



REPUBLIC OF KENYA



**Apex Steel Limited v Nyagaresi (Appeal 7 of 2021)
[2022] KEELRC 13290 (KLR) (28 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13290 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
APPEAL 7 OF 2021
MA ONYANGO, J
NOVEMBER 28, 2022
(FORMERLY MACHAKOS HCCA NO. 08 OF 2018)**

BETWEEN

APEX STEEL LIMITED APPELLANT

AND

CYRUS ATIMA NYAGARESI RESPONDENT

(Being an Appeal from the decree and judgment of the L. Kassan Senior Principal Magistrate (SPM) delivered on the 28th day of September 2017 in CMCC No. 403 of 2015 at Mavoko)

JUDGMENT

1. This is an Appeal arising from the decision of Hon. L. Kassan, Senior Principal Magistrate in Mavoko PMCC No. 403 of 2015 delivered on 28th September, 2017.
2. The Respondent alleged in his plaint dated 10th May, 2015 that he was injured on 30th May, 2014 while in the cause of lawful duties with the Appellant. He attributed his injuries to negligence, breach of the terms of his employment by the Appellant.
3. In his Plaint the Respondent sought the following reliefs:
 - a. General damages for pain and suffering
 - b. Special damages of Kshs.4,500/-
 - c. Costs and Interest of the suit.
4. The Appellant through its Statement of Defence dated 24th June, 2015 and filed in Court on 25th June 2015 denied liability and in the alternative attributed negligence to the Respondent as itemized in paragraph 8 (a) to (h) in the Statement of Defence.



5. In his judgment delivered on 28th September, 2017 the Trial Magistrate found in favour of the Respondent and apportioned liability to the Appellant at 90:10 in favour of the Respondent and awarded general damages of Kshs.150,000/- special damages of Kshs.3,000/- for the medical report and Kshs.8,000/- for Court attendances together with costs of the suit and interest.
6. Aggrieved by the decision of the Trial Court, the Appellant filed the instant Appeal vide its Memorandum of Appeal dated 17th January, 2018 in which it raises the following grounds of Appeal:
 - i. That the Learned magistrate erred in law and fact in holding and finding that the Plaintiff was injured while working for the defendant at the defendant's premises.
 - ii. That the Learned Magistrate erred in law and fact in holding and finding that the defendant was liable for the alleged accident
 - iii. That the Learned Magistrate erred in law and fact in failing to appreciate the available evidence indicated that the Plaintiff was not an employee of the defendant and that he was not injured at the defendant's premises hence the defendant should never have been found liable at all.
 - iv. That the Learned Magistrate erred in law and fact in holding the defendant liable despite the evidence to the contrary before him.
7. The Appellant seeks orders as follows:
 - a. That this Appeal be allowed.
 - b. That the finding of the lower Court be set aside and more specifically the judgment of the lower Court against the Appellant be set aside.
 - c. That alternatively this Court does evaluate the evidence and make an assessment on liability and the measure of damages.
 - d. That the Appellant's be awarded the costs of the Appeal.

Appellant's Submissions

8. On liability, the Appellant submits that there was no evidence adduced proving that the Respondent sustained injuries while in the cause of lawful duties. The Appellant submits that the Respondent was in fact not under its employment and that no evidence was adduced to support this assertion. In evidence the Appellant produced an accident register for May/June 2014, the attendance registers for 29th May to 31st May 2014 as well as the wage register for 27th May 2014 to 26th June, 2014. To fortify this argument the appellant relied on the provisions of Sections 107 and 108 of the *Evidence Act*.
9. The Appellant submitted that the trial court failed and/or ignored to consider its evidence and further the testimony of its witness (DW1) who testified that no accident was reported to him as supervisor. It is on these grounds that the appellant maintained that the Respondent was neither their employee nor did the alleged accident occur.
10. In support of this appeal the Appellant relied on the case of *Jackson Kaio Kivuwa v Penina Wanjiru Muchene* [2019] eKLR where it was held that as a first appeal, the appellate Court has a duty to re-evaluate, re-analyse the evidence that was produced during trial with a view of giving an independent determination.
11. The Appellant further submitted that the Respondent had not made out a case as the accident was disputed and there was no evidence produced by the Respondent to confirm the same. The appellant



further submitted that it had availed sufficient evidence to support its contention that no accident occurred as alleged and therefore the Respondent was not entitled to any compensation. It argued that the evidence availed was therefore uncontroverted and unchallenged. For emphasis the Appellant relied on the case of *Kenya Nut Company Limited v Sarah Nanjala Wambogo* [2019] eKLR where the Court held that where there is failure to produce evidence to confirm an assertion the evidence adduced remains uncontroverted and is therefore unchallenged.

12. In conclusion the Appellant urged this Court to find its appeal with merit and to allow it as prayed.
13. At the time of writing this judgment there were no submissions on record filed on behalf of the Respondent.

Determination

14. I have considered the appeal, the evidence in the record of appeal, the Appellant's submissions and the authorities cited. The issues for determination in my view are following: -
 - a. Whether the Learned Magistrate erred in law and in fact by holding that there was an employment relationship between the Appellant and the Respondent;
 - b. Whether the Learned Magistrate erred in law and fact for finding the Appellant wholly liable for the Respondent's injury;
 - c. Whether the orders sought by the Appellant should be granted.
15. The duty of an appellate court on first appeal as in the instant suit is to re-evaluate, re-assess and re-equalise the record and then determine whether the conclusions reached by the trial court are correct or not and give reasons either way. Refer to the case of *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
16. The Appellant has submitted that the Respondent never adduced any evidence to prove that he was indeed under the Appellant's employment at the time he alleges to have been injured in the course of employment. It was the Appellant's contention that the trial Magistrate erred by failing to consider the evidence adduced to support its assertion that the Respondent was neither employed by it and neither was he injured while on lawful duties.
17. I have examined the Defence Exhibits 1 and 2 and the Trial Magistrate's decision. In the judgment the Trial Magistrate held that the two documents were handwritten and no evidence was adduced to prove their authenticity and that there was a possibility of manipulation.
16. The Trial Magistrate went on to find that the Respondent was in fact a casual employee. The Trial Magistrate took judicial notice that most casual workers are not issued with letters of employment.
17. He further faulted the Appellant for failing to call an expert to explain how secure their records are. The Trial Court proceeded to make a finding in favour of the Respondent.
18. Given that the Appellant disputed the Respondent's employment relationship it was necessary for the trial court to make a finding on whether or not there existed an employer–employee relationship between the Appellant and the Respondent.
19. The Respondent did not avail any evidence to prove his employment by the Appellant. The Appellant availed evidence to support its assertion that the Respondent was never under its employment and that he was never injured while on lawful duties.



20. Section 109 of the *Evidence Act* provides as follows: -

“The burden of proof as to any particular fact lies on a person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

21. In light of the foregoing, I agree with the Appellant’s submissions that the Learned Trial Magistrate erred in law and in fact in finding there existed an employer – employee relationship between the Appellant and Respondent when there was no evidence to support the same.

22. In absence of an employer – employee relationship between the Appellant and the Respondent, the Appellant cannot be held liable for the alleged injuries sustained by the Respondent.

23. In the circumstances I find merit in the appeal and allow it as prayed. The Lower Court’s judgment is hereby set aside and substituted with an order dismissing the suit in its entirety with costs to the Appellant.

24. The Appellant is awarded the costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28TH DAY OF NOVEMBER 2022

MAUREEN ONYANGO

JUDGE

