



**Ogada v Multimedia University of Kenya (Cause E192 of 2023)
[2023] KEELRC 3441 (KLR) (20 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3441 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E192 OF 2023
NZIOKI WA MAKAU, J
NOVEMBER 20, 2023**

BETWEEN

PETER OGERO OGADA CLAIMANT

AND

MULTIMEDIA UNIVERSITY OF KENYA RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent vide his memorandum of claim dated 28th February 2023. In it, he averred that the Respondent hired him as an ambulance driver and that as part of his duty he was entrusted to transport various COVID-19 patients to various hospitals from the University to other hospitals in the region. He averred that the nature of his employment was high risk as transporting COVID-19 patients or any other persons suffering from any acute illness calls for high safety standards and protective gear to ensure prevention from contracting such related diseases. The Claimant averred that he was admitted at Sinai Hospital on 22nd May 2022 after falling ill and showing such symptoms related to Covid. He averred that after his condition worsening, he was transferred to another facility better equipped to handle his condition. The Claimant averred that on 28th May 2021, he was admitted at Nairobi West Hospital and upon various tests conducted he was found to have contracted COVID-19 and was immediately admitted. The Claimant avers after the whole treatment process, the hospital bill exceeded the cover limits provided by the contracted medical service provider. The Claimant averred that he had made several attempts to have the Respondent settle the excess of Kshs. 1,747,826/- and the same had been denied by the Respondent absolving itself from any liability for complications occasioned to the Claimant in line of duty.
2. The Claimant averred that he incurred COVID 19 in the line of duty and as such is entitled to demand made to the Respondent to offset the medical bill after the exhaustion of his medical cover by the National Hospital Insurance Fund. The Claimant averred that he had to seek the assistance of guarantors so as to provide the hospital with security of unpaid medical bill in the form of a



parcel of land being CIS/Mara/Olombokishi/1795 as per the guarantee agreement entered with the Respondent in contemplation that the Respondent would offset what was owed to the hospital so as to get discharged. The Claimant avers that he was served with a demand notice by the legal representative of the Nairobi West Hospital indicating the intended sale by public auction of the security parcel being CIS/MARA/OLOMBOKISHI/1795 in efforts to recover the medical bill owed. The Claimant thus sought payment of the medical bill amounting to Kshs. 1,747,826/- and reimbursement of Kshs. 632,000/- paid by the Claimant; general damages occasioned to the Claimant by the Respondent's inaction on the demand made; interest calculated at court's rate on the sums claimed as well as costs of the suit.

3. The Respondent on its part asserts that at no time did it ever direct the Claimant herein or any of its drivers for that matter to ferry any covid-19 patient to any hospital whatsoever. It avers that at the time of the Claimant's alleged admission at Sinai Hospital on 22nd May 2022, the Respondent's records show the Claimant was from an upcountry travel 2 days earlier and the Respondent had transitioned to full online classes. The Respondent further denied the allegations by the Claimant on contraction of Covid-19 while at work. It avers that the Claimant has never contracted Covid-19 while on duty. The Respondent averred that the Claimant and all its members of staff are enrolled on the NHIF which covers the employees and when the cover is exhausted the University is not liable to cover the expenses beyond the cover thus the Respondent refused to settle the excess of Kshs. 1,747,826/- requested by the Claimant.
4. The Respondent averred that if indeed it is true that the Claimant entered into an agreement with Nairobi West Hospital in which it was agreed that security in the form of Title Deed for the land parcel CIS/MARA/Olomokishi/1795 was deposited in exchange of the medical services issued, then the Respondent, by the principle of privity of contract is absolved from any liability arising from the contract for it was not a party to. The Respondent averred that the figures had been plucked from the air, no single documentary evidence was availed in support of the figures including a policy document requiring reimbursement of amounts for use for medical services beyond the statutory cover offered to all employees of the Respondent. The Respondent averred that the Claimant had no claim recognizable in law as against the Respondent. The Respondent thus urged the court to dismiss the suit with costs.
5. The matter was disposed of in terms of Rule 21 of the *Rules* of the Court.
6. The Claimant submitted that the Respondent hired him as a driver and entrusted him to transport various covid-19 patients to various hospitals from the Respondent institution to other hospitals within the region. The Claimant submits he was admitted at Sinai Hospital on 22nd May 2022 after falling ill and showing symptoms related to covid-19 and upon his condition worsening was transferred to Nairobi West Hospital on 28th May where upon being admitted and being tested found to have contracted covid-19. He submits that after the treatment process was completed the hospital bill exceeded the cover limits provided by the contracted medical service provider. The Claimant submits that he thereafter made several requests to the Respondent to settle the excess amount of Kshs. 1,747,826/- whereby the Respondent institution denied the same absolving itself from any liability or complications occasioned to the Claimant in line of duty. It was submitted that the same complication was occasioned by the lack of provision of protective gear by the Respondent to the Claimant as he handled patients and was in control of such vehicle that made his chances of contracting such illness highly probable if proper protective gear/equipment was not provided. The Claimant submitted that he thereafter he sought the assistance of guarantors so as to provide the hospital with security of unpaid medical bill that was in excess of Kshs. 1,747,826/- after the exhaustion of his medical cover.



7. The Claimant submitted that the issues for determination were whether the Claimant's line of duty required proper protective gear that was to be provided by the Respondent; whether the Claimant is entitled to the reliefs sought in the claim given that he contracted covid-19 in the line of duty without proper protective gear given to him by the Respondent; and what order as to costs. The Claimant submitted that there was lack of compliance with safety standards and measures aimed at curbing such risks occasioned to the Claimant. It was submitted that the requirements of the Occupational Safety and Health Act 2007 were not complied with in the instant case as no personal protective equipment such as face mask and eye protection-goggles were availed to the Claimant in his line of duty. The Respondent submits that the officer in charge of transport at the material time writing to the administration of the Respondent the risks prevalent to the ambulance drivers, the same were never followed up on as no response to such correspondences were given and the same were never complied with in toto. The Claimant submitted that the Respondent institution never complied with the Ministry of Health Guidelines for Cleaning Emergency Management Services Transport Vehicles after transporting a suspected or confirmed covid-19 patient since the Respondent never:-
- a. Provided soap or detergent and disinfectants that are effective in management of SARS-COV-2 to remove particles on the surface of an ambulance.
 - b. The Respondent never provided guidelines on routine cleaning methods that should be employed throughout the ambulance and on non-disposable equipment.
 - c. Rarely did the Respondent institution provide ambulance decontamination or spraying even after transporting suspected Covid-19 patients.
8. The Claimant submitted that on the strength of the treatise of Winfield and Jolowicz on Tort Seventeenth Edition where it opined that the nature of the employer's duty in summary is the duty to take reasonable care so as to carry out operations as not to subject persons employed to unnecessary risk, and this includes the duty to provide competent staff, adequate plant and equipment, a safe place of work and a safe system of working. The Claimant also cited the provisions of sections 3, 6(1) and 6(2) of the Occupational Safety and Health Act. The Claimant submitted that he contracted Covid-19 while in the line of duty and that the Respondent has not tabled any evidence that indeed it complied with the recommended safety standards as brought out by the Transport Officer at the material time as the various correspondences were never responded to. The Claimant cited the case of Faith Mutindi Kasyoka v Safepark Limited [2019] eKLR held that the aspect of a safe working environment was explained in the case of Sakoro Saws Limited v Bernard Muthimbi Njenga Nakuru High Court High Court Civil Appeal No. 38 of 1995 where the Court stated that the duty of the employer to provide a safe place of work to the employee comprises,
- Not merely to warn the employee against unusual dangers known to them... but also make the place of employment as safe as the exercise of reasonable skill and care would permit.
9. As to whether the Claimant is entitled to the reliefs sought in the claim given that he contracted covid-19 in the line of duty without proper protective gear given to him by the Respondent, he submitted that the incubation period of Covid-19 virus varies for different individuals and the estimated 1-14 days maturity period is the period of most preponderance. The Claimant submitted that furthermore, a majority of the populace was never tested of the same but developed hard immunity thereafter. The Claimant submitted that the Respondent has not tabled evidence to prove that it had complied with the Ministry of Health directives on Covid-19 to workers that were of high risk exposure, it would be just to find that that indeed such measures were vital for implementation to minimise or prevent the Claimant from contracting Covid-19. The Claimant submitted that the



Respondent's negligence and omission led to the Claimant's predicament and the same could have been evaded had the Respondent complied with the set safety standards and thus the Respondent was in breach of the implied conditions it had to fulfil during the subsistence of the employment contract issued to the Claimant as at the time he was being awarded the job. The Claimant submitted that he was entitled to the prayers in the claim with costs.

10. The Respondent submits that the issues for determination are whether the Claimant is entitled to the reliefs sought in the claim and who is to bear the costs. The Respondent submits that the University did not record any incidents of ferrying a confirmed Covid-19 case during the entire Covid-19 period since at the time, the University had fully transitioned to online classes as per the Government's directive on Covid-19. The Respondent submits moreover, at no time did the Respondent direct the Claimant or any of its drivers for that matter, to ferry any Covid-19 patient to any hospital whatsoever since it conducted its business online. The Respondent submits it had availed evidence that the Claimant had last used its ambulance 3 weeks before he was admitted to hospital and that at the material time of admission to hospital, the Claimant had been from up-country travel 2 days prior. The Respondent submits that Covid-19 was a pandemic and the Claimant could not accurately tell where he contracted the virus and that it was evident from the travels of the Claimant. The Respondent submitted that the Claimant could not assert the illness was within the definition of an occupational disease. The Respondent submitted that the Ministry of Health issued guidelines as well as sensitisation on the disease and that further, the Ministry of Health provided free health care to all patients who suffered from Covid-19 and was at the time claimed by the Claimant issuing vaccinations at all healthcare facilities. The Respondent submits that it is not liable where medication or healthcare is provided at no cost by Government hospitals or where there is an insurance scheme that covers the employee. The Respondent submitted that it should not be asked to bear the bill incurred by the Claimant more so, the extra bill as the Respondent had given the Claimant a medical cover which he utilized. The Respondent submits that section 34(4) of the *Employment Act* provides that it shall not apply where medical treatment is provided free of charge by the Government or under any insurance scheme established under any written law which covers the employee.
11. The Respondent submitted that it was not privy to the contract entered into by the Claimant and the Nairobi West Hospital where security was agreed to be title deed for land parcel No. CIS Mara/Olombokishi/1795. The Respondent submitted it was absolved from any liability arising out of the said contract for which it was not a party to. The Respondent cited the case of *City Council of Nairobi v Wilfred Kamau Gitbua t/a Gitbua Associates & another* [2016] eKLR where the court observed that *Halsbury's Laws of England*, 4th Edition Vol. 9(1) Paragraph 478 states:

The general rule. The doctrine of privity of contract is that, as a general rule, at common law a contract cannot confer rights or impose obligations on strangers to it; that is persons who are not parties to it. The parties to a contract are those persons who reach agreement ...
12. The Respondent submits that it is a stranger to the contract entered by the Claimant and the hospital. Therefore, the Claimant should not seek to enjoin it at his convenience. The Respondent submits that its liability as employer to the Claimant is to remit monies deducted from the employee's salary to the relevant insurance scheme which it did. It was the Respondent's submission that it provided proper awareness to its employees by notifying them of the covid-19 disease, its mode of transmission, how to prevent contracting the disease and went on to issue protective gear as well as putting in place all the safety measures were to protect its employees, before and upon resuming their normal business and that having created awareness of the disease among its employees and issuing protective gear, it submits that it had fulfilled its obligation therefore it was up to the employees to take caution and prevent themselves from getting the disease.



13. The Respondent relied on the case of *Purity Wambui Murithi v Highlands Mineral Water Co. Ltd.* [2015] eKLR where the Court of Appeal sitting in Nyeri stated as follows:

“Section 6(1) of the Occupational Safety and Health Act provides:-

“Every occupier (employer) shall ensure the safety, health and welfare at work of all persons working in his workplace.”

It, therefore, follows that as a general rule the employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of the employer’s failure to ensure their safety. Does this mean that the employer would always be liable in all circumstances regardless of what caused the accident in question? We do not think so. We say so because where an accident happens due to the employee’s own negligence it would be unfair to hold the employer liable. Further Section 13(1) (a) of the Occupational Safety and Health Act provides:-

“13(1) every employee shall, while at the workplace -

- (a) Ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace.

Therefore, the employee is also required to take reasonable precaution to ensure his/her safety at the workplace while performing his/her duties.

14. The Respondent submits that in reiteration of the *Occupational Safety and Health Act* and the above, the employee also bore the duty of care to himself; to take safety precautions while working. It argued that however, the Claimant herein did not state the reasonable precaution he took whilst on duty. On the issue as to who should bear costs of this suit, the Respondent submits that costs do follow the event. The Respondent submits the claim herein is not merited and should therefore be dismissed and the Claimant should bear the costs of this suit.
15. The Claimant is seeking recompense for the overpayment he made after falling ill – suffering from Covid-19. He was compelled to make provision for payment of the excess amounts which were beyond his medical cover under the Respondent. In correspondence before the Court, the Respondent disavowed any liability in regard to the extra payment made by the Claimant as well as the extraordinary arrangements he made to secure the debt. The Claimant got a friend to give the Hospital his title as security. The Claimant is entitled to seek support from the Respondent. However, this being gratuitous, the Claimant cannot force the Respondent to step in and help him in his financial woes. Some employers do occasionally give ex gratia payments but in this case his request was declined. The Claimant assumed incorrectly that the Respondent was bound to meet the extra payments he made on account of his illness.
16. The Claimant has not attached any logbooks, any records of patients ferried and the perceived risk he asserts to additional exposure to Covid-19 at the workplace. The Respondent had indicated a heightened alertness to Covid-19 through memos it attached. The Respondent was wrongly accused of not following the Ministry of Health directives on Covid-19. The Claimant must have been well aware of the requirements on prevention of Covid-19 and it would be foolhardy to imagine one declined to protect himself by acquiring personal protective equipment such as face masks, gloves, sanitizer and declined to adhere to handwashing protocols then blame an employer for contracting Covid-19. The Claimant was also notably on off-duty when he apparently contracted Covid-19. Whereas the disease had a degree of variance in its progression in the human populace, it is stated that Covid-19 symptoms typically occur 2 to 14 days after exposure to the virus, most commonly after 4 to 5 days.



Most people will experience mild-to-moderate symptoms during this period. The Claimant does not indicate the progression of his disease to ascertain whether the same was contracted during his time at work or elsewhere. Secondly, the Claimant leaves a lot of room for interpretation of his appreciation of the Ministry of Health Guidelines for Cleaning Emergency Management Services Transport Vehicles after transporting a suspected or confirmed covid-19 patient. He did not state what he himself did as the driver of the ambulance to ensure the vehicle was cleaned either to the required specifications or whether he was careful to ensure the cleaning was done in a manner as to ensure his as well as his clients' safety.

17. As we cannot pin the contraction of Covid-19 on the Respondent, especially absent any medical finding as to the manner the Claimant contracted the disease, the Claimant cannot place any blame on the Respondent and neither will this Court. The Respondent having done its outmost best to safeguard learners and staff, the Claimant has no recourse to assert losses against it for the amounts he spent in hospital. Given the foregoing conclusion by this Court, the Court cannot injunct the Hospital from making an attempt to recover the unpaid charges due from the Claimant. In the final analysis, the Court finds that the Claimant's suit against the Respondent is not merited and is accordingly dismissed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF NOVEMBER 2023

NZIOKI WA MAKAU

JUDGE

