



Nyamota v Kariobangi Owners Sacco Limited (Employment and Labour Relations Cause E700 of 2022) [2025] KEELRC 1541 (KLR) (28 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1541 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E700 OF 2022**

**HS WASILWA, J
MAY 28, 2025**

BETWEEN

JOHN ONGIRI NYAMOTA CLAIMANT

AND

KARIOBANGI OWNERS SACOO LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted this claim vide a Memorandum of Claim dated 15th September 2022 based on the unlawful termination of his employment. He prays for judgment against the Respondent for:
 - a. Salary arrears for the entire period the Claimant has been out of employment since July 2022 until the date of judgment.
 - b. General damages as set out above in number 7 of the claimant's pleadings.
 - c. Maximum compensation of 12 months for wrongful dismissal.

OR

 - d. In the alternative, payment of all the lawful terminal dues comprising of Notice pay, allowance for leave days due since January 2014, salary arrears for the days worked and service pay for the Claimant.
 - e. Issuance for Certificate of service.
 - f. Interest on (a) and (d) from the time the judgment is delivered to full payment of the amounts.
 - g. Costs of this suit with interest thereon.



Claimant's Case

2. The Claimant avers that he was employed by the Respondent on 1st January 2014 to collect income from matatu operators who are members of the Respondent and banking the collections. He was earning a salary of Kshs. 26,000.
3. The Claimant avers that he worked for the Respondent diligently until 21st July 2022 when the Respondent unlawfully and irregularly dismissed his employment without notice and any justifiable reason.
4. The Claimant avers that the Respondent dismissed his employment without adherence to proper procedure provided in law and it unfairly withheld his lawful benefits subjecting him to unwarranted stress, anxiety and loss.

Respondent's Case

5. In opposition to the Claim, the Respondent filed a Response to Memorandum of Claim and Counterclaim.
6. The Respondent admits that the Claimant was its employee and avers that he was in charge of collections as a Route Cashier/Collector from matatu operators earning a monthly salary of Kshs. 26,000.
7. The Claimant was in charge of Juja Road and collection of lump sum daily stage fees from Gikomba, Eastleigh and Kariobangi -Huruma Corner. The lump sum fees collected were reflected holistically under Gikomba in KMOS SACCO Daily Collection Sheets which the Claimant used to fill in by himself; he was to deposit the fees in the Respondent's bank account.
8. The Respondent avers that the Claimant deserted his employment on 21st July 2022 by taking off with the Respondent's money collected the previous day being Kshs. 37,100 meant to be deposited in the Respondent's bank account. He then switched off his mobile phone.
9. The Respondent avers that the Claimant went with its office mobile phone (Model ITEL A25 Pro, 32 GB ROM 2GB RAM) used to receive prompts for its banking transactions; and it had a software installed in it (Dyna-Mat POS) by Dynatec Systems & Solutions Limited for purposes of providing information on collections for NHIF, maintenance fees, members savings, parking fees, insurance and loans for operations of the Respondent as a SACCO.
10. The Respondent avers that it tried to reach the Claimant on several occasions but was unsuccessful as he had vacated his residential premises in Mathare.
11. The Respondent avers that it conducted a forensic audit for the period of 01/01/2021 to 31/07/2022 by Nelse Else & Enock Associates, CPAK, bringing to its Treasurer's, Luko Soso Dula, attention that there were discrepancies in the Respondent's bank account over money ought to have been collected and deposited by the Claimant over 19 months. Kshs. 731,560 could not be accounted for; the bank statements and daily collections differed with the banking slips.
12. The Respondent avers that the matter was reported to Kariobangi Police Post under O.B No. 50/21/07/2022. The Claimant was arrested at one time after being traced and later released as investigations are still ongoing.



13. It is the Respondent's case that the Claimant was responsible of informing the management of any issues or suspicious activities that may have occurred in the course of this contractual duties; he failed to discharge these responsibilities as assigned.
14. The Respondent avers that the Claimant is not entitled to any compensation due to his desertion without lawful cause. Further, he was paid up to the point of his desertion and is therefore not entitled to any salary arrears.
15. The Respondent avers that the Claimant used to go for his annual leave during his employment and in the times, he did not go for annual leave, he was paid in lieu thereof.
16. It is the Respondent's case that to cover up any misappropriation of funds under his watch or in collusion with others, the Claimant in collusion with some officials of the previous regime, destroyed some of the Respondent's employment records and office files.
17. The Respondent avers that the Claimant colluded with the former Office Manager, Joseph Ambutu, who was overall in charge of going through bank slips and reconciling that with the daily collections before filing. Due to the collusion and fraudulent syndicate connived by the two, the Respondent's Treasurer was only able to discover the fraud after the forensic audit.
18. The Respondent avers that the Claimant has never visited the Respondent's offices for purposes of collection of his Certificate of Service which has been ready for collection after his desertion.
19. The Respondent avers that the Claimant was informed they were preparing a Notice to Show Cause and he was to be subjected to a disciplinary hearing on grounds of desertion and the unaccounted money which amounted to gross misconduct rendering an employee liable to summary dismissal.
20. The Respondent further informed the Claimant that it was in process of trying to take up the matter with the labour office a for conciliation, however, the Claimant declined to offer any reasonable explanation.

Counterclaim

21. The Respondent reiterated the matters in its response to the Memorandum of Claim and by way of Counterclaim pleaded that that the Claimant deserted his employment on 21st July 2022 upon the Respondent raising concerns with the money collected by him and banking of the same over a period of 19 months.
22. It is the Respondent's case it discovered that the Claimant has not accounted for the sum of Kshs. 731,650 upon conducting a forensic audit.
23. The Respondent therefore prays that:
 - a. The Claimant's Memorandum of Claim be dismissed with costs.
 - b. An order be issued directing the Claimant to pay the Respondent the sum of Kshs. 731,650.
 - c. Interest on (b) from the date of judgment until payment thereof.
 - d. Costs of the suit and the counterclaim.
 - e. Any other relief that this Honourable Court may deem fit and just to grant in the circumstances of the case.



Evidence in Court

24. The Claimant (CW1) adopted the documents attached in his pleadings, a response to the defence and his witness statements dated 30th May 2022 and 19th March 2024 as his evidence in chief.
25. During cross-examination, CW1 testified that on 21st July 2021, he went to work as usual and at 8 am he proceeded to the bank to deposit the cash collection of the previous day to the SACCO's bank account. When he was in the bank line, the Respondent's treasurer, Mr. Soso, called him asking where the file with the deposit slips were kept, to which he responded, he did not know.
26. CW1 testified that he asked the Treasure to let him deposit the Kshs 37,100 but he refused and sacked him on grounds that he could not get the records. He was not given an opportunity to talk to the Board.
27. CW1 testified that the Treasurer had authority to sack him, however, he was not aware he was being sacked at the time.
28. CW1 testified that he did not report the loss of his phone.
29. CW1 testified that he was not paid any dues and that he did not go on leave and never applied for leave. However, in 2018, he went for a funeral when he was bereaved by a close relative and when he was sick he did not go to work.
30. During re-examination, CW1 testified that he used the Kshs. 37,100 which he was to bank at the Respondent's account as his salary.
31. The Respondent's witness (RW1) Luka Soso Dula, stated that he works as a Treasure of the Respondent SACCO. He adopted his witness statement dated 4th August 2023 as his evidence in chief and produced the Respondent's filed documents dated 7th September 2023 as his exhibits.
32. During cross-examination, RW1 testified that there was a disciplinary procedure to be followed and the power to sack was with the Board.
33. RW1 testified that a file had gone missing in the office which was held by 2 secretaries, a manager and 2 conductors. The office keys were kept by the Secretaries who are not witnesses in this case.
34. RW1 testified that the Claimant did not have the key and that the file was kept by the person who collects money.
35. The Respondent's second witness, Gabriel Ochieng Ogot (RW2), stated that he works as an associate with Nels Else & Enock Associates.
36. RW2 testified that he prepared the audit report of 7th September 2022 which he produced in court as his evidence. The report touches on two employees, the Claimant and Ochudo, and the audit was in respect to monies not accounted for.
37. During cross-examination, RW2 testified that he was instructed on 29th August 2022 and that the Claimant was given a show cause letter before the audit was done.
38. RW2 testified that the bank slips were filed by Reinhard and not the Claimant.
39. Upon re-examination, RW2 testified that their purpose was to do an audit and he reviewed the daily collections summary, bank slips and bank statements; they were not the check who banks.



Claimant's Submissions

40. The Claimant submitted that the Respondent confirmed in court that 5 other employees had access to the office where the file for banking slips was placed but the Respondent did not have at least one of them testify to confirm or contradict the statement of the Claimant. Further, the Claimant's statement that he was verbally dismissed without lawful reason is uncontroverted.
41. The Claimant submitted that the police report OB No. 50/21/07/22 was reported on 21st July 2022 when he was verbally dismissed and the basis for the audit report was financial fraud. From the evidence of the Claimant, Respondent and the auditor, there was one file that contained banking slips and the auditor obtained the same from the Respondent, the same file claimed it was taken away by the Claimant.
42. It is the Claimant's submission that he was not served upon the show cause letter and its authenticity is in question. The Respondent had the duty to demonstrate to the court that the Claimant was personally served the letter and no testimony was given by the person who served him.
43. On misappropriation of funds, the Claimant submitted that the police report had a record of funds reported lost at Kshs 900,000; the demand letter by the Respondent dated 25th August 2022 claimed the Claimant fraudulently took Kshs. 600,000 and the figure Kshs. 731,650 was not appropriated to a specific period as at 1st August 2022.
44. The Claimant submitted that the credibility of the show cause letter dated 1st August 2022 is in suspense as the Respondent's treasurer discovered the fraud after forensic audit, whereas, the audit was conducted after his dismissal.
45. The Claimant submitted that he was merely informed of the hearing date of 18th August 2022 without being accorded a notice period. Further by reporting the Claimant to the police on 21st July 2022, it rendered any internal disciplinary action thereafter unfair and unprocedural.
46. On the audit report, it is the Claimant's submission that there are no minutes of a Sacco meeting authorizing an audit to be carried out therefore there is no justifiable reason for carrying out the audit for 19 months. Additionally, there are no minutes to confirm that the audit report was tabled and adopted by the Sacco officials.
47. The Claimant submitted that the bank statements relied by the auditor were not produced in court and/or to the Claimant to inspect, verify and interrogate what the auditor used to arrive to his conclusion. The figures by the auditor were also unsubstantiated and cannot form the basis of a discrepancy case.
48. The Claimant submitted that from his analysis of the daily collection summaries produced in court, the total money lost for a period of 2 years was Kshs. 26,710 which is within the margin of error in accounting terms compared to what was banked. If the Respondent lost Kshs. 731,650 as claimed, the probability of the Sacco going under is high.
49. It is the Claimant's submission that he was arrested in September 2022 on allegations of misappropriating funds from the Respondent. However, upon summoning and interrogating all relevant witnesses, the investigating officers established that the allegations were unfounded.
50. The Claimant submitted that no minutes of the management committee were files to confirm whether the Claimant stole any money and it can be presumed that it was ultra vires actions of the treasurer to dismiss him because he was a disturbance.



51. It was the Claimant's submission that a substantial portion of the bank slips produced in court were illegible therefore of no evidentiary value. Further, during cross-examination, the auditor testified that the specific account he audited ended in 600. The Respondent's had two bank account with Cooperative Bank that share this numerical ending, 01136179751600 and 01121179751600, rendering his response ambiguous.

Respondent's Submissions

52. The Respondent submitted on four issues: whether the Claimant was unlawfully terminated or he deserted duty; whether the Respondent has established its claim for Kshs. 731,650.00; whether the Claimant is entitled to the reliefs sought; and who should bear the costs of this suit.
53. On the first issue, the Respondent submitted that the Claimant's witness statement was filed and served, almost a year after the Respondent had filed its Response and the witness statement of Mr. Soso; even after the Claimant perused the Respondent's documents, his witness statement categorically stated that Mr. Soso called him into his office to inform him of his termination of employment and did not give him reasons for the same.
54. However, during the hearing, the Claimant testified that he had in fact had been purportedly dismissed because of his failure to trace the missing file. He also remembered during the hearing that he had been barred from seeing the Respondent's Board members to make his claim against the alleged verbal termination.
55. The Respondent submitted that these fabrications of fact ought not to be relied upon by this Court in support of the findings of fact of the purported unlawful dismissal. It relied on the case of *M'Ituamka M'Marambei (Suing as the legal representative of the Estate of Peter Miriti v Board of Management - Miathene High School [2020] eKLR* wherein the Court quoted with approval the case of *LARKIN VS. NASSAU ELECTRIC R. R. Co. 98 N. E 465 (N. Y., 1912)* where it was stated that: "Repugnant statements or contraries cannot be true and the fact that the witness has made them tends to show that his is untrustworthy through carelessness, an uncertain memory or dishonesty. Nor need there be a direct and positive contradiction. It is enough that the testimony and the statements are inconsistent and tend to prove differing facts."
56. It is the Respondent's submission that in absence of corroboration, and more so in light of the inconsistencies in the Claimant's account of events; he has failed to discharge his burden of proving unfairness or wrongful dismissal from employment has occurred.
57. On desertion, the Respondent relied on the case of *Ronald Nyambu Daudi v Tornado Carriers Limited [2019] [2019] KEELRC 2150 (KLR)* it was held that:
- "Desertion of duty is a grave administrative offence, which if proved, would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration."
58. It is the Respondent's submission it met the ingredients to support its claim that the Claimant had deserted his employment as when he was asked about the missing file, the Claimant fled under the guise that he was going to the bank to deposit the Respondent's collections and did not return to the office. He then switched off his mobile handsets to avoid being traced.



59. Subsequently, the Respondent made various attempts to reach the Claimant to no avail which fact was not controverted. This prompted the Respondent to issue a Notice to Show Cause on 1st August 2024, however, the Claimant served them with a demand letter the following day alleging termination of his employment.
60. In acknowledging his desertion of employment, the Respondent, through its Advocates wrote in response to the Claimant's demand letter confirming in writing that the Claimant "absconded duty without notice to the employer" and that "he was never dismissed at all". It is the Respondent's submission that in light of the Claimant's disappearance, it has sufficiently established that the Claimant deserted employment.
61. On the second issue, the Respondent submitted that the Audit report was not controverted by the Claimant either by way of a separate report or expert evidence challenging the contents contained therein.
62. The Respondent submitted that the Claimant's submission that a substantial portion of the banking slips supplied were illegible and therefore of no evidentiary value and onpolitical wrangles and malicious arrest are an afterthought. These issues were neither pleaded, nor were they the subject of hearing on the various dates when the parties' cases were heard, hence, the Court should not to entertain the same.
63. On the third issue, the Respondent submitted that the Claimant has not established the claim for salary arrears as he has not prayed for reinstatement to his employment with the Respondent. Salary arrears are an attendant relief to reinstatement of employment as held in case of Teachers Service Commission v Timothy Onyango Olale [2022] KEELRC 363 (KLR).
64. It is the Respondent's submissions that a claim for salary arrears cannot be granted if the Claimant was not in service for the period in question, the same would amount to unjust enrichment. Reliance was placed on the case of Abraham Gumba v Kenya Medical Supplies Authority [2014] KEELRC 463 (KLR).
65. The Respondent submitted that the Claimant was not dismissed from employment but deserted his employment, therefore, his prayer for compensation and notice pay is unjustified and lacks merit. Further, the Claimant admitted in his testimony to taking the Respondent's collections of Kshs. 37,100.
66. The Respondent submitted that the Claimant also is not entitled to service pay as it was neither pleaded nor established that he was not a member of the National Social Security Fund or that the Respondent failed to remit his statutory collections to the National Social Security Fund.
67. It is the Respondent's submission that the Claimant admitted in his testimony that he did not apply for leave days, and when he did the same was never declined. He testified to attending a funeral in 2018 and not reporting to work when sick. Therefore, by operation of Section 28 (4) of the Employment Act, the Claimant's annual leave with pay was forfeited.
68. On costs, the Respondent submitted that the Court to be guided by the principle that costs follow the event.
69. I have examined all the evidence and submissions of the parties herein. From the evidence adduced by the Respondent's witness RW1, the file to the office was missing but the key was not in the Claimant's custody.



70. The witness also stated in cross-examination that there was a disciplinary process to be followed but which was not followed in this case.
71. The RW1 confirmed that the audit was conducted by him and the books were inspected on 29th August 2022 which was after the date the Claimant alleged he was dismissed. The RW1 confirmed that from the document he examined, the bank slips were filled by Reinhard and not the Claimant.
72. The Respondents have averred that the Claimant deserted duty. They have however not indicated the measures they took to find and trace him and even in the wake of their admission that they even reported to the police and he was arrested. This is evident that they knew where he was.
73. The Respondents however didn't subject the Claimant to any disciplinary process. They also failed to prove that the lost KShs.700,000/= plus was stolen by the Claimant as the audit report produced by RW1 didn't find the Claimant culpable.
74. Section 41 of the Employment Act 2007 states 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 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.
75. Section 45(2) of the Employment Act 2007 on the other hand states as follows:-
- (2) A termination of employment by an employer is unfair if the employer fails to prove-
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason-
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.
76. The Respondent having failed to prove that the Claimant was responsible for the loss and having also failed to take him through a disciplinary process, I find the dismissal unfair and unjustified. The counter claim fails also for the same reason.
77. In terms of remedies, I find for Claimant and I award him as follows:
1. 1 month salary in lieu of notice – 26,000/=.
 2. In view of the fact that he was dismissed without any hearing, I will also award him 10 months compensation for the unfair dismissal = 10x26,000 = 260,000/=.



3. I grant him 1 year's leave not taken s leave = 26,000/=.
Total - 312,000/= less statutory deduction.
4. I also direct he be issued with a certificate of service.
5. The Respondents will pay costs of this suit plus interest at court rates with effect from the date of this judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH OF MAY, 2025.

HELLEN WASILWA

JUDGE

