REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO. E068 OF 2024

BENSON MUTUKU KISILU……..……

APPELLANT

-VERSUS-

INSIGHT MANAGEMENT CONSULTANTS LIMITED……..…… RESPONDENT

(Being an appeal from the Judgment and decree of Hon. A.N. Ogonda (RM) delivered on 29th February, 2024 CMEL NO. 6450 of 2018)

JUDGMENT

1. Through the Memorandum of Appeal dated 4th March, 2024 the Appellant appeals against the judgment of Hon. A.N. Ogonda (RM) delivered on 29th February, 2024 CMEL NO. 6450 of 2018. The Appeal was based on the grounds among others that: -

i) **THAT** the learned Honourable magistrate erred in law and fact in holding that the appellant's had not proved that he was an employee of the respondent against the weight of evidence.

ii) **THAT** the learned honourable magistrate erred both in fact and

law by subjecting the appellant to a higher standard of proof than proof on a balance of probability.

iii) **THAT** the learned Honourable magistrate erred both in law and in fact by holding that the appellant was not entitled to compensation for injuries suffered in the course of his employment.

iv) **THAT** the learned Honourable magistrate erred in both law and fact by failing to analyse the evidence before her and making a judgment that avoided determination of all issues placed before the court for determination.

v) **THAT** the learned Honourable magistrate erred in law and fact in ignoring the pleadings, evidence and submissions by both parties and thereby making a lopsided and unjust determination.

2. The Appellant therefore prayed that the appeal be allowed and the decision of the Honourable Magistrate finding that the appellant was not an employee of the respondent be set aside and that the Court assesses the quantum of damages payable to the appellant. The appellant further prayed that alternatively the court makes an award of damages as had been proposed by the trial magistrate.

3. The Appeal was disposed of by written submissions.

APPELLANT'S SUBMISSIONS

4. The Appellant's Advocate Mr. Kamau submitted among others that the appellant told the trial court that he was employed by the respondent as a general worker but not issued with a letter of appointment or a payslip. Upon his injury at work the respondent refused for his hospital bills. Counsel further submitted that the respondent did not call any witnesses to rebut the appellant's allegations and further did not produce any documents in support of the allegations in the statement of defence. In support counsel relied on the case of Netah Njoki Kamau & another vs. **Eluid Mburu Mwaniki [2021]eKLR and Elizabeth Muriga vs. Nathaniel D. Schulter Appeal No. 2 of 1997** on the issue of not calling any witness to defend a claim and failure to adduce evidence.

5. Counsel further submitted that under section 74 of the Employment Act an employer is required to keep employee records and that the obligation is mandatory. The

respondent was therefore expected to adduce evidence and produce records to rebut the appellant's claim.

6. On the issue of standard of proof, counsel submitted that in civil cases the standard of proof is on a balance of probabilities and the respondent having failed to call any witness or adduce any evidence, the trial court had no other evidence except the appellant's to the trial court to therefore dismiss the appellant's claim for lack of evidence meant the court applied another standard of proof than balance of probability.

7. On the issue of liability, counsel submitted that the appellant told the trial court that on the material day he was assigned duties inside a truck of tying pallets with boxes so that a forklift operator could hook its arm on the pallets and pull the pallets closer to the door for offloading. The forklift operator did not wait for his signal and neither did he warn the appellant that he was about to pull the pallets as a result of which the appellant's thumb was crushed by the pallets. The appellant blamed the respondent for failing to provide him with protective devices like safety gloves. The appellant

further told the trail court that he had asked for safety gloves but was never provided with the same.

8. Counsel further submitted that the respondent was the employer of the forklift operator hence vicariously liable for the negligent act of its employees. On the issue of quantum of damages, counsel submitted that the appellant sustained a deep cut wound to the right thumb and for the injuries sustained counsel urged the court to assess damages at Kshs. 500,000/-. He relied on the case of Lucy Ntibuka vs. Benard Mutwiri HCCC No. [illegible] of 1983 and Samuel Muthama vs. Kenneth Maundo Mundi HCCA No. [illegible]02 of 2008.

<u>RESPONDENT'S SUBMISSIONS</u>

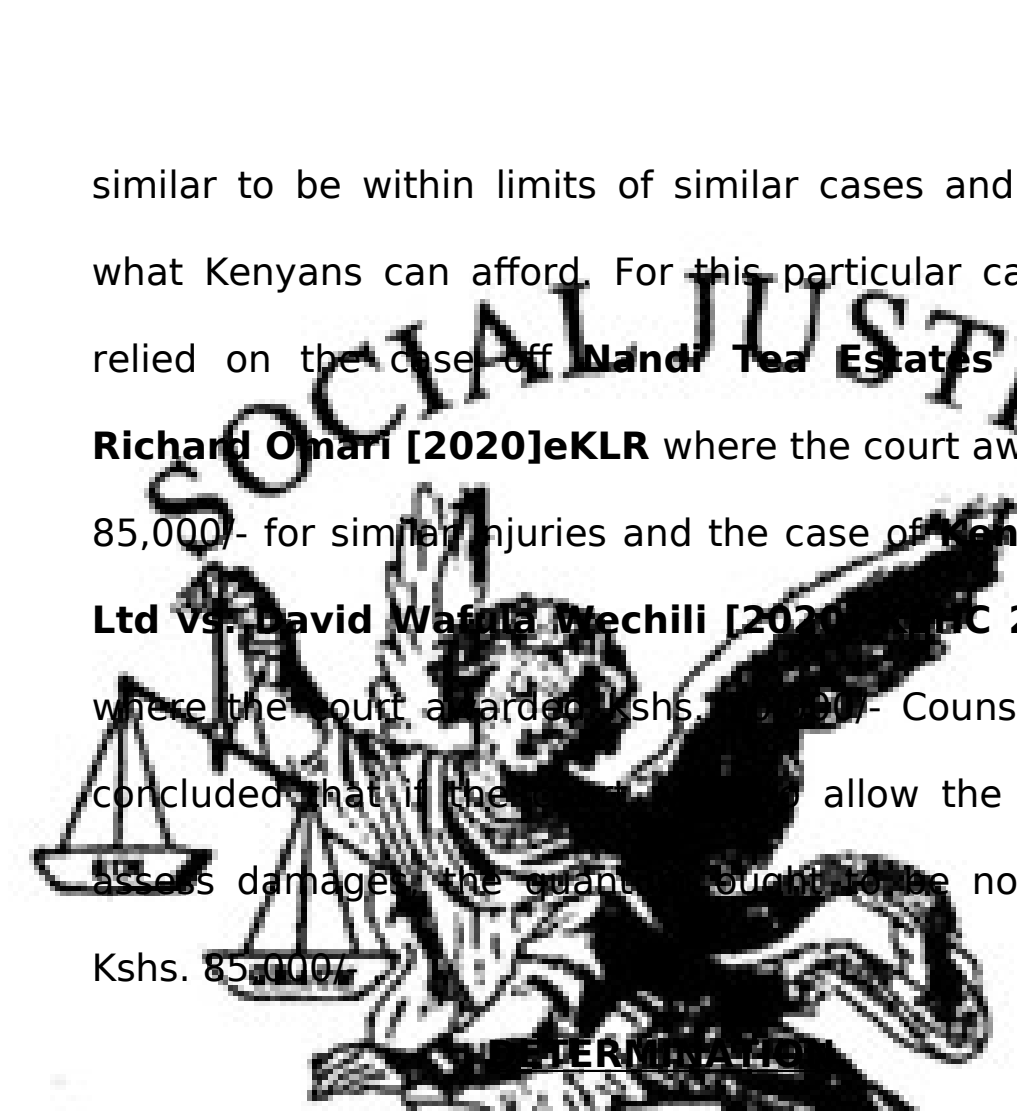
9. Counsel for the respondent Mr. Kamau on the other hand submitted among others that the foundation of work injury claim is an employment contract. The proof of employment is therefore paramount. Further the jurisdiction of the ELRC even at magistracy level as far as employment matters are concerned is limited by the existence of an employment relationship as defined by law. Counsel further submitted

that although it was the responsibility of an employer to document the employment relationship, the said responsibility did not release the claimant from the burden of proving their case. According to counsel, the appellant failed to call any of his fellow colleagues to corroborate his allegations and was unable to give the name of the forklift operator who caused the alleged injury. In support of this line of submissions, counsel relied on the case off Zarika Adoyo Obondo vs. Tarmac & Another [2020]eKLR and Mutua Muasya vs. Meera Construction Limited [2019]eKLR

10. On the issue of failure by the respondent to call witnesses, counsel submitted that absence of witnesses did not absolve the appellant from establishing his case as was held in the case of **Susan Mumbi vs. Kefafa Gre[illegible]n HCCC No. 332 and the case of Daniel Toroitich [illegible]ap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR.**

11. On the issue of quantum of damages, counsel submitted that the law regarding general damages was settled in the case of **Nyambura Kigaragari vs. Agrippina Mary Aya [1982-1988 1 KAR** where it was held that awards should be

similar to be within limits of similar cases and also within what Kenyans can afford. For this particular case, counsel relied on the case of **Nandi Tea Estates Limites v. Richard Omari [2020]eKLR** where the court awarded Kshs. 85,000/- for similar injuries and the case of **Kenya Nut Co. Ltd vs. David Wafula Wechili [2021] eKLR 2065 (KLR)** where the court awarded Kshs. [illegible]/- Counsel therefore concluded that if the [illegible] allow the appeal and assess damages the quantum ought to be no more than Kshs. 85,000/-



DETERMINATION

12. This appeal revolves around the [illegible] whether the trial court erred in finding that there was no employer-employee relationship between the appellant and the respondents. The court has carefully considered the record of appeal, pleadings, documents and judgment of the trial court. The court has further noted that counsel for the appellant in his submissions referred to the 1st appellant as managers of the 2nd appellant. It therefore cannot be gainsaid that the 1st appellants were indeed agents of the 2nd respondent. The

foregoing coupled with the contract of employment between the appellant and the 2nd respondent dated 2nd December, 2015 which the appellant acknowledged signing, presents no other conclusion than that the appellant was an employee of the 2nd respondent. It is curious that whereas the appellant claims that he was an employee of the respondents he joined the 2nd respondent as a party to the suit. The appellant in the back ground must have acknowledged a relationship with the 2nd respondent in order to have joined them as a party to the suit. That relationship must have been that of an employer-employee relationship.

13. **In conclusion, the court is of the view that the trial court was right in holding as it did that there was no employer-employee relationship between the appellant and the 1st respondent. The appeal is therefore found unmerited and is hereby dismissed as against the 1st respondent. The Court however directs that the suit as against the 2nd respondent proceeds in the lower court to determine if merited, the claims by the appellant. For avoidance of doubt, the 1st**

respondents are hereby struck off the suit in the trial court.

14. **Each party shall bear their own costs of the appeal.**
15. **It is so ordered.**

Dated at Nairobi this 3rd day of October 2025

Delivered virtually this 3rd day of October 2025

Abuodha Nelson Jorum

Presiding Judge, Kisii Sale Division