



**Damu v Hanna Roses Limited (Cause E458 of 2023)
[2025] KEELRC 145 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 145 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E458 OF 2023
L NDOLO, J
JANUARY 30, 2025**

BETWEEN

KADLAG PARAJI DAMU CLAIMANT

AND

HANNA ROSES LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced his claim for unpaid salary, by a Statement of Claim dated 7th June 2023 and filed in court on 13th July 2023. The Respondent responded by a Response dated 2nd November 2023 and amended on 15th October 2024.
2. The matter went to full trial where the Claimant testified on his own behalf and the Respondent called Elizabeth Gathoni. Thereafter, the parties filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent, in the position of Chief Executive Officer, from February 2019 until November 2022.
4. The Claimant tendered a 90-day resignation notice running from 1st September 2022 until 30th November 2022. He gives his salary as at the time of resignation as Kshs. 1,563,176.
5. The Claimant claims to have been sent on leave in October and November 2022 and adds that he was not paid his salary while on leave. He received a certificate of service dated 30th November 2022.
6. Upon receiving a demand letter from the Claimant's Advocates, regarding the unpaid salary, the Respondent responded that the salary was withheld on account of items supplied to customers for which payment had not been received.



7. The Claimant's case is that the Respondent has unjustifiably withheld his accrued salary. He therefore pursues judgment for salary for October 2022 and November 2022, together with interest.
8. He further seeks punitive damages for unfair labour practices and costs of the suit.

The Respondent's Case

9. In its Response as amended on 15th October 2024, the Respondent admits having employed the Claimant as Chief Executive Officer, effective February 2019.
10. The Respondent however denies that at the time of exit the Claimant was earning a monthly salary of Kshs. 1,563,176 as pleaded in the Statement of Claim.
11. The Respondent further denies the Claimant's averment that he was sent on leave during his notice period and states that the Claimant himself made an application seeking leave from 25th October 2022 to 30th November 2022, which was not allowed by the Respondent.
12. The Respondent avers that in the course of the clearance process, the Human Resource Manager inquired from the Claimant regarding an account of goods that had been supplied. The Claimant is said to have confirmed that payment had been made but he could not account for the funds.
13. The Respondent adds that upon further follow up, it was discovered that the Claimant had misled the Respondent since the amounts were outstanding. The Respondent avers that the Claimant was invited to give an explanation on the outstanding payments and to offer a solution on recovery but his conduct was defiant.
14. According to the Respondent, company policy requires that before clearance of an employee, all outstanding amounts linked to the employee's sales must be settled so as to minimise sales on credit and ensure proper running of the business.
15. The Respondent maintains that the Claimant was not cleared because of outstanding amounts arising from his sales.

Findings and Determination

16. It is not in dispute that the Claimant's salary for the months of October and November 2022 was withheld by the Respondent. The Respondent justifies its action on a loss allegedly incurred as a result of negligence by the Claimant, in the performance of his duties as Chief Executive Officer.
17. By withholding the Claimant's salary on account of loss allegedly caused by the Claimant, the Respondent effected a surcharge against the Claimant. In its decision in *Kenya National Library Services Board v Beatrice N. Ayoti* [2014] eKLR this Court held that a surcharge is a disciplinary action that can only be taken pursuant to the following procedural fairness provisions of Section 41 of the *Employment Act*:
 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 this 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.

18. It follows therefore that a unilateral decision to surcharge an employee is out-rightly unlawful and unfair. If indeed the Claimant had caused loss to the Respondent as alleged, he ought to have been afforded an opportunity to respond, by way of a show cause notice and attendant response as well as a personal hearing with full preparation. There being no evidence of any such opportunity, the only conclusion to make is that the decision to withhold the Claimant's salary was unlawful.
19. I therefore find and hold that the Claimant is entitled to his withheld salary for the months of October and November 2022.
20. No basis was established for the claim for punitive damages which therefore fails and is disallowed.
21. In the result, I enter judgment in favour of the Claimant in the sum of Kshs. 3,126,352 being withheld salary for the months of October and November 2022.
22. This amount is subject to statutory deductions and will attract interest at court rates from the date of judgment until payment in full.
23. The Claimant is also entitled to the costs of the case.

Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF JANUARY 2025

LINNET NDOLO

JUDGE

Appearance:

Mr. Aziz for the Claimant

Mr. Marete for the Respondent

