



REPUBLIC OF KENYA



**Ndegeyo v Sukari Sacco Society Ltd (Cause 181 of 2018)
[2023] KEELRC 3035 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3035 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 181 OF 2018
S RADIDO, J
NOVEMBER 29, 2023**

BETWEEN

MARTIN MUGAYA NDEGEYO CLAIMANT

AND

SUKARI SACCO SOCIETY LTD RESPONDENT

JUDGMENT

1. The questions for determination in this Cause are:
 - i. Whether the termination of the employment of Martin Mugaya Ndegeyo (the Claimant) was unfair?
 - ii. Whether Sukari Sacco Society Ltd (the Respondent) defamed the Claimant?
 - iii. Whether the Respondent was in breach of contract?
2. The Cause was heard on 6 March 2023 and 5 October 2023. The Claimant and the Respondent's Board Treasurer testified.
3. Despite clear directions, none of the parties filed their submissions.
4. The Court has considered the pleadings and evidence.

Unfair Termination Of Employment

Procedural Fairness

5. On 18 December 2017, the Respondent sent the Claimant on compulsory leave to pave way for investigations into alleged withdrawal of funds from an account belonging to a person who was ill.



6. The Respondent thereafter issued a show-cause dated 13 February 2018 to the Claimant and requested him to respond to certain allegations. The Claimant responded on 26 February 2018.
7. Upon receipt of the response, the Respondent invited the Claimant to a disciplinary hearing and advised him of the right to be accompanied with a colleague, and the hearing was held on 7 March 2018. The hearing included written questions and answers.
8. The hearing was followed with a termination letter on 25 March 2018.
9. Before the Court, the Claimant assailed the process leading to the termination on the grounds that there was no prior notice and that he was not allowed an opportunity to be heard.
10. Section 35(1)(c) of the *Employment Act*, 2007 contemplates written notice of termination and section 41 of the *Act* envisages allowing the employee an opportunity to make representations.
11. The Respondent alerted the Claimant of the allegations for contemplated disciplinary action and requested him to respond which he did. Thereafter, the Respondent invited the Claimant to a disciplinary hearing. The Claimant attended.
12. The Court is satisfied that the Respondent was in substantial compliance with the requirements of procedural fairness.

Substantial fairness

13. Sections 43 and 45 of the *Employment Act*, 2007 demand that the employer proves not only the validity but fairness of the reasons for terminating an employment contract.
14. The reason for the termination of the Claimant's employment revolved around the unauthorised withdrawal of some monies from a member's account on or around 8 December 2017. The said account holder was reportedly sick at home.
15. The Respondent's witness testified that when he learnt of the withdrawal, he made inquiries and the FOSA Supervisor informed him that the Claimant had instructed him to withdraw the funds and hand the same to him and that he (Claimant) had retained the withdrawal slip instead of having it kept in a file.
16. The witness also testified that he confronted the Claimant about the irregularities and he allegedly responded that he intended to bank the money in an external bank account.
17. In the response to the show-cause, the Claimant explained that the withdrawn funds did not belong to the ill account holder but were Sacco funds irregularly posted to her account. The Claimant also explained that it is the account holder who had complained of unexpected funds in her account.
18. The Claimant maintained that he had acted in the best interests of the Sacco within his administrative competence.
19. If the explanation by the Claimant was plausible, it raises the question why it was necessary to withdraw cash from a member's account for purposes of depositing it into the right account. Why were the funds not transferred directly to the right account or through a cheque? The Respondent's bylaws made provision for cheque payments.
20. It is striking that the Claimant did not explain or disclose how he became aware that Sacco funds had been channeled or paid into the wrong account or why there were no written instructions from the account holder.



21. The Claimant did not come out clearly on the question of the withdrawn funds. He fully participated in the withdrawal of the funds in cash. His explanations were vague. There was some level of dishonesty.
22. The Court finds that a reasonable employer would have taken the decision to terminate. The Respondent cannot be faulted.
23. The Court finds the termination was grounded on valid and fair reasons.
24. Compensation and pay in lieu of notice are not available to the Claimant.

Breach Of Contract

Unpaid Leave

25. An employee is entitled to at least 21 days leave with full pay. The Claimant did not disclose the relevant period for the accrued leave. Without any evidential foundation, relief is declined.

Overtime

26. The Claimant's contract expressly excluded overtime pay for extra working hours. The Human Resource Policy also provided that staff in senior categories would not qualify for overtime pay but would get off-days.
27. This relief is declined.

Unpaid Salary

28. The Claimant filed a schedule indicating that he was owed salary arrears from November 2015 to March 2017. The schedule was based on number of hours.
29. Despite the schedule, the Claimant did not place before the Court any evidence that he was not paid the salaries contractually agreed to.
30. This head of the claim was not proved to the required standard.

Service Pay

31. The Claimant was contributing towards the National Social Security Fund and by dint of section 35(5) and (6) of the [Employment Act, 2007](#) would not be eligible for service pay.

Defamation

32. Although seeking general damages for defamation, the Claimant did not plead defamation as required under procedural law nor put any iota of evidence to support the cause of action or relief.
33. This cause of action fails.

Conclusion and Orders

34. From the foregoing, it is clear by now that the Cause is without merit. It is dismissed with costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 29TH DAY OF NOVEMBER 2023.

RADIDO STEPHEN, MCIARB

JUDGE



Appearances

For Claimant Namatsi & Co. Advocates

For Respondent Anwar & Co. Advocates

