Masai Rolling Mills Limited v Ongaki & another (Appeal E155 of 2022) [2025] KEELRC 510 (KLR) (24 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 510 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E155 OF 2022

NJ ABUODHA, J

FEBRUARY 24, 2025

BETWEEN

MASAI ROLLING MILLS LIMITED ..... APPELLANT

AND

CHARLES MBAKA ONGAKI ..... 1ST RESPONDENT

BARFORD COMPANY LIMITED ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Order of Hon. L.L GICHEHA, CM delivered on 18/8/2022 in Kajiado Chief Magistrates Court Employment Case NO. E009 OF 2021 which was consolidated with CMEL E55 of 2021 and CMEL E076 of 2021)

JUDGMENT

1. Through the Memorandum of Appeal dated 12th September 2022, the Appellant appeals against the whole of the Judgment and Order of Honourable L.L CICHEHA, CM delivered on 18/8/2022.
2. The Appeal was based on the grounds that:
    i. The Learned Magistrate erred in law and fact in finding that the Claimant was employed by the Appellant.
    ii. The Learned Magistrate erred in law and fact in finding that the Claimant ought to have consented before his services were transferred to the 2nd Respondent.
    iii. The Learned Magistrate erred in law and in fact in disregarding the Appellant's evidence that the Claimant was employed by the 2nd Respondent after the Appellant had entered into labour outsourcing agreement with the 2nd Respondent.
    iv. The Learned Magistrate erred in law and in fact in disregarding the Labour Outsourcing Agreement on record.

v. The Learned Magistrate erred in law and in fact in placing the burden of proof on the Appellant to produce an employment agreement between the 1st Respondent and the 2nd Respondent.

vi. The Learned Magistrate erred in law and in fact in failing to take into account the fact that the 1st Respondent did not have any employment contract, job card or any document showing he was employed by the Appellant.

vii. The Learned Magistrate erred in law and in fact in failing to take into account the fact that the 1st Respondent's salary and NSSF was paid by the 2nd Respondent.

viii. The Learned Magistrate erred in law and in fact in deciding that the 1st Respondent was unfairly terminated.

ix. The Learned Magistrate erred in law and in fact in finding that there existed a relationship between the 1st Respondent and the Appellant yet the 1st Respondent's salary and NSSF was paid by the 2nd Respondent.

x. The Learned Magistrate erred in law and fact in awarding damages for unlawful termination.

xi. The Learned Magistrate erred in law and fact in not apportioning any liability to the 2nd Respondent and finding the Appellant wholly liable.

3. The Appellant prayed that the appeal be allowed with costs; the Learned Magistrate's Judgment and Order issued in Kajiado CMEL No E009 of 2021 be reviewed, varied and/ or set aside and the Honourable court finds that the 1st Respondent was not an employee of the Appellant.

4. The Appeal was disposed of by written submissions.

Appellants' Submissions

5. The Appellant's Advocates Moinket & Company Advocates filed written submissions dated 28th May 2024. On the issue of whether the 1st Respondent was an employee of the Appellant, Counsel relied on Section 2 of the *Employment Act* on definition of an employee and the case of Samuel Wambugu Ndirangu vs 2NK Sacco Society Limited(2019) eKLR on the ingredients that are necessary to determine the existence of the employer-employee relationship.

6. Counsel submitted that both the 1st Respondent and the Appellant agreed that the 1st Respondent was paid wages by the 2nd Respondent. The 1st Respondent did not prove that he was hired, paid and finally dismissed by the Appellant. Counsel relied on section 107 and 108 of the *Evidence Act* on proof of the said allegations.

7. Counsel further submitted that the 1st Respondent stated that he was employed by the Appellant on 12th April 2017 but was not issued with an employment contract but did not produce any document showing that he was employed by the Appellant nor did he call any of his former colleagues to corroborate his evidence.

8. Counsel submitted that in the Labour Outsourcing Agreement paragraph 3.6 it was the duty of the 2nd Respondent to pay wages and salaries of employees it outsourced. That the Appellant was not aware of termination of the 1st Respondent as the 2nd Respondent had the powers to hire and fire its employees and the two companies were independently run. That the 1st Respondent's NSSF dues was also paid by the 2nd Respondent as per their obligation in the Labour Outsourcing Agreement paragraph 3.20.

9. Counsel relied on among others the case of Linus Songwa Musamali v Bamco Construction Company [2020] eKLR and submitted that by virtue of the Outsourcing Agreement, the 2nd Respondent assumed 100% liability for the workers recruited to work for the Appellant. He contended that the mandate of the 2nd Respondent as listed in the Labour Outsourcing Agreement included among others dealing with claims or court cases arising from its employees. The 2nd Respondent paid salaries, NSSF and kept records of employees who attended work by having the muster roll which was not disputed by the 1st Respondent.

10. Counsel relied on the court of Appeal case of Kenya Airways Ltd vs Aviation & Allied Workers Union & Others and contended that outsourced service was a widely accepted business concept which enabled a company to focus on core business, reduce overheads, increase cost and efficiency savings and manage cyclical resource demands. That the Appellant was not getting laborers from the 2nd Respondent and employing them but rather had contracted the 2nd Respondent to come in with its employees and handle the production at a fee.

11. Counsel submitted that the 1st Respondent had not proved connection between him and the Appellant. There was no employment contract, or job card and that his salary and NSSF were paid by the 2nd Respondent and thus there existed no employer-employee relationship between the Appellant and the 1st Respondent. The 1st respondent did not prove on a balance of probabilities that he was employed, supervised and paid by the Appellant.

12. On the issue of whether the 1st Respondent was unlawfully terminated by the Appellant counsel submitted that the Appellant could not have terminated the 1st Respondent when it had not employed him. It was only the 2nd Respondent who could terminate the 1st Respondent services as its employee.

13. Counsel submitted that the 1st Respondent did not attach treatment notes to show he attended hospital while unwell or produce permission or leave form from the Appellant if indeed permission was granted by the Appellant. That the 1st Respondent did not call a witness to corroborate that he was given permission to leave work early and also that he was denied entry next day.

1St Respondent's Submissions

14. The 1st Respondent's Advocates Ngingi Njuguna & Company Advocates filed its submissions dated 2nd December 2024. Counsel submitted on the duty of the first Appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions and relied on the case of Faith Kasyoka v Safepark Limited [2019] eKLR.

15. On the issue of whether the 1st Respondent was employed by the Appellant or the 2nd Respondent, counsel submitted that the import of the labour outsourcing agreement was that the 2nd Respondent was an Employment Agent of the Appellant while relying on section 2 of the *Labour Institutions Act* on definition of Employment Agency as a person or company which acts as an intermediary for the purpose of procuring employment for a worker.

16. Counsel submitted that an employment Agency's role ends once the employee is seconded to the employer. That prior to the amendment of 12th July,2012 section 55(2) of the *Labour Institutions Act* it outlawed employment agencies. Counsel relied on the case of Aviation and Allied Workers Union v Kenya Airways Limited and 3 Others(2012) eKLR and submitted that outsourcing of labour was contrary to the principles of fair labour practices and intended to avoid regular employment relationships.

17. Counsel submitted that the 1st Respondent denied being aware of the existence of the outsourcing agreement, RW1 admitted that the 1st Respondent was not involved in the negotiations for the said agreement neither was his consent sought and came to learn of the 2nd Respondent when he applied for his bank statement to initiate the primary suit.

18. Counsel relied on the case of Wrigley Company (East Africa) Limited v Attorney General & 2 others [2013] eKLR on the parameters for a credible outsourcing program.

19. Counsel submitted that paragraph 3 of the Appellant's statement stated that the 2nd Respondent was to provide man power, issue employment contracts, supervise employees, procure WIBA Insurance, procure PPEs, handle union matters, deal with Labour office, meet all administrative costs, pay salaries and wages and deal with employees' conflicts and terminal dues, handle court claims and handle all statutory deductions which were the core function of the Appellant, employer.

20. Counsel submitted that the main purpose of the agreement was to aid the Appellant avoid paying workmen's compensation. No consent was provided to show that the 1st Respondent had agreed to be part of the outsourcing agreement. That there was no evidence that the 2nd Respondent was registered as an Employment Agency as per the amendment under section 55(2) of the Labour Institution Act 2007. That the trial magistrate did not err by finding that the 1st Respondent was an employee of the Appellant and that the Labour Outsourcing agreement was void.

21. On the issue of whether the 1st Respondent was unfairly and unlawfully terminated, Counsel relied on the case of Moses Kiprop Meli v Riley Falcon Services Ltd (2021) eKLR on the burden of proof of each party in allegations of unfair termination. That it was the 1st Respondent's uncontested testimony that he was operating the Appellant's machine in the factory at Isinya on 24th October,2020 when he was dismissed for stopping to drink water. That the Appellant sought to hide behind the illegal outsourcing agreement and abuse the court process with impunity.

22. Counsel submitted that having found that the labour outsourcing agreement was illegal; the Appellant was bound by employment laws and procedure to see to it that the termination of the 1st Respondent was fair and lawful.

23. Counsel submitted that the 1st Respondent's testimony that he was sent away on account of stopping to drink water was not challenged and he was not issued with a month's notice prior to termination. That the termination was not as a result of his misconduct or inability to deliver neither did he dessert work. No disciplinary meeting was held and he was not issued with a termination letter and was not paid his terminal dues. That the trial magistrate did not err in holding that the 1st Respondent was unlawfully and unfairly terminated and awarded notice pay and six months compensation.

Determination

24. The court has considered the record of appeal, submissions filed by the parties and observes that the principles which guide this court in an appeal from a trial court are now well settled. In Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, the same was stated thus:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"

25. The Judgment of the trial court was entered as against the Appellant on the basis that the Agreement between the Appellant and the 2nd Respondent did not affect the relationship between the Appellant and the 1st Respondent. The 1st Respondent was awarded 6 months' salary as compensation for unfair termination of Kshs 114,660/= and one month's notice pay of Kshs 19,110/=

26. Having considered the appeal, the evidence in the Record of Appeal and the submissions the Court is of the view that the ground's of appeal which if determined will fully dispose of the appeal are:

    a. Whether the trial court erred in law and fact in finding that the 1st Respondent was an employee of the Appellant and not the 2nd Respondent

    b. Whether the trial court erred in law and fact in finding that the 1st Respondent's service was unfairly terminated by the appellant hence entitled to reliefs sought.

27. The court before delving into issues at hand takes cognizance of the fact that the claims CMEL E009 of 2021, E055 of 2021 and E076 of 2021 in the lower court were consolidated. The Appellant had filed an application as Appeal E141 of 2024 seeking to appeal the other claims out of time and the Court is of the view that since the claims were consolidated at lower court, there was no need to separate the appeals hence the outcome of this appeal will apply to the other claims.

Whether the trial court erred in law and fact in finding that the 1st Respondent was an employee of the Appellant and not the 2nd Respondent

28. It was the 1st Respondent's case that he was an employee of the Appellant and only came to learn of the 2nd Respondent when he applied for his bank statement to initiate the suit and was not even aware of the existence of the outsourcing agreement. On the other hand, the Respondent's case was that the 1st Respondent was employed by the 2nd Respondent after the Appellant had entered into labour outsourcing agreement with the 2nd Respondent.

29. The onus of proving employment under a contract of service lies with the person who alleges that he was so employed. Under section 2 of the *Employment Act* an employee has been defined as:

> " A person employed for wages or salary and includes an appredice and indentured learner."

30. At common law an employee is one who:

    (a) is required to comply with the employer's instruction about when, where and how he or she must work.

    (b) has been trained by the employer to gain experience for purposes of working for the employer.

    (c) has been integrated into the business operations of the employer so that he is subject to the direction and control of the employer.

    (d) must render services personally

    (e) has assistants hired, supervised and paid by the employer

    (f) has worked continuously for a long time

    (g) has specific working hours set by the employer

    (h) is working substantially full-time for an employer and is not free to work for other employers

    (i) performs work on the employers premises

(j) is required to submit regular oral or written report to the employer

(k) has his business trips or travel expenses paid for by the employer

(l) has tools, material and other requirements met by the employer

(m) is easily dismissed at the will of the employer

(n) has the right to terminate his contract without incurring any liability.

31. T he 1st Respondent's employment was not in question. The issue was whether the employment relationship existed between the 1st Respondent and the Appellant or with the 2nd Respondent. The Concept of labour outsourcing as held in Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR, is that outsourcing services was an accepted business strategy. Murgor, JA. observed that;

> " Outsourced services is one such widely accepted business concept, which enables a company to focus on core business, reduce overheads, increase cost and efficiency savings, and manage cyclical resource demands. It is not designed to deprive Kenyans of their jobs."

32. In principle therefore, outsourcing of employees is not illegal or untoward, provided it is carried out in accordance with fair labour practices, and the process adopted is not aimed at rendering an employee redundant. This was the position in Superforam Limited v Olwanda & 7 others (Appeal E007 of 2022) [2022] KEELRC 4028 (KLR) (12 May 2022) (Judgment) where the court held as follows: -

> Whereas outsourcing labour is now an accepted labour concept, such should not be applied to allow for unfair labour practices.

33. The court went on to state as follows: -

> " The employer must lawfully and procedurally end the employment relationship and issue Certificate of Service before a new employer such as the 8th respondent can take over the subject employees. to enter into an agreement to outsource labour without notice to the affected employees is defined as an unfair labour practice which goes contrary to sections 35, 41 and 45 of the *Employment Act*, 2007. The subject employee affected by such an agreement must be issued with notice, given a hearing and the same addressed procedurally....Employees are not chattels to be moved from one entity to the next. Due regard to the law is an imperative".

34. In the case of Elizabeth Washeke & 62 others v Airtel Networks (K) Ltd & another [2013] eKLR it was held that;

> ... what an outsourcing or transfer of business entails, this must be clearly spelt out in the contract of employment between the concerned employee and the new employer failure to which the former employer must complete their end of the bargain as between themselves and their employee before conferring a responsibility unsecured with a third party.

35. From the record (p.58 of the Record of Appeal), the 1st respondent stated that from his Bank statements, it showed he was receiving salary payment from Barford Limited, the 2nd respondent herein and further that his NSSF statement showed his employer was the 2nd respondent but denied knowledge of the 2nd respondent. The claimant further stated in his witness statement before the trial court that he was employed on casual basis on from 12th April, 2017. The appellant's witness on the

other hand stated (p.59 of the Record of Appeal) that the 2nd respondent came in 2016 when they signed a labour outsourcing agreement. It therefore means that when the 1st respondent was hired, the outsourcing agreement was already in place. This corresponds with the 1st respondent's evidence in the lower that his salary to his bank account and NSSF dues were remitted by the 2nd respondent.

36. From the foregoing, it was therefore erroneous for the trial court to reach a finding that there was employer-employee relationship between the appellant and the 1st respondent. This ground of appeal therefore succeeds and any award against the appellant on the premise that it was the 1st respondent's employer and consequential orders are hereby set aside and substituted with an order dismissing the suit as against the appellant.

Whether the trial court erred in law and fact in finding that the 1st Respondent's service was unfairly terminated by the appellant hence entitled to reliefs sought.

37. The court having found that there existed no employer-employee relationship between the appellant and the 1st respondent and set aside such finding by the trial court including consequential orders, the issue of the fairness or otherwise of the termination can only be decided between the 2nd respondent as the 1st respondent's employer and the 1st respondent. It is noteworthy that the 1st respondent sued both the appellant and the 2nd respondent but from the record, only the appellant defended the suit. It is not clear from the record whether the 2nd respondent was served but failed and or ignored to defend the suit. The Court could have been prepared to order enforcement of the judgment of the lower court against the 2nd respondent but cannot do so in the circumstances. The matter will therefore be remitted back to the lower court for trial between the 1st and the 2nd Respondent herein on the issue of the fairness or otherwise of the termination and compensation if any for such termination.

38. In conclusion the appeal is hereby allowed with no order as to costs and that the claim filed in the lower court herein commences de novo to determine between the 1st respondent and the 2nd respondent the issue of the fairness or otherwise of the termination of the 1st respondent's service and compensation if any for such termination.

39. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2025

DELIVERED VIRTUALLY THIS 24TH DAY OF FEBRUARY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION