



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.338 OF 2013

ANTHONY MWAI MUNYI.....CLAIMANT

VERSUS

COMPUTER REVOLUTION AFRICA LTD.....RESPONDENT

JUDGEMENT

1. The claimant filed the Memorandum of Claim on 13th March, 2013 and the defence and counter-claim filed on 25th April, 2013. The claimant replied to the defence and counter-claim on 10th May, 2013. On 25th August, 2015 the respondent filed a supplementary response. At the close of the hearing, both parties filed written submissions.

Claim

2. The claimant was employed by the respondent as a Country Manager for the respondent's country office in Ethiopia though the contract of employment was executed in Kenya. The claimant thus remained answerable to the Kenya office.

3. By letter of appointment dated 1st March, 2011 the respondent confirmed the claimant in his employment. The payable monthly salary was agreed at kshs.191,989.00. an annexure to the contract dated 28th June, 2011 indicated the gross salary at kshs.277,480.00 with the net salary being Kshs.200,000.00 per month.

4. On 25th June, 2012 the respondent wrote to the claimant an appraisal for 2011 noting that due to his good performance he would be entitled to take 12 working days holiday in addition to his annual leave and a return air ticket each quarter to home country from Ethiopia.

5. The claimant was not given a job description during the tenure of his employment with the respondent.

6. On 14th September, 2012 the claimant gave notice of resignation which was signed by the human resource and finance manager. As the claimant was serving his 3 months' notice, on 20th September, 2012 the respondent wrote to the claimant purporting to terminate his employment for alleged gross misconduct and breach of confidentiality of his employment contract. The claimant was only allowed to read the letter by the respondent as no copy was left with him.

7. On 29th October, 2012 the claimant wrote to the respondent asking for his dues and on 2nd November,

2012 the respondent replied noting that the claimant had been summarily dismissed.

8. On 29th October, 2012 the claimant also received a letter from the respondent's advocate alleging that his employment had been terminated on 20th September, 2012 on the grounds of gross misconduct and for breach of confidentiality an non-performance and was required to refund the sum of Kshs.400,000.00 in respect to a loan for importing a car and a refund of 47,461 Ethiopian Birr or the equivalent of Kshs.237,305.00 being monies the claimant had received from the Ethiopian office and had allegedly not accounted for.

9. The claimant responded to the respondent's demands on 30th November, 2012 claiming \$17,000 or the equivalent Kshs.1,479,000.00 but the respondent failed to reply.

10. The claim is for the sum of \$17,000 or the Kshs.1,479,000.00 equivalent made up as follows;

(i) 3 months' salary from 14th September, 2012 to 14th December, 2013 for notice pay \$9,000;

(ii) Commissions for 17 months worked \$7,000;

(iii) Penalties for delays of salary and commissions \$1,000.

11. The claim is also that during the 17 months the claimant worked for the respondent, the respondent effect statutory deductions of PAYE, NHIF, and NSSF but did not furnish the claimant with remittance confirmations. The claimant is demanding for all the details, records and payments so as to clear his tax liabilities with Kenya Revenue Authority.

12. In evidence, the claimant testified in support of his claim the he is rained in Computer Science and has served in various capacities with different organisations. In January, 2011 he got a call from Samuel kinuthia, a director of the respondent and got an offer to work for the respondent in Ethiopia as the Country Manager. He negotiated the terms and was to start the job on 1st March, 2011 and so both travelled to Ethiopia together. A day before travel, he signed his contract of employment in Kenya.

13. On 4th March, 2011 the claimant reported o work at his office in Addis Ababa. The office was in shambles. The manager before him had misappropriated funds of 20 million and the business was doing badly. The claimant started by hiring staff for the office as he had been advised not to associate with old employees who were alleged to be colluding with the former manager. The claimant also had the duty to build back customer relations.

14. The claimant performed well and he was appreciated by the respondent. his appraisal was good. His terms of employment were enhanced as a result and he go 4 tickets to fly home and back to see his family. He also go a car loan approved for Kshs.400,000.00.

15. The claimant decided to resign from his employment with the respondent. he issued a three (3) months' notice staring on 14th September, 2012.

16. Upon resignation, the claimant's work environment changed. There was change in chief executive officer (CEO). The Uganda Country manager took over CEO position and when he visited the Ethiopia office, the claimant did not agree and or like his strategy and way of work and thus decided to give a resignation notice.

17. The claimant also testified that in defence the respondent have made a counter-claim. The claimant sent an email to a friend Cedric at Microsoft and was accused of blowing the whistle over an incident in Ethiopia on a matter the claimant thought the employees should know. The issue was that while the respondent was responding to a government tender for the supply of software, an employee in the Ethiopia office edited a document purporting it was by Microsoft to enable them win the government tender. The claimant was not aware of the on-going until Microsoft brought the matter to his attention. He

did his investigations and recommended that the subject employee be disciplined. During the technical evaluation, it emerged that the documents submitted were not legal as they had been falsified from Microsoft and there was to be a sanction. The government agency sent the letter to the respondent and this was followed by investigations by the claimant.

18. The employee who did the alterations did an apology and admitted to wrongdoing. The claimant had not been aware of the editing and the mistakes of the employee which only came to his notice later.

19. One had to be a partner of Microsoft for them to give a manufacturer authority form (MAF) as their support to a company to tender. The requirement was to get a formal consent. In this regard therefore, following the investigations conducted by the claimant, he recommended that the employee who had done the mistake be sanctioned as in Ethiopia, one does not lie to the government. The claimant then realised he had to resign from his position as country manager.

20. The claimant also testified that following what had happened to him while at the respondent and the same relating to professional and ethical practices he had to inform Microsoft. He knew in his profession he was bound to work with Microsoft in the future and professionally he had to clear his name.

21. As the claimant was serving his notice period, the respondent sent a director to his office for handing over. The claimant was made to sign a new job description. He was then directed to return to Nairobi.

22. The claimant was supposed to meet the respondent board on 24th September, 2012 at 4pm with regard to his recall back to the head office. The claimant met with the chairman who advised him to accept that he had sent an email to Cedric of Microsoft and then he would be paid his terminal dues.

23. The claimant admitted to having sent the email to Cedric as he was in need of cash. He had a daughter turning one year and he was to host a party for her. The claimant was made to write the email trusting the word of the chairman that he would be paid. In the process, the claimant asked for his P9 form for KRA return but the respondent replied that there was no P9 for the claimant.

24. On 29th October, 2012 the claimant received a letter from respondent's advocate that he had been dismissed due to gross misconduct. The termination was not justified and had no basis.

25. The claimant is seeking a notice pay of 3 months as his termination was unfair and without basis.

26. The claimant is also seeking his unpaid commissions for 17 months. The claimant testified that he was doing good work but was not paid his commissions of \$7,000.

27. While in the employment of the respondent, the claimant's salary was paid less statutory deductions but the details were not included in the P9 form. The claimant went to KRA and they confirmed there was no remittances of PAYE and NSSF and NHIF were not remitted. KRA required directed the claimant to file a complaint for them to commence investigations.

28. The claimant then realised that his salaries had been paid in cash by a bank deposit for the respondent to avoid KRA payments.

27. The allegations that the claimant was dismissed from his employment due to gross misconduct are not supported by any evidence. The tender in question was by Comprev, a company registered in Ethiopia and local procedures had to be complied with. To register the company in Ethiopia one was required to have one Ethiopian contact. For the respondent to trade in Ethiopia, Comprev was registered and thus the claimant got linked to this company with the permission of the respondent. This was to help generate income and remit to the respondent. The link between the claimant and Comprev was not appropriate as this was a company registered in Ethiopia with two independent directors.

28. By the time the claimant resigned from his employment on 14th September, 2012 he had not been told of any outstanding monies owed to the respondent. The allegations that he was owing the respondent is

done in bad faith. All other accusations are made in bad faith as there is no justification. All communication he made were copied to the respondent.

29. The claimant admit that he owed the respondent kshs.300,000.00 as the respondent already recovered kshs.100,000.00 from the loan he had taken with them. his should have been recovered from the 3 months' notice pay that was due. Any terminal dues paid can be paid less this amount.

30. In reply to the counter-claim, the claimants avers that his employment with the respondent and the entity to Comprev IT Solution Importer PLC is different and not an affiliate of subsidiary and thus not part of his contract of employment. The letter of summary dismissal was never served on the claimant on 20th September, 2012 and in any event he did not misconduct himself to warrant the termination of his employment with the respondent. The respondent has concealed and hidden vital information from the submitted records of which would have clarified the issues set out in the claim.

31. The parties agreed under the contract of employment to be governed by the laws of Kenya and thus income tax, social security and other legal entitlements under Kenyan laws are due to the claimant in terms of payment of income tax, HSSF and NHIF. The claim for the loan amounts due is thus admitted and should be set off from the amounts owing from the respondent to the claimant. The claimant also admits there is an arrangement on imprests referred and amounting to Ethiopian Birr 73,786.30 but that he accounted for the same. The claim for Birr 120,125.00 is denied and that he never signed in receipt of such monies.

Defence and Counter-Claim

32. The defence is that the respondent is a group holding company running other subsidiaries and affiliates including Comprev IT Solution Importer PLC in Ethiopia. As part of the respondent operations in Ethiopia and for the legal requirements, through its affiliate Comprev IT Solution Importer PLC the claimant provided services as the Country Manager and General Manager respectively. This was agreed upon by the parties under clauses 2(2) and 2(5) of the contract of service dated 1st March, 2011.

33. The claimant was serving the respondent under through Comprev IT Solution Importer PLC and on 25th June, 2012 he was appraised and it was confirmed that he would be entitled to take 12 working days holiday in addition to the due annual leave and a return air ticket each quarter from travel to Nairobi from Addis Ababa.

34. The respondent received the claimant's notice of resignation but such notice did not insulate him from legal provisions relating to summary dismissal in the event that the claimant engaged or was found to have engaged in gross misconduct or fundamental breach of the employment terms. The claimant was bound to use his best endeavours to promote the interests of the respondent as the employer; to conduct himself honestly at all times; and to observe the duty of confidentiality as pertain to the company information.

35. Under the contract of employment, the respondent had the right to summarily dismiss the claimant in the event he was found guilty of serious and wilful breach of the contract; where the respondent found him guilty of conduct detrimental to the reputation or interests of the respondent; was guilty of conduct tending to bring the respondent into disrepute; he disclosed confidential information concerning the respondent and or committed acts defined by the respondent as acts of gross misconduct.

36. On 20th September, 2012 the respondent summarily dismissed the claimant upon the discovery that he was engaged in gross misconduct and in breach of confidentiality. The claimant as the general manager was in charge of a tender for the supply of software, air conditioner, information technology and related goods for the Ethiopian Revenue and Customs Authority (ERCA) using falsified documents thereby causing the respondent to fail the technical evaluation of the tender and to lose expected revenue and to appear fraudulent in the eyes of the Ethiopian government and the main dealer, Microsoft Corporation and this exposed the respondent to penal sanctions by the Ethiopian government for engaging in unethical practices. The claimant by applying duress upon an employee under him by the name, Mastewal

Berhamu and forced him to falsely confess in an email dated 16th September, 2012 that he rather than the claimant was the one responsible for falsifying the letter to ERCA. The claimant secretly and without authority sent the false information to the respondent's vendor, Microsoft Corporation on 18th September, 2012 and appeared to cast aspersions on the respondent's director and Chief Executive Officer, Shagun and referred to the respondent as 'fraudsters'.

37. The defence is also that the acts by the claimant were inimical to his duty of confidentiality towards the respondent, was detrimental to the reputation and interests of the respondent, brought the respondent into disrepute, the respondent and the act of casting aspersions on the respondent directors was tantamount to insubordination.

38. On numerous occasions the claimant was instructed to channel all communication to the Board of Directors through his supervisor and Chief Executive Officer but he persistently continued addressing matters with individual directors and refused to take instructions as directed thus causing confusion in the board. This was in breach of the contract of employment. The claimant's performance was below quality based on client's complaints and below quantities as required and based on no profits made by the company agreed between him and the respondent and these were discussed with him and it was agreed he required to improve.

39. Upon hearing the claimant on his conduct, breaches and performance, his employment was lawfully terminated. Employment with Comprev IT Solution Importer PLC was also terminated for similar reasons. The claimant is not owed \$17,000 or Kshs.1, 479, 00.00 and his case required no notice as this was a summary dismissal and no commissions are payable the same would only be due on condition there were profits and the claimant met the performance indicators. The penalties claimed for delay in salaries and commission are not provided for under the contract of employment.

40. The claimant was working in Ethiopia and all statutory deductions and remittances are paid to Ethiopian authorities and not Kenya authorities. Under the Income Tax Act and NSSF Act the claimant cannot make any claims with regard to his employment with the respondent. There are no salary arrears owing for 20 days allegedly worked in September, 2012 and where such owes, this should be set off from the counter-claim.

Counter-claim

41. The respondent has also made a counter-claim and avers that in August, 2012 the claimant successfully made an application to the respondent for a loan of Kshs.400,000.00 to enable him meet custom duty relating to the importation of a motor vehicle. He was to repay the loan in four monthly instalments and had only paid once and leaving a balance of Kshs.300,000.00. These amounts remain unpaid despite demand.

42. While the claimant was the Country manager in Ethiopia he made requests and collected imprest which he failed to account for. By the time of termination of employment, the claimant had not accounted for Ethiopian Birr 73,786.30 and has admitted to owing the same.

43. While the claimant was the general manager of Comprev IT Solution Importer PLC he took imprest amounting to Ethiopian Birr 120,125 and did not account or settle the same. At the time of termination this amount owed from him. The claimant has admitted to owing this sum.

44. The counter-claim is for the sum of Kshs.1,007,954.19

- a) *Loan amount unpaid* - Kshs.300,000.00
- b) *Unpaid imprest of Birr 73,786.30* - Kshs.333,383.23
- c) *Unpaid imprest of Birr 120,125.00* - Kshs.542,164.17

<i>Total</i>	<i>- Kshs.1,175,547,40</i>
<i>Less 20 days salary</i>	<i>- Kshs.167,593.21</i>
<i>Total due from the claimant</i>	<i>- Kshs.1,007,954.19</i>

45. The respondent is also claiming for costs of the suit.

46. The respondent also filed a Supplementary response. The claimant apologised for breach of confidentiality and further he was given a hearing by the respondent board of directors vide his email dated 24th September, 2012. The claimant failed to address the owing amounts from himself to the respondent and amounting to Kshs.1,007,954.19.

47. In evidence the respondent called Fresiah Githua, an Advocate of the High Court of Kenya and the human resource and Legal Service manager of the respondent as the sole witness. She avers that she witnessed the claimant sign his contract of employment and the legal advisor to the respondent on 1st March, 2011 and later in December, 2011 employed by the respondent.

48. While the claimant served the respondent in Ethiopia, there were legal challenges and only a local company could be allowed to sell products and services and hence a decision was taken to register a local company with local shareholders. Comprev was registered as an affiliate of the respondent. There was a verbal agreement with confidential details from Microsoft and it was agreed that the country manager for the respondent would be the general manager.

49. Upon the employment of the claimant, he moved to the Ethiopia office which required reorganisation. He hired new staff as the overall manager. When the respondent got a tender to supply software in Ethiopia, the local registered company, Comprev was to reply the respondent office did the tendering under the supervision of the claimant who signed all the documents. The claimant falsified documents and when he made a declaration on the authenticity of any document, he had a duty to ensure correctness. The claimant failed in this duty. Had the claimant been keen to detail, no forgery would have occurred. One staff under the claimant's supervisor, Mastewal Berhamu made an admission that he was under duress to make false documents. The employee made a statement to the police.

50. The claimant was dismissed by the respondent for breach of confidentiality and insubordination. The claimant wrote confidential information of the respondent to Microsoft outside his mandate and without authority.

51. When the claimant was reviewed by the respondent chief executive officer in his work performance, he was found to be below the required standard. The claimant was directed to communicate directly and through the chief executive officer but he continued to share information with individual board members and this amounted to poor performance of his duties and insubordination. There are matters which amounted to gross misconduct, no notice was required and there was summary dismissal.

52. At the time of dismissal, the claimant had a loan amount due and he had imprests not accounted for due to the respondent and hence the counter-claim should be confirmed.

53. Both parties filed written submission put into account in the analysis of the issues herein.

Determination

54. The claimant has admitted owing the respondent the loan amount due from him and amounting to Kshs.300,000.00. The claimant further urges the court to off-set this amount from dues owing to him from the respondent as he was not paid for 20 days worked in September, 2012.

55. In the defence and counter-claim, the respondent at 32(iii), in the respondent's computation of the amounts owing and part of counter-claim there is set out the amount of Kshs.167,593.40 being salary due

to the claimant for 20 days worked in September, 2012. I take it that this is in acknowledgement that the claimant was not paid for the 20 days worked in September, 2012 and this amount is due.

56. The above shall be taken into account in addressing the claims made by the claimant and the counter-claims.

57. During the hearing there was adjournment to allow the respondent address the question of statutory deductions and remittances to the Kenya revenue authority. This is a matter addressed under the Employment Act, 2007. the claims made by the claimant with regard to deductions and non-payment of statutory dues and the defence that the statutory dues and remittances for the claimant were made with the Ethiopian government, and noting the matter is now being addressed with the Kenya Revenue Authority in acknowledgement by the respondent that all statutory dues for the claimant should comply with Kenyan law, such shall be addressed thus. save to add and for clarity that, Freshiah Githua admitted in evidence that the contract of employment was made in Kenya under her watch as the witness and as an officer of this court and also that under the Employment Act, 2007 the claimant being a Kenyan citizen and having his place of domicile in Kenya and the contract of employment having been executed by the respondent in Kenya for work abroad, Kenyan laws apply with regard to the protection of the claimant's employment. The taxation regime is that of the Republic of Kenya. Whatever sanctions the claimant faced for the purpose of attending to work for the respondent abroad and was thus required to work in Ethiopia where the tax regime is regulated differently from that of Kenya in terms of remittance to income tax, such is the burden of the employer and the respondent. where the claimant was not deducted the requisite amounts for remittance to Kenya Revenue Authority (KRA) or the equivalent in Ethiopia while he remained in the employment of the respondent, the sanction should not be from the due the claimant. Such should be paid from the respondent's account.

58. The admission by the respondent that this is a matter now being resolved by them with KRA and noting matters set out above, at the time of the claimant's termination of employment with the respondent, there were no statutory payments in his case with NSSF and NHIF. As the respondent waits to resolve the matters of non-payment and or non-remittances to KRA and whether there are sanctions due for such non-payment and or non-remittance, section 35 of the Employment Act, 2007 protects the claimant to the extent that for the duration of his employment, a service pay is due. The sanction or penalty to be levied against the respondent from KRA notwithstanding and where the respondent shall be required to address the non-payment and or non-remittances, the court shall award 15 days' pay for each year full year worked.

59. The amounts due to KRA or to NSSF or NHIF are not to the claimant. These are statutory deductions required to be remitted to the statutory bodies and a penalty is due on the employer for failure to effect a deduction and for failure to remit the same as required. The claimant cannot be handed these amounts. There is a statutory duty upon the employer to deduct and remit.

60. Service commenced on 1st March, 2011 and termination of employment was on the 20th September, 2012. As such, the claimant had served the respondent for a period of 18 months. The due gross monthly salary at the time of termination of employment was kshs.277,480.00 and the claimant is entitled to the sum of Kshs.138,740.00 as service pay.

61. It is common cause that on 14th September, 2012 the claimant issued notice to resign from his employment with the respondent. Such notice was received on equal date but there is no response thereto by the respondent as the employer.

62. The contract of employment required the termination notice to be for a period of three (3) months or equivalent pay as set out under clause 13.1 of the contract. In this case therefore, the notice by the claimant should have taken effect on 14th December, 2012.

63. The claimant did not serve his full resignation notice as on 20th September, the respondent dismissed the claimant. This letter is not acknowledged and there was no clarification by the respondent as to when this letter was issued to the claimant. What the claimant asserted in his evidence is that he upon giving his

resignation notice, he was directed to hand over his duties in Ethiopia and return to Nairobi with his goods to which he complied. He was required to meet the respondent's board on 24th September, 2012 as the letter of summary dismissal had not been issued to him and only got to see it in the statement of defence filed herein.

64. The claimant was not paid his dues and this led him to engage the board chairman to resolve the matter. He admitted having written an email to Microsoft so that he could be paid his dues. He was under pressure to meet costs for his daughter's birthday and needed cash. He communicated with the board chairperson in trust and hoping that this would alleviate his financial needs at the time but bore no fruits. On 24th October, 2012 the claimant learnt from the respondent's advocate communication to him that he had been dismissed from service due to gross misconduct.

65. Section 44(3) and (4) of the Employment Act, 2007 allow an employer to terminate the employment of an employee for breach of contract and for gross misconduct. The list of matters which warrant summary dismissal under sub-section 44(4) are not exhaustive and are subject to addition by the employer through the contract of employment or the human resource manual that the employee is issued with at the time of employment or once this is compiled. Where there is a separate document setting out human resource matters, the employee must be issued with a copy to which he must sign to be bound.

66. In **Fred Ondari Makori versus The Management Committee of Ministry of Works Sports Club ICC 1079 of 2010** the court held that, even where there is a valid reason to dismiss an employee for gross misconduct, the employee must be accorded due process by being issued with notice and a hearing pursuant to the provisions of section 41 of the Employment Act, 2007. It is trite that even where the employee has grossly misconducted himself, section 41(2) of the Employment Act, 2007 requires as follows;

(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.

67. In appendix 5 to the defence filed on 25th April, 2013, the termination letter issued to the claimant states that the two reasons for his dismissal are that he was in gross insubordination by failing to take express instructions and that he refused to refund and or account for money paid to him by the respondent company contrary to financial policy. The details thereto are not given.

68. The claimant has admitted receipt of letter dated 24th October, 2012 in reply to his letter of demand and seeking his dues which had not been paid since he was recalled back to Nairobi. That it is from this letter that he learnt of his dismissal from employment.

69. The respondent has not made effort to show what transpired on 24th September, 2012 when a meeting between the claimant and the board of directors was to be held. There are email exchanges between the claimant and various officers of the respondent as follows;

On 17th September, 2012 the claimant wrote to the Belaynesh and copied Githua seeking a check list for the purpose of his handing over the company house bills and for water together with electricity. He also requested to know if there were outstanding bills unpaid so that he could clear. This was to ensure a smooth handover;

On 18th September, 2012 Belaynesh replied to the claimant and advice that he could clear his debt with CRA for his handing over;

On equal date, the claimant asked for a clarification on the advice to clear debt with CRA;

On equal date there was a reply that *there were few transactions which adjust the balance on your*

debt that I were confirmed you at the end of March, 2012 at the time Esete were resigned. [Some meanings lost due to language difference];

The claimant then replied shocked about these transactions for 2011 but indicated this would be discussed the next day;

On 19th September, 2012 Belaynesh sent the claimant a document. This is not extracted for the court to assess the content. The respondent does not explain the purpose at all.

Communication following the above ends at this point. This matter is not expounded further. It is also not clarified if the claimant and Belaynesh met to resolve the matters.

The next email from the records submitted by the respondent is the email dated 28th September, 2012 which he states as follows;

....I have done my part as promised and handed over everything you asked of me I have accounted for the 2011 accounts to the best of my knowledge, I will continue searching for more supporting documents.

There are two documents remaining which I will hand over to Freshiah as soon as I receive them from ET.

70. What is apparent from the records submitted by the respondent in defence is that as of 24th September, 2012 when a meeting seem to have been held with the claimant, he was not clear as to the agenda. The issue of his handing over arose and the claimant was asking for better particulars but there is no record as to whether these particulars were issued to him and whether there was a meeting on 24th September, 2012 at 4pm as the respondent had directed.

71. Section 35 of the Employment Act, 2007 requires that where an employee has a written contract of employment be issued with a written letter of dismissal. Section 41 of the Act also requires that the employee be issued with written notice for hearing and the reason for the same be given to him to enable him prepare his defence and bring a representative. Further section 43 of the Act requires that there must be reasons given to the employee for his termination of employment.

72. Even where the matters the justification termination of employment are so gross and serious, as set out above, section 41(2) requires notice to the employee. The rights under section 41 of the Employment Act, 2007 do not change based on the rationale of the employer. Recourse is in the law to enable each party enjoy the benefit of due process. See **Kiliopa Omukuba Okutoyi versus Telkom Kenya [2012]eKLR**. Even where an employer has required an employee to make written submissions, the procedural requirements of section 41 of the Employment Act, 2007 must be addressed. The rights therein cannot be negated for expediency or to justify summary dismissal that is not procedural.

73. The respondent in counter-claim and in filing further documents has submitted records which ordinarily should have been issued to the claimant before his summary dismissal from employment and at the shop floor for him to address and render account. These records on what he owed the respondent are not relevant for the court at trial. The primary place where such records should be addressed is when hearing the employee in the context of internal mechanisms for disciplinary process before the employee is totally removed from the workplace and termination is effected.

74. Nothing stopped the respondent from suspending the claimant from his employment, an interdiction or any other sanction to allow for investigations over any impropriety or misconduct. Upon the discovery of monies owing and or not accounted for, the respondent had a right to cause an investigation. However, upon completing such investigation, the claimant ought to have been called and confronted with the same to enable him effectively respond. To thus terminate the claimant's employment as alleged on 20th September, 2012 and then cause him to reply to matters after the fact on any date after this date as noted

in the various emails set out above was to engage in unfair labour practice.

75. As of 20th September, 2012 the claimant was recalled back from Addis Ababa to Nairobi. If indeed this was his date of summary dismissal, what then was the purpose of the meeting to be held with him with the board member on 24th September, 2012? What was the context of the email sent by Ms Githua to the claimant and dated 24th September, 2012? The email notes as follows;

On Mon, Sept 24, 2012 at 9.42 AM, Fresiah Githua (KE)

Anthony,

Please note that it is the BOD's prerogative to call for meetings. ...

In view of the above, lease avail yourself at the CRAHQ Boardroom today at 4.00pm for the meeting.

76. I must pose, at this point, the claimant was being addressed in what capacity? As a former employee or as an employee of the respondent? These questions are posed in the context of the respondent's attachment and letter dated 20th September, 2012 allegedly the letter of termination issued to the claimant .

77. These are the records of the respondent. Having thus removed the claimant from its employment, I find the claimant was not in a position to respond effectively to any questions with regard to financial returns and or accounting as all records of the respondent had been handed over. Where the claimant was based in Ethiopia and had been recalled back to Nairobi, it was not humanly and practically possible or reasonable for him to respond to matters that took place in the respondent's office without the necessary facilitation and his employment having ceased.

78. Had the respondent applied itself to the procedures of the law and adhered to procedural requirements of section 41 of the Employment Act, 2007 the claimant would have been guaranteed the benefit of his defence and to render proper account. Without such safeguard being met, the summary dismissal of the claimant that resulted from matters set out under the letter of termination of his employment and which has been contested as not having been issued to him, the resulting termination of employment was wrongful and cannot be justified. Even where the claimant was issued with such letter dated 20th September, 2012 terminating his employment with the respondent, I find no material evidence that fair procedure set out in law in mandatory terms under section 44 read together with section 41(2) of the Employment Act, 2007 were adhered to.

79. With the above thus set out, the counter-claim must fail in its entirety. It is hereby dismissed with costs.

80. Before addressing the remedies due, in defence, the issue of the claimant's work performance arose. That he failed to meet the quality and quantities of work requirements. However the materials and assessments which would have enable the court to make this assessment and analysis is in documents largely under Annexures 4(a) and 4(b) in the defence which are defaced and blocked out. The evidential value of these documents is lost in the respondents efforts to keep from the court materials which may not be favourable to its case. I take this as a deliberate effort to conceal relevant information from the court.

81. Also aspersions were cast against the claimant that he failed in his duties and caused statements to be fraudulently submitted under duress to employees of the respondent. Save for the confession made and filed with regard to Mastewal Berhamu, there is no statement from him or affidavit to confirm any coercion or influence by the claimant to make a confession. Where such material existed, such should have been brought to the attention of the claimant before his dismissal to given him a fair chance for a defence. To raise such matters after the claimant had tendered his notice of resignation is suspect. Even where the respondent enjoyed the right to dismiss the claimant from his employment, due regard must be

given to the statutory protections in force.

82. The claims made by the court are specific to the nature that he should be paid for notice due; pay for unpaid commissions for 17 months; and for penalties for salary delays and commissions. The claimant has also made the all rider and prayer that the court should give any other relief the court may deem fit and just to grant.

83. I take it that the claimant, with the benefit of counsel, there is knowledge of the claims which relate to wrongful and unfair termination of employment and a litany to remedies under section 49 of the Employment Act, 2007. As none are addressed, I will deal with what is specifically pleaded and proved.

84. The fact of the claimant’s notice to terminate his employment and three (3) months’ notice is not challenged. With the issues set out above, this is a salary he ought to have been paid the fact of summary dismissal now challenged and addressed as above. This pay is rightfully due to the claimant. Had the claimant been allowed to cover his notice period, matters that befell him and being unable to pay for his daughter’s birthday party would not have arisen. I hereby award the claimant the total gross monthly salary due for the notice period all amounting to Kshs.832,440.00.

85. On the finding that the summary dismissal of the claimant failed to meet the mandatory provisions of the law, the same being procedurally unfair notice pay is due. The contract of employment required either pay to issue three (3) months’ notice of payment in lieu. The claimant is thus awarded 3 months gross salary based on Kshs.277,480.00 his last due monthly salary all being Kshs.832,440.00.

86. The above dues and thus payable under separate and distinct contexts. One due for notice period given by the claimant and expected salary owing for the period and the other due for the unfair practice by the respondent.

accordingly, the counter-claim is hereby dismissed with costs to the claimant and judgement is herein entered for the claimant against the respondent for the payment of the 20 days worked in September, 2012 Kshs.167,593.40; notice pay Kshs.832,440.00; pay for unfair labour practice Kshs.832,440.00; service pay Kshs.138,740.00; and the dues herein shall be less admitted owing amounts from the claimant at Kshs.300,000.00.

Costs awarded to the claimant.

Delivered and dated in open court at Nairobi this 11th day of September, 2017.

M. MBARU JUDGE

In the presence of:

Court Assistant: David Muturi

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