



EPCO Builders Limited v Malongo (Employment and Labour Relations Appeal E138 of 2023) [2024] KEELRC 13528 (KLR) (18 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13528 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E138 OF 2023**

**JW KELI, J
DECEMBER 18, 2024**

BETWEEN

EPCO BUILDERS LIMITED APPELLANT

AND

ALBERT LUGAKA MALONGO RESPONDENT

(Being an appeal against the judgment of the Chief Magistrate's court sitting at Milimani Commercial Courts (PM) Hon. G. Omodho delivered on 29th June 2023 in Employment MCERLC NO. E1763 OF 2021)

JUDGMENT

1. The Appellant herein, EPCO Builders Limited being dissatisfied with the entire Judgment that the Honourable G. Omodho delivered on 29th June 2023 filed a Memorandum of Appeal dated 27th July 2023 seeking the following reliefs:-
 - a. The Judgement of the Honourable G. Omodho delivered on 29th June 2023 be set aside.
 - b. In its place, this Honourable Court do find that the Claimant was not wrongfully or unfairly terminated and,
 - c. The Claimant is not entitled to the reliefs awarded.
 - d. The Claimant be granted the costs of this Appeal and the costs in the trial court.

Grounds of the appeal

2. That the learned trial magistrate erred in law and in fact and misdirected herself in failing to deliberate on and or consider the Waiver executed by the Respondent on the 10th September 2020.



3. That the learned trial magistrate erred in law and in fact and misdirected herself in failing to consider the evidence of the Respondent's Letter dated 17th August 2020 indicating that he was resigning from employment.
4. That the learned trial magistrate erred in law and in fact and misdirected herself in failing to consider that the Termination Letter dated 6th August 2020 and Certificate of Employment dated 12th September 2020 provided in evidence by the Respondent were forgeries.
5. That the learned trial magistrate erred in law and in fact and misdirected herself in holding that the Claimant was wrongfully and unfairly terminated.
6. That the learned trial magistrate erred in law and in fact and misdirected herself in awarding the Claimant compensation for unfair termination.
7. That the learned trial magistrate erred in law and in fact and misdirected herself in awarding the Claimant twelve (12) months' salary in compensation for unfair termination.
8. That the learned trial magistrate erred in law and in fact and misdirected herself in awarding the Claimant 1 month salary in lieu of notice and service pay.
9. That the learned trial magistrate erred in law and in fact and misdirected herself in awarding the Claimant eighty five and a half (85.5) leave days.
10. That the learned trial magistrate erred in law and in fact and misdirected herself in awarding the Claimant six (6) days salary allegedly worked in August 2020.
11. That the learned trial magistrate of the trial court erred in law and fact in failing to take into account the Respondent's evidence and submissions.

Background to the appeal

12. The Respondent instituted this claim vide a statement of claim dated 12th October 2021 alleging unfair termination and under payment during his time of service. The Appellant entered appearance and filed a defense against the claim dated 29th October 2021. In its defense, the Appellant averred that on the 17th August, 2020 the Respondent wrote a letter to the Appellant Company informing them that 'the company had no liability against him' and he proceeded to ask for his personal toolbox. Further, that he was leaving the Respondent Company to look for other avenues of work. The Appellant plead that it understood the letter to amount to a resignation by the Claimant and as a result, the Respondent computed his terminal dues that amounted to Kshs 103, 947/- which was inclusive of leave days accrued and one month's notice pay less the statutory deductions. The Respondent appended his signature on the terminal dues form acknowledging his resignation and terminal dues computed as correct.
13. The Trial Court in its judgement found that the Respondent had been unfairly terminated and awarded him as follows:
 - a) 12 months compensation Kshs. 280, 800/-
 - b) Notice Pay Kshs. 23,400/-
 - c) Leave Kshs. 115, 824/-
 - d) Service Pay Kshs. 81, 900/-
 - e) 6 days worked Kshs. 5, 400/-



- f) Costs and interests TBA TOTAL Kshs. 507, 324/- Less amount already paid Kshs. 103, 947/-
AMOUNT DUE Kshs. 403, 377/-

Written submissions

14. The appeal was canvassed by way of written submissions. Both parties complied.

Determination

15. The court is sitting on the first appeal. The duty of the court sitting as the first appellate court is as stated in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] KECA 208 (KLR)“ This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. ‘

Issues for determination

16. The appellant in written submissions addressed the following issues:-
- a. Whether the Respondent was entitled to any other amount besides the terminal dues pay he had already received
 - b) Whether the Respondent resigned from employment.
17. Respondent in written submission identified the following issues for determination in the appeal
- a. Whether the Trial Magistrate erred in awarding the Respondent the awards in the judgment delivered on 29th June 2023.
 - b. Whether the decision by the trial court was based on the evidence tendered in Court during the Hearing and in the submissions filed by both parties.
 - c. Whether the Appellant was granted or filed any application seeking STAY of execution after the delivery of the judgment on 29th June 2023.
 - d. Whether the Appellant filed a Notice of Appeal as required by the law.
18. The Court taking into account the grounds of appeal finds the issues for determination in the appeal to be :-
- i. Whether the Respondent resigned from employment or was unfairly terminated
 - ii. Whether the reliefs granted were merited.

Whether the Respondent resigned from employment or was unfairly terminated

Appellant’s submissions

The Appellant submitted as follows:-

19. That the Trial Court found that the Respondent had been unfairly terminated because, “None of the parties produced the resignation letter.” (see the judgment at page 230 of the ROA at par. 5) This is however an erroneous finding because both parties did for a fact produce the Respondent’s resignation letter i.e the Respondent produced it in his bundle of documents in Exhibit 12 at pages 24 - 27 of the ROA while the Appellant produced it in its bundle of documents in Exhibit 7 at page 106 of the ROA.



The Respondent in the said letter indicated interalia that, “I therefore demand my toolbox that is not connected to the company as I look for other avenues.”

20. Secondly, the letter was a clear resignation and the Respondent’s resignation was a voluntary termination of employment by himself and the same took effect on the date stated in the resignation letter. As a result, the Appellant computed the Respondent’s terminal dues that amounted to Kshs 103, 947/- which was inclusive of leave days and service pay less the statutory deductions. The Respondent appended his signature on the terminal dues form acknowledging his resignation and terminal dues computed as correct. In explaining the consequences of resignation of an employee from employment the court in *Edwin Beiti Kipchumba v. National Bank of Kenya Limited* [2018] eKLR, stated that; “65. ...resignation by an Employee from employment, is basically termination of employment at the instance of the Employee. It is a unilateral act. The *Employment Act* does not require the Employer to accept a notice of termination issued by the Employee, for that notice to take effect.” Similarly, in *William Kariuki v Kenya Civil Aviation Authority* [2008] eKLR, the court ruled to the effect that; “By resigning and his resignation being accepted effective 31.3.2002 the Plaintiff had excluded himself as a staff of the defendant. It therefore follows that any dealings that the defendant purported to deal with the plaintiff as a staff in addition of being an exercise of that power in a vacuum it was also an exercise in futility as well as an illegality. It amounted to an exercise in futility because as at the time it was written, there was no staff to be disciplined, through summary dismissal. It amounted to an illegality because the defendant could only discipline and dismiss a staff by way of summary dismissal if the staff was within his employment and under their control. By that time the plaintiff was neither under their control nor within their employment...”
21. The Appellant further relied in the case of *Benard Muriuki Gikandi v Kenya Wildlife Service* [2022] eKLR where the Court stated that, “43. My view is that the claimant indeed resigned from employment and there is no indication that the reason for the resignation was prompted by harsh or unfair termination. 44. This is because in his resignation letter, the claimant indicated that he resigned for personal reasons. The prayer for unlawful and unfair termination cannot therefore stand or be granted.” That the net effect of the foregoing is that the Respondent was in law required to issue the Appellant with the requisite notice to terminate the contract of service. Under section 35 of the *Employment Act*, the duration of the notice to terminate is directly proportionate to the duration one has to work in order to earn a wage, which he did not.
22. The Appellant submitted without prejudice to the foregoing, that the termination letter produced by the Respondent dated 6th August 2020 and the Certificate of Employment dated 11th September 2020 at pages 71 and 72 of the ROA respectively were a forgeries) The Appellant couldn’t have possibly issued a termination letter when the Respondent had voluntarily resigned. In the two documents attached, the signature on the alleged termination letter allegedly signed by the Director of the Respondent Company Mr. Varsani, very much resembles the signature of the purported Human Resource “Benson Owino’ on the certificate of employment. That the H. R Manager at the Respondent’s Company is not “Benson Owino” as purported in Certificate of Service produced by the claimant but “Bernard Owino”, the Respondent witness who testified in court. For these reasons the Appellant submitted that the claimant’s fraudulent acts wre made with the sole intent and purpose of fraudulently misrepresenting the facts of the case to this Honorable court. That Justice Makau, in *Peter Murigi Mburu v Kenya Forest Services* [2019] eKLR, where the claimant had forged the signature of the Zonal Manager for the Respondent’s Organization, adjudged as follows; “From the testimony and evidence before me, there was a hearing at which the Claimant was heard, his defence was considered and termination recommended. As he was accorded a proper and fair hearing before the disciplinary committee which found him guilty of forging the Zonal Manager’s signature, the claim is unmerited and without any basis. The claim is dismissed with costs to the Respondent.” The Appellant submitted



that presentation of fake certificates is a criminal offence under Penal Code Cap 63 Chapter X abuse of Office, Section 102 and Chapter XXXV-punishment for forgery, section 349. The Claimant acted to the total disregard and disdain of the Respondent Company by forging signatures of its senior management team. The appellants sought for the court to find that the Respondent did in fact resign and was not terminated as alleged.

The Respondent's submissions

23. The Respondent on this issue submitted that the Trial Court having exercised its jurisdiction powers and after the whole process, pretrial, mentions and hearing of the matter, the Magistrate found that the termination of the Respondent's employment was unprocedural and substantially unfair and entered the judgment against the Appellant in accordance with the evidence given by both parties and awarded the Respondent accordingly. The Respondent submitted on other procedural issues on the filing of the Notice of Appeal which the Court finds was overtaken by events pursuant to directions on the filing of written submissions on the appeal by Justice Ocharo Kebira, on the 6th May 2024.

Decision

24. The burden of proof in employment claims is 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.” Thus, the burden to prove there was wrongful dismissal lies with the claimant and on discharge of the burden, the burden shifts to the employer to justify the reasons for the termination of the employment.
25. In the instant case the Respondent/ Claimant in paragraph 14 of his statement of claim pleaded that: - “The respondent unfairly terminated the services of the claimant on or about 6th August 2020 to 31st August 2020 purporting to have reduced workload..” In paragraph 11 of the claimant's witness statement he stated that when he complained he was being underpaid he was given a letter to terminate his service on or about 6th August 2020. The Claimant/ Respondent issued a demand letter dated 23rd September 2021 and the Court observed that the issue of redundancy was raised. The Appellant produced letter dated 17th August 2020 authored by the Respondent and addressed to the Appellant titled, “Terms of duty” The letter read:-“ I hereby write to you that I have no mistake, I have not made any mistake as per your company guidelines . I have not made any mistake that made a loss to the company, I therefore demand my toolbox that is not connected to the company as I look for other avenues” (page 106 of the record of appeal). At page 105 was a document titled waiver signed by the Respondent and witnessed to effect that upon termination of his contract of employment he received terminal dues of Kshs. 103,947. The Court observed that the Respondent acknowledged receipt of the funds. He agreed not to demand any further payment from the Appellant in relation to the employment.
26. During cross-examination before the trial court the Claimant/Respondent stated that it was true he was paid the Kshs. 103,947. That he signed the voucher blindly because of school fees and illness. He stated he was sacked for demanding his arrears.
27. RW1 was Mr. Mwangi who produced the exhibits including the voucher and letter by the Respondent and testified that the claimant/Respondent was paid 1 month salary in lieu of notice and all his terminal dues.



28. In decision the Trial Court stated that the resignation letter or the process followed in discharging the claimant from his duties was unfair. This Court having evaluated the contents of the letter authored by the Respondent holds it was not a voluntary resignation letter. The court finds, though raised in submissions, the alleged forgeries claims were not raised at trial court during the cross-examination and were not relied on by the trial court in making decision. (pages 71 and 72 were the alleged forgeries)
29. From the foregoing the Court finds that there was no proof of resignation by the Respondent. The letter only disclosed the claimant was not happy with the separation but did not disclose the reasons in the letter. The Claimant having accepted the separation he was entitled to notice pay and terminal dues.

Whether the reliefs granted were merited.

Appellant's submissions

30. During cross examination, the Respondent although admitting to having received the sum of Kshs 103, 947/- as his final dues from the Appellant (see tabulation & cheque at pages 102 & 103 of the Record of Appeal (hereinafter referred to as 'the ROA') respectively) and signing the Waiver Form (at page 105 of the ROA) stating clearly at Clause 3 thereon that he had no further claim from the Appellant Company, he claimed that he signed the Waiver Form blindly (see proceedings at page 224 of the ROA) The Appellant submitted that the Respondent was estopped from making any claim against the Appellant because he waived his right to make any further claim when he signed the Waiver Form which stated that, "3. THAT I agree that I will not demand any further payment from Epcu Builders Company Limited in relation to my employment either directly or otherwise. I also acknowledge by signing this agreement that I have no further claim against the company."
31. The Appellant submitted that the contract was legally binding on the Respondent and relied on the decision in the Court of Appeal Nairobi Case No. 147 OF 2005 Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited [2015] eKLR, where the superior court dismissed the Plaintiff's suit on the ground that the signed discharge voucher constituted a contract and no further liability on the Defendant remained. The learned judges held that, "The execution of the 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." Similarly, in the case of Court of Appeal Mombasa Case No. 21 of 2017 Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR, the Plaintiff/Respondent's employment was similarly terminated on account of redundancy. The learned judges therein in sighting the Trinity Prime vs Lion of Kenya (supra) case with approval overturned the superior court's decision and held that, "22. All the ELRC was required to do was to give effect to the intention of the parties as discerned from the settlement agreement. Our position is fortified by the sentiments of Sir Charles Newbold P in Damondar Jihabhai & Co Ltd and another vs. Eustace Sisal Estates Ltd [1967] EA 153 that:- "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 & Others vs TRW Lucas Electric Steering Ltd & Others (supra) – Lord Justice Beatson stated as follows:- 'Absent statutory or common law restrictions, the general principle of the 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." 23. 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."



32. The Appellant further relied on the decision in *Gilbert Mugambi v Michimikuru Tea Factory Limited* [2018] eKLR where Makau J. in dismissing a claim on account of the Plaintiff employee willfully signing the discharge voucher held that, “6. The court needs not delve any further into the claim or even consider the other aspects as there is no basis for an alternative finding. No matter how attractive the words in Article 159(2)(d) are, they cannot be a panacea for a contract freely executed between parties. The words used to discharge the Respondent are not colonial and I do not buy the argument that upon receiving some payment a party who is dismissed thanks God and takes the sum given so as to move on suggesting that there is a remedy beyond the waiver given. The upshot of the foregoing is that the suit is misplaced on account of the waiver and therefore is accordingly dismissed with no order as to costs.” That in the case of *William Wambua Munyao v Thika Coffee Mills Limited* [2019] eKLR the learned Makau J. in dismissing the Plaintiff employee’s suit held that, “25. The Court of Appeal in *Thomas De La Rue* case held that Discharge Voucher does not absolve an employer from statutory obligations or bar this court from investigating in to alleged unfair termination but the court must consider whether the discharge voucher was freely and willingly executed. In the *Coastal Bottlers Co. Ltd* Case the Court of Appeal held that a discharge voucher is a binding contract and constitutes a full discharge and the court can only interfere therewith if vitiating factors are pleaded and proved.”
33. The Appellant relying on the foregoing case law submitted that the Claimant did not plead and prove by evidence that the discharge voucher was signed through coercion, mistake, fraudulent misrepresentation or undue influence. In the submissions by his counsel, he suggested that the delay by the respondent before paying the dues amounted to oppression and unfair labour practice which forced the claimant to sign the voucher.

Respondent’s submissions

34. The Respondent on this issue submitted that the Trial Court having exercised its jurisdiction powers and after the whole process, pretrial, mentions and hearing of the matter, the Magistrate found that the termination of the Respondent’s employment was unprocedural and substantially unfair and entered the judgment against the Appellant in accordance with the evidence given by both parties and awarded the Respondent accordingly.

Decision

35. The Respondent submitted that the reliefs granted were an exercise of discretion of the Court and a court sitting on appeal should be reluctant to interfere with the exercise of the discretion unless demonstrated it was improperly exercised.
36. The Appellant stated that the Respondent waived all other claims on the employment against it under the discharge voucher/Waiver (page 105 of the Record of Appeal was the Waiver). The contents of the waiver were not in dispute. What is the effect of the discharge voucher which the Respondent signed and received the payment? In *Gilbert Mugambi v Michimikuru Tea Factory Limited* [2018] eKLR the learned Makau J. in dismissing a claim on account of the Plaintiff employee willfully signing the discharge voucher held that, “6. The court needs not delve any further into the claim or even consider the other aspects as there is no basis for an alternative finding. No matter how attractive the words in Article 159(2)(d) are, they cannot be a panacea for a contract freely executed between parties. The words used to discharge the Respondent are not colonial and I do not buy the argument that upon receiving some payment a party who is dismissed thanks God and takes the sum given so as to move on suggesting that there is a remedy beyond the waiver given. The upshot of the foregoing is that the suit is misplaced on account of the waiver and therefore is accordingly dismissed with no order as to costs.” In the Court of Appeal Nairobi Case No. 147 OF 2005 *Trinity Prime Investment Limited v*



Lion of Kenya Insurance Company Limited [2015] eKLR, the superior court dismissed the Plaintiff's suit on the ground that the signed discharge voucher constituted a contract and no further liability on the Defendant remained. The Learned Judges held that, "The execution of the 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 court is bound by the doctrine of stare decisis unless it can distinguish. I find the foregoing authorities relevant to the instant case. I uphold to apply in the instant appeal the decisions in the cases of Court of Appeal Mombasa Case No. 21 of 2017 Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR and in Court of Appeal Mombasa Case No. 21 of 2017 Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR (supra) to find the Respondent was estopped from making further claims on the employment against the Appellant having signed and received money under the waiver/discharge dated 10th September 2020 (page 105 of the Record of Appeal).

37. The court held that the Respondent having signed the waiver/discharge was only entitled to Notice pay and terminal dues which the court finds were paid under the documents filed in court at pages 102 and 103 of the Record of Appeal. The court holds that the granted reliefs were unmerited and the same are set aside.

Conclusion

38. In the upshot the appeal is allowed and the judgment of the Chief Magistrate's Court sitting at Milimani Commercial Courts (PM) Hon. G. Omodho delivered on 29th June 2023 in Employment MCERLC NO. E1763 OF 2021 is set aside in its entirety with costs to the Respondent at the lower court.
39. The Court, in order to temper justice with mercy this appeal arising from an employment relationship, the Court makes no order as to costs in the appeal.
40. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18th DAY OF DECEMBER, 2024.

JEMIMAH KELI,

JUDGE

IN THE PRESENCE OF:

Court Assistant: Caleb

Appellant : - Awuor

Respondent: Mwangi

