



**Peter v Jei Stores Limited (Cause E6477 of 2020)  
[2024] KEELRC 2008 (KLR) (1 August 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2008 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E6477 OF 2020  
NZIOKI WA MAKAU, J  
AUGUST 1, 2024**

**BETWEEN**

**SYLVIA MUENI PETER ..... CLAIMANT**

**AND**

**JEI STORES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed this suit seeking recompense for the alleged wrongful and unlawful termination from employment. The Claimant averred that she was employed sometime in June 2012 on an oral contract as a shop attendant. She averred that she served the Respondent diligently and with loyalty leading to her getting various pay raises and was later promoted to the position of Mpesa agent earning Kshs. 11,500/-. The Claimant averred that she served until 14<sup>th</sup> July 2020 when her services were terminated without lawful cause. The Claimant averred the verbal termination was calculated to deny her a livelihood and she thus sought issuance of a certificate of service, salary in lieu of notice – Kshs. 11,500/-, salary for July 2020 – Kshs. 11,500/-, service pay for 8 years worked – Kshs. 46,000/-, unpaid leave for 8 years – Kshs. 92,000/-, NSSF cover for 8 years – Kshs. 38, 400/-, NHIF cover for 8 years – Kshs. 48,000/-, house allowance for 8 years – Kshs. 165,000/-. She also sought costs of the suit.
2. In reply, the Respondent filed a response to claim and counterclaim. In the defence, the Respondent averred that Claimant did not serve it with diligence and loyalty. The Respondent averred that it discovered that the Claimant was stealing Mpesa agency funds and it suspended her on 14<sup>th</sup> July 2020 to facilitate investigations. It averred that the Claimant was invited back on 17<sup>th</sup> July 2020 with a view to discussing the way forward but the Claimant failed, neglected and/or refused to honour the said invitation. The Respondent averred that the Claimant’s employment was not terminated but that the Claimant absconded from work. It was averred that the Claimant is the one who breached her employment contract with the Respondent by stealing from her employer and then absconding from work. The Respondent thus sought dismissal of the Claimant’s claim with costs.



3. The Respondent by way of counterclaim averred that at the time the Claimant absconded from her workplace she had stolen from the Respondent's Mpesa Agency a total of Kshs. 140,803/-. The Respondent thus claimed the sum of Kshs. 140,803/- being a refund of the funds stolen by the Claimant from the Respondent's Mpesa Agency. The Respondent sought the sum together with interest thereon at court rates as well as costs for the counterclaim.
4. The Claimant in reply to defence and response to counterclaim, denied that she stole from the Respondent. She denied being indebted to the Respondent on the counterclaim. The Claimant averred that the only shortfall that had ever occurred during her employ occurred only once on 10<sup>th</sup> June 2017 when a con artist posing as a customer tricked the Claimant out of monies which amounts were wholly deducted and settled out of the Claimant's salary. The Claimant averred that the counterclaim is a ploy towards unjust enrichment and an abuse of court process. The Claimant averred the Respondent's counterclaim is estopped. She averred it was an afterthought, is frivolous, vexatious and otherwise an abuse of the court process only meant to circumvent lawful obligations to the Claimant. The Claimant denied that the Court had jurisdiction to deal with the counterclaim and thus sought the defence be struck out, the counterclaim dismissed with costs and judgment be entered against the Respondent as prayed in the memorandum of claim.
5. The Claimant and the Respondent's witness Mr. Edward Wanjohi Mugo testified. The Claimant testified that she was aware an audit was carried out but stated that she was never called by the auditor to clarify nor was she present when the auditor audited the Mpesa Agency. She stated that she never run the Mpesa Agency on her own as the branch manager had access. She said he was the one who kept the key. The Claimant stated that she had finally got employed elsewhere. The Respondent's witness was the director and owner of the Respondent and he stated that the NSSF and NHIF dues were deducted and remitted. He said that it was not true that the Claimant did not go on leave. He testified that the Claimant would get a month for annual leave and she used to take leave. He stated that there were reports in 2020 by the manager on the Mpesa counter where losses were noted. He said the Claimant was suspended to allow for investigations and that the Claimant was to see him but she absconded work. He stated that the Claimant was indebted to the Respondent for the loss enumerated on the counterclaim. In cross-examination he admitted that he never called the Claimant about the audit report and that he had not availed a record of the leave days taken. He testified that he was called by an advocate but because he was driving he did not note her name but said the Claimant could return. He said he never called the Claimant directly to inform her she was to return.
6. Thereafter the parties were to file submissions and the Claimant in her submissions asserts that the issues for determination are:
  - a. Whether the summarily termination is unlawful, unfair and a violation of the Claimant's labour rights
  - b. Whether the Claimant is entitled to compensation for unlawful termination.
7. The Claimant cited sections 43 and 45 of the [Employment Act](#) and submitted that an employer may not terminate an employee except for good cause. She relied on the case of *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR and that even where there exists substantive ground(s) to justify a termination, the law obligates the employer to observe certain procedural strictures to ensure the upholding of the broad principles of natural justice in processing the separation between him/her and the affected employee. The employer has to: provide the employee with details of the accusations against the employee; allow the employee an opportunity to respond to the charges; allow the employee to be accompanied by a shop steward or co-employee of his choice during the process; and finally provide the employee with a decision either terminating or swing the contract of service. The Claimant



cited the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR where the Court held that section 41 of the *Employment Act* is imperative that an employee be heard. The Claimant submitted that she was given 4 official days off from 10<sup>th</sup> -13<sup>th</sup> July 2020. And that when the Claimant reported back to work on 14<sup>th</sup> July 2020, the Respondent verbally informed her that her employment had been terminated as it did not have money to pay her. The Claimant submits she wrote a letter on 6<sup>th</sup> August 2020 to claim for her terminal dues but the Respondent in their response stated that the Claimant had been suspended pending investigation for allegedly stealing money from the M-pesa. The Claimant submitted that the Respondent made a complaint at Capitol Hill Police Station and criminal charges were instituted against the Complainant in Criminal Case No. E1310 of 2020 on the offence of Stealing by Servant of Kshs. 140,803/-. The Claimant submits she was acquitted of the offence in the Ruling dated 24<sup>th</sup> May 2023. The Claimant submitted that the Respondent has however continuously failed to pay the Claimant her terminal dues. The Claimant submitted that it is quite unfair to only terminate one employee purporting a loss of money yet there were others who were in possession of the same funds such as the Manager Mr. Mundia and one Lister (besides the other employees who worked at the Supermarket Tills). In fact, in all the claims of loss of funds, the Manager was the constant as he is the one that had access to the Supermarket and the funds at all material times. The Claimant submits she was not invited for any disciplinary meeting nor allowed to be accompanied by a shop steward or co-employee of her choice during the process. The Claimant submitted that there is no evidence indicating that she stole the alleged money. It was conceded that in the year 2017, the Claimant lost some Kshs. 60,000/- which she paid for through deductions from her salary. However, in regard to the lost sums, the Claimant submits the Respondent lacks any evidence whatsoever to prove that she indeed stole the Kshs. 140,803/- as purported by the Respondent through its Advocates and in its Response to the Memorandum of Claim to justify the summarily dismissal under section 44 of the *Employment Act*. It was submitted that in fact, the Claimant was acquitted of the Charges brought against her in respect to the same.

8. The Claimant cited the case of *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR where the Court of Appeal held:

“remedies for unfair termination is provided for in section 49 of the Act. They include, payment equivalent to a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employees at the time of dismissal. In deciding whether to adopt some of the remedies, the court has to take into account a raft of considerations such as the conduct of the employee, which to my extent caused or contributed to the termination.”

9. The Claimant cited the cases of *Pius Machafu Isindu u Lavington Security Guards Limited* [2017] eKLR and *Cooperative Bank of Kenya Limited v Yator (Civil Appeal 87 of 2018)* [2021] KECA 95 (KLR) 22 October 2021) (Judgment) where the Court of Appeal stated as follows in regards to compensation for summarily dismissal:

“34. Turning on the issue of the damages awarded, one of the guiding principle for the remedies under section 49 is that damages are awarded to compensate the claimant, not as punishment to the employer but to make good the employees loss. In *Hema Hospital vs Wilson Makongo Marwa* [2015] eKLR this Court adopted with approval the holding of the Labour Court of South Africa in *Le Monde Luggage cc t/a Pakwells Petze vs. Commissioner G. Dun and others*, Appeal Case No. JA 65/205 which when applying provisions of the *Labour Relations Act* of South Africa which is similar to ours held that: “The



compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This Court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer."

10. The Claimant submitted that she had proved her case and was entitled to the prayers in her claim.
11. The Respondent submitted that the issues for determination were:
  - i. Whether the Claimant was dismissed from employment.
  - ii. Whether the said dismissal was lawful and fair.
  - iii. Whether the Claimant absconded from employment
  - iv. Whether the Claimant is entitled to the remedies sought.
  - v. Whether the Respondent is entitled to the Counterclaim
12. The Respondent submitted that the Claimant had conceded that she was suspended to pave way for investigations but never came back to work despite being asked to. The Respondent relied on the case of Julius Kyalo Malonza v Ruth Osolo t/a Eraeva Catering Services [2021] eKLR where the Court held as follows:-
  36. The Claimant provided no evidence on where and how the termination took place and does not attribute any wrongdoing to the Respondent. The claim suffers the deficit of the essential factual background to support the termination as alleged.
13. The Respondent submitted that similarly, in this case, the Claimant cannot prove how the termination took place. It is the Respondent's submission that the Claimant was not summarily dismissed but suspended to facilitate investigations on the amounts unaccounted for, and after the Claimant failed to report back to work as agreed upon, the Respondent adjudged this as an abscondment. It submitted that there was no dismissal.
14. The Claimant was accused of theft of monies from the Respondent's Mpesa Agency. When the suspension was meted out, it was oral and the Claimant was not directly contacted to return to work either for a disciplinary hearing or for further audit queries. The Respondent's witness admitted that he was called by a lawyer seeking to know the fate of the Claimant. He conceded he never called the Claimant. The Claimant was therefore not subjected to the rigours of section 41 despite the accusations levelled against her. The Respondent was required to demonstrate the efforts it made in calling the employee it accused of abscondment. It is not enough to just say the employee absconded. The employer is required under section 43 and 45 of the *Employment Act* to demonstrate there was basis for any termination and in this case, the Respondent failed to do so. The Respondent as such is liable to the Claimant to the following extent. The Claimant is entitled to pay for the month of July, the notice period of one month and compensation which the court sets at 3 months given the Claimant has even moved on and secured alternative employ.
15. The Respondent raised a counterclaim. Other than claim the Claimant stole the money, the audit conducted was not produced as evidence as the forensic audit carried out would have revealed the extent and complicity (if any). As such, the Respondent failed to discharge its evidentiary burden to prove the Claimant was liable for the loss. The criminal case which relied on an even higher threshold found



her not guilty. I similarly do not find her culpable and so hold. The counterclaim is dismissed albeit with no order as to costs.

16. In the final analysis, I enter judgment for the Claimant against the Respondent for:-

- a. One month's salary in lieu of notice – Kshs. 11,500/-,
- b. salary for July 2020 – Kshs. 11,500/-
- c. 3 months' salary as compensation – Kshs. 34,500/-
- d. Certificate of service strictly in terms of section 51 of the [Employment Act](#).
- e. Costs of the suit.
- f. Interest at court rates on the sums in (a), (b) and (c) above from the date of judgment till payment in full.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 1<sup>ST</sup> DAY OF AUGUST 2024**

**NZIOKI WA MAKAU**

**JUDGE**

