



**Mwavali v Vipingo Beach Limited (Cause 112B of 2023)  
[2024] KEELRC 2736 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2736 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 112B OF 2023  
M MBARŪ, J  
NOVEMBER 7, 2024**

**BETWEEN**

**WYCLIFFE MWAVALI ..... CLAIMANT**

**AND**

**VIPINGO BEACH LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant's case is that he was employed by the respondent on 1 October 2016 as a manager at a salary of Ksh.160 per month. He worked well until 9 November 2019, when, at a management meeting, the respondent summarily dismissed him without due process.
2. The claim is that the termination of employment was without notice, and the claimant was not given a hearing. He was not paid terminal dues. He is claiming the following dues;
  1. 3 months' notice pay Ksh.480,480;
  2. Leave days for 2019 Ksh.129,360;
  3. Salary for November 2019: Ksh.55,360;
  4. 12 months compensation Ksh.1,921,920;
  5. Costs of the suit.
3. The claimant also admitted Kilifi CMCC No. 920 of 2019, and the respondent is claiming Ksh.1, 827,324 with costs against him.
4. The claimant testified in support of his case that upon employment by the respondent, he was not inducted into the job or given the details of the manager position. He was given an office, files, a computer CDS QuickBooks, bank statements, and chequebooks. He was also handed over the Land



- rent and rates files and charter party agreements between the respondent and third parties. He leant on the job.
5. On 7 November 2019, an issue arose regarding Mr Arief, a board member and the owner of the plots in which a structure was being erected, constructing a prayer room within Vipingo Beach Estate. It was agreed that the board would discuss the issue on 9 November 2019.
  6. On the same day, the claimant received a message on his WhatsApp group from Mr Steel, a board member, instructing him to hand over office keys to him by 8 November 2019 and stay away on 9 November 2019 during the scheduled board meeting. Another board member, Mr Rawal, opposed these instructions and insisted that the claimant was entitled to be the custodian of crucial company shareholders' documents at the meeting. Mr. Steel varied his instructions and allowed the claimant to be present at his office but away from the meeting. The board meeting proceeded with six members.
  7. The claimant testified that around noon, he was invited to the office. Mr Steel informed him that there was a cash balance swap between the current account and petty cash according to the internal audit draft management report he had prepared for September 2019 and the system-generated report. He asked to reconcile the accounts but was not allowed, and instead, Mr Steel dictated a statement for him to write in the presence of other directors, Christopher Angell, Yogendra Rawal, Ariefali Madhani, Jamil Chaudhri and Timothy Steel. The claimant signed the statement given to him. It was an admission that there was a cash shortage with an undertaking to pay the same. He asked that this be confirmed by his lawyers but was handed a letter of summary dismissal and directed to leave the premises.
  8. The claimant was then directed to disclose the passwords for his computer, online mobile banking, and personal and official emails and surrender the safe keys, which he had to collect from his house.
  9. The claimant testified that on 15 September 2020, he received notice from the respondent demanding payment of the amount he had admitted to a cash shortage. He was not paid his terminal dues and demanded the same, leading to these proceedings.
  10. Upon cross-examination, the claimant admitted that he agreed to refund the sum of Ksh.1, 715,769 upon confirmation by his advocates, and he noted this in the document. The admission was conditional, and his advocate was to reconcile the figures, but this was not proof of loss of funds. In his statement, his lawyers did not write to the respondent to confirm, and he never got an opportunity to write to the respondent about the matter until he received a demand notice to pay the same.
  11. From 9 November 2019 to September 2020, he did not change his admission statement, acknowledging that he was responsible for the missing funds.
  12. In response, the respondent admitted that the claimant was employed as a manager under a contract dated 1 October 2016. His employment was terminated by summary dismissal on the grounds of gross misconduct on his admission dated 9 November 2019 that he fraudulently falsified a petty cash account report submitted to the board in an attempt to conceal the amount of ksh.1,827,324.07 that was missing from the account. On his admissions, the summary dismissal was strictly observed in sections 41, 43, 44 and 45 of the *Employment Act* and under his employment contract. Termination of employment was fair and justified.
  13. The claims made are unjustified and notice pay is not due in a case of summary dismissal. The claimant was entitled to 21 leave days yearly, and the claim for leave pay in 2019 is highly misplaced. There was full payment for the 9 days worked in November 2019, and no compensation is due.



14. The respondent is based in Kilifi County, and the claimant should have been filed in the Malindi Employment and Labour Relations Court registry. There is a pending case between the parties in Kilifi CMCC No.920 of 2019.
15. In evidence, the respondent called Steel Timothy Graemea, a director who testified that the claimant's duties included financial and accounting responsibilities. He was the manager of the respondent's estate, including finances and accounts. He had the duty to receive cash payments, account for transactions, record them on Quickbooks to ensure accuracy and generate balance sheets when reporting to the directors.
16. Mr Steel testified that the claimant was invited to the board meeting on 9 November 2019 and taken through the chain of events on the accounts. The financial records were sent by the claimant to the board members on 7 November 2019 and printed from real-time accounting software, and he realized there were disparities in September 2019. The cash balance, as presented to the board by the claimant, was Ksh.257, 350 while the cash balance in the Real-time accounting system was Ksh.2, 027,138.07 with an unexplainable difference of Ksh.1, 769,788.07
17. The witness also testified that the Standard Chartered bank account balance in the report presented to the board by the claimant showed Ksh.3, 975,762.49 while the balance according to the Real-time accounting system was Ksh.2, 205,974.42 with an unexplainable difference of Ksh.1, 769,788.07
18. The amounts presented by the claimant of Ksh.257, 350 upon inspection of the safe were unavailable.
19. The claimant was invited to respond to these issues and asked for more time to reconcile the books. However, he failed to explain the differences between the real-time system and the report he had presented to the board, which was a deliberate attempt to conceal the respondent's correct financial position and cover up the mismanagement of funds.
20. Mr. Steel testified that upon probing, the claimant admitted to misleading the board on the actual balance in the cash account. Ksh.1, 827,324.07 was missing from the account, and he made his handwritten statement on the debt. He made an undertaking to pay the respondent the same. The statement was made voluntarily on 9 November 2019. He also asked for time to get advice from his lawyers but refused to pay, and the respondent filed proceedings before Kilifi Magistrates Court for the due amounts.
21. At the close of the hearing, both parties filed written submissions.
22. The claimant submitted that under Section 44(2) of the *Employment Act*, no employer can terminate employment without notice. In this case, he was not issued with a notice of any misconduct to be able to respond and defend himself. On 9 November 2019, he was called to a meeting and directed to respond to various financial issues without prior notice. There is no record of the financial loss. The notice of summary dismissal that followed lacked due process as held in the case of Kenya Petroleum Oil Workers Union v Kenya Petroleum Refineries Ltd [2013] eKLR and the case of Donald Odeke v Fidelity Security Limited [2012] eKLR that it does not matter what offence the employee is accused of having committed. If the employee is not given a hearing, termination of employment is unfair.
23. The claimant submitted that he is entitled to the claims made with costs.
24. The respondent submitted that summary dismissal on 9 November 2019 was justified following the claimant's admission that he had misappropriated funds, the respondent's property. Section 44 of the *Employment Act* allows the employer to dismiss the employee from his employment where there is criminal conduct and loss of his property. In the case of *Diamond Industries Limited v Mwale Appeal*



E028 of 2022, the court held that theft is a criminal act, and when it happens, the employer is allowed to dismiss the employee for gross misconduct.

25. The respondent has since filed Kilifi CMCC No.E048 of 2021, claiming Ksh.1, 827,324.07 against the claimant. Judgment was delivered on 11 September 2023 with the award of the admitted amount. In the case of David Otieno Ogada v Bidco Africa Limited [2020] eKLR, the court held that where the employee admitted to committing an offence, the disciplinary hearing he expected to have little value. In this case, the reasons leading to summary dismissal are fair and justified, and the claim should be dismissed with costs.

### **Determination**

26. The respondent raised the issue of jurisdiction but in a subtle way. The cause of action arose in Kilifi County, and the claim should have been filed at Malindi, Employment and Labour Relations Court registry, not Mombasa. This issue was not pursued before the hearing.
27. However, I note that the matter was initially filed before the lower court, and on 13 April 2023, the court declined jurisdiction and transferred the file to this court.
28. The ELRC has a sub-registry at Malindi. There are circuit sessions, with the central station being Mombasa. The court enjoys jurisdiction within the country, and the place of filing suit should not apply to negate a suit filed at the central station in Mombasa instead of the Malindi ELRC registry.
29. On the substantive issue, both parties agreed that on 9 November 2019, the respondent terminated the claimant's employment by summary dismissal. He was invited to a board meeting and was put to task over the financial reports he had shared with the board members on 7 November 2019, which were found to have disparities. Whereas the claimant used Excel sheets to present the financial reports, he had access to a real-time accounting system that would give real-time financial records.
30. The minutes of 9 November demonstrate that this issue of the financial records formed a big agenda item. The claimant could not account for a variance of Ksh.1, 769,788.07, and the cash in the safe was checked and was not available, as indicated to be Ksh.257, 350 in the Excel sheets presented.
31. In his handwritten statement of 9 November 2019, the claimant noted that;

... during the board meeting on 9/11/2019, the directors of Vipingo Beach called me to explain a variance in cash balance reported in the management accounts and figures extracted from the operation safe.

The difference reflected a swap between the current account and petty cash in reports. The variance had accumulated from 2015 to November 20...

I, Wycliffe Mwavali, hereby undertake to refund Vipingo Beach Ltd a sum of Ksh. One million seven hundred fifty thousand seven hundred sixty missing within two weeks of November, the date of this letter, in settlement of this matter referred to in my statement dated 9/11/2019.

This shall further be confirmed by the family lawyers by 11/11/2019.
32. The claimant did not pay, and his lawyer did not confirm it by 11 November 2019.
33. The claimant filed his claim on 1st April 2022.
34. The respondent sued the claimant in Kilifi CMCC No. E048 of 2021, claiming payment of Ksh. 1,827,324.07 with costs. The judgment was delivered on 11 September 2023.



35. From 9 November 2019 to 1 April 2022, the claimant did not rescind his admission of liability for owing the respondent Ksh.1, 750,760.

36. In the case of *Manga v Wildlife Works Sanctuary Limited* [2024] KEELRC 1402 (KLR), the court held that;

An admission of misconduct by an employee over a case of gross misconduct is purely at the hands of the employer to determine. Under Section 44 of the Act, an employee who engages in gross misconduct is subject to summary dismissal. In this regard, the respondent took the appellant through due process, a show cause notice was issued to allow for investigations, and eventually, she was invited to a disciplinary hearing. By her admission, the appellant accepted the allegations made against her.

37. Upon admission of the misconduct, the procedures under Sections 41 and 44 of the *Employment Act* are unnecessary.

38. In the case of *Mukenya v Texas Alarms (K) Limited* [2023] KEELRC 2482 (KLR), the court held that;

The appellant does not deny his conduct. The admission of misconduct and apology well placed with the employer to allow or give the appellant another chance became purely an operational matter, and in this case, summary dismissal for the misconduct was issued and cannot be faulted. Under the provisions of Section 44(4) of the *Employment Act*, 2007 (the Act), an employer is allowed to dismiss an employee subject to the issuance of notice and hearing, however short the notice is taking into account the matter of gross misconduct in terms of Section 41(2) of the Act. On his admission to gross misconduct, holding a disciplinary hearing became unnecessary. ...

39. In this case, the need for notice, hearing, or the claimant being invited to attend the disciplinary hearing with another employee of his choice was removed by his admission to pay the missing funds. His undertaking to make the refund was unequivocal and the confirmation by his family lawyer did not negate the admission of liability to pay. See *Banking, Insurance & Finance Union (Kenya) v Capital Sacco Society Limited* [2015] KEELRC 502 (KLR) and *David Mauki Kithaka v Tharaka Nithi Teachers Sacco Society Limited* [2015] KEELRC 1184 (KLR).

40. A competent court has since adjudged the owing amounts as due.

41. The claim that there was unfair termination of employment in the given circumstances does not arise.

42. On the claims made, notice pay for 3 months and 12 months compensation are not available in a case of summary dismissal that is justified.

43. On the November 2019 salary claim, the claimant worked for 9 days. In the summary dismissal letter, the respondent indicated that the claimant would be paid for the days worked in November 2019. From the appointment letter, the claimant was earning Ksh.160,000 per month. For 9 days, the sum due is Ksh.48 000 if this has not been paid in full and taking into account the misappropriated funds.

44. On the claim for leave days for 2019, the claimant was employed on 1st October 2017. Leave days accrue annually, and under Section 28 of the *Employment Act*, the law allocates 21 days. The claimant's leave anniversary is each 1st October. For October to November 9, 2019, under Section 28(2), the claimant earned only 2 days of annual leave. If not paid as indicated in the notice dated 9 November 2019, such is due for 2 days only, less than what the claimant owes the respondent.



45. On costs, the claim is without merit and is hereby dismissed, save where the salary due for 9 days worked in November 2019 and the two leave days if not paid shall be tabulated at the shop floor and paid less what the claimant owes the respondent under Section 17 of the *Employment Act*.

46. The claimant is to pay costs.

47. Orders accordingly.

**DELIVERED IN OPEN COURT AT MOMBASA ON THIS 7<sup>TH</sup> DAY OF NOVEMBER 2024.**

**M. MBARŪ**

**JUDGE**

