



**Kamau & 35 others v Sala Terrena Creative Construction Ltd (Appeal E010 of 2022) [2024] KEELRC 1776 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1776 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI  
APPEAL E010 OF 2022**

**AK NZEI, J  
JULY 4, 2024**

**BETWEEN**

- PETER KAMAU ..... 1<sup>ST</sup> APPELLANT**
- KAVATA MWANZIA ..... 2<sup>ND</sup> APPELLANT**
- DOUGLAS KATANA ..... 3<sup>RD</sup> APPELLANT**
- PETER MURIUKI ..... 4<sup>TH</sup> APPELLANT**
- EMMANUEL FONDO ..... 5<sup>TH</sup> APPELLANT**
- BENSON KALAMA ..... 6<sup>TH</sup> APPELLANT**
- MICHAEL KATUA ..... 7<sup>TH</sup> APPELLANT**
- KAHINDI NGONYO ..... 8<sup>TH</sup> APPELLANT**
- LUCAS MWANGI ..... 9<sup>TH</sup> APPELLANT**
- SAIDI KAINGU ..... 10<sup>TH</sup> APPELLANT**
- JOSEPH ONDERI ..... 11<sup>TH</sup> APPELLANT**
- JOSEPH NJAU GITAU ..... 12<sup>TH</sup> APPELLANT**
- DAVID KIBET ..... 13<sup>TH</sup> APPELLANT**
- DONALD N NJAMO ..... 14<sup>TH</sup> APPELLANT**
- PHILIP KITHI ..... 15<sup>TH</sup> APPELLANT**
- EDWARD CHENGO ..... 16<sup>TH</sup> APPELLANT**
- JOHN M KARUNYE ..... 17<sup>TH</sup> APPELLANT**
- WILLIAM KONDE THUVA ..... 18<sup>TH</sup> APPELLANT**
- HASSAN WANJE ..... 19<sup>TH</sup> APPELLANT**



KADENGE MASHA .....	20 <sup>TH</sup> APPELLANT
BENSON MFULA .....	21 <sup>ST</sup> APPELLANT
NGUMBAU KALUME .....	22 <sup>ND</sup> APPELLANT
SHEHE CHARO .....	23 <sup>RD</sup> APPELLANT
ANDERSON SAFARI .....	24 <sup>TH</sup> APPELLANT
JOSPHAT FONDO .....	25 <sup>TH</sup> APPELLANT
JUMAA MAUNDU .....	26 <sup>TH</sup> APPELLANT
KARISA BAYA .....	27 <sup>TH</sup> APPELLANT
DAVID MWAURA .....	28 <sup>TH</sup> APPELLANT
SIKUBALI CHARO .....	29 <sup>TH</sup> APPELLANT
STEPHEN MUNGUMI .....	30 <sup>TH</sup> APPELLANT
MUSEMBI MUNYITHYA .....	31 <sup>ST</sup> APPELLANT
MWANGO CHARO .....	32 <sup>ND</sup> APPELLANT
HENRY MASHA .....	33 <sup>RD</sup> APPELLANT
SULUBU CHARO .....	34 <sup>TH</sup> APPELLANT
RASHID NYANJE .....	35 <sup>TH</sup> APPELLANT
DALMAS YONGO SHUNDU .....	36 <sup>TH</sup> APPELLANT

AND

SALA TERRENA CREATIVE CONSTRUCTION LTD ..... RESPONDENT

*(Being an appeal from the entire judgment and decree delivered by Hon. D. WAsike Senior Resident Magistrate on 24th August 2022 at Malindi in CM -ELR Case No. 7 of 2020)*

## JUDGMENT

1. The 36 Appellants herein were the Claimants in Malindi Chief Magistrate’s Court Employment suit No 7 of 2021 whereby they had sued the Respondent claiming:-
  - a. House allowance.
  - b. Accrued leave pay
  - c. NSSF pay
  - d. Notice Pay
  - e. Compensation for unfair termination of employment.
  - f. Severance pay in accordance with Section 40(1) (g) of the [Employment Act](#).
  - g. Certificate(s) of service.



- h. Costs of the suit.
  - i. Interest on (a, b,c,d,e, and h) above.
  - j. Any other relief that the Court may deem fit and just to award.
2. The Appellants had pleaded:-
- a. that they were employed by the Respondent on diverse dates between January 2005 and October 2014. (The pleaded dates of employment of each of the Appellants are set out in the first schedule of the memorandum of claim).
  - b. that vide an internal memo dated 10/1/2017, the Respondent required all its employees, including the Appellants herein, to sign contracts of service in compliance with the law. That in the memo, the Respondent acknowledged to owing the Appellants pending dues, which it promised to pay after the signing of the contracts; but which the Respondent never paid. (The claims by each Appellant are set out in the 3<sup>rd</sup> Schedule to the Memorandum of Claim).
  - c. that more dues accumulated from January 2017 to the date of the Appellant’s dismissal from employment.
  - d. that the Appellants continued to execute their duties as assigned by the Respondent until the months of June, July, August, September, October and December 2018 and April 2019 when the Respondent informed the employees reporting to work that there was no more work, thus terminating their contracts of employment.
  - e. that some of the employees received short text messages from the Respondent’s persons while at home asking them not to report to work as their employment had been terminated.
  - f. that the Respondent unlawfully, wrongfully and unfairly terminated the Appellants’ employment summarily on diverse dates. (The dates of termination of each Appellant are set out in the second schedule of the memorandum of claim).
  - g. that the Appellants’ employment was terminated by the Respondent without notice and reason whatsoever.
  - h. that due to the large lay offs, the Respondent’s action can only be interpreted to be termination of employment on grounds of redundancy.
  - i. that during the period of employment, the Appellants were not paid house allowance or accorded accommodation in the alternative.
  - j. that the 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 23<sup>rd</sup>, 25<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup>, and 29<sup>th</sup> Appellants did not proceed on their leave and were not paid in lieu.
  - k. that the Respondent deducted NSSF contributions from the 5<sup>th</sup> and 8<sup>th</sup> Appellants for 14 months but did not remit the same to the fund.
3. Documents filed by the Appellants alongside the memorandum of appeal included a witness statement of the 2<sup>nd</sup> Appellant dated 2/3/2020 and an evenly dated list of documents listing 9 documents. The listed documents included copies of the Respondent’s Memo dated 5/8/2016 and 10/1/2017 respectively, a copy of the 5<sup>th</sup> Appellant’s contract of employment dated 8/8/2016, copies of the Appellants’ employment contracts dated 10/1/2017, copies of the 3<sup>rd</sup> and 8<sup>th</sup> Appellants’ NSSF statements for the periods 2012-2014 and 2013-2016 respectively and copies of the Appellants’ demand letters dated 12/6/2019, 1/7/2019 and 1/10/2019.



4. The Respondent filed Response to the Appellants' claim and denied the same. The Respondent further pleaded that the Appellants were not dismissed as alleged, but rather their contracts with the Respondent expired and were not renewed, while some of the Appellants resigned voluntarily.
5. Documents filed by the Respondent alongside its statement of response included witness statements of Andrew Alexander Melesi and George Gasston, both dated 19/10/2021, and an evenly dated list of documents listing 4 items. The listed documents are (a bundle of) employment contracts, Annual leave pay Muster Roll, Rest day/Public holiday pay/overtime pay Muster Roll and NSSF remittances. The filed employment contracts are those of:-
  - a. Kaima Peter (1<sup>st</sup> Appellant) dated 10/1/2017 for a period of 6 months.
  - b. Mwanzia Kavatha (2<sup>nd</sup> Appellant) dated 10/1/2017 for a period of 6 months.
  - c. Douglas Katana (3<sup>rd</sup> Appellant) dated 10/1/2017 for a period of 6 months.
  - d. Peter Muriuki (4<sup>th</sup> Appellant) dated 10/1/2017 for a period of 6 months.
  - e. Emmanuel Fondo (5<sup>th</sup> Appellant) dated 8/8/2016 for a period of 4 months.
  - f. Benson Kalama (6<sup>th</sup> Appellant) dated 8/8/2016 for a period of 4 months.
  - g. Michael Katana (7<sup>th</sup> Appellant) dated 10/1/2017 for a period of 6 months.
  - h. Kahindi Ngonyo (8<sup>th</sup> Appellant) dated 10/1/2017 for a period of 6 months.
  - i. Saidi Kaingu (10<sup>th</sup> Appellant) dated 10/1/2017 for a period of 6 months.
  - j. Lucas Mwangi (8<sup>th</sup> Appellant) dated 10/1/2017 for a period of 6 months.
  - k. Joseph Onderi (11<sup>th</sup> Appellant) dated 10/1/2017 for a period of 6 months.
  - l. Joseph Njau (12<sup>th</sup> Appellant) dated 10/1/2017 for a period of 6 months
  - m. David Kibet (13<sup>th</sup> Appellant) dated 10/1/2017 for a period of 6 months.
  - n. Donald Nyangui (14<sup>th</sup> Appellant) dated 30/7/2016 for a period of 4 months.
  - o. Philip Kiti (15<sup>th</sup> Appellant) dated 8/8/2016 for a period of 4 months.
  - p. Edward Chengo (16<sup>th</sup> Appellant) dated 8/8/2016 for a period of 4 months.
  - q. John Muchembe (17<sup>th</sup> Appellant) dated 11/8/2016 for a period of 4 months.
  - r. William Khonde (18<sup>th</sup> Appellant) dated 10/1/2017 for a period of 6 months.
  - s. Hassan Wanje (19<sup>th</sup> Appellant) dated 10/1/2017 for a period of 6 months.
  - t. Kadenge Masha (20<sup>th</sup> Appellant) dated 10/1/2017 for period of 6 months.
  - u. Benson Mfula (21<sup>st</sup> Appellant) dated 10/1/2017 for a period of 6 months.
  - v. Ngumbau Kalume (22<sup>nd</sup> Appellant) dated 10/1/2017 for a period of 6 months.
  - w. Anderson Safari (24<sup>th</sup> Appellant) dated 10/1/2017 for a period of 6 months.
  - x. Josephat Fondo (25<sup>th</sup> Appellant) dated 10/1/2017 for a period of 6 months.
  - y. Juma Maundu (26<sup>th</sup> Appellant) dated 10/1/2017 for a period of 6 months.



- i. Karisa Baya (27<sup>th</sup> Appellant) dated 5/1/2016 for a period of 12 months.
  - ii. Musembi Munyithya (31<sup>st</sup> Appellant) dated 10/1/2017 for a period of 6 months.
  - iii. Mwongo Charo (32<sup>nd</sup> Appellant) dated 8/8/2016 for a period of 4 months.
  - iv. Henry Masha (33<sup>rd</sup> Appellant) dated 10/1/2017 for a period of 6 months.
  - v. Sulubu Charo (34<sup>th</sup> Appellant) dated 8/8/2016 for a period of 4 months.
6. It is to be noted from the foregoing that contracts signed by the 1<sup>st</sup> to the 34<sup>th</sup> Appellants between August 2016 and 10/1/2017 were for fixed terms ranging from 4 months to 6 months, and that the same are not shown to have been extended/renewed. The 27<sup>th</sup> Appellant is shown to have signed a 12 months' contract in 2016. The same is not shown to have been renewed.
7. At the trial, the Appellants called one witness, the 2<sup>nd</sup> Appellant (Kavata Mwanzia – CW1), who adopted her filed witness statement as her testimony; and produced in evidence the documents referred to in paragraph 3 of this judgment. The witness further testified that the Appellants were no longer working for the Respondent. She further testified that the Appellants never used to be paid house allowance, leave days and that NSSF was not being remitted. The witness produced in evidence the schedules referred to in paragraph 2 of this judgment “for tabulation of unpaid dues being claimed by each of the Claimants for the entire period of employment from the year 2005”.
8. Cross-examined, CW1 testified that there were no employment letters regarding the Appellants' initial employment as none were being given for construction work. That the employment documents/ contracts were given in 2017. This is all that I could decipher from the recorded evidence given by the witness under cross-examination.
9. The Respondent called two witnesses; one being Andrew Alexander -RW1, who adopted his filed witness statement as his testimony and produced in evidence the Respondent's documents referred to in paragraph 5 of this judgment. Cross-examined, the witness (RW1) testified that he knew Majority of the Appellants (who were the Claimants), and mentioned them one by one, except the 4<sup>th</sup>, 6<sup>th</sup>, 15<sup>th</sup>, 18<sup>th</sup>, 26<sup>th</sup>, 32<sup>nd</sup>, and 34<sup>th</sup> Appellants. He however admitted that he did not have his office records. He testified that the Respondent remitted NSSF (deductions) and gave annual leave.
10. The Respondent's second witness, Robert George Caston (RW2), adopted his filed witness statement as his testimony. He further testified that the Appellants were no longer working with the Respondent company, and that he did not know what the Appellants were paid when leaving the Respondent company. That the Respondent had filed in Court the Appellants' contracts.
11. The trial Court delivered its judgment on 24/8/2022, dismissing the Appellants' claim with no order as to costs. Aggrieved by the trial Court's said judgment, the Appellants preferred the present appeal and set forth the following grounds of appeal. That the learned trial magistrate erred in law and in fact:-
  - a. in failing to determine if the Claimants were casual labourers or if they were employed on contract.
  - b. in failing to disregard the Respondent's contradictory positions in their submissions stating in one hand that the Appellants were casuals and on the other hand stating that they were on fixed term contracts.
  - c. in holding that there was no evidence that the Appellants' were entitled to leave, while it was the Appellant's uncontroverted submission that they were employed in 2004. That the Respondent only produced leave records from 2011.



- d. in holding that there was no evidence to show that the Appellants were entitled to house allowance, yet by their own admission, the Respondent averred that it never paid house allowance, contrary to Section 31 of the *Employment Act*.
  - e. in holding that the Appellants did not show in what capacity they were employed after their contracts lapsed, yet the leave records for 2018 (pages 92-201 of the Respondent's Bundle) submitted by the Respondent showed that the Appellants were paid until 2018/2019; an implied confirmation that they were still in employment in 2018/2019.
  - f. in failing to consider the Respondent's own admission that they did not know when the Appellants were employed as they did not have the records.
  - g. in failing to disregard the Respondent's witness testimony as having joined in 2016 while some of the Appellants were employed in 2004, way before the Respondent's witness joined.
  - h. in failing to consider the Respondent's witness testimony that the Respondent changed its modus operandi, reducing from having a large team (of above 200 employees) to a lesser number who had specialty; therefore confirming that there was redundancy as there was no more work to be offered to the Appellants.
  - i. in failing to take into account (the issue of whether) the right procedure of termination on account of redundancy was followed.
  - j. in failing to find a case of unlawful termination of the Appellants inspite of overwhelming evidence adduced by the Appellants.
  - k. in not determining all issues before her.
  - l. in disregarding the Appellants' submissions.
  - m. in dismissing the suit with costs to the Respondent.
  - n. in failing to appreciate the principles applicable, and therefore arriving at an erroneous finding, thus failing to do justice to the Appellants.
12. The Appellants sought the following reliefs on appeal:-
- a. that the appeal be allowed.
  - b. that the judgment of the learned trial magistrate delivered on 24<sup>th</sup> August 2022 and all consequential orders be set aside.
  - c. that the Appellants be awarded costs of the appeal.
13. This is a first appeal, and this Court is a first appellate Court. As stated in *Mursal & another v Manesa* [2022] eKLR:-

“A first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the judgment and to arrive at its own independent judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and to make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associates Motor Boat Co. Ltd & another* [1968] EA 123 and in *Peters v Sunday Post Ltd* [1958] EA page 424.”



14. There were 36 Claimants before the trial Court, who are the Appellants in this Court. A memorandum of claim was filed in the trial Court, complete with three (3) Schedules setting out each of the 36 Appellant's (Claimant's) name, date of employment, job description, date of termination and each Appellant's claim. These schedules formed part of the Appellants' pleadings filed in the trial Court as stated both in the memorandum of claim and in this judgment. Surprisingly, instead of evidence being led in proof of matters stated in those schedules, the schedules are shown in the proceedings to have been produced in evidence as exhibits. Pleadings are not pieces of evidence and cannot be produced as evidence. Pleadings are stated facts of a case that must be proved by evidence during a trial. It is the evidence presented at trial in proof of the pleaded facts which a first appellate Court subjects to fresh evaluation and scrutiny. Further, this Court is not able to decipher much from the recorded evidence, and particularly the evidence given by the witnesses under cross examination.
15. In view of the foregoing, and in the interest of justice, I hereby set aside the trial Court's judgment delivered on 24/8/2022 and send the trial Court's file back to the Chief Magistrate's Court at Malindi for fresh trial by a Magistrate other than Hon. D. Wasike. The fresh trial shall be conducted on priority basis.
16. Each party shall bear its own cost of the appeal.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 4<sup>TH</sup> JULY 2024**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

.....Appellants

.....Respondent

