



**Luania v Mitchell Cotts Freight (K) Limited (Cause 61 of 2017)
[2023] KEELRC 3449 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3449 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 61 OF 2017
M MBARŪ, J
NOVEMBER 23, 2023**

BETWEEN

KENNETH ADALA LUANIA CLAIMANT

AND

MITCHELL COTTS FREIGHT (K) LIMITED RESPONDENT

JUDGMENT

1. The claim is that the claimant was employed as a casual worker of the respondent but on 7 June 2016, while in the course of his duties, his supervisor instructed him to load 50kgs of fertilizer from the stores, go down to the truck. In the process, a pallet collapsed causing the claimant to slip and fall down and sustained injury, loss and damage. The claim is that the injury was occasioned by the negligence, recklessness and carelessness and in breach of the employment conditions to be in a safe environment. The respondent never provided any safety gear to the claimant while undertaking his duties.
2. The claimant was exposed to negligence and the respondent was in breach of its statutory duty. Such breach arose from exposing the claimant to risk and injury, failing to give him proper instructions, failing to give him protective gear and a safe working environment, failing to give adequate warning to dangers involved in the kind of work allocated, permitting the claimant work in a dangerous environment. As a result, the claimant sustained injuries and a cut on his left elbow. He was treated and incurred loss of Kshs. 2,000.
3. The claim is for general damages, special damages of Kshs. 2,000 and costs of the suit.
4. The claimant testified in support of his case that he was employed as a casual employee by the respondent and while at work, he got injured to his left elbow. On 7 June 2016 he was allocated duties of carrying and offloading fertilizer bags from the go down. At the end of the day, he would sign the payment sheet but following his injury he was taken to Changamwe dispensary and hence was not allowed to sign in for the day. The work allocation was at Changamwe go-down. The respondent had



- two gangs for the day and the claimant was in the first gang. The work records filed by the respondent do not reflect his gang. His team had a total of 98 persons. When he got injured, a friend, Ochieng applied spirit to the wound because his arm was bleeding. He then went to Ganjoni Hospital for treatment.
5. The claim by the respondent that the treatment notes are false is not correct since these were issued by the hospital. He was also issued a note to buy medicines. He also obtained a medical report from Dr. Ajoni Adede.
 6. Upon cross-examination, the claimant testified that he cannot recall any of his former workmates because it has been so long since he left employment with the respondent. upon injury, the procedure required one to make a report to the supervisor and in his case, Ochieng only applied spirit to the wound that was still bleeding. On the schedule of employees at work, his name is not listed. No injury is recorded on the material date. he was not offered any protective gear or provided with the overalls or boots while at work.
 7. The claimant called Dr. Ajoni Adede who examined him and filed a medical report dated 14 June 2016 and which related to a reported case of accident on 7 June 2016 a week before and the wound had healed well with no disability.
 8. In response, the respondent denied having any employment relationship with the claimant as alleged and that without any employment, there was no duty of care to ensure his safety. No accident occurred or reported on 7 June 2016 or any employee injured. The allegations that there was negligence and breach of duty and the particulars thereof are denied and are without proof.
 9. The response is also that if any accident did occur, the same was due to circumstances beyond the control of the respondent despite exercising all necessary measures to prevent any accident. Where the claimant had an accident, if at all, he was solely to blame for exposing himself to the risk of injury, he failed to take any adequate or reasonable precautions for his own safety and the respondent will plead the doctrine of *res ipsa loquitur*. The claimant also failed to exercise due care and skill while performing his duties and the claims for injury and special damages should be dismissed.
 10. In evidence, the respondent called Benedict Mutua an investigator with Flenix Assessors Investigators who filed his report dated 7 May 2017. The respondent briefed him on the matter and conducted investigations following the instant claim that there was injury on 7 June 2016. The investigations revealed that the claimant was not an employee of the respondent on 7 June 2016. He spoke to the supervisors who took in casuals and went through the lists but the claimant was not registered.
 11. The investigations also established that the claimant had treatment notes and he went to search for the facility listed as Ganjoni Health Development Committee but there was no such record of the claimant and therefore fake.
 12. The treatment notes had a rubber stamp of Ganjoni Communicable Disease and Control Centre which was forged and did not match the hospital records. The facility rejected such a record.
 13. At the close of the hearing, both parties agreed to file written submissions. Only the respondent complied.
 14. The respondent submitted that it is not liable for the injuries of the claimant as she failed to discharge the burden of proof under Section 107(1) of the *Evidence Act*. according to the claimant, he was a casual employee and was directed by his supervisor to carry a 50kgs bag. The respondent's witness who investigated the matter carried out interviews but could not get any record of the claimant. The practice of the respondent was established to be that all those who got injured would be taken to Coast General



Hospital for treatment. The claimant filed records indicating he was treated at Ganjoni Community Clinic but a visit to the facility, they denied ever treating him or issuing him with the filed records.

15. In the case of *Evans Nyakwana v Cleopas Bwana Ongaro* [2015] eKLR the court held that a claimant had the burden of proof in a claim for injury and payment of damages which is lacking in this case. The claimant has not established any liability on the part of the respondent. The claimant is therefore not entitled to any damages and his claim should be dismissed with costs.
16. In the event there is any liability established, the claimant alleged to have been injured to the elbow which has healed. He should be awarded damages at Kshs. 60,000 as held in similar cases of *Eastern Produce Ltd v Mamboleo Khamadi* [2015] eKLR; *Buds and Bloom Ltd v Lawrence Emusugut Obwa* [2016] eKLR; and *Kipkere Limited v Peterson Ondieki Tai* [2016] eKLR.

Determination

17. In a claim for work injuries, the claimant's case is that he was a casual employee of the respondent taken in the first gang. The only item he was required to submit to be allocated duties was his national identity card left with the supervisor. It would be recovered in the evening during payment of his daily wages.
18. The respondent called an investigator, Mr Mutua who testified that he examined the records and did not find the claimant's name. He undertook the investigations a year after the fact.
19. Employment of casuals is allowed under Section 7, 8 and 9 of the *Employment Act*, 2007. Where an employer is seeking for services that are not of a permanent nature, casual employment is permissible subject to payment of due wages at end of day.
20. The practice of having casual employees taken to load or offload goods through labour gangs is not challenged. For such ad hoc duties, an employer is allowed to secure labour without a formal engagement save to pay for the services rendered at end of day.
21. Mr Mutua testified that he was not able to get any work records for 7 June 2016. He only obtained part of the details and even those that he took note of, they were not filed even where the employer takes in casual employees, the duty to record such employees on a daily basis is a legal requirement under Section 10(6) and (7) of the *Employment Act*, 2007. The records must be kept and stored for not less than 5 years.
22. Without any work records to challenge the employment of the claimant, the court finds the claimant was a casual employee of the respondent on 7 June 2016.

Was the claimant injured while at work with the respondent?

23. The claimant's case is that on 7 June 2016 he got injured to his elbow, he was bleeding and one Ochineg applied spirit to the wound. He later went to Ganjoni Health Development Committee. On 14 June 2016 he was reviewed by Dr. Ajoni Adede who established that the wound had healed well without disability.
24. The investigations that the Ganjoni Health Development Committee did not treat the claimant and that the stamp on the medical note for Ganjoni Communicable Disease Control Centre was fake and not from the facility. This evidence was not challenged in any material way.
25. The ordinary practice in case of injury was to be treated at Coast General Hospital or a public facility where the subject employee was to obtain a medical certificate in terms of Section 30 and 34 of the *Employment Act*, 2007. The claimant opted to visit Ganjoni Health Development Committee and the filed treatment notes are stamped by a different entity. Without the report by the investigator being challenged in any material way, the primary treatment records challenged, even in a case where Dr.



Anjoni Adede examined the claimant after a week of his alleged injury, the causal link to the respondent is lost. Despite working as a casual employee of the respondent, where work injury arose, the steps taken to address such matter became crucial. The alleged injuries and treatment cannot be ascertained and or linked to the respondent.

26. Without proof of injury that is linked to the respondent, the claim for general damages and special damages thereof are lost.

27. The claim herein is found without merit and is hereby dismissed. Each party to bear own costs.

Delivered in open court at Mombasa this 23rd day of November 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

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