IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, MUSINGA & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 17 OF 2018

BETWEEN

COMPUTER REVOLUTION AFRICA LTD ..... APPELLANT

AND

ANTONY MWAI MUNYI.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court at Nairobi (M. Mbaru, J.) delivered on 11th September, 2017 in ELRC Cause No. 338 of 2013)

JUDGEMENT OF THE COURT

1. The appellant, *Computer revolution Africa Ltd*, is a company incorporated in Kenya with an affiliate company, *Comprev IT Solution Importer PLC* established in Ethiopia. It is engaged in the business of information technology software products, services and systems. The respondent, Antony Mwai Munyi, was employed by the appellant on 1st March 2011 as the appellant's country manager in Ethiopia. His mandate was to provide "*strategic vision and day to day leadership*" for its operations in Ethiopia. According to the appellant, the respondent was also the General Manager of *Comprev IT Solution Importer PLC*.

2. The terms and conditions of employment were set out in a Contract of Service dated 1st March 2011 after execution of which the respondent took up the position in Ethiopia. After the successful completion of the probation period, the appellant confirmed the respondent's appointment by a letter dated 28th June 2011. Thereupon, the respondent's gross monthly salary was increased from Kshs.191,989.00 to Kshs.277,480.00.

3. For over one year after the respondent took up the position in Ethiopia, the relationship between the parties appears to have been smooth. To attest, in June 2012, after appraising the respondent's performance, the appellant improved the respondent's emoluments by granting him the benefit of a return air ticket from Addis Ababa, Ethiopia, to Nairobi, Kenya, quarterly in a year, and an additional 12 working days holiday on top of his annual leave entitlement. In August of the same year, the appellant approved the respondent's application for a loan of Kshs.400,000.00 to enable him pay for customs duty on importation of a vehicle.

4. Two subsequent events put a strain in the relationship. The first event related to a tender for the supply of software and other equipment to the Ethiopian Revenues and Customs Authority. The appellant's bid for that tender failed the technical evaluation on account of inclusion in the tender documents of a falsified document purporting to have been issued by Microsoft Corporation.

5. The appellant considered that the respondent, as the General Manager in charge of the preparation of the tender, should take responsibility for the botched bid. According to the respondent, it was another employee, (Mastewal Berhanu) who had falsified the Microsoft Corporation document, and had confessed having done so.

6. On 16th September 2012, the said Berhanu sent an email to the Chief Executive Officer of the appellant, Shagun Vashisht, exonerating the respondent from responsibility and apologized for having *'edited'* the Microsoft Corporation document in question.

On 18th September 2012, the respondent transmitted that email to one CT Cedric of Microsoft Corporation admonishing him to keep it to himself and informing him that he had to leave the appellant because the Chief Executive Officer of the appellant would not dismiss the said Berhanu from employment, and that he could not work with, "*fraudsters*."

7. Following that incident, the appellant complained that the respondent "*had secretly and without authority*" sent, by email, the alleged confession by Berhanu to Microsoft Corporation, the appellant's vendor, and cast aspersions on the appellant by the reference to it in the email, as *"fraudsters."*

8. The second event that strained relations between the parties was the change in the Chief Executive Officer of the appellant. The respondent testified that when Shagun Vashisht became the Chief Executive Officer of the appellant, he (the respondent) could not cope with him and "*had to resign.*"

9. Against that background, on 14th September 2012, the respondent gave "*Notice for My Resignation*" to the appellant. He did so by a letter addressed to the Group Human Resource and Administration Director of the appellant stating, in relevant, part:

> ***"I am writing to you to officially notify Computer Revolution Africa of my notice of resignation as the Country Manager, Computer Revolution Africa, Ethiopia Branch, in accordance to the contract between myself and Computer Revolution Africa."***

10. Clause 13.1.2 of the Contract of Service provided that the employment may be terminated, "*after probation by either party giving to the other three (3) months' notice in writing (expiring on any day of any month; or three (3) months' salary in lieu of notice*." Had the resignation notice given by the respondent on 14th September 2012 ran its full course, the respondent would have remained in employment until 14th December 2012 when the notice would have expired and taken effect. That was not to be.

11. As already stated, Mastewal Berhanu, the head of sales of the appellant in Ethiopia, sent an email on 16th September 2012 to the Chief Executive Officer of the appellant, Shagun Vashist exonerating the respondent from responsibility for the falsification of the Microsoft Corporation document. In the same email, the said Mastewal Berhanu apologized for having *'edited'* the Microsoft Corporation document. According to the appellant, however, the said Mastewal Berhanu was coerced by the respondent to write that email and did so under duress. As indicated, on 18th September 2012, the respondent transmitted that email to one CT Cedric of Microsoft Corporation in which he implicitly castigated the Chief Executive of the appellant, Shagun Vashist, for not dismissing Mastewal Berhanu. In that email of 18th September 2012 to the said Cedric, the respondent wrote:

> ***"See below and keep it to yourself. Shagun will not fire this dude so I have to leave. I can't work with fraudsters."***

12. In his testimony before the trial court, the respondent explained that he sent that email in a bid to safeguard his own reputation with Microsoft Corporation.

13. Soon thereafter, the respondent received instructions to hand over to Human Resources in Ethiopia and return "*to Nairobi with* [his] *goods*". He did so and met with the board of directors of the appellant on 24th September 2012. He testified that he spoke to the Chairman of the Board, one Harry Chager, about his dues who informed him that he had to hand over and accept responsibility for sending the offending email to Cedric.

14. On 24th September 2012, the respondent sent an email to the said Harry Chager titled "*Apology"* in which he acknowledged that he was wrong to have sent the offending email to Microsoft Corporation and apologized for having done so. In a follow up email sent on 28 September 2012 to the said Harry Chager, the respondent yet again took responsibility for the offending email and again apologized for his action.

15. By the time the respondent was sending those apology emails, the appellant asserted, it had by a letters dated 20th September 2012 and 24th September 2012, summarily terminated the respondent's employment from *Computer revolution Africa Ltd* and from *Comprev IT Solution Importer PLC* respectively on grounds of insubordination; refusal to account for money; poor performance; and breach of fiduciary duty of keeping company information confidential.

16. The respondent denied ever receiving the termination letter dated 20th September 2012, claiming that he saw it in the course of the proceedings before the lower court; that he learnt that his employment had summarily been terminated when he received a letter dated 24th October 2012 from the appellant's advocates demanding an amount of Kshs.300,000.00 as balance of the loan and a further amount of Kshs.237,305.00 (the equivalent of Ethiopian Birr 47, 461) which the respondent had allegedly failed to account for or refund. As for the letter of termination dated 24th September 2012 as General Manager of *Comprev IT Solution Importer PLC*, the respondent maintained that he was not an employee of that entity.

17. On 29th October 2012, the respondent wrote a letter to the appellant demanding his salary for the month of September together with sales commission due in the amount of US$7000

> "*due to me after my notice for resignation dated 14th September 2012*" as well as his "*salary for the 2 and half months notice period not served a cost of USD 7,500.*"

18. In a response to the respondent's demand, the appellant in its letter dated 2nd November 2012, stated that the respondent's resignation notice had been rejected and that his employment was summarily terminated "*for gross misconduct and breach of confidentiality*" in accordance with the law and the contract; that he was not entitled to any notice or payment *in lieu* of notice; and that his September 2012 salary was used to offset the funds the respondent had misappropriated which he did not account for or refund. With that, the stage was set for litigation that followed.

19. In March 2013, the respondent filed suit against the appellant before the ELRC claiming an amount of USD 17,000 made up as follows:

> "

i) 3 Months' Salary from 14th September

2012 to 14th September 2012 for the 3

Months' Notice period in terms of the

Contract from 14/9/12 to 14/12/12 ..... $ 9000 USD

ii) Add Unpaid Commissions for

17 Months worked ..... $ 7000 USD

iii) Add Penalties for Delays of Salaries

And Commissions ..... $ 1000 USD

iv) Grand Total ..... $17000 USD"

20. In addition, he sought details of all statutory deductions made from his salary in respect of PAYE, NHIF, NSSF and evidence of remittance to KRA.

21. The appellant denied the claim and counterclaimed against the respondent for Kshs.1,007,954.19 made up of:

"

i) Outstanding car loan Kshs.300,000/00

ii) Unpaid imprest owed to Respondent amounting to Ethiopian Birr 73,786/30 at the Exchange rate of Kshs. 4.513 per Birr Kshs.333,383/23

iii) Unpaid imprest owed to Comprev IT Solution Importer PLC but *assigned to the Respondent amounting to Ethiopian Birr120,125/00 at the Exchange rate of Kshs. 4.513 per Birr Kshs.542,164/17*

Sub total Kshs.1,175,547/40

Less Salary for 20 days worked in September 2012

Amounting to USD 2000 at the Exchange rate of

Kshs.83.80 per Dollar - Kshs.167,593/21

iv) Total Ksh.1,007,954/19"

22. At the trial, the respondent testified on his own behalf. For the appellant, Fresiah Githua, its Human Resources and Legal Services Manager, testified. After considering the evidence and the submissions by counsel, the learned trial Judge, ***M. Mbaru, J.*** delivered the impugned judgment on 11th September 2017.

23. The Judge found: that the termination of the respondent's employment was wrongful and cannot be justified; that there is no evidence that fair procedure under Sections 41(2) and Section 44 of the Employment Act, 2007 were adhered to; that the respondent was entitled to be paid: for the 20 days that he worked in September 2012 in the amount of Kshs.167,593.40; total gross monthly salary for the notice period amounting to Kshs.832,440.00; notice pay for 3 months in the amount of Kshs.832,440.00 on the basis that summary dismissal was procedurally unfair; service pay under Section 35 of the Employment Act at the rate of 15 days' pay for each full year worked which she computed at Kshs.138,740.00.

24. On the counterclaim, the judge found that the amount of Kshs.300,000.00 was admitted and would be set off against the above awards. The claim for refund of imprest was rejected on the basis that the requirement by the appellant for the respondent to account after terminating his employment was in the circumstances an unfair labour practice; that, "*having thus removed the claimant from its employment, I find the claimant was not in a position to respond effectively to any questions with regard to financial returns and or accounting as all records of the respondent had been handed over*."

25. That judgment is challenged on 10 grounds as set out in the memorandum of appeal canvassed in the appellant's written submissions that were highlighted before us by learned counsel ***Mr. F. G. Thuita***. He submitted that the appellant was justified in dismissing the respondent from employment in light of the disparaging email he sent to the appellant's vendor, Microsoft Corporation, labelling the appellant, his employer, as fraudster; and that the trust and confidence the appellant had in the respondent was thereby eroded.

26. In support counsel cited the case of ***Francis Nyongesa Kweyu vs. Eldoret Water Sanitation Company Limited [2017] eKLR*** where the ELRC observed that "*the open and clear display of a dishonesty and deficiency in the integrity"* of an employee "*in the course of duty … eroded all element of trust inter partes*" and is sufficient basis for terminating employment.

27. It was submitted that in the present case, the Judge had no basis for concluding as she did that the respondent tendered an apology for sending the offensive email under duress; that it was clear that the respondent authored that email and there was therefore no basis for challenging his dismissal. A decision of this Court in the case of ***Dr. Thuo Mathenge vs. IEBC and another, C.A. No. 103 of 2017*** was cited.

28. Counsel also faulted the decision of the trial court on the ground that it granted reliefs that were neither pleaded nor sought. The decision of this Court in the case of ***Caltex Oil (Kenya) Limited vs. Rono Limited [2016] eKLR*** was cited for the argument that the court has no jurisdiction to award damages where no such plea is made in the pleadings. It was submitted that in the present case there was no prayer for severance pay and damages for unfair termination and there was therefore no basis for awarding the same; that by awarding damages that were never pleaded or sought, the appellant was prejudiced as it was not heard on the same; that the contention by the respondent that the awards are payable *ipso facto* has no basis in law.

29. On the counterclaim, counsel submitted that it was absurd for the Judge to have dismissed it with costs, having found that the respondent admitted his indebtedness to the appellant for the car loan. With regard to the appellant's claim for imprest, it was submitted that the evidence that was tendered in support was sufficient and the claim should have been allowed.

30. Counsel concluded by urging us to set aside the judgment of the lower court in favour of the respondent and substitute it with an order dismissing the respondent's suit and allowing the appellant's counterclaim.

31. Opposing the appeal, learned counsel for the respondent, ***Mr. E. T. Gaturu***, also relied on written submissions which he highlighted. He submitted that the trial court was right in finding that the respondent's dismissal from employment was not procedural; that the invitation for the respondent to appear before the board of directors of the appellant on 24th September 2012 after the decision to summarily terminate his employment was a futile exercise as the respondent had by then ceased to be an employee of the appellant.

32. Regarding the complaint that the trial Judge gave reliefs that had not been pleaded or sought, counsel submitted that severance pay is provided for in law and is presumed *ipso facto* irrespective of whether it is pleaded; that in any event, there was a basis for granting the relief as the respondent had sought *"such further or other relief the court deemed fit to grant"*. Counsel concluded by urging us to dismiss the appeal with costs to the respondent.

33. We have considered the appeal and the submissions. In our view, there are three issues for determination. The first issue is whether the Judge granted reliefs that were not pleaded or prayed for and if so whether the Judge erred in doing so. The second issue is whether the learned Judge erred in finding that the respondent's employment was wrongfully and unfairly terminated. The third issue is whether the Judge erred in dismissing the appellant's counterclaim.

34. In addressing those issues, we are cognizant of our duty on a first appeal such as this. We are at liberty to depart from the conclusions reached by the trial Judge should our review, evaluation and analysis of the evidence lead us to different conclusions. [See ***Selle vs. Associated Motor Boat Co Ltd [1968] EA 123***].

35. We begin with the question whether the Judge granted reliefs that were not pleaded or prayed for, and if so, whether she erred in doing so. As a general legal principle, courts should determine cases before them based on the issues arising from the pleadings. There are many authorities for the principle. In ***Caltex Oil (Kenya) Limited vs. Rono Limited*** (above) to which counsel for the appellant referred, the Court expressed that a prayer for damages must be specifically pleaded and particularized and that the court has no jurisdiction to award damages where no plea was made in the pleadings.

36. In ***Kenya Commercial Bank Ltd vs. Sheikh Osman Mohammed, CA No. 179 of 2010***, the Court expressed that:

> ***"It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff's claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear"***

37. The principle was also expounded by the Court in the case of ***Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 others [2014] eKLR***. It is necessary to quote from the judgment at length:

> ***"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice…In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."***

38. Exceptionally, a court may validly determine an issue that is not pleaded where evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide. (See ***Odd Jobs vs. Mubea [1970] EA 476***).

39. In the present case, the trial Judge was alive to the legal principle and stated in her judgment that the respondent had "*the benefit of counsel*" with knowledge of the claims which relate to wrongful and unfair termination of employment and "*a litany to(sic) remedies under Section 49 of the Employment Act, 2007*". She went on to state, "*as none are addressed, I will deal with what is specifically pleaded and proved*." But did the Judge do so?

40. It is important to appreciate what the respondent's claim before the ELRC was and what it was not. In his statement of claim before the lower court, the respondent pleaded that he tendered his resignation from employment in accordance with the terms of the contract of service; that following his resignation he wrote to the appellant asking for his dues. In paragraph 11 of the statement of claim, the respondent pleaded its specific claims as set out in paragraph 19 above. His claim comprised 3 months' salary for the notice period; unpaid commissions and penalties for delays in salaries. He pleaded:

> "*And the Claimant Claims from the Respondent the said sum of $17,000 USD or the Kenyan Shilling Equivalent of 1,479,000/= together with Interest at Court Rates from 14th September 2012 until payment in full."*

41. Beyond that monetary claim, the only other prayer was for the appellant to supply details and records of payments of statutory deductions.

42. It was not the respondent's case, as the learned Judge appears to have perceived, that he was wrongfully dismissed. Rather, it was the appellant, in answer to the respondent's claim, which in its defence contested the respondent's resignation, and asserted that the respondent was summarily dismissed from employment at the same time raising a counterclaim and set off. In effect, the relief that the respondent sought from the lower court was not premised on the cause of action of wrongful termination of employment. The reliefs that respondent sought were, as already indicated limited to 3 months' salary in the amount of USD 9,000 for the notice period; unpaid commissions of USD 7000 and penalties for delays in salaries and commissions of USD 1000.

43. The awards made by the Judge in favour of the respondent for Kshs.832,440.00 for 3 months' salary *in lieu* of notice and the award for service pay of Kshs.138,740.00 had no basis, either in the body of the pleading or in the prayers. To borrow the words of this Court in the case of ***Judicial Service Commission & another vs. Francis Gitau Muraya [2019] eKLR***, those awards were based on "*unpleaded and unaddressed issues*". The Court, in that case when setting aside a judgment of the ELRC stated:

> ***"None of the parties raised or addressed the issue of compliance or non-compliance with section 41 of the Employment Act. That provision has two limbs; the first entitles the employee to reasons for intended dismissal, in a language that he understands, and a hearing in the presence of another employee of his choice or representative of a union, while the second limb demands a consideration of the representations by the employee. Those issues needed to be specifically raised or otherwise addressed by the parties before they could form the basis of the court's decision. (See Odd Jobs v. Mubea [1970] EA 476). Yet those unpleaded and unaddressed issues are what the learned judge ultimately relied upon to determine the claim"***

44. In our judgment therefore, the Judge erred in granting reliefs that were neither pleaded nor prayed for.

45. We turn next to the question whether the learned Judge erred in finding that the appellant wrongfully and unfairly terminated the respondent's employment. We reiterate that this issue arose from the defence put forth by the appellant in answer to the respondent's claim and was not the basis of the respondent's claim.

The trial Judge expressed that having regard to Section 41 of the Employment Act, the termination of the respondent's employment, irrespective of whether or not it was justified, was not procedural; that had the respondent applied itself to the procedures of the law and adhered to procedural requirements of Section 41 of the Employment Act, 2007, its defence would have been sustainable.

46. The contract of service stipulated in clause 2(4), among other things, that the respondent would conduct himself honestly at all times, and under clause 11, he was under a duty of confidentiality and was not at liberty to divulge non-public information relating to the appellant. One of the reasons stated in the appellant's letter dated 20th September 2012 conveying the appellant's decision to summarily terminate his employment was that he was in "*breach of fiduciary duty of keeping company information confidential*."

47. Evidence was led at the trial, as already noted, that on 18th September 2012, a few days after tendering his resignation notice, the respondent sent an email to one Cedric of Microsoft Corporation and transmitted an email that another employee of the appellant, had sent concerning the alleged falsification of a Microsoft Corporation document in connection with a tender. As we have seen, the respondent in that email cautioned the recipient to keep it to himself before declaring that he could not work with *"fraudsters"*.

48. The appellant's witness, Fresiah Githua, stated in her evidence that Cedric, to whom that email was sent, was an officer of Microsoft Corporation who was responsible for the East Africa region; that the appellant's main business in Ethiopia was Microsoft business; and that by communicating with Microsoft Corporation in the manner that he did, the respondent was effectively sabotaging the appellant's business in Ethiopia.

49. Quite clearly, apart from labelling his employer as a fraudster, in asking the recipient of that email to keep it to himself, the respondent was no doubt conscious of what he was doing. He was divulging information about his employer which he very well knew he should not have been doing. Our view in that regard is given further credence by the fact that the respondent, in subsequent emails to the chairman of the appellant acknowledged the error of what he had done. In his email sent to the chairman of the appellant on 24th September 2012, with the subject title *"Apology"*, the respondent wrote:

"*Hi Harry,*

I was wrong with that email professionally as well as personally where I let you and myself down. Anger got the better part of me and I should have controlled it better. It may be too late to apologies (sic) but I really am sorry and have no choice but be prepared to take full responsibility of it and when the time comes. I always learn from my mistakes. Regards, A. Mwai."

50. Four days later, in yet another email sent to the chairman of the appellant on 28th September 2012 the respondent again wrote:

"*Good afternoon Harry,*

I have done my part as promised and handed over everything you asked of me. I have accounted for the 2011 accounts to the best of my knowledge. I will continue searching for more supporting documents. There are two documents remaining which I will handover to Fresiah as soon as I receive them from ET.

My apologies once again for the sent email. I regret my action and must be ready to take responsibility. I look forward to your reply."

51. Evidently, the respondent acknowledged the error of what he had done. We accept, as urged by counsel for the appellant that in those circumstances, the appellant had good grounds for dismissing the respondent from employment. We are unable to find any evidence on record to support the view taken by the trial Judge that the respondent tendered the apologies under duress because he needed money for his child's birthday or that he was coerced into doing so in order to recover his dues.

52. We are also not persuaded, as contended for the respondent, that the appellant could not terminate the services of the respondent after he had tendered his resignation which had yet to take effect. We think it would be untenable for an employer to retain an employee in employment for the duration of the notice period where such employee has manifested an intention to undermine the employer and where the employer's trust in the employee has justifiably been eroded.

53. That said, there is the question whether the employee was entitled, as the Judge found, to due process notwithstanding the fact that the circumstances justified the dismissal. There is contention regarding whether, and if so, when the appellant's notice of (summary) termination dated 20th September 2012, was served or delivered to the respondent. The letter of termination of 24th September 2012 in respect of *Comprev IT Solution Importer PLC* is contested on the basis that the respondent was never in the employment of that entity.

54. In his statement of claim before the ELRC, the respondent averred that the appellant "*did not conveniently serve [him] with the said letter save for allowing him to read it in the office of the Human Resources' Manager*." In its statement of response, apart from stating that the respondent was summarily dismissed on 20th September 2012, the appellant did not state when the same was served on the respondent. In his testimony, the respondent stated that he was serving his notice period when he was instructed to return to Nairobi and hand over in Ethiopia. He suggested that he realized that he had been terminated when he received the appellant's advocates letter dated 29th October 2012 demanding payment. In her testimony in connection with the termination letters, the appellant's witness stated:

"I personally gave Claimant letter as his reason was he had resigned and a termination was of no effect. On 24th September 2015 (should be 2012) respondent did terminate the Claimant. There were 2 termination letters by respondent and company."

55. Although the record of that testimony is not entirely coherent, it would appear that the termination notice was not served on the respondent on the 20th September 2012 as claimed by the appellant. There is therefore merit in Mr. Gaturu's argument that the attempt to accord the respondent a hearing before the board of directors of the appellant on 24th September 2014 would have been futile, considering the decision to dismiss him had already been made by 20th September 2012.

56. We are therefore in agreement with the trial Judge when she stated in her judgment that:

"72. Even where the matters the justification termination of employment are so gross and serious, as set out above, section 41(2) requires notice to the employee. The rights under section 41 of the Employment Act, 2007 do not change based on the rationale of the employer. Recourse is in the law to enable each party enjoy the benefit of due process. See Kiliopa Omukuba Okutoyi versus Telkom Kenya [2012] eKLR. Even where an employer has required an employee to make written submissions, the procedural requires of section 41 of the Employment Act, 2007 must be addressed. The rights therein cannot be negated for expediency or to justify summary dismissal that is not procedural"

We respectfully agree.

57. The last issue, to which we now turn, is whether the Judge erred in dismissing the appellant's counterclaim in respect of which she pronounced that "*the counter claim must fail in its entirety. It is hereby dismissed with costs.*". The total counterclaim of Kshs.1,007,954.19 was in two parts. The first related to an outstanding car loan in the amount of Kshs.300,000.00. There was no contest by the respondent over that amount. It was expressly admitted by the respondent in his defence to the counterclaim and set off where he pleaded that he "*consents to a set-off of the said sum of Kshs.300,000.00*". The Judge correctly found that that amount was admitted.

58. The second part of the counterclaim related to "*unpaid imprest*" of Kshs.333,383.23 (Ethiopian Birr 73,786.30) allegedly owed to the appellant and Kshs.542,164.17(Ethiopian Birr 120,125.00) allegedly owed to *Comprev IT Solutions Importer PLC* but assigned to the appellant. Among the documents the appellant produced in support of those claims were two *'acknowledgments'* or *'confirmations'* dated 20th September 2012 (the same date as the summary dismissal letter) authored by one Belaynesh Eshetu, Finance & Administration (who

according to the defence witness was in charge of Human Resource and Finance in Ethiopia). In those *'acknowledgments'* or *'confirmations'* the respondent is said to have confirmed the accuracy of the information relating to "*the balance of funds which was transferred to* [him] *for the company expenses but not settled*…".

In his testimony, the respondent was categorical that the signatures on those documents were not his and asserted that they were forgeries.

59. In her testimony before the trial court, the appellant's witness Fresiah Githua referred to emails that had been exchanged and stated that the claims were also supported by payment vouchers and ledgers that were produced. Based on her testimony, it emerges that it is the Finance Manager of the appellant with whom respondent dealt and corresponded with concerning the alleged claim. In as far as we can tell from the record, Fresiah Githua was not able to authoritatively speak to or explain the documents produced in support of that aspect of the counterclaim.

60. We have examined the documents, the emails, payment vouchers and ledgers that were produced in support of the claim for imprest. Those documents do not speak for themselves. For instance, although the account description in the computer-generated ledgers, refer to the respondent, the transactions descriptions are not self-explanatory and do not in all cases relate to the respondent. Some of the payment vouchers that were produced would appear to relate to other officers. It would have greatly assisted the trial court for the Finance Manager of the appellant who was conversant with the accounts, to have been called to speak to those documents to support the counterclaim.

61. It was also incumbent upon the appellant, on whom the burden lay to establish its counterclaim, to establish that the purported *acknowledgments* or *confirmations* by the respondent were indeed his deeds. Doubt is cast regarding the authenticity of those *acknowledgments* or *confirmations* by the fact, as already mentioned, that they bear the same date as the letter by which the appellant's decision to summarily terminate the respondent's employment is conveyed, namely, 20th September 2012. A subsequent letter of demand dated 24th October 2012 addressed to the respondent by the appellant's advocates demanding a different figure of Kshs.237,305.00 (Ethiopian Birr 47,461) made no reference at all to the said acknowledgments, quite apart from the fact that the figures demanded in that letter are at variance with those in the counterclaim.

62. Based on the foregoing, we are not persuaded that the appellant established, to the required standard of balance of probabilities, that the respondent was liable to it for the amounts of "*unpaid imprest*" of Kshs.333,383.23 (Ethiopian Birr 73,786.30) and Kshs.542,164.17(Ethiopian Birr 120,125.00) that it claimed. We hold, therefore, that the trial Judge was right in dismissing those claims.

63. In conclusion therefore, the result of the foregoing is that the appeal partially succeeds. We uphold the award for 20 days' salary worked in September 2012 acknowledged by the appellant in the amount of Kshs.167,593.40. We also uphold the award of Kshs.832,440.00 being the gross salary the respondent would have earned for the notice period had it not been for the un-procedural process of terminating his employment. We set aside the award of Kshs.138,740.00 for service pay as well as the further award for Kshs.832,440.00 that had not been sought. The total award in favour of the respondent is therefore Kshs.1,000,033.40 from which the admitted amount of Kshs.300,000.00 is set off, leaving a net amount of Kshs.700,033.40 payable to the respondent.

64. Although the appellant has partially succeeded in its appeal, we think, in the circumstances of this case, each party should bear its own costs of the appeal as well as the costs of the suit and counterclaim in the lower court.

Orders accordingly.

Dated and delivered at Nairobi this 24th day of April, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR