



**Top Tank Company Kenya Limited v King'oo (Employment and Labour Relations Appeal 3 of 2020) [2022] KEELRC 13478 (KLR) (9 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13478 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS  
EMPLOYMENT AND LABOUR RELATIONS APPEAL 3 OF 2020  
MA ONYANGO, J  
DECEMBER 9, 2022**

**BETWEEN**

**TOP TANK COMPANY KENYA LIMITED ..... APPELLANT**

**AND**

**BERNARD MUIA KING'OO ..... RESPONDENT**

*(Being an appeal from the Judgement of the Senior Principal Magistrate (SPM) Ms. C. Olouch delivered on the 1st Day of November, 2017 in PMCC No. 163 of 2013 at Mavoko)*

**JUDGMENT**

1. Top Tank Company Kenya Limited, the Appellant herein filed this appeal against the Judgment and Decree of the Senior Principal Magistrate (SPM) Ms C Olouch delivered on the November 1, 2017 in PMCC No 163 of 2013 at Mavoko.
2. In the judgment, the Learned Trial Magistrate ruled in favour of the Respondent and awarded him Kshs 121,500/= together with costs and interest thereon at Court rates.
3. The Respondent had sued the Appellant for damages arising out of the injuries he sustained due to a work related accident that occurred on March 24, 2012 which he alleged to have been caused by the negligence and breach of the terms of contract by the Appellant herein.
4. In the judgment the Court found the Appellant 100% liable for the accident and awarded the Respondent general damages of Kshs 120,000/= for pain and suffering and special damages of Kshs 1,500/= being fees charged in obtaining the medical report.



5. In the Memorandum of Appeal dated November 11, 2017, the Appellant raises the following grounds of appeal:
- i. The Learned Magistrate erred in law and in fact in finding that the evidence adduced by the Appellant with respect to the issue of the Respondent's employment with the Appellant at the time of the accident was made up.
  - ii. The Learned Magistrate erred in law and in fact in finding that the Respondent was injured in the course of his employment with the Appellant when the evidence on record showed the contrary.
  - iii. The Learned Magistrate erred in law and in fact in finding the Appellant 100% liable or to blame for the accident when the Respondent had failed to discharge the burden of proof placed upon him as a matter of law.
  - iv. The Learned Magistrate erred in law and in fact in finding the Respondent 100% liable or to blame for the accident when the evidence on record showed that the Respondent has been in total control of the item that allegedly led to injuries sustained.
  - v. The Learned Magistrate erred in law and in fact in finding that cogent evidence had to adduced in support of a plea for contributory negligence when the same could be deduced from the circumstances.
6. The Appellant prays for the following orders:
- a. That the appeal herein be allowed and the judgement of the Subordinate Court be set aside and the suit in the Subordinate Court be dismissed with costs;  
Or alternatively: -
  - b. That liability between the Appellant and the Respondent be varied to the extent that this Honourable Court deems fit; and
  - c. That the costs of this Appeal be awarded to the Appellant.
7. The appeal was originally filed as Machakos High Court Civil Appeal No 148 of 2017 but was later transferred to this Court by orders of Odunga J made on February 5, 2020. Upon transfer, parties agreed on disposal of the appeal by way of written submissions.

### **Appellant's Submissions**

8. The Appellant submitted that the Respondent, despite indicating that he was a casual labourer did not present any evidence to prove his case. It relied on the case of *Nandi Tea Estates Ltd v Eunice Jackson Were [2006] eKLR* where the Court held that the burden to prove that a casual labourer was on duty on a given day is placed on the said casual labourer. That such evidence can be in the form of proof of payment or even through the testimony from a colleague on duty on the same day.
9. The Appellant submitted that the Respondent's only evidence that he was injured while working was a note from Athi River Shalom Hospital which document did not indicate where he was injured. The Appellant pointed out that the mere production of treatment records is not sufficient as was held in the Nandi Tea Estates Case (supra).



10. On liability the Appellant submitted that the Respondent, had not on a balance of probabilities proved that he was injured as a result of negligence of the Appellant. That in the event that the Court found that the Respondent was injured while working for it, he was still under obligation to prove that there was negligence on the part of the Appellant.
11. The Appellant relied on the case of [\*Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another \[2014\] eKLR\*](#) and submitted that there was no causative link between itself and the injuries sustained by the Respondent. As such the finding by the Learned Magistrate on 100% liability lacked basis. That the Respondent's claim ought to have been dismissed for want of proof at that point.
12. The Appellant submitted that the Respondent did not prove what actions he took to avert the accident considering that he was in full control of the machete that allegedly cut him. It argued that despite stating that he was not given protective gear, he did not testify how the same would have prevented the accident.
13. The Appellant relied on the case of [\*Purity Wambui Muriithi v Highlands Mineral Water Co Ltd \[2015\] eKLR\*](#) where the Court held that while an employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of its failure to ensure their safety an employee is also required to take reasonable precaution to ensure his/her safety while performing his/her duties.
14. The Appellant submitted that Section 13(1)(a) of the [\*Occupational Safety and Health Act\*](#) makes it mandatory for every employee to ensure his/her safety at work. Further, Section 14 of the same Act imposes a duty on the employee to report any situation that is likely to cause imminent or serious danger to safety or health.
15. The Appellant submitted the Respondent was guilty of contributory negligence which the Learned Magistrate failed to take note of. It relied on the case of [\*Mohamed Farrah v Kenya Ports Authority \(1988-1992\) 2 KAR 283\*](#) and urged the Court to find as such.

### **Respondent's Submissions**

16. The Respondent on his part submitted that he had proved that he was injured in the course of his employment as a result of negligence of the Appellant.
17. The Respondent submitted that the Appellant's argument that he was not on duty on the date of the accident as reflected in attendance register did not fully prove his absence. He relied on the case of [\*Gachagua Sawmills Ltd v Joel Njuguna Kamanga \[2015\] eKLR\*](#) where the Court held that a Muster Roll and accident registers are documents unilaterally prepared by the employer.
18. The Respondent submitted that given that the maker of the Accident and Attendance registers were not called as witnesses, the Court was right in not giving weight to the said documents.
19. The Respondent further submitted that while the Appellant argued that all its employees are treated at Avenue Health Care and not Shalom Community Hospital where he was treated, the Court rightly held that it could not agree with them on the grounds that no document was produced to show any memorandum of understanding or contract between the Appellant and said health institution.
20. On negligence, the Respondent submitted that the trial Court was proper in finding that the Appellant was 100% liable. He submitted that under the provisions of Section 6(1) and (2) of the [\*Occupational Safety and Health Act\*](#), the responsibility of providing a safe working environment falls on the employer and that this not restricted only to its areas of control by the employer. He relied on the case of [\*Samson Emuru v Ol Suswa Farm Ltd \[2006\] eKLR\*](#) where the Court held that it is the duty of the employer to provide a safe place of work and not to merely warn against unusual dangers known to the employer.



21. He submitted that the trial Court was in error in finding that the Appellant had not supplied him with protective gear and that no evidence was presented to controvert the same.
22. The Respondent submitted that to accept the Appellant's argument that he knew of the dangers and ought to have taken precautionary measures would imply that the defence of *volenti non fit injuria* would have absolved the Appellant from liability.
23. He relied on the case of *Garton Limited v Nancy Njeri Nyoike [2017] eKLR* where the Court held that it is expected that the employer when assigning its employees to work in an environment where there is potential risk of injury, would provide proper appliances to safeguard the workers.
24. The Respondent submitted that the Appellant failed to show what steps it took to ensure the environment under which the Respondent worked was safe. That failure to supply the same could only prove that the Appellant was liable. He added that the Appellant did not provide any evidence to show his possible contribution to the accident. The Respondent therefore urged the Court to dismiss the appeal.

### **Determination**

25. As a first Appellate Court, this Court has a singular duty to re-evaluate the entire case and come up with my own findings in the matter this is as was set out in the case of *Selle v Assorted Motor Boat Company 1968 EA Company 1968 EA 123-126* where the Court stated as follows:

' Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial. Judge's findings of fact appear earlier than he has clearly failed on some part to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.'

26. In the case of *Ol Pejeta Ranching Limited v David Wanjau Muboro (2017) eKLR*, the Court observed that in a first appeal the court is called upon to re-evaluate, re-assess and re-analyse the evidence on record and then determine whether the conclusions reached by the learned trial Judge should hold.
27. The Court in the Ol Pejeta case further cited the case of *Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2 EA 212* where this Court espoused that mandate or duty as follows:-

' On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.'

28. I have considered the memorandum of appeal, the record of appeal and the parties' submissions. The issues that arise for determination are –
  - i. Whether the Learned Magistrate erred in law and in fact by holding that there was an employment relationship between the Appellant and the Respondent;
  - ii. Whether the Learned Magistrate erred in law and fact by holding that the Respondent was injured in the course of his duties;



- iii. Whether the Learned Magistrate erred in law and in fact for finding the Appellant wholly liable for the Respondent's injury;
- iv. Whether the orders sought by the Appellant should be granted.

### **Whether there was an employment relationship between the Appellant and Respondent**

29. Although this issue was not raised in the lower Court, one of the grounds of appeal are that the Respondent did not prove his employment by the Appellant at the time of the accident.
30. DW1 in his evidence stated that the Appellant did engage casuals on a weekly basis, the Respondent herein being one of them. To support this position the Appellant produced as exhibit the attendance register for casual employees which list included the Respondent's name.
31. For this reason I find that there is sufficient evidence to hold that there was an employment relationship between the Appellant and the Respondent.
32. The next issue is whether at the time of accident the Respondent was at work. According to the pleadings the Respondent was injured on March 24, 2012. The attendance record produced by the Appellant show that the Respondent was at work on 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup> and March 17, 2012. His name is however missing from the attendance register on Sunday 18<sup>th</sup>, Tuesday 20<sup>th</sup>, Thursday 22<sup>nd</sup>, Friday 23<sup>rd</sup> and Saturday March 24, 2012. The record thereafter reflects that he worked on Monday 26<sup>th</sup>, Tuesday 27<sup>th</sup>, Wednesday 28<sup>th</sup> and Thursday March 29, 2012.
33. This evidence appears to support the evidence of DW1 who stated that casuals were taken for one week and were not taken the following week. Further, that the Respondent was not at work on the day he alleges he was injured.
34. I have further noted that the Respondent's plaint, statement and demand letter all state that the he was hit by a sharp object that was uncontrollable on his left leg and face causing serious injuries. In his evidence in Court, it turned out that he was hit by a panga or machete that he was using and the injuries were self-inflicted. This only came out during the hearing.
35. I have also observed from the treatment records that there is an alteration on the date of discharge which appears to be on March 26, 2012. On this date the Respondent was at work according to the attendance register produced by the Appellant.
36. These are issues that raise a lot of doubt on the evidence of the Respondent. The Respondent ought to have explained or responded to dispel the notion that he was not at work during the week he alleges to have been injured yet he reported back to work only a day after his alleged injuries.
37. In the judgment of the lower Court, it was held that the attendance register and accident register were unilaterally prepared by the Appellant, and there was no guarantee that they were made by the employees whose names appeared on the disputed list. No evidence was adduced by the parties to support this conclusion. It was not contested that the employees personally signed the attendance register. The Respondent stated in cross examination that he signed the attendance register. He did not state that he wore his name on it.
38. It was the Respondent's duty to prove that the accident occurred as alleged by himself. There was no objection by the Respondent over the authenticity of the attendance register and accident register. It was therefore an error on the part of the Trial Court to hold that the same were not authentic and to shift the burden of proof of authenticity on the Appellant without the same being raised by the Respondent.



39. In the case of *Sokoro Saw Mills Limited v Grace Nduta Ndungu (2006) eKLR* which the Trial Court relied on, the Court held that:-

' The evidence of the master roll and the accident book which were produced as exhibits were documents which were prepared by the Appellant itself with no input by the Respondent. The evidence of the said records therefore cannot be considered to be factual in the face of the evidence adduced by the Respondent and her witness.'

40. I however find that the facts in the instant case are not similar to those in the authority where the employer's witness corroborated the facts as adduced by the employee.

41. I find that the Trial Court erred in law and fact in finding that the Respondent was injured in the course of employment when there was no conclusive evidence to support the same.

### **Liability**

42. On liability the Learned Trial Magistrate found the Appellant herein 100% liable for the accident. Even had I found that the Respondent sustained the injuries in the course of employment, I would not find the Appellant 100% liable.

43. The Respondent testified that he was cutting tank rejects when he lost control of the panga that he was using and cut himself. The employee was aware of the object he was cutting and was in full control of the equipment he was using to cut with. He admits that he lost control of the equipment. The Appellant could not have been 100% liable for the loss of control by the Respondent in the circumstances. It was therefore an error for the Trial Magistrate to hold the Appellant 100% liable for the injury to the Respondent.

44. From the totality of the evidence on record, I find that the Respondent did not prove that he was injured in the course of employment or at the place of work. The appeal therefore succeeds. I set aside the judgment of the Trial Court and substitute therefore an order dismissing the suit with costs both in the lower Court and in the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF DECEMBER 2022**

**MAUREEN ONYANGO**

**JUDGE**

