



CM ADVOCATES LLP



EMPLOYEE THEFT, FRAUD & NEGLIGENCE :

WHY SUMMARY DISMISSAL IS NOT ENOUGH: CIVIL FRAUD, CONVERSION, ASSET TRACING & RECOVERY OPTIONS FOR EMPLOYERS

EXECUTIVE OVERVIEW

Employers across Kenya and the worldwide are facing an unprecedented rise in employee-driven fraud, internal theft, asset misappropriation, and negligent handling of entrusted resources. These risks are particularly acute in finance, procurement, payroll, inventory management, project administration and senior managerial roles. A persistent but dangerous misconception is that an employer's legal response ends with summary dismissal. This is incorrect.

Kenyan law provides layered, cumulative remedies (employment, civil, and criminal) which may be pursued concurrently or sequentially. Increasingly, regulators, auditors, insurers and boards expect employers to take affirmative recovery action, not merely disciplinary measures.

Summary Dismissal: Necessary, but Legally Incomplete

Under Section 44(4) of the Employment Act, 2007, an employer may summarily dismiss an employee for, among other grounds, theft or dishonesty, fraud or misrepresentation, gross negligence or willful breach of trust or fiduciary duty.

Kenyan courts have consistently upheld summary dismissal where employees entrusted with company assets fail to exercise due care, even where fraudulent intent is disputed.

In *Stephen Ndolo v Nairobi Water & Sewerage Company Limited [2016] eKLR*, Lady Justice Linnet Ndolo (as she then was) of the Employment and Labour Relations Court (ELRC) confirmed that senior cash and finance officers are subject to a heightened standard of diligence and that negligent release of funds alone may justify summary dismissal and loss of trust. The Court further noted that the employer had complied with both the procedural and substantive requirements in summarily dismissing the employee from employment noting the reasons adduced thereof. Dissatisfied by the decision, the Claimant appealed to the Court of Appeal. This decision was upheld by the Court of Appeal on 16th January 2026 in Nairobi Civil Appeal No. 419 of 2019 wherein the 3-judge bench (Tuiyott, Muchelule and Odunga JJA) insisted on the need for employees in finance-related roles to uphold a high degree of trust (duty of care), failure of which this may successfully justify dismissal.

In this case, the Claimant, now Appellant, had recorded a false entry of KES. 1,200,000/= and lied that he had paid out the amount as an I.O.U to some unidentified “employees” of the Respondent. His dishonest conduct led to the breakdown of the employment relationship.

The critical point is that summary dismissal protects the organisation prospectively but does not recover lost assets nor extinguish civil liability.

Civil Fraud & Conversion: The Primary Recovery Path

Employers are legally entitled to pursue civil claims for fraud, conversion, negligence, breach of fiduciary duty and unjust enrichment, independent of employment termination.

An action for conversion arises where an employee wrongfully takes or applies employer funds or property, exercises unauthorised control over company assets, or causes loss through reckless, negligent or dishonest handling of entrusted resources.

Civil recovery does not depend on criminal prosecution. The civil standard of proof is lower than the criminal standard, and liability may arise from negligence alone, particularly for senior or fiduciary employees. Section 43 (2) of the Employment Act, 2007 specifically caps the standard of proof in employment matters to “matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”

Available remedies include recovery of misappropriated funds or assets, general damages for conversion or deceit, special damages for consequential and operational losses, interest, costs and enforcement measures, as well as equitable relief including injunctions and restitution.

Section 19 (1) (d) of the Employment Act, 2007 allows employers to deduct any amount equal to the amount of any shortage of money arising from negligence or dishonesty of the employee whose contract of service provides specifically or his being entrusted with the receipt, custody and payment of money.

Fiduciary Breach & Senior Employee Exposure

Directors, managers, finance officers and senior staff owe overlapping contractual, statutory and fiduciary duties of loyalty, care and good faith.

Where loss results from circumvention of internal controls, failure to verify transactions, ignoring red flags or audit warnings, or reliance on informal or undocumented approval practices, courts have shown increasing willingness to impose personal civil liability, even where fraud is ultimately perpetrated by third parties.

The Ndolo decision above (both at the ELRC and the Court of Appeal) emphasizes that as seniority and experience increase, so too does the duty of care owed by an employee. As illustrated in this case where the Claimant, having risen through the ranks to become Chief Cashier, ought to have exercised greater caution in his duties.

Asset Tracing & Recovery: Following the Value

Modern employee fraud rarely involves static assets. Misappropriated funds are often layered through multiple accounts, converted into property or digital assets, or transferred to associates or third parties.

Kenyan law recognises tracing principles in equity and common law, enabling employers to follow misappropriated value across accounts and asset classes, obtain freezing and preservation orders, recover assets from third-party recipients who are not bona fide purchasers and pursue cross-border recovery with appropriate court support.

6. Criminal Proceedings: Strategic, Not Automatic

Criminal offences such as stealing by servant, fraudulent false accounting, or conspiracy may arise under the Penal Code. However, criminal prosecution is not a prerequisite to civil recovery, an acquittal does not bar civil claims and poorly timed reporting may compromise recovery strategies.

Criminal action should therefore be deliberate, evidence-driven and strategically aligned with civil and employment processes.

Procedural Discipline: Protecting the Employer

To preserve recovery rights and mitigate exposure to unfair termination claims, employers must ensure prompt and documented investigations, forensic audits where financial loss is suspected, compliance with Section 41 of the Employment Act during disciplinary processes, preservation of electronic and documentary evidence and a clear separation of disciplinary, civil, and criminal tracks.

Njuguna v Lochab Transport Limited [2023]KEELRC92(KLR) shows the courts strict approach at interpreting the procedural requirement outlined in Section 41 of the Employment Act in that, it mandates that before terminating the employment of an employee for misconduct, poor performance, or physical incapacity, the employer must explain the reason and hear the employee often according the employee a chance to adduce a witness of their choice.

Our Civil Fraud, Asset Tracing & Recovery (CFAR) Unit

The CFAR Unit provides specialist, end-to-end support in complex fraud and recovery matters, including civil fraud and conversion litigation, asset tracing and recovery (local and cross-border), freezing, preservation, and injunctive relief, employment-linked fraud disputes, director, officer, and fiduciary liability advisory, and governance, control-failure and risk-response advisory.

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