



REPUBLIC OF KENYA



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**M'Ikiyu v Michimikuru Tea Company Limited (Cause E024 of 2021)
[2022] KEELRC 13583 (KLR) (19 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13583 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
CAUSE E024 OF 2021
ON MAKAU, J
DECEMBER 19, 2022**

BETWEEN

JULIUS GITONGA M'IKIYU CLAIMANT

AND

MICHIMIKURU TEA COMPANY LIMITED RESPONDENT

JUDGMENT

1. The claimant brought this suit on July 15, 2021 seeking the following reliefs;
 - a. A refund of Kshs 185,068.75
 - b. Costs of the suit and interest at court rates.
2. The respondent filed defence on September 7, 2021 denying liability and thereafter filed amended defence and counter claim on September 29, 2021. In the counter claim he alleged that between July 1, 2017 and December 31, 2017 failed to account for 8,817.59 kgs of green leaf collected by him in the course of employment and thereby caused the company a loss of Kshs 573,326.00. It further averred that the claimant failed to explain the loss and he was surcharged the said Kshs 573,326.00. However as at the time of his retirement in the year 2020, only Kshs 185,068.75 which it sought to recover by the counter claim plus costs.
3. The claimant filed defence to the counter claim denying liability to pay the Kshs 388,257.25 and prayed for the counter claim to be dismissed with costs.
4. The parties dispensed with oral testimonies and adopted their written witness statements plus documents filed as their evidence. They then filed written submissions to dispose of the suit.



Evidence

5. The claimant stated that he was formerly employed by the respondent as a logistics assistant. From January 2018, the respondent started to deduct money from his salary to recover Kshs 573,326.00 loss allegedly caused by his negligence between July 1, 2017 and December 31, 2017. A total of Kshs 185,068.75 was deducted from his salary as at the time he retired from service. He denied that he caused the said loss to the company and prayed for the reliefs sought in his pleadings.
6. The respondent's production manager stated that the claimant's duty was to weigh/buy and collect green leaf from buying centers within the company's operation area. Between July 1, 2017 and 31st December 2017, he was unable to account for 8,817.59 kgs of green leaf he had collected from farmers of various tea buying centers. The value for the missing Green Tea was Kshs 576,326.00.
7. The witness further stated that the claimant was given an opportunity to explain the said loss he failed to tender any credible reason and on January 30, 2018 he was notified that he was surcharged the sum of Kshs 573,326.00. He admitted that a sum of Kshs 185,068.75 was recovered through salary deductions from 2018 until his retirement in the year 2020. He further stated that the claimant never protested against the deduction until his retirement. Therefore the witness prayed for the counter claim of Kshs 388,257.25 be allowed as prayed.

Submissions

8. The claimant submitted that the respondent has admitted that it deducted the said Kshs 185,068.75 from his salary to recover the alleged loss caused by him between July 1, 2017 and December 31, 2017. He never maintained that the said deduction was unlawful because the alleged loss has not been proved by evidence.
9. The claimant further submitted that the record titled cumulative individual losses/gains produced by the respondent is suspect and no substantiate the alleged loss attributable to him or gains made by his colleagues. Like Lydia Mwonjiru, Benard Kaberia Tarichia and John Mutuma Ndege. He also submitted that the author of the document is not indicated and that the document is not genuine.
10. Finally the claimant submitted that the surcharge *vide* the letter dated January 30, 2018 did not give the basis for charging Kshs 65 per kilogramme of green tea. He further contended that he was not heard in his defence before the deductions were made and maintained that even in this suit the alleged loss has not been proved on a balance of probability. Consequently, he prayed for the Kshs 185,068.75 deducted from his salary to be refunded plus costs and interest at court rates.
11. The respondent filed its submissions on September 27, 2022 whereby he reiterated the facts of the case as set out in the pleadings and witness statements. It was reiterated that the claimant was served with notice of the intended surcharge and he never raised any objection.
12. The respondent further submitted that it has led evidence to show how the claimant's negligence caused the said loss to the company. Therefore it submitted that the claimant's case is an afterthought, vexatious and meant to waste this Honourable court's time.

Analysis and Determination

13. There is no dispute that the claimant was employed by the respondent until 2020 when he retired. There is also no dispute that a total of Kshs 185,068.75 was deducted from his salary from January 2018 until the time of his retirement. The said money was surcharge towards recovery of Kshs 573,326.00



loss alleged caused to the company by the claimant's negligence while in the course of his employment between July 1, 2017 and December 31, 2017.

14. The issues for determination are;
 - a. Whether the deduction of the said Kshs 185,068.75 was unlawful.
 - b. Whether the said sum should be refunded to the claimant as prayed.
 - c. Whether the respondent's counter claim for Kshs 388,257.25 should be allowed as prayed.

Unlawful deduction

15. As already observed, there is no dispute that the Kshs 185,068.75 was deducted from the claimant's salary from January 2018 to the year 2020 when he retired from the respondent's company. The claimant contends that the said deduction was unlawful and unjustified. It is the claimant's case that he was not afforded any opportunity to defend himself before the surcharge was imposed. Finally he contends that the document produced to prove the loss attributable to him falls short of proving the same on a balance of probability.
16. The respondent maintains that the claimant was given a chance to defend himself in writing and he admitted the loss, that the claimant was further notified of the intended surcharge by the letter dated January 30, 2018 and that the claimant did not object to the deductions during his tenure of service. According to the respondent, the suit is only an afterthought coming after retirement.
17. I have carefully considered the facts of the suit, evidence and submissions by both parties. Section 19 of the [Employment Act](#) provides that;
 - (1) Notwithstanding section 17 (1), an employer may deduct from the wages of his employee-
 - (d) an amount equal to the amount of any shortage of money arising through the negligence or dishonesty of the employee whose contract of service providers specifically or his being entrusted with the receipt, custody and payment of money.”
18. The respondent has produced claimant's letter of appointment signed on January 19, 2016. The letter shows that he was tasked with maintenance of accurate records among others. Specific tasks given to him included;

“Inspection, weighing, recording and collecting good quality green leaf delivered by farmers,”
19. It follows from the above provisions of the claimant's contract that the claimant was duty bound to maintain accurate record of the green leaf collected from the farmers and in breach of the duty, the employer was entitled to penalize him by salary deduction.
20. In this case however, the respondent has not produced as exhibits the records of the green leaf prepared by the claimant to establish whether he failed in his duty to prepare accurate records, or that the records he prepared revealed variation between the actual weight delivered by the farmers and the actual weight received by the company.
21. The respondent only field a summary titled individual gains/losses whose author is unknown. Such evidence does not prove that the claimant caused the alleged loss to the respondent. The said summary is neither prepared by the claimant or an auditor. There is nothing to show where the information was derived from. Consequently, the court finds that the respondent has not shown the basis upon which the surcharge was imposed and proceeds to hold that the deductions of the claimant's salary to recover the said loss was unlawful and not covered by section 19 (1) (d) of the [Employment Act](#).



Refund of Kshs 185,068.75

22. Having found that the deduction of money from the claimant's salary on the basis of surcharge from the loss of green leaf was unlawful, I must hold that the sum deducted should be refunded to him. The respondent admitted that it deducted Kshs 185,068.75 between 2018 and 2020 when the claimant retired. Consequently, I grant the prayer for the refund of the said sum plus interest as prayed.

Counter claim of Kshs 388,257.25

23. The court has already made a finding that the surcharge of the Kshs 573,326.00 has not been justified and therefore section 19 (1) (d) of the *Employment Act* was not properly invoked. The claim does not hold any water going by the evidence adduced. Consequently, the counter claim is without merits and it must fall on its face.

Conclusion

24. For the reasons and findings made herein above, I enter judgment for the claimant as follows;
- a. Refund of Kshs 185,068.75
 - b. Costs and interest at court rate from the date of filing the suit.
 - c. The respondent's counter claim is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF DECEMBER, 2022.

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 April 15, 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

