**Glad Toto Apartment Limited v Mugasia (Employment and Labour Relations Appeal E221 of 2024) [2025] KEELRC 3721 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3721 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**EMPLOYMENT AND LABOUR RELATIONS APPEAL E221 OF 2024**

**NJ ABUODHA, J**

**DECEMBER 19, 2025**

**BETWEEN**

**GLAD TOTO APARTMENT LIMITED ..... APPELLANT**

**AND**

**FREDRICK MOODY MUGASIA ..... RESPONDENT**

***(An appeal from the Judgment and decree of the Honourable Becky Cheloti Mulemia (PM) delivered on the 15th July, 2024 in Nairobi MCCC/11301/2019 FREDRICK MOODY MUGASIA V GLAD TOTO APARTMENT LIMITED)***

## JUDGMENT

1. Through the Memorandum of Appeal dated 29th July, 2024 the Appellant appeals against the whole of the Judgment of Honourable Becky Cheloti Mulemia (PM) delivered on 15th July,2024.
2. The Appeal was based on the grounds that:
    i. The Learned Magistrate erred in law and fact by apportioning liability at ratio of 90.10 in favour of the Respondent herein as against the Appellant.
    ii. The Learned Magistrate erred in law by finding for the Respondent while the Honourable Magistrate found that the Respondent did not establish a nexus between himself and the Appellant.
    iii. The Learned Magistrate erred in law by rely on hearsay evidence as the medical notes were not produced by the maker.
    iv. The Learned Magistrate erred in law and fact in failing to consider the evidence produced by the Appellant.

v. The Learned Magistrate erred in law by awarding the Respondent herein a sum of Kenya Shillings Two Million Thousand (Kshs 2,000,000/=) without any assessment of the extent of the injury.

vi. The Learned Magistrate erred by failing to give due consideration to the Appellant's submissions.

vii. The Learned Magistrate erred by applying the wrong principles of law thereby arriving at a wrong decision.

viii. In all the circumstances of the case, the findings of the learned Magistrate are unsupportable in Law on the basis of the evidence adduced and the circumstances of the case.

3. The Appellant prayed that the Appeal be allowed with costs and the judgment and decree of the Hon. Becky Cheloti and all consequential orders ensuing thereafter be set aside.

4. The Appeal was disposed of by written submissions.

**Appellant's Submissions**

5. The Appellant's Advocates Hassan N. Lakicha & Company Advocates filed written submissions dated 18th March, 2025 and on the issue of whether the Respondent established the employer-employee relationship with the Appellant, counsel submitted that without proof of employment relationship, the Respondent failed to establish a prima facie case against the Appellant to justify the allegations of work-related injury. That the Respondent ought to have produced supporting documents like bank slips or M-pesa or job card to corroborate his assertions.

6. Counsel submitted that the trial court found that the employer-employee relationship was not established, but went forward to find the that the Appellant owed the Respondent a duty of care to provide a safe working environment as he was in the Appellant's premises. Counsel relied on the case of Kenya Union of Commercial Food and Allied Workers v Mwana Black Smith Limited [2013] eKLR to submit that without the employment relationship being proved, the court lacked jurisdiction. Counsel further submitted that it was trite law that he who alleges must prove. The Respondent therefore bore the burden of proof, which he ought to have discharged in order to succeed in his claim.

7. Counsel relied on among other cases, the case of George Kyalo Kilunda v Donjawes Limited [2021] eKLR to submit that it was imperative to first establish an employment relationship before an employer's liability for a workplace injury could be inferred.

8. On the issue of whether the court relied on hearsay evidence, counsel submitted that the Respondent stated that he sustained injuries on 4th October, 2018 and was taken to Eastleigh hospital for first aid and later taken to Kikuyu Hospital for more medical attention. That the Respondent produced to court medical receipts and medical report from PCEA Kikuyu hospital on 5th October, 2018.

9. Counsel submitted that the Respondent failed to explain to the court the difference and inconsistence in the two days where in his statement he sustained injuries on 4th October, 2018 but the hospital invoice indicates that he was admitted on 5th October, 2018. That the Respondent did not call any other witness or doctor from PCEA Kikuyu Hospital with regard to the medical report on injuries suffered, filed and exchanged before hearing.

10. Counsel submitted that there was no consent on record that any of the documents was admitted by consent. Thus, the medical report relied upon had to be produced in court in such a way that they would not be hearsay evidence, as the rule on hearsay evidence also applies to documents.

11. Counsel relied on section 64 of the *Evidence Act* (cap 80) on production of primary documentary evidence and among other cases, the case of Alex Kyalo Ngima & 2 others v Kisau Girls Secondary School (sued through Chairman Board of Governors Kisau Girls Secondary School [2021] eKLR to submit that the Respondent should have called at least one person to testify on the medical documents, even if it was the medical practitioner who ultimately filed the report in order to avoid the pitfall of relying on hearsay evidence. That even documents marked for identification have to be produced in evidence as exhibits.

12. Counsel further submitted that the Respondent did not call any medical practitioner who dealt with the medical records to support any of the medical reports relied upon. Such default rendered the medical reports they relied upon to be hearsay evidence, even though the same were produced as exhibits by PW1.

13. Counsel further contended that the extent and nature of the injuries were never explained and thus the court was not given enough evidence on which to make a determination. That the Respondent through submissions tried to introduce the doctor's report which was never relied on and or produced in court during the hearing.

14. Counsel submitted that the Respondent failed to prove his case against the Appellant on a balance of probabilities and failed to provide any proof of the employment relations thus the trial court lacked jurisdiction to hear the claim.

**Respondent's Submissions**

15. The Respondent's Advocates, Ann Nyasuguta Ondande & Co. Advocates filed written submissions dated 20th May, 2025 and submitted that the Respondent was injured while in the course of duty at the Appellant's premises. The trial court on her decision articulated that she had considered the evidence and the submissions and authorities filed by both parties and settled that the Respondent had proved his case on a balance of probability and as a result the scale of justice fell on the Respondent's favour as against the Appellant.

16. Counsel submitted that the Appellant's submissions did not disclose any triable issues which would constrain this Honourable Court to disturb the award on damages of Kshs. 2,000,000/- and that the Respondent suffered total damage on his eye, lost his eyesight thus he is permanently blind in his right eye. The injury had been confirmed at PCEA Kikuyu hospital and further by Doctor Okoth Okere who classified the injury as maim and assessed the degree of permanent incapacity at 100%.

17. Counsel relied on Order 11 of the Civil Procedure Rules to submit that during the pre-trial stage, the Appellant did not demand that the makers of the documents attend court to produce the same. That the demand was not made during the production of the said documents or during the hearing. The issue raised is baseless and could not hold water. That this court on appeal is called upon to re-evaluate the evidence already on record.

18. Counsel submitted that the Respondent would have wished for more general damages but he was satisfied with what he was awarded since no amount of money could replace his eye which is completely blind. That as a carpenter he finds it very hard to use one eye which affects his production at work. That the trial court considered all the evidence on record and oral testimony by the Respondent before making her decision.

19. Counsel submitted on the employer-employee relationship that the Respondent stated in his statement that he was employed by one Abdirahman being the servant or employee of the Appellant. Although he did not produce a document to prove the same, it was his testimony that he was being paid

his wages by Abdirahman and this evidence was never denied by the Appellant. That the Respondent had established the employer-employee relationship.

20. Counsel relied on the case of Pioneer Holdings (Africa) Limited v Francis Shitsukane Abakala & another (2017) eKLR where the court awarded the Respondent general damages of Kshs 2,500,000/= for injuries sustained as a result of chemical burns to his eyes resulting in to total blindness. On appeal the award was upheld. Counsel urged this Honourable court to dismiss the Appellant's appeal with cost.

**Determination**

21. The principles which guide this court in an appeal from a trial court are now well settled. In Selle And Another v Associated Motor Boat Company Ltd & Others, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows: -

> "An appeal to this Court from a trial by the High Court is by way of a 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."

22. The Judgment of the trial court was that although the Respondent did not establish the employer-employee relationship the Appellant had a duty of care to provide a safe working environment being lawfully at the Appellant's premises. The court apportioned liability at the ratio of 90:10 and awarded total damages at Kshs 1,814,076/- (which is Kshs 2,015.640/= less Kshs 201,564 being 10% contributory negligence), General damages at Kshs 2,000,000/, special damages at Ksh 15,640/= with costs and interest. The Appellant being aggrieved by the whole judgment fronted 8 grounds of appeal.

23. This court will condense the grounds in to four issues: –

    a. Whether the trial court erred by finding there was no employer-employee relationship between the Respondent and the Appellant.

    b. Whether the trial court erred by finding that the Appellant had a duty of care to provide safe working environment for the Respondent.

    c. Whether the trial court relied on hearsay evidence.

    d. Whether the trial court was justified in apportioning liability at 90:10 and awarding the Respondent Kshs 2,000,000/= as general damages.

**Whether the trial court erred by finding there was no employer-employee relationship between the Respondent and the Appellant.**

24. The employer-employee relationship is paramount before this court can adjudicate any employment matter. The Appellant alleged that it sub-contracted the construction at Eastleigh site to one Antony Muriuki Maithigah who was to employ other workers to assist in the work. The Respondent on the other hand alleged that Abdirahman who was the Appellant's supervisor was his supervisor who paid

his wages and the said Antony Muriuki was his colleague. That he was employed as a carpenter earning Kshs 5,400/= weekly since 9th July,2018 to 4th October, 2018.

25. Under section 2 of the *Employment Act* an employee is defined as

> " means a person employed for wages or a salary and includes an apprentice and indentured learner" The Black's law dictionary defines an independent contractor as "one who is entrusted to undertake a specific project but who is left to do the assigned work and to choose the method for accomplishing it"

26. This court notes that the agreement produced by the Appellant sub-contracting the work to the contractor was not signed by either party but only stamped by assistant chief. The Appellant produced payments made to the sub-contractor and the roles he was to do. The Appellant's witness confirmed that no where was it indicated in writing that the sub-contractor was to hire other employees.

27. In addition, the Respondent stated that he was employed by the Appellant from 9th July,2018 while in the alleged letter of sub-contracting work was to start on 9th August, 2018 a month after the Respondent started working with the Appellant. The sign post attached by the Respondent showed the Appellant as the client hence to this court is convinced that the Respondent was an employee of the Appellant and not under the subcontractor. He indicated that his wages were paid by the said supervisor Abdirahman.

28. Whereas this court appreciates that the Respondent had no written contract and this was an oral contract, it was the duty of the Appellant to reduce the contract into writing and it was upon the Appellant to disprove any fact alleged by the Respondent. The Appellant could not require the Respondent to produce bank slips, M-pesa messages or job card when none was supplied to him by the Appellant. In addition, the said sub-contractor should have testified to illustrate that he was the one paying the Respondent and not the supervisor.

29. The Appellant had a duty if he felt someone else was responsible to enjoin the subcontractor in the suit in the trial court to illustrate contributory negligence which never happened in this case. The fact remains that the Respondent was working at the Appellant's premises and that is who he knew as his employer. Any third party had to be introduced by the Appellant for the court to believe that it was the third party who was liable and not the Appellant.

30. This court therefore overturns the trial court finding that the Respondent did not establish an employer-employee relationship and finds that there existed employer-employee relationship in this matter. This court faults the trial court because after finding there was no employer-employee relationship there was no way the court could go ahead and find the Appellant liable.

**Whether the trial court erred by finding that the Appellant had a duty of care to provide safe working environment for the Respondent**

31. This court having found that indeed the Respondent was an employee of the Appellant and he was injured at the Appellant's premises where he was assigned the duty of constructing ladders and supporters for fixing safety nets. That some of the workers were working above him and the Respondent was doing his work on the ground floor when suddenly a piece of wood fell from height injuring his right eye damaging it completely.

32. The Respondent blamed the Appellant for failure to issue him with protective gear. On the other hand, the Appellant's case was that Respondent failed to take proper care in the course of his duty and failed to wear safety gear provided by the Appellant.

33. Section 107(1) of the *Evidence Act*, provides that:

> " Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

34. This was the position on Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that:

> " As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidentiary burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

35. The trial court held that the Appellant had a duty of care to provide a safe working environment for the Respondent. From the above, there was no evidence presented by the Appellant to controvert the Respondent's claim that he was not provided with protective gear. The Appellant never produced an inventory of issuance of protective gears to the Respondent and that he failed to wear them.

36. The Court is fully aware that it is the responsibility of an employer to provide protective gear to an employee as it was held by the Court of Appeal in the case of Makala Mailu Mumende vs Nyali Golf County Club [1991] KLR 13 that an employer must reasonably take steps in respect of the employment, to lessen danger or injury to the employee as it is his responsibility to ensure a safe working place for its employees.

37. This court notes that the Appellant ought to prove that the Respondent was negligent in terms of the duty of care the Respondent had to the Appellant hence he sustained the injuries. In the case of Segwick Kenya Insurance Brokers –Vs- Price Water House Coopers Kenya, High Court Civil Appeal No. 720 Of 2006 (NAIROBI) the learned Lesiit, J cited the case of Capro Industries Limited Plc –Vs- Dickman &Others (1990) 1 ALL ER, 658, where the House of Lords held thus;

> " The three criteria for the imposition of a duty of care were foreseeability of damage, proximity of relationship and reasonableness or otherwise of imposing a duty of care. In determining whether there was a relationship of proximity between the parties the court, guided by situations in which the existence, scope and limits of a duty of care had previously been held to exist rather than by a single general principle, would determine whether the particular damage suffered is the kind of damage which the Defendant was under a duty to prevent and whether there were circumstances from which the court could pragmatically conclude that a duty of care existed."

38. However, from the above proposition this court asks the question whether assuming the Respondent had the said protective gear would they prevent the accident from taking place? The courts answer to this question is that since the Respondent was working on the ground floor and other employees were working above him the protective gear on the head could have mitigated the injury he sustained incase construction materials were to fall.

39. The court also asks itself what was the Respondent supposed to do to prevent the said accident and answers this question that the Respondent could not prevent the wood from falling from the height as it was the responsibility of the Appellant to ensure any construction material was trapped to avoid falling. The Respondent as observed by the trial court had a duty to ensure he had a safe working space

since he knew there were other workers who were working above him and construction materials could fall on him. He ought to have ensured he had the protective gears.

40. In the case of James Finlaly (K) Ltd v Benard Kipsang Koechi [2021] eKLR the court had this to say in support of the above assertion.

> However, it is my view that the said duty of care is not absolute and it does not absolve the employee from the duty to exercise due care to avoid exposing himself from foreseeable risk. An employee is not a robot that must be programmed to work in particular way. Consequently, an employee will solely or largely to take the blame if he exposes himself to injuries due to his negligence.

41. This court therefore finds this to be a case of contributory negligence as held by the trial court since each party had some duty to mitigate the accident and agrees with the trial court that the Appellant owed a higher duty to the Respondent which was a duty of care to provide a safe working environment.

**Whether the trial court relied on hearsay evidence**

42. On the issue of hearsay evidence alleged by the Appellant that the Respondent did not call the maker of the documents; this court notes that the Respondent produced medical report dated 5th October, 2020 by Dr. Cyprianus Okoth Okere who apportioned the degree of permanent incapacity at 100%. The medical records also show the extent of the injuries sustained by the Respondent who had to suffer total blindness in his right eye.

43. Section 35(5) of the *Evidence Act* makes exclusions on medical practitioner reports to be relied to prove a fact in trial. If the Appellant had any doubt with the above report it could have requested for its second medical report. The Appellant should have indicated that the maker of the medical report testifies in court during pre-trial under Order 11 of the Civil Procedure Rules or during hearing which it did not. This comes as an afterthought hence the court did not rely on hearsay evidence. The court in support of the above position relies on the case of Eldoret Express Company Limited v Nandabelwa (Civil Appeal 120 of 2017) [2022) KEHC 3226 (KLR)(5 May 2022) where it was held:

> The Appellant having consented to the production of the only evidence on record cannot at the appellate stage, seek to impugn its authenticity. In particular, the Appellant consented to the production of Plaintiff's Exhibit 3A - the injuries which the Respondent allegedly sustained from the road traffic accident, a Medical Report by Dr. Kiamba. That report described accident which was the subject of the trial.
>
> By accepting its production as evidence and producing no alternative version, it was left to the Learned Trial Magistrate to assign probative value to the Report.

44. The Appellant also raised the issue of the Respondent being admitted on 5th October,2018 while he was injured on 4th October, 2018. It was clear that the Respondent was referred on 4th October, 2018 but he was operated on 5th October, 2018.

**Whether the trial court was justified in apportioning liability at 90:10 and awarding the Respondent Kshs 2,000,000/= as general damages.**

45. As noted in this judgment in the above paragraphs this was a case of contributory negligence where the Appellant had a duty to ensure a safe working environment for the Respondent such that materials falling could be trapped knowing the Respondent was working on the ground. The Appellant never by evidence illustrate that the Respondent was given safety gears and he never wore them. The Appellant

as the custodian of employment records under section 74 of the Act should have produced an inventory of issuance of the safety gears to the Respondent. Without proof of safety gears and ensuring that the Respondent had a safe space to work made the trial court apportion higher liability on the Appellant.

46. The Respondent was to ensure his working environment was safe and ensure he wore safety gear. Most weight was on the Appellant to provide the safe working environment which is why the trial court apportioned liability at 90:10 since the Respondent had little to control the said accident. This court will not disturb such a finding as it is reasonable.

47. On the issue of quantum of general damages awarded by the trial court this court will only interfere with the issues of quantum on the circumstances stated in the case of Butt v. Khan [1981] KLR 349 where it was held as per Law, J.A that:

> " An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

48. This court will therefore interfere with quantum herein if it was inordinately high or low. The medical report dated 5th October, 2020 by Dr. Cyprianus Okoth Okere described the nature of injuries as corneal perforation, lens rapture and ureal prolapse which resulted to permanent blindness on the right eye. The injury was classified as maim with the degree of permanent incapacity of the right eye at 100%.

49. The trial court awarded the Respondent Kshs 2,000,000/= as general damages as per above nature of injuries which the Appellant faults as excessive. The court notes that the Respondent suffered total blindness of the right eye and with the degree of permanent incapacity being assessed at 100%. The Respondent was said to experience pain on the eye and he could not work with one eye comfortably as a carpenter.

50. In the cases of Pioneer Holdings (Africa) Limited versus Francis Shitsukane Abakala & Another (2017) eKLR and Peter Oduor Shikuku versus Magnum Engineering & General contractors Limited & Another (2021) eKLR the courts awarded Kshs 2,500,000/= and Kshs 2,000,000/= respectively for same injuries of loss of one eye with 100% degree of permanent incapacity. This court therefore finds the award of Kshs 2,000,000/= awarded by the trial court not excessive bearing in mind inflation over the years from when decisions were made.

51. In the foregoing the Appeal is found unmerited and is hereby dismissed with costs to the Respondent.

52. It is so ordered.

**DATED AT NAIROBI THIS 19TH DAY OF DECEMBER 2025**

**DELIVERED VIRTUALLY THIS 19TH DAY OF DECEMBER 2025**

**ABUODHA NELSON JORUM**

**PRESIDING JUDGE-APPEALS DIVISION**