



**Opiyo v Uzuri Foods Limited (Bread Division) (Cause 1591 of 2018)
[2024] KEELRC 2156 (KLR) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2156 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1591 OF 2018**

K OCHARO, J

JULY 29, 2024

BETWEEN

MOSES OGETO OPIYO CLAIMANT

AND

UZURI FOODS LIMITED (BREAD DIVISION) RESPONDENT

JUDGMENT

Introduction

1. Contending that at all material times, he was an employee of the Respondent but who separated with the latter through resignation, and that at the separation the Respondent failed and or neglected to pay him that which he was genuinely and legally entitled to, the Claimant instituted the suit herein through a Statement of Claim dated 5th December 2018 seeking: a declaration that the deductions that were made on his salary were unfair and unmerited; payment by the Respondent of terminal dues amounting to Kshs 559,928; a certificate of service; costs of the suit and interest.
2. The Respondent resisted the Claimant's claim through a Memorandum of Response and Counterclaim dated 21st March 2019. In defence, it denied the Claimant's cause of action against it and his entitlement to the reliefs sought. In its Counterclaim, the Respondent sought against the Claimant, a sum of Kshs 1, 498,310.70.
3. The Claimant countered the Response and Counterclaim through a Reply to Respondent's Memorandum of Response and Counterclaim dated 21st March 2019.

Claimant's case

4. The Claimant's case is that he was an employee of the Respondent, but resigned on 20th April 2016, by giving the Respondent the requisite statutory notice. After the resignation, he sought payment of his terminal dues plus a refund of his security deposit, a payment which the Respondent refused to make.



- Surprisingly, and without justification, the Respondent made deductions on the dues and security deposit, yet according to him, he owed it no money to entitle it to make the deductions.
5. Security deposit was an amount deducted from his account monthly, and at the date of resignation, he had an amount of Kshs 160,000 to his credit.
 6. The Respondent did not pay his basic salary for April 2016, Kshs 140, 870 and a house allowance of Kshs 21, 131. Further, at the separation, he had earned but unutilized leave days, for which he was entitled to Kshs 37,927.
 7. Cross-examined by Mr. Museve for the Respondent, the Claimant testified that he resigned through his letter dated 20th April 2016. His resignation was to take effect on 30th April 2016. Thus, the notice issued was ten days. This wasn't in line with the contractual notice of thirty [30] days.
 8. He further testified that per his letter of appointment, he was charged with the responsibility of coordinating and supervising the sales department. In answer to Counsel's suggestion that he [the Claimant] was responsible for the money and crates lost by distributors, within his territory, the Claimant asserted that the suggestion was being drawn from a document that he never executed.
 9. Upon resigning, the Respondent tabulated his final dues, though he executed the document that contained the tabulation, he was not in agreement with the computation, hence the suit herein.
 10. The Claimant asserted the Respondent unjustifiably made deductions on his account for losses incurred as a result of other employee's losing crates.
 11. On the insurance claim settlement, the Respondent's Insurer declined to settle on account of late notification, the Claimant testified that it wasn't his responsibility to notify the insurer of the attachment of risks, it was the General Manager's. As such, it cannot be available to the Respondent to urge that he settle any losses that flowed from the rejection of the Claim.
 12. The criminal case No 1993 of 2014- Republic v Everline Odhiambo and Clifford Owino, was withdrawn after it was agreed that it be in a meeting at the Respondent's. This followed the Investigation Officer's advice that one of the accused be made a witness if the case was to succeed.
 13. The documents availed to the Court show that the "other deductions" made from his dues amounted to Kshs 122, 000. This was among the many unjustified deductions on his dues.

Respondent's case

14. The Respondent presented one Quinter Ouma to testify on its behalf. The witness presented himself as the Respondent's Human Resource Manager. The witness stated that upon resignation, the Claimant was entitled to the Sum of Kshs 287,178, which sum was offset from the ledger balance of Kshs 592,342.78 leaving an outstanding amount of Kshs 305,164.78 still owing to the Respondent.
15. The witness stated further that the Claimant also owes the Respondent a sum of Kshs 983, 603 following the rejection of its insurance claims by its Insurer. Further, a sum of Kshs 209,493, following his unauthorized withdrawal of the criminal case. He therefore owes the Respondent a total sum of Kshs 1, 498,310.78, the subject matter of the counter-claim.

Claimant's Submissions

16. The Claimant identified three issues for determination; whether the deduction of the Claimant's salary account to cover losses incurred by the Respondent company was fair and or lawful; whether the



Claimant is entitled to the terminal benefits sought in the statement of claim; and who should bear the costs of this suit?

17. The Claimant submitted that, undeniably accounts were opened in his name, which were meant to be holding accounts for various transactions. However, this fact did not mean that he could be personally responsible for all losses incurred by the Respondent from his funds. On numerous occasions, the Respondent unjustifiably and without any contractual basis, deducted his salary.
18. It was further submitted that the Respondent cunningly altered the letter of appointment, its exhibit No 1 to his detriment. At the time of his promotion as a sales manager, his contract did not have a personal liability clause concerning the company's losses.
19. On the terminal benefits sought, the Claimant submitted that he is entitled to his salary for April 2016, Kshs 140,870/- as the house allowance, Kshs 21,131/- in line with Section 31 of the [Employment Act 2007](#).
20. On earned but unutilized leave days, it was submitted that his evidence that he was owed Kshs 37, 927 on the account remained unrebutted. Too, his evidence on the claim on illegally deducted amounts, Kshs 120,000, and the security deposit, was not controverted.

Respondent's Submissions

21. The Respondent identified three issues for determination thus; whether the deductions made by the Respondent were fair; whether the Claimant's terminal dues are unjustified; and whether the Respondent's Counterclaim is merited.
22. It was submitted that, upon exit, the Claimant was entitled to Kshs 287, 178.00. However, the amount was used to offset the ledger amount of Kshs 592,342.78. This left an outstanding balance of Kshs 305,164.78.
23. The Court was urged to take note of and consider the implication of the main duties set forth on the Claimant's letter of appointment. A keen consideration of the duties as set out on the letter, will reveal that the Claimant was to ensure that the Respondent does not incur losses or damage of its properties under the Claimant's supervision.
24. It is the Respondent's position that the deductions made from the Claimant's salary were justified as he was responsible for losses as demonstrated by his Letter of Appointment. The amounts prayed for by the Claimant are therefore not payable.
25. It was further submitted that according to the Respondent's witness's evidence, that certain losses were suffered under the Claimant's watch and he was surcharged the amount, "security deposit". He was responsible for the loss of 10 crates in the period 6th July, 2015, to 7th July, 2015 and he in writing allowed to be surcharged for the loss. Further, losses were incurred in the period 1st December, 2015, to 31st December, 2015 within his area of supervision, for which he committed to be surcharged.
26. Considering the various ledgers exhibited by the Respondent, it can be safely concluded that the deductions made against the Claimant were justified as he was responsible for losses made in his area of supervision.
27. On the 2nd issue, the Respondent submitted that the April salary sought by the Claimant, Kshs 140, 870, house allowance, Kshs 21,131, and compensation for earned but untaken leave days, Kshs 37, 927, were included in the Claimant's final dues before the deductions were effected.



28. It was further submitted that the Kshs 120,000 sought by the Claimant was used towards offsetting the outstanding ledger balance that was owed to the Respondent. The amount deducted was Kshs 122, 178.
29. The Respondent submitted that its counterclaim is merited. The sum of Kshs 983, 653 was the cumulative amount lost by the Respondent through acts of theft by 14 salespersons whom the Claimant recruited and who were working in his area of supervision. The Respondent's Insurer declined liability to settle the sum. Per the Claimant's employment contract, he was bound to shoulder the liability.
30. The Respondent invited the Court to note that the Claimant in his letter dated July 2014 indicated that he was pursuing the claims with the Insurance firm.
31. Lastly, the Claimant caused the withdrawal of the criminal case against one of the accused persons, without the authority of the Respondent. As a result, the Claimant suffered damages amounting to Kshs 209,493.

Issues for Determination

32. I have carefully considered the parties' pleadings, oral and documentary evidence, and submissions as well as the authorities cited, and distil the following issues for determination: -
 - a. Whether the deductions made from the Claimant's terminal dues were fair and lawful.
 - b. Whether the Respondent's Counterclaim is merited.

Whether the deductions made from the Claimant's terminal dues were fair and lawful.

33. It is not in dispute that the Claimant was an employee of the Respondent in the position of Sales Manager and that he resigned from employment on 20th April 2016. The bone of contention between the parties is the Claimant's terminal benefits. The Respondent contended that the dues were duly computed and applied to offset the Claimant's liabilities owed to it. The Claimant on the other hand asserted that the Respondent's action of dealing with his terminal dues as it did, was unjustified and unlawful. The Respondent should be compelled to pay the same.
34. Before I delve further into this issue, I am impelled to note and state that both Counsel for the Claimant and the Respondent in their submissions went into great depths placing forth facts that were neither brought out nor elaborated in the parties' respective evidence. Maybe they need to take heed that submissions are never a substitute for evidence.
35. From the material placed before me by the Respondent for instance the Respondent's Appendix 5- Full and Final dues, Opiyo Moses Ogeto, I get it admitting that the Claimant was entitled to the following:
 - a. Salary for the days worked in April 2016... Kshs 140, 870.00
 - b. House allowanceKshs 21,131.00.
 - c. Security deposit.....Kshs 160,000.00
 - d. Salary deduction for April 2016.....Kshs 122,178.00.

These are the amounts that it again admits it withheld and utilised to offset the liabilities owed to it by the Claimant. Hence paying him nothing, at separation.

36. Undeniably, the deductions above set out were largely on the Claimant's salary. Part IV of the [Employment Act](#) is designed to protect an employee's wages/salary. It restrains the employer's authority



from dealing with an employee's wages and salary as it desires, by providing instances when the employer can lawfully make deductions on the wages/salary, the extent of the deductions, and place of payment inter alia. Section 19 specifically deals with the deduction of wages, in the scheme of the protection. It states:

“Deduction of wages

- (1) Notwithstanding section 17(1), an employer may deduct from the wages of his employee—
 - (a) any amount due from the employee as a contribution to any provident fund or superannuation scheme or any other scheme approved by the Commissioner for Labour to which the employee has agreed to contribute;
 - (b) a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the wilful default of the employee;
 - (c) an amount not exceeding one day's wages in respect of each working day for the whole of which the employee, without leave or other lawful cause, absents himself from the premises of the employer or other place proper and appointed for the performance of his work;
 - (d) an amount equal to the amount of any shortage of money arising through the negligence or dishonesty of the employee whose contract of service provides specifically for his being entrusted with the receipt, custody and payment of money;
 - (e) any amount paid to the employee in error as wages in excess of the amount of wages due to him;
 - (f) any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award;
 - (g) any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages;
 - (h) an amount due and payable by the employee under and in accordance with the terms of an agreement in writing, by way of repayment or part repayment of a loan of money made to him by the employer, not exceeding fifty per cent of the wages payable to that employee after the deduction of all such other amounts as may be due from him under this section; and
 - (i) such other amounts as the Cabinet Secretary may prescribe.
- (2) No employer shall make a deduction from the wages payable to an employee as an advance of wages in consideration of, or as a reward for, the provision of employment for that employee, or for retaining the employee in employment.



- (3) Without prejudice to any right of recovery of any debt due, and notwithstanding the provisions of any other written law, the total amount of all deductions which under the provisions of subsection (1), may be made by an employer from the wages of his employee at any one time shall not exceed two thirds of such wages or such additional or other amount as may be prescribed by the Cabinet Secretary either generally or in relation to a specified employer or employee or class of employers or employees or any trade or industry.
- (4) An employer who deducts an amount from an employee's remuneration in accordance with subsection (1)(a), (f), (g) and (h) shall pay the amount so deducted in accordance with the time period and other requirements specified in the law, agreement court order or arbitration as the case may be.
- (5) An employer who fails to comply with the provisions of subsection (4) commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.
- (6) Where proceedings are brought under subsection (5) in respect of failure by the employer to remit deductions from an employee remuneration, the court may, in addition to fining the employer order the employer to refund to the employee the amount deducted from the employee's wages, and pay the intended beneficiary on behalf of the employee with the employer's own funds.”

37. Therefore, to justify the deductions as lawfully made, the Respondent needed to demonstrate that the deductions didn't affront the provisions of the section aforementioned. In my view, relevant to this case is Section 19(1)(b) and (d) which authorize the deduction of a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the willful default of the employee; and an amount equal to the amount of any shortage of money arising through the negligence or dishonesty of the employee whose contract of service provides specifically for his being entrusted with the receipt, custody and payment of money.
38. The Respondent did not gear its evidence towards establishing that the Claimant was culpable of the two or any of the incidents contemplated in the sub-sections above. Instead, it heavily expended its effort on, what it called the responsibility clause under the Claimant's employment contract to fix liability on the Claimant and justify the deductions.
39. Having failed to demonstrate that the deductions flowed from what is contemplated under that part of the law, hereinabove mentioned that accords protection to employee's wages/salary, this Court cannot be off the mark to hold as it hereby does, that the deductions were unlawful. It is imperative to state that this Court hasn't lost sight of the fact that the cumulative deductions made on the Claimant's salary by the Respondent, surpassed the ceiling imposed under Section 19[3] of the Act.
40. In my view, if indeed the Respondent believed that the Claimant was liable to compensate it for the “losses”, in the circumstances of this matter, recourse in civil proceedings for remedy could have been the only proper and lawful option.



41. Having found as I have herein above, and assuming I am wrong in the finding, and for completeness of the record, I now turn to consider whether under the contract of employment, as the Respondent insisted, the Claimant was liable to offset the amounts, the basis for the deduction on his terminal dues.
42. The Respondent contended that under his contract, the Claimant was enjoined to shoulder responsibility for the losses for losses and damages incurred in his area of supervision. The contract also provided that the Claimant would shield the Company from liability for such losses. In discounting this position taken by the Respondent, the Claimant asserted, first, he didn't execute any contract of employment with a clause that placed such responsibility on him, further, he was not furnished with a copy of the contract. second, it cannot be sensible for him to bear liability on acts of commission or omission that weren't his but of other employees of the Respondent.
43. I have carefully considered the employment contract tendered in evidence [appendix 1], and note that it does not bear the name of the person accepting the offer. The Claimant alleged that page 1 of the contract has been doctored by the Respondent to unjustifiably fix liability on him, without his consent inserting the responsibility/ liability clause. His assertion, that he was not given a copy of the contract was not challenged at all by the Respondent. Section 9 of the *Employment Act* required the Respondent to issue the contract. Having failed to issue the contract, and as there was a dispute on a term of the contract, it was an onus on the Respondent under section 10[7] of the Act, to demonstrate that indeed, the term was agreed upon. The Respondent didn't. I am left with no option in the circumstance, other than agreeing with the Claimant's position.
44. The clause of the contract that the Respondent has heavily placed reliance on, reads;
- “..... make sure that all company money and crates are under your supervision are returned to the factory on a daily basis as well ensuring that all company distributors are well managed daily.
- You will be responsible for money and crates that might be lost by the distributors in your territory as well as ensuring that the company does not take any liability in terms of damages and loss of company properties under your supervision...”
45. In my view, I do not consider the clause as imposing personal liability on the Claimant to compensate the Respondent for losses occasioned by other employees of the Respondent, including theft by the other employees, where the Claimant was not at all involved for example either as a conspirator or through condonation, or as a result of negligence or deliberate action or omission. In my view, a read of all his main duties as enumerated in the letter of appointment without reading them in isolation from each other will give the sense that the two quoted duties do not speak to personal liability to compensate, but to ensuring the presence of mechanisms to avoid and impede losses, and where they occur, pursuing efforts and mechanisms.
46. This position by the Court is exemplified by the Respondent's letter dated 5th February 2015, by the Accounts Manager addressed to the Claimant. The letter read in part;
- “ Kindly find attached your statement of account as at 31 .01.2016 showing Kshs 233, 471.07 unpaid.
- Kindly confirm back in writing accepting the unpaid balances and kindly make necessary arrangements to clear these unpaid balances by the end of the day.



If no explanation is given by yourself in writing, then that balance will be deemed yours and you will be fully responsible for payment.”

47. By reason of the foregoing premises, I find that there was no contractual basis or justification, the premise upon which the Respondent could deduct the Claimant’s terminal dues to offset losses that were suffered by the Respondent, as a result of acts of the Respondent’s employees, including through a loss of crates, and theft, and more particularly when it could not be shown as was in this matter that he was involved directly or indirectly in the acts.
48. The Respondent had the legal option of pursuing the employees who occasioned the losses for the remedy of compensation. The Claimant won’t as the doctrine of privity of contract could certainly militate against such action by him.
49. In its Counterclaim, the Respondent sought inter alia damages amounting to Kshs 209,493 allegedly arising from an unauthorized withdrawal of Criminal case No 1993 of 2014. This figure was specifically pleaded. In nature, therefore, the Claim under this head was a special damage claim. It needed to be specifically proved. I have carefully scanned the material presented before this Court, inclusive of the evidence by the Respondent’s witness, I see not how this figure was arrived at. No evidence was tendered at all to establish the damages. I reject the claim under this head.
50. Further, the Respondent sought the sum of Kshs 983, 653.00, as unpaid insurance claims. It was the Respondent’s position that its Insurer declined liability to compensate it in the stated sum, a cumulative amount of losses that it had suffered as a result of various incidences inclusive theft by employees who were working in the Claimant’s area of supervision. The liability was declined due to late notification. The Claimant strongly argued that it was the responsibility of the General Manager to notify the insurance company, and therefore, if there was any loss as a result of a default in timely notification, it could only be blamed on the General Manager.
51. I have carefully considered the evidence placed before this Court, and the submissions, by the Respondent and I am unable to conclude that it was not shown that notifying the insurance company of the attachment of risks was one of those contractual duties for the Claimant. His evidence that he was to bring to the attention of the General Manager that a loss[es] had occurred was not controverted.
52. As a result, I take a clear view that the Respondent has failed to prove its entitlement to compensation by the Claimant of the alleged unpaid insurance claims.
53. Lastly, the Respondent sought for the sum of Kshs 305,164, as outstanding Ledger Balance. I have carefully considered the Ledgers presented before this Court, and note that the amounts thereon relate to transactions, actions and activities that cannot be personally attributed to the Claimant. Having taken the position hereinabove as I have, that there was no contractual basis and or justification for making the Claimant shoulder liabilities that ought to be shouldered by the other employees, I reject the claim under this head.
54. As a result, the Claimant’s claim shall succeed to the extent brought out hereunder, while the Respondent’s counterclaim fails.
55. In the upshot, judgment is hereby entered for the Claimant as against the Respondent in the following terms: -
 - a. A declaration that the deductions made to the Claimant’s salary were unfair, wrongful, and unmerited in the circumstances of this matter.
 - b. The Claimant be paid;



- i. Salary for April 2016 Kshs 140,870/-
 - ii. House allowance Kshs 21,131/-
 - iii. Leave encashment Kshs 37,927/-
 - iv. Security deposit Kshs 160,000/-
 - v. Salary deductions Kshs 120, 000.
Total Kshs 479,928/-.
- c. Interest on (b) above at court rates from the date of this Judgment until payment in full.
 - d. Costs of the suit be borne by the Respondent.

READ, DELIVERED AND SIGNED THIS 29th DAY OF JULY, 2024.

OCHARO KEBIRA.

JUDGE

In the presence of:

Ms. Okondo for Ms. Guserwa for the Claimant

Mr. Bichanga for Mr. Nyabena for the Respondent

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

