Essak v Mkaja & another (Employment and Labour Relations Appeal E191 of 2024) [2025] KEELRC 2411 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 2411 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

EMPLOYMENT AND LABOUR RELATIONS APPEAL E191 OF 2024

K OCHARO, J

JUNE 26, 2025

BETWEEN

OSMAN SIDDIK ESSAK ..... APPELLANT

AND

JARED MWAMBEJA MKAJA ..... 1ST RESPONDENT

DIRECTOR OF OCCUPATIONAL SAFETY & HEALTH SERVICES ..... 2ND RESPONDENT

JUDGMENT

Background

1. It is undisputed that on the 26th of June, 2023, while driving a motor vehicle along the MombasaNairobi Highway, the Second Respondent was involved in an accident and consequently sustained injuries.

2. It is also not disputed that the accident and resulting injuries led to proceedings under the Work

   Injury Benefits Act. An assessment was carried out by the Director of Occupational Safety and Health Services [the 1st Respondent], and the 2nd Respondent was awarded the sum of KSHS. 522,444.85.

3. Subsequently, the Appellant filed an objection against the assessment and award under thestipulations of Section 51[1] of the *Work Injury Benefits Act*. The 1st Respondent dismissed the objection. The objection was raised in a letter dated July 3, 2024.

4. Aggrieved by the dismissal, the Appellant challenged the decision on the grounds set out in hisMemorandum of Appeal herein filed dated 13th September, 2024.

5. This Court directed that the Appeal be canvassed by way of written submissions. Counsel for theparties obliged. Their respective submissions are on record.

The Appeal

6. 3By the above-stated Memorandum of Appeal, the Appellant challenged the decision and award of the Director of Occupational Safety and Health Services [the 1st Respondent], setting forth the following ground;

   I. That the 1st Respondent erred in fact and law by failing to find that there existed no employer-employee relationship between the Appellant and the 2nd Respondent within the meaning of Section 2 of the *Employment Act* 2007 and Section 5[1]and[2] of the *Work Injury Benefits Act* 2007 as read together with Section [5][3][a]of the *Work Injury Benefits Act* and therefore failing to find that the 2nd Respondent was prohibited from laying any claim against the Appellant by operation of the law.

   II. That the 1st Respondent erred in fact and law by failing to find that the 2nd Respondent was anindependent contractor, responsible for his own safety and insurance against any injuries and related incidents likely to occur in the course of executing his responsibilities, thereby discharging the Appellant from any liability in respect of the same.

   III. That the Respondent erred in fact and law by failing to find that, as at the time of the accident,which was at 1.00 am, the 2nd Respondent was driving outside the operating hours designated by the Appellant's principal, which only permitted driving between 6.00 am and 6.00 pm. The 2nd Respondent disregarded his own safety and that of other road users by driving carelessly and recklessly beyond the designated operating hours, which resulted in him causing an accident by hitting a truck from behind. As a result, and with the intent of frustrating investigations into the accident, the 2nd Respondent declined to record a statement with the Mtito Andei police station to aid in compiling an investigation report, which has never been done to date on account of the 2nd Respondent's non-cooperation.

   IV. That the 1st Respondent erred in fact and law by failing to find that the said accident was self-inflicted, having been caused by the deliberate and wilful misconduct of the 2nd Respondent and therefore failing to find that the 2nd Respondent was not entitled to any compensation under the law by didn't of the provisions of Section 10[3] of the *Work Injury Benefits Act*.

   V. That the 1st Respondent erred in fact and law by failing to find that the notification of theaccident was not authored by the Appellant but by the 1st Respondent's own personnel, who forced the Appellant to sign the notification under the false misrepresentation that it was a P3 form and whose contents the Appellant could not confirm or verify on account of his illiteracy.

   VI. That the 1st Respondent erred in law by assessing the compensation award to the 2ndRespondent at 50% permanent incapacity, hence arriving at the wrong quantum of award for an accident that was caused by the deliberate and wilful misconduct of the 2nd Respondent, and for using information that was neither provided nor verified by the Appellant to determine the quantum of award.

   VII. That the 1st Respondent erred in fact and in law by failing to consider the Appellant'sobjections made pursuant to the provisions of section 52 of the *Work Injury Benefits Act* under Ref: Dosh/ WIBA /12 dated 16th August 2024, calling upon the 1st Respondent to discharge the Appellant from any liability arising from the said accident on account of the grounds stated therein. By failing to consider the Appellant's grounds of objection, the 1st Respondent proceeded to uphold his impugned decision in respect of the

contested award, as per his letter Ref: ML & SP/ DOSHS/WIBA/MSA/14851, dated 23rd August 2024.

Analysis and Determination.

7. I have carefully considered the grounds of appeal, hereinbefore set out, submissions filed, and hold that the appeal herein can be justly and duly determined on the following issues;

   I. Whether the 2nd Respondent was at the material time driving the accident motor vehicle as anemployee of the Appellant.

   II. Whether the subject accident was caused by wilful negligence and misconduct on the part of the2nd Respondent to disentitle him to a benefit under the *Work Injury Benefits Act*. III. Whether the 1ST Respondent in the circumstances of the matter erred in rejecting the Appellant's objection.

8. Before I delve into these identified issues, it is essential to point out that on matters of appealsfrom decisions and or actions under the *Work Injury Benefits Act*, this Court is the first Appellate Court, and thereby enjoined to reconsider and re-evaluate the material that was placed before the 1st Respondent, and come up with its own conclusions, without necessarily being bound by those by the 1st Respondent.

9. It is also worth noting that the *Work Injury Benefits Act* doesn't specify how an objection to theDirector should be presented. In other words, it doesn't stipulate a particular format for commencing an objection. In my view, a letter would be sufficient, provided it clearly outlines the grounds for objection. The objection by the Appellant was properly initiated.

10. I note that under the letter of objection, the Appellant strongly argued that the 2nd Respondentwas never an employee of the Appellant. Furthermore, under Section 5[3] of the *Work Injury Benefits Act*, the 2nd Respondent falls within those persons who would not be regarded as employees for the purposes of the Act.

11. It is essential to note that it does not matter what label the parties or any of them have assignedto their relationship. Courts will not hesitate to cut through the label to reveal the true nature of the relationship between the parties. In Massey v Crown Life Insurance Company [1978] 1 WLR 676, Lord Denning MR opined;

> " The law, as I see it, is that: If the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label upon it. On the other hand, if their relationship is ambiguous and is capable of being one or the other, then the parties can remove that ambiguity by the very agreement itself, which they may make with one another. The agreement itself then becomes the best material from which to gather the true relationship between them."

12. From the wording of the letter, there is a clear admission that the 2nd Respondent had someform of engagement with the Appellant. The Appellant described the arrangement as a contract for service. As such, the 2nd Respondent was an independent contractor. He stated in part;

> " That, said Jared Mwambeja, was among eleven [11] independent contractors who approached our clients sometime on or around 28th June 2023 and was granted a one-off ad hoc contract as an independent contractor to drive one imported transit unit [motor vehicle] belonging to M/s Transfreight Logistics Ltd from Mombasa for delivery

to their client in Kampala, Uganda. It was verbally agreed upon with all the independent contractors [Jared included] that their assignment shall cease upon successfully delivering their respective units to the intended destination. As independent contractors, the drivers are required to take care of themselves during such trips, taking appropriate insurance to cover themselves in the event of any incidents during the one-trip."

13. I have keenly considered the description given in the above paragraph of the letter, as regards the engagement between the Appellant and the Respondent, and disagree with Counsel for the Appellant's submissions that it fits one for a contract for service [independent employment contract]. In my firm view, the description reveals a contract of service, specifically a piece-rate or task-based employment arrangement.

14. The *Employment Act*, 2007, defines piece work as any work for pay, the pay for which is ascertained by the amount of work performed, irrespective of the time occupied in its performance. 15 To further demonstrate that the 2nd Respondent's employment was that of a contract of service in the nature stated herein above, it becomes instructive to note the stipulations of section 18 of the *Employment Act*, which provides;

> "(1) Where a contract of service is entered into under which a task or piece work is to be performed by an employee, the employee shall be entitled-
>
> a. When the task has not been completed, at the option of his employer, to be paid by his employerat the end of the day in proportion to the amount which has been performed, or to complete the task on the following day, in which case he shall be entitled to be paid on completion of the task; or
>
> b. in the case of piece work, to be paid by his employer at the end of each month in proportion to theamount of work which he performed during the month, or on completion of the work, whichever date is earlier.
>
> c. .....
>
> d. in the case of an employee employed for an indefinite period or on a journey, at the expiration ofeach month or of such period, whichever date is earlier, and on the completion of the journey, respectively."

15. The 2nd Respondent, in my view, was to be paid on delivering the motor vehicle at its destination,thus at completion of the task, and completion of a journey.

16. For a long time, courts have employed different tests to distinguish between relationships wherean employee works under a contract of service and an independent contractor under a contract for services. The control test, the integration test, the multiple test, the economic reality test, and the mutuality of obligations test.

17. The economic reality test, also known as the entrepreneur test, aims to determine whether, interms of economic reality, the worker is dependent on the hiring party or operates independently. When it is established that the worker depends on the hiring party, they are more likely to be classified as an employee. No doubt, transporting an imported motor vehicle from one country to another would

require the hired driver to rely on the hiring party for cross-border procedures, including customs processes and payments. He cannot do these on his own account.

18. Applying this test, I conclude that the Appellant's assertion that the 2nd Respondent was anindependent contractor was not well-founded.

19. What I gather from the material that was placed before the 1st Respondent is the fact that theAppellant filled and executed the Form 1, Usually filled as a statutory requirement by the employer, and described the 2nd Respondent as his employee. In his objection, he contended that he was forced to sign a pre-filled form at the 1st Respondent's offices. Without stating who exactly, and how he was forced to sign the form, I cannot see it in any other way; the assertion is just a bald assertion and an afterthought.

20. Having signed the form and declared the 2nd Respondent as his employee therein, he is estoppedfrom denying what he stated.

21. Counsel for the Appellant submitted that the 2nd Respondent falls under the category of thosepersons excluded under section 5[3] of the *Work Injury Benefits Act*, as he was engaged on a casual basis. He cited the case of Joash Shisia Cheto vs Thepot Patrick Charles [2022] eKLR.

22. Section 5[3] provides;

> " The following persons shall not be regarded as employees for purposes of this Act-
>
> a. a person whose employment is of a casual nature and who is employed otherwise than for thepurposes of the employer's trade or business.
>
> b. Any person employed outside Kenya, save as provided in section 11 of this Act.
>
> c. A member of the family dwelling in the employer's house or cartilage thereof and not for purposesof employment; or
>
> d. A member of the Armed Forces as defined in the Armed Forces Act."

23. From the objection letter that was submitted to the 1st Respondent, it cannot be said to be off themark in concluding that the Appellant was in the business of selling motor vehicles or facilitating their delivery into market[s] outside Kenya. The Appellant engaged the 2nd Respondent for the purposes of his business, no doubt.

24. I do not see the provisions of Section 5[3][a] as advancing defiance of the meaning of casualworker, or casual employment as contemplated under the *Employment Act*, 2007.

25. 28 Consequently, I find the submissions by Counsel on this provision of the law unpersuasive.Relying on the decision mentioned above does not assist the Appellant's appeal either.

26. To support his claim that the 2nd Appellant, contrary to the policy of the Appellant, decided todrive the accident motor vehicle outside the designated time [between 6.00 am and 6.00 pm], and therefore, the 2nd Respondent was the author of his own misfortune through his deliberate misconduct. Consequently, the 2nd Respondent, by virtue of the provisions of Section 10[3], would not benefit under the Act. The policy referred to was not produced to the 1st Respondent. I am unable to understand how the Director could have concluded that the 2nd Respondent drove outside the hours specified in the Appellant's policy, thus disqualifying him from the benefit.

27. Section 10[3] provides;

> "An employee is not entitled to compensation if an accident, not resulting in serious disablement or death, is caused by deliberate and wilful misconduct of the employee"

The Act does not specify what constitutes deliberate and wilful misconduct. In this Court's view, the law cannot provide an exhaustive list of employee actions or inactions that qualify as deliberate and wilful for workplace injury compensation purposes. It depends on the circumstances of each case. Conduct that is reckless and knowingly dangerous, with disregard for personal safety or the safety of others, and which defies known safety procedures, would undoubtedly be regarded as intentional.

28. To benefit from the defence provided for in Section 10[3][a], the duty lies on the employer toprove that the conduct was deliberate and wilful.

29. This Court takes judicial notice of the fact that vehicles are allowed to be driven on Kenyan roadsthroughout the 24 hours of a day. With this, and in the absence of proof of the existence of the policy mentioned in the objection letter, neither the 1st Respondent could, nor this court can, hold that driving the motor vehicle at 1.00 am was deliberate and wilful misconduct that led to the accident.

30. In the upshot, I conclude that there was no sufficient ground for the 1st Respondent to disturb itsdecision on liability.

31. I have thoroughly reviewed the Appellant's submissions concerning quantum and noted that theissues raised in the submissions were not included in the objection letter. Therefore, they were not presented to the 1st Respondent for consideration during the objection process. Consequently, these points cannot be introduced here for the first time.

32. As a result, I find the Appellant's appeal herein lacking in merit; it is hereby dismissed with costs.

READ, SIGNED, AND DELIVERED VIRTUALLY IN MOMBASA ON JUNE 26, 2025.

SIGNED BY: HON. MR. JUSTICE OCHARO KEBIRA

THE JUDICIARY OF KENYA.

MOMBASA ELRC

EMPLOYMENT AND LABOUR RELATIONS COURT