



REPUBLIC OF KENYA



**KENYA LAW**  
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**Devki Steel Mills Limited v Wambua & another (Appeal 51 of 2018)  
[2023] KEELRC 2049 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2049 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL 51 OF 2018  
NJ ABUODHA, J  
JULY 28, 2023**

**BETWEEN**

**DEVKI STEEL MILLS LIMITED ..... APPELLANT**

**AND**

**HENRY MBUVI WAMBUA ..... 1<sup>ST</sup> RESPONDENT**

**JOKALI HANDLING SERVICES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. By a memorandum of appeal filed on October 24, 2018, the appellant faulted the judgment of the trial court (Honourable L. Kassam SPM) on grounds among others that;
  - i. That the learned trial magistrate erred in law and fact in failing to judiciously analyze the evidence adduced at trial thereby apportioning 90% liability upon the appellant which finding was unsupported by evidence and thus untenable and unjust to the appellant.
  - ii. That the learned trial Magistrate erred in law and fact in disregarding the evidence on record that clearly showed that the 1<sup>st</sup> respondent was under the employment and supervision of the 2<sup>nd</sup> Respondent who was liable as an independent contractor and hence arrived at an erroneous finding on liability.
  - iii. That the learned trial Magistrate erred in law and fact by failing to judiciously analyze the common law and statutory duties owed by the 1<sup>st</sup> Appellant and 2<sup>nd</sup> Respondent herein towards the 1<sup>st</sup> Respondent and hence arrived at finding on liability that is not supported by the law and evidence and hence wholly erroneous.
  - iv. That the learned trial magistrate erred in law and fact by making an award of Kshs.400,000/= under general damages for pain and suffering which award was manifestly excessive, an



erroneous estimate altogether and contrary to the general guiding principle on awards under this head.

2. In the submission in support of the appeal, the appellant’s counsel Mr. Muriuki submitted that the respondent in his pleading and evidence as per the witness statement was clear that he was an employee of 2<sup>nd</sup> respondent and worked solely under it’s instructions.
3. Further the respondent adduced evidence that was at variance with his pleadings. The respondent never pleaded that the appellant owned the machine he used to execute his duties. The respondent further testified that his employer was the 2<sup>nd</sup> respondent and that it never had supervisors and that the supervisors were from the appellant. This according to Counsel was in contrast with the respondent’s express pleadings that he worked under the directions of the 2<sup>nd</sup> respondent. Counsel thus submitted that any evidence that was at variance with the pleadings was of probative value and should be disregarded. Counsel relied on the case of *IEBC & Another -vs- Stephen Mutinda Mule & three others* [2014] eKLR.
4. There having been no employer/employee relationship between the 1<sup>st</sup> respondent and the appellant there existed no circumstances that would create a duty of care on the part of the appellant towards the respondent.
5. The court has received and considered the judgment of the trial court and noted that the proceedings though very brief captured that the 1<sup>st</sup> respondent was an employee of the 2<sup>nd</sup> respondent. At page 86 of the record of appeal the respondent stated as follows;

“The Jokali employer are the ones who took me to work for the defendant”.

Further at page 87 the respondent stated;

“Devki took me to hospital Jokali had employed me”.

6. From the foregoing it was evidently clear that the respondent was an employee of the 2<sup>nd</sup> respondent Jokali. It was therefore erroneous for the trial court to hold the appellant liable as there existed no employer-employee relationship between the appellant and the 1<sup>st</sup> respondent.
7. The appeal therefore succeeds to the extent that the judgment entered against the appellant herein is hereby set aside. The 1<sup>st</sup> respondent shall be at liberty to pursue the enforcement of the judgment as against the 2<sup>nd</sup> respondent.
8. The appellant shall have the costs of the appeal

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS DAY OF 28<sup>TH</sup> DAY OF JULY, 2023.**

**ABUODHA J. N.**

**JUDGE**

**In the presence of:-**

..... for the Appellant

..... for the Respondent

