



REPUBLIC OF KENYA



**Sabwa v Fargo Courier Limited (Cause 488 of 2018)
[2025] KEELRC 302 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 302 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 488 OF 2018
K OCHARO, J
JANUARY 30, 2025**

BETWEEN

FRED CHUNGULI SABWA CLAIMANT

AND

FARGO COURIER LIMITED RESPONDENT

JUDGMENT

1. Via the Memorandum of Claim dated 29th March 2018 the Claimant sued the Respondent seeking the following reliefs;
 - a. A declaration that the Respondent unfairly and unlawfully terminated the Claimant's employment;
 - b. Compensation in accordance with Section 49 of the *Employment Act*, 2007 in the sum of Kshs. 7,200,000.00/= being the Claimant's 12 months' salary for unfair and wrongful termination;
 - c. Kshs. 600,000.00/=being one month's salary in lieu of notice;
 - d. Costs of the suit;
 - e. Interest on the above until payment in full.
2. The Respondent in its Statement of Response dated 24th May 2018, admits employing the Claimant as a Logistics and Warehousing Manager from 1st August 2017 but denied that it terminated his employment unfairly and unlawfully. It further denied his entitlement to the reliefs sought.



Claimant's case

3. It was the Claimant's case that he first came into the employment of the Respondent under a contract of employment dated 9th June 2019, as a Logistics and Warehousing Manager. The commencement date of his employment was 1st August 2017, and his monthly gross salary was Kshs. 600,000/=.
4. He worked diligently, dedicatedly, and professionally until termination and in conformity with the terms and conditions of his contract of service and job description.
5. On 23rd January 2018, the Claimant was summoned to a meeting with the Respondent's Operations Director, his immediate supervisor. While in the meeting, he was informed of the termination of his employment and given a termination letter.
6. He asserted that the termination of his employment was unconstitutional, unfair, and malicious because there was no valid reason for the termination; he was not notified of any allegations against him prior to the termination; he was not given an opportunity to be heard; and no notice was issued to him prior to the termination. The termination letter didn't bear the reasons for the termination.
7. Further, the Claimant states that his termination appeared to be pre-determined, as it was executed immediately after the Claimant successfully implemented a new warehouse management system for a key client for the Respondent.
8. The Respondent didn't care that it had head-hunted him from a former employer where he had worked for close to 15 years and where he was holding the position of Country Manager.
9. As at the time the Respondent was terminating his employment, his performance had not been reviewed.
10. The Respondent paid him one month's salary in lieu of notice, transport allowance, and salary for January 2018.
11. Upon receiving the payment, he executed a discharge certificate. His understanding of the document was that it was to enable him to access his salary for that month, and not that it was going to inhibit him from pursuing his rights against the Respondent.
12. Shown an extract of notes from a notebook of his supervisor, dated 29th September 2017, he denied that there was ever a meeting between him and the supervisor on that day and that there was a discussion between them on the alleged poor relationship that existed between his wife and one of the Respondent's Customers. Additionally, that issue was discussed between them way before he joined the Respondent's workforce.
13. Cross-examined by Counsel for the Respondent, the Claimant stated that his immediate supervisor was the Respondent's Operations Manager. In the course of his employment, he could have day-to-day discussions with the Director. Any issue could be discussed then.
14. The termination occurred within the probation period. The period was to come to an end, and the end of the month when his employment was terminated.
15. Clause 4 of his contract of employment provided for termination during the probation period. It provided for a notice pay of seven [7] days.
16. Performance appraisals were to be done monthly and the results thereof communicated to him.



17. He signed the discharge voucher on 24th January 2018. He acknowledged receipt of the amount paid to him. He was not given the opportunity to interrogate the voucher duly. He had just come from losing his father only to be confronted with a termination letter on the first day of reporting back to work.
18. In his evidence under re-examination, the Claimant testified that the termination letter didn't give any reason for the termination. Equally, in the meeting on 23rd January 2018, he wasn't informed of the reason[s] for the termination.
19. In all the discussions he had with the Director, none of them featured his performance.
20. The termination letter was issued on 23rd January 2018. He signed the voucher on 24th January 2018. He signed it as a precondition that was given to him to receive his salary.

Respondent's case

21. The Respondent presented Gray Cullen, its Operations Director, to testify in support of its case. The witness adopted his witness statement dated 6th June 2018 as his evidence in chief. He stated that following an interview with the Respondent, the Claimant was offered and accepted employment in the position of Logistics and Warehousing manager with effect from 1st August 2017.
22. It was a term of the contract of serviced inter alia that the Claimant was to serve a probationary period of six [6] month during which time The Claimant's employment contract stipulated a six-month probation period, during which either party could terminate a notice period of seven days or payment in lieu of notice from either side would be required in the event of termination of employment.
23. The Claimant was still on probation as at 23rd January 2018 when his contract was terminated. The termination was in accordance with clause 4 of his employment contract.
24. The witness contended that the provisions of section 41 and 45 of the *Employment Act* didn't apply to the Claimant at the material time. The provisions didn't apply to probationary contracts. As such, the grounds that the Claimant put forth as the basis for the allegation that the termination of his employment was unlawful and unfair could not come the support of his case.
25. He alleged that the termination had nothing to do with the implementation of the new warehousing system.
26. The Respondent claims that upon terminating the Claimant's employment, it paid him Kshs. 443,443 in full settlement of all contractual dues, which the Claimant acknowledged receiving.
27. The witness testified that he was the Claimant's direct supervisor. During the Claimant's tenure, he could have two to three meetings with him to discuss the performance of his Division, and therefore, indirectly his performance as well.
28. On 29th September 2017, he had a meeting with the Claimant to discuss a complaint that had been raised by one of its target customers [Mkopa], through its operations manager. It was the Client's desire that the Claimant should not be in the employment of the Respondent to handle their [the client's] matters. The Claimant explained to him that the client's suggestion flowed from the fact that his wife had once worked for the client but unfortunately her relationship with their CEO wasn't good.
29. The witness asserted that he decided to be handling that client's matters personally. He further stated that the Claimant hadn't brought the stated bad relationship between his wife and the client's CEO, any time earlier than the day of the meeting.



30. The witness asserted that on 2nd January 2018, he held a meeting with the Claimant where they discussed the performance of his Department, and his individual performance.
31. Besides the Mkopa client, there were other two large clients who insisted that the witness should deal with their matters personally, as the Claimant was ineffective. He never gave prompt feedback on issues whenever it was required. The email dated 9th December 2017 is a testament to this.
32. In the meeting of 23rd January 2018, he explained to the Claimant why his employment was being terminated. His performance was unsatisfactory. He hadn't closed even a single sale.
33. Cross examined by Counsel for the Claimant, the witness admitted that the termination letter didn't set out the reasons for the termination.
34. He further admitted that he didn't have any document to show the Claimant's performance during the material times.
35. Cross examined on the file notes, the witness accepted that neither him nor the Claimant signed the same. Further, the notes were done at the prompting of a third party.
36. Though he alleged that he held weekly meetings with the Claimant, he had no document[s] to demonstrate that.
37. The witness testified further that he could recall how the Respondent recruited the Claimant.
38. When the Court sought clarification on a point, the witness stated that there would be a performance appraisal mechanism in the Respondent organization. He further testified that there were sales and operations target for the Claimant. However, the Claimant didn't place any document before Court to demonstrate the same.

Analysis and Determination

39. I have carefully analysed the pleadings by the parties, their evidence, and their Counsel's respective submissions, and distil the following issues for determination;
 - I. Whether the execution of the discharge certificate, acted as a bar to the institution of any employment claim by the Claimant against the Respondent.
 - II. Whether the Claimant's employment was unfairly terminated.
 - III. Whether the Claimant is entitled to the reliefs sought.

Issue I

40. This is a preliminary issue that this Court must decide. There is no dispute that upon being discharged from the Respondent's employment, the Claimant signed a discharge certificate dated 23rd January 2018. The Respondent took the position, and its Counsel submitted in support, that the execution of the document discharged it from all liability. The Claimant held a contrary view, the execution wasn't intended to be a bar against him, to pursue a claim[s] like the instant one against the Respondent.
41. The Respondent's Counsel submitted that in considering the effect of the certificate, the Court must look at the intention of the parties at the time. In this case it is apparent that the intention of the parties was that upon execution of the document, the Claimant discharged the Respondent from all claims. To buttress this submission, reliance was placed on the case of Coastal Bottlers Limited vs- Kimathi Mithika [2018] eKLR.



42. By instituting the current claim, the claimant seeks further dues from the respondent as set out in prayer a-e in his memorandum of claim contrary to the agreement he entered into with the respondent.
43. The Claimant's Counsel submitted that in interrogating the import of the discharge certificate, it should give regard to the wording of the document and the circumstances of this matter. To fortify this submission, she placed reliance on the decision in *Thomas De La Rue Ltd v David Opondo Omutelema* [2013] eKLR.
44. To fully appreciate the implication of a discharge certificate, the wording of the entire document must be analysed. The fact that an employee executed a discharge document upon termination of his or her contract, doesn't necessarily imply that the execution thereof discharges the employer of all liability. A discharge certificate duly executed has a contractual effect regarding the matter[s] it addresses. As such it must be couched in a manner that unambiguously brings out the intention of the parties.
45. In the case of *Thomas De La Rue [k] Ltd v David Opondo Omutelema* [2013] eKLR, the Court of Appeal held;

“We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and it cannot absolve an employer from statutory obligation and this 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, 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.....”

46. As regards the discharge certificate, this Court is invited to ascertain the intention of the parties and pronounce itself thereon. Then, it becomes imperative to bring out the contents of the document, in extenso. The certificate read;

“Discharge Certificate

Further to our letter dated 23rd January 2018, we can now discharge you from employment with the company, and now pay you KShs. 443, 443 being full payment of all dues payable to you under your employment contract that ended today.

We wish you the best in your future endeavours.

Yours sincerely

Willis Ayieko

Group Human Resources Director.

I Fred Chunguli Sabwa, accept cheque number 016666 for KShs. 443, 443 being payment for my dues payable to me following the termination of my employment with the company. I confirm that there are no further dues or payments due to me.”

47. I have carefully considered the wording of the document and take a clear view, that the Respondent in taking the position it has, and more specifically that the certificate discharged it from all liability including future liabilities that would ensue from an employment matter, flow from a deliberate ignorance of the need not to read paragraphs of a document in isolation from each other. In my view, had the Respondent read the second paragraph of the document, not in isolation from paragraph one thereof, it could have picked a different meaning from the wording of the document.



48. In its plain meaning, paragraph one overtly states that the dues that the Claimant received, KShs. 443,443, were dues contemplated under his contract of employment that had just ended. Therefore, the dues/payment that he acknowledged receipt of, were those that his contract of service contemplated to be computed and paid at the termination of his employment. The undertaking that he gave not to pursue any further payments cannot be seen in any other way other than being those that the contract provided as payable at the time of termination of his employment. Payments under a successful employment litigation cannot be held to be payment[s] under a contract of service.
49. In *Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd* [2017] eKLR, the Court of Appeal, Ouko, Kiage, and Murgor JJA held: -
- “ Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of the Instrument, which insists that documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed.....”
50. In my view, the parties’ intention was to bind themselves as regards the payment of dues that were payable to the Claimant under the contract of service, computed and paid upon termination of the contract. I see no word, no line, no paragraph that obtains in the document from which one can safely conclude that in the wording of the document, the parties intended that the payment of dues referred to therein could include future dues that would emanate from a case for unfair termination.
51. By reason of the premises, I am not persuaded that the discharge certificate in its wording provided a bar against the Claimant from instituting the instant claim.

Whether the termination of the Claimant’s employment was unfair.

52. The Claimant contended that the termination of his employment was unfair and contrary to the provisions of section 45 of the *Employment Act* which prohibits unfair termination. Contrary to the stipulations of section 45[2], the termination the termination was without a valid reason, and procedural fairness wasn’t present.
53. The Respondent asserted that the Claimant’s employment was terminated, while he was serving his probationary period. As such, the protection and rights accorded under section 41 and 45 of the *Employment Act* didn’t apply to him. This argument was based on the provisions of section 42[1] of the *Employment Act*.
54. Section 42[1], expressly provides that the provisions of section 41[1] of the *Employment Act* did not apply to probationary contracts. The provision doesn’t exclude applicability of any other provision of the statute either expressly or by implication. If it were the intention of the legislature that it does, nothing could have been easier for them than expressly so state as they did as regard section 41. As such, any thinking, and or decision suggesting that the provision also ousts applicability of section 43, 45 [and more specifically that part on substantive justification], and 47, is a thinking and or authority, that with great respect, I cannot agree with.
55. It was common cause that a three judges’ bench of this Court in the *Monica Munira Kibuchi & 6 others v Mount Kenya University, Attorney General* [Interested Party] [2021] eKLR declared the provision, section 42[1] unconstitutional. I can only say here that the decision came in long after the termination, and that retrospectivity of decisions isn’t quite cherished. The decision doesn’t apply in this matter, therefore.



56. In the upshot, I hold that the provisions of section 41 of the Act, aren't applicable in the instant case. Therefore, I will not determine the fairness or otherwise of the termination of the Claimant's employment using the procedural fairness lens provided under the provision.
57. It is my considered view, therefore, that those provisions of the Employment Act that speak to substantive fairness have always been and are, applicable to probationary contracts.
58. Section 43 of the Employment Act places a legal burden on the employer in a dispute regarding termination of an employee's employment, to prove the reason[s] for the termination, otherwise the termination shall be deemed unfair by dint of the provisions of section 45 of the Act.
59. A further duty is placed upon the employer under section 45 of the Act, to demonstrate to the requisite standards that the reason[s] for termination was valid and fair.
60. The Claimant contended that the termination of his employment was without any reason. The termination letter didn't set out any reason as to the termination. The reason was not explained to him at any time.
61. I have carefully considered the Respondent's witness statement and its Statement of Response, filed herein. Neither of them gives the reason for the termination of the Claimant's employment.
62. A careful analysis of the tone of the two documents reveal that the Respondent misguidedly acted under the comfort that the tenets of substantive fairness weren't applicable to the Claimant as he was an employee under probation. Having paid him in lieu of notice, it needed not mandatorily, dispense with him with cause.
63. The Court notes that the Respondent's witness expended huge effort to explain that the termination of the Claimant's employment was on the ground of poor performance during the probation period. Its Counsel made elaborate submissions on the aspect. Unfortunately, it is this Court's view, that nothing turns on this. The effort wasn't worth expending, with great respect. Poor performance was not pleaded by the Respondent.
64. The Supreme Court of Kenya in its ruling in *Raila Amolo Odinga & Another v IEBC & 2 others* [2017] eKLR, found and held as follows in respect to the essence of pleadings:
- “In absence of pleadings, evidence if any, produced by parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing relevant evidence before the court for consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”
65. By reason of the forgoing premises, I conclude that the Respondent has failed to discharge the legal burden under section 43 and 45 of the Act. The reason for the termination hasn't been proved. The termination was unfair.

Whether the Claimant is entitled to the reliefs sought

66. Having found that the termination of the Claimant's employment was substantively unfair, I now turn to consider whether the reliefs sought can be availed to him.



67. The Claimant sought for a compensatory relief for unfair termination of employment pursuant to the provisions of section 49[1][c] of the Employment Act. It is pertinent, however, to state that grant of the relief is discretionary. It depends on the circumstances of each case.
68. The Court hasn't lost sight of the fact that the Claimant's terminated on or about the 5th month into his employment contract with the Respondent. However, this fact notwithstanding, this Court considering many other factors, is inclined to find and hereby does, that he is entitled to the compensatory relief contemplated under the provision to the extent of ten [10] months' gross salary. Why ten [10] months? The Claimant testified that immediately before joining the Respondent company, he was in the employment of another entity, in the role of a Country Director. He was headhunted to join the Respondent. This evidence was not challenged. Cross examined, the Respondent's witness flatly stated that he couldn't remember how they recruited him. Inexplicably, the Respondent terminated his employment without cause. My conscience is really disturbed, this happened following dictation from the "the big" customer, Mkopa. The contract of employment was permanent and pensionable. In sum, the termination was inhumane, there was no due regard to the fact that an employment is a livelihood.
69. The Claim for one month's salary in lieu of notice is misplaced. The Claimant was serving under a probationary period when his employment was terminated. Per the contract of employment, termination within the period could be with a seven days' notice.
70. In the upshot, Judgment is hereby entered for the Claimant in the following terms;
- I. A declaration that the termination of his employment was substantively unfair.
 - II. Compensation pursuant to the provisions of section 49[1][c] of the Employment Act, KShs. 6,000,000 [six million].
 - III. Interest on the awarded sum at court rates from the date of this Judgment, till full payment.
 - IV. Costs of this suit.

READ SIGNED AND DELIVERED THIS 30TH DAY OF JANUARY 2025.

OCHARO KEBIRA

JUDGE

In the presence of: -

Mr. Oganga for Ms Weru for the Claimant.

Mr. Mwendwa for the Respondent.

