



Ndiritu v H Young & Company (East Africa) Limited (Employment and Labour Relations Appeal E078 of 2020) [2022] KEELRC 13006 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 13006 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E078 OF 2020**

**MN NDUMA, J
OCTOBER 27, 2022**

BETWEEN

JOHN GITONGA NDIRITU APPELLANT

AND

H YOUNG & COMPANY (EAST AFRICA) LIMITED RESPONDENT

(Magistrate's Court at Milimani CMELR CAUSE NO. 455 OF 2018)

JUDGMENT

1. The facts of this case are simple. The claimant was employed by the respondent as a long-Haul driver on November 10, 2004. The claimant worked continuously for the respondent until he voluntarily resigned from employment on March 29, 2018.
2. Upon tendering his resignation, the respondent calculated the claimant's terminal dues and on April 18, 2018, the respondent issued the claimant with a terminal dues payslip for Kshs 449,343.
3. However, on August 14, 2018, the respondent issued the claimant with a cheque No XXX for Kshs 156,198 in part payment of the terminal dues.
4. The respondent declined to pay the balance despite service of demand notice and reminders. The balance claimed was Kshs 293,145.
5. The respondent testified that it had computed terminal dues owing to the claimant at Kshs 418,852 in error in the mistaken belief that the claimant was a union member and was entitled to gratuity by fact of being a union member.
6. That the respondent discovered later that though the employer consistently deducted union dues from the salary of the claimant he was not a union member and in fact, his contract of employment had prohibited him from joining the union.



7. The respondent testified that, at most, the claimant would have been entitled to refund of union dues deducted over time but not to payment of gratuity payable to union members. That in any event, if the claimant was a union member, the collective agreement disallowed payment of gratuity to an employee upon resignation under clause 19(b) thereof. The respondent testified that the claimant had on August 16, 2018 freely and voluntarily acknowledged receipt of his dues and absolved the respondent from any further liability.
8. The respondent/appellant filed the appeal against the judgment of Hon P Ngare Gesora, the chief magistrate Milimani Court, Nairobi dated April 30, 2020.
9. In his very brief judgment, the learned trial magistrate analysed the facts of the case and found as follows:

' The only issue for consideration is whether the claimant was a member of the union so as to qualify for the sums claimed herein. The claimant produced payslips showing that deductions were made and remitted. This qualified him to draw the full amount that was assessed being Kshs 449,343. The signing of the discharge does not take away the claimant's right to be paid the full amount.'
10. The court went ahead to award the claimant the unpaid balance of Kshs 293,145.
11. In his testimony before the court, the claimant testified that:-

'I was advised to write a resignation and they accepted to pay me my dues. The calculation for my dues comes to 449,343. I was told to wait for three months.'
12. The claimant testified that he was a member of the union but was not aware of the collective agreement.
13. DW 1 Eunice W Ng'ang'a testified that they had initially calculated the gratuity at Kshs 418,8562 in error but upon realizing the error, they paid the claimant Kshs 156,198.
14. DW 1 testified further-

' There was a collective bargaining agreement for unionisable employees. According to clause 18(4) (6) an employee who resigns is not entitled to gratuity. He never informed the respondent that he was diabetic.'
15. Under cross-examination, DW 1 admitted that the discharge was not signed by the employer. DW 1 admitted that union dues were deducted from the claimant in error.
16. A careful analysis of the facts in this case show that the claimant desired to retire at 50 years of his employment but his request was declined by the employer and he was advised to resign which he proceeded to do. The court is satisfied that, the claimant was a union member and the respondent had all along deducted and remitted his union dues. The court is satisfied that the claimant had no knowledge of the collective agreement at the time.
17. The letter of resignation produced before the trial court dated March 5, 2018 shows that the claimant had resigned for 'personal reasons' and was not due to any health condition.
18. In terms of clause 19 of the collective agreement titled retirement/terminal benefits is provided that: -

' (b)) An employee who resigns for reasons other than certified ill health or old age or is dismissed summarily for any lawful cause, shall not be entitled to gratuity.'



19. There is no evidence that the claimant was aware of the collective bargaining agreement and clause 19(b) in particular at the time the respondent advised him to resign and calculated his terminal benefits which included payment of gratuity. The court is satisfied that the claimant left the employment in full believe and legitimate expectation that he would be paid the full terminal benefits calculated by the respondent and in respect of which, payment was deferred for three months.
20. The circumstances of this case lead the court to the conclusion that by fact of the legitimate expectation arising from a written promise to the claimant that he would be paid Kshs 449,343, in three months' time, upon his resignation, the respondent was estopped from renegeing from that promise. The unsigned discharge could not supersede, the promise to pay terminal benefits reduced into writing voluntarily and served on the claimant before he left his employment. The decision of the court in *Coastal Bottles Limited -vs- Kimathi Mithika (2018) eKLR*, is not applicable to the circumstances of this case. The purported discharge in this case did not amount to an agreement between the claimant and the respondent the same having not been executed by both parties from the testimony of DW 1.
21. Accordingly, the court finds that the appeal lacks merit and upholds the decision of the trial court.
22. In the final analysis, the court enters judgment in favour of the respondent as against the appellant in the sum of Kshs 293,145 plus interest at court rates from the date of judgment of the trial court till payment in full.
23. The court also awards costs to the respondent in the trial court and this court.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 27TH DAY OF OCTOBER, 2022.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr Burugu for Appellant

Obel & Co Advocates for the respondent

Ekale: Court Assistant

