



**Maweu v Paper Converters (K) Limited (Cause 2110 of 2017)
[2022] KEELRC 3932 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3932 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2110 OF 2017
JK GAKERI, J
SEPTEMBER 21, 2022**

BETWEEN

DONALD MUTUA MAWEU CLAIMANT

AND

PAPER CONVERTERS (K) LIMITED RESPONDENT

JUDGMENT

1. The claimant initiated this action by a memorandum of claim dated October 16, 2017 and filed on October 19, 2017 alleging unlawful/unfair termination of employment.
2. The claimant avers that he was employed by the respondent on February 2, 2004 as an Administrative Assistant at Kshs.12,500/= per month, exclusive of house allowance and the salary subsequently rose to Kshs.45,000/= when he was appointed as sales person in the Marketing Department.
3. It is the claimant's case that he worked diligently and dutifully for the respondent and had no warning letter for the 13 years 7 months he served.
4. That on July 6, 2017, he was issued with a notice to show cause and responded on September 29, 2017 and his employment was terminated on October 6, 2017 without notice.
5. The claimant further avers that he did not proceed on annual leave nor was he paid leave allowance for the entire duration and the respondent unlawfully deducted Kshs.121,153.10 from his dues and did not issue a certificate of service.
6. The claimant prays for;
 - a. A declaration that the dismissal of the claimant's employment was unfair and unlawful.
 - b. An order compelling the respondent to pay the claimant a total sum of Kshs.2,012,653.10 comprising;



- i. Three months' salary in lieu of notice
 - ii. Accrued leave for two (2) years
 - iii. Severance pay
 - iv. Compensation for loss of employment
 - v. Accrued house allowance
 - vi. Unlawful deductions
- c. Certificate of service
 - d. Costs and interest of this suit.

Respondent's Case

7. The respondent filed a memorandum of defense dated May 6, 2021 denying all the allegations made by the claimant against it.
8. It avers that after persistent drop in the claimant's sales and performance, he was issued with a notice of three (3) months to improve performance failing which adverse action would be taken and his performance did not improve as minutes of the hearing demonstrate and his employment was terminated for poor performance.
9. The respondent avers that the claimant's dues were tabulated and he was paid by a cheque drawn in his favour and he gave an unequivocal and unconditional undertaking that he had received his full and final dues and had no further claims whatsoever against the respondent.
10. That the claimant signed the discharge voucher without any fraud, duress, mistake, misrepresentation or undue influence.
11. Finally, it is the respondent's case it gave the claimant a certificate of service, was paid notice, outstanding leave days and severance pay and was not entitled to compensation as the termination was not unfair.
12. The respondent prays for dismissal of the suit with costs in its favour.
13. In his response to the respondent's defence, the claimant states that the meeting held on October 2, 2017 was not a hearing as contemplated by section 41 of the Employment Act, as no notice had been issued containing the charge(s) and he was not allowed to be accompanied by an employee or union official.
14. That the letter dated October 30, 2014 is a forgery as he did not sign it.
15. The claimant further avers that the resignation was under duress, undue influence compulsion and misrepresentation causing him to give 8 days' notice in lieu of 1 month as dictated by one Mr. John Ochuku a Deputy Chief Human Resource Officer, Administration in his office.

Claimant's Evidence

16. The claimant adopted the written statement signed on October 16, 2017. The statement rehashes the contents of the Memorandum of Claim.
17. On cross-examination, the witness testified that he was a proud and cheerful performer and his employment was terminated by letter dated October 2, 2017.



18. That the Marketing Department had 4 or 5 sales persons and one Accountant who was being introduced to marketing. He confirmed that he had no record of how the others performed but told the court that he had the largest number of clients and highest sales.
19. It was his testimony that although Uchumi and Nakumatt were winding up business, Brookside was doing well and sales dropped slightly. Other clients were NSSF, Neg Pro, KPLC, Barclays Bank of Kenya, I & M, Equity Bank.
20. The claimant testified that he did not attend the meeting allegedly held on 2nd October, 2017 as he had not been invited.
21. He also confirmed that he was not a member of the Union and had been issued with a certificate of service but had not amended the Memorandum of Claim which indicated that it was not issued.
22. On re-examination, the claimant stated that he had neither been invited nor did he attend the meeting of 2nd October, 2017.
23. It was his testimony that the appointment letter had neither targets nor benchmarks.
24. He testified that he could not fathom what poor performance meant and had not been issued with a warning letter or notice to show cause on performance.
25. The witness further confirmed that the tabulations of payments made to him was signed by among other persons a shop steward and a deduction of Kshs.121,153.10 was made.

Respondent's Evidence

26. RWI, Judith Koech adopted the written statement dated 29th April, 2021 which generally rehashes the Memorandum of defence. Save for the addition that the claimant was not truthful for having testified that he had not proceeded on leave since 2004 but later changed his claim.
27. The witness confirmed that the minutes on record were a draft he had prepared at the meeting though unsigned and had been circulated for the claimant and others to sign before typing could take place.
28. It was her testimony that the claimants gross salary included house allowance.
29. That the computations made after termination of the claimant's employment included prorated leave days and travelling allowance.
30. On the deduction of Kshs.121,153.10, she explained that it was an overpayment of commissions to the claimant at an earlier rate even after targets had been revised downwards and the excess had to be recovered.
31. On cross-examination, the witness confirmed that the document did not indicate the reason for the deduction and had no document containing a narrative of the deduction.
32. The witness alleged that the claimant underperformed and was as a consequence dismissed from employment, but had no evidence of the targets or how the claimant had performed.
33. The witness confirmed that the claimant attended the meeting on 2nd October, 2017 although no formal notice had been issued. That he attended alone. The witness confirmed that she prepared the minutes on record.
34. RWI confirmed that neither the contract of employment nor any other document had the claimant's targets.



35. The witness stated that the purpose of the meeting was to accord the claimant an opportunity to explain his performance. That his employment was terminated on the same day after the meeting.
36. Finally, the witness testified that the claimant collected his terminal dues on 6th October, 2017.
37. On re-examination, RWI testified that appointment letter dated 5th February 2004 had a meaning for gross pay.

Claimant's Submissions

38. The claimant identifies two issues for determination, namely; whether termination of claimant was substantively and procedurally fair and whether the claimant is entitled to the reliefs prayed for.
39. As regards the 1st issue, the claimant relies on the provisions of section 43 and 45 of the [Employment Act](#) to urge that in the instant case the respondent led no evidence to prove that it had a valid and fair reason to terminate the claimant's employment as it had no evidence of the alleged poor performance.
40. The sentiments of the court in *Janet Nyandiko v Kenya Commercial Bank Ltd* (2017) eKLR are relied upon to reinforce the submission.
41. It is submitted that the meeting of 2nd October, 2017 which purportedly terminated the claimants employment had no agenda and the claimant had not been invited.
42. That the minutes produced were in draft form and had not been authenticated. The provisions of section 41 of the [Employment Act](#) and the decision in *Janet Nyandiko v Kenya Commercial Bank Ltd* (*supra*) are cited to urge that the prescribed procedure was not complied with.
43. As regards proof of poor performance as a ground for termination, reliance is made on the sentiments of the court in *Jane Samba Mukalla v Ol Tukai Lodge* (2010) LLR 255 (KK) to urge that the respondent had no performance management system on the basis of which it measured the claimant's performance and found it wanting.
44. It is submitted that the claimant was never invited to explain the sudden poor performance yet his low sales were attributable to the close of Uchumi Supermarkets Ltd and Nakumatt.
45. The decision in *Pius Machafu Isindu v Lavington Security Guards Ltd* (2017) eKLR was relied upon to urge that the respondent failed to prove a valid reason(s) for terminating the claimant's employment.
46. It is submitted that the claimant's termination of employment was unfair and unlawful.
47. Finally, it is submitted that the claimant received part payment of the terminal dues under duress and was compelled by the respondent to sign the document which contained the tabulation of the dues but his protests were in vain.
48. That the respondent did not release the claimant from employment formally as no certificate of service was issued and the court is urged to order the respondent to issue the same.
49. As to whether the claimant is entitled to the reliefs sought, it is the claimant's submission that the claimant is entitled to 3 months' notice by virtue of section 35 (1) of the [Employment Act](#) of KShs.135,000/= and leave allowance for 2 years at KShs.90,000/= by virtue of section 28 of the [Act](#) and the claimant did not proceed on leave for 3 years 7 month but for the 2 or 4 days, he would take occasionally. The claim for severance pay was abandoned.
50. The sum of KShs.1,100,250/= is claimed as accrued house allowance by reason of section 31 of the Employment Act.



51. The sum of Kshs.621,000/= is claimed as compensation for unlawful termination of employment.
52. The decision in *Ken Freight (EA) Ltd v Benson K. Nguti* (2019) eKLR and ELRCC No. 760 of 2015, *Peter Kamau Mwaura v National Bank of Kenya* are relied upon to urge that once a finding that termination of employment was unfair, the appropriate remedy is provided by section 49 of the *Employment Act*.
53. Finally, it is submitted that claimant is entitled to the unlawful deduction of Kshs.121,153.10 made by respondent disguised as “Loan due to the company” which RWI failed to justify.
54. It is submitted that the deduction was illegal and unjustified and thus recoverable.
55. The court is urged to award Kshs.2,067,408/= with costs and interest at court rates.

Respondent’s Submissions

56. The respondent did not file submissions within the prescribed duration.

Analysis and Determination

57. The issues for determination are;
 - i. Whether termination of the claimant’s employment was unfair.
 - ii. Whether the claimant waived his rights to pursue further claims against the respondent.
 - iii. Whether the claimant is entitled to the reliefs sought.
58. As to whether termination of the claimant’s employment was unfair, the starting point is the legal framework on termination of employment.
59. As the claimant submits, the *Employment Act*, 2007 contains elaborate provisions on termination of employment.
60. In the words of the Court of Appeal in *Pius Machafu Isindu v Lavington Security Guard Ltd* (supra)

“ There can be no doubt that the *Act* which was enacted in 2007 places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for the termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47(5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination . . .”
61. These provisions and others have been interpreted and applied consistently.
62. Courts have been unequivocal that for a termination of employment to pass as fair, it must be substantively justified and procedurally fair. This was clearly articulated in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR, *CMC Aviation Ltd v Mohammed Noor* (2017) eKLR and *Naima Khamis v Oxford University Press (EA) Ltd* (2017) eKLR among others.
63. As explained in *Walter Ogal Anuro v Teachers Service Commission* (supra), while substantive justification relates to the reasons and justification for the termination, procedural fairness implicates the procedure employed by the employer.



64. More significantly, Section 45(2) of the Act provides:

A termination of employment by an employer is unfair if the employer fails to prove –

- a. that the reason for the termination is valid;
- b. that the reason for the termination is a fair reason –
 - i. related to the employee’s conduct, capacity or compatibility; or
 - ii. based on the Operational requirements of the employer; and
- c. that the employment was terminated in accordance with fair procedure.

Reasons For Termination

65. The termination letter dated October 2, 2017 states inter alia

“Following our letter dated July 6, 2017 and the contents therein, we regret that nothing has been forthcoming from your end and your performance has significantly dropped the most. Based on this, the management had no option but to terminate you from services as from 6th October, 2017 . . .”

66. The letter dated 6th July, 2017 under the reference performance improvement informed the claimant that management had noted with concern the significant drop in his monthly sales and reduction in the number of customers.

67. The claimant was called upon to explain the reasons for the diminishing performance.

68. It is unclear how the respondent determined that the claimant’s performance was diminishing and what mechanism it put in place to enhance his performance.

69. This is informed by the fact that the respondent did not produce any record of the claimant’s performance by way of sales record or list of customers, neither those of the claimant’s colleagues for comparative purposes.

70. In Jane Samba Mukala v Ol Tukai Lodge Ltd (supra), the court expressed itself as follows

- “(a) Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the Employment Act, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.
- (b) It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.
- (c) Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation



on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.

- (d) In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.”

71. The court is guided by these sentiments.
72. In the instant case, the respondent did not have a policy as contemplated by section 8 of the *Employment Act* or a performance Management System or simply an appraisal system.
73. Although, RWI confirmed on cross-examination that the claimant’s employment was terminated for under performance, the witness testified that neither the contract of employment dated February 5, 2004 nor any other document contained the targets the claimant was supposed to meet per month.
74. Even in the absence of a policy, the respondent could have given its case more traction by availment of monthly records of the claimant’s sales for a significant period of time to demonstrate the declining list of customers and sales.
75. In the absence of statistical data on the claimant’s performance vis-à-vis the targets set, it would be an exercise in futility for the respondent to urge the court to find that it had a valid reason to terminate the claimant’s employment as prescribed by law.
76. The respondent made no effort to unpackage the purported ground of termination of the claimant’s employment for the claimant to rebut. It was exceedingly general.
77. For the above stated reasons, it is the finding of the court that the respondent has on a balance of probabilities failed to establish that it had a valid and fair reason to terminate the claimant’s employment on 2nd October, 2017.

Procedure

78. As explained by the Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Ltd* (*supra*), section 41 of the *Employment Act* provides a mandatory and elaborate process which an employer must comply with for a termination of employment to pass the fairness test.
79. The specific elements or steps were enumerated by the Court of Appeal in *Postal Corporation of Kenya v Andrew K. Tanui* (2019) eKLR 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 or termination is made.
 - iv. hearing and considering any representations made by the employee and the person chosen by the employee”
80. The court is guided by these sentiments.



81. In the instant case, the claimant testified that he was not invited for the meeting slated for October 2, 2017 and did not attend.
82. RWI confirmed on cross-examination that the claimant was present at the meeting and his name appears on the list of attendees of the meeting as captured by the respondent's witness who testified that she took the minutes at the meeting.
83. Puzzlingly, in his reply to the respondent's Memorandum of defence, the claimant appear to suggest that he attended the meeting but avers that "he was not allowed to be accompanied by an employee or an official of the union . . ." The draft minutes were not signed by any of the participants.
84. The claimant confirmed on cross-examination that he was not a member of the trade union and his payslips had no deductions of any membership or agency fee as necessary.
85. Be that as it may, RWI confirmed that the claimant was not given notice of the meeting and was not accompanied by a colleague or union member.
86. In *Postal Corporation of Kenya v Andrew K. Tanui* (*supra*), the court state as follows;
- "It is our further view that section 41 provides the minimum standards of a fair procedure that an employer ought to comply with . . ."
87. Without an invitation letter setting out the reasons for the meeting and the requirements on the part of the claimant to attend, setting out his right to be accompanied by an employee of his choice or authenticated minutes to demonstrate what transpired at the meeting, including the evidence the claimant had to confront, the court is in agreement with the claimant's submissions that the respondent has on a balance of probability failed to establish that it complied with the provisions of section 41 of the *Employment, 2007* and so the court so finds.
88. As to whether the claimant waived his rights to pursue further claims against the respondent, it is not in dispute that the claimant signed a discharge voucher or settlement agreement on October 6, 2017.
89. The voucher tabulated the claimant's dues including severance pay for 13 years (208 days); days worked in October 2017 and prorated leave of 12 days.
90. It also shows the deductions made and the amount due to the claimant Kshs.154,933.45 paid by cheque No. 00xxx3 dated 5th October, 2017 whose receipt the claimant acknowledged on 6th October, 2017.
91. In addition, the discharge voucher states as follows;
- "I Donald Mutua have received my full and final dues during my service with Paper Converters (K) Ltd. I hereby state that I have no further claims whatsoever with Paper Converters (K) Ltd
- Date 6/10/2017
- ID No. 11xxxxx20 Sign:.....
- Witness:.....
- Signed
- Personnel Manager Judy Koech
- Date 6/10/2017 Signed:.....



Checked by:.....

Approved by:.....”

92. In addition to the claimant’s signature, the discharge voucher was signed by the Personnel Manager, RWI and two witness, one Charles Ndeti and one Muange Harrison. The claimant confirmed on re-examination that one of the signatories was a shop steward.
93. The Court of Appeal has considered the effect of a discharge voucher or settlement agreement in several decisions including *Coastal Bottlers Ltd v Kimathi Mithika* (2018) eKLR where the respondent had signed a discharge voucher or payment certificate and admitted having received the amount indicated in full and final settlement of his dues and had no further claims against the appellant. The trial court had entered judgement for the claimant. The court allowed the appeal with costs.
94. The law on the effect of a discharge voucher or settlement agreement or payment certificate has been addressed in several decisions.
95. In *Krystalline Salt Ltd v Kwekwe Mwakele & 67 others* (2017) eKLR, the Court of Appeal stated as follows;
- “ . . . It is important to bear in mind that in Kenya, employment is governed by the general law of contract as much as by the principles of common law now enacted and regulated by the Employment Act and other related statues. In that sense, employment is seen as an individual relationship negotiated between the employee and the employer according to their needs.”
96. In *Coastal Bottlers Ltd v Kimathi Mithika* (*supra*), the court had this to say in relation to discharge vouchers or settlement agreements.
- “Whether or not a settlement agreement or 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 import of such discharge/agreement; and secondly, whether the same was voluntarily executed by the concerned parties.
- As such, we respectfully disagree with the submissions made on behalf of the respondent to the effect that this court in the Thomas De La Rue case found such agreements could not bar further claims. Our understanding of that decision is that the court simply stated that the answer lay with the facts of each case. In its own words, this court in the aforementioned case expressed: . . . The court has in each and every case, to make a determination if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge.”
97. Finally, in *Trinity Prime Investment Ltd v Leon of Kenya Insurance Co. Ltd* (2015) eKLR, the Court of Appeal stated as follows;
- “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 want payment quickly and execution of the voucher was free of misinterpretation, fraud or other. The appellant was thus fully discharged.”



98. The enforceability or otherwise of a discharge voucher or settlement agreement is interwoven with the intentions of the parties to the agreement as observed by Sir Charles Newbold P in *Damondar Jhabhai & Co. Ltd and another v Eustace Sisal Estates Ltd* (1967) EA 153.

“The function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement . . .”

99. In *Coastal Bottlers Ltd v Kimathi Mitbika* (*supra*), the court concluded as follows;

“Apart from tabulating the respondent’s entitlements, the settlement agreement also read in part . . . In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the Appellant from any further claims under the contract of employment and even in relation to the respondent’s termination. It is instructive to note that the respondent never denied signing the said agreement or question the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent’s part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a building contract between the parties . . .”

100. The court is bound and guided by these sentiments.

101. The above sentiments apply on all fours to the facts in the instant case.

102. Instructively, the memorandum of claim makes no reference to the existence of a discharge voucher or settlement agreement or allegations that it was executed under duress, undue influence, trickery, misrepresentation or compulsion, terms used by the claimant in his reply to the memorandum of defence dated 25th November, 2021.

103. More significantly, neither the written statement nor the oral testimony advert to the duress, trickery, undue influence, compulsion or misrepresentation pleaded four (4) years after the suit was filed.

104. As adverted to elsewhere in this judgement, the claimant confirmed on re-examination that one of the signatories of the discharge voucher was a shop steward ostensibly representing the interests of the claimant. In addition, there was another witness by the name Charles Ndeti.

105. The respondent was represented by Judy Koech, RWI, the Personnel Manager.

106. The claimant tendered no scintilla of evidence of who exerted the alleged duress, undue influence, trickery or misrepresented the import of the settlement agreement dated 6th October, 2017.

107. The claimant confirmed having received his full and final dues from the respondent and had no further claims against it.

108. This was a binding agreement which effectively discharged the respondent from further claims by the claimant.

109. The claimant’s submission that he received part payment of his terminal dues is not supported by any evidence. The claimant adduced no evidence of the alleged protest, how it was made and to whom, and why after the alleged protest he accepted the cheque and encashed it.



110. For the reasons stated above, it is the finding of the court that the discharge voucher or settlement agreement dated October 6, 2017 was binding on the parties thereto and discharged the respondent from any further claims by the claimant rendering the suit herein incompetent.

Reliefs

111. Having found that the settlement agreement between the claimant and the respondent was a binding agreement, the claimant is not entitled to any of the reliefs sought, having admitted on cross-examination that he received the certificate of service.

112. In the final analysis, the suit herein is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21ST DAY OF SEPTEMBER 2022

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 15th March 2020 and subsequent directions of 21st 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.

DR. JACOB GAKERI

JUDGE

