



**Muthui v Kitui Flour Mills Limited (Cause E019 of 2024)
[2025] KEELRC 2114 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2114 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E019 OF 2024**

**M MBARŪ, J
JULY 17, 2025**

BETWEEN

JAMES GACHORA MUTHUI CLAIMANT

AND

KITUI FLOUR MILLS LIMITED RESPONDENT

JUDGMENT

1. The respondent employed the claimant as a national sales manager for modern trade on 15 January 2017, earning Ksh. 130,000 per month. The claimant worked until 15 July 2021, when the respondent issued a notice of summary dismissal.
2. The claim is that before the summary dismissal, the claimant had submitted a four-month notice of intention to resign from his employment, which was to take effect on 31 August 2021, and the notice had been accepted. While serving under the resignation notice, the claimant was summarily dismissed.
3. The claim is that on 15 July 2021, the claimant reported to work only to be handed a summary dismissal letter. The respondent alleged that he was involved in fraud and had committed a fundamental breach. The claimant contends that this led to an unfair termination of his employment, as the respondent failed to provide him with notice of the details of the alleged fraud or involve him in any investigations regarding such matters. No show-cause notice was issued, nor was the claimant permitted to make representations before the summary dismissal.
4. The claim is that there was no payment of terminal dues, and the claimant is seeking the following:
 - a. Notice pay Ksh.130,000,
 - b. Annual leave for 4 years and 6 months Ksh 409,468,
 - c. Service pay for 4 years and 6 months, Ksh 292,477,



- d. Damages for unfair termination of employment ksh.1,560,000,
 - e. Costs of the suit.
5. The claimant testified that he was primarily responsible for sales in supermarkets and followed up on various brands of the respondent. In February 2021, a cash shortage of Ksh . 706,600 was reported. However, it was not a shortage as reported, but rather an issue that was reported at the Thika depot, where he was in charge. Following this report of a shortage, the claimant agreed to refund the alleged deficit as the person in charge.
 6. The claimant testified that he resigned in May 2021, months after the agreement to refund the shortage. He resigned because his car was switched off while he was on the road. He provided three months' notice and would have settled the shortage within this time.
 7. In July 2021, the claimant requested an LPO from Maathai supermarket, which was sent to his email. He subsequently handed it over to another employee. Following the issuance of the LPO, goods were loaded for delivery; however, a question arose between the order and the truck transporting the goods. He visited the Maathai supermarket and discovered that the LPO was a forgery.
 8. The claimant testified that, in a day, he would receive over 10 LPOs from various entities. During the investigations, the respondent reported the matter to the police, which resulted in an ongoing criminal case.
 9. The claimant acknowledged and accepted the shortage of Ksh. 706,604 as the officer responsible at the Thika depot. By the time he resigned, this amount had not been fully paid. He felt compelled to resign due to what he perceived as historical injustices.

Response and counterclaim

10. In response, the respondent admitted to the employment relationship but denies that the claimant was earning Ksh. 130,000 per month as alleged.
11. On 25 February 2021, the respondent issued a claim and a warning letter concerning the misappropriation and theft of funds amounting to Ksh. 706,600 at the Thika depot, which the claimant accepted and agreed to repay through monthly instalments of Ksh. 50,000 until the debt was settled in full. The respondent conducted an audit to determine if any additional sums had been misappropriated beyond those acknowledged by the claimant before submitting his resignation notice. In collusion with staff from other departments, it was discovered that the claimant had engaged in fraudulent activities and forged bank slips, thereby perpetrating a scheme to misappropriate the respondent's funds.
12. The claimant was guilty of gross misconduct because, on 25 February 2021, he admitted to the misappropriation and theft of Ksh. 706,600 at the Thika depot and agreed to repay it through monthly instalments. Following his admission, the respondent conducted an audit and uncovered additional misappropriations that the claimant had failed to disclose.
13. The claimant submitted his resignation notice on 10 May 2021. However, on 15 July 2021, the respondent became aware that the claimant had allegedly presented a fraudulent Letter of Payment Order (LPO) from a customer for goods valued at Ksh. 704,000. The respondent reported the incident to the Makupa Police Station via OB No. 60, as referenced in OB No. 36/16/07/2021, located in the Nairobi Industrial Area Police Station. In Criminal Case No, the claimant was arrested and charged with theft, in breach of Sections 388 and 389 of the *Penal Code*. E2218 of 2021.



14. The summary dismissal was procedural and justified. The claims made should be dismissed.

Counterclaim

15. The respondent counterclaimed against the claimant for losses incurred due to forgeries at the Thika depot involving banking slips, amounting to the theft of Ksh. 706,600, which is the respondent's property. The claimant acknowledged the missing funds and had not repaid the full amount by the time he submitted his notice of resignation.
16. The respondent counterclaims for Ksh 706,600 and the costs of the suit.
17. In evidence, the respondent called Jascars Ngwio Isika, the human resources officer, and the persons responsible for the payroll. He testified that the claimant was employed as the national sales manager and earned Ksh. 53,470, as indicated in his pay slips, and not Ksh. 130,000, as alleged. The monies paid through Mpesa were commissions and bonuses that would be agreed upon between the claimant and the manager.
18. Isika testified that the termination of employment was not unfair as alleged. He claimed to have resigned from his employment, but before the notice period ended, an issue arose, and the respondent established that the claimant was involved in the misappropriation of funds; hence, the respondent terminated the employment through summary dismissal.
19. The claimant's action prompted the respondent to initiate summary action. A stock shortage occurred at the Thika depot, and the claimant was deemed responsible. He acknowledged his responsibility and consented to refund the loss, which was to be deducted from his monthly salary of Ksh 50,000.
20. The respondent has a salary structure. Salaries are paid through the bank, and commissions are paid through M-Pesa.
21. The claimant also admitted accepting an LPO purportedly from the Maathai supermarket. He failed to conduct due diligence to verify the LPO, and when the respondent's officers contacted the customer, it was established that the LPO was fraudulent. The matter was reported to the police, leading to the claimant's arrest, and he is currently undergoing criminal proceedings.
22. Before the matter could be concluded and the agreed sums paid, the claimant resigned.
23. Isika testified that the claimant had paid Ksh. 250,000 at the time of summary dismissal. The counterclaim included the total sum due, except that it should amount to Ksh. 456,600.
24. At the close of the hearing, both parties submitted written submissions that were analysed, and the issues that emerged for determination are as follows:
- Whether there was unfair termination of the claimant's employment;
 - Whether the remedies sought should issue;
 - Whether the counterclaim has merit.
 - Who should pay costs.
25. It is undisputed that the respondent employed the claimant as the national sales manager. However, the claimant alleged that his monthly salary was Ksh. 130,000, whereas the respondent maintained that his salary was Ksh. 53,470. The respondent submitted the payment statement for 2021 to verify the monthly wage, which was Ksh. 53,470, along with bonuses and commissions paid via M-Pesa.



26. According to a notice dated 10 May 2021, the claimant resigned from his employment and offered to serve the notice period, which concluded on 31 August 2021.
27. Through a notice dated 15 July 2021, the respondent issued a notice of summary dismissal to the claimant. The notice took effect immediately. The reasons given were that,
 Summary dismissal
 You have committed fraud and have fundamentally breached your obligations under your employment contract. The fraud committed is criminal in nature and under investigation by the authorities, and we suspect your continued stay can compromise the investigations.
 Therefore, as your resignation notice issued earlier has been overtaken by events, you are summarily dismissed, effective 15 July 2021. ...
28. The claimant admitted that following a fraudulent LPO sent through his email, the respondent commenced investigations, leading to his arrest and arraignment in court in Criminal Case No. E2218 of 2021. He admitted that the matter is ongoing.
29. Indeed, the employer can summarily terminate employment where the employee has fundamentally breached the employment contract and committed gross misconduct, as per section 44 of the [Employment Act](#). The employer must also have a genuine reason to support the sanction for summary dismissal under section 43 of the Act.
30. However, whatever the case, even in a situation that justifies the application of sections 44 and 43 of the Act, the same must abide by fair procedure as held in [Walter Ogal Anuro v Teachers Service Commission](#) [2013] eKLR.
31. This position is reiterated in [Pius Machafu Isindu v Lavington Security Guards Limited](#) [2017] KECA 225 (KLR), where the court held that:
 “... [The [Employment Act](#)] places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 , requiring notification and hearing before termination. ...”
32. The employer is bound to accord the employee due process and follow a fair procedure as contemplated under Section 41(2) of the [Employment Act](#). Even in a serious case involving fraud or misappropriation of funds, the provisions of Section 41 are mandatory, as held in [Postal Corporation of Kenya v Andrew K. Tanui](#) [2019] KECA 489 (KLR). The employer who finds the employee at fault must issue notice to allow the employee to attend and make their representations.
33. In this case, despite tendering his resignation, the claimant offered to serve notice and, therefore, remained an employee of the respondent when the summary dismissal notice was issued on 15 July 2021. His resignation did not diminish his employment rights, which took effect on 31 August 2021.
34. Due process of law was not followed, resulting in the unlawful and unfair termination of employment. The criminal charges stemming from the shop floor misconduct did not prevent the respondent, as the employer, from conducting a fair procedure with the claimant.
35. Due to a lack of due process, the claimant is entitled to notice pay and compensation.



36. As outlined above, the salary due to the claimant was Ksh. 53,470. The bonus and commission payments by the managers were for work done, not the monthly salary.
Notice pay is due at Ksh 53, 470.
37. Compensation is owed in cases of unlawful and unfair termination of employment, as per Section 49 of the *Employment Act*. However, the court must be guided by section 45(5) of the *Employment Act* when determining the appropriate compensation. The employee's conduct and work record are taken into consideration.
38. The claimant acknowledged a fund shortage at the Thika depot, which he agreed to reimburse. The total amount owed was Ksh. 706,600, to be deducted at Ksh. 50,000 per month. The respondent conveyed this through a letter dated 25 February 2021.
39. Mr. Isika testified that the claimant had paid some of the money at the end of his employment, and there was a balance of Ksh. 456,600.
40. The claimant's conduct is considered for due compensation; making an award would be to reward gross misconduct. In this regard, a zero (0) award is deemed justified as held in *Lilian W. Mbogo-Omollo v Cabinet Secretary, Ministry of Public Service & Gender & another* [2020] KEELRC 53 (KLR). Despite finding no due process, the employee was awarded Ksh. 10 in compensation under section 49 of the *Employment Act*. In the case of *Lele v Mwaura t/a Gongoni Market* [2025] KEELRC 1076 (KLR), the court granted zero compensation to an employee whose employment had been unfairly terminated, given that his work record was tainted by gross misconduct.
41. Concerning the counterclaim, the claimant admitted that he owed the respondent Ksh. 706,600 and was willing to repay it in Ksh. 50,000 instalments remain valid despite his resignation. He had partially paid this amount, leaving a balance of Ksh. 456,600 due to the counterclaim.
42. On costs, the claim and counterclaims are addressed. Each party shall bear its costs.
43. Consequently, judgment is entered for the claimant for payment of Ksh. 53,470 in notice pay, with no compensation awarded; the counterclaim is allowed for the respondent in the amount of Ksh. 456,600 to be paid by the claimant. The claimant shall pay the respondent less than his award. Each party shall bear its costs.

DELIVERED IN OPEN COURT AT MOMBASA, THIS 17 JULY 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

