



**Hobaya v Roy Hauliers Limited (Cause E554 of 2020)
[2024] KEELRC 449 (KLR) (21 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 449 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E554 OF 2020
DKN MARETE, J
FEBRUARY 21, 2024**

BETWEEN

MOHAMED HANNIF HOBAYA PLAINTIFF

AND

ROY HAULIERS LIMITED RESPONDENT

JUDGMENT

1. This matter was originated by way of a Plaintiff's Statement dated 4th August, 2020. It does not raise any issue in dispute on its face.
2. The Respondent in a Defendant's Amended Statement of Defence and Amended Counter Claim sated 13th January, 2023 opposes the claim and prays that the case be dismissed with costs. She also prays that judgement for the Counter Claim to the tune of Kshs.18,016.300.00 and interest thereof be entered in the favour for the date of filing this suit.
3. The Claimant in a replying defence dated 3rd March, 2023 counters and denied the defence and prays that both the defence and counter claim be truck out and judgment be entered in his favour as prayed.
4. The Claimant's case is that at all material times to this suit, the claimant was an employee of the Defendant working as Branch Manager, Mombasa with effect from 11th April, 2016. His further case is that he worked diligently on a basic salary of Kshs. 148,556.00 per month exclusive of other allowances.
5. The Plaintiff's for other case is that on 6th November, 2019, he was informed verbally that he had been placed on suspension until the 16 when he was served with a letter of summary dismissal. It is his case that his termination of employment was unlawful and was not afforded an opportunity to be heard. There was no hearing conducted to determine his guilty nor was he given a chance to respond to the allegations mentioned in the letter of dismissal dated 13th November 2019. This was against the provision of the Section 41 of the *Employment Act* Cap 226 Laws of Kenya.



6. The Plaintiff again avers that between October 2019 and November of the same year, the defendant deducted Kshs.408,133.00 which has declined to refund. This is in addition to Kshs.64,133 being salary for 16 days of November, 2019 and 41 days of accumulated leave totalling Kshs.202,366.00.

He prays as follows;

- a. Reinstatement to his position with full benefits.
- b. Unlawful salary deductions – Kshs.408,357/=
- c. Severance pay for 3 years of service – Kshs.222,834/=
- d. 13 days worked in November 2019 – Kshs.64,133/=
- e. 41 days accrued leave pay – Kshs.202,266/=
- f. Payment in lieu of Notice – Kshs.148,556/=
- g. Compensation for unlawful termination being 12 month’s salary – 1,782,672/=
- h. Costs of this suit
- i. Interests at court rates on (b), (c), (d), (e), (f) and (g) above
- j. Any other relief the court may deem fit to grant.

7. The Defendant’s case is an admission of the amount paid to the Plaintiff but avers that his stint of employment was marred with misappropriation of funds and loss of product under his management.

8. Her further case is that the Plaintiff was accorded several opportunities to be heard and account for monies missing as from October to November, 2019 but to no avail. She puts the claimant to strict proof of his allegations of unlawful termination of employment as claimed.

9. Again, the deductions were justified in that the Plaintiff’s misappropriated funds at the Mombasa offices as we would not account on expenditure despite numerous request for the Accounts Department. This comes out as follows;

8. The Defendant denies the contents of 7 9 of the Plaint and avers that the Plaintiff was fully compensated in the month of November of the said 41 leave days as clearly evidenced by his payslip. The Plaintiff is put to strict proof of his allegations.

9. The Defendant denies the contents of paragraph 10, 11, 12 and 13 of the Plaint and Plaintiff and invites strict proof thereof. Further the Defendant wishes to respond on the claims in paragraph 10 as follows;

- a. The Plaintiff is not entitled to one-month salary in lieu of notice as he was summarily dismissed from work.
- b. He is not entitled to deductions made since the same were lawful and made pursuant to the provisions of the [Employment Act](#).
- c. The Plaintiff’s salary for the days worked as well as any other pending dues was considered in the calculation of his terminal dues which he was paid.
- d. The Plaintiff is not entitled to severance pay since he was summarily dismissed.
- e. The Plaintiff is not entitled to compensation for wrongful termination as the Defendant had a justifiable reasons to summarily dismiss the Plaintiff.



The Defendant further raised a Counter Claim thus;

13. The Plaintiff/Defendant avers that after the Defendant/Plaintiff was terminated, he did not avail to the Plaintiff/Defendant all the company properties that were issued to him, this includes but not limited to one Samsung Galaxy J2 of approximately Kenya shillings Fifteen Thousand Five Hundred only (Kshs.15,500.00) and a 16 GB memory card costing Kenya Shilling Eight Hundred Only. (Kshs.800.00).
 14. The Plaintiff/Defendant counterclaims a total of Kenya Shillings eighteen million 8,000,000.00) being money misused and misappropriated by the Defendant/Plaintiff and loss of product occasioned by theft brought about by the negligence, ignorance and carelessness of the Defendant/Plaintiff.
 16. The Plaintiff/Defendant states that despite making effort to recover the same items the Defendant/Plaintiff has refused, neglected and or denied to avail the same to the Plaintiff/Defendant.
10. She therefore prays for a dismissal of the claimant's case with costs and further that judgment be entered in favour of her counter claim to the tune of Kenya shilling eighteen million sixteen thousand three hundred only.(18,016,300.00) with interest from the date of filing this suit.
 11. The matter came to court variously until the 25th April, 2023 when they agreed for a dismissal of the matter by way of written submission.

The issues for determination therefore are;

1. Whether the termination of the employment of the plaintiff by the Respondent was wrongful, unfair and unlawful.
 2. Whether the Respondent is entitled to the counter claim for Kshs.18million and whether it was attributable to the plaintiff.
 3. Whether the plaintiff is entitled to the relief sought
 4. Who bears the costs of this cause.
12. The 1st issue for determination whether the termination of the employment of the plaintiff by the Respondent was wrongful, unfair and unlawful. The parties hold diametrically opposed position on this. The Plaintiff elaborately answers this issue as follows;
 - a. The plaintiff was called by the director operations to his office in Nairobi on the 11th November 2019. He went into his office and he told him that you services as an employee are hereby terminated just wait for the letter of termination. He travelled back to Mombasa and on the 16th November 2019 he came for his letter which he signed for confirming that his services were terminated from the 13th November 2019.
 - b. The Plaintiff was never accorded any hearing, he was not furnished with the charges or reasons before the termination. He was never asked to defend himself and to have a shop steward, fellow employee or friend or person of his choice to participate in the hearing of the disciplinary cause.
 - c. Section 41 of the [Employment Act](#) 41 (1) and (2) Notification and hearing before termination on grounds of misconduct.(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.

d. The Act and the Laws of natural justice and Article 50 of *the Constitution* on fair trial are very clear that before termination a party ought to be notified on the charges or accusations against him, a hearing will be arranged in which he will present himself with another employee or shop/floor steward or representative of a union of his own choice. The charges will be read to him and he will make his representations which the employer will consider before termination or summary dismissal.

Section 45 provides that;

45. Unfair termination

(1) No employer shall terminate the employment of an employee unfairly.
(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 employee's conduct, capacity or compatibility;

Or

(ii) based on the operational requirements of the employer; and that the employment was terminated in accordance with fair procedure.

(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

(4) A termination of employment shall be unfair for the purposes of this Part where-

(a) the termination is for one of the reasons specified in section 46; or
(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

e. The employer/defendant herein acted unfairly in terminating the employment of the plaintiff in that no notice was granted for termination, the due process was not followed before the termination decision. The termination was solely acted upon by the operations director who handed over to the employee the termination.



In accordance with Section 45 4(b) the action was not in accordance with justice and equity.

- f. The employee was not satisfied with the termination, he appealed to the personnel committee of the company for review. The committee committed the same error in that in its report it is clear that the charges were never read to the employee, no audit report was produced or referred to. His representations were not noted neither were they considered before coming up with the final verdict.
- g. The personnel committee never called the complainant officer or the operations director or his agent to point out the offence or misconduct of the employee, the report speaks for itself, and it was not impartial. It basically confirmed what their boss had done. The process was not equitable or just contrary to the provisions of Section 45 of the Act.

13. There was no disciplinary board constituted as asserted in paragraph 10 of the witness statement done by Patrick Kyalo. The proceedings therefore are not attached to the list of documents, because none was constituted. It is incumbent upon the respondent to prove the allegation in line with Section 108 & 109 of the *Evidence Act*. In the absence thereby we urge you to dismiss the allegation.

He who alleges must prove...

108. Incidence of burden

The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Further there was no suspension given to the plaintiff before the termination and take note that none is attached to the list of documents.

The Respondent on the other hand and in answer to this issue comes out thus;

- a. The Claimant was employed as a branch manager on 11th April, 2016 for a salary of Kshs.148,556/= as attested by the letter of appointment produced by the Respondent at page 1-4 of the Respondent's bundle of documents.
- b. In the letter of appointment are work instructions for managers which stipulate what a branch manager was required to do and conduct himself. That document was received by the claimant as attested by his signature.
- c. The Claimant was further inducted at the head office and later assigned work in Mombasa.
- d. The Claimant's employment period was littered with instances of gross misconduct involving unexplained unauthorized transactions as well as unsupported expenditure contrary to Respondent's company policies.
- e. On several occasions, the Claimant as well as the other managers were cautioned against spending without the express authorization of the directors as evidenced by the email



extract at pages 44 and at page 60-61 of the Respondent's bundle of documents but the Claimant disobeyed the orders and continued using funds entrusted to him without seeking authority from the directors.

- f. Additionally, he failed to remit the petty cash vouchers and the supporting receipts despite numerous requests from the accounts department to allow reconciliation of the Respondents books of accounts. He also ignored all the communications from the accounts team reminding him to submit the petty cash vouchers which were due weekly, as attested by the email correspondences at pages 47-62 of the Respondent's bundle of documents.
- g. The Respondent through its accounts department, pleaded with the Claimant to provide the requisite documents or else he risked being debited but still the Claimant ignored the requests from the accounts which left them with no other option but to debit the amounts unaccounted for.
- h. Before any such debit, the Respondent informed the Claimant and gave him time to remit the petty cash vouchers and the supporting documents but he never complied. This can be attested by the emails at pages 46, 47, 48 and 49 of the Respondents bundle of documents.
- i.
 - (1) The Claimant as the then branch manager, had a duty to ensure that he carried out a test load report for all the tankers loading petroleum products at the depot, to verify the quantity of the product loaded. This would ensure that the product is not interfered with by the drivers while on transit and would also ensure that the depot loaded the correct quantities.
- j. Despite being aware of this duty, the Claimant failed to carry out a test loads for the products loaded, consequently causing the company untold transit losses amounting to Ksh.17Million as attested by the debit notes produced at pages 66 -165 as well as the invoices at pages 166to page 220 of the Respondent bundle of documents.
- k. On various occasions, the claimant received verbal warnings but did not heed the same. Subsequently he was called by the director on 8th November, 2019 and requested to avail himself at the Nairobi office for a meeting to explain and sort out the issue of misappropriated funds and the transit losses. The meeting took place on place on 11th November, 2019, a fact confirmed by the Claimant in his witness statement as well as his email extract of 15th November, 2019 appealing the decision to terminate him, contained in his list of documents.
- l. During the meeting, he was unable to explain or provide any documentation for the unaccounted for petty cash and was placed on suspension until 13th November, 2019 when the decision was made to dismiss him. The decision was communicated to him and he was asked to collect his summary dismissal letter as he clears with the company. The Claimant presented himself to the Nairobi office on 16th November, 2019 and was issued with the summary dismissal letter. His final dues were tabulated which included leave days as well as the days worked in November as attested by the pay slip attached by the Claimant in his documents.



- m. The Claimant appealed the decision of the Respondents through the Email of 15th November, 2019 (attached in the Claimant documents) and in the said email, he confirms that he had been called to sort out the issue of imness which had been pending for a period of eight (8) months.
- n. The Respondent Personnel Committee convened on 6th February, 2020 to hear the Claimant appeal. He attended the meeting together with Mr. Shaik Ismail as his Representative as evidenced by the attendance list annexed to the committee minutes at pages 63 and 64 of the Respondent list of documents.
- o. The committee heard the appeal and noted that although the Claimant had every chance to sort out the issue of unaccounted for funds, he did not make any effort. That despite the various requests for him to account for the petty cash, he ignored and/or refused to respond to the requests.
- p. The committee therefore upheld the decision of the Respondent to dismiss the Claimant for misappropriation of funds.

14. This is expressed in her opener written submission dated 29th September, 2023.

The Respondent further submits as follows;

...in view of the foregoing the summary dismissal was justified and in line with the Claimant's terms of employment as well as the provisions of the [Employment Act](#) for the following reasons;

- i. Through his unprofessional conduct, made the company lose substantial amount of money when he failed to account for petty cash as well as conducting test load reports.
- (ii) He deliberately failed to respond and sort out the issue of unaccounted funds despite the numerous reminders and appeals.
- (iii) His performance and attitude towards work kept deteriorating.
- (iv) Despite the warnings given, he did not change.
- (v) He was accorded two hearings to account for the unaccounted funds but he failed to give sufficient explanation and supporting documents for the expenditures.

15. In the penultimate and in overall answer to the Plaintiff's written submission dated 15th June, 2019, the Respondent has this to say;

- (a) The Respondent took all necessary steps during separation of the Claimant and submits that in all fairness the Claimant was afforded a hearing before termination and an appeal hearing after his dismissal contrary to his assertion.
- (b) The reasons for his dismissal were well outlined in the letter of dismissal which he acknowledged. Furthermore, the issue of claims for misappropriation of funds was there for over eight months. The Claimant was warned severally and as such he cannot be heard to say that he did not know the reasons for his dismissal.
- (c) Further, he was notified severally that if he does not present the petty cash vouchers and the supporting documents the unaccounted for amount was going to be recovered from his salary.



as per the terms of his appointment letter. He neither objected nor raised any question as he was aware of the same.

- (d) The Claimant did not prove that he was deducted a total of Kshs.408, 357/ or how the figure was arrived at.
 - (e) Also, despite the Claimant pleading that he was placed on suspension, he now conveniently seeks to depart from his averments to paint the Respondent in bad faith by claiming he was never told of the same.
 - (f) Although the Claimant claims in his submissions his termination was precipitated by his inquiries on his salary deductions, no evidence has been placed before this court to prove the same neither were the allegations pleaded in his pleadings. The Claimant cannot purport to introduce new facts by way of submissions. As a matter of fact, the Respondent requested the Claimant to remit the vouchers and the supporting documents to avoid being debited but he ignored the requests. As such, we urge this court to disregard the Claimant submissions based on the allegation.
 - (g) Further, the Claimant claims that he was constructively dismissed which is a clear departure from his pleadings. Order 2 Rule 6 of the Civil Procedure Rules bars a party from departing from what he pleads as follows:-

“No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit”
 - (h) In *Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule Others* (2014) e KLR the Court of Appeal cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) Ltd v. Nigeria Breweries PLC SC 91/2000* on this as follows;

“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...in fact parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation”
 - (i) The submissions on the grounds of constructive dismissal should therefore be disregarded.
 - (j) At paragraph 6 of the submissions, the Claimant claims that he was not furnished with an audit of the misused funds yet the Respondent constantly requested the Claimant to account for the missing funds which he failed to do.
 - (k) Finally, the Claimant confirms that the Cellphone was not handed over to the Respondent and as such, the Claimant should compensate the Respondent for the same since he no longer works for it.
16. She therefore submits the claimant has miserably failed to establish a case of unfair, wrongful and unlawful dismissal from employment or even that the salary deductions were unlawful.
17. A look at the respective cases of the parties tilts this matter in favour of the Respondent. This is because despite her overwhelming case and submissions for lawful termination of employment, the Claimant



does not in anyway controvert this. Instead, the Claimant dwells on a case of denial and false allegations in support of a case for unlawful termination of employment.

18. The Claimant has not satiated the requirement of Section 47(5) of the Employment Act, 2007 on burden of proof which provides as follows;

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

19. Section 47(5) offers the phenomena of a shifting burden of proof. It is the onus of the employee to establish and evidence unfair termination of employment or wrongful dismissal whereas the burden of justifying termination vests on the employer. In the current scenario, it is outright that the claimant attempts at incepting a case of unlawful termination of employment have been rubbished by the Respondent's clamour and evidence of lawful dismissal and termination of claimant for continued misconduct and unaccountability during the performance of his work.

20. It is trite law that he who alleges must proof. This is the gist of sub paragraph g of paragraph 12(1) of the Respondent submission which is also in tandem with Section 107, 108 and 109 of the Evidence Act, chapter 80, Laws of Kenya which come out thus;

He who alleges must prove...

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- (1) "whoever desires any court to give judgment as to legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

108. Incidence of burden

The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

21. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
22. Further there was no suspension given to the plaintiff before the termination and take note that none is attached to the list of documents.
23. In as much as the claimant sought to rely on these provisions of the Evidence Act to buttress his case, one finds that it was he who was and failed to substantiate a case of unlawful termination of employment well enough to contradict the Respondent's case. I therefore find a case of lawful termination of employment and hold as such.
24. The 2nd issue for determination is whether the Respondent is entitled to the counter claim for Kshs.18million and whether it was attributable to the plaintiff. Here again, the Respondent's case brings out a case of the claimant misconduct through misappropriation of the Respondent's property, resources and monies throughout his tenure of office. The Respondent ably demonstrates this in evidence and attributes the various salary deductions as a way of effecting recovery of such losses. She even submits that throughout the Claimant's stint of employment, he never raised a finger against his



salary deductions. These deductions were not adequate to offset the Claimant's indulgence and looting spree and therefore i find for the Counter Claim for Kshs.18million as set-out.

25. The Respondent has gone out of his way to support the Counter Claim in evidence. This is through documents and testimony of her witnesses. The Plaintiff's denial and allegations of no proof for the Counter Claim are baseless and hold no water. In the circumstances of overwhelming evidence of the Respondent. Even on a preponderance of evidence, the Respondent's case takes sway. I therefore find a supported case for the Counter Claim and hold as such.
26. The 3rd issue for determination whether the plaintiff is entitled to the relief sought. He is not. Having lost a case of unlawful termination of employment, he becomes disentitled to the relief sought.
27. I am therefore incline to dismiss the claim with orders that each party bears their costs of the claim and Counter Claim.
28. The relief orders of this judgment shall be as follows;
 - i. The Claimant be is hereby ordered to meet the Counter Claim for Kshs.18,000,000.00 as awarded by this court.
 - ii. Each party shall bear their costs of the claim and Counter Claim.

DELIVERED, DATED AND SIGNED THIS 21ST DAY OF FEBRUARY 2024.

D. K. Njagi Marete

JUDGE

Appearances:

1. Mr. Muriase instructed by Ombachi Moriase & Company Advocates for the Claimant.
2. Miss Gitau instructed by Kipkorir Kipkemboi & Company Advocates for the Respondent

