



**Hamadi v Abbas Traders Limited (Appeal E126 of 2024)  
[2025] KEELRC 392 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 392 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E126 OF 2024  
M MBARÚ, J  
FEBRUARY 7, 2025**

**BETWEEN**

**ATHUMAN HAMADI ..... APPELLANT**

**AND**

**ABBAS TRADERS LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. Gathogo Sogomo  
delivered on 17 May 2024 in Mombasa CMELRC No.257 of 2022)*

**JUDGMENT**

1. The appeal arises from the judgment delivered on 17 May 2024 in Mombasa CMELRC E257 of 2022. The appellant is seeking that the judgment be set aside and a fresh judgment be issued allowing the claim.
2. The appellant filed his claim before the trial court on the basis that he was employed by the respondent as a general labourer in 2010. He worked in Mombasa on the respondent's premises at a wage of Ksh.15,000 per month. He worked until 16 December 2021, when his employment was unlawfully and unfairly terminated without payment of his terminal dues. He claimed that on 2 December 2021, he sustained an injury while at work; he visited the hospital and was advised that he needed to take a scan, which would cost a huge sum of money. He sought medical financial support from the respondent but was denied and informed that his services were no longer required. He claimed the following dues;
  - a. Notice pay Ksh.15,000;
  - b. House allowances for 131 months Ksh.294,750;
  - c. Unpaid leave for 10 years Ksh.105,000;
  - d. 12 months compensation Ksh.180,000;



- e. Unpaid overtime of one hour for 131 months Ksh.245,625;
  - f. Unpaid NHIF for 131 months Ksh.65,500;
  - g. Service pay for 10 years Ksh.75,000;
  - h. Costs of the suit.
3. The lunch break that no other on-site employee had witnessed. The respondent settles the medical bill owing to its relationship with the gang leaders. The appellant resumed duty under the gang leader on 17 December 2021 and did not attend work. These details were sent to the County Occupational Safety and Health Officers, leading to the report's close. There was no unfair termination of employment since the appellant was a day labourer out of the respondent's control and hence not entitled to the claim made, especially leave pay. He was on piecemeal work and did not work overtime. There was the payment of a daily rate wage through the gang leaders responsible for payment of statutory dues.
4. The learned magistrate heard the parties and delivered judgment on 17 May 2024. He held that the employment relationship had been established based on bank statements, but the nexus of employment was broken through the Memorandum of Agreement between the respondent and the gang leaders. The appellant had been engaged as a piece-rate employee. His claims did not lie in piece-rate employment. His claims were dismissed with costs to the respondents.
5. Aggrieved by the judgment, the appellant filed the appeal on the grounds that;
1. The learned magistrate erred in law and fact in shifting the burden of proof to the appellant who had established a prima facie case that he was employed by the respondent and dismissed unfairly from his employment.
  2. The learned magistrate erred in law and fact in finding that the appellant was not an employee of the respondent despite the respondent admitting that it procured a job identity car for the appellant which stipulated his designation as the respondent's employee.
  3. The learned magistrate erred in law and fact in finding that there was no employer-employee relationship between the appellant and the respondent despite the respondent failing to demonstrate that the appellant was employed by any other person or company.
  4. The learned magistrate erred in law and fact in finding that the appellant failed to produce documents yet the law recognizes oral contracts which documents may not be available.
  5. The learned magistrate proceeded on wrong principles in arriving at the finding that the appellant was not an employee of the respondent.
  6. The trial magistrate disregarded the overwhelming evidence tendered by the appellant to prove that he was entitled to terminal dues upon unlawful dismissal from work.
6. Both parties attended and agreed to address the appeal through written submissions.
7. Respondent admitted that the appellant was a casual labourer availed via subcontract between the respondent and a gang leader on a need basis. Thus, he was not on the payroll. He was not continuously assigned duties since he was not the respondent's employee. He was a day labourer under the control and supervision of a gang leader through a memorandum. The appellant submitted that he had proved before the trial court that he was an employee of the respondent as defined under Section 2 of the [Employment Act](#). He produced a job identity card and notice of occupational injury in his evidence. The respondent witness testified that the job identity card was issued to the appellant for access to the



- office during the COVID-19 period. The job card was not revoked. There were no objections when the respondent was served with the DOSH form. The respondent paid the appellant's medical expenses.
8. On the evidence, the appellant was protected under Section 37 of the *Employment Act*. His casual employment with the respondent was converted under the law. In the case of *Henry Kenya Kamami v Star Brilliant (EPZ) K Limited* [2021] eKLR, the court held that where employment is converted under the law, the employee is entitled to rights and benefits under the *Employment Act*. Based on the records submitted in court, the appellant was the respondent's employee.
  9. The appellant submitted that the respondent's witness testified that in December 2021, the appellant attended work for 4 days only. He then failed to report to work. In the case of *Paul Mwakio v Reliable Freight Services Ltd* [2022] eKLR, the court held that under Section 44(4) (a) of the *Employment Act*, where the employee absconds work, such constitutes gross misconduct. The employer is required to apply the provisions of Section 41 of the Act. In this case, the respondent did not act against the appellant. It resulted in unfair termination of employment.
  10. No notice to show cause was issued. The respondent failed to adhere to the mandatory provisions of Sections 41, 43, and 45 of the *Employment Act*. The claim made for notice pay, house allowance, annual leave pay, and overtime with unremitted statutory dues, including service pay, should be awarded costs.
  11. The respondent submitted that the employee has the burden of proof to prove his case under sections 107 and 109 of the *Evidence Act*. The nature of labour relations between the appellant and respondent was through gang leaders through a memorandum of agreement for the provision of labour. Through outsourcing, the respondent contracted gang leaders who employed the appellant on piece work. The respondent produced this Memorandum of Understanding dated 1 August 2000 to have gang leaders recruit, control, and pay loaders necessary for offloading tea.

The appellant admitted that he was a general worker and loader. This evidence was supported by the gang leader, who testified that he has worked with the appellant since 2020 and recruited him. In the case of *Musa Mzenga Musa v Jilao Company Ltd*, the court held that where an employee failed to prove an employment relationship, the respondent had no reason to justify the alleged termination of employment.
  12. The respondent proved it outsourced all labour in loading and offloading tea. The appellant was issued a job identity card to facilitate access during the COVID period. Such did not constitute an employment contract. In responding there was no admission of the employment relationship. The payment of medical bills did not indicate an employment relationship.
  13. The court acknowledged the unique circumstances in the use of gang leaders to outsource temporary labour. In the case of *John Mutisya & 2 others v Rapid Kate Services Limited* [2016] eKLR, the court held that gang contracts are a common feature in Kenya. Such gangs are used to provide casual labour and temporary tasks.
  14. The Court of Appeal, in addressing the same matter in *Rapid Kate Services Limited v John Mutisya & 2 others* [2018] eKLR, held that before a court can convert a contract of service under Section 37 of the *Employment Act*, the employee ought to establish first that the employer has engaged him/her in question on a casual basis and second that he/she has worked for the said employer for a period aggregating to more than one month.
  15. The respondent submitted that they proved that they had no employment relationship with the appellant. Hiring, supervising, and paying day labourers was wholly outsourced to gang leaders



through contract. The documents held by the appellant did not prove employment with the respondent.

16. The appeal is without merit and should be dismissed with costs.

### **Determination**

17. This is a first appeal. The court is called upon to re-evaluate all the material on record and conclude on the disputed facts. However, keep in mind that there was no opportunity to assess the demeanour of the witnesses as did the trial court. Thus, in the analysis, be reluctant to upset the trial court's decision that turns on an assessment of the credibility of witnesses unless there are compelling grounds to do so as held in *Top Tank Company Limited v Amos Ondiek Wandaye* [2018] eKLR).
18. The appellant's case was premised on the respondent employing him to work on its premises. He produced a job identity card and notice for occupational injury dated 12 January 2022.
19. In his evidence-in-chief on 15 August 2023, the appellant testified that;

... I was employed as a loader and a general labourer ... the job card was issued in 2020 and not 2010. It was issued due to corona. ...
20. The respondent denied the employment relationship and produced a Memorandum of Agreement with gang leaders, a copy of attendance lists, and a letter to the County Occupational Safety and Health Officers dated 24 January 2022.
21. In evidence, the respondent called the human resource office, Ruth Butiko, who testified that the respondent sought employees through gang leaders and that the appellant was not an employee. He was issued a job identity card to allow access during the COVID period. The gang leaders were Ngumbau Omar and Ali Shabi, contracted to source labour.
22. The respondent, Hari Ali Shambi, admitted that he was contacted by the respondent in 1993 and paid for piece-rate work. He engaged the appellant in 2020 for piece rate work for the respondent.
23. The employment relationship between the appellant and the respondent was challenged, which was a material aspect of his case.
24. In filing the response, the respondent declined the employment relationship. It produced the Memorandum of Agreement with gang leaders to provide contract workers who would communicate directly with the company representatives. The gang leaders must ensure that there are enough human resources to carry out the work the company gives from time to time.
25. The Memorandum of Agreement is executed between the respondent officers and the gang leader, Karisa Ngumbao Mwambire. A list of the contracted persons under the agreement was provided. The appellant was listed as part of the employee sourced under the Agreement.
26. Labour outsourcing is not regulated under Kenyan law. However, it is an accepted form of sourcing employees through long practice and application.
27. *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR held that outsourcing services was an accepted business strategy. Outsourcing labour is not illegal or untoward,



provided it is carried out following fair labour practices, and the process adopted is not aimed at rendering an employee redundant, and that;

Outsourced services are one widely accepted business concept. It 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.

28. In *Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union & Jokali Handling Services Limited* [2016] KECA 510 (KLR), the court acknowledged that an entity was allowed to outsource labour. The outsourced employees entered into express contractual relationships with the third party (Jokali), the employer, which in turn contracted with Abyssinia to provide employees to perform various duties. While working on Abyssinia's premises, the employees remained under Jokali's management and control.
29. This is a similar scenario. The gang leader's admission that he agreed with the respondent was not challenged. This agreement was provided immediately upon the filing of the response, and the appellant did not challenge it.
30. With employment admitted with the gang leader, the appellant lacked a key element to file his claim seeking employment before the trial court. His case against the respondent on the facts presented denied him proper standing.
31. The claims for alleged unfair termination of employment, notice and house allowances, untaken leave days or overtime, including unremitted statutory dues or service pay, cannot accrue where there is no employment relationship established as a core requirement for his claim.
32. The learned magistrate analyzed the facts well before the court, applied the law and arrived at the correct finding. The claim was properly dismissed with costs.
33. The appeal is without merit and is hereby dismissed. Costs to the respondent.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 7 DAY OF FEBRUARY 2025.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

