



**Mesa v Gusii Mwalimu Sacco Society Ltd (Cause E043 of 2022)  
[2023] KEELRC 2238 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2238 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E043 OF 2022  
CN BAARI, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**COLLINS CHUMA MESA ..... CLAIMANT**

**AND**

**GUSII MWALIMU SACCO SOCIETY LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant's claim was commenced vide a Statement of Claim dated 6<sup>th</sup> October, 2022. He seeks a declaration that his termination by the Respondent was unfair, unlawful and irregular, an order for payment of his full terminal benefits, an order for reinstatement to the position he held before termination, an award of exemplary, compensatory and punitive damages, and costs of the suit and interest at court rate.
2. The Respondent filed a response to the claim and a counterclaim on 16<sup>th</sup> November, 2022. The Claimant filed a reply to the memorandum of response and a defence to the counterclaim on 24<sup>th</sup> January, 2023.
3. The Claimant's case was heard on 6<sup>th</sup> February, 2023, when the Claimant testified in support of his case. He adopted his witness statement and produced documents filed as exhibits in the matter
4. The Respondent called a total of five (5) witnesses, with the first three testifying on 7<sup>th</sup> March, 2023, and the last two (2) on 17<sup>th</sup> April, 2023. The Respondent closed its case on the second hearing, paving way for filing of submissions.
5. Submissions were filed for both parties and the Respondent further filed supplementary submissions dated 8/9/2023.



## The Claimant's Case

6. The Claimant states that he was employed by the Respondent on 1<sup>st</sup> July, 2007, as a Computer Operator earning a gross salary of Kshs. 34,300/-. It is his case that he rose up the ranks to the position of Head of Department Information Management on a gross salary of Kshs. 188,466.28/- as at the time of his termination in October, 2019.
7. It is the Claimant's case that he was served with a letter of interdiction on 17<sup>th</sup> October, 2019, on the basis that he was involved in the production of a local Sacco ATM card for member number 17551 without authority.
8. The Claimant further states that the interdiction letter informed him that he was required to write a response to the allegations within two weeks. He states that he responded to the letter wherein, he denied the allegations in toto, but later changed his response to read as directed by the Board of the Respondent.
9. It is the Claimant's case that he accepted to write a statement/response as directed by the Respondent's Directors who demanded that he writes the response in their presence and accept the allegations on the promise that the disciplinary action will be dismissed, and his statement used to claim compensation from their insurance company, and he be retained in the employ of the Respondent.
10. The Claimant states that the Respondent instead, proceeded to use his statement to dismiss him from the service on 24<sup>th</sup> July, 2020. He further states that the letter dismissing him from service, indicated the reasons for the termination to be that on 14<sup>th</sup> July, 2019, he without authority produced or caused to be generated local ATMs Cards, utilized the cards to withdraw funds from members accounts and that he admitted liability and agreed to repay the stolen amount of Kshs. 3,118,000/- on account of forgery.
11. It is the Claimant's case that the theft of the money was merely fabricated and a tactic by the Respondent to enrich itself and to get rid of the Claimant unlawfully and unprocedurally. The Claimant states that he suffered loss and damage from the actions of the Respondent and for which he claims as per his statement of claim.
12. In his testimony before Court, the Claimant told the court that he initially wrote a response to the interdiction vide a letter dated 23<sup>rd</sup> October, 2019, where he denied the allegations against him. He further states that he was asked to attend a Board meeting where he was asked to change his statement and instead, admit liability in the pretext that his statement would be used to get compensation from insurance and the charges against him dropped.
13. On cross-examination, the Claimant told Court that he could not confirm that the withdrawal of funds was made without the consent of the member. He further stated that the money withdrawn was Kshs. 8000/-
14. The Claimant further told Court that although he was told by the Board of the Respondent that Kshs. 3.108.000 was stolen, he was not told when or how the money was stolen/lost. He further told the Court that he was coerced to write a figure that he would agree to refund and he indicated an amount of Kshs. 400,000/-
15. The Claimant further told this Court that the Respondent's premises had CCTV surveillance cameras which he did not have access to, and hence could not confirm if money was withdrawn from the ATM as alleged.



16. The Claimant on cross-examination denied having access to withdrawals and told court that he follows logs of various systems to ascertain the logs, and which would show if money was withdrawn from the members accounts. He further told Court that the logs alone would not enable him to know who withdrew the money.
17. The Claimant further told Court that he was not allowed time to investigate the production of the complainants' ATM card and its subsequent use to withdraw money or whether the card was dispatched to the customer.
18. It is the Claimant's case that he was informed by the Respondent's Chief Executive Officer (CEO) that there were more accounts involved in the fraudulent process.
19. On re-examination, the Claimant told Court that production of an ATM is through a defined procedure and involves more than one person and several systems, yet only three (3) of them were interdicted and subsequently dismissed, while the rest were transferred to other offices.
20. It is his testimony that video footage would have shown who withdrew the money. He further told the Court that he was terminated on the ground of fraud and not failure to supervise.
21. In response to the counterclaim, the Claimant states that he never irregularly generated ATM cards without instructions from the customer, and neither has he ever withdrawn money from a customer's account.
22. It is his further case that admission of liability was not voluntary but was obtained under duress since the Respondent dictated the terms of his statement on the pretext that it was going to drop the complaint and retain him in their employment.
23. The Claimant states that the audit report produced before court is irregular for reason that it does not specify the steps and persons involved in the production of ATM cards, and even left out the custodians of the mandatory key encryption from the process.
24. It is the Claimant's case that the Respondent's claims in relation to the counterclaim are false and pray that the counterclaim be dismissed with costs.

### **The Respondent's Case**

25. The Respondent states that it acted within the law when dismissing the Claimant, the Claimant having been involved in the production of a local ATM Card for account number 17551 without authority.
26. It is the Respondent's further case that it invited the Claimant to respond to the charges subject of the interdiction letter to the Respondent's Board of Directors within two weeks. It is its case that the letter of interdiction served as a show cause letter granting the Claimant an opportunity to be heard.
27. The Respondent states that it is not true that the Claimant in his response denied the charges therein, and specifically the allegation that its Directors forced him to change his statement.
28. It is the Respondent's case that the Claimant expressly admitted involvement in the fraudulent activities vide his letter dated 9/11/2019, and committed to refund Kshs. 400,000/- being his share of the loot arising from the irregular withdrawals.
29. The Respondent confirms that it terminated the Claimant vide a letter dated 24/7/2020, and denies that the letter or the termination was premised on terms dictated by its Board of Directors. It further states that the reasons for the termination were provided in the letter of termination.



30. The Respondent further states that the Claimant's dismissal was fair for reason that he was informed the grounds for his interdiction, accorded an opportunity to be heard, his admission of liability, the statement from the holder of account number 17551 which proved the allegations against him, and that his continued employment would have been detrimental to the Respondent's financial interest.
31. The Respondent states that the termination of the Claimant was carried out in accordance with the Employment Act and the rules of natural justice. It further states that the Claimant has not demonstrated any unlawful conduct on its part to warrant the grant of exemplary, compensatory and punitive damages
32. It is the Respondent's case that the Claimant had filed a similar claim between the same parties and over the same subject matter being Kisii ELRC No. 1 of 2022 and which is still pending.
33. RW1 told Court that the Claimant was the one responsible to issue super access rights for production of ATM cards and that he participated in making and verification of the particular ATM cards.
34. RW1 further confirmed on cross-examination that only three ICT officers were interdicted and later dismissed notwithstanding the fact that there were several officers involved in ATM card production process.
35. RW1 further states that the only complaint received was in relation to the withdrawal of Kshs. 8000 from one Josephine Onkoba's account.
36. RW1 further told this Court that a daughter of the Respondent's Vice-Chair and a daughter of the Treasurer were employed when the Claimant was terminated.
37. RW1 further stated on cross-examination that the Claimant owes the Respondent Kshs. 400,000/- which is the sum he agreed to pay but did not pay.
38. It is RW1 further testimony that he did not file logs for the affected accounts in court and that the CCTV footage would have shown the exact occurrence in the accounts. He further told court that the matter was handled administratively and was thus not reported.
39. RW1 finally stated that the Claimant had an outstanding loan facility of Kshs. 3, 252, 355/- which is yet to be repaid.
40. RW2 one Christine Nyanchoka also confirmed on cross examination that she was responsible for issuance of ATM cards to members during the said period that the alleged fraud occurred, and further confirmed that she was never investigated concerning the alleged fraud.
41. RW3 a Ms. Fridah Nyamisa Mangare confirmed during cross examination that there is in the custody of the Respondent a pin mailer record which contains the names and details of members who have applied for ATM cards, and which if produced in court would have confirmed to court whether the holders of the alleged accounts which monies were withdrawn had ever applied for ATM cards.
42. RW3 further confirmed that there are several system logs involved in production of ATM card and it is possible from this system to know exactly who accessed the various alleged accounts and withdrew customer funds by use of ATM cards which system logs are in the custody of the Respondent.
43. RW3 confirmed that she does not in her current position have any role in relation to ATM card production process which capacity the Claimant was holding before his employment was terminated.
44. RW4 one Josephen Banchiri Onkoba the complainant in the withdrawal of Kshs. 8000, confirmed that the bank statement for account No. 17551 produced before Court was not complete and only



showed transactions starting from the year 2014. She further confirmed that she is not aware of any other similar case or complaint by any other account holder.

45. RW5 a Mr. Lewis Ndege the Respondent's chief internal auditor, confirmed that even after conducting his investigation he was not sure who activated the dormant accounts. He however confirmed that using the system logs and records which were in the custody of the Respondent it could be ascertained who exactly logged into the said account and withdrew the alleged monies.
46. RW5 confirmed that the report presented in Court lacked crucial personal data like customer names, identification numbers, membership numbers among others, which would have enabled the court to verify the validity of the report.
47. Under the counterclaim, the Respondent states that it carried out an internal audit whose report indicates that the Claimant verified irregular ATM withdrawals amounting to Kshs. 1,183,000 between 14/2/2019 and 17/9/2019.
48. The Respondent seeks an order compelling the Claimant to pay it Kshs. 1,183,000/- being monies fraudulently obtained from his employer and its customers plus costs of the counterclaim.

### **The Claimant's Submission**

49. It is the Claimant's submissions that under Section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee, but which burden is discharged once the employee establishes a prima facie case. He submits that his termination did not fall within the four corners of the legal threshold set out by section 45 of the Act. The Claimant sought to rely in Josephine M. Ndungu & others v Plan International Inc 120191 eKLR to support this position.
50. It is submitted for the Claimant that the details of the accounts from which funds were allegedly withdrawn was not extracted from the system, which if it was, would have indicated all the particulars for each and every member's account and the persons who withdrew the funds.
51. It is further submitted that the Respondent's Auditor fabricated the report choosing which details to include in the report and left out major information and particulars to be specific the details of the individuals who accessed the said accounts and withdrew the funds.
52. It is the Claimant's further submission that the Respondent was wrong in dismissing him from employment based on a report whose authenticity is highly questionable and hence the Respondent did not have a valid reason for dismissing him from employment.
53. It is submitted that the Claimant has proved that an unfair termination of employment occurred and the Respondents has not justified the grounds upon which it terminated the Claimant's employment as required under Section 47(5) of the *Employment Act*, and further that the Claimant was not accorded procedural fairness in the process of terminating his employment.

### **The Respondent's Submissions**

54. The Respondent submits that the Claimant's letters dated 23<sup>rd</sup> October, 2019, 9<sup>th</sup> November, 2019, and 29<sup>th</sup> June, 2020, are an admission of facts having confirmed that he did the letters. Reliance was had to the Court of Appeal decision in Choitram v. Nazari (1992) eKLR to support this position.
55. It is the Respondent's further submission that the Claimant is estopped from making assertions that are contradictory to his prior position.



56. It is submitted for the Respondent that the Claimant did not tender sufficient evidence in support of his claim other than the unsubstantiated allegations of coercion by the Respondent's Chairman.
57. It is the Respondent's submission that the reason for terminating the Claimant was a valid reason as one Josephine Onkoba showed that her account was transacted using a local ATM card, and money therein withdrawn. The Respondent placed reliance in the case of *Judicial Service Commission v. Gladys Boss Shollei & Another* (2014) eKLR to support this position.
58. The Respondent submits that the Claimant was given sufficient hearing before the Board of Directors which hearing was fair in its deliberations and the Claimant made written representation.
59. The Respondent further submits that the sanction given was reasonable in the circumstances of the case, and pray that judgment is entered in favour of the Respondent in the counterclaim for Kshs. 400,000/-.
60. It is submitted that the role of this Honourable Court is limited to making a wider inquiry to establish if the employer followed a reasonable procedure in terminating the employee. The Respondent sought to rely in ELRC Cause No. 57 of 2012: *Mwajuma Juma Kunde vs KAPS Municipal Parking Service Ltd* (2013) e KLR where this Court while addressing itself to section 43 (2) of the *Employment Act*, held that the decision to dismiss an employee ought to be hinged on an objective test, loosely referred to as 'range of reasonable responses test'
61. It is the Respondent's further submission that the Claimant neither pleaded specifics with respect to the allegations that he was coerced to admit the offence nor led any evidence to support this allegation.
62. The Respondent submits that having demonstrated that the argument by the Claimant that he was unduly influenced and/or that he was forced to admit to the subject wrongdoing is baseless, and having led evidence to demonstrate justifiable reasons for the Respondent to terminate the Claimant's employment; urge the court to return a verdict that the Claimant's termination was conducted in a procedurally fair manner.

### **Analysis and Determination**

63. I have considered the pleadings herein, the witnesses' oral testimonies and the written submissions by both parties. The issues that fall for determination are:
  - i. Whether the Claimant's was unfairly terminated.
  - ii. Whether the Claimant is entitled to the reliefs sought.

### **Whether the Claimant was unfairly terminated**

64. The Claimant contends that he was unfairly, unprocedurally and irregularly terminated, and seeks to be compensated for the unfair termination, and further be reinstated back to the position he held in the employ of the Respondent prior to the termination.
65. For a termination to be said to be fair, an employer must adhere to the tenets of procedural fairness as well as meet the substantive justification test as stipulated under Sections 41, 43, 45 and 47(5) of the *Employment Act*, 2007.
66. Procedural fairness refers to a disciplinary hearing that affords the concerned employee opportunity to defend himself/herself. The *Employment Act* under Section 45, expressly states that no employer shall terminate the employment of an employee unfairly.



67. Further, Section 41 of the Act demands that before an employer terminates the employment of an employee on the grounds of misconduct, poor performance, or physical incapacity, it shall explain to the employee in a language the employee understands the reasons for which the employer is considering termination.
68. The Court in the case of *Alphonse Maghanga Mwachanya v Operation 680 Limited* [2013] eKLR set out what has come to be referred to as the irreducible minimum principles of a fair hearing as, the need for an explanation of the reasons for the contemplated termination, the requirement for a representative to be present during the explanation, the need for the employee to be accorded a hearing and compliance with the employer's internal procedures where the employer has more than 50 employees.
69. The question become whether the Respondent adhered to fair procedure set out above, in arriving at the decision to terminate the Claimant.
70. The Claimant was issued with a letter of interdiction dated 17<sup>th</sup> October, 2019, which letter interdicted the Claimant, and further required him to answer to a charge of production of a local Sacco ATM without authorization by the account holder.
71. Other than the interdiction letter, nothing shows that the Claimant was invited for a disciplinary hearing or that he was informed of his right to have a representative present during such hearing. Although the Claimant did not deny appearing before the Board of Directors of the Respondent, his right to a representative cannot be overlooked.
72. Further, in the absence of a letter inviting the Claimant to the disciplinary hearing, the Court cannot determine whether the Claimant was accorded sufficient time between the date of interdiction and the hearing date to prepare for the hearing.
73. There is also no prove that reasonable effort was made to explain to the Claimant the charges against him, which is an express requirement under Section 41 of the Act. Further, the subject of the interdiction was a single ATM card, but several other charges such as production of ATM cards for dormant accounts, were introduced at the hearing as evidenced by the minutes placed before court.
74. In the premise, I find and hold that the decision to terminate the Claimant did not meet the irreducible minimum principles of a fair hearing, and which renders the termination unfair on account of procedure.
75. On the question of substantive justification for the termination, the issue is whether the Respondent had valid, fair and justified reasons to terminate the Claimant.
76. The *employment Act* in Sections 43, 45(2) and 47(5), places both the legal and evidential burden of proof of reasons for termination upon the employer, where an employee alleges that his/her employment was terminated without a sound legal justification.
77. The Claimant vide his pleadings, exhibits and oral testimony, has shown that he was indeed dismissed from the service of the Respondent, and placed before court reasons he deems make the termination unfair. This shifts the burden to prove the reasons for termination to the employer/Respondent.
78. A letter of interdiction issued to the Claimant and dated 17<sup>th</sup> October, 2019, indicates the reason for the contemplated disciplinary process on production of an ATM card for a customer of the Respondent named Josephine Onkoba without authority.



79. The question is whether this is a fair, valid and justified reason to terminate an employee. Firstly, the production of the ATM, and which is said to have been used to withdraw money from a customer's account, if proved, is a clear act of fraud which would without doubt justify an employee's termination.
80. Parties produced before court two responses to the letter of interdiction, also said to be the letter of show cause. One is typed and dated 23/10/2019, wherein, the Claimant denies involvement in the production of the ATM card and the withdrawal of funds from the customer/complainant's account. The second letter is hand written and dated 9/11/2019 and shows on the face that it was received on the same date.
81. The Claimant's contention is that his response to the show cause/interdiction letter, was through the letter of 23/10/2019, but which he was coerced to change so as to admit liability vide the latter hand-written letter of 9/11/2019.
82. The letter interdicting the Claimant is dated 17/10/2019. The Respondent under this letter, required that the Claimant files his response within two weeks. The response to the show cause dated 23/10/2019 was submitted within the set timelines, and which in my view is sufficient prove that it was the Claimant's genuine response to the charge against him, and which further confirms the allegation of coercion and intimidation to admit liability through the letter of 9/11/2019.
83. The Claimant faced eminent risk of losing his job and was thus vulnerable at the time he was coerced to change his response, and would in my view, agree to anything to save his job. The Respondent no doubt took undue advantage of the Claimant's vulnerability to secure a plea of guilt.
84. The admission of liability, and which was used to dismiss the Claimant was obtained through coercion and intimidation and cannot hold. If the Respondent lost money at all, the Board failed in using shortcuts by coercing and intimidating employees instead of properly investigating the alleged thefts/fraud and procedurally and properly bringing the fraudsters to book.
85. It is also not lost on this Court that RW3 confirmed that she does not in her current position have any role in relation to the production of ATM cards, and which capacity is similar to that held by the Claimant before his termination. This would thus also mean that the Claimant was also not directly involved in the production of ATM cards, and which formed the sole reason for his termination going by the letter of interdiction placed before this court.
86. It was not disputed that the Respondent's premises, and specifically the ATM lobby had CCTV surveillance cameras which should easily have shown who withdrew money from which account at a particular time. The Respondent did not deem it necessary to avail the CCTV footage as prove that the Claimant was culpable for the theft.
87. The admission by RW1 who was the Respondent's CEO that the daughters of the Respondent's Vice-Chair and Treasurer were employed after the dismissal of the Claimant, lends credence to the Claimant's assertion of fabrication of charges to create employment opportunities for the Respondent's Director's kin.
88. This analysis leads me to the conclusion that the Respondent did not discharge the burden placed upon it under the *Employment Act* to prove that the reasons for terminating the Claimant are fair, valid and justified. This finding thus renders the termination unfair on account of failure to prove reasons for the termination.
89. I conclude by holding that the Claimant's termination is both procedurally and substantively unfair.



### **Whether the Claimant is entitled to the Reliefs Sought**

90. The Claimant seeks a declaration that his termination by the Respondent was unfair, unlawful and irregular, an order for payment of his full terminal benefits, an order for reinstatement to the position he held before termination, an award of exemplary, compensatory and punitive damages, and costs of the suit and interest at court rate.
91. The finding of an unfair termination entitles the Claimant to compensation under Sections 49 and 50 of the *Employment Act*. In making such a compensation, the court is to consider the 13 factors set out under section 49 (4) of the *Employment Act* (See Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR)
92. In the case of Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR the Court while citing the case of D.K. Marete v Teachers Service Commission Cause No. 379 of 2009, held that remedies are not aimed at facilitating the unjust enrichment of aggrieved employees but to redress economic injuries in a proportionate way.
93. The Claimant was the head of the Respondent's ICT department and although it has been shown that he did not have a direct role in the ATM production process, his position may have placed upon him an opportunity to tamper proof the Respondent's systems. This leads the Court to the conclusion that the Claimant may have contributed to the termination.
94. In the circumstances, I deem an award of seven months' salary sufficient compensation for the unfair termination.
95. The claim for payment of terminal dues was not substantiated. No evidence was led to show that the Claimant was owed on account of terminal dues, and the nature of terminal dues that are due and owing to the Claimant. The claim fails and is dismissed.
96. The Claimant has also sought to be reinstated to the position he held before termination. Section 49(4) (c) of the *Employment Act* provides for reinstatement where the court deems it a practical remedy.
97. Section 12(3)(viii) of the *Employment and Labour Relations Court Act*, states thus on reinstatement:

“In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

(viii) An order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law.”
98. The Claimant was dismissed from the service of the Respondent on 24<sup>th</sup> July, 2020. By simple arithmetic, it is clear that the Claimant was dismissed over three years ago, and is thus not eligible for reinstatement going by the provisions of the law laid out herein above.
99. The claim for reinstatement thus fails and is dismissed.
100. The claims for exemplary and punitive damages were equally not proved and they fail.

### **The Counterclaim**

101. The Claimant's interdiction was premised solely on a complaint by a member/account holder of the Respondent, named Josephine Onkoba, whose complaint was that an ATM card was produced for her account and used to make withdrawals without her consent.



102. It was the complainant's case that the money withdrawn from her account was Kshs. 8000. It is thus not clear to the court where the amount of Kshs. 3,108,000 came from there not having been formal complaints in relation to this amount, and the charges against the Claimant not having included the amount subject of the counterclaim.
103. This leads the Court to concur with the Claimant that the entire fiasco was a fabrication intended to either terminate the Claimant or swindle the insurance company through fraudulent claims.
104. Going by the letter of interdiction which also served as the show cause letter, the singular charge against the Claimant was that of production of a local Sacco ATM card without the authority of the holder of account number 17551. No charge was levelled against the Claimant in relation to the so-called dormant accounts which form the basis of the Respondent's Counterclaim.
105. I concur with the Claimant that the counterclaim and the amount sought therein, was an afterthought as this did not form part of the charges against the Claimant. Further, even if the alleged withdrawals from the dormant accounts arose and were only discovered after the internal audit, the audit/ investigation should in my view have preceded the disciplinary process so as to ascertain the actual issues in informing the disciplinary action.
106. In the premise, the counterclaim fails and is dismissed with costs to the Claimant.
107. In whole, Judgment is entered for the Claimant as against the Respondent as follows:
- i. A declaration that the Claimant's termination is unfair and unlawful.
  - ii. An order for payment of Seven (7) Months' salary as compensation for the unfair termination at Kshs. 1, 319,263.96/-
  - iii. Costs of the suit and interest until payment in full.
  - iv. The Respondent's Counterclaim is dismissed with costs.
108. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

**\*\*Ms. Nyaenya present for the Claimant**

**\*\*Mr. Metho present for the Respondent**

**\*\*Christine Omolo- C/A**

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