



REPUBLIC OF KENYA



**KENYA LAW**  
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**Tisar Limited v Musyoka (Appeal E038 of 2022)  
[2025] KEELRC 1351 (KLR) (5 May 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1351 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E038 OF 2022**

**NJ ABUODHA, J**

**MAY 5, 2025**

**BETWEEN**

**TISAR LIMITED ..... APPELLANT**

**AND**

**JONATHAN KITONGA MUSYOKA ..... RESPONDENT**

*(Being an appeal against the Judgment delivered by The Honourable  
Selina Muchungi Resident Magistrate, Milimani Commercial Chief  
Magistrate's Court CMEL No. 246 of 2020 delivered on 18th February, 2022)*

**RULING**

1. Through the Memorandum of Appeal dated 15<sup>th</sup> March 2022, the Appellant appeals against the whole Judgment of Honourable Selina Muchungi delivered on 18<sup>th</sup> February, 2022.
2. The Appeal was based on the grounds that:
  - i. The Learned Trial Magistrate erred both in law and in fact when she failed to take into consideration the fact that the Respondent herein admitted that he voluntarily signed an Agreement with the Appellant in a letter dated 17<sup>th</sup> July 2018 stating that he had no further claim against the Appellant.
  - ii. The Learned Trial Magistrate erred both in law and in fact when she failed to take into consideration that the Respondent herein did not set up a Defence of “non est factum” to disclaim his signature on the Agreement reached in letter dated 17<sup>th</sup> July 2018.
  - iii. The Learned Trial Magistrate erred both in law and in fact in falling to note that the said Agreement was produced by the Respondent herein yet the payment accepted was not affected with and deducted from the award made in Judgment.



- iv. The Learned Trial Magistrate erred in fact and in law in failing to consider that the Respondent herein did not repudiate the said Agreement on the letter dated 17<sup>th</sup> July 2018.
  - v. The Learned Trial Magistrate erred in law and in fact in shifting the burden of proof of the items claimed from the Respondent to the Appellant.
  - vi. The Learned Trial Magistrate erred in fact and in law in finding that the Respondent herein worked for the Appellant for 47 months as the Respondent failed to produce any evidence to support his claim yet the Appellant produced documentary evidence to dispute the said claim.
  - vii. The Learned Trial Magistrate erred in fact and in law in awarding the Respondent leave pay for the full year of 2018 despite the fact that it was common ground on record that the Respondent did not work for the Appellant for the full year of 2018.
  - viii. The Learned Trial Magistrate erred both in law and in fact in awarding the Respondent damages for loss of employment yet the Respondent did not produce any evidence either oral or documentary to substantiate any loss, suffering of damage he incurred as a result of the termination of his employment contract.
  - ix. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the Respondent did not adduce sufficient evidence to prove his case.
  - x. The Learned Trial Magistrate erred in law and in fact in failing to critically examine the factual issue brought out in cross examination of the Respondent which established that the Respondent did not have a valid case against the Appellant.
3. The Appellant prayed that the Appeal be allowed with costs; the Honourable Court do set aside the Judgment entered in the Lower Court and dismiss the suit and in the alternative to above this Honourable Court do set aside or substitute the award made in the Lower Court or revise the judgment in the Lower Court.
  4. The Appeal was disposed of by written submissions.

#### **APPELLANT'S SUBMISSIONS**

5. The Appellant's Advocates Othieno & Company Advocates filed written submissions dated 22<sup>nd</sup> November 2024 and on grounds 1, 2 and 4, on the legal consequences of signing a document counsel submitted that the Trial Magistrate failed to take into consideration the legal effect of the Respondent's signature on the letter dated 17<sup>th</sup> July, 2018 and thereby wrongly concluded that the Respondent was entitled to make a claim for terminal dues against Appellant. That the said letter was relied upon by both parties at trial court.
6. Counsel submitted that the Respondent in cross examination averred that he was told to sign and get money and didn't know what he was signing but he could recognize the amount of money. Counsel relied on the Halsbury's Laws of England while submitting on the legal consequence of signing a document that should be binding unless the exceptions of plea of non est factum, mental incapacity or mistake among others.
7. Counsel submitted that the Respondent admitted that he signed it and it was his signature on the said Letter of Acknowledgment dated 17<sup>th</sup> July, 2018 and gave no evidence or not pleaded otherwise to entitle him to repudiate the Agreement. That the Respondent stated in cross examination that he noted that he would be paid Kshs. 25,604/20 when he signed the document confirming that he knew it was contractual document and that the defence of non est factum is unavailable to him.



8. Counsel submitted that the Respondent is not in a position to repudiate the contract unless he pays back the money he took pursuant to the agreement/ contract. That he can not have his cake and eat it. That the Appellant's witness stated that the Respondent was in a position to understand what he was signing and that was not told to sign to be paid.
9. Counsel submitted that the Respondent had no locus standi to file this claim as he had already accepted payment on the condition that he had no further claim against the Appellant. That the trial magistrate ought to have known the legal position as regards signing a document is as stated and the Respondent was bound by the contents of the documents dated 17<sup>th</sup> July 2018 which he admitted that he signed declaring he had no claim against the Appellant. That the Respondent's contention that he signed under duress was unsupported by any evidence circumstantial or otherwise and was made as an afterthought.
10. On the issue of burden of proof, counsel submitted that the trial court awarded the Respondent Kshs. 105,750/= as unpaid house allowance for 47 months from August 2014 to July 2018 as the period the Respondent claimed to have worked for the Appellant and severance pay for August 2014 to October 2015 in Kshs 7,500 as the Respondent claimed that NSSF was unremitted. That the Respondent did not provide any evidence that he was employed for 47 months and stated that he didn't file in court the 2014 payslip.
11. Counsel submitted that the Respondent NSSF statements does not include the year 2014 and that 2015 Statements establishes no remittance for January to October 2015 and also from August to December 2015 which clearly reflect that he was not employed by the Appellant during that time and left employment on 17<sup>th</sup> July 2018.
12. Counsel submitted that the award of Kshs 7,500 is based on erroneous assessment and should be disallowed as well as the award of Kshs. 105,000/= of house allowance based on the Respondent evidence that he was employed from August 2014 to July 2018. Counsel relied on section 107 and 108 of the Evidence Act on a party alleging to prove the allegations. That the trial court erred by accepting this evidence by the Respondent on the basis that it was not controverted.
13. Counsel submitted that the award of Kshs. 105,750/= should be vacated and substituted with correctly calculated to reflect the employment was from November 2015 to July 2018 as the Appellant admitted that this was the period of time during which it employed the Respondent.
14. On ground 8, counsel submitted that the award of Kshs 75,000 as compensation had no basis as the Respondent at no time in his evidence in chief or in documentary evidence placed evidence to demonstrate loss, suffering or damage which he incurred as a result of his employment. Counsel relied on the case of Kenya Breweries Limited v Kiambu General Transport Agency Limited (2000) eKLR and submitted that it is the duty of Claimant to prove its claim for damages as pleaded and it is not enough to write down particulars.
15. On ground 7 of Appeal, counsel submitted that the Respondent claimed untaken leave for one year less the 3 days he had taken and he calculated his claim to be Kshs 5,714/=. That the Respondent during trial admitted that he took leave regularly once a year. That the claim for untaken leave could only relate to the year 2018 and the Respondent employment was terminated in July 2018 and was therefore only entitled to 6 ½ months leave pay which was correctly calculated by the Appellant in its termination letter dated 17<sup>th</sup> July 2018 and the Respondent admits receipt of the payments and the award should be disallowed.



16. On ground 3 of Appeal, counsel submitted that the trial court failed to make a finding that Kshs. 25,604/20 was paid to the Respondent and direct that the awards in judgment be reduced by that amount. That the sum was tendered and accepted in the termination letter and it was recorded in the proceedings as the Respondent's evidence.
17. Counsel submitted that item 3 in the decree of kshs 144,520/= be disallowed and expunged as the Respondent never made any claim for underpayment and trial court never made an award of Kshs. 144,520/= in under payment.

## RESPONDENT'S SUBMISSIONS

18. The Respondent's Advocates Namada & Co. Advocates filed its submissions dated 29<sup>th</sup> November 2024 and on the issue of whether the Trial Court erred in awarding compensation and damages to the Respondent, counsel submitted that the statutory burden placed upon the person complaining of unfair termination of employment or wrongful dismissal is anchored in section 47(5) of the [Employment Act](#).
19. Counsel relied on section 43 of the [Employment Act](#) and submitted that the employer shall be required to prove reason or reasons for termination failure to which it is deemed unfair termination under section 45 of the Act. That the reason or reasons for termination of a contract are matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee. That the parameters for determining whether the employer acted in accordance with justice and equity in terminating the employment of the employee are inbuilt in section 45 of the [Employment Act](#).
20. Counsel submitted that the Court as the adjudicator is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. That it was the Respondent's testimony that he reported to work on 13<sup>th</sup> July 2018 and at around 4pm he was summoned by the Appellant's accountant/ Administrator Mr. Wilson Mwangi who informed him that his services were no longer required.
21. Counsel submitted that in cross examination the Appellant witness stated that the Respondent was unable to operate machines and that he did not work properly and conceded that prior to termination the Respondent was never issued with any notice and was never taken to any training to improve skills. The Appellant witness stated that he had discussion with the Respondent about his performance but there was no evidence filed by the Appellant to prove the same. That he never availed any performance appraisal for the job to confirm this assertion.
22. Counsel submitted that the Respondent worked as a machine operator for 4 years. That it did not make sense that after 4 years was when the Appellant realized that the Respondent performance was poor and proceed to terminate his services on that ground. That section 41 of the [Employment Act](#) enjoins the employer to hear the employee before termination.
23. Counsel relied on the case of Walter Ogal Anuro v Teachers Service Commission (2013) eKLR and submitted that for a termination to pass the fairness test there should be both substantive justification and procedural fairness. That the Appellant did not prove that there was a valid and fair reason to terminate the Respondent's employment on ground of poor performance as required under section 45 of the Act.
24. Counsel submitted that the Appellant terminated the Respondent's services without following the due process as set down in the [Employment Act](#) which was confirmed by the Appellant's witness Mr.



Wilson Mwangi. On the issue of the Respondent being paid terminal dues, counsel submitted that the Respondent testified that the document was never clarified to him before being told to sign. That the Respondent witness during cross-examination testified that the computation on amount payable was done in presence of the Respondent but there was no evidence to prove the same rendering it a mere allegation.

25. Counsel submitted that the payment of terminal dues does not indicate a cause for unfair dismissal and the attendant compensation.

## **DETERMINATION**

26. The court has considered the grounds in the Memorandum of Appeal, the Record and observes that the principles which guide this court in an appeal from a trial court are now more or less settled. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this 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 allowances in this respect”

27. The Judgment of the trial court was entered as against the Appellant with the court finding that the termination of the Claimant was unfair and awarding damages as follows; House allowance Kshs 105,750/=, Unpaid leave days Kshs 5,714/=, Severance pay Kshs 7,500/= and damages for unlawful termination Kshs 75,000/=.
28. The Appellant being aggrieved by the above judgment appealed on the 10 grounds in the Memorandum of Appeal which the court will condense in to three issues of whether the trial court erred by not considering the legal impact of the agreement dated 17<sup>th</sup> July, 2018 that the Respondent signed that he will have no future claims against the Appellant, whether the trial court erred by finding that the Respondent’s termination was unfair and if the trial court erred in awarding the reliefs sought by the Respondent.

### **Whether the trial court erred by not considering the impact of the agreement dated 17<sup>th</sup> July, 2018 that the Respondent will have no future claims against the Appellant.**

29. The Appellant alleged that the Respondent signed the discharge voucher which was the termination letter dated 17<sup>th</sup> July, 2018 accepting payment of Kshs. 25,604.20/= as full and final settlement and stating that he will have no further claims against the Appellant. That he did not illustrate the exceptions of such agreement like mental incapacity, coercion, misrepresentation among others for the agreement not to be binding.

30. The Courts have had occasion to consider the status of employees executing discharge vouchers stating they constitute a complete contract. The Court of Appeal (*Visram, Karanja, Koome JJA*) in the case of *Coastal Bottlers Limited v Kimathi Mithika* [2018] eKLR held as follows:-

21. In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondent’s termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent’s part at the time he executed the same.



It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties. “Whether or not a settlement agreement or a discharge voucher bars a party from making further claims depends on the circumstances of each case. A court faced with such an issue, in our view should address its mind firstly, on the import of such a discharge/agreement; and secondly, whether the same was voluntarily executed by the concerned parties.”

31. In this particular case the termination letter of 17<sup>th</sup> July, 2018 which provided that the Respondent will not have a claim against the Appellant was not in strict sense a discharge voucher or settlement agreement as envisaged in the above case law. A proper scrutiny of the same reveals that the Respondent was only paid his statutory dues that is leave pay, notice pay and days worked which are payable whether there is fair or unfair termination and the same cannot bar the Respondent from raising the issue of unfair termination.
32. The court notes that the trial court did not address this issue in awarding its reliefs. The trial court could have factored in, any statutory relief paid under the termination letter. This ground of Appeal therefore fails.

**Whether the trial court erred by finding that the Respondent was unfairly terminated.**

33. The events leading to the termination of employment of the Appellant alleges poor performance as the main reason for the termination of employment. The Appellant’s witness at the trial court alleged that the Respondent could not operate machines properly and that he had a discussion with him though the same could not be proved. The trial court found that the Appellant had not proved the reasons for termination neither did it follow the procedure hence unfair termination.
34. Under section 47(5) of the *Employment Act*, the burden of proof that an unfair termination has occurred is on the employee while the burden of proving reasons for termination is on the employer. It is an established principle that for termination to pass fairness test there should be both substantial and procedural fairness. This has been decided in an number of cases including the cases of Janet Nyandiko versus Kenya Commercial Bank Limited (2017) eKLR and Walter Ogal Anuro v Teachers Service Commission [2013] eKLR as correctly observed by the trial court.
35. On substantial justification, the Appellant was issued with a termination letter dated dated 17<sup>th</sup> July 2018 stating vaguely that the reason for termination were well known to the Respondent without stating poor performance as the reason. The certificate of service stated that he left employment on his own accord. The Appellant alleged that the Respondent was unable to operate machines and that he did not work properly and conceded that prior to termination the Respondent was never issued with any notice. Neither was the Respondent put on a Performance Improvement Plan to track his performance for the purposes of improvement.
36. On termination on account of poor performance, merely citing poor performance is not enough. In the case of Periosteum Bheekhoo v. Linksoft Group [2015] eKLR: Cause No.1232 of 2014 at Nairobi it was held that the employer must prove that the employee was aware of performance standards, efforts were made to support improvement, and time was given for the employee to make necessary improvements.
37. This court therefore agrees with the trial court that the Appellant failed to prove the reasons for termination as provided for under section 43 of the Act. The Appellant did not prove how the Respondent despite working for it for over three years he could not operate machines well hence poor performance suddenly.



38. Procedural fairness is mandatory even in the event that the employer has a valid ground for termination. The procedure would be as defined under section 41 of the *Employment Act*.
39. The Court therefore finds that it was undisputed fact that there was no procedural fairness in the termination as contemplated under section 41 of the *Employment Act* as the Respondent was not given any show cause letter and taken through the disciplinary hearing on account of poor performance. This court once again agrees with the finding of the trial magistrate that the Appellant failed on both substantive and procedural fairness hence unfair termination under section 45 of the Act.

**Whether the trial court erred by awarding the Respondent the reliefs sought.**

40. The Appellant was aggrieved by the awards made by the trial court those of compensation for unfair termination, house allowance, severance pay and untaken leave. The court also notes that the Respondent acknowledged receipt of the Kshs 25,604.20/= settlement from the Applicant in the dimensions of leave pay, one month's Notice and 11 days worked in July 2018 which the Applicant submits should be subtracted from the total award.
41. In calculation of the awards due, the court notes that while the Respondent alleged to have worked with the Appellant from August 2014 to July 2018, it was the Appellant's case that he worked from November 2015 to July 2018. The Appellant relied on the NSSF statement which showed remittance of dues between November, 2015 to July, 2018. The Respondent alleged that his dues for August 2014 to October, 2015 were not remitted despite being deducted. He however never produced any pay slip for 2014.
42. The Court finds that the Respondent failed to prove his employment in the year 2014 despite claiming to have pay slips for the year 2014 in his possession; nothing could have stopped the Respondent from filing the same in court.
43. The burden therefore shifted to the Appellant who stated that the reason as to why there was no NSSF remittance in 2014 and until October 2015 was because the Respondent was not in employment of the Appellant hence the calculations could reflect the 33 months.
44. This court is however aware to the precedents that house allowance and leave pay are continuing injuries under section 90 of the *Employment Act* which the employee must file their claim within 12 months after cessation of employment. In this case the Respondent was dismissed on July, 2018 and filed his claim in November, 2019 hence past the given period. This court therefore overturns the trial court finding that the Respondent was entitled to the same prayers.
45. The claim on severance pay as well fails since the Respondent did not illustrate if he was in employment between August 2014 and October 2015 as alleged.
46. The award of underpayments in the decree are also out of place since none was claimed and awarded by the trial court.
47. Having found that the Appellant was unfairly terminated, the court therefore proceeds to find that he was entitled to compensation for unfair termination as provided for under section 49 of the *Employment Act*. The court proceeds to take into account the considerations given under section 49(4) of the Act. These include the fact that the Claimant had worked for the Respondent for over 3 years as well as considering the conduct of the Appellant and finds that an award of 5 months' salary is sufficient compensation in the circumstances as awarded by the trial court. This court does not deem it to be inordinately too high in the circumstances.
48. In conclusion the Appellant's Appeal partially succeeds with no orders as to costs as follows;



- i. House Allowance.....NIL
  - ii. Severance pay.....NIL
  - iii. Unpaid leave days.....NIL
  - iv. Underpayments.....NIL
  - v. Compensation for unfair termination.....Kshs 75,000/=
- TOTAL: 75,000/

50. It is so ordered.

**DATED AT NAIROBI THIS 5<sup>TH</sup> DAY OF MAY, 2025**

**DELIVERED VIRTUALLY THIS 5<sup>TH</sup> DAY OF MAY, 2025**

**ABUODHA NELSON JORUM**

**PRESIDING JUDGE-APPEALS DIVISION**

