



**Yego v National Cement Company Limited (Appeal E001 of 2023)
[2023] KEELRC 1391 (KLR) (2 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1391 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
APPEAL E001 OF 2023
B ONGAYA, J
JUNE 2, 2023
(FORMERLY HCCA NO. 127 OF 2017)**

BETWEEN

NAOH CHERUIYOT YEGO APPELLANT

AND

NATIONAL CEMENT COMPANY LIMITED RESPONDENT

(Being an appeal from the judgment and order of the Hon. Kibellion, Senior Resident Magistrate, Machakos in CMCC No. 270 of 2016 delivered on 24.08.2017)

JUDGMENT

1. The appellant is Noah Cheruiyot Yego. He filed the memorandum of appeal on September 13, 2017 through A.K Mutua Advocate. It was stated the appeal was upon the grounds that the learned trial Magistrate erred in law and fact as follows:
 - a) In holding that the appellant did not prove his case on a balance of probabilities as required.
 - b) In relying on irrelevant facts to reach erroneous decision.
 - c) In holding that the appellant did not sustain any injury despite doctor's evidence.
 - d) In holding that the appellant was x-rayed in Machakos when such evidence was not adduced by him.
 - e) In relying on facts of another case to come up with his decision.
 - f) In holding that the plaintiff's names were missing in Company's records when no such records were availed.



2. The respondent filed submissions on the appeal on February 24, 2023 through Ojienda & Company Advocates. For the appellant the submissions had been filed on January 6, 2023. The court has considered all the material on record. The court returns as follows.
3. This is a first appeal. The role of the court is to reconsider the evidence, evaluate it by itself and draw its own conclusions bearing in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. The court is not bound to necessarily follow the trial court's findings of fact if it appears the trial court has clearly failed in some part to take into account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. In *Mbogo & another v Shab* [1968]EA 93 approved in *Farah Award Gullet v CMC Motors Group Limited* [2018]eKLR it was held thus, "An appellate court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice."
4. The appellant filed a plaint before the trial court on April 26, 2016 praying for judgment against the respondent for special damages of Kshs. 5,000.00; general damages for pain, suffering and loss of amenities; and costs of the suit plus interest. The appellant alleged that on July 20, 2014 he was working with the respondent as a general worker when he was assigned duties of carrying and lifting heavy wires to support a broken machine when due to heavy weight and breach of duty and negligence on part of the respondent the heavy wire crushed him down and he sustained severe injuries and suffered great loss and damage. He pleaded that at the material time the respondent had employed him as a casual worker. The alleged particulars of negligence included failing to provide protective gear, failing to provide a forklift, failing to provide any meaningful training to the appellant, exposing the appellant to the danger, assigning duties in unsafe place, failure to provide adequate precaution for appellant's safety, and, failing to provide steel ladder. The particulars of injuries pleaded were blunt injury the chest swollen and tender; and, blunt injury to the shoulder.
5. The respondent filed the defence dated May 10, 2016 and admitted that the appellant was a casual worker but denied all other claims and prayers. The respondent prayed that the suit be dismissed with costs.
6. The trial court found that the respondent and appellant were in a casual employment relationship. In declining to find for the appellant, the trial Court found thus, "I have considered the evidence tendered by the parties and the submissions filed by the parties. It is trite law that he who alleges must prove. (See section 107 of the *Evidence Act*). In the instant case, the plaintiff alleges to have been injured at the defendant's premise. He states that after the injury, he went to Athi River Community Health Centre where he was treated and discharged. He stated that on the same day he bought drugs at Machakos. The plaintiff stated further that he was X-rayed the same day at Machakos Level 5 and was examined by Dr. Mutunga on July 20, 2014 a period in excess of 2 years. There is a material inconsistency on the places of treatment of the plaintiff. The defence on the other hand maintained that their employees are referred to Athi River Medical Services. It is not stated by the plaintiff why he did not go to the defendant's preferred hospital for treatment. It cannot also be a coincidence that the plaintiff's name was missing from the company records of the injured and cannot be equally a coincidence that every time the plaintiff he is with specifically PW2. I wish to also observe that the examining doctor did not see anything significant in his findings. It is therefore my finding based on the above observations that the plaintiff did not sustain any injuries on the material date and the plaintiff's case fails at that. Had the



plaintiff proved the case to the required standards, I would have awarded Kshs. 50, 000.00 the injuries being soft tissue in nature. In the upshot I dismiss the plaintiff's suit with costs."

7. The court has reconsidered the evidence before the trial court. The appellant alleged the injury was on July 20, 2014 while he was on duty. The claimant in cross-examination stated, "... I was given money for treatment by Kikani. He gave me Kshs.2000/- to go to hospital. I bought the medicine for Kshs.5, 000/-. I bought the medicine at Machakos. I have x-ray film. X-ray was taken from Machakos Level 5. I paid and returned the receipt to the company. I gave the x-ray to Dr. Mutunga. I do not know if the doctor referred to the x-ray. I was at work that date. We were paid by Kikani." By that appellant's testimony it is clear that the trial court was correct in stating that the X-ray was, per appellant's account, taken at Machakos. Ground 4 of the appeal collapses.
8. The respondent's witness was Stephen Mutuku, the respondent's Human Resource Manager. He testified that no injury was reported on July 20, 2014 involving the appellant as was alleged. Further the respondent's procedure was that in event of an injury the immediate supervisor of the victim worker was informed, the worker taken to company nurse for first aid and then, if the injury is major, referral is done only to Athi River medical services and if there is any further referral to other hospital then the same is done by them. Further, for casual employees, there was a daily check-in register. Protective clothing was provided to both permanent and casual employees. On the material date the appellant was not on duty as he was an off and on casual employee. In his testimony, the respondent's witness stated that he had not produced or exhibited the check-in register or attendance book for July 20, 2014. However, he had produced the payroll, both permanent and casual staff were paid at the bank accounts, and, the appellant was not on the payroll. The register of injured or sick employees showed that on July 20, 2014 the appellant was not one of the patients seen. The court has considered that evidence before the trial court. The appellant says nothing about steps taken immediately after the alleged accident such as reporting, first aid, or going to hospital. The details surrounding the treatment and then the immediate further steps are not given by way of pleading or evidence. The question arising is if indeed the alleged accident took place, was it ever reported to the respondent and then immediate events involved coherently stated by the appellant. The appellant mentions persons who essentially appear unconnected to the respondent as that nexus is not given such as Kikani who allegedly gave the appellant money to go for treatment. The clinical summary at Athi Complex and Community Health Centre is dated April 11, 2016. The appellant has not provided any medical records or hospital which attended to him immediately after the alleged injury. The trial court cannot therefore be faulted for finding that there was material inconsistency in the appellant's places of treatment and the examining doctor had not seen anything significant about the alleged injuries. The court has considered the judgment by the trial court and on a balance of probability returns that the trial court was correct in finding that the alleged accident is unlikely to have taken place at the respondent's premises as was alleged for the appellant. There is also no good reason to doubt the elaborate respondent's regime for handling and managing injuries at the work stations as given by its witness. On the whole the grounds of appeal will collapse.

In conclusion, the appeal is hereby dismissed with costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 2ND JUNE, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

