



**Butalanyi v Technical University of Kenya (Cause 297 of 2018)  
[2024] KEELRC 1115 (KLR) (14 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1115 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 297 OF 2018**

**JK GAKERI, J**

**MAY 14, 2024**

**BETWEEN**

**PAMELA K. BUTALANYI ..... CLAIMANT**

**AND**

**THE TECHNICAL UNIVERSITY OF KENYA ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Statement of Claim filed on 13<sup>th</sup> March, 2018 and amended on 20<sup>th</sup> January, 2023 alleging wrongful and unlawful termination.
2. The Claimant avers that she was employed by the Respondent on the 30<sup>th</sup> March 1989 as a Technician and was promoted to the position of Senior Technician, Chief Technician and lecturer as a course tutor under job group L.
3. The Claimant avers that while on Study Leave in the UK undertaking her PHD Studies, the Respondent unlawfully terminated her services vide a letter dated 21<sup>st</sup> August, 2009.
4. The Claimant avers that she filed a suit in the Industrial Court on the 22<sup>nd</sup> September, 2011 and after hearing the suit, the court ordered as follows;
  - a. The summary dismissal of the Claimant was unfair.
  - b. The Respondent shall reinstate the Claimant to her previous position with effect from 1<sup>st</sup> June 2015 without loss of salaries, benefits and privileges. The payback to be calculated from the 1<sup>st</sup> August, 2009.  
  
In The Alternative
  - c. The Respondent shall pay the Claimant 1month salary in lieu of notice at Kshs.54,592/= and 12 months' salary in compensation at Kshs.655,104/=, total Kshs.709,696/=



- d. The Claimant must communicate her option to the respondent within 30 days of the delivery of the Award
5. It is the Claimant's case that on 17<sup>th</sup> June, 2015 the Respondent elected to reinstate her to employment. However, upon reinstatement the Respondent violated the Courts decision as follows;
  - a. Failure to reinstate the Claimant to the previous position.
  - b. Demoting the Claimant to the position of Senior Technician
  - c. Failure to pay the Claimant a lump sum pay granted to all employees under a Collective Bargaining Agreement dated 22<sup>nd</sup> March 2016.
  - d. Failure to pay salary increment , benefits and privileges of the Claimant from 1<sup>st</sup> July 2009 as per institutional change of status
  - e. Failure to pay salary increment, benefits and privilege under the Collective bargaining Agreement
  - f. Failure to pay the Claimants salary under the universities grading system, commuter allowance, leave days.
  - g. Failure to approve leave application by Claimant.
  - h. Failure to allocate duties to the Claimant.
  - i. Designating the Claimants payslip as being employed on contractual basis.
6. The Claimant avers that on the 11<sup>th</sup> May, 2017, the Respondent issued her with a Notice to show cause on the ground that she had neglected her duties and had been absent without authority.
7. The Claimant avers that she was invited for a disciplinary hearing on 15<sup>th</sup> September, 2017 and was denied representation and on the 16<sup>th</sup> February, 2018, the Respondent terminated her employment.
8. It is the Claimant's case that the Respondent's actions of terminating the Claimant's employment amounted to unfair dismissal on the following grounds;
  - a. The Respondent failed to allocate duties to her and dismissed her on the ground of neglect of duty.
  - b. The Respondent acted with malice by failure to comply with the court decision in Industrial Court Cause no. 1601 of 2011.
  - c. The respondent failed to act on various letters from the Claimant and other government agencies.
  - d. Failure to pay the Claimant her entitlement.
  - e. Frustrating the Claimant on account of her having sued the institution.
  - f. Failure to complete disciplinary process within 6 months.
  - g. The reasons advanced for termination were not valid.
9. The Claimant states that as a result of the Respondent's actions, she has suffered loss and damage.
10. The Claimant prays for;



- a. A declaration that the termination of the Claimant's employment was unfair and unlawful.
- b. Alternatively, damages as follows;
  - i. Unpaid salary.....Kshs.18,307,914/=
  - ii. CBA Arrears.....Kshs.709,286.47/=
  - iii. 12 months' salary amounting to Kshs.655,104/=
  - iv. Exemplary damages for the Respondents conduct
  - v. 3 months' salary in lieu of notice amounting to Kshs.163,776/=
- c. Costs of this suit with interest.

### **Respondent's case**

11. In its Response filed on the 6<sup>th</sup> February 2019, the Respondent avers that the issues raised in the statement of claim were dealt with and concluded in Industrial Court Cause Number 1601 of 2011.
12. The Respondent avers that the Claimant was reinstated to the position of Senior Technician with a gross pay of Kenya Shillings Fifty Four Thousand, Five Hundred and ninety two (Kshs.54,592/=) following the court order in Cause No. 1601 of 2011.
13. It is the Respondent's case that the Claimant is not eligible to receive a lump sum pay, salary increment, salary review and commuter allowances under the Collective Bargaining Agreement.
14. The Respondent further avers that the Claimant cannot claim for the accumulated leave days amounting to 180 days as the terms of service are clear that leave days not taken automatically lapse at the end of every calendar year.
15. It is the Respondent's case that the averment that it failed to allocate duties to the Claimant is a mere allegation.
16. The Respondent states that the Claimant was supposed to attend laboratory duties but constantly insisted on getting teaching allocation which did not match the position of a Senior Technician.
17. The Respondent avers that the Claimant was allowed to be accompanied by anyone of her choice during the disciplinary committee hearing.
18. It is the Respondent's case that the Claimant was dismissed for perpetual absenteeism at the work place in disguise that she had not been allocated duties.
19. Finally, the Respondent states that it complied with the court order and reinstated the Claimant and expected her to reciprocate by discharging her duties diligently not absconding duty.

### **Claimant's evidence**

20. The Claimant adopted her written witness statement dated 5<sup>th</sup> February, 2019 as evidence-in-chief.
21. On cross-examination, the Claimant confirmed that her previous position was Course Tutor-Lecturer. She testified that there is no letter on record stating that she was a Chief Technologist.
22. The witness stated that she was a senior member of Technical University of Kenya from the time it was a polytechnic and had been teaching for 9 years prior to the filing of the suit.



23. The witness further stated that she wrote to Commission on Administration Justice (CAJ) for failure of the Respondent to complete the disciplinary process within 6 months as provided by the terms of service.
24. The witness further stated that she was a member of Kenya Universities Staff Union (KUSU) and the CBA applied to her and that from 2009 to 2018 and there was no salary increment.
25. The Claimant further stated that she was reinstated to work but was not allocated duties or office. She also stated that she was never issued with a warning letter for non-attendance since 2017 and the termination letter dated 16<sup>th</sup> February, 2018 had only one reason for termination

### **Respondent's evidence**

26. RW1, Ruth Kirwa, the Legal Officer of the Respondent adopted her witness statement filed on 6<sup>th</sup> February, 2019 as evidence-in-chief.
27. On cross- examination, RWI stated that the court ordered the Claimant to be reinstated to her previous position which the Respondent did. It was her testimony that by the time of the Claimant's reinstatement, the institution was a full-fledged University as opposed to a constituent college.
28. The witness confirmed that the Claimant was not assigned teaching duties at the time of reinstatement, as the institution had transitioned to full university status and the grading structure had changed.
29. The witness stated that the Claimant was issued with a show cause letter and a hearing conducted in her presence and the committee resolved that the claimant's employment be terminated.

### **Claimant's submissions**

30. The Claimant's counsel highlighted several issues for determination;
  - a. Whether the Claimant's employment was reinstated according to the judgment delivered in Employment Cause No. 1601 of 2011.
  - b. Whether the Claimant was assigned duties after reinstatement.
  - c. Whether the termination of the claimant's employment was procedural.
  - d. Whether the reasons advanced for termination of the Claimant's employment were valid.
  - e. Whether the Claimant is entitled to the reliefs sought.
31. On the first issue, counsel submitted that the Respondent violated the court order when it reinstated the Claimant to the position of Senior Technician instead of a Course Tutor in Group L, a position she held prior to her termination. (Proceeding to the UK for studies).
32. Counsel further submitted that the Claimant was never paid the arrears that accrued and back pay as the court had ordered.
33. On the second issue, the Claimant testified that prior to her first termination, she was a Senior Technician and a lecturer but in her reinstatement letter there was no mention of her duties as a Senior Technician or as a lecturer.
34. Reliance was placed in the case of Anthony Makala Chitavi v Malindi Water and Sewerage Company Limited [2013] eKLR where the ingredients of procedural fairness were held to be; information of the charges, an opportunity to respond and conducting of a hearing.



35. Counsel submitted that in the instant case, the notice to show cause was issued by a memo dated 11<sup>th</sup> May, 2007, while the memo dated 12<sup>th</sup> June, 2017 written after the notice show cause indicated that there was no record of absenteeism in the Claimant's file.
36. Further, counsel submitted that the notice to show cause was not comprehensive enough to enable the Claimant prepare a concise defence.
37. Reliance was made on the holding in Jonathan Chepkony v George Makateto, acting Chief Executive Officer, Export Processing zone Authority [EPZA] & 2 Others eKLR to urge the key components of a notice to show cause as follows;
- “..... a show cause letter ought to have the following ingredients;
- a. Be written in a clear and dispassionate manner.
  - b. Be issued as soon as practicable.
  - c. Identify the workplace issue-giving rise to the disciplinary action....
  - d. Address with sufficient particulars the factual allegation or allegations being made against the employee requiring a response.
  - e. Such particulars will likely require the times, dates places and circumstances for each allegation being made. In some instances names of witnesses or supporting information such as documents should be disclosed.
  - f. Be accurate and not omit or misrepresent any relevant circumstance and
  - g. Afford a fair time for the employee to make an effective response”.
38. Counsel submitted that on 22<sup>nd</sup> September, the claimant sought to be provided with the particular dates on which she was absent from duty. He further submitted that the Claimant was denied to a representative of her choice during the hearing.
39. Counsel submitted that the Claimant was subjected to an unfair hearing as at the time of hearing she had not been supplied with proper documentation. Reliance was made on the holding in Ruth Adhiambo Apindi v Uneliver Kenya Limited (2020) eKLR where the court held that the disciplinary hearing was unlawful as it proceeded without the Claimant being supplied with all the necessary documentation.
40. Counsel further submitted that on reinstatement, the Claimant was discriminated, as her salary was not reviewed. Counsel urged that the Claimant complained about the discrimination to the Respondent and Ombudsman (CAJ).
41. Counsel submitted that the Respondent terminated the Claimant's employment on the basis of negligent performance of her duties yet the duties were never assigned and as such there was no justifiable reason to terminate the Claimant's employment.
42. It is counsel's submission that the Respondent has failed to discharge its burden as provided by the [Employment Act, 2007](#) that the grounds of termination are valid and justifiable.
43. Counsel urged the court to find that the claimant has proved her case on unfair termination and is entitled to the reliefs sought in the statement of claim.



## Respondent's submissions

44. Counsel for the Respondent highlighted the following issues for determination;
- i. Whether the Claimant was reinstated to previous position as per the judgment in Employment Cause No. 1601 of 2011.
  - ii. Whether the Claimant was assigned duties after reinstatement.
  - iii. Whether the termination of the Claimant's employment was unfair and unlawful.
  - iv. Whether the Claimant is entitled to the damages sought.
  - v. Who should bear the cost of the suit?
45. On the first issue, counsel submits that the judgment in Employment Cause Number 1601 of 2011 directed that the Claimant be reinstated to her previous position and the Respondent, in compliance with the court order reinstated the Claimant on 11<sup>th</sup> June, 2015 to the position of Senior Technician.
46. On the second issue, counsel submits that the Claimant was assigned the duties of a Senior Technician and could not be assigned duties of a lecturer as she declined to present her certificates.
47. On the third issue, counsel submits that the Claimant alleged not to have been assigned work yet she did not refute claims of absenteeism.
48. It is the Respondent's submission that the Claimant failed to display any form of loyalty to the Respondent and chose to desert her employment hiding behind her demands to be allocated teaching duties.
49. Counsel relied on the holding in *Ann Njoroge vs Topez Petroleum Ltd (2013)* where the court observed as follows:
- “When employees claim is based on unfair termination that is countered with defence of absconding, this court is thus invited to look at the circumstances of such a case more carefully as where an employee is proved to have absconded duty this is a tantamount to gross misconduct and the sanction is summary dismissal without notice. This as outlined under Section 44 of the *Employment Act* and more particularly as under paragraphs 44(4) (a) as read together with (c)”.
50. Counsel submits that the Claimant absconded duty as per the attendance sheet, which entitled the Respondent to summarily dismiss her without notice.
51. On the fourth issue, counsel submitted that the claimant was invited for a disciplinary hearing for reporting late to work and absconding duty which allegations the claimant did not refute at the hearing.
52. Finally, counsel submits that the disciplinary process was fully adhered to and urges the court to find that the reasons for dismissal were unambiguous and valid and the Claimant's claim should entirely fail.

## Findings and determination

53. The issues for determination are;
- i. Whether termination of the Claimant's employment by the Respondent was unfair.



- ii. Whether the Claimant is entitled to the reliefs sought.
54. As regards the 1<sup>st</sup> issue, the provisions of the *Employment Act*, 2007 and case law are consistent that for a termination of employment to pass muster, it must be demonstrated that the employer had a valid and fair reason to terminate the employment and did so in accordance with a fair procedure.
55. The foregoing has been reinforced by legions of decisions such as *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR where Ndolo J. underscored the need to establish a substantive justification and procedural fairness for a termination to pass the fairness test and emphasized by the Court of Appeal in *Naima Khamis v Oxford University Press (EA) Ltd* [2017] eKLR.
56. While Sections 41 and 45(2)(c) of the *Employment Act*, 2007 address procedural fairness, Sections 43, 44, 45(2)(a) & (b) (5) and 47(5) deal with substantive justification.

### **Reason(s) for termination**

57. It is common ground that the Claimant was an employee of the Respondent from 30<sup>th</sup> March, 1989 when the Respondent was known as the Kenya Polytechnic College and held the position of a Technician and was later promoted to the position of Senior Technician.
58. It is also not in contest that on the 21<sup>st</sup> August, 2009 while the Claimant was on study leave in the UK undertaking doctoral studies, her employment was terminated when she refused to return home after a request by the Respondent. The Claimant challenged the termination in Industrial Court Cause No. 1601 of 2011 and judgment was entered in her favour reinstating the Claimant her previous position.
59. From the documents on record, it is clear that the Claimant opted for reinstatement which was to take effect effective 1<sup>st</sup> June, 2015.
60. By letter dated 11<sup>th</sup> June, 2015, the Respondent informed the Claimant that she had been reinstated to the position of Senior Technician of the Respondent University, Department of Applied Sciences (Faculty of Science & Technology) at a salary of Kshs.54,592.00, the position held on 21<sup>st</sup> August, 2009 when employment was terminated from employment.
61. Notably, by letter dated 13<sup>th</sup> May, 2015, the Respondent demanded the Claimant's original PhD Certificate and other testimonials and the Bond forms she had signed before proceeding for Doctoral Studies at the University of Manchester.
62. Equally, by letter dated 15<sup>th</sup> June, 2015, the Respondent's Director Human Resource identified the 4 documents the Claimant was to avail within 7 days. The Claimant tendered no evidence of having availed the documents. However, by letter dated 22<sup>nd</sup> June, 2015 to the Respondent, the Claimant stated that she would report to work immediately as directed but demanded that her employment grade be spelt out but be placed in Grade 12A as her peers if placed in academic grading as she had a MSc degree and if placed in the Technical Grade, she be placed in Grade 13N and salary arrears be looked into.
63. The Claimant was emphatic that her taking up of the assignment was subject to the fulfilment of her conditions.
64. The Respondent responded by letter dated 24<sup>th</sup> June, 2015 noting that the Claimant had declined to take up her position as directed by the court.
65. This letter prompted counsel's letter of 26<sup>th</sup> June, 2015 threatening to institute contempt proceedings if the Claimant was not reinstated as directed by the court.



66. By letter dated 29<sup>th</sup> June, 2015, the Respondent's Director, Human Resource reminded the Claimant to submit her certificates within 5 days.
67. Relatedly, by letter dated 3<sup>rd</sup> July, 2015, the Respondent confirmed to the Claimant's counsel, Guserwa & Co. Advocates that it had complied with the court order.
68. The Claimant's counsel threatened court action by a further letter dated 16<sup>th</sup> November, 2015 and the Respondent's Vice-Chancellor responded vide letter dated 20<sup>th</sup> November, 2015 reiterating the contents of its letter dated 3<sup>rd</sup> July, 2015, on compliance with court orders and letters to the Claimant dated 11<sup>th</sup> June, 2015 and 25<sup>th</sup> August, 2015.
69. The latter reminded the Claimant that she had not responded to the letter of reinstatement dated 11<sup>th</sup> June, 2015.
70. Notably, although the Respondent wrote to the University of Manchester for a status update of the Claimant's studies there, the letter dated 19<sup>th</sup> July, 2016 was not responded to.
71. Documentary evidence also reveal that the Claimant lodged complaints with the Ministry of Education, Attorney General and the Commission on Administrative Justice.
72. In his letter to the Attorney General, the Vice-Chancellor of the Respondent explained how the University Council had transitioned employees of the former Kenya Polytechnic to University grades both academic and non-academic.
73. The bone of contention between the Claimant and Respondent was that the Claimant wanted to be reinstated on her own terms as a Tutor on account of having been allocated classes and instructed students prior to her proceeding on Doctoral Studies in 2007.
74. The Respondent reinstated her as a Senior Technician as she was in 2009 before termination of employment.
75. It is common ground that the Claimant was employed on 1<sup>st</sup> May, 1989 as a Technician Job Group F and later promoted to Senior Technician effective 1<sup>st</sup> June, 2000 and upgraded to Job Group L in January 2003.
76. Was the Claimant also a lecturer?
77. Documentary evidence on record shows that the Claimant was tutoring students and conducted examinations in addition to being a Senior Technician, duties allocated by the Chair of Department, effective 6<sup>th</sup> September, 2002.
78. Evidently, the Claimant's employment and designation remained that of a Senior Technician and was not a Lecturer as alleged but a course tutor which was an auxillary duty.
79. On her reinstatement in 2015, the Claimant expected to continue teaching as evidenced by the exchange of letters adverted to elsewhere in this judgment and by an Internal Memo dated 29<sup>th</sup> September, 2016, the Claimant sought permission to teach in the Department of Chemical Science & Technology on the premise that she held the MSc degree, the degree she held before proceeding to the University of Manchester for Doctoral Studies and had not availed her documents to enable the Respondent place her appropriately as the institution was now a full University.
80. There is no evidence on record that the memo was responded to.



81. Significantly, by an Internal Memo dated 11<sup>th</sup> May, 2017, the Chairman, Department of Chemical Science & Technology (DCST) called upon the Claimant to show cause why disciplinary action should not be taken against her for neglect of duty as per the appointment letter and absence from duty without permission and was accorded 7 days to submit a written response.
82. The Claimant responded by letter dated 15<sup>th</sup> May, 2017 complaining that no duties had been allocated; teaching responsibilities.
83. The Claimant complained about sitting on a tool in the laboratory and student commotion as she was writing manuscripts for publication.
84. Significantly, the Claimant admitted that she did not qualify for the award of the PhD degree.
85. Strangely, by an internal memo dated 12<sup>th</sup> July, 2017, the Senior Assistant Registrar, HRS, Mr. B. Opondo notified the Chairman DCST that the Claimant's file had no record of the specific days she absented herself from duty. This followed instructions of the University Secretary dated 27<sup>th</sup> June, 2017 to the Director HRS to commence disciplinary proceedings against the Claimant.
86. Intriguingly, disciplinary process against the Claimant commenced by an internal memo dated 6<sup>th</sup> September, 2017, the Claimant's Head of Department, Dr. Austin Ochieng informed the Deputy Vice-Chancellor, API that the Claimant had not given reasons for not reporting to the workplace and that she had told one Mr. Samson Gurema, the Senior Technician not to assign her laboratory duties as she wanted to teach notwithstanding the fact that she was appointed as a Senior Technician.
87. According to the letter, records showed that the Claimant had not reported for duty since April 2017.
88. In its Supplementary list of documents dated 26<sup>th</sup> July, 2022, the Respondent attached 7 pages of photocopies of an unidentified book or document containing names, times and signatures of persons identified by hand as "Technician Staff".
89. The 7 pages lack authentication by the Respondent's officers and in particular Head of Department, the dates are barely visible and have nothing to associate them with the Respondent University.
90. Although RWI testified that he was the Respondent's reporting tool, the 7 pages lack authenticity and are of nominal probative value.
91. The court is at a loss to understand why the Respondent could not tabulate the specific days the Claimant was not at her designated workplace for her response and availment to the court as evidence.
92. None of the communication on record make reference to the day, date or month the Claimant was absent.
93. The notice to show cause dated 11<sup>th</sup> May, 2017 makes a sweeping allegation that the Claimant "have been absent from duty without permission" and the Chairman's memo adverted to above adopts a similar texture, as is the invitation letter for the disciplinary hearing dated 15<sup>th</sup> September, 2017.
94. The letter states inter alia;  

"On various dates in the year 2017, particulars that are well within your knowledge. You undermined the integrity of the Technical University of Kenya by performing your duties negligently by absconding and absenting yourself from duty and you have been reporting late without permission."
95. The letter of termination dated 16<sup>th</sup> February, 2018 had the same charge as the reason for termination.



96. Since the charge is that the Claimant absconded duty and was not at the workplace without permission, demonstrable evidence would have been easy to avail and the Respondent would have effortlessly shown the particular days on which the Claimant was not at the workplace.
97. Did the Claimant abscond duty or desert?
98. According to Black's Law Dictionary (10<sup>th</sup> Edition), desertion is;
- “The wilful and unjustified abandonment of a person's duties or obligations.”
99. In the South African case of *Seabolo v Belgravia Hotel* [1997] 6 BLLR 829 (CCMA), the court stated as follows:
- “... desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning, or having left his or her post subsequently formulates the intention not to return”.
100. From the foregoing, and based on the evidence on record, it is discernible that the Claimant did not abscond or desert the workplace.
101. The foregoing is fortified by the fact that the notice to show cause made no reference to desertion or absconding of duty.
102. The charge of absconding duty had not been brought to the Claimant's attention, before the invitation to the hearing nor had the particulars been provided.
103. Relatedly, the Respondent tendered no evidence of having searched or looked for the Claimant to resume duty. (See *Felistas Acheha Ikatwa v Charles Peter Otieno* [2018] eKLR, *Simon Mbithi Mbane v Inter Security Services Ltd* [2018] eKLR, *Joseph Nzioka V Smart Coatings Ltd* [2017] eKLR and *Judith Atieno Owuor v Sameer Agriculture & Livestock Ltd* [2020] eKLR).
104. It is trite law that absconding or deserting the workplace by an employee amounts to gross misconduct and a valid ground for termination of employment, if it is proved as by law required.
105. In this case, it is the finding of the court that the Respondent has failed to demonstrate on a balance of probabilities that the Claimant deserted her workplace.
106. Did the Claimant absent herself from the workplace without permission as per the contents of the notice to show cause?
107. Section 44(4)(a) of the *Employment Act*, 2007 identifies absence from the workplace without leave as gross misconduct as follows;
- “Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work.”
108. The foregoing formulation captures the actual place where an employee performs his/her work.
109. As adverted to elsewhere in this judgment, the Respondent neither availed to the Claimant nor the court any tabulation of the days or dates when the Claimant did not report at the workplace or a warning letter on her not reporting to the Department.
110. In a University Department setting, it is exceeding easy to tell who is at the workplace and who is not and when.



111. For unexplained reason(s), the Respondent opted not to avail reliable and credible evidence of the simple fact of the Claimant's absence from the workplace, if that was the case.
112. Evidence of the Chair of Department or a colleague would have exemplified the actual state of affairs in 2017.
113. Intriguingly, in her response to the notice to show cause, the Claimant is emphatic that she was not allocated any duties, laboratory or otherwise, evidence the Respondent did not rebut or demonstrate that duties had been allocated but were not discharged.
114. Although the Claimant had expressed desire to be allocated teaching duties, she was employed as a Senior Technician and ought to have been allocated duties as such. It is not the domain of an employee to dictate what duties ought to be allocated to him/her. The job description defines the scope of the duties of an employee and additional duties ought to be agreed upon.
115. Section 43(1) of the *Employment Act*, 2007 provides that;
- “In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.”
116. Section 45(1) of the *employment Act* , 2007 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 reasons for termination were valid
    - b. that the reason for termination were fair reason.
117. Similarly section 47(5) of the *Employment Act* , 2007 provides that;
- “For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for termination of employment or wrongful dismissal shall rest on the employer”.
118. These provisions are consistent that it is the obligation of the employer to prove that it had a valid and fair reason or substantive justification to terminate the employee's employment.
119. In this case, the Respondent availed an internal memo dated 12<sup>th</sup> July, 2017 from the Senior Assistant Registrar stating that there was no record of the Claimant's absenteeism and another from the Chairman Department of Chemical Science & Technology dated 6<sup>th</sup> September, 2017 stating that the Claimant had not reported for duty since April 2017 but did not attach a work schedule, memo or official letter showing the specific dates on which the Claimant did not report to the workplace.
120. From the foregoing, it is clear that the Respondent's allegation that the Claimant did not report for duty lacks supportive evidence and remains unsubstantiated.
121. In the absence of verifiable evidence of the alleged dates on which the Claimant was absent from duty without permission, it is the finding of this court that the Respondent has failed to prove on a balance of probabilities that it had a valid and fair reason to terminate the Claimant's employment.



## Procedure

122. As underlined by the Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Ltd* [2017] eKLR, section 41 of the *Employment Act*, 2007 prescribes an elaborate and mandatory process to be complied by the employer in effecting a termination of employment.
123. The specific elements of procedural fairness have been elaborated upon in legions of decisions such as *Loice Otieno V Kenya Commercial Bank* (2013) eKLR by Radido J. and the Court of Appeal in *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR among others
124. The tenets include reason(s) for which termination of employment was being considered, explanation of the grounds of termination in a language understood by the employee, entitlement of the employee to the presence of another employee of his choice as well as hearing and consideration of the representations made by the employee and/or the person chosen by the employee.
125. Judicial authority is consistent that a termination of employment conducted otherwise than in accordance with the provisions of Section 41 of the *Employment Act*, 2007 is irregular.
126. In the instant case, the Respondent issued a Notice to show cause to the Claimant dated 11<sup>th</sup> May, 2017 which was responded to. Secondly, the Claimant was invited for a disciplinary hearing, was informed of the right to be accompanied by another person and the disciplinary hearing took place on the 28<sup>th</sup> September, 2017, thereafter, the Claimant's employment was terminated vide letter dated 16<sup>th</sup> February, 2018 on the grounds of absconding and absenteeism from duty without permission.
127. The court is not persuaded that the absence of the Claimant's counsel or a union representative denied the Claimant the right to be accompanied by another person.
128. The Claimant appealed the decision and the termination was upheld by the University Council Staff Appeals Review Committee.
129. For the foregoing reasons, it is the finding of the court that Respondent has demonstrated that it conducted the disciplinary process substantially in accordance with the provisions of Section 41 of the *Employment Act*, 2007 and was thus fair within the meaning of Section 45 of the *Employment Act*, 2007.

## Reliefs

### a. Declaration that termination was unfair

130. Having found that the Respondent failed to prove that it had a valid and fair reason to terminate the Claimant's employment, the declaration that termination of the Claimant's employment was unfair is merited.

### b. Unpaid salary

131. Neither the Claimant's Amended Statement of Claim nor the witness statement set out the particulars of the unpaid salary. For instance, how was the figure arrived at, when was it earned or became payable?
132. On cross-examination, the Claimant confirmed that the salary dates from 2009 to the date of termination in 2018. When pushed further by the Respondent's counsel, the Claimant confirmed that she was being paid a salary by the Respondent but "unfairly", which the witness did not elaborate.
133. The Claimant further confirmed that it was the award made by the court in March 2015 before she filed the instant suit.



134. Finally, the Claimant confirmed that she had not tabulated the unpaid salary.
135. In the court's view, since the Claimant has neither pleaded nor demonstrated that she was underpaid by the Respondent by how much and from when, and did tabulate the unpaid salary or unpackage the same, the prayer is unsustainable for want of proof as ordained by the provisions of the Evidence Act.
136. It is trite law that he who alleges must prove the allegations. The prayer lacks particulars and is for dismissal and it is accordingly dismissed.

### **c. CBA Arrears**

137. Although the Claimant alleged that she was a member of KUSU and the CBA applied to her, she tendered no evidence of the CBAs from 2009 to 2018 or demonstrate how the increments tabulated in the claim and witness statement were computed bearing in mind that the Claimant could not be promoted while pursuing Doctoral Studies in the UK.
138. The court is however persuaded that there may have been increments based on the operative CBA which ought to have been factored in the Claimant's salary which she was entitled to. However, the claim is only merited if the increments were not factored in from the date of reinstatement.

### **d. 12 months' salary compensation**

139. Having found that the termination of the Claimant's employment was substantively unfair, the Claimant is entitled to compensation under section 49(1)(c) of the Employment Act, 2007.
140. In determining the quantum, the court has taken into consideration the fact that Claimant worked for the Respondent since 1989 in different capacities, which is long. The Claimant appealed the decision expressing her wish to continue working for the Respondent. The Claimant substantively contributed to the termination of employment.
141. Puzzlingly, the Claimant blatantly refused to avail copies of certificates including the PhD yet the Respondent had given her study leave to acquire the qualification and was being paid part of her salary for the entire duration till 2009, almost 5 years. The Claimant owed the Respondent and the Ministry of Education an explanation. She did not, which in the court's view signified impunity on her part.
142. In the circumstances, the court is satisfied that an equivalent of 4 months gross salary is sufficient compensation.

### **e. Exemplary damages**

143. As explained in *Rookes v Barnard & others* [1964] AC 1129, exemplary damages are awardable in defined circumstances.
144. Exemplary damages are not compensatory in nature and are seldom awarded in termination of employment contracts.
145. The Claimant tendered no evidence to demonstrate entitlement to exemplary damages. The prayer lacks supportive evidence and is dismissed.

### **f. Salary in lieu of notice**

146. Having found that termination of the Claimant's employment was substantially unfair, the Claimant is entitled to salary in lieu of notice in compliance with the CBA in force.
147. In the upshot, judgment is entered for the Claimant against the Respondent as follows;



- a. Declaration that termination of the Claimant's employment was unfair.
- b. Salary increments effective the date of reinstatement to the date of termination of employment, if unpaid.
- c. Equivalent of 4 months gross salary.
- d. Notice pay as per the CBA.
- e. Costs of this suit

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF MAY 2024**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

**In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.**

**DR. JACOB GAKERI**

**JUDGE**



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***JUDGEMENT Nairobi ELRC Cause No. 297 of 2018 Page 19 of 19***

