



**Iyala v Butali Sugar Mills Ltd (Appeal E017 of 2024)
[2025] KEELRC 3280 (KLR) (20 November 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3280 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
APPEAL E017 OF 2024
DN NDERITU, J
NOVEMBER 20, 2025**

BETWEEN

JOSEPH MUNIALO IYALA APPELLANT

AND

BUTALI SUGAR MILLS LTD RESPONDENT

*(Being an appeal from the judgment and decree issued in Webuye SPMCC
No.169 of 2016 by Hon. Viola Yator (PM) delivered on 24th July 2024)*

JUDGMENT

I. Introduction

1. In a judgment dated and delivered on 24th July 2024 the lower trial court dismissed the cause by the appellant (the claimant in the lower court) with costs.
2. Thereafter, the appellant through Omundi Bw'Onchiri Advocates commenced this appeal vide a memorandum of appeal dated 31st July 2024 raising the following grounds of appeal –
 1. That the Hon. Magistrate erred in both law and fact when she failed to find that the Appellant was an employee of the Respondent at the time of the Industrial Accident hence occasioning a miscarriage of justice.
 2. That the Judgment by the learned Trial Magistrate is contradictory and poorly reasoned.
 3. That the learned Trial Magistrate failed to take into account the entire documentary evidence before her and thereby arrived at a wrong decision in dismissing the Appellant's case.
 4. That the learned Trial Magistrate erred in law and fact when she failed to consider the submission by the Appellant hence occasioning a miscarriage of justice.



5. That the learned Trial Magistrate erred both in law and fact when she failed to find that the Appellant had proved his case on a balance of probability.
6. That the proposed Quantum (General Damages) is too low taking into account the injuries the Appellant sustained and the current rate of inflation in the country.
3. The appellant is seeking for orders that –
 - a. That the Appeal be allowed and in its place an order do issue allowing the Appellant’s case in Webuye SPMCC No. 169 of 2016.
 - b. That the Appellant be awarded costs of this Appeal and costs in Webuye SPMCC No. 169 of 2016.
4. By consent, the appeal was canvassed by way of written submissions. Counsel for the appellant Miss Wanyama filed written submissions dated 14th March 2025 while counsel for the respondent Mr. Osewe instructed by Kigen W. J. & Co. Advocates filed submissions dated 6th May 2025.

ii. Background

5. In a plaint dated 15th September 2016 filed through Omundi Bw’Onchiri Advocates the appellant pleaded that at all material times to the suit he was a casual employee of the respondent as a cane-loader. It was pleaded that on or about 17th February 2016 the appellant was injured while on duty aboard a vehicle belonging to the respondent. It is the appellant’s case that the respondent breached its duty of care towards him as an employee and holds it responsible for the consequences thereof.
6. The particulars of the negligence and breach of the contract were pleaded in paragraph 7 of the plaint – page 5 of the record of appeal.
7. The appellant pleaded for the following prayers –
 - a. General damages for past, present and future medical and nursing expenses.
 - b. Special damages Kshs.3500/=.
 - c. Interests.
 - d. Costs.
 - e. Any other relief this Honorable court may deem fit to grant.
8. In a defence dated 25th October 2016 through Kigen & Co Advocates the respondent denied that the appellant was its employee at the material time, or any other time, or at all. In the alternative, and without prejudice to the total denial of the claim, it was pleaded that if at all an accident occurred as alleged by the appellant then the same was caused by the appellant and or that the appellant contributed solely to his alleged injuries. The respondent pleaded Res iptor loquitor and Volenti non fit injuria in that regard.
9. In a judgment dated and delivered on 24th July 2024 the lower court found and held that the appellant had failed to prove the fact of employment by the respondent as pleaded and the claim was dismissed with costs. This appeal is against that judgment.

II. Submissions By Counsel

10. Counsel for the appellant condensed the grounds of appeal into three thematic areas. Grounds 1, 2, 3, and 4 were argued together, and grounds 5 and 6 argued as stand alone.



11. On grounds 1, 2, 3, and 4 it is submitted that the appellant during the trial produced a gate-pass and stated that he was taken to the hospital by the respondent who also paid for the medication bills as prove of his employment.
12. Citing *Empire Feeds Ltd V Kingo'u* (2022) KEELRC 1501(KLR) & *Mokaya V Christ the King Parish & Another* (2024) KEELRC 28 (KLR) it is submitted that it was upon the respondent to avail employment records of the appellant and it failed to do so hence leaving the evidence by the appellant that he was an employee of the respondent unchallenged. It is submitted that Section 10 of the *Employment Act* imposes an obligation upon the employer to keep and produce records of the employment but the respondent failed to discharge that burden.
13. On ground 5 it is submitted that since the appellant worked in the employ of the respondent, the latter owed him a duty of care and the police abstract produced in evidence confirms that he was indeed involved in the accident and that the subject vehicle belonged to the respondent. It is submitted that as an employee, a cane-loader at that, the appellant was lawfully riding in the vehicle that was involved in the accident. It is submitted that there was no warning to the appellant that he was not authorized to ride in the vehicle.
14. It is submitted that the subject vehicle belonged to the respondent and was driven by a driver engaged by the respondent and the respondent owed him a duty of care. Counsel cited *Mwangi Alexander V Francis Kariuki Wanja* (2018) eKLR in support of the foregoing argument.
15. On ground 6 it is submitted that a sum of Kshs500,000/= is a reasonable award to the appellant as general damages considering the injuries suffered. It is submitted that the sum of Kshs80,000/= proposed by the lower trial court in this regard is too low considering the nature of the injuries suffered. The court is urged to interfere with the low award by applying the principles in *Butt V Khan* (1982-1988) 1 KAR.
16. Counsel for the respondent isolated the following issues for determination –
 - a. Whether the trial magistrate erred in holding that the Appellant was not the Respondent's employee at the time of the accident
 - b. Whether the Appellant proved his case on liability against the Respondent
 - c. Whether any quantum of damages is payable to the Appellant and whether the Trial court's proposal is inordinately low.
17. On the first issue, it is submitted that the respondent pleaded that the appellant was not its employee right from the defence filed in the lower trial court. It is submitted that it was upon the appellant to prove his alleged employment with the respondent in line with Section 107 of the *Evidence Act*.
18. It is further submitted that the gate-pass produced by the appellant in his evidence was issued by *Frodak Kenya Ltd* – an entity that was not a party in the proceedings and this appeal - and the same was valid from June to December, 2016, yet the alleged accident occurred on 17th February 2016. It is submitted that the appellant did not call any evidence to corroborate the fact of the alleged accident.
19. It is further submitted that while no notice to produce documents of employment was issued and served upon the respondent, the respondent held no such documents as the appellant was not its employee as at the time of the alleged accident or any other time or at all. In support of this argument counsel cited *Isuzu East Africa Limited (Formerly General Motors East Africa Limited) V Joseph Likoe Nyangweso* (2020) KEELRC 1725 (KLR) & *Kay Construction Company Ltd V Malezi Muthama* (2002) KEHC 860 (KLR).



20. On the second issue, it is submitted that since the appellant was not an employee of the respondent the issue of the respondent owing him a duty care as alleged and pleaded in the plaint as filed in the lower court did not arise. In this regard counsel cited the two decisions in the foregoing paragraph, that since there was no established employer-employee relationship between the parties, the issue of liability as pleaded and compensation did not and should not arise.
21. It is submitted that the documentary evidence availed by the respondent in the lower court through DW1 confirms that indeed no accident was registered with the respondent on 17th February 2016 or any other time or at all involving the appellant.
22. It is submitted that the appellant's claim as filed in the lower trial court was founded and based on alleged employment relationship with the respondent and as such the assessment of damages arising from alleged injuries does not arise. The court is urged to uphold the findings and the judgment of the lower court and dismiss this appeal with costs.

II. Issues For Determination

23. 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 in this appeal -
 - a. Whether the appellant was an employee of the respondent.
 - b. Whether the lower trial court arrived at the wrong and improper verdict and made the wrong and unlawful orders in the impugned judgment.
 - c. Is there a reason(s) for this court to interfere with the decision of the lower trial court as prayed by the appellant?
 - d. What appropriate orders should this court make in regard to the above issues and on costs?

II. The Fact Of Employment

24. 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 *Selle & Another V Associated Motor Boat Company Ltd (1968) EA*.
25. The appellant's case is that he was an employee of the respondent as of 17th February 2016 when he was allegedly injured in an accident while at work as a cane-loader and riding in a vehicle belonging to the respondent.
26. An elementary presumption in law is that (s)he who alleges shall prove – see Section 107 of the [Evidence Act](#). Upon pleading that he was an employee of the respondent, it was upon the appellant to prove that fact on a balance of probabilities. It was upon him to avail oral and or documentary evidence establishing and proving that employer-employee relationship between him and the respondent.
27. While Sections 10 & 74 of the [Employment Act](#) place a legal burden on an employer to keep and avail records of employment, that does not shift the primary burden of an employee to prove the fact of alleged employment. Both in the lower trial court and in this appeal the respondent has maintained that at no time was the appellant its employee in whatever capacity or at all.
28. It was upon the appellant to satisfy the lower trial court that he was indeed an employee of the respondent as claimed and pleaded. It was only then that the respondent would have been obligated



to produce the records in rebuttal. The appellant should have established and proved the fact of his such employment by availing evidence, oral and or documentary, pointing to and proving such employment. It is important to note that though duly represented by counsel no notice to produce or discovery of documents was issued. In any event, the respondent's position is that no such documents existed as there was no such employer-employee relationship as alleged by the appellant.

29. If it is the appellant's case that he was not issued with a written contract, he should then have produced other evidence such as pay-slips or called a workmate to confirm and corroborate evidence of his employment, at least on a balance of probabilities. Instead of so doing, the appellant produced a gate-pass issued by Frodak Kenya Ltd without offering any evidence of the connection or nexus between the said company and the respondent herein, yet the said company was neither a party in the lower trial court nor in this appeal. Further, the gate-pass availed was valid for the period from June to December, 2016, way outside the date of the alleged accident of 17th February 2016.
30. In any event, a gate-pass is not evidence of employment. The gate pass may be issued to any person authorizing him or her to enter and exit premises. The gate-pass implies that the appellant was in the control and direction of Frodak Kenya Ltd and, as stated above, the said company was neither a party in the trial in the lower court nor in this appeal.
31. In all the documents availed by the respondent, including the duty rooster and the accident register, none confirms the alleged accident and the involvement of the appellant therein.
32. The court has this far said enough in demonstrating that the appellant failed to prove, on a balance of probabilities, that he was an employee of the respondent at the alleged time, or any other time, or at all. This court cannot fault the lower trial court for arriving at the finding and holding that it did in this regard.
33. Having failed to prove the fact of his employment, the appellant's claim in the lower trial court collapsed and this appeal collapses on the same ground. This court agrees with the decisions cited by the respondent's counsel in *Kay Construction Company Ltd V Malezi Muthama (supra)* & *Isuzu East Africa Limited V Joseph Likoe Nyangweso (supra)*.
34. There is one aspect of the claim and the appeal that the court may wish to comment on, even though it does not affect the outcome in view of the finding and holding above. Even if the appellant was an employee of the respondent as alleged and claimed, he ought to have lodged a claim for compensation under the Workmen's Injury Benefits Act (WIBA) and only approach the court in accordance with the procedure provided for therein. For that reason, even though this issue was neither raised in the lower trial court nor in this appeal, the lower trial court lacked the jurisdiction to entertain the claim ab initio.
35. Likewise, even if the appellant was involved in the alleged accident, which is however not proved as discussed above, he could only claim compensation in the ordinary way, through a claim for damages for injuries sustained, having failed to prove his alleged employment. In that event, this court (ELRC) would have had no jurisdiction to deal with an appeal arising from a claim based on compensation for injuries arising from a road traffic accident outside employment.
36. For all the foregoing reasons, this appeal has no merits and the same is hereby dismissed and the decision of the lower trial court is hereby upheld and affirmed.
37. However, considering the nature and the circumstances of this appeal and the trial in the lower court, counsel for the appellant ought to have weighed the nature and the circumstances of the claim and advised him accordingly. Whether this happened or not can only be a subject of speculation. And since the court is not in the business of speculation, this court shall order that each party meets own costs for the trial in the lower court and for this appeal.



II. Orders

38. Flowing from the foregoing, the court makes the following orders –

- a. This appeal is hereby dismissed for lack of merits.
- b. However, each party shall meet own costs in the lower court and for this appeal.
- c. The dismissal of the claim by the lower trial court is hereby upheld and affirmed.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 20TH DAY OF NOVEMBER, 2025.

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DAVID NDERITU

JUDGE

