



**Ngeteta v Kenya Seed Company Limited (Cause E037 of 2021)  
[2024] KEELRC 13601 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13601 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE E037 OF 2021  
DN NDERITU, J  
OCTOBER 17, 2024**

**BETWEEN**

**JACOB KIORIA NGETETA ..... CLAIMANT**

**AND**

**KENYA SEED COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

**I. Introduction**

1. In a memorandum of claim dated 27<sup>th</sup> May, 2021 filed through N. Ikua & Company Advocates the claimant prays for –
  - a. Payment in lieu of three months notice – Kshs. 381,900/=
  - b. Unpaid Leave allowance for the year 2019 – Kshs. 21,000/=
  - c. Unpaid salary for the month of December, 2019 – Kshs. 77,150/=
  - d. Refund for unexplained and wrongful deduction done on 14<sup>th</sup> February, 2017 – Kshs. 707,390/=
  - e. 1-year compensation for wrongful/unfair termination from employment – Kshs. 1,527,600/=
  - f. General damages for discrimination
  - g. Certificate of service
  - h. Costs of this suit.
2. Alongside the statement of claim were filed a verifying affidavit, a statement by the claimant, a list of documents, and a bundle of copies of the listed documents, all in support of the claim.



3. The respondent entered appearance through Mburu Maina & Company Advocates on 21<sup>st</sup> July, 2021 and filed a statement of response to the claim on 26<sup>th</sup> July, 2021. In the response to the claim the respondent prays that the claimant's cause be dismissed with costs for want of merits.
4. The claimant filed a reply to the response to the statement of claim on 17<sup>th</sup> November, 2021 reiterating the averments in the statement of claim and urging that judgment be entered against the respondent as prayed.
5. On 28<sup>th</sup> January, 2022 the claimant filed a further list of one document with a copy of one document attached. On the same date he filed a further written statement. A further claimant's list of documents was filed on 10<sup>th</sup> May, 2022 with copies of the listed documents attached.
6. On 30<sup>th</sup> March, 2022 the respondent filed a list of one witness, Stephen Marakwen, alongside his written statement and a list of documents with a bundle of copies of the listed documents. On 28<sup>th</sup> March, 2023 the respondent substituted the above witness with Wycliffe Muchanji and a witness statement by this new witness was filed.
7. The cause came up for hearing in open court on 26<sup>th</sup> October, 2022 when the claimant (CW1) testified and closed his case.
8. The defence was heard on 8<sup>th</sup> May, 2023 with Wycliffe Muchanji (RW1) testifying and the respondent's case was closed.
9. Counsel for both parties addressed the court by way of written submissions. Miss Kimure for the claimant filed her submissions on 30<sup>th</sup> May, 2023 while Mr Ojuo for the respondent filed on 20<sup>th</sup> June, 2023.

## **II. The Claimant's Case**

10. The claimant's case is expressed in the memorandum of claim, the oral and documentary evidence adduced through the claimant (CW1), and the written submissions by his counsel.
11. In the memorandum of claim the claimant avers that he was engaged by the respondent on 6<sup>th</sup> August, 2007 as a field sales assistant, subsequently rising through the ranks to ultimately become the Bungoma branch manager as at the time of his dismissal on 19<sup>th</sup> December, 2019.
12. It is pleaded that in the night of 14<sup>th</sup> March, 2019 the offices of the respondent's Bungoma branch, managed by the claimant, were broken into and a sum of Kshs1,690,719/= stolen therefrom. It is pleaded that the claimant was not involved, culpable, and or responsible for the said theft but nonetheless the respondent held him responsible and summarily dismissed him for alleged gross misconduct. It is further pleaded that no criminal charges were filed against the claimant in regard to the alleged loss or theft.
13. It is pleaded that the dismissal was unfair and unlawful for lack of both substantive and procedural fairness. It is further pleaded that the claimant was denied leave and salary for the month of December, 2019.
14. In his testimony in court the claimant adopted his statement filed in court on 28<sup>th</sup> January, 2022 as his evidence-in-chief. He stated that he was an employee of the respondent from 6<sup>th</sup> August, 2007 to 19<sup>th</sup> December, 2019 when he was summarily dismissed. As at the time of his dismissal he was the branch manager at Bungoma.



15. The claimant further adopted the averments in the memorandum of claim and stated that he was served with a show-cause letter following a theft at the branch office and that he responded to the same denying involvement in the theft of the sum of Kshs1,690,719/= that the respondent allegedly lost. He further stated that he recorded a statement with the police following the theft. He stated that he was accused of failing to switch-on the generator as he left the office on the material day hence facilitated the theft in the darkness of the night. However, he stated that there were security guards in the premises who were supposed to switch-on the generator and keep guard.
16. He stated that the money that was stolen had been collected late in the evening after the banks had closed and hence the same was to be banked on the day that followed.
17. He stated that after the theft and loss of the monies alluded to above, he was allegedly coerced by the respondent to accepting and undertaking to repay the same by way of surcharge through a set-off from his terminal dues. He stated that no employee was charged with criminal offence(s) in regard to the theft and loss of the monies stated above.
18. He further stated that he was not supplied with the investigation report concerning the incident and insisted that the dismissal was unfair and unlawful. He produced copies of all the listed documents as exhibits 1 to 25.
19. He said that it is only after he undertook to repay the monies lost that his pension was released from Minet Insurance Brokers. He stated that this demonstrated the coercion, pressure, and blackmail that the respondent applied in making him to pay the stolen funds.
20. In cross-examination, he admitted that he was interdicted on half-pay prior to his summary dismissal. He also admitted that he was served with a show-cause letter and invited for a disciplinary hearing which he duly attended. He further admitted that he was served with a letter of summary dismissal.
21. He denied any wrong-doing and insisted that he left security lights on and the generator switch-on meaning that if the power went-off the generator would automatically start. He stated that he left office at 6:30pm on the material date and did not know what time the theft took place.
22. The claimant admitted that in 2015 he was surcharged approximately Kshs500,000/= for driving a company vehicle out of jurisdiction and that he had not cleared the surcharged amount as at the time of his dismissal. He stated that during his clearance he signed that he was indebted to the respondent in the sum of Kshs1,300,642.59 part of which was for the amount lost during the theft. He conceded that he acknowledged the debt and signed to that effect.
23. The claimant admitted that he was arrested and booked at Bungoma Police Station in respect of the theft alongside the branch cashier. He stated that the cashier was subsequently exonerated but the respondent proceeded to summarily dismiss him.
24. On re-examination by his counsel the claimant insisted that he acknowledged the debt under duress as he was suffering financial embarrassment. Responding to a query by the court he stated that his children had been sent out of school, the wife was sick, and he was in rent arrears and as such he admitted to the debt so as to unlock his terminal dues and pension to meet those financial obligations. He insisted that he was not negligent in the manner that he handled the respondent's money that was lost.
25. It is on the basis of the foregoing evidence and circumstances that the claimant is seeking that judgment be entered in his favour as prayed in the statement of claim. The submissions by his counsel shall be considered in a succeeding part of this judgment.



### III. The Respondent's Case

26. The respondent's case is contained in the statement of response to the claim, the oral and documentary evidence adduced through RW1, alongside the submissions by its counsel.
27. In the response to the claim, the respondent admits to the facts on employment of the claimant, rising from the rank of a field sales assistant to that of a branch manager, Bungoma, as at the time of his dismissal.
28. It is pleaded that on the night of 14<sup>th</sup>/15<sup>th</sup> March, 2019 the respondent's branch office in Bungoma, wherein the claimant was the manager, was broken into and a sum of Kshs1,690,719/= in cash stolen. It is pleaded that upon investigation the respondent concluded that the claimant neglected duty for failing to switch-on the generator, being the last person to leave the office, hence rendering the premises an easy target for robbers in the darkness of the night. It is further pleaded that the claimant failed to deposit into the bank the above stated sum of money rendering the same vulnerable to theft, occasioning a huge loss to the respondent.
29. It is pleaded that after investigating the incident and upon giving the claimant a fair hearing, the claimant was found culpable of gross misconduct that enabled and or facilitated the theft occasioning the said loss to the respondent.
30. It is further pleaded that upon the claimant's dismissal vide a letter dated 19<sup>th</sup> December, 2019 he was paid his terminal dues and he undertook to pay the money that had been lost in the theft but he did not pay.
31. It is further pleaded that the claimant had a poor disciplinary record having been found culpable of misuse of company vehicle and surcharged in the sum of Kshs462,146/= on 3<sup>rd</sup> June, 2016. It is pleaded that as the manager the claimant lost stock for which he was surcharged with the final balance thereof of Kshs107,390/= recovered from his final dues paid in February, 2020.
32. It is pleaded that the claimant was fairly and lawfully dismissed for gross misconduct after being subjected to due process. It is pleaded that the claimant is not entitled to any of the reliefs sought and the court is urged to find as such.
33. In his testimony in court RW1, a senior human resources manager, relied on his filed written statement dated 24<sup>th</sup> March, 2023 as his evidence-in-chief and produced the respondent's filed documents as exhibits 1 to 13. He reiterated the contents of the response to the claim as stated above emphasizing that the claimant was fairly and unlawfully summarily dismissed for gross misconduct based on his neglect of duty.
34. He stated that the claimant had a long-standing poor disciplinary record as an employee as enumerated in the response to the claim and that the respondent had accommodated him for a long time before he was finally dismissed following the theft. He stated that the claimant was negligent in performance of his duties in that he failed to ensure that the money was banked at the earliest opportunity and secondly for failing to switch-on the generator as he left the office.
35. It is pleaded that the claimant was paid all his dues and that he left employment indebted to the respondent in the sum of Kshs1,300,642.59 which he undertook to settle but has not paid to this day.
36. In cross-examination, RW1 stated that the claimant was the last person to leave office on the material day yet he failed to switch-on the generator putting the respondent's property at the risk of attack by thieves and robbers as it happened on the material night. He conceded that there were security



guards on the premises on the material night, 14<sup>th</sup>/15<sup>th</sup> March, 2015. He stated that the claimant failed to ensure that money collected was banked on daily basis and hence exposed the company to loss of the funds. However, he admitted that no audit was carried out to establish that the money lost had overstayed in the office without banking.

37. He stated that the claimant had a poor disciplinary record and was on the last warning before the incident that led to his summary dismissal. He stated that the claimant had been found culpable of misuse and abuse of company vehicle and fuel and loss and or theft of stock prior to the misconduct that led to his summary dismissal.
38. He stated that the claimant was paid all his terminal dues which were applied to partly set-off what he owed to the respondent and that he undertook to pay the balance which he failed and or refused to settle. He stated that the claimant was paid his pension. He stated that the claimant was summarily dismissed for neglect of duty, not criminal conduct.
39. It is on the basis of the foregoing evidence and circumstances that the respondent prays that the claimant's cause be dismissed with costs.

#### **IV. Submissions By Counsel**

40. On the one hand, the claimant's counsel submitted on three issues – Whether the summary dismissal of the claimant by the respondent was lawful; Whether the surcharge made against the claimant was legally justified; And, Whether the claimant is entitled to the reliefs sought.
41. On the first issue, it is submitted that the procedure applied by the respondent in arriving at the decision to summarily dismiss the claimant violated Section 41 of the Employment Act (the Act). Further, it is submitted that the respondent did not comply with Sections 43 & 45 of the Act and counsel cited *Loice Otieno V Kenya Commercial Bank Ltd (2013) eKLR* in support of the argument that the entire disciplinary process lacked in substance and procedure.
42. It is submitted that the minutes of the disciplinary hearing were not availed for the court to scrutinize the authenticity and validity of the same. It is submitted that the respondent deliberately failed to supply the claimant with a copy thereof. Further, it is submitted that the respondent filed in court two show-cause letters dated 27<sup>th</sup> June, 2019 and 23<sup>rd</sup> July, 2019 which caused confusion as to which letter the claimant was supposed to respond to. However, the court has only noted one show-cause letter dated 27<sup>th</sup> June, 2019. The letter dated 23<sup>rd</sup> July, 2019 invited the claimant to a disciplinary hearing.
43. It is submitted that it was not proved that the claimant was the last to leave the premises on 13<sup>th</sup> May, 2019 when the theft occurred and or that he was responsible for switching-on the generator. Besides, it is submitted that the evidence confirms that there were security guards in the premises who were supposed to ensure that no robbery, theft, or other criminal activity took place. It is further submitted that no evidence was availed to illustrate or prove that the claimant was in any way or manner connected to the said theft. It is further submitted that no audit was carried out by the respondent to establish that indeed the allegedly stolen amount was stolen or that the cash had indeed overstayed its banking timeline.
44. Citing *Samuel Omache V Tuff Steel Limited (2021) eKLR* and *Silas Owiti Oluoch & Another V Fidelity Commercial Bank Limited (2017) eKLR* it is submitted that the respondent failed to establish and prove a lawful reason for terminating the claimant as demanded by Section 43 of the Act. It is further submitted that the respondent failed to establish gross misconduct as envisaged under Section 44 of the Act.



45. On the second issue, it is submitted that the claimant was neither responsible for the theft nor for any loss to the respondent arising therefrom. It is submitted that it was wrongful, unfair, and unlawful for the respondent to subject the claimant to surcharge for the lost funds without prove that he was responsible or even remotely involved in the theft and or the loss. The court is urged to believe the pleading and testimony by the claimant that he admitted to paying the money lost in the theft under coercion and duress.
46. For all the foregoing reasons the court is urged to find in favour of the claimant and award all the reliefs as prayed.
47. On the other hand, counsel for the respondent identified the following issues for determination – Whether the termination of the claimant’s contract of employment was unfair and unlawful (substantive justification); Whether the respondent upheld the procedural fairness in terminating the claimant’s contract of employment (procedural fairness); and, Whether the claimant is entitled to the reliefs as prayed.
48. On the first issue, it is submitted that the respondent observed and complied with the provisions of Sections 41, 43, 44, 45, & 47 of the Act in effecting the summary dismissal upon the claimant. Citing *Galgal Jarso Jillo V Agricultural Finance Corporation (2021) eKLR* it is submitted that based on the pleadings and the oral and documentary evidence adduced the respondent had reasonable grounds to genuinely believe that there existed grounds for taking disciplinary action against the claimant as it did.
49. On the two specific charges that the claimant faced during the disciplinary hearing it is submitted that the claimant was the branch manager and hence in-charge of the overall management and the day to day operations of the depot. Besides, it is submitted that the claimant was the last person to leave the office on the material date and that his failure to switch-on the generator amounted to gross misconduct.
50. On the second issue of failing to bank the sum of Kshs1,690,719/= that was stolen and or lost in the theft it is submitted that the claimant failed and or neglected performance of his express duties for failing to secure the money and or banking the same in time hence exposing the respondent to the theft and the loss occasioned.
51. In support of the position taken that the respondent had genuine grounds for proceeding against the claimant as it did, counsel cited *Janet Nyandiko V Kenya Commercial Bank (2017) eKLR*, *National Bank of Kenya V Anthony Njue John (2019)*, *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 Others (2019) eKLR*, *Thomas Sila Nzivo V Bamburi Cement Limited (2014) eKLR*, & *Winnie Mbete Mutua V Brackenhurst Kenya Limited (2021) eKLR*. The court is urged to uphold the respondent’s position that based on the evidence and the circumstances disclosed there were reasonable and genuine grounds upon which the respondent was justified to proceed against the respondent as it did.
52. On procedural fairness, it is submitted that the respondent complied with the law starting with Section 41 of the Act. In buttressing this point counsel cited *Janet Nyandiko V Kenya Commercial Bank (supra)*, *National Bank of Kenya V Anthony Njue John (supra)*, & *Jane Samba Mukala V Ol Tukai Lodge Limited (2010) eKLR*.
53. It is submitted that overall the claimant failed to prove his cause on a balance of probabilities and counsel cited *Titus Mumo Munini V Adix Plastics Limited (2021) eKLR* in that regard.
54. The submission on the reliefs shall be considered in a succeeding part of this judgment.
55. The court is urged to dismiss the cause with costs.



## V. Issues For Determination

56. Upon careful examination and consideration of the pleadings filed, the oral and documentary evidence tendered from both sides, and the submissions by counsel for both parties, the court identifies the following issues for determination -
- a. Whether the summary dismissal of the claimant was wrongful, unfair, and unlawful.
  - b. Whether the claimant is entitled to the reliefs sought.
  - c. Costs.

## VI. Employment

57. The facts on the employment of the claimant by the respondent and the terms and conditions thereof are not in dispute. The claimant was engaged by the respondent as a field sales assistant as per a letter of appointment dated 6<sup>th</sup> August, 2007 on the terms and conditions set out therein.
58. As at the time of his dismissal the claimant was the branch manager, Bungoma, on a monthly gross salary of Kshs127,300/=.

## VII. Dismissal

59. The claimant's case is that the dismissal lacked in both substance and procedure. The respondent's position is that the dismissal was fair and lawful in all the material aspects. The jurisprudence on what constitutes fair and lawful dismissal or termination is now somehow settled. There are two elements or ingredients to it – substantive and procedural fairness – or simply what is collectively known as due process. Substantive fairness has to do with the reason or foundation or basis for the disciplinary action taken while procedural fairness has to do with the propriety of the procedure adopted from the initiation of the process to its conclusion. Both ingredients are founded on the general principles of natural justice as ingrained and enshrined in various provisions of *the Constitution*, statutes, and precedents.
60. Articles 41, 47, & 50 of *the Constitution*, Section 4 of the Fair Administrative Actions Act, Sections 35, 41, 43, 44, 45, & 46 of the *Employment Act* (the Act) are some of the provisions that readily come to mind when considering substantive and procedural fairness. This court (ELRC) has pronounced itself on this issue in a multitude of decisions – see for example *Kenya Power & Lighting Company Limited V Aggrey Lukorito Wasike* (supra), *Mandeep Chauhan V Kenyatta National Hospital & 2 Others* (supra), and *Pamela Nelima Lutta V Mumias Sugar Co. Ltd* (supra). Counsel for both parties have also provided a multitude of decisions on the same issue.
61. It is the foregoing scale that the court has to apply in weighing and determining whether the respondent was justified in acting against the claimant as it did, culminating in his summary dismissal.
62. In terms of substance, the respondent took out disciplinary proceedings following an alleged robbery or theft and loss of Kshs1,690,719/= from the Bungoma branch office of the respondent on the night of 14<sup>th</sup>/15<sup>th</sup> March, 2019. It is alleged firstly that the claimant failed to ensure that the said money was banked on the 14<sup>th</sup> and secondly that he failed to switch-on the generator to avoid the office being engulfed in darkness in case the regular power supply went off.
63. The two issues above, which according to the respondent formed the substantive basis for the disciplinary action, are easy and simple to deal with based on the evidence on record. Firstly, the claimant's case is that the money that was stolen was collected after banking hours and hence had to be



retained in the office overnight for banking on the day that followed. That evidence and assertion by the claimant was not dislodged or rebutted by the respondent. No evidence came from the respondent to disapprove that the subject sum of money was received after the banking hours and as such could not be banked on the day of receipt. Further, no audit was carried out to confirm that the said money or part thereof had been withheld in the office beyond a single banking day. It is also not alleged that the claimant kept the money in an unsafe place of the office other than the designated place of safe-custody. It is also instructive that the claimant was not charged with any criminal offence(s) relating to the theft in which the money was lost.

64. Secondly, on the allegation of failing to turn-on the generator switch, it has neither been proved nor established that the claimant was the last person to leave office on the material date and or that it was his singular duty to switch-on the generator. The evidence on record is that there were security guards in the facility and there is no evidence of conspiracy between them and the claimant to commit a robbery or theft. Besides, there is no evidence that the regular supply of power was lost at any time during the material night as to attribute the burglary or theft due to the resultant darkness as to hold the claimant accountable for allegedly not turning the generator on.
65. On what basis then did the respondent found the disciplinary action against the claimant? In my considered view, as much as the test applicable under Section 43(2) of the Act is subjective, the same ought to be based on genuine believe of the existing facts. Genuine here implies that the believe ought to be authentic and established based on prima facie evidence founded on some fundamental or basic investigation.
66. For the foregoing reasons the court finds and holds that the respondent failed to demonstrate that it had reasons or prima facie evidence to believe that there existed grounds for taking disciplinary action against the claimant. Even if the respondent suspected that the claimant was culpable or liable for the robbery, burglary, or theft, it ought to have moved quickly to find and establish the extent and manner in which the claimant was to blame and liable. Further, once the matter was taken up by the police and the claimant was not charged the respondent ought to have reviewed its position.
67. For the above reasons and grounds, the court finds and holds that the respondent failed the substantive test and hence the entire process culminating in the summary dismissal was therefore wrongful, unfair, and unlawful.
68. Its almost pointless to dwell on the procedure once the court has found that the disciplinary process lacked substance. However, the court takes the view that the respondent reasonably well complied with the requirements on fair procedure. The court has followed the trail of the process from the show-cause letter, invitation to the hearing, the disciplinary hearing as per the minutes, and the letter of summary dismissal and to a large extent the same complies with the necessary and applicable thresholds.
69. One more point though. If the claimant was not involved in the robbery, burglary, or theft, how and why did he then accept and undertake to repay the money lost? The claimant explained that he was in dire need of money and that he signed the letter of undertaking to pay the lost monies to pacify and convince the respondent to releasing his other dues and more so to facilitate the processing and payment of his pension. He explained that his wife was sick, children had been sent out of school, he was in rent arrears, and his family faced starvation. In absence of other evidence, the court holds the view that although he was clearly not to blame for the loss or theft of the monies lost by the respondent, the claimant gave a plausible and reasonable explanation as to why he reluctantly signed the undertaking to refund the monies. Robbery, burglary, and theft are criminal offences that need be proved beyond reasonable doubts. So is the offence of failing to prevent commission of a felony or stealing by servant or employee. There is no evidence whatsoever that the claimant was involved in the



theft or loss of the money and or that he was so negligent in performance and or execution of his duties as to have contributed to the loss.

70. Even on a balance of probabilities, based on the evidence on record, the court cannot attribute the loss of the money to a commission or an omission on the part of the claimant.

### **VIII. Reliefs**

71. Having found and held that the dismissal of the claimant was wrongful, unfair, and unlawful, the court shall proceed to assess each of the reliefs sought.
72. Prayer (a) is for payment of three months' salary in lieu of notice in the sum of Kshs381,900/=. The initial contract between the parties dated 6th August, 2007 provided that either party could terminate the contract by issuing and serving the other party with a three months' notice. That term of the contract was carried forward and applied in all the subsequent contracts in the wording "all the other terms of appointment remain the same". It is on that basis that the claimant is seeking this relief. The respondent's position as expressed in the submission by its counsel is that the same was already paid as the same was applied in reduction of the debt allegedly owed to the respondent by the claimant as per the clearance form and final dues payment schedule produced as an exhibit by the respondent.
73. By implication, the relief is conceded by the respondent. In the circumstances, this relief is allowed. The issue of settlement of debt allegedly owed by the claimant to the respondent and the implication of the same on the award made shall be discussed below.
74. Prayer (b) is for unpaid leave allowance for 2019 at Kshs21,000/=. The respondent submitted that this relief was settled in the sum of Kshs100,300/= alongside (a) above and that the same was applied as part set-off for the debts due and payable to the respondent by the claimant. By implication, the claim is admitted though in a higher amount. The court awards the relief as claimed in the sum of Kshs21,000/=.
75. Prayer (c) is for unpaid salary for December, 2019 in the sum of Kshs77,150/=. The respondent's answer is that the same was paid and applied as a set-off to debts owed by the claimant to the respondent like the other items above. This claim is allowed as prayed but the issue of set-off shall be considered below for this item and the others above.
76. Prayer (d) is for refund of unexplained deduction of Kshs707,390/= made on 14<sup>th</sup> February, 2017. It is the respondent's position that the said deduction was made for the claimant's admitted misuse of a company vehicle allocated to him and for stock lost under his watch. It is submitted that the claimant is estopped from claiming otherwise and the court is urged to deny this item. Clearly and evidently, this claim is time barred under Section 90 of the Act and the same is hereby denied and dismissed.
77. Prayer (e) is for compensation for the wrongful and unlawful dismissal equivalent to 12 months' gross salary in the sum of Kshs1,527,390/=. The respondent's counsel submitted that this is a discretionary remedy under Section 49(1)(c) of the Act and that the court ought to be very careful not to reward gross misconduct on the part of the claimant. The court is urged not to make any award as the dismissal, according to the respondent, was fair and lawful. Without prejudice to the foregoing, the court is urged by the respondent, in case it decides to make any award, to consider the holding in *Ol Pajeta Ranching Limited V David Wanjau Muhoro (2017) eKLR* to the effect that for a court to award the maximum compensation the judge shall consider all factors provided for in the law cited above with appropriate support from the evidence and circumstances of the cause. The court is urged to stay away from whimsical and capricious abuse of the discretion granted as above.



78. The court has considered the evidence on record and the submissions by counsel for both parties. It is not in doubt that the claimant by his prior misconduct had tested the patience of his employer, the respondent, to the limit. Two of the most outstanding instances of misconduct involved the claimant's misuse and abuse of a company vehicle allocated to him for official duties and loss or theft of stock of trade under his watch. For the two misconducts the claimant was surcharged. That is not the record of a committed and serious employee. It is that misconduct that prompted the respondent to desire not to keep the claimant in its workforce any longer and the robbery on 13<sup>th</sup> May, 2019 provided the respondent the opportunity, albeit wrongfully and unlawfully, to get rid of the claimant and terminate him. In that regard, it cannot be said that the claimant did not actively contribute to his ultimate dismissal, notwithstanding that the court has held that the dismissal was wrongful and unlawful. In fact, the evidence on record is that the claimant had been issued with a "final warning" on 3<sup>rd</sup> June, 2016.
79. Bearing in mind all the above, it is my considered view that compensation equivalent to six months' gross salary is fair and adequate in the entire circumstances of this cause. The same is calculated at Kshs127,300/ \* 6 = Kshs763,800/=.
80. Prayer (f) is for general damages for discrimination. In *Mumo Matemu V Trusted Society of Human Rights Alliance* (2014) eKLR a decision that followed the reasoning in *Anarita Karimi Njeru V Republic* (1979) KLR 154 it was held that an allegation of threat, breach, or violation of a constitutional right shall not only be specifically pleaded but also specifically proved. No particulars of the alleged discrimination were pleaded in the memorandum of claim and no evidence was tendered in support of the alleged discrimination. Whether viewed from the purview of Article 27 of *the Constitution* or Section 5 of the Act the court finds and holds that this prayer shall fail and the same is hereby denied and dismissed.
81. Prayer (g) is for a certificate of service. The respondent's submission is that the same has been availed to the claimant. However, a copy of the same was not availed in court. In the circumstances, the court orders and directs the respondent to issue and deliver a certificate of service to the claimant in accordance with Section 51 of the Act.

#### **IX. Set-off/counter-claim**

82. From the pleadings filed and the evidence on record, the respondent did not file a counter-claim against the claimant for the debt allegedly due and owing to it by the claimant as at the time of his dismissal. The court cannot litigate on matters that have not been placed before it for trial and determination. If the respondent wished to have the issue of the set-off or counter-claim heard and determined, nothing would have been easier than to plead on the issue and adduce evidence in support thereof for the court's consideration and determination.
83. The court has found and held that the claimant was not to blame, liable, or culpable for the robbery, burglary, or theft and the resulting loss of an alleged sum of Kshs1,690,719/=. Likewise, the court was not invited to determine how much the claimant owed the respondent in regard to the alleged misuse or abuse of the company vehicle and or the alleged loss in stock. If the respondent wished to have those issues heard and determined it was free to file a counter-claim or plead a set-off.
84. The matters placed before the court by the claimant and hence the subject of the cause are those pleaded and determined by the court in the above analysis on the issues for determination. The court has pronounced itself on the same and shall thus proceed to make appropriate orders on the same as hereunder. Subject to the law of limitation, the respondent is still free to file a claim for recovery of whatever it considers due and payable to it from the claimant.



## **X. Costs**

85. The claimant is awarded the costs of the cause and interest on the amounts awarded.

## **XI. Disposal**

86. In the disposal of the cause the court issues the following orders:

- a. A declaration be and is hereby issued that the summary dismissal of the claimant was wrongful, unfair, and unlawful.
  - b. The claimant is awarded a total of Kshs1,243,850/= made up as follows –
    - i. Three months' salary in lieu of notice ..... Kshs381,900/=
    - ii. Unpaid leave ..... Kshs21,000/=
    - iii. Salary arrears for December, 2019...Kshs77,150/=
    - iv. Compensation for wrongful and unlawful dismissal..... Kshs763,800/=Total ..... Kshs1,243,850/=
- This award is subject to statutory deductions.
- c. The respondent shall issue and deliver a certificate of service to the claimant within 30 days of the date hereof.
  - d. Costs of the cause to the claimant.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 17<sup>TH</sup> DAY OF OCTOBER, 2024.**

**DAVID NDERITU**

**JUDGE**

