



**Ogechi v DPL Festive Limited & another (Cause 1427 of 2018)  
[2023] KEELRC 1845 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1845 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1427 OF 2018  
BOM MANANI, J  
JULY 13, 2023**

**BETWEEN**

**LAMECK NYARANGO OGECHI ..... CLAIMANT**

**AND**

**DPL FESTIVE LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**KENYA COMMERCIAL BANK LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claim before me combines several causes of action. These include claims for: unfair termination of employment; defamation; false imprisonment; and general damages for workplace injuries.
2. The defense does not admit liability for the various claims. In response to the claim, the Respondents have filed their individual defenses.
3. On its part, the 1<sup>st</sup> Respondent avers that the Claimant's contract of service was fairly terminated. Further, the 1<sup>st</sup> Respondent denies that the Claimant was falsely imprisoned or defamed as alleged. Besides, the 1<sup>st</sup> Respondent denies that the Claimant suffered any injuries whilst at work.
4. On its part, the 2<sup>nd</sup> Respondent denies that it had an employment relation with the Claimant. Consequently, the 2<sup>nd</sup> Respondent contends that this court has no jurisdiction to entertain the Claim against it.

**Claimant's Case**

5. In the Memorandum of Claim, the Claimant avers that he was employed by the 1<sup>st</sup> Respondent as a general worker to sell and deliver the 1<sup>st</sup> Respondent's confectionery products to its customers. He



was required to deposit proceeds from the sales into the 1<sup>st</sup> Respondent's account held by the 2<sup>nd</sup> Respondent on a daily basis.

6. The Claimant states that on 4<sup>th</sup> December 2017, he deposited the sum of Ksh. 90,013.00 into the aforesaid account through an agent of the 2<sup>nd</sup> Respondent. However, on 7<sup>th</sup> December 2017 the transaction was reversed by the 2<sup>nd</sup> Respondent allegedly for the reason that the Claimant had deposited Ksh. 9,013.00 only. The Claimant asserts that the reversal aforesaid was an act of fraudulent collusion between the 2<sup>nd</sup> Respondent and its agent.
7. The Claimant asserts that due to the reversal of the entry of Ksh, 90,013.00, the 1<sup>st</sup> Respondent's account was left with a credit balance of Ksh. 9,013.00 out of the initial deposit of Ksh. 90,013.00. As a result, the Claimant was allegedly falsely accused of stealing the difference from the 1<sup>st</sup> Respondent being Ksh. 81,000.00.
8. The Claimant alleges that this development led to the 1<sup>st</sup> Respondent summoning him on 28<sup>th</sup> January 2018 to explain the shortfall in the cash deposit. In the process, the Claimant alleges that the 1<sup>st</sup> Respondent's management falsely detained him at the 1<sup>st</sup> Respondent's premises for the entire day against his will.
9. The Claimant contends that he was later taken to the Industrial Area Police Station the same day for further interrogation. He asserts that investigations by the police established that the accusations against him were false. Thus, he was released without charges.
10. The Claimant further states that despite the police clearing him, the 1<sup>st</sup> Respondent convened a disciplinary session against him based on the same accusation of misappropriating the sum of Ksh. 81,000.00. He avers that he was eventually issued with a letter of dismissal from employment dated 28<sup>th</sup> February 2018. According to the Claimant, the sole reason for the decision to terminate his services was that he had misappropriated the sum of Ksh. 81,000.00 from the 1<sup>st</sup> Respondent.
11. The Claimant contends that the assertion that he had misappropriated Ksh. 81,000.00 was false. He avers that this false accusation injured his reputation for which he seeks to be compensated.
12. The Claimant further states that in the course of his duties, he fell off the delivery van on 7<sup>th</sup> April 2017 incurring injuries. Thus, he seeks compensation for the accident.
13. The Claimant also contends that during the currency of his employment, the 1<sup>st</sup> Respondent made unauthorized deductions from his salary. He prays that the 1<sup>st</sup> Respondent be ordered to refund the amount in question.

### **Respondents' Case**

14. In its response, the 1<sup>st</sup> Respondent denies that it unfairly terminated the Claimant's contract of service as alleged. The 1<sup>st</sup> Respondent's case is that on 4<sup>th</sup> December 2017, the Claimant deposited Ksh. 9,013.00 instead of Ksh. 90,013.00 on its account held by the 2<sup>nd</sup> Respondent. This transaction was allegedly processed by an agent of the 2<sup>nd</sup> Respondent.
15. Although the amount deposited was allegedly Ksh. 9,013.00, the 1<sup>st</sup> Respondent asserts that the Claimant was issued with a deposit slip showing that he had deposited Ksh. 90,013.00. However, the error was later realized prompting the 2<sup>nd</sup> Respondent to reverse its agent's post of Ksh. 90,013.00 and replace it with the correct post of Ksh. 9,013.00. As a result, there was a shortfall of Ksh 81,000.00 in the amount that was supposed to have been deposited by the Claimant on 4<sup>th</sup> December 2017.



16. The 1<sup>st</sup> Respondent asserts that the Claimant was asked to account for this shortfall. It is the 1<sup>st</sup> Respondent's case that the Claimant admitted having held onto Ksh. 81,000.00 being the cash difference between the amount that he was to have deposited and the amount that he actually deposited on the material day as he waited to see if the error will be detected by the 2<sup>nd</sup> Respondent's agent. Believing that the error had gone unnoticed, the Claimant allegedly converted the cash to his personal use.
17. According to the 1<sup>st</sup> Respondent, when the Claimant was eventually confronted about the loss, he admitted having redirected the funds to his personal ventures. The Claimant allegedly pledged to repay the money. However, he allegedly changed his mind and insisted that the entire Ksh. 90,013.00 had been surrendered to the 2<sup>nd</sup> Respondent's agent.
18. The 1<sup>st</sup> Respondent states that when the Claimant changed his position on the matter, the issue was referred to the police for further investigations. However, before the issue was processed further, the 2<sup>nd</sup> Respondent settled the matter by paying the 1<sup>st</sup> Respondent the shortfall.
19. In the 1<sup>st</sup> Respondent's estimation, there was a valid reason to terminate the employment relationship between the parties. Further and according to this Respondent, the procedure for terminating the said relation was in accordance with the tenets of due process.
20. The 1<sup>st</sup> Respondent denies having made unlawful deductions to the Claimant's salary. It is the 1<sup>st</sup> Respondent's case that all deductions it made to the Claimant's salary were with his express permission and for his own good.
21. The 1<sup>st</sup> Respondent also denies that the Claimant suffered the injuries that he alleges whilst at work. In addition, the 1<sup>st</sup> Respondent contests the Claimant's assertion that his reputation has suffered following the decision to terminate his employment on grounds of gross misconduct. Further, the 1<sup>st</sup> Respondent denies that it detained the Claimant against his will on 18<sup>th</sup> January 2018 as alleged.
22. On its part, the 2<sup>nd</sup> Respondent has distanced itself from the dispute between the Claimant and the 1<sup>st</sup> Respondent. According to the 2<sup>nd</sup> Respondent, its duty was to merely manage the 1<sup>st</sup> Respondent's account. The 2<sup>nd</sup> Respondent denies that it colluded with its agent to reverse deposits made to the 1<sup>st</sup> Respondent's account as alleged by the Claimant.
23. Further, the 2<sup>nd</sup> Respondent contends that there was no employment relation between it (the 2<sup>nd</sup> Respondent) and the Claimant. As such, this court has no jurisdiction to entertain the case directed against it.

#### **Issues for Determination**

24. From the pleadings and evidence that the parties have tendered, the following are the issues that present for determination:-
  - a. Whether the 1<sup>st</sup> Respondent had a valid reason to terminate the contract of service between it and the Claimant.
  - b. Whether the 1<sup>st</sup> Respondent terminated the aforesaid contract in accordance with due process.
  - c. Whether the Claimant was falsely detained by the 1<sup>st</sup> Respondent on 18<sup>th</sup> January 2018.



- d. Whether the Claimant's reputation was injured as a result of the allegation of misappropriation of funds against him.
- e. Whether the Claimant suffered injuries at work and whether the 1<sup>st</sup> Respondent is liable to compensate him for the alleged injuries.
- f. Whether the 1<sup>st</sup> Respondent made irregular deductions from the Claimant's salary.
- g. Whether the court has jurisdiction to determine the dispute between the Claimant and the 2<sup>nd</sup> Respondent.
- h. What reliefs ought to issue?

### Analysis

25. It is noteworthy from the Memorandum of Claim that the Claimant's case for wrongful termination is premised on the alleged loss of Ksh. 81,000.00 on 4<sup>th</sup> December 2017. As a matter of fact, the Claimant does not at all, in the said Memorandum of Claim, allude to the alleged loss of Ksh. 43,642.00 on 18<sup>th</sup> January 2018.
26. However, in his further witness statement dated 22<sup>nd</sup> May 2018, the Claimant alluded to the alleged loss of Ksh. 43,642.00 when he stated that at the time he was summoned back to the office and subsequently surrendered to the police on 18<sup>th</sup> January 2018, he had collected Ksh. 20,500.00 from the sales of the day. The Claimant contends that this amount was picked from him by the 1<sup>st</sup> Respondent's management whilst he was in police custody. The Claimant's further witness statement of 22<sup>nd</sup> May 2018 read together with his response to the notice to show cause dated 2<sup>nd</sup> February 2018 leads to the conclusion that the sum of Ksh. 20,500.00 that he alludes to in his further witness statement is part of the sale proceeds of Ksh. 43,642.00 from sales of 18<sup>th</sup> January 2018 that he was accused of not having account for.
27. The 1<sup>st</sup> Respondent's Statement of Defense does not allude to the loss of Ksh. 43,642.00 on 18<sup>th</sup> January 2018 as one of the reasons why the Claimant's contract of service was terminated. However, from the notice to show cause letter that was issued to the Claimant dated 30<sup>th</sup> January 2018 and the letter of dismissal from employment dated 24<sup>th</sup> February 2018 it is clear that the issue of the loss of Ksh. 43,642.00 was one of the matters that informed the disciplinary action against him and his eventual dismissal from employment. These two documents were tendered in evidence.
28. It is also apparent from the witness statement by the 1<sup>st</sup> Respondent's witness filed in court on 14<sup>th</sup> November 2019 that the loss of Ksh. 43,642.00 was one of the reasons why the Claimant's contract of service was terminated. The matter is also alluded to in the 1<sup>st</sup> Respondent's letter to the Federation of Kenya Employers dated 5<sup>th</sup> April 2018. The letter was produced in evidence.
29. Although in his Memorandum of Claim, the Claimant refers to 28<sup>th</sup> January 2018 as the day he was allegedly unlawfully detained by the 1<sup>st</sup> Respondent's management, in his response to the notice to show cause, he refers to 18<sup>th</sup> January 2018 as the date he was interrogated by the 1<sup>st</sup> Respondent and taken into custody. Further, in his further witness statement dated 22<sup>nd</sup> May 2018, the Claimant indicates that he was in police custody on 20<sup>th</sup> January 2018 when the 1<sup>st</sup> Respondent's management allegedly collected from him Ksh. 20,500.00 being part of the sale proceeds for 18<sup>th</sup> January 2018.
30. Besides, the OB number 56/18/1/2018 suggests that the Claimant was taken into police custody on 18<sup>th</sup> January 2018. It therefore appears to me that reference by the Claimant to 28<sup>th</sup> January 2018 in



his Memorandum of Claim as the date of his alleged unlawful detention by the 1<sup>st</sup> Respondent and arrest by the police may have been out of error. The date that he may have intended to allude to is 18<sup>th</sup> January 2018.

31. Although neither of the parties pleaded the loss of Ksh. 43,462.00 as a factor in the Claimant's dismissal from employment, both of them made this an issue for trial. On its part, the 1<sup>st</sup> Respondent referred to the issue in the documentary evidence it placed on record as demonstrated in the preceding sections of this decision. Further, the 1<sup>st</sup> Respondent's witness alluded to the matter both in the written witness statement that she adopted as her evidence in chief and her oral testimony before court.
32. On the Claimant's part, despite him not having raised the matter in his pleadings, he referred to the alleged loss of Ksh. 43,642.00 in his further witness statement dated 22<sup>nd</sup> May 2018. He also alluded to the loss in his response to the notice to show cause letter of 2<sup>nd</sup> February 2018. The Claimant adopted the further witness statement as part of his evidence. His response to the notice to show cause was produced in evidence.
33. Although it is a cardinal rule that parties are bound by their pleadings and are not, as a general principle, at liberty to litigate upon unpleaded matters, courts have sometimes indicated that where parties make a matter the subject of a trial even though not pleaded, the court may consider such matter as raising an issue for determination (see *M N M v D N M K & 13 others* [2017] eKLR). In the case before me, the Claimant has argued that the issue about the alleged loss of Ksh. 43,642.00 is not what the 1<sup>st</sup> Respondent had pleaded as the reason for terminating the Claimant's contract. However, I note from the record that the parties have extensively deliberated on the matter in both the documentary and oral evidence before me. Consequently, I consider it a matter that they placed before the court for determination.
34. On whether the 1<sup>st</sup> Respondent had valid reason to terminate the Claimant's contract of service, it is evident from the 1<sup>st</sup> Respondent's evidence that although it (the 1<sup>st</sup> Respondent) initially blamed the Claimant for the loss of Ksh. 81,000.00, this matter was resolved when the 2<sup>nd</sup> Respondent paid it (the 1<sup>st</sup> Respondent) the amount that had been lost. From the evidence by the 1<sup>st</sup> Respondent's witness, the loss of Ksh. 81,000.00 eventually became a non issue in the termination of the relation between the parties.
35. The Claimant's pleadings focused blame for his dismissal from employment on the alleged loss of Ksh. 81,000.00. As indicated earlier, the Claimant appeared to initially suggest that this was the sole reason why the 1<sup>st</sup> Respondent terminated the contract of service between the parties. However and as is clear from the record, away from their initial pleadings, both parties extensively deliberated on the loss of Ksh. 43,642.00 as the other reason for termination of the Claimant's employment.
36. From the evidence tendered by the 1<sup>st</sup> Respondent's witness, when the Claimant was arrested on 18<sup>th</sup> January 2018, it was realized that he had collected Ksh. 43,642.00 from the 1<sup>st</sup> Respondent's customers on account of sales for that day but had not remitted the money to the bank. According to the 1<sup>st</sup> Respondent, when the Claimant was confronted about the matter, he alleged that he had only managed to collect Ksh. 20,000.00 for the day which amount he had handed over to the police for transmission to the 1<sup>st</sup> Respondent.
37. The 1<sup>st</sup> Respondent denies receiving the cash as alleged. According to the 1<sup>st</sup> Respondent, the Claimant was expected to bank all sale proceeds as and when he collected them. Therefore, it was surprising that he had released the money to the police as alleged. Further, the 1<sup>st</sup> Respondent asserts that even assuming that the Claimant had handed the cash to the police as he alleged, he still did not account for the entire of Ksh. 43,642.00 that he allegedly collected on 18<sup>th</sup> January 2018.



38. On his part, the Claimant admits that at the time he was recalled to the office on 18<sup>th</sup> January 2018, he had made sales worth Ksh. 43,642.00. Out of this money, the Claimant contends that he had only collected Ksh. 20,500.00 leaving a balance of Ksh. 23,142.00 uncollected.
39. In his response to the notice to show cause, the Claimant states that he withdrew Ksh. 20,000.00 whilst at the police station. However, in the said response, he does not indicate where the money was taken to after being withdrawn. The Claimant then states in his response to the notice to show cause that he accepted to repay the 1<sup>st</sup> Respondent the difference of Ksh. 23,642.00 or thereabouts through deductions to his salary.
40. In his further written witness statement dated 22<sup>nd</sup> May 2018, the Claimant indicates that he withdrew Ksh. 20,500.00 from his Mpesa account whilst in police custody. Noteworthy, this is a higher figure than the one alluded to in his response to the notice to show cause dated 2<sup>nd</sup> February 2018. In the further witness statement, the Claimant says that he gave the cash to the 1<sup>st</sup> Respondent's members of staff.
41. On its part, the 1<sup>st</sup> Respondent has denied that the Claimant remitted either the Ksh. 20,000.00 that he mentions in his response to the notice to show cause or Ksh. 20,500.00 that he refers to in his further witness statement to its staff as alleged or at all. Further, the 1<sup>st</sup> Respondent contends that although the Claimant admits having sold products worth Ksh. 43,642.00 and alleges to have released Ksh. 20,000.00 or thereabouts to the 1<sup>st</sup> Respondent's employees, he does not account for the difference of approximately Ksh. 23,000.00 which he allegedly had collected from the 1<sup>st</sup> Respondent's customers in cash.
42. I have considered the above evidence against the law on termination of employment contracts in sections 41, 43 and 45 of the *Employment Act*. These provisions obligate the employer to prove the reasons for terminating a contract of service for an employee. Under section 43(2) of the Act the employer may terminate a contract of service if he has a reasonable basis for believing that a valid reason to terminate the contract exists (see *Kenya Revenue Authority v Renwel Waitbaka Gitahi & 2 others* [2019] eKLR).
43. The evidence on record demonstrates that whilst the Claimant concedes that he had sold stock worth about Ksh. 43,642.00 at the time he was summoned back to the office on 18<sup>th</sup> January 2018, he did not provide a convincing account for the sale proceeds. Whilst he argues that he remitted Ksh. 20,000.00 or thereabouts to the 1<sup>st</sup> Respondent, it is noteworthy that the 1<sup>st</sup> Respondent denies having received this cash. Whilst the record shows that the Claimant withdrew Ksh. 20,000.00 from his Mpesa account when he was in police custody, there is no cogent proof that this money was remitted to the 1<sup>st</sup> Respondent.
44. Further, the Claimant did not provide a satisfactory account for the difference of approximately Ksh. 23,000.00. Even as he alleges that this amount had not been collected from the 1<sup>st</sup> Respondent's customers, the Claimant did not provide any form of evidence to demonstrate that the money was still with the said customers. The sales in question had been undertaken by the Claimant allegedly on credit. Therefore, he is expected to have kept proof of the customers that were yet to settle their accounts. One would have expected some form of evidence of indebtedness of the said customers to the 1<sup>st</sup> Respondent in the form of sales invoices or such other evidence. No such evidence was placed before the 1<sup>st</sup> Respondent's disciplinary panel or indeed this court.
45. Having regard to the foregoing, it is clear to me that the 1<sup>st</sup> Respondent had reasonable grounds to believe that the Claimant had misappropriated the sum of Ksh. 43,642.00. Therefore and in terms



- of section 43(2) of the *Employment Act*, the 1<sup>st</sup> Respondent had reasonable grounds to terminate the Claimant's employment contract.
46. Besides the duty on the employer to demonstrate that he had valid grounds to terminate the employee's contract of service, he must demonstrate that the decision to terminate the contract was arrived at in accordance with due procedure (see *Kenya Revenue Authority v Reuwel Waitbaka Gitahi & 2 others* [2019] eKLR). The procedure to be followed in terminating a contract of service is stipulated under section 41 of the *Employment Act* and the *Fair Administrative Action Act*.
  47. Under the *Employment Act*, the employer is obligated to: notify the employee of the charge against him in a language that the employee understands; permit the employee an opportunity to respond to the charge and call witnesses if he so desires; render a prompt decision over the matter with notice to the employee; and provide the employee with an avenue for appeal or review of the decision. Under the *Fair Administrative Action Act* and in addition to the stipulations under section 41 of the *Employment Act*, the employer has a duty to share with the employee beforehand all the material in his possession which he proposes to rely on during the disciplinary session.
  48. In his Memorandum of Claim, the Claimant states that he was dismissed from employment without observance of due process. In the further witness statement that he presented to court dated 22<sup>nd</sup> May 2018, the Claimant avers that he was not afforded an opportunity to attend the disciplinary session with witnesses of his choice. If correct, this would be a procedural lapse on the part of the 1<sup>st</sup> Respondent as the law entitles an employee to the right to fully ventilate his defense including by calling his witnesses to the session. The employer is obligated to consider the representations of the employee and his witnesses before rendering his decision.
  49. Despite the Claimant's contention that he was not allowed the opportunity to call his witnesses, the 1<sup>st</sup> Respondent has not provided evidence to controvert this assertion. Under section 45 the *Employment Act* the employer bears the duty to demonstrate that he afforded the employee the opportunity to call his witnesses if he wished. Absent evidence to controvert the Claimant's evidence that he was not afforded the opportunity to call witnesses, I find that there was a procedural flaw in the process leading to termination of his contract of employment.
  50. The Claimant has alleged that he suffered injury when he fell off a delivery van of the 1<sup>st</sup> Respondent. To prove the injury, the Claimant presented medical documents to the court.
  51. Although the Claimant claimed that the injury was occasioned by a fall from the 1<sup>st</sup> Respondent's van, he provided no evidence to suggest that the fall was occasioned by the negligence and or breach of a term of a contract and or a provision of statute by the 1<sup>st</sup> Respondent with respect to the duty to ensure the Claimant's safety whilst at work. In the premises, I reach the conclusion that the claim for compensation for injury whilst at work has not been cogently proved.
  52. The Claimant has also claimed for damages against the 1<sup>st</sup> Respondent for unlawful detention. The Claimant's case in this respect is that whilst he was undergoing interrogation by the Claimant's management on 18<sup>th</sup> January 2018, his freedom of movement was unlawfully curtailed. He contends that the 1<sup>st</sup> Respondent's management locked him up and forced him to confess to an infraction he had not committed.
  53. I have evaluated the evidence on this aspect of the case. Besides the bare assertion that he was detained at the 1<sup>st</sup> Respondent's premises, the Claimant provides not cogent evidence on the issue. It is noteworthy that the 1<sup>st</sup> Respondent's witnesses denied the assertion that they detained the Claimant.



54. I take cognizance of the fact that the parties had an outstanding dispute relating to loss of funds that were in the Claimant's possession as a result of his employment. In the premises, I think that the 1<sup>st</sup> Respondent was entitled to interrogate the Claimant on the matter. Understandably, such interrogation may take some while. The mere fact that the 1<sup>st</sup> Respondent took the Claimant through this process cannot, without more, amount to unlawful detention of the Claimant. Consequently and for want of convincing evidence, I am unable to accede to the Claimant's claim for compensation for unlawful detention.
55. The Claimant has also prayed for compensation for defamation of character. As I understand it, defamation of one's character only arises where his standing has been lowered in the eyes of right thinking members of society. This presupposes that there are members of society who have come up to indicate that they think the less of the victim because of what was said or published about him.
56. In the case before me, the Claimant called nobody to confirm that as a result of his arrest on 18<sup>th</sup> January 2018, society's view of him had been distorted. The Claimant relied on his own evidence to make this assertion which in my view is not permissible. As a consequence, I reach the conclusion that the claim for compensation for defamation of character has not been established.
57. The Claimant also sought to be reimbursed deductions that were made to his salary without his consent allegedly towards various levies such as trade union agency fees, donations, security deposit and APA Insurance. In reaction to the claim, the 1<sup>st</sup> Respondent asserts that the Claimant had sanctioned some of the deductions whilst others were statutory in nature.
58. The 1<sup>st</sup> Respondent's witness asserts that the money that was deducted in agency fees was paid to a trade union that had negotiated a Collective Bargaining Agreement (CBA) from which the Claimant was drawing a benefit. The 1<sup>st</sup> Respondent's witness asserts that although the Claimant was not a member of the union, he was drawing a benefit from the CBA. Therefore, he was under statutory duty to pay the union agency fees.
59. In respect of deductions to APA Insurance, the 1<sup>st</sup> Respondent contends that the payments were to cover the Claimant's pension. That these amounts were remitted to the relevant pension scheme and the Claimant was at liberty to pursue payments from the said scheme.
60. Regarding deductions of Ksh. 300.00 per month, the 1<sup>st</sup> Respondent states that the deductions were towards a welfare fund. It is contended that the Claimant had consented to the deductions.
61. The 1<sup>st</sup> Respondent did not make any comments on the claim for Ksh. 1200.00 towards security deposit. This sum is neither admitted nor disputed.
62. From the evidence on record, it is clear that the 1<sup>st</sup> Respondent does not deny making the impugned deductions from the Claimant's salary. Instead, the 1<sup>st</sup> Respondent's position is that the deductions were justified either by statute or that the Claimant had sanctioned them.
63. I have combed through the evidence that was tendered by the 1<sup>st</sup> Respondent and found nothing to demonstrate that the 1<sup>st</sup> Respondent had a recognition agreement with a trade union during the currency of the Claimant's employment. There is no evidence that the 1<sup>st</sup> Respondent had a subsisting CBA with a trade union. There is no evidence to show to which trade union that the deductions towards agency fees were remitted.
64. Similarly, there is no evidence regarding the provident scheme to which the Claimant was a member. There is no evidence that the funds deducted from the Claimant's salary over the years were in fact remitted to a Provident Fund.



65. The 1<sup>st</sup> Respondent argues that the funds were remitted to some trade union and a Provident Fund. That because the trade union and Provident Fund had not come up to deny receiving the cash, the court ought to believe that the funds were remitted as suggested.
66. I have a problem accepting this argument. First, there was no evidence regarding which trade union was allegedly receiving the agency fees. Importantly, neither the alleged trade union nor the Provident Fund is a party to the current action. How then were the two to lodge their indication that they had not received the alleged payments?
67. With respect to the welfare fund and security deposit, there is no evidence that these funds were remitted to the intended beneficiaries. Besides, there is no evidence provided by the 1<sup>st</sup> Respondent that the Claimant had consented to the impugned deductions. Absent this evidence, the court cannot presume consent from the Claimant.
68. Section 17 of the *Employment Act* requires an employer to pay to the employee the entire salary that the employee has earned. Section 19 of the *Act* permits the employer to make deductions from an employee's salary to cover only those liabilities that the law has sanctioned or when the employee has given his consent.
69. I am unable to find evidence to lead me to the conclusion that the 1<sup>st</sup> Respondent has established that it had a lawful basis to make the impugned deductions from the Claimant's wages. In the premises, it is only fair that the 1<sup>st</sup> Respondent reimburses the Claimant all the irregular deductions that were made to his salary.
70. The Claimant has also sued the 2<sup>nd</sup> Respondent for compensation following the dispute over how the deposit of Ksh. 90,013.00 was handled. The 2<sup>nd</sup> Respondent has objected to the action on the grounds that there is no employment relation between it and the Claimant.
71. Under section 12 of the *Employment and Labour Relations Court Act*, this court only has jurisdiction over disputes relating to employment and labour relations. It can only entertain disputes outside this reach, if they stem from the employment relation between the disputants.
72. In this case, it is not in doubt that the 2<sup>nd</sup> Respondent has no employment relation with the Claimant. Consequently, the jurisdiction of this court to entertain the Claimant's claim against the 2<sup>nd</sup> Respondent is doubtful.
73. The next question for consideration relates to the nature of reliefs to issue in the cause. This will be guided by the findings on the other issues as discussed in the preceding sections of this judgment.
74. The court has arrived at the conclusion that the 1<sup>st</sup> Respondent had valid reason to terminate the Claimant's contract of employment. It is also evident from the evidence that was tendered that the 1<sup>st</sup> Respondent substantially complied with the requirements of due process whilst processing the release of the Claimant from employment. There is evidence that the 1<sup>st</sup> Respondent notified the Claimant of the infraction that he was accused of. There is evidence that the 1<sup>st</sup> Respondent afforded the Claimant an opportunity to respond to the accusations against him. There is evidence that the 1<sup>st</sup> Respondent rendered its decision in time and communicated it to the Claimant.
75. However, there is also evidence of failure by the 1<sup>st</sup> Respondent to ensure certain aspects of due process were observed. In particular, the 1<sup>st</sup> Respondent did not controvert the Claimant's evidence that he was not afforded the chance to call witnesses.



76. Despite the failure to fully observe the requirements of due process, it is clear to me that the Claimant was the author of his misfortune. His conduct of failing to account for the sale proceeds of 18<sup>th</sup> January 2018 substantially led to the decision to terminate his employment. It is evident that the Claimant's conduct contributed to the final separation of the parties.
77. In view of the foregoing, I am disinclined to make any substantial award to the Claimant to cover compensation for unfair termination. Having regard to all factors and the guidelines enshrined under section 49 of the Employment Act, I award the Claimant compensation for unfair termination that is equivalent to his gross salary for one month, that is to say, Ksh. 40,031.00
78. The pay slip produced in evidence shows that the Claimant had been enrolled as a contributor under the National Social Security Fund. Consequently and by virtue of section 35(6)(d) of the Employment Act, he is dis-entitled to service pay or gratuity as he calls it.
79. As observed earlier in the judgment, there was no evidence to demonstrate that the 1<sup>st</sup> Respondent had legitimate reasons to make the various impugned deductions from the Claimant's salary. The said deductions were irregular. Consequently, the court enters judgment for the Claimant for the sum of Ksh. 147,834.00 being the amount irregularly deducted from the Claimant's salary.
80. The Claimant's prayers for compensation for unlawful detention, defamation and injuries whilst at work were not proved. Accordingly, the same are dismissed.
81. I award the Claimant interest on the amount awarded at court rates from the date of institution of the suit.
82. Since the Claimant substantially contributed to the circumstances that led to the decision to terminate his employment with the 1<sup>st</sup> Respondent, I award him half costs of the suit against the 1<sup>st</sup> Respondent.
83. The 1<sup>st</sup> Respondent is ordered to issue the Claimant with a Certificate of Service in terms of section 51 of the Employment Act.
84. The court has no jurisdiction to entertain the Claimant's claim against the 2<sup>nd</sup> Respondent. Consequently, the suit against the 2<sup>nd</sup> Respondent is dismissed with costs to the 2<sup>nd</sup> Respondent.

## **Summary of Award**

### **As between Claimant and 1<sup>st</sup> Respondent**

- a. The court finds that the 1<sup>st</sup> Respondent had reasonable grounds to terminate the Claimant's contract of employment.
- b. However, the court arrives at the conclusion that there were some procedural flaws in the process leading to termination of the contract of service between the parties.
- c. The court grants the Claimant compensation equivalent to his salary for one month, that is to say, Ksh. 40,031.00 as compensation for unlawful termination of employment arising from the procedural flaws aforesaid.
- d. The court finds that the deductions effected by the 1<sup>st</sup> Respondent on the Claimant's salary amounting to Ksh. 147,834.00 were irregular. Accordingly, the court enters judgment for the Claimant for the above sum of Ksh. 147,834.00.
- e. The Claimant's claims for defamation of character, unlawful detention and compensation for work injuries are declined for want of proof.



- f. The Claimant's claim for service pay is declined.
- g. The 1<sup>st</sup> Respondent is ordered to issue the Claimant with a Certificate of Service.
- h. The Claimant is awarded interest on the amounts awarded at court rates from the date of institution of the suit.
- i. As the Claimant's conduct substantially contributed to his misfortune, the court declines to grant him full costs of the case against the 1<sup>st</sup> Respondent. The Claimant is granted half costs against the 1<sup>st</sup> Respondent.

**As between the Claimant and the 2<sup>nd</sup> Respondent**

- j. The court has no jurisdiction to entertain the Claimant's claim against the 2<sup>nd</sup> Respondent.
- k. Consequently, the suit against the 2<sup>nd</sup> Respondent is dismissed with costs to the 2<sup>nd</sup> Respondent.

**DATED, SIGNED AND DELIVERED ON THE 13<sup>TH</sup> DAY OF JULY, 2023**

**B. O. M. MANANI**

**JUDGE**

In The Presence Of:

..... for the Claimant

.....for the Respondent

Order

In light of the directions issued on July 12, 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M. MANANI**

