



**Oucho v Trees for the Future INC (Cause E007 of 2023)
[2024] KEELRC 1354 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1354 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E007 OF 2023**

CN BAARI, J

JUNE 6, 2024

BETWEEN

BEN OUCHO CLAIMANT

AND

TREES FOR THE FUTURE INC RESPONDENT

JUDGMENT

1. Ben Oucho, the Claimant herein, filed this suit against Trees for the Future Inc vide a Memorandum of Claim dated 18th January, 2023, seeking the following reliefs: -
 - i. A declaration that he was constructively dismissed.
 - ii. A declaration that his termination was unfair and unlawful.
 - iii. A total of Kshs 5,850,000/= in terminal dues and other outstanding amounts from the contract.
 - iv. Leave pay 14 days.
 - v. Costs of the suit.
 - vi. Interest on (iii) and (iv) above at the prevailing court rates.
 - vii. A certificate of service
2. The Respondent entered appearance on 28th February, 2023 and filed a Response to the Memorandum of Claim that is similarly dated. The Respondent further lodged a counter claim dated 21st February, 2023 for the sum of Kshs 544,212/= plus interest from the date of filing suit till payment in full.



3. The matter was referred to court annexed mediation, but Counsel for the Claimant expressed reservations stating that a hearing date had already been set, hence the suit was returned for determination by the Court.
4. The case was heard on 19th September, 2023, when the Claimant testified in support of his case. The Claimant presented one witness who testified on 17th October, 2023. The Respondent called three witnesses who tendered their evidence on 27th November, 2023.
5. Both parties filed written submissions.

The Claimant's Case

6. It is the Claimant's case that he was employed by the Respondent on 1st January 2018 as a lead technician on a one-year fixed contract. He contends that his contract was renewed on the 1st January 2022, for a period of two years, and was promoted to the position of Regional Manager on 1st of September 2022.
7. It is his case that he dutifully and diligently carried out his work until 4th October, 2022, when he was unlawfully sent on administrative leave, for ostensibly failing to refund company money.
8. It is his assertion that he was thereafter on 14th November, 2022, issued with a show cause letter on failure to refund company money. He states that he responded to the show cause, indicating that he could not return the money, on the basis that some activities had already been undertaken, and that he was subsequently invited for a disciplinary hearing
9. It is his case that the administrative leave was unwarranted as the funds had been utilised for company purposes. He contends that the disciplinary hearing proceeded through a phone call due to internet challenges, and that he was asked questions which he responded to.
10. He further avers that the online disciplinary hearing did not meet the legal threshold. He states that he received a termination letter on 6th December, 2022.
11. The Claimant further affirms that the administrative leave was conjured up as a pretext to terminate his services on account of misappropriation of funds. He restates that his termination did not adhere to the dictates of Section 41 of the [Employment Act, 2007](#).
12. It is his case that the Respondent has unlawfully withheld his salary for the months of November and December, 2022.
13. On cross-examination, the Claimant told the Court that he was employed on contracts of one year from 2018 to 2021. He avers that the 2022 contract was for a term of two years.
14. He states further on cross-exam, that he did not receive formal communication on the two year contract for the year 2022.
15. The Claimant confirms that money was sent to his account on 11th October, 2022, in batches of Kshs.250,000 and Kshs.698,000/- all amounting to Kshs. 948, 000/-
16. It is the Claimant's further testimony that he was aware that pursuant to the letter sending him on administrative leave, he was not supposed to transact on behalf of the Respondent.
17. He further testified that he utilized the money on the Respondent's programs and that he has produced receipts of the payments in evidence. He further affirmed that he had authority to write vouchers to suppliers and issue receipts upon payment.



18. He confirmed that he did not invite the persons he paid as witnesses in in the case. He further confirmed that he still owed the Respondent money as he had not utilized all the money sent to him.
19. He confirmed on cross- exam that he received a show cause letter sent to his email address, that he understood the show cause, and that he responded to it.
20. The Claimant confirmed further that he was invited for disciplinary hearing, but that he asked the Respondent to reschedule the meeting on the basis that he was attending a funeral on the same day, and the Respondent agreed to his request and rescheduled the hearing to the 29/11/2022
21. It is his evidence that he did not complain about the unsatisfactory hearing. It is his further evidence that his contract is the correct contract and not the one produced by the Respondent.
22. He confirmed that he knew one Pius Odawo as the Human Resources Officer, and who had custody of all employee records. It is his testimony that he did not counter the forensic evidence.
23. CW2, one Gideon Osofi told court that he signed the contract produced by the Claimant, and that the one produced by the Respondent bears his signature though he is not the one who signed it.
24. He further confirmed that though he forwarded contracts to the Respondent's Director via email, he has not produced email exchanges on renewal of contracts.
25. It is CW2's evidence that Mr. Pius Odawo signed renewal of contract letters. He further told court that the said Pius Odawo was the HR specialist on 1st January, 2022 when the Claimant's contract was renewed, but that he was still on probation. It is his evidence that the HR specialist had custody of employee records.
26. It is his evidence that Kshs. 250,000 and another Kshs. 698,000 were transferred from the Respondent's account for which he was signatory, to the Claimant's account, but denied approving the transfer of the funds.
27. The witness further stated that he was aware that receipts produced by the Claimant in evidence were taken through forensic examination and that it is possible for one person to write all the receipts.
28. The Claimant prays that the court awards him the reliefs listed in his statement of claim.

The Respondent's Case

29. The Respondent contends that it is a non-profit organisation reliant on donor funding. It asserts that due to the uncertainty of availability of funds, it only issues one-year contracts. The Respondent acknowledges that the Claimant was its employee, but emphasises that it issued him a one-year contract from 1st January 2022.
30. The Respondent stresses that the contract produced by the Claimant was a forgery as its intricate contract renewal process did not allow for the contract and the offer letter to have different terms and conditions.
31. The Respondent emphasises that it was due to disciplinary issues that the Claimant was dismissed. It avers that after consultative and deliberative meetings on 4th October 2022, it was mutually agreed that the Claimant proceeds on leave to enable the carrying out of an internal audit.
32. It contends that the Claimant willingly acquiesced to being sent on leave by signing the notification of administrative leave.



33. It is the Respondent's case that during the pendency of the leave, the Claimant received Kshs.948,000/= irregularly transferred from its accounts to his. The Respondent further states that the Claimant's failure to pay back the irregularly transferred money is what necessitated issuance of a notice to show cause and the subsequent disciplinary action.
34. The Respondent avers that the Claimant responded to the notice to show cause and was invited for a disciplinary hearing on 29th of November 2022. It is the Respondent's averment that the Claimant acknowledged receiving the transferred amount, but failed to provide a statement of proof that the money was utilised for the company operations, and that it is for this reason that it dismissed him for gross misconduct and insubordination.
35. In summary, it is the Respondent's case that constructive dismissal does not arise as there was no resignation. Additionally, it asserts that unfair termination and 12 months' salary compensation cannot issue as the Claimant was lawfully dismissed.
36. On the counter claim, the Respondent avers that the Claimant owes it the illegally transferred amounts. It restates that upon the Claimant's dismissal, it recovered Kshs 403,787/= from his terminal dues leaving a sum of Kshs 544,212/= which forms the basis of the counterclaim.
37. RW1, Mr. Pius Odawo, confirmed that he did not sign the Claimant's contract and does not dispute the country Director's signature.
38. It is his evidence that the pay slip produced accurately indicates the Claimant's salary. He states further that its true the promotion letter reviewed the Claimant's salary.
39. RW2's evidence is that the disciplinary hearing was to take place on 29th November, 2022, online, but the claimant's network failed and he requested to be heard through a call to his mobile phone, hence the hearing proceeded by way of phone call.
40. RW further states that the Claimant told the disciplinary committee that he received the money and had utilized it on the Respondent's operations. He avers that the Claimant sought time to provide prove that he utilized the money, and though he was allowed to, he did not present any documents.
41. It is RW2's testimony that the Claimant was only notified that his terminal dues will be used to offset the amount owed through the letter of dismissal and no other meeting was held with him in this regard.
42. RW3, the forensic examiner, told court that the contract produced by the Claimant and that produced by the Respondent were printed from different sources.
43. He further affirmed that the contract produced by the Claimant, did not come from the employer/ Respondent. It is his evidence that in carrying out the forensic examination of the documents, he was solely guided by the documents provided and not what the client wants.
44. The Respondent prays that the Claimant's claim be dismissed with costs and that its counter claim be allowed as prayed.

The Claimant's Submissions

45. The Claimant submits that it is the Respondent's duty to justify termination in accordance with Sections 43, 45 and 47 of the *Employment Act*. He had reliance in the case of Peter Otabong Ekisa v County Government of Busia [2017] eKLR, where the court while citing Section 47(5) of the *Employment Act*, emphasised the employer's burden of rebutting the prima facie evidence of dismissal.



46. It is the Claimant's further submission that his 2-year contract has not been controverted as the Respondent neither produced the 12-month contract nor proved that the 2-year contract was a forgery. Furthermore, he asserts that the document examiner's report did not impugn the authenticity of the signatures in the contract.
47. The Claimant firmly restates that the provisions of Section 41 of the *Employment Act* regarding information of the reasons for contemplated dismissal and having a representative present at the hearing were not adhered to.
48. On the remedies available to the Claimant, he submits that the court should be guided by Section 49 of the *Employment Act*, and further urges the court to grant the prayers as sought in the Memorandum of Claim.
49. The Claimant finally prays that the court exercises its discretion in his favour and award him the costs of the suit.

The Respondent's Submissions

50. It is the Respondent's submission that the Claimant's allegation of constructive dismissal does not arise, as the Claimant did not resign. He relies on the cases of *Milton M Isanya v Aga Khan Hospital Kisumu (2017) eKLR* and *Coca Cola East and Central Africa v Maria Kagai Ligaga (2015)eKLR*, where the common thread was that constructive dismissal only occurs when an employee resigns due to a hostile work environment.
51. The Respondent submits that the Claimant was summarily dismissed for failure to obey lawful command. It affirms that Section 45 lists such failure as a reason for termination.
52. The Respondent asserts further that it had met the threshold of Section 43 given the Claimant's admittance of receiving Kshs 948,000/= and his subsequent failure to refund as directed. It sought to rely in the Court of Appeal decision in *Kenya Revenue Authority v Reuvel Waithaka & 2 Others [2019] eKLR*, where it was held that an employer need not undertake a near forensic examination to the level of proof beyond reasonable doubt before taking action.
53. It submits that the Claimant failed to give account of the money sent to him during the disciplinary hearing, leaving them with no option but to terminate his services. The Respondent emphasises that the administrative leave was not intended to terminate the Claimant, but to assess their operations.
54. Regarding the termination procedure, the Respondent submits that the same was followed to the letter. It avers that the Claimant was issued with a notice to show cause, invited for a disciplinary hearing and informed of his right to be accompanied by a representative. It placed reliance on the Kenya Revenue Authority case (*supra*) in which the four elements crucial for procedural dismissal were delineated.
55. To buttress the correctness of the procedure, it asserts that the minutes of the disciplinary meeting produced have not been disputed. Moreover, it contends that everything points to the meeting being participatory. Reliance is placed on *Kudhehia Workers v Masinde Muliro University of Science and Technology [2018] eKLR*, where the court held that a party cannot deny participating in a disciplinary hearing when they have participated in it.
56. In support of its counterclaim, the Respondent submits that the receipts and payment vouchers ostensibly utilised for company purposes were a forgery. Furthermore, it affirms that the receipts having not been produced at the disciplinary hearing should be disregarded.



57. The Respondent further submits that Section 19 (1)(b) and (d) of the *Employment Act* contemplates recovery of lost funds and property from an employee who misappropriated it. It relies on the case of *Liech v Sameer Agricultural & Livestock (K) ltd* where the court allowed a counterclaim on account of negligent loss of cash by an employee.
58. In respect of the Claimant's entitlement to the reliefs sought, the Respondent submits that 1 months pay in lieu of notice is not payable as the termination was actuated by gross misconduct. It further submits that given that the dismissal was lawful the Claimant is equally not entitled to damages.
59. On statutory deductions, the Respondent submits that they were not specifically pleaded or particularized. On the claim for leave days, the Respondent avers that the same was deducted to recover the unrefunded funds.
60. With respect to salary for the remainder of the contract term, the Respondent contends that the same was not provided for in the contract hence, is not awardable. It relies on the case of *Alphonse Maghanga Mwachanya v Operation 680 limited* [2013] eKLR where it was held that in a fixed term contract compensation for the remainder of the term has to be contractually agreed.
61. In conclusion, the Respondent submits that the Claimant's case be dismissed and the counterclaim be allowed. It urges the court to be guided by its decision in *Jacob Otieno Oyugi v Trees for the future Inc* (2023) eKLR arising out of the same series of events in issue herein.

Analysis and Determination

62. I have considered the pleadings, the witnesses' oral testimonies and the rival submissions. The issues that present for determination are:
 - i. Whether the Claimant was constructively dismissed; and if not, whether he was unfairly dismissed.
 - ii. Whether the Claimant is entitled to the remedies sought.
 - iii. Whether the Respondent is entitled to the remedy sought under the Counter-Claim.

Whether the Claimant was constructively dismissed; and if not, whether he was unfairly terminated.

63. In his pleadings, the Claimant sought a declaration that he was constructively dismissed. He however, did not lead any evidence nor did his oral testimony support the allegation of a constructive dismissal.
64. In the case of *CMC Aviation Ltd. vs. Cruisair Ltd. (No. 1)* [1978] KLR 103; [1976-80] 1 KLR 835 Madan J (as he then was), had this to say on proof of the averments in a pleading: -

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”



65. The Black's Law Dictionary (Tenth Edition) defines constructive dismissal as:
- “An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”
66. Lord Denning in *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344, had this to say on constructive dismissal: -
- “If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”
67. The Claimant was sent on what the Respondent referred to as administrative leave. Parties were in agreement that at the period of the administrative leave, the Claimant was still an employee of the Respondent, on full salary and entitled to all his benefits, and further that the administrative leave was not a disciplinary process.
68. In the description of a constructive dismissal from the holding of Lord Denning in *Western Excavating* (Supra), a salient feature is that an employee must leave the service of the employer through resignation, with or without notice.
69. The Claimant did not allege having resigned from the service of the Respondent. Both his pleadings and his oral testimony as well as the Respondent's evidence, indicate that he was summarily dismissed.
70. In light of the foregoing I conclude by holding that the Claimant has not proved a case of constructive dismissal.

Whether the Claimant was unfairly dismissed

71. The Claimant's case is that he was sent on administrative leave on 4th October, 2022, and while on leave, a sum of Kshs.948,000/= was wired to his personal account from the Respondent's account.
72. It is his assertion that he was informed that the money was wired by error, and instructed to refund the money to the Respondent. He told the court that he did not refund the money and was then issued a show cause letter dated 14th November 2022, whose charge was failure to obey lawful command by dint of his refusal to refund company money.
73. The Claimant told this Court that he responded to the show cause, indicating that he could not return the money, on the basis that some activities had already been undertaken, and that he was subsequently invited for a disciplinary hearing.



74. Section 41 of the *Employment Act*, 2007 states thus on procedural fairness:
- “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”.
75. It is evident from the record that the Claimant was issued with a show cause letter on the 14th November 2022. It was also confirmed to this Court that the Claimant responded to the show cause notice and though the disciplinary hearing did not take place the first time it was scheduled, the rescheduling was at the instance of the Claimant.
76. The minutes of the disciplinary hearing indeed show that the Claimant attended the disciplinary hearing and responded to the charges levelled against him.
77. In *Hosea Akunga Ombwori v Bidco Oil Refineries Limited* (2017)eKLR the Court expounded on the provisions of Section 41 as follows: -
- “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.
27. The notice also ought to inform the employee that disciplinary action which might lead to termination of employment is under consideration.....”.
78. Further in *Silvester Malei Kyengo v Kenya Meat Commission* (2019) eKLR the Court in that matter opined: -
- “In this case the Claimant was first served with a show cause letter stating the charges against him, interdicted pending investigation, accorded on oral hearing in the company of another employee of his choice and finally served with a termination letter confirming that his defence was considered but his services terminated for reasons cited in the letter. Such procedure in my view passes the test of procedural fairness and I so hold”
79. The show cause letter sent to the Claimant, spelt out the basis of the charges and required that the Claimant makes written representation in response to the charges. Further, the invitation letter informed him of his right to attend the hearing with a fellow employee, a right to question the disciplinary committee, a right to tender evidence and a right to an interpreter if he needed one.
80. The Claimant’s only issue with the disciplinary process, is that he was called to a disciplinary hearing that did not satisfy the threshold provided in the *Employment Act*, on the basis that the notice was short and the hearing was conducted through a telephone call.
81. The Claimant told Court on cross-examination that participating in a virtual hearing was his choice and that he accepted to proceed with the hearing through a phone call since it is his network that failed, coupled with the fact that the hearing had earlier been rescheduled at his instance.
82. It is clear from the record that the first disciplinary hearing was first scheduled for 25th November, 2022, but at the Claimant’s instance, the hearing was rescheduled to 28th November, 2022. In the premise, the issue of short notice is unfounded.



83. The minutes of the hearing do not show that the Claimant objected to the hearing proceeding through a telephone call and the conversation was recorded.
84. In view of the foregoing, this court is satisfied that the Claimant was accorded fair process and find the dismissal procedurally fair.
85. On whether the Respondent had valid, fair and justified reasons to dismiss the Claimant, otherwise referred to as the substantive fairness test, Sections 43, 45 and 47(5) of the [Employment Act](#), require that an employer proves the reasons for termination/dismissal, prove that the reasons are valid and fair and further prove that the reasons are justified.
86. The Respondent dismissed the Claimant for failure to refund money sent to his account, and which he admitted receiving. The Claimant's position is that he used the money to pay for operations of the Respondent, and that he produced vouchers and receipts in evidence as prove that he utilized the money for the Respondent's purpose.
87. In Titus Muriuki [Ndirangu v Beverly School of Kenya Limited \[2022\] eKLR E009 of 2021](#) the court held: -

“Section 43 of the Act places a burden on the Respondent to demonstrate and prove the reason of termination based on the facts, matters, and circumstances that existed at the time of termination. As stated elsewhere in this judgment, the Respondent did not defend this cause and as such the evidence by the Claimant that there was no lawful reason the existed as at the time of his termination on redundancy stands uncontroverted and unchallenged.”
88. Further, in John Jaoko Othino v Intrahealth International [2022] eKLR , the Court while relying on the test of reasonableness set out by Lord Denning in the case of British Leyland UK Ltd vs Swift (1981), held that the test of reasonableness would be to answer the question, was it reasonable for the employer to dismiss the employee? And proceeded to state that if no reasonable employer would have dismissed the employee, the dismissal would be unfair, but if a reasonable employer might reasonably dismiss him, then the dismissal would be fair.
89. The Claimant was sent on administrative leave on 4th October, 2022. Money was sent to his account on 11th October, 2022, and he asserts that he spent the money on the Respondent's operations, when the letter of administrative leave clearly stated that he was not supposed to transact the Respondent's programs in the pendency of the administrative leave, and which position he confirmed being aware of during cross-examination.
90. Further, the payment receipts and vouchers produced in support of the expenditure, did not amount to the sum transferred and were further confirmed through the evidence of the forensic document examiner to have been written by the same person, and were thus forgeries.
91. It is also not lost on the Court that the evidence of the forensic document examiner was not rebutted, leaving the Court with just the Respondent's position on the issue.
92. In my considered view, an employee receiving Kshs.948,000 from the employer, refuses to refund the money on demand, and is unable to prove having utilized the money on the employer's operations, is no doubt a fair, reasonable and justified ground to dismiss the services of the employee.
93. I therefore hold the Claimant's dismissal substantively fair.



Whether the Claimant is entitled to the remedies sought.

94. Having found that the Claimant's dismissal was procedurally and substantively fair, the claim for 12 months' salary as compensation for the unfair dismissal fails and is dismissed.
95. The Claimant is entitled to payment on account of unutilized leave days and the salaries for November and the 5 days worked in December, 2022 since his dismissal took effect on 6th December, 2022. The claims are thus allowed as prayed.
96. I note that the Respondent computed these salaries and applied it to recover money it lost through the negligence of the Claimant.
97. The Claimant was summarily dismissed for gross misconduct, which dismissal by law does not entitle an employee to either notice or pay in lieu thereof. The claim for pay in lieu of notice thus equally fails and is dismissed.
98. Compensation for the remainder of the contract is not a remedy known to the law, and did not form part of the agreement between the parties. The claim is dismissed.

Whether the Respondent is entitled to the counterclaim

99. The Respondent's counter-claim is in respect of the monies the Claimant received and failed to refund when directed to do so.
100. The Respondent contends that it computed the Claimant's terminal dues upon dismissal and arrived at a figure of Kshs.403,787.99/-, comprising of salary for the month of November, 2022, outstanding leave days and salary for 5 days worked in December, 2022.
101. It is the Respondent's further assertion that it applied the amount of Kshs.403,787.99/- to recover part of the Kshs.948,000/- that the Claimant received and failed and/or neglected to refund in compliance with Section 19 of the [Employment Act](#), and hence Kshs.544,212.01/- is still outstanding, and is the subject of the counter claim.
102. In the case of *Liech v Sameer Agricultural & Livestock (K) Ltd (now) Devyan Food Industries (K) Limited*, the court while addressing a similar issue of funds lost through the negligence of the employee held: -

“In view of the foregoing finding that the Claimant caused the loss of Kshs.690,000 through negligence, I allow the Respondent's counterclaim for Kshs.310,075 being the balance of the lost money.”
103. In the same breath, having found that the Claimant neither refunded nor utilised the amounts for the benefit of the Respondent, the counterclaim is allowed as prayed.
104. In the end, I make the following orders: -
 - i. A declaration that the Claimant's dismissal is not unfair.
 - ii. An order that the Claimant pays the Respondent the amount of the counter-claim at Kshs.544,212/=
 - iii. The Claimant shall bear the costs of the suit.
105. Judgment of the court.



DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 6TH DAY OF JUNE, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Mbeka h/b for Mr. Otieno for the Claimant

Ms. Kasioka h/b for Mr. Gachaga for the Respondent

Ms. Anjeline Wanjofu- C/A

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