



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Mattan Construction Limited (Appeal E025 of 2025)
[2026] KEELRC 879 (KLR) (24 March 2026) (Judgment)**

Neutral citation: [2026] KEELRC 879 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
APPEAL E025 OF 2025
SC RUTTO, J
MARCH 24, 2026**

BETWEEN

DICKSON WARUHIU MWANGI APPELLANT

AND

MATTAN CONSTRUCTION LIMITED RESPONDENT

*(Being an appeal from the Judgment of Hon. L. Mutai (Ms.) Chief
Magistrate delivered on 12th October 2017 in Nanyuki CMCC 94 of 2016)*

JUDGMENT

1. By way of a Complaint dated 10th August 2016, the Appellant commenced proceedings before the Chief Magistrate's Court at Nanyuki, being Civil Suit No. 94 of 2016. He pleaded that he had been engaged by the Respondent as a casual employee and that it was an express and/or implied term of his employment that the Respondent bore a duty to take all reasonable precautions for his safety while at work. In particular, the Appellant averred that the Respondent was obligated not to expose him to risks of injury or damage which it knew or ought to have known, and to provide a safe and proper system of work together with adequate supervision.
2. The Appellant's case before the trial Court was that on or about 13th September 2013, while lawfully carrying out his assigned duties at the Respondent's construction site under the instructions of the Respondent, its agent and/or servant, he was subjected to an unsafe system of work. He averred that in the course of his duties, a road paver struck him, occasioning loss and damage.
3. The Appellant further averred that prior to the accident, he was a healthy, industrious and productive casual worker aged 28 years, earning about Kshs 550.00 per day. He contended that as a result of the injuries sustained, he was unable to engage in any gainful employment for a period of four (4) months and suffered permanent functional incapacity assessed at 90%.



4. On the basis of the foregoing, the Appellant prayed for the award of special damages in the sum of Kshs 232,321.00, general damages for pain, suffering and loss of amenities, together with costs of the suit and interest.
5. The Respondent opposed the claim through a Defence dated 28th September 2016, denying that the Appellant had been its employee, whether as a casual worker or otherwise, at the time of the alleged accident. Putting the Appellant to strict proof, the Respondent denied any negligence or occurrence of the alleged accident.
6. The Respondent further contended that it had never undertaken any road construction projects within Nanyuki or its environs and, consequently, no accident involving its machinery and the Appellant could have occurred on 13th September 2013 or at all.
7. Further, the Respondent averred that all its motorised construction equipment, including road pavers, were duly registered, and that a search at the Registrar of Motor Vehicles would disclose the registered owner. To this end, the Respondent urged the Court to dismiss the suit with costs.
8. At the trial Court, both parties adduced oral evidence and subsequently filed written submissions. After evaluating the evidence, the trial Court dismissed the Appellant's suit, finding that he had failed to prove his case on a balance of probabilities, particularly due to the absence of documentary evidence proving that he had an employment relationship with the Respondent. Consequently, the trial court awarded costs to the Respondent.

The Appeal

9. The Appellant was aggrieved by the judgment of the trial Court, hence lodged the instant Appeal. In his Memorandum of Appeal dated 31st October 2017, the Appellant sets out the following ten (10) grounds: -
 1. That the Honourable Magistrate erred in law and in fact in holding that the appellant has failed to prove employment between himself and the respondent herein in light of Section 10 (7) of the *Employment Act*.
 2. That the trial magistrate erred in law and fact in holding that the appellant failed to prove his case on a balance of probability.
 3. That the learned trial magistrate further erred in law and fact in that he failed to find that the case before the court was a civil case and the appellant had indeed proved the elements of negligence as required by the law and thereby the court imposed a higher degree of proof on the part of the appellant and thereby the court arrived on a wrong finding.
 4. That the magistrate erred by arriving at his decisions on liability on assumptions not supported by evidence on record.
 5. That the learned magistrate erred in law and fact in disregarding and failing to appreciate the evidence addressed, thus failing to arrive at her decision on the issue of liability in a judicious manner.
 6. That the learned trial magistrate erred in law and in fact in failing to consider the evidence adduced in support of the plaintiff's case while arriving at his decision.



7. That the learned trial magistrate erred in law and in fact in failing to find that the plaintiff had proved negligence against the defendant and ought to have been compensated for the serious/grievous injuries suffered.
 8. That the learned trial magistrate erred in law and in fact in failing to find that the defence 6 case did not offer any and/or any satisfactory answer to the plaintiff's case.
 9. That the trial magistrate erred in law and in fact by wrongly evaluating the evidence on record and thereby arrived at a wrong conclusion.
 10. That the trial magistrate erred in law and in fact in failing to appreciate the law and /or the duty imposed upon the respondent towards the appellant while on duty and thereby arrived at a wrong conclusion all together.
10. Consequently, the Appellant seeks the following orders:
- a. This appeal be allowed.
 - b. The judgment delivered on 12th October, 2017, dismissing the appellant's case be set aside.
 - c. Judgment be entered in favour of the appellant. The cost of this appeal be borne by the Respondent.

The Submissions

11. On the Appellant's part, it was submitted that the burden rested upon the Respondent to produce employment records to rebut his assertion that he was not an employee. On this score, the Appellant placed reliance on Section 10(7) of the *Employment Act*.
12. The Appellant further posited that the evidence he adduced before the trial Court remained uncontroverted, maintaining that the accident was occasioned by the Respondent's negligence.
13. It was also the Appellant's position that the Respondent was in breach of its statutory obligations and was, in addition, negligent.
14. On the other hand, the Respondent submitted that, in the absence of proof of an employment relationship, Section 10(7) of the *Employment Act* was inapplicable. According to the Respondent, the provision only arises where an employment relationship is established, but the employer has failed to reduce its terms into writing.
15. The Respondent maintained that the burden lay with the Appellant to prove, on a balance of probabilities, that he was indeed its employee. Relying on the case of *Stephen Edwin Okoth v Attorney General* (2019) eKLR, the Respondent argued that the Appellant failed to discharge this burden and that his evidence did not meet the requisite legal threshold.
16. The Respondent further submitted that the Appellant failed to prove that the road paver allegedly involved in the accident belonged to it, and as such, liability could not attach. In support of this contention, reliance was placed on the cases of *Ignatius Makau Mutisya v Reuben Musyoki Muli* (2015) eKLR and *Billiah Matiangi v Kisii Bottlers Ltd & another* (2021) eKLR.

Analysis and Determination

17. This being the first appeal, the Court has a duty to revisit and exhaustively re-evaluate the evidence presented before the trial Court and draw its own independent conclusion but bearing in mind that, unlike the trial court, it did not have the advantage of seeing and hearing the witnesses. This position



was reaffirmed by the Court of Appeal in the case of *Selle & Another vs Associated Motor Boat Company Ltd & Others*, [1968] EA 123.

18. Being mindful of the role of the Court at this juncture and upon considering the entire Record of Appeal as well as the submissions by the parties and the law, three (3) issues stand out for determination, thus: -
- a. Whether an employment relationship between the Appellant and the Respondent has been established;
 - b. Subject to (a), whether the Appellant proved negligence on the part of the Respondent on a balance of probabilities;
 - c. Subject to (b), whether the Appellant is entitled to the reliefs sought before the trial Court.

Existence of an employment relationship between the Appellant and the Respondent?

19. The record bears that, from the outset, the Respondent denied the existence of any employment relationship with the Appellant.
20. On his part, the Appellant contended that on 13th September 2013, he was engaged by the Respondent as a casual worker when, due to the negligent operation of a road paver by its operator, the machine struck him and caused him serious injuries.
21. A perusal of the record reveals that the Respondent's primary defence was a denial of any employment relationship with the Appellant.
22. It is a settled principle of law, embodied in Sections 107 and 108 of the *Evidence Act*, that he who alleges must prove. Accordingly, the burden of proof lies with the party asserting a fact and remains so until discharged by sufficient evidence establishing the existence of that fact or set of facts.
23. In the circumstances, the Appellant, having asserted that he was an employee of the Respondent, bore the obligation to prove that assertion. This was fundamental to his claim, particularly in light of the Respondent's consistent denial of any such relationship.
24. Cross-examined on this issue, the Appellant admitted that he had no evidence to demonstrate that he was employed by the Respondent. Further cross-examined, he admitted that he was unable to prove that the Respondent had engaged him or that it was responsible for the road construction in question.
25. Consequently, there was no evidentiary material placed before the trial Court to establish any nexus, in the nature of an employment relationship, between the Appellant and the Respondent.
26. It is also notable from the record that the Appellant did not provide the registration details of the road paver alleged to have caused his injuries. In the absence of such particulars, there was no basis upon which to link the machinery to the Respondent.
27. Even if the Court were to believe the Appellant's contention that he was indeed the Respondent's casual worker hence may not have been issued with a formal contract of employment, he nonetheless had alternative avenues to prove his claim. For instance, he could have invoked the Court's assistance to compel the Respondent to produce relevant employment records in its possession, such as the muster roll during the material time. Under Section 69, read together with Section 68(a) of the *Evidence Act*, a party may seek production of documents held by the opposing party, typically through a Notice to Produce.



28. Alternatively, the Appellant could have called corroborative oral evidence from a former co-worker or any other person with knowledge of his alleged employment. Being aware of the gaps in his case, it was incumbent upon the Appellant to take further steps to prove, to the required standard, that he was indeed employed by the Respondent.
29. In so observing, the Court is mindful of the obligations imposed upon employers under Sections 10(6) and (7) and 74 of the *Employment Act* regarding the maintenance of employment records and the attendant burden of proof. However, such obligations arise only where the existence of an employment relationship is either undisputed or has been established. This position is consistent with the holding in the case of *Casmir Nyankuru Nyaberi v Mwakikar Agencies Limited* [2016] eKLR, where the Court stated as follows: -
- “This Court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the Claimant from the burden of proving their case. Even where an employment contract is oral in nature, the Claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. More importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obligated to serve a production notice.”
30. In view of the foregoing, I am not persuaded that the Appellant proved, to the requisite standard, the existence of an employment relationship with the Respondent, which was a fundamental element of his claim as it formed the basis upon which his alleged work-related injuries were anchored.
31. It is trite that a court of law cannot presume the existence of a fact not supported by evidence. Its findings must be grounded in the material presented before it. Accordingly, since the Appellant failed to adduce evidence at the trial Court proving the existence of an employment relationship with the Respondent, the Court had no basis upon which to reach a contrary finding.
32. In light of this finding, there is no justification to disturb the trial Court’s conclusion that the Appellant failed to establish that he was employed by the Respondent.
33. Having reached the above conclusion, the remaining issues for determination become moot, as they were predicated on the existence of an employment relationship between the Appellant and the Respondent.

Orders

34. Accordingly, the Court finds that this Appeal lacks merit and is hereby dismissed, with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 24TH DAY OF MARCH 2026.

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STELLA RUTTO

JUDGE

In the presence of:

For the Appellant No appearance

For the Respondent No Appearance



Court Assistant Ndati

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

