



Atieno v Timafloor Limited (Employment and Labour Relations Appeal E008 of 2023) [2024] KEELRC 724 (KLR) (5 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 724 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E008 OF 2023
ON MAKAU, J
APRIL 5, 2024**

BETWEEN

MERCY OMOLLO ATIENO APPELLANT

AND

TIMAFLOOR LIMITED RESPONDENT

(Being an Appeal against the Judgment and Decree of Hon.Kitihinji A.R (C.M) delivered on 24th May, 2023 in NANYUKI MELRC No. E023 of 2021)

JUDGMENT

1. This appeal arises from employment relationship between the parties herein which was terminated by the respondent on 11th May 2020. The appeal seeks to set aside the judgment rendered by the trial court on 24th May 2023 and in its place, judgment be entered as prayed in the statement of claim dated 31st August 2021 plus costs of the appeal.
2. The appeal stands on the following grounds: -
 - a. That the learned Magistrate erred both in law and in fact by failing to appreciate the fact that the Discharge dated 11th May 2020 was executed by the Appellant under coercion and without full knowledge of its contents and implications and thus dismissed the Appellant's claim.
 - b. That the learned Magistrate erred both in law and in fact by failing to take into account the fact that the Discharge was not mutually negotiated between the parties and did not contain all the Appellant's settlements in tandem with the provisions of the Employment Act, 2007.
 - c. That the learned Magistrate erred both in law and in fact by failing to find that the Appellant did not waive her right to make further claims pursuant to the Discharge dated 11th May 2020. The Discharge does not override the provisions of the Employment Act, 2007 and the Constitution of Kenya, 2010.



- d. That the learned Magistrate erred both in law and in fact by failing to find that the Discharge was not voluntarily executed by the Appellant but rather that the Appellant signed it due to desperation and apprehension that she would not receive any pay unless she signed the Discharge.
- e. That the learned Magistrate erred both in law and fact by finding that the termination of the Appellant's employment was unfair but ironically dismissed the Appellant's claim.
- f. That the learned Magistrate erred both in law and fact by taking into account extraneous matters that were not placed before him and thus arrived at a wrong decision.

Factual background

3. The appellant was employed by the respondent from 8th January 2018 as a flower attendant. She started under seasonal contracts of six (6) months but on 6th November 2019, she was confirmed as Senior Production Supervisor at Timaflor 3. One of her duties was to ensure that all chemicals were accounted for.
4. On 15th January 2020, 20th and 21st April 2020 the appellant failed to account for farm chemicals namely 4.45kgs of Equation, 9.4kg of Ridomil and 3.9kg of Teldor. As a result, her employment was terminated for gross misconduct but the employer paid her one-month salary in lieu of notice among other terminal dues. The appellant signed a document titled Disclaimer in which she acknowledged the sum paid as full and final settlement of her employment benefits and discharged the employer from any further claims related to her employment including reinstatement. She was also issued with certificate of service dated 11th May 2020.
5. By a letter dated 29th January 2021, the appellant demanded for payment of Kshs 648,000.00 being damages for unlawful dismissal plus accrued leave. She alleged that the reason for the dismissal was not justifiable and she was not afforded an opportunity to defend herself against the allegations levelled against her. The respondent replied vide the letter dated 15th February 2021 contending that the termination was lawful and fair. It further contended that the appellant was paid all her terminal dues and executed an acknowledgment and a discharge to that effect.
6. The appellant filed suit in the court seeking declaration that the termination of her employment was unlawful and prayed for compensatory damages plus terminal dues totaling to Kshs 784,474.62. The respondent denied liability and the matter went through full trial. After considering the evidence and the submissions presented by both parties, the trial court (Hon.Kithinji-CM) concluded that the termination of the appellant's employment by the respondent was unfair and unlawful.
7. However, the court declined to award the damages sought because the appellant had executed a discharge voucher dated 11th May 2020 voluntarily and thereby created a binding contract between her and the employer waving her right to any other claims against the employer. The court then dismissed the suit observing that the appellant was estopped from filing the suit against the employer to press for more reliefs under the terminated contract of service. No costs were awarded since the employer was to blame for the unlawful termination.

Submissions in the appeal

8. The appellant filed her submissions on 27th November 2023. In brief she submitted that the trial court fell into error by failing to award damages under section 49 (1) of the *Employment Act* yet he had reached a finding of fact that the termination of employment was unlawful.



9. She further faulted the trial court for failing to appreciate that she executed the discharge dated 11th May 2020 under coercion and without full knowledge of its contents and implications. She contended that the discharge was not mutually negotiated between the parties and did not contain all the Appellant's entitlements in tandem with Section 49 (1) (c) of the *Employment Act*.
10. For emphasis, she relied on the case of *Thomas De La Rue (K) Ltd v David Opondo Omutelema* (2013) eKLR, *Star Publication Ltd v Simiyu* (2023) KECA 23 (KLR) and *Dennis Kipngetich Koech v MKPPA Kenya Limited* (2018) eKLR and urged the court to allow the appeal since she is entitled to damages for the unfair termination.
11. The respondent on the other hand submitted that the appeal ought to be dismissed with costs for lack of merits. It submitted that the appellant did not, in her submissions fault the finding by the trial court that the termination of her employment was unlawful.
12. As regards the failure by the court to award damages, the respondent submitted that the appellant never pleaded that she signed the discharge under duress or coercion but only made the allegation during cross examination. Further the allegation that she did not have full knowledge of the contents and implications of the discharge were first made during submissions before the trial court and the submissions filed in the appeal.
13. The respondent submitted that, submissions cannot take the place of pleadings or evidence. It fortified the above submissions by citing the *Thomas De La Rue case supra*, and *Jevase Kariuki Nyongi Eagle Watch Co. Ltd and another* (2020) eKLR, where the courts held that a discharge voucher is valid contract unless provided otherwise by evidence.

Analysis and determination

14. This being a first appeal, the mandate of the court is well cut out. In the case of *Selle & another v Associated Motor Boat Co.Ltd & others* (1968) EA 123, the Court of Appeal held that:-

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court...is by way of a retrial and the principles upon which this Court acts in such an appeal is well settled. Briefly put they are that this court must reconsider the evidence, evaluate 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...”
15. In the instant appeal, the appeal challenges the whole judgment of the trial court but in the submissions filed by the appellant, the appeal was narrowed down to a challenge against the failure to award damages after the court declared the termination unlawful. Consequently, the issues falling for determination in the appeal are: -
 - a. Whether the settlement agreement/Discharge dated 11th May 2020, was executed voluntarily.
 - b. Whether the appeal should be allowed as prayed.

Settlement Agreement/Discharge

16. The settlement agreement/Discharge stated as follows:

“Employee Disclaimer



I Mercy Atieno of Bondo Acknowledge receipt of sum of seventy-nine thousand five hundred and forty-eight shillings in full and final settlement and discharge of all sums due to me and also acknowledge that I have no further claims against the company including claims for reinstatement into my job or to further compensation. I further confirm that I have left the services of Timaflor without any injuries sustained and I have no claims regarding the same.

Signed ID No.

Witness John Ngunjiri

Prepared by Joseph Gitau

Human Resources Manager

Checked by Accounts Approval”

17. I have perused the statement of claim and confirmed that there is no mention of the alleged coercion or any allegation that the settlement agreement/Discharge was not executed voluntarily. It was only raised during cross examination. (See page 96 of the Record of Appeal) Guided by the *Thomas De La Rue case, supra*, and *Coastal Bottlers Ltd v Kimathi Mithika* (2018) eKLR, the trial court was satisfied that no pleadings or evidence was adduced to prove that settlement agreement/Discharge was vitiated by coercion, mistake, misrepresentation or undue influence.
18. In the *Thomas De La Rue case* the Court of Appeal stated that: -
- “We would agree with the trial court that a discharge voucher per se does not absolve an employer from statutory obligations and that it cannot preclude the industrial court from enquiring into the fairness of a termination.
- ...the court has in each and every case to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge.”
19. In the *Coastal Bottlers case, supra*, the Court of Appeal held that:-
- “Whether or not a settlement agreement or discharge voucher bars a party thereto from making further claim depends on the circumstances of each case.
- A court faced with such an issue, in our view, should address its mind firstly upon the import of such a discharge/agreement; and secondly whether the same was voluntarily executed by the concerned parties”
20. In this case, I am satisfied that the allegation by the appellant during cross examination that she was forced to sign the Discharge voucher was rebutted by DW1 in her evidence. Interestingly, the counsel for the appellant did not file Reply to defence or even ask the appellant or DW1 any question about the Discharge voucher. The counsel ignored such a serious matter before close of pleadings and while examining the witnesses for both side during the trial. It is therefore an afterthought for the appellant to raise the matter on appeal.
21. Having considered the pleadings and evidence on record, I find that the appellant signed the settlement agreement/Discharge voluntarily and she never challenged it during the trial. She has also not proved that the agreement was vitiated by coercion. Guided by the said decisions of the Court of Appeal, I must hold that the settlement agreement/Discharge voucher constituted a valid contract between the



appellant and the Respondent. The contract was not vitiated by coercion as alleged and therefore the appellant was estopped from filing suit to press for more payment after the waiver given in the said settlement agreement.

Merits of the Appeal

22. In view of the foregoing holding, it is apparent that the appeal is bereft of merits and it must fail. Consequently, I dismiss the appeal with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NYERI THIS 5TH DAY OF APRIL, 2024.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

