



Nyajwaya v Synergy Lubricant Solutions Limited & another (Petition 56 of 2018 & Employment and Labour Relations Cause 1574 of 2018 (Consolidated)) [2024] KEELRC 2724 (KLR) (7 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 2724 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 56 OF 2018 & EMPLOYMENT AND LABOUR
RELATIONS CAUSE 1574 OF 2018 (CONSOLIDATED)**

MA ONYANGO, J

NOVEMBER 7, 2024

**IN THE MATTER OF ARTICLES 19,20,21,23,25,27,28,29,35,36,40(1)
& (6),47 & 50(1),64(B) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
19,25,27,28,35,40(1),47, & 51(1) OF THE CONSTITUTION OF KENYA,2010**

AND

**IN THE MATTER OF SECTION 12 OF THE
EMPLOYMENT AND LABOUR RELATIONS COURT ACT**

BETWEEN

JOHN SIWO NYAJWAYA PETITIONER

AND

SYNERGY LUBRICANT SOLUTIONS LIMITED 1ST RESPONDENT

DILASH BHAYANI 2ND RESPONDENT

JUDGMENT

1. This judgment is in respect of two suits. The first is petition No. 56 of 2018 while the second suit is Nairobi ELRC Cause No. 1574 of 2018. The two suits were consolidated. The Petitioner and the Claimant sued the Respondents alleging that the termination of their employment was unfair and that the Respondents breached their fundamental rights and freedoms during the termination process.



2. In the Petition dated 11th June 2018 and amended on 16th January 2019, the Petitioner alleged that the Respondents breached Articles 19, 20, 21, 27 and 42 of *the Constitution* during his dismissal from employment. The Petitioner seeks the following orders against the Respondents:
 - a. A declaration that the Respondents have breached, infringed and/or violated the rights and fundamental freedoms of the Petitioner enshrined in *the Constitution* of Kenya.
 - b. An Order for damages and/or compensation for violation of the Petitioner's constitutional rights and freedom based on disciplinary treatment
 - c. An order against the 1st Respondent for compensation for unlawful/unfair and/or wrongful termination and terminal dues as follows:
 - i. Salary for the month of March, 2017...Kshs. 120,000
 - ii. Pay in lieu of notice....Kshs. 120,000
 - iii. Leave for 2016 until March 2017....Kshs 126,000
 - iv. House allowance October 2011 to March 2017....Kshs 2,640,000
 - v. 12 months' salary for unfair/wrongful termination...Kshs 1,440,000
 - vi. Service pay.....Kshs. 450,000
 - Total.....Kshs. 4,896,000
3. The Petition is supported by the affidavit of John Siwo Nyajwaya, the Petitioner herein.
4. The Respondents opposed the Petition and filed their Answer to the Amended Petition together with a counterclaim on 12th February 2019.

The Petitioner's case

5. In the petition, the Petitioner avers that he was employed by the 1st Respondent vide a contract of employment dated 1st October 2011 as Accounts Officer and that he served the 1st Respondent until 20th March 2017 when the 2nd Respondent alleged that the Petitioner occasioned loss of unknown amount of money.
6. He contends that his employment was verbally terminated on 20th March 2017. That on 1st April 2017, he received an email from the 1st Respondent forwarding a letter dated 30th March 2017 purporting to be a termination letter.
7. The Petitioner has particularized the unfair and wrongful termination in his petition as follows:
 - a. The 1st Respondent through the 2nd Respondent verbally terminated the Petitioner's service on 20th March 2017
 - b. That the Petitioner was never issued with a show cause notice neither was he requested to respond to any allegations.
 - c. The Petitioner was not given any opportunity to be heard as required by law
 - d. The 2nd Respondent created a very hostile environment in the 1st Respondent thus limiting the Petitioner's rights and freedoms and barring him from lodging any complaint within the 1st Respondent.



- e. The 1st Respondent did not give reasons for the impugned termination but only allowed the 2nd Respondent to threaten and unilaterally terminate the services of the Petitioner.
8. According to the Petitioner, the 1st and 2nd Respondents contravened his rights under Article 27 of *the Constitution* by discriminating him and/or using words that belittled, undermined or degraded him because of his race, to wit:
- a. The 2nd Respondent called the Petitioner a dog because of his black race
 - b. The 2nd Respondent indicating to the Petitioner that he will be wretched forever because of his black race
 - c. By the 2nd Respondent expressing that due to the petitioner's economic disadvantage he was equivalent to a dog.
 - d. The 2nd Respondent by using his influence to manipulate the police to punish the Petitioner due to his disadvantaged economic background contrary to the provisions of *the Constitution* and relevant laws.
9. The Petitioner urged the court to award him compensation as provided for in section 49 of the *Employment Act* and also an award of damages premised on the discriminatory treatment he received from the Respondents.

The Respondents' case

10. In their answer to the Amended Petition, the Respondents denied that the Petitioner was verbally terminated. They maintained that the Petitioner's employment was terminated vide a termination letter dated 30th March 2017 after following due process of giving him reasons and affording him an opportunity to be heard.
11. It is the Respondents' case that the Petitioner while being an employee of the 1st Respondent colluded with his former colleague, Mr. Maurice Ochieng Peter (the Claimant), the sales supervisor, to steal, embezzle and misappropriate the 1st Respondent's stocks in their control, failed to account for monies received on behalf of the 1st Respondent and tried to cover up the theft by creating false invoices and debtors.
12. It is averred that the offence was reported to Gigiri police station for investigations and criminal charges were preferred against the Petitioner together with Mr. Maurice Ochieng Peter for the offence of theft by servant.
13. The Respondents particularized particulars of fraud and breach of contract of service as:
 - a. Failure on the part of the Petitioner and his colleague Mr. Maurice Ochieng Peter to account for or remit to the 1st Respondent huge outstanding payments from credit sales and missing stocks in the sum of Kshs. 10,428,791/- as per the audit report conducted by the 1st Respondent.
 - b. Creating false invoices, false Debtors list, stock sheets jointly with Mr. Maurice Ochieng Peter with the intention of covering up the theft of the 1st Respondent's goods and stocks worth Kshs. 10,428,791/-.
 - c. Releasing goods to his colleague Mr. Maurice Ochieng Peter without proper authority from the 1st Respondent.



- d. Defrauding, stealing, misappropriating and or embezzling the 1st Respondents stocks/goods and monies worth Kshs. 10,428,791/-.
14. The Respondents further averred that after establishing that the Petitioner and the Claimant had colluded in stealing and/or misappropriating the 1st Respondent's stocks and monies, they lodged a formal complaint on 13th April 2017 at Parklands Police Station under OB/52/13/04/2017 and the Petitioner and Claimant were investigated and thereafter charged with the offence of theft by servant in criminal case No. 726 of 2018.
15. According to the Respondents, the assertion by the Petitioner that the 2nd Respondent decided to influence the criminal justice system is misleading and devoid of any truth.
16. The Respondents alleged that the Petitioner scrappily cited irrelevant articles of *the Constitution* with the intent to hoodwink the court that his rights had been infringed without clearly demonstrating how the same had been infringed and whether any prejudice had been occasioned as a result of the purported infringement.
17. It is the Respondents' case that the 1st Respondent lawfully and legally terminated the employment of the Petitioner by following due legal process.
18. In the Counter-claim, the Respondents aver that the Board of the 1st Respondent received monthly management accounts as at 30th November 2016 from the accounts department at the 1st Respondent's head office and noticed that a lot of Debtors had huge outstanding payments from credit sales generated by the Claimant and the Petitioner up to 30th November, 2016.
19. It is further contended that in mid-December, 2016 the Respondents instructed the Claimant to collect payments for all the goods he had supplied as appearing on his Debtors' list as at 30th November, 2016 and not to receive or collect any more stocks from the depot. That the 1st Respondent also instructed the Petitioner not to release any more goods to the Claimant until he received further instructions.
20. According to the Respondents, they discovered that the Claimant had made no material collections against the Debtors he had listed in his Debtors' List. That following the discovery of the false Debtors, the 1st Respondent summoned him to explain what was happening and he verbally admitted that he had created false invoices/Debtors and had actually misappropriated some of the stock which had been released to him by the Petitioner who had not obtained proper authority from the 1st Respondent as required.
21. The 1st Respondent avers that following the discovery, it made the decision to give the Petitioner and the Claimant an opportunity to give written explanations and schedules of all the stock variances and false Debtors. That they held numerous meetings for the Claimant and Petitioner to explain how they had caused the 1st Respondent to make such huge losses due to the unauthorized release of goods and false Debtors. The Respondents averred that in one of those meetings, the Claimant disclosed that he had transferred monies collected from some of the Debtors and belonging to the 1st Respondent to the Petitioner through his personal account and/or MPESA. That the Claimant actually provided a list of MPESA payments sent to the Petitioner's account through his cell phone number and the Petitioner confirmed having received certain payments from the Claimant although he claimed that the same was a loan.



22. It is the Respondents' case that at this point it was clearly evident that both the Petitioner and the Claimant had colluded in stealing/misappropriating the 1st Respondent's stocks and monies and that it is then that they made the decision to terminate their employment after following the due process.
23. The Respondents in their Counterclaim prayed for the following:
 - a. Judgment against the Petitioner for the sum of Kshs. 1,270,072/- being the outstanding amount not accounted for by the Petitioner and forming part the false invoices and false debtors
 - b. Judgment against the Petitioner for the sum of Kshs. 4,337,180/- being the stock shortage unaccounted for by the Petitioner jointly and severally with his former colleague, Mr. Maurice Ochieng Peter as aforesaid;
 - c. Interest on (a) and (b) above at court rates from the due date until payment in full ;and
 - d. Costs the suit and counterclaim.
24. In a rejoinder, the Petitioner filed a further affidavit sworn on 22nd February 2019 in which he maintained that his services with the 1st Respondent were terminated verbally by the 2nd Respondent. He stated that he was never issued with any notice to show cause and that he was never invited to any disciplinary hearing.
25. On the allegations of misappropriation of funds, the Petitioner contended that during the course of his employment with the 1st Respondent, he never received any reports or complaints over the performance of his duties and that he got to learn of the said complaints from the proceedings herein.
26. The Petitioner also denied falsifying any invoice or debtors list and maintained that as an accounts officer, he could only generate invoices as per the approval of the 2nd Respondent and his co-director. The Petitioner states that the 1st Respondent's system was a digitally networked system where all his activities could be viewed by the directors.
27. According to the Petitioner, he was never called by the police to record a statement and neither has he been charged before any court of law.
28. The Petitioner urged the court to award him the reliefs he is seeking in his petition and dismiss the Respondents Counterclaim.
29. The suits were heard on 19th January 2021 when the Petitioner testified. The Claimant testified on 2nd November 2021. The 2nd Respondent testified as RW1, Momammed Baraka testified as RW2 and RW3 was Pamela Caren Ochieng, the 1st Respondent's office administrator. Mr. Vincent Kombo, the 1st Respondent's Accountant testified as RW4.
30. Parties also filed their respective submissions which are on record. The Petitioner and the Claimant filed two sets of submissions dated 12th September 2022 and 24th October 2022. The submissions of the Respondents are dated 14th October 2022.

The Petitioner and the Claimant's submissions

31. In their submissions, the Petitioner and the Claimant identified the issues for determination to be:
 - a. Whether the termination of the Petitioner and the Claimant was unfair and/or wrongful
 - b. Whether the Petitioner's constitutional rights were violated;



- c. Whether there was fraud and breach of contract on the part of the Petitioner and the Claimant;
 - d. Whether the Court should grant reliefs sought by the Petitioner and the Claimant or the Respondent in the Counterclaim;
 - e. Which party should bear the Costs.
32. On the first issue, the Petitioner and the Claimant submitted that on 20th March, 2017 the 2nd Respondent chased them away from the company while insisting that they should not go back until they paid to him an undisclosed amount of money. According to the Petitioner and the Claimant, no notice to show cause was ever issued, no disciplinary hearing was ever conducted and no reasons were given for termination.
 33. On the second issue, the Petitioner and the Claimant submitted that the 2nd Respondent discriminated against them on the basis of their black race and even called them dogs. According to the Petitioner and the Claimant, the 2nd Respondent did not deny the allegations of discrimination. That since those allegations were not challenged, the Petitioner and Claimant had succeeded in proving them.
 34. On the Respondents' counterclaim, the Petitioner and the Claimant maintained that they were never made aware of the losses before their dismissal and no hearing was accorded to them to enable them give their side of the story. The Petitioner and Claimant further submitted that although the Respondents claimed losses of Kshs. 5,607,252.80 against the Petitioner and Kshs 9,158,780 against the Claimant, the Respondents in their further supplementary affidavit alleged complaints of Kshs 4,309,370 while the external audit reported a shortfall of Kshs 10,428,791 and the Police abstract alleged loss of Kshs 9,989,153.52.
 35. The Petitioner and the Claimant submitted that when the Respondents' witnesses were asked about the basis of these figures, they had no idea how they were arrived at and had no idea whether the loss was in terms of stock or cash.
 36. On whether fraud had been proved, the Petitioner and the Claimant submitted that the Respondents had not proved fraud/misappropriation of funds against them since all the Respondents' witnesses could not point out the wrongs perpetrated by the Petitioner and Claimant or extent of liability.
 37. The Petitioner and the Claimant therefore prayed that the court grants the prayers sought in the Petition and Claim as well as an award for breach of Article 27 of *the Constitution*, payment of salary of March 2017, pay in lieu of notice, leave dues, house allowance and compensation for unfair or wrongful termination.

Respondents' submissions

38. In their submissions, the Respondents identified the following issues for determination:
 - a. Whether the 1st Respondent unfairly and/or wrongfully terminated the Petitioner (John Siwo Nyajwaya) and Claimant (Maurice Ochieng Peter);
 - b. Whether the constitutional rights of the Petitioner and Claimant were infringed/violated by the Respondents;
 - c. Whether there was fraud and breach of contract of service on the part of the Petitioner and Claimant;
 - d. Whether the Petitioner and Claimant are entitled to the reliefs/prayers sought in the amended Petition and Claim respectively;



- e. Whether the Respondents are entitled to the reliefs/prayers sought in the Counterclaim; and
- f. Who should bear the costs of the amended Petition, Statement of Claim and the Counterclaim.
39. It is the Respondents' submission that the termination of employment of both the Petitioner and the Claimant were fair within the meaning of section 45 of the *Employment Act*, No. 11 of 2007, Laws of Kenya. It is also the Respondents' submission that the instant case is distinguishable from the authorities cited by the Petitioner and the Claimant in their submissions.
40. The Respondents submitted that RW1 led evidence that the Petitioner was employed by the 1st Respondent as an Accounts Officer on 1st October, 2011 while CW1 was employed as a Sales Supervisor on 7th April, 2014. The Respondents submitted that the Petitioner and the Claimant maliciously and improperly joined the 2nd Respondent as a party to these proceedings. The Respondents aver that the Amended Petition and the Claimant's Statement of Claim disclose no reasonable cause of action whatsoever against the 2nd Respondent. According to the Respondents, the 2nd Respondent is merely an Agent of the 1st Respondent and any employment and or labour claim against the 1st Respondent arising from an employer-employee relationship cannot extend to the 2nd Respondent.
41. The Respondents further submitted that at the trial, RW1 and RW2 led evidence that on or around 15th December, 2016, RW1 received a monthly management accounts as at 30th November, 2016 from the accounts department at the head office. From the management accounts RW1 noticed that a lot of debtors had huge outstanding payments from credit sales generated by the Petitioner and the Claimant up to 30th November 2016.
42. It was submitted that RW1 and RW2, led evidence that following the discovery of the false debtors, the Board of the 1st Respondent summoned the Petitioner and the Claimant to explain what was happening. CW1 verbally admitted creating false invoices/debtors. He further admitted that he had actually misappropriated some stocks which had been released to him by the Petitioner without proper authority from the 1st Respondent. The Claimant also hinted that the Petitioner had released the goods to him without authority. That the Claimant had actually advised the Respondents to reconfirm or check the physical stocks at the depot/warehouse.
43. It is further submitted that from the evidence of RW1 and RW2, the 1st Respondent followed due process in terminating the Petitioner and the Claimant's employment including giving them an opportunity to be heard. According to the Respondents, the Petitioner and the Claimant were summoned by the Respondent on 20th March 2017 to appear before the board of the 1st Respondent to answer to the issue of misappropriated stocks. That they attended the disciplinary hearing but remained silent and non-committal on making good the shortfalls attributed to them despite having previously admitted the same.
44. The Respondent submitted that the 1st Respondent complied with all the substantive and procedural aspects of termination of employment as required by sections 43 and 41 of the *Employment Act*.
45. On whether the constitutional rights of the Petitioner and the Claimant were violated by the Respondents, it was submitted that neither the Petitioner nor the Claimant led evidence to substantiate the allegations of discrimination. According to the Respondents, the Petitioner and the Claimant did not lead evidence to demonstrate that they informed, notified or communicated to the 1st Respondent complaining of any form of racial discrimination, malice, frustrations or hostile working environment purportedly perpetrated by the 2nd Respondent.



46. With regard to the third issue, the Respondents submitted that at trial, RW1 and RW2 led evidence that the Petitioner and the Claimant jointly and severally perpetrated fraud and breached their respective contracts of service. It is submitted that the audit report, Respondents' exhibit 5, shows that the Petitioner and the Claimant were not complying with the instructions given to them with regard to their respective duties and functions as per their terms of service with the 1st Respondent.
47. Lastly, on the issue whether the Petitioner and the Claimant are entitled to the reliefs they are seeking, it was the Respondents submission that their employment was not unlawfully terminated as alleged and as such they are not entitled to the reliefs they were seeking. The court was urged to find that the constitutional rights of the Petitioner and the Claimant were neither infringed or violated as alleged.
48. On whether the Respondents are entitled to the reliefs sought in the counterclaim, the Respondents submitted that RW4 led evidence that the Audit report dated 24th August 2017 established that there were a lot of variances and discrepancies attributed to the Petitioner and the Claimant who were in charge of cash sale and stock management. According to the Respondents, the gross value of stock shortage revealed that the amount unaccounted for was Kshs. 4,337,180 inclusive of VAT management valuation, that the long outstanding debtors not settled directly attributed to the Claimant amounted to the sum of Kshs 4,821,539 and Kshs, 1,270,072 for the Petitioner totaling to Kshs 10,428,791 as the total shortfall.
49. The Respondents submitted that they are entitled to the reliefs sought in the Counterclaim given that they had proved their counterclaim against the Petitioner and the Claimant to the required standard.
50. The court was thus urged to dismiss the Petitioner's amended Petition and the Claimant's Statement of Claim with costs.

Determination

51. From the pleadings on record, the oral testimony of the parties in court and the submissions filed by the parties, the following issues arise for the court's determination:
 - a. Whether the Petitioner was discriminated by the Respondents;
 - b. Whether the Petitioner's and the Claimant's contracts of employment with the Respondent were terminated for valid reason;
 - c. Whether the Respondent followed fair procedure in terminating the claimant.
 - d. Whether the Petitioner and the Claimant are entitled to the reliefs they are seeking;
 - e. Whether the Respondents are entitled to the prayers in the counterclaim;
 - f. Who bears the costs for the Petition, Claim and Counterclaim.

Whether the Petitioner was discriminated upon by the Respondent.

52. In his Amended Petition, the Petitioner avers that he was discriminated by the 2nd Respondent by making statements laced with racial insinuations.
53. Section 5 of the *Employment Act* prohibits discrimination on grounds of among others, race, colour, language, ethnic or social origin. Section 5(2) and (3) provide as follows:
 - (2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.



- (3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—
- (a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;
 - (b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.

54. The Petitioner and the Claimant in their testimony stated that the 2nd Respondent discriminated against them by calling them black dogs. Although Mr. Kennedy Ochieng’ filed his witness statement in court on 19th June 2019 averring that the 2nd Respondent used to discriminate the employees of the 1st Respondent on racial grounds, he did not tender evidence in court to support those allegations.
55. In the absence of any evidence that the 2nd Respondent made the racial statements, the allegations of discrimination against the Petitioner and Claimant remain just allegations.

Whether the contracts of the Petitioner and the Claimant were terminated for valid reason

56. Section 45(1) and (2) of the [Employment Act](#), 2007 provides that—

- “(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
 - (c) that the employment was terminated in accordance with fair procedure.”

57. The Respondents maintained that the Petitioner and the Claimant were summarily dismissed from employment after it was established that they had colluded in misappropriating the 1st Respondent’s stocks and monies and that they failed to account or explain loss of goods that were in their sole custody.
58. The Petitioner and the Claimant denied that they failed to account for the alleged loss. The Petitioner in his further affidavit filed in court on 25th February 2019 denied that he was ever questioned by the Respondents on the loss of stock and monies. He stated that he learned that there was a physical stock count that was conducted from the proceedings herein.
59. The 2nd Respondent in his evidence gave a detailed account of how the Petitioner and the Claimant allegedly misappropriated funds of the 1st Respondent. He stated that in mid-December 2016, he instructed the Claimant to collect payments for all the goods he had supplied appearing on his debtors lists as at 30th November 2016. That in January 2017, the Respondents discovered that the Petitioner



had not made material collections against the debtors he had provided. That a Mr. Mohamed Baraka, the 1st Respondent's director, followed up with the alleged debtors who denied owing any monies on account of any goods purportedly supplied by the 1st Respondent. It was the Respondents' case that following the discovery of the false debtors, the Board of the 1st Respondent summoned the Claimant who verbally admitted that he created false invoices and misappropriated some stock which had been released to him by the Petitioner without proper authority from the 1st Respondent. It was the Respondents' case that following the discovery, the 1st Respondent made the decision to give the Petitioner and the Claimant a chance to give written explanations and schedules of all the stock variances and false debtors. It was the Respondents' case that the Petitioner and the Claimant had indeed stolen/embezzled goods worth Kshs. 10,428,791 belonging to the 1st Respondent.

60. In support of their claims, the Respondents produced a copy of the Audited Report by the audit firm of M/s Devani –Devani & Company for the period between January 2015 to December 2016.
61. After analyzing the Respondents evidence in totality, I find that the 1st Respondent had every reason to believe that the Petitioner and the Claimant engaged in acts of gross misconduct as contemplated under section 44 of the Employment Act.
62. Section 44(4)(g) of the Employment Act provides that an employer can terminate the employment of an employee where the employer has reasonable and sufficient grounds to suspect that the employee has been involved in gross misconduct.
63. I therefore find that the 1st Respondent had valid reasons to terminate the employment of the Petitioner and the Claimant as there was sufficient evidence to point at gross misconduct on their part.
64. The next issue for determination is whether due process was followed by the Respondents before the termination of the employment of the Petitioner and the Claimant. Section 41 of the Employment Act provides:-

“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.”
65. During cross examination of RW2, he stated that he convened four to five meetings with the Petitioner and the Claimant which meetings sought to have them account for the lost stock and monies. The 2nd Respondent stated that the Petitioner and the Claimant were taken through a disciplinary hearing but they chose to remain silent during the disciplinary hearing. RW3 corroborated the evidence of RW1 and RW2 when she testified that she called the Petitioner and Claimant for meetings several times on instructions of RW2.
66. Section 41 of the Employment Act does not state that there must be letters summoning the employee for disciplinary meeting or that there must be written minutes of such meetings. All that is necessary is convincing evidence to that effect. I am satisfied that the Respondents proved compliance with section 41 of the Act.
67. It is therefore the court's view that the 1st Respondent had valid grounds for terminating the employment contracts of both the Petitioner and the Claimant and that it complied with fair procedure. I find that the termination of the Petitioner and the Claimant were fair both substantively and procedurally.



What reliefs should issue?

68. The Petitioner and the Claimant prayed for several reliefs which I now address under the separate heads.

The Petitioner

69. The Petitioner prayed for the following reliefs in his Amended Petition:

- a. A declaration that the Respondents have breached, infringed and/or violated the rights and fundamental freedoms of the Petitioner enshrined in *the Constitution* of Kenya.

This prayer cannot issue as the Petitioner did not prove that his rights and fundamental freedoms were violated. Indeed the claims by the Petitioner were ordinary claims that should have been made in a memorandum or statement of claim as all the averments therein could have been made within the provisions of the *Employment Act*.

- b. An Order for damages and/or compensation for violation of the Petitioner's constitutional rights and freedom based on discriminatory treatment

The Petitioner did not prove that he was discriminated against by the Respondents. This prayer is dismissed for want of proof.

- c. An order against the 1st Petitioner for compensation for unlawful/unfair and/or wrongful termination

The Petitioner's employment was fairly terminated. He is thus not entitled to compensation for unfair termination of his employment.

- i. Salary for the month of March 2017

The Respondents admitted that the Petitioner and Claimant were not paid salary for March, 2017. I award them the same in the sum of Kshs. 110,560 and 77,703 respectively.

- ii. Pay in lieu of notice

Having found the termination to be fair, the Petitioner and Claimant are not entitled to pay in lieu of notice.

- iii. Leave for 2016 until March 2017

The Petitioner claimed for unpaid leave from 2016 until March 2017. The Respondent on its part maintained that the Petitioner is not entitled to leave dues since he utilized his leave days during the course of his employment. The Respondents filed copies of the Petitioner's schedule of leave days from the year 2013 to 2017, the Petitioner's leave application forms and the Petitioner's leave encashment in their supplementary list of documents filed on 28th March 2019. It is clear that the Petitioner utilized all his leave days and the Petitioner is therefore not entitled to this prayer.

- iv. House allowance October 2011 to March 2017

The Petitioner's contract of employment stated that he was to be paid a gross salary and not a basic salary. He is therefore no entitled to house allowance. The prayer is dismissed.



- v. 12 months' salary for unfair/wrongful termination
Having found the termination fair, the Petitioner is not entitled to compensation for unfair termination.
- vi. On claim for service pay, the Respondent filed copies of the NSSF statement in respect of the Petitioner showing 1st Respondent remitted the NSSF deductions to the scheme. He is therefore not entitled to service pay.

The Claimant

70. In his statement of Claim dated 30th November 2018, the Claimant sought for the following reliefs:
- a. A declaration that the Claimant's termination by the Respondent was wrongful, unfair and in breach of the express provisions of the Employment Act, Article 25 and 50 of the Constitution. I have already held above that the termination was fair.
 - b. An order for payment of the Claimant's compensation itemized below
 - i. Salary for the month of March 2017 - Kshs 110,560
The Claimant's contract of employment provided that the Claimant's salary was Kshs 77,703. The Claimant is entitled to payment of salary for the month of March 2017 as the Respondents admitted that the same was not paid.
 - ii. Annual leave for 2014 until March 2017
The Respondent tendered evidence that the Claimant went on leave during the course of his employment. A copy of the Claimant's schedule of leave days for the year 2014 to 2017 and the leave application forms were filed in court in the Respondents supplementary list of documents on 28th March 2019. I decline to award the Claimant this prayer.
 - iii. Service pay
On claim for service pay, from the copies of the NSSF statement, there is evidence on record that the Claimant was a member of the NSSF. He is therefore not entitled to service pay
 - iv. House allowance October 2011 to March 2017.
The Claimant's employment contract provided for payment of gross salary. He is therefore not entitled to house allowance as his salary was inclusive of the same.
 - v. Damages for Discrimination
The Claimant did not prove that he was discriminated by the 2nd Respondent.
 - vi. Twelve(12) month's salary being compensation for unfair/ unlawful termination and/or wrongful dismissal pursuant to section 49 of the Employment Act
The termination of the Claimant's employment having been fair, he is not entitled to compensation for unfair termination of his employment. The prayer is dismissed.
71. Regarding the Respondents' counterclaim, RW1 in his testimony stated that the Petitioner and the Claimant colluded and misappropriated funds from stock belonging to the 1st Respondent and that this was evidenced by the Mpesa transactions between the two. It was RW1's evidence that the Petitioner and the Claimant blamed each other for the loss. RW1 averred that they engaged an audit



firm to do a forensic audit and it was established that the 1st Respondent had lost stock worth between Kshs. 9 and 10 Million.

72. RW1 stated that the Petitioner and the Claimant had made fictitious debtors list showing that they had supplied the debtors with stock when in real sense, no stock had been supplied to them. RW4, Vincent Mutiso in cross examination stated that he conducted the audit in August 2017 after the employment of the Petitioner and the Claimant had been terminated.
73. In the audit report produced as Respondents' exhibit 5, the total shortfall is stated to be Kshs. 10,428,791. From that report, among the recommendation made was that the company should redesign an appropriate internal control system for movement of inventory.
74. From the above analysis, it is clear that the 1st Respondent's business had loopholes that led to the loss of the funds. Even though there was evidence of collusion and fraud by the Petitioner and Claimant, there is no tangible proof that they were solely responsible for the lost stocks and funds or what amounts each of them was responsible for.
75. I therefore find that the Respondents Counterclaim has not been proved on a balance of probabilities.
76. In the end, the Petitioner and the Claimant are each awarded salary for March 2017 in the sum of Ksh.110,560 for the Petitioner and Ksh.77,703 for the Claimant with exemption of the salary for March, 2017 for both the Petitioner and Claimant. The Petition, the Claim and the Counter claim are all dismissed.
77. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 7TH DAY OF NOVEMBER, 2024

MAUREEN ONYANGO

JUDGE

