



REPUBLIC OF KENYA



**Mbugua v Powermax General Electrical Merchants (Cause  
1092 of 2018) [2024] KEELRC 620 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 620 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1092 OF 2018  
L NDOLO, J  
MARCH 14, 2024**

**BETWEEN**

**VIOLET WAITHERA MBUGUA ..... CLAIMANT**

**AND**

**POWERMAX GENERAL ELECTRICAL MERCHANTS ..... RESPONDENT**

**JUDGMENT**

1. This dispute arises from an employment contract between the Claimant and the Respondent running from 1<sup>st</sup> February 2010 to 5<sup>th</sup> April 2014. The Claimant states her case in a Statement of Claim dated 22<sup>nd</sup> June 2018 and the Respondent opposes the Claimant's claim by way of a Statement Defence dated 29<sup>th</sup> August 2018.
2. The matter went to full trial with the Claimant testifying on her own behalf and the Respondent calling its Operations Manager, Joseph Ng'ang'a.

**The Claimant's Case**

3. The Claimant states that she was employed by the Respondent on 1<sup>st</sup> February 2010 as a Storekeeper, rising through the ranks to the position of Store Manager.
4. The Claimant states that from the month of November 2012 until the termination of her employment in April 2014, the Respondent deducted the sum of Kshs. 7,000 every month from her salary. According to the Claimant, the reason given by the Respondent for the deduction was that the Claimant had not been honest.
5. The Claimant claims that in the year 2012, the Respondent granted her only two months' maternity leave, instead of the statutory three months.



6. On 24<sup>th</sup> February 2014, the Claimant received a letter from the Respondent, asking her to go on 30 days' leave effective 1<sup>st</sup> March 2014. This leave was inclusive of 10.5 days accrued from 2012 and 2013. The Claimant was to report back to work on 5<sup>th</sup> April 2014.
7. The Claimant avers that while still on leave, the Respondent called to inform her that her contract had been terminated; she was asked to collect her dues.
8. The Claimant was issued with a letter giving the reasons of the termination as misappropriation of company revenue through the system, dishonesty, underperformance and poor supervision of staff who were allegedly giving out goods on credit, contrary to company policy.
9. The Claimant complains that she was not given an opportunity to defend herself against the accusations levelled against her. She states that save for the year 2012, she had not received any warning or complaint about her work.
10. The Claimant's case is that the termination of her employment was unlawful for want of substantive justification and procedural fairness. She now claims the following:
  - a. Deductions (@ Kshs. 7,000 per month Nov 2012 to March 2014).....Kshs. 119,000
  - b. One month's salary in lieu of notice.....45,000
  - c. One month maternity leave.....45,000
  - d. Gratuity for 6 years @ 1/3 of a month's salary per year.....90,000
  - e. 12 months' salary as damages for unlawful termination.....540,000
  - f. Costs plus interest

### **The Respondent's Case**

11. In its Statement of Defence dated 29<sup>th</sup> August 2018, the Respondent denies the Claimant's claim and puts her to strict proof.
12. The Respondent contends that if there was summary dismissal, it was executed procedurally and in accordance with the law.
13. The Respondent avers that the Claimant was in violation and breach of her employment contract, citing the following particulars of breach:
  - a. Poor supervision of staff which led them to give out goods on credit;
  - b. Underperformance;
  - c. Failing to follow lawful instructions from the Respondent;
  - d. Dishonesty at the work place including theft of goods.

### **Findings and Determination**

14. There are two (2) issues for determination in this case:
  - a. Whether the Claimant has made out a case of unlawful termination of employment;
  - b. Whether the Claimant is entitled to the remedies sought.



## Unlawful Termination?

15. The Claimant's employment was terminated by letter dated 5<sup>th</sup> April 2014 stating as follows:

“RE: TERMINATION OF SERVICE

This is to inform you that your services have been terminated with effect from today (5/04/14).

The reason being that you have not been honest while discharging your duties including misappropriation of company revenue through the system. This was notified to you by my office through a meeting and you agreed to refund the same. This was not your first time to be dishonest refer to slumbernight issue of 16/9/2010. The company had given you a chance expecting you to change as you had promised but you did not.

The other reason was underperformance including the shop attendants giving goods on credit without raising any invoice on delivery while you being the person in charge of the same shop (sic) and which is against the company policy. During our meeting on the same issue you agreed responsibility and to pay the amount in question kindly refer to your payslips dated back from Nov 2012 to date which has been done with your consent.

Arrange to hand over any company property in your possession.

You will receive your final dues which include:-

Any pending leave  
A one month notice as stipulated in your letter of appointment.

Please note that the above amount is subject to all statutory deductions as per the law and any other advances recoverable, in addition to any other amount due to the company.

The Accountant will have all the details ready for your collection after clearance.

We wish you all the best in your future endeavors

Yours faithfully,

(signed)

Samuel Njau

For and on behalf of Powermax”

16. Prior to this letter, the Claimant was by letter dated 24<sup>th</sup> February 2014, sent on 30 days' leave running from 1<sup>st</sup> March 2014 until 5<sup>th</sup> April 2014. Significantly, the letter of 24<sup>th</sup> February 2014 did not disclose the reason why the Claimant was being sent on leave.
17. Additionally, it is evident that the date of termination coincided with the last day of leave. This is not surprising because the letter sending the Claimant on leave gave detailed instructions for her to hand over. It would therefore be reasonable to infer that by the time the letter dated 24<sup>th</sup> February 2014 was written, the decision to terminate the Claimant's employment had already been made.
18. The letter of termination accuses the Claimant of dishonesty, misappropriation of company revenue and underperformance. These allegations, if proved, would constitute serious acts of misconduct and poor performance. The operative word is 'proof' and both the employee and the employer have specific burdens to discharge.



19. In her final submissions the Claimant referred to the decision in *Milano Electronics Limited v Dickson Nyasi Muhaso* [2021] eKLR where the Court referred to the earlier decision in *Peter Otabong Ekisa v County Government of Busia* [2017] eKLR where it was held:

“The standard of proof is set out under Section 47(5) of the Act. In terms thereof, the employee shall adduce prima facie evidence that there was no valid reason to dismiss him from employment and once that is done the employer bears the burden of justifying the dismissal. In other words the respondent bears the evidential burden of rebuttal. If the employer is unable to rebut the evidence by the claimant, then the employee is said to have proven that there was no valid reason to dismiss him on a balance of probabilities.”

20. Section 43 of the Act sets out the employer’s burden in the following terms:

43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

21. When a claim for unlawful termination of employment, such as the present one is made, the duty of the Court is to examine the process undertaken at the shop floor. The Court does not sit as an appeal panel nor does it seek to supplant the employer’s prerogative.

22. It is the duty of the employer to take the employee through due process so that by the time the employee is leaving employment, the reason for the termination has been clearly established, not only for the benefit of the employee but also for any reasonable person examining the employer’s decision. This is the essence of the procedural fairness dictates of Section 41 of the *Employment Act* which provides 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.

23. There was no evidence adduced to show any prior notice to the Claimant of the allegations leading to the termination of her employment. She was also not availed an opportunity to respond to these



allegations at the shop floor, as required by Section 41 of the Employment Act. The allegations therefore remained unsubstantiated and unproved.

24. Moreover, it is evident that the Claimant was surcharged the sum of Kshs. 7,000 per month for what the Respondent referred to as dishonesty, misappropriation and underperformance. This is evidenced by the termination letter which states inter alia:

“During our meeting on the same issue you agreed responsibility and to pay the amount in question kindly refer to your payslips dated back from Nov 2012 to date which has been done with your consent.”

25. The surcharge was confirmed by the Claimant’s payslip for the month of February 2014.
26. 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 procedural fairness provisions of Section 41 of the Employment Act.
27. Although the termination letter intimates that the Claimant had consented to the surcharge, no evidence was adduced to support this proposition. The only conclusion to make therefore is that the surcharge was a unilateral decision made by the Respondent in violation of due process.
28. What is more, by surcharging the Claimant, the Respondent effectively extinguished the allegations made against her and the said allegations could not be used as a basis for any further disciplinary action against her. It follows therefore that by using the same allegations as a reason for termination of the Claimant’s employment, the Respondent breached the rule against double jeopardy.
29. Additionally, the Respondent’s action of sending the Claimant on compulsory leave, which transitioned into termination was not supported either by the law or the Respondent’s internal rules and regulations.
30. On the whole, I find and hold that the termination of the Claimant’s employment was substantively and procedurally unfair and she is entitled to compensation.

## Remedies

31. Flowing from the foregoing, I award the Claimant eight (8) months’ salary in compensation. In making this award, I have considered the Claimant’s length of service and the employer’s unlawful conduct; ranging from an unexplained compulsory leave slapped on the Claimant, surcharge in violation of due process, breach of the rule against double jeopardy and failure to allow the Claimant an opportunity to defend herself.
32. I further award the Claimant one (1) month’s salary in lieu of notice as provided in her letter of appointment.
33. In light of the express admission by the Respondent in the termination letter dated 5<sup>th</sup> April 2014 that it had effected a monthly surcharge against the Claimant, the claim for these deductions is allowed.
34. The claim for maternity leave pay and gratuity were not proved and are disallowed.
35. Finally, I enter judgment in favour of the Claimant as follows:
- a. 8 months’ salary in compensation.....Kshs.360,000
  - b. 1 month’s salary in lieu of notice.....45,000



c. Unlawful surcharge.....119,000  
Total.....524,000

36. This amount will be subject to statutory deductions and will attract interest at court rates from the date of judgment until payment in full.

37. The Claimant will have the costs of the case.

38. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 14<sup>TH</sup> DAY OF MARCH 2024.**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Mogikoyo for the Claimant

Ms. Njani for the Respondent

