



Mohamed & 2 others v Pothiwalla t/a Songoro Boat Services (Appeal E019 of 2024) [2025] KEELRC 1950 (KLR) (30 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1950 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E019 OF 2024**

**M MBARŪ, J
JUNE 30, 2025**

BETWEEN

**SALIM SAID MOHAMED 1ST APPELLANT
CHENGO MZUNGU NGOWA 2ND APPELLANT
ALI MHAMAD MAVUNE 3RD APPELLANT**

AND

KHUZEMA POTHIWALLA T/A SONGORO BOAT SERVICES ... RESPONDENT

*(Being an appeal from the judgment of Hon. L. Sindani delivered
on 8 February 2024 in Mombasa CMELRC No. E658 of 2021)*

JUDGMENT

1. The appeal arises from the judgment delivered on 8 February 2024 in Mombasa CMELRC No. E658 of 2021. The appellants seek to have the judgment set aside and a fresh judgment entered in their favour.
2. The background of the appeal is a claim filed by the appellant before the trial court. The case of Salim Said Mohamed was that he was employed as an engineer and coxswain by the respondent on 2 February 2011 and assigned duties in Mombasa County. His work included repairing boats and transporting tourists. He worked until 18 July 2021 when he was unfairly dismissed from his employment. At that time, the wage paid was Ksh. 000 per month. His claim was that he was not allowed to take annual leave or paid for overtime work. There was no house allowance or housing provided, nor payment of statutory dues. Employment was terminated unfairly as there was no notice or payment of terminal dues, and he claimed the following:
 - a. Notice pay Ksh.25,000,
 - b. Salary for 18 days worked in July 2021 Ksh. 14, 994,



- c. House allowance for 118 months Ksh. 442,500,
 - d. 9 years unpaid leave Ksh. 157,437,
 - e. 12 months compensation Ksh.300,000,
 - f. Unremitted NHIF for 118 months Ksh.59,000,
 - g. Service pay for 9 years Ksh. 112,000,
 - h. Costs of the suit.
3. In response, the respondent denied the existence of an employment relationship and stated that there was no contract of employment with the appellant as an engineer or coxswain, as alleged. The respondent had a business investment plan and therefore acquired several boats with the intention of entering the business of hiring out the boats to shipping lines and any prospective clients needing the respondent's transporting services. The appellants were among those hired for this purpose. The respondent assigned mechanic duties to the appellant, with the agreement that the respondent would pay 40% of the day's earnings, leaving the remaining amount to be divided among themselves. Therefore, there was no employer-employee relationship as claimed. The business of hiring boats was not sustainable, and due to the COVID pandemic, which stalled the business, the respondent decided to sell most of the boats. There was no obligation on the part of the appellants to continue hiring them. No monthly wages were paid as alleged, and the claims made are not justified.
 4. The learned magistrate heard the parties, consolidated the various claims by the appellants, delivered judgment, and held that there was no employer-employee relationship between the parties. The appellants failed to discharge the burden of proving the employment relationship; therefore, the records filed demonstrated a business partnership.
 5. Aggrieved, the appellant's grounds of appeal are that the learned magistrate erred in law and fact in shifting the burden of proof of employment to the appellants, who have proved their case on the balance of probabilities through documentary evidence that they were employed by the respondent and were dismissed unfairly. Despite the respondent admitting that an employment relationship existed with the appellants, as evidenced by a letter dated 31 October 2018, the trial court disregarded this evidence. The respondent did not produce any evidence to suggest that an agreement existed for hiring boats to the appellant. The finding that a partnership and business transaction existed between the appellants and the respondent was in error.
 6. The appellants submitted that they proved the employment relationship on a balance of probabilities; therefore, the trial court's findings that the respondent did not employ them were in error. The respondent admitted that the appellants were issued a letter dated 31 October 2018 allowing them to obtain a gate pass to perform their duties. Such an admission should have been used to confirm the employment relationship. The provisions of Section 43 and 47(5) of the *Employment Act* state that the employee bears the burden of proving unfair termination of employment. At the same time, the employer has the burden of justifying the reasons for termination, as held in *Josephine M. Ndungu & others v Plan International Inc* [2019] eKLR. The appellants discharged their burden, and the respondent failed to prove the reasons for the termination of employment. In the case of *Muthaiga Country Club v KUDHEIHA Workers* [2017] eKLR, the court held that without the employer discharging its burden of proof under the *Employment Act*, termination of employment is unjust and the remedies sought should be granted.
 7. The respondent submitted that the existence of an employer-employee relationship is primary in any employment claim, as held in *Samuel Wambugu Ndirangu v 2NK Sacco Society Limited* [2019]



eKLR. Without proof of the employment relationship, a party cannot justify filing a claim before the court over the alleged unfair termination of employment.

8. The appellants relied on a gate pass authorising them to access the port for ease of movement in the business operations with the respondent. That did not entail employment. The appellants were not under the control of the respondent. The earnings were shared on a percentage. There was no payment of a salary which would accrue to an employee. The trial court's judgment should be confirmed and the appeal dismissed with costs.

Determination

9. This is a first appeal. The court must reexamine the evidence, review the record, and draw its conclusions. However, consider that the trial court had the opportunity to hear the witnesses testify.
10. The main issue in dispute is the employment relationship. The appellants assert that the respondent employed them, and the letter dated 31 October 2018 allowing them access to the port issued by the respondent confirms their employment status. The respondent, on its part, contends that the applicants were hired among other personnel and assigned brokerage duties to attract prospective customers to the boats. They would be paid 40% of the day's earnings through a mutual agreement and left to divide it among themselves.
11. Under section 2 of the *Employment Act*, an employee is defined as a person employed for wages or a salary, including an apprentice and an indentured learner. This definition covers a casual worker, someone on a fixed-term contract, an employee paid on a piece-rate basis, and a permanent, pensionable employee.
12. However, there is a distinction between an employee and someone hired to provide a service. In the case of *Omusamia v Upperhill Springs Restaurant* [2021] KEELRC 3 (KLR), the court outlined the difference between an employee hired for a service and an independent contractor engaged under a commercial transaction.
13. While an employee is subject to the employer's control, an independent contractor is not. One receives a wage, whereas the other is paid based on the business model and agreement on sharing the returns. See *Ibrahim Ulalo v Nation Media Group* [2019] KEELRC 2141 (KLR).
14. In this case, the appellants rely on the letter dated 31 October 2018, which the respondent wrote to facilitate their access to the port. This document does not suggest employment. A gate pass on its own cannot confirm an employment relationship.
15. In his evidence in court, Salim Said Mohamed's record used to assert that he was an employee of the respondent was the gate pass and a letter dated 31 October 2018. He also relied on the letter from the Labour Officer dated 18 August 2021.

He testified that;

"I used to earn Ksh. 22,000 in cash. He did not give us contracts to sign. ..."

16. The respondent provided payment records for the appellants. The payments vary on any given day, week, or month. These do not show regular constant payments of Ksh. 22,000 or Ksh. 25,000, as the appellants claimed.
17. Indeed, under Section 47(5) of the *Employment Act*, an employee who claims that their employment has been unfairly terminated bears the burden of providing evidence indicating that a termination took place and that it either lacks substantive justification or is procedurally defective, as held in *Kisero v*



Wabwire [2025] KEELRC 176 (KLR). Once the employee establishes a prima facie case, the burden of proof shifts to the employer to justify the termination. See Kenya Revenue Authority v Reuvel Waithaka Gitahi & 2 others [2019] eKLR.

18. In this case, the applicants failed to discharge the required mandate under Section 47(5) of the Employment Act. The records submitted and the reliance on the gate pass through letter dated 31 October 2018 cannot confer employment status. To argue their case over the alleged employment with the respondent cannot suffice.
19. The learned magistrate carefully assessed the records and evidence presented and reached a correct conclusion in dismissing the appellants' claims. The appeal in this case is without merit and is accordingly dismissed, with costs awarded to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA THIS 30TH DAY OF JUNE 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

