Case Number:	Civil Appeal 350 of 2005
Date Delivered:	08 Nov 2012
Case Class:	Civil
Court:	High Court at Kisii
Case Action:	-
Judge:	
Citation:	SOUTH NYANZA SUGAR COMPANY LIMITED V JOHN NYAKWEBA ONGANGA[2012]eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 350 of 2005

NO.523

SOUTH NYANZA SUGAR COMPANY LIMITED …….…… APPELLANT

AND

JOHN NYAKWEBA ONGANGA …….. RESPONDENT

(Being an appeal arising from judgment and decree of Mr. Chepseba Esq., the SRM in Kilgoris SRMCC NO.148 of 2003 dated and delivered on 3rd November, 2005)

JUDGMENT

1. The Respondent JOHN NYAKWEBA ONGANGA sued the appellant SOUTH NYANZA SUGAR CO. LTD. seeking to be paid special damages and general damages resulting from injuries which he suffered while in the employment of the appellant. This suit was filed in the Resident Magistrate's court at Kilgoris being Civil Suit No.148 of 2003.

2. The respondent alleged that it was a term of employment between himself and the appellant that the appellant would take all reasonable precautions for the safety of the respondent while the respondent was engaged upon his work as a cane cutter and not to expose him to risk of damage or injury which the appellant knew or ought to have known and to provide and maintain adequate and suitable measures to enable the respondent to carry out his work in safely, and to provide a safe and proper system of working. The respondent alleged that the accident occurred as a result of a breach of statutory duty of care on the part of the appellant, its servants or agents, by *inter alia*, failing to make or keep safe the respondent's place of work, failing to provide or maintain safe means of access to the appellant's place of work and employing the respondent without instructing him as 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. The respondent also alleged that the appellant breached the statutory duty by failing to provide a safe system of work.

3. The respondent pleaded in the alternative that the accident occurred as a result of the negligence and/or breach of duty and/or breach of the contract of employment and the terms thereof. The respondent set out the particulars of negligence, and in particular that the appellant failed to take any or any adequate precautions for the safety of the respondent while he was so engaged in his work and that the appellant exposed the respondent to risk of damage or injury of which the appellant knew or ought to have known. The respondent also alleged that the appellant failed to provide or maintain adequate or suitable plant, tackle or appliances for the safe working of the respondent and that the appellant failed to provide the respondent with suitable gloves and other adequate equipment to enable him carry out his work safely. The respondent averred that as a result of the said accident, he suffered a cut wound on the left hand for which he claims damages.

4. The appellant entered appearance and also filed defence in which it denied that it breached any statutory duty of care to the respondent. The appellant averred in the alternative that if the respondent suffered any injuries at all, which was denied, then such injuries were caused by the respondent's own negligence for failing to exercise care and attention for his own safety, exposing himself to danger, performing his duties carelessly and thereby causing the accident. It was also the appellant's contention that the respondent's case was frivolous, vexatious, misconceived and incurably defective. The appellant asked the trial court to dismiss the respondent's suit with costs. The respondent filed Reply to defence in which he denied all allegations of negligence attributed to him by the Appellant. He denied that he in anyway contributed to the occurrence of the accident in which he was injured.

5. The suit was heard in the court below. The respondent testified and told the court how the accident occurred. He blamed the appellant for failing to issue him with gloves which he said could have prevented the accident. He produced a Delivery Note to prove that he was an employee of the appellant. The respondent testified further that after the accident he went to Embakasi for treatment and later on he was seen by Dr. Ezekiel Ogando who prepared a medical report. The Delivery Note, treatment chits from dr. Ogando and a receipt for Kshs.3500/= by Dr. Ogando were produced in evidence as **P. Exhibits 1-4**. The respondent stated that he was injured on the left thumb.

6. During cross examination, the respondent stated that prior to the accident, he had worked for 3 years as a cane cutter and that during that whole period, he never used gloves. He also stated that in the 3 years he acquired adequate experience for his work as a cane cutter. He also stated that at the time of the accident, he had full control of the panga and that if he had exercised care during the time he was cutting the cane on that material day, he would not have been cut; though he stated that he was not working with the accident in mind. When questioned about the mutilated Delivery Note, the respondent stated that he did not know who had mutilated it.

7. The appellant did not call any witnesses, but at the close of the hearing, both parties filed written submissions.

8. After carefully considering the evidence that was before it, the trial court found that the respondent had proved his case against the appellant on a balance of probabilities since the appellant had failed to rebut the testimony by the respondent. Though the trial court did not expressly make a pronouncement on liability, it appears from the judgment that the appellant was held 100% liable for the accident. General damages were assessed at Kshs.50,000/= and specials at Kshs.3500/=. The respondent was also awarded costs and interest.

9. The appellant was aggrieved by the whole of the judgment by the trial court hence this appeal which is predicated on the following 9 grounds:-

1. *The Learned Trial Magistrate erred in both law and in fact in holding that the Respondent was an employee of the Appellant when in face no evidence at all was led in that regard.*

2. *The Learned Trial Magistrate erred in both law and in fact in failing to appreciate the fact that the alleged tool which caused injuries to the Respondent was in his sole and exclusive physical control and he had only himself to blame for the alleged accident if at all.*

3. *The Learned Trial Magistrate erred in both law and in fact in holding that the Appellant owed to the Respondent statutory duty of care while in fact no evidence was led in that regard.*

4. *The Learned Trial Magistrate erred in both law and in fact in failing to find that the Respondent having failed to file a reply to the defence was deemed to have admitted the allegations of fact as pleaded thereat pursuant to* ***Order 9 (ii)*** *of the* ***Civil Procedure Rules****.*

5. *The Learned Trial Magistrate erred in both law and in fact in failing to apportion a greater portion of liability on the Respondent, he the Respondent having admitted to have cut himself.*

6. *The Learned Trial Magistrate erred in both law and in fact in failing to hold that the Respondent is a vexatious litigant and that the suit below is frivolous, the Respondent having filed several other suits against the Appellant.*

7. *The Learned Trial Magistrate erred in both law and in fact in deciding the suit on no evidence at all and by failing to dismiss the Respondent's suit as the evidence adduced did not prove the particular of negligence and or breach of statutory duty pleaded.*

8. *The Learned Trial Magistrate erred in both law and in fact in awarding to the Respondent against the Appellant general damages in the sum of Kshs.50,000/= which amount is manifestly high and excessive in the circumstances.*

9. *The Learned Trial Magistrate erred in both law and in fact in failing to hold that the Respondent was an employee of an independent contractor and not the appellant.*

10. The appellant prays that the appeal, be allowed with costs and that the Respondent's suit in the court below be dismissed with costs.

11. The parties to this appeal agreed to canvass the appeal by way of written submissions. The submissions together with relevant authorities were filed and they are on record. I have carefully read the submissions and considered the authorities cited. I have also carefully read the pleadings, the proceedings and the judgment of the trial court. I have done all the above pursuant to the obligation imposed upon this court as a first appellate court. The duty of a first appellate court was restated by the Court of Appeal for Eastern Africa in the case of **Peters –vs- Sunday Post Limited [1958] EA 424**. As a first appellate court, I am under a duty to consider both matters of fact and law, and to analyze the evidence afresh, evaluate it and arrive at my own independent conclusion, only remembering that the trial court had the singular advantage of seeing and hearing witnesses. The trial court had the advantage of seeing the demeanour of the Respondent as he testified, and on this appeal, I must make allowance for the same. See also the cases of **Selle & another –vs- Associated Motor Boat Company Ltd. & others [1968] EA 123** and **Williamsons Diamonds Ltd. –vs- Brown [1970] EA 1 at p. 12**.

12. In the instant appeal, the issue for determination is whether the Respondent proved that the appellant had breached the duty of care owed to him. It is not disputed that the respondent was employed by the appellant as a cane cutter. It is also not disputed that the Respondent had, prior to the occurrence of the alleged accident, been in the employ of the appellant for 3 years, doing the same job and using a panga as his tool of trade and had never used gloves. According to the Respondent, the panga cut him because the appellant had not provided him with gloves. The respondent admitted while under cross examination that if he had exercised due care, he would not have cut himself. The respondent also admitted that both before and at the time of the accident, he was in full control of the panga and that he had full experience in doing his job as a cane cutter using a panga.

13. In light of the above facts, can it be said that the Respondent established firstly that he was injured while he was working for the appellant and secondly whether the Respondent established on a balance of probabilities and to the required standard of proof that the appellant owed him a duty of care in the circumstances under which the Respondent was allegedly injured on the thumb of his left hand.

14. After carefully reconsidering and evaluating the evidence that was before the court, it seems improbable to me that the respondent was injured on the left thumb while he was cutting cane. If the respondent had claimed that he was cut on his left leg, it would sound probable. Infact a look at the treatment chit from Embakasi cast some considerable doubt on whether indeed the respondent was injured on the hand. The treatment notes are therefore unreliable as to whether the respondent was injured on the hand or the leg and yet the said notes are said to have been written on the day of the alleged accident. I therefore resolve the first issue by concluding that the respondent was not injured on his left hand while he was working for the appellant as cane cutter on 5th July 2002.

15. Further, even if this court were to find that the respondent was injured while he worked for the appellant as a cane cutter, were the circumstances surrounding the accident of such a nature that this court would conclude that the appellant breached its duty of care owed to the respondent" In my humble view, I do not think that the respondent proved that the appellant was in such breach. The courts have held that it is not under all circumstances that an employee is injured while on duty that an employer would be held liable in negligence under common law. In the instant case, the respondent stated that he had worked as a cane cutter for 3 years prior to the alleged accident. He also admitted that he did not exercise due care as he worked using the panga, an implement he had used day in and day out for 3 years already. A panga is a simple tool and though the respondent averred that the appellant employed him without instructing him as to the dangers likely to arise in connection with his work, or without providing him with any or any sufficient training in working with a panga, this court finds that after 3 years of working as a cane cutter, using a panga, there was no training required of the appellant to the respondent. The truth of the matter, as can be seen from the respondent's own testimony is that he did not exercise due care as he worked. In any event, the respondent's contention that if he had gloves, the accident would have been prevented does not hold water because for 3 years, the respondent had consented to working without gloves.

16. The circumstances under which an employer can be held liable for the injuries of an employee are explained in **John Munkman's** book entitled **"Employer's Liability at Common Law" 9th Edition, London Butterworth's, 1979** at P.74 in the following words:-

"It is the duty of an employer, acting personally or through his servants or agents, to take reasonable care for the safety of his workmen and other employees in the course of their employment.This duty extends in particular to the safety of the place of work, the plant and machinery, and the method and conduct of work: but is not restricted to these matters."

17. The standard of care required of an employer once a duty of care has been established was expanded in the case of **Walker –vs- Northumberland County Council [1995] 1 All ER 737** where it was held that the standard of care required for the performance of that duty must be measured against the yardstick of reasonable conduct on the part of the person in that position who owes the duty. It was stated further at p. 750 by Colman J. that:-

"The law does not impose upon him the duty of an insurer against all injury or damage caused by him, however unlikely or unexpected and whatever the practical difficulties guarding against it. It calls for more than a reasonable response, what is reasonable being measured by the nature of the neighbourhood relationship; the magnitude of the risk of injury which was reasonably foreseeable, the seriousness of the consequences for the person to whom the duty is owed, if the risk eventuating, and the cost and practicability of preventing the risk."

18. In the instant appeal, it was not expected that the appellant would ensure that the respondent did not work carelessly as he went about his work so as to prevent injury such as the one suffered by the respondent. The appellant's expectation was that the respondent would work with care and caution as he indeed had done for 3 years. In the circumstances, the appellant cannot be blamed for what befell the respondent out of carelessness. In any event, this is a case that should have been pursued under the Workman's Compensation Act under which the standard of proof is not as high as that under common law. The respondent therefore failed to prove that the appellant herein owed him a duty of care in the circumstances he alleged the accident occurred. Though I am aware of the fact that it is a strong thing for an appellate court to differ from the findings of a trial court, the evidence and the circumstances in this case dictate that I take the opposite view of the trial court's findings.

19. In the premises, and for the reasons above given, this appeal has merit. The same is allowed. The judgment and the decree of the trial court is hereby set aside and substituted with the judgment of this court dismissing the respondent's suit with costs. The appellant shall have the costs of this appeal.

20. It is so ordered.

Dated and delivered at Kisii this 8th day of November, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Sagwa for Odhiambo (present) for Appellant

Mr. Sagwe for Ogweno (present) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.