



REPUBLIC OF KENYA



KENYA LAW
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**Okeyo v Diamond Trust Bank (K) Ltd (Cause 1 of 2019)
[2023] KEELRC 2594 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2594 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 1 OF 2019
S RADIDO, J
OCTOBER 25, 2023**

BETWEEN

DENNIS ODHIAMBO OKEYO CLAIMANT

AND

DIAMOND TRUST BANK (K) LTD RESPONDENT

JUDGMENT

1. The Cause was heard on 21 February 2023 when Dennis Odhiambo Okeyo (the claimant) testified and on 22 June 2023, when the Head of Security and Investigations and a Senior Manager, Human Resources with Diamond Trust Bank (K) Ltd (the respondent) testified.
2. Despite securing leave on 15 June 2021 to file and serve an Amended Response before 9 July 2021, the respondent failed to file the Amended Response.
3. The claimant filed his submissions on 15 August 2023 (should have been filed and served before 22 July 2023) and the respondent on 25 September 2023.
4. The Issues for determination are:
 - i. Whether the claimant waived the right to sue?
 - ii. Whether the termination of the claimant's employment was unfair?
 - iii. Whether the respondent was in breach of contract?
 - iv. Appropriate remedies.



Whether the claimant waived the right to sue?

5. On 31 August 2018, the claimant signed a Discharge acknowledging receipt of Kshs 237,083/- terminal dues in full and final settlement and further acknowledging that he had no further claims against the respondent including for compensation arising out of the summary dismissal.
6. The respondent now urges the Court to disallow the Cause on the basis of the discharge and the holding in *Pauline Waigumo v Diamond Trust Bank Kenya Ltd* (2021) eKLR wherein the court stated: it is not open to reopen the question of monetary compensation between the parties. Accordingly, I decline to award the claimant any compensatory award.
7. The respondent also drew the attention of the court to the judgment in *Ronald Kipngeno Bii v Unilever Tea Kenya Ltd* (2022) eKLR where it was found:

I am satisfied that the discharge voucher was signed voluntarily with full knowledge of the material information and the import of the document. There were no vitiating factors when he signed the discharge voucher and as such it constituted a binding contract between the claimant and the respondent. He waived the right to any further claim from the employer and as such he is estopped from filing this suit against the employer to press for more reliefs under the terminated employment contract.
8. The respondent further urged the court to adopt the Court of Appeal holding in *Trinity Prime Investment Ltd v Lion of Kenya Insurance Co Ltd* (2015) eKLR 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 thus fully discharged.
9. It is true that the claimant signed a Discharge. One of the primary purposes of such a Discharge is to serve as a commitment from the employee that upon payment of agreed dues or benefits, the employee waives the right to sue the employer in terms of the commitment.
10. The Court of Appeal had the opportunity to discuss the import of a discharge or release agreements in *Thomas De La Rue (K) Ltd v David Opondo Omutelema* (2013) eKLR and *Coastal Bottles Limited v Kimathi Mithika* (2018) eKLR.
11. The principles that emerges from the authorities is that when called upon to determine whether a release or discharge agreement is vitiated, the trial court should consider whether the discharge agreement was freely and willingly executed and whether the employee was seized of all the relevant information and knowledge.
12. Within the employment relationship, the employee is ordinarily a weaker party. At the point of termination of the contract, the employee becomes even more vulnerable. There is emotional turbulence. He has lost his source of income and without any income, life becomes uncertain. Such an employee would readily sign a discharge because of the basic needs of the moment.
13. Considering the power imbalance, it would not meet the ends of fairness to demand without mutual engagements and explanations that the employee signs a pro-forma or fit-for-purpose discharge.
14. In my view, in such cases, the employer should place before the court some form of evidence that some explanation of the legal consequences of the discharge was discussed with the employee before he was required to execute the document.



15. The court finds that the claimant did not freely waive the right to sue the respondent for unfair termination of employment.

Unfair termination of employment

Procedural fairness

16. The respondent issued a show-cause dated 7 June 2018 to the claimant. The allegation was absence from duty from 24 May 2019 and the relevant provision of the Human Resources Policy and Procedures Manual was stated.
17. The show-cause requested the claimant to respond within 5 days. The claimant did not respond.
18. On 18 June 2018, the respondent invited the claimant to attend an in-person disciplinary hearing set for 29 June 2018. The claimant did not attend the hearing.
19. Consequently, the respondent issued a summary dismissal letter to the claimant on 10 July 2018.
20. While challenging the procedural fairness of the dismissal, the claimant asserted that he was arrested on 23 May 2018 and was released from custody on 24 May 2018 on condition that he report to the police every day at 2.00 pm and that he used to report to his supervisor one Mr Joel Wasonga every morning and that he could not perform his normal duties/access the work station because his access card had been confiscated at the time of arrest.
21. He also testified that in early July 2018, the supervisor informed him not to report to the workplace allegedly because he was likely to interfere with investigations.
22. The claimant denied being afforded an opportunity to respond to the allegations.
23. The respondent's Human Resources Manager however testified that the show-cause letter was sent to the claimant through his postal address in Nairobi on 15 June 2018, and that a certificate of posting was available.
24. On the invitation to the disciplinary hearing, the witness stated that it was sent through registered post and evidence of posting was also available.
25. It cannot be disputed that the show-cause notice and letter inviting the claimant to attend the disciplinary hearing were addressed to his Nairobi postal address.
26. The respondent's Human Resource Manager testified that certificates of posting to show that the notices were sent were available.
27. The same were not placed before the court. There was no disclosure as to why the notices were not served upon the claimant through the supervisor and/or at the workplace considering the respondent knew that he had been arrested by the police.
28. The claimant's testimony that he used to report to his named supervisor every morning during the intervening period until early July 2018 when the Manager instructed him not to report to work was not controverted. The Manager was not called to testify nor the failure to call him explained.
29. Upon consideration of the above, the Court is want to agree with the claimant that he was not afforded an opportunity to be heard before the decision to dismiss was taken.



Substantive fairness

30. Sections 43 and 45 of the [Employment Act](#) demand that the employer prove as valid and fair the reasons for terminating an employment contract.
31. The reason for dismissing the claimant was given as absence without communication.
32. It is common that the claimant was arrested by the Police and was released on 24 May 2018. The claimant's testimony that he was required to report to the police every afternoon was not controverted. His further testimony that he used to report every morning to his supervisor, the Branch Manager, and that it was only in early July 2018 that the supervisor instructed him not to report to work was not questioned at all.
33. In the circumstances, the court concludes that the dismissal of the claimant was not for valid or fair reasons.

Breach of contract/Remedies

House allowance

34. An employer is under an obligation to provide housing or pay a house allowance. The claimant prayed for Kshs 24,942/- on account of house allowance.
35. However, he did not disclose which period the house allowance was for.
36. The court in this regard notes that the claimant was paid a pro-rated house allowance of Kshs 4,100/- for July 2018.

Leave

37. On account of leave, the claimant sought Kshs 5,625/-.
38. The respondent did not traverse this head of the claim and in light of section 10(3) of the [Employment Act](#), the court will allow this head of the claim.

Unpaid salary

39. The claimant pleaded an entitlement to Kshs 141,340/- being salary up to 30 August 2018. The claimant separated from the respondent on 10 July 2018 and he was paid the earned wages. He cannot make a valid claim for any wages after 10 July 2018 and the head of claim is declined.

Salary in lieu of Notice

40. With the finding that the summary dismissal of the claimant was unfair, the Court will allow the equivalent of 1-month basic salary in lieu of notice in the sum of Kshs 70,669/-.

Compensation

41. The claimant served the respondent from 2012 to 2017 and in consideration of the length of service, the Court is of the view that the equivalent of 5 months' gross wages as compensation would be appropriate (gross wage in June 2017 was Kshs 83,141/-).



Conclusion and Orders

42. The court finds and declares that the summary dismissal of the claimant was unfair and further that he is entitled to commuted accumulated leave.
43. The claimant is awarded:
- i. Salary in lieu of notice Kshs 70,669/-
 - ii. Compensation Kshs 415,705/-
 - iii. Leave Kshs 5,625/-
- TOTAL Kshs 491,999/-
44. The claimant did not file submissions within the agreed timelines and no explanation for the failure was given therefore he is denied costs

DELIVERED VIRTUALLY, DATED, AND SIGNED IN KISUMU ON THIS 25TH DAY OF OCTOBER 2023.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For claimant James Nyakundi & Co. Advocates

For respondent Oraro & Co. Advocates

Court Assistant Chrispo Aura

