



**Ngatia v Express Connections Limited T/A Double ‘M’ Commuter Train Services  
(Cause 1314 of 2017) [2023] KEELRC 1138 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1138 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1314 OF 2017**

**L NDOLO, J**

**MAY 11, 2023**

**BETWEEN**

**NIVAN KIARIE NGATIA ..... CLAIMANT**

**AND**

**EXPRESS CONNECTIONS LIMITED T/A DOUBLE ‘M’ COMMUTER TRAIN  
SERVICES ..... RESPONDENT**

**JUDGMENT**

1. When I began hearing this matter on 28<sup>th</sup> September 2022, I formed the opinion that the Claimant was too ill to testify. I therefore stood him down and directed Counsel to file written submissions. This judgment is based on the pleadings and submissions filed by the parties.
2. The Claimant’s case is contained in a Statement of Claim dated 10<sup>th</sup> July 2017 and filed in court on 12<sup>th</sup> July 2017. The Respondent filed a Statement of Defence on 19<sup>th</sup> December 2018, to which the Claimant responded on 9<sup>th</sup> October 2019.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent in 1999, as a Route Supervisor. He claims to have risen through the ranks to the position of Senior Route Inspector as at 30<sup>th</sup> April 2016, when his employment was terminated. He adds that he earned a gross monthly salary of Kshs. 25,000 as at the time of termination.
4. The Claimant accuses the Respondent of unlawfully terminating his employment. He cites the following particulars in this regard:
  - a. Failure to give termination notice;
  - b. Failure to provide reasons for the termination;



- c. Failure to accord the Claimant an opportunity to be heard and to defend himself.
5. The Claimant further claims that the Respondent did not remit his National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) deductions for ten (10) years from 2000 to 2010.
6. The Claimant adds that he did not take his leave for the years 1999 to 2011. He also claims to have worked overtime without compensation.
7. The Claimant now seeks the following remedies:
  - a. Three months' pay in lieu of notice.....Kshs. 75,000
  - b. Unremitted NSSF deductions.....38,000
  - c. Unremitted NHIF deductions.....48,000
  - d. Payment in lieu of leave days.....252,786
  - e. Unpaid overtime @ 8 hours daily since 1999.....5,105,187
  - f. General damages for unlawful termination
  - g. Costs plus interest

### **The Respondent's Case**

8. In its Statement of Defence dated 19<sup>th</sup> December 2018 and filed in court on even date, the Respondent denies that it trades as Double 'M' Commuter Train Services.
9. The Respondent further denies that the Claimant was its employee in the manner pleaded in the Statement of Claim.
10. The Respondent states that it was incorporated and came into existence on 10<sup>th</sup> June 2003 and consequently, it cannot be that the Claimant was its employee from 1<sup>st</sup> January 1999.
11. The Respondent further states that Double 'M' Commuter Train Services was a partnership operated by John Mwangi Mugo (now deceased), Sylvester Githinji Mugo, Michael Kanyago and Fredrick Wachira Waiganjo.
12. The Respondent adds that on 30<sup>th</sup> November 2010, the Claimant and the partnership known as Double 'M' Commuter Train Services, mutually terminated the Claimant's employment.
13. According to the Respondent, the Claimant was paid the sum of Kshs. 17,650 being his salary for November 2010, including overtime and less an advance, which payment the Claimant duly acknowledged.
14. The Respondent avers that by a letter dated 1<sup>st</sup> December 2010, the Claimant was employed by Middle Management Services as an Inspector for a period of one (1) year. The contract of employment was renewed for a further 1 year effective 1<sup>st</sup> December 2011.
15. The Respondent states that the Claimant worked for Middle Management Services from 1<sup>st</sup> December 2010 to 28<sup>th</sup> April 2016, over which period he was paid all his emoluments.



16. The Respondent accuses the Claimant of failure to collect his communication radio from the depot, leading to communication breakdown in operations. The Respondent states that the Claimant was issued with a show cause letter by Middle Management Services.
17. The Respondent further accuses the Claimant of declining to sign a code of conduct issued to him by Middle Management Services in March 2016. The Respondent filed a letter dated 24<sup>th</sup> March 2016, by which Middle Management Services notified the Claimant that failure to sign the code of Conduct within seven (7) days, would result to dismissal from service.
18. It is alleged that the Claimant did not sign the code of conduct and on 31<sup>st</sup> March 2016, he was issued with a thirty-day termination notice. The Claimant's last day at work is given as 30<sup>th</sup> April 2016.
19. The Respondent denies the Claimant's entire claim and puts him to strict proof thereof.

### **Findings and Determination**

20. There are four (4) issues for determination in this case:
  - a. Whether there was an employment relationship between the Claimant and the Respondent capable of enforcement by this Court;
  - b. Whether the Claimant has made out a case of unlawful termination of employment against the Respondent;
  - c. The effect of the discharge voucher signed by the Claimant;
  - d. Whether the Claimant is entitled to the remedies sought.

### **Employment Relationship**

21. The first ground upon which the Respondent challenges the Claimant's claim is that it had no employment relationship with him.
22. In this regard, the Respondent states that it was incorporated on 10<sup>th</sup> June 2003, after the date given by the Claimant as the commencement date of his employment. The Respondent further states that Double 'M' Commuter Train Services was a partnership operated by John Mwangi Mugo (now deceased), Sylvester Githinji Mugo, Michael Kanyago and Fredrick Wachira Waiganjo.
23. The Respondent adds that effective 1<sup>st</sup> December 2010, the Claimant was employed by Middle Management Services. According to the Respondent, it is this entity that terminated the Claimant's employment.
24. My reading of the pleadings filed by the parties discloses that although the Claimant was engaged by several entities within a continuous employment span, the business in which he was engaged and his line of work remained unchanged.
25. Moreover, in its Statement of Defence dated 19<sup>th</sup> December 2018, the Respondent gives a complete account of the Claimant's employment history. If the Respondent is indeed a stranger to the Claimant's employment, how did it access all these details regarding the Claimant's employment, including the events leading to the termination of employment?
26. It seems to me that the business known as Double 'M' Commuter Train Services was operated by the same persons using multiple operational entities. This cosmetic transformation cannot be said to have affected the Claimant's employment in any way.



27. This position is confirmed by documentary evidence filed by the Respondent itself; being an inspector's card for the month of March 2013, issued to the Claimant by the Respondent. In addition, the Respondent did not challenge the authenticity of employment cards filed by the Claimant, showing the Respondent as his employer.
28. In *Kenya Hotels and Allied Workers Union v Diani Sea Resort t/a Carlslake Nominee Limited* [2015] eKLR Rika J stated the following:
- “Employees cannot be closed out from pursuing their Claims on the ground that they have given the Court the wrong description, of the business and legal structures which constitute their Employers. Employees hardly know what these capacities are, and what the Employers' business and legal structures are.....Employees would be hampered in correcting employment wrongs, if they are expected to sift through these multiple layers before filing their claims.”
29. In this case, the Respondent's foot prints are all over the Claimant's employment history and I therefore reject the proposition that there was no employment relationship between the parties.

### **The Termination**

30. That settled, I will now examine the termination of the Claimant's employment for substantive justification and procedural fairness.
31. The Respondent filed a letter dated 31<sup>st</sup> March 2016 from Middle Management Services addressed to the Claimant as follows:

“Dear Nivan,

RE: FAILURE TO OBEY LAWFUL INSTRUCTIONS

Please refer to my letter dated 24<sup>th</sup> March, 2016 reminding you to sign company code of conduct for inspectors and Supervisors.

You have defied the instructions with impunity contrary to *Employment Act*, 2007 section 44(4)(e) which is punishable by summarily (sic) dismissal.

This is a clear indication that you are not willing to obey company rules. This letter therefore give (sic) you 30 (thirty) days notice to terminate your contract. Your last day in the company will be 30<sup>th</sup> April 2016. Please arrange to return all company properties under your possession to the Human Resources Manager by 29<sup>th</sup> April, 2016 for clearance.

The management take this opportunity to thank you for the services you have rendered over the period and wish you well in your future endeavors.

Yours faithfully,

For: Middle Management Services

(signed)

Charles Ongunya

General Manager

32. This letter accuses the Claimant of defying instructions to sign a code of conduct for inspectors and supervisors. The Respondent filed a previous letter dated 24<sup>th</sup> March 2016, putting the Claimant on



notice that he would be dismissed from employment, if he did not sign the code of conduct within seven (7) days.

33. The Respondent did not however adduce any evidence to confirm that the Claimant had been issued with the code of conduct or that he had received the letter dated 24<sup>th</sup> March 2016. More significantly, there is no evidence that the Claimant was confronted with any charge at the shop floor and allowed an opportunity to respond.
34. In the result, I find and hold that the Respondent failed to establish a valid reason for terminating the Claimant's employment as required by section 43 of the *Employment Act*. Further, in effecting the termination, the Respondent did not observe the procedural fairness requirements set by Section 41 of the Act.

### **The Discharge Voucher**

35. The Respondent states that the Claimant is estopped from bringing the present claim because he signed a discharge voucher dated 30<sup>th</sup> April 2016, upon which he was paid terminal dues in the sum of Kshs. 59,949.
36. In the final submissions filed on behalf of the Respondent, reference was made to the decision in *Coastal Bottlers Ltd v Kimathi Mitbika* [2018] eKLR where the Court of Appeal stated the following:

“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 such an issue, in our view, should address its mind firstly, on the impact of such a discharge voucher/ agreement and secondly, whether the same was voluntarily executed by the concerned parties.”

37. Unlike in common law contracts, discharge vouchers issued to departing employees operate as primary accounting documents confirming that an employee has received their terminal dues. They cannot however be used to sanitise an otherwise unlawful termination of employment. That is all I will say on this issue.

### **Remedies**

38. In light of the foregoing findings, I award the Claimant twelve (12) months' salary in compensation. In arriving at this award, I have considered the Claimant's long service and the Respondent's unlawful conduct in the termination transaction.
39. According to the evidence on record, the Claimant was given 30 days' termination notice. The claim for notice pay is therefore without basis and is disallowed.
40. Regarding the claims for unremitted NSSF and NHIF dues, the only thing to say is that any such dues would be payable to the respective statutory body and not to the Claimant.
41. The claims for leave pay and overtime compensation were not proved and are dismissed.
42. Ultimately I enter judgment in favour of the Claimant in the sum of Kshs. 300,000 being twelve (12) months' salary for unlawful and unfair termination of employment.
43. This amount will attract interest at court rates from the date of judgment until payment in full.
44. The Respondent will also pay the costs of the case.



45. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 11<sup>TH</sup> DAY OF MAY 2023**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Nganga for the Claimant

Mr. kefa Ombati for the Respondent

