



**Odhiambo v Chatur t/a Sooper Guest House (Appeal E022 of 2024)  
[2024] KEELRC 13327 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13327 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E022 OF 2024  
JK GAKERI, J  
DECEMBER 5, 2024**

**BETWEEN**

**MERCELINE ATIENO ODHIAMBO ..... CLAIMANT**

**AND**

**KAYAM CHATUR T/A SOOPER GUEST HOUSE ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal against the Judgment of Hon. E.A. Obina, Senior Principal Magistrate in MCELRC No. 102 of 2020 Merceline Atieno Odhiambo V Kayan Chatur uploaded on the CTS on 6<sup>th</sup> June, 2024 where the learned trial Magistrate dismissed the Claimant's case and the Respondent's Counter-claim with no order as to costs prompting the instant appeal.
2. Briefly, the Claimant was employed by the Respondent as a Launder/Housekeeper on 10<sup>th</sup> October, 2010 by word of mouth and served diligently until sometime in early May 2020 when the parties separated. There is no consensus as to how the separation took place.
3. What is however, discernible is that it was occasioned by the COVID-19 pandemic. The Claimant was paid Kshs.78,050.00 as terminal dues and acknowledged receipt.
4. In its response to the Memorandum of Claim, the Respondent filed a counter-claim for the sum of Kshs.123,540.00 claiming that it made an error in the computation of the Claimant's terminal dues as she was a member of NSSF.
5. While the appellant argued then and argues that the termination of employment by the Respondent was unfair, the Respondent maintained that it was a mutual separation and involved all employees in light of the prevailing circumstances.
6. After considering the evidence on record, and submissions by the parties, the learned trial Magistrate held that the COVID-19 pandemic was a *force majeure* event as it destabilized businesses by rendering



their continuity uncertain as held in *East Africa Institute of Certified Studies Ltd V Mayfair Holdings Ltd Civil Appeal No. E066 of 2023*.

7. The trial Court held that the Respondent could not be blamed for the separation as the outbreak of the COVID-19 pandemic was unforeseeable and thus beyond his control.
8. The Court dismissed the Claimants suit and the Respondents counter claim with no orders as to costs.
9. This is the decision the Appellant has appealed against.
10. The Appellant assails the judgment of the trial Court on the following grounds:
  1. The trial Court erred in fact and law by failing to appreciate that Section 40 of the *Employment Act* was the applicable procedure.
  2. The trial Court erred in law and fact by failing to appreciate that when an employee is declared redundant the provisions of Section 40 of the *Employment Act* must be complied with failing which the redundancy amounts to an unfair termination of employment.
  3. The trial Court erred by relying on a decision not related to employment and which made no reference to Section 40 of the *Employment Act*.
  4. The trial Court failed to appreciate the facts of the case and arrived at an unjust decision.
11. These grounds may be condensed as two; that the trial Court ignored the provisions of Section 40 of the *Employment Act* and misapprehended the evidence on record.

#### **Appellant's submissions**

12. Counsel cited the provisions of Section 40 of the *Employment Act* to urge that this was the applicable law which the Respondent did not comply with and learned trial Magistrate did not appreciate that fact.
13. Reliance was made on the sentiments of the Court in *Adera V Central Organization of Trade Unions [2024] eKLR* where an employees services had been terminated on account of COVID-19 pandemic as well as those of *Onyango J in Kenya Private Workers Union V East Africa [2021] eKLR* on the effect of non-compliance with the provisions of Section 40 of the *Employment Act*, to urge that the trial Magistrate erred in law by relying on a civil case on a claim for rent to determine an employment dispute which is governed by the *Employment Act*.
14. According to Counsel, the Appellant had proved a case of unfair termination of employment and is thus entitled to the prayers sought.

#### **Respondent's submissions**

15. Counsel submits that the Respondent paid the Claimant the sum of Kshs.78,100.00 as terminal dues and she was also a member of the NSSF and it was making contributions without deducting from the appellant's salary.
16. Counsel relied on the sentiments of Lord Denning in *British Leyland UK Ltd V Swift [1981] I. R. L.R. 91* on the band of reasonable responses test and further submitted that the Respondent held negotiations and consultations of with all its employees on 27<sup>th</sup> April, 2020 and 30<sup>th</sup> April, 2020 and an agreement was reached and terminal dues were computed and the same collected on 5<sup>th</sup> May, 2020 and the separation was mutually agreed and the Appellant is the only one who sued the Respondent.



17. Reliance was made the sentiments of the Court in *Mberia V Majlis Lamu Ltd* where the Court found that the COVID-19 pandemic was a valid and fair reason for declaration of redundancy as was the decision in *Mwajomba V Mambogani Ltd* [2024] KEELRC 722 (KLR) to fortify the submission that the Appellant was paid all her terminal dues and acknowledged receipt.
18. This being a first appeal, the Court is required to re-evaluate and re-consider the evidence before it and make its own conclusions and findings warning itself that it neither saw nor heard the witness.
19. See *Selle & Another V Associated Motor Boat Co. Ltd & Others* [1968] EA 123 among other decisions.
20. It is common ground that the Appellant was an employee of the Respondent from 10<sup>th</sup> October, 2010 to 30<sup>th</sup> April, 2020 when his employment was terminated on account of the COVID-19 pandemic, having been sent on compulsory leave on 16<sup>th</sup> March, 2020 due to lack of business.
21. The appellant admitted that as at the date of retirement or termination her salary was Kshs.15,620.00 but claimed a different sum in the same witness statement.
22. Similarly, the contract dated 1<sup>st</sup> November, 2018 which the appellant signed has a figure of Kshs.14,650.00, as consolidated salary. A copy of the appellants payslip on record has a figure of Kshs.15,620.00 as admitted in evidence.
23. The appellant tendered no evidence of having signed for or promised a salary of Kshs.23,813.00 per month. In any case the memorandum of claim has a figure of Kshs.15,620.00.
24. The appellant denied having signed the voucher sheet on record yet it has her signature but admitted having received the sum of Kshs.78,050.00.
25. Mr. Chatur Kayam confirmed that he had only 5 members of staff and had no Human Resource Policy and the amount paid to the appellant was her termination dues.
26. Notably, although the appellant denied that there were discussions before the separation, it is discernible that the separation was not acrimonious and payment was accepted voluntarily without contestation.
27. The unprecedented circumstances occasioned by the COVID-19 pandemic placed businesses and individuals in uncharted circumstances which they had to navigate through.
28. In the cases of employers, the pandemic was a valid ground for declaring redundancy as held in *Mberia V Mjilis Lamu Ltd* (Supra) and *Mwajomba Mambogani Ltd* (Supra) cited by the Respondents.
29. These are some of the circumstances envisioned by the definition of redundancy under Section 2 of the [\*Employment Act\*](#).

**Redundancy means;**

30. The loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation or loss of employment.
31. Needless to belabour, the COVID-19 pandemic and the attendant restrictions on movement, congregating and travelling rendered employees in different sectors superfluous and employers could not retain them as they had nothing to do and expect payment.



32. However, as correctly submitted by the Appellant’s Counsel an employer faced with such circumstances must invoke the provisions of Section 40 of the Employment Act for purposes of ensuring a lawful and fair separation.
33. In *Freight in Time Ltd V Rosebell Wambui Munene* [2018] eKLR, the Court of Appeal stated as follows:
- “In addition Section 40(1) of the Employment Act prohibits in mandatory tone, the termination of a contract of service on account of redundancy unless the employer complies with the following seven conditions namely...”
- See also *Barclays Bank of Kenya Ltd & Another V Gladys Muthoni & 20 Others* [2018] eKLR.
34. The mandatory conditions are notice to the Labour Officer and the union if the employee(s) is a member of the union or written notice to the employee and the Labour Officer, if not a member of a union at least one (1) month before the effective date of the redundancy, selection criteria, equity where redundancy dues are provided for by a CBA, payment of untaken leave days in cash, one month’s salary or pay in lieu of notice and severance pay at 15 days for every completed year of service.
35. In addition, courts have held that consultations are an integral part of the redundancy process see *Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR and *Cargill Kenya Ltd V Mwaka and 3 Others* [2021] eKLR.
36. Significantly, the positions of Section 45 of the Employment Act apply and the redundancy must be substantially justifiable as there must be a valid and fair reason for the redundancy.
37. It is evident in this case that although the Respondent testified that it consulted the employees and they had discussions on the way forward and even notified the Labour Officer, RWI admitted that he had no supportive evidence to buttress the allegations.
38. Clearly, the relevant provisions of Section 40(1) of the Employment Act were not complied with and the termination of the Appellant’s employment was unfair for want of compliance with the provisions of the Employment Act.
39. Although Counsel for the appellant assails the trial Court for having relied on force majeure in a commercial dispute, it is equally applicable in employment matters as it merely exempts the party from liability if it does not perform owing to an act of God or vis major or inevitable accident or disaster.
40. If for instance, a factory in which employees are employed to work is destroyed by a hurricane, the employer would be justified in declaring such employees redundant and no liability attaches for not retaining them as the event is disaster or act of God for which neither of the parties is to blame.
41. In the court’s view, while reliance on the decision in *East Africa Institute of Certified Studies Ltd V Mayfair Holdings Ltd* (Supra) per se by the learned trial Magistrate is not an error of law or fact, failing to appreciate that the provisions of Section 40(1) of the Employment Act was the applicable legal framework was, as the Respondent did not comply with mandatory provisions of law.
42. As to whether the trial Court failed to appreciate the facts of the case, the Court is not persuaded that it did not as the Judgment uploaded on 6<sup>th</sup> June, 2024 captures the evidence as adduced by the parties save for some of the documentary evidence and in particular the Acknowledgment sheet dated 30<sup>th</sup> April 2020 which the appellant signed on even date in the presence of witness named ‘Seth’. The document identifies the amount received as severance pay for 10 years and ex gratia.



43. The uncontested document is explicit that the appellant had received all her dues, leave annual, annual gratuity, overtime etc.
44. Significantly, the appellant states that she had “no further claim whatsoever against management”.

**Did the appellant waive her right to pursue other claims against the Respondent?**

45. The principles that govern settlement agreements or discharge vouchers or clauses have been articulated by the Court of Appeal in several decisions, such as Thoma De La Rue (K) Ltd V David Opondo Omutelema [2013] eKLR where the Court stated;

“...the Court has in each 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 relevant information and knowledge”.

46. In Trinity Prime Investment Ltd V Lion of Kenya Insurance Co. Ltd [2015] eKLR the Court stated that

“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. Ananda took that money...”

47. Similarly, in Coastal Bottlers Ltd V Kimani Mithika [2018] eKLR the Court laid it bare that each case depends on its circumstances and it is the courts duty to make a determination.
48. In the instant case, since the appellant did not contest the contents of the document or her signature, which in any case resembles the one appended on the Employment Contract dated 1<sup>st</sup> November, 2018, and no evidence of misrepresentation of its import or duress, undue influence or mistake was availed at the trial.
49. The parties appear to have agreed that payment of the sum of Kshs.78,100 would absolve the Respondent from other claims.
50. The document states as follows:

“I Merceline Atieno Odhiambo of my own accord wish to retire from Sooper Guest House ID No.29XXXX87.

51. I have received my severance pay 78,100 for 10 years and ex gratia payment for a month from SOOPER GUEST HOUSE and agreed to retire effective 30/4/2020.
52. I have received all my dues, leave, annual gratuity, overtime etc.
53. I have no further claim whatsoever against the Management.

SIGNATURE/DATE.....(Signed)

Witness 1. .... (Signed)

2. ....



54. Having not contested the document it is the finding of the Court that the Appellant appreciated its import and the parties intended to be bound by it.
55. In a similar vein, the Appellant's case against the Respondent is unsustainable on account of the doctrine of promissory or equitable estoppel, aptly capture by Lord Denning LJ in *Combe V Combe* [1951] 2K.B 215 as follows.
- Where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave a promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him. He must accept their legal relations subject to the qualification which he himself has so introduced, even though, it is not supported in point of law by any consideration but only by his word".
56. The doctrine of equitable or promissory estoppel may be relied upon by the Respondent or defendant as a shield as it is defensive not offensive.
57. See *Central London property Trust Co. Ltd V High Trees House Ltd* [1947] 1KB 130 and *Century Automobiles Ltd V Hutchings Biemer Ltd* [1965] EA 304.
58. Having indicated that she had no further claim whatsoever against the Respondent, the Appellant was estopped from filing the suit before the Magistrates Court as well as this appeal as she made a promise or representation, which the Respondent relied upon and paid the sum of Kshs.78,100.00 believing that no other claims would be made and it would be inequitable to subject the Respondent to the matters he ought to have been subjected to but for the settlement agreement on record.
59. In sum, the Court is persuaded that the Appellant's suit was not sustainable as she waived her right to make further claims against the Respondent and it is dismissed with no Orders as to costs.
60. In the upshot the trial Court's decision dismissing both the claim and the counter-claim with no orders as to costs is affirmed though for different reasons in the case of the claim.
61. Parties shall bear own costs of this appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 5<sup>TH</sup> DAY OF DECEMBER, 2024.**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.



**DR. JACOB GAKERI**  
**JUDGE**

