



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE 936 OF 2014**

**WILLIAM WAMBUA MUNYAO.....CLAIMANT**

**VERSUS**

**THIKA COFFEE MILLS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant brought this suit against the respondent on 5.6.2014 claiming one month salary in lieu of notice plus compensation for unlawful termination of his employment. He further prayed for certificate of service plus costs and interest.

2. The respondent filed her defence on 16.8.2014 denying the alleged unlawful termination of the claimant's employment she averred that the termination was fair and justified and it was done in accordance with justice and equity as provided by the Employment Act. Finally, she averred that the claimant was paid all his lawful dues and executed a discharge in her favour that no further claims were outstanding. She therefore prayed for the suit to be dismissed with costs.

3. The issue for determination arising from the pleadings are:

(a) Whether the claimant's employment contract was unfairly and unlawfully terminated.

(b) Whether in view of the said discharge, the claimant is entitled to the reliefs sought.

**Claimant's evidence**

4. The claimant testified that he was employed by Kenya Nut before being transferred to the respondent in October 2010. That in November 2010, his work was good and it earned him a promotion to the position of Team Leader Technical Department. The promotion letter referred to a Job Description but upon several enquiries, he was never given the same.

5. On 17.10.2012, he received a letter from the CEO asking him to proceed on leave to pave the way for investigations on low production among other things. However, on the following day the Respondent's Chairman wrote a memo to the Operations advising that as a result of a restructuring process that was on going the post of lead in charge of Technical Department had been scrapped effective 18.10.2012. The claimant contended that he received a copy thereof on 15.2.2015 as Head of the Department.

6. In the meanwhile, the claimant was served with the letter dated 28.11.2012 asking him to respond to 4 charges which pointed to his role in the alleged low production. The claimant responded to the said charges by his letter dated 30.11.2012 denying liability. Again on 21.1.2013, he was addressed in another letter by the Respondent's Managing Director telling him that his response to the letter dated 28.11.2012 was not satisfactory and asked him to explain numerous breakdowns, which compromised the milling capacity. The letter also invited him to a hearing on 28.1.2013. That he responded by the letter dated 24.1.2013 restating the same answer and alerting the Respondent that he deemed his services as terminated by being denied both work and his pay. That thereafter he received dismissal letter dated 4.2.2013.

7. In cross examination, he admitted that he was paid compensation and he was forced to sign a Discharge Voucher. He further admitted that he was paid all his salary for the period he was on leave. He further admitted that all his leave was paid. He maintained that his post was scrapped in October 2012 and when he reported back to December 2012 he was told to go back on leave. He further maintained that he got a copy of the letter scrapping his post as a Section Head. That he got the letter before his dismissal.

8. He further contended that he responded to the MD's letter dated 21.1.2013 by his letter dated 24.1.2013. He further admitted that he attended the meeting on 28.1.2013 but denied the charges levelled against him. Later he received a dismissal letter. He also admitted that he

was in charge of the Technical Staff including Machine Operators but contended that the supervision over the Staff was under the Operations. He further contended that the breakdown of machines was due to wear and tear and the time taken to repair depended on the issue. He however contended that the breakdowns did not affect production. He concluded by contending that the Discharge Voucher was only for salary arrears.

### **Defence evidence**

9. Mr. Titus Ndungu Machanga testified as Rw1. He confirmed that the Claimant was employed by the respondent as the Technical Officer in charge of repair of machines. He further testified that in 2012 there was change of management who sought to know why there were frequent breakdown of Milling Machines and the claimant was first sent on leave to pave the way for investigation of the low production. That on 28.11.2012 he was served with letter requiring him to explain the frequent breakdown and he respond by his letter dated 30.11.2012.

10. Rw1 further stated that the letter was found unsatisfactory and the MD served him with the letter dated 21.1.2013 asking him to effectively respond to the issues raised and attend a hearing on 28.1.2013. That the Claimant responded by his letter dated 24.1.2013 and attended the hearing on 28.1.2013 and denied the charges levelled against him. Thereafter, the MD dismissed him for insubordination for his failure to change his response from the one contained in his letter dated 30.11.2012. He denied that the Claimant was dismissed for sabotaging machines or failure to do his job properly.

11. Rw1 contended that the dues from the claimant were computed after the termination and were paid based on his monthly salary of Ksh.50,059. He further contended that the claimant signed the discharge voucher in his presence stating that the payment was full and final dues and that he had no further claims from the employer. He contended that the MD was not present during the signing of the Discharge Voucher and contended that no one coerced the claimant to sign the voucher. He further contended that the claimant was paid his salary for November and December 2012 and also for January and February 2013 inclusive of leave, off days and lunch allowances but less SACCO loan. He concluded by stating that Mr. Henry Kamami and Abel Nambale wrote letters explaining the reasons for low production and blamed the same on the breakdown of machines among other issues.

12. In cross examination, Rw1 stated that he was the Paying Clerk for the Respondent and in this case, his role was just to pay the Claimant what he was told to pay him. He admitted that he never attended the hearing on 28.1.2013 and he did not know what transpired there. He contended that the letters by Mr. Abel and Henry were written on 17.1.2013 and 18.1.2013 respectively but he was not aware whether they were shown to the Claimant.

13. Rw1 further admitted that the discharge voucher signed by the claimant on 3.8.2013 did not refer to any other dues except salary. He further admitted that the said payment was done 6 months after the termination. He admitted that the respondent has a disciplinary procedure, which involves the MD, Administration Officer and the Union. He maintained that he claimant was taken through the disciplinary hearing and thereafter acknowledged payment of terminal dues signing the Discharge Voucher.

### **Claimant's submissions**

14. The claimant submitted that his termination was unfair and it violated section 45 and 41 of 51 of the Employment Act. That there was no valid reason to justify his dismissal and was not accorded a fair hearing as required by section 41 of the Act. He further contended that he was not issued with a certificate of service after the termination. He relied on *Union of Commercial Food and Allied Workers vs Meru North Farmer's Cooperative Sacco Ltd [2014]eKLR* and *Mercy Chemweno Kiptui vs Kenya Pipeline Co. Ltd [2014]eKLR* to urge that, failure to follow the mandatory procedure provided under section 41 of the Act renders the termination of the employee's employment unfair.

15. As regards the Discharge Voucher herein, the claimant submitted that the court has a duty to consider the circumstances under which the voucher was signed. He submitted that he was suspended in October and until August 2013, he had no other source of livelihood and that forced him to sign the Discharge Voucher. He contended that the oppression by the respondent amounted to unfair labour practices contrary to Article 41 of the Constitution.

16. He relied on *James Njuguna Muchiri vs Armed Forces Canteen Organization (AFCO) [2016]eKLR* where the Court of Appeal overturned decision of the High Court and stated that suspension without pay is unlawful unless it can be traced from terms of the contract of Employment. He also relied on the *Thomas De la Rue (K) Ltd vs David Opondo Omutelema[2013]eKLR* where the Court of Appeal agreed with the trial court that a Discharge Voucher cannot *per se* absolve an employer from statutory obligation and that it cannot preclude this court from inquiring into the fairness of a termination. He therefore urged the court to grant the reliefs sought in the suit including salary in lieu of notice, 12 months salary compensation for unfair termination, certificate of service, costs and interest.

### **Respondent's Submissions**

17. The Respondent submitted that the Claimant's services were fairly terminated for failure to obey lawful command from the MD. That he failed to respond to the MD's letter dated 21.1.2013 and insisted that he responded to the same issues by his letter dated 30.11.2012. The respondent further submitted that the procedure followed was fair because the claimant was accorded a fair hearing on 28.1.2013 in accordance with section 41 of the Employment Act.

18. In view of the foregoing the respondent submitted that the claimant is not entitled to salary in view of notice and compensation for unfair termination. In addition, she contended that in view of the Discharge Voucher signed by the Claimant on 3.8.2013, the Claimant was estopped from claiming any further reliefs herein. She relied on *Coastal Bottlers Limited V Kimathi Mithika [2018]eKLR* where the Court of Appeal held that a Discharge Voucher is a binding contract and it constituted a full discharge and the Court should not entertain the suit filed after execution of the discharge.

## Analysis and determination

19. There is no dispute that the Claimant was employed by the respondent as the Team Leader in charge of Technical Department of the Company. There is also no dispute that he was sent on leave on 17.10.2012 to pave way for investigations into the alleged low production. There was further no dispute that Claimant's post was scrapped effective 18.10.2012 and before being dismissed by the letter dated 4.2.2013. Finally, there is no dispute that the Claimant was paid all his salary and allowances and executed the discharge voucher dated 3.8.2013 stating that he had no further claim against the respondent. The issues for determination are therefore as framed herein above which now proceed to answer.

### (a) Whether the termination of the Claimant's services was

#### unfair and unlawful

20. Termination of employment is unfair and unlawful if the employer fails to prove that it was substantively and procedurally fair. Section 45 (2) of the Employment Act provides that termination is unfair if the employer fails to prove that it was grounded on valid and fair reasons(s) related to the employee's conduct, capacity and compatibility or based on the employers operational requirement; and that a fair procedure was followed by according the employee a fair hearing in accordance with section 41 of the Act, and issued him with certificate of service under section 51 of the Act.

#### Reason for the termination

21. In this case the reason cited for the dismissal of the claimant in the letter dated 4.2.2013 was insubordination by failing to respond to the MD's letter dated 21.1.2013 and instead referring to the previous response in the letter dated 30.11.2012. The claimant denied the alleged offence and contended that he responded to the MD's letter by the letter dated 24.1.2013. Rw1 also confirmed that the claimant responded to the said letter by the letter dated 24.1.2013. consequently, I find on a preponderance of evidence that the reason cited for the summary dismissal of the claimant was not valid because the claimant has proved that he indeed responded to the MD's letter dated 21.1.2013 and as such by dint of section 43 of the Act the termination was unfair within the meaning of section 45 of the Act.

22. In addition to the foregoing, the court must observe that the claimant's position was scrapped immediately after he was send on forced leave. It was not denied that by the memo dated 18.10.2012 claimant's position was indeed scrapped due to restructuring process which was allegedly in progress. It would therefore not be difficult to conclude that the claimant had already lost his job through redundancy and the disciplinary process was therefore a sham

### (b) Procedure followed.

23. The Claimant admitted that he was given chance to respond to the charges against him in writing and later he was given a chance to defend himself in an oral hearing on 28.1.2013. I therefore return that the Respondent followed a fair procedure before dismissing the Claimant for the alleged misconduct, which I have found to have been untrue.

#### Relief Sought

24. The respondent objected to the reliefs sought by the Claimant and relied on the discharge voucher dated 3.8.2013 by which the claimant accepted the dues paid and discharged her from any further claims. The discharge voucher was addressed to the Respondent's MD and it read as follows:-

***"Date: 3rd August 2013***

***RE: DISCHARGE VOUCHER***

***I Mr. William Wambua Munyao ID No. 6260177 confirm receipt of Kshs.57,081.00 (fifty Seven Thousand Eight One Only) being payment of my full termination dues from Thika Coffee Mills Limited.***

***I confirm that I have surrendered all Company property that was in my possession and further confirm that Thika Coffee Mills Limited has fulfilled all its obligations to me and I confirm having understood the computation of the amounts due to me and that I have no further claims against Thika Coffee Mills Limited with regard to my employment.***

***Name: .....***

***Signature: .....***

***Witness Name: .....***

***Signature: ....."***

25. The Court of Appeal in ***Thomas De La Rue case*** held that Discharge Voucher does not absolve an employer from statutory obligations or bar this court from investigating in to alleged unfair termination but the court must consider whether the discharge voucher was freely and

willingly executed. In the Coastal Bottlers Co. Ltd Case the Court of Appeal held that a discharge voucher is a binding contract and constitutes a full discharge and the court can only interfere therewith if vitiating factors are pleaded and proved. The Court held that:-

***“In our minds, it is clear that the parties agreed that the 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 binding contract between the parties.”***

26. The said precedents are binding on this Court. The Claimant did not plead and prove by evidence that the discharge voucher was signed through coercion, mistake, fraudulent misrepresentation or undue influence. In the submissions by counsel, he suggested that the delay by the respondent before paying the dues amounted to oppression and unfair labour practice which forced the claimant to sign the voucher.

27. I however find such submissions unfounded and return that the discharge voucher dated 3.8.2013 was a binding contract between the parties herein and that it fully discharged the respondent from further claims including the claims advanced by the present suit. By the said discharge voucher, he waived all his claims against the Respondent under the contract of service and as such without any evidence of a vitiating factor, this suit is a nonstarter notwithstanding my finding above that the dismissal of the claimant from service was unfair. Consequently, I dismiss the suit with no order as to costs.

**Dated, Signed and Delivered in Open Court at Nairobi this 26th day of July 2019**

**ONESMUS MAKAU**

**JUDGE**