



Shikuku v Childcare Worldwide Kenya and East Africa (Employment and Labour Relations Cause E019 of 2020) [2023] KEELRC 3373 (KLR) (19 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3373 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E019 OF 2020**

**HS WASILWA, J
DECEMBER 19, 2023**

BETWEEN

MICHAEL WAFULA SHIKUKU CLAIMANT

AND

CHILDCARE WORLDWIDE KENYA AND EAST AFRICA RESPONDENT

JUDGMENT

Introduction

1. The claimant instituted this suit by a memorandum of claim dated 18th November, 2020, which was Amended on 23rd June, 2022, alleging to have been unfairly terminated and seeking for compensation for the unfair termination

Claimant's case

2. The claimant states that he was employed by the Respondent on the 1st January, 2014 by the letter of employment dated 29th November, 2013 to the position of an Administrative assistant earning a monthly consolidated salary of Kshs 50,000 made of basic salary of Kshs 42,500 and a house allowance of Kshs. 7500.
3. That he was confirmed by the letter dated 1st April, 2014 and his consolidated salary raised to Kshs 55,000. In November, 2014, the claimant salary was further raised to Kshs 92,000.
4. In July, 2015 the claimant was promoted to be a director and his salary was increased to Kshs 115,000. In November, 2015, he was added USD 1000 per month. From May, 2016 to September, 2020 was paid Kshs. 123,050 together with 1500 USD per month.
5. He stated that he worked faithfully for the Respondent until 24th August, 2020 when the Respondent's CEO suspended him via email on allegation of misappropriation of funds. That the email indicated



further that the Respondent's President, Mr. Bill and the CEO was to carry out investigation on the said allegations.

6. He stated that despite receiving the email that there was misappropriation of funds accounts, fraud and ministry embezzlement, the email did not state how the claimant was involved in the said misappropriations. Nevertheless, that he responded to the email immediately, requesting for evidence of how he was involved.
7. The claimant took issue with the fact that the suspension was indefinite and stated that the suspension was illegal. Within the same month, the claimant was invited for a virtual discussions meeting scheduled for 27th August, 2020, however, on the day of the video conference, he received an email at 12.05 pm, cancelling the said meeting.
8. He stated that he wrote back to the Respondent demanding for precise answers to the issues raised in the email of 25th August, 2020, however the said demands were never met till his dismissal on 15th and 16th September, 2020.
9. The claimant stated that prior to the termination, he was sent an email on 7th and 8th September, 2020, asking him to write a letter authorizing one Ruth to sign bank letter as such, Ruth took over all authorization role from September, 2020.
10. He stated that the process of his termination from suspension was communicated via email and no disciplinary process was ever carried out as such the termination was unfair as per the provisions of the Employment Act.
11. The claimant stated that throughout his employment, he never went for leave, never took off days and was always at work during public holidays.
12. The claimant urged this Court to allow the claim and grant the following reliefs;
 - a. That the Honourable Court be pleased to find and establish that the termination and/ or dismissal of the claimant from the employment of the Respondent was totally wrongful, unprocedural, unjustified hence unlawful and unfair.
 - b. That after establishing that the termination and or dismissal was wrongful, then Honourable Court be pleased to issue the following orders;
 1. 1-month salary in lieu of notice of Kshs 286,130.
 2. 1 ½ months' pay for August and 16 days worked in September, 2020 of Kshs 435,798.80.
 3. Off duties for 3 years of Kshs 4,483,155.90.
 4. Public Holidays for 3 years of Kshs 1,307,499.50.
 5. Annual leave 3 years of Kshs 1,034,470.
 6. The Respondent to pay the claimant compensation for unfair termination of the Employment based on the provisions of section 49(1)(c) of the Employment Act of 286,130 X 12 months adding up to Kshs 3,435,560.
 7. The Respondent to issue the claimant with a certificate of service in the meaning of section 51 of the Employment Act.



8. Interest on prayers 1,2,3,4,5 & 6 from the time of delivery of Judgment until payment in full.
9. That the Respondent to pay the costs and interest of the cause from the date of filing of the cause.
13. During hearing, the claimant testified as CW-1 and adopted his witness statement dated 18.11.2020 and list of documents dated 15.11.2020 filed with memorandum of claim as his evidence.
14. The witness testified that he was unfairly terminated as proper disciplinary procedures were not followed and that he was not paid anything on termination.
15. He stated that the allegations against him are malicious and was aimed at terminating his employment.
16. Upon cross examination by Nduta Advocate, the witness testified that he was the Respondent's East African Director, in-charge of running of the organization but that he was not in-charge of payments. He however admitted that he was the one in charge of signing everything.
17. He testified that the organization had 5 evangelists and who were all terminated in 2021. He stated that Joseph was terminated for allegedly sending a video to staff, but that he did not see the video. He admitted that they hired him back for the reason that he was from the Maasai community.
18. He refused to comment on the payment of Joseph and Otuma and avers that he was not handling payments. He also denied the allegations of embezzlement of funds for purchase of children uniforms and told this court that all documentations in relation to that purchase are at the Respondent's.
19. The claimant testified that during Covid-19 pandemic Teachers were retained on Saturday and those who taught were paid, However, that he does not have the payment vouchers.
20. He stated that Nelson Njoroge was in-charge of college, school fees which paid Kshs. 70,000/= per year and the extra amount was meant for shopping and uniform.
21. On the fuelling of his private cars, the claimant told this Court that he was using his private car because the Organization had only one vehicle. He stated that all the vehicles listed were used in operations. He admitted to buying tyres for Kshs. 76,000.
22. He testified that he was not accorded fair hearing. He stated that he was first informed that issues were raised against him, then placed on suspension on the basis of carrying out investigations of these allegations.
23. On the alleged admission to allegations raised in the email dated 13/9/2019, the witness testified that, when he received that email, he instructed Jonathan to respond. However, that the said Jonathan did not tell the truth.
24. On the terminal dues, the claimant admitted to receiving 50% of his pension as per his contract and the balance is to be received when he turns 55 years.
25. He testified that during his employment, he was given a loan of 20,000 USD and signed a Promissory note on 20/4/2018. That the loan was deducted from his salary and also that the loan was secured against his land. That at the time of termination in September 2020, he had paid 9000 USD leaving a balance of 11,000 USD, which he avers that he still has intentions of paying.
26. He admitted to buying new tyres for his car. Further that he used Kshs. 32,800 to pay for students shopping and uniform. However, that he was not aware of payment of 34,000 paid to an accountant's child, though the signature shows he was the one that approved the payment.



27. On the Kshs. 485,000 deposited to his account, he testified that, the money was his own, received from business proceeds. Additionally, that Kshs 200,000 was deposited to his account by one Mwaura and not from the organization. He objected to the claim of 64,464USD.
28. Upon re-examination, the claimant testified that the 5 evangelists were employed up to June 2020 and Teresia Njeri was one in-charge of the evangelists but that she never reported to him that there were fewer evangelists.
29. The claimant testified that the amount received was not strictly for school fees but also for other school related expenses such as attachment, where necessary, catering, uniform among others.
30. He told this Court that he was suspended by August, 2020 as such by 17th September 2020 he could not access his email, therefore the allegations by Jonathan Bii that he authorized some payment is not true.
31. He confirmed that he took a loan and signed the promissory note but that he is not liable to repay the same, because he was unfairly terminated.
32. The claimant denied the allegations that he diverted money meant to buy students sweaters for his personal uses. Also that he did not divert money to fuel his car because, the organization had authorized the fuelling of his car.

Respondent's case

33. The Respondent entered appearance on the 8th February, 2021 and filed a statement of defence on the 3rd March, 2021. By leave granted to the Respondent, it filed an Amended statement of Response and Counterclaim on the 30th May, 2022.
34. In the defence, the Respondent stated that it is a Non- Governmental Organization pursuant to the provisions of the NGO Act and has been in operation since 1984 and always in compliance with all the provisions of the Act.
35. It described the claimant on the hand a church minister, also referred to Reverend Michael Wafula shikuku. That the claimant was employed by the Respondent on 1st January, 2014 as Administrative assistant at a starting salary of Kshs 50,000.
36. That the claimant was promoted to several positions and at the time of his termination, he was the director of the Respondent. It is averred that the claimant was terminated for gross misconduct of mishandling/ misappropriation of money which was entrusted on him.
37. The Respondent stated that the circumstances that led to the dismissal of the claimant is that on the 11th August, 2020, the Respondent's president, Bill Nienhuis, received a call from one of the employees, Samuel Mwaura, that the Respondent's money is being misappropriated by the claimant in cahoots with Jonathan Ndeto.
38. That the said money was embezzled by manipulating the book and creating fictitious receipts. In doing so, they facilitated the payroll to include ghost workers and workers who had left the organization. Example is Simon Kishoiyan, who left three years ago and Jane Mwangi who left two years ago among others.
39. Furthermore, that the claimant together with Mr. Ndeto proceeded to pay employees who were temporary employees as full time employees and pocketed the extra money.
40. It is also stated that the claimant in furtherance of his misconduct, sought to rehire an employee by the name John Sadera, who had been terminated for sexual inappropriateness, including distributing



- pornography and placed him in close proximity to sponsored children which placed the children at risk. To cover up the irregular hiring, the claimant used the name Otuma Sasera on the payroll.
41. The Respondent stated that between the year 2018 and 2020, the claimant cause approximately Kshs 867, 180, from the organization to be used to pay his children's school fees, money that had been budgeted for the needy children.
 42. It is also stated that during the pandemic, the organization introduced the use of Mpesa, due to the restriction of movement and during that period, it was reported that the teachers did not received their Saturday stipend of 700 which had been released from the organization. As a result, the Respondent lost Kshs 786,700 in the hands of the Claimant, as the said money was never account for.
 43. It is further stated that the Respondent created a program during the Covid-19 pandemic, called 'Hope-Pak deliveries', which plan was to feed 1,539 children and a sum of Kshs 3,017,292 was set aside for the program, it was however discovered that the claimant fed only 600 children and the balance of the budgeted money was deposited in the claimant's account.
 44. It is averred that the claimant, without any authority, used the organizations money to fuel his motor vehicles registration numbers; KCV 594Z, KCT 650U, KBY 866Y, KCQ 925V and KCK 400Z . Cumulatively a total sum of Kshs 279,455 was used to fuel the claimant's cars.
 45. Having received all these allegations, the president of the Respondent, wrote an email to the claimant and Jonathan Ndeto, placing them on suspension, pending investigations.
 46. That investigations took a lot of time because the directors of the organization were residing in the USA. Nonetheless, that after investigations it was discovered further that the claimant was making purchases from different distributors in Nakuru and inflate the figures then submit a higher figure than what was spent.
 47. The Respondent also noted in another occasion, when the claimant was directed to purchase two school uniforms and two school shoes for the sponsored students, that the claimant instead bought the students each a pair of uniform and one pair of shoes and upon inquiring why the said purchase was different, the claimant refused to give an explanation.
 48. It is stated that the Respondent has recovered several bank slips where the claimant deposited money to his bank, for instance Kshs. 485,000, which was meant for purchase of food for the needy during the Covid-19 pandemic and another Kshs 200,000, a clear indication of misappropriation of funds.
 49. The Respondent avers that all these acts were admitted by Jonathan Ndeto, who stated that they engaged in various embezzlement of funds and he did so under the directive of his supervisor who was the claimant herein.
 50. It is stated that having received evidence of the embezzled funds, the Respondent invited the Claimant for disciplinary hearing via an email on the 3rd June, 2020. That during hearing, it was further discovered that the claimant's allegations that there were 5 evangelist who were paid by the organization was not true as was affirmed by Jonathan Ndeto, who stated that there were only evangelist / coordinators that were being paid were 2.
 51. The Respondent stated that having confirmed all the allegations raised against the claimant, they summarily dismissed him by the letter of 15th September, 2020, pursuant to section 44 (4)(e) & (g) of the *Employment Act* for gross misconduct.



52. Based on the foregoing, the Respondent submitted that the termination of the claimant was justified in the circumstances. Further that the Respondent is in the process of filing a criminal case against the Claimant.
53. The Respondent stated further that during employment, on 12th April, 2018, the Respondent herein extended a loan facility of US\$ 20,000 with interest, to the claimant, who was required to service the loan from 1st June, 2018-1st May, 2023 at interest rate of 4% per annum but that the Respondent has not paid the said loan running in arrears of US\$ 11,492.16.
54. In response to the reliefs sought, the Respondent stated that the claimant was afforded fair hearing, where he denied all the allegations. Also that the law was followed before the said termination.
55. On the payment of August, 2020 salary, it was submitted that the claimant's accounts had been frozen pending investigations of the alleged embezzlement of funds and due to that, the Respondent had requested for another bank account to deposit, his August salary but the claimant did not provide an alternative account.
56. On the pension claim, the Respondent stated that the Claimant upon termination received 50% of his pension due to him, and is only entitled to access the balance upon reaching the age of 60 years as is the law with pension payment.
57. The Respondent maintained that the claimant has enjoyed all his leave days and is therefore not entitled to any compensation on the same. In any case, leave days as per the *Employment Act* is 15 days per year, thus the prayer by the Claimant is misguided and ill advised.
58. On compensation for "off-duties", the Respondent stated that it does not understand what the Claimant mean by "off duties" as it is neither contained in the *Employment Act* of 2007, or the agreement between the parties. Nonetheless, that the agreement between the Employer and the Employee is that he was to work for 6 days a week, and was entitled to 1 day off, for worship and being Reverend, he was to administer to his church.
59. On compensation for working during Public Holidays, the Respondent stated that the claim is false because Public Holidays are observed all over the Country under *the Constitution* and during such days, all citizens are required to rest. Further, that at no point did the respondent ask the claimant to work for it during public holiday. Furthermore, that no evidence has been tendered to proof the same.
60. The Respondent also denied the claim for overtime and stated that at no point did the parties agreed on working overtime.
61. On the claim for compensation, the Respondent reiterates that the Claimant was lawfully terminated by way of summary Dismissal for Gross misconduct in compliance with the law under Section 45 (2) (i) of the *Employment Act*.
62. On the Counter-Claim, the Respondent stated that it is counterclaiming for USD 64,469.86 being the aggregate amount of money misappropriated by the claimant and a further USD 11,162.14 being a loan balance advanced to him during his employment.
63. With regard to the loan advanced, the Respondent stated that the claimant signed a promissory note on 20th April, 2018 to pay the loan amount but has since defaulted in repaying the loan upon termination, leaving a balance of USD. 11,162.14 which continue to accrue interest.
64. On the embezzled funds, the Respondent stated that out of the total amount budgeted for Covid relief food, Kshs 485,000 was banked into the claimant Bank of Baroda Account. That the claimant oversaw



- the misuse of Kshs. 320,509 to fuel personal car contrary to the organizations policy. Further that a total of Kshs 780,000 meant to purchase children sweaters were diverted to the claimant's personal use.
65. It was stated also that Kshs 202,800 meant for staff at life centres were diverted by the claimant in collusion with other staff to be used for his personal use. Further that the claimant presided over the misappropriation of Kshs. 34,153 which was used to pay personal motor vehicle insurance for vehicle Registration number KAW, 491P which did not belong to the Company and Kshs. 56,000 to repair his car at Auto tune garage contrary to the organization policy.
66. The Respondent stated that under the watch of the claimant, a sum of Kshs. 815,131 allegedly paid as staff advances, was unaccounted for. Also that the claimant used Kshs 203,000 to pay school fees for his children, Kshs 19500 to pay school fees for one of the accountants, Kshs 295,000 to pay school fees at St. Paul University for one of the Accountants, Kshs 34,101 to fuel another accountant car and Kshs 190,000 to pay hostel fees for another accountant's child, all these contrary to the Respondent's policy.
67. The Respondent stated that investigations have revealed that the claimant was the mastermind behind all the embezzled funds. On that basis, the Counterclaim sought for the claimant's claim to be dismissed with costs and the judgement be entered as per the counterclaim as follows:-
- a. Judgement be entered for the claimant in the counterclaim against the Respondent in the counterclaim for the sum of USD 11,162.14 being the unpaid amount that was advanced to him together with interest thereon at the prevailing commercial interest rates from the date of filing this suit until full payment (Currently at 13% per annum).
 - b. Judgement be entered for the claimant in the counterclaim against the Respondent in the counterclaim for the sum of USD 64,469.86 being the aggregate amount of funds embezzled and utilized by the Respondent in the counterclaim together with interest therein at prevailing commercial rates from the date of filing the suit until payment in full (Currently 13% per annum).
 - c. Costs of the counterclaim and interest thereon at such Rate and such period of time as this Honourable Court may deem fit to grant.
 - d. Such other or further reliefs as this Honourable Court may deem appropriate in the circumstances.
68. During hearing, the Respondent called 4 witnesses to testify in support of its case. The First witness was Nelson Njoroge, who testified as RW-1 and stated that he works for respondent as in-charge of Life Centres as Life Centre Coordinator. Prior to that, he was the Field Officer in-charge of colleges, tertiary institutions, whose work was to ensure school fees was paid to students.
69. He adopted his witness statement of 14/10/22 and stated that they were paying Kshs. 70,000 to each student divided into 2 or 3 terms as per the student. The money was to cater for school fees, exam fees and attachment fees and any other need. He stated that for each child, Kshs. 75,600 was sent from the donors with a balance of Kshs. 5,600/= per child but did not know where the difference went to.
70. Upon cross examination by Kipruto Advocate, RW-1 testified that he always received 70,000/= per child and that he had no budget for his department because all matters were dealt with the by the accountant.
71. On re-examination, he testified that Sponsorship department is one that handled these finance. his work was to get cash for needy students from accounts and did not at any point inquire the amount of money that was sent from the USA. He maintained that the Kshs. 5,600/= was excess amount.



72. The 2nd Respondent's witness was Teresia Njeri who testified as RW-2. Ms. Teresa testified that she works at Child Care World Wide as a Project Manager. Prior to that she was in-charge of the Life Centres e.g. Local Churches. She adopted her witness statement dated 14/10/2022 and elaborated on the work of the Respondent that the Respondent worked with local churches and retain teachers and assistant teachers, who use to receive Kshs 700/= as a stipend to teach every Saturday. That this money was paid to the teachers at the end of the month. However, that during the COVID-19 Pandemic, the organization stopped the teachings as from March, 2020.
73. She testified that the money was disbursed in two instalments; Kshs. 381,500 was sent on 24/6/2020 and Kshs. 202,800 was sent on 29/5/2020. She told this Court that she has a table showing money received from teachers and requested but could not tell who requested for the said money, though he suspected the claimant was the one that requested the money.
74. Upon cross examination by Kipruto Advocate, the witness testified that She personally made payments to teachers through M-Pesa, but did not have evidence of how many teachers were paid prior to the lock down.
75. The Third witness was Joyce Gathau, who testified as RW-3. She told this Court that she is a Life Care Centre Co-ordinator at the Centre. Initially she was in-charge of all high school children at the centre. She adopted her witness statement dated 14/10/2022 and testified that the organization was sponsoring about 200 Children in school and that she used to received Kshs. 70,000 for each of the said students and did not know where the extra money went to.
76. Upon cross examination by Kipruto Advocate, the witness testified she does not have evidence in court of how much was disbursed to her or was paid out. Also that she does not have any evidence in Court that there was any balance or that they were paid out to the claimant and that she does not know where the balance went.
77. The last witness was Eric Ngetich who testified as RW-4. He adopted his witness statement dated 14th October, 2022 and stated he is the Life Centre Manager. Prior to that he was the Field Officer and in-charge of issuance of school fees. He told this Court that while he was in charge of school fees, he used to prepare the list of beneficiaries and give to suppliers to source the uniforms. Thereafter, he could go to the director, who was the claimant, to get approval to send to suppliers. He stated further that each student got a full set uniform but that there were instances where a child would not get a full set due to shortfalls. He admitted that there were no refunds for incomplete uniform and that he could not tell where the money went.
78. Upon Cross-examination by Kipruto Advocate, the witness testified that the claimant, being the director, approved the list of uniform budget. That most of the students got a complete set, with a few getting incomplete uniform. He admitted that he did not have any evidence on the number of students who did not get the complete set or evidence of the claimant taking the money meant for uniform.

Claimant's Submissions.

79. It was submitted for the claimant from the onset, that it is not disputed that the claimant was employed by the Respondent but that the termination of the Claimant's services was unfair. He argued that the claimant's termination was unfair because the disciplinary proceedings that culminated to the termination were commenced by the suspension communicated by email on the 24th August, 2020, with invitation for a video conference disciplinary hearing on 27th August, 2020, that was cancelled on the D-day at 12.05 afternoon, thus no hearing was conducted. Therefore, that termination was done



without following proper procedure, hence was unfair. To support this, they relied on the case of David Gichana Omuya V Mombasa Maize Millers Limited [2014] eklr where the Court held that;

“Section 41 of the [Employment Act](#) requires an employer to notify and explain to an employee in a language the employee understands of the reasons it is considering for terminating the services of the employee. The employer is also under an obligation to hear and consider any representations which the employee may make before taking the decision to terminate an employee. During the process the employee is entitled to have a fellow employee present and if a union member, a shop floor union representative. The requirements of section 41 of the Act have long pedigree in administrative/public law and are usually referred to as the rule of natural justice. In employment law and practice, it is called procedural fairness.”

80. The Applicant submitted that the Respondent sought to defend itself by alleging that the claimant was summarily dismissed under Section 44 of the [Employment Act](#). However, that even if the claimant was terminated for gross misconduct under Section 44(2) of the [Employment Act](#), he ought to have been given notice of dismissal and the dismissal satisfy the conditions set out under Section 41 of the [Employment Act](#) as was stated in the case of Nicholas Otinyu Muruka V Equity Bank Limited[2013] eklr where the Court held that;-

“disputes of summary dismissal will always be subjected to the test of section 41 of the Act, whenever employees dispute and claim that the circumstances of the case did not give them reasons of gross misconduct.”

81. On Substantive justification, the Claimant submitted that the Respondent did not prove any of the reasons of the alleged gross misconduct because, Firstly, that no evidence has been tabled before this Court to ascertain that investigations were carried out on the alleged embezzled funds. Secondly, that the alleged witnesses that informed the Respondent of the claimant’s misconduct, were not called as witnesses to support their assertions, as such the allegations remain as such without prove. To support this case the Applicant relied on the case of Peter Mutinda Ngei V Rentokil Initial (K) Limited [2022] eklr.

82. To further buttress his arguments, the claimant relied on the case of David Gichana Omuya V Mombasa Maize Millers(Supra) that cited Mombasa Cause No. 159 of 2013, Reuben Mwamboga v Bahnhof Bar & Restaurant, where the court held that;

“Section 45(2) of the [Employment Act](#) expects an employer to prove that the reasons for termination are valid and fair reasons. The Respondent’s pleading/Response did not attempt to justify or prove the validity or fairness of the reasons for dismissing the Claimant. In fact the type of Response filed by the Respondent cannot and does not meet the threshold expected of a pleading in the Industrial Court. The [Employment Act](#) has explicitly set out the legal burden an employer should discharge. In this regard the content and form of a Response must adhere to what the Act expects an employer to discharge. Bare denials and putting Claimants’ to strict proof will not just do.”

83. On the reliefs sought, the claimant submitted that he was not given notice of termination or paid in lieu of such notice, hence, he is entitled to notice pay.
84. On the unpaid salary for the month of August, and 16 days worked in September, 2020, the claimant submitted that, the Respondent admitted to not paying the claimant on allegations that his accounts had been frozen, therefore that the said money is due and owing, which the Respondent should be compelled to remit.



85. On leave pay, it was submitted that the claimant has indicated in his pleadings that he did not take his annual leave for the last three years before the termination, a fact which the Respondent did not oppose, therefore he is entitled to leave pay for three years.
86. On off days' claim, the claimant submitted that he was not granted any off by the Respondent for the three years preceding his termination and since an employee is entitled to one off day per week, he was entitled to 48 days in a year and 144 days in the three years, which should be paid for.
87. On public Holidays, the claimant maintained that he worked throughout the year including all the 12 Public Holiday a fact which the Respondent did not adduce evidence to dispute. Thus he is entitled to 36 Public Holidays pay for the three years worked.
88. On compensation for the unfair, termination, the claimant submitted that the termination was not justified as established above, therefore that he should be paid maximum compensation of 12 months.
89. On the counterclaim, the claimant submitted that the Respondent listed several instances of allegations that the claimant misappropriated the organizations funds but failed to tender evidence in support of the same, He argued that the Respondent called 4 witness but none produced the documents filed in support of their case and none linked the claimant to the alleged embezzlement of funds. He added that since the Respondent is the custodian of all records, they ought to have tabled all necessary evidence before this Court in support of their claim, failure to which the Counter-Claim should be dismissed.
90. The Applicant submitted further that the claimant was not in charge of finance, because there was an Accountant in charge, in any event that each department had a person in charge, who was responsible for budgeting and requisitions. Furthermore, that no evidence has been tendered to support the allegations that the Kshs 485,000 deposited to the claimant's account was the Respondent's money. To support his case, the claimant relied on the case of Peter Mutinda Ngei V Rentokil Initial (K) Limited [2022] eKLR, where the Court held that; -

“There was also no evidence tendered by the respondent to prove that the said Mr. Githiri was a competitor to its business, thus justifying its suspicions that his interaction with the claimant was work-related and not merely social. In other words, there was no evidence to discount the claimant's assertion that his interaction with the said Mr. Githiri was merely social. At the very least, the respondent ought to have presented statements from the persons who had knowledge of the claimant's connection with the said Mr. Githiri. None of the persons testified before court. In any event, the respondent averred that its disciplinary action against the claimant was based on reports and information it received. Who gave these reports and why were they not called to testify? The Mpesa statements were not sufficient to prove dishonesty and theft on the part of the claimant. There was need for more evidence either through documentary or oral means, so as to substantiate the charges against the claimant. The dismissal letter revealed a lot of information the respondent had in regards to the allegations against the claimant but did not adduce evidence to back up the same. As aforesaid, the burden of proof fell squarely on the respondent, hence it had the onus to adduce all the evidence it had against the claimant so as to justify that indeed, he had committed the acts he was accused of, thus the dismissal. This it failed to do. In order to commence disciplinary action against the claimant, there must have been some substantive evidence to implicate him.”

91. With regard to the fuelling of the Claimant's cars, Motor vehicle repairs, insurance and maintenance and school fees for the claimant's children, the claimant argued that all these items were budgeted for and factored in as benefits the organization gave to the claimant as the director of its Kenya and East



Africa Organization. Therefore, that the allegations of embezzlement of funds does not stand, more so, because, there is no link between the funds spent, payments made and organizations Funds.

92. On the other claim for balance of children uniform, staff life centres, staff advances, school fees for one of the Accountants, School fees at St Pauls University, fuelling of Accountants vehicles and Hotel fees, it was argued that all these items have not be supported by any evidence. Further that the purported Audit report mentioned at paragraph 18 of the Counterclaim Claim is not annexed to claim or listed in the documents. Therefore the claim under this heads must fail. To support this, he relied on the case of Fredrick Kibwana Elabonga V Build Africa Kenya [2016] eklr where the Court held that;-

“...On the Counter-Claim, the Claimant informed Court that he used to take imprest from the office for running various activities. This was why he encashed certain cheques in his name. There is no evidence that Claimant actually used any office money for his own use and therefore the Counter-claim must fail.”

93. On the loan claim of USD11,000, the Claimant submitted that the Respondent has failed to produce the promissory note that would have confirmed the alleged loan taken. Having failed to produce such note and loan statement, the claim must fail.
94. In conclusion, the claimant urged this Court to allow his claim and dismiss the Counterclaim but award him costs for both claim and counterclaim.

Respondent’s Submissions.

95. The Respondent submitted on two issues; whether the Claimant is entitled to the reliefs sought in the Memorandum of Claim and whether the Respondent is entitled to reliefs sought in the Counterclaim.
96. On the first issue, it was submitted that the termination of the Claimant was both substantively and procedurally fair. He argued that the Claimant was summarily dismissed for gross misconduct, for committing several acts of mishandling the Respondent’s money that he was entrusted to handle. This, he argued has been proved by providing documents such as; receipts, cheques, email correspondence and witness testimony.
97. The Respondent submitted that some of the actions that resulted in the claimant’s termination include; facilitating payment to non-existent staff as seen in the copy of the payroll provided and marked as appendix 2, rehiring staff who had been terminated from employment, forging receipts of purchases with a view to defraud the Respondent, diverting the Respondent’s money to his personal account, receiving money for disbursement to evangelists/coordinators and misappropriating the same as can be seen in the attached email of 23rd August 2020, where the Claimant’s accomplice admits to and even apologizes for this misappropriation.
98. It was submitted that it was incumbent upon the Claimant, in his position as the Respondent’s Country Director to ensure the proper utilization of funds.
99. Based on these misconducts, the Respondent argued that, it was forced to summarily terminate the claimant in line with the provisions of section 44(4) of *Employment Act* 2007. To justify the dismissal, the Respondent relied on the case of Amos Kitavi Kivite v Kenya Revenue Authority [2020] eKLR, where the Court found that misappropriation of funds amounts to gross misconduct in the following words:

“Having carefully considered the evidence and the submissions presented by the parties, I am satisfied that the respondent had reasonable grounds for suspecting or concluding that the



claimant had committed a criminal offence against her and to her financial detriment. The said offence amounted to gross misconduct within the meaning of section 44(4)(g) of the [Employment Act](#).”

100. The Respondent further submitted that the termination meets the standards of a reasonable and justifiable termination as stated in the case of Joseph Mwaniki Nganga v United Millers Limited [2022] eKLR where it was held as follows:

“The question for this court then become whether these are valid and fair reasons for an employer to terminate an employee. Section 43(2) of the [Employment Act](#) defines reasons for termination to be matters the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the employee. In the case of British Leyland UK Ltd v Swift (1981) ILR.L.R91 Lord Denning described the test of reasonableness in the following words: The correct test is; was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him,”

101. The Respondent further cited the case of Thomas Sila Nzivo vs Bamburi Cement Limited [2014] eKLR where Rika J, while discussing the import of section 44 (4) (g) observed that the employer was not required to have conclusive proof of the claimant’s involvement and was only expected to have reasonable and sufficient grounds. In that case, 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 4-4 [4] [gz] 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].”

102. Similarly, the Respondent invited this Court to consider the uncontroverted testimony by the Respondent’s witnesses that stated that the Claimant was in charge of monies disbursed by the Respondent for the benefit of needy children, who instead of utilizing the said money as directed diverted it for his personal use creating a deficit that was never explained. Further that only the Claimant was in charge and would have known how the balance was used but he failed to account for the same. It follows, therefore that the Claimant misused the monies to the detriment of the Respondent. Furthermore, that the the Claimant wilfully neglected to perform the work of ensuring the disbursed money was properly utilized and thus the loss was orchestrated by him, therefore that the termination of the Claimant’s employment under Section 44(4) (c) of [Employment Act](#) 2007 was justified.



103. On whether due procedure was followed, the Respondent submitted that the Claimant was accorded a chance to be heard before termination, but he chose to frustrate the process. He elaborated that by the email dated 24th August 2020 the Respondent gave the Claimant a chance to respond to inquiries regarding his embezzlement of funds. The Claimant never bothered to respond to this email. He therefore cannot claim to have been denied a hearing.
104. On the reliefs sought, the Respondent submitted on the notice pay that such salary is not payable in instances of summary dismissal as provided for under Section 44 of the *Employment Act*.
105. With regard to claim for leave, off days and public holidays pay, the Respondent submitted that ‘he who alleges must prove.’ Accordingly, that the Claimant has not tendered evidence to support the claims under these heads, when he is the one tasked with the burden of proof. In this, they relied on the case of *Ngunda v Ready Consultancy Limited (Civil Appeal 129 of 2019) [2022] KECA 577(KLR)* where the Judges of the Court of Appeal held as follows:

“On the issue of payment for 33 public holidays, 152 Sundays, and 518-4 hours of overtime, the learned judge was not satisfied that a firm basis was established, and dismissed the claim. An analysis of the record does not disclose that these claims were properly established. No evidentiary proof was provided that the appellant worked on those days. There were no details or particulars given of the public holidays or Sundays worked, Did he work on all public holidays and Sundays, or just some of them? Which days in particular? As regards the alleged overtime, there was no breakdown of the 5184 hours into the days to which they related. As it were, it would seem that the appellant was engaged in overtime work continuously for the entire 5184 hours, which is neither feasible nor humanly possible, as correctly submitted by the respondent, he who alleges must prove. Since the appellant did not provide any proof that he worked on public holidays or the Sundays, or indeed overtime, contrary to his assertions, the burden could not shift to the respondent to provide further evidence in this regard. As rightly observed by the learned judge, the appellant did not clock overtime, and there was no record to show that he attended the workplace on public holidays or on Sundays. We would further add that the appellant was a General Manager. Being a part of management, he was well placed to pursue payment for public holidays, Sundays and overtime worked, or at the very least furnish the court with further and better particulars in support of his claim. As a consequence, the learned judge cannot be faulted for finding that the claim was unsubstantiated and lacking in foundation or basis. As such, the claim was not merited and is dismissed.”

106. Similarly, that in the case of *Rogoli Ole Manadieg v General Cargo Services Limited [2016] eKLR* the Court said;

“It is true the employer is the custodian of employment records. The employee in claiming overtime however, is not deemed to establish the claim for overtime by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he worked on public holidays or even rest days....he did not justify the global figure claimed in overtime showing specifically how it was arrived at...”

107. On the basis of the foregoing, the Respondent submitted that the Claimant is not entitled to the reliefs sought and urged this Court to dismiss the Amended Memorandum of Claim with costs to the Respondent.



108. On the second issue, whether the Respondent is entitled to the reliefs sought in the Counterclaim, the Respondent submitted that it has in its bundle of documents produced a promissory note dated 12th April, 2018 showing that the Claimant owed the Respondent while he was in employment. He argued that the promissory note indicates that at the time the Claimant was dismissed from employment in September 2020, he owed the Respondent USD 11,162.10 and given that the Claimant has since been dismissed from employment, it follows that the money, together with the accrued interest, is due. To support this the Respondent relied on the decision by Monica Mbaru, J in the case of Kenya Tea Development Agency Limited v Lee Kimathi (2015] Eklr, where the Court found a dismissed employee liable to pay money owed to the employer after leaving employment, holding thus:

“I find that the Respondent is owing the Claimant the car loan balance of Kshs. 499,994.00 and should repay the balance due and accruing from the date of termination, 19th December 2006 with all due interests to date and until full repayment, such interest shall be computed at the rate of 7% per year. The non-payment of such a facility when it became due on the basis that the Respondent was not in gainful employment is not tenable.”

109. This position was reiterated by the Court in the case of George Otieno Rambo v Nation Media Group Limited [2021] eKLR where it was held that:

“The Claimant admitted that at the time of termination of the employment, he had not fully liquidated the car loan. The Respondent’s claim to this extent is admitted. The reasons given as to why the Claimant thinks he should not pay this balance is unconvincing and make little sense. To accede to the line of thinking, would be tantamount to take it that there is a right to employment for life. Consequently, I award the Respondent Kshs. 1,040,625.00 being the balance of the car loan.”

110. The Respondent submitted further that it claims the funds amounting to USD 64,469.86 that were misused and embezzled by the Claimant as elaborated above.

111. In conclusion, the Respondent, urged this Court to allow the Respondent's Counterclaim with costs.

112. I have considered the evidence and submissions of the parties herein.

113. The issues for court’s determination are as follows;

1. Whether the claimant’s termination was fair and justified.
2. Whether the counter claim by respondent is proved.
3. Whether the claimant is entitled to remedies sought.

Issue No. 1

114. On this issue, the claimant has submitted that he was unfairly terminated because he was never accorded an opportunity to be heard.

115. The claimant explained that he was served with a NTSC through Email on 24th August, 2020 to explain how he misappropriated the respondent’s funds.

116. He responded to this Email immediately requesting for evidence of his guilt and how he was involved in the misappropriation of funds within the same month, he was invited for a virtual discussion meeting scheduled for 27th August 2020.



117. However, on the same day at 12.05pm he received an Email cancelling the meeting.
118. On 15th & 16th September, 2020, he was dismissed. The respondents have not denied this chronology of events but have averred that they had valid reasons to terminate the services of the claimant due to misappropriation of the respondent's funds. He denied handling any payments.
119. The respondents submitted that the respondent was summarily dismissed for gross misconduct under Section 44 (4) of the [Employment Act](#).
120. It is however true that before this dismissal, the claimant was not subjected to any disciplinary process. Section 41 of the [Employment Act](#) 2007 is clear on the process for termination of employment.
121. A fair disciplinary process must be accorded to any employee however the employer feels that the guilt is obvious.
122. It is only also through a disciplinary process that the validity of the reasons for the termination can be established.
123. By failing to accord the claimant a hearing, the respondent condemned the claimant unheard. This contravenes 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”.

124. It is therefore my finding that the claimant was dismissed unfairly and unjustly.

Issue No.2

125. The respondent filed a counter claim against the claimant demanding payment of USD 64,469.86 which they aver are the moneys misappropriated by the claimant.
126. It is still unfortunate that the counter claim still arises from the transactions said to have been paid to the claimant which the claimant denied and which were also not tested in any disciplinary process as per issue No. 1 above.
127. It therefore follows that the counter claim is not proved too and cannot stand.
128. It is dismissed accordingly.



Issue No.3 Remedies

129. On remedies, having found as above, I find for the claimant and award him as follows;

1. 1 month salary in lieu of notice = 286,130/=
2. 1 ½ months pay for August and 16 days of September 2020 – Kshs.435,798/=
3. Payment for 1 year leave 2020 = 286,130/=
4. 6 months compensation for unfair termination = 6 x 286,130 = 1,716,780/=
5. TOTAL = 2,724,838/=
6. Less statutory deductions
7. The respondent to pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED IN OPEN COURT THIS 19TH DAY OF DECEMBER, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Arori for Respondent – present

Kipruto for Claimant – present

Court Assistant – Fred

