



**Mwai v Semi-Conductor Technologies Ltd (Cause E001 of 2023)  
[2023] KEELRC 2130 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2130 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE E001 OF 2023  
ON MAKAU, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**ANDREW WAIGWA MWAI ..... CLAIMANT**

**AND**

**SEMI-CONDUCTOR TECHNOLOGIES LTD ..... RESPONDENT**

**JUDGMENT**

1. The claimant was employed by the respondent as its Operations Manager on 12<sup>th</sup> October 2021 and worked until 28<sup>th</sup> November, 2022 when he received an email forwarding a dismissal letter dated 24<sup>th</sup> November, 2022. The reasons cited for the dismissal was embezzlement of Company funds. He was not served with any show cause letter or accorded a hearing before the dismissal. Therefore, he brought this suit describing the dismissal was unfair and prayed for the following relief: -

- a. 12 months compensation for unfair termination Kshs.120,000 x 12 moths in lieu.....Kshs.1,440,000.00
- b. One month’s salary in lieu of notice.....Kshs.120,000.00
- c. Unpaid salary for the month of October and November.....Kshs.240,000.00
- d. Unpaid house allowance Kshs.18,000/- x 15 Months.....Kshs.270,000.00
- e. Arrears of annual leave not taken.....Kshs.120,000.00
- f. Certificate of service.
- g. Costs of this suit with interest at court rates.



- h. Any other or further relief as this court may deem fit to grant.
2. The respondent admitted that it employed the claimant as its operations manager and later dismissed him. However, it denied the alleged unfair termination and averred that the claimant misconducted himself so grossly that he deserved dismissal within a short notice and without the rigors of a hearing. Therefore, it prayed for the claimant's suit to be dismissed with costs. Further it counterclaimed against the claimant the sum of Kshs.686,194.00 which it alleged was received from it by the claimant through fraudulent activities. It averred that the said fraud was discovered during a routine audit and the claimant was arrested and charged with criminal case, Nyeri CMCR No.938 of 2022 which is still pending trial. It also prayed for costs of the suit plus interest.

### **Evidence**

3. The claimant testified as CW1. He adopted his written statement dated 5<sup>th</sup> January, 2023 as his evidence in chief and produced five (5) documents as exhibits. In brief, his evidence was that on 28<sup>th</sup> November 2022, he was shocked to receive an email from the respondent's HR Manager, Ms Juliana Kadzo forwarding his summary dismissal letter dated 24<sup>th</sup> November 2022. The reason cited was that he has embezzled Company funds.
4. He contended that the dismissal was unfair because he was neither served with prior notice nor was he accorded any disciplinary hearing before the dismissal. He further contended that the dismissal was unjustified because the allegations against him were not substantiated and were only used as a smoke screen to unlawfully terminate his services.
5. He further stated that since his dismissal, the respondent has failed to pay his salary for October and November 2022, leave arrears, salary in lieu of notice and house allowance. Therefore, he prayed for the reliefs sought in his prayers including maximum compensation for unfair termination.
6. On cross-examination, he admitted that his role involved overseeing the company activities and procurement. He stated that the dismissal letter was served upon him after being arrested and told not to step back to the company premises. He denied having defrauded the employer Kshs.686,194.00. He admitted that he was charged with criminal case but clarified that it is still pending trial.
7. He confirmed that Lajmax Investment Limited, MGM Ventures Limited and Mukaro Electricals were suppliers to the respondent. He denied that he wrote email to Lajmax Investment to amend its invoice to read Kshs.25,600.00. He further denied that he paid Lajmax Investment the Kshs.25,600.00 from his funds. However on being shown a payment of Kshs.25,600.00, on 24<sup>th</sup> June, 2022 in his Mpesa statement, he stated that the said payment does not mean that it was towards the said invoice. He explained that he had some personal business with Lajmax.
8. He observed that the items in the requisition dated 16<sup>th</sup> June 2022 were not the same as the ones in the email dated 24<sup>th</sup> June, 2022. He admitted that Alex Maina Mwangi was paid Kshs.90,250.00 for the invoice dated 16<sup>th</sup> June, 2022 and contended that Mr.Alex Maina Mwangi was also doing business with the respondent.
9. As regards MGM Ventures Limited, he denied the allegations that he was inflating its invoices. On being shown an analytical review (page 3 of the respondent's Supplementary List of documents), he admitted that there was variance between the price paid for the items and the actual prices. However, he maintained that the company paid the prices quoted by the supplier and he never received any kickbacks from them.



10. On being shown cash movement between the respondent, MGM Ventures and himself (page 22 of the Respondents Bundle of documents, he admitted that from 31<sup>st</sup> January 2022 to 17<sup>th</sup> October 2022, there was a pattern showing that whenever the respondent paid MGM Ventures, the latter also paid some money to the claimant. However, he contended that the said payments were his salary for sourcing jobs to MGM ventures and the reason he was paid the same day the supplier was paid by the respondent was because that was the day he was sure of the payment. He denied that the said payments were kickbacks.
11. As regards Mukaro Electricals, he confirmed that it was the same case as MGM Ventures. He contended that when Mukaro failed to deliver the items ordered, he personally brought them on behalf of the supplier, who in turn refunded the money to him. He testified that he had business with Mukaro Investment even before joining the respondent.
12. On being shown clause 8(B) (iv) of his employment contract, he confirmed that it provides for summary termination of the contract on ground of misappropriation of the Company's funds or property. However, he denied that he misappropriated any Company property. He contended that by email dated 24<sup>th</sup> June, 2022 the supplier was asked to lower the invoice from Kshs.90,250,00 to Kshs.25,600.00. He further stated that Kshs.90,250.00 was never paid to him but a Mr.Alex Mwangi. He denied that he was doing business with Alex Mwangi.
13. Finally, he stated that Audit report and the cash movements analysis were strange to him and he only saw them in court. He stated that he was not the maker of the same and they lacked official stamp from the respondent. He therefore maintained his innocence.
14. The respondent called three witnesses. The HR Manager Ms.Juliana Kadzo testified as RW1. She adopted her written statement dated 1<sup>st</sup> February, 2023 as her evidence in chief and produce 5 documents as exhibits. In brief her evidence was that the claimant was the respondent's operations manager dealing with procurement and overseeing operations. His department was audited and a report was prepared which revealed misappropriation of Kshs.686,194.00 by him.
15. She testified further that she tried to call the claimant but he could not be reached and therefore she sent him the dismissal letter as per his contract of service. Thereafter the claimant called her using a different number.
16. On cross-examination, she confirmed that she served the dismissal letter via email. She admitted that the claimant was never served with show cause letter or accorded disciplinary hearing before the dismissal. She further admitted that the claimant was also not paid salary for October and November, 2022 totaling Kshs.120,000.00 per month.
17. She also admitted that the respondent has an Accountant who makes all the payments based on the information given by departments. She confirmed that the Company also has Mpesa which is operated by the Facility Manager Marigi. She denied knowledge whether the Director of the Company approves all the payments but she confirmed that the Director approves all payments in her department. Finally, she stated that the claimant was not making direct payment but only giving instructions for the payments to be made.
18. RW2 was Mr.Havold Murimi, an Auditor. He holds B.Com and Masters Degree in finance. He has 10 years' experience and has conducted forensic audit for 6 years in different companies. He further testified that he prepared a Forensic Report in this case dated 3<sup>rd</sup> November, 2022 and 8<sup>th</sup> March, 2023. He produced the same as exhibit D.6. The forensic audit revealed that the claimant had embezzled funds in respect of MGM Ventures, Mukaro Electricals and Lajmax Investment Limited.



19. He testified that the embezzlement took the nature of inflation of prices and receiving the incremental amount from the supplier. He interviewed the suppliers and obtained documents and did comparison. For MGM Venture the variance was Kshs.655,555.00 while for Mukaro Electricals the variance was Kshs.49,140.00.
20. For Lajmax Investment, he testified that the supplier made a quotation of Kshs.58,000.00 but the claimant wrote an email requesting it to reduce the price to Kshs.25,600.00 of which he paid personally. He further prepared an LPO for Kshs.90,250.00 which was paid to one Alex Mwangi. He testified that the quotation was for the same services. He called Alex Mwangi to clarify the nature of his business but he never responded. Therefore he concluded that Alex was colluding with the claimant to embezzle respondent's funds by inflating prices and receiving the difference from the suppliers.
21. He testified that the police called him and he showed the Audit Report to them after which the claimant was charged in court.
22. On cross-examination, he reiterated that he received the documents he used in his report, from the suppliers and the respondent. He admitted that the documents (quotations) do not bear official stamps for the suppliers. However, he stated that one of the documents, a purchase order from the respondent had a stamp although there was nothing to prove that it was prepared by the claimant.
23. He admitted that the payment of Kshs.90,250.00 was to Alex Mwangi and not the claimant. However, he contended that it is the claimant who gave the details of the person to be paid. He admitted that the claimant never benefited directly from the payments. He testified that he discovered the fraud during his routine quarterly review and alerted the respondent. Finally, he stated that the Mpesa statements produced was given to him by the supplier.
24. RW3 was No.111078 PC Raphael Wafula from DCI Central Regional Headquarters Nyeri. He testified that a report of theft by servant was made at Nyeri police station and he was assigned to handle the matter. The report was made by respondent's HR Manager and he visited the crime scene. He then singled out the claimant from other staff members because he was implicated as the prime suspect.
25. RW3 further testified that he took documents from the company including Audit Report, Mpesa Records and invoices among others which pointed to the claimant's culpability. He also interviewed the respondent's staff members and the suppliers who also gave him documents. He testified that all the suppliers told him that they were dealing with the claimant over the phone and that they never met him. He stated that they were being paid excess money for their supplies and then demanded a refund of the excess money less tax on the total sum paid.
26. RW3 further testified that Lajmax Investment made a quotation of Kshs.58,350.00 but the claimant wrote an email asking for the quotation to be reduced to Kshs.25,600.00 and exclude some items. The reduced amount was paid by the claimant personally via Mpesa but the respondent paid Kshs.90,250.00 to Alex for the invoice by Lajmax. The respondent believed that the money was paid to Lajmax but it went to Alex Mwangi who later transferred to the claimant via Mpesa.
27. RW1 stated that the claimant was charged with conspiracy to defraud but the suppliers were not charged. He stated that the suppliers were innocently dealing with the claimant thinking that he was the owner of the respondent. He produced copies of 11 documents which he received during the investigations.
28. On cross-examination, he stated that he received a complaint from the respondent's Director and he visited the company and arrested the claimant from the office. He detained the claimant for two days from Saturday. He confirmed that the criminal case against the claimant is still ongoing.



## Submissions

29. The claimant submitted that his dismissal from employment was unfair because the reason for the same was not valid, and fair procedure was not followed. He maintained that the alleged embezzlement was not true since the Kshs.90,250.00 was not paid to him but one Alex Maina Mwangi. Further that RW2 confirmed in his evidence that the claimant negotiated the quotation drawn from Kshs.58,500.00 to Kshs.25,600.00 and the money was sent directly to Lajmax Investment.
30. He reiterated that he was arrested before any investigation and had to be locked up for days before the offence was established. He was further dismissed from work without being served with show cause letter and he was not accorded any hearing. Further that, criminal case is still on going and therefore the reason for the dismissal was not substantiated. Consequently, he submitted that his dismissal was unfair within the meaning of section 45 of the *Employment Act*.
31. In view of the foregoing, he submitted the prayers sought by the suit are merited including compensatory damages under section 49 of the Act.
32. Finally, the claimant submitted that the respondent's counter claim for Kshs.696,194.00 is without merits because the allegations against him were never substantiated. Further, that the suppliers involved in the alleged fraud were not called to give evidence. Besides, the counter claim is in the nature of a civil debt which falls outside the jurisdiction of this court.
33. The respondent on the other hand submitted that the dismissal of the claimant was substantively and procedurally fair. It submitted that section 44(4) (g) of the *Employment Act* entitles an employer to dismiss his employee who commits or who is reasonably suspected to have committed a criminal offence against his employer or employer's property.
34. The respondent submitted that it has tendered overwhelming evidence demonstrating that the claimant may have engaged in criminal activity which were fundamentally inconsistent with the employment contract. It submitted that before dismissing the claimant, it reasonably believed that he had breached his trust and his employment was no longer tenable.
35. It contended that the Forensic Audit Report produced by RW2 detailed the extent of the criminal activities by the claimant. Further the matter was investigated by the DCI and the claimant was arrested and charged in court. Consequently, the respondent submitted that the dismissal of the claimant three weeks after being charged in court was substantially fair and within the provisions of Clause 8 of his contract of employment. For emphasis, the case of *Bamburi Cement Limited v William Kilonzo* (2016) eKLR was cited.
36. As regards procedural fairness, the respondent submitted that RW1 has given evidence that she tried to reach the claimant to inform him of the allegations but he was not reachable. Further he failed to respond to audit queries when the forensic audit was going on and finally he failed to exonerate himself during the investigation by the police.
37. In view of the foregoing matters, the respondent submitted that the dismissal was and the claimant is not entitled to the reliefs sought.
38. As regards the counterclaim, the respondent submitted that this court has jurisdiction to entertain it as it relates to employment between it and the claimant. For emphasis, it relied on *Carole Nyambura Thiga v Oxfam* (2013) eKLR where the court allowed a counter claim for medical bills as an advance loan.



39. The respondent urged the court to grant the counter claim herein contending that it was merited. It submitted that there is evidence showing that Kshs.769,345.00 was embezzled by the claimant through kickbacks from suppliers. It maintained that RW2 gave overwhelming evidence that was corroborated by RW3. The evidence included Mpesa and bank statements. Further the claimant has admitted in his evidence that he received money from the suppliers which he described as salary. Consequently, it prayed for the counter claim to be allowed being Kshs.650,970.00 made up of Kshs.67,750.00 from Mukaro Electricals, Kshs.61,500.00( Kshs.90,250 – Kshs.25,600) in respect of Lajmax Investments and Kshs.521,720.00 from MGM Ventures.

### **Determination**

40. Having considered the pleadings, evidence and submissions presented to the court, the following issues comment themselves for determination;
- a. Whether the reason for the termination was valid and fair.
  - b. Whether fair procedure was followed.
  - c. Whether the claimant merits the reliefs sought.
  - d. Whether the respondent's counter claim should be allowed.

### **Reason for termination**

41. Section 45 of the *Employment Act* 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.”
42. In this case the summary dismissal letter dated 24<sup>th</sup> November, 2022 cited the reason for the dismissal as:
- “Between 1<sup>st</sup> January, 2022 to 29<sup>th</sup> October 2022, you embezzled Kshs.686,194.00 by inflating the prices of purchased items for the Company.”
43. I am alert to the fact that the alleged offence is pending trial before the lower court and therefore I will try as much as possible to eschew making conclusions which may prejudice the criminal trial. Having said that, I must also observe that the standard of proof in civil trial is much lower than in criminal trial where proof is beyond reasonable doubt.
44. In this case there is evidence that the claimant was the operations and procurement manager for the respondent. There is further evidence that he received money from MGM Ventures and Mukaro Electricals who were supplying items to the respondent. Most of the payments by the suppliers to the



- claimant were made the same day they received payments from the respondent. RW2 did a forensic audit of all the said payment using Mpesa and bank transactions. The police also investigated the claimant and charged him in court. Based on the foregoing information, the respondent believed that the claimant had defrauded it of its money and dismissed him summarily.
45. During the hearing, the claimant admitted that he received the money from the suppliers but contended that it was salary for sourcing work for them. Further some of the money was refund for items brought on behalf of the suppliers when they failed to deliver. He was dismissed before he could defend himself.
46. Having considered the evidence and the submissions by the two parties, I find that the weight of the evidence tilts in favour of the respondent. It has shown that the claimant's conduct fundamentally breached his contract of employment and made the employer to lose trust in him. On the basis of the forensic audit, the employer believed that the claimant had committed a crime against it. Consequently, I must hold that the employer has proved on a balance of probability that the reason for dismissing the claimant was valid and fair. Any reasonable employer in the same circumstances would have dismissed the employee.
47. Section 44 (3) of the [Employment Act](#) provides that;
- “...an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.”
48. Subsection (4) (g) further justifies summary dismissal where;
- “An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.”
49. I have already made a finding of fact that the respondent has shown by evidence that it had sufficient grounds upon which to believe that the claimant had committed a crime against it. The said believe in my view was reasonable considering the information obtained from the Forensic Audit and the police investigations.

### **Procedure followed**

50. The respondent admitted both in its pleadings and evidence under oath that the dismissal was done without serving the claimant with a show cause letter or according him any hearing. RW1 alleged that she called the claimant without success. However, that evidence by RW1 contradicts the averment in paragraph 7 of the Response to the claim which states that:
- “In the alternative, and without prejudice to 6 above, the respondent further avers that the nature of the claimant's offence made it permissible to terminate his employment summarily with short notice and without the rigors of a hearing.”
51. I take great exception to the above pleading. It points at an unfair procedure. Section 41 of the [Employment Act](#) provides that: -
- “(1) 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.”

52. It follows that, the procedure followed to dismiss the claimant for misconduct was not in accordance with the mandatory procedure provided by section 41 of the Act. Consequently, I find and hold that the dismissal of the claimant was not in accordance with a fair procedure and it was therefore unfair within the meaning of section 45 of the *Employment Act*.

### **Reliefs to the claimant**

53. In view of the foregoing finding that the dismissal was unfair, the claimant is entitled to damages under section 49 (1) of the Act. He is entitled to salary in lieu of notice and compensation for unfair termination. His contract provided for one month notice and therefore I award him Kshs.120,000.00. I further award him two months' salary being Kshs.240,000.00 as compensation for the unfair dismissal considering that he worked for only one year and that he contributed to his dismissal through misconduct.
54. The claimant is also awarded salary for October and November, 2022 since the respondent has admitted that it never paid him the same. His dismissal was on 24<sup>th</sup> November, 2022 but he received the notice on 28<sup>th</sup> November 2022 and therefore I award him salary for only 28 days in that month equaling to Kshs.112,000.00.
55. The claim for house allowance is declined because clause 4 (a) of the letter of appointment provided that his monthly salary of Kshs.120,000.00 was gross salary.
56. The claim for leave is granted at the rate of 1.75 per month from 12<sup>th</sup> October, 2021 to 28<sup>th</sup> November, 2022 is equivalent of 13 months. Hence the accrued leave days were 22.75 translating to Kshs.91,000.00.

### **Counterclaim**

57. The respondent has given evidence to prove that the claimant received Kshs.686,194.00 from the suppliers, namely MGM Ventures and Mukaro Electricals. The respondent believes that the said payment were proceeds of fraud involving a conspiracy between the claimant and the suppliers. The claimant has admitted that he received the money from the suppliers but denies that it was proceeds of crime but genuine income for work done and also refunds.
58. The above rival contentions are the matters pending trial before lower court where the claimant stands charged with conspiracy to defraud and stealing by servant of Kshs.686,194.00. The said sum is the same being sought by the counter claim. The suppliers were not called as witnesses and have not been sued to account for the money paid as price for their supplies. They have also not been charged for fraud in the alleged suspicious dealings. In the circumstances I find that there is no sufficient evidence to hold the claimant liable for fraud or embezzlement at this juncture. Simply put there is no proof on a balance of probability that the alleged inflated pricing was illegal or fraudulent. These are matters am



opting to leave to the criminal court to determine. Once established that a crime was committed the respondent will have every right to file a claim under the law of tort.

### **Conclusion**

59. I have found that although the respondent has proved a valid reason to justify the dismissal of the claimant from employment, the dismissal was rendered unfair by the failure to follow a fair procedure. I have further found that the claimant is entitled to reliefs sought and assessed the appropriate quantum. I have also found the respondent's counter claim not proved by evidence to the required standard. Consequently, I dismiss the counterclaim and enter judgment for the claimant in the following terms: -

- a. Notice.....Kshs.120,000.00
- b. Compensation .....Kshs.240,000.00
- c. Salary for October & Nov,2022.....Kshs.232,000.00
- d. Leave.....Kshs.91,000.00  
Kshs.683,000.00

60. The award is subject to statutory deductions but in addition to costs and interest at court rates from the date hereof.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 22ND DAY OF SEPTEMBER, 2023.**

**ONESMUS N MAKAU**

**JUDGE**

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment 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.

**ONESMUS N. MAKAU**

**JUDGE**

