

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 1444 OF 2018

JULIET WANJIKU MULI.....CLAIMANT

VS

DAVIS & SHIRTLIFF LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Juliet Wanjiku Muli, the Claimant in this case, was an employee of the Respondent, Davis & Shirliff, having been employed on 23rd November 2011, in the position of Assistant Sales Engineer. The Claimant brought this claim following her summary dismissal on 8th September 2017.
2. The claim is contained in a Statement of Claim dated 15th October 2018 and the Respondent's defence is documented by a Statement of Response dated 19th November 2018.
3. The matter went to full trial where the Claimant testified on her own behalf and thereafter called her husband, Timothy Wanyoike and Counsel, Allan Mukuki Munyao.
4. The Respondent called four witnesses; Olive Muasya, the Manager-Group Legal & Secretarial; Bernard Karimi, the Group Internal Audit Manager; David Gacheru, General Manager-Talent Management and Administration; and Michael Mogusu- a Sales Technician. Thereafter, the parties filed final submissions.

The Claimant's Case

5. By a letter dated 23rd November 2011, the Claimant was employed by the Respondent in the position of Assistant Sales Engineer. This appointment was subject to a three months' probation period which the Claimant served and duly completed. She was confirmed in her appointment effective March 2012.

6. The Claimant was later promoted to the position of Senior Service Engineer, earning a monthly gross salary of Kshs. 157,000.

7. Sometime in July 2017, the Respondent's Internal Audit Department conducted an audit of the Field Service Department where the Claimant was deployed. The audit is said to have revealed stock items that were listed in jobs but not invoiced, thereby occasioning a loss of Kshs. 1,844,052.

8. The Claimant avers that the Respondent attributed the loss to her, and demanded that she should take responsibility for it. She adds that she denied knowledge of or participation in the fraud, but claims to have been tricked, intimidated and unduly influenced by the Respondent's Legal Officer, Internal Audit Manager and Chief Operating Officer, to enter into an agreement admitting liability and consenting to settle the amount of Kshs. 1,844,052.

9. The Claimant states that she unwillingly entered into the agreement which she executed on 8th September 2017. She offered the Respondent a title deed of a property known as Juja/Komo Block 1/2576 which she jointly

owned with her husband as security for payment of the amount of Kshs. 1,844,052.

10. The Claimant received a summary dismissal letter dated 8th September 2017 on the ground of gross misconduct. She claims that the dismissal was in violation of due process. She further avers that the Respondent had no valid reason to terminate her employment.

11. The Claimant lays a claim of wrongful and unfair dismissal and therefore seeks the following remedies:

- a) A declaration that the termination of her employment was unlawful;
- b) A declaration that her fundamental rights enshrined in Articles 26, 41, 47 and 50 of the Constitution have been contravened and infringed upon by the Respondent;
- c) A declaration that she is entitled to damages and/or compensation to be assessed by the Court, for violation and contravention of her fundamental rights as provided under Articles 26, 41, 47 and 50;
- d) Kshs. 157,000 being one (1) month's salary in lieu of notice;
- e) Kshs. 1,884, 000 in damages for unlawful termination of employment;
- f) Kshs. 90,577 being 15 days' leave pay;
- g) Kshs. 1,413,000 being leave pay for 60 months;
- h) Kshs. 64,056,000 being full salary from the date of termination to intended date of retirement at 65 years;
- i) Costs plus interest.

The Respondent's Case

12. In its Statement of Response dated 19th November 2018, the Respondent states that pursuant to a letter dated 23rd November 2011, the Claimant was employed as an Assistant Sales Engineer. The Claimant was confirmed in her appointment by letter dated 29th June 2012.
13. The Respondent avers that the Claimant was promoted to the position of Senior Service Engineer in the Field Service Department, where she earned a monthly gross salary of Kshs. 157,000.
14. It is pleaded that on 31st July 2017, the Respondent's General Manager-Service noticed unusually low margins in jobs being handled by the Field Service Department. The General Manager is said to have requested the Internal Audit Department to conduct an audit of the Field Service Department.
15. According to the Respondent, the audit revealed that on diverse dates between 31st December 2015 and September 2017, the Claimant fraudulently caused various stock items to be listed in jobs without invoicing customers. The Respondent alleges that the stock items were subsequently dispatched out of the Respondent's premises and sold to various parties but the proceeds were not remitted to the Respondent.
16. The Respondent avers that the audit revealed that the Claimant had, over a period of two years, defrauded the Respondent a sum of Kshs. 1,844,052 which fraud the Claimant admitted by her letter dated 25th August 2018. The Claimant settled the full amount pursuant to an agreement executed by her.

17. The Respondent asserts that the audit was conducted with the participation of the Claimant. It is pleaded that the Claimant's employment was terminated effective 8th September 2017 and she was asked to hand over all the active jobs she was handling.

18. The Respondent avers that during the handover, it was discovered that the Claimant had several active jobs created in favour of three companies being; Blue Waterwells Limited, East Africa Tanners (K) Ltd and Beacon of Hope, where she had opened jobs and subsequently signed delivery notes dispatching stock items for which no invoices had been raised.

19. The Respondent further avers that there were no corresponding local purchase orders or documentation from customers placing the orders or authorising the transactions. It is alleged that upon inquiry, the respective customers denied having placed any such orders or authorising the said transactions.

20. The Respondent lists the following particulars of fraud by the Claimant:

- a) Fraudulently opening a job without a corresponding customer order or local purchase order;
- b) Releasing or causing release of stock items to various third parties without a specified customer order or local purchase order;
- c) Receiving the proceeds of fraudulent sale of stock items and failing to remit the proceeds to the Respondent;
- d) Failing to invoice customers for stock items received and/or receiving payments which were not remitted to the Respondent.

21. The Respondent avers that as a result of the aforementioned fraudulent activity, it lost stock items valued at Kshs. 3,063,280 purportedly issued to Blue Waterwells.
22. The Respondent further claims to have lost stock items valued at Kshs. 147,244 purportedly issued to East Africa Tanners (K) Ltd and Beacon of Hope.
23. The Respondent states that as a result of the aforesaid fraudulent activity, it instituted a suit being; *Nairobi Chief Magistrate's Court Case No 8438 of 2017: Davis & Shirtliff Limited v Juliet Wanjiku Muli* claiming the sum of Kshs. 3,210,524 together with interest at court rates.
24. The Respondent avers that upon further inquiry, it discovered that Blue Waterwells Limited was a company run by the Claimant's husband, Timothy Wanyoike. The Respondent accuses the Claimant of failing to disclose this conflict of interest.
25. The Respondent defends the decision to dismiss the Claimant, stating that the Claimant was availed an opportunity to be heard through participation in the audit. The Respondent therefore denies the entire claim and adds that the Claimant was paid all her terminal dues.

Findings and Determination

26. There are two (2) issues for determination in this case:
- a) Whether the Claimant's dismissal was lawful and fair;
 - b) Whether the Claimant is entitled to the remedies sought.

The Dismissal

27. The Claimant's dismissal was communicated by letter dated 8th September 2017 stating as follows:

"Dear Juliet,

SUMMARY DISMISSAL

Reference is made to the recent surprise audit conducted in the Field Service department and subsequent queries touching on your handling of various customer job transactions, details of which you are well aware.

On diverse dates between January 2016 and August 2017, with the intention to defraud, you raised stock items to jobs and consequently dispatched stock items from Davis & Shirtliff Ltd Head Office located on Dundori Road, Industrial Area, without raising official invoices and remitting payment to the company. Transaction details are enclosed for your reference. It has been established the stock items were released for your personal gains leading to loss of goods with a cash value of KShs. 1,855,052.

It is noted that you were given an opportunity to answer to the audit queries pertaining to those transactions. In your response on 25th August 2017 you admitted to giving clients the said stock items, receiving money for the same without invoicing the clients. You agreed in writing to make payment of the cash value established after completion of the investigation.

It is clear that your actions transgressed the company cardinal value of integrity, and your actions were not honest which details are outlined [in] the staff charter that you signed on joining the company. As a result of these

serious infractions, your employment has been terminated with immediate effect from 8th September 2017.

We deeply regret having to take this action against you as you have been one of our valued employees but time and again you have heard management has zero tolerance towards lack of integrity.

You are required to finalize the clearance process immediately and hand over all company assets before processing of your final dues. Any amounts owed to the company shall be deducted from the dues and alternative means used to recover any outstanding amounts.

for DAVIS & SHIRTLIFF LTD

(signed)

David Bolo

General Manager Service”

28. The dismissal letter accuses the Claimant of raising and dispatching stock items without accompanying invoices, with intent to defraud, thus leading to a loss of Kshs. 1,855,052.

29. The question to ask at this point is whether this accusation constituted a valid reason for dismissal, as contemplated by Section 43 of the Employment Act, which requires that:

43.(1) In any claim arising out of termination of contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the

termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

30. It is now firmly settled in case law that the test to be applied in determining the validity of a reason for termination of employment is the 'reasonable responses test' defined in the Halsbury's Laws of England, 4th Edition, Vol. 16(1B) para 642 as follows:

"In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if falls outside the band, it is unfair."

31. The 'reasonable responses test' cautions courts against supplanting the employer's decision with their own. In other words, when a court sits, it does not ask what action it would have taken had it been in the employer's position; rather, it examines if the decision taken by the employer is one that any reasonable employer would have taken.

32. In the persuasive South African decision in ***Nampak Corrugated Wadeville v Khoza (JA 14/98) [1998] ZALAC 24*** it was held that:

"The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether it could have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable."

33. It was not contested that a settlement agreement was executed between the Claimant and the Respondent on 8th September 2017, stating *inter alia*:

“WHEREAS

A. The Company employed JULIET WANJIKU MULI of ID NO. XXX on 1st December 2011 as an Assistant Sales Engineer. She rose through the ranks and currently she is employed as a Senior Service Engineer at the Field Service Department.

- B. A final audit check revealed that Juliet Muli had defrauded the Company the sum of **ONE MILLION EIGHT HUNDRED AND FORTY FOUR THOUSAND AND FIFTY TWO (KES 1,844,052)** from the period beginning 1st January 2016 to 23rd August 2017.
- C. The sum of KES 1,844,052 is confirmed by Juliet Muli as the final amount owing.
- D. The Company has agreed not to pursue criminal or civil charges against Juliet Muli who has hereby acknowledged that a total sum of KES 1,844,052 as at 23rd August 2017 is owed and outstanding.
- E. Both parties are desirous of entering into this out of court settlement agreement for an amicable resolution of the amount owing.

NOW THE PARTIES HEREIN HEREBY AGREE AS FOLLOWS:-

1. AGREEMENT

Juliet Muli hereby commits to repay the amount owing to the tune of KES 1,844,052 as stated hereunder:

- a. An initial deposit of KES 500,000 will be paid on 12th September 2017;
- b. Subsequent instalments will be paid as follows:
 - i. KES 400,000 on or before 30th November 2017;
 - ii. KES 400,000 on or before 30th December 2017; and
 - iii. KES 144,052 on or before 31st January 2018.
- c. The instalments will be made by way of direct deposit into any of the Company's bank accounts, whose details are attached herewith. The deposit remittance slip shall be scanned and sent to the Company's Legal Officer."

34. While the Claimant claimed to have been tricked and/or coerced into signing the settlement agreement, she did not adduce any evidence to support this assertion. In her position as Senior Service Engineer, the Claimant was evidently a senior employee of the Respondent and the Court was unconvinced that she may have been misled into signing an agreement without considering its full implication and import.

35. Further, the Claimant's husband, Timothy Wanyoike Wanjiku, not only witnessed the settlement agreement but also gave a written consent for use of the original title deed for a property jointly owned by him and the Claimant being Juja/Komo Block 1/2576 as security for payment of the sum of Kshs. 1,844,052 admittedly owed by the Claimant to the Respondent.

36. The Claimant paid the sum stated in the settlement agreement in two instalments of Kshs. 500,000 on 8th September 2017 and Kshs. 1,344,052 on 30th September 2017. The title deed held as security was therefore released on 9th October 2017.

37. The cumulative effect of the foregoing is that the Claimant willingly admitted having engaged in unlawful acts leading to substantial loss to her employer. This in my view, constituted a valid reason for her summary dismissal. The requirements of Section 43 of the Employment were therefore satisfied.

38. The next question is whether in effecting the dismissal, the Respondent observed due process. The Claimant complained that she was not issued

with a show cause notice and was not availed a personal hearing. Section 41 of the Employment Act provides as follows:

41.(1) 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 the explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

39. The foregoing provision establishes the beacons of fair disciplinary procedure; it does not however define the exact mode in which this procedure is to be rolled out. In my view, the question to ask in this regard is whether the charges were put to the employee in an appropriate fashion, with adequate opportunity to respond.

40. In its final submissions, the Respondent relied on the decision in ***Kenya Revenue Authority v Menginya Salim Murgani [2010] KECA 164 (KLR)*** where the Court of Appeal held that the fairness of a disciplinary hearing is not defined by its oral nature.

41. Prior to execution of the settlement agreement, the Claimant had participated in an audit. More significantly, she had signed a statement admitting having received money from clients in payment for un-invoiced items. In this statement, the Claimant undertook to cooperate with the audit team and management and pay for all the items.
42. It seems to me therefore, that the Claimant was well informed of the charges raised against her and was given adequate opportunity to respond. I have consequently reached the conclusion that the procedural fairness requirements of Section 41 of the Employment Act were fully satisfied.
43. Overall, I find and hold that the Claimant's dismissal was lawful and fair. The claims for compensatory damages and notice pay are therefore without basis and are dismissed.
44. The claims for leave pay was not proved and is disallowed.
45. Ultimately, the Claimant's entire claim fails and is dismissed with costs to the Respondent.
46. Orders accordingly.

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JUDGE

Delivered by Onesmus Makau J this 26th Day of February, 2026.

Appearance:

Mr. Otieno B.O for the Claimant

Mr. Kisinga for the Respondent