



**Macharia v Cellulant Kenya Limited (Cause E6514 of 2020)  
[2025] KEELRC 466 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 466 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E6514 OF 2020  
B ONGAYA, J  
FEBRUARY 21, 2025**

**BETWEEN**

**RACHEL WANJIRU MACHARIA ..... CLAIMANT**

**AND**

**CELLULANT KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the amended memorandum of claim dated 01.11.2023 in person. She prayed for judgment against the respondent for:
  - a. A declaration that the respondent's action on summary dismissal against the claimant was unlawful, unfair and inhuman.
  - b. A declaration that the claimant is entitled to payment of her terminal dues and compensatory damages pleaded in the sum of Kshs. 8,380,500.00 as particularized at paragraph 10.
  - c. Interest on (b) above plus costs of the suit.
2. The claimant's case was as follows:
  - a. The respondent employed the claimant as a Content Developer from 01.08.2015 and enjoyed frequent upward salary increments due to excellent performance. She worked for the respondent for almost four (4) years.
  - b. On 17.04.2019, the respondent wrote a letter to the claimant notifying her of an unpaid suspension that stand valid pending a final decision. Later, she received another letter on 03.05.2019 confirming her suspension was with pay contrary to the respondent's earlier position.



- c. On 06.05.2019, the claimant was summoned to attend a disciplinary hearing on 08.05.2019 and issued with a notice to show cause why she should not be summarily dismissed from employment. The same was with regard to the suspension letter dated 17.04.2019 and the alleged Criminal Case No. 216 of 2019, Republic vs. Rachel Wanjiru Macharia at Kibera Law Courts, whereas the claimant was charged in Criminal Case No. 972 of 2019 before Kibera Law Courts.
  - d. Further on 24.05.2019, despite giving reason for non-attendance, the claimant was summoned to attend a disciplinary hearing. She was issued with another notice to show cause why she should not be summarily dismissed, failure to which the decision to dismiss her would be made.
  - e. On 30.05.2019, the respondent handed her a letter informing her that it no longer required her services, notwithstanding the determination of the ongoing criminal case. In addition, the respondent had no lawful or justifiable reason to terminate her services and due process was also not adhered to in the process leading to her summary dismissal.
  - f. According to the claimant, the respondent ought to have withheld the disciplinary process until conclusion of the criminal case. That proceeding with the disciplinary hearing before determination of the criminal case was therefore a predetermined dismissal by the respondent. That she hence deserves an award of maximum compensation on ground that she had legitimate expectation to work up to the retirement age of 60 years.
  - g. The claimant contended that the allegations complained against her related to an alleged loss of Kshs. 13 million. She denied having stolen the said amount because she was neither an approver of finances nor were such money held in her private account and/or were there artists that had complained not to have been paid by her during their performances in the field. She further contended that the criminal case brought against her was hypothetical and designed to dismiss her from service due to unchallenged excellent performance. She also refuted having occasioned any loss to the respondent and argued that save for the respondent's employees, no artists testified against her. She further asserted that the decision of the criminal court is not binding to this Court.
  - h. Due to the unlawful and unfair summary dismissal, the claimant is entitled to payments of her outstanding terminal dues totalling Kshs. 8,380,500.00 and including: one month's salary in lieu of notice; damages for unlawful, wrongful and unfair termination at 12 months' gross salary; unpaid house allowance for 41 months; and service gratuity for 3.5 years less NSSF contributions.
  - i. The claimant further seeks compensation at 12 months' gross salary as damages for suffering abrupt loss of income and trauma and inability to meet her continuing obligations, at Kshs. 1,812,000/=.
3. The respondent's further amended response to the memorandum of claim dated 06.02.2024 was filed through Mwamuye Mzungu Solomon Advocates LLP. The respondent's case was as follows:
- i. The claimant was earning a monthly salary of Kshs. 150,000/= at the time of her dismissal.
  - ii. In early 2019, the respondent discovered that the claimant was engaged in making fraudulent payments to bank accounts belonging to herself and one Paul Maina Macharia, under the guise of making payments to artists enrolled by the respondent on Skiza Tunes. She had notably indicated the said Paul Maina Macharia as her brother and a next of kin in her employment records. Subsequently, the respondent reported the fraudulent conduct to Kileleshwa Police



Station leading to the claimant's arrest and charging in Kibera Criminal Case 550 of 2019, Republic vs. Rachel Wanjiru Macharia, with offences including stealing by servant and obtaining money by false pretences.

- iii. On 17.04.2019, the claimant was suspended from work to facilitate further investigations. She was nevertheless paid all her dues while on suspension.
  - iv. The respondent's letter dated 06.05.2019 informed the claimant that there were sufficient reasons to summarily dismiss her for gross misconduct for fraudulently transferring Kshs. 13,621,299 to accounts in her name under the pretext of payment to artists; and in the alternative, she had failed to provide any sufficient explanation as to how the funds were paid into accounts in her name on her instructions. The claimant was further informed of her right to be accompanied by another employee of her choice at the hearing scheduled for 08.05.2019.
  - v. However, the respondent postponed the disciplinary hearing of 08.05.2019 following the claimant's refusal to attend. Its notice to show cause letter of 24.05.2019 to the claimant found her reasons for failing to attend the hearing unfounded and invited her to a hearing on 29.05.2019 to show cause why she should not be summarily dismissed. The said letter reiterated the reasons for which it was considering terminating the claimant's employment and that she had a right to have another employee present at the hearing. In response, the claimant indicated in a letter dated 27.05.2019 from her advocates - Ndeda & Co. Advocates, that she would once again not be attending the hearing.
  - vi. The respondent consequently had no option but to summarily dismiss her. Furthermore, no sufficient cause was given as to why the claimant should not be dismissed whereas the respondent had a fair and proper reason to dismiss the claimant for gross misconduct.
  - vii. According to the respondent, the criminal proceedings against the claimant did not bar it from conducting disciplinary proceedings against her. The claimant's dismissal was therefore proper and lawful as it had a fair and lawful reason and followed the proper procedure. She was accordingly neither entitled to notice or salary in lieu of notice nor to any compensation or damages as alleged or at all.
  - viii. The claimant's claim for house allowance is time-barred and should be dismissed pursuant to section 89 of the *Employment Act*, 2007. However, should this Court be compelled to allow the said claim, the house allowance should be calculated on a pro-rata basis dependent on the varying basic pay she received during her tenure as follows:  
  
From July 2015 to January 2017; 15% of 40,000 x 18months = Kshs. 108,000.00  
From February 2017 to September 2017; 15% of 75,000 x 8months = Kshs. 90,000.00  
From October 2017 to February 2019; 15% of 85,000 x 16months = Kshs. 204,000.00  
From March 2019 to May 2019; 15% of 151,000 x 3months = Kshs. 67,950.00  
Total: Kshs. 469,950.00
4. The respondent also filed a counter-claim to recover the Kshs. 13,621,299/= from the claimant. It averred that the inspections by its investigation officers revealed that the claimant had illegally, maliciously and fraudulently made payments of the said amount to bank accounts belonging to herself under the guise of making payments to artists enrolled by the respondent on Skiza Tunes. It prayed that the claimant's claim be dismissed with costs to the respondent/claimant and that judgment be entered in its favour for Kshs. 13,621,299/= together with interest at court from May 2019 until payment in full.



5. The parties gave their evidence before Court and filed their respective submissions. The Court has considered the material on record and returns as follows:
- a. There is no dispute that the parties were in a contract of service. The respondent employed the claimant as a Content Developer from August 2015 to 30.05.2019. Her last monthly pay was Kshs.150, 000.00 per month.
  - b. The claimant was suspended by the letter dated 17.04.2019 on account of suspected fraud that took place at the respondent's enterprise. He testified that he was fully paid throughout the suspension. A notice to show cause was dated 06.05.2019 in circumstances that she had been arrested and charged in Criminal Case No. 216 of 2019 with the offence of stealing by servant contrary to section 281 of the *Penal Code*. It was alleged that she had stolen Kshs.13, 856,849.00 at Cellulant Kenya Limited by channelling the funds through stated three banks. Other counts included obtaining by false pretences contrary to section 313 of the *Penal Code*; fraudulent appropriation contrary to section 328(b) (i) of the *Penal Code*; and, uttering a document with intent to defraud contrary to section 357(b) of the *Penal Code*. The notice to show cause alleged that the claimant had stolen a sum of Kshs.13, 856, 849 which belonged to the respondent and had failed to explain how the money came into her possession.
  - c. The claimant received the invitation to attend a disciplinary hearing accompanied with representatives of his choice. He declined to attend the disciplinary hearing upon what she considered to be a court order barring him from accessing the respondent's premises. She was subsequently summarily dismissed by the letter dated 30.05.2019 effective the same date. He was to be paid his full salary up to 31.05.2019. The reason for termination was theft and fraud in connection with the business or property of the respondent or respondent's client as per terms of the contract. The dismissal letter further stated that the dismissal was upon reasonable suspicion that the claimant had committed a criminal offence against or to the substantial detriment of the respondent per section 44(4)(g) of the *Employment Act*, 2007. In any event, the claimant was subsequently convicted in the criminal case per the judgment delivered on 06.10.2023 by Hon. M. Maroro, SPM at Kibera.
  - d. The Court finds that as urged for the respondent the Court order did not bar the claimant from attending the disciplinary hearing. The evidence shows that indeed criminal proceedings had been preferred against the claimant which amounted to well-founded ground for reasonable suspicion that the claimant had committed a criminal offence per section 44(4)(g) of the Act. Further the claimant testified and confirmed that she was responsible of making payment list from master file prepared by another employee, Jenifer. The payment list she prepared was used for monthly dispatch. She confirmed that she had included in the list in issue her brother's name as beneficiary to receive the payment while the said brother was not an artist and was not entitled to be paid. The Court finds that the procedure adopted to dismiss the claimant was fair per section 41 and 45 of the Act. Further, the respondent has established that the reason of dismissal was valid and fair per sections 43 and 45 of the Act. The summary dismissal was not unfair both in procedure and in substance.
  - e. While making that finding, the Court has considered the claimant's testimony that the order in the criminal case was that she was to avoid interference with the matter in Court and that she further understood that a criminal case was different from a disciplinary case. Accordingly, the Court finds that there was no valid reason as based upon the order for the claimant to fail to attend the disciplinary hearing.



- f. The respondent's counterclaim to recover the Kshs. 13,621,299/= is not established at all. In particular, the respondent's witness testified that no cash as alleged in the criminal case was recovered from the claimant's bank accounts. Further, no artist complained about failure to be paid and the money in issue actually belonged to Safaricom but which was not involved in the criminal case or other established claims in that respect. On a balance of probability, the Court finds that the claimant has failed to strictly prove the liquidated claim as per applicable trite law. In particular, the trial Court in the criminal case stated in the judgment thus, "In addition, the accuseds to refund the monies to the company under section in default civil suit to be filed." That judgment did not apportion the amounts to the two accused persons and a civil suit was to be filed. The instant case appears to be the civil suit but the respondent has failed to show the extent of the claimant's individual liability and then the amount she is to pay. Holding her liable to pay all the amount as claimed and as prayed for is found unjustified.
- g. It is submitted for the respondent that the claim for house allowance should fail because 12 months from cessation of the continuing injury per section 90 of the Act have lapsed. However, as urged for the claimant, the respondent has pleaded and admitted to Kshs. 469,950.00 which would be allowable. However, the amount when awarded would only amount to such set-off of the colossal amounts that the claimant is partly liable of stealing as found in the judgment in the criminal case. Thus, to balance justice for parties, it is found not actually payable but as operating as set-off accordingly.
- h. The Court has considered the margins of success and each party to bear own costs of the claim and counterclaim.
6. In conclusion judgment is accordingly entered for the parties for dismissal of both the counterclaim and claim and each party to bear own costs of the proceedings.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 21<sup>ST</sup> FEBRUARY, 2025.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

