Roadtainers (Msa) Ltd v Munuve (Civil Appeal E116 of 2022)
[2025] KECA 1302 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KECA 1302 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E116 OF 2022

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

JULY 18, 2025

BETWEEN

ROADTAINERS (MSA) LTD ..... APPELLANT

AND

MUMO KIMINZA MUNUVE ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Mombasa (Ndolo, J.) dated 7th October 2021 in ELRC Cause No. 389 of 2018)

JUDGMENT

1. This is an appeal from the Judgment of the Employment and Labour Relations Court of Kenya (the ELRC) at Mombasa dated and delivered on 7th October 2021 by (Ndolo, J.). In the Judgment, the learned Judge allowed Mumo Kiminza Munuve's (the respondent) claim against Roadtainers (Msa) Limited (the appellant). Aggrieved, the appellant filed this appeal urging us to: allow the appeal and set aside, vary and review the judgement of Ndolo, J. delivered on 7th October 2021; dismiss the respondent's claim with costs; and award costs of the appeal to it.

2. As mandated by rule 31(1) (a) of the Court of Appeal Rules, 2022, we are required to re-appraise the evidence adduced before the trial court and draw our own inferences of fact.

   However, we must bear in mind that we did not have the advantage of seeing and hearing the witnesses testify, and so give due allowance for this. If no witnesses testified, our jurisdiction is to be exercised with caution, also bearing in mind that we must not necessarily come to a different conclusion.

3. In the case of Ng'ati Farmers' Co-operative Society Ltd. vs. Ledidi & 15 Others [2009] KLR 331, this Court's espoused its mandate on first appeal as follows:

   > " An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this

Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

4. Again, in Peters vs. Sunday Post Ltd [1958] E.A 424, the Court had the following to say:

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."
>
> See also: Selle vs. Associated Motorboat Company Ltd (1968) EA 123

5. As a background, the respondent instituted a suit against the appellant by way of a Memorandum of Claim dated 30th May 2018 seeking the following orders:

   a. that the appellant be ordered to pay the respondent his terminal and contractual dues amounting to Kshs.465,768;

   b. costs of the claim and interest thereon at court rates;

   c. a declaration that the dismissal of the respondent from work was unfair and unjust;

   d. that the respondent be issued with a Certificate of Service; and

   e. any other or further relief.

6. The respondent was employed by the appellant as a long- distance truck driver in November 2013, earning a salary of Kshs.28,428 per month until the month of May 2016 when he was terminated from his employment; that, in the course of his duties on 24th October 2015, and while on his way from Malaba to Mombasa, he was involved in a road traffic accident at Webuye; that he was treated at Webuye District Hospital and, on 25th October 2015, he was transferred to Moi Teaching and Referral Hospital in Eldoret; that, when he returned to Mombasa, he continued with his treatment as an outpatient in a different facility which he did not disclose in his pleadings; that on 31st March 2016, he went back to work and was issued with a sick sheet, directing him to go to Aga Khan Hospital in Mombasa to be examined by one Dr. Mulunga; that, after the examination, Dr. Mulunga recommended that he be given alternative duties instead of driving trucks; and that, around May 2016, he was called by the appellant and directed not to report back to work because of the injuries that he sustained.

7. The respondent contended that the decision to terminate his employment was unfair, unprocedural and unlawful since the requirements under sections 41, 43 and 45 of the *Employment Act* (the Act) were not adhered to. He was aggrieved that he was not notified of the impending termination, and nor was he paid salary in lieu of notice; that he never proceeded for leave; that he used to work seven days a week and during holidays without pay; and that the actions of the appellant were in breach of the rules of natural justice as envisaged under section 45 of the Act, Articles 41 and 47 (1) of *the Constitution* of Kenya and the ILO: Termination of Employment Convention No. 158, 1982.

8. In view of the foregoing, the respondent computed the dues to which he was entitled as follows:

   a. One-month salary in lieu of notice Kshs.28,428.00

   b. Leave for the period between November 2013 - May 2016 (2 years) 28, 428 x 2 years Kshs.56,856.00

   c. Public holidays for the period between November 2013 to May 2016 (18 holidays) (1,093x18) x2 Kshs.39, 348.00

   d. Compensation for unfair termination 28,428 x 12 months Kshs.341, 136.00

      Total Kshs.465, 768.00

9. Opposing the claim, the appellant filed a response dated 4th March 2019 which was later amended on 24th July 2020 to include a counterclaim. The appellant admitted that the respondent was its employee, and that he was involved in a self-involving accident at Webuye; that, as a result of the respondent's negligence, it incurred loss and damages, including but not limited to, medical bills, breakdown and recovery charges for the overturned truck, damage to container, payment of salaries while on sick leave and damage to motor vehicle KBS 485W Beiben Truck; that, upon confirmation that the respondent could not recover and fully revert to his usual duties, he was called to a meeting and informed that the appellant could no longer retain him in his state; and that, he was paid all his terminal dues, including outstanding leave dates in the presence of his colleague and wife.

10. In its counterclaim, the appellant stated that the respondent breached the terms of employment and the Company Policy and Code of Conduct. It particularised the alleged breach of contract by the respondent as follows:

    i. driving a motor vehicle carelessly and/or without any regard to the Highway Code;

    ii. failing, neglecting and/or refusing to abide by the Company Policy and Code of Conduct;

    iii. failing to protect the cargo entrusted to him to ferry safely;

    iv. failing to pay attention to the road while driving the appellant's motor vehicle; and

    v. otherwise causing loss to the company as a result of the accident herein.

11. The appellant further particularised the loss and damage on

    the respondent's part as follows:

    i. breakdown or recovery charges for M/V KBS 485W - Kshs.158,500

    ii. refund of salaries paid beyond the sick leave -Kshs. 78,170 Total -Kshs.236,670

12. For the above reasons, the appellant asked that the respondent's claim be dismissed with costs and that judgement be entered against him as follows:

    i. special damages - Kshs.236, 670;

    ii. general damages for lost of business and breach of contract; and

    iii. costs and interest.

13. In a rejoinder to the appellant's response to the Memorandum of Claim and in response to the counterclaim, the respondent denied the particulars of negligence attributed to him as a result of the accident. He stated that it was the appellant who was in breach of the terms of employment by

not assigning him lighter duties as recommended by Dr. Mulunga. The respondent particularised the breach of contract on the part of the appellant as:

i. terminating the respondent's services without notice;

ii. terminating the respondent's services without affording him a hearing;

iii. refusing to pay the respondent's terminal dues; and

iv. refusing to issue the respondent with a certificate of service.

14. On 21st May 2021, the respondent took the witness stand to give his testimony. However, after a brief testimony, he was stood down on account of poor memory recollection of the events leading to his termination of employment. By consent of both counsel on record, the claim proceeded by way of written submissions.

15. After considering the pleadings, the response and the written submissions of all the parties, the learned Judge (Ndolo, J.) isolated three issues for determination. Firstly, on whether termination of the respondent's employment was lawful and fair, the learned Judge considered the contents of the letter of termination dated 14th May 2016 and reproduced it in her judgment. She held that it was evident from the letter that the respondent was terminated on account of incapacity as a result of the injuries sustained in the course of his duty.

16. While referring to the decisions of Kennedy Nyanguncha Omanga vs. Bob Morgan Services Limited (2013) eKLR; and Kenya Plantation and Agricultural Workers Union vs. Rea Vipingo Plantations Limited & Another (2015) KEELRC 27 (KLR) in which the ELRC discussed the steps to be taken by an employer when an employee is sick before termination of employment, the Judge was of the view that the appellant did not attempt to re-deploy the respondent as recommended by his doctor, nor was he subjected to due process; that, therefore, the respondent's termination was found to be unfair; and that, consequently, he was entitled to compensation.

17. Secondly, on the remedies which the respondent was entitled to, the Judge awarded the respondent 12 months' salary as compensation for unlawful termination while taking into account the length of service, the appellant's alleged unlawful conduct and the unlikelihood of the respondent to secure any other employment. The respondent's claim for pay in lieu of notice, leave pay, one month's salary and claim for public holidays were found to be unmerited and were thereby dismissed.

18. Thirdly, on the appellant's counterclaim, the learned Judge held that it was solely based on the allegation that the respondent was to blame for the accident of 25th October 2015; that no evidence was led to establish causation; and that special damages were not proved with precision. The counterclaim was dismissed.

19. The result was that judgement was entered in favour of the respondent for: a sum of Kshs.341,136, being 12 months' salary as damages for unlawful termination; interest thereon from the date of judgement until payment in full; certificate of service; and costs of the suit.

20. Aggrieved, the appellant is now before this Court on appeal. In a Memorandum of Appeal dated 7th November 2022, he has raised six (6) grounds of appeal faulting the learned Judge for erring in law and in fact in:

i. finding that the respondent's services were unfairly terminated by the appellant;

ii. finding that the appellant failed to redeploy the respondent to an alternative workstation;

iii. failing to note that the respondent had signed a discharge voucher in the presence of his wife and a colleague absolving the applicant from any further claim (s);

iv. failing to consider that the respondent solely contributed to the accident that resulted in his incapacity;

v. failing to award the counterclaim filed by the appellant; and

vi. failing to consider the submissions by the appellant.

21. We heard this appeal on 28th January 2025. Learned counsel Miss Zamzam Abdi was present for the appellant while learned counsel Mr. Tolo was present for the respondent. Both counsel relied on their respective parties' written submissions. Those of the appellant are dated 21st January 2025 while of the respondent are dated 7th December 2023.

22. According to the appellant, it did its best to sustain the respondent at work until it became practically impossible for him to work; that for 8 months after the accident, it maintained the respondent in employment in the hope that his condition would improve; that when the respondent's condition did not improve, the appellant invited him for a meeting in the company of his wife, one Mercy Kalunda King'ondu and a colleague friend, one Tito Nzuki Mathuva, so as to deliberate on the way forward; that the medical reports, including one from the respondent's own doctor, indicated that he had loss of vision of one eye, and mental deterioration and forgetfulness; and that, consequently, the appellant had good and justifiable reasons to relieve the respondent of his duties. On account of the respondent's poor health, the appellant submitted that the respondent's termination could not be said to be unfair.

23. The appellant further submitted that its business involved operation of heavy plant equipment, machinery, truck and other hazardous materials, which would be inherently dangerous to the respondent; that it took close to 3 months to find the respondent a suitable workstation, but to no avail; and that, as it had nowhere else to redeploy the respondent, relieving him of duty was the only option.

24. The appellant also contended that the respondent did not dispute the validity of the discharge voucher, but that, instead, he confirmed and/or acknowledged it; that the respondent never challenged his capacity to execute the discharge voucher; and that the respondent could not impugn the discharge voucher at this stage as it was admitted in evidence at trial. Reference was made to this Court's decision in Coastal Bottlers Limited vs. Kimathi Mithika (2018) KECA 523 (KLR); and Trinity Prime Investment Limited vs. Lion of Kenya Insurance Company Limited (2015) KECA 793 (KLR) in which the legal implications of a discharge voucher were extensively discussed.

25. On the merits of its counterclaim, the appellant submitted that it proved that the accident was self-involving; that the respondent was in control of the motor vehicle that did not have mechanical issues at the time; and that, on these grounds, the trial court should have compensated it for expenses incurred in repair of the truck as attested in the Petty Cash Voucher and the reimbursements claimed in the counterclaim.

26. In conclusion, the appellant submitted that the award of damages made to the respondent for unfair termination and costs were erroneous. It prayed that the judgement of the ELRC be set aside, and that judgement be entered in its favour as per the counterclaim.

27. On the part of the respondent, it was submitted that, although the appellant cited the reasons for his (the respondent) termination as physical incapacity, he was not given an opportunity to be heard and make his representation on these allegations contrary to this Court's finding in Kenfreight (E.A) Limited vs. Benson Nguti (2016) KECA 688 (KLR) and the provisions of section 41(1) of the

Employment Act. We were urged to find that the learned Judge did not err in fact and in law by holding that the respondent's services were unfairly terminated by the appellant.

28. On the failure to redeploy the respondent to an alternative workstation, it was submitted that Dr. Mulunga's medical report recommended that he be assigned lighter duties. Reliance was placed on the case of Package Insurance Brokers Limited vs. Simon Gitau Gichuru (2019) KECA 477 (KLR) where, on appeal, this Court allowed damages for discrimination on account of sickness, yet the respondent therein did not avail his medical report. The respondent submitted that, in this instance, he produced the medical report to support that he was indeed terminated because he was unwell, and that, therefore, the damages awarded to him were warranted.

29. As to whether he executed the discharge voucher, the respondent submitted that he was not in a mental state that would have enabled him to freely and willingly sign a discharge voucher as he had sustained serious injuries. Reference was made to this Court's decision of Thomas De La Rue (K) Ltd vs. David Opondo Omutelema (2013) KECA 492 (KLR) for the proposition that, when a question of execution of a discharge voucher are raised, the court has to make a determination on its legality.

30. Lastly, as regards the counterclaim, the respondent submitted that the claim made therein was in the nature of special damages; that special damages ought to have been strictly proved, but which was not done in this case; and that, further bearing in mind that the police abstract did not indicate that he was to blame for the accident, neither was any evidence adduced to the effect that he was culpable for the accident, the counterclaim was rightfully dismissed.

31. The respondent thus prayed that the appeal be dismissed; and, as was observed by Supreme Court in Kenfreight (E.A) Limited vs. Benson Nguti (2019) KESC 79 (KLR), we should award him remedies pursuant to section 49 of the Act.

32. We have accordingly considered the record of appeal and respective rival submissions. In our view, the issues that fall for our determination are:

    i. whether the procedure for termination of the respondent's employment was in accordance with the laid down procedure as underpinned in the *Employment Act*;

    ii. whether the respondent's termination and the reasons thereof were lawful;

    iii. whether the appellant was obligated to assign other duties to the respondent;

    iv. the place and effect of the discharge voucher signed by the parties; and

    v. whether the appellant proved its counterclaim.

33. There is no doubt that there is a meeting of the mind by the appellant and the respondent that there existed an employment relationship between them. The record confirms this as there is a Contract of Employment dated 14th October 2013 in which the respondent was employed by the appellant as a Heavy Commercial Vehicle Driver with effect from 28th October 2013. It is also common ground that the respondent received a monthly salary of Kshs.28,428. Further, it is not disputed that the respondent was involved in an accident in Webuye on 23rd October 2015, resulting to his inability to continue with his duties as a driver; and that, his services were terminated by a letter dated 14th May 2016. We shall come back to the contents of this letter later on in this judgement.

34. We shall condense the first, second and third issues and determine them together as they are inter-twined. The relevant provisions in the Act which we shall examine and are relevant in our discourse are sections 41, 43, 45 and 47.

35. Section 41(1) and (2) make it compulsory that, prior to the termination of an employee, he/she should be notified as follows:

    1. Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

    2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds on the grounds of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.

36. Section 43(1) and (2) make it incumbent upon the employer to set out the reasons for the termination of an employment contract with the employee by providing that:

    1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

    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.

37. Section 45 provides for when and under what circumstances unfair termination can be said to arise, thus:

    1. No employer shall terminate the employment of an employee unfairly.

    2. A termination of employment by an employer is unfair if the employer fails to prove-

        a. that the reason for the termination is valid;

        b. that the reason for the termination is a fair reason-

            i. related to the employees conduct, capacity or compatibility; or

            ii. based on the operational requirements of the employer; and

        c. that the employment was terminated in accordance with fair procedure.

    3. An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

    4. A termination of employment shall be unfair for the purposes of this Part where-

        a. the termination is for one of the reasons specified in section 46; or

        b. it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

5. In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Industrial Court shall consider-

   a. the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

   b. the conduct and capability of the employee up to the date of termination;

   c. the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

   d. the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

   f. the existence of any previous warning letters issued to the employee.

38. It is clear that section 41 makes it mandatory for an employer to notify its employee of the intention to terminate his/her services, among other grounds, and for our purpose, for physical incapacity. It does not end there as an employer is expected to conduct a hearing and consider any representations made by an employee before termination. Even as an employer exercises his/her right to sever his/her relationship with an employee, the reasons thereof should be provided, and they should be valid as encapsulated by sections 43 and 45 of the Act.

39. This Court in Janet Nyandiko vs. Kenya Commercial Bank Limited (2017) eKLR summarized the above procedure as follows:

> "Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.
>
> The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.
>
> Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in

the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations levelled against him by the employer."

40. We emphasise that the burden of proof as to the events which led to the termination solely lies with the employer as provided for under section 47(5) of the Act as follows:

> For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

41. From the evidence on record, it is evident that the respondent was issued with a notice of Termination of Services vide a Letter dated 14th May 2016. The reasons for the termination were outlined as follows:

> "As per your doctor's report, you are unable to comprehend clearly and still suffer memory lapses and poor eyesight. He has recommended light duties for you.
>
> The company has tried to find a suitable position to place you but in vain. The company is left with no option but to terminate your services with effect from 14th May 2016."

42. Prior to the issuance of the above letter, there is no evidence on record that the appellant strictly adhered to the procedure outlined in section 41(1) and (2) of the Act. In stricto sensu, it would be easy to infer that the respondent's termination was unfair and unlawful. Ms. Zamzam, learned counsel for the appellant, submitted that the termination of the respondent not being on grounds of gross misconduct, it was not necessary to conduct a hearing as envisaged under section 41 of the Act.

43. Suffice it to state that it is always not necessary that an oral hearing must ensue for it to be said that a fair hearing was conducted. Oral hearing may be necessary where the accusation(s) against the employee is so grievous and there exists highly contested facts. And, when no oral hearing is conducted, the employer must ensure that the procedure undertaken prior to the termination achieves the required degree of fairness under the statute. We say so taking to mind the decision of R vs. Immigration Appeal Tribunal Ex- Parte Jones (1988) 1 WLR 477, 481 where the English Court of Appeal stated:

> "the hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing...Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made..."

44. The special circumstances which arose in this case are fairly simple. The respondent was terminated on account of his health status, being his inability and incapacity to continue discharging his duties as a driver. There are two different independent medical reports which reported on his health status and his functional abilities as a driver after the accident. The first report is by Dr. Mulunga dated 31st March 2016. Two years later, a second report by Dr. Ajoni Adede dated 16th February 2018 was prepared. The common thread running in both reports is that the respondent was adjudged to have a percentile disability of 40-50% due to a brain injury. The eventual debilitating aftermath of the accident was that the respondent would generally suffer mental shutdown, loss of memory and loss of vision.

45. In our view, whether an employee is willing and able to work, and when he or she may be in a position to do so, are material considerations. The court should draw inferences from the circumstances before it to make a finding on the employee's incapacity, whether he or she has been absent from work for an unreasonably long period of time and whether alternatives to dismissal exist.

46. In as much as there was a recommendation from Dr. Mulunga that the respondent should be allocated alternative duties, and with which the trial court agreed, the respondent did not lead evidence on the skills and qualifications he possessed which would otherwise have proved useful to the appellant's company in order for him to be given alternative duties, given that he was employed as a driver. Neither did he point out, or inform the appellant of the other duties he had the ability to execute.

47. To our minds, in so far as anything turns on it, we hesitate to draw an inference of bad faith on the appellant's part in terminating the respondent's employment through the letter dated 14th May 2016 on grounds of poor health and inability to allocate him alternative duties in its company.

48. Though there was no formal hearing which took place prior to the termination, the evidence discloses that a meeting was held between the parties, which the respondent has not denied, that was attended by the respondent's wife and a driver colleague to discuss the separation. Therefore, the respondent cannot be heard to claim that his termination was fait accompli, that is to say that it had already been decided that he would be terminated long before he was heard on the intention to terminate him; or that he was not given an opportunity to make any representations.

49. Our finding is that the appellant discharged its burden of proof under section 47 (5) of the Act, and that the reasons for the termination on health grounds were lawful.

    Accordingly, the appellant was not necessarily obligated to assign the appellant other duties in the company.

50. Turning to the fourth issue as to the place and effect of the discharge voucher signed by the parties, the appellant contended that the respondent signed a discharge voucher on 23rd July 2016 in his wife's and colleague's presence. According to the appellant, the discharge voucher absolved them from any further claims by the respondent. The respondent signed against the following statement in the document christened as 'final dues statement' dated 23rd July 2016.

> "I Mumo Kiminza Munuve of ID No. (particulars withheld) hereby confirm and agree to have received all my full and final dues, wages, leave and overtime from my employer Roadtainers (Msa) Ltd. I also confirm that I do not have any further claims whatsoever against my employer."

51. The import of a discharge voucher has been a subject of discussion by this Court in several decisions. The principles to be considered in determining whether a discharge agreement absolves an employer from further claims are well settled. In Thomas De La Rue (K) Ltd (supra), this Court held as follows:

> "We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That is however, as far as we are prepared to go. The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge. Whilst section 119 of the *Evidence Act* entitles a court to presume certain facts; what is involved is no more than presumption of fact, not presumption of law. The court cannot shut its mind to the fact that the presumption of fact

can be rebutted. To rigidly presume a state of facts in all and sundry cases without willing to consider whether the presumption has been rebutted is erroneous. We find the suggestion that the court treats all cases involving discharge vouchers the same way a bit alarming. The industrial court is a court of law and in each case where the validity of a discharge voucher is in issue, evidence has to be led to support or disprove its validity. The court cannot abdicate its responsibility by adopting a general presumption and applying it rigidly in each and every case without considering whether the presumption has been rebutted or not. That may suggest a firm and closed mind-set which a court of law cannot afford to have."

52. To our minds, a discharge agreement is synonymous with a contract entered between parties. And, in a contract, it is not the business of the court to rewrite the parties' contract, but to interpret what the intention of the parties was when they wrote it. Therefore, the starting point in examining the legality of discharge from liability agreements is whether the same was executed voluntarily by the parties in question. If the answer to this question is in the affirmative, it follows that it is difficult for any one of the parties to it to purport to renege against its content in the last minute. In contrast, if any of the parties to the agreement was coerced into signing, then ultimately, the agreement would be vitiated by coercion, or intimidation and fraud. In Coastal Bottlers Limited (supra), this Court observed:

> "Whether or not a settlement agreement or a 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."

53. In Trinity Prime Investment Limited (supra), it was held:

> " The execution of the 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 thus fully discharged."

54. In his submissions before the trial court dated 22nd July 2021, the respondent had this to say about the discharge voucher at paragraph 27 :

> " We further submit that the discharge voucher tendered as the respondent's (now the appellant) exhibit 10 shows that the claimant (now the respondent) was paid Kshs. 55,603.20 after statutory deductions for one month's salary in lieu of notice, 2014/2015 leave pay, 2015/2016 leave pay and 13 days salary for the month of May 2016."

55. We have also had regard to the contents of the respondent's Memorandum of Claim and his reply to the appellant's Amended Statement of Defence and Counterclaim. In all the pleadings and the reproduced submission above, the respondent did not challenge the validity of the impugned discharge agreement. There was no remote suggestion from him that there was coercion, fraud, or that the appellant placed him at a disadvantaged position that would have vitiated the legality of the discharge from liability agreement.

56. Acting out of abundance of caution, the appellant invited the respondent's wife and a colleague to discuss the separation and who witnessed the execution of the discharge voucher. There were no representations from the respondent's wife and colleague that there was any form of coercion or that the respondent did not understand the task he was being subjected to. In our view, therefore, we concur

with the appellant's contention that the respondent signed the discharge agreement voluntarily and willingly.

57. For the respondent to now come to Court two years later, after signing the discharge agreement, to claim that he had no capacity to sign it is a testament of lack of ingenuity on his part. We conclude that, by signing the discharge voucher, he absolved the appellant from future liability claims. Addressing itself on the same issue, this Court in Star Publications Ltd vs. Simiyu (2023) KECA 23 (KLR) held as follows:

> " As we have already deduced in the preceding paragraphs, the respondent herein did not mount any challenge against the discharge voucher that he signed with the appellant. Even before this Court, he has not challenged it. The respondent throughout the trial and in this appeal kept mum on the issue of the discharge voucher. It therefore remains as an admitted fact that the respondent willingly forfeited his rights to pursue any further claim against the appellant by signing that discharge voucher. We are convinced that this appeal succeeds on this ground."

58. Having found that the appellant's conduct in dismissing the respondent was in no way an egregious display of bad faith, and that the discharge voucher absolved the appellant from further claims, the award of 12 months' compensation was unjustifiable, and that the learned Judge was in error in awarding damages under this head.

59. That said, we agree with and uphold the learned Judge's decision not to award the respondent the claim for public holidays. The learned Judge also rightly found that the respondent was paid one month's salary in lieu of notice and leave pay. Indeed, by the excerpt we have duplicated above, the appellant admitted receiving these payments. There would have been no ground on which a double compensation was to be made.

60. Finally, as to whether the appellant proved its counterclaim, we do not wish to belabour this issue. The trial court dismissed it on the ground that no evidence was led to establish causation, and the special damages claim was not proved with precision. The appellant had prayed that it be awarded: breakdown charges; and the salaries paid during the period when the respondent was sick to a tune of Kshs.236,670. These items being a claim of special damages, it is trite law that, apart from specifically pleading them, the appellant was required to strictly prove them.

61. There is a Petty Cash Voucher dated 11th November 2015 for Kshs.158,500 for the recovery of the motor vehicle. However, the said document was not formally produced as an exhibit in court for the trial court to consider its veracity and probative value to the case. This Court in Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others (2015) KECA 334 KLR had the following to say on failure to produce a document as an exhibit:

> "How does a document become part of the evidence for the case?... A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account."

62. For the foregoing, we find nothing on which we can fault the learned Judge for dismissing the appellant's counterclaim.

63. In the end, we find that the appeal succeeds partially as follows:

    a. We set aside the findings of the learned trial Judge (Ndolo, J.) in her judgment dated 7th October, 2021 for compensation of 12 months' salary as damages for unlawful termination.

    b. We also make a finding that the discharge voucher of 23rd July 2016 absolved the appellant from further claims.

    c. However, the appellant's counterclaim stands dismissed.

64. As to the issue of costs, we take to mind that the appeal succeeds in part on the terms aforesaid, but that it fails in so far as it sought to challenge the trial court's decision to dismiss the appellant's counterclaim. For this reason, we hereby order and direct that each party bears their own costs of the appeal.

65. Last, it would be remiss of us not to commend the humane manner in which the appellant treated the respondent. Despite the fact that the respondent was unable to work for a considerable period of time, indeed, close to a year after treatment, the appellant did not fail to look after its erstwhile employee's best interests. A company which is in the business of making profits can only do so much.

66. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF JULY, 2025.

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR