



**H. Young & Co (E. Afica) Ltd & another v Mwangi & another (Appeal E049 & E050 of 2021 (Consolidated)) [2023] KEELRC 1001 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1001 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E049 & E050 OF 2021 (CONSOLIDATED)**

**AN MWAURE, J  
APRIL 20, 2023**

**BETWEEN**

**H. YOUNG & CO (E. AFICA) LTD ..... CLAIMANT**

**AND**

**JOHN MWANIKI MWANGI ..... RESPONDENT**

**AS CONSOLIDATED WITH**

**APPEAL E050 OF 2021**

**BETWEEN**

**H. YOUNG & CO (E. AFICA) LTD ..... APPLICANT**

**AND**

**JOHN KIMANI ..... RESPONDENT**

**JUDGMENT**

1. The judgment relate to appeals relating arising from suits filed respectively as CMELRC No 4 of 2019 being appeal No 049/2021 and Gatundu CMELRC No 5 of 2019 being Appeal No 050/2019.
2. From the pleadings and the submissions the two matters raise similar issues of law and fact and so were consolidated hence this honourable court will deliver one judgment pertaining to the two respondents.
3. The Appellants filed a memorandum of appeal dated May 6, 2021 respectively. The appellants averred that the learned trial magistrate erred in failing to consider that the respondents signed discharge vouchers respectively at diverse dates being November 5, 2018 by John Mwaniki and November 17, 2018 by John Kimani.



4. The respondent says the magistrate erred in holding that procedure for redundancy had to be followed and in awarding six months gross salary as compensation. They say the magistrate erred in awarding service pay and yet it was not provided in the contract and awarding costs. Respondent was a member of NSSF as well.
5. The respondent prays for the appeals to be allowed and judgement of lower court be set aside and suit against the lower court be dismissed in its entirety. They also pray that costs of the appeals in the lower courts be borne by the respondents.

### **Appellants' Submissions.**

6. The appellants in their submissions averred the respondents respectively signed discharge voucher which was a significant point in appellant's case and yet the court did not consider it in her judgment.
7. Appellant relied on the case of Court of Appeal in *Thomas de La Rue (k) Limited vs David Opondo Omutulema* (2013) eKLR where court held that a discharge voucher is a complete bar to a suit.
8. The court held that a discharge voucher cannot bar an employer from statutory obligations but nevertheless each case must be dealt as per circumstances of each case.
9. Also in the case of *Coastal Bottlers limited vs Kimathi Mithica* (2018) eKLR the court stated

" it is clear in our minds that the parties had agreed that payment of the amount stated in the settlement of agreement could absolve the appellant from further claims under the respondent's termination."

The appellant submits the trial court should have given effect to the discharge voucher as a binding contract.

10. The appellant further states that respondents' contracts are contingent contracts and were dependent on Gatundu Project. He says the respondents were not unlawfully terminated but were terminated due to the expiry of the Gatundu project and their contracts were contingent of Gatundu project. They say that the trial court erred in holding that the termination was via redundancy and yet it was not.
11. The appellant as well avers the trial court awarded excessive compensation of 6 months equivalent salary without due consideration of length of time worked by the respondent. He avers that even if compensation was to be awarded it should not have been more than three months as compensation.
12. The appellant also submits that the trial court misconstrued the service pay and confused it with gratuity. He says the respondent was in the NSSF scheme and so according to section 35(6) of the *Employment Act* he was not entitled to service pay.
13. He concludes therefore that the judgment and decrees of the trial court should be dismissed with no orders as to costs.

### **Respondent's Submissions**

14. The respondent raised two issues for determination which were whether the due process was followed in terminating the claimants/respondents and secondly whether the claimants/respondents were barred from following their rights because of signing the discharge voucher. The final one issues was whether the remedies awarded were excessive.



15. The respondents claim they had worked continually for the appellant until on July 18, 2018 when they were handed the termination letters. They claim they signed the discharge voucher as acknowledgment of their payment and that was after they had sought legal redress.
16. The respondents further say that as at the time of termination the Gatundu project was still going on and so their termination was not due to closure of Gatundu Project.
17. The appellant says there was no evidence presented to court to show the Gatundu project was not going on.
18. So they claims the termination of the respondents was due to redundancy and yet the appellants did not follow the right procedure.
19. As to the issue whether respondents were both barred from pursuing their rights because of signing a discharge voucher they submit that they were not barred from following their legal rights. They say they discussed their issue extensively in their lower court's Submissions.
20. The respondents states the discharge voucher is not part of the contract and an employer should not misuse discharge voucher to preclude him from meeting their obligations. Appellants say a discharge voucher is not a binding document as is not an agreement between the appellant and the respondent and furthermore it is only signed by the respondent. The appellant did not sign it.
21. The respondent further also say the discharge voucher does not prevent an employee from pursue unpaid dues as a result of signing a discharge voucher. They say that attempt to use a discharge voucher to protect an employer from meeting its obligations is an unfair labour practice under article 41 of the constitution of Kenya 2010.
22. They rely on the case of Jane Njeri Wanyoike & 23 Others v Pan Africa Insurance Company Ltd [2017] eKLR where court held:

“ Even where an employee has accepted terminal dues and acknowledged the same as a final and full settlement, such does not negate the payment of any lawful and justified payment that ought to go with such employment. As a right in employment all owing dues in fact and in law cannot be compromised by an employee signing off a payment less what is an entitlement. The rationale is that such dues owing to an employee as of right should be paid as a matter of course when due and owing. To accept less what is due does not affect a claim for the whole.

In the claimants' acceptance of terminal dues offered upon their termination of employment by the respondent, such was an acceptance of what was owed to them in redundancy. Such did not stop the claimants from filing suit before the court seeking what is legally due to them.”

23. The respondentS Submits that the award for damages as guided by section 49 of the Employment Act was fair and there is no justification to interfere with the Discretion of the trial court.
24. They also submits that they are entitled to the costs at the lower court and Court of Appeal.

### **Determination and Analysis**

25. The main issue for determination in this case is whether the respondents were both precluded from following their dues as a result of having executed a discharge voucher. Secondly were they unfairly and wrongfully terminated?



26. The evidence from the lower court is that the two respondents worked for the appellant for about one year. On different days in July 2018 both were issued with termination letters. There was no reasons given for the termination. Actually the termination letters availed to court simply indicated their services were no longer needed. There is no indication that both were given reasons for the said termination.
27. The appellant alluded that the respondents' contract were tied up to a specific project known as Gatundu project work. But even if it was tied to the project there is nowhere the parties signed a contract which indicated that the same was tied to any specific project. There is no fixed contract entered between the parties so as to justify the appellant to claim termination was therefore by affluxion of time.
28. The appellant also shows no evidence from the lower court proceedings that they had any discussions with the respondents before termination. They flouted the provisions of section 41 of the [Employment Act](#) 2007 which provide that the employer must follow the mandated procedure before terminating an employee. This section 41 of [Employment Act](#) is mandatory and is not left to the choice of the employer.
29. Indeed the appellant may have terminated the respondent due to low business or due to expiration of the referred Gatundu Project works. Then this would have required the appellant to declare the respondents' positions redundant. If that was the reason for termination it was crucial that the statutory provisions provided in section 40 of the [Employment Act](#) 2007 be followed. The court agrees with the trial court that the appellant should have followed the provisos of section 40 of the [Employment Act](#) if they considered the position of claimant no longer tenable. The same was not followed and yet there are numerous authorities that build on section 41 of the [Employment Act](#) as far as declaring a position redundant is concerned.
30. In the case of [Jane Khalei vs Oxford University Press EA Limited](#) (2013) eKLR the court held:  
" that section 40 of the [Employment Act](#) gives conditions precedent before one is declared redundant. These conditions outlined in the law are mandatory and not left to the choice of the employer. Redundancies affect workers livelihoods and where this must be done by an employer the same must be put into consideration."
31. In other words if an employer is to declare a position redundant it is clear what procedure should be followed and it is mandatory.
32. Flowing from the above the court is in agreement with the trial court that the appellant terminated the respondents' employment without a valid reason and furthermore without following the procedure provided precedent to terminating an employee's employment.
33. The other issue which the appellant has raised and indeed emphasised a lot is the fact that the respondents signed a discharge vouchers at termination. He claims the discharge voucher estopped the respondents from filing a suit against the appellant. One of the discharge certificate of John Mwaniki is dated 5/11/2018 which reads in part:  
"I confirm that I have no further claims against H. Young & Co (EA) Ltd or any of the employees."
34. There are conflicting interpretationS by the various judges as pertains to the import of discharge voucher. Some authorities have held that a discharge voucher is a binding agreement and once an employee appends his signature he is bound by the same. There are other equally number of authorities



that provide that a discharge voucher will be considered according to the circumstances of each case. Indeed a discharge voucher is usually a document generated by an employer without the input of an employee. In that case the court would hesitate to regard the same as an agreement binding on both parties. If for the sake of argument the employer discovered he had a counterclaim against the employee who has executed a discharge voucher would he be prevented from pursuing the counterclaim? This therefore makes the discharge voucher a one sided document usually forced on an employee to sign in order to receive his terminal dues.

35. The employee will usually not have much choice but to sign the discharge voucher in order to receive his dues.
36. The court is particularly inclined to disregard a discharge voucher as a document that would prevent an employee from following his rights where the employer has flouted the provisions of employment laws in terminating the employee. This is one case where the appellant clearly did not comply with the provisions of employment laws referred herein before and especially sections 40 and 41 and 45 of *Employment Act*.
37. In support of the above is the case of *Jane Njeri Wanyoike & 23 Others v Pan Africa Insurance Company Ltd* [2017] eKLR cited by the respondents where the court held:

“ Even where an employee has accepted terminal dues and acknowledged the same as a final and full settlement, such does not negate the payment of any lawful and justified payment that ought to go with such employment. As a right in employment all owing dues in fact and in law cannot be compromised by an employee signing off a payment less what is an entitlement. The rationale is that such dues owing to an employee as of right should be paid as a matter of course when due and owing. To accept less what is due does not affect a claim for the whole.

In the claimants’ acceptance of terminal dues offered upon their termination of employment by the respondent, such was an acceptance of what was owed to them in redundancy. Such did not stop the claimants from filing suit before the court seeking what is legally due to them.”

38. The court has considered the record of appeal and the annexures thereto and submissions by the respective counsels and is satisfied the trial court gave a sound determination of the case for unlawful termination of the respondents. The appeal by the appellant is therefore found to be unmerited and is dismissed accordingly.
39. As for the reliefs awarded by the trial court the only one awarded was compensatory damages which was awarded in provisions of section 49 of the *Employment Act*. The respondents were awarded salary equivalent to six (6) months which amounted to Kshs 140,688 for John Mwaniki and Kshs 154,866/- for John Kimani.
40. The salary of the 1<sup>st</sup> respondent John Mwaniki Mwangi as in the memorandum of claim was Kshs 32,781/- and the appellant did not controvert the same.
41. The court is cognisant the respondent worked for the appellant for about one year. A compensation of three (3) months is well sufficient and so the court will set aside the award of six (6) months compensation as awarded by the trial court and replace the same with three months award. The same will be a total of Kshs 98,343/-.
42. Equally the respondent in Appeal No E050/2021 John Kimani and his salary which is not controverted by the appellant was Kshs 35,303/-. The court will award him Kshs 35,303 for three months in the



place of the six months awarded by the trial court. I therefore set aside the award by the trial court of a total of Kshs 154,866/- and award Kshs 35,303x3. The sum total for John Kimani is Kshs 105,909/-.

43. The costs of the lower court and the costs of this appeal are awarded to the respondents and both will be based on this award of this court.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> DAY OF APRIL, 2023.**

**ANNA NGIBUINI MWAURE**

**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 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.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

