



**Otieno v Abyssinia Iron and Steel (Cause 272 of 2018)
[2023] KEELRC 2879 (KLR) (15 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2879 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 272 OF 2018
S RADIDO, J
NOVEMBER 15, 2023**

BETWEEN

CHILEX ODHIAMBO OTIENO CLAIMANT

AND

ABYSSINIA IRON AND STEEL RESPONDENT

JUDGMENT

1. Chilex Odhiambo Otieno (the Claimant) sued Abyssinia Iron & Steel Ltd (the Respondent) on 27 July 2018 alleging breach of statutory duty/negligence.
2. The Respondent filed a Memorandum of Response on 13 December 2018, prompting the Claimant to file a Reply to the Response on 12 February 2019.
3. The Cause was heard on 25 September 2018. The Claimant and a Human Resources Manager with the Respondent testified.
4. The Claimant filed his submissions on 11 October 2023 (not paid for and therefore not considered), and the Respondent filed its submissions on 11 November 2023.
5. The Court has considered the pleadings, evidence and the Respondent's submissions.
6. The Claimant's testimony was that on 22 February 2018, while fixing scrap inside a banding machine, the machine knocked and cut him on the left finger.
7. In terms of negligence, the Claimant testified that the Respondent had exposed him to known risks by failing to provide him with gloves, helmets, masks, boots and other safety clothing. He also alleged that the Respondent had failed to conduct safety training.
8. The Respondent took a two-pronged approach in defending itself.



9. First, it denied that the Claimant was its employee and secondly it denied the allegations of breach of duty/negligence and asserted that if the Claimant sustained any injuries, he was the author of such misfortune.
10. The Respondent produced an extract of casual weekly attendance sheet for the furnace department from 19 February 2018 to 25 February 2018 to support the contention that the Claimant was not its employee.

Employment relationship

11. The Claimant testified that he was employed in the banding department. The Respondent disowned him and produced records from the furnace department to show that he was not an employee.
12. During cross-examination, the Respondent's witness admitted that there was an employee called Titus in the furnace department and that his name was missing in the schedule produced in Court.
13. The obligation to prepare and maintain employment records is placed upon the shoulders of the employer by sections 9 and 10 of the *Employment Act, 2007*.
14. The Respondent found it convenient to bring records from only one of its department and not the department the Claimant had testified he was assigned to.
15. The Claimant had put the Respondent on alert that he worked in a different department. The records from that department were not produced.
16. It is apparent that the Respondent was intent on not producing the relevant records to enable the Court determine the question of contractual relationship.
17. In light of the evidence put before the Court and section 10(3) of the *Employment Act, 2007*, the Court finds that the Claimant was an employee of the Respondent.

Negligence

18. The Claimant attributed negligence to the Respondent on the grounds that he was not trained and that he was not provided with protective gear.
19. The Claimant did not disclose when he was employed by the Respondent. He only indicated the date of accident/injury. He did not mention or give evidence on the type of training which was required from the Respondent.
20. The main duty of the Claimant appeared to have been putting scrap inside a machine. It is not clear what type of training that required. The duty could have been akin to offloading stones from a lorry.
21. The Court finds that the Claimant did not prove that failure to provide training was a sign of negligence on the part of the Respondent.
22. The Claimant also asserted that he was not provided with safety equipment. He mentioned masks, gloves, helmets and boots.
23. However, there was no clarification as to how these gear would have prevented or ameliorated the accident from happening.
24. The Claimant, again failed to show that the Respondent was liable to him in negligence.
25. A close examination of the little evidence on record suggests that the Claimant's option would have been to make a claim under the *Work Injury Benefits Act*.



26. Negligence is not a consideration in compensation under the Act.

Conclusion and Orders

27. The Claimant failed to discharge the burden of proving on a balance of probabilities that the Respondent breached its duty of care/negligence to him.

28. The Cause is dismissed with costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISII ON THIS 15TH DAY OF NOVEMBER 2023.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant M.I. Wafula & Co Associates Advocates

For Respondent Omondi, Abande & Co. Advocates

Court Assistant Chrispo Aura

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