



**Rorio v Yetu Sacco Limited (Cause E011 of 2022)  
[2024] KEELRC 131 (KLR) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 131 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU  
CAUSE E011 OF 2022  
ON MAKAU, J  
JANUARY 30, 2024**

**BETWEEN**

**ELKANA CHERUIYOT RORIO ..... CLAIMANT**

**AND**

**YETU SACCO LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This is a claim for unfair and unlawful termination of employment. The claimant is seeking the following reliefs: -
  - a. A finding that the claimant's termination was procedurally and substantively unfair.
  - b. A finding that the Respondent discriminated against the claimant on account of his ethnicity and tribe.
  - c. An award of damages for discrimination on account of tribe and ethnicity contrary to Sections 5 and 46 (a) of the Employment Act of 2007 to be determined by the court.
  - d. An award of Damages for Defamation and rendering the claimant unable to secure employment to be determined by the court.
  - e. An award of Kshs.1,337,600.00 made up as follows;
  - f. The accrued and unpaid leave days 17...Kshs.61,200.00
  - g. 12 months compensation.....Kshs.1,305,600.00
  - h. One month's notice pay.....Kshs.108,800.00
  - i. Costs of the suit
  - j. Any other relief that the court may deem fit to grant.



2. The respondent has denied that it terminated the claimant's employment unfairly and prayed for the suit to be dismissed with costs for lack of merits.

### **Factual background**

3. The claimant was employed by the respondent as a Branch Manager on 3<sup>rd</sup> August, 2020 and he was confirmed after six months' probation period. He worked as such until 17<sup>th</sup> February, 2022 when he was demoted to a Manager-Recovery reporting to the Head of Credit. The demotion was done without any prior performance appraisal or review and no reason was given to him for the adverse action.
4. Again, on 24<sup>th</sup> May 2022, he was sent on compulsory leave for 14 days vide a letter dated 23<sup>rd</sup> May, 2022. The letter alleged that, audit reports revealed how several accounts opened while he was serving as the Branch Manager, were used for fraudulent activities. On the same day, 24<sup>th</sup> May 2022, he received another letter inviting him to a disciplinary hearing on 26<sup>th</sup> May 2022 at 9.00am.
5. He took issue with the hurry in which the proceedings were being conducted even before being served with any show cause letter. In his view the employer had predetermined his fate and the hearing scheduled was a charade. He nevertheless attended the hearing which turned out to be a monologue where no specific issues were discussed. He was not shown any evidence of the alleged fraudulent activities at his branch and how he was implicated. He was also not asked to be accompanied by a fellow employee as required under section 41 of the Employment Act.
6. At the end of the hearing he signed the minutes of the proceedings but he was denied a copy. By the time he left the meeting he had senses that his goose had been cooked due to the manner in which the proceedings were conducted. On 13<sup>th</sup> June 2022 he received a termination letter dated 7<sup>th</sup> June 2022. The letter referred to audit investigation and finding of fraud which were all strange to him since it was prepared on 23<sup>rd</sup> May 2022 and it had not been served on him before the disciplinary hearing.
7. He, however, admitted in evidence that after the Account Opening Officer compiles the required documents, and inputs them to the system, they are forwarded to the Branch Manager or his Assistant for checking and approval. He contended that the approval by the Branch Manager or Assistant does not require the presence of the customer. However, he clarified that the presence of the customer was mandatory when changes in the account is being approved.
8. He further admitted that, he approved the opening of some of the accounts involved in the alleged fraudulent activities. One of them was for Samuel Marete where Kshs.1.7 million was allegedly lost. However, he never verified the loss because he heard the allegation during the disciplinary hearing.
9. He contended that he was discriminated among many other officers who were involved in account opening process. He was the only one dismissed and he attributed that to tribal grounds. He contended that there were only three non-Meru staff and who were being discriminated on basis of their language.
10. The respondent's case on the other hand is that an audit investigation done revealed that the claimant was involved in several malfeasance that led to loss of money from customers accounts in the Sacco. It averred that the claimant's tenure was marred by gross misconduct and gave particulars as:-
  - a. Approving transactions carried out in the affected customers accounts, approved Msacco registrations of some accounts and recruited accounts where fraudulent cheques had been deposited at Co-operative Bank of Kenya and complains regarding they were of the cheques logged by the Co-operative Bank of Kenya to the Respondent.



- b. Authorizing several transactions from accounts belonging to the customers by third parties without carrying out due diligence as per the Sacco policies.
  - c. Authorizing fraudulent cheque deposits and withdrawals.
  - d. Failing to take due diligence and disregarding the Sacco laid down procedures and therefore exposing the customer's account.
  - e. Authorizing withdrawals without due diligence leading to third parties withdrawing money from the customer's account.
  - f. Failing to exercise leadership, watch and monitor junior staff under him and instead becoming a mastermind in a syndicate of perpetuating immoral fraudulent schemes.
  - g. Failing to carry its role as the required standard procedures of the Sacco.
  - h. Failing to perform as best to the required standard in his office.
11. As a result of the above misconduct, the Sacco was exposed to disrepute and loss of business. Consequently, it took the claimant through disciplinary process including a hearing on 26<sup>th</sup> May 2022. Overwhelming evidence was adduced against him but he sought to shift blame to his junior colleagues. However, a decision to terminate his services was reached and a termination letter was issued to him.
  12. In her evidence, RW1 confirmed that she did investigations in respect of various accounts and prepared a report. She also sat in the disciplinary hearing for the claimant. The report showed that there was negligence in the approval chain of command from teller to the Operations manager. The claimant also approved the transactions and opening of accounts. The report gave the details of the accounts, the approvals and the amount of money lost.
  13. On cross examination, RW1 confirmed that she is the Head of Audit since 2012 and reports were produced annually. She admitted that her report dated 23<sup>rd</sup> May, 2022 captured accounts with incidents from as far as 2020, which had not been detected during audit of the respective years. She confirmed that the investigation was prompted by complaint from Sacco members and her Report implicated the claimant, but she never shared the report with him.
  14. she further confirmed that her report implicated many employees and she recommended that they all face disciplinary process. However, only the claimant was dismissed while the rest were given warning letters including Naomi Gakii. She clarified that her investigations report was general and it did not target anyone.
  15. RW2 confirmed that he was involved in the inputting of data into the system as the alternative business channels. He contended that the claimant brought some customers to him to input details into the system. He stated that the customers were present but some had missing requirements and when he raised concern the claimant told him the customers were busy people and denying them a chance would mean loss to the Sacco. He did not wish to contradict his boss. Some of the accounts he raised concern were later involved in the fraud.
  16. On cross examination, RW2 admitted that he works in the ICT Department and that no mobile transaction can take place without involvement of the ICT department. He confirmed that the said customers were brought by the claimant from his office and they only had the National Identity card but there had to be photos and signatures. He admitted that it was his role to take the photos and signatures of the customers.



17. He further stated that some of the customers were not presented to him by the claimant, but he assured him that the customers would avail the required items at a later date. He denied that he was involved in any fraudulent transactions knowingly and contended that what he did, was in obedience of verbal instructions from the claimant. He reiterated that he raised his concerns about missing requirements to the claimant verbally. He contended that failure to comply with his instructions by the claimant would attract punishment for insubordination.
18. RW3 is Customer Care Officer. She narrated the procedure for opening account in the respondent Sacco and also the procedure for changing account details. She confirmed that the Customer Care Officer is the one who verifies whether a customer has met the requirements for opening an account and then inputs the same to the system. Thereafter she forwards the same to the supervisor (Branch Manager) for approval before the account number is generated. She added that the person recruiting the customer is required to confirm that he knows the customer and recommend him as a customer.
19. She stated that she recruited Ms. Elizabeth Nyawira Kagunya as a customer and later the claimant asked her to register the customer for mobile banking. RW3 raised concern that the customer did not present herself to the bank for a photo and signature but the claimant told her that the customer is busy in her business. He further told RW3 that he knew the customer very well because they were neighbors.
20. RW3 contended that there was no procedure provided for one to raise queries in writing. She admitted that she was implicated by the investigation report and after disciplinary hearing, she was demoted to a teller. However, she later promoted to Assistant Branch Operations Manager.

### **Submissions**

21. Only the respondent filed submissions after the close of the hearing. In brief the respondent submitted that the dismissal of the claimant was fair because it was grounded on valid reason and a fair procedure was followed. It submitted that the claimant was sent on compulsory leave and then called for disciplinary hearing as required by section 41 of the *Employment Act*. He admitted that he attended the hearing and even signed the minutes of the proceedings.
22. It further submitted that fraudulent accounts were opened and transacted under the claimant's watch. The accounts were opened without following the standard procedure as a result of which, the Sacco lost millions of shillings. Most of the said accounts were opened with the claimant's recommendation and approval. He also approved all e-banking channels for customers.
23. It also submitted that the claimant disregarded queries by his junior officers, about the failure by the customers to provide all the requirements for opening accounts or registration for e-banking. Instead he advised them that the customers were busy and as such insisting on procedures would cause the Sacco to lose money. In the respondent's view, the claimant was more concerned about posting profits even if it meant breaching the standard procedure.
24. It further submitted that the claimant approved fraudulent transactions in the account for Gladys Kanjiru and Susan Mparu Gikunda. The latter account had been dormant since 17<sup>th</sup> August, 2016. Accordingly, it submitted that it had discharged its burden of proof prescribed by section 43 and 45 of the *Employment Act* and prayed for the suit to be dismissed with costs.

### **Issues for determination and Analysis**

25. Having carefully considered the pleadings, evidence and submissions, the following issues fall for determination:



- a. Whether the dismissal of the claimant was unfair and unlawful.
- b. Whether the claimant was discriminated on account of ethnicity.
- c. Whether the claimant was defamed.
- d. Whether the reliefs sought are merited.

### **Unfair termination**

26. Section 45 (1) and (2) of the *Employment Act* provides that: -
- (1) No employer shall terminate the employment of an employee unfairly.
  - (2) A termination of employment by an employer is unfair if the employer fails to prove –
    - a. That the reason for the termination is valid;
    - b. That the reason for the termination is a fair reason -
      - i. Related to the employee’s conduct, capacity or compatibility, or
      - ii. Based on the operational requirements of the employer; and
    - c. That the employment was terminated in accordance with fair procedure.”
27. The claimant contended that the reason for the termination was not valid and the procedure followed was not fair. However, the respondent is of a contrary view.

### **Reason**

28. The termination letter has not been produced as evidence. Nevertheless, there is no dispute that the termination was on alleged gross misconduct. The facts of the case are that an investigatory audit was done in 2022 and the report implicated the claimant for breach of account opening procedure, and also approving fraudulent transactions.
29. The claimant admitted that procedure was violated during account opening but he blamed his juniors for the error. The juniors have however given consistent evidence that they were made to open accounts and register customers for e-banking contrary to the standard procedure by the claimant. Some of the accounts were by customers who were introduced by the claimant and the claimant approved the fraudulent transactions.
30. Having carefully evaluated the evidence before the court, I am satisfied that the weight of evidence tilts in favour of the respondent. The claimant breached the standard procedures of the Sacco, which he was oversighting at the Head office. He placed profit above due diligence and the Sacco procedures that were put in place to prevent fraud.

### **Procedure followed**

31. Section 41 of the *Employment Act* provides that: -
- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.



- (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.”
32. The claimant admitted that he was summoned for a disciplinary hearing on a short notice but he attended and participated in the hearing without any complaint. At the end of the hearing he signed the minutes of the proceedings but left convinced that his goose had been cooked.
33. After two weeks, he wrote complaining about how he was treated including demotion, compulsory leave, hurried hearing and being denied the evidence used against him during the hearing. That was obviously an afterthought. The claimant was not a no-body in the Sacco. He was the Branch Manager of the Head Office who also admittedly played HR Role. He was therefore conversant with the disciplinary procedures of the Sacco but he kept quiet and went through the disciplinary process quietly. I would therefore find that his failure to protest against the procedure followed by the employer meant that he was okay with the process.
34. Having considered the evidence presented, I find that the claimant was notified about his misconduct vide the suspension letter and the invitation letter. He was then afforded a fair opportunity to defend himself before a disciplinary committee. He made his presentations and never protested against the procedure adopted by the employer. He never demanded for any information or documents from the employer. He admitted that he made his representation and the same were considered. Thereafter he was notified of the decision to terminate his employment. In the circumstances, I hold that a fair procedure was followed.
35. Having made a finding that the reason for the termination was valid and that a fair procedure was followed, I proceed to hold that the dismissal of the claimant from service was fair and lawful.

### **Discrimination**

36. The claimant alleged that he was discriminated against at the work place on ground of his ethnicity. I agree with the respondent that there is no evidence to substantiate the claim of discrimination. He was the branch manager notwithstanding his ethnicity. He failed to perform his role well and after investigations and hearing, he was lawfully dismissed.

### **Defamation**

37. The claimant alleged that he was defamed through publication of a notice to the public that he was no longer working for the Sacco. The said publication in my view does not amount to defamation. There is no proof that it was malicious and false publication intended to lower his reputation in the eye of the public. The burden of proof of the said elements of defamation lies with the claimant but in this case, he has failed to discharge the same.
38. The public notice is normal business practice intended to warn members of the public against falling prey to mischievous former employees. It is a good practice which aims at protecting the members of the public and not to malign the former employees. It also shields the employer from liability incurred by former employees without authority.



39. In the instant case, the publication is not injurious to the claimant's reputation. It carried his photo together with that of his colleague with a caption:

“The Above-named persons are no longer staff of yetu sacco society limited and are not authoised to transact on behalf of Yetu Sacco Society Limited.”

**Reliefs sought**

40. Having found that the claimant has not proved a case of unfair termination, discrimination and defamation, I find and hold that he is not entitled to the reliefs sought. Consequently, the suit is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 30TH DAY OF JANUARY 2024.**

**ONESMUS N MAKAU**

**JUDGE**

**Order**

This judgment has been delivered to the parties via Teams video conferencing with their consent, 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**

