



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2000 OF 2015

(Before Hon. Justice Dr. Jacob Gakeri)

THOMAS OTIENO OLUOKO.....CLAIMANT

VERSUS

UZURI FOODS LIMITED (GOLDEN HARVEST MILLS).....RESPONDENT

JUDGMENT

1. The Claimant instituted this suit by a memorandum of claim dated 9th November 2015 and filed on 10th November 2015 praying for terminal dues and compensation for unfair termination and injuries sustained at the work place.
2. The Claimant's case is pleaded as follows: That he served the Respondent diligently from 2006 to 19th June 2014 when he was terminated. That on 10th August 2013 at 6.00 pm as he checking off the workplace, at the gate he was found with tapes in his pockets yet he did not deal with them at the work station. That he wrote a statement about the incident. That the Supervisor who was at the gate changed the word taken to stolen and the Claimant refused to sign the letter.
3. It is further averred that on 18th June 2014 a colleague came to his work station to draw samples of flour being produced. That the machine went off when the door was opened. The Claimant avers that he advised the staff to collect samples from the last stage of the process but the member of staff refused and opened the door and the machine went off and he could not meet the day's target.
4. It is further averred that on 19th June 2014, the machine ran out of material (paper), that he requested the Supervisor to assign an officer to bring paper to him but no action was taken and the machine stopped. The Supervisor inquired about the stoppage and the Claimant explained the shortage of materials.
5. That at around 3 pm on the same day, the main Supervisor and a sub-contractor went to the Claimant's work station. That the Supervisor held his hand and took him to the Manager who told him to go home and report back on 21st June 2014 to meet the Director. The Director was unavailable on 21st June 2014 and returned on 23rd June 2014 on which date he was informed to report back on 27th June 2014, on which date he was given a dismissal letter dated 22nd June 2014. That he was paid Kshs.16,000 as terminal dues.
6. That attempts by the Union to have the matter settled failed because the Respondent did not respond to letters written to it. The Union's letter dated 3rd July 2014 and the Minister's letter of 3rd September 2014 elicited no response.
7. It is further averred that on or about 18th May 2013, the Claimant while working on the glue pot was injured when hot glue gashed out of the pipe owing to the Respondent's negligence. That the Technician did not tighten the lid properly. The particulars of negligence include –
 - (a) Failure to provide protective gear/equipment
 - (b) Failure to provide a safe working environment
 - (c) Employing careless technician who failed to tighten the lid properly causing the accident
 - (d) Failure to provide safety equipment.
8. That as a consequence the Claimant suffered severe burns on two fingers of the right hand and had swollen, tender bruise.

9. It was also averred that the termination of employment on 22nd June 2015 allegedly under Section 44(4)(g) of the Employment Act was unlawful for want of –(i) Show cause letter before dismissal

(ii) Reason for termination

(iii) Opportunity defend himself

(iv) Fairness

10. The Claimant prays for –

(a). One (1) month's salary in lieu of..... Kshs.13,044.00

(b). Unpaid leave

(at 26 days per x 13,044)..... Kshs.104,352.00

(c).. Leave pay for 8 years..... Kshs.104,352.00

(d). Unfair termination at 12 months' gross salary

(13,044 x 12 months)..... Kshs.156,833.00

(e). House allowance

(x 13,044 x 8 years)..... Kshs.187,833.60

(f).. Severance pay

(x 13,044 x 8 years)..... Kshs.52,176.00

Total..... Kshs.618,285.60

(g). General damages for injuries to be quantified by the Court

11. The Respondent filed its reply to the memorandum of claim on 5th August 2016 admitting that it employed the Claimant as a Machine Operator at the Packing and Loading Department in October 2006 and was dismissed on 22nd June 2014 for gross misconduct. That on 16th August 2013, the Claimant was inspected before checking out and was in possession of the Respondent's tapes in his pocket, an incident witnessed by one Komu Albanus and the Claimant apologised for the same.

12. The Respondent avers that on 18th June 2014, the Claimant was abusive to one Sarah Ndung'u who had instructed him to stop the machine to drawn samples of the flour the Claimant was producing. That the said Sarah Ndung'u filed a written complaint dated 18th June 2014. That on 19th June 2014, the Claimant stopped the machines without cause and when asked by one Kevin Khamili, the Claimant was uncooperative and when the Supervisor started the machine, the Claimant switched it off.

13. It is further averred that the Claimant had been verbally warned several times as Albanus Komu's complaint dated 19th June 2014 shows, that he was rude and not a team player and was dismissed for gross insubordination.

14. The Respondent denies the claim for compensation for injury at the work place and avers that the Claimant was paid all his dues as the payslip for June 2014 attests.

15. Finally, it was averred that the Claimant received full and final dues of Kshs.16,163 which he acknowledged receipt and signed a release form on 2nd July 2014.

16. The Respondent prays that the claim be dismissed with costs.

Evidence

17. The Claimant testified that he was engaged by the Respondent in 2006 as a Machine Operator and was more experienced than the Supervisor. That he was forced to write the letter dated 10th August 2013 and the contents were changed. He also testified that on 18th June 2014 he did not meet his target because one Sarah Ndung'u (the Quality Assurer) had requested him to stop the machine to take samples of the flour the Respondent was making. That on 19th June 2014, he had a shortage of material and had to stop the machine and did not meet the target for the day. That he was dismissed on 22nd June 2014 before being issued with a show cause letter and disciplinary hearing.

18. On cross examination, he confirmed that he was a qualified machine operator and the company had many employees and the changing rooms were at the gate where all employees would change. He confirmed that the security guard found him in possession of tapes and wrote the letter dated 10th August 2013. He also confirmed having had an encounter with Sarah Ndung'u who had gone to collect samples of flour. That Sarah Ndung'u stopped the machine for 7 minutes. He also confirmed that he was aware that Sarah Ndung'u wrote a complaint about his behaviour on that day.

19. He further confirmed that his Supervisor had complained about him on 19th June 2014. He also confirmed that there were issues and admitted being involved in the three incidences but stated that he deserved another chance. He indicated that his salary was Kshs.16,163 per month and used to go on leave and was a member of NSSF and NHIF and was paid house allowance every month and received a certificate of service.

20. RW1 testified that the security gate and changing rooms were more than 50 metres apart and no personal items were left at the security office and changing rooms had lockers. He confirmed that Sarah Ndung'u was the Quality Controller and used to take samples every hour for quality assurance purposes. The collection would take less than one minute he testified.

21. That Sarah Ndung'u could give orders to the Claimant and could stop production for justifiable cause. He confirmed that he was not aware of any enmity between the Claimant and his Supervisor. That the Claimant often took annual leave and his statutory deductions were remitted to the relevant bodies.

22. On cross examination, the witness confirmed that he was not at the security gate when the Claimant was found in possession of tapes but knew his hand writing. That stealing is a ground for summary dismissal but his services were needed. He also confirmed that the Claimant was not given a notice to show cause before dismissal on 22nd June 2014 and was not taken through a disciplinary hearing since the Committee had no members to conduct the proceedings.

23. He further confirmed that all complaints against the Claimant were reported by Supervisors and in writing though some complaints were verbal. That the Claimant was dismissed because he had misconducted himself severally.

24. Finally, for unexplained reason, none of the parties raised the issue of the discharge form on record.

Claimant's Submissions

25. The Claimant isolated three issues for determination namely –

- a) Whether the Claimant was unfairly terminated from employment;
- b) Whether the Claimant's terminal dues were duly paid
- c) Whether damages for work injuries are payable.

26. As regards termination, the Claimant submitted that the Claimant's dismissal on 22nd June 2014 was effected without compliance with the mandatory procedure provided by the Employment Act, 2007. Reliance was made on Section 41 of the Act. That RW1 confirmed this state of affairs. Further reliance was made on Section 45 of the Employment Act.

27. On the reason for termination, it was submitted that the grounds of termination relied upon are the incidences that occurred on 10th August 2013, the tapes found in the Claimant's pockets, and the encounters with Sarah Ndung'u and the Supervisor on 18th and 19th June 2014 respectively which is characterised as insubordination. It is submitted that the taking of tapes happened 8 months earlier and could not be reason for the termination on 22nd June 2014. That Sarah Ndung'u was not the Claimant's senior at the workplace and the encounter did not amount to insubordination.

28. On the encounter with the Supervisor on the 19th June 2014, it is submitted that this incident was not tested at a hearing within the Respondent and only came up during the hearing of the matter in Court. That Mr. Kevin Khamili was a Unit/Section Supervisor and had failed to deploy someone to feed packaging paper into the machine. That a hearing was necessary to determine who between the Claimant and Kevin Khamili was wrong.

29. Finally, it is submitted that because no hearing was conducted, the claim of insubordination was not tested and Claimant did not face his accusers at all.

30. On terminal dues, it is submitted that on 27th June 2014, the Respondent was requested to sign a letter showing that he had been paid Kshs.16,163, that there was no meeting of minds between the parties. That the letter dated 2nd July 2014 was not a discharge of the Respondent from other liabilities.

31. It is submitted that the payment by the Respondent did not fully pay what the Employment Act provided, thus the part payment did not excuse the Respondent from full liability. Reliance is made on the common law rule in **Pinnel's case (1602)** that payment of a lesser sum in satisfaction of a larger is not sufficient consideration for the promisee's promise to accept the lesser sum in full settlement of the amount due. The rule is cited in **Makhecha & Company Advocates v Central Bank of Kenya [2013] eKLR**. Counsel posits whether this private contract can be taken to supersede public policy considerations enshrined in the Employment Act, 2007 which require that notice before termination of employment be given.

32. It was submitted that the discharge letter was the elephant in the room. That the claims made by the Claimant have a statutory underpinning in the Employment Act and the document purports to release the Respondent from payment of all and further terminal dues. That although superior courts have enforced release agreements similar to the one in question, it is submitted that such precedents are distinguishable.

33. It is contended that the circumstances in which the release was executed were inescapably skewed against the Claimant, that he signed the letter out of expediency having reported to the office three times to meet the director. That the Court should find that no contract was entered into in light of the vitiating circumstances of imbalance of power.

34. Further reliance was made on the decision in **Root Capital Incorporated v Tekangu Farmers Co-operative Society Limited & Another [2016] eKLR** where a loan had been disbursed without compliance with Section 49 of the Cooperatives Societies Act. The loan agreement was held to have been unenforceable.

35. It is urged that the release or discharge letter be disregarded. Reliance was also made on the decision in **Apollo Mboya v attorney General & 2 Others [2018] eKLR** for the submission that the release or discharge letter is unconstitutional and offends the spirit of legality for attempting to bar scrutiny of the Respondent's actions by the Court.

36. In sum, it is submitted that the Respondent cannot rely on its document which the Claimant signed without being made aware of the "ouster clause" in a highly pressurized and skewed circumstances to escape its statutory obligations. That the Court should find that the release document was not a binding on the Claimant for want of consideration.

37. On payment in lieu of notice reliance was made on Section 36 of the Employment Act.

38. On untaken leave days reliance was made on Section 28(1) of the Employment Act on leave days. The amount due under this head is indicated as Kshs.84,258.72 as opposed to Kshs.104,352 in the memorandum of claim.

39. As regards general damages for injuries at the workplace under Section 21 of the Work Injuries Benefits Act, 2007, it is submitted that the Respondent was aware of it and granted leave as evidenced by the sick leave sheet dated 21st May 2013. That the injury was not compensated and remains outstanding. Reliance was made on the decision in **FM (Minor suing through Mother and next friend MWM) v JNM & Another [2020] eKLR** where the Court awarded Kshs.100,000 for soft tissue injuries in urging the Court to award Kshs.150,000 as compensation.

40. Finally, the Court was urged to award the claims pleaded in paragraph 2 of the memorandum of claim.

Respondent's Submissions

41. The Respondent identifies two issues for determination –

- a) Whether the Claimant's termination was unfair;
- b) Whether the Claimant is entitled to the terminal benefits and compensatory damages sought in the memorandum of claim

42. On termination, the Respondent relies on Section 45 of the Employment Act on the requirement of valid and fair reason(s) for termination and fair procedure. The decision in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** is also relied upon for the proposition that a termination of employment must be substantively and procedurally fair. Section 43 is relied upon for the employee's duty to prove the reason(s) for termination.

43. Further reliance is made on the decision in **Mary Chemweno Kiptui v Kenya Pipeline Company [2014] eKLR** on the application of Sections 45(2) and 41 of the Employment Act.

44. The Respondent urges that it had a valid reason to terminate the Claimant as required by Section 45 of the Act.

45. On procedural fairness, the Respondent cites section 41 of the Act to urge that it observed the procedural requirements in that he had given the Claimant several verbal warnings, the Claimant had apologised and the Claimant was paid terminal benefits. That the only step not complied with was the disciplinary hearing. The Respondent uses the decision in **Rebecca Ann M & 2 Others v Jomo Kenyatta University of Agriculture & Technology [2014] eKLR** for the proposition that internal disciplinary proceedings are nonjudicial on application.

46. Finally, Section 44 of the Employment Act is cited to urge the Court that the conduct of the Claimant justified the invocation of gross misconduct since he neglected his duties and knowingly disobeyed his Supervisor's proper commands.

47. On reliefs, it is submitted that the Respondent had already paid the sum of Kshs.16,163 in lieu of notice. That the Claimant had confirmed having taken leave and/or cash as evidenced by the payslips on record. On compensation, the Respondent submits that it had a valid reason for termination and invoked a fair procedure and the claim for compensation should thus fail.

Analysis and Determination

48. Flowing from the pleadings, evidence on record and submissions, the issues for determination are:-

- (a) Whether the release or discharge voucher/letter discharged the Respondent from further liability under the contract of employment;
- (b) Whether the Claimant's termination was unfair;
- (c) Whether the Claimant is entitled to general damages for pain and suffering;
- (d) Whether the Claimant is entitled to the reliefs sought.

49. Before delving into the merits of the case, it is important to determine the character and effect of the discharge/release form signed by the Claimant on 2nd July 2014. Although the Claimant testified that he received Kshs.16,163 on 27th June 2014, he did not disclose that he signed a discharge/release form on 2nd July 2014.

50. It is unclear why the Claimant did not care to controvert the document.

51. The Claimant submitted extensively on the common law rule enunciated in **Pinnel's case (supra)** and its non-applicability to this case. He contended the claims herein are statutorily mandated thus a contract cannot oust statutory provisions as these are matters of public policy encapsulated by Parliament through legalisation. It was submitted that the Claimant did not appreciate the implications of the letter when he appended his signature in light of the circumstances he was in, which placed him at a disadvantage in relation to the Respondent. The decision in **Root Capital Incorporated v Tekangu Farmers Co-operative Society Limited & Another (supra)** was relied upon.

52. It was submitted that the exclusionary clause was unconstitutional and illegal.

53. In addressing this issue, the Court is guided by pronouncements of Court of Appeal in **Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR** where the Court cited its holding in **Krystalline Salt Limited v Kwekwe Mwakele & 67 others [2017] eKLR** 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."

54. In **Coastal Bottlers Limited v Kimathi Mithika (supra)** the Court held that –

"Whether or not a settlement agreement or a 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 a 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:*

"We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That is however, as far as we are prepared to go. 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."

55. In **Coastal Bottlers Limited v Kimathi Mithika (supra)** the discharge voucher tabulated the Respondent's entitlements and stated as follows –

"I Kimathi Mithika of ID No... certify having received the sum of Kenya Shillings one million five Hundred Sixteen Thousand, Two Hundred and Eighty One (Kshs.1,516,281) being my full and final payment due to me from Coastal Bottlers Limited as follows:

I confirm that, I have no further claim against the Company whatsoever."

56. Allowing the appeal with costs, the Court held that: -

"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 questioned 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 binding contract between the parties."

57. The Court had expressed words to the same effect earlier on in **Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited [2015] eKLR**.

58. In the instant case, the Claimant executed a discharge voucher on 2nd July 2014, five (5) days after receipt of the termination letter.

59. The release/discharge form read as follows –

“From Thomas Otieno

Date 2/7/2014

The Director

Golden Harvest Mills

P.O. Box 49855

Nairobi

Dear Sir

RE: TERMINATION OF MY SERVICES

With reference to above, I would like to confirm that I have received my full and final dues from your company.

I do not have any claims against the company present or

future. I have checked the final computation of my dues and I fully agree to computation of Kshs.16,163 which I have received in full.

I surrender my ID card, shoes, etc, given to me during my employment.

Thank you

Yours Faithfully

Thomas Otieno

13877929”

60. RW1 testified that the Claimant had received his full and final dues which he acknowledged receipt by signing the release form on 2nd July 2014.

61. Neither the Claimant nor the Respondent’s Counsel raised the issue during the oral hearing. In particular, the Claimant did not deny signing the discharge form or discredit it in any manner having previously denied as having signed other documents.

62. The Claimant submits that since the claims herein are statutory, they cannot lawfully be waived by a discharge form/voucher. That since the Claimant had just been terminated, the circumstances were skewed against him and only took the amount paid for expediency as a prudent and reasonable man would do. The decision in **Root Capital Incorporated v Tekangu Farmers Co-operative Society Limited & Another (supra)** where the 1st Defendant had taken a loan from the Plaintiff/Applicant in contravention of Section 49 of the Cooperatives Societies Act, it was held that the loan agreement was unenforceable since the borrowing was contrary to a statute. That the above scenario mirrors that in the instant case, that the release form is contrary to public policy.

63. The Court respectfully disagrees with these submissions because the two scenarios are distinguishable. Whereas in the decision relied upon there was a clear violation of a statutory provision in relation to taking of loans by a cooperative society, in the instant case, the release/discharge form violates no statutory provision in the Employment Act, 2007. In a similar vein; since the statutory dues are a creation of the contract of employment, they are unenforceable outside the contract.

64. Relatedly, the rule in **Pinnel’s case** is a rule of consideration. It states that at common law, payment of a lesser sum on the day a larger sum was due is not sufficient consideration for the Creditor’s promise to accept the lesser sum in full settlement of the debt. In other words, payment of a lesser sum when a larger sum is due, does not extinguish the entire debt. The rule has several exceptions. The rule was elaborated in **Foakes v Beer [1884] 9 Appa Cas 605**. In instant case, the Claimant has not shown that he was entitled to a larger sum on 2nd July 2014 and provided consideration to the Respondent’s promise or that the case falls within any of the recognised exceptions to the rule in **Pinnel’s case (supra)**.

65. On the issue of absence of meeting of minds, it is submitted

that since the Claimant had *“been commanded never to show up again at his employer’s premises”* there was no meeting of minds. The Claimant did not disclose who uttered the alleged words and did not repeat them in the oral testimony. In addition, he did not allege that he

was unwelcome when he went to collect his dues.

66. The common law notion of meeting of minds or *consensus ad idem* is a legal abstraction of the moment at which an agreement is concluded in the minds of the parties which is a subjective moment not discernible by either party until the same is manifested externally by word or conduct. For instance, signing a document is the external manifestation of acceptance of its terms unless there are vitiating circumstances such as misrepresentation, duress or undue influence or other factors such as mistake.

67. In the word of Higgins J. in **R v Clarke [1927] 40 CLR 2207** –

“I am of the opinion that an offer does not bind the person who makes it until it has been accepted, and its acceptance has been communicated to him or his agent.

68. As regards the contract being contra-statute, it was submitted that the words *“I do not have any claims against the Company present or future”* were exclusionary and thus unconstitutional and contra-statute

69. As the Court of Appeal held in **Krystalline Salt Limited v Kwekwe Mwakele & 67 others (supra)** employment in Kenya is governed by the general law of contract as much as by the principles of common law enacted and regulated by the Employment Act and other related statutes. The Constitution of Kenya, 2010 is also part of the legal gamut on employment.

70. Employment law generally lies in the domain of private law for the simple reason that a contract of employment is a legally binding agreement between an employer and an employee. The contract creates rights and obligations some of which are constitutional and statutory. All these rights have their foundation in the agreement between the parties. Observance of these right and duties is mandatory on the part of both parties and non-observance attracts sanctions.

71. It is important to emphasise that under the general law of contract applicable in Kenya, what has been created by a agreement may be extinguished by agreement encapsulated by the maxim *eodem modo quo oritur, eodem modo dissolvitur* *“An agreement by the parties to existing contract to extinguish the rights and obligations that have been created it, itself a binding contract provided that it is either made under seal or supported by consideration.”*

See **Cheshire G.C., Fifoot C.H.S and Furmston M.P, The Law of Contract [8th Edition 1972] at 529.**

72. The decision in **Apollo Mboya v Attorney General & 2 Others [2018] eKLR** which held ouster clauses in statutes barring the questioning of executive and/or parliamentary decision to be unconstitutional since they deprive citizens the right to access courts is distinguishable since it is exclusively in the domain of public law.

73. The Claimant’s submissions notwithstanding, the Respondent’s evidence on record that the the Claimant signed a release/discharge form remain uncontroverted. It is the finding of the Court that the release/discharge form dated 2nd July 2014 was binding upon the parties and the Claimant waived his right to pursue further claims against the Respondent. The Claimant made a promise which the Respondent relied upon.

74. As was held in **Damondar Jihabhai & Co Ltd & Another v Eustace Sisal Estates Ltd 1967 EA 153 at p 156**

*“The function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement. In the English Court of Appeal case above - **Globe Motors Inc & Others vs TRW Lucas Electric Steering Ltd & Others (supra)** – Lord Justice Beatson stated as follows:*

“Absent statutory or common law restrictions, the general principle of the English law of contract is [that parties to a contract are free to determine for themselves what obligations they will accept]. The parties have the freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct.”

75. Having found that the release/discharge form was binding, the Claimant waived his right to pursue any claim against the Respondent.

76. Consequently, the Claimant’s suit against the Respondent is incompetent and is hereby dismissed. There will be no orders as to costs.

77. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7TH DAY OF DECEMBER 2021

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