



**Western Steel Mills Limited v Rogoncho & another (Appeal E023 of 2023)  
[2025] KEELRC 2923 (KLR) (23 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2923 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
APPEAL E023 OF 2023  
MA ONYANGO, J  
OCTOBER 23, 2025**

**BETWEEN**

**WESTERN STEEL MILLS LIMITED ..... APPELLANT**

**AND**

**RAPHAEL MAKORI ROGONCHO ..... 1<sup>ST</sup> RESPONDENT**

**AFRITOP ENTERPRISES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment delivered by Honourable K.G. Odhiambo (Senior Resident Magistrate) delivered on 31st August, 2023 in the Chief Magistrates Court at Eldoret in CMELRC No. 569 of 2017)*

**JUDGMENT**

1. This is an appeal arising from the Judgment and Decree of Hon. Keyne G. Odhiambo (Senior Resident Magistrate) delivered on 31<sup>st</sup> August 2023 in Eldoret CMCC No. 569 of 2017, wherein the learned magistrate found the Defendants jointly and severally liable for the injuries sustained by the Plaintiff (now the 1<sup>st</sup> Respondent) and awarded him Kshs. 188,500 as general damages and Kshs. 8,500 as special damages, together with costs and interest.
2. The Appellant being dissatisfied with the Judgment of the Trial Magistrate seeks to set it aside on the following grounds as raised in its Memorandum of Appeal dated 1<sup>st</sup> September 2023:
  - i. The learned trial Magistrate erred in law and fact by holding that the 1<sup>st</sup> defendant could be held liable for tortious acts of the 2<sup>nd</sup> defendant despite acknowledging the fact that plaintiff was not an employee of the 1<sup>st</sup> Defendant.
  - ii. The learned trial Magistrate erred in law and fact by holding that the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant were 100% liable in disregard of the liability clause that the 2<sup>nd</sup> defendant would be held liable and with no objective of avoiding the statutory obligation.



- iii. The learned trial Magistrate erred in law and fact by presuming that there existed a principal-agency relationship between the 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant thus jointly imposing liability on them.
  - iv. The learned trial Magistrate erred in law and fact by contravening the provisions of sections 107 and 108 of the *Evidence Act* by shifting the burden of proof on the defendants to show that the machines were not faulty and to prove how the plaintiff got injured.
  - v. The learned trial Magistrate erred in law and fact by holding that the plaintiff's mere allegation that the machines were faulty without any evidentiary proof of the same on the part of the plaintiff as to the engineer's examination of the machine.
  - vi. The learned trial Magistrate erred in law and fact by rendering its decision of prove of how the plaintiff got injured based on medical reports which were only intended to prove the extent of severity of injuries sustained by the Plaintiff as a conclusive proof of how he got injured at the 1<sup>st</sup> defendant's premises.
  - vii. The learned trial Magistrate erred in law and fact by failing to factor in the 1<sup>st</sup> defendant's evidence on record by holding that the 1<sup>st</sup> defendant had sufficient control over the premises.
  - viii. The learned trial Magistrate erred in law and fact by failing to hold on the liability of an employer for the actions and/or omissions of an independent contractor.
  - ix. The learned trial Magistrate erred in law and fact by failing to find and hold that the Plaintiff was partly negligent for his actions despite the 1<sup>st</sup> defendant providing evidence that the plaintiff went to work without wearing protective gears which had been availed to him.
  - x. The learned trial Magistrate erred in law and fact by entering a judgement in favor of the plaintiff against the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant at Kshs. 188,500/= in disregard of lack of the privity of contract between the 1<sup>st</sup> defendant and the plaintiff.
3. The Appellant therefore sought for the following orders: -
- i. The Appellant's appeal be allowed
  - ii. The entire judgment delivered by the Honourable Keyne G. Odhiambo (SRM) on 31<sup>st</sup> August 2023, be set aside
  - iii. The Appellant be awarded the costs of this appeal and costs at the trial court.

### **Background of the case**

4. The 1st Respondent was the Plaintiff in the trial court. In his Plaint dated 18<sup>th</sup> May 2017, he averred that the 2<sup>nd</sup> Defendant acted as an agent of the 1<sup>st</sup> Defendant, who had authorized the 2<sup>nd</sup> Defendant to engage casual workers within the Appellant's premises. He further stated that he was engaged by the 2<sup>nd</sup> Defendant as a machine operator to perform work for the benefit of the Appellant.
5. The Plaintiff averred that on 26<sup>th</sup> August 2016, while undertaking his assigned duties, due to breach of contract of employment and breach of statutory duty and common law duty of care by the Defendants, the Plaintiff while undertaking his assigned duties within the 1<sup>st</sup> Defendant's premises was seriously injured when he was burned by hot metal pieces that fell from the Cutting Machine after being cut when the machine jammed.



6. The Plaintiff attributed the occurrence of the accident to negligence and breach of statutory duty on the part of the Defendants.
7. The Trial Magistrate upon considering the evidence on record and submissions by the parties awarded the Respondent Kshs 188,500 as general damages and Kshs. 8,500 as special damages.

### **The Appeal**

8. When the appeal came up for hearing, the court directed the parties to dispose of the same by way of written submissions. The Appellant filed its submissions on 30<sup>th</sup> April 2025 while the 1<sup>st</sup> Respondent filed his submissions on 29<sup>th</sup> April 2025. The 2<sup>nd</sup> Respondent did not participate in the Appeal.

### **The Appellant's submissions**

9. In its submissions, the Appellant identified the issues for determination to be: -
  - i. Whether the Appellant is statutorily liable;
  - ii. Whether the 1<sup>st</sup> Respondent contributed to the accident;
  - iii. Who bears the cost of the Appeal.
10. On the first issue, the Appellant submitted that the learned trial magistrate erred both in law and in fact by holding that the Appellant was statutorily liable for the acts of negligence that occasioned the 1<sup>st</sup> Respondent's injuries as the finding was not supported by the evidence on record.
11. It is the Appellant's submissions that the 1<sup>st</sup> Respondent expressly admitted that his contract of employment was with the 2<sup>nd</sup> Respondent and not with the Appellant and that this was confirmed by the three-month contract of service between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent, produced by the Appellant and the 1<sup>st</sup> Respondent which clearly identified the 2<sup>nd</sup> Respondent as the employer.
12. According to the Appellant, the learned trial magistrate failed to consider the terms of the contract for service dated 30<sup>th</sup> June 2016 between the Appellant and the 2<sup>nd</sup> Respondent which explicitly defined the respective obligations of the parties and identified the 2<sup>nd</sup> Respondent as the employer responsible for the 1<sup>st</sup> Respondent.
13. While placing reliance on the case of Pius Kimaiyo Lagat v Co-operative Bank of Kenya Ltd [2017] eKLR, the Appellant argued that the trial court erred by disregarding the express terms of the contract for service between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent. The Appellant emphasized that since the 1<sup>st</sup> Respondent in his testimony before the trial court admitted that the Appellant was not his employer, the court had no legal basis for holding it liable under a contract to which it was not privy.
14. The Appellant therefore urged this Honourable Court to set aside the judgment of the trial court and find that it was not liable for any acts or omissions arising from the employment relationship between the 2<sup>nd</sup> Respondent and the 1<sup>st</sup> Respondent.
15. On the second issue, the Appellant submitted that section 13 of the *Occupational Safety and Health Act* (OSHA) places a duty on every employee to ensure their own safety at the workplace. In this regard, the Appellant submitted that the 1<sup>st</sup> Respondent on cross examination admitted that on the date of the accident, he had not worn gumboots. That the 1<sup>st</sup> Respondent did not demonstrate to the court that he had reported the issue of not having protective gear to his supervisor.



16. According to the Appellant, the 1<sup>st</sup> Respondent chose to risk his life by working without protective gear yet he knew the risks involved and cannot now seek to shift responsibility to the employer.
17. The Appellant further relied on clause 2.4 of the 1<sup>st</sup> Respondent's contract of employment which obligated the employee to observe all safety and health regulations. It is the Appellant's submission that the 1<sup>st</sup> Respondent, by choosing to work without protective gear, breached that clause and knowingly exposed himself to foreseeable risk.
18. The Appellant submitted that while an employer has a duty to ensure the safety of its employees, that duty does not extend to constant supervision of employees who disregard safety measures. Reliance was placed in the case of *Woods v Durable Suites Ltd* [1953] 2 All ER 391.
19. On the third issue, regarding costs, the Appellant submitted that the 1<sup>st</sup> Respondent failed to prove his case on a balance of probabilities and should therefore be condemned to pay the costs of both the suit and the appeal, as costs follow the event.
20. The Appellant opined that should the court find it liable, a sum of Kshs 94,250 would suffice in the ratio of 50:50 as the plaintiff contributed to the alleged accident.

### **1<sup>st</sup> Respondent's Submissions**

21. The 1<sup>st</sup> Respondent on his part identified the issues for determination to be:
  - i. Whether the trial court erred in law and fact by holding that the Appellant and the 2<sup>nd</sup> Respondent were 100% liable for the accident that occurred on 26<sup>th</sup> August, 2016.
  - ii. Whether trial court erred in fact and in law by presuming that there existed a principal agency relationship between the Appellant and the 2<sup>nd</sup> Respondent thus imposing joint liability.
  - iii. Whether the trial court erred in law and in fact by shifting the burden of proof on the Appellant and the 2<sup>nd</sup> Respondent to show that the machines were not faulty.
  - iv. Whether the trial court erred in law and in fact by holding that the Appellant had sufficient control over the premises.
  - v. Whether the trial court erred in law and in fact by failing to find that the 1<sup>st</sup> Respondent was partly negligent for the accident that occurred on 26<sup>th</sup> August 2016.
22. On the first issue, the 1<sup>st</sup> Respondent submitted that his services were contracted by the 2<sup>nd</sup> Respondent on behalf of the Appellant, and that at all material times he worked as a machine operator at the Appellant's premises. He contended that both the Appellant and the 2<sup>nd</sup> Respondent owed him a duty of care, which they breached by failing to ensure a safe working environment.
23. The 1<sup>st</sup> Respondent submitted that the trial court properly found the Appellant and the 2<sup>nd</sup> Respondent jointly liable, as the evidence on record satisfied the elements of negligence.
24. The 1<sup>st</sup> Respondent submitted that in his testimony before the trial court, he testified that the Appellant owed him a duty of care as he was lawfully performing assigned duties within its premises which duty was breached when the Appellant failed to ensure that the cutting machine was in proper working condition and further, that it failed to provide him with protective gears.
25. The 1<sup>st</sup> Respondent maintained that the Appellant was vicariously liable for the accident and the trial court did not err in holding both the Appellant and the 2<sup>nd</sup> Respondent 100% liable.



26. On the second issue, it was submitted that the 2<sup>nd</sup> Respondent acted as the Appellant's agent in recruiting and managing workers at the Appellant's premises. The 1<sup>st</sup> Respondent argued that the contract between the Appellant and the 2<sup>nd</sup> Respondent, which was produced in court, showed that the 2<sup>nd</sup> Respondent described itself as a contractor of the Appellant, thereby implying an agency relationship. Consequently, the 1<sup>st</sup> Respondent submitted that the Appellant is estopped from denying the existence of that relationship. To support this position, the 1<sup>st</sup> Respondent relied on the case of *Transmara Sugar Co. Ltd v Danree Multihandling Services Ltd & Another* [2021] KEHC 1782 (KLR)
27. In addition, the 1<sup>st</sup> Respondent submitted that under clause 6(c) of his employment contract, the Appellant had a non-delegable duty to ensure compliance with environmental health and safety regulations.
28. The 1<sup>st</sup> Respondent submitted that the Appellant and the 2<sup>nd</sup> Respondent therefore owed him a joint duty of care, which they jointly breached.
29. On the third issue, the 1<sup>st</sup> Respondent contended that the Appellant failed to prove that the cutting machine was in good working condition or that it had been inspected prior to the accident. He argued that once he proved the occurrence of the accident and the circumstances, the evidentiary burden shifted to the Appellant to show otherwise.
30. Relying on *Kenya Knit Garments (EPZ) Ltd v Patrick Muomo Mwololo* [2018] eKLR, he submitted that the trial court rightly required the Appellant to disprove negligence, as it was in a better position to provide evidence on the condition of the machinery.
31. On the fourth issue, the 1<sup>st</sup> Respondent emphasized that the premises and the machines belonged to the Appellant, as confirmed by its own witness and that the Appellant, being in control of the premises and equipment, owed a statutory duty of care to all lawful workers present thereon, including the 1<sup>st</sup> Respondent.
32. With regard to the fifth issue, the 1<sup>st</sup> Respondent maintained that he was not provided with any protective gear and that the Appellant failed to prove that such gear had been supplied or that it had instructed the 2<sup>nd</sup> Respondent to provide it.
33. The 1<sup>st</sup> Respondent submitted that both the Appellant and the 2<sup>nd</sup> Respondent were therefore jointly liable for failing to provide protective gear and for exposing him to a foreseeable risk of injury.
34. The 1<sup>st</sup> Respondent further argued that the Appellant did not prove any contributory negligence on his part, as no evidence was adduced to show that he caused or contributed to the malfunctioning of the machine or that he ignored any safety instruction.
35. He concluded that the trial court correctly held the Appellant and the 2<sup>nd</sup> Respondent jointly liable and properly awarded damages of Kshs. 188,500/= for the injuries he sustained.
36. The 1<sup>st</sup> Respondent urged the Court to find that the appeal lacks merit, as the Appellant and the 2<sup>nd</sup> Respondent owed and breached a joint statutory duty of care to him.
37. The court was thus urged to dismiss the appeal with costs.

### **Analysis and Determination**

38. In a first appeal as this one, the duty of the Appellate Court is to evaluate the evidence before the trial court as well as the Judgment and arrive at its own independent judgment on whether or not to allow



the appeal (see *Bwire v Wayo & Sailoki Civil Appeal 032 of 2021*) [2022] KEHC 7(KLR) (24<sup>th</sup> January, 2022) (Judgment).

39. Having considered the grounds of appeal herein as well as the submissions filed by the rival parties, I find that the issues for determination are;
- i. Whether the trial court erred in finding the Appellant statutorily and vicariously liable for the injuries sustained by the 1<sup>st</sup> Respondent.
  - ii. Whether the 1<sup>st</sup> Respondent contributed to the accident.
  - iii. Whether the award of damages by the trial court was justified.
  - iv. Who should bear the costs of this appeal.

**Whether the trial court erred in finding the Appellant statutorily and vicariously liable for the injuries sustained by the 1<sup>st</sup> Respondent**

40. It is not in dispute that the 1<sup>st</sup> Respondent sustained injuries while operating a cutting machine within the Appellant's premises. It is further not in dispute that the 1<sup>st</sup> Respondent was employed by the 2<sup>nd</sup> Respondent to work in the Appellant's premises under a labour supply contract.

41. The Appellant contends that it cannot be held liable because the 1<sup>st</sup> Respondent was engaged by the 2<sup>nd</sup> Respondent as an independent contractor. The 1<sup>st</sup> Respondent on the other hand contends that the Appellant exercised control over the work being undertaken, provided the tools and machinery used, and directly benefited from the services rendered. It was argued that the Appellant stood in the position of an employer or principal, and is vicariously liable for the negligence that occasioned the accident.

42. The 1<sup>st</sup> Respondent worked in the Appellant's premises where he was deployed by the 2<sup>nd</sup> Respondent. Section 17 of the *Work Injury Benefits Act* allows the employee to sue either the employer or the third party responsible for the injury. The section provides:

17. Claims against third parties

(1) If an occupational accident or disease in respect of which compensation is payable, was caused in circumstances resulting in another person other than the employer concerned (in this section referred to as the 'third party') being liable for damages in respect of such accident or disease—

- (a) the employee may claim compensation in accordance with this Act and may also institute action for damages in a court against the third party; and
- (b) the employer or insurer by whom compensation in respect of that accident or disease is payable may institute action in a court against the third party for the recovery of compensation that the employer or insurer, as the case may be, is obliged to pay under this Act.

43. Further, section 17 and 18 of the *Occupational Safety and health Act* impose duties on occupiers of premises to persons other than their employee as follows:

General duties of occupier and self-employed to persons other than their employees.

17.



- (1) Every occupier shall conduct his undertaking in such a manner as to ensure, that a person who is not his employee who may be affected thereby is not exposed to risks to safety or health.
- (2) Every self-employed person shall conduct his undertaking in such a way as to ensure that he and any other person who is not his employee who may be affected thereby is not exposed to risks to safety or health.
- (3) It shall be the duty of every employer and every self employed person to give relevant safety and health information to every person, not being his employee who may be affected by the manner in which the employer or the self employed person conducts his undertaking, on such aspects of the way he conducts his business as may affect safety or health.
- (4) It shall be an offence for a person on whom a duty is imposed under this section to fail to carry out such a duty.

Duties of an occupier of a place of work to persons other than his employee

18.

- (1) An occupier of non-domestic premises which have been made available to persons, not being his employees, as a place of work, or as a place where the employees may use a plant or substance provided for their use there, shall take such measures as are practicable to ensure that the premises, all means of access thereto and egress therefrom available for use by persons using the premises, and any plant or substance in the premises provided for use there, are safe and without risks to health.
- (2) A person who has, by virtue of a contract, lease or otherwise, an obligation of any extent in relation to the—
  - (a) maintenance or repair of a place of work or any means of access thereto or egress there from; or
  - (b) prevention of risks to safety and health that may arise from the use of any plant or substance in the place of work, shall for the purpose of subsection (1), be deemed to have control of the matters to which his obligation extends.
- (3) It shall be an offence for a person on whom a duty is imposed under this section to fail to carry out such a duty.

44. The 1<sup>st</sup> Respondent was therefore entitled to claim liability against the Appellant as the occupier of the premises where he was working and who was therefore responsible for his safety while working at the said premises.



45. Further, the verification and authorization of the 1<sup>st</sup> Respondent's employment contract by the Appellant substantiates the 1<sup>st</sup> Respondent's assertion that the 2<sup>nd</sup> Respondent acted as an agent of the Appellant in the recruitment and supervision of workers at the Appellant's premises. This fact demonstrates an element of control and oversight over the employment process, which is inconsistent with a purely independent contractor relationship.
46. Although clause 5 of the contract between the Appellant and the 2<sup>nd</sup> Respondent at page 19 of the Record of Appeal contains an indemnity provision purporting to absolve the Appellant from liability arising out of accidents involving workers, such a clause cannot override the established principles of agency and vicarious liability.
47. In *Transmara Sugar Co. Ltd v Danree Multihandling Services Ltd & Another* [2021] KEHC 1782 (KLR), the court held that where an agency relationship is established, the principal cannot evade liability for the acts or omissions of the agent by relying on contractual terms intended to exclude such responsibility.
48. Guided by that decision, this court finds that once it was demonstrated that the 2<sup>nd</sup> Respondent acted under the direction and control of the Appellant in the recruitment and supervision of workers, the Appellant could not contract out of its statutory or common law obligations owed a duty of care to those workers. The Appellant therefore bears primary responsibility for the acts and omissions of the 2<sup>nd</sup> Respondent committed in the course of executing duties within its premises.
49. Consequently, the court finds that the Appellant is liable for the injuries sustained by the 1<sup>st</sup> Respondent in the course of his employment, and the learned trial magistrate did not err in so holding.

#### **Whether the 1<sup>st</sup> Respondent contributed to the occurrence of the accident.**

50. The Appellant contended that the 1<sup>st</sup> Respondent contributed to the occurrence of the accident by failing to adhere to safety precautions while operating the cutting machine. It was submitted that the 1<sup>st</sup> Respondent was aware of the operational risks involved, yet failed to exercise due care for his own safety.
51. The 1<sup>st</sup> Respondent denied any contributory negligence on his part and maintained that the accident occurred due to the defective condition of the machine provided by the Appellant and the absence of adequate protective gear.
52. Upon evaluation of the evidence on record, it is clear that the 1<sup>st</sup> Respondent was operating a cutting machine at the Appellant's premises. There was no evidence tendered by the Appellant to demonstrate that the 1<sup>st</sup> Respondent would have prevented himself from getting injured. The argument that he did not request for protective gear does not absolve the employer of its statutory duty to ensure a safe working environment. The obligation to provide such gear and enforce its use lies squarely with the employer and cannot be shifted to the employee.
53. The duty to provide a safe working environment, functional equipment, and protective gear primarily rested with the Appellant and its agent, the 2<sup>nd</sup> Respondent. The court finds no basis to attribute contributory negligence to the 1<sup>st</sup> Respondent. The court therefore upholds the finding of the trial court that both the Appellant and the 2<sup>nd</sup> Respondent were wholly liable for the accident.

#### **Whether the award of damages by the trial court was justified.**

54. The trial court awarded the 1<sup>st</sup> Respondent a sum of Kshs. 188,500 as general damages and Kshs. 8,500 as special damages. In his plaint dated 18<sup>th</sup> May 2017, the 1<sup>st</sup> Respondent pleaded that he sustained a



burn wound on the right leg while operating the cutting machine. Unfortunately, the medical report relied upon at the trial was not included in the Record of Appeal. This omission limits the court's ability to independently assess the nature and extent of the injuries sustained by the 1<sup>st</sup> Respondent.

55. Nevertheless, noting that the trial court had the benefit of considering the medical report and observing the witnesses, this court finds no sufficient ground to interfere with the award. The award of Kshs. 188,500 as general damages and Kshs. 8,500 as special damages is therefore upheld.
56. The court further notes that the Appellant did not dispute the quantum of the award per se but only sought contribution by the 1<sup>st</sup> Respondent at 50/50 on grounds that he was contributorily negligent.
57. Consequently, I find that the appeal lacks merit and is hereby dismissed. The judgment of the trial court delivered on 31<sup>st</sup> August 2023 is upheld.
58. The Appellant shall bear the costs of this appeal as well as the costs in the lower court.

**DATED, DELIVERED AND SIGNED THIS 23<sup>RD</sup> DAY OF OCTOBER, 2025.**

**M. ONYANGO**

**JUDGE**

