



**Indeche v Butali Sugar Mills Limited (Appeal E015 of 2024)  
[2025] KEELRC 2573 (KLR) (22 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2573 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
APPEAL E015 OF 2024  
DN NDERITU, J  
SEPTEMBER 22, 2025  
FORMERLY BUNGOMA ELRC APPEAL NO. E009 OF 2024**

**BETWEEN**

**WILFRED NDUNDE INDECHE ..... APPELLANT**

**AND**

**BUTALI SUGAR MILLS LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment and decree issued in Webuye Principal Magistrate's Court Civil Suit No.83 of 2017 by Hon. P. Y. Kulecho (PM) delivered on 19th March, 2024)*

**JUDGMENT**

**Introduction**

1. In a judgment dated and delivered on 19th March 2024 the appellant's suit mentioned above against the respondent was dismissed with costs.
2. Thereafter, the appellant through Abok Odhiambo & Co Advocates commenced an appeal vide Bungoma ELRC Appeal No. E009 of 2024. However, the appeal was on 23rd July 2024 transferred to Kakamega ELRC and allocated the reference cited above.
3. In the memorandum of appeal dated 18th April 2024 the appellant raises three grounds of appeal and is seeking for orders as hereunder –
  1. That the learned trial magistrate erred in law and fact by failing to find the respondent wholly liable for the accident.
  2. The learned trial magistrate erred in law and fact by relying on secondary evidence.



3. That the learned trial magistrate erred both in law and fact by dismissing the appellant's suit against the weight of evidence on record.

REASONS WHEREFORE the appellant prays for judgment against the respondent in the following terms;

a. That this appeal be allowed.

b. That the order dismissing the appellant's suit in the lower court be set aside and the respondent be held wholly liable for the accident.

c. That costs of this appeal and costs of lower court be awarded to the appellant.

4. By consent, the appeal was canvassed by way of written submissions. Abok & Co. Advocates for the appellant filed written submissions dated 18th March 2025 while L.G. Menezes & Co. Advocates for the respondent filed submissions dated 17th March 2025. Counsel for the appellant filed further/supplementary submissions dated 18th March 2025.

### **I. Submissions By Counsel**

5. Citing *Selle & Another V Associated Motor Boat Company Ltd (1968) EA 123* counsel for the appellant reminded this court of its duty to re-evaluate the evidence and reach its own conclusions while bearing in mind that it neither recorded the evidence nor heard the testimonies by the witnesses.

6. For the appellant the following issues were identified for determination –

1. Whether there existed an employer-employee relationship between the appellant and respondent at the material time.

2. Whether the appeal is merited in its entirety.

7. On the first issue, it is submitted that in the trial the appellant produced a gate-pass and sick-sheet as evidence of his engagement with the respondent. It is submitted that the evidence on record confirms that the appellant was hired by Frodak (K) Limited to work for the respondent. It is further submitted that the records availed by the respondent in the trial were deliberately manufactured to suit its narrative that the appellant was not its employee.

8. It is submitted that the respondent failed to provide safe working environment for the appellant resulting in the injury sustained. It is submitted that the evidence on record confirmed employment relationship between the appellant and the respondent. The court is urged to be persuaded by the reasoning and holding in *West Kenya Sugar Co. Ltd (2023) KEELRC 939(sic!)* on the duty and obligation of an employer to provide safe working environment for all employees.

9. It is submitted that the evidence by the appellant was uncontroverted in the trial and the court is urged to find in favour of the appellant as prayed.

10. For the respondent, it is submitted that the appeal is incompetent as no decree has been attached as required under Order 42(2) of the Civil Procedure Rules. Counsel cited *Rentworks East Africa Limited V Jeniffer Kinya Simon (2022) eKLR* in support of this point.

11. It is submitted that it was upon the appellant to prove his case in the trial as per Section 107 of the *Evidence Act*. It is further submitted that the appellant failed to establish and prove any employment relationship between him and the respondent on a balance of probabilities. Further, it is submitted that the appellant failed to prove that he was injured while in such employment.



12. It is further submitted that while the appellant alleged to have been injured while on duty on 2nd June 2014 he failed to avail any documentary evidence indicating that he was in employ of the respondent at the said date or any other date or at all, that he was injured while in such employment, and further no medical records were availed.
13. It is submitted that while Frodak (K) Limited was contracted to supply casual labourers to the respondent, the appellant was not among those engaged as such. It is further submitted that the sick-sheet and gate-pass produced by the appellant as exhibits were objected to by the respondent as they are fake. It is submitted that with his name missing in the records of Frodak (K) Limited, payroll, accident register, and master-roll, for casual workers engaged during the material period and working for the respondent, the appellant lacked foundation for his claim and hence the trial court was right in dismissing the same.
14. It is submitted that the appellant did not adduce medical records for his alleged treatment at Neema Hospital and in any event the said hospital was not operational at the material time as documented in the investigation report.
15. Counsel cited Gideon K. Kemboi V Nyayo Tea Zone Development Corporation (2015) eKLR to the effect that the appellant ought to have established employment and that the injury was as a result of negligence on the part of the respondent. It is submitted that the appellant failed in this duty.
16. It is submitted that the documentary evidence availed by the respondent completely dislodged the allegation by the appellant that he was an employee of the respondent as those are the official records and the name of the appellant does not appear in those records for the period between 2013 and 2015.
17. The court is urged to uphold the decision of the lower trial court and dismiss the appeal with costs.
18. Counsel for the appellant filed further/supplementary submissions in regard to the issue raised by the counsel for the respondent as to whether the appeal was properly in court. It is submitted that the appeal is not fatally defective for failure to include a copy of the decree in the record. In supporting that position counsel cited Emmanuel Ngade Nyoka V Kitheka Mutisya Ngata (2017) eKLR wherein the Court of Appeal held that failure to include a formal decree in a record of appeal is not fatal. It was held that a court should endeavor to dispense substantive justice and avoid technicalities as that is a constitutional imperative and an overriding objective under Sections 1A & 1B of the [Civil Procedure Act](#).
19. The court is urged to dismiss that submission by the respondent's counsel and proceed to allow the appeal as prayed.

## II. Issues For Determination

20. The court has perused the record of appeal, including the proceedings in the lower trial court, the memorandum of appeal, and the submissions by counsel for both parties as summarized above. In my considered view, the following issues commend themselves to the court for determination –
  - a. Is the appeal properly before the court?
  - b. If (a) above is in the affirmative, was there an employment relationship between the appellant and the respondent as the time of the alleged accident?
  - c. If (b) above is in the affirmative, what was the nature, terms and conditions of that relationship?



- d. Was the appellant injured at work and what was the nature of the injuries suffered?
- e. Was the respondent negligent and or liable for the injuries suffered by the appellant?
- f. Did the lower trial court arrive at the right decision?
- g. Are there any reasons for this court to interfere with the decision of the lower trial court as prayed by the appellant?
- h. What appropriate orders should this court make in regard to the above issues and on costs?

### III. Employment

21. As the first appellate court, this court is obligated to re-evaluate the evidence on record and arrive at its own conclusions bearing in mind that it neither heard nor recorded the evidence during the trial – see *Sielle & Another V Associated Motor Boat Company Ltd* (supra).
22. On the first issue, it is the considered view of this court that while failure to include a decree in the record of appeal is a serious omission, it is not fatal. Courts of law are constitutionally and statutorily called upon to dispense substantive justice as opposed to being mechanical and technical in their interpretation and application of the law. In any event, a copy of the judgment is in the record of appeal and there is no denial on the part of the respondent that the same is a true reflection of the outcome of the litigation in the lower trial court.
23. In the circumstances, the court finds and holds that the omission of a copy of the decree is neither fatal nor prejudicial to the respondent as the court is able to hear and determine the appeal based on the materials filed and more so the proceedings and the judgment from the lower trial court. The court agrees with and is bound by the position taken by the Court of Appeal in *Emmanuel Ngade Nyoka V Kitheka Mutisya Ngata* (supra).
24. On the second issue, the basis and foundation of the claim by the appellant is that he was an employee of the respondent and that while in such employment he sustained an injury for which he blames the respondent for being negligent. It is on that foundation that the appellant filed his claim in the lower trial court.
25. In his plaint in the lower trial court the appellant pleaded as follows in paragraphs 3, 4, and 5 –
  3. THAT at all material time to this suit the plaintiff was an employee of the defendant as a casual worker.
  4. THAT it was an express term of the said contract between the plaintiff and the defendant that the defendant was to take all reasonable precautions for the safety of the plaintiff while he was engaged upon his work and not to expose him to a risk damage or injury which the defendant, its agent and/or servant knew or ought to have known and to provide and maintain an adequate and suitable plant appliances to enable the plaintiff carry out his work in safety to take all reasonable measures to ensure that the plaintiff was safe and to provide proper system of work.



5. THAT on or about 02/06/2014, the plaintiff was engaged in his cause of employment as a casual laborer disconnecting the trailer from the tractor by removing the dropper pin when due to the defendant's negligence the driver of the tractor without any warning reversed the tractor and the metal rod from the trailer hit him on the head and in the process he suffered severe bodily injuries which he holds the defendant liable.
26. The above allegations were denied in the respondent's filed defence as were denied allegations that an accident occurred and or that the claimant was injured as claimed or at all. It was thus upon the appellant to prove that indeed he was an employee of the respondent at the material time before proceeding to offer proof of the accident and the injuries.
27. The trial lower court concluded that the appellant had failed to prove an employment relationship between him and the respondent and the case collapsed upon that finding. It is the appellant's contention that the lower trial court arrived at the wrong conclusion and failed to consider the evidence that he adduced in support and prove of the purported employment relationship between him and the respondent.
28. The appellant's case is that he was involved in an accident on 2nd June 2014 while working as a casual employee of the respondent hence his pleading as reproduced verbatim above. In support of the allegation of employment the appellant produced a gate-pass valid for the period from 1st May to 2nd June, 2014 and a sick-sheet dated 2nd June 2014. The said documents were dismissed by the respondent as forgeries.
29. It is important to note that neither of the two documents bear the name of the respondent's officer who signed and or issued them and or the official stamp of the respondent.
30. In his oral testimony in court, the appellant claimed that he was on a daily wage of Kshs200/= that was paid fortnightly. The appellant did not call any further evidence, say from a fellow worker or colleague, or any trail of wage payments. The lower court made the conclusion that the gate-pass and the sick-sheet were not adequate evidence of an employment relationship between the parties.
31. On its part, to counter the allegation by the appellant, the respondent called oral evidence and produced pay-roll and master-roll wherein the name of the appellant does not feature. The only witness called by the respondent, George Onyango Ager (DW1), was an employee of Frodak (K) Ltd, a legal entity contracted by the respondent to outsource casual labourers. He stated that the said company kept the attendance (master roll) register and pay-rolls for all employees sourced by Frodak (K) Ltd for the respondent and that the appellant was not such an employee at the material time or any other time or at all.
32. This court is confronted with the same scenario that the lower trial court faced – Does the evidence on record establish an employment relationship between the appellant and the respondent?
33. As noted above, the appellant alleged to have been an employee of the respondent but that allegation was vehemently denied. It was then the burden of the appellant to prove that indeed there existed such employment relationship as he who alleges shall prove – see Section 107 of the *Evidence Act*.
34. Upon re-evaluation and analysis of the evidence adduced in the lower trial court, this court comes to the same conclusion that the lower trial court arrived at. The gate-pass cannot be evidence of employment as the same may be issued to any person, including a stranger, visiting the respondent's facility. It simply allows the bearer to pass through the gates and does not designate the purpose for the entry and exit.



As for the sick-sheet, the same does not bear the name and the designation of the officer who issued the same. It does not bear the official stamp of the respondent.

35. The two documents cannot amount to a contract of employment and do not even in the most remote way establish or prove the fact of employment of the appellant by the respondent as alleged. Faced with the vehement denial of the fact of employment from the respondent, the appellant ought to have either called a workmate or colleague who should have testified and confirmed the employment. Further, the appellant should have availed evidence of payment of salary or wages in any form. The payroll availed by the respondent does not bear the name of the appellant as an employee for the period alleged or any other time or at all.
36. The court finds and holds that the appellant failed to establish and prove that he was an employee of the respondent as pleaded and claimed. The court agrees with the finding and holding of the lower trial court that the appellant failed to discharge that burden of proof on a balance of probabilities.
37. The foregoing finding and holding renders any interrogation of the other issues merely academic. If there was no employment relationship between the parties, the entire foundation of the claim and the appeal falls. The court thus dismisses this appeal on this ground and upholds and affirms the judgment of the lower trial court.
38. But the court wishes to comment on this other angle of this matter. Even if one was for a moment to assume that the appellant was an employee of the respondent as alleged and claimed, the lower trial court lacked jurisdiction to entertain the claim by virtue of the provisions of the [Work Injury Benefits Act](#) (WIBA). The appellant ought to have lodged his claim with the Director as provided for in that statute.
39. The above law was in force as of April 2017 when the appellant lodged the claim in the lower trial court. Although this issue was not raised during the trial and the lower trial court did not comment on the same, and neither was it raised in this appeal, it is clear that the claim as filed in the lower court was incurably defective and without jurisdiction and ought to have been dismissed in le mine.
40. In the circumstances, this appeal is without merit and the same is hereby dismissed.
41. Ultimately, the judgment of the lower court is hereby affirmed in its entirety and this appeal is dismissed.

#### **IV. Orders**

42. Flowing from the foregoing, the court makes the following orders –
  - a. This appeal is hereby dismissed in its entirety and the judgment of the lower trial court upheld and affirmed.
  - b. Costs to the respondent.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2025.**

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**DAVID NDERITU**

**JUDGE**

