



**Bakery, Confectionery, Food Manufacturing & Allied Workers Union
[K] v Sameer Agriculture and Livestock Limited & another (Cause
149 of 2018) [2025] KEELRC 191 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 191 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 149 OF 2018
J RIKA, J
JANUARY 31, 2025**

BETWEEN

**BAKERY, CONFECTIONERY, FOOD MANUFACTURING & ALLIED
WORKERS UNION [K] CLAIMANT**

AND

**SAMEER AGRICULTURE AND LIVESTOCK LIMITED 1ST RESPONDENT
HAGGAI MULTI CARGO HANDLING SERVICES LIMITED 2ND
RESPONDENT**

JUDGMENT

Representations:

Amalemba & Associates, Advocates for the Claimant

Eliud Maina Karanja Advocates, for the 1st Respondent

No appearance for the 2nd Respondent

1. The Claimant is a registered trade union.
2. The Claim, filed on 12th February 2015, is brought on behalf of the Claimant's member Joseph Mureithi [Grievant], who was recruited as an Employee by the 2nd Respondent.
3. The Claimant states that the Grievant was recruited to work for the 1st Respondent, as an Invoice Clerk, on 26th April 2015. He was paid a monthly salary through his bank account, at Kshs. 18,000, by the 2nd Respondent.
4. The Claimant has a Recognition Agreement with the 1st Respondent.



5. The Claim is that the Grievant, was employed by the 1st Respondent, and was stationed at the 1st Respondent's dispatch department.
6. He was recruited as a member of the Claimant, in March 2017. The 1st Respondent was notified to deduct and remit trade union dues, with regard to the Grievant.
7. The Grievant was locked out of the workplace, as soon as the 1st Respondent was notified of his union membership. He was informed that his position had been rendered redundant, and was paid Kshs. 11,000 as terminal dues.
8. The dispute was referred to the Ministry of Labour. The 1st Respondent failed to attend conciliation meetings, and the dispute was escalated to the Court.
9. The Claimant states that the Grievant was assigned duties and supervised directly, by the 1st Respondent. His lockout, and declaration of his position as redundant, was unfair and unlawful. The 1st Respondent did not adhere to Section 40 of the Employment Act. The Grievant was victimized on account of his association with the Claimant.
10. The Claimant prays for Judgment in favour of the Grievant, against the Respondent [not clear which Respondent] for: -
 - a. Declaration that employment and subsequent placement of the Grievant herein, under an outsourcing agent, was tailored to circumvent the law and is illegal, and unfair labour practice.
 - b. Declaration that the Grievant was a direct Employee of the 1st Respondent.
 - c. Declaration that redundancy was substantively and procedurally wrongful.
 - d. Reinstatement with back salaries and benefits.
Alternatively,
 - e. Terminal / redundancy benefits, in accordance with the law.
 - f. Compensation equivalent of 12 months' salary.
 - g. Certificate of Service.
 - h. Costs.
 - i. Any other suitable relief.
11. The 1st Respondent filed its Statement of Response, dated 21st July 2020. The Statement is stamp-dated by the Court 'received,' much later on 5th May 2021. The 1st Respondent's position, is that the Grievant was an Employee of the 2nd Respondent. He was never employed by the 1st Respondent. Termination was done in accordance with the law.
12. He worked at the 1st Respondent's premises. He was seconded to work there, under an outsourcing agreement between the Respondents. If there was any termination, it was carried out by the 2nd Respondent, in accordance with the law. The 1st Respondent is not aware of the allegations made by the Claimant, regarding the Grievant's termination. The 1st Respondent did not carry out any redundancy exercise. If any terminal benefits were payable, payment was made by the 2nd Respondent, to the Grievant. The 1st Respondent urges the Court to dismiss the Claim with costs.
13. The 1st Respondent made an application dated 17th July 2019, asking the Court to be discharged from the proceedings, on the ground that it did not employ the Grievant. The application was declined in a



- ruling of the Court, dated 22nd November 2019, the Court having found that there were triable issues, and that the 1st Respondent was a necessary party, for the resolution of those issues.
14. The 2nd Respondent did not file a Statement of Response, or in any other way, participate in the proceedings.
 15. The Grievant gave evidence, as did the 1st Respondent's Legal Officer Paul Maina, on the 6th July 2023, closing the hearing. The Parties were advised that Judgment would be delivered on notice, at the last mention on 30th November 2023. It was not until November 2024, that the file was forwarded to the undersigned Judge, after transfer from the trial station, for preparation of the Judgment. The Court apologizes to the Parties for the delay in preparation, and release of the Judgment.
 16. The Grievant relied on his witness statement and documents [1-12] in his evidence-in-chief. He confirmed that he worked as an Invoice Clerk. He was supervised by Joyce, an Employee of the 1st Respondent. He was also supervised by the 2nd Respondent. He was informed by Joyce on 23rd April 2017, that there was no more work. He consulted the 2nd Respondent, who advised him, that it would consult the 1st Respondent.
 17. Cross-examined, he told the Court that the 2nd Respondent paid his salary. He was sent by the 2nd Respondent, to work for the 1st Respondent. He was paid Kshs. 11,000 by the 2nd Respondent, as terminal dues. There was no letter of termination. Redirected, he told the Court that the 1st Respondent informed him that there was no more work.
 18. Paul Maina relied on his witness statement and documents filed by the 1st Respondent [1-2] in his evidence-in-chief. He underscored that the Grievant was not an Employee of the 1st Respondent. He was outsourced from the 2nd Respondent. The 1st Respondent is not liable to him. It did not have an Employee named Joyce, alleged to have been the Grievant's supervisor. The 1st Respondent was not aware about conciliation process at the Ministry of Labour.
 19. Cross-examined, Counsel Maina told the Court that he was employed by the 1st Respondent, in August 2020. He was not there when the Grievant was employed by the Respondents. The Respondents had an outsourcing agreement. The Grievant worked as an Invoice Clerk. Maina did not agree that invoicing, was a core function of the 1st Respondent. The 1st Respondent was not able to identify Joyce. The 1st Respondent had an office space for the 2nd Respondent, within its workplace. If there was a disciplinary issue, the 1st Respondent would communicate to the 2nd Respondent.
 20. Redirected, Maina told the Court that the 1st Respondent's core function is manufacture and processing of milk. Invoicing was never a core function. The employment contract was between the Grievant and the 2nd Respondent.
 21. The issues are whether the Grievant was employed by the 1st or the 2nd Respondent; whether termination was unfair and unlawful; and whether he is entitled to the prayers sought.

The Court Finds: -

22. Resolution of the first issue, rests on the scope and interpretation of the outsourcing agreement, in particular the obligations assigned to each Respondent, under the agreement.
23. In this Court's decision, Maundu & 40 Others v. Beirsdorf E.A. Limited & Another [2024] KEELRC 1504 [KLR], the Court found the wording of the outsourcing agreement between the Respondents, to have given large and direct degree of control of the outsourced Employees, to the recipient of the labour services.



24. Among the expressions of this control, was in the 1st Respondent's [recipient] obligation to determine the skills and suitability of recruited Employees; determine their hours of work; and supervision of the Employees jointly with the supplier of labour services.
25. The Court concluded that the obligations of the recipient company, made the recipient company a Co-Employer with the supplier company. Liability to the Employees was deemed to be joint.
26. In the outsourcing agreement between the Respondents herein, it was the obligation of the 1st Respondent, to lay and set the minimum standards and qualifications of persons to be recruited by the 2nd Respondent; it would provide a conducive working environment; and provide safe drinking water, proper dining facilities, changing room for each gender, and sanitation to the Employees.
27. Further control of the Employees by the 1st Respondent, was extended to disciplinary issues. The outsourcing agreement allowed the 1st Respondent to conduct security searches on the Employees, and to subject the Employees to disciplinary action, if found to be in unlawful possession, of the 1st Respondent's property. The agreement states that such disciplinary action, would include institution of criminal proceedings by the 1st Respondent.
28. There is adequate evidence in the outsourcing agreement, to lead the Court to the conclusion, as was held in *Maundu & 40 Others* [citation above], that the Respondents, herein were Co-Employers to the Grievant.
29. The role discharged by the Grievant was a core function in manufacture, processing and sale of milk. The Claimant invoiced the 1st Respondent's customers, on supply of the 1st Respondent's products. He was at the centre of the 1st Respondents supply chain, not on the periphery. Non-core functions would include services such as cleaning and provision of security, at the 1st Respondent's workplace. Invoicing, a sale and marketing function, was not peripheral to the 1st Respondent's business. Non-core functions, would be functions in the periphery. Invoicing was certainly not a peripheral role, in manufacture, processing and sale of the 1st Respondent's products.
30. The 1st Respondent appears to have used the Grievant to work under conditions typical of an employment relationship. The Grievant rendered his labour, for a remuneration, and with subornation to the 1st Respondent. The outsourcing agreement was intended to disguise or dissimulate, the employment relationship between the Grievant and the 1st Respondent. The Grievant at all times, provided labour to the 1st Respondent, at the 1st Respondent's premises, with subornation, under the direction and supervision of the 1st Respondent.
31. The answer to the 1st issue, identified above, is that the Grievant was an Employee of both Respondents.
32. Was termination fair and lawful? The 1st Respondent was contented to posit that the Grievant was not its Employee, and his contract was not administered or terminated by the 1st Respondent. Without giving the facts, the 1st Respondent told the Court to accept its explanation, that the Grievant's contract was terminated by the 2nd Respondent, fairly and lawfully. There is no indication at what point, the 1st Respondent interacted with the termination process, so as to conclude that the process was fair and lawful.
33. The 2nd Respondent, Co-Employer to the Grievant, did not respond to the Claim, or give any evidence, justifying the decision to terminate the Grievant's contract.



34. The Grievant told the Court that he was locked out, and told by the 1st Respondent, that there was no more work. He consulted the 2nd Respondent, who told him that it would consult the 1st Respondent. The Grievant was not returned to work. The position that there was no more work, remained.
35. He was entitled to believe that termination was on account of redundancy. There was no more work, or work for him was diminished, which was another way of telling him that his invoicing clerkship, was no longer required.
36. None of the Respondents however, had the presence of mind, to take the Grievant through the redundancy process, prescribed under Section 40 of the *Employment Act*.
37. On the 2nd issue, the Court is satisfied that termination was unfair and unlawful, under Sections 40, 41, 43 and 45 of the *Employment Act*.
38. On the last issue relating to remedies, it is declared that termination of the Grievant's contract by the Respondents was unfair and unlawful.
39. There is no purpose served, by orders declaring that the Grievant was a direct Employee of the 1st Respondent. A finding to that effect as made above, suffices. Similarly, an order declaring redundancy to be substantively and procedurally wrongful and illegal, adds nothing to the order already made, declaring that termination was unfair and unlawful.
40. Reinstatement is way beyond the statutory limit of 3 years, from the date of termination, prescribed under Section 12 of the E&LRC Act. Termination took place in 2017, some 8 years ago. Parties have moved on, and it is not likely to be practicable, for the Grievant to go back to invoicing clerkship, at the 1st Respondent.
41. He did not inform the Court if the outsourcing agreement under which he found his way to the 1st Respondent's workplace, is still in force.
42. He did not state anything in his evidence, about underpayment of salary. He was paid Kshs. 18,000 monthly. He worked for 2 years. He was not shown to have caused or contributed to the circumstances, leading to termination. He did not disclose to the Court, if he secured alternative work, in mitigation to his loss of employment. He was paid Kshs. 11,000 in terminal dues, whose details were not specified to the Court.
43. He is granted equivalent of 4½ months' salary in compensation for unfair termination, at Kshs. 81,000.
44. The prayer for notice of 1 month, is allowed at Kshs. 18,000.
45. He claims annual leave over the period of 2 years worked. Neither of the Respondents supplied the Court with the Grievant's annual leave records to discount the prayer. Section 74 [1] [f] of the *Employment Act*, requires an Employer to retain the annual leave records of its Employees. The records, must be readily availed to the Court whenever a dispute on annual leave arises. Section 10 [3] [a] of the *Employment Act* requires an Employer, to give the terms and conditions of service, with relation to annual leave entitlement. In the absence of proof by the Respondents, of the Grievant's annual leave entitlement, the Court can only endorse his oral evidence, that he was owed annual leave of 2 years, at Kshs. 29,077. The prayer for annual leave is allowed, at Kshs. 29,077.
46. The reason given by the Respondents to the Grievant in justifying termination, was that there was no more work for him, which the Court has interpreted to mean that his position was declared redundant. He is entitled to severance pay, under Section 40 of the *Employment Act*, which is granted as prayed, at Kshs. 18,000.



47. The Respondents shall issue him the certificate of service.
48. Costs to the Claimant.
49. This Judgment is executable against the Respondents, jointly and severally.

In sum, it is ordered: -

- a. It is declared that termination of the Grievant's employment by the Respondents, was unfair and unlawful.
- b. The Respondents shall pay to the Grievant through the Claimant, equivalent of 4 ½ months' salary in compensation for unfair termination, at Kshs. 81,000; 1-month salary in lieu of notice at Kshs. 18,000; annual leave at Kshs. 29,077; and severance at Kshs. 18,000 – total Kshs. 146,077.
- c. Certificate of Service to issue.
- d. Costs to the Claimant.
- e. The Judgment is executable against the Respondents, jointly and severally.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 31ST DAY OF JANUARY 2025.

James Rika

Judge

