Kibos Distillers v Onyango (Appeal E082 of 2024)
[2025] KEELRC 2590 (KLR) (29 September 2025) (Judgment)

Neutral citation: [2025] KEELRC 2590 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E082 OF 2024

JK GAKERI, J

SEPTEMBER 29, 2025

BETWEEN

KIBOS DISTILLERS ..... APPELLANT

AND

NYAPARA OSIKE ONYANGO ..... RESPONDENT

JUDGMENT

1. This is an appeal against the Judgment of Hon. K. Cheruiyot, SPM delivered on 18th May, 2023 in CMELRC No. E172 of 2021, Nyapara Osike Onyango V Kibos Distillers Ltd.

2. The brief facts of the case are that the appellant employed the respondent as a fermentation operator on 17th November, 2018 and appear to have served diligently until 24th May, 2021 when he was accused by the respondent of having stolen ethanol and was suspended vide letter dated 24th May, 2021, and responded vide handwritten letter dated 25th May, 2021 denying the allegation and proposing thorough investigations to unearth the truth. The respondent was invited to a disciplinary hearing vide a short message on 3rd June 2021 at 2:23pm scheduled for 4th June, 2021 at 10:00am, attended the hearing and was dismissed from employment vide letter dated 14th June, 2021 and acknowledged receipt, cleared and was paid the sum of Kshs.42,024.00 and signed a discharge voucher.

3. The respondent prayed for damages for wrongful termination of employment, Kshs.229,320, comprising leave allowance and damages, certificate of service, costs and interest.

4. The appellant denied having employed the respondent on 17th November, 2018 and averred that he was the author of his misfortune as he had been stealing the appellant's ethanol.

5. The appellant admitted having issued the suspension letter dated 24th May, 2021 and the respondent responded as requested but the appellant was not satisfied with the explanation and subjected the respondent to a disciplinary process and terminated his employment vide letter dated 14th June, 2021 and the respondent had no pending leave days.

6. After considering the pleadings, evidence on record and submissions by counsel, the learned trial magistrate found that termination of the respondent's employment by the appellant was unfair and awarded the sum of Kshs.246,960 less the amount paid, a balance of Kshs.204,936 remained outstanding. The court also awarded costs, interests and certificate of service.

   This is the judgment appealed against.

7. The appellant faulted the trail court for having erred in law and fact by:

   a. Disregarding the discharge voucher on record.

   b. Misapprehending the evidence on record and thus arriving at an erroneous conclusion.

   c. Misapprehending the provisions of Section 44 of the *Employment Act*.

   d. Failing to appreciate the role played by the respondent in the separation.

   e. Lowering the standard of proof to the prejudice of the appellant.

   f. Disregarding the evidence tendered by the appellant and

   g. The judgment of the trial court was against the weight and tenor of the evidence on record.

8. The appellant prayed that the appeal be allowed, trial court's judgment set aside and an Order dismissing the respondent's case issued.

9. By the time the court retired to prepare this Judgment none of the parties had filed submissions.

10. Being the first appellate court in this matter, the court is enjoined to reconsider and re-evaluate the evidence on record afresh and arrive at its own conclusions bearing in mind that it has neither seen nor heard the witnesses and make due allowance.

11. As held in Selle & another V Associated Motor Boat Co. Ltd [1968] EA 123 and other decisions such as Peters V Sunday Post Ltd [1958] EA 424.

12. In Mursal & another V Manese (suing as the Legal Administrator of Dalphine Kanini Manesa [2022] KEHC 282 (KLR) Mativo J (as he then was) stated as follows:

> " A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in Selle & another V Associated Motor Boat Co. Ltd. & others and Peters V Sunday Post Limited. A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court"

13. A perusal of the Grounds of Appeal dated 20th December, 2024 reveals that while ground No. 1 challenges the trial court's disregard of the discharge voucher, and ground No. 4 is specific to the provisions of Section 44 of the *Employment Act*, all the other grounds assail the trial court's

appreciation and application of evidence in its decision. The appeal is primarily premised on the evidence availed to the trail court.

14. The pith and substance of the appeal is whether the evidence provided by the parties justified the decision the court arrived at.

15. Needless to underline, the discharge voucher was also part of the evidence at the disposal of the trial court.

16. A summary of the evidence on record reveals that the respondent provided a total of five (5) documents namely, suspension letter dated 24th May, 2021, print out of sms response to the suspension letter, termination letter dated 14th June, 2024 and a completed clearance form.

17. The appellant on the other hand availed a copy of a cheque number 002666 for Kshs.42,024.00 in the name of the respondent, discharge voucher dated 29th July, 2021, minutes of the disciplinary hearing, letter of termination, print out of the sms response to the suspension letter, photographs of used plastic bottles, incident report dated 24th May, 2021 and employment form.

18. From the foregoing list and the oral testimony adduced at the hearing in court on 13th March, 2025, the facts of the case were largely agreed upon as regards employment, allegation of having stolen ethanol, suspension, response, invitation to the disciplinary hearing by sms, hearing and termination.

19. It was not in contest that no notice to show cause was issued though the suspension letter required a response, no specific charges were preferred against the respondent, no investigation report or other evidence was adduced at the disciplinary hearing, the respondent was not informed of his rights, and the termination letter did not detail the reason(s) for termination of employment.

20. The trial court found and held that the appellant had not proved that the respondent stole any ethanol.

21. While that may have been the position, the reason relied upon by the court is curious.

22. The trial court reasoned that since stealing is a criminal offence, the appellant ought to have proved it beyond any reasonable doubt consistent with the standard of proof in criminal cases, a finding the appellant contested as prejudicial to the appellant and this court is in agreement with the appellant's assertion for the simple reason that the appellant was not conducting a criminal trial as these were internal disciplinary proceedings and the standard of proof is on a preponderance of probabilities.

23. See in this regard, Miller V Minister of Pension [1947] ALLER 372, James Muniu Mucheru V National Bank of Kenya Ltd [2019] eKLR, Jackson Mwambili V Peterson Mateli [2020] eKLR and Palace Investment Ltd V Geoffrey Kariuki Mwenda & another [2015] eKLR.

24. It must be demonstrated that the alleged fact was more probable than not.

25. By ascribing the standard of proof beyond reasonable doubt applicable in criminal cases, the trial court prejudiced the appellant's case.

26. For a termination of employment to pass muster it must be proved that the employer had a substantive justification to terminate the employee's services and did so in accordance with a fair procedure as held in Walter Ogal Anuro V Teachers Service Commission [2013] eKLR.

27. Under Section 43 of the *Employment Act*.

    1. ...

    2.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

28. All that the employer is required to show is that it had sufficient and reasonable basis to genuinely believe that it had a reason to terminate the employee's employment as held in Galgalo Jarso Jillo V Agricultural Finance Corporation [2021] eKLR.

29. In Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 Others [2019] eKLR, the Court of appeal observed

> The standard of proof is on a balance of probability, not beyond reasonable doubt and all the employer is required to prove are the reasons it "genuinely believed to exist" causing it to terminate the employee's services. That is a partly subjective test".

See also Bamburi Cement Ltd V William Kilonzi [2016] eKLR.

30. In charging and prosecuting the respondent, the appellant used the incident report dated 24th May, 2021 and the photographs of used plastic bottles found by the security officer, who suggested names of the persons most likely involved.

31. Puzzlingly, no investigation report was produced yet the suspension letter was explicit that the suspension was pending investigation.

32. Similarly, there was no evidence to show that the respondent was interviewed on the issue or any other step was taken before the disciplinary hearing. The respondent's role in the alleged theft remained unknown.

33. In the court's view the appellant did not adduce evidence to demonstrate that it had reasonable and sufficient basis for its belief that the respondent was implicated in the theft of ethanol. An investigation would have revealed the real culprits and the respondent might have been one of them.

34. The foregoing is also discernible from the absence of a notice to show cause with a clear allegation(s) and relevant particulars.

35. Equally, the letter of termination of employment did not identify the reason(s) for termination of the respondent's employment. To that extent the court is not persuaded that the appellant demonstrated that it had a substantive justification or valid and fair reason to terminate the respondent's employment.

36. Section 44 of the *Employment Act* identifies specific types of conduct which would amount to gross misconduct and stealing falls in that category.

37. However, the allegation ought to be supported by verifiable evidence. The factual circumstances or particulars are more critical than the allegation. In this case, the appellant's case was based on an unsubstantiated allegation.

38. This is vividly demonstrated by the fact that during the hearing neither the documents nor witnesses were availed to give evidence.

39. An investigation report would have revealed when ethanol stolen, how much, method used and the persons involved. The fact that the respondent had access to ethanol was not sufficient evidence that he is the one who stole it bearing in mind that RWI confirmed that it was not consumable.

40. In sum, the appellant failed to adduce evidence connecting the respondent to the alleged theft of ethanol and thus failed to discharge the burden of proof that it had a substantive justification to terminate the respondent's employment as by law required.

41. The court is in agreement with the trial court that termination of the respondent's employment by the appellant was substantively unfair.

42. On procedure, it is patently clear that the appellant committed various fundamental procedural flaws which rendered the termination of the respondent's services procedurally unfair. It is equally clear that the appellant failed to comply with the provisions of Section 41 of the *Employment Act* which are mandatory as held in Pius Machafu Isindu V Lavington Security Guards Ltd [2017] eKLR and Jane Samba Mukal V Ol Tukai Lodge Ltd [2013] eKLR, which rendered the termination of the respondent's services procedural unfair in the following ways;

> First, the respondent used a short message service (sms) to invite the respondent to the disciplinary hearing as the main method. A detailed notice setting out the reason for invitation, place, date and time of the meeting and the employee's rights is necessary. A single sentence sms falls below the prescribed threshold as held in Postal Corporation of Kenya V Andrew K. Tanui [2019] eKLR.
>
> Second, the message did not inform the respondent that he was at Liberty to be accompanied by a fellow employee of his choice or a shop floor union representative or a witness. This was a critical omission.
>
> Third, the less than one (1) day notice of the meeting was undoubtedly inadequate for purposes of enabling the respondent secure a colleague or shop floor union representative for his defence, arguments he raised before the trial court. The law insists on reasonable time dependent on the circumstances of each case. In the court's view at least 4 days as a minimum.
>
> Fourth, at the disciplinary hearing no evidence was adduced by way of an investigation report or witness testimony. The committee merely relied on the evidence of the security officer, which document had not been furnished upon the respondent for perusal.

43. The appellant adduced no evidence to show that the document mentioned in the report implicated the respondent in person or the role he played in the alleged theft, bearing in mind that the appellant had no CCTV cameras at the time.

44. Needless to belabour, non-availment of the evidence an employer intends to rely on at the disciplinary hearing vitiates a disciplinary process, because it jeopardizes the employee's right to fair hearing and impairs his/her ability to launch an effective defence to the allegations.

45. From the minutes on record, is discernible that the charges were read out to the respondent by way of the agenda and he was accorded an opportunity to defend himself, was notified of the outcome and informed of the right to appeal which he did not exercise.

46. See Ol Pejeta Ranching Co. V David Wanjau Muhoro [2021] eKLR and Regent Management Ltd V Wilberforce Ojiambo Oundo [2019] eKLR.

47. This far and analogous to the trial magistrate, this court is satisfied and finds that termination of the respondent's employment by the appellant vide letter dated 14th June, 2021 was unlawful for want of procedural propriety and thus unfair within the meaning of Section 45 of the *Employment Act*.

48. On termination of the respondent's employment, the learned trial magistrate appreciated the evidence before the court and in the court's view applied it correctly to find that termination of the respondent's services by the appellant was unfair.

49. The foregoing addresses grounds 2, 3, 4, 5, 6 and partly 7 of the grounds of appeal.

50. As to whether the learned trial magistrate disregarded the discharge voucher, it requires no belabouring that a perusal of the six (6) page judgment delivered on 18th May, 2023 reveals that the trial court did not address its mind to the import or effect of the discharge voucher on record which the respondent admitted having signed after receiving payment.

51. The trial court merely deducted the amount paid by the appellant as terminal dues from the total award.

52. The failure by the trial court to examine and determine the import of the discharge voucher on the entire suit amounted, in the court's view, to a misdirection.

53. The principles that govern deeds of release, discharge vouchers and settlement agreements are well settled.

54. In Coastal Bottlers Ltd V Kimathi Mithika [2018] eKLR, the Court of Appeal stated as follows:

> Whether or not a settlement or discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with such an issue, in our view, should address its mind firstly, on the import of such a discharge/agreement; and secondly whether the same was voluntarily executed by the concerned parties".

55. The court expressed similar sentiments in Thomas De La Rue Ltd V David Opondo Omutelema [2016] eKLR that:

> We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligations and that it cannot preclude the Industrial court from inquiring into the fairness of a termination.

56. That is however, so far as were are prepared to go. The court has in every case, to make a determination if the issue is raised, whether the discharge voucher was freely executed when the employee was seized of all the relevant information and knowledge".

The court is guided by these sentiments.

57. In the instant case, and as adverted to elsewhere in this judgment, the respondent admitted on cross-examination that he signed the discharge voucher on record but did not know the contents.

58. The Discharge Voucher on record dated 29th July, 2021 under the title 'In the Matter of Payment of Terminal dues and Final Dues' stated in part:

> I Nyapara Osike Onyango of National Identity Card Number XXXXXXX and P. O. Box 566 Suna former employee of M/s Kibos Distillers Limited P/F No. 02043 of P. O. Box 3115 Kisumu do hereby acknowledge that
>
> a. ...
>
> b. ...

I, in consideration for the ex gratia payment and receipt of Kenya Shillings Fourty Two Thousand And Twenty Four Only (Kshs.42,024.00 via Cheque No.002686 dated 22nd July, 2024 (receipt of payment is hereby acknowledged), I hereby unconditionally, wholly and fully discharge the former employer from all past, present and future claims (financial, monetary and of any other nature) by me or on my behalf arising out of in respect to over and during my employment against the said Former Employer.

I hereby confirm and declare that I have read and understood the contents, substance and purport of this Discharge Voucher and that have willingly and voluntarily executed/signed the same"

Date At Kisumu by the said

This 29th day of July 2021

Lorna O. Odhong ....

Advocate Sign. Thumb Print

Witnessed by Walter Odhiambo Juma ID No.XXXXXXXXX, P. O. Box 371 Iten

Cellphone No.XXXXXXXXX

.....

SIGN.

59. To the respondent assertion that he did not know the contents of the discharge voucher, the common law has the answer that signature prima facie means acceptance, as held in L'estrange V Grancob [1934] 2 KB 394.

60. In Parker V South Eastern Railway Co. [1877] 2 CPD 416 Mellish L J stated:

> In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents".
>
> Maugham L. J. expressed similar sentiments in L'Estrange V Grancob (supra).

61. In the instant case, the respondent's evidence that he did know the contents of the discharge voucher could not avail him having signed it in the presence of a witness Mr. Walter Odhiambo Juma. He was bound by its contents.

62. Significantly, the respondent did not allege fraud, misrepresentation, duress or undue influence on the part of the appellant or mistake on his part so as to plead non est factum.

63. It is trite law that a discharge voucher is a contract in its own right by which parties free themselves from obligations they had entered into prior.

64. In Trinity Prime Investment Ltd V Lion of Kenya Insurance Co. [2015] eKLR, the Court of Appeal held:

> The execution of a discharge voucher, we agree with the learned Judge constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was fully discharged".

The court expressed similar sentiments in Coastal Bottlers Ltd V Kimathi Mithika (supra).

65. The foregoing sentiments apply on all fours to the circumstances of the instant case. The respondent admitted having signed a discharge voucher and did so in the presence of an advocate and a witness and was thus bound by its contents hook, line and sinker.

66. The respondent waived his right to pursue further claims against the appellant relating to the employment relationship and the suit he instituted against the appellant ought to have been dismissed.

67. Relatedly, the respondent's conduct, likewise, estopped him suing the appellant consistent with the doctrine of promissory or equitable estoppel as espoused in Central London Property Trust Ltd V High Trees House Ltd [1947] KB 130 and exquisitely elucidated by Lord Denning L. J. in Combe V Combe [1951] 2KB 215.

68. Having signed the discharge voucher, the respondent made a representation to the appellant that he would not institute any proceedings against the appellant after payment of Kshs.42,024.00, the appellant relied on the representation and paid the sum of Kshs.42,024.00 in the belief that no other claim would be made against it by the respondent, the respondent was estopped from instituting any claim against the appellant as it would be inequitable to do so.

    The appellant was fully discharged.

    See in this regard, Century Automobiles V Hutchings Biemar Ltd [1965] EA 304.

69. Having found that the respondent waived his right to pursue any other claim against the appellant by signing a discharge voucher on 29th July, 2021 the court's finding that termination of his employment was unfair amounts to nothing at this stage.

70. Finally, in the court's view, other than disregarding the discharge voucher which was an important piece of evidence and on which the case ought to have turned, the learned trial magistrate cannot be faulted for having misapprehended or misapplied the evidence on record. Save as adverted to elsewhere in this judgment, the trial court's judgment was consistent with the evidence availed by the parties.

71. The upshot of the foregoing is that the appellant's appeal succeeds in. The judgment of the trial court is set aside in its entirety and in its place an Order dismissing the respondent's case in the Magistrate's court with costs.

    Parties shall bear own costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 29TH DAY OF SEPTEMBER, 2025.

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty

of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.