delivered on 20th December, 2004 the learned magistrate found for the respondent both on liability and quantum. She took the position that since the appellant offered no defence, the averments of the respondent as well as his evidence was not rebutted. Accordingly she entered judgment for the respondent as against the appellant on full liability and proceeded to assess general damages payable at Kshs. 50,000/= and Kshs. 1,500/= being special damages.

The appellant was aggrieved by the said judgment and preferred this appeal. Seven grounds were set out

in the memorandum of appeal dated 26th January, 2006 and filed in court on the same date. Those grounds are that:-

"1. The learned trial magistrate erred in both law and in fact in finding the appellant liable for the injuries allegedly suffered by the respondent without any evidenced (sic) being led in that regard.

2. The learned trial magistrate erred in both law and in fact in holding that the appellant was under both contract and statutory duty of care to the respondent when in fact there was no evidence led in that regard.

3. The learned trial magistrate erred in both law and in fact in holding that the respondent failed to prove any contractual employment relationship with the appellant.

4. 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 his own negligence (sic) the plaintiff was the author of his own misfortune.

5. The learned trial magistrate erred in law and in fact in failing to find that the respondent having injured himself, could thus not blame the appellant.

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

7. The learned trial magistrate erred in both law and infact in awarding to the respondent general damages in the excessive, unrealistic and exorbitant sum of Kshs. 50,000/= for basically soft tissues, self-inflicted injuries which the respondent allegedly suffered."

When the appeal came up for directions before me on 29th June, 2010, the appellant was represented by **Mr. Odhiambo** whereas the respondent was represented by **Ochwang'i** holding brief for **Mrs. Asati**, both learned counsel. They agreed to canvass the appeal by way of written submissions amongst other directions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them together with the authorities cited.

The jurisdiction of a first appellate court in an appeal was succinctly enunciated by the Court of Appeal in the case of **Peters Vs Sunday Post Limited (1958) E.A 412**. It was in terms that an appellate court has jurisdiction to review the evidence that was adduced before the trial court to determine whether the conclusions reached by the trial court can stand. If there is no evidence to support a particular conclusion or if it is shown that the trial court had failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to interfere with the decision.
In this appeal, the respondent testified that he was in the employment of the appellant. Since his claim was premised on employer/employee relationship, it was up to him to bring fourth irrefutable and credible evidence to buttress that assertion. Such evidence was in my view tendered. He stated under cross-examination that he was employed by the appellant in 1999. He was given a delivery note by a contractor **Omaiyo** who also doubled as a supervisor. In the absence of any other evidence to the contrary this was sufficient evidence that the appellant had been employed by the appellant. As a casual labourer, it is not expected that he would have documentary evidence of such employment by the appellant, I am therefore satisfied just like the learned magistrate was, that the respondent was an employee of the appellant.
There is no doubt at all that the respondent was injured as he worked in the appellant's sugar fields. It was his case that the panga got stuck in the sugar cane and in the process cut him. Had he been supplied with protective gear such as gloves and gumboots he may well have avoided the accident. Once again this evidence was uncontroverted and or rebutted. I see no reason why the learned magistrate should not have believed the same and acted on it. He categorically stated in his evidence that: ***"I am blaming the company for the injuries sustained (sic) they did not issue us with protective devices such as gloves and***

gumboots …I was not given any training on cutting cane…..” On these unchallenged, uncontroverted and unrebutted evidence I am satisfied that the respondent proved negligence both statutory and common law against the appellant on a balance of probabilities just like the learned magistrate held.
With regard to quantum, the respondent gave particulars of injuries, loss and damage suffered as a result of the accident. PW2 testified and confirmed those injuries. They were soft tissue injuries. In those days, such injuries attracted the kind of award that was made by the learned magistrate. It was within the range. I see no reason to interfere or disturb it.
The end result of this appeal is that the same is unmerited. Accordingly it is dismissed with costs to the respondent.

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

ASIKE-MAKHANDIA

JUDGE