



Mburu v Tusker Mattresses Limited (Employment and Labour Relations Cause 735 of 2018) [2025] KEELRC 2580 (KLR) (25 September 2025) (Judgment)

Neutral citation: [2025] KEELRC 2580 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 735 OF 2018
MN NDUMA, J
SEPTEMBER 25, 2025**

BETWEEN

PETER WAWERU MBURU CLAIMANT

AND

TUSKER MATTRESSES LIMITED RESPONDENT

JUDGMENT

- 1 The Claimant filed suit on 17/5/2018 seeking the following reliefs against the Respondent:
 - a. An order quashing and/or annulling the following actions and decisions of the Respondent namely:
 - i. the suspension of the Claimant's employment as Chief Cashier; and
 - ii. withholding of the Claimant's monthly salaries and other benefits.
 - b. An order directing the Respondent to allow the Claimant resume his duties as a Chief Cashier;
 - c. An order directing the Respondent to pay the Claimant Kshs. 7,033,124.00 plus accrued interest at court rates, being the Claimant's accumulated salary arrears withheld by the Respondent at the rate of Kshs. 104,972.00 for a period of 67 months from October, 2012 to April, 2018.
 - d. An order directing the Respondent to pay the Claimant Kshs. 700,000.00 being the costs of defending Criminal Case No. 3000 of 2012.
 - e. General damages for malicious prosecution;
 - f. Interest on (d) above at court rates from the date of filing this claim until full and final settlement;



- g. The costs incidental to these proceedings; and
 - h. Such other, further, additional, incidental and/or alternative reliefs as the Honourable Court may deem just and expedite.
2. The Respondent filed a Notice of Preliminary Objection dated 27/6/2018 to wit that the matter is time barred by dint of section 90 of the [Employment Act](#) 2007 in that the cause of action arose more than 3 years from the date the suit was filed.
 3. In a ruling delivered by Onesmus N. Makau dated 16/11/2018, the objection was dismissed for not raising pure points of law. The Judge stated at paragraph 9 of the ruling:

“The question whether or not the Claimant was suspended or dismissed in October 2012 in my view is a matter to be ascertained by taking evidence. It is not a pure point of law apparent on all pleadings. In fact, the Respondent has not controverted the factual averment pleaded by the Claimant.”
 4. The Judge concluded by stating “The Respondent is at liberty to file defence to the suit.”
 5. The Respondent filed a Statement of Response on 17/4/2019 in which the Respondent denied liability arising from the Claimant’s arrest by the police stating he was arrested upon reasonable suspicion of collaborating with armed robbers who robbed the Respondent’s Digo Branch.
 6. The Respondent averred that the Claimant was duly informed orally that he had been summarily dismissed from the Respondent’s employment with immediate effect on 24/10/2012. That the Respondent prepared Claimants certificate of service and computed his dues but the Claimant has to date neglected or refused to collect the same.
 7. The Claimant (CW1) testified in support of his claim by adopting the witness statement dated 17/5/2018. The Claimant also produced exhibits ‘1’ to ‘9’ dated 17/5/2018 in support of his case.
 8. The evidence adduced by the Claimant may be summarized as follows:
 9. That on or around 1/4/2017, the Respondent appointed the Claimant following a competitive recruitment process, to the position of a shop assistant. That on or around 1/7/2007, after satisfactory performance during the probation phase, the Respondent confirmed his employment as a shop assistant. Claimant stated that on or around 1/1/2011, the Respondent appointed him, following a competitive recruitment process to the position of Chief Cashier. That his appointment from Chief Cashier was from a lower to a higher position in the Respondent’s organizational structure and was informed by excellent performance appraisals given to him by the Respondent.

Suspension from employment

10. The Claimant stated that on or around 29/9/2012, armed robbers invaded the Respondent’s Tusky’s Digo Branch where he was stationed and stole cash together with other valuables at gun-point. That the Respondent accused the Claimant of playing a collaborative role in the robbery and procured the police to arrest the Claimant in the presence of his colleagues just a few hours after that robbery. That the arrest was done in the most inhumane and callous manner imaginable.
11. Claimant stated that before the arrest, he was denied the immutable rights to natural justice, in particular the right to be heard on the allegations against him and to be advised and represented by legal counsel of his choice. Claimant reiterated that he was surprised by the Respondent’s decision to have him arrested because he did not mean the entry to the Respondent’s branch at Digo and he was



not in a supervisory role, and did not have any influence over, those who manned the entry to the Respondent's premises.

12. Claimant stated that on or around 9/10/2012, the Respondent suspended him from employment for a period of 2 weeks. That in the suspension letter, the Respondent indicated that it suspected the Claimant of involvement in the robbery; the Respondent also advised that the suspension was done to pave way for unimpeded investigations into the robbery and he was advised to report back to the Head Office on 24/10/2012 for further instructions.
13. The Claimant stated that at the time of his suspension he was earning a monthly basic salary of Kshs. 104,972.00. That the Claimant fully co-operated and gave way for the Respondent to conduct its investigations into the robbery.

Malicious Prosecution in Criminal Court

14. The Claimant stated that on 17/10/2012, he was maliciously charged with the twin offences of: conspiracy to commit a felony contrary to section 393 of the Penal Code; and stealing by servant contrary to section 281 of the Penal Code. He stated that the criminal proceedings were instituted against him without reasonable or probable cause and despite his repeated explanations that he had played no role in the robbery. Claimant was subsequently arraigned at the Mombasa Resident Magistrate's Court on 18/10/2012 wherein he pleaded not guilty to the charges alluded to and was released with a bond of Kshs. 500,000.00 with surety of the same amount.
15. The Claimant stated that on 24/10/2012 he reported back to the Respondent's Head Office as advised in the suspension letter for further instructions. That instead of informing the Claimant of the results of the investigation, the Respondent's General Manager Human Resources (Mr. Mwenda) directed the Claimant to go back home and await further instructions. That the further instructions were to be issued upon conclusion of the criminal case.
16. The Claimant told the court that he believed that the Respondent failed and/or neglected to carry out proper and/or internal investigations to ascertain whether the Claimant had participated in the robbery. The Claimant said that as at the date of writing his statement the Respondent had never informed him of the results of the alleged investigations.
17. Claimant stated that he informed the Respondent that it would be unduly prejudicial to require the Claimant to await the outcome of the criminal case before getting further instructions. Specifically, Claimant informed the respondent that he had not played any role in the robbery; that the criminal case would take considerable time to determine given the courts' backlog and unpredictable nature of the courts' diary and that in any event, it was unfair and illegal to require the Claimant to await further instructions after the conclusion of the criminal matter on the basis of mere suspicion.
18. The Claimant also stated that the Respondent would hear none of his pleas and ordered him out of its premises. That the Respondent's decision and the resultant criminal proceedings caused significant injury to the character and reputation of the Claimant. That he suffered mental anguish, anxiety and unnecessary expense during the trial. Claimant said that he spent Kshs. 700,000.00 to defend the malicious criminal proceedings instituted against him.

Acquittal by the Criminal Court.

19. The Claimant stated that on 11/12/2017, vide a judgment delivered by Hon. Kagoni E.M. SRM, the trial court vindicated Claimant's innocence on both offences and proceeded to acquit him under section 215 of the Criminal Procedure Code. That despite the Claimant's acquittal by the criminal



court and Claimant's communication of the acquittal to the Respondent, the Respondent did not give the Claimant further instructions on the status of his employment as it promised.

Withholding salaries and other benefits

20. The Claimant testified that from 9/10/2012 the Respondent unlawfully withheld and continued to withhold as at the date of this statement the Claimant's monthly salaries and other benefits due to him under the contract of employment. That despite numerous telephone correspondences with the Respondent's officers to release Claimant's unpaid salaries, the Respondent, in a fundamental breach of the employment contract, continued to withhold Claimant's monthly salaries and benefits.
21. Claimant testified that the Respondent's act of withholding his monthly salaries and other benefits had caused and continued to cause irreparable harm, loss and damage to the Claimant and his family. That the indefinite suspension without pay exposed Claimant and his family to destitution by making it impossible for Claimant to access food, shelter, healthcare and education. That it infringed on Claimant and his family's constitutional rights to food, shelter, healthcare and education. That Claimant was constrained to dishonour his loan repayment and other contractual obligations thereby exposing him and his family to civil lawsuits.
22. The Claimant stated that he verily and conscientiously believe that withholding an employee's salary is an unfair labour practice that offends the principles of fair labour practices and protection of wages; that Claimant's suspension from employment for an indefinite period without pay violates the constitution and the relevant labour laws in force.
23. The Claimant told the court that he served the Respondent with exemplary dedication and distinction as evidenced in his confirmation to the position of shop assistant; excellent performance appraisals; appointment/promotion to the position of Chief Cashier and confirmation to the position of Chief Cashier.

Demand and notice to institute legal proceedings.

24. Claimant stated that on or around 29/5/2015 and 26/2/2018, he sent a demand letter to the Respondent urging it to rescind the unlawful and unfair labour practice. That the Respondent ignored, refused or otherwise failed to comply with Claimant's demand and notice of intention to commence legal proceedings.
25. The Respondent in spite of having filed a statement of response did not appear for the hearing of the case on 18/3/2025. Previously, the Respondent had failed to attend the hearing set for 30/10/2024; 21/9/2022; 25/1/2023; 25/7/2023 and 11/12/2023 despite having been served and affidavits of service filed by the Advocates for the Claimant.
26. The matter proceeded to formal proof in the absence of the Respondent. The evidence adduced by the Claimant remains uncontroverted. The Claimant has proved on a balance of probability that he was suspended indefinitely from employment pending hearing and determination of a criminal case No. 3000 of 2012. The suspension was on 9/10/2012. That the Claimant was not paid any salary during the entire period of suspension. The Claimant was acquitted of the malicious charges brought at the behest of the Respondent without any evidence on reasonable suspicion on 11/12/2017 by Hon. Kagoni Elisaphan. The Claimant testified that the Respondent is guilty of giving false information leading to the malicious arrest, detention and prosecution. That the acquittal vindicated the Claimant.
27. That the Claimant worked for the Respondent as a Chief Cashier earning a monthly salary of Kshs. 104,972.00. That the salary was withheld from October 2012 upto the time of filing the suit.



28. That the Claimant incurred expenses of Kshs. 700,000.00 in his defence in the criminal case. The Claimant produced the letter of appointment initially as shop assistant on 1/4/2007 and later promoted on 7/1/2011 as Chief Cashier by a letter dated 7/1/2021 which is before court.
29. That until his suspension and arrest, the Claimant had a good record without a blemish and the malicious and false information given to the police by the Respondent's caused him loss and damage. That the Claimant suffered pain as a result of loss of job; withholding of his salary for a long time, damage to his reputation due to the false allegation of theft and has suffered great loss and damage.
30. The Claimant produced the letter of suspension written by one F. N. Kamau Director and P. M. Mwenda, General Manager Human Resource on 9/10/2012 to the Claimant. In the letter the Respondent said:

“Management has reasonable grounds to suspect that contrary to section 44(4)of the Employment Act, 2007 and in breach of your employment contract with the company you played a collaborative role in the theft. To allow for investigations to proceed unimpeded you are herewith suspended from your work for a period of two (2) weeks (effective 9th to 23rd October 2012).”
31. The Claimant testified that the Claimant was not recalled upon expiry of the two weeks and his salary was not paid. That the Respondent told him to await the outcome of the criminal trial which ended in the year 2017. That upon being acquitted the Claimant requested to be reinstated with full pay but the Respondent refused to do so hence this suit.
32. The Claimant prays that the court upholds the claim and grant him the awards set out in the statement of claim.
33. The Claimant produced a payslip for the month of September 2012 which shows that he earned a gross pay of Kshs. 104,972.00 as at the time the salary was stopped.
34. The charges against the Claimant from which he was acquitted was stealing by servant contrary to section 281 of the Penal Code. The Claimant stated that Respondent failed to adduce any evidence at all for the court to find him guilty of alleged offence which the Claimant stated could not have been brought by the Director of Public Prosecution but for the false information given to the police by the Respondent.
35. The Claimant produced receipt of fees paid to the Claimant's defence Advocate Oduor Okuma and Co. Advocates totaling the claimed amount of Kshs. 700,000.00 by way of legal fees. The Claimant prays that the court awards him accordingly.
36. The Claimant also produced transport tickets in respect of which he incurred transport expenses to and from court. The cumulative cost evidenced by the receipts amount to Kshs. 700,000.00.
37. The Magistrate court in its judgment found that the prosecution presented evidence of robbers holding what appeared to be a gun stuffing cash into bags and walking away with cash by way of CCTV footage yet the prosecution had charged the Claimant with the offence of theft by servant yet the evidence disclosed a more serious offence of robbery with violence by unknown persons.
38. The Claimant prays the court award him as prayed in respect of unlawful suspension, malicious prosecution and unlawful withholding of salaries, interest and costs.



Determination

39. The Claimant filed submissions which the court has carefully considered together with the evidence adduced by the Claimant in the absence of any rebuttal by the Respondent and finds that the Claimant has proved all elements of the case on a balance of probability.
40. Accordingly, the indefinite suspension and withholding of salary during the tenure of the criminal case without conducting any disciplinary proceedings against the Claimant or handing in a formal letter of termination amounted to unlawful and unfair constructive dismissal.
41. That the Claimant was entitled to await conclusion of the criminal case in the circumstances of the case and so the constructive dismissal crystallized upon the acquittal of the Claimant by the magistrate court and upon presentation of himself and the judgment to the Respondent, and the Respondent refused to take him back and/or pay his withheld salary.
42. Accordingly, the Claimant is entitled to payment of his full salary during the period of suspension, since no letter of termination was produced by the Respondent during this period and the uncontroverted evidence by the Claimant is that he was told to await the outcome of the criminal trial which he proceeded to do.

Compensation/Reinstatement

43. The Claimant had served the Respondent diligently and for a continuous period from the year 2012 when he was suspended. The court deems his service to have ended in 2017. The Claimant suffered loss and damage from malicious prosecution and withholding of his salary. There is no evidence that the Claimant participated in the robbery and so did not contribute to the constructive dismissal. In terms of section 49(1) read with sub-section (4) the Claimant was entitled to reinstatement but only within 3 years from the date he stopped working. The Claimant has been out of employment for a long time and with the malicious treatment he received from the Respondent, this is not a suitable case for reinstatement due to the evident, though misguided, loss of trust by the Respondent against the Claimant.
44. Accordingly, since the Claimant was not compensated for the loss of his employment and a very good career progress as a chief cashier. The court considers this matter to be suitable for an award of the equivalent of the 12 months salary in compensation for the unlawful and unfair dismissal in the sum of Kshs. (104,000 x 12) Kshs. 1,248,000.00

Malicious prosecution

45. For the claim of malicious prosecution to succeed, the Director of Public Prosecution must be enjoined in the suit as a party to give the office opportunity to defend itself and not to sue the employer alone in respect of a case of malicious prosecution. It must be demonstrated that the police and the Director of Public Prosecution failed to conduct proper and/or reasonable investigation before preferring the charges against the Claimant.
46. The Claimant having failed to enjoin the Director of Public Prosecution to the suit constitute a fatal omission in this matter. Accordingly, that claim and relief sought must fail and the court dismiss that claim and reliefs sought accordingly.
47. In the final analysis judgment is entered in favour of the Claimant against the Respondent as follows:



- a. The Respondent is ordered to pay the Claimant all the unpaid salary from the date of suspension to the date of acquittal being 9th October 2012 to 11th December 2017 in the sum of Kshs. (62 months x 104,000) = Kshs. 6,448,000.00
- b. Compensation for unlawful constructive dismissal equivalent to 12 months salary in the sum of Kshs. 1,248,000.00.
- c. Special damages being proved expenses to defend the criminal case no. 3000 of 2012 Kshs. 700,000.00.
Total award Kshs. 8,396,000.00
- d. Interest at court rates from date of judgment till payment in full
- e. Costs of the suit.

DATED AT NAIROBI THIS 25TH DAY OF SEPTEMBER 2025.

MATHEWS NDUMA

JUDGE

Appearance:

Mr. Njoroge Karanja for Claimant

Ms. Kanchony & Co. Advocates for Respondent

Mr. Kemboi – Court Assistant

