



**Njuguna & another v Ubuntu Life Foundation (Employment and Labour Relations Cause 44 & 43 of 2022 (Consolidated)) [2023] KEELRC 1366 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1366 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 44 & 43 OF 2022 (CONSOLIDATED)**

**HS WASILWA, J**

**JUNE 8, 2023**

**BETWEEN**

**PAUL GICHERU NJUGUNA ..... CLAIMANT**

**AND**

**UBUNTU LIFE FOUNDATION ..... RESPONDENT**

**AS CONSOLIDATED WITH**

**EMPLOYMENT AND LABOUR RELATIONS CAUSE 43 OF 2022**

**BETWEEN**

**FAITH WANJIRU KURIA ..... CLAIMANT**

**AND**

**UBUNTU LIFE FOUNDATION ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. This judgment is in respect of two suit; ELRC Cause number 43 of 2022 filed by Paul Gicheru Njuguna and ELRC Cause Number 44 of 2022 instituted by Faith Wanjiru Kuria both against the Respondent, Ubuntu Life Foundation. Both files were consolidated with ELRC cause number 44 of 2022 marked as the lead file.

**Cause No 44 of 2012**

2. In this claim, Faith Wanjiru Kuria, claimed to have been unfairly terminated and sought to be reinstated back to employment without loss of benefits. In her claim she prayed for the following Reliefs;



- a. A declaration that the claimant was unfairly, unlawfully and illegally terminate from employment by the Respondent.
  - b. Salary for the period of four months starting December, 2021 to March, 2022 at the rate of Kshs 213,972 adding up to Kshs 855,888.
  - c. 27 days earned leave amounting to Kshs 213,972.
  - d. Salary cut of 30% for the month of October and November, 2021 each of Kshs 64,191.60 amounting to Kshs 128,383.
  - e. Service pay for the 11 years worked calculated at yearly rate of Kshs 106,986 amounting to Kshs 1,176,846.
  - f. Compensation for wrongful dismissal at the rate of 12 months amounting to Kshs 2,567,664.
  - g. One-month salary in Lieu of Notice of Kshs 213, 972.
  - h. Remainder of monthly pay that would have been earned but for breach up to July, 2025 at the rate of Kshs 213, 972 for 52 months mounting to Kshs 11. 126,544.
  - i. Remainder of service charge that would have been earned but for breach at the rate of Kshs 106,986 per year amounting to Kshs 427,944.
  - j. Fines and incidental liabilities from the creditors and connected government entities.
  - k. Payment of outstanding pension contributions.
  - l. Certificate of service.
  - m. Cost of this suit and interest from the date of filing this suit.
3. The summary of this case is that the claimant was employed by the Respondent on contractual basis with effect from June 7, 2010 into the position of Human Resource Manager. She was tasked with; staff relations, legal compliance, performance management, HR Support to the business and Championing HR Projects. That she performed her work with zeal till her termination in December, 2021.
  4. It is her case that she was issued with various contract of employment which were renewed from time to time with the last contract running from July, 2020 till July, 2025 for a period of five. Her monthly salary from the date of employment till termination was Kshs 213,972.
  5. The claimant states that based on her contract which was to expire on July, 2025, she took a loan facility with a banking institution, which the Respondent guaranteed as employer. The Respondent was to deduct her salary and make direct payments to the bank. Further that she was registered with a pension scheme which the Respondent consented to and committed to making monthly contributions.
  6. She stated that the Respondent has failed to pay her salary from December, 2021 and has failed to remit any of the statutory deductions as per the employment contract.
  7. It is her case that the Respondent's directors have unlawfully used her position as the Human Resource manager to underquote their salaries in Kenya and make them seems like donations from the USA and in effect evade tax.
  8. The circumstances that led to her termination is that on December 6, 2021, while she was on duty she received an email from Jeremiah Thuo Kuria, one of the Respondent's Trustees, that the board of the Trust had resolved to suspend her from employment. She sought for copies of the resolution



and the minutes of the meeting but none was provided to her. Nonetheless, that she proceeded for her suspension.

9. While still serving her suspension notice, the claimant was informed via email on January 5, 2022, by the said Jeremiah Thuo Kuria, that her services were terminated. The reasons given for termination was on the basis that the Respondent could no longer sustain its operations, unsatisfactory performance and misappropriation of funds hence audit queries.
10. It is her case that no audit was carried out at the time of her termination to ascertain the allegation of misappropriation of funds. She added further that the Respondent has not carried out any assessment of her performance to alleged that she had underperformed as a Human Resource Manager. She therefore avers that her termination was unfair in the circumstances.
11. She reiterates that she worked diligently for the Respondent for more than 10 years without any complaint raised against her character or performance as such the allegations raised herein are without basis and urged the Court to allow the claim as prayed.

### **Response and Counterclaim.**

12. The Respondent entered appearance and filed an Amended Defence and counterclaim on the June 20, 2022 denying the entire claim and in particular stated that indeed the claimant was employed by the Respondent but her employment contract was on annual basis which expired at the end of each year.
13. It is stated that the claimant was suspended from duty on December 5, 2021 pending investigation that was to be carried out on misappropriation of funds by the claimant.
14. The Respondent denied guaranteeing the claimant a loan from any financial institution, in any case that the said loan was for a personal benefit and not the Respondent thus the Respondent could not guarantee such a facility. The Respondent also denied making any standing order for the payment of the claimant's Loan.
15. In the counterclaim, the Respondent stated that the claimant misappropriated funds as follows; unauthorised transfer of organizations funds though payment of excessive and fraudulent transfer of monthly staff salaries to GDC and K unit Sacco accounts in the amounts of Kshs 3,031,680, under declared gross salaries on itax portal of Kshs 345,786, under-declared PAYE taxes in the itax portal of Kshs 255,768, unauthorised transfer of funds through excessive remittance of funds to umbrella Sacco to a tune of Kshs 193,950 and unauthorised transfer of funds through excessive remittance of funds to Jubilee insurance to the tune of Kshs 145, 660.
16. The Respondent urged the Court to freeze the accounts of the claimant and compel her to reimburse the Respondent all the funds listed herein above. It sought for the following prayers in the counterclaim;
  - a. A perpetual order of her accounts to be frozen and or a mandatory order compelling the claimant to reimburse the misappropriated funds to the defendant as per the audit to a tune of Kshs 5,397,643.
  - b. General damages.
  - c. Costs of this suit.
  - d. Interest on a, b and c above.
  - e. Any other relief that this Honourable Court may deem fit to grant.



17. In response to the counterclaim, the Claimant denied the counterclaim in entirety and reiterated the contents of her claim and in addition stated that the Respondent is yet to provide the audit on allegation of misappropriation of funds that led to her termination.

**Cause Number 43 of 2022.**

18. Paul Gicheru Njuguna, filed his claim on the April 5, 2022, alleging to been wrongfully terminated from employment and seeking for compensation for the said termination. He prayed for the following reliefs; -
- a. Salary for a period of four months starting December, 2021 to March, 2022 at the rate of Kshs 310,400 adding up to Kshs 1,241,600.
  - b. 30 days earned leave amounting to Kshs 310,400.
  - c. Salary cut of 30% for the month of October and November, 2021 each of Kshs 93,120 amounting to Kshs 186,240.
  - d. Service pay for the 6 years worked calculated at yearly rate of Kshs 155,200 amounting to Kshs 931,200.
  - e. Compensation for wrongful dismissal at the rate of 12 months amounting to Kshs 3,724,800.
  - f. One-month salary in Lieu of Notice of Kshs 310, 400.
  - g. Remainder of monthly pay that would have been earned but for breach up to April, 2025 at the rate of Kshs 310,400 for 52 months mounting to Kshs 16, 140,800.
  - h. Remainder of service charge that would have been earned but for breach at the rate of Kshs 155,200 per year amounting to Kshs 620,800.
  - i. Fines and incidental liabilities from the creditors and connected government entities.
  - j. Payment of outstanding pension contributions.
  - k. Certificate of service.
  - l. A written Apology.
  - m. Cost of this suit and interest from the date of filing this suit.
19. The summary of this case is that the claimant was employed by the Respondent as the Head of Operations, who doubled up as the head of finance/Accounts commencing April 6, 2016 till his termination in December, 2021.
20. As per the contract, the claimant was tasked with managing the Respondent's Finances, overall production oversight, business planning and development, new project management and Budgeting control and business performance analysis and projections. He earned a monthly salary of Kshs 310,400.
21. It is the claimant's case that his last contract commenced in April, 2020 for a period of five years to lapse in April, 2025. By virtue of this renewal, he took a loan facility with a banking institution where the Respondent guaranteed as his employer. That the Respondent was to deduct the monthly deduction toward servicing of the loan, from his salary, and pay directly to the Bank.



22. It is his case that he was a registered member of a pension scheme which the Respondent consented to and committed to making monthly contributions which he has now failed to pay and even failed to pay his salary from December, 2021, or remit any of the statutory deductions as per the employment contract.
23. It is his case that the Respondent's directors have unlawfully used His position as the Head of operations and Chief Finance officer to unlawfully underquote their salaries in Kenya and making the same to be paid out as donations from the USA in an attempt to evade tax.
24. He stated that when he refused to comply with the directions of the Respondent, one of the trustees, Jeremiah Thuo Kuria, terminated his services via email and later forced him to write a resignation letter.
25. The claimant herein reiterates that he was unfairly termination without any cause or being subjected to any disciplinary hearing and urged the Court to find as such and allow the claim as prayed.

### **Response and Counterclaim.**

26. The Respondent entered appearance and filed an Amended response to claim and counterclaim on the June 20, 2022 denying the entire claim and putting the claimant to strict proof.
27. The Respondent admitted to employing the claimant but denied terminating his services as alleged and stated that the Claimant resigned from employment with effect from December 5, 2021 by tendering his resignation by Email.
28. The Respondent stated that the claimant, like all other employees, were employed on a one-year contract that expired after one year but renewable upon evaluation of performance and based on availability of funds from the Respondent, it being a charitable institution.
29. It is the Respondent contention that its position with regard to the application of the loan was to confirm that the claimant was their employee and notify the bank when the employee leave employment and not guarantee payment of the said loan.
30. Contrary to the claim herein, the Respondent stated that it is the claimant that has misappropriated funds and crippled the operation of the Respondent.
31. It is averred that in December, 2021, the Respondent wrote to the claimant asking him to step down to pave way for audit which is conducted as a routine regarding financial operations of the foundation. Instead of stepping aside, the claimant opted to resign and tendered in his resignation, giving the Respondent one-month notice. The Respondent acknowledged the resignation and requested the claimant to hand over the foundation laptop which he delayed to deliver.
32. The Respondent maintained that the claimant herein voluntarily left its employment on resignation and was not terminated as alleged in the claim. Further that he was paid all his dues and nothing is owing to him.
33. In the counterclaim, the Respondent stated that the claimant had misappropriated funds by unauthorised transfer of organizations funds though payment of excessive and fraudulent transfers of monthly staff salaries to GDC and K unit Sacco accounts in the amounts of Kshs 3,889,208, under declared the gross salaries on itax portal of Kshs 327,482, under-declared of PAYE taxes in the itax portal of Kshs 400,553 and reviewed staff recoveries and deductions to a tune of Kshs 780,400.
34. The Respondent prayed for the following reliefs in the counterclaim; -



- a. A perpetual order of his accounts to be frozen and or a mandatory order compelling the claimant to reimburse the misappropriated funds to the defendant as per the audit to a tune of Kshs 5,397,643.
  - b. General damages.
  - c. Costs of this suit.
  - d. Interest on a, b.
  - e. Any other relief that this Honourable Court may deem fit.
35. In response to the counterclaim, the claimant denied the counterclaim and reiterated his claim and in addition stated that he was not in charge of making any payment and any cheques made by the Respondent were drawn by Jeremiah Kuria, the Respondent's Director.

### **Hearing.**

36. During hearing Faith Waithera Kuria, testified as CW-1 and adopted her statement and documents dated March 9, 2022 and upon cross examination by Obado Advocates, the claimant testified that she was employed by the Respondent in June, 2010 but did not file the employment contract save for the one issued in 2020. She confirmed that she was employed as the HR manager and confirmed that the employment contract was initially on yearly basis but that they were changed in 2020 and the contracts were extended to 5 year contracts. She told the court that her salary in 2010 was Kshs 22,000 which was increased to Kshs 213,972 at the time of termination in 2021.
37. Upon further cross examination she testified that the suspension on December 6, 2021 was communicated verbally but the reason for suspension was not communicated. She also stated that she took a personal loan with the bank and the Respondent's responsibility was remit the monthly deductions to the Bank. She stated that she was a member of NHIF and NSSF.
38. On re-examination she told this Court that she believed her employment was on permanent and pensionable terms because her pension was remitted to a pension scheme for three years. She reiterated that she was suspended verbally without any notice or disciplinary hearing. She stated that she took the loan on the strength of the employment with the Respondent.
39. The second witness was Paul Gacheru Njuguna, who testified as CW-2 and stated that he is seeking for payment of his terminal dues. He sought to adopt his documents as his evidence.
40. Upon cross examination, he told this Court that he was employed by the Respondent for 6 years and unfairly terminated in December, 2021. He stated that the claimant coerced him to evade tax payment and ordered him to underquote the gross salaries paid to employees and himself and therefore he underquoted their salaries to evade tax, following orders of his superior. He testified that these illegalities at the Respondent's employ forced him to resign.
41. Upon further cross examination he admitted to giving notice of resignation, which notice was accepted by the Respondent but was quick to add that he was forced to resign. He stated that his claim was for payment of his terminal dues and stated that he was not privy to other employees' contracts.
42. On re-examination he told this Court that he worked on orders. That he was a permanent and pensionable employee. He reiterated that he was directed to resign failure to which he would suffer dire consequences. He stated further that the threatens are still ongoing and he is now out on bail.



43. The Respondent Summoned its Director, Jeremiah Kuria as its RW-1 who adopted his witness statement of 13.5.2022 together with list of documents of even date. He testified that sometime in September, 2021, they experienced financial constraints and communicated this position to its employees and requested them to take salary cut to keep the foundation afloat which employees obliged and consented. He testified that the Respondent is a charitable organization that help mothers and their children. That 60 children come in on a daily basis and 250 with epilepsy. That they receive their funding from donors from the USA.
44. He testified that all their employees serve on a year's contract. He told the Court that he communicated to the claimants that he was carrying out investigation into their conduct on loss of funds. Soon after Paul resigned then he Suspended Faith to enable them carry out investigations and terminated her services in January, 2022.
45. Upon cross examination by Odero Advocate, RW-1 testified that the resignation by Paul was occasioned by the alleged accusation. He testified that he carried out investigation and concluded in March, 2022 after the case was filed. He also stated that the issue was not reported to the police till this case was filed in Court. He testified that Faith earned a salary of Kshs 230,000 while Paul earned Kshs 310,000. He admitted that the contracts before Court show that the claimants' contract was to run to April and June, 2025 respectively. He also admitted to being the one that paid NSSF, NHIF & PAYE of all employees. He maintained that Paul resigned from employment but Faith was suspended and later terminated. He also admitted to not conducting any disciplinary hearing before the termination. He also admitted not paying any dues to the claimants.
46. On re-examination, he testified that the audit was carried out from December, 2021 and completed in March, 2022 when he reported the claimants to the police for misappropriation of funds. He also reiterated that he wrote to Faith asking her to step aside.
47. The second Respondent's witness was Joel Chacha, the auditor at MacJoel & Associates. He produced the audit report exhibited at No 5 of the Respondent's list.
48. Upon cross examination, he testified that he was instructed by the Respondent on March 28, 2022 to carry out audit for the period between January 1, 2010 and December 31, 2021. He testified that his report revealed misappropriation of funds. He stated that the salary of Faith and Paul was paid excessively in several bank accounts when their main account was at CFC Stanbic. Further that some money was paid through Sacco's. He stated that Jeremiah was aware where the money was going because he did not complain of any coercion to authorise payment.
49. On re-examination, he testified that Faith was doing payroll, while Paul was doing approval. He maintained that he was not having any target person in his investigations.

#### **Claimants' Submissions.**

50. The claimant filed separate submissions. Paul Gicheru Njuguna, identified two issues for determination being; whether the actions of the Respondent amount to constructive dismissal and who should bear cost of this suit.
51. It was submitted that the claimant was constructively terminated from service on the January 24, 2018 without any justifiable reason contrary to the provisions of the *Employment Act*. He argued that he was forced out of employment because he failed to comply with instruction given by the Respondent's directors wanting him to use his position to unlawfully underquote their salaries and make them be paid out as donations from the USA in an attempt to evade tax. Furthermore, that he was humiliated by Jeremiah, One of the Respondent's Directors, forcing him to leave employment as such he was



constructively terminated. The Claimant defined what constructive dismissal is as per *Black's Law Dictionary*, 10<sup>th</sup> Edition and relied on the case of *Milton M Isanya v Aga Khan Hospital Kisumu* [2017] eKLR where the Court held that;

“In constructive dismissal the desire to resign is from the employee as a result of a hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tenders’ resignation.”

52. He also relied on the case of *Nathan Ogada Atiagaga v David Engineering Limited* [2015] eKLR, where the Court held that; -

“Constructive dismissal, occurs when an employee resigns because their employer's behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge.”

53. The claimant also relied on the Court of Appeal case of *Coca Cola East and Central Africa Limited V Maria Kagai Ligaga* [2015] eKLR that set out the principles to consider in determining what amounts to constructive dismissal and listed them as follows;

“The legal principles relevant to determining constructive dismissal include the following:

- a. What are the fundamental or essential terms of the contract of employment?
- b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?
- c. The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.
- d. An objective test is to be applied in evaluating the employer's conduct.
- e. There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e. causation must be proved.
- f. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.
- g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
- h. The burden to prove repudiatory breach or constructive dismissal is on the employee.
  - i. Facts giving rise to repudiatory breach or constructive dismissal are varied.”



54. On that note, it was submitted that the fact that the claimant was forced to take salary cuts and later forced to perform unlawful acts of underquoting their salaries to evade tax, repudiated the employment contract and therefore his resignation from the company was constructively occastrated by the Respondent and amounts to unfair termination. He added that the Respondent created a hostile environment for the claimant in failing to pay him his salary forcing him to resign.
55. On costs, it was submitted that costs follow events as captured in Section 27 of the *Civil Procedure Act*. He urged this Court to allow the claim with costs.
56. Faith Wanjiru Kuria also submitted on two issues; whether the claimant’s termination was unfair, unlawful ad without just cause and who should bear costs of this suit.
57. The claimant herein submitted that the termination fell shorts of the procedural and substantive fairness enunciated under Sections, 41, 43, 44, 45 and 47 of the *Employment Act*.
58. On procedural fairness, it was submitted that the Respondent suspended the claimant from employment on 6<sup>th</sup> December, 2021 to pave way for investigations but the said email did not give particulars of accusations or the requirement for any response from the claimant. Later on while serving the suspension, her services were terminated without any notice or disciplinary hearing. Therefore, that the termination failed under this head.
59. On substantive fairness, it was submitted that at the time of her termination no investigation or audit of accounts had been made by the Respondent to justify the termination. Under this, he relied on the case of *National Bank of Kenya v Anthony Njue John* [2019] eKLR where the Court held that;

“Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee’s employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations levelled against him by the employer.”
60. Accordingly, it was submitted that the claimant was termination without any justifiable reason.
61. On costs, it was submitted that the same follow event and urged this Court to allow the claim with costs.

### **Respondent’s Submissions.**

62. The Respondent opted to file joint submission and submitted on whether the termination of the claimants was unfair and who should bear costs of the suits.
63. The Respondent submitted the first issue on the negative and argued that before suspending the claimants, they wrote to them informing them of the financial irregularities which required investigation and these investigations could only be conducted in their absence. On receipt of the suspension email, the 1<sup>st</sup> Claimant decided to resign on his own volition, while the 2<sup>nd</sup> Claimant opted to move this Court, curtailing the disciplinary process. It was submitted that the Respondent engaged a private Audit firm that uncovered massive financial irregularities that was occastrated by the claimants against the organization.



64. It was submitted that the issue of constructive termination has been raised on submission stage and not on the pleadings, therefore the Respondent was unable to give a proper response. Furthermore, that parties are bound by the pleadings so that if any issue is not raised in the pleadings the same cannot be raised in Submissions. To support this argument, the Respondent relied on the case of *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others* [2014] eKLR where the Court relied on Nigerian Supreme Court decision in the *Adetoun Oladeji (NIG) Ltd vs. Nigeria Breweries Plc* S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;

“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded..

Judge Christopher Mitchell J.S.C. rendering himself thus;

“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

65. They reinforced their argument by citing the Supreme Court decision in *Raila Amolo Odinga & Stephen Kalonzo Musyoka v Independent Electoral and Boundaries Commission, Chairperson Independent Electoral and Boundaries Commission & Uhuru Muigai Kenyatta* (Election Petition 1 of 2017) [2017] KESC 31 (KLR) (Election Petitions) (28 August 2017) (Order) where the Court held that;-

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”

66. It was further submitted that the 1<sup>st</sup> claimant was engaged on contractual basis and when the issue of accounts was raised, he opted to resign voluntarily without any coercion on the part of the Respondent. To justify this, they relied on the case of *David Njuguna v Registered Trustees of sisters of Mercy t/a Matter Hospital* [2015] eKLR where the Court relied on the case of *William Kariuki v. Keye Civil Aviation Authority* [2008] eKLR, which held that;-

“The Plaintiff’s resignation having been accepted and taken effect the contractual relationship of an employer – employee had already been severed and so there was nothing to dismiss. The said alleged dismissal was therefore a purported dismissal. .... In law the relief of summary dismissal could only be available to an employer if the action is taken while the relationship still subsists. Herein, the relationship had ceased on 31st March, 2005. By April 20, 2005 the cord had been severed and there was nothing to dismiss.”

67. On the termination of the second claimant, it was submitted that, she was terminated on suspicion which were later affirmed in the audit report that the claimant fraudulently and negligently misapplied



the Respondent's funds. It was submitted that as soon as the respondent commence disciplinary proceeds on the claimant by suspending her, she moved to Court thwarting the disciplinary process as such the same was not completed as a result of the case that was filed in this Court. It was submitted that investigation have revealed that the claimant participated in the misapplication of the Respondent's finances and even paid herself in excess as captured by the Audit report. It was submitted that the fact that the Claimant failed to give any explanation for the excess money received affirmed that she worked in cahoots with others to defraud the Respondent and therefore her suspension and eventual termination is justified in the circumstances. In support of this argument, they relied on the case of *Thomas Sila Nzivo v Bamburi Cement Limited* [2014] eKLR where the Court held that ;-

“The Respondent had reasonable and sufficient grounds to suspect the Claimant of having acted to the substantial detriment of the Respondent and its property, and was justified in summarily dismissing the Claimant under Section 44 [4] [g] of the *Employment Act, 2007*. The Employer was not required to have conclusive proof of the Claimant's involvement; it was only expected to have reasonable and sufficient grounds. The physical audit, the discovery that no Oil was available even as the Claimant protested he received such Oil, the Claimant's role in receiving the Oil and releasing the delivering Truck, all gave the Respondent reasonable and sufficient grounds to act against the Claimant. Alternative to Section 44 [4] [g], the Respondent may still have found justification in making the decision against the Claimant, under Section 44 [4] [c]”

68. In conclusion, the Respondent submitted that termination of claimants services was justified in the circumstances and urged this Court to dismiss the claims and award the Respondent costs of these suits.
69. I have examined all the evidence and submissions of the parties herein. The issues for this court's determination are as follows;-
1. Whether the 1<sup>st</sup> claimant (Faith) was terminated for valid reasons.
  2. Whether due process was followed before Faith's termination.
  3. Whether the counter claim against the claimants is proved.
  4. Whether the claimants are entitled to payment of the remedies sought.
  5. Who pays costs of this suit.

### **Issue No 1. Validity Of Reasons**

70. Faith was terminated vide an Email sent to her on January 5, 2022 by one Jeremiah Thuo Kuria who stated that the respondent could not sustain its operations any further and that the claimant had shown unsatisfactory performance and funds had been misappropriated hence audit queries had been raised.
71. On the issue of the respondents failure to sustain its operations, this is a reason bordering on redundancy and which redundancy could only be effected as per Section 40 of the *Employment Act, 2007* which procedure was never followed.
72. On issue of unsatisfactory performance and misappropriation of funds, the respondents have averred that the 1<sup>st</sup> claimant who was their HR Manager had caused them loss as per a pending audit report.
73. Prior to this period, the 1<sup>st</sup> claimant had been placed on suspension on December 5, 2021 pending the audit.



74. She was however dismissed from employment a month later before the audit was completed.
75. Infact, the RW1 admitted in his evidence that the audit was carried out from December 2021 and completed in March 2022 when he reported the claimants to the police for misappropriation of funds.
76. Infact, the audit was carried out after this case had been filed and a report made to the police.
77. From this preposition, though an audit had to be carried out to ascertain the guilt of the 1<sup>st</sup> claimant, this was done after her dismissal.
78. The validity of reasons if any leading to her dismissal was therefore not in existence as at the time of her dismissal.
79. In the circumstances of the case, there was not valid reason to warrant 1<sup>st</sup> claimant's dismissal at the time she was dismissed on January 5, 2022.

### **Issue No 2: Due Process**

80. The 1<sup>st</sup> claimant submitted that she was dismissed following her suspension without being subjected to due process. The RW1 in cross examination admitted that there was no disciplinary hearing conducted against the 1<sup>st</sup> claimant before her termination.
81. Section 41 of the [Employment Act, 2007](#) states as follows;

“41.

- (1) Notification and hearing before termination on grounds of misconduct  
Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

82. What the law envisages is that a man should not be condemned unheard whether due to unsatisfactory performance or for any other reason relating to his conduct.
83. In the case of the 1<sup>st</sup> claimant, she was however never subjected to a hearing and was therefore condemned unheard.

### **Issue No 3: Counter Claim**

84. The respondents filed counter claim against the claimants based on their audit report carried out between January 1, 2010 and December 31, 2021.
85. According to RW2, the Audit report revealed misappropriation of funds. The auditor averred that the audit revealed that the salary of Faith and Paul was paid excessively at its several bank accounts when the main account was at CFC Stanbic and that some money was paid through SACCOs to the tune



of 3,889,208/= plus under declared gross salaries, under declared PAYE and staff deductions made all totalling 5,397,643/=.

86. In response to the counter claim, the claimants denied the same indicating that any cheques made by the respondent were drawn by Jeremiah Kuria, the respondent's Director.
87. The respondent's audit however showed that several cash transactions were made in favour of the claimants through various banks and SACCOs.
88. The respondent's audit also revealed that there was theft of organizational funds through excessive remittance of funds to umbrella SACCOs and also to Jubilee Insurance. Further the audit also showed under declaration of gross salaries in the i-tax portal.
89. The audit recommended surcharge and deductions of these amounts of the concerned staff.
90. In relation to excessive transfer of salaries, the amount was Kshs3,889,208/= to Paul Njuguna and 3,031,680/= to Faith Kuria and Kshs327,482/= for Paul Njuguna and Kshs345,786/= to Faith Kuria for under declaration of gross salaries in the i-tax portal.
91. In their defence, the claimants denied any complicity. RW2 indicated that money was paid to the claimants and that Jeremiah – the RW1 knew where the money was going and authorized it.
92. In defending the counter claim, though the claimant's defence was a more denial the claimants didn't deny receiving the moneys allegedly paid to them as excess salaries.
93. There was also under declared gross salaries in the i-tax portal and other money.
94. The 1<sup>st</sup> claimant indicated they were not in charge of making any payments and any cheques made by the respondent were drawn by Kuria.
95. Despite the glaring submissions that payments were made, the respondents didn't submit any documentary evidence to show who authorized payments and under whose hand the cheques paid were made.
96. This left a gap in respondent's case making it untenable to determine culpability on the part of the claimants.
97. The audit report alone falls short of evidential value of who authorized or made payments that are alleged to have been made in favour of the claimants or to the detriment of the respondents.
98. The audit report was also made after the dismissal and resignation of the claimants respectively and was therefore made without due consideration of their import.
99. The report therefore works prejudicially to the claimants without any other documentary evidence to support the findings therein.
100. Indeed he who alleges must prove but in this case the allegations made by the respondent are not proved. In the circumstances, the counter claim fails and is dismissed accordingly.

#### **Issue No 4: Remedies**

101. Having found as above, it is my finding that the 1<sup>st</sup> claimant was unfairly dismissed as provided for under Section 45 (2) of the [Employment Act, 2007](#) which states as follows;

“ 45.

(1) .....



- (2) A termination of employment 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”.

102. The 2<sup>nd</sup> claimant had averred that he was constructively terminated or was coerced to resign.
103. This assertion has however not been established by the 2<sup>nd</sup> claimant because what is on record is that he tendered his resignation which was accepted by the respondents.
104. The 2<sup>nd</sup> respondent is therefore only entitled to payment of his terminal benefits.
105. In the circumstances of this case, I award the claimants as follows;-

1<sup>st</sup> Claimant

1. Payment of salary not paid from December 2021 to January 5, 2022  
 = 36 days salary =  $36/30 \times 213,975$   
 = 256,770/=
2. 27 days leave earned amounting to 213,972/=
3. Salary cut of 30% for the month of October & November 2021 each of Kshs64,191.60 all totalling 128,383/=
4. 1 month salary in lieu of notice  
 = 213,975/=
5. 8 months salary as compensation for the unlawful and unfair termination  
 =  $8 \times 213,975 = 1,711,800/=$   
Total = 2,524,903/=  
 Less statutory deductions
6. Issuance of Certificate of Service
7. The respondent to pay costs of this suit plus interest at court rates with effect from the date of this judgment.

2<sup>nd</sup> Claimant

1. 4 months salary not paid for December 2021 to April 11, 2022 as pleaded  
 = 1,241,600/=
2. Leave earned and not take = 310,400/=



3. Salary as pleaded = 186,240/=
  4. 1 month salary in lieu of notice = 310,400/=
- Total = 2,567,704,317/=
- Less statutory deductions
5. Issuance of Certificate of Service
  6. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 8<sup>TH</sup> DAY OF JUNE, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

In the presence of:

Miiri holding brief for Odera for Claimant – present

Obado holding brief for Ombayo for respondents – present

Court Assistant - Fred

