Star Publications Ltd v Simiyu (Civil Appeal 23 of 2018)
[2023] KECA 23 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KECA 23 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 23 OF 2018

FA OCHIENG, LA ACHODE & WK KORIR, JJA

JANUARY 26, 2023

BETWEEN

STAR PUBLICATIONS LTD ..... APPELLANT

AND

JOHN WAFULA SIMIYU ..... RESPONDENT

(An Appeal from the Judgment, Order and Decree of the Employment and Labour Relations Court at Kericho (D.K. Marete Njagi, J.) dated 17th June, 2016) inELRC case No. 240 of 2015)

JUDGMENT

1. The appellant, the Star Publications Limited, is a limited liability company duly incorporated in the Republic of Kenya. It is in the business of print media. The respondent, John Wafula Simiyu, was an employee of the appellant from July 1, 2009 until February 13, 2015.

2. The appellant is aggrieved by the judgment, order and decree of D.K. Njagi Marete, J dated June 17, 2016 which allowed the respondent's claim against the appellant in Kericho E & LRC Case No. 240 of 2015 and prays for the setting aside of the trial court's orders and the dismissal of the claim. The appellant also prays for the costs of this appeal and those of the trial court.

3. The genesis of the respondent's suit against the appellant is that on February 13, 2015 the respondent received a letter from the appellant terminating his services for poor performance. It was the respondent's case at the trial court that he was not supplied with the particulars of poor performance and no explanation was offered to him regarding the claim of poor performance. The respondent further claimed that he was not accorded an opportunity to defend himself before his contract of employment was terminated. He also denied the allegation of poor performance and asserted that he always discharged his duties diligently and competently. It was therefore the respondent's case that the appellant terminated his services summarily without following the right procedure laid down in the

Employment Act and specifically breached sections 19, 28, 35, 36, 41, 44, 45 and 51 of the Act as well as section 15 (c) of the *Labour Institutions Act*.

4. On the other hand, the appellant's case was that the respondent's contract was rightfully, fairly and lawfully terminated on account of poor performance. The appellant argued that they initially placed the respondent on a performance improvement plan (PIP) as provided in the employee handbook and the respondent was required to satisfy specific performance deliverables within a specific period of time failure to which his employment would be terminated. The appellant further argued that the placement of the respondent on PIP was part of the fair hearing mechanism and that upon termination, the respondent was paid all his dues, including one month's salary in lieu of notice and was also issued with a letter of service. The appellant also contended that upon payment of the final dues, the respondent had irrevocably discharged and released it from any liability or further obligation.

5. This matter proceeded via *viva voce* evidence and exhibits were produced.

   The respondent testified as CW1 and reiterated his case as already highlighted. He maintained that he had been a diligent and hardworking employee of the appellant since July 15, 2009. The respondent also testified that he received the termination letter via email and that there were no particulars of poor performance communicated in the letter. He further stated that he was neither issued with a termination notice nor was he heard prior to dismissal. It was also his case that he was neither issued with a job description nor inducted into the job. The respondent testified that he started working for the appellant as a Deputy Regional Sales Manager and was called to the head office for appraisal during the first week of January 2015. According to the respondent after the appraisal, he signed his part of the appraisal form while the officer who appraised him said he would fill in the rest. He referred the trial court to his appraisal form which indicated that he ought to have had six workers to assist him yet he only had two employees after having started with one. He also stated that the evaluation was done in his absence. On cross- examination he confirmed that placement on PIP was one of the procedures in the Employee Handbook. He also conceded to having been paid one month's salary in lieu of notice and that he signed the discharge form after clearing with the appellant.

6. The appellant on its part called two witnesses. DW1 Charles William Chege testified that he worked as a business manager with the appellant having previously worked as the Deputy Advertising Manager and that the respondent reported to him. DW1 stated that he conducted an appraisal upon the respondent during the time he was under PIP. He recounted how the appraisal form was filled while also pointing out the sections which were filled by the respondent and areas he jointly filled with the respondent. On cross-examination, DW1 testified that the respondent had insufficient staff and was not accorded adequate time to serve his probation period. He also testified that he recommended an extension of the respondent's probation for three months.

7. The appellant's second witness was DW2 Catherine Nyambura Kageni who testified that she was the Human Resource Director of the appellant. She attested that the respondent was expected to meet at least 50% of his sales target by January 2015. Her testimony was that the respondent was notified of his poor performance and was given three months to improve after which another appraisal was conducted. She also deposed that the respondent was paid all his final dues less statutory deductions. On cross- examination, DW2 stated that the Employee Handbook did not provide for probation of employees who had been promoted. She also testified that the respondent was taken through orientation and induction, although she could not produce any evidence to back this assertion.

8. At the conclusion of the trial, the learned Judge found that the appellant had wrongfully, unfairly and unlawfully terminated the employment of the respondent. He proceeded to award the respondent Kshs. 60,000 being one month's salary in lieu of notice, Kshs. 600,000 being ten months' salary as

compensation for wrongful termination of employment as well as the costs of the claim. The learned Judge further ordered the appellant to provide to the respondent a certificate of service within 30 days. Those are the orders the appellant is challenging through this appeal.

9. In the Memorandum of Appeal dated February 6, 2018, the appellant seeks to upset the decision of the trial court on the grounds that:

    a. The learned Judge erred in law and in fact in awarding to the Respondent one month's salary in lieu of notice when the Respondent acknowledged during the proceedings that he had in fact been paid the same by the appellant and which claim was abandoned in his submissions;

    b. The learned Judge erred in law in solely relying on the respondent's submissions and failing to consider the appellant's submissions in arriving at his findings against the appellant;

    c. The learned Judge erred in law and in fact in failing to distinguish the process that the respondent was subjected to which met the due process requirements for termination based on poor performance as opposed to a regular performance appraisal process;

    d. The learned Judge erred in law and in fact in failing to find that the termination of the Respondent's employment was substantively justified based on the evidence available before him and the Respondent's own agreement with the below-target ratings he achieved;

    e. The learned Judge erred in law and in fact in failing to consider the Appellant's arguments concerning its discharge from further liability;

    f. The learned Judge erred in law and in fact in awarding the Respondent ten months' salary as compensation without demonstrating the basis for the same;

    g. The learned Judge erred in law and in fact in ordering the Appellant to issue a certificate of service when that had already been done and without making any finding that the one issued was defective.

10. Through submissions dated 30th September, 2022, the appellant submitted on each of the grounds of appeal. On the award of one month's salary in lieu of notice to the respondent, the appellant submitted that although Section 36 of the *Employment Act*, 2007 provides for payment in respect of the period of notice where an employment contract is terminated without notice, the learned Judge erred in failing to consider the evidence on record confirming that the respondent was paid one month's salary in lieu of notice. Reliance was placed on the case of *Kenya Commercial Bank Ltd vs Mwa Nzau Mbaluka & another* [1998] eKLR in support of the argument that the Judge went astray by considering an issue that was neither pleaded by the parties nor canvassed at trial. This Court was therefore urged to declare this particular award a nullity.

11. On its claim that the trial Judge ignored its submissions, the appellant relied on the Employment and Labour Relations Court decision in *Paul Odhiambo Onyango & another vs Kalu Works Limited* [2020] eKLR in support of its contention that the failure by a court to consider submissions on record amounts to an error. However, the appellant did not pinpoint the submissions that were not considered by the trial court.

12. Turning to the ground of appeal that the learned Judge erred in law and in fact in failing to find that the termination of the respondent's employment was substantively and procedurally justified, the appellant submitted that the Judge failed to distinguish that the respondent was terminated because of poor performance and not as a result of the regular performance appraisal process. According to the appellant, this process met the requirements of Section 45(2) of the *Employment Act* as it had proved that the termination was for a fair reason as it related to the respondent's conduct, capacity

or compatibility. To this end, the appellant relied on the case of *Abdalla Mohamed Abdalla vs Independent Electoral and Boundaries Commission*, ELRC Cause No. 1685 of 2013 where it was held that the duty of the court is to examine the reasonableness of the employer's decision in light of the obtaining circumstances and the applicable law but not to substitute its decision for that of the employer.

13. It was further contended by the appellant that the learned Judge erred by not taking into consideration the evidence on poor performance which was enough proof that the appellant had lost confidence and trust in the respondent having accorded him a fair opportunity to improve his performance to meet the appellant's operational standards. The appellant cited the case of *Jane Samba Mukala vs Ol Tukai Lodge Limited* Industrial Cause No. 823 of 2010 as establishing the standards for termination of an employee for poor performance. Reliance was also placed on the decision in *Nazareno Kariuki vs Feed the Children Kenya* [2013] eKLR in support of the assertion that the termination of the respondent for poor performance was substantively justified.

14. On its assertion that the learned Judge erred by failing to consider that the respondent's claim was unsustainable because he had discharged the appellant from further liability upon the payment of his further dues, the appellant relied on the decisions in *Trinity Prime Investment Limited vs Lion of Kenya Insurance Company Ltd* [2015] eKLR; *Southern Engineering Company (SECO) vs David Anzani Ombeba* [2015] eKLR; and *Fredrick Odhiambo vs Kenya Safari Lodges & Hotels Ltd* [2015] eKLR for the submission that the execution of a discharge voucher constitutes a contract that fully discharges the parties from further liability. This Court was urged to find that the discharge signed by the parties herein is an agreement in express terms and the Court should enforce it and not rewrite it.

15. In regard to the ground of appeal that the learned Judge erred in awarding the respondent ten months' salary as compensation without demonstrating the basis for the same, the appellant urged that such an award must be justified. In support of this argument, reliance was placed in the decisions in the cases of *Board of Governors, Kenya Baptist Theological College vs Evans Mwana Katana Dyuya* [2021] eKLR and *Nicholas Kyula Muasya vs FarmChem Ltd* [2012] eKLR where the courts in making such awards considered the peculiar circumstances of each case including the longevity of the employment.

16. Finally, on its claim that the learned Judge erred in directing the issuance of a certificate of service notwithstanding that the same had already been issued, the appellant stressed that it had provided a certificate of service in compliance with Section 51 of the *Employment Act* and the respondent had acknowledged receiving it on 9th March, 2015. The decision in *Angela Wokabi Muoki vs Tribe Hotel Limited* [2016] eKLR was cited in support of the proposal that a certificate of service is not a recommendation letter and only need to conform to the requirements of Section 51 of the *Employment Act*. The appellant pointed to the trial record as confirming that DW2 did indeed issue a certificate of service and that the respondent acknowledged this fact during cross-examination. This Court was subsequently urged to allow the appeal and set aside the judgment and orders of the trial court.

17. On his part, the respondent argued for the dismissal of the appeal through submissions dated 18th September, 2022. The first issue he submitted on is whether the respondent was unlawfully, unprocedurally and unfairly terminated from employment by the appellant. On this issue, the respondent submits that a termination of employment must satisfy both the procedural fairness test and the substantive (reason for termination) test otherwise the termination will be regarded unlawful and unprocedural. The respondent supported this statement by reference to, among other cases, the decisions in the cases of *Walter Ogal Anuro vs Teachers Service Commission* [2013] eKLR; *Janet Nyandiko vs Kenya Commercial Bank Limited* [2017] eKLR; and *Anthony Mkala Chitavi vs Malindi Water & Sewerage Company Ltd* [2013] eKLR. The respondent also asked us to test his termination against the provisions of and 45 of the *Employment Act*.

18. This Court was referred to the cases of *Everline Kagendo vs Statpack Industries Limited, Industrial* Cause No. 2081 of 2011; *Agnes Yahuma Digo vs PJ Petroleum Equipment Limited*, Industrial Cause No. 2049 of 2011; and *Jane samba Mukala vs Ol Tukai Lodge Limited* Industrial Cause No. 823 of 2010 as stating the circumstances under which performance appraisals and poor performance can lead to the termination of an employment contract. It was submitted by the respondent that when the principles established in the cited authorities are applied to the circumstances of this case, it becomes apparent that the appellant failed to establish a valid reason as required by Section 45(2) of the *Employment Act* for the termination of his employment.

19. According to the respondent, the appellant did not meet the fairness requirements set out in Section 41 of the *Employment Act* as summarized in *Alphonce Machanga Mwachanya vs Operation 680 limited* [2013] eKLR that the employer must explain to the employee in a language that he understands the reasons for the proposed termination; that the employer allowed the presence of a representative of the employee during the explanation; that the employer has heard and considered any explanation by the employee or the representative; and that the employer has complied with its own internal disciplinary procedure rules where it has over 50 employees. It was urged by the respondents that the appellant never complied with any of the procedural safeguards provided by the law.

20. The second issue identified by the respondent is whether the claimant is entitled to compensation for unlawful, un-procedural and unfair termination of his employment. On this issue, the respondent submits that having convinced this Court that the termination of his employment was unlawful, un-procedural and unfair, then he was entitled to the relevant compensatory awards made by the trial court.

21. As regards to the third issue as to whether he was entitled to a certificate of service, the respondent submitted that having worked for the appellant for about six years, he was entitled to a certificate of service as stipulated under Section 51 of the *Employment Act*.

22. In this matter, this Court is sitting as a first appellate court and in line with Rule 31(1)(a) of the *Court of Appeal Rules*, 2022, the Court is required to re-appraise the evidence and to draw inferences of fact. The duty placed on the Court is therefore to reconsider the evidence, evaluate it itself and draw its own conclusions. In doing so, the Court should make due allowance for the fact that unlike the trial court it has neither seen nor heard the witnesses. The first appellate court has the leeway to depart from the trial judge's findings of fact where it determines that the trial judge clearly failed to take into account particular circumstances or the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. See *Selle vs Associated Motor Boat Company Ltd* [1968] EA 123.

23. We have, in adherence to our mandate as enunciated above, carefully considered the record of appeal, the law, the submissions of all parties as well as all the authorities cited. In our view, the issues for the determination of the Court are: whether the appellant adopted the right procedure in terminating the respondent's employment contract; whether the reasons given by the appellant for terminating the respondent's contract are valid; whether the awards made by the trial court in favour of the respondent have legal backing; and, the effect of the discharge voucher signed by the parties.

24. The first issue we address is whether the appellant adopted the right procedure in terminating the respondent's contract. On this issue, we note that both the appellant and the respondent agree that they were in an employment relationship between 1st July, 2009 to 13th February, 2015 during which period the respondent rose from an advertising executive to a deputy regional manager.

25. In the appeal before us we find that the most relevant provisions of the *Employment Act* are sections 41, 43 and 45. Section 41 provides for notification and hearing before termination on grounds of misconduct. It states:

> 41.
>
> (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.

26. Section 43 places the burden of establishing the reason or reasons for the termination of an employment contract upon the employer by providing that:

> 43.
>
> (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.

27. Section 45 then proceeds to provide the rules on unfair termination thus:

> 45. (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.

28. In the case of *Janet Nyandiko vs Kenya Commercial Bank Limited* [2017] eKLR, the Court condensed the cited provisions 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 leveled against him by the employer."

We are, in agreement that the procedure for termination of an employment contract is as stated in the cited case and the factors to be considered by an adjudicating authority in determining the validity of the termination of an employment contract are as stated therein.

29. In *Pius Machafu Isindu vs Lavington Security Guards Limited* [2017] eKLR, this Court considered the issue of burden of proof and how the burden shifts in light of employment disputes and stated thus:

> "There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act*/Rules. Finally, the remedies for breach set out under section 49 are also fairly onerous and generous to the employee. But all that accords with the main object of the Act as appears in the preamble:
>
> "..to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees.."
>
> Those provisions are a mirror image of their constitutional underpinning in Article 41 which governs rights and fairness in labour relations."

30. Our re-evaluation of the evidence adduced at the trial must therefore be conducted within the parameters of the procedural requirements and the burden of proof as discussed in the cited authorities. From the evidence on record, it is evident that the appellant fell short of adhering to the procedure outlined above. DW1 and DW2 never explained the procedure that was used to terminate the respondent's contract. They only gave the reason of poor performance as the basis for the termination of the contract. There was, however, need to demonstrate that once the respondent was found to be a non-performer, he was given notice and a hearing as required by Section 41 of the *Employment Act*. No evidence was forthcoming from the appellant on this aspect of the process of the removal of the respondent. Furthermore, no evidence was tendered by the appellant's witnesses to controvert the evidence of the respondent that he did not receive the reasons for termination nor was he given such reasons in the presence of a colleague or his representative.

31. An argument has been fronted by the appellant that during the appraisal and the PIP, the respondent was aware that he could possibly be fired if he did not meet the targets. This argument cannot substitute the clear statutory procedure under sections 41 and 45 of the Employment Act and it falls flat. Upon determining that the respondent was not meeting his targets despite being placed on PIP, the appellant ought to have engaged the provisions of Section 41 of the *Employment Act* by issuing notice giving the reasons for the intended termination and affording the respondent an opportunity to be heard. In short, on the face of the evidence on record, we find no convincing reason to believe that the learned Judge misdirected himself when he ruled that the appellant did not adhere to the statutory procedure in terminating the respondent's contract.

32. The next issue is whether the reasons given by the appellant for terminating the respondent's contract are valid. Both the appellant and the respondent agree that the reason for terminating the respondent's contract was due to poor performance. The appellant asserts that upon appraising the respondent, his performance was found wanting and he was placed under PIP. The respondent again failed to impress forcing the appellant to fire him. In this respect, the Employment and Labour Relations Court case

of *Jane Samba Mukala vs Ol Tukai Lodge Limited*, Industrial Cause No. 823 of 2010, as cited by the appellant, offers some guidance as to the procedure to be followed before an employee can be dismissed for poor performance. The steps were enumerated as follows:

> "Where the termination of an employee is based on the reasons of poor performance, the employer must comply with the provisions of section 41 of the *Employment Act* which require that such an employee should receive an explanation as to such a reason in the presence of another employee of their own choice...
>
> This is important to note as where poor performance is shown to be a reason for termination, the employer is placed at a high level of proof as outlined under section 8 of the *Employment Act* to show that in arriving at this decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance...
>
> Therefore, it is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further what measures they have taken to address poor performance once the policy or evaluation system has been applied. It will not suffice to just say that one has been terminated for poor performance. The effort leading to this decision must be demonstrated. Otherwise, it would be an easy option for abuse.
>
> Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and an explanation on their poor performance shared where they would in essence be allowed to defend themselves or be given an opportunity to address their weaknesses. In the event a decision is made to terminate an employee on the reasons of poor performance, the employee must be called again and in the presence of another employee of their choice, the reasons for termination shared and explained to such an employee."

33. We have reviewed the evidence on record. From the evidence, it is not disputed that the respondent was employed by the appellant for a period of about 6 years. The only evidence of appraisal is one which occurred in 2014 leading to termination in 2015. No evidence was adduced by the appellant to show that this had been an annual occurrence at its place of work. Similarly, both the respondent and DW1 confirmed that the respondent ought to have had 6 workers under him but he only had two. In this regard, no explanation was offered as to the impact of such deficiency of labour on the respondent's performance. The record also shows that once the placement of the respondent on PIP was found not to be helpful, he was not once again confronted with his alleged poor performance and given the chance to defend himself. In light of what we have stated above and upon our review of the record we find no fault in the finding of the learned Judge that the reasons given by the appellant for the dismissal of the respondent were not sustainable. The appellant never discharged the burden placed upon it by the law to satisfy the trial court that the termination of the respondent's employment was fair.

34. The remaining issue is the import of the discharge voucher on the respondent's claim. The appellant has faulted the trial Court for not considering the discharge from liability form signed by the parties. According to the appellant, the learned Judge erred by failing to find that the discharge from liability form had the effect of discharging it from any further liability upon the payment of the respondent's further dues. The respondent did not submit on this issue. Our perusal of the judgment of the trial court also show that the Judge did not address this issue despite the same having been raised in the memorandum of defence and submitted upon by the appellant. The issue is now properly before us and we must consider it.

35. The import of a discharge voucher in employment matters has been discussed in a number of decisions by this Court. In our view, the law on the issue was correctly captured in *Thomas De La Rue (K) Ltd vs David Opondo Omutelema* [2013] eKLR 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."

36. From the cited authority, it becomes clear that a court will not automatically bar an employee from seeking further redress where a discharge from liability agreement has been signed between the employer and an employee. In a situation where a discharge voucher becomes an issue in litigation, the court must assess the import and legality of the same based on the evidence adduced before the court. On this point we find support in the holding in *Coastal Bottlers Limited vs Kimathi Mithika* [2018] eKLR that:

> "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."

37. We therefore need to consider the evidence adduced in regard to the discharge voucher. The discharge from liability form is at page 97 of the record of appeal. It is signed by the respondent and witnessed by one Rachel Ndana. From the document, the respondent received Kshs. 63,522 through cheque number 00286. The contents of the form read as follows:

> "I confirm that this payment is in full and final settlement of all dues owed to me by the Radio Africa Limited. I hereby irrevocably discharge and release the Radio Africa Limited, its Directors, Management and staff from any and/or any further liability to me for any obligation whatsoever.
>
> I commit and bind myself to settle any justified excess medical bill(s) and any other claims that Radio Africa Limited may be notified of and which my dependants or myself incurred during my contract period in the Radio Africa Limited.

I further acknowledge that in light of my exit from the Company I am no longer mandated to transact any business on behalf of or in the name of Radio Africa Limited nor pose as a representative of this entity.

A copy of my National Identity Card is attached."

38. During his cross-examination, as captured at page 124 of the record of appeal, the respondent stated in the last paragraph that:

> "I was paid for days worked in February. I asked (*sic*) receipt of this sum of payment. I discharged the company from any further responsibility to me. I received a certificate of service. It is not true that I was not issued with a certificate of service."

39. DW2 states at paragraphs 3 and 4 of page 129 of the record of appeal thus:

> "The claimant's final dues were computed as salaries due, notice pay all less statutory deductions and owings to the company and also debts owing. He was paid his final dues. He was issued with a certificate of service. "Page 26 is a final dues declaration. This is acknowledged by the claimant. There is also discharge."

40. The respondent did not through his pleadings, testimony or submissions question the existence of the discharge agreement or its validity. That being the case, and guided by this Court's previous pronouncements, we find that indeed there was a valid and legally binding discharge of liability voluntarily signed by the respondent. As already stated, there is no evidence on record to insinuate that the existence and validity of the discharge from liability was challenged by respondent. Similarly, there is no evidence of any existence of any factors that would vitiate the legality of the discharge form signed by the respondent. In the circumstances, we find that the learned Judge erred in failing to consider and find that there was a discharge from liability form signed by the respondent.

41. Based on our findings above, this Court must then reconcile the finding that the respondent was unfairly terminated by the appellant and the fact that the respondent discharged the appellant from further liability. The answer to this conundrum is found in *Coastal Bottlers Limited vs Kimathi Mithika* [2018] eKLR, where this Court stated that:

> "(18) 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...
>
> (21) In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondent's termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent's part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties."

42. Earlier, in *Trinity Prime Investment Limited vs Lion of Kenya Insurance Company Limited* [2015] eKLR this Court stressed the sanctity of a valid discharge voucher as follows:

> "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."

43. 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.

44. Notwithstanding our finding above, it is important to address the appellant's grievance concerning the remedies awarded to the respondent. Section 49 of the *Employment Act* provides the remedies for wrongful dismissal and unfair termination as follows:

49. (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following —

a. the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

b. where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

(2) Any payments made by the employer under this section shall be subject to statutory deductions.

45. The trial Court granted the following reliefs to respondent against the appellant:

i. A declaration be and is hereby made that the termination of the employment of the claimant by the respondent was wrongful, unprocedural, unfair and unlawful;

ii. One month' salary in lieu of notice Kshs. 60,000.00;

iii. Ten months' salary as compensation for unlawful termination of employment Kshs. 600,000.00;

iv. That the respondent be and is hereby ordered to issue a certificate of service to the claimant within thirty (30) days;

v. That the costs of this claim shall be borne by the respondent.

46. The appellant contends that the reliefs under items (ii) and (iv) above were made erroneously since the respondent had conceded that he had already received one month's salary in lieu of notice and a certificate of service. Additionally, it is submitted that the respondent even signed a discharge note which confirmed that he had already received those items from the appellant. The arguments of the appellant are supported by the record and are merited.

47. We are also aware that the powers under Section 49 of the *Employment Act* are discretionary in nature. This position was affirmed by the Supreme Court in *Kenfreight (E.A) Limited vs Benson K Nguti* [2019] eKLR where it stated that:

> "(32) When giving an award under Section 49 of the *Employment Act*, a court of law is expected to exercise judicial discretion on what is fair in the circumstances. The *Black's Law Dictionary* 9th edition at page 534 defines judicial discretion as follows:
>
> "the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not to act when a litigant is not entitled to demand the act as a matter of right."

48. A perusal of the judgment of the trial court will show that the learned Judge did not give any reason for the award of ten months' salary for unlawful termination of employment. Furthermore, and as rightly submitted by the appellant, this award was against the weight of the existing evidence. There was before the court a discharge voucher duly signed by the respondent. The respondent had also conceded to receiving one month's salary in lieu of notice as well as payment for the days worked during the month his employment was terminated. In the circumstances the appellant has established grounds upon which this Court should interfere with the award of ten months' salary as compensation for unlawful termination. However, as we have already held that the respondent waived his right to make further claims from the appellant when he voluntarily signed the discharge voucher there is no basis for making further orders as the judgement of the trial court will be set aside in its entirety.

49. The appellant also took issue with the order directing it to issue a certificate of service to the respondent on the ground that it had already issued the document to the respondent. The respondent did not address this Court on this issue. We have reviewed the record of appeal and at page 96, there is a certificate of service signed by the appellant's human resource manager. Further, the respondent did confirm during cross- examination that a certificate of service had been issued to him. The learned Judge did not address himself to this issue but proceeded to make an order for the issuance of another certificate of service. No reasons were advanced to elucidate the insufficiency of the certificate of service already issued to the respondent by the appellant. We fail to understand why the learned Judge would grant an order for the issuance of a certificate of service when such a certificate had already been issued to the respondent. We agree with the appellant that the learned Judge erred in making an order for the award of a certificate of service notwithstanding that such a certificate had already been issued to the respondent.

50. The last issue pertains to the costs of the litigation. It is the legal norm that costs follow the event unless the court shall for good reason otherwise order. In this case, the appellant has succeeded in its appeal. However, considering the history of the case, the issues raised in this appeal and the outcome, it is our view that it is just that each party meet own costs of the appeal and the trial.

51. In summary, we find this appeal has merit and the same is allowed.

The judgment and orders of the trial court are vacated and in their place an order is issued dismissing the respondent's claim in Kericho ELRC No. 240 of 2015. The parties shall meet their own costs of the proceedings at trial and on appeal.

Dated and delivered at Nakuru this 26th day of January, 2023

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR