REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL DIVISION

CIVIL APPEAL NO. 115 OF 2023

FORMERLY KIAMBU CIVIL APPEAL NO. E217 OF 2022

JOSEPH NG'ANG'A KAHIGA ..... APPELLANT

VERSUS

CHANIA FEEDS MANUFACTURING LTD ..... RESPONDENT

(Being an Appeal from Judgement of Hon. A. Mitullah, Senior Principal Magistrate delivered at Thika on 6 September 2022 in Thika CMCC No. 347 of 2015)

JUDGEMENT

1. By Plaint dated 24 March 2015, the Appellant instituted proceedings against the Respondent for:
   (i) Special Damages of Kshs 3,000/-;
   (ii) General damages for pain, suffering and loss of amenities;
   (iii) Costs of this suit;
   (iv) Interest on (i), (ii) and (iii) at court rates;
   (v) Any other or further relief that the Honourable Court may deem just to grant.

2. The Appellant averred that on or about 1 August 2014, while employed by the Respondent as a casual worker at a site identified as 'Jamrose 3', the Appellant was tasked with constructing the fifth floor of a commercial

building. He alleged that due to Respondent's negligence, the building collapsed, causing him severe physical injuries.

3. The Respondent entered appearance and filed a Statement of Defence dated 31 January 2018, denying the claim in its entirety. The Respondent specifically traversed the allegation of employment, the occurrence of the accident and the ownership or control of the alleged construction site.

4. The matter proceeded to hearing. The Appellant called two witnesses: himself as PW1 and Dr. George Karanja as PW2. The Respondent called one witness, David Maina Mutuura.

5. The Appellant testified that he was a casual laborer. On the material day, the Appellant was working at the Respondent's site, engaged in the construction of a slab on the fifth floor. He stated that the support structures gave way, leading to the collapse of the building. The Appellant alleged that he sustained injuries and was rushed to Thika Level 5 Hospital. To support his claim, the Appellant relied on the testimony of PW2, the doctor from Prime Medical Services, who produced a Medical Report indicating that the Appellant had sustained soft tissue injuries and a permanent scar on the palm. The medical notes recorded a history of sustaining injury from a falling house.

6. Under cross examination, the Appellant made several concessions. He confirmed that he had no letter of appointment or pay slips. There was no evidence of him being at the site. The Appellant also confirmed that the accident, despite allegedly involving a fatality, was not reported to the Police. He did not possess a Police Abstract or a P3 Form.

7. The Respondent's case was one of total denial. DW1 testified that the Respondent is strictly engaged in the business of manufacturing animal feeds. He stated that the company does not undertake construction projects

and did not have a construction site at the material time. DW1 testified that the Respondent maintains records of its employees, both permanent and casual, and that the Appellant's name did not appear in any of these records. The Respondent argued that the Appellant was a stranger to them and that the allegations were a fabrication.

8. In its judgment, the trial court dismissed the Appellant's case with costs. The trial court held that the Appellant failed to discharge the burden of proving that he was an employee of the Respondent or that the alleged accident occurred as pleaded. The trial court further remarked on the absence of public notoriety i.e media reports or police records, for an event as catastrophic as a 5-storey building collapse.

9. Aggrieved by the decision, the Appellant lodged this appeal on the following grounds:

   (i) That the learned Magistrate misdirected himself in law and in fact by overlooking and/or failing to appreciate the import of section 10(7) of the Employment Act;
   (ii) That the learned Magistrate erred in law and in fact by misapprehending the evidence adduced, thereby reaching an erroneous finding;
   (iii) That the learned Magistrate misdirected himself in law and in fact by basing his decision on an extraneous and erroneous fact;
   (iv) That the learned Magistrate erred in law and in fact by failing to consider the totality of the evidence adduced;
   (v) That the learned Magistrate misdirected himself in law and in fact by failing to appreciate that similar injuries should, so far as possible, attract similar awards, thereby arriving at an erroneous award;
   (vi) That the learned Magistrate erred in law and in fact by failing to consider the Appellant's submissions.

10. The appeal was canvassed by way of written submissions.

11. The Appellant argued that the Respondent's failure to produce employment records should have led to an adverse inference under section 10(7) of the Employment Act. Citing ***Lawi Wekesa Wasike vs. Mattan Contractors Limited eKLR*** and ***Abigael Jepkosgei Yator vs. China Hanan International Co. Ltd eKLR***, the Appellant contended that where an employer fails to keep records, the employee's version must be believed.

12. On the accident, the Appellant argued that the medical treatment notes provided sufficient corroboration, and the Magistrate's requirement for media coverage was an error of law.

13. On its part, the Respondent submitted that section 107 of the Evidence Act takes precedence. They argued that section 10(7) of the Employment Act is only triggered after a relationship is established. Relying on ***Kudheiha Workers vs. Esther Njoroge eKLR*** *and* ***Samson Gwer vs. KEMRI eKLR***, the Respondent argued that the initial evidentiary burden lies with the Appellant. they further submitted that the absence of police abstract for a fatal building collapse is fatal to the credibility of the claim.

Analysis & Determination

14. The role of this Court, sitting as a first appellate court, is well-settled in our jurisprudence. As established in the *locus classicus* case of ***Selle & Another vs. Associated Motor Boat Co. Ltd & Others EA 123***, this Court is not merely a rubber stamp for the lower court's decision, nor is it a forum for a completely fresh trial. Rather, this Court must reconsider the evidence, evaluate it itself, and draw its own conclusions. However, it must bear in mind that it has neither seen nor heard the witnesses and should make due allowance for this fact.

15. Having keenly read and considered the Record of Appeal and submissions, the following issues lend themselves for determination:

(i) Whether the Appellant discharged the legal and evidentiary burden to prove the existence of an employment relationship with the Respondent.

(ii) Whether the Appellant proved, on a balance of probabilities, the occurrence of the accident and the Respondent's negligence.

(iii) Whether the Learned Magistrate erred in relying on the absence of media reports as a basis for dismissal.

(iv) Whether the provisional assessment of damages was erroneous in principle.

Burden of Proof and Employment Relationship

16. The primary issue of conflict in this appeal is the interplay between section 10(7) of the Employment Act and section 107 of the Evidence Act. The Appellant posits that the former provision reverses the burden of proof entirely; the Respondent contends that the latter provision retains the primacy of the initial evidential burden.

17. Section 10(7) of the Employment Act provides:

> *If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer*

18. Section 107(1) of the Evidence Act provides:

> *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.*

19. The Appellant relies on the decision in ***in Lawi Wekesa Wasike vs. Mattan Contractors Limited eKLR,*** where Justice Mbaru held that failure to produce records leads to an assumption that the employee's claim is true. In that case, the Court stated: *"The Court is left with the evidence of the Claimant and the Respondent and without any record, the evidence of the Claimant is to be believed."*

20. However, a critical distinction must be draw. In the ***Lawi Wekesa case,*** the dispute was not whether the claimant was at the site or working. The dispute was whether he was a casual or permanent employee. The substratum of the relationship was established; the terms were in dispute. In the present appeal, the Respondent denies the Appellant was ever at their premises. They deny his very existence as a worker.

21. I am persuaded by the reasoning of the Court in ***Kudheiha Workers v Njoroge [2021] KEELRC 2429 (KLR),*** which clarified the limits of section 10(7). The Court held that the onus of proving employment under a contract of service lies initially with the person alleging it. The Court noted:

> *"I do not understand the learned Judge as saying that the burden of proof to disprove the fact of employment lies on the party alleged to be the employer in a dispute. Rather, the court was restating the accepted position that where it is undisputed that such contract exists, the employer must produce records of it to assist the court reach a just decision on the contested terms of the contract."*

22. This position aligns with the Supreme Court's holding in ***Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] KESC 66 (KLR).*** The apex Court, dealing with discrimination claims, reiterated that the burden of

proof shits only after the petitioner has discharged the initial evidentiary burden. The Court stated***:***

> *"…a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden…."*

23. To hold otherwise would create a jurisprudential absurdity. If Section 10(7) were interpreted as the Appellant suggests, any stranger could file a suit against any corporation claiming to be an employee. If the corporation failed to produce a record for this stranger (which they logically cannot do, as no record exists), the stranger would automatically succeed. This 'proving a negative' scenario is repugnant to justice.

24. The Appellant claims he was a casual employee. Section 2 of the Employment Act defines a casual employee as "*a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time*". Even within the informality of casual labor, there are indicia of employment: muster rolls, gate passes, M-Pesa transaction logs, or testimony from fellow labourers.

25. In ***Mumias Sugar Company Ltd v Silas Okhuya Indakwa [2021] KEHC 6707 (KLR),*** a similar dispute arose regarding a casual labourer injured by a falling metal bar. The Court upheld the claim because the claimant produced a gate pass, proving access to the premises. The gate pass was the crucial link that shifted the burden to the employer. In the instant case, the Appellant did not produce any gate passes, payment vouchers, mpesa statements, appointment letter or witness who worked with him.

26. I, therefore, find that the Appellant failed to cross the evidentiary threshold required to trigger the presumptions in Section 10(7) of the Employment Act. He failed to prove the fact of employment. Consequently, the Respondent

was under no obligation to disprove terms of a contract that was never shown to exist. The trial magistrate's finding on this issue was legally sound.

Negligence and the Occurrence of the Accident

27. The Appellant's claim is anchored on negligence. Specifically, the Appellant alleges breach of common law duty of care and statutory duties under the Occupational Safety and Health Act (OSHA).

28. It is trite law that a plaintiff must prove duty of care, breach of that duty, causation and damage. The Appellant alleged a catastrophic event; the collapse of a building from the fifth floor, resulting in a fatality. Yet, on cross examination, he admitted that this event was not reported to the Police.

29. In Kenya, a police abstract is the standard *prima facie* evidence of an accident, particularly one involving injury or death. Its absence in a case involving a fatality is conspicuous.

30. Under section 11 of OSHA and section 21 and 11 of the Work Injury Benefits Act, an employer must report accidents to the Director of Occupational Safety and Health Services (DOSHS) within 24 hours, for fatal accidents, or 7 days for non-fatal accidents. While the duty to report lies with the employer, the existence of a report, or a complaint by the employee to DOSHS for failure to report, constitutes vital evidence. The Appellant offered no evidence that he ever reported the accident to DOSHS or any authority.

31. The Appellant argues that the Respondent's failure to report should not prejudice him. This argument is circular. It presumes the Respondent was the employer. Since the Respondent denies the accident occurred at all, the Appellant cannot rely on their statutory non-compliance as proof of the event.

32. The Appellant relied on treatment notes produced by Dr. George Karanja (PW2). The notes contained a history of the injury as sustaining injury from a

falling house. Medical history recorded by a doctor is hearsay regarding the cause of the accident unless corroborated. The doctor can testify to the nature of the injuries, such as soft tissue and scar, but cannot testify as a witness of fact to the occurrence of the building collapse.

33. Dr. Karanja admitted in cross-examination that the injuries observed could have been sustained in circumstances other than a construction site accident.

34. In ***Timsales Limited v Stanley Njihia Macharia [2016] eKLR***, the Court of Appeal held that failure to produce an initial treatment card is not always fatal if there is other corroborating evidence, e.g., the employer admitting they took the employee to the hospital. In this instance, there was no corroboration whatsoever. No ambulance log, no taxi receipt, no witness.

35. The Appellant attempted to invoke the doctrine of *res ipsa loquitur*. This doctrine applies where an accident is of such a nature that it would not usually happen without negligence, and the instrumentality was under the defendant's exclusive control. However, the doctrine is a rule of evidence regarding negligence, not occurrence. It helps prove breach when the facts of the accident are known but the cause is unexplained. It cannot be used to prove that the accident happened in the first place***.***

36. In ***Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank [2004] KECA 166 (KLR),*** the Court of Appeal emphasized that parties are strictly bound by their pleadings. The Appellant pleaded a specific event at a specific site ("Jamrose 3"). He failed to prove the existence of this site or its link to the Respondent, who proved they are an animal feeds manufacturer, not a construction firm.

37. The Appellant failed to prove the occurrence of the accident. The absence of a Police Abstract, P3Form or independent witness for a purportedly fatal collapse renders the claim factually hollow.

Extraneous Matters

38. The Appellant attacked the trial court's statement: "*For lack of better word, if at all it is true, then this was a big happening. It must have hit the headlines and the police must have been involved."* The Appellant characterizes this as reliance on an extraneous fact.

39. While courts must rely on evidence, Section 60 of the Evidence Act allows courts to take judicial notice of matters of public notoriety. A 5-storey building collapse causing death is, by its nature, a matter of public interest in Kenya, often attracting regulatory response from the National Construction Authority.

40. However, even if the learned Magistrate's comment regarding headlines was speculative, it was not the sole basis of the decision. It was *obite*r—a comment on the improbability of the Appellant's narrative given the lack of police involvement. The *ratio decidendi* was the failure to discharge the burden of proof. As held in ***Selle case (supra),*** an appellate court looks at the substance of the judgment. Stripping away the headlines remark, the judgment stands on the solid ground of evidentiary deficiency. Therefore, this ground of appeal fails to vitiate the judgment.

Quantum of Damages

41. Having found that the Appellant failed to discharge his burden of proof, it goes without saying that this ground of the appeal fails.

42. The Appellant's case was built on shifting sands. He sought to use the statutory shield of the Employment Act as a sword to bypass the fundamental requirement of proving his case. He asked the court to presume he was an

employee, presume an accident happened, and presume negligence, all without a scintilla of independent evidence.

43. Courts of law are courts of evidence. Sympathy for an injured person cannot override the rules of evidence that safeguard the rights of defendants against baseless claims. The Respondent, a manufacturer of animal feeds, successfully demonstrated that it had no connection to the construction work alleged. The Appellant failed to prove otherwise.

44. The trial magistrate's judgment was sound, reasoned, and fully supported by the evidence, and lack thereof. There is no merit in this appeal.

45. Accordingly, this appeal is dismissed. Costs, assessed at Kshs 50,000/-, are awarded to the Respondent.

Dated and Delivered at THIKA this 16 day of JANUARY 2026

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered virtually in the presence of:

For Appellant: N/A

For Respondent: Ms Omollo h/b Mr. Gachau

Court Assistant: Lucy Mwangi