



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MACHAKOS**

**APPEAL NO. 11 OF 2020**

*(Formally Machakos HCCA No. 29 of 2016)*

**Before Hon. Lady Justice Maureen Onyango**

**APEX STEEL LIMITED.....APPELLANT**

**VERSUS**

**ELIJAH ONGWENYI MANOTI..... RESPONDENT**

*(Being an appeal from the judgement of Hon. Ms. C. K. Kisiangani, Resident Magistrate*

*delivered on 24<sup>th</sup> February 2016 in the Chief Magistrate's Court at Machakos in*

*CMCC No. 521 of 2014 – Elijah Ongwenyi Manoti v Apex Steel Limited)*

**JUDGMENT**

1. The appeal herein arises from the judgment of C. K. Kisiangani, Resident Magistrate at Machakos delivered on 24<sup>th</sup> February 2016. In the judgment, the Learned Resident Magistrate entered judgment for the Respondent against the Appellant and awarded general damages of Kshs.75,000 and special damages of Kshs.1,500. Liability was apportioned at 10.90 in favour of the Respondent.
2. The suit in the subordinate Court was instituted through a plaint dated 10<sup>th</sup> June 2014 in which the Plaintiff (Respondent herein) alleged that he was an employee of the Appellant on or about 2<sup>nd</sup> March 2013 when he was assigned the duty of placing hot metal rods from a cutting machine to a rolling bed. That due to the heavy weight of the metal rods, a piece of metal fell on him and burned his left forearm. The Respondent blamed the accident on the negligence of the Appellant.
3. The Appellant entered appearance and filed a statement of defence in which it denied that the alleged accident ever happened on 2<sup>nd</sup> March 2013. It further denied the averments by the Respondent that it was negligent.
4. In the memorandum of appeal dated 24<sup>th</sup> March 2016, the Appellant raised four grounds of appeal as follows:
  - i) *The learned Magistrate totally misdirected herself by making a finding that, the Appellant's Witness had confirmed that on 2<sup>nd</sup> March 2013, the Respondent sustained the injuries alleged in the Plaint.*
  - ii) *The learned Magistrate erred in law and fact by totally ignoring the evidence placed before her which clearly demonstrated that no accident occurred on 2<sup>nd</sup> March 2013 involving the Respondent thereby arrived at an erroneous conclusion.*
  - iii) *The learned Magistrate showed extreme prejudice by totally ignoring the testimony of the Appellant which clearly demonstrated that the Respondent's claim is fraudulent, therefore arriving at an erroneous conclusion.*
  - iv) *The Learned Magistrate showed extreme prejudice by totally ignoring the Appellant's Counsel's submissions on issues of law and evidence and thereby arrived at an erroneous conclusion.*
5. The Appellant prays that:

i. *THAT the Appellant's Appeal be allowed with costs.*

ii. *THAT the judgement of the Trial Court be set aside and the Order allowing the Respondent's suit be substituted with an order dismissing the said suit with costs to the Appellant.*

6. This appeal was originally filed in the High Court at Machakos as **Machakos High Court Civil Appeal No. 29 of 2016** but was transferred to this Court by a ruling of Odunga J. on grounds of jurisdiction.

7. By the time the file was transferred to this Court, the parties had already taken directions, filed submissions and were awaiting judgment.

8. The Appellant condensed its submissions into two grounds –

i) *The Legal Principles to be observed in deciding whether the Trial Court exercised its discretion properly;*

ii) *The merits of the Appellant's Appeal.*

9. It is the Appellant's submissions that it was the Respondent's duty to prove that the Appellant owed him a duty of care, that the Appellant breached that duty and as a result of the breach of the duty he sustained the alleged injuries. The Appellant submits that on the converse, there was no legal duty imposed upon the Appellant to tender evidence demonstrating its innocence. The Appellant refers the Court to page 34, line 1 to 26 of the record of appeal.

10. The Appellant further relies on Section 107, 108 and 3(4) of the Evidence Act. It is submitted that the occurrence of the accident having been denied, it was the burden of the Respondent to tender evidence to prove that the accident occurred. It relied on the Court of Appeal decision in **Wareham t/a A. F. Wareham & 2 Others v Kenya Post Office Savings Bank 2 KLR [2004]** at Page 97, Line 27 where the Court stated:-

*"... in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules ...*

*... It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail. It also follows that a court should not make any findings on unpleaded matters or grant any relief which is not sought by a party in the pleadings."*

11. It is the Appellant's submissions that the Respondent did not prove that any accident occurred on 2<sup>nd</sup> March 2013. That PW2 DENNIS OBIRI MAUTI who testified that he witnessed the accident was not at work on that day.

12. It is further the Appellant's submission that the Learned Resident Magistrate ignored the testimony of DW1 Mr. Onesmus Kali Muema and the issues raised by the Appellant during cross examination of the Respondent's witnesses.

13. For the Respondent it is submitted that it proved the case on a balance of probabilities. It relies on the decision in **Kanyungu Njogu v Daniel Kimani Maingi [2000] eKLR**.

14. The Respondent submits that the computer printout relied upon by the Appellant could easily have been manipulated, relying on the decision in **Eastern Produce (K) Limited v Joseph Mamboleo Khamachi [2015] eKLR**.

15. In a first appeal like this one, the duty of the Court is to re-evaluate the evidence on record and draw independent conclusions (See **Selle & Another v Associated Motor Boat Company Limited & Others [1968] E.A. 123**, and **Williamson Diamonds Lao v Brown [1970] E.A. 1**.)

16. From the record, the Respondent testified that he was injured on 2<sup>nd</sup> March 2013. That he was carrying hot metal weighing 24 kgs with his colleague when the colleague was "outweighed" by the metal causing the colleague to slip and drop the metal which in turn caused the Respondent also to slip on to the metal. That he got burnt by the metal when he fell.

17. **PW2 MAUTI OMBIRO DENNIS** testified that on 2<sup>nd</sup> March 2013 he was at work when the Respondent was injured at around 6 pm.

18. **DW1 ONESMUS KALI MUEMA**, testified on behalf of the Respondent that he was a Supervisor at Apex Steel Limited, the Appellant and knew the Respondent. His duties were to assign duties to employees and to supervise. He also did first aid in case of accidents and kept the attendance register. He was at work on 2<sup>nd</sup> March 2013 and there no report of any accident.

19. He produced the clocking card, a computer generated record of all employees at work on the material date which showed that the Respondent reported to work at 6.52 and left work at 18.12 on the material date.

20. Both PW1 and PW2 admitted that the clocking-in sheet was accurate and that it was the record used for payment of wages as it reflected the number of hours worked on a daily basis.

21. The accident register produced by DW1 at defence Ex 2 does not reflect any accident was reported on 2<sup>nd</sup> March 2013. It therefore

supports the evidence of DW1 that no accident occurred on 2<sup>nd</sup> March 2013.

22. In the judgment at page 62 of the Record of Appeal at line 17 – 26, the Trial Magistrate states –

*“From the record the defendant did not produce any documents to prove that he provided a safety gear to the plaintiff. DW1 failed to tell the court as to how the defendant had ensured that its employees do not incur injuries while working and that a safe working environment had been provided. Therefore, PW1's evidence-” remains unchallenged to the effect that he was not provided with protective gear and a safe working environment by the defendant. I find that he has proven his case on a balance of probability. DW1's allegations that the plaintiff's injuries were not recorded and therefore did not happen does not hold water since he is the sole custodian of the said injury register. He is the only one to explain why the plaintiff's injuries were not recorded on that day.”*

23. From the proceedings, no issue arose during the hearing about safety gear and safe working environment. The only mention made of safety gear is at page 46 of the record at line 9 – 10 where the Respondent states *“I blame the Defendant for not providing me an overall.”* Further, the Respondent stated that the cause of the accident was that his colleague tripped because there were offcuts on the ground. His allegation that the metal the two were carrying which weighed 25 kgs was too heavy causing his colleague to drop the metal would not be plausible as 25 kgs is not too heavy for two men to carry.

24. I do agree with the Appellant that the Trial Magistrate erroneously shifted the burden of proof to the Appellant. The Trial Magistrate further failed to take into account the fact that PW2 was according the clocking in record, not at work at the time the accident occurred.

25. Both PW1 and PW2 admitted that the clocking in records were accurate. This, coupled with the evidence adduced by the Appellant to the effect that no accident was reported on 2<sup>nd</sup> March 2021 created reasonable doubt as to establish a finding that the Respondent did not prove on a balance of probabilities that an accident occurred on 2<sup>nd</sup> March 2013 at which was injured.

26. The Respondent further did not prove that the Appellant had failed to provide a safe working environment or was negligent as a result of which he was injured.

**27. For the foregoing reasons, I allow the appeal, set aside the decision of the Trial Magistrate and substitute therefore an order dismissing the suit with costs.**

**DATED, SIGNED AND DELIVERED AT MACHAKOS ON THIS 26<sup>TH</sup> DAY OF NOVEMBER 2021**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**