



REPUBLIC OF KENYA



**Kiptanui v Wevarsity Sacco Society Ltd (Cause 111 of 2019)  
[2023] KEELRC 1279 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1279 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 111 OF 2019**

**S RADIDO, J  
MAY 31, 2023**

**BETWEEN**

**VICTOR KIPTANUI ..... CLAIMANT**

**AND**

**WEVARSITY SACCO SOCIETY LTD ..... RESPONDENT**

**JUDGMENT**

1. Victor Kiptanui (the Claimant) was appointed as a Manager through a letter dated 10 March 2014 by Wevarsity Sacco Society Ltd (the Respondent).
2. On 26 June 2019, the Respondent issued a show-cause notice to the Claimant asking him to respond within 14 days to allegations of facilitating and authorising a loan on 4 June 2019 irregularly, and in contravention of the credit policy guidelines to a Mr Paul Nganga Kamau.
3. Since the Claimant was on leave, the Respondent extended the leave by 55 more days to enable further investigations.
4. The Claimant responded on 4 July 2019 and on 22 July 2019, the Respondent advised him that it would communicate in due course once investigations had been completed.
5. The Respondent completed the investigations and on 17 September 2019, it issued a fresh show-cause notice to the Claimant and requested him to respond within 14 days to some 7 allegations.
6. The Claimant responded on 30 September 2019 and on 11 October 2019, he was sent on 2 months' compulsory leave.
7. Thereafter, the Respondent invited the Claimant to attend a disciplinary hearing through a letter dated 24 October 2019. The hearing was set for 30 October 2019 and the Claimant attended the hearing.



8. On 15 November 2019, the Respondent wrote to the Claimant informing him that it had considered his responses and resolved that he be warned and surcharged Kshs 2,795,411/-.
9. The letter further informed the Claimant that he was being deployed to the department of Internal Audit and that he should report to duty on 16 December 2019.
10. The Claimant appealed on 27 November 2019 and on 2 December 2019, the Respondent rescinded the surcharge decision but maintained the deployment to audit department.
11. The Claimant was not satisfied and he sued the Respondent on 5 December 2019, alleging unlawful demotion and unfair disciplinary process (filed together with the Memorandum of Claim as an application which the Court determined on 30 April 2020).
12. The Respondent filed a Response on 30 January 2020.
13. On 28 April 2022, the Respondent terminated the Claimant's employment, prompting him to secure leave to file an Amended Statement of Claim.
14. The Amended Statement of Claim was filed on 3 October 2022. The Respondent filed an Amended Response on 11 October 2022.
15. The Cause was heard on 30 January 2023, 21 March 2023 and 20 April 2023.
16. The Claimant filed his submissions on 8 May 2023 and the Respondent on 23 May 2023.
17. The Court has considered the pleadings, evidence and submissions.

### **Unlawful demotion**

18. The Claimant asserted that he was employed by the Respondent as the Chief Executive Officer on 5 May 2014 and confirmed on 25 March 2015, and that after a disciplinary hearing, he was unlawfully demoted on 15 November 2019 to the position of Internal Auditor, a non-existent post.
19. To support the assertions, the Claimant produced a copy of his letter of appointment dated 10 March 2014, and a confirmation letter dated 25 March 2015.
20. The Respondent's witness admitted during cross-examination that the Claimant had been confirmed as the Chief Executive Officer in 2015.
21. On the basis of the confirmation letter, the Court is satisfied that the Claimant was serving as the Chief Executive Officer as of 15 November 2019.
22. In the submissions, the Claimant urged that pursuant to sections 41 and 45 of the *Employment Act*, 2007 as read with Article 47 of the Constitution, he was entitled to be heard before the demotion, but the Respondent did not afford him the chance.
23. The Respondent produced a copy of the Terms and Conditions of Service.
24. Chapter 7 of the Terms and Conditions of Service allowed the Respondent the discretion to demote an employee where the employee had been found culpable for misconduct.
25. The Claimant was taken through a disciplinary process after which the Respondent found him culpable.
26. The Court, therefore, finds that the demotion, qua demotion, had a contractual foundation and was within the sanctions which the Respondent could impose and was not unlawful.



## Unfair termination of employment

### Procedural fairness

27. The Respondent's Board met on 12 April 2022, and after noting that the Claimant had been absent without lawful cause or permission from November 2021, resolved to suspend him for 3 months to pave way for further investigations.
28. As a result, the Respondent suspended the Claimant and also issued a show cause to him on 13 April 2022 and instructed him to respond within 14 days.
29. The Claimant did not respond within the 14 days and on 27 April 2022, the Board met and resolved to summarily dismiss him. The dismissal letter was issued on 28 April 2022.
30. Section 35(1) of the *Employment Act*, 2007 contemplates written notice of termination of employment. The Respondent issued a show cause to the Claimant.
31. The show cause called on the Claimant to respond within 14 days but he did not respond.
32. The Respondent then went ahead to dismiss the Claimant in consideration of the failure to respond.
33. However, section 41(2) of the Act demands that in cases of summary dismissal, the employer should conduct an oral hearing in the presence of the employee's representative of choice.
34. The Respondent did not demonstrate that it offered the Claimant this additional layer of protection before taking the decision to dismiss on the ground of absence without lawful cause or permission.
35. On that ground, the Court finds that the decision to dismiss the Claimant was procedurally tainted.

### Substantive fairness

36. It is the employer who knows the reasons for terminating an employment contract and so it should not be difficult for it to prove and justify the reasons leading to the decision as demanded by sections 43 and 45 of the *Employment Act*, 2007.
37. The reason(s) the Respondent gave for dismissing the Claimant was habitual absence from duty, dishonesty and insubordination.
38. The Respondent called its Chair of the Board to discharge the burden.
39. The witness testified that the Claimant had absented himself habitually and was issued with a show-cause but did not respond in time.
40. The Claimant was aware of the reasons for dismissal way before the Court hearing. He did not allude to the allegations of absence without cause at all during his testimony or challenge the Respondent's oral evidence on the absence.
41. In the circumstances, the Court concludes that the Respondent had valid and fair reasons to dismiss the Claimant.



## **Remedies**

### **Compensation**

42. The Court has concluded that the Respondent did not comply with the requirements of procedural fairness but it had valid reasons to dismiss the Claimant. The Claimant had served the Respondent for about 5 years.
43. Considering these factors, the Court is of the view that the equivalent of 4-months' salary as compensation would be appropriate (gross monthly salary was Kshs 116,816/- according to March 2022 pay slip).

### **Conclusion and Orders**

44. The Court finds and declares that the summary dismissal of the Claimant was procedurally unfair.
45. The Claimant is awarded:
  - (i) Compensation Kshs 467,264/-.
46. The Claimant to have costs.

**DELIVERED VIRTUALLY, DATED, AND SIGNED IN KISUMU ON THIS 31<sup>ST</sup> DAY OF MAY 2023.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

### **Appearances**

For Claimant Bruce Odeny & Co. Advocates

For Respondent Abok Odhiambo & Co. Advocates

Court Assistant Chrispo Aura

