



**Makori v Gusii Mwalimu Sacco Ltd (Cause E036 of 2023)
[2024] KEELRC 1338 (KLR) (5 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1338 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E036 OF 2023**

S RADIDO, J

JUNE 5, 2024

BETWEEN

BENARD KIBAGENDI MAKORI CLAIMANT

AND

GUSII MWALIMU SACCO LTD RESPONDENT

JUDGMENT

1. Benard Kibagendi Makori (the Claimant) sued Gusii Mwalimu Sacco Ltd on 8 June 2023, alleging unfair termination of employment.
2. The Respondent filed a Response and Counterclaim on 10 July 2023.
3. Pursuant to leave, the Claimant filed an Amended Statement of Claim on 21 December 2023, and the Respondent filed an Amended Response on 7 February 2024. In the Amended Statement of Claim, the Claimant introduced a cause of action for breach of contract.
4. The Cause was heard on 8 February 2024, 18 March 2024, 18 April 2024 and 6 May 2024. The Claimant and 4 witnesses called by the Respondent testified.
5. The Claimant filed his submissions on 22 May 2024, and the Respondent on 22 May 2024.
6. The Court has considered the pleadings, evidence, and submissions.

Unfair termination of employment

Procedural fairness

7. The Respondent interdicted the Claimant from employment through a letter dated 3 October 2019. The reason for the interdiction was the unauthorised production of an ATM card for a member (who had not applied for the card).



8. The interdiction letter indicated the account number in contention and instructed the Claimant to make a written representation within 2 weeks before further action. The Claimant responded through a letter dated 17 October 2019.
9. The Claimant appeared before a Committee of the Respondent's Board on 29 October 2019 and made oral representations.
10. On 24 July 2020, the Respondent dismissed the Claimant.
11. Section 35(1) of the *Employment Act*, 2007 contemplates written notice of termination of employment while section 41 of the Act requires the employer to allow the employee an opportunity to respond to any allegations which may lead to termination of employment.
12. The Respondent made the Claimant aware of the allegations to confront and granted him both written and oral opportunities to make representations before deciding on dismissal.
13. The Court is satisfied that the Respondent substantially complied with the requirements of procedural fairness.

Substantive fairness

14. Sections 43 and 45 of the *Employment Act*, 2007 place a burden on the employer to prove as valid and fair the reasons for terminating an employment contract.
15. The reason given for the termination of the Claimant's employment was the unauthorised production of an ATM Card.
16. The Respondent brought the account holder to testify and she stated that she never applied for the ATM card which was produced and used to withdraw money from her account.
17. The Respondent also led evidence from one of its Customer Executives and she testified that the ATM card was not issued through the customer desk as was the norm.
18. Evidence led by the Respondent established that the Claimant was one of the ICT personnel tasked with the responsibility of producing ATM cards and that there were protocols for the production of the cards. The Claimant admitted that he would initiate the process for the production of ATM cards and that he followed the requisite procedures to produce the card in question.
19. Further evidence by the Respondent indicated that the production of the ATM card in question was initiated by the Claimant at 1127 hours and it was used to withdraw funds at 1136 hours. The records showed the Claimant activated the card in the Respondent's systems.
20. In one of the letters the Claimant wrote to the Respondent, he admitted liability for the loss of monies from members' accounts.
21. The Claimant alleged that he was coerced to make the admission by the Chair and other members of the Respondent's Board. The Claimant did not disclose the name of the Chair and or Board members who coerced him to admit responsibility. He did not prove coercion or duress.
22. Taking the above cumulatively, the Court is satisfied that the Claimant initiated the production of an ATM card without a request from the account holder and used the card to withdraw money from the account.
23. The Respondent had and proved in Court valid and fair reasons to terminate the Claimant's employment.



Breach of contract

Unpaid wages

24. The Claimant claimed Kshs 1,049,798/- said to be wages from October 2019 to July 2020.
25. During the period, the Claimant was on interdiction.
26. Under Chapter 13 of the Respondent's Terms and Conditions of Service, salary or part of salary withheld during interdiction is payable upon the lifting of the interdiction. The Claimant's interdiction was not lifted.
27. The Claimant was dismissed and he would not qualify for part of the salaries withheld during interdiction.

Gratuity

28. The Claimant's letter of appointment did not provide for gratuity.
29. However, the Respondent's Terms and Conditions of Service in clause 18 provide as follows:
18.0 Retirement
18.1 Gratuity
An employee engaged shall be granted gratuity of twenty five percent (25%) of the total salary paid to him during his employment. Money shall be set aside to an account for the same. Gratuity shall be payable in an event of retirement.
30. The Claimant did not retire. His employment was terminated and in terms of the clause would not be entitled to gratuity.

Compensation

31. The Claimant sought compensation under clause 18.1 of the Terms and Conditions of Service. The clause provides for compensation (terminal benefits) upon retirement.
32. The Claimant did not retire nor did he demonstrate that the compensation accrued despite the nature of separation and the Court declines to allow this head of the claim.

Counterclaim

33. The Respondent counterclaimed for Kshs 958,000/- from the Claimant. The wrongful acts by the Claimant are pleaded to have occurred from 14 February 2019 to 17 September 2019.
34. The Respondent further pleaded that the Claimant admitted liability in writing on 6 November 2019.
35. The Counterclaim by the Respondent was lodged in Court on 10 July 2023, more than 3 years after the admission of liability by the Claimant.
36. The Counterclaim is caught up by the limitation prescription in section 90 of the *Employment Act, 2007* and is dismissed.

Conclusion and Orders

37. The Court finds no merit in the Cause and it is dismissed with costs.
38. The Counterclaim is also dismissed with costs.



DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 5TH DAY OF JUNE 2024.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Claimant Bosire Gichana & Co. Advocates

For Respondent Mose, Mose & Mose Advocates

Court Assistant Chemwolo

