



REPUBLIC OF KENYA



KENYA LAW
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Luambe v Fidelity Security Limited (Employment and Labour Relations Appeal E064 of 2023) [2025] KEELRC 864 (KLR) (14 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 864 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E064 OF 2023**

JW KELI, J

MARCH 14, 2025

BETWEEN

EZEKIEL OGOLA LUAMBE APPELLANT

AND

FIDELITY SECURITY LIMITED RESPONDENT

(Being an Appeal from the Judgment of the Honourable Wendy Michemi (CM) delivered at Nairobi on the 14th April, 2023 in Nairobi MCELRC E098 of 2021)

JUDGMENT

1. The Appellant, dissatisfied with the Judgment and Orders of the Honourable Wendy Muchemi (CM) delivered at Nairobi on the 14th April, 2023 In Nairobi MCELRC No. E098 of 2021 between the parties filed a Memorandum of Appeal dated 20th April, 2023 seeking the following orders:-
 - i. That the Appeal herein be allowed and the Judgment of 14th April, 2023 in Milimani CMEL No. E098 of 2021 be set aside
 - ii. That the Respondent do pay costs of this Appeal.

The Grounds of the Appeal

2. That the Learned Magistrate erred in law and in fact in delivering a judgment against the Appellant dismissing his Memorandum of Claim dated 12th January 2021 in its entirety with no Order as to Costs.
3. That the Learned Magistrate erred in law and in fact by relying on a controverted Payment voucher as the sole evidence for dismissing the Appellant's Claim entirely.
4. That the Learned Magistrate erred in law and in fact by failing to find that material documents were not produced or adduced by the Respondent.



5. That the Learned Magistrate erred in Law and in Fact by applying the wrong and inaccurate principles and/or considering erroneous, irrelevant and/or extraneous factors in determining the issue of unlawful termination of employment.
6. That the Learned Magistrate erred in Law and in Fact by failing to consider or by dismissing out of hand, the issues and/or submissions raised by the Appellant.
7. That the learned Magistrate erred in Law and in Fact by failing to find that the Appellant's termination was unfair.
8. That the Learned Magistrate erred in law and in fact by failing to find that due process was not followed in the termination of the Appellant.

Background to the Appeal

9. The Claimant/Appellant filed claim against the Respondent vide a memorandum of claim dated 12th January, 2021 seeking the following orders:-
 - a. A declaration that the termination of the Claimant by the Respondent was unlawful, unprocedural and unfair.
 - b. That the Honorable Court be pleased to award the Claimant the sum of Kshs. 19,000/= being the equivalent of one month's salary in lieu of notice.
 - c. That the Honorable Court be pleased to award the Claimant the sum of Kshs. 228,000/= being 12 month's compensation.
 - d. That the Honorable Court be pleased to award the claimant the sum of Kshs. 66,500/= untaken/unpaid leave.
 - e. That the Honorable Court be pleased to award the claimant the sum of Kshs. 47,500/= being service pay
 - f. That the Honorable Court be pleased to award the claimant the sum of Kshs. 34,833/= being unpaid public holidays worked.
 - g. That the Honorable Court be pleased to award the claimant the sum of Kshs. 2,600/= being amount deducted for purchase of uniform.
 - h. That the Honorable Court be pleased to award the claimant the sum of Kshs. 4,400/= being amount deducted but not remitted to NSSF for 16 months.
 - i. That the Honorable Court be pleased to award the claimant the sum of Kshs. 137,331.70/= being overtime.
 - j. That the Honorable Court be pleased to compel the Respondent to issue a Certificate of Service to the Claimant.
 - k. Interest on the sums claimed above from the date of filing this cause in court.
 - l. The costs of this cause
 - m. Such further orders and/or relief as this court may deem Just and fit to award (page 5 of ROA).
10. The Claimant filed his verifying affidavit, his statement and list of documents all of even date together with the bundle of documents (see pages 6-16 of ROA).



11. The claim was opposed by the Respondent who entered appearance and filed a Respondent's Memorandum of Response dated 10th March, 2021 (pages 18-20 of ROA), Respondent's list of witnesses (Page 21 of ROA), Respondent's Witness statement of Peter Kimemia dated 23rd April, 2021 (Pages 24-26 of ROA) and list and bundle of documents dated 11th May, 2021 (Pages 27-31 of ROA).
12. The claimant's case was heard on the 5th December, 2022 where the claimant testified on oath in the case, produced his documents, and was cross-examined by counsel for the Respondent Ms. Mwaniki (pages 89-91 of ROA).
13. The Respondent's case was heard on the same date where DW1 Peter Kimemia testified on oath on behalf of the Respondent. He relied on his filed witness statement. He was cross-examined by counsel for the claimant Ms. Milka (pages 91-93 of ROA)
14. The parties took directions on filing of written submissions after the hearing. The parties complied.
15. The Trial Magistrate Court delivered its Judgment on the 14th April, 2023 dismissing the Claimant's Claim with no orders as to costs. (judgment at pages 81-84 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.* [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." See also *Peter Kamau Njau Vs. Emmanuel Charo Tinga* (2016) eKLR
18. The court is further guided by the principles on appeal decisions in *Mbogo v Shah* [1968] EA De Lestang V.P (as he then was) observation at page 94:

"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 the court's determination namely:-
 - a. Whether the trial Court erred in law and in fact in failing to find that the Respondent had no valid reason to terminate the Appellant's employment;
 - b. Whether the trial court erred in law and in fact in failing to find that the Respondent failed to observe fair procedure in terminating the Appellant's employment;
 - c. Whether the Appellant was entitled to the reliefs sought before the trial Court;



- d. Who should bear the costs of the lower court and the Appeal
20. The Respondent submitted on the issue of whether the Appellant was unfairly/unlawfully terminated from employment.
21. The court having perused the grounds of appeal and the written submissions by the parties of was of the considered opinion the issues for determination in the appeal were as follows:-
- i. Whether the trial Court erred in law and in fact in failing to find that the Respondent had no valid reason to terminate the Appellant's employment and failed to observe fair procedure in terminating the Appellant's employment;
 - ii. Whether the Appellant was entitled to the reliefs sought before the trial Court;

Whether the trial Court erred in law and in fact in failing to find that the Respondent had no valid reason to terminate the Appellant's employment and failed to observe fair procedure in terminating the Appellant's employment;

22. The thresh hold for fair termination of employment against which the Court determines claims for unfair termination is according to the provision 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) (supra) has two components, of substantive fairness of valid reasons related to the employees conduct, capacity or compatibility; or(ii) based on the operational requirements of the employer and procedural fairness according to section 41 of the Act.
24. The germane of the grounds for appeal under substantive fairness was the challenge on validity of the reasons for the termination. In *Walter Ogal Anuro v Teachers Service Commission (2013)eKLR*, it was held that there must exist both substantive and procedural fairness for the termination to pass the fairness test under Section 45 of the Employment Act. The prove of fair termination of employment is as according to section 47(5) of the Employment Act to wit:- "(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."

Appellant's submissions

25. The appellant submitted as follows:-
26. Despite the Respondent alleging that the Appellant was not declared redundant, every indication and evidence before the trial court then and this court now says otherwise. The record of Appeal will bear witness that the Respondent admitted in its defence and evidence before the trial Court that the



Appellant was laid off due to the adverse effects of Covid 19 which allegation is disputed. It is therefore not in dispute that the alleged reason for the Appellant's termination was not occasioned by an act or omission on the part of the Appellant and as such the same would suffice for redundancy as defined at Section 2 of the *Employment Act*. The Act in defining redundancy refers to the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer. Which was exactly the case in this instance.

27. That the Appellant's employment was terminated on 7th April, 2020 way before the Covid 19 pandemic resulted in any adverse action in Kenya and before its adverse effects could be felt in Kenya. Having established that the Appellant's termination was solely at the initiative of the Respondent and through no fault of the Appellant's, the Respondent had only one duty, having alleged that the reasons they laid down the Appellant was due to the adverse effects of the Covid -19, it was incumbent upon them to adhere to the redundancy procedure as laid out under Section 40 of the *Employment Act*, 2007 and in this instance to communicate the said reason if at all the same was valid to the Appellant via a general notice and thereafter a specific notice, this was not done. The Respondent attempted to rely on a purported letter dated 3rd April, 2020 which document was neither signed nor received by the Appellant to indicate communication. The Appellant however disowned the purported document as the signature therein does not resemble his signature and he only saw the document for the first time before this court. The appellant relied on the case of *Angela Shiukuru llondanga v Airtel Networks Kenya Limited (2018) eKLR* where the Court held as follows: - "... The 2nd issue for determination is whether the reason for redundancy was valid. It was the respondent's case that the respondent reorganized for better efficiency with the consequence that the office held by the claimant was rendered redundant. During cross-examination, the respondent's witness confirmed that the respondent's Parkside Shop where the claimant was deployed as the Express Shop Manager was still in operation. The Court has considered that evidence against the email of 25th February 2016 addressed to one Kennedy Olouch, Shop Manager, Parkside Shop and returns that the claimant has established on a balance of probability that the office held by the claimant in the respondent's establishment was never abolished or rendered redundant. In any event, it has not been shown that the respondent notified the abolition of the office held by the claimant to the Director of Employment as required under Section 77 of the *Employment Act*, 2007 and that failure should be sufficient evidence that the office was not abolished... Thus, as at the time of termination, the Court returns that the respondent has failed to show that there existed a genuine reason for the termination of the contract of service on account of redundancy..."
28. The Respondent Company continued to run during the Covid 19, no criteria was tabled before the trial court to show why the Respondent decided to lay off the Appellant and not any other employee considering that the Appellant had served the Respondent for a solid 5 years. Further, the Respondent having alleged that the reason for laying off the Appellant was the adverse effects of Covid 19, no attempts were made to recall the Appellant after Covid 19 went under and the business picked up. The Respondent's witness during cross examination before the lower court admitted that business has picked and that to date he has never written to the Appellant recalling him back to work. The Respondent did not only have any justifiable reason to terminate the Appellant's employment, but also that the alleged reason was not communicated to the Appellant, as such urged the court to find that the Appellant's termination was unfair and unlawful in light of the decision in *Walter ogal Anuro* cited above.
29. The appellant submitted that, without prejudice to the foregoing, in any event if the Respondent's evidence that the Appellant was terminated and not declared redundant was anything to go by, the Respondent would still have failed the fairness test as there existed no reason at all to terminate the Appellant's employment. The appellant urged the court to find that the trial Court erred in law and in



fact in failing to find that the Respondent had no valid or justifiable reason to terminate the Appellant and thus the Appellant's termination was unfair and unlawful.

Respondent's Submissions

30. The Respondent submitted as follows:-
31. It is the Appellant's case that he was unfairly/unlawfully terminated from his employment by the Respondent and that his terminal dues were not paid. On the other hand, it is the Respondent's case that the Appellant was not unfairly terminated for reasons that during the COVID-19 pandemic, the Respondent's business was gravely affected and vide a letter dated 3rd April, 2020, it offered the Claimant a sum of Kshs. 20,000.00 which covered his notice pay and all other allowances under the Appellant's employment contract. This was not disputed by the Appellant. As a result of the harsh effects of the pandemic, the Respondent through a discharge letter offered the Appellant Kshs. 20,000.00 inclusive of his notice pay and other allowances owed to the Appellant and that the Appellant's salary and any outstanding dues to be paid on a pro rata basis up to the last working day. This was paid as evidenced by the Appellant's Pay slip of the month of April, 2020. The Appellant signed the afore-stated discharge contract which clearly stipulated that its signing would be strictly on a voluntary basis and that upon the payment of the dues therein, there would be no claim by either one of the parties against the other.
32. Further, at the trial court, the Appellant acknowledged signing the discharge voucher dated 3rd April, 2020. However, he alleged that he had been coerced into signing it. Despite this assertion, he failed to provide any evidence in support of his claim of coercion. In fact, he only mentioned this during the hearing but he neither pleaded coercion in his Memorandum of Claim, nor called any witnesses to corroborate this claim. To this end, the Respondent submitted that this was a clear afterthought. To buttress the submission above, the Respondent urged the court to be guided by the provisions of Section 107(1) of the Evidence Act which provides that; -

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” The burden of proving coercion therefore lied with the Appellant. Seeing as he failed to prove it, it thus stands that he signed the discharge voucher voluntarily and even appended his signature and Identity Card Number on it. That the discharge letter signified a voluntary and mutual separation between the Appellant and Respondent and not a termination by way of redundancy. The fact of the mutual separation is confirmed by the wording of the Discharge Letter which read in part that; -

“In view of the above, the difficult operating environment, the rapid spread of the disease and the uncertainty as when the disease will have been contained and return to normalcy experienced; the management has held various consultative meetings with the Guards Representatives. [...] This would be strictly on voluntary basis. 1. ... 2. ... 3. ... 4. When normalcy returns and in the event of future vacancies arising, given your past experience and loyalty to the company you may be offered such employment under fresh employment contract on a priority basis. It was mutually and voluntarily agreed that upon formal clearance neither the company nor the employee shall have any claim against one another whatsoever.” I, EZEKIEL OGOLA of ID NUMBER 5959940 hereby acknowledge that I have read and understood the contents of this letter and received my dues in full and final settlement.” From the inferences above, it is clear that the discharge letter dated 3rd April, 2020 was in the form of a contract and



the terms thereto were binding to the parties. The Appellant having accepted the said terms of the contract, cannot therefore turn around even in the event that he deems the compensation was inadequate.

33. The Appellant on his own admission confirmed at the trial court that he was indeed paid under the terms of the said contract, thereby proving that the Respondent was discharged from any other claim. To fortify the submissions above, the respondent relied on the case of Sheila Kiplangat v Uniliver Tea Kenya Limited [2022] eKLR where the Honourable Justice Onesmus Makau cited with approval the Court of Appeal decision in Costal Bottlers Limited –V – Kimathi Mithika [2018] eKLR where the court in determining whether or not a settlement agreement or discharge voucher bars a party thereto from making further claim, held that: - “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 respondents’ 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 adequate. As it stood, the agreement was a binding contract between the parties... All the ELRC was required to do was to give effect to the intention of the parties as discerned from the settlement agreement. ...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” The above finding was also reiterated by the Court of Appeal in Trinity Prime Investment Limited -vs- Lion of Kenya Insurance Company Limited [2015] eKLR where in discussing the import of a discharge letter the Court 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...”

34. The discharge letter dated 3rd April, 2020 clearly brings forth the Appellant’s intention, and it is quite clear that he accepted the sum of Kshs. 20,000.00 as his notice pay and all other allowances in his contract, and by that acceptance he waived any further claims against the Respondent. In light of the foregoing, the Respondent submitted that from the discharge letter as captured above, the parties’ intention was quite clear. Both the Appellant and the Respondent agreed that payment of the amount of Kshs. 20,000.00 would absolve the Respondent from any other claims under the contract. The Appellant signed the discharge letter voluntarily being well aware of its import. There were no vitiating factors when he signed the letter and as such, it was binding to both the Appellant and the Respondent herein. That being the case, the Appellant waived any right of further claim from the Respondent and as such, he was estopped from filing any claim against the Respondent seeking for more reliefs. Accordingly, the trial court was right in dismissing the Appellant’s case with costs.

Decision

35. The trial court stated:- “the respondent has shown that the claimant came looking for his dues and was subsequently paid. That the claimant signed a document acknowledging payment of Kshs. 20000 having been offered the same to voluntary resign due to economic difficulties it was facing due to COVID 19 pandemic”(page 82-84 of ROA)The court then held that plaintiff had not established a valid reason for claim of unfair termination as he was given payment that was due to cover for notice.



36. During cross-examination the appellant told the court his employment was terminated and he not informed of the difficulty the respondent was facing due to COVID 19. He denied signing document dated 3rd March 2020 . He stated he signed the voucher dated 14th April 2020 and was paid Kshs. 20000 which he stated was his salary for March 2020.
37. RW1 on cross-examination told the court the termination was voluntary and the appellant signed represented by the union. There was no discussion of redundancy. He agreed the payment voucher of 14th April 2020 did not indicate the purpose of the payment and that they had not recalled the claimant.
38. The court is guided by the decision in *Mbogo v Shah* [1968] EA De Lestang V.P (as he then was) observation at page 94: “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.” The court did not find basis to doubt that the appellant signed the letter dated 3rd April 2020 for voluntary termination. The court took judicial notice of the adverse effects of COVID 19 pandemic on businesses. The claimant received the payment under the letter of 3rd April 2020. In letter produced by the respondent at page 30 of ROA the appellant acknowledged the effects of COVID 19 Pandemic and stated they were stopped from work.
39. The court finds that the appellant executed the agreement without any duress to terminate his employment due to COVID 19 effects on the economy and was paid under the agreement. The court is obliged to respect contracts between parties unless there is proof of vitiating factors. The claim for coercion was not proved. The Appellant was represented by the union in the process. The court upheld the decision in *Sheila Kiplangat v Uniliver Tea Kenya Limited* [2022] eKLR where the Honourable Justice Onesmus Makau cited with approval the Court of Appeal decision in *Costal Bottlers Limited -V - Kimathi Mithika* [2018] eKLR where the court in determining whether or not a settlement agreement or discharge voucher bars a party thereto from making further claim, held that: -

“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 respondents’ 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 adequate. As it stood, the agreement was a binding contract between the parties... All the ELRC was required to do was to give effect to the intention of the parties as discerned from the settlement agreement. ...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” The above finding was also reiterated by the Court of Appeal in *Trinity Prime Investment Limited -vs- Lion of Kenya Insurance Company Limited* [2015] eKLR where in discussing the import of a discharge letter the Court 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...” Applying the foregoing decisions the court upheld the judgment of the trial court.

40. In the upshot the court found no demonstration that the trial magistrate was clearly wrong or misinterpreted the facts and the law to reach a wrong conclusion for the court to disturb the judgment (Mbogo v Shah).
41. The appeal is dismissed with no order as to costs taking into account the status of the appellant and as former employee of the respondent.
42. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF MARCH , 2025.

J.W. KELI,

JUDGE.

In the Presence of:

Appellant – Milicent small

Respondent – Nyakoe

