H Young and Company (East Africa) Limited v Mwangi (Civil Appeal E089 of 2022) [2024] KEELRC 13619 (KLR) (18 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13619 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CIVIL APPEAL E089 OF 2022

JW KELI, J

DECEMBER 18, 2024

BETWEEN

H YOUNG AND COMPANY (EAST AFRICA) LIMITED ..... APPELLANT

AND

BENSON MWANGI ..... RESPONDENT

(Being an Appeal from the Judgement and decree of the Magistrate's Court at Milimani (Hon C.K Cheptoo (PM)) dated 6{{^th}} June 2022 in Milimani CMELR CAUSE NO 1190 of 2019)

JUDGMENT

1. H Young and Company (East Africa) Limited, the respondent in Milimani CMELR Cause No 1190 of 2019, being aggrieved with the judgment delivered by Hon C.K Cheptoo (PM)) dated 6th June 2022 in the suit, filed memorandum of appeal dated 4th July 2022 and record of appeal dated 2nd November 2023 seeking for the following Orders:-

    a. That this appeal be allowed and the Judgement of the Lower Court be set aside.

    b. That the suit against the Appellant in the Lower Court be dismissed in its entirety.

    c. That the costs of this Appeal and the Lower Court be borne by the Respondent herein.

    Grounds of the appeal

2. The Appeal was based on the following grounds:

    a. The learned Magistrate erred in law and fact by holding that the Appellant terminated the employment of the Respondent without following a fair procedure.

    b. The learned Magistrate erred in law and in fact by holding that minutes were necessary in order for the Appellant to prove that it gave the Respondent a fair hearing.

c. The learned Magistrate erred in law and fact by holding that the Respondent was not he offered a sufficient opportunity to give an explanation for the misconduct he was accused of yet he admitted during hearing that he was issued with a show cause letter which he chose not to respond to with any reasonable detail.

d. The Learned Magistrate erred in law and fact in holding that the Respondent's termination was unfair.

e. The Learned Magistrate erred in law and fact in failing to give weight to, fathom or to consider the Appellant's written submissions and authorities.

f. The learned Magistrate erred in law and fact in awarding the Respondent notice pay at all and further by using a monthly rate of Kshs 54,822 when the evidence demonstrated that the Respondent earned a basic pay of Kshs 41,955 plus a house allowance of Kshs 8,391 to give a total of Kshs 50,346.

g. The learned Magistrate erred in law and fact in awarding the Respondent 3 months' pay in compensation or any compensation at all and further erred in applying a rate of Kshs 54,822 in light of the evidence adduced by the Appellant.

h. The learned Magistrate erred in law and fact in failing to dismiss the case by virtue of the final discharge certificate signed by the Respondent.

i. The learned magistrate erred in law and fact in finding that the Respondent had proved his case on a balance of probabilities.

j. The learned magistrate erred in law and fact in awarding costs of the suit to the Respondent.

Background To The Appeal

3. The Respondent/ claimant filed suit dated 22nd May 2019 before the lower court alleging unfair termination and seeking compensation, untaken leave, and certificate of service (page 6 of the record of appeal). The Trial Magistrate having heard the case on merit, interpartes, delivered judgment in the suit on the 6th June 2022 in favour of the Respondent/ claimant in the following terms:-

   a. A declaration that the claimant's employment services with the respondent were terminated unfairly.

   b. Payment of the claimant's salary for one month in lieu of Notice, the amount being Kshs. 54,822.00

   c. Damages for unfair dismissal Kshs. 54,822 x 3 months =Kshs. 164,466/-

   d. Salary for accrued leave days- No evidence was led to prove the same.

   e. Certificate of service.

   f. Costs of the suit. (Judgment at pages 128-136 of the Record of Appeal)

Written submissions

4. The appeal was canvassed by way of written submissions. The appellant's written submissions drawn by Macharia, Burugu & Company Advocates were dated 19th January 2024. The Respondent's written submissions drawn by Mbuthi Kinyanjui were dated 20th June 2024 and received in court on the 9th August 2024.

Determination

5. The court is sitting on 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 reanalyse 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

6. The appellant in its written submissions contended that the Trial Court held there was substantive fairness and identified the following issues for determination in the appeal:-

    a. Whether there was procedural fairness(grounds 5(a-e)

    b. Whether the trial court erred in failing to consider the weight of the discharge certificate (ground 5 e).

    c. Whether the court erred in remedies awarded(Grounds 5 f,g,i and j).

7. The Respondent addressed the same issues as the appellant and the same are adopted as the issues for determination in the appeal.

Whether there was procedural fairness(grounds 5(a-e)

8. The appellant submits that the trial court determined there was substantive justification for the respondent’s termination but the procedure was not fair. That the Respondent’s (Original Claimant’s) testimony on the question of a hearing before dismissal was as follows when cross-examined about the show cause letter (which is annexed at page 31 of the Record) “It is true that the Respondent asked me to respond to the allegations. I told the company that I know nothing about that. I have not answered a letter exhaustively explaining the same. On dismissal letter, it is dated 24/11/2018. The show cause letter is dated 23/11/2018. When given the show cause letter, I didn’t see the need of giving a comprehensive response. I confirm that I was the driver of the motor vehicle whose fuel consumption was in question and was the only one who could explain. My boss had a right to ask me how the fuel was being utilized.” (See pages 144 to 145 of the Record) The appellant contended that an employee who testifies as such cannot be said to have been denied an opportunity to be heard before termination.

9. The Appellant submits that the trial Court in its Judgment captured the Respondent’s refusal to respond to the show cause letter in the following words at pages 129 and 133 of the Record: “He admitted in cross examination that although he was asked to explain the fuel loss, he did not see the need of giving a comprehensive response to the notice to show cause. He only indicated in his response that he knew nothing about the allegations.” (See page 129 of the Record of appeal). That in the judgment it was observed that in the show cause letter, the claimant was informed of the suspected gross misconduct and was asked to respond to the allegations. He was also asked to be accompanied by a co-employee of his choice during the process. The Claimant chose not to respond to the allegations and failed to call a co employee to the hearing. (See page 133 of the Record) The Trial Court despite the foregoing then went ahead to hold that the hearing procedure followed was not fair as can be seen at pages 133 and 135 of the Record. The Trial Court’s view was that minutes were necessary even in the circumstances of this case.

10. The appellant submits that in light of the foregoing, it discharged its burden of giving the Respondent an opportunity to be heard which he squandered and it was an error for the Trial Court to hold otherwise. The Appellant submitted on that point strenuously at paragraphs 15 to 19 of its submissions to the Trial Court (see pages 44 to 46 of the Record).

11. The appellant submits that its case before the trial court was that the hearing procedure was commenced by the Appellant issuing to the Respondent a show cause letter which is normally the first step in the formal hearing process(the letter was at page 31 of the Record of appeal). However, the Respondent was dismissive and treated the matter in a simplistic manner and declined to make any explanation other than saying "I know nothing about this". During cross- examination, the Respondent stated that he did not see the need to give a comprehensive response. Thus the Respondent squandered an opportunity to give his side of the story in written form. The show cause letter also informed the Respondent that when submitting his response, he could be accompanied by a fellow colleague as required by section 41 of the *Employment Act*. Upon the Respondent refusing to respond to the letter, there was nothing else the Appellant could do other than conclude that the Respondent was guilty of the misconduct accused of based on the information available.

12. The appellant to buttress the foregoing submissions relied on the decision in David Njeka V Lavage Dry Cleaners Limited [2013]eKLR, where Mbaru J stated as follows as early as in 2013: "11. In normal practice an internal disciplinary process is triggered by correspondence between the employer and the employee. By declining to to present his written explanation as required by the Respondent, the Claimant effectively locked himself out of the internal disciplinary/grievance handling process. He cannot therefore be heard to say that he was not given an opportunity to defend himself. For this reason, the Claimant's claim for unfair termination fails and is hereby dismissed. The claims for salary arrears and three months notice are also dismissed on this account." Further, the Court also instructively stated as follows:- '10.The Respondent stated and the Claimant admitted that the Claimant was required to give a written explanation on the coat in issue but he failed to do so. In the case of Jackson Butiya Vs Eastern Produce Limited (Industrial Court Cause No 335 of 2011) this Court held that: "An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say "I refused to talk with those people and therefore I was not heard, order them to pay me." It is not the role of the Court to supervise the internal grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law".

13. The appellant further submits that the finding by the trial Court (See pages 133 to 135 of the Record) that minutes were necessary in the circumstances of this case is not supported by case law. All the Court needed to ask is whether the employee was given an opportunity to be heard and not whether he was actually heard. It is a matter of fairness on a case to case basis and in this case nothing was wrong with the employer concluding that the Respondent had no response to the accusations made. There was no testimony by the Respondent to the effect that he asked for more time to respond and was denied, or that had he been heard orally, that he would have given any better explanation. Hence the Court dealt with extraneous matters to fault the hearing procedure adopted. The appellant further relied on the decision (Ongaya J) in Nicholas Mwangi Wambui Vs H Young & Co (EA) Ltd (2023) KEELRC 393 (EKLR) where the Court held as follows: "8. The 2nd issue is whether the procedure adopted to dismiss the respondent was unfair. As submitted for the appellant, the evidence was that the respondent, when served with the letter to show cause dated November 25, 2018, he refused to sign the same. The trial Court found as much. Did refusal to so sign amount to frustrating the due procedure as prescribed in section 41 of the *Employment Act*, 2007? The Court finds that as submitted for the appellant, an employee is required to cooperate and subject himself to the due process and failing to do so defeats the employee's claims of denial of due process. ..... The legitimate

thing was for the claimant to receive the letter and reply and be heard in his defence that he was not culpable as charged. He instead got annoyed and refused to submit to the process thereby frustrating the due process. The Court considers that in the circumstances of the case, the trial court deviated to extraneous consideration that the time to respond and attend the hearing was too short whereas clearly, the claimant had frustrated the disciplinary process by rejecting to accept the show cause letter on grounds he judged himself innocent – and whether that judgment was correct or wrong, the legitimate step was to submit by accepting the letter, responding, and being heard in selfexculpation. Grounds (a) and (b) of appeal will succeed."

14. The appellant cited several authorities to make a case that there needed not be a oral hearing. In Jacob Oriando Ochanda Versus Kenya Hospital Association T/A Nairobi Hospital (2019) e KLR "In light of the foregoing we do not understand the appellant's argument that there was no oral hearing. But even if this was true, the Court has repeatedly said that the right to be heard does not necessarily entail an oral hearing only. Such was the opinion of the English Court of Appeal in R V. Immigration Appeal Tribunal ex-parte Jones [1988] I WLR 477, 481 where it was held:- "The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing.....Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made ..." In the case of Kenya Revenue Authority V. Menginya Salim Murgani, Civil Appeal 108 of 2009, this Court pronounced itself as follows: "However, in our view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter before us and we are satisfied that it was a fair hearing. . ... With our determination, in agreement with the learned Judge, that the appellant's summary dismissal was lawful and procedural, we find no point of considering the other grounds that have now been subsumed in that determination. There is no merit in the appeal. It is accordingly dismissed with costs".

Respondent's submissions

15. The Respondent submitted that of importance to note was that at page 31 of the Record of Appeal was in fact the letter for Notice to show cause served upon the Respondent. The letter is well articulated and the response of the Respondent is clear that he knew nothing about the allegations as stated in the letter. That it would be extremely improper and a misdirection if this court accepts the invitation by the appellant to make a finding that there was indeed a hearing and that the Respondent chose not to be accompanied. In any event, the Appellant's witness himself did confirm to the Court that the Respondent was not given a hearing hence the logical explanation as to why there was no meeting. In fact, the witness did testify that he only issued a letter to the Respondent and the response was to be in the form of a letter. One wonders then whether the Respondent could have logically brought in a co-worker to write a response. (See page 149 of the Record of Appeal) The Respondent contended that it was important to note at any given point, the Appellant could not give the names of the individuals who sat and decided the fate of the Respondent. The Appellant's witness actually stated in testimony: "He was not giving a hearing" (sic) - (See page 149 of Record of Appeal) Further, this Court in the case of *New Kenya Co-operative Creameries v Sigei (Appeal E002 of 2022*) [2024] KEELRC 27 (KLR) (25 January 2024) (Judgment) held that:- ' a disciplinary hearing is very crucial and imposes a higher responsibility on the employer given that they are the ones leveling accusations. Similarly, it observed that substantive fairness cannot be complete without procedural fairness. This is not necessarily to require that an employer should conduct proceedings like a Court of law but the expectation is to

give a fair hearing and accommodate an employee in accordance to the general rules and foundational structure of natural justice as enshrined in the constitutional and statutory provisions."

16. The Respondent contended that this case, it was also improper for the Appellant to submit (at paragraph 2 of submissions) that the finding of "substantive justification" is to be translated to "substantive guilt" and the Courts ought to be extremely careful in distinguishing the two aspects. That Substantive justification in the context of the judgment is that the Appellant had substantive "reason" to cause the Respondent to be dismissed from employment however, there was no finding of substantive "guilt" and as such, substantive guilt can only be accomplished through a procedural finding of such guilt.

17. The Respondent submitted that procedural fairness is the foundation that breathes life to what can be deemed as fair termination. This has been found to be non-negotiable as it is the inalienable right pursuant to the rules of natural justice that a person be cannot be condemned unheard. This Court as per New Kenya Co-operative Creameries case (supra) has time and again held that "it is the duty of an employer, inter alia, to inform an employee in clear details and particulars of the grounds upon which a disciplinary action is founded. It is also the duty, and indeed an obligation, for an employer to supply the employee with all evidence gathered, both oral and documentary, to enable and facilitate the employee to mount whatever defence that such an employee may wish to advance. It is also the duty of an employer to inform the employee of his right to call witnesses of his choice, to be accompanied by a co-worker of his choice to the disciplinary hearing, and to come along with a trade union representative of choice if the employee is a member of such union." That this gives the employee a chance to cross-examine his accuser. The rules of natural justice in line with the provisions regulating the conduct of a fair hearing if followed, would have given the Respondent the forum and opportunity, to have been called to a hearing where the GPS operator and Fuel supervisor were present so that the ultimate finding of his guilt would be fair enough to dismiss him from employment.

18. On the issue of minutes, the Respondent relied on this Court's decision in Kiilu v Isinya Resorts Limited (Cause E022 of 2021) [2022] KEELRC 13240 (KLR) (17 November 2022) (Judgment). In this case, the Court observed that where a hearing is conducted, such like the non-existent one alleged to have been conducted by the appellant, minutes must be taken and signed and should mirror the exact agenda of discussed in such a meeting. Needless to say, the law demands the evidential burden of proving the existence of a hearing to provide evidence of such a hearing. The Respondent submitted that the reliance by the Appellant in the case of Nicholas Mwangi Wambui v H Young & Co. (EA) LTD (2023) KEELRC 393 (eKLR) (See page 4 of the Appellant's submissions); is distinct because in that case the Appellant refused to sign the notice to show cause letter thereby frustrating the due process. The court in that matter went on to state that: "...the legitimate thing was for the claimant to receive the letter and reply and be heard in his defence that he was not culpable as charged. He instead got annoyed and refused to submit to the process." That this case cannot be used as an authority. In the instant case, the Respondent herein received the notice to show cause letter and signed it after indicating on it that he did not know anything about it. That was a sufficient response as far as the vagueness of the allegation and lack of supporting documents in the Notice to show cause letter is concerned. And, as rightly captured by the Honorable judge in the above cited case, the next step after recording his response on the letter was to be heard in his defence. The Respondent submitted that the Trial Court did not place the burden on the Respondent to request for a hearing but that a hearing was the next procedural. That the reliance of the case of Lawrence Maina Nyamu v Boma Hotels (2019) eKLR is also distinct and the appellant cannot mislead this Court. The Court in its wisdom at paragraph *para_15 15* placed a caveat/qualification on the compliance with section 41 on dismissal without an oral hearing. In the words of the Court, "In the view of the Court, the Respondent was in substantial compliance with the statutory requirements of sections 35(1)(c) and 41 of the *Employment*

Act, 2007 and without having demonstrated that he was prejudiced by failure to have an oral hearing, the court finds that process followed by the Respondent was fair."(emphasis ours) That the operative caveat was that the employee must have demonstrated prejudice by failure to have an oral hearing. This decision goes on to demonstrate the correctness of the evidential burden of proof and what the Court in Nicholas Mwangi v H. Young case above stated in regards to submitting to the process. In this case before the Trial Court, the accusation of criminal conduct of siphoning fuel and tampering with a GPS tracking system was denied given that the Respondent did not know about it as he did not have a hand in it. The prejudice to be suffered was so blatant in that; the GPS operator and the Fuel supervisor did not table that evidence alongside the notice to show cause which only appeared during trial. Again, the giving of a notice to show cause letter is not enough, it ought to be accompanied by supporting documents. The Respondent explained what happened during the receiving of the notice to show cause letter. That he only met the HR who handed him the letter which letter demanded that he respond by close of business of that day which was not sufficient time to prepare a defence.

19. The Respondent contended that in the course of the trial, the apparent prejudice to be suffered by the Respondent came out to light when the Appellant's witness openly told the trial that he could not 100% ascertain that the fuel was siphoned or that the GPS was also tampered with. That this was the blatant prejudice suffered by the Respondent. The case law relied upon by the Appellant of Joseph Mwangi Gioche v Gatamaiyu Dairy Farmer's Cooperative Society Limited [2019] eKLR is also distinct. The Claimant in that case was accused of embezzlement of funds. He was summoned through his mobile phone by the caretaker committee to answer some audit queries. He attended the meeting at 11.00 a.m. and found the auditor from Kigo Njenga and answered the audit queries in the presence of Mr. Mwicigi and Mr. Murimi. Further in quoting the Court, it again placed a caveat/qualification to be satisfied before a Court makes a finding that a pedantic and mechanical path of a disciplinary hearing must be followed. The Court stated: "32. Concerning the procedure followed in terminating the claimant's service, the court is persuaded that due process was followed. The requirement of issuance of notice to show cause and invitation to a disciplinary hearing does not have to follow a pedantic and mechanical path. Once the court is satisfied as the case here that the employee had reasonable notice of the allegations against him and he has been called upon to answer questions around those allegations and has done so, if a dismissal follows thereafter the employee cannot insist on a mechanical process of notice to show cause and a disciplinary hearing. In the court's view therefore the dismissal was procedurally fair." The qualification/caveat is that a Court must be satisfied that there is reason to not necessarily demand a disciplinary hearing. That thel Court had the opportunity to interrogate the evidence and in doing so this Court will note that the Appellant did concede that nobody who accused the Claimant of siphoning fuel and tampering with the GPS system was present during the notice to show cause. It is undeniable that the Respondent was not supplied with the supervisor reports and that the appellant could not prove that he siphoned fuel or tampered with the GPS. The Respondent agreed with the trial Court that indeed it was not satisfied that there was a reason not to demand a hearing. That the case law relied upon by the Appellant of Mwaragu Kimani v Shengli Engineering Construction [2016] eKLR is also misdirection. The facts of the case are totally different from the facts and issue of the instant case. In that case the Claimant was terminated on medical grounds as he could no longer work as a driver having broken both his legs. Again, the court placed a caveat on its holding that not all employment situations give must result in a hearing and the relevant pronouncement that the Appellant has chosen to leave out demonstrate the distinctness of the instant matter and the case law relied upon... the Court fully held that: "To argue that the claimant was not afforded a hearing prior to termination is pedantic. Not every employment situation requires that before termination a formal hearing must be called and minutes taken. Between the claimant and the respondent, there was no dispute that the claimant as a result of the injuries sustained during the accident, could no longer continue as a driver. It is therefore being overly procedural to require that a formal hearing be called

to deliberate over what was obvious to both parties." The caveat or qualification to that exception was that a formal hearing is not necessary over what is so obvious to both parties. It goes without saying that the case law is totally misplaced. Lastly, the reliance, by the Appellant, of the Court of Appeal decision of Jacob Oriando Ochanda v Kenya Hospital Association Ltd t/a Nairobi Hospital [2019] eKLR goes on to support the finding of all the precedents cited above. It is also distinct from this case because in that case, the appellants were accused of defrauding their employer company (respondent). The appellants were served with a notice to show cause and that the appellant's response to the show cause letter was unsatisfactory as a result of which, he was suspended with pay from 19th July, 2013 to 2nd August, 2013 to enable the respondent conclude investigations. The suspension was extended to 6th August, 2013. Following the conclusion of those investigations, a report dated 22nd July, 2013 was made and a disciplinary hearing conducted on 23rd July, 2013. In its report, the disciplinary panel recommended that the appellant and his two accomplices be dismissed.

Decision.

20. The Trial Court on the reasons for termination held that :- ' I find that the Respondent had valid reasons to terminate the claimant." There was no cross-appeal hence the issue is held as settled. The only issue before the court is that of procedural fairness. The applicable law is section 41 of the *Employment Act* to wit:- '41. Notification and hearing before termination on grounds of misconduct

    (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, an 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 grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make."

21. The Trial Court held there was no hearing accorded to the Respondent before the termination of his employment. During cross-examination of the claimant the following was what he told the court on the procedural fairness:- "It is true that the Respondents asked me to respond to the allegations. I told the company that I know nothing about that. I have not answered a letter exhaustively explaining the same. On dismissal letter, it is dated 24/11/2018. The show cause letter is dated 23/11/2018. When given the show cause letter, I didn't see the need of giving a comprehensive response. I confirm that I was the driver of the motor vehicle whose fuel consumption was in question and was the only one who could explain. My boss had a right to ask me how the fuel was being utilized." (See pages 144 to 145 of the Record) on re-examination the claimant told the Trial Court he stated he had nothing to say as his response.

22. The court deduced that after the statement by the claimant on the notice to show case that he had nothing to say he was dismissed from service. There was no compliance with the processes envisaged at section 41 of the *Employment Act* of the claimant being given opportunity to be heard in the presence of employee of choice or shop floor union representative. The appellant relied on several authorities to state that the oral hearing was not necessary. The respondent distinguished authority relied on in the case of Nicholas Mwangi Wambui v H Young & Co. (EA) LTD (2023) KEELRC 393 (eKLR) (See page 4 of the Appellant's submissions); to submit that his case was distinct because in that case the Appellant refused to sign the notice to show cause letter thereby frustrating the due process. The court

in that matter went on to state that: "...the legitimate thing was for the claimant to receive the letter and reply and be heard in his defence that he was not culpable as charged. He instead got annoyed and refused to submit to the process." In the instant case, the Respondent herein received the notice to show cause letter and signed it after indicating on it that he did not know anything about it. That was a response as far as the allegation in the Notice to show cause letter was concerned. The next step in the circumstances was for the appellant to afford the Respondent a hearing according to section 41 of the *Employment Act*. That did not take place.

23. The Court upholds the finding on the procedural unfairness.

Whether the trial court erred in failing to consider the weight of the discharge certificate(ground 5 e).

Appellant's submissions

24. This ground relates to the Trial Court's failure to give weight to the discharge certificate signed by the Respondent acknowledging that he had no further claims against the Appellant before he filed his suit. The Trial Court made absolutely no mention of this pertinent issue and it is safe to state that the Court failed to consider crucial evidence, submissions and authorities thereon. The Respondent admitted to signing the discharge voucher voluntarily in the 6 following words during his cross examination as can be seen at page 145 of the Record. "On page 9 of Respondent's bundle, I confirm receiving the cheque. On page 10- I signed company receipt. I confirmed having no other claim against the Defendants (in the letter). In my witness statement and claim I have not stated that I had been paid some money. I filed the case in July 2019. I signed the document on page 10 on 08/03/2018. I have not stated in my claim that I was forced to take the pay." The Appellant contended that their testimony was enough to dispose of this case by dismissal. The appellant relied on decision in Ronald Ongori Gwako VS Styroplast Limited (2022) EKLR where the Court held as follows: "*66*.....the Claimant executed in acknowledgement of receipt of the sum of money, that had been agreed upon as due and owing to him, and that the payment was a final one. 67. The Claimant is bound by the terms of the settlement agreement dated 27th January 2017. There has not been demonstrated any reason why this Court can hold otherwise. In any event the Claimant has not sought so. 68. To hold otherwise would be tantamount to rewriting an agreement for the parties, agreement that they freely entered into. It has never been the role of a court of law to so do. In fact, allowing the Claimant to run away from the terms of the settlement agreement will be aiding him to breach the Respondent's legitimate expectation that a party who has freely entered into an agreement is bound by the terms of that agreement not unless there is a show that the same has been vitiated for one or more of those reasons recognized in law." That the Respondent upon being paid his final dues signed the Final Discharge Certificate (see page 34 of the Record) which he admitted to signing. Where there is no allegation and proof of undue influence, the Final Discharge Certificate is a complete bar to suit which is a position that has been settled by the Court of Appeal.

25. The Appellant asserted that the discharge document states as follows: " RE: Final Dicharge Certificate 7 Name: Benson Mwangi Kariuki Work No: HJ8412 ID NO: 22166208 I certify that I have received the amount of Kshs 58,736 In words Fifty eight thousand, seven hundred and thirty six being my final dues on discharge. I confirm that I have no further claim(s) against H Young & CO. (E.A) LTD or any of its employees. Name Benson Mwangi Witness Eunice Signature (signed) Signature (signed) Date 08/05/2018 (sic) " That in a recent 2018 decision of Coastal Bottlers Limited versus Kimathi Mithika (2018) ekLR, the Court of Appeal stressed the weight to be given to discharge vouchers. In that case, the voucher was worded in similar terms to the voucher signed by the Claimant herein as follows: "I Kimathi Mithika of ID No... certify having received the sum of Kenya Shillings one million five Hundred Sixteen Thousand, Two Hundred and Eighty One (Kshs. 1,516,281) being my full and final payment due to me from Coastal Bottlers Limited as follows: ..... I confirm that, I have no further claim against the Company whatsoever." The Court of Appeal then stated as follows: "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..... 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 there under would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties. In Trinity Prime Investment Limited vs. Lion of Kenya Insurance Company Limited [2015] eKLR this Court, while discussing the import of a discharge voucher which is more or less similar as the agreement in question observed: "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 appellant was thus fully discharged." All the ELRC was required to do was to give effect to the intention of the parties as discerned from the settlement agreement. 8 .....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." That from the Claimant's pleadings and testimony there was no claim made of any fraud undue influence, coercion or misrepresentation relating to the signing of the discharge. He did not deny that he signed the same. That in absence of such vitiating factors therefore, the Court ought to give effect to and to enforce the parties' intention expressed in the contractually binding discharge voucher and hold that the Respondent's suit was for dismissal even on this ground alone.

Respondents submissions

26. The Respondent submitted that: - On the issue of the discharge voucher, one cannot help but realise that the same is dated 8th March 2018 yet the Respondent was terminated on 24th November 2018 and a cheque paid to him dated 18th February 2019. The Appellant's witness testified that the date was a clerical error but in essence the date appearing on the discharge voucher was written by the Respondent himself and not the Appellant. In fact, the Appellant cross-examined the witness on the date of the alleged discharge voucher and the Respondent confirmed that he signed it on 8th March 2018. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and facts and come up with its own findings and conclusions. The first thing this Court should take note is that the Respondent testified in Kiswahili as he was not proficient in English. To this end, this Court re-looking at facts and evidence will come to a conclusion that the disposition of the Respondent, a bitumen sprayer driver who could not express himself in English has the benefit of doubt in his favor to conclude that he could not understand more than a man of his level would the implications (drafted in legalese) of the discharge voucher which we nonetheless contest its validity. That looking at the cross-examination of the Respondent, he referred to the discharge form as a "company receipt" and to him, it was a mere receipt to confirm that he had received money. (See page 145 of the Record of Appeal) .

27. Further, the Respondent submitted: - That while still observing the cases quoted by the Appellant to wit, this Court in Ronald Ongorei Gwako Vs. Styroplast Limited (2022) eKLR and Court of Appeal in Coastal Bottlers Limited Vs. Kimathi Mithika (2018) eKLR, there are qualifying factors that a party relying on a discharge voucher must demonstrate that such a contract is free from misrepresentation, fraud, coercion or other vitiating factors recognized by law. In essence, case law gives credence that it is standard contract law that a valid contract is where there must be what is called a "meeting of the minds" between the parties to the contract. This means both parties to the contract must understand what offer is being accepted. The acceptance must be absolute without any deviation, in other words, an acceptance in the "mirror image" of the offer. That in the recently decided case of Pauline Waigumo

v Diamond Trust Bank Ltd. (2021) eKLR, the ELRC, in declining to reopen the question of monetary compensation between parties who had signed a discharge agreement, laid out general guidelines in dealing with the effect of discharge agreements on further claims by concerned parties through future litigation, as follows: ''i) As a general principle, a pre-trial settlement operates as a contract between the parties ii) It is to be considered as generally binding on the parties unless it is assailed on the usual grounds that will vitiate a contract iii) Such settlements may, albeit not always, constitute a full settlement of the issues under consideration with the consequence that parties to them may not pursue further claims on the same subject either in Court or otherwise iv) There is no general principle that such settlements will inevitably discharge an employer from his/her statutory obligations under the contract of service v) In order to determine whether the settlement operates as a bar to further claims by the parties to it, a trial Court or other arbiter must consider: the import of the settlement; whether the parties executed the agreement freely; and whether they had relevant information and knowledge regarding the settlement vi) The mere existence of a pretrial settlement should not be construed as taking away the Court's jurisdiction to inquire into the lawfulness of a termination of a contract of service .'' Relying on the decision the Respondent pleaded with the Court to look into the facts of the case and re-evaluate the evidence before making a determination in this issue. The Respondent clearly called the discharge voucher a receipt and that is what he understood it to be even during cross- examination. Further, the Respondent confirmed that the date appearing on the voucher was 8th March 2018 which begs the question as to the validity of the voucher. The Appellant had not brought evidence to the contrary and as such the Court ought to find the voucher inoperative in the circumstances.

Decision

28. Having considered the submissions of the parties and the details of the discharge voucher and the cited case law I find that the variance between the dates of the discharge voucher and the show cause and the termination letter enough to vitiate the discharge voucher. The voucher was dated 8th March 2018 (page 34 of the record of appeal). The claimant was issued with notice to show cause dated 23rd November 2018(page 31 of the record of appeal) and was issued with dismissal letter dated 24th November 2018. As at 8th march 2018 the Respondent had not been dismissed hence had no reason to have unfair termination claims against the Appellant. The discharge voucher had no weight in determination of the case in the circumstances save for payable terminal dues.

Whether the court erred in remedies awarded(Grounds 5 f,g,i and j).

Appellant's submissions

29. These grounds relate to the remedies awarded and to the applicable rate of salary for the remedies. They also address the award of costs and interests. The Appellant submitted that it was an error to find for the Respondent and award him any compensation in this matter. Further, even if the Trial Court is said to have rightly found in favour for the Respondent, the trial Court erred when it arbitrarily used a monthly pay of Kshs 54,844 as simply pleaded by the Respondent instead of applying the rate applicable from the evidence. The payslip in the Appellant's documents (see page 26 of the Record) gives a basic pay of Kshs 41,955 and a house allowance of Kshs 8,391 to give a total salary pay of Kshs 50,346. It is therefore a patent error to have based the compensation on a sum of Kshs 54,844 which is simply arbitrary and plucked from thin air by the Respondent. The award of interests and costs should also be set aside as the suit itself is not merited.

Respondent's submissions

30. The Respondent submitted as follows:- On the issue of the amounts granted by the lower Court, the trial Court was right in its decision. The basic pay was indeed 41,955, a house allowance of Kshs. 8,391 and traveling allowances amounting to Kshs. 4,500 plus Kshs. 1 being coins B/Forward. Unfortunately, the Appellant filed an incomplete Record of Appeal by failing to include the Respondent's pay-slip as filed together with the Memorandum of Claim in the subordinate Court. Page 12 of the Record of Appeal shows the documents filed by the Respondent and surprisingly, his pay-slip has not been included. What the Appellant has failed to disclose is that the Respondent was at all times a beneficiary of travel allowance and based on the documents filed in the lower Court, the pay was correctly assessed to Kshs. 54,822.On the issue of costs and the Appellant's contention that the Respondent did not deserve costs, the trial Court was properly guided by the case of Machin*i v Safaricom Limited (Appeal E126 of 2021*) [2022] KEELRC 1463 (KLR) (15 June 2022) (Judgment) borrowed the sentiments of the Court in the case of Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others [2013] eKLR where the court stated as follows: - " It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial Judge is given discretion. .....But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so." Further, the Supreme Court in the case of Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 Others Sup. Ct. Petition No. 4 of 2012; [2014] eKLR opined that:- "[15] It is clear that there is no prescribed definition of any set of "good reasons" that will justify a Court's departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the Courts have proceeded on a case-by-case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question, shows that, as an example, matters in the domain of public-interest litigation tend to be exempted from award of costs."

Decision

31. The award of compensation is question of merit and applicable salary. Section 49 of the *Employment Act* guides on remedies for unfair termination to wit:- '(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—

    (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

    (b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

    (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal."

32. In the instant case the Trial Court found the reason for termination was valid and hence substantially fair. The only issue was procedural unfairness. The employee cannot be compensated for their own wrongs. The termination having been held to have been based on valid reasons the Respondent was only entitled to notice pay for unprocedural fairness.

33. On the salary, the payslip was produced at page 26 of the record of appeal. This was the final payslip. The Respondent asserted his salary was basic pay 41,955, a house allowance of Kshs. 8,391 and traveling allowances amounting to Kshs. 4,500 plus Kshs. 1 being coins B/Forward. The appellant stated it was the basic pay and house allowance only.

34. The court holds that the last payslip applies as held in H Young & Company (EA) Ltd v Wambui(supra). The payslip of November 2018 itemized the pay to be Basic 41,955, house allowance 8391, and travelling allowance Kshs. 2423 and B coins Fwd Kshs. 1. The other amounts were one-off. The court without a previous payslip was not able to find that the travel allowance was one -off payment and the Appellant did not submit on that. The court then finds that the applicable gross salary was Kshs. 52770 comprised of Basic 41,955, house allowance 8391, and travelling allowance Kshs. 2423 and B coins Fwd Kshs. 1.

35. In the upshot the Court sets aside the remedies awarded for being based on erroneous gross salary amount.

In conclusion

36. The appeal is held as partially successful. The Judgement and decree of the Magistrate's Court at Milimani (Hon C.K Cheptoo (PM)) dated 6th June 2022 in Milimani CMELR Cause No 1190 of 2019 is set aside and substituted as follows:-

Judgment is entered in favour of the Claimant as follows:-

a. The termination of the employment of the claimant is held to have been based on valid reasons but lacked procedural fairness.

b. The claimant is awarded Notice pay of Kshs 52770 subject to statutory deductions(Paye Only).

c. Certificate of service

d. Costs follow the event and are awarded to the claimant together with interest from judgment date until payment in full.

37. The appeal being partially successful the Court holds that each party to bear own costs in the appeal

38. It is so Ordered.

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

JEMIMAH KELI,

JUDGE.

In The Presence Of:

Court Assistant: Caleb

Appellant : - Achieng h/b Burugu

Respondent: Kinyanjui