



**Amukhale v Alpharama Limited (Cause 516 of 2015)
[2022] KEELRC 32 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 32 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 516 OF 2015**

J RIKA, J

MAY 27, 2022

BETWEEN

GODFRED MIMA ADINGA AMUKHALE CLAIMANT

AND

ALPHARAMA LIMITED RESPONDENT

JUDGMENT

1. The Claimant [Godfred, not Godfrey], filed his Statement of Claim, on 1st April 2015.
2. He states, he was employed by the Respondent as a Field Branch Manager on or about 1st July 2005. His last monthly salary was Kshs. 16,834.
3. His contract was terminated by the Respondent on or around 17th August 2012. He states, there was no notice. There was no letter to show cause. There was no valid reason given to the Claimant. The Claimant prays for Judgment against the Respondent for: -
 - a. Declaration that termination was unfair and unlawful.
 - b. 1-month salary in lieu of notice at Kshs. 16,834.
 - c. Annual leave for 2012 at Kshs. 16,834.
 - d. Gratuity at 15 days' salary for 7 complete years of service at Kshs. 202,008.
Total...Kshs. 294,595.
 - e. Certificate of Service to issue.
 - f. Costs.
 - g. Interest.



4. The Respondent filed its Statement of Response on 2nd March 2016. Its position is that the Claimant worked in various positions, including being a Supervisor and Senior Selector. He last worked as a Senior Selector at Mombasa Branch. He absconded on 15th August 2012. He took off with Kshs. 91,646 belonging to the Respondent. The Respondent was only able to recover Kshs. 17,966 from the Claimant's salary for the month of August 2012. He was removed from the payroll in the month of August 2012, to prevent the Respondent from incurring additional losses. The Claimant is not entitled to the prayers sought.
5. The Respondent claims that there was a shortage in its accounts, of Kshs. 91,646. It was only able to recover Kshs. 17,966. A difference of Kshs. 73,680 remained unpaid. The Respondent tabulated the Claimant's terminal dues before removing him from the payroll. These included salary for the Period 23rd to 28th August 2012 at Kshs. 3,561; leave from 1st July 2011 to 28th August 2012 at Kshs. 21,603; salary in lieu of notice at Kshs. 18,517; and gratuity over a period of 7 years- total Kshs. 108,491. Less statutory deductions, the amount payable was computed at Kshs. 81,553.
6. The Respondent counterclaims the sum of Kshs. 73,680, which offset against the sum due to the Claimant, leaves a sum of Kshs. 7,873.
7. The Respondent on the whole prays the Court to dismiss the Claim with costs, and allow its counterclaim as follows: -
 - a. It is declared that the Claimant wrongfully and illegally absconded.
 - b. 1-month salary in lieu of notice.
 - c. Declaration that the sum due to the Claimant is Kshs. 7,873.
 - d. The Claimant be compelled to clear with the Respondent and to reconcile accounts.
 - e. General damages.
 - f. Costs.
 - g. Interest.
8. The Counterclaim appears to the Court irregularly pleaded. The Respondent includes the title to the Claim in the Counterclaim, reversing the roles of the Parties, naming the Respondent as the Claimant, and the Claimant as the Respondent. It is not necessary to rename the Parties in a Counterclaim, or to plead the Counterclaim as though it is a fresh Claim. It would have sufficed for the Respondent to continue with its pleading of the Counterclaim, without restating the title to the Claim, and reversing the roles of the Parties. It muddles the Pleadings where for instance, the Advocates for the Respondent refer to the themselves as Advocates for the Claimant, at the end of their Statement of Response and Counterclaim.
9. The Claimant filed a Reply to the Statement of Response and Response to the Counterclaim, on 6th February 2016. It would have muddled the Pleadings further, if the Claimant adopted the approach taken by the Respondent, and referred to himself as the Respondent, in his Reply to the Statement of Response and Counterclaim. He states that he was not issued any letter to show cause with regard to the alleged loss of money occasioned to the Respondent. He did not abscond. Several officers, agents and/or servants of the Respondent were present, when he was asked to hand over job cards, uniforms and keys belonging to the Respondent. He did not abscond, or occasion the Respondent any loss. He was advised on 17th August 2012, that the Respondent no longer needed his services.



10. Parties agreed to have the dispute considered and determined under Rule 21 of this Court's [Procedure] Rules, 2016. They confirmed filing and exchange of Submissions at the last mention, on 15th March 2022. The Submissions replicate the facts as narrated in the Parties' Pleadings.
11. The issues are whether the Claimant's contract was terminated unfairly and unlawfully or at all, by the Respondent; whether he absconded; whether he was responsible for monetary loss to the Respondent; whether he is entitled to the remedies sought; and whether the counterclaim is merited.

The Court Finds

12. It is common evidence that the Claimant was employed by the Respondent.
13. Sections 43, 45 and 47[5] of the *Employment Act* require the Employer to establish and justify the reason for termination. The Respondent states that the Claimant absconded, while the Claimant states that he was told, on 17th August 2012, that his services were no longer required. He was told to hand over properties of the Respondent which were in his possession.
14. The Court notes that the Respondent computed, as per the Counterclaim, the Claimant's salary for days worked between 23rd August 2012 and 28th August 2012; annual leave from 1st July 2011 to 28th August 2012; and even offered salary in lieu of notice to the Respondent.
15. It would be illogical to offer salary up to 28th August 2012, and notice pay, to an Employee who is said to have absconded on 15th August 2012. The Respondent contradicts its position. It offers the Claimant benefits up to 28th August 2012, while claiming that the Claimant absconded on 15th August 2012. Strikingly, the Respondent offers notice pay to the Claimant, in its computation, while demanding for notice in its counterclaim. It cannot be that notice is payable to both Parties. There is only one Party who defaulted.
16. In the circumstances, and on the balance of probability, it is the finding of the Court that termination was instigated by the Respondent. It was ostensibly on the allegation that the Claimant was responsible for loss of Kshs. 91,644 to the Respondent, out of which Kshs. 17,966 was recovered. The Respondent asked the Claimant to leave, on either 15th August 2012 or 17th August 2012, and to surrender all its property in his custody.
17. The Respondent did not take the Claimant through a disciplinary process. There was no letter to show cause. There were no charges presented before the Claimant. He was not asked to defend the charge of causing monetary loss to the Respondent, or that of abscondment. He was not called to a disciplinary hearing.
18. The Court does not find any merit in the Counterclaim. There is no evidence in support of the alleged loss sustained by the Respondent. It is not pleaded in detail how the loss occurred, and how it was attributable to the Claimant. There are no statements of account, or other financial records, exhibited by the Respondent, to show that it sustained financial loss, consequent upon the actions or omissions of the Claimant. It is not the responsibility of the Court to order any Party to avail itself to the other, for purposes of reconciling accounts. The Respondent ought to have reconciled its accounts and presented those accounts before the Court, establishing loss sustained, and linking the Claimant to such loss. It is also not for the Court to issue an order for an Employee to go and clear with his Employer. What does clearance in the circumstances entail? What was the Claimant required to do, and declined to do, so as to justify the position that he failed to clear?
19. The Counterclaim is declined.



20. The Court is satisfied that the Claimant's contract was terminated by the Respondent, and terminated unfairly and unlawfully. Termination did not meet the minimum standards of fairness under Sections 41, 43, and 45 of the Employment Act. The Respondent did not justify its decision, under Section 47[5] of the Employment Act.
21. Salary for the period 23rd to 28th August 2012 at Kshs. 3,561 as computed by the Respondent is granted to the Claimant.
22. Annual leave pay is granted to the Claimant at Kshs. 21,603, as computed by the Respondent.
23. Salary in lieu of notice is granted at Kshs. 18,517 as computed by the Respondent.
24. Service gratuity over a period of 7 years, is granted at Kshs. 64,810, as computed by the Respondent.
25. The Claimant worked for 7 years. His record was unblemished. He did not play any role as concluded by the Court above, in circumstances leading to his dismissal. He was paid nothing on termination. He is allowed equivalent of 7 months' salary in compensation for unfair termination, based on the monthly rate pleaded by the Respondent as the monthly salary of Kshs. 18,517, totalled at Kshs. 129,619.
26. Certificate of Service to issue.
27. Costs to the Claimant.
28. Interest allowed at court rates, from the date of Judgment till payment is made in full.

In Sum, It Is Ordered:

- a. The Counterclaim is declined.
- b. It is declared that the Claimant's contract was terminated unfairly and unlawfully by the Respondent.
- c. The Respondent shall pay to the Claimant: unpaid salary for August 2012 at Kshs. 3,561; leave at Kshs. 21,603; notice at Kshs. 18,517; gratuity at Kshs. 64,810; and compensation at Kshs. 129,619 – total Kshs. 238,110.
- d. Certificate of Service to issue.
- e. Costs to the Claimant.
- f. Interest allowed at court rates, from the date of Judgment, till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 27TH DAY OF MAY 2022.

JAMES RIKA
JUDGE

