



REPUBLIC OF KENYA



Kisavi alias Douglas Mutinda Kisavi v Uchongaji Sacco Limited (Appeal E224 of 2024) [2025] KEELRC 756 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 756 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E224 OF 2024
M MBARÚ, J
MARCH 6, 2025**

**BETWEEN
MUTINDA KISAVI ALIAS DOUGLAS MUTINDA KISAVI APPELLANT
AND
UCHONGAJI SACCO LIMITED RESPONDENT**

(Being an appeal from the judgment of Hon. L. Sindani delivered on 19 September 2024 in Mombasa CMELRC No.102 of 2020)

JUDGMENT

1. The appeal arises from the judgment in Mombasa CMELRC No.102 of 2020. The appellant is seeking the judgment to be set aside on the counterclaim with costs.
2. The appellant filed his claim seeking orders that his employment was terminated unlawfully and unfairly. He sought compensation and payment of terminal dues;
 - a. Notice pay Ksh.55,000;
 - b. Accumulated leave days Ksh.110,000;
 - c. 12 months compensation Ksh.660,000;
 - d. Certificate of service;
 - e. Costs.
3. In reply, the respondent denied the claims and counterclaimed the sum of Ksh.1, 500,000 against the appellant. The claim was that the appellant carelessly and improperly performed his duties as a bank agent in a manner that exposed the respondent to financial loss by failing to call for G4S escort services while he was aware that the risk management policy dictated for security escort when carrying



- money from the bank. He collected money on Saturday when there was no urgency for the funds or an intended purpose. He breached the society's code of conduct and exposed the respondent to revenue loss.
4. There was a further counterclaim for Ksh.227, 100 advanced to the appellant as a development loan on 26 September 2016 and remained unpaid at the end of employment.
 5. The respondent counterclaimed for Ksh.664, 681.15 which was advanced to the appellant as a staff loan in August 2016 and which had been secured through employment benefits and the loan was unpaid. The respondent counterclaimed for;
 - a. payment for loss of Ksh.1,500,000;
 - b. Unpaid loans Ksh.891,781.15;
 - c. Costs of the counterclaim.
 5. In reply to the counterclaim, the appellant's case was that he did not owe the sum the amount of Ksh.1, 500,000 and if the same was lost, it was due to intervening actions of a third party beyond his control. The loss occurred in the cause of the lawful performance of his duties and instructions by a director, Augustine Mwongela. He did not know a risk management policy and collecting money on Saturday was the ordinary course of business. The loss of money was not a result of carelessness as alleged and the counterclaim is without merit.
 6. The trial court heard the parties and in the judgment held that there was unfair termination of employment and the appellant was not invited to the disciplinary hearing. The court awarded notice pay, one month's compensation and leave pay.
 7. On the counterclaim, the learned magistrate held that there was no response to the counterclaim. The appellant failed to adhere to the security policy and collected cash without getting security. He was found culpable and liable to pay for the loss of Ksh.1, 500,000 and the due loans. The counterclaim was allowed as prayed.
 8. Aggrieved, the appeal is that;
 1. The learned magistrate erred in law and fact in finding that the appellant failed to file a response to the counterclaim.
 2. The learned magistrate erred in law and fact in awarding the respondent Ksh.1, 500,000 as lost money.
 3. The learned magistrate erred in law and fact by awarding the respondent Ksh.891, 781.15 as outstanding loans.
 4. The trial court erred in law and fact in failing to consider the evidence of the appellant with respect to the status of the loans at the time of the appellant termination of employment.
 5. The learned magistrate erred in law and fact in failing to consider properly the evidence adduced by the appellant at trial and the submissions made by the appellant's advocate.
 9. Parties filed written submissions on the appeal.
 10. The appellant submitted that upon being served with the response and counterclaim, he filed a reply and denied the counterclaim. The learned magistrate in the judgment held that there was no response to the counterclaim and hence allowed it with costs. This was in error since there exists a response that was before the court and the loss of Ksh.1, 500,000 arose out of acts of third parties beyond the



appellant's control. The action of withdrawing the money from the bank was under the instructions of the respondent. There was no policy against withdrawing money on a Saturday as alleged. The respondent gave the appellant two cheques to withdraw from the bank.

11. In the case of *Alexina Kerubo Misaro v Postal Corporation of Kenya* [2019] eKLR the court held that when the employee was charged in a criminal case for loss of money, the case was dismissed. In this case, the appellant was charged in court and the same dismissed for lack of evidence. The trial court failed to consider this evidence in awarding the counterclaim.
12. The appellant submitted that the respondent claimed that he had taken two staff loans. There were deductions from the pay slip in repayment. In May 2017, the development loan balance was Ksh.156, 000 while the staff loan balance was Ksh.395, 800. The award of Ksh.227, 000 and Ksh.664, 681.15 was in error.
13. The development loan was secured by way of deposits of Ksh.97, 000 held by the appellant with the respondent. It was secured by salary and by guarantors at ksh.80, 000. In default, the respondent had the right to use the security to recover the loan to avoid accumulation of interest.
14. The loan application of 1 November 2016 filed by the respondent on the development loan shows the amount of Ksh.180, 000. It was secured against deposits held by the appellant with the respondent's salary, shares of Ksh.92, 000 held by guarantors. The deposits and shares given as security were still at the disposal of the respondent to recover the loan.
15. On the staff loan, the respondent submitted a loan application form for Ksh.500, 000, which was secured by guarantors. The appellant held Ksh.600, 000 in the provident fund which funds were at the respondent's disposal in the loan recovery.
16. The outstanding loans were Ksh.156, 000 and Ksh.395, 800 respectively.
17. The counterclaim was not filed before the proper forum. Loans are regulated under the *Societies Act* and should have been addressed before the Tribunal as held in *Peter Macharia Gakure & another v AMica Savings and Credit Limited* [2019] eKLR and *Abeid Mwamburi v Sokoro Savings & Credit Co-operative Society Limited* [2021] eKLR.
18. The respondent submitted that it is possible that the learned magistrate was not acquainted with the response to the counterclaim. This did not affect the findings that the appellant failed to follow the security policy and was thus negligent and careless in handling money, the property of the respondent. The evidence was considered as a whole.
19. The award of loans due at Ksh.891, 781.15 is justified. The appellant does not deny owing the loans but contests that it was secured by Ksh.97, 000 deposits. The appellant was paying the loan through the salary. The guarantors did not allocate any amount of their shares/deposit security. The loan was advanced to the appellant and he is responsible for making the repayment since 9 May 2017.
20. The respondent submitted that the appellant did not raise any objections about the application of jurisdiction or section 76 of the Cooperatives *Societies Act*. Section 16 of the *Civil Procedure Act* provides that there should be no objections at the point of appeal. Under Section 12 of the *Employment and Labour Relations Court Act*, the court is given jurisdiction to hear matters between an employer and an employee. The court has jurisdiction to hear employment disputes including what the appellant was owing as held in *Philip Muiruri Ndaruga v Gatemu Housing Company Ltd* [2019] eKLR. The evidence before the trial court was sufficient to justify the awards in the counterclaim.



Determination

21. As a first appeal, the court is allowed to review the entire record and reassess the findings with a conclusion. However, consider that the trial court had the opportunity to hear the witnesses testify in court.
22. Through notice dated 9 June 2017, the respondent terminated the appellant's employment through summary dismissal. He was accused of breaching the risk management policy manual and the code of conduct resulting in gross misconduct. That he failed to obey the lawful command and was suspected of having committed a criminal offence to the substantial detriment of the employer. As a result of such conduct, the respondent lost Ksh.1.5 million.
23. Before the summary dismissal, the appellant had been interdicted on 5 December 2015 for violation of the code of conduct, negligence of duty through carelessness and breaching security in CIT [cash in transit], risks management policy, and operational risks which required a reputable security firm for CIT.
24. The respondent admitted that he was sent to the bank with two cheques. He withdrew Ksh.1, 500,000 on a Saturday since he worked half a day. He was not aware of the risk management policy despite being employed by the respondent in 1999.
25. The learned magistrate held that employment was terminated unlawfully since the appellant was not given a fair hearing. His employment was terminated through summary dismissal without a hearing.
26. Certain positions once held, go with a higher responsibility. Handling of funds belonging to an entity is one such responsibility. Having worked for the respondent from 1999 to 2016 was a long time for the appellant to appreciate the motions of bookkeeping and being a bank agent for the respondent. His levels of trust and probity were stated in his letter dated 18 June 2001 where he earned a salary review upwards for professionally undertaking his duties.
27. In the case of *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] KEELRC 323 (KLR) the employee was dismissed from his employment for recklessness in the manner he handled accounts. By his actions, the employee failed to ensure financial probity at the branch by failing to ensure that the imprest account was properly managed at the branch. In *Gatundu v First Assurance Company Limited* [2024] KEELRC 2518 (KLR) the court held that;
28. Certain positions attract a high calling of integrity and financial probity. Once held, great responsibility and accountability is called for. As the CFO, the claimant had bigger accountability beyond what he held while employed as the accountant. ...
29. Therefore, where an employee fails to undertake his duties properly and this includes duties in the accounts, finance, banking, or bookkeeping duties, trust is lost. his financial probity and integrity becomes questionable and the employer is allowed under the provisions of Section 43 of the *Employment Act* to lawfully terminate his employment. In the case of *Violet Kadala Shitsukane v Kenya Post Savings Bank* [2020] eKLR the Court of Appeal in addressing a similar matter held that;
30. Banks are custodians of their customers' funds and other valuables of a personal nature and operate in a highly sensitive environment therefore, in order to inculcate and maintain customer confidence, banks and their staff are required to maintain a high degree of integrity, prudence and financial probity. It follows that where a staff's conduct in relation to funds and valuables belonging to customers points to fraud, such a staff risks termination of his or her employment. ...



31. The appellant cannot justify his conduct of withdrawing money from the bank without any protocols. Whether he knew of the risk management policy or not, which is not the case, his long service to the respondent carrying such duties came with responsibility. Casually handing Ksh.1, 500,000 was a serious breach of his employment. This led to loss and the counterclaim, present or not, the deduction from his terminal dues was justified.
32. The sum of Ksh.1, 500,000 is lawfully due from the appellant to the respondent. The fact of criminal proceedings addressing such a matter did not stop the employer from recovering the same from the appellant based on his employment. Before payment of any terminal dues, this deduction was imperative.
33. Under Sections 17 and 19 of the *Employment Act*, the employer is allowed to make deductions of monies lost by the employee through negligence and carelessness or an advance through salary or agreement. Where such money is not repaid at the end of employment, the employer is allowed to recover before payment of terminal dues.
34. The appellant asserts that the loans due should have been claimed before the Cooperative Societies Tribunal and not through the counterclaim. However, the appellant filed a claim seeking payment of terminal dues, and the employer is insulated from losing its money lawfully due from the employee at the end of employment as held in *In Javan Were Mbango v H. Young & Co. (EA) Ltd [2012] eKLR*, the court held that;
35. In making payments to any employee, an employer must ensure that all the statutory deductions due are removed from the gross pay. The employer is, therefore, entitled to make a deduction of any amount authorized by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award. This Court is guided by the provision of Section 19 of the *Employment Act*.
36. Employees who, out of their own free will, join employees at Sacco do so by their employment and authorize the employer to make deductions from their salaries to Sacco for their welfare and the collective good of all. An employee is, therefore, stopped from claiming that once their employment is terminated, they are owed all their savings without considering the collective agreement under their Sacco and/or cooperative society. Where an employee has enjoyed a loan facility from the collective kitty, he is equally obliged to make reasonable any dues, and his relationship with the collective is severed by virtue of the termination of his relationship with the principal.
37. The court had jurisdiction to hear and determine the counterclaim for dues owed to the employer.
38. On the loans advanced to the appellant by the respondent, the appellant urges the court that he had security deposits and guarantors. These should have been applied to offset the loans instead of counterclaiming the totals due.
39. The loans were advanced to the appellant. The security deposit did not insulate the appellant from repaying what was due at the end of his employment to enable the respondent to release the securities and guarantors. The appellant had the duty to repay his debts at the end of employment. He cannot claim that the employer had to organize his finances.
40. The purpose of Section 19 of the *Employment Act* is to safeguard the employee who enjoys a benefit at work and to insulate the employer from making a loss arising out of negligence or careless performance of duty by the employee.
41. The learned magistrate well addressed the provisions of Section 19 of the *Employment Act* and made a correct finding.



42. Based on a reanalysis of the record, the court is satisfied that the materials presented to the respondent and the trial court established on a balance of probabilities that the appellant was negligent and careless in his duties leading to financial loss. He owed the respondent loan facilities advanced during employment. The counterclaim was with merit. The conclusion of lack of integrity and financial propriety was well-founded.

43. For the appeal, the respondent is entitled to costs.

In sum, the court find that the appeal is without merit, and is dismissed with costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 6TH DAY OF MARCH 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

