



REPUBLIC OF KENYA



**Mugo v Mwietheri Savings & Credit Co-operative Ltd (Cause E031 of 2021)  
[2022] KEELRC 13106 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13106 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE E031 OF 2021  
DKN MARETE, J  
OCTOBER 31, 2022**

**BETWEEN**

**JULIA WAMBUI MUGO ..... CLAIMANT**

**AND**

**MWIETHERI SAVINGS & CREDIT CO-OPERATIVE LTD ..... RESPONDENT**

**JUDGMENT**

1. This matter was originated by way of a Statement of Claim dated June 11, 2021. It does not disclose an issue in dispute on its face.
2. The respondent in a Statement of Response dated October 4, 2021 denies the claim and prays that this be dismissed with costs.
3. The claimant's case is that at all material times relevant to this suit, the claimant was employed as an Accountant of the respondent. She earned Kshs.36,883.6/=.
5. The claimant's other case is that in the year 2016 the respondent Sacco lost Kshs.769,500.00 which upon investigation was found to have been stolen by one Eliud Mwangi Njiru, a Teller in the Sacco.
6. The claimant avers that the said Eliud Mwangi Njiru agreed to repay the said Sacco the said amount in instalments as follows;
  - a. Kshs.50,000/= on or before November 30, 2016.
  - b. Kshs.10,000/= on every 30th day of every subsequent month starting December 30, 2016.
  - c. Kshs.100,000/= during every coffee payout.
7. This was repaid until late 2017 when he stopped.



8. The claimant's further case is that a new management committee took over the Sacco in 2017 and started investigations into this fraud. It wrote to her on February 27, 2017 asking her to explain how the fraud had occurred.
9. The claimant's other case is that she did explain vide a letter of March 2, 2016 but the claimant as a data officer was implicated and asked to pay Kshs.76,950.00 in 90 days from March 5, 2018. On failure to repay she was interdicted and dismissed on June 19, 2018.
10. She further avers as follows;She was not liable to repay/refund the amount of 10% of the lost monies.She was not mandated with the task of data entry and this lay with the clerk.Entries on loans and fees charged was the mandate of the internal auditor.The summary dismissal was unfair, unlawful, without any colour of right and unlawful.
11. She prays as follows;
  - a. A declaration that the claimant was unlawfully dismissed from employment.
  - b. Payment of terminal benefits in the sum of Kshs.277,700/=.
  - c. Compensation at the rate of 12 months gross salary for loss of employment on account of unfair and unlawful dismissal amounting to Kshs.442,603/=.
  - d. Interest on terminal benefits under (b) at the rate of 12% from 13th June, 2018.
  - e. Interest on compensation under (c) at the rate of 12% as from the date of judgment until payment in full.
  - f. Any other relief the court deems fit to grant.
  - g. Costs of this suit.
12. The respondent's case is that;
  - a. It is true that the Respondent lost Kshs.769,500/= through fraud.
  - b. Initial investigations pointed out to a teller, Eliud Mwangi Njiru as one of the culpable persons.
  - c. Upon arrest by the police, the said Eliud Mwangi Njiru initially agreed to repay the said sum of Kshs.769,500/=.
  - d. He subsequently appealed to the management board of directors of the respondent indicating that more people were involved in the fraud.
  - e. The board of directors conducted independent investigations and each of the suspected employees was afforded an opportunity to be heard.
  - f. Upon conclusion of the investigations the following employees were found to have participated in the fraud or to have acted grossly negligent so as to facilitate the fraud:
    - i. The claimant who was the Accountant
    - ii. Eliud Mwangi Njiru who was the teller
    - iii. Bonface Mugo Gachenge who was an Internal Auditor
    - iv. Kenneth Murage Nyaga who was the manager
    - v. Caroline Muthoni Muriuki who was the teller



- g. The board recommended that each of the culpable employees do repay their share of the lost funds as follows:
    - i. The claimant Kshs.76,950/=
    - ii. Eliud Mwangi Kshs.230,850/=
    - iii. Bonface Mugo Gachenge Kshs.230,850/=
    - iv. Kenneth Murage Nyaga Kshs.115,425/=
    - v. Caroline Muthoni Muriuki Kshs.115,425/=

Kshs.769,500/=
  - h. That all other employees repaid their dues but the claimant failed and/or refused to.
  - i. That it is clear from the duties of the claimant, that she was responsible of supervising the input and handling of financial data and reports for the respondents automated financial systems; to maintain the Respondent's financial data bases, computer software systems and manage filing systems. She was also expected to establish, maintain and co-ordinate the implementation of accounts; and accounting control procedures; to compile and analyse financial information, to prepare entries of accounts such as general ledger accounts and document society transactions.
  - j. That the claimant failed to peruse data and have it updated daily. She would have accounts updated after a couple of days or weeks. This was grossly negligent and the theft of Kshs.769,500/= could not be discovered in time to stop it.
  - k. The claimant by her gross negligence contributed to the loss of Kshs.769,500/=.
  - l. The claimant failed to detect glaring anomalies on loan advanced to member No. 3397 of Kshs.144,000/= due to her gross negligence.
13. The Respondent's other case is that the claimant was requested to pay the amount assigned to her vide a letter dated March 5, 2018 but declined. She was summoned to make some payment which she ignored and was ultimately dismissed from employment. This was lawful and did not entitle her to any terminal benefits, or at all.
14. The matter came to court variously until the December 14, 2021 when the parties agreed on a disposal by way of written submissions.
15. The issues for determination therefore are;
1. Was the termination of the employment of the claimant by the respondent wrongful, unfair and unlawful.
  2. Is the claimant entitled to the relief sought.
  3. Who bears the costs of this cause.
16. The claimant in her written submissions dated October 6, 2021 reiterates her case. She avers that she was not responsible for data entering or even verification of loans awarded and fees charged but only posting of the summaries given by the clerk. She therefore prays that the claim be allowed as prayed.
17. The respondent in her written submissions dated January 14, 2022 also reiterates her case as pleaded and presented. It is her case that the summary dismissal inflicted on the claimant was lawful and had been occasioned by the claimant's negligence.



18. Further, the claimant was always included and participated in hearings on this matter particularly before the Conciliator where the matter was heard and determined. Indeed, it is the claimant's ..... that the respondent resorted to her dismissal and even in all this, she was paid her terminal benefits less the amount of Kshs.76,950.00 being her portion of refund for the loss.
19. The respondent sums up her case by relying on section 107 and 108 of the *Evidence Act*, chapter 80 Laws of Kenya as follows;
- 107 'Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist'
- 108 'The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.'
20. Again, section 47 (5) of the *Employment Act*, 2007 provides thus;
- 5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.
21. She further seeks to rely on the authority of *Protus Wanjala Mutike v Anglo African Properties t/a Jambo Mutara Lodge Laikipia* [2021] eKLR the court observed thus;
- “It binds the claimants at the onset to bring out the case of unlawful termination for employment to which the respondent shall adduce evidence in justification failure of which a claim is lost.
- The respondent's case overwhelms that of the claimant. This is because the claimant has failed to satiate the burden of proof of unlawful termination of employment as provided under section 47(5) of the *Employment Act*, 2007. He has not adduced evidence in support of termination, let alone unlawful termination on a balance of probability. I therefore find a case of no termination of employment and hold as such.”
22. The claimant has failed to prove his case of unlawful termination of employment on both the test of balance of probabilities and also preponderance of evidence. It fails flatly on this stand. I therefore find a case of lawful termination of employment and hold as such. This answers the 1st issue for determination.
23. The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is not. Having lost on a case of unlawful termination of employment, she also loses on this.
24. I am therefore inclined to dismiss the claim with orders that each party bears their cost of the same.

**DATED AND DELIVERED AT NYERI THIS 31<sup>ST</sup> DAY OF OCTOBER 2022.**

**D.K.NJAGI MARETE**

**JUDGE**

Appearances

Mr. Nyaga instructed by Nyaga Gitari & Co. Advocates for the Claimant.

Miss Hambar instructed by Magee Law LLP Advocates for the Respondent.

