



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Tea Warehouse Limited v Khaemba (Appeal E074 of 2022)
[2024] KEELRC 118 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 118 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E074 OF 2022
AK NZEI, J
FEBRUARY 1, 2024**

BETWEEN

TEA WAREHOUSE LIMITED APPELLANT

AND

TITUS WABWILE KHAEMBA RESPONDENT

*(Being an appeal from the whole judgment of the Hon. D.O. Mbeja- PM in
Mombasa CMCC ELRC No. E263 of 2021 delivered on 30th September 2022)*

JUDGMENT

1. The Appellant herein was the Respondent in Mombasa CMC ELR Case No. 263 of 2021 wherein it had been sued by the Respondent herein, Titus Wabwile Khaemba, who sought the following reliefs:-
 - a. A declaration that the Respondent's termination/dismissal was unlawful.
 - b. Salary in lieu of noticeksh. 60,000
 - c. Unpaid house allowanceksh. 117,000
 - d. Unpaid overtime allowance.....ksh. 390,000
 - e. Unpaid holiday allowance.....ksh. 27,333.
 - f. Compensation for unlawful dismissal (12 months' pay)..ksh, 720,000
 - g. Issuance of a certificate of service.
 - h. Costs of the suit and interest.
 - i. Any other relief that the Court may deem fit to justly grant.



2. The Respondent had further pleaded in the trial Court suit that he was employed by the Appellant as a Warehouse Supervisor vide a letter of offer dated 16/1/2020, earning a gross monthly salary of ksh. 60,000, plus an annual travelling allowance of ksh. 5,000. That the Respondent worked from 16/1/2020 to 16/2/2021 (for 1 year and 1 month), when the Appellant summarily dismissed him without any valid explanation, lawful procedure and without according the Respondent a fair hearing.
3. It was the Respondent's further pleading that despite performing his work as was required of him, the Appellant had the Respondent arrested on 28/1/2021 and charged with theft, and that upon posting bail and being released, the claimant was summoned to a disciplinary hearing on 16/2/2021. That the Respondent was dismissed on the said date without being accorded a hearing.
4. The Respondent further pleaded that he was not provided with housing by the Appellant during the period of employment, and was not paid house allowance, he sought to be paid ksh. 117,000 as house allowance for the 1 year and 1 month that he worked. The Respondent also pleaded that he worked for more hours than the hours expressly provided for, and that he was never compensated for 7 holidays on which he worked.
5. The Respondent had further pleaded that he was dismissed without notice, and that his dismissal was contrary to provisions of the Employment Act; ILO Convention No. 158 on termination of employment, and Chapter 4 Part 2 of the Constitution of Kenya 2010.
6. Documents filed by the Respondent alongside the statement of claim included the Respondent's contract of employment, a show cause letter dated 1/2/2021, response to the show cause letter dated 6/2/2021, summary dismissal letter dated 16/2/2021 and the Respondent's payslip for September 2020, among other documents.
7. The Appellant defended the Respondent's claim *vide* a response to claim dated 19/5/2021. The Appellant admitted having employed the Respondent as pleaded, but stated that the monthly salary of ksh. 60,000 was consolidated; and that the Respondent was dismissed on 16/2/2021 on account of gross misconduct, and in accordance with provisions of the Employment Act.
8. The Appellant further pleaded:-
 - a. that the Respondent was on 1/2/2021 issued with a notice to show cause why disciplinary action could not be taken against him; to which he responded vide a show cause letter dated 6/2/2021; and that vide a letter dated 11/2/2021, the Respondent was invited to attend a disciplinary hearing on 16/2/2021.
 - b. that upon a disciplinary hearing, to which the Respondent brought a witness (Maurice Eboso), the Respondent was summarily dismissed on 16/2/2021, and was paid all his terminal dues amounting to ksh. 116,932.40, upon which the Respondent discharged the Appellant from all future claims arising from the employment relationship.
 - c. that termination of the Respondent's employment was in accordance with the law and the Respondent's contract of employment. The Appellant denied the Respondent's assertion that the dismissal was unlawful/unfair.
 - d. that the Respondent worked for 8 hours a day, and that any overtime allegedly worked was done contrary to the terms of contract and without the Appellant's knowledge. That the Respondent did not work on holidays.
9. The Respondent filed reply to the Appellant's response on 27/5/2021, and joined issues with the Appellant.



10. Documents filed by the Appellant alongside the response to claim included a letter dated 11/2/2021 inviting the Respondent to a disciplinary hearing on the same dated (11/2/2021), handwritten minutes of a meeting held on 16/2/2021, and acknowledgement of final dues, among others. The Appellant also filed a written witness statement of Susan Kamau, the Appellant's Finance Manager.
11. At the trial, the Respondent (who was the Claimant) adopted his filed witness statement as his testimony, and produced in evidence the evidential documents filed by him and listed on his list of documents dated 20/4/2021. He was cross-examined and re-examined.
12. The Appellant called one witness, Susan Njeru Kamau (RW-1) who adopted her filed witness statement dated 16/11/2022 as her testimony and produced in evidence the documents listed on the Appellant's list of documents dated 8/11/2021. She (RW-1) was cross-examined and re-examined.
13. It was RW-1's evidence that the Appellant paid the Respondent all his terminal dues which included his salary, leave allowance and house allowance, and that the dues were paid as a consolidated (d) amount. That the Respondent worked upto 5pm, that proper procedure was followed in terminating him; and that the Appellant had a justified reason to dismiss the Respondent for gross misconduct.
14. The Appellant (RW-1) admitted that the Respondent's salary was a gross salary but not a consolidated salary. That there was no investigation report to show that the Respondent was involved in an illegal business, that there were no CCTV footage, and that the Appellant did not have an overtime policy.
15. The trial Court, having received written submissions from both parties, delivered its judgment on 30/9/2022, making a finding of wrongful and unfair termination of the Respondent's employment. It was the trial Court's finding that the Appellant acted on allegations and suspicions and dismissed the Respondent without just cause. The trial Court also found that the Respondent worked for 10 hours a day.
16. The trial Court entered judgment for the Respondent against the Appellant as follows:-
 - a. Salary in lieu of noticeksh. 60,000
 - b. Unpaid house allowance.....ksh. 117,000
 - c. Unpaid overtime allowance.....ksh. 390,000
 - d. Unpaid holiday allowance.....ksh. 27,333,24
 - e. Six months' compensation for
unfair termination of employmentksh. 360,000

total ksh. 954,333.24
17. The Respondent was also awarded costs of the suit and interest from the date of filing suit.
18. Aggrieved by the said judgment, the Appellant filed the present appeal and set out 13 grounds of appeal as follows:-
 - a. that the learned trial Magistrate erred in law and in fact in disregarding the Appellant's evidence and as a result arriving at a wholly erroneous decision.
 - b) that the learned trial Magistrate erred in law and in fact in finding that the Appellant dismissed the Respondent unfairly, unlawfully and without any sufficient cause.



- c) that the learned trial Magistrate erred in law and in fact in holding that the Respondent had proved his claim for unfair and unlawful termination on a balance of probabilities.
 - d) that the learned trial Magistrate erred in law and in fact in holding that the Appellant did not adduce cogent evidence to challenge the evidence adduced by the Respondent.
 - e) that the learned trial Magistrate erred in law and in fact in finding that the Appellant did not adduce evidence of any criminal proceedings despite the Respondent admitting that he was arrested and released on bail.
 - f) that the learned trial Magistrate erred in law and in fact in disregarding the Appellant's evidence proving the existence of criminal proceedings being Mombasa Criminal Case No. E311 of 2021 where the Respondent has been charged with the offence of stealing by servant.
 - g) that the learned trial Magistrate erred in law and in fact in awarding the Respondent kshs. 390,000 being unpaid overtime allowance despite evidence of a contract of employment which proves that the Respondent's working hours were between 8.00am to 5.00 pm.
 - h) that the learned trial Magistrate erred in law and in fact in awarding the Respondent kshs. 117,000 being unpaid house allowance despite the contract of employment providing that the Respondent's salary was consolidated.
 - i) that the learned trial Magistrate erred in law and in fact in awarding the Respondent holiday allowance in the absence of evidence supporting the claim.
 - j) that the learned trial Magistrate erred in law and in fact in awarding the Respondent ksh. 60,000 being salary in lieu of notice despite evidence that he was terminated on gross misconduct.
 - k) that the learned trial Magistrate erred in law and in fact in awarding the Respondent kshs. 360,000 being compensation for unfair termination.
 - l) that the learned trial Magistrate erred in law and in fact in failing to put into consideration the fact that the Respondent was paid kshs. 116,942.30 upon his termination.
 - m) that the learned trial Magistrate erred in law and in fact in disregarding the Appellant's written submissions and authorities relied upon.
19. I will tackle the grounds of appeal together. This being a first appeal, the entire case as presented before the trial Court is before me for re-evaluation of the evidence. I take cognizance of the fact that this Court did not see or hear the witnesses first hand.
20. Having considered the pleadings filed in the trial Court and the evidence presented thereon, issues that present for determination, in my view, are as follows:-
- a. Whether termination of the Respondent's employment by the Appellant was unfair.
 - b. Whether reliefs sought in the trial Court were deserved.
21. On the first issue, it is to be noted that any employer intending to terminate an employee's employment on grounds of misconduct, poor performance or physical incapacity must, as a matter of law, adhere to the mandatory procedure set out in Section 41 of the *Employment Act*, which provides as follows:-
- (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, the 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 ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”
22. In the present case, the Appellant had accused the Respondent of acts of gross misconduct, and was therefore obligated to adhere to Section 41 of the Employment Act. Although the Appellant issued the Respondent with a notice to show cause dated 1/2/2021, shown to have been served on the Respondent on 4/2/2021; and to which the Respondent responded in writing vide a letter dated 6/2/2021, the procedure adopted by the Appellant in terminating the Respondent’s employment was devoid of fairness, and did not accord with principles of justice and equity as enunciated in Section 45 of the Employment Act.
23. The Appellant invited the Respondent for a disciplinary hearing *vide* a letter dated 11/2/2021, which stated as follows:-
- “RE:Disciplinary Hearing Invitation
- Following your response to the show cause letter dated 01/02/2021, we hereby invite you for a hearing meeting today at 3pm (sic) company meeting room.
- You will be accorded an opportunity to present your case on (sic) and you may be accompanied by a representative of your choice. You are at liberty and encouraged to bring your witness (any TWL employee).
- The outcome of this meeting and any further investigation that follows may result in disciplinary action, upto and including summary dismissal.”
24. It is clear from the wording of the aforesaid letter that the Respondent was invited to a disciplinary hearing before closure of investigations by the employer (the Appellant), and that further investigations into the alleged gross misconduct could ensue thereafter, and could lead to the Respondent’s summary dismissal. Further, the said invitation to attend a disciplinary hearing required the Respondent to attend the hearing on the date of the letter (11/2/2021) at 3pm; and to avail a witness/representative. The invitation letter does not indicate at what time of the day on 11/2/2021 it was served on/given to the Respondent.
25. Further, no minutes of any disciplinary hearing held on 11/2/2021 were exhibited by the Appellant. What the Appellant exhibited were handwritten pages of a 2021 diary purported to be minutes of a disciplinary hearing held on 16/2/2021 at 3.30pm. The purported minutes have no indication of the names of the disciplinary panel members or those who attended the hearing, and are not signed by either the Respondent or the disciplinary panelists. It is not shown what the “hearing” was about.
26. It is to be noted that the Appellant did not exhibit any letter inviting the Respondent to a disciplinary hearing on 16/2/2021.
27. Back to the disciplinary hearing invitation letter dated 11/2/2021 inviting the Respondent for a disciplinary hearing on the same date. It must be noted, and I have severally stated so in previous judgments, that an employer inviting an employee to attend a disciplinary hearing must give the



employee reasonable notice to prepare for the hearing, and to look for/find a witness or a union official (if the employee is unionised) to accompany him to the hearing. What amounts to reasonable notice may be decided by the Courts depending on the nature and circumstances of each case, but I have severally held the view that any notice that is below 3 days, depending on the nature and circumstances of the case is grossly unfair. Asking an employee to appear for a disciplinary hearing on the date of the disciplinary invitation letter is, in my view, unfair and a gross abuse of the principle of fairness. It is enough to render the entire disciplinary/termination process unfair.

28. Section 45(4) (b) of the [Employment Act](#) provides that termination of employment shall be unfair:

“If it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.”

29. I find and hold that the Appellant, being the Respondent’s employer, did not act in accordance with justice and equity in terminating the Respondent’s employment. The termination was therefore unfair, and I so hold and declare.

30. On the second issue, I uphold the trial Court’s award of ksh. 360,000 being compensation for unfair termination of employment. I would have awarded the Respondent an equivalent of nine months’ salary had there been a cross-appeal regarding the award by the trial Court. There is no cross appeal.

31. Regarding the quantified claims and awards thereon of ksh. 60,000 being payment in lieu of notice, ksh. 117,000 being unpaid house allowance, ksh. 390,000 being overtime allowance and ksh. 27,333,24 being unpaid holiday allowance, it is to be noted that the Appellant demonstrated that on 16/2/2021, the Respondent signed and executed a discharge in favor of the Appellant stating that he had no claims against the Appellant company. The discharge is signed by both the Appellant and the Respondent. the discharge is worded as follows:-

“Date 16/2/2021

Acknowledgement of final dues from Tea Warehouses Limited

I Titus Wabwile Khaemba, of ID No. 11563295 have received my full and final dues payment via cheque No. 00140 of ksh. 116,942/- and have no claim against the company.

I leave the company in good faith and wish the company prosperity and success.

Thank you.

Titus Wabwile Khaemba – signed

Witnessed by

Susan Kamau

Finance Managersigned”

32. The Respondent did not rebut the Appellant’s evidence in the foregoing regard, and did not deny either having executed the foregoing discharge or having received the payment cheque referred to therein, whose photo image appears on, and forms part of the discharge.



33. The discharge forms a separate contract between the parties thereto, and unless vitiated by factors that would ordinarily vitiate a contract, it is binding on them. I stated as follows in *Ben Otieno Aketch -vs- Macharia Mwangi & Njeru Advocates*[2021] eKLR:-

“The Claimant who is an Advocate of the High Court of Kenya, did not demonstrate the existence of any vitiating factors like fraud, undue influence, undue pressure, ignorance, misrepresentation, coercion, threats, or illegality. The allegations of a flight cancellation are not a vitiating factor, and were not proved.

The Discharge and Clearance Certificate executed by the claimant on 8th June 2015 is binding on him, and the Respondent is fully discharged.”

34. The Court of Appeal, while discussing the import of a discharge vouchers in *Trinity Prime Investment Ltd -vs- Lion Of Kenya Insurance Company Limited* [2015] eKLR, observed as follows:-

“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 Appellant was thus fully discharged.

35. In the case of *Damondar Jubabbhai & Co. Ltd And Another -vs- Eustace Sisal Estates Ltd*[1967] EA 153, Sir Charles Newbold expressed the following sentiments:-

“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. & Another -vs- TRW Lucas Electric Steering Ltd & Others (supra)*, Lord Justice Beatson states as follows:-

“...Absent statutory of common law restrictions, the general principle of 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.”

36. As I stated in the *Ben Otieno Aketch Case (supra)*, a Court of Law cannot be called upon to undo, change and/or overlook agreements and undertakings made by parties out of their own free will. The Court can only enforce and/or give effect to the intention of the parties as discerned from their agreements and/or undertakings.

37. The trial Court fell into error by failing to consider all the evidence presented by the parties. In view of the foregoing, the awards of ksh. 60,000 (salary in lieu of notice), ksh. 117,000 (unpaid house allowance), ksh. 390,000 (unpaid overtime allowance), and ksh. 27,333,24 (unpaid holiday allowance) were erroneously awarded, and are hereby set aside, the Respondent having contractually waived his right to raise further claim regarding his dues.

38. In my view, the aforesaid waiver on dues did not take away the Respondent’s right to challenge the legality and fairness of his termination or the process leading to it; hence my finding elsewhere in this



judgment that the award of ksh. 360,000 being compensation for unfair termination of employment was deserved.

39. Having considered written submissions filed by both parties herein, I allow the appeal to the extend stated in this judgment.
40. For avoidance of doubt, the Respondent shall be paid by the Appellant kshs. 360,000 being compensation for unfair termination of employment as awarded by the trial Court and upheld by this Court. Interest on the said sum shall be calculated from the date of the trial Court's judgment.
41. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the *Employment Act*.
42. Each party will bear its own costs of the appeal, but the Respondent is awarded costs of proceedings in the Court below.
43. The Appellant shall issue a certificate of service to the Respondent within thirty days of this judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 1ST FEBRUARY 2024

AGNES KITIKU NZEI

JUDGE

ORDER

THIS JUDGMENT HAS BEEN DELIVERED VIA MICROSOFT TEAMS ONLINE PLATFORM. A SIGNED COPY WILL BE AVAILED TO EACH PARTY UPON PAYMENT OF THE APPLICABLE COURT FEES.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Appellant

.....Respondent

