



REPUBLIC OF KENYA



KENYA LAW
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**Livoi v Sunpar Pharmaceuticals Limited (Appeal E173 of 2021)
[2025] KEELRC 1462 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1462 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E173 OF 2021
MN NDUMA, J
MAY 15, 2025**

BETWEEN

CLIFFORD OTWERE LIVOI APPELLANT

AND

SUNPAR PHARMACEUTICALS LIMITED RESPONDENT

*(Being an appeal from the judgment of the Chief Magistrate's Court of Nairobi
by Hon. E. Wanjala delivered on 19th November 2021 Cause No: E170 of 2021)*

JUDGMENT

1. The appeal serving before court is against the judgment of Principal Magistrate E. Wanjala Mrs in which the learned trial magistrate upon evaluating the contractual relationship between the Appellant (employee) and the Respondent (employer) found that: -

“From the evidence before me, I am persuaded that the Claimant’s services even though on probationary terms were terminated unfairly and unlawfully.”

2. On whether the Claimant was entitled to the reliefs sought, the trial court awarded the Appellant Kshs. 31,250.00 in lieu of leave days not taken; found that the Appellant had already been paid in lieu of 7 days’ notice and also awarded the Appellant the equivalent of two months’ salary in the sum of Kshs. 150,000.00 as compensation for the unfair termination of employment taking into account the period of employment, terms of employment and circumstances of his dismissal.

The Appellant was awarded certificate of service.



3. The learned trial magistrate having found the above proceeded to find that the parties had executed a final settlement agreement dated and signed on 3/7/2019 which fully discharged the Respondent from any liability and concluded: -

“Guided by the cited case I hold that even though I found a case for unfair and unlawful termination of the Claimant’s services but since parties executed a settlement agreement dated 31/7/2019 in which the Claimant bound himself not to make any financial claim in respect of employment I am bound by the agreement and barred from interfering with the parties’ agreement dated 31/7/2019.

The upshot is that for reason given, the Claimant’s services were unfairly and unlawfully terminated but the Claimant gets no remedy--- The suit is dismissed. Each party bear its costs.”

4. This being a first appeal, the court is guided by the decision of the Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd* 1968 EA that;

“It is the duty of the court to reconsider the evidence adduced before the trial court and re-evaluate it so as to draw its own independent conclusion and to satisfy itself that the conclusions reached by the trial court are consistent with evidence.’

5. The facts of the case before the trial court are that the Appellant entered into a written agreement of employment with the Respondent dated 15/3/2019 in the position of a Product Manager. The contract was for a period of two years and was due to end on 15th March 2021. The Appellant was placed on 6 months’ probation period and during the probation period termination was by giving seven days’ notice in writing by either party or payment in lieu of notice.
6. It was not in dispute that the Respondent vide Director of Operations Mr. M. Khan terminated the employment of the Appellant by a letter dated 31/07/2019 with immediate effect. In terms of the letter the Appellant was to be paid seven (7) days salary in lieu of notice period according to the contract.
7. It is also not in dispute that the Appellant and the Respondent signed a letter dated 31/07/2019 titled: -

“Full and final settlement for Mr. Clifford Otwere Livoi”

in terms of which the Appellant was paid “towards your full and final settlement of your dues,” as follows: -

- a. Kshs. 76,763.00 salary
 - b. Kshs. 15,648.00 in lieu of 7 days’ notice
 - c. Kshs. 41,200.00 car mileage
- Total Kshs. 133,641.00

8. The Appellant and the Respondent signed the letter. The Appellant in particular appended the signature and dated it on 2/8/2019.
9. From the record, the Appellant testified that he was poached from a different organization, trained in March and April 2019 and started working well. That in May 2019, he was made Business Development Manager but towards the end of May the Respondent started being rude to him.



10. That beginning June 2019, the Respondent gave the Appellant a letter asking the Appellant to resign but the Appellant refused. Subsequently on 31/7/2019 the Respondent summoned the Appellant and issued him with a letter of termination.
11. That his monthly salary was Kshs. 75,000.00. The Appellant testified that he was not given notice of termination or job appraisal before termination. Simply stated that the reason for termination was simply given as incompatibility.
12. The Appellant said he had not taken leave at the time. That he had wished to serve the entire term of two years contract. The Appellant said the termination was unfair and he is entitled to the reliefs sought.
13. The Respondent on the other hand called Mohamed Khan (RW1) to testify in defence of the case. PW1 relied on a witness statement dated 15/3/2021 as his evidence in chief and was cross-examined by counsel for the Appellant.
14. RW1 testified that the Appellant was employed on 15/3/2019 on a two -year contract. He was placed on six months' probation within which period either party could terminate the contract by giving 7 days' notice or payment in lieu of notice. That the Respondent terminated the employment of the Appellant on 31/7/2019 while he was on probationary contract. RW1 denied having pressured the Appellant to resign. RW1 stated that the Respondent was not obligated to give the Appellant any reason but nevertheless gave the Appellant a fair reason of incompatibility as provided under section 45(2)(5)(b)(i) of the *Employment Act*, 2007. That the Respondent paid the Appellant all terminal benefits upon termination. That the suit lack merit.

Determination

15. The court has carefully considered the memorandum of appeal, the appeal record and the submissions by the parties and the issues for determination are: -
 - a. Whether the Respondent was obliged to adhere to the provisions of section 36, 41, 43 and 45, of *Employment Act*, 2007 in terminating the probationary contract.
 - b. Whether the parties were bound by the agreement in full and final settlement.
16. In answer to the first issue, section 42(1) and (2) of the *Employment Act*, 2007, provides: -

“The provision of section 41 shall not apply where a termination of employment terminates a probationary contract.

(2) A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.”
17. The learned trial magistrate correctly found that the termination of the contract of the Appellant happened during probationary period. It follows that section 41 of the Act did not apply to the termination that occurred.
18. What it means is that the Respondent was not obliged to: -
 - a. Give the reason for which it was considering termination of the employment contract of the Appellant.



- b. That the Respondent was not obliged to convene a meeting with the Appellant in which the Appellant had a right to be accompanied by a fellow employee or union official while the Respondent gave an explanation to the Appellant for the intended termination.
18. The Respondent was only obliged to give the Appellant the notice period provided for in the written contract of employment and pay all terminal benefits to the Appellant.
19. The case of *Danish Jalango & another v Amicabre Travel Services Limited* [2014] eKLR, per Justice Rika rendered this position correctly as follows: -

“The effect of this is that employers have no obligation, to hear employees who are serving probation for any of the reasons stated under section 41, i.e. poor performance, misconduct or physical incapacity, before arriving at the termination decision. There is no obligation under section 43 and 45 for employers to give valid and fair reasons for termination of probationary contracts, or to hear such employees at all, little less in accordance with the rules of fairness, natural justice or equity. The termination of the probationary contract is strictly regulated by the terms of the contract. The only question the court should ask, is whether the appropriate notice was given, or if not given, whether the employee received pay in lieu of notice; and, whether the employee was, during the probation period, treated in accordance with the terms and conditions of the probationary contract. The employee has no expectation of substantive justification, or fairness of procedure, outside what the probation clause and section 42 of the *Employment Act* 2007 grants. If the employee has received notice of 7 days before termination, or is paid 7 days’ wages before termination, there can be no further demands made on the employer. If the employee is advised termination is because the employer feels there should be no confirmation, there can be no additional demands for substantive justification made on the employer. The employer retains the discretion whether to confirm, or not confirm an employee serving under probation. The law relating to unfair termination does not apply in probationary contracts. (emphasis added).”

20. The learned judge further elaborated:

“There was no obligation imposed on the employer under any other law. If sections 43, 45 of the *Employment Act* 2007 or Article 41 of *the Constitution*, required the Respondent to demonstrate substantive justification, this obligation was discharged by the proof of the existence of a valid probationary clause. It was not even necessary for the Respondent to reveal to the court, or to the 2nd Claimant that his contract was terminated because he tampered with the Respondent’s vehicles. It was sufficient that the Respondent observed, and weighed the 2nd Claimant’s suitability for the job, while on probation and in exercise of managerial prerogative, was satisfied his employment should not be confirmed. It was not necessary to issue the 2nd Claimant with the letter to show cause or hear him at all.”

21. Accordingly, the trial magistrate erred in finding that the termination of the employment of the Appellant was unlawful and unfair in the first place and so no compensation for unlawful and unfair termination could be awarded by the court in terms of section 49(1) (2) and (4) of the *Employment Act*, 2007.
22. With regard to the discharge in full and final settlement, the trial magistrate was correct in holding that the parties were bound by the agreement signed by both of them on 31/7/2019 which agreement was consummated by payment of all terminal dues owed by the Respondent to the Appellant in the sum of



Kshs. 133,641.00 in “full and final settlement.” The Appellant did not adduce any evidence to impeach this agreement between the parties on any ground permissible in law including mutual mistake, fraud, misrepresentation or coercion/undue influence.

23. The effect of this agreement is as was stated by Justice O. N. Makau in *Felix Mutie Musango v Tin Con Manufacturers Limited* [2020] eKLR where the judge held: -

“It is now trite law that a settlement agreement like the said discharge certificate is binding contract between the parties involved and the court cannot interfere with it unless it is vitiated by any relevant facts that vitiates an ordinary contract at common law.”

24. The learned trial judge correctly upheld this binding contract between the parties and was wrong in the first place to award two months’ salary in compensation for unfair termination of contract on the facts presented before her.

25. Accordingly, the appeal lacks any merit and is dismissed in its entirety and the court abides by the trial court decision that each party to bear their own costs of the trial and this appeal.

DATED AT NAIROBI THIS 15TH DAY OF MAY 2025

MATHEWS NDUMA

JUDGE

Appearance:

Appellant in person

Kamotho Njomo & Company Advocates for Respondent

Mr. Kemboi – Court Assistant

