



Keya & another (Suing as the Administrators and Legal Representatives of the Estate of the Late Isaac Mudimba Okello) v Alliance Media Limited (Civil Appeal 444 of 2010) [2023] KEHC 26479 (KLR) (Civ) (15 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26479 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL 444 OF 2010
CW MEOLI, J
DECEMBER 15, 2023

BETWEEN

FLORENCE KEYA 1ST APPELLANT

BENARD MUCHONGORI 2ND APPELLANT

**SUING AS THE ADMINISTRATORS AND LEGAL REPRESENTATIVES OF
THE ESTATE OF THE LATE ISAAC MUDIMBA OKELLO**

AND

ALLIANCE MEDIA LIMITED RESPONDENT

(Being an appeal from the Judgment of S. A. Okato (Mr.) PM. delivered on 24th September 2010 in Nairobi Milimani CMCC No. 3574 of 2009)

JUDGMENT

1. This appeal emanates from the judgment delivered on 24.09.2010 in Nairobi Milimani CMCC No. 3574 of 2009. The suit had been commenced by way of a plaint filed on 09.06.2009 by Florence Keya and Benard Muchongori, the plaintiffs in the lower court (hereafter the Appellants) in their capacity as the legal representatives of the estate of the late Isaac Mudimba Okello (hereafter the Deceased), against Alliance Media Limited, the defendant in the lower court suit (hereafter the Respondent).
2. The Appellants' claim was for damages under the [Law Reform Act](#), [Fatal Accidents Act](#), [Employment Act](#), [Work Injury Benefits Act](#) and arose from an incident that occurred on 13.12.2006.
3. It was averred that at all material times the Deceased was an employee of the Respondent and that on the above date, the Deceased while on duty and in the cause of his employment, was instructed to fix an advertisement tarpaulin on a road side billboard; that while the Deceased was carrying out the



instruction, and due to the Respondent's negligence and lack of care for the safety of the Deceased, he was thrust onto a live electric cable by strong winds billowing against the tarpaulin, and was electrocuted, fell down on the ground and died instantaneously. That because of the Deceased's death, his estate and dependents had suffered great loss and damage.

4. The Respondent filed a statement of defence denying the key averments in the plaint and pleaded in the alternative and without prejudice to the averments in the statement of defence that, if the alleged incident occurred, and which was denied, it was due to the negligence of the Deceased.
5. The suit proceeded to full hearing during which all the respective parties adduced evidence. In its judgment, the trial court found that the Appellants failed to prove their case on a balance of probabilities and accordingly dismissed the suit with costs to the Respondent. Aggrieved with the outcome, the Appellants preferred the instant appeal on the following grounds: -
 - “ 1. That the learned trial magistrate erred in law and fact in deciding, the case totally against the weight of evidence.
 2. That the learned trial magistrate erred in law and fact in holding that the deceased was not employed by the Defendant in spite of overwhelming direct and unchallenged evidence proving the said fact.
 3. That the learned trial magistrate erred in law and in fact in giving credence and totally relying on hearsay evidence by the defence not proved or supported in court and not borne out of any pleadings.
 4. That the learned trial magistrate therefore erred in law in holding that the Defendant was not negligent in the events leading to the death of the deceased Plaintiff/Appellant.
 5. That the learned trial magistrate erred in law and in failing to assess the amount of damages payable to the deceased's estate and dependents and in failing to order the Defendants to pay to the same to the Plaintiff in compensation.” (sic)
6. The appeal was canvassed by way of written submissions. Based on the Appellants grounds in their memorandum, the appeal was premised on the twin issues of liability and damages. Addressing the question of the Deceased's employment status, counsel took issue with the trial court's finding in placing the burden of proof on the Appellants yet there was oral evidence to the effect that the Deceased was working at the behest of the Respondent. While calling to aid the decision in *Mary Mmbone Mbayi v Chandubhai Patel & Another* (Industrial Cause No. 761 of 2011) as cited in *Zarika Adoyo Obondo v Tai Shunjun & Another* [2020] eKLR counsel contended that based on the totality of evidence before it, the trial court had enough material to support the finding that on a balance of probabilities the Deceased was an employee of the Respondent and or died while working on the Respondent's facility.
7. It was further emphasized that the Respondent did not tender any evidence by way of an employee register to disprove that the Deceased was at the time its employee, as averred. That in any event, given the nature of the Deceased's engagement with the Respondent, there would have been no documentary evidence by way of a letter of employment to demonstrate that the Deceased was employed by the Respondent, being a casual whose wages were paid in cash. Counsel argued further that the Respondent, as the owner and or operator of the billboard in question and by which the Deceased sustained fatal injuries, failed to prove that it had sub-contracted the duties to any other company, let alone Savoy Traders.



8. Concerning the Respondent's culpability, it was submitted that notwithstanding the issue of the Deceased's employment, there was undisputed evidence that the Deceased met his untimely demise while working on the Respondent's billboard. And that whether the Deceased was employed by the Respondent and or was an independent contractor did not vitiate the fact that the Respondent owed a strict duty of care by dint of the occupier's liability to ensure that the billboard was safe to work on. That the trial court failed to consider the said issue, solely basing its finding on negligence on the fact that the Appellants failed to prove that the Deceased was employed by the Respondent.
9. While calling to aid the decisions in *Boniface Muthama Kavita v Canton Manufacturers Ltd* [2015] eKLR and *Mwanthi v Kewal Contractors Limited & Another (Civil Appeal 70 of 2018)* [2022] KEELRC 23 (KLR) counsel contended that the Respondent's negligence was the actual and or immediate cause of the Deceased's death, irrespective of his employment status. Consequently, regarding damages, the court was urged to award to the tune of Kshs. 1,690,000/- tabulated as follows; - lost dependency $2/3 \times 5,000 \times 12 \times 8 =$ Kshs 1,520,000/-; loss of expectation of life Kshs 100,000/-; pain and suffering Kshs. 50,000/-; and special damages Kshs. 20,000/-. The court was urged to allow the appeal with costs.
10. The Respondent defended the trial court's findings. Addressing the Appellants grounds of appeal, counsel condensed his submissions around five (5) cogent issues while reiterating the principles applicable in the determination of a first appeal. Concerning the question whether the Deceased was employed by the Respondent, counsel relied on the decisions in *Headmistress Menengai Primary School & Another v Jamila Anyona* [2006] eKLR, *Waqo Roba Molu v Personal Systems Computer Limited* [2021] eKLR, *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR and *Michael Hubert Kloss & Another v David Seroney & 5 Others – Civil Appeal No. 285 of 2005*. To support the submission that despite the evidence on record pointing to the fact that Savoy Traders were the Deceased's employer, the Appellants opted to institute proceedings against the Respondent. That the trial court's decision was arrived at in accordance with the law and facts presented before it, as such grounds 1, 2 & 3 of the memorandum of appeal ought to fail.
11. On whether the trial court's exoneration of the Respondent for negligence was justified, counsel cited the provisions of Section 13 (1)(a) of the *Occupational Safety and Health Act*, the decisions in *Jamal Ramadhan Yusuf & Another v Ruth Achieng Onditi & Another* [2010] eKLR and *Abdalla Baya Mwanyule v Said t/a Jomvu Total Service Station* [2004] eKLR. It was the Respondent's contention that there was no indication regarding the Deceased's competency to perform the job he was allegedly carrying out; that the Deceased was a stranger to the Respondent, hence the latter did not owe him a duty of care; that the Deceased's cause of death as captured in the death certificate was inconclusive; and that the Deceased equally failed to exercise the ordinary care which he ought to have exercised for his own safety, and consequently a finding of negligence could not be made as against the Respondent.
12. Responding to the issue of occupier's liability, counsel calling to aid the decisions in *George Owen Nandy v Ruth Watiri Kibe* [2016] eKLR and *Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others ex-parte Tom Mbaluto* [2018] eKLR as cited in *Adan Chuda Sode v Madina Oshe Jira & another* [2021] eKLR and argued that the issue was not canvassed before the trial court and this court ought to disregard it.
13. Nevertheless, in the alternative and without prejudice to the foregoing, counsel cited the provisions of Section 3(5) of the Kenya Occupiers Liability Act, the decision in *Catherine Wangechi Wariahe (Suing as the administratrix of the Estate of the Late James Mwambiro Njeri) v Meridian Hotel Limited* [2016] eKLR, the English decisions in *Osbourne v London & North Western Railway (1888)* 21 QBD 220 and *Buck Pitt and Oates 1968* 1 ALL ER 1145 . All in support of the contention that the



Respondent was absolved of occupier's liability upon the Deceased willingly and knowingly assuming the risk and dangers associated with the undertaking he was engaged in.

14. Concerning whether the trial court properly weighed the facts and evidence before it, counsel placed reliance on the decision in *China Zhongxing Construction Co. Ltd v Ann Akuru Sophia* [2020] eKLR in asserting that the Appellants have not sufficiently demonstrated why this court ought to interfere with the trial court's decision. Finally, regarding damages, counsel argued that in the event the court is inclined to award the same, the court ought to award damages in the tune on Kshs. 590,000/- tabulated as follows; pain and suffering Kshs. 10,000/-; loss on expectation of life Kshs 60,000/-; loss of dependency $\frac{1}{3} \times 5,000 \times 12 \times 25$ being Kshs 500,000/-; and special damages Kshs. 20,000/-.
15. The decisions in *Lucy M. Njeri v Fredick Mbutia & Another* [2006] eKLR, *Kenya Railways Corporation v Samwel Mugwe Gioche* [2012] eKLR; *Mary Florence Mwhaki v Francis Njuguna Mbui* (Suing as the legal representative of the Estate of John Marekia Njuguna) [2020] eKLR, *Joseph Kahiga Gathii & Paul Mathaiya Kahiga v World Vision Kenya & 2 Others* [2014] eKLR and *Benedeta Wanjiku Kimani v Changwon Cheboi & Another* [2013] eKLR were cited in that regard. Counsel urged the court to dismiss the appeal with costs.
16. The court has considered the record of appeal, the original record of proceedings as well as the submissions by the respective parties. This appeal turns on the twin issues of liability and damages. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle –Vs- Associated Motor Boat Co.* [1968] EA 123 in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

17. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278.
18. The overarching issue for determination is whether the trial court's findings were well founded. In its judgment, the trial court after restating the evidence tendered before it stated as follows concerning liability ; -

“Both counsels for the plaintiff and for the defendant filed written submissions which I have read. The issues for determination are whether the Deceased was an employee of the Defendant at the time he died, whether the Deceased died as a result of the Defendant's negligence and whether the Plaintiff is entitled to the orders sought in the plaint.



It was the Plaintiffs evidence that the Deceased was employed by the Defendant at the time of his death. This averment was vehemently denied by the Defendant. It was therefore incumbent upon the Plaintiff to prove the Deceased was employed by the Defendant

Victor Oduor Owino (PW2) was called by the Plaintiffs to confirm to the court that indeed he together with the Deceased were employed by the Defendant at the time. He did not produce any document to support his claim. He did not even tell the court whether he was a permanent employee of a casual. He did not tell the court how much he used to be paid for what period and when.

In fact what I have on record is the Plaintiffs word that the Deceased was employed by the Defendant against the Defendant's word that the Deceased was not employed by the Defendant but given the letter dated 20th April 2007 (exhibit 10) in which it was admitted that the Deceased was employed by Savoy Traders and the letter dated 26th April 2007 (exhibit 11) wherein Mr. Namada advocate for the Plaintiff asked for Savoy Trader to confirm their client's willingness to negotiate settlement of this case, I find and hold that the Deceased was not employed by the Defendant at the time of his demise.

With regard to whether the Defendant was negligent and whether the Plaintiff is entitled to the prayers sought in the plaint, these do not arise in view of my finding above but for avoidance of doubts I find that the Defendant was not negligent as alleged and also that the Plaintiff cannot recover from the Defendant as sought in the Plaint.

I have considered the evidence on record and find that the Plaintiff has failed to prove her case against the Defendant on a balance of probabilities and accordingly dismiss her suit (Plaintiffs) with costs to the Defendant." (sic)

19. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. As to the standard of proof in civil liability claims in our jurisdiction, the same was discussed by the Court of Appeal in *Mumbi M'Nabea v David M. Wachira* [2016] eKLR. Hence, the duty of proving the averments contained in the plaint lay squarely on the Appellants. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:

“The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.” (Emphasis added)

20. During the trial Florence Keya testified as PW1. It was her evidence that the Deceased was her husband having wed under customary law and that the couple had two (2) issues. That the Deceased was working for the Respondent as a painter, his work involving installation of billboards and that the Deceased's colleagues informed her of the accident, and later death as the Deceased was being rushed to hospital. She stated that the Deceased used to earn Kshs. 5,000/- per month as an employee of the Respondent.



21. She produced as PExh.1, a referral note from Provide International Hospital; receipts from Chiromo Mortuary, City Mortuary and an invoice as PExh.2(a), (b) & (c); receipts from Ukwala Furniture Mart Ltd, and transportation receipts as PExh.3(a)&(b); receipt for vehicle hire as PExh.4; burial permit as PExh.5; Death Certificate as PExh.6; letter from the Chief as PExh.7; Grant of letters of administration as PExh.8; demand letter dated 22.03.2007 as PExh.9; reply to demand letter dated 20.04.2017 as PExh.10;; and response to Reply to demand letter as PExh.11.
22. Under cross-examination she reiterated her marriage to the Deceased and that he was employed by the Respondent although she did not have any documents, or proof of the Deceased's instructions to mount the billboard. On re-examination she asserted that the Deceased had worked for the Respondent for a duration of six (6) months.
23. Victor Oduor Owino, testified as PW2. The gist of his evidence was that the Respondent was in the business of erecting billboards and that he and the Deceased and one Gerald Uriwa were employees of the Respondent and were engaged in the work of putting up billboards. Regarding the date of the accident, he stated that he and the Deceased were working on a billboard next to National Youth Service (NYS). It was his evidence further that they were to strip the billboard of the tarpaulin and in the process of doing so, the Deceased touched an electric cable, was electrocuted and fell off the ladder to the ground. That Deceased was subsequently rushed to Provide International Hospital but was pronounced dead on arrival. He asserted that the Respondent did not provide any safety gear and that the workers did not concern themselves with issues regarding electricity cables in their line of the work.
24. Under cross-examination, he stated that he was employed in June of 2006 by the Respondent but had no document to prove the same. He affirmed that the Deceased touched a live wire and was not pushed by strong winds. He admitted he had no tangible proof that the Deceased was employed by the Respondent. Upon re-examination, he reiterated that the Deceased was untying a tarpaulin when he touched a live wire; that the Respondent's workers were not issued with letters of employment, but would sign a book for purposes of receiving their monthly salary ranging between Kshs. 5,000/- and 6,000/-.
25. Francis Okello Alulu, testified as PW3. The gist of his evidence was that the Deceased was his son, worked in Nairobi and was married to PW1. He stated that the Deceased used to send him upkeep money on a monthly basis and that he was in good health prior to death.
26. On the part of the Respondent, Robinson Kinyanjui testified as DW1. It was his evidence that he had worked for the Respondent as a Site Development Manager for eight (8) years. That on the date in question, he was still in the employment of the Respondent, and denied that the Deceased was the Respondent's employee. He emphasized that the Deceased did not work under the instructions of the Respondent as the latter engaged independent contractors who carried out billboard works on its behalf.
27. That at the material time, the Respondent had engaged Austine Opanga t/a Savoy Traders to provide the required services. He pointed out that through PExh.11, the Appellants admitted the fact that the Deceased was an employee of the latter while tendering no documentary proof connecting the Respondent to the Deceased. That in any event the Deceased met his untimely demise in the line duty, hence Savoy Traders ought to be held liable.
28. On cross-examination, he confirmed that the Respondent owns advertising billboards and that he was aware that a person died at the site of one of the Respondent's billboards on the date in question. He stated that the Respondent did not have any supervisor or electrician on site, that while the Respondent does provide protective gear to all its employees, the Deceased was not the latter's employee. He



- admitted that he did not produce the Respondent's register of employees; payment register for the period in question and or the contract with Savoy Traders. Upon re-examination, he asserted that it was the duty of the contractor to supply its employees with protective gear and that the Respondent did not take part in hiring the contractor's employees.
29. The occurrence of the incident was not disputed and the description thereof by PW2, the sole eye witness, was not rebutted. The suit before the trial court turned primarily upon the Deceased's employment status, which the Respondent vehemently denied and to a lesser extent, the negligence of the Respondent. That said, the initial burden of proof rested with the Appellants, to adduce some credible and believable evidence, which could stand in the absence of credible rebuttal evidence by the Respondent.
 30. PW1 testified that the Deceased worked for the Respondent and used to earn Kshs. 5,000 per month. However, neither he nor PW2 produced any documents in support of the foregoing. PW2 on his part stated that both he and the Deceased were employees of the Respondent charged with the duty of erecting billboards in Nairobi. He said he did not have any written contract in that regard but would acknowledge payment by endorsing his signature in a book for purposes of monthly wages ranging between Kshs. 5,000/- and 6,000.
 31. DW1 refuted the totality of the Deceased's employment to the Respondent and testified that the latter had contracted Austine Opanga t/a Savoy Traders to provide labour services. He, however, did not produce the contract between the Respondent and Savoy Traders. He further asserted that it was the duty of the contractor to supply its employees with protective gear and that the Respondent did not participate in hiring the contractor's employees.
 32. The *Employment Act* recognizes both casual and contract employees. Section 2 defines casual employees as;- "a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time." That Act equally acknowledges that the nature of contract of service may also be oral and written in nature.
 33. Section 37 further automatically recognizes the conversion of a casual employment to term contract by stating that;- "(1) Notwithstanding any provisions of this Act, where a casual employee—(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or (b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service".
 34. The Court of Appeal in *Nanyuki Water & Sewage Company Limited v Benson Mwititi Ntiritu & 4 others* [2018] eKLR, unwaveringly pronounced itself on the issue by stating that;-

"Section 37 of the Employment 2007 applies to the employment of the respondents to the effect that their casual employment was converted into a contract of service where wages are paid monthly and to which Section 35 (1) (c) of the Act applies. The respondents were entitled to such terms and conditions of service as they would have been entitled to under this Act had they not initially been employed as casual employees."
 35. On the uncontroverted evidence of PW1 and admissions of DW1, it is believable that the Deceased was in employment in the material period and executing his duties on the material date when he suffered fatal injuries. The key question here being, whose employee, was he? The Appellants' case stood or fell on that account. The Appellants bore the initial legal burden to prove their averments. The Supreme



Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others* [2014] eKLR in discussing the question of legal and evidentiary burden, held inter alia that:

“The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue”.

36. The Supreme Court was here upholding the time-honored legal principle as earlier spelt out by the Court of Appeal in *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 to the following effect:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendants’ failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.” (Emphasis added)

37. The court upon reviewing the Appellant’s evidence found it wanting. Mere oral assertions by PW2, and apparently contradicted by the documents tendered by the Appellants, could not stand on the contested matter of employment. Not a single document of any description or other credible evidence was tendered to connect the Deceased, or even PW2 with the Respondent despite assertions that the two had by the date of the accident worked with the Respondent for 6 months or more. In its defence statement, the Respondent had disputed such employment, putting the Appellants on notice, and inviting strict proof. In addition, the apparent existence of a second firm, namely, Savoy Traders that seemed to admit being the Deceased’s employer appeared to discredit the assertions of the Appellants.

38. The Appellants’ letters P.Exh. 9,10, and 11 are instructive in that regard. The former was a demand letter from the Appellants’ advocate and addressed to the Respondent. However, P.Exh. 10 being the response thereto, came, not from the Respondent but from the advocates of Savoy Traders to whom the demand letter appears to have been forwarded by the Respondent. P.Exh.10 stated as follows; -

“Re: Fatal injuries to the late Isaack Mudimba; Savoy Traders – Our Client.

Your letter dated 22nd March 2007 addressed to Alliance Media Ltd has been placed before us by our above-mentioned client with instructions to reply as hereunder.

That our client denies in total that your client was electrocuted on the 13th day of December 2006 when fixing an advertisement tarpaulin and our client maintains that the tarpaulin had already been brought down when the same was pushed by the wind and your client negligently and recklessly of his own motion decided to go and try to bring down the tarpaulin that was hanging on the live wire and it was then that he was electrocuted.

That our client denies the liability in toto and avers that the employees who had brought down the tarpaulin had not even climbed down the pole when your client hastily went



to hold the hanging tarpaulin without heeding to warning from his colleagues that it was dangerous to do the same.

That your client is the sole author of his predicament as the tarpaulin was being brought down within the compound of Stima Club and our client's employees would have contacted the Kenya Power employees to assist them immediately had your client not acted hastily and negligently.

Please note that if any misconceived suit is filed against our client the same shall be strenuously defended at your clients' risk to as to costs." (sic)

39. Patently, Savoy Traders were addressing the Appellants advocate in PExh.10 from a point of authority and knowledge regarding the circumstances leading to the accident and without making an express denial of the fact that the Deceased was an employee of Savoy Traders. This means that as of 20.04.2017 the Appellants were aware of Savoy Traders, and their role in the matter at hand.

40. In responding to the letter by Savoy Traders, the Appellants' advocates via PExh. 11 stated that; -

"Yours of 20th April 2007 refer,

First and foremost you acknowledge on behalf of your client that they are aware and do recognize that the deceased was electrocuted in the course of duty

The deceased was entitled to protection from such hazard by your clients.

Further on recognizing the deceased died while on duty with your clients the minimal your clients should be addressing is compensation as a workman where liability is not a consideration.

Please confirm your client's willingness to negotiate settlement on this case" (sic)

41. Despite the foregoing events, the Appellants neither sued nor enjoined Savoy Traders in their suit. And having sued the Respondent which disputed any relationship to the Deceased, the Appellants appeared content to rely on mere oral proof of the fact of the Deceased's employment by the Respondent. As matters stood, the Appellant's material, seemingly contradicting their oral assertions, appeared to lend credence to the fact that Savoy Trader was in all probability the Deceased's employer, as asserted by the Respondent. The initial legal burden on the Appellants regarding this aspect was not discharged and the trial court's finding that the Deceased was not employed by the Defendant at the time of his demise cannot be faulted.

42. Consequently, the question of the Respondent's duty of care and negligence as an employer as pleaded by the Appellants could not arise. The Appellants in attempting to shore up their case have sought to introduce the matter of occupier's liability against the Respondent, which issue, as correctly observed by the Respondent's counsel, was not canvassed at the trial. Nor was it pleaded in the plaint.

43. In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

"We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree



thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.” (Emphasis added).

44. Parties are bound by their pleadings. In *Associated Electrical Industries Ltd v William Okoth* (2004) eKLR, Visram J. (as he was) stated:

“I entirely agree with the Appellant’s submissions that parties are bound by their pleadings. The Respondents have plead one thing and sought to prove another. In such a situation the defendant/appellant was highly prejudiced. It sought to defend the case against it as stated in the plaint. And the case stated in the plaint was never proved”.

45. No doubt the learned Judge was echoing the words of the Court of Appeal in *Galaxy Paints Company Ltd V. Falcon Guards Ltd* (2000) eKLR; where the court stated:

“It is trite law, and the provisions of OXIV of the CPR, are clear that issues for determination in a suit generally flow from the pleadings, and unless the pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of OXXr4 of the aforesaid rules, may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court’s determination”.

See also Ochieng J (as he then was) in *Silas Tiren & Another v Simon Ombati Omiambo* [2014] eKLR.

46. In the circumstances, it was too late in the day for the Appellants to attempt to introduce what appears to be a totally new case on this appeal. I think I have said enough to demonstrate that this appeal is without merit and is for dismissal. In view of the circumstances giving rise to the suit in the lower court, the Court will order that on this appeal, each party shall bear its own costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 15TH DAY OF DECEMBER 2023.

C.MEOLI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of

For the Appellants: N/A

For the Respondent: Ms. Ouma

C/A: Emily

