



**Mwangi v Multiple Haulier (Ea) Limited (Cause 293 of 2018)
[2022] KEELRC 12978 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12978 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 293 OF 2018
JK GAKERI, J
OCTOBER 27, 2022**

BETWEEN

PAUL GACAGUA MWANGI CLAIMANT

AND

MULTIPLE HAULIER (EA) LIMITED RESPONDENT

JUDGMENT

1. The claimant commenced this suit by a memorandum of claim filed on March 13, 2018 alleging that he was unlawfully, wrongfully and unfairly terminated from employment by the respondent.
2. The claimant avers that he was initially employed by the respondent on November 24, 2010 and summarily dismissed on December 5, 2012 but apologised and was re-employed on June 26, 2013 under a new contract.
3. The claimant further avers that on November 23, 2015 while on the way from Burundi to Nairobi, the truck he was driving run out of fuel and the same was supplied by the respondent. That on arrival, his employment was terminated allegedly for having stolen fuel. The dismissal was summary and he had no opportunity to defend himself and no termination letter was issued.
4. It is the claimant's case that he was paid terminal dues on November 23, 2015 less Kshs 9,900/= for the fuel he had allegedly stolen and was not paid salary in lieu of notice.
5. The claimant prays for;
 - i. A declaration that termination of the claimant by the respondent was unfair and unlawful.
 - ii. Damages for unfair, unlawful and wrongful termination equivalent to 12 month's salary Kshs 304,596/=
 - iii. One month's salary in lieu of notice Kshs 25,383/=



- iv. Kshs 9,900/= deducted for the diesel allegedly stolen.
- v. Costs of the claim.
- vi. Interest.

Respondent's case

6. The respondent's response on file attached to receipt number 0140836 dated April 19, 2018 Civil Case No 293 of 2018 belong to ELLC Cause No 2172 of 2017, [Martin Mwanzia Nguni v Multiple Hauliers Ltd.](#)
7. The correct response was served upon the claimant who filed a reply to response to memorandum of claim.
8. The claimant denies the allegations that he resigned from employment.

Claimant's evidence

9. The claimant's written statement replicates the contents of the memorandum of claim.
10. On cross-examination, the claimant confirmed that after the initial dismissal in 2012, he apologised on his own volition.
11. The claimant further confirmed that the respondent had a policy for drivers and the same had been given to him.
12. He testified that he was unaware of the number of drivers who were on the Nairobi-Burundi-Nairobi route at the time. That he had been briefed about the route and the vehicle had been fueled.
13. It was his evidence that the vehicle he was driving run out of fuel. He confirmed that he was paid Kshs 47,000/= less the amount for the fuel and signed the document on record dated November 23, 2015 voluntarily, and accepted the amount paid.
14. On re-examination, the witness testified that he did not resign but his employment was terminated by the respondent.

Respondent's evidence

15. RWI, Joshua Ochilo testified that he had been in the respondent's employment since 2012 and knew the claimant as one of the respondent's truck drivers. it was his evidence that the respondent had a drivers journey management policy and the claimant was aware of it. it covered *inter alia* drivers academy, *per diem*, fuel and route survey.
16. It was his testimony that 60-80 trucks of the same type were involved and only 7 drivers required additional fuel which the respondent characterised as misconduct since others did not and the 7 drivers were summarily dismissed.
17. On cross-examination, the witness confirmed that he had not filed the alleged policy. It was his testimony that summary dismissal does not require a disciplinary process. That all dues were paid except the one-month notice pay and Kshs 9,900/= that was deducted for the fuel allegedly stolen and no termination notice was given.



Claimant's submissions

18. The claimant identifies three issues for determination including costs.
19. As to whether the respondent had a valid reason to terminate the claimant's employment, reliance is made on the decision in *Pius Machafu Isindu v Lavington Security Guards Ltd* (2017) eKLR and *Kennedy Mutuku Mwove v M-Kopa Kenya Ltd* (2021) to urge the requirements of section 43(1) and 45 of the *Employment Act* on the burden of proof of the employer.
20. It is urged that the respondent led no evidence that only 7 drivers were fired and that there were other drivers on the same route.
21. That the claimant had testified that the route had changed and was new.
22. That the claimant worked diligently until he was unprocedurally dismissed.
23. It is the claimant's case that although his dues were paid, one month notice pay was not and Kshs 9,900/= was deducted from the amount paid.
24. That he was not taken through a disciplinary process as required by law.
25. The decisions in *Godfrey Barasa Ochieng v Security Guards Ltd* (2022) eKLR and *Co-operative Bank of Kenya Ltd v Yator* (2021) eKLR are relied upon to demonstrate the essence of procedural fairness irrespective of the mode of termination and RWI confirmed that the respondent did not conduct any hearing.

Respondent's submissions

26. The issues identified are whether termination of employment was unlawful and entitlement to reliefs.
27. As regards termination of employment, it is urged that the claimant did not follow the protocols and procedures spelt out by the respondent.
28. Reliance is made on the Court of Appeal decision in *Judicial Service Commission v Gladys Boss Shollei & another* (2014) for the proposition that the sanction must be proportional to the misconduct having regard to the circumstances of the case.
29. It is urged that failure by the claimant to abide by the respondent's policies entitled the respondent to take action against him as provided by section 44 of the *Employment Act*. The decision in *Amos Kivite Kitavi v Kenya Revenue Authority* (2020) eKLR is relied upon to urge that the respondent had reasonable ground to suspect that the claimant had committed a criminal offence. That the claimant's dismissal was warranted. The decision in *Thomas Sila Nzivo v Bamburi Cement Ltd* (2014) eKLR was also relied upon to buttress the submission.
30. It is submitted that the claimant is not entitled to the reliefs sought as he has failed to demonstrate that he was unfairly terminated from employment.
31. The decisions in *George Okello Munyolo v Unilever Kenya Ltd* (2019) eKLR and *Kipkebe Ltd v Peterson Ondieki* (2016) eKLR are also relied upon to urge that the claimant had not discharged the burden of proof and his claim should thus fail.

Determination

32. The issues for determination are;



- i. Whether termination of the claimant's employment was unfair.
 - ii. Whether the settlement agreement or discharge voucher dated November 23, 2015 discharged the respondent from further liability to the claimant.
 - iii. Whether the claimant is entitled to the reliefs sought.
33. As to whether termination of the claimant's employment was unfair, the starting point is invariably the provisions of the *Employment Act*, 2007 on termination of employment.
 34. Needless to emphasize, sections 41, 43, 44, 45 and 47(5) generally embody the gamut of the law on termination of employment other than by redundancy which is specifically addressed by the provisions of section 40 of the *Act*.
 35. These sections provide for justification of termination of employment, burden of proof of the employer and employee, procedural requirements and examples of circumstances that may warrant summary dismissal from employment.
 36. Leading the park is section 45 of the *Act* which provides that for a termination of employment to be deemed fair, the employer must prove that it had a fair and valid reason for the termination of the employee's employment and must have conducted it in accordance of fair procedure.
 37. These requirements apply for all forms of termination of employment including summary dismissal.
 38. The prerequisites of a fair termination of employment were also elaborated upon by the Court of Appeal in *Naima Khamis v Oxford University Press (EA) Ltd* (2017) eKLR and *CMC Aviation Ltd v Mohammed Noor* (2015) eKLR and by Ndolo J in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR.
 39. These decisions are categorical that for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair.
 40. I will now proceed to apply the law to the facts of the instant case.

Reason for termination

41. It is common ground the claimant was a truck driver employed by the respondent. It is also not in dispute that on November 23, 2017 while enroute to Nairobi from Burundi, his truck run out of fuel and the respondent supplied the fuel needed after the claimant called the office. The rival submissions are centred on the evidence on record. While the claimant urges that the respondent led no evidence of other trucks or drivers, the respondent urges that it had reasonable ground to suspect foul play by the claimant and 6 other drivers and dismissed them summarily.
42. Although the claimant submitted that the route had been changed, he led no such evidence. Neither the written statement nor the oral testimony make reference to a new route or any other challenge faced on the way to or from Burundi.
43. Instructively, the claimant is reticent on the place at which fuel run out or when he discovered that fuel was running out.
44. Relatedly, the claimant admitted that he was well versed with the respondent's drivers journey management policies and had a copy and the truck he was using had been fueled before the journey commenced.



45. The respondent appear to have been convinced that the claimant was engaged in fuel siphoning or other form of misconduct. Would such conduct warrant summary dismissal?
46. Drivers of cargo trucks are entrusted not only with the cargo to be conveyed, but the truck which is a humongous investment by the employer. There exists between the parties a high degree of trust and confidence and if broken, the employer may be justified to terminate the employment.
47. Judicial authority has it that the employer need not prove that theft of fuel or other criminal act has been committed by the employee, reasonable suspicion is sufficient as emphasized in *Amos Kitavi Kivite v Kenya Revenue Authority* (Supra) where the court stated as follows;

“ Having carefully considered the evidence and the submissions presented by the parties, I am satisfied that the respondent had reasonable grounds of suspecting or concluding that the claimant had committed a criminal offence against her to her detriment. The said offence amounted to gross misconduct within the meaning of section 44(4)(g) of the *Employment Act* . . .”
48. The court is guided by these sentiments.
49. Similar sentiments were also expressed in *Thomas Sila Nzivo v Bamburi Cement Ltd* (Supra).
50. Barring driving styles and other imponderables, a long distant transportation company such as the Respondent must have been aware of the amount of fuel required to and from Burundi. This would perhaps explain the speed at which the termination was affected.
51. Similarly, section 43(1) of the *Employment Act* provides that

The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.
52. For the foregoing reasons, the court is satisfied and finds that the respondent had a valid and fair reason to terminate the claimant’s employment.

Procedure

53. As observed by the Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Ltd* (Supra), section 41 of the *Employment Act* provides a mandatory process to be complied with in cases of termination of employment, including summary dismissal.
54. There is no gainsaying that the claimant was not taken through the procedures envisaged by section 41 of the *Employment Act* or at all. RWI confirmed as much on cross-examination.
55. As explained in *Naima Khamis v Oxford University Press (EA) Ltd* (Supra), non-compliance with the procedural prescriptions of Section 41 renders a termination of employment unfair for want of procedural propriety.
56. It is the finding of the court that the Respondent did not abide by the provisions of the *Employment Act* germane to termination of employment which rendered the same procedurally unfair and the court so finds.
57. As to whether the settlement agreement or discharge voucher discharged the respondent from further claims by the claimant, the homeport is the law on discharge voucher/settlement agreements.



58. It is common ground that the claimant signed the settlement agreement/discharge voucher dated November 23, 2015 and on cross-examination the claimant confirmed that he signed the document voluntarily.

59. The jurisprudence on settlement agreement/discharge vouchers is firmly rooted in the law of contract and is thus applicable to employment contracts.

60. In *Krystalline Salt Ltd v Kwekwe Makele and 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 statutes. In that sense, employment is seen as an individual relationship negotiated between the employee and the employer according to their needs.”

61. In *Coastal Bottlers Ltd v Kimathi Mitbika* (2018) eKLR, the Court of Appeal stated

“ Whether or not a settlement agreement or a discharge voucher bars a party 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 a discharge/agreement; and secondly, whether the same was voluntarily executed by the concerned parties.”

62. Similar sentiments were expressed in *Thomas De La Rue (K) Ltd v David Opondo Omutelema* (2013) eKLR

“ . . . 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 relevant information and knowledge.”

63. The effect of a discharge voucher or settlement agreement was explained by the Court of Appeal in *Trinity Prime Investment Ltd v Lion of Kenya Insurance Co. Ltd* (2015) eKLR 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 wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged.”

64. In the instant case, apart from tabulating the claimant’s entitlements such as salary for November 2015, leave and service pay, the settlement agreement stated as follows;

“ This is to confirm that I Mr Paul Gacagua Mwangi (Driver of (KBN 448V) of ID No 11129083 Payroll Number PR 823 has received Kshs (37,440) (Thirty seven thousand four hundred and forty shillings only) on November 23, 2015 being payment of my full and final dues payment from Multiple Hauliers EA Ltd as detailed below:

Re: Acknowledgement

I hereby confirm and acknowledge that, with this payment, I have no further claim(s) from the company or its agents. I also confirm, accept and sign that my terminal exit dues have been fairly computed as per the *Employment Act*, 2007.



Name: Paul Mwangi G Date November 23, 2015

Signature: Signed

Witnessed by: Joshua Ochilo HR Manager.

65. By this settlement agreement, the parties appear to have agreed that payment of the sum stated therein would discharge the respondent from any further claims under the contract of employment and in relation to the termination of employment and as adverted to elsewhere in this judgement, the claimant testified that he signed the document voluntarily and did not question its authenticity or lead evidence of misrepresentation of the contents or incapacity to comprehend its import, coercion or duress.
66. This proposition finds support in *Moses Gichohi Gateru v Njuca Consolidated Co Ltd* (2019) eKLR where Nzioki Wa Makau J stated as follows;
- “A contract can only be vitiated on the grounds of coercion, mistake or fraud, misrepresentation, undue influence and illegality . . . I do not discern any intention for the claimant not to be bound by the discharge he executed.
67. For the foregoing reasons, the court is satisfied and finds that the settlement agreement dated November 23, 2015 was a binding agreement between the claimant and the respondent which discharged the respondent from further claims by the claimant.

Reliefs

68. Having found that the settlement agreement dated November 23, 2015 was a legally binding agreement between the parties, the claimant waived his rights to pursue further claims against the respondent.
69. In the premise, the suit herein is not sustainable against the respondent.
70. It therefore follows that the claimant is not entitled to the remedies sought.
71. In the end, the claimant’s suit is unmerited and is accordingly dismissed.
72. Parties to bear own costs.
73. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF OCTOBER 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

