



Securkenya Group Limited v Wesiko (Employment and Labour Relations Appeal E021 of 2023) [2025] KEELRC 1031 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 1031 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E021 OF 2023**

**JW KELI, J
MARCH 28, 2025**

BETWEEN

SECURKENYA GROUP LIMITED APPELLANT

AND

FRANCIS MUNYANCHA WESIKO RESPONDENT

(Being an Appeal from the Judgment of the Honourable H. Mwangi Ng'ang'a (PM) delivered at Nairobi on the 23rd February, 2023 in Nairobi MCELRC E698 of 2021)

JUDGMENT

1. The Appellant being dissatisfied with the Judgment and Orders of the Honourable H. Mwangi Ng'ang'a (PM) delivered at Nairobi on the 23rd February, 2023 in Nairobi MCELRC E698 of 2021 between the parties filed a Memorandum of Appeal dated 6th March, 2023 seeking the following Orders:
 - I. That the finding and holding of the learned magistrate erred that the Claimant was unlawfully and unfairly terminated be and is hereby set aside.
 - II. That the court finds that there existed grounds to terminate the Claimant and he was lawfully and fairly terminated.
 - III. That award of damages of a sum of Kshs. 300,000.00 being a 12 months salary as compensation for unlawful termination to the Claimant be and is hereby set aside.
 - IV. That award of damages of a sum of Kshs. 449,280.00 as compensation for overtime worked be and is hereby set aside.
 - V. That the award of costs to the Claimant be and is hereby set aside.
 - VI. That the costs of this Appeal be awarded to the Appellant.



THE GROUNDS OF THE APPEAL

2. That the learned magistrate erred in law and fact by holding that the Claimant was unlawfully and unfairly terminated yet he was accorded a hearing before being terminated.
3. That the learned magistrate erred in law and fact by holding that the Claimant was unlawfully and unfairly terminated yet there existed grounds to terminate the Claimant.
4. That the learned magistrate erred in law and fact by awarding the Claimant damages of a sum of Kshs. 300,000.00 being a 12 months salary as compensation for unlawful termination yet he had not served the company for a period of more than 1 year.
5. That the learned magistrate erred in law and fact by awarding the Claimant damages of a sum of Kshs. 300,000.00 being a 12 months salary as compensation for unlawful termination yet the employment contract could be terminated by 1 month notice or 1 moth salary payment in lieu of notice.
6. That the learned magistrate erred in law and fact by awarding the Claimant a sum of Kshs. 449,280.00 as overtime yet there was no sufficient proof to support this claim of overtime.
7. That the learned magistrate erred in law and fact by awarding the Claimant costs of suit yet there were valid grounds that gave rise to his termination.
8. That the learned magistrate erred in law and fact by granting the Claimant damages for unlawful termination, overtime and allowances yet there existed a document which he signed admitting all his dues having been paid upon termination.

BACKGROUND OF APPEAL

9. The Claimant filed claim against the Appellant/Respondent vide a Statement of Claim dated 22nd April, 2021 seeking the following Orders:-
 - i. A declaration the underpayment of the Claimant's employment was unfair and unlawful;
 - ii. An order compelling the Respondent to pay the Claimant a total sum of Kshs. 1,153,888/=;
 - iii. In the alternative, the Claimant be reinstated into the position he prior to termination held without any loss of benefits
 - iv. Costs and interest of this suit at Court rates;
 - v. Any other relief which the Court deems fit, just and expedient to grant.
10. The Claimant filed his verifying affidavit, witness statement and list of documents all of even date together with the bundle of documents (see pages 7-20 of ROA).
11. The claim was opposed by the Respondent who filed a Memorandum of Response to the Statement of Claim dated 28th June, 2021 (Pages 21-32 of ROA), Respondent's list of witnesses, Respondent's Witness Statement of Patricia Wanjiku and George Nerry and list and bundle of documents all of even date (Pages 33-45 of ROA).
12. The claimant's case was heard on the 14th February, 2022 where the claimant testified in the case, produced his documents and was cross-examined by Counsel for the Respondent, Mr. Mutende.
13. The Respondent's case was heard on 18th October, 2022 where the Respondent's witness Mr. Mulwa Matheka testified on behalf of the Respondent and was cross-examined by counsel for the Claimant, Mr. Mageto.



14. The parties took directions on filing of written submissions after the hearing. The parties complied.
15. The Trial Magistrate Court delivered Judgment on the 23rd February, 2023 in favour of the Claimant awarding him a total sum of Kshs. 839,280/= consisting of compensation for unlawful termination, unpaid house allowance, and overtime (Judgment at pages 92-97 of ROA).

DETERMINATION

16. The appeal was canvassed by way of written submissions. Both parties complied.
17. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123 that:- “The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 witnesses and should make due allowance in this respect. In particular the 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 demeanor of a witness is inconsistent with the evidence in the case generally.”
18. The court is further guided by the principles on appeal decisions in *Mbogo v Shah* [1968] EA by De Lestang V.P (as he then was) :- “I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

ISSUES FOR DETERMINATION

19. The Appellant submitted the following issues for determination:-
 - i. Whether the learned magistrate erred in law and fact by granting the Claimant damages for unlawful termination, overtime and allowances yet there existed a document which he signed admitting all his dues having been paid upon termination?
 - ii. Whether the learned magistrate erred in law and fact by awarding the Claimant a sum of Kshs. 449,280.00 as overtime yet there was no sufficient proof to support this claim of overtime?
 - iii. Whether the learned magistrate erred in law and fact by awarding the Claimant damages of a sum of Kshs. 300,000.00 being a 12 months salary as compensation for unlawful termination yet the employment contract could be terminated by 1 month notice or 1 moth salary payment in lieu of notice?
 - iv. Whether the learned magistrate erred in law and fact by holding that the Claimant was unlawfully and unfairly terminated yet he was accorded a hearing before being terminated?
20. The Respondent submitted on the following issues for determination:
 - i. Whether the learned magistrate erred in holding the Respondent was unlawfully and unfairly terminated or whether the appellant had been accorded a fair and lawful hearing?



- ii. Whether the learned magistrate erred in law and fact by granting the Claimant damages for unlawful termination, overtime and allowances yet there existed a document which he signed admitting all his dues having been paid upon termination?
 - iii. Whether the learned magistrate erred in law and fact by awarding the Claimant damages of a sum of Kshs. 300,000.00 being a 12 months salary as compensation for unlawful termination yet he had not served the company for a period of more than 1 year and that the employment contract could be terminated by 1 Month Notice or 1 month salary payment in lieu of notice.
 - iv. Whether the learned magistrate erred in awarding the Respondent a sum of Kshs 449,280 as overtime?
 - v. Whether the learned magistrate erred in law and fact by awarding the Claimant costs?
21. The court adopted the issues at trial court and framed them on first appeal as follows:-
- 1. Whether the Trial court erred on its findings on the lawfulness and fairness of the termination.
 - 2. Whether the trial court erred on the reliefs sought.

Whether the Trial court erred on its findings on the lawfulness and fairness of the termination

22. The threshold for fair termination of employment against which the Court determines claims for unfair termination is according to the provisions of section 45(2) of the Employment Act to wit:-⁴⁵ Unfair termination
- (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.”
23. Fairness as per section 45(2) of the Employment Act (supra)has two components:-
- (a) substantive fairness of valid reasons related to the employees conduct, capacity or compatibility; or(ii) based on the operational requirements of the employer; and
 - (b) procedural fairness under section 41 of the Employment Act.
24. On procedural and substantive fairness, the Trial Magistrate Court delivered Judgment on the 23rd February 2023 held as follows:-⁶ having evaluated the evidence I find that the disciplinary process adopted by the respondent was not only unfair but fundamentally flawed. Due to the unfairness procedure it would not be necessary to considered if there was a valid reason for termination.”

The appellant’s submissions

25. It is common ground that the employment contract between the Claimant and the Respondent could be terminated by either of the parties issuing a 1-month notice or payment instead of notice. It was a further common ground that the Claimant was employed by the Respondent for a period of 2 years



as per the Certificate of Service dated 8th December 2020 that was produced by the Claimant (at page 18 of the Index of Appeal dated 27th May 2024). In the case of *Central Bank of Kenya vs. Julius Nkonge* [2002] eKLR the Court of Appeal held that: “the trial Judge had erred by computing damages beyond the notice period. It was the Court’s view that on the assumption that the respondent’s dismissal was wrongful, he was only entitled to damages equivalent to the salary he would have earned for the period of notice, namely, three months, and that the trial Judge erred in awarding him more.” The employment contract between the parties provided for 1 month’s notice period. The Respondent submitted that the Claimant’s computations were grossly misguided and unfounded. Similarly, in *CMC Aviation Limited vs. Mohammed Noor* [2015] eKLR, the Court of Appeal held that: “despite a finding of unfair termination of employment, the fact that the employment contract was terminable by one month’s notice meant an award of one month’s salary in lieu of notice was reasonable compensation.”

26. The appellant contended that considering the employment contract could be terminated by any of the parties issuing a 1 month written notice of payment in lieu of notice, the learned magistrate ought to have awarded a maximum of 1 month pay in lieu of notice. That the Claimant was issued with a Notice to show cause after which he attended a disciplinary hearing and was later terminated. He was paid his salary for the days worked up to 7th December, 2020, 30 days salary in lieu of notice, annual leave earned but not taken if any and was issued with a certificate of service. The termination was based on misconduct on the part of the Claimant as he declined to take lawful instructions that formed part of his duties. This falls under section 44(3) of the *Employment Act* whereby an employee could only be dismissed summarily if he had fundamentally breached his obligations under the contract of service. The employer in this case was justified to dismiss the employee. The Claimant’s actions amounted to negligent performance of his duties which led to the Employer’s client complaining of the Respondent’s actions through an email.
27. The Appellant submitted that the Claimant had an employment record replete of complaints as evidenced by the letter he wrote on page 37 and 38 of the Index of Appeal. It was common ground that also the company had a valid reason to terminate the Claimant since he declined to take lawful instructions from their client where he was posted.
28. The appellant relied on the findings made in the case of *Walter Ogal Anuro Vs Teachers Service Commission* (2013) eKLR the Court held that; “... for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.” The appellant complied with both procedural fairness and substantive fairness before terminating the Claimant.
29. The appellant asserted that it was common ground that the Claimant confirmed that indeed he was issued with a show cause notice and show cause meeting which he insisted be conducted on the same day and he attended. The Claimant did not protest in writing that the meeting was held on the same day. He contradicted himself by alleging that he did not attend the said meeting but at the same time blamed the Respondent for conducting it on the same day and further, he signed the documents relating to this meeting. The minutes of disciplinary hearing were produced as evidence (page 39 of the Index of Appeal dated 27th May 2024).

Respondent’s submissions

30. The Respondent submitted that the learned magistrate correctly held that the Respondent was unlawfully and unfairly terminated. The Respondent’s case was that he was summoned to collect his show cause letter on 4th December 2020 and upon collecting the letter from Human resource



office which did not disclose the reason for show cause and before showing cause, on the same day he verbally summoned to appear for hearing at a hurriedly constituted disciplinary committee where he attended. It was the Respondent's case that he was never served with a notice calling upon him to attend the hearing. It was the Respondent's further case the charges /reasons for disciplinary hearing were never read and or explained to him in the language he understands and was he not permitted to attend in the company of/alongside a co-worker/ colleague or any official of a union or to tender any evidence or call any witnesses to support his case and or rebut the allegations against him . That section 41 of *Employment Act* obliges and imposes a duty upon the employer who wishes or seeks to terminate the employment of an employee to hear him in the presence of a colleague or an official of a union and must first read to him and explain the reason for the intended termination. Section 41 of the *Employment Act* provides: "(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 of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make." [Emphasis Added]

31. In the case of Janet Nyandiko Versus Kenya Commercial Bank Limited [2017] e KLR, the Court stated: "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."
32. The verdict of the disciplinary hearing was to the effect that the Respondent was :- a. to be released and be paid 1 month salary if he was not able to work on his attitude b. be directed to give an open resignation letter so that in case a repeat of other similar offences he will just leave Securkenya. The disciplinary committee's verdict sounded like a warning that did not amount to termination of employment that was meted on the respondent. Indeed even the letter of termination dated 7.12.2020 made no mention of the disciplinary hearing that took place on 4th December 2020. The Court of Appeal in the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR had the following to say on the burden of proof: "There can be no doubt that the Act 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, prove the reasons are valid and fair, prove that the grounds are justified. A mandatory and elaborate process under Section 41 requiring notification and hearing before determination. The appellant (employee) in this case had the burden to prove, not only were his services terminated but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon to prove the reason for termination, and where the employer fails to do so, the termination will be deemed to have been unfair."

Decision

33. The respondent was issued with show cause letter dated 4th December 2020 which stated he had defied instructions of the client (Crown Plaza) through their internal security person (Mr. Emmanuel) on



how he was supposed park the repondent's vehicle. That he had negative attitude. The respondent was asked to respond in writing why disciplinary action should not be taken against him. The appellant produced minutes of the disciplinary proceedings of even date of the show cause at 12.24pm where the respondent was the accused and faced the MD, HR Manager and Operations Manager. The verdict was indicated to be two choices:-a. to be released and be paid 1 month salary if he was not able to work on his attitude b. be directed to give an open resignation letter so that in case a repeat of other similar offences he will just leave Securkenya. The minutes of the disciplinary hearing were produced as evidence before the trial court (page 39 of RoA).

34. The appellant produced a termination letter dated 7th December 2020. The letter did not disclose the reasons for the termination. The court read the witness statement of Patricia Wanjiku. The court noted that reasons for termination in the letter dated 7th December 2020 did not refer to the disciplinary hearing nor state the reason for termination. The verdict of the disciplinary hearing amounted to be termination on repeat offence namely:- 'a. to be released and be paid 1 month salary if he was not able to work on his attitude b. be directed to give an open resignation letter so that in case a repeat of other similar offences he will just leave Securkenya.' There was no evidence of the occurrence of another offence for the termination to occur.
35. During cross-examination the respondent told the court he was not given opportunity to be heard, the notice to show cause did not indicate a date of hearing. That he did not ask for the immediate hearing and did not attend the disciplinary hearing. That he signed the minutes on the 8th December 2020 to access his dues. RW1 on cross-examination stated that the respondent asked for immediate hearing. RW1 did not attend the hearing. He could not say the verdict was conclusive. RW1 received the complaint by the client against the Respondent on email.
36. The court, having evaluated the evidence before the trial court as above, found no reason to disturb the finding of unfair termination. Fair procedure is according to section 41 of the *Employment Act* to wit:- '41. Notification and hearing before termination on grounds of misconduct
 - (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 of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.' The claimant was given a show cause without notice of hearing. He was apparently heard within few hours of the notice without being accorded right to be accompanied by another employee of choice or a shop floor union representative during the said hearing. The claimant denied having attended the hearing. There was no notice of the hearing. The court found that the minutes did not reflect that the claimant requested for immediate hearing. The court upheld the trial court finding of flawed procedure.
37. On the reason, the court on evaluation of the documents and evidence found that the verdict of the said disciplinary committee was not conclusive to lead to the termination of 7th December 2020 which did not cite any misconduct on the part of the respondent. The verdict had two options which were condition to repeat misconduct(negative attitude)- 'a. to be released and be paid 1 month salary if he was not able to work on his attitude b. be directed to give an open resignation letter so that in case



a repeat of other similar offences he will just leave Securkenya.” There was no demonstration of the respondent having repeated the negative attitude between date of the hearing and the termination. Consequently, the court upheld the finding by the trial court of unlawful and unfair termination.

Whether the trial court erred on the reliefs sought.

38. The trial court held that the respondent provided evidence of payment of days worked in December 2020 and leave days not taken. The respondent did not produce the payslip on payment of salary inclusive of house allowance. That the evidence of overtime was not controverted.
39. The appellant contended that the learned magistrate erred by granting the said compensation when there existed a document signed by the Claimant acknowledging having been paid and that he had no outstanding claims against the company. This document is attached to the letter of termination dated 7th December 2020 (at page 41 to page 42 of RoA). It was common ground that the final dues had a disclaimer that “By signing this form I confirm acceptance of the final calculations and do hereby declare that I have been paid all my dues owed by SecureKenya Group Ltd in full and I shall not lodge any claim against the company.”(Page 42 of RoA). That the Court of Appeal reaffirmed the decision in the case of *Coastal Bottlers Limited v Kimathi Mithika* [2018] KECA 523 (KLR), where the in upholding a settlement agreement, held as follows:- ‘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. In *Trinity Prime Investment Limited vs. Lion of Kenya Insurance Company Limited* [2015] eKLR this Court, while discussing the import of a discharge voucher which is more or less similar as the agreement in question observed: “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. All the ELRC was required to do was to give effect to the intention of the parties as discerned from the settlement agreement. Our position is fortified by the sentiments of Sir Charles Newbold P in *Damondar Jihabhai & Co Ltd and another vs. Eustace Sisal Estates Ltd* [1967] EA 153 that:- “The function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement. In the English Court of Appeal case above - *Globe Motors Inc & Others vs TRW Lucas Electric Steering Ltd & Others* (supra) – Lord Justice Beatson stated as follows:- ‘Absent statutory or common law restrictions, the general principle of the English law of contract is [that parties to a contract are free to determine for themselves what obligations they will accept]. The parties have the freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct.” Giving effect to the parties’ intention meant that the ELRC could not entertain the suit filed by the respondent. This is because the respondent had waived his rights to make any further claim in relation to his relationship with the appellant. Having expressed ourselves as herein above, we see no reason to delve into the other grounds of appeal. In the end, we find that the appeal has merit and is hereby allowed with costs. We set aside the judgment dated 29th July, 2016 in its entirety and substitute the same with an order dismissing the respondent’s suit with costs.” The appellant submitted that the learned magistrate considered the Claimant’s submission that the said document was signed under duress, but this duress was not particularised and proven by the Claimant.



40. The respondent submitted that on termination of the Respondent's employment on 8th December 2022 the Appellant arbitrarily proceeded and made a tabulation of the Respondent's terminal dues itemized as- a. salary arrear of November 2020 b. leave days not taken, c, Notice payment in the total sum of Kshs 65,010 /=. The tabulation headed employees terminal dues was duly received by the Respondent on a without prejudice basis. The Document had a disclaimer to the effect "By signing this form I confirm my acceptance of the final calculation and I do hereby declare that I have been paid all my dues owed by Secure Kenya group limited in full and I shall not lodge any claim against the company" The disclaimer did not specify to whom it related to and did not qualify as a contract / agreement. The document containing the disclaimer was prepared by the Appellant which held a superior position in the intended agreement and did not exonerate Appellant from legal liability of paying the statutory payments not included in the tabulation as set out in the document dated 8th December 2020. .In the case of E & LR C CAUSE NO. 82 OF 2015 Fredrick Odhiambo Versus Kenya Safari Lodges & Hotels Ltd the Court made reference to the case of Muthaiga county club vs Simon Wachira Muhuro (2009)eKLR where the Court held that the employee was the weaker party in a settlement agreement compared to the employer. In the same case the made reference to a Court of Appeal decision in the case of Thomas De La Rue (K) Ltd vs David Opondo Omutelema (2013)eKLR where it was held that a discharge voucher per se cannot absolve an employer from statutory obligation and it cannot preclude this court from enquiring into the issue of whether the discharge voucher was freely and willingly executed. The Honourable has a legal duty to inquire into the statutory obligations of the Appellant including payment of correct terminal dues as stipulated by the law even where there exists a discharge voucher /disclaimer . Further the amount due and payable to the employee upon termination are legally statutorily provided for and any extraneous agreement made outside the purview of the law is secondary and cannot override the statutes. In the case of Nairobicause No. 239 Of 2017 Kioko Muindi versus-United Aryan (Epz) Limited the court made reference to the case of Krystalline Salt Limited v Kwekwe Mwakele & 67 others [2017] eKLR where the Court of Appeal held: - "... it is important to bear in mind that in Kenya, employment is governed by the general law of contract as much as by the principles of common law now enacted and regulated by the Employment Act and other related statutes. In that sense employment is seen as an individual relationship negotiated between the employee and the employer according to their needs." In the case of Nairobi ELRC Appeal E049 & E050 Of 2021 (Consolidated)H. Young & Co (E. Afica) Ltd Versus John Mwaniki Mwangi and Another the Court stated as follows:- 'There are conflicting interpretations by the various judges as pertains to the import of discharge voucher. Some authorities have held that a discharge voucher is a binding agreement and once an employee appends his signature he is bound by the same. There are other equally number of authorities that provide that a discharge voucher will be considered according to the circumstances of each case. Indeed a discharge voucher is usually a document generated by an employer without the input of an employee. In that case the court would hesitate to regard the same as an agreement binding on both parties. If for the sake of argument the employer discovered he had a counterclaim against the employee who has executed a discharge voucher would he be prevented from pursuing the counterclaim? This therefore makes the discharge voucher a one sided document usually forced on an employee to sign in order to receive his terminal dues'. The court of appeal in the case of Thomas De La Rue (K) Ltd vs David Opondo Omutelema (2013)eKLR where it was held that a discharge voucher per se cannot absolve an employer from statutory obligation and it cannot preclude this court from enquiring into the issue of whether the discharge voucher was freely and willingly executed.

Decision

41. The claimant signed the disclaimer document and was paid. The court did not find a reason to doubt that the disclaimer was not willingly executed. Indeed, the claimant never pleaded duress in signing



the said disclaimer. The court noted from his statement the claimant was a well exposed employee and with good command of English language.

42. The Court of Appeal in *Trinity Prime Investment Limited -vs- Lion of Kenya Insurance Company Limited* [2015] eKLR in discussing the import of a discharge letter held that: - “The execution of a discharge voucher we agree with the Learned Judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other...” The court upheld the decision to hold that the Respondent in signing the disclaimer on final dues waived any claims of terminal dues. The court in the instant case found no prove of the claim of house and overtime. The awards of housing and overtime being terminal dues are set aside.
43. On compensation, the court did not agree such disclaimer on the document titled final dues covered claim for unfair termination whose payment was under section 49 of the *Employment Act*. Compensation was not a matter final dues. Evidence was led on the conduct of the respondent; he had worked for only two years; as a driver he could secure a job elsewhere as he was issued with a certificate of service. He was paid notice pay. The court took into account length of service of two years and the evidence of previous misconduct and the payment of all salary, leave and notice and held the award of maximum award was undeserved and reduced the compensation to the equivalent of 6 months’ salary thus Kshs. 150000.

Conclusion

44. The appeal was partially successful. The judgment of Judgment of the Honourable H. Mwangi Ng’ang’a (PM) delivered at Nairobi on the 23rd February, 2023 in Nairobi MCELRC E698 of 2021 is set aside and substituted as follows:

Judgment is entered for the claimant against the respondent as follows:-

1. A declaration that the termination of the claimant’s employment by the respondent as unlawful and unfair.
 2. Compensation for unfair termination equivalent of 6 months’ salary for Khs. 150,000.
 3. Costs and interest from the date of judgment until payment in full.
45. Each party is to bear its costs at the appeal.
46. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF MARCH, 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Appellant : - Mutanda

Respondent: Ondieki h/b Mageto

