



**Khalumi v Emco Billets & Steel Limited (Cause 2338 of 2017)
[2022] KEELRC 13063 (KLR) (1 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13063 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2338 OF 2017
AN MWAURE, J
NOVEMBER 1, 2022**

BETWEEN

PETER BARASA KHALUMI CLAIMANT

AND

EMCO BILLETS & STEEL LIMITED RESPONDENT

JUDGMENT

Claimant case

1. The Claimant filed his memorandum of claim dated November 22, 2017 and he states that he was employed by the Respondent on June 1, 1998 as a cleaner.
2. He says he rose through the ranks to become a supervisor. He says in 2001 he left his employment due to stoppage of production.
3. He says in 2007 he was re absorbed back to work and worked as a supervisor until 2016 when he was wrongfully terminated on a false allegation of theft. He says at the time of termination he was earning Kshs 26,000/- per month. The Claimant says that due to his hard work he was sent to DRC Congo twice on December 17, 2007 and 5/1/2009 to Respondent's sister company.
4. He says that on September 20, 2017 he was called by plant manager Mr Mohamed who asked him where Mr Rakesh the electrician was. He informed Mr Mohamed that he did not know. He says that later on Mr Rakesh assaulted him apparently for what he had told the production manager.
5. On October 8, 2016 he was arrested on allegations of theft but was never charged. He further says he was out of work on October 10, 2016 but was recalled on October 26, 2016 until October 30, 2016.
6. He claims he reported to work on October 31, 2016 and was denied entry into the premises. He says he tried to enquire from Mr Joab Mwangi the Human Resource Manager why he was locked out of work but did not get any information.



7. The Claimant says he never went on leave and was never paid for overtime or house allowance. He says the decision to dismiss him was unfair and unlawful and also inhuman.
8. The Claimant now prays to be paid his terminal dues as per his claim and to be issued with a certificate of service.

Claimant's Evidence in Court.

9. The Claimant in his evidence in Court on June 29, 2022 said he was employed by the Respondent in 1998 to 2001 and again in 2007 up to 2017. He says he never got a letter of employment. He says at the time of termination he was earning Kshs 30,000/-.
10. He says he was terminated without cause and was only paid the outstanding three months' salary. He says he signed a discharge voucher because he was told if he did not sign he would not get his salary which had been outstanding for three months. He says he had no choice but to sign the same. He says the discharge voucher he signed is dated 7/12/2016 and he got Kshs 48,987/-. He also says house allowance was not part of his salary.
11. Respondent did not file a response despite the respective parties consenting to allow him to file his response. Similarly he did not present any witness before the honourable Court.

Claimant's submissions

12. The Claimant in his submissions says the Respondent unfairly terminated his employment and he was never informed the reason for his dismissal. He was arrested for theft of a motor vehicle but the Respondent never adhered to the provisions of Section 41(1) of the *Employment Act*.
13. They place reliance on the case of *Hosea Akunga Ombwori vs Bidco Oil Refineries Limited* (2017) eKLR where Court held:-

“to satisfy the requirements of Section 41 of the *employment act*, 2007, an employer issues what is called in ordinary parlance a show cause notice/letter. Such a letter or notice should outline the allegations or charges against the employee and also request him to respond within a reasonable time.

The notice also ought to inform the employee that disciplinary action which might lead to terminating of employment is under consideration. In other words, the notice should be set out in clear terms.”

14. The Claimant avers that the Respondents never heard or considered any representations of the Claimant before terminating his employment.
15. As for the signing of the discharge voucher by the Claimant the Claimants relied on the case of *Nichola Mwangangi Waua vs Samax Limited* (2021) eKLR where Court held that:-

“it is clear there was no agreement on the dues of the Claimant from the Respondent and that the Claimant signed the discharge voucher out of desperation and apprehension that he would not receive any pay unless he signed he discharge voucher.”

The Claimant in short prays that the Court makes a declaration that the Claimant was unlawfully dismissed from his employment and is entitled to the reliefs prayed.



Respondent's submissions

16. The discharge voucher dated December 7, 2016 that is part of the Claimant's documents filed in the Court states in part:

“I Peter Barasa agree to accept the sum of Kenya shillings forty eight thousand nine hundred and thirty seven (kshs 48,937/-) in full settlement and satisfaction of my claim against the employer from all claims past present and future including all claims under the law of contract”
17. The Claimant then signed an acknowledgment of receipt of final dues. He says that it is clear client did not plead any vitiating factors in his memorandum of claim. He did not allege he was unduly influenced to execute the discharge voucher and acknowledgment. He did not deny signing the documents or receiving the payment.
18. They are relying on the case of *Rongai Tile & Sanitary Wares Limited vs Commissioner of Domestic taxes* (Tax Appeal E011 of 2020) where Court held that allegation of vitiating factors does not amount to proof. The Claimant must proof the factors alleged.
19. Respondent also avers Claimant filed suit almost a year since signing the discharge voucher and so was like an afterthought.

Determination

20. The issue for determination is basically whether the Claimant was unfairly terminated from his employment and if so is he entitled to the reliefs sought.
21. The Claimant's evidence is that he was employed by the Respondent from June 1, 1998 up to 2001 when productions stopped. He says he was recalled in 2007 until 2016 when he was now unlawfully and wrongly terminated. He says he was incriminated on a charge of theft and was arrested but no charge was preferred against him.
22. The law is settled that an employer who terminates employment of an employee must give a valid reason or reasons for terminating the employee. It is not in contention that the Claimant was an employee of the Respondent.
23. On or about November 2016 his employment with the Respondent came to an end. Since there are no documents it is not clear how the Claimant was terminated. He just claims that when he reported to work on October 31, 2016 he was locked out of the premises. He says he tried to inquire from the human resource manager Mr Joab Mwangi but he could not explain to him why he was locked out.
24. The other documents in Court are now the discharge voucher dated December 17, 2016 and acknowledgment of cheque of kshs 48,937/- being his dues. The letter said he had no other claim of arrears from the Respondent or liabilities.
25. It is Claimant's evidence that he was locked out of his employment with effect from October 31, 2016 and the voucher is signed on December 17, 2016 for salary of September, October and November 2016.
26. In the first place it was wrong for the Respondent to delay the employee's salary for three months. The Court has said this time and again that failure to pay an employee his salary is a fundamental breach of *Employment Act* and of the employee's human rights.



27. The Claimant was terminated from his employment without any valid reason. In fact the Respondent did not produce any evidence oral or documentary to establish the grounds for termination of the Claimant from his employment. In fact Claimant says he was first arrested on charges of theft and then was locked out of the premises and that is how his employment came to an end.
28. The Respondent contravened the requirements of Sections 41 of the Employment Act 2007 and Section 45 of the said act. Part of Section 41 of Employment Act states
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 a 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.
- And Section 45 says as follows:
1. No employer shall terminate the employment of an employee unfairly.
 2. 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 employees 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.”
29. There are now numerous authorities to support that the employer cannot just terminate the employment of an employee without a valid reason. If an employer fails to give a valid reason then the termination of his employee must be deemed to be wrongful and unfair.
30. In the case of Loice Otiemo vs Kenya Commercial Bank Cause No 1050 of 2021 the Court held that summary dismissal even in face of a fundamental breach of the employment contract obligations or gross misconduct must not be resorted to without complying with procedural fairness/natural justice. An employer who summarily dismisses his employee without a hearing will be falling a foul of Section 41 (2) of the Employment Act. Similarly the Court must add that an employer who dismisses or terminates his employee without a valid reason fails on the substantial justification test and must be held to have terminated his employee wrongfully and unlawfully.
31. Indeed the Court has considered the evidence, pleadings and submissions of the parties and is persuaded the respondent terminated the Claimant’s employment wrongfully and unlawfully. Consequently judgment is entered in favour of the Claimant.
32. As pertains to a discharge voucher signed by the Claimant the Court would like to comment on the same. The Claimant was locked out of his employment on October 31, 2016 and for three months he had not received his salary. It was on December 17, 2016 when he had to sign the discharge voucher exonerating the Respondent of any other liability and so his salary in arrears was paid.
33. The Respondents have cited the case of Rongai Tiles & Sanitary Works Limited vs Commissioner of Domestic Taxes (*supra*) where Court held that allegations of vitiating factors does not amount to proof. The Court further found that even if amounts paid are less than due client can be bound by



the discharge voucher if signed voluntarily. But each case in matters of discharging an employer really depend on the circumstances of each case.

34. But the other side is as held in the case of *Coastal Brothers Limited vs Kimathi Imithiki* 2018 eKLR where Court held “ whether or not a settlement agreement or discharge voucher bars a party thereto from making further claims depends on the circumstances of each case.

35. In the case of *Thomas De la Rue vs David Opondo Omotelemi* 2013 JELR the Court held:-

“we would agree with the trial Court that a discharge voucher does not necessarily absolve an employer from statutory obligation and that it cannot preclude the industrial Court from enquiring fairness of a termination.

36. Even if Claimant signed the discharge voucher it is clear from records he was owed salary for 3 months. He was not going to be paid his salary unless he signed the discharge voucher. What choice did he have?

37. The Court will not allow a glaring injustice to be done on the guise that a Claimant who is really at a great disadvantage consented to the underpayment. The circumstances in this case justify the Court to disregard the discharge voucher. The Court is convinced the Claimant is entitled to more claims than the salary he was paid which he had already earned being only for the three months he worked. Further Court finds Claimant was unlawfully and wrongfully terminated and judgment is entered in his favour.

38. I grant the following remedies.

1. 1 month salary in lieu of notice Kshs 26,000/-
2. Unremitted NSSF is not proved and the specific amounts unremitted are not provided.
3. Unpaid leave is a specific prayer and is not proved
4. House allowance is also not proved and Claimant did not ask for it in the years he worked for the Respondent.
5. General damages awarded are 5 months’ salary equivalent 130,000/-
Costs of the suit are awarded to the Claimant.
Total award is Kshs 156,000/-
Interest is also to be paid on the decretal sum from date of judgment until full payment.
6. Claimant also to be issued certificate of service 30 days from today’s date

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 1ST NOVEMBER, 2022.

ANNA NGIBUINI MWAURE

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 had 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.

ANNA NGIBUINI MWAURE

JUDGE

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