



**Mburu v International Committee of the Red Cross (Cause
315 of 2018) [2023] KEELRC 1869 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1869 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 315 OF 2018
NZIOKI WA MAKAU, J
JULY 26, 2023**

BETWEEN

SAMUEL JOSEPH MUTURI MBURU CLAIMANT

AND

INTERNATIONAL COMMITTEE OF THE RED CROSS RESPONDENT

JUDGMENT

1. The Claimant instituted this claim against the Respondent for unfairly dismissing him from employment and failing to pay his terminal dues. He prayed for issuance of the following Orders:
 - i. A declaration that the termination of the Claimant's employment and/or dismissal was unfair and in breach of the Claimant's contract of employment.
 - ii. A declaration that the Respondent fundamentally breached his statutory obligations under *the Constitution* of Kenya and the *Employment Act*, 2007.
 - iii. An order directing and/or compelling the Respondent to pay the Claimant Kshs. 600,385.12 as particularized in paragraph 13 & 14 of the statement of claim with interest at court rates from the date of filing of this suit.
 - iv. An order that the costs of this suit be awarded to the Claimant with interest thereon at court rates from the date of filing of the claim.
 - v. Any other relief as the Court would deem just and expedient to grant.
2. The Claimant averred that on 13th January 2013, the Respondent employed his services as an Airport Clerk on a monthly salary of Kshs. 48,984.76. That on 13th March 2015, the Respondent suspended him from his duties in relation to taxi receipts that had been submitted for reimbursement and that the Respondent also made deductions from his salary for reimbursements. He stated that he was served



with the suspension letter and thereafter a termination letter dated 24th March 2015 and contended that he was terminated without any cause or notice to that effect. Further, it was the Claimant's averment that the Respondent inconsistently remitted NSSF deductions on his behalf and that his efforts to ask for payment of his dues were rendered futile. His claim against the Respondent was for a Working Advance Refund and compensation for unfair termination.

3. In its Memorandum of Response dated 7th May 2018, the Respondent averred that it employed the Claimant by a temporary Contract of Employment dated 4th April 2013. That later on, his contract was confirmed as indefinite by a Contract Addendum dated 9th January 2014, with effect from 13th January 2014. That as at the date of termination of the Claimant's employment, his monthly salary was a consolidated sum of Kshs. 42,905/-. The Respondent further averred that on or about 2nd and 3rd January 2015, the Claimant was paid a cash disbursement of Kshs. 2,000/- on each day (Kshs. 4,000/- in total) to use to pay taxi fare for official purposes. That on 5th January 2015, the Claimant was paid a Cash Working Advance of Kshs. 14,530/- for payment of casual workers and airport charges. According to the Respondent, its financial rules required the Claimant to produce receipts in support of the expenses as and when they were incurred and before the end of the month accounting closure of January 2015. That however when the Claimant produced his receipts, the following issues were raised:
 - a. The receipts were not presented on the days when the Claimant allegedly used the taxis, but several days later after the Respondent asked for them;
 - b. The receipts were written and signed by the same person yet the Claimant had allegedly used two different taxis driven by different drivers.
4. It was the Respondent's averment that in light of the foregoing, the Claimant was invited, vide a letter dated 9th March 2015, to attend a disciplinary hearing on 11th March 2015 to give an explanation on the allegation that the receipts were not genuine. That the said invitation letter informed the Claimant of his right to be accompanied to the hearing by a fellow employee, which right he chose to exercise when the hearing proceeded on 11th March 2015. That the Claimant was also given the opportunity to make representations on the allegations against him and that prior to the hearing, he had prepared a report of what transpired, which report formed the basis of his oral representations. That pending determination of the matter, the Claimant was placed on suspension with full pay by a letter dated 13th March 2015.
5. It further averred that when the Claimant also failed to account for the Cash Working Advance of Kshs. 14,530/-, he was invited to give an explanation on the matter at a meeting held on 18th March 2015. That his explanation was however not satisfactory and neither did he refund the cash nor produce any receipts to show how he used the cash. That in accordance with the law, it consequently recovered the said amount from the Claimant's March salary. The Respondent averred that upon conclusion of the investigations and as a result of the Claimant's unsatisfactory responses, it exercised its right to terminate his employment. That the Claimant thereafter received terminal benefits amounting to Kshs. 113,157/- being payment for: salary for the days worked in March 2015 including transportation allowance; one month's salary in lieu of notice; two (2) accrued leave days; service pay; and a 13th salary paid on a pro-rata basis for the months worked in 2015 (2.8 months). That the Claimant acknowledged receipt of the said payment and confirmed that the Respondent did not owe him any additional money.
6. The Respondent refuted the claims that the Claimant was not accorded a fair disciplinary hearing; that it inconsistently remitted NSSF deductions; that the Claimant was terminated without any cause or notice; and that the Claimant was wrongfully and unlawfully terminated from his employment. It averred that the Claimant was not entitled to any of the reliefs sought in his Claim, which it stated was unwarranted and should be dismissed with costs.



7. In a Reply to the Response, the Claimant averred that the Kshs. 2,000/- he was paid per day (Kshs. 4,000/- in total) was part of the Working Advance, which he accounted for. He denied that he was given an opportunity to make his representations, averring that the procedure was not followed as laid down and that his suspension was unlawful as no investigation was done. He further averred that the Claim before this Court is for unfair termination and refund of the Working Advance erroneously and unlawfully deducted from his earnings. The Claimant prayed for the Response to be struck out with costs and judgment be entered for him as prayed in the Claim.

Evidence

8. The Claimant testified that when he went to work on 2nd January 2015, he requested a receipt from the Taxi Driver of the taxi he was using but the Driver told him he had forgotten the receipt book. That he then went to work to organise the scheduled flight dispatch to Congo but on arrival, he found the flight had been cancelled and re-assigned for 3rd January 2015. That he again took a taxi on the said 3rd January to the office and then to the airport to dispatch the goods (medicines). The Claimant asserted that the Work in Advance was deducted from his salary as 18,000/- but could not explain how the figure rose to 18,000/- from Kshs. 14,530/-. That he had asked to be allowed to call the Taxi Driver to testify and even offered the driver's number for them to call him but they did not. According to the Claimant, the place he went to pick the taxi was a place where they had a common receipt book and the receipt issued by a custodian.
9. The Claimant confirmed in cross-examination that he was called to a meeting to explain the taxi receipts, was notified that he would attend with another employee and that there was also a meeting on the Cash Advance. In that regard, he stated that he took Hosea Chepkwony as his witness. He further confirmed receiving payment from the Respondent and signing for the same as full and final payment of all his claims and without being forced. He stated in re-examination that he however noticed later on that they had deducted the funds for taxi used by his colleague.
10. The Respondent's witness, Ms. Abijah Mwakodi (RW1), testified that she was the HR Manager of KRC Logistics Support Centre. She stated that the Claimant was suspected of producing fabricated taxi receipts for refund and that he was asked to show cause on the same and given an opportunity to be heard. She confirmed having been present at the two meetings involving the Claimant and being the one who took the minutes. Under cross-examination, RW1 stated that they had a policy for staff to take taxis and that it is the supervisor who normally was to pick but if the supervisor was unable to clear Work in Advance, an employee could pick. That in this case, the Claimant was accountable as the Work in Advance was taken by him and he was thus the one to ensure delivery of the receipts. She confirmed that no reasons for termination were given in the Claimant's termination letter and that they did not reach out to any of the taxi drivers. She further confirmed that no deductions of Work in Advance were made from the dues paid to the Claimant as shown in the document of 23rd April 2015. RW1 clarified in re-examination that the reason the Claimant was terminated was because he produced falsified taxi receipts.

Claimant's Submissions

11. The Claimant submitted that a perusal of the Termination Notice shows that the Respondent did not state the specific grounds for termination as provided under section 43 of the *Employment Act*. That whereas the investigation proceedings vindicated him from any wrongdoings, the Respondent was intent on punishing him and acted in a discriminatory manner by terminating his services on alleged misappropriation of a Cash Advance. The Claimant noted that from the Minutes of Investigation dated 11th March 2015, one of the interviewees - Linus Aluondo confirmed that the monies were



issued by Titus Okola and not by the Claimant. That the final statement of the other interviewee – Humphrey Kalemera was also to effect that the monies were issued by Titus Okola. According to the Claimant, there was no specific requirement that such monies collected would be used to travel with a specific taxi and/or taxi company and hence the employees were free to seek independently how the monies would be used in their travels. Furthermore, the Respondent had not shown the Court the policy requirements that called upon the Claimant to use a specific taxi and for the receipts to be returned within a certain period, as alleged in the Respondent’s oral testimony. It was the Claimant’s submission that the reasons advanced for termination of his employment were frivolous and unreasonable and that in the case of *British Leyland UK Ltd v Swift* (1981) I.R.L.R 91, Lord Denning described the test of reasonableness in the following terms:

“The correct test is; was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”

12. The Claimant also cited the case of *Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union (K)* [2017] eKLR wherein it was held that the Court looks into the validity and justifiability of the reasons for termination. It was the Claimant’s submission that the decision for termination was unreasonable and was hence unfair. As regards the process of termination, the Claimant submitted that the same was unfair and unprocedural and resulted in his unfair dismissal. That no Notice to Show Cause was ever issued to him and he was denied a chance to call the taxi drivers as witnesses to rebut the Respondent’s allegations on the receipts, despite indicating his willingness to avail the said drivers to the Respondent to testify. He cited the case of *Omusamia v Upperhill Springs Restaurant* (Cause 852 of 2017) [2021] KEELRC 3 (KLR) (5 October 2021) (Judgment). The Claimant also cited section 41 of the *Employment Act* that provides as follows:

41(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 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.

41(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.

The Claimant submitted that he was therefore entitled to the prayers sought in his memorandum of claim.

Respondent’s Submissions

- 13 The Respondent submitted that the terminal dues statement at page 17 of the Respondent’s bundle of documents is a discharge voucher executed by the Claimant in full knowledge and in which he states clearly that he would have no further claims whatsoever present or future once he was paid his



terminal dues. That the document was in fact a contract entered into validly and that this Court has no power to rewrite contracts as was held in the celebrated case of *Damondar Jihabhai & Co. Ltd and another v Eustace Sisal Estates Ltd* [1967] EA 153. That similarly, this Court must give effect to the agreement entered by the Claimant and the Respondent with the effect that this suit is not properly before this court. It further submitted that the Claimant had failed to raise any ground and evidence sufficient to void the said contract and it was clear to the court that the Claimant executed his signature as well as his ID Number on the letter, therefore binding himself to the terms of the said agreement. The Respondent further relied on the binding decision of the Court of Appeal in the case of *Coastal Bottlers Limited v Kimathi Mithika* [2018] eKLR in which Visram JA, Koome JA (as she then was) and Karanja JA found a discharge voucher to be valid and stated that the court's only duty was to bring to life the parties' intention of not coming to court with any further claims. It beseeched this Court to make a similar finding that the court cannot entertain this suit as the Claimant had waived his right to make any further claims regarding his employment with the Respondent. It also relied on the case of *Magdalene Kamene Nziuko v Standard Chartered Bank Ltd* [2019] eKLR in which the ELRC found that the claimant had executed a discharge voucher which the court had no choice but to find as a valid agreement and the suit therefore not properly before the court.

14. It was the Respondent's submission that this Court ought not to dwell on the form of the discharge but rather the substance thereof, meaning that the fact the Discharge is on the terminal dues' calculation is not material to the substance thereof, which is the confirmation that he would have no further claims present or future following the payment. It thus urged the Court to dismiss the claim with costs on account of the valid Discharge Voucher that the Claimant executed. The Respondent submitted that the Claimant confirmed he was called to explain the issue of the taxi receipts since there was a genuine belief that the receipts were fake. On this submission it relied on the decision of the Court of Appeal in the case of *Bamburi Cement Ltd v Farid Aboud Mohammed* [2016] eKLR. It further submitted that this Court should not take the place of the employer by determining whether it would have terminated for the said reason, but should examine whether a reasonable employer in the same position would find the grounds sufficient to terminate. That the issue of presenting fake receipts was thus a valid reason for it to terminate the Claimant's employment. Moreover, that it utilised a fair procedure in effecting termination of the Claimant's employment.
15. According to the Respondent, the Claimant's claim for compensation for unfair termination is a non-starter since he should not have filed this suit in court having executed a discharge voucher. Without prejudice, it submitted that the Claimant was not entitled to compensation because the termination of his employment was for a valid reason and was procedurally executed. As regards the claim for Working Advance Refund, the Respondent submitted that the Claimant was taken through a hearing in order to determine whether he owed any refund to the company, which he confirmed in his testimony and as is evidenced by the Minutes of the meeting of 18th March 2015. For the forgoing reasons, it submitted that this matter should be dismissed with costs to the Respondent.
16. The Claimant was dismissed by the Respondent for using fake taxi receipts to obtain reimbursement or account for funds taken from the Respondent. It would seem there was a problem in cash handling whereby the staff would take cash in advance, execute tasks then procure receipts to account for the expenditure. Apparently, ICRC had not migrated to a system where dedicated taxi service providers could be used to pick and drop staff when working either too early or late in the night. This led to a system replete with opportunity for abuse. The Claimant did procure 2 damning receipts on 2nd and 3rd January 2015. Though the receipts were different in appearance, the handwriting was the same on both receipts. The Claimant seemed to have fallen in the trap where Titus his colleague would orchestrate refunds using forged receipts. That gave reason to the Respondent to dismiss not only the Claimant but some of his other colleagues who had engaged in duplicitous conduct. The Respondent carried



out meticulous investigations which led to a number of the Claimant's colleagues admitting to wrong doing. The meetings held by the Respondent demonstrate culpability. Despite the Claimant being afforded opportunity to defend himself he did not dislodge the accusations levelled against him. The Claimant further, on 29th April 2015 to be precise, in his own handwriting acknowledged receipt of Kshs. 113,157/- being his final dues. He attested that he had no further claims from his employer, present or future. He thus absolved the employer freely. He has not produced any evidence that the acceptance was anything other than willful and as such cannot resile from the agreement that he would not pursue any additional claims against the employer. His claim was therefore in contradiction to his avowal in his statement on 29th April 2015. His suit thus being handicapped by his waiver is dismissed with an order that each party bears their own costs.

17. By way of *obiter dicta*, it is hoped the Respondent has in place better systems of control as regards cash payments for either services rendered by casuals at its warehouse in JKIA or reimbursement of expenses for either taxi or other use by its staff. Loopholes such as the one present when the Claimant was engaged lead to opportunities for what has led the Respondent to be a defendant in this case.

18 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2023

NZIOKI WA MAKAU

JUDGE

