



**Ongera v Transebel Ltd (Branan Flowers) (Cause 2175 of 2017)  
[2023] KEELRC 240 (KLR) (7 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 240 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2175 OF 2017  
JK GAKERI, J  
FEBRUARY 7, 2023**

**BETWEEN**

**HOSEA GESURA ONGERA ..... CLAIMANT**

**AND**

**TRANSEBEL LTD (BRANAN FLOWERS) ..... RESPONDENT**

**JUDGMENT**

1. The Claimant initiated this Claim vide a Memorandum of Claim dated 1<sup>st</sup> November, 2017 alleging unfair or unlawful dismissal from employment and non-payment of terminal dues.
2. It is the Claimant's case that he was employed by the Respondent on 18<sup>th</sup> July, 2001 as a general worker at a salary of Kshs.13,648/= per month and served the Respondent diligently, 6 days a week from 6.00 am to 6.00 pm with no overtime pay and was not provided with housing.
3. The Claimant avers that on 28<sup>th</sup> August, 2015, he received a show cause letter which accused him of theft of company property, an accusation he denied and demanded evidence and an opportunity to present his case.
4. That he was placed on a 3 days suspension by the Farm Manager and subsequently a hearing took place after which no dismissal letter was issued and he was requested to proceed on leave, an action he alleges amounted to summary dismissal contrary to the law as he was innocent, no cogent evidence was adduced against him, there was no investigation report or complaint and was not accorded a chance to defend himself.
5. The Claimant avers that the decision to dismiss him from employment was harsh having served the Respondent for 14 years.



6. The Claimant prays for;
  - i. A declaration that the Respondent's dismissal of the Claimant from employment was unlawful/unfair and unjustified.
  - ii. A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
  - iii. An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totalling Kshs.2,241,001/= with interest from the date of judgement till payment in full.
  - iv. Costs of this suit plus interest thereon.
7. In its Memorandum of Defence filed on 7<sup>th</sup> May, 2018, the Respondent avers that it employed the Claimant on 17<sup>th</sup> July, 2001 as a general worker and on 1<sup>st</sup> February, 2003, he became a security guard (shift leader), a position he held until 3<sup>rd</sup> September, 2015 when his employment was terminated.
8. The Respondent further avers that in August 2015, it was noted that the company was loosing diesel and manhole covers among others and the Respondent commenced investigations through its security supervisor and during a community policing meeting on 3<sup>rd</sup> August, 2015, it was noted that the Respondent's pipes, electric cables, spare wheels, buckets and other items were being smuggled out and sold in the town centres near the Respondent's premises and the Claimant's name featured as he was the Assistant Security Officer and in particular, during the meeting held on 28<sup>th</sup> August, 2015. A notice to show cause was issued for the Claimant to explain his involvement in the alleged theft.
9. That the Claimant's employment was terminated after a hearing on 4<sup>th</sup> September, 2015 and was paid his dues amounting to Kshs.114,108/= and issued with a certificate of service.
10. On cross-examination, the Claimant confirmed that he lived outside the Respondent's compound. That the documents provided by the Respondent showed that overtime had been paid. He however contested his payslip and stated that he did not notice pay in lieu of notice as part of terminal dues and signed the document dated 8<sup>th</sup> September, 2015.
11. The Claimant further confirmed that he was paid terminal dues as evidenced by the document on record.
12. Finally, the witness stated that as a supervisor, he sometimes allocated duties to staff and informed his supervisor.
13. On re-examination, the witness contradicted himself by stating that he did not receive the amount indicated in the document he had signed willingly and had not received a termination letter.
14. On 2<sup>nd</sup> June, 2022, the Respondent's witness did not attend the hearing and hearing was adjourned to 22<sup>nd</sup> September, 2022 when the witness failed to show up for a second time. Counsel for the Respondent proposed that the parties proceed by way of the documents on record and submissions and the Claimant's Counsel was in agreement. Filing of submissions was confirmed on 26<sup>th</sup> October, 2022 and a judgement date given.
15. The Claimant's counsel identified three issues for determination, namely; whether termination was justified, procedure of termination by the Respondent and entitlement to reliefs.



16. As regards termination of employment, reliance was made on the provisions of Section 43 and 45 of the *Employment Act* to urge that the termination was unfair as the Respondent had not discharged its burden under Section 43 of the *Employment Act* as the allegations made against the Claimant were never substantiated. The decision in *Gibson D. Mwanjala V Kenya Revenue Authority* was relied upon to buttress the submission.
17. On the procedure of termination of employment, it was submitted that the Respondent did not comply with the procedure prescribed by Section 41 of the *Employment Act*, as the Claimant was not taken through a fair disciplinary process before dismissal from employment.
18. It was further submitted that the Claimant was not afforded the opportunity to cross-examine his accusers nor were they invited to the hearing notwithstanding his request.
19. Reliance was made on the decisions in *Joshua Rodney Marimba V Kenya Revenue Authority* (2019) eKLR and *Menginya Salima Murgani V Kenya Revenue Authority*. The latter decision was set aside by the Court of Appeal.
20. It was urged that the procedure employed by the Respondent was a sham and biased against the Claimant.
21. The Claimant, finally submitted that there was neither substantive justification nor fair procedure in the termination of the Claimant's employment and it was therefore unfair.
22. The Respondent's counsel addressed three issues including costs. The other issues related to the termination of employment and the reliefs sought.
23. As to whether termination of the Claimant's employment was fair and lawful, the Respondent's counsel submitted that the Claimant was dismissed from employment on account of suspected stealing and was given a chance to be heard pursuant to the provisions of Section 41 of the *Employment Act* as he was given a notice to show cause, responded and participated in a hearing and specific instances were cited to him.
24. Reliance was made on the decision in *Anthony Mkala Chitavi V Malindi Water & Sewerage Co. Ltd* (2013) eKLR to urge that the provisions of Section 41 of the *Employment Act* were complied with.
25. Further, the provisions of Section 41(4)(c) of the Act was also relied upon to reinforce the submission that the provisions of the Act were complied with.
26. The decisions in *CMC Aviation Ltd V Mohammed Noor* (2015) eKLR as well as *Naqvi Syed Qmar V Paramount Bank & another* (2015) eKLR were also relied upon to urge that the Claimant had either neglected his duties or performed the same carelessly and improperly.
27. It was the Respondent's case that termination of the Claimant's services was fair.
28. On reliefs, it was submitted that the Claimant was not entitled to any as the employer had a valid reason and adopted a fair procedure. Moreover, he was paid in lieu of notice, had a consolidated salary, the claim for overtime was statute barred under Section 90 of the *Employment Act* as a continuing injury and the termination of employment was fair.
29. The court was urged to find that termination of the Claimant's employment was fair.

### **Determination**



30. The issues that commend themselves for determination are;
- i. Whether termination of the Claimant's employment was fair and lawful.
  - ii. Whether the Claimant waived his right to pursue further claims against the Respondent.
  - iii. Whether the Claimant is entitled to the reliefs sought.
31. As to whether termination of the Claimant's employment was fair and lawful, the home part are the relevant provisions of the *Employment Act*, 2007 as summarised by the Court of Appeal in Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR.
32. In sum, these provisions address, notice of termination of employment, procedure of termination, prove of reason(s) for termination, prove that the reason was valid and fair and that the termination was justifiable.
33. Compliance with these provisions is mandatory for a termination of employment to pass muster.
34. In summary, for a termination of employment to pass the fairness test, it must be substantively justifiable and procedurally fair, as aptly captured by Ndolo J. in Walter Ogal Anuro V Teacher Service Commission (2013) eKLR and elaborated by the Court of Appeal in Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR. In the latter the court stated as follows;
- “On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of Section 43(1) of the *Employment Act* which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also Section 45(2)(c) requires a termination be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required.”
35. I will now proceed to apply the foregoing provisions and propositions of law to the facts of the instant case as follows;

### **Reason(s) for termination**

36. The termination letter dated 4<sup>th</sup> September, 2015 makes reference to the notice to show cause dated 28<sup>th</sup> August, 2015 and the disciplinary hearing held on 3<sup>rd</sup> and 4<sup>th</sup> respectively and stated as follows;
- “Our investigation have revealed existence of a network of employees who have been engaging in acts of taking company properties converting them into personal properties and selling them within the community . . .”
- However, you failed to sufficiently exonerate yourself from accusations levelled against you. Hence the management has reasonable and sufficient grounds to believe you were part of this network.”



37. The letter informed the Claimant that a hearing would be convened on 31<sup>st</sup> August, 2015 at 8.00 am and he was entitled to representation by an employee of his choice. The hearing was subsequently postponed to 3<sup>rd</sup> September, 2015.
38. The Notice to Show Cause dated 28<sup>th</sup> August, 2015 made reference to an investigation by management about the incidences of loss of company property and the Claimant's name had featured and a hearing took place on the same day to discuss loss of diesel, manholes covers and a phone under the Claimant's care. The letter was categorical that the Claimant was a suspect in the alleged theft.
39. The Claimant was accorded a day to respond and did so on 29<sup>th</sup> August, 2015. The Claimant stated that he was working closely with management and was honest and had managed to recover chemicals stolen by a worker.
40. On the theft of items, the Claimant requested the management to allow him invite those who had the information on the theft of manhole covers and diesel, to the hearing on 31<sup>st</sup> August, 2015 and Mr. Moses Muiruri and Kuria and Sabina Wangui the owner of the lost phone. According to the Claimant, the witnesses would provide details on the loss of diesel, manhole covers and the phone.
41. The Claimant denied having been involved in the alleged theft.
42. In another letter from the Claimant dated 31<sup>st</sup> August, 2019, the Claimant requested the Respondent to allow the community policing members who had mentioned his name to be present at the hearing scheduled for the same day. "Those are Diesel Community Policing, Scrap Metal Dealers phone owner and Moses Muiruri."
43. Strangely, the Claimant stated that he had been threatened by members of the community and fellow workers since 2003 due to his performance, and was ready to explain the threats.
44. Lastly, the Claimant states that there were eye witnesses in all the three cases of theft.
45. Evidence on record shows that the Claimant attended and participated at the hearing on 4<sup>th</sup> September, 2015 where he denied the accusations levelled against him.
46. From the foregoing, it is clear that the Claimant was engaged in security and had power to re-assign security guards and did so severally. The evidence on record shows that the Claimant did not respond to the accusations but requested the Respondent to allow other persons who had information to come and explain the alleged thefts.
47. The Claimant was aware of the thefts and persons who had information to unravel the puzzle. As a Security Supervisor, he ought to have had a detailed report on each of the thefts with names of possible suspects but had nothing to offer.
48. In the court view, the Claimant had more information about the alleged thefts but opted not to reveal it. During the hearing, he did not deny that after re-assigning guards, thefts took place.
49. In the court's view, it is discernible that the alleged threats from employees and the community since 2003 was a diversionary tactic by the Claimant and of no consequence.
50. Accepting the Claimant's allegations that he was threatened by fellow employees and the community he was part of since 2001 and having not informed the Respondent's management or any other person would be overstretching imagination.



51. From the foregoing, it is clear to the court that the Claimant did not sufficiently rebut the allegations set out in the notice to show cause to eradicate the suspicion the employer had on the alleged thefts and loss of property.
52. Section 44(4)(c) of the [Employment Act](#), 2007 empowers the employer to dismiss an employee summarily if “an employee wilfully neglects to perform any work which it was his duty to perform or if he carelessly and improperly performs any work which from its nature it was his duty under his contract to have performed carefully and properly.
53. From the evidence on record, it is clear that at no time did the Claimant engage his supervisor on the issue of the alleged thefts yet he was the one on the ground and even lived in the community. Such engagements would have assuaged the Respondent’s suspicion of his involvement in the network.
54. In light of the foregoing, the court is satisfied that the Respondent has on a balance of probability demonstrated that it had a reasonable and sufficient grounds to suspect that the Claimant was part of the network that was stealing its property and selling it to third parties.
55. This finding finds support in Section 43(2) of the [Employment Act](#) which provides that;  
The reason or reasons for termination of a contract are the matters that the employer at the time of termination of contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

### **Procedure**

56. As emphasized in countless decisions of this court and the Court of Appeal, for a termination to pass the fairness test, it must be conducted in accordance with a fair procedure.
57. Section 41 of the [Employment Act](#) prescribes the procedural precepts to be complied with.
58. In *Pius Machafu Isindu V Lavington Security Guards Ltd* (Supra), the Court of Appeal held that the requirement of Section 41 of the Act were mandatory.
59. The detailed procedural elements have been articulated in various decisions of this court and the Court of Appeal as well, such as *Loice Atieno V Kenya Commercial Bank Ltd* (2015).
60. In *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR, the Court of Appeal stated as follows;  

“Four elements must thus be discernible for the procedure to pass muster:-

  - i. an explanation of the grounds of termination in a language understood by the employee;
  - ii. the reason for which the employer is considering termination;
  - iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
  - iv. hearing and considering any representations made by the employee and the person chosen by the employee.”
61. In the instant suit, the notice to show cause explained the reasons why the Respondent was considering termination of employment and informed the Claimant that he was entitled to appear with another employee of his choice and as adverted to elsewhere in this judgement, the Claimant responded to the



- allegations and requested certain persons to be present at the meeting for cross-examination and made a similar request by letter dated 31<sup>st</sup> August, 2015.
62. Regrettably, the Respondent neither acknowledged nor responded to the Claimant's request or explain to him why the witnesses he wanted summoned could not be summoned.
63. The Claimant considered the witnesses crucial to his case but the Respondent failed to facilitate him which in the court's view vitiated the process. Although the Claimant appeared for the disciplinary hearing alone although he had been informed of his entitlement to attend with a representative of his choice.
64. For the foregoing reasons, it is the finding of the court that the Respondent has on a balance of probability failed to demonstrate that it conducted termination of the Claimant's employment fairly within the meaning of Section 45 of the *Employment Act*, 2007.
65. As to whether the Claimant waived his right to pursue further claims against the Respondent, the starting point are the guiding principles on discharge vouchers or settlement agreements.
66. It is trite that the law relating to discharge voucher or settlement agreements is now well settled.
67. In *Coastal Bottlers Ltd V Kimathi Mithika* (2018) eKLR, the Court of Appeal stated as follows;
- “Whether or not, a settlement agreement or a discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with an issue, in our view, should address its mind firstly on the import of such a discharge agreement and secondly, whether the same was voluntarily executed by the concerned parties.”
68. These sentiments were founded on the inter alia the findings of the Court in *Krystalline Salt Ltd V Kwekwe Mwakele & 67 others* (2017) eKLR as follows;
- “. . . It is important to bear in mind that in Kenya, employment is governed by the general law of contract as much as the principles of common law now enacted and regulated by the *Employment Act* and other related statutes. In that sense, employment is seen as an individual relationship negotiated between the employee and the employer according to their needs.”
69. Relatedly, in *Trinity Investment Ltd V Lion of Kenya Insurance Co. Ltd* (2015) eKLR, the Court of Appeal stated 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 appellant was fully discharged.”
70. Since a settlement agreement or discharge voucher is a complete agreement, the obligation of the court is to give effect to the intention of the parties as decipherable from the settlement agreement. (See *Damodar Jhabhai & Co. Ltd and another V Eustace Sisal Estates Ltd* (1967) E.A. 153).
71. In the instant case, the Claimant confirmed on cross-examination that he signed the settlement agreement and did not allege that he did not understand its contents or they were misrepresented or any other vitiating element. He signed the document voluntarily.
72. The settlement agreement dated 8<sup>th</sup> September stated as follows;



Dear Mr. Hosea Gesura Ongera

RE: TERMINATION OF SERVICES

NAME: Hosea Gesura Ongera

We Transebel Ltd hereby terminate your services with Transebel Ltd for following reasons:-

1. Our letter to you refers
2. ....
3. ....

Terminal benefits due to me are as follows;

Overtime Shs. 657.00

1. Days worked Shs. 1020.00
  2. Leave pay Shs. 298.00
  3. Service Shs. 96,123.00
  4. Notice Shs. 17,911.00
- 166,009.00

SIGNED .....

BRIAN WAHOME Less: NSSF 200

GENERAL MANAGER NHIF 1700.00

FOR AND ON BEHALF PAYE 32,155

OF TRANSEBELL 81,953

DATE 08/09/2015 Addback paye 32,155

144,108.00

I HOSEA GESURA Hereby confirm that I have received Kshs.114,108.00 from Transebel Ltd. being in full and final settlement of my dues as stated above.

I further hereby confirm that I have no further claims against Transebel Ltd whatsoever.

Signed: Signed:

Name: HOSEA GETURA Brian Wahome

Signed (General Manager)

Date: 08/09/2015 Signed . . . . .

Date: 8<sup>th</sup> Sep. 2015

73. Analogous to the holding in Coastal Bottlers Ltd V Kimathi Mithika (Supra), the court is persuaded that when the parties signed the foregoing settlement agreement they intended to discharge the contract of employment between themselves and it absolved the Respondent from further claims under the contract or in relation to the termination.



74. The settlement agreement was a binding agreement.
75. For the foregoing reasons, it is the finding of the court that the Claimant waived his right to pursue further claims against the Respondent.

### **Reliefs**

76. Having found that the settlement agreement executed by the parties discharged the Respondent from further claims by the Claimant, the issue of entitlement to reliefs is not sustainable.
77. In conclusion, the Claimant's suit is dismissed.
78. Parties to bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF FEBRUARY 2023**

**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.

