



**Ngeli v Agility Logistics Limited (Cause 1064 of 2018)
[2023] KEELRC 2409 (KLR) (3 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2409 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1064 OF 2018
DKN MARETE, J
OCTOBER 3, 2023**

BETWEEN

ALFONCE MUSYOKA NGELI CLAIMANT

AND

AGILITY LOGISTICS LIMITED RESPONDENT

JUDGMENT

1. This matter was originated by way of a memorandum of claim dated June 18, 2018. The issue in dispute is herein cited as;

Refusal, failure and neglect by the respondents to pay the claimants terminal dues.
2. The respondent in a memorandum of Response dated 13th August, 2018 denies the claim and prays that the same be dismissed with costs.
3. The claimant's case is that on 1st August, 2008 the respondent offered him employment as a truck driver at a basic salary of Ksh.36,587.00 per month.
4. The claimant's further case is that expended diligent and honest service to the respondent throughout his stint of service and was ready willing to do this throughout his entire service.
5. The claimants other case and complaints is that starting on the month of June, 2015, he was unjustifiably deducted Kshs.4,000 from his salary. Again, his salary reviewed downwards from Kshs.36,587.00 to ksh.33,406 with effect from October, 2017.
6. He served overtime of eight hours daily and also public holidays and weekends on no extra pay or compensation.
7. His other case is that he ultimately tendered his resignation sometimes on 30th November, 2017 after a stint of nine years and this was accepted by the respondent.



8. He claims as follows;-

- a. Leave 63 days (3 months) (Kshs.36,587/= x 3) Kshs.109,761/=
 - b. Overtime (Kshs.1,220/= x 23 days per month x 100 mnts) Kshs.2,806,000/=
 - c. Welfare (Kshs 250 x 28 months) Kshs.7,000/=
 - d. Unlawful Deductions (Kshs.4,000 x 31 months w.e.f June 2015)Kshs.124,000/=
 - e. Unlawful deductions (Kshs. 3,181 x 2 months w.e.f Oct 2017) Kshs.6,362/=
- Kshs.3,053,123/=

He prays as follows;

- i. The principal sum of Kshs. 3,053,123/= as more particularized and set out in paragraph 10 hereinabove.
- ii. Interest at court rate on (i) above
- iii. Costs of this suit
- iv. Any other relief that the honourable court may deem fit and just to grant.

9. The respondent denies the claim.

10. In response, she admits that the claimant was a bona fide employee of the respondent at all material times up to his resignation.

11. The respondent further case is that the claimant's salary entry point was at the level of Ksh.24,750.00 gross and this was reviewed upwards to Ksh.36,587.00 which he earned at the time of his resignation.

12. The respondent's other case is that the claimant's service was not blemish free. He was severally surcharged for occasioning loss to third party property while on duty. He was also surcharged for fuel loss all of which he admitted to and never questioned the deductions so effected.

13. Again, the respondent avers that the claimant's resignation was occasioned by indiscipline and misconduct wherein he lost Kshs. 29,000.00 and USD 3,100.00 belonging to the respondent while on duty in March, 2015.

14. The respondent case further comes out as follows;

9. That as result thereof, the claimant was given the opportunity of following up the case with the police as he claimed that the money got lost but he never bothered to make a follow up or give a report of the extent of the matter. The respondent could not make a follow up as it was not the complainant and it is the claimant who lost the stated cash.
10. As a result of the foregoing, the respondent was forced to deduct from the claimant's salary an amount of Kshs. 4,000.00 until recovery of the lost cash in full since April 2015. (See Appendix 4).
11. The respondent avers that the claimant accepted to have his salary deducted to recover te money rather than make a follow up with the complaint filed with the police, which was a subtle admission of his complacency in the loss or an indication of that he actually never lost the cash but misappropriated it.



12. The claimant continued serving the respondent throughout 2015 to November 2017 when he tendered his resignation on account of advanced age. (See Appendix 5).
13. That for the duration of service since the monthly deductions were commenced, the claimant never raised a complaint or protest against them. Part of this is due to the fact they he opted to have the deductions effected. Secondly, he was guilty of the loss.
The respondent's further case is a counter claim in the following terms;
 28. The respondent avers that the claimant ought to have given the requisite 1 month Notice or payment in lieu thereof at his resignation which he never did and claims for Kshs.38,416.00.
 29. The respondent further avers that the claimant had not completed paying back the moneys due to it and had a balance of Kshs.32,865.00.
 30. The respondent counter-claims against the claimant for the stated sum of Kshs.71,281.00 from the claimant.
15. She prays thus;
 - a. The claimant's case be dismissed with costs and judgment be entered in favour of the respondents with costs in terms of the counter-claim and/or set-off.
 - b. Any relief this Honourable Court may deem fit to grant.
16. The issues for determination therefore are;-
 1. Whether there was a termination of the employment of the claimant by the respondent.
 2. Whether the termination, if at all was wrongful, and unlawful.
 3. Whether the claimant is entitled to the relief sought.
 4. Who bears the costs of this suit.
17. The first issue for determination is whether there was a termination of the employment of the claimant by the respondent. The claimant in his written submissions dated 12th May 2023, does not address this issue.
18. The respondent in her written submission dated 18th May 2023, reiterate his case that the claimant's stint of service was issue ridden and that he resigned after occasioning massive loss to the respondent in the cause of his employment.
19. Her further case and submission is as follows;
 5. The respondent entered into an agreement with the claimant for the lost amount, converted to Kenya shillings at the then prevailing CBK rate to be deducted from his salary till recovery in full. The respondent then started to deduct from the claimant's salary an amount of Kshs.4,000.00 from April 2015. The claimant resigned in November 2017 which is about 2 years since the deductions wee first effected. The same is exhibited in Appendix 4.
 6. The claimant accepted to have his salary deducted to recover the money rather than make a follow-up with the complaint filed with the police which was an actual indication that he actually never lost the cash but misappropriated it.
 7. For about 2 years since the commencement of the deductions, the claimant never protested indicating his acquiescence and agreement with the status.



8. The claimant continued serving the respondent throughout 2015 to November 2017 when he rendered his resignation on account of advanced age. The same is exhibited in Appendix 5. He never raised any protest against the deductions. It is noteworthy that the parties had entered into similar agreements for other monies lost, misappropriated, or for damages caused to third-party property under his care before.
9. Since the monthly deductions were commenced, the claimant never raised a complaint nor protest against the deductions.
10. At the time of claimant's resignation, he owed the respondent an outstanding amount of Kshs.146,163.00.
11. The claimant did not give notice of resignation as required by his contract of service. He was invited to clear from the respondent so that his terminal dues would be processed and possibly paid. The finance manager indicated in his clearance form that he owed the respondent Kshs.146,163.00 and the claimant refused to complete his clearance thereafter.
12. The respondent computed his terminal dues and as a gesture of good will, include service pay although the respondent was not required to pay service under the Employment Act 2007 as it was contributing to NSSF for the claimant. The same also included accrued leave of 16 days. The same is exhibited in 6a-d.
20. On a test of preponderance of evidence, the respondent's case and submissions override the claimant's case. There is overwhelming evidence that the claimant resigned from employment and was not terminated whatsoever. Having been a rubble-rouser employee, he opted out to ease his exit from employment.
21. He cannot therefore be heard to claim unlawful termination of employment. Not in the least. And this answers the first issue of determination.
22. Having established a case of resignation from employment on the volition of the claimant, all the other issues for determination fall by the way side.
23. The Counter Claim as set out also succeeds on the merit of the evidence in support thereof.
24. I am there inclined to dismiss the claim and allow the counter claim with orders that each part bears the costs of the same.
25. The amount of counter claim due to respondent is therefore Ksh.71,281.00, all payable to herself.

DELIVERED, DATED AND SIGNED THIS 3RD DAY OF OCTOBER 2023.

D. K. NJAGI MARETE

JUDGE

