



**Oyugi v Silafrica Kenya Limited (Petition 189 of 2019)
[2024] KEELRC 2648 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2648 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 189 OF 2019**

**J RIKA, J
OCTOBER 31, 2024**

BETWEEN

JACOB OMONDI OYUGI PETITIONER

AND

SILAFRICA KENYA LIMITED RESPONDENT

JUDGMENT

1. The Petitioner filed his Petition, on 15th October 2019.
2. He filed an Amended Petition, dated 23rd March 2022.
3. The Petition is founded on the Affidavit of the Petitioner, sworn on 14th October 2019, and on extensive grounds outlined in the 69-paragraph Petition.
4. The Petitioner states that he was employed by the Respondent as a Senior Sales Manager, on 17th June 2016.
5. He rose to become the Head of Sales, reporting directly to the Chief Executive Officer, by the time he left employment. His last gross monthly salary was Kshs 351,357.
6. He gave the Respondent a notice of resignation of 2 weeks, dated 13th August 2019.
7. He was invited for a meeting with Group Human Resources Officer, Stephen Kamau, slated for 13th August 2019.
8. At the meeting, he found 2 strange white men. They were introduced to him as investigators. The investigators informed him, that he had been under investigation for some time, and there was overwhelming evidence against him, implicating him in certain malpractices. He was not given details of the allegations.



9. The Petitioner was shocked. He did not know what was being investigated. He felt harassed and intimidated. Kamau suggested that he should resign, to save himself from being soiled.
10. There was a new Group Chief Executive Officer [CEO], and the Petitioner felt he was being pressured to leave, to give room to the new CEO, to make fresh appointments.
11. Once the Petitioner had issued his notice of resignation, the Respondent immediately shut down his official e-mail address; relocated his official laptop and duty car to other officers; and placed his office under another officer.
12. The new CEO also forced the Human Resource Manager-Kenya, to resign. Other Managers were issued warning letters, by the CEO. The CEO insinuated that the said Managers were incompetent and unqualified to hold their positions.
13. The Country CEO-Kenya, Deputy CEO-Kenya, and Head of Technical and Production, all tendered their resignations.
14. The Respondent replaced the Petitioner's department with the commercial department. The functions of the Petitioner as Head of Sales, were taken over by the commercial department. Fredrick Nzomo was named Head of the commercial department. The Petitioner's position was effectively, rendered redundant.
15. The Respondent declined the Petitioner's resignation, through a letter dated 14th August 2019. After refusal, the Respondent engaged in acts of harassment against the Petitioner. His salary was withheld.
16. He was issued a letter to show cause, dated 26th September 2019. He was alleged to have engaged in fraudulent sale activities by depositing money, contrary to standing instructions. He was alleged to have failed to account for Kshs 4.5 million worth of sales. There were no records to support other sales worth Kshs 12.5 million, marked as disputed. It was also alleged that sales worth Kshs 2.5 million, marked as credit notes, were unsupported.
17. The Petitioner replied, explaining that his role as Head of Sales, as per standing instructions, was minimal. He denied liability. The Respondent had in any event, shut down his official e-mail account, and he could not access relevant documents, to enable him adequately respond.
18. He asked for the investigation report, which the Respondent used, in making the allegations against the him. None was supplied. Without hearing the Petitioner, the Respondent issued a letter summarily dismissing the Petitioner, dated 1st October 2019.
19. He prays the Court for: -
 - a. Declaration that the Respondent's access, or purported access, of the Petitioner's bank account, was unconstitutional, and contravened the Petitioner's rights under Articles 35 and 50 of the Constitution.
 - b. Declaration that the Respondent's refusal to accept the Petitioner's letter of resignation, or notice to resign, was unconstitutional and amounted to forced labour, contrary to Article 30 of the Constitution.
 - c. Declaration that the Respondent breached the Petitioner's constitutional right to confidentiality and/or accessed data and information from his bank account through unauthorized means, and contrary to the law.



- d. Declaration that the constitutional mandate to investigate criminal matters, is conferred on specific agencies, and the Respondent acted unconstitutionally, by appointing private persons to conduct investigations on the Petitioner.
 - e. Declaration that the Respondent failed to grant the Petitioner fair hearing and to take fair administrative action, in breach of Sections 41, 43, 44 and 45 of the *Employment Act*, and Sections 3 and 4 of the *Fair Administrative Action Act*, and hence contrary to Articles 47 and 50 of the *Constitution*.
 - f. Declaration that the letter of summary dismissal dated 1st October 2019, was illegal, null and void, and of no legal consequence.
 - g. An order quashing the purported bank pay slips, investigation report and dismissal letter.
 - h. An order for compensation for unfair termination under Section 49 of the *Employment Act*, and payment of any accrued terminal benefits.
 - i. Payment of unutilized annual leave.
 - j. Damages.
 - k. Costs.
 - l. Any other suitable relief.
20. The Respondent relies on the Affidavit of Group Human Resource Officer, Stephen Kamau, sworn on 7th November 2019, and that of Eric Nguyo, a former supervisee of the Petitioner, sworn on the same date.
21. It is conceded that the Petitioner was employed by the Respondent, as pleaded in the Petition.
22. Kamau explains that the Petitioner was involved in fraudulent activities, first brought to the attention of the Respondent, by Eric Nguyo.
23. Management found out that debt level for trade sales, was ballooning. Old debts of over 90 days, stood at Kshs 40 million. The Respondent's working capital was affected.
24. The Management introduced a risk and reward policy, where any staff who collected over 80% of the outstanding debts, was paid an additional month's salary.
25. The Petitioner generated reports on performance of the members of sales team, under the policy. Those who failed to achieve their targets were issued warning letters.
26. Eric Nguyo was marked by the Petitioner, as one of the staff who did not meet their targets. He was exposed to disciplinary action. He had information that the Petitioner was defrauding the Respondent.
27. The Petitioner was dealing directly with accounts belonging to Kathumbi Financial Services, Navu FSA, Nunguni FSA, Kikima FSA and Makuyuni FSA. He would collect cash from these accounts, or send Nguyo to collect on his behalf. The amounts collected would be deposited in the Petitioner's own bank account at Equity, Number 0550266838472. Fearing that he would be summarily dismissed, Nguyo reported the Petitioner to another supervisor, Rina Kibaara. He also gave details of the Petitioner's fraudulent activities, to Kamau.
28. Nguyo availed banking slips for the sums he had deposited in the Petitioner's personal bank account.



29. The Petitioner would collect cheques from customers, and bank in Cooperative Bank Account Number 011488XXXXXX, held by Genial Supplies. He would then send Nguyo to withdraw cash, and deposit in his personal account.
30. The Respondent engaged a private investigator. The Petitioner was confronted with the interim investigation report, and did not deny wrongdoing. Instead, he offered to resign, on 13th August 2019.
31. The Management declined his resignation, and endeavoured to complete investigation. The investigation and reconciliation report, dated 18th September 2019, disclosed serious fraud involving the Petitioner.
32. He was issued a letter to show cause, dated 26th September 2019, which he replied to, on 30th September 2019. He was summarily dismissed, on 1st October 2019 for gross misconduct.
33. Termination was fair. The Petitioner was granted a fair hearing. No rights of the Petitioner under the Constitution and the cited Statutes, were infringed.
34. Eric Nguyo confirmed in his Affidavit, that he worked under the Petitioner. The Petitioner collected money from customers, and coerced Nguyo to deposit in his personal bank account. Nguyo confirmed that he fell short in his targets, and felt victimized by the Petitioner. He feared he would be dismissed, and therefore whistle-blew on the Petitioner.
35. The Petitioner gave evidence on 27th October 2022, and 15th March 2022, when he closed his Petition. Michael Ombogo, an Auditor engaged by the Respondent, gave evidence on the same date- 15th March 2022. The last witness for the Respondent was scheduled to testify on 5th October 2023 and 20th February 2024. The witness was not available, and the Court ordered proceedings closed. The Petition was last mentioned on 2nd July 2024, when the Parties confirmed filing and exchange of their Closing Submissions.
36. The Petitioner restated the contents of his Affidavits, and Grounds on the face of his Petition, in his evidence-in-chief, as summarized above. He emphasized that he was not taken through a disciplinary hearing. He stated that he resigned, but was forced by the Respondent to continue working for 2 months, after resignation. Cross-examined, the Petitioner stated that he was forced to resign. He resigned on 13th August 2019, the very day he was first confronted with allegations of fraud. Deposits made in his bank accounts, were not necessarily, from the Respondent's customers. He was running his own business, while in employment.
37. Auditor Michael Ombogo, exhibited 2 fraud reports, based on his examination of the disputed accounts. He was convinced that the Petitioner was involved in fraud against the Respondent.
38. Cross-examined, he told the Court that he prepared 2 fraud reports, dated 20th March 2020 and 20th September 2022. It was almost 1 year, after the Petitioner left employment. He contacted Respondent's customers, but not the Petitioner. They gave him details of the fraudulent transactions. Money from the Respondent's customers, was deposited in the Petitioner's bank accounts. There were cheques written out in favour of the Petitioner, for goods delivered by the Respondent. All payments were supposed to be made directly to the Respondent. Redirected, Ombogo told the Court that he did not manufacture any of his reports.
39. The issues are whether, the Petitioner's constitutional rights were violated by the Respondent, and constitutional remedies warranted; and whether he was summarily dismissed unfairly, contrary to the Employment Act and the Fair Administrative Action Act, and statutory remedies warranted.



The Court Finds

40. The Petitioner was employed by the Respondent, on 21st June 2016, as a Sales Manager- Trade.
41. He rose to become Head of Sales, reporting directly to the CEO.
42. He was summarily dismissed on 1st October 2019, for stealing from the Respondent. It was explained that he would collect money in cash, or through cheques, and deposit the money to his own bank account. He did so mainly through his supervisee, Eric Nguyo, who filed an Affidavit, detailing the fraud.
43. Violation of constitutional rights, prayers for remedies: The Respondent did not access, or purport to access the Petitioner's bank account, in violation of the Petitioner's rights under Articles 35 and 50 of the Constitution.
44. As clearly shown in the Affidavit of Eric Nguyo, and the reports filed by auditor Ombogo, the Petitioner was engaged in repeated acts of gross misconduct. He would send Nguyo to deposit stolen money and cheques, belonging to the Respondent. Upon deposit, Nguyo would be issued banking slips, which are exhibited before the Court.
45. The access to banking details of the Petitioner was made possible through his own decision to send Nguyo, to transact on his behalf, at his bank. He enlisted Nguyo into his criminal enterprise, and cannot seek the protection of the Constitution, after Nguyo decided to turn over details of the fraud, including the Petitioner's bank details, to the Respondent.
46. It is clear also, that the Petitioner was engaged in crime, and could hardly seek the protection of the Constitution, when evidence of crime was accessed by his Employer.
47. Nguyo did not access the Petitioner's bank details without the authority of the Petitioner. There was no breach of the Petitioner's right to confidentiality. His bank details became available to Nguyo and the Respondent, through his own wrongdoing.
48. The Petitioner did not deny that money was deposited in his bank accounts by Nguyo. He incredulously, explained under cross-examination, that deposits made, were not necessarily from the Respondent's customers. He told the Court, that he had his own business, and the deposits made, were proceeds of his own business.
49. Employees are bound by an implied term in their contracts of employment, not to conduct own businesses in completion with their Employers. They have an implied obligation not to run their own businesses, that would affect their Employers' business. They have an obligation to devote their time to their Employers' businesses. There is an implied obligation to act in good faith. The Petitioner disclosed that he was not only running his own business while employed by the Respondent, but also that he enlisted Eric Nguyo, an Employee of the Respondent, and his supervisee, to deposit money for him. He diverted human and capital resources, from the Respondent, which was both criminal and completely against the implied duty, to act in good faith.
50. Declaratory orders [a] and [c], as listed in the Petitioner's Submissions dated 26th March 2024 have no foundation, and are declined.
51. There is similarly no merit, to the suggestion by the Petitioner, that the Constitution bars an Employer, from carrying out internal investigations, into allegations of fraudulent activities carried out by an Employee, against an Employer.



52. Fair hearing which the Petitioner alleges he was denied, contemplates that there is an investigation, an enquiry into the allegations, before the actual hearing. Section 43 of the [Employment Act](#) requires an Employer to establish a valid reason, before termination. Investigations are the foundation, upon which the establishment of a valid reason, rests. Employers must of necessity, investigate, and not wait for state agencies, to unravel employment offences committed by their Employers, within the workplace.
53. The Respondent was within its mandate to engage internal investigators. State agencies were not required to investigate an administrative matter. It was entirely within the discretion of the Respondent to conduct investigations internally, and determine whether the process should have been escalated to the Police. There was nothing unconstitutional about calling in private investigators. The bottom line is that there is no Article under the [Constitution](#), which requires state agencies to investigate employment offences, to the exclusion of an Employer. Declaratory order sought at paragraph [d] of the Submissions is declined.
54. The Petitioner prays the Court to find that the Respondent acted unconstitutionally, but also, acted in violation of the Petitioner's rights under Sections 41, 43, 44 and 45 of the [Employment Act](#).
55. The remedies sought include invalidation of the letter of summary dismissal, quashing of banking slips and letter of summary dismissal, compensation for unfair termination, and payment of annual leave.
56. The remedies sought, discount characterization of the dispute, as a Constitutional Petition. The remedies are accessible under the [Employment Act](#). There ought to be no resort to the [Constitution](#), where an aggrieved party, has complete remedies under a Statute. This is a dispute which could have been brought, prosecuted and remedied, solely under the [Employment Act](#). Invocation of the [Constitution](#), and the multiple declaratory orders sought, appear to the Court obfuscatory, intended to divert attention from the real issues.
57. Declaratory order sought under paragraph [e] of the Petitioner's Submissions is declined.
58. Whether termination was unfair and statutory remedies warranted: The Petitioner handed in his resignation letter, dated 13th August 2019, when confronted with the allegations of fraud.
59. His letter gave the Respondent a notice of 2 weeks, which would have taken effect around 27th August 2019.
60. The Respondent wrote back the following day, of 14th August 2019, advising the Petitioner that his resignation would only be accepted, after he had reconciled his accounts. He was told that the accounts must be signed off by the customers. He was warned that, the Respondent contemplated taking disciplinary action within 7 days, if he did not reconcile the accounts.
61. The Respondent was not satisfied with the Petitioner, after suspending his resignation, and issued him a letter to show cause why disciplinary action should not issue. He was to respond by 30th September 2019. He responded on the same date.
62. The Respondent issued the Petitioner a letter of summary dismissal, dated 1st October 2019.
63. The Court does not think that the Petitioner was forced to work for 2 months between the time he issued his letter of resignation, and the time he was summarily dismissed.
64. He wrote his letter of resignation voluntarily, and did not leave employment, when advised by the Respondent to reconcile his accounts, as a condition for acceptance by the Respondent, of his resignation.



65. *ILO Forced Labour Convention, 1930* [No 29] defines forced labour as all work or service, which is exacted from any person under the threat of a penalty and for which the person has not offered himself voluntarily.
66. The Petitioner was merely asked to reconcile his accounts, which was a lawful command, issued by his Employer, before his resignation could be accepted. He was not forced to work, and was not under any threat of a penalty. The Respondent merely asked him to reconcile his accounts, as a condition for the acceptance of his resignation. That was not forced labour. He continued to work, and receive his salary for 2 months. He did not walk away from the relationship.
67. His prayer [b] asking the Court to declare that he was subjected to forced labour, is devoid of merit.
68. Ordinarily, the Respondent would have an obligation to hear the Petitioner, after he responded to the letter to show cause. This obligation is imposed by Sections 41 and 45 of the *Employment Act*.
69. The Court has however held, in *Edwin Beiti Kipchumba v National Bank of Kenya Limited* [2018] eKLR, and in latter decisions such as *Wakasiaka v Textbook Centre* [2024] KEELRC 779 [KLR], that a notice of resignation, is a notice of termination of employment, issued by an Employee.
70. A notice of termination of employment issued under Section 35 of the *Employment Act*, does not require to be accepted by an Employer, to take effect.
71. The notice issued by the Petitioner on 13th August 2019, took effect after 2 weeks. There was no legal requirement for the Respondent to accept it. There was no legal justification, on the part of the Respondent, to suspend the effective date of resignation.
72. There similarly was no legal basis, for the Respondent to issue the Petitioner conditions, for acceptance of his resignation.
73. In the case of Edwin Beiti Kipchumba above, it was held that an Employee, could in limited circumstances, rescind his resignation, such as in instances where resignation was involuntary. The Petitioner did not write to the Respondent, after 13th August 2019, indicating that he had changed his mind, and recalled his letter of resignation. The letter therefore took effect, after 2 weeks.
74. The Respondent's letter suspending the effective date of resignation, and imposing conditions for acceptance of resignation; the letter to show cause; and the letter of summary dismissal, were all redundant, meaningless motions, and inconsequential, coming after the Petitioner had resigned. The effective date of termination [EDT], was 2 weeks after 13th August 2019. There was no employer-employee relationship, after resignation notice took effect.
75. There is therefore no legal basis for the prayers made by the Petitioner, to find dismissal illegal. It is however correct, as prayed, that dismissal was null and void, and of no legal consequences, the Petitioner having resigned.
76. It is declared that the letter of summary dismissal dated 1st October 2019, is null and void, and of no legal consequences, the Petitioner having resigned.
77. There is no merit, to the prayer for compensation for unfair termination. The Petitioner tendered a valid resignation letter. He terminated his contract of employment.
78. The Court does not have jurisdiction to quash documents issued by the bank. The prayer made to the Court, to quash banking slips exhibited by the Respondent, is misplaced. It is not necessary for the Court to quash a letter of summary dismissal, which has been found to be legally inconsequential.



79. The prayer for pending annual leave was not specific. The days in issue were not pleaded, or specified in the Petitioner's evidence.

It is Ordered

- a. It is declared that the letter of summary dismissal, dated October 1, 2019, is null and void, and of no legal consequences, the Petitioner having resigned.
- b. Other prayers are declined.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6 [2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 31ST DAY OF OCTOBER, 2024.

JAMES RIKA

JUDGE

