



**Master Fabricators Ltd v Nyamoko & 11 others (Employment and Labour Relations Appeal E137 of 2022) [2024] KEELRC 1537 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1537 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E137 OF 2022**

**MN NDUMA, J**

**JUNE 13, 2024**

**BETWEEN**

**MASTER FABRICTORS LTD ..... APPELLANT**

**AND**

**DOUGLAS NYAMOKO ..... 1<sup>ST</sup> RESPONDENT**

**ELLY OTWOMA KOMBO ..... 2<sup>ND</sup> RESPONDENT**

**AUGUSTUS MUSILI MWANZIA ..... 3<sup>RD</sup> RESPONDENT**

**CONSTANT OWINO ..... 4<sup>TH</sup> RESPONDENT**

**PATRICK KILANGO ..... 5<sup>TH</sup> RESPONDENT**

**DUNCAN ODEYO ..... 6<sup>TH</sup> RESPONDENT**

**PAUL NYAMOKO ..... 7<sup>TH</sup> RESPONDENT**

**NICODEMUS NZOMO ..... 8<sup>TH</sup> RESPONDENT**

**LAWRENCE WERE ..... 9<sup>TH</sup> RESPONDENT**

**NJOMO MUSELE ..... 10<sup>TH</sup> RESPONDENT**

**STEPHEN MULINGE ..... 11<sup>TH</sup> RESPONDENT**

**MUTANGILI NZIU ..... 12<sup>TH</sup> RESPONDENT**

*(Being an Appeal following the decision by Hon. S. A. Opande PM in MCELRC/  
E770/2020 delivered on 18th July 2022 at the Milimani Magistrates Court)*



## JUDGMENT

1. The appeal emanates from a judgment of Hon. S. A. Opande PM delivered on 18<sup>th</sup> July 2022 at the Milimani Chief Magistrates Court.
2. The grounds of appeal are set out in the memorandum of appeal as follows:-
  1. That the learned magistrate erred in law and in fact by failing to recognize that the appellant and the respondents had individual contracts for service which provided for expiry of the contracts once the specific job was completed.
  2. That the learned magistrate erred in law and in fact in failing to appreciate that the respondents engagement with the appellant did not fall within the definition of the term 'employee' under section 2 of the *Employment Act*, 2007.
  3. That the learned magistrate erred in law and in fact by failing to differentiate between an employee and an independent contractor.
  4. That the honourable magistrate erred in law and in fact by relying on undated and unsigned witness statements filed by the respondents.
  5. That the honourable magistrate erred in law and in fact by failing to appreciate that the court of law cannot create a contract on behalf of the parties noting that there was no employer-employee relationship between the appellant and the respondents' herein.
  6. That the learned magistrate erred in law by failing to accord the appellant a reasonable and fair opportunity to be heard contrary to Article 25(c) and 50 of *the Constitution* of Kenya, 2010.
  7. That the learned magistrate erred in law and in fact in relying on hearsay to find in favour of the respondents.
  8. That the learned magistrate erred in law and fact in applying the provisions of section 41 of the *Employment Act*, 2007 to the matter, yet the respondents were independent contractors and not employees.
  9. That the learned magistrate erred in law and in fact in applying the *General Order 2022* in calculating purported dues for the respondents without any basis, yet the said order came into effect in May 2022.
  10. That the learned magistrate erred in law and in fact in applying non-existent principles like length of service to the *General Order 2022*, which he misapplied in calculating purported dues to the respondents.
  11. That the learned magistrate erred in law and in fact in laying the burden of proof on payment of taxes on the appellant, yet it is the respondents who are issued with certificates of withholding tax.
  12. That the learned magistrate erred in law and in fact in referring to a non-existent master roll and finding the same suggested control.
  13. That the learned magistrate erred in law and in fact in suggesting that quality assurances by the respondent was tantamount to supervision of the respondents.



14. That the learned magistrate erred in law and in fact in forming the opinion that the respondents had no capacity to be independently engaged in the nature of work they were meant to do.
  15. That the learned magistrate erred in law and in fact in ignoring the evidence on record in support of the appellant's case and therefore arriving at a wrong decision.
  16. That the honourable magistrate erred in law and in fact by arriving at a decision without considering the pleadings and submissions of the appellant.
  17. That the learned magistrate erred in law and in fact by arriving at a decision without giving reasons for the decision.
3. The respondents worked for the appellant in different capacities and the issue in dispute was whether the respondents were engaged as independent contractors whose work ended upon expiry of the tasks given to them or whether the respondents were engaged on contracts of service and were therefore employees of the respondent entitled to have their engagement ended only in terms of the individual contracts of service and the applicable provisions of the Employment Act, 2007 with attendant protections from arbitrary termination and entitlement to benefits regulated by the Employment Act and other relevant statutes.
  4. Upon hearing the case, the trial court held that there existed contracts of service between the claimants and the respondent. That the respondent did not follow the laid down procedure in terminating the contracts of employment in that no disciplinary hearings preceded the termination.
  5. The trial magistrate held that on that ground alone, the court was satisfied that the termination of the claimants from employment was unfair and they were therefore entitled to the reliefs sought in the memorandum of claim including compensation under the Employment Act and payment of terminal benefits comprising one month salary in lieu of notice; severance pay for each completed year of service; and payment in lieu of leave days not taken for the entire period of service.
  6. The trial court in awarding the terminal benefits found that all the claimants were entitled to payment of the minimum wage provided under Regulation of Wages (General) order Kenya 2022 which provided a minimum wage of a welder/fabricator of at least 5 years to be Kshs. 32,000/= per month. The salary was applied to each of the claimants.
  7. The court further awarded each of the claimants' compensation equivalent to six months' salary for the unfair termination of employment.
  8. This being a first appeal, the court is guided by the principles set out in the case of *Selle versus Associated Motor Co Ltd* 1968 EA. As the first Appellate Court, it is the duty of the Court to reconsider the evidence adduced before the trial court and re-evaluate it so as to draw its own independent conclusion and to satisfy itself that the conclusions reached by the trial magistrate are consistent with evidence
  9. Accordingly, the court will evaluate the evidence adduced by respondents vis a vis that adduced by appellant to establish if the learned trial magistrate correctly considered the facts of the case without ignoring any crucial part of the said evidence and applied correctly the principles and law applicable to the circumstances of the case in arriving at the impugned decision by the appellant.
  10. The claimant relied on the testimony of the 1<sup>st</sup> and 11<sup>th</sup> claimants who adduced oral evidence before court and in addition the claimants would rely on the filed documents in further support of their respective positions.



11. PW1 Douglas Nyamoko produced all documents dated 8/9/2020 and 8/6/2021 respectively on behalf of all the 12 claimants. RW1 also produced 12 witness statements in respect of each of the claimants and they were adopted by the court as evidence in chief for the 12 claimants. Counsel for the respondent agreed to that mode of proceeding and commenced cross-examination of PW1.
12. Under cross-examination, PW1 stated that he was employed in the year 2006 and entered into a piece work wages agreement just like all other claimants. The agreement stated at paragraph D that the agreement expired once the job was finished. That they were paid Kshs.15,000/= monthly pay and they were given pay slips. PW1 said that they worked from 8 am to 5 pm and if they worked overtime, they were given a lateness cheque. RW1 said himself and his colleagues were employees and not contractors since they never subcontracted other people to work for them and the company provided them with tools of trade. PW1 said they were sacked irregularly and were not compensated.
13. A careful perusal of the witness statement of PW1 which was adopted as evidence in the matter discloses other finer details of the relationship between the claimants and the respondent including that, he worked as framework welder from the year 2006. That payment was done per work done with no fixed salary depending on the production during the month. That the respondent issued him with uniforms, job identification card and tools of performing work. That the respondent exercised full control over his work which PW1 did without delegating. That hours of work were determined by the respondent who supervised the work done and PW1 could not engage in other forms of work.
14. That PW1 was subjected to the respondent's disciplinary process whenever a dispute arose such as reporting to work late or was absent.
15. That on 2<sup>nd</sup> June 2020 PW1, reported to work as usual only to find that all his colleagues had been denied access at the work place. That one of the respondent's Director Mr. Singh later came and started accusing the claimants of stealing from the company. Mr. Singh then informed the claimants that their services were no longer required and to never report at the work place again. PW1 said that the respondent then had his account blocked which was an invasion of his privacy. That the termination was unlawful and unfair.
16. The evidence in the witness statements of the 12 claimants was the same in all material respects except the date of employment which was the year 2009 for the 2<sup>nd</sup> claimant and that he was a framework fitter; 3<sup>rd</sup> claimant was employed in the year 2008 as a fitter; 4<sup>th</sup> claimant was employed in the year 2010 as a painter; 5<sup>th</sup> claimant was employed in the year 2004 as a fitter; 6<sup>th</sup> claimant was employed in the year 2016 as a M.G. Welder; 7<sup>th</sup> claimant was employed in the year 2012 as a fitter; 8<sup>th</sup> claimant was employed in 2010 as a MIG Welder; 9<sup>th</sup> claimant was employed in 2007 as a fitter; 10<sup>th</sup> claimant was employed in the year 2010 as a MIG Welder; 11<sup>th</sup> claimant was employed in 2010 as a fitter and 12<sup>th</sup> claimant was employed in the year 2008 as a seat cushioning personnel. Their employment was terminated in the same manner by Mr. Singh on 2/6/2020 and they all served under similar circumstances. They all produced pay slips showing their payments upon completion of various tasks.
17. The appellant sought leave to adduce additional evidence in the Appeal to wit:-
  - i. KRA withholding certificate dated 30/5/2016
  - ii. KRA withholding certificate dated 20/4/2017
  - iii. KRA withholding certificate dated 14<sup>th</sup> June 2018 and
  - iv. KRA withholding certificate dated 17<sup>th</sup> April 2020.



18. This additional evidence is aimed to demonstrate that the claimants were indeed independent contractors and not employees in respect of whom PAYE was remitted. This application was granted on 27<sup>th</sup> September 2023. The court will consider the effect if at all of this additional evidence to the outcome of the appeal.

### **Determination**

19. The appellant and the respondent filed written submissions which the court has carefully considered together with the record of Appeal and the additional evidence adduced by the appellant.
20. The issues for determination are:-
- a. Whether the trial court misdirected itself in law and fact by finding that the claimants were employees and not independent contractors?
  - b. Whether the trial court misdirected itself to find that the termination of the employment of the claimants was unfair?
  - c. Whether the trial court erred in law and fact in awarding compensation and terminal benefits to the claimants?
  - d. Who will meet the costs of the appeal?
21. In answer to issue number one, the evidence before court shows that even though the appellant granted each claimant a piece rate work contract and paid the claimants fortnightly, the work done by the claimants be it on framework welding; framework fitting; painting; MIG welding and seat cushioning did not end upon completion of one contract for service but was continuous and was done under the instructions, supervision and on a daily monthly and yearly basis for the respective periods. Indeed, the respondent had adduced that evidence during the trial and it was not sufficiently rebutted by the appellant.
22. What is material in this matter is whether the respondents despite being granted piece work contracts on a continuous basis actually converted to normal employees due to the nature, the manner and the period of the work served by the respondents at the premises of the appellant.
23. It is not in dispute that 1<sup>st</sup> claimant served for a period of 14 years from 2006 to 2<sup>nd</sup> June 2020; 2<sup>nd</sup> claimant for a period of 11 years from 2009 to 2<sup>nd</sup> June 2020; 3<sup>rd</sup> claimant for a period of 12 years from 2008 to 2<sup>nd</sup> June 2020; 4<sup>th</sup> claimant for a period of 10 years from 2010 to 2<sup>nd</sup> June 2020; 5<sup>th</sup> claimant for a period of 16 years from 2004 to 2<sup>nd</sup> June 2020; 6<sup>th</sup> claimant for a period of 4 years from 2010 to 2<sup>nd</sup> June 2020; 7<sup>th</sup> claimant for a period of 8 years from 2012 to 2<sup>nd</sup> June 2020; 8<sup>th</sup> claimant for a period of 10 years from 2010 to 2<sup>nd</sup> June 2020; 9<sup>th</sup> claimant for a period of 13 years from 2007 to 2<sup>nd</sup> June 2020; 10<sup>th</sup> claimant for a period of 10 years from 2010 to 2<sup>nd</sup> June 2020. 11<sup>th</sup> claimant for a period of 9 years from 2010 to 2<sup>nd</sup> June 2020 and the 12<sup>th</sup> claimant for a period of 12 years from 2008 to 2<sup>nd</sup> June 2020.
24. There was no compelling evidence by the respondent that there were any breaks and or any significant breaks in the continuous work done by the claimants although being dubbed piece rate work. The rate of payment for all claimants was the same fortnightly.
25. It is not in dispute that the claimants were all terminated from employment on 2<sup>nd</sup> June 2020 by being simply locked out of the premises. No notice of termination was served on them. They were not asked to answer to any disciplinary charges nor were they subjected to a disciplinary hearing. This was the finding of the trial magistrate in very few words, in the brief final determination of the trial court.



## The Law

26. Section 2 of the [Employment Act](#) defines, “piece work” as follows;

“means any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance.”

27. In terms of the sample contract for the 1<sup>st</sup> claimant dated 12/1/2009 titled “piece work wages contract agreement” the salient features are that the duties and rates of payment of the various jobs, are categorized as being Kshs.9,500/=; medium Kshs.700/= and small Kshs.7,000/=.

28. The contract then proceed to provide:

“However you may be asked by the management to do something else other than the above mentioned after agreeing with yourself and you accept.”

29. The duration of the contract is described as follows:-

“This contract is valid on confirmation of every job assigned on the material and worker requisition slips and expires once the job is finished, confirmed by the relevant management staff and the slip given at the payment register”

Payment is described as follows:-

“Every job detailed slip will only be paid as per the above rates once the job is completed, confirmed by the supervisor in charge and registered in the contractor payment register and will be done after two weeks and paid after 5 days. Payments will be made twice a month follows: -On the 15<sup>th</sup> of the month for work accomplished between the 26<sup>th</sup> of the previous month to the 10<sup>th</sup> of the current month. End of the month for the work accomplished from the 11<sup>th</sup> of current month to the 25<sup>th</sup> of the current month. All payment will be made through bank transfer”

30. Section 37(1) on the other hand provides.

“Notwithstanding any provisions of the Act, where a casual employee:-

- a. Works for a period of a number of continuous working days which amount in aggregate to the equivalent of not less than one month; or
- b. Perform work which cannot reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months or more:

“The contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to the contract of service”

31. Section 35(1)(c) on termination notice referred to above states:

- i. A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made in Kenya be deemed to be –



- ii. Where the contract is to pay wages periodically at intervals of less than one month a contract terminable by either party at the end of the period next following the giving of notice in writing.
32. A clear interpretation of the contracts between the respondents and the appellant has led the court to the conclusion that although, they were said to be contracts to perform piece rate work, the said contracts did not define specific work to be performed by the respondents. (emphasis added)
- As a matter of fact, the contracts specifically provided that work to be performed could be added or carried from time to time upon agreement by the parties. (emphasis added)
33. The evidence before court is that the work performed by the respondents did not end in one month, in three months or even in one year. The respondents continued to perform the same unending work for many years as demonstrated by evidence adduced before the trial court in case of each claimant.
34. In terms of section 37(4) which provides,
- “Notwithstanding any provisions of this Act in any dispute before the industrial court on the terms and conditions of service of a casual employee, the industrial court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with the Act.”
35. Black’s Law Dictionary Tenth Edition, defines casual employment as
- “occurring without regularity; occasional”
- The dictionary defines piece work to be
- “work done or paid for the piece or job”
36. It would have been absurd for the trial court to find that the respondents did piece work, reporting at 8 am to 5 pm daily, to work by themselves, using the appellant’s tools and under the supervision and disciplinary control of the appellant. The respondents did the work themselves and did not subcontract others to help them finish their respective tasks. The respondents were subject to the terms and conditions of service at the work premises provided by the appellant for periods of between four and twelve years. The work did not end, it was continuous and they left it behind when they were summarily dismissed from employment without notice or opportunity to be heard on 2<sup>nd</sup> June 2020.
37. The court has authority under provisions cited herein before to declare and find, notwithstanding the contracts titled otherwise, that in practice, the appellant was only avoiding the obligations of an employer to firstly give the respondents proper contracts of employment with rights and obligations as provided under section 10 of the Employment Act 2007. The court finds the trial court did not err in so finding and upholds the decision accordingly.
38. The trial court was right in deeming the work performed by the respondents to be done under contracts of service and not for service within the meaning of an employee and employer in terms of the Employment Act, 2007, were entitled to termination notice of equivalent of one month salary; to at least 21 days leave for every completed year of service; to terminal gratuity of at least 15 days salary for each completed year of service since the appellant did not regard the respondents as employees then so as to make statutory deductions and remission in respect of NSSF and NHIF by dint of section 35(5) (c) of the Employment Act 2007.



39. Furthermore, the respondents were entitled only to be summarily dismissed for a valid reason and the appellant following fair procedure as provided under sections 36, 41, 43 and 45 of the *Employment Act*, 2007.
40. The trial magistrate though did not give elaborate reasons for his decisions on liability did not misdirect himself in the finding that the summary dismissal of the respondents was unlawful and unfair and that the respondents were entitled for compensation in terms of section 49(1)(c) and (4) of the *Employment Act*, 2007.
41. This court upholds the decision of the trial court in this regard.
42. Furthermore, the appellant did not provide any evidence contradicting the wage order adduced by the respondents to be applicable to them at the time of termination on 2<sup>nd</sup> June 2020. We have no reason to fault the holding of the trial magistrate in respect to the minimum wage applicable to the respondents at the time of their termination. We uphold the finding that the minimum salary for the respondents was Ksh.32,000 at the time.

### **Compensation**

43. In awarding the twelve claimants a blanket compensation of the equivalent of six (6) months' salary to each one of them the learned trial magistrate did not state the reasons for that assessment of compensation as guided by section 49(4) of the *Employment Act*, 2007.
44. The trial magistrate should have considered the circumstances in which the dismissal took place including the extent if any to which the respondents caused or contributed to the dismissal.
45. In the present case, all the respondents were dismissed under similar circumstances and they did not contribute to the arbitrary and unlawful summary dismissal which was meted on them on 2/6/2020 when the respondent simply locked them out of the work place when they reported to work in the morning.
46. The trial magistrate did not also consider the length of service each of the respondents had served the appellant; the opportunity available to the respondents to search comparable or suitable employment with another employer; the value of the service pay paid to them which in this case is solely dependent on the salary each one of them earned at the time of dismissal and the length of service of each one of them served. All were paid at the same rate and so were entitled to same monthly salary guided by the general wage order for the artisans in their cadre.
47. The respondents were affected equally by the sudden loss of income and the respondent did not adduce evidence to show that he respondents may have caused or contributed to the summary dismissal having failed to conduct any disciplinary hearing before summarily dismissing all of them on the morning of 2<sup>nd</sup> June 2020.
48. We did not have any evidence as to whether any of the respondents had made effort to secure alternative employment and mitigate their loss and none of the respondents were paid any compensation or ex-gratia payment upon summary dismissal.
49. This court finds that the only distinguishing features is only the length of service by each claimant and the difference in the job designation.
50. The court finds that this court will not interfere with the awards made by the trial magistrate simply because this court would have arrived at a different decision.



51. Accordingly, the court has established that the guiding factors under section 49(4) are similar in respect of all the respondents except the period of service by each of the claimants.
52. The court finds it fair and just to retain the award by the trial court without any interference.
53. In the final analysis the judgment by the trial court is upheld in respect of the finding on liability and the reliefs granted to the claimants.
54. The appellant to meet the costs of the appeal and trial proceedings

**DATED AT NAIROBI THIS 13<sup>TH</sup> DAY OF JUNE, 2024**

**MATHEWS NDERI NDUMA**

**JUDGE**

Appearance:

Ms. Rebecca Mogire for the appellant

Ms. Mugo for respondent

Mr. Kemboi, Court Assistant

