



**Okeyo v Maseno University & another (Cause E082 of 2023)
[2024] KEELRC 2022 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2022 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E082 OF 2023
CN BAARI, J
JULY 25, 2024**

BETWEEN

DR STEPHEN ONYANGO OKEYO CLAIMANT

AND

MASENO UNIVERSITY 1ST RESPONDENT

VICE CHANCELLOR, MASENO UNIVERSITY 2ND RESPONDENT

JUDGMENT

1. Dr Stephen Onyango Okeyo (the Claimant) filed this suit against the Respondents alleging unlawful termination. He seeks the following reliefs: -
 - i. A declaration that his summary dismissal was un-procedural, unlawful, unfair and illegal.
 - ii. Unconditional reinstatement with no loss of salary and allowances
 - iii. In the alternative, an order for payment Kshs 3,370,590/= as compensation for wrongful dismissal.
 - iv. Certificate of service.
 - v. Costs of the Claim.
 - vi. Interests on prayers (3) and (5) at court rates.
2. In a response to the claim dated 21st December, 2023, the Respondents refuted the claim and averred on a without prejudice basis that the Claimant's termination was lawful and fair.
3. The matter was heard on 13th March, 2024 and 15th April, 2024 with the Claimant testifying in support of his case, and the 1st Respondent's Assistant Registrar testifying for the Respondent.
4. Both parties filed submissions on the matter.



The Claimant's Case

5. The Claimant's case is that he was employed by the 1st Respondent in June, 2008 as a Graduate Assistant in the department of Physics and Material Science, rising to tutorial fellow in February, 2012, and finally to a physics lecturer earning a monthly salary of Kshs 224,706/=.
6. The Claimant states that he was first terminated from the service of the Respondent on 1st May, 2022, which termination he appealed against and the termination was revoked, and was reinstated to the employment on condition that he resigns from the position of Secretary of UASU-Maseno chapter.
7. The Claimant further states that though he resigned from his position in the union leadership, he remained a member of the union and the Respondent continued remitting his union deductions.
8. He states that he picked his reinstatement letter and resumed duty on 27th June, 2022. It is his case that later on 28th February, 2023, he received yet another termination letter indicating that he had been dismissed from service for reason of having been cleared to contest in union-by elections, which elections he won and currently serves as the Secretary General of UASU.
9. The Claimant states that he was neither issued with notice nor taken through disciplinary hearing prior to the dismissal from service. He further avers that he was not issued with a physical copy of the dismissal letter.

The Respondent's Case

10. The Respondents' case is that the Claimant was initially taken through a lawful dismissal process, starting with the show cause letter of the 22nd March 2022, culminating in his termination on 31st May, 2022 after two disciplinary hearings.
11. The Respondents avow that after re-considering the Claimant's case on appeal in a council meeting of 20th June, 2022, they resolved to conditionally reinstate him to their service.
12. It is the Respondents' case that upon resumption of duty, the Claimant blatantly disregarded the pre-conditions of reinstatement, specifically that he should desist from engaging in union administration.
13. The Respondents avow that they were forced to summarily dismiss the Claimant when he sought re-election as Secretary General University Academic Staff Academic Union (UASU), Maseno Chapter.
14. The Respondent's case is that the dismissal was justified due to breach of conditions of reinstatement.
15. In testimony, the Respondents' Assistant Registrar stated that relations with the Claimant was irretrievably strained as he had used his Union position to tarnish the 1st Respondent's name.
16. On cross-examination, Modester Sindani (RW1), told court that there were no provisions stopping the Claimant from contesting for a union position. She further stated that the letter reinstating the Claimant did not carry a term that should the Claimant contest for re-election, he will stand dismissed.
17. RW1's further testimony is that the issues the Respondents had with the Claimant were resolved at the point of his reinstatement. She further confirmed that the Claimant had no work-related issues and that being in his mid-forties, and the retirement age being 70 years, the Claimant would still have had a long period of service if not for the dismissal.
18. It is RW1's evidence that she did not produce council minutes dismissing the Claimant.



The Claimant's Submissions

19. It is the Claimant's submission that his seeking for election as Secretary General UASU was not a valid reason for dismissal, and neither did it amount to gross misconduct. He asserts that the conditions in the reinstatement letter did not bar him from running for elective posts in the union.
20. Additionally, the Claimant submits that his summary dismissal contravened Clause 18.3 (d) of the 1st Respondent's statute which provides that no person may be removed from office without approval of the University Council, without reasonable hearing by the Council and without adequate opportunity to prepare for a hearing.
21. It is the Claimant's submission that he is entitled to the remedies on account of the unlawful summary dismissal.
22. It is further submitted for the Claimant that the Respondents' conduct of barring employees from engaging in labour relations would spell doom on trade unions. He avows that UASU Maseno members reserved the right to elect officials of their choice.

The Respondents' Submissions

23. On their part, the Respondents submit that the Claimant's termination adhered to the dictates of procedural and substantive fairness. They submit further that the dismissal was warranted as the Claimant had admitted to using his position in the union to tarnish the good image of the university.
24. The Respondents assert that they complied with the minimum standard of fair procedure outlined by the Court of Appeal in *Postal Corporation of Kenya v Andrew. K. Tanui* (2019) eKLR.
25. Furthermore, the Respondents submit that they complied with the procedures set out in the Human Resource Policy and the *Employment Act*.
26. On substantive fairness, the Respondent submits that the Claimant's decision to vie for Secretary General in blatant disregard of the conditions for reinstatement was a valid reason for dismissal. They cite *South Nyanza Sugar Company v Leonard O. Arera* [2020] eKLR as quoted in *Pius Kimaiyo Langat v Co-operative Bank of Kenya* (2017) eKLR on the binding nature of contracts. It is their submission that the Claimant's action was tantamount to insubordination.
27. Regarding the prayers sought, the Respondents affirm that the dismissal was lawful and just.
28. On the Claimant's claim for reinstatement, the Respondents submit that it is not viable as the Claimant had displayed a pattern of uncooperative behaviour. Additionally, the Respondents argue that their confidence in the Claimant was eroded having found him guilty of gross misconduct.
29. They pray that the Claimant's claim be dismissed.

Analysis and Determination

30. From the pleadings, witnesses' testimonies, documents produced and submissions by both parties, the following issues present for determination: -
 - i. Whether the Claimant's dismissal was lawful; and if so
 - ii. Whether the Claimant is entitled to the remedies sought.



Whether the Claimant's dismissal was lawful

31. Section 41 of the [Employment Act](#), 2007 demands that before terminating an employment contract on the grounds of misconduct, performance or physical incapacity, the employer must grant the employee an opportunity to make representations in the presence of a colleague or a representative of a trade union.
32. It is now settled that even in instances of summary dismissal the employee is entitled to a hearing in accordance with Section 41 of the [Employment Act](#).
33. Section 41 (2) of the [Employment Act](#) states: -

“(2) Notwithstanding any other provision of this part, an employer shall before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance and the person, if any, chosen by the employee within subsection (1) make.”
34. It is clear from the evidence before court that the Claimant's initial dismissal of 1st May, 2022 adhered to the tenets of procedural fairness.
35. On the Claimant's summary dismissal of 28th February, 2023, no evidence has been led to show that the Respondents attempted to adhere to the statutory provisions on dismissal. Notice to show cause was not issued and neither was the Claimant taken through a disciplinary hearing.
36. It is disingenuous of the Respondents to base their latter dismissal of the Claimant on the previous hearings, as once the decision to reinstate the Claimant was reached upon hearing of his appeal against the dismissal, that decision closed the matter. The Claimant's future dismissal could only be said to be procedural if based on new issues put to him to answer and a hearing mounted in accordance with Section 41.
37. It is therefore evident that the Claimant was not afforded a hearing before his second dismissal vide the letter dated 27th February, 2023, which renders the dismissal unprocedural, hence unlawful and so I hold.
38. On the question of substantive fairness, Sections 43 and 45(2) of the [Employment Act](#) places the burden on the Employer to prove that the reasons for termination are fair, valid and justified.
39. The reason for the Claimant's dismissal as gleaned from the summary dismissal letter is for his quest to seek re-election as Secretary General University Academic Staff Union (UASU)- Maseno chapter. According to the Respondents this was a breach of the contract signed upon reinstatement.
40. From the onset, it is clear that seeking an elective post in a union cannot be termed a valid reason for dismissal. Article 41 (2) (c) of the [Constitution](#) read with Section 4 (2) (d) of the [Labour Relations Act](#), guarantees every worker's right to form, join or participate in the activities and programmes of a trade union, and to base the dismissal on the Claimant's election to the position of Secretary General of UASU, is not only unlawful, but grossly unconstitutional.
41. The Respondents argument that not taking part in union activities was a pre-condition for reinstatement does not hold, as such an agreement is null and void to the extent that it is antithetical to the [Constitution](#) and the [Labour Relations Act](#).



42. It is also true that the Respondents have not in any way proven that Claimant made disparaging remarks in his official capacity as Secretary General of the Union against the 1st Respondent.
43. The sacrosanct nature of the rights under Article 41 (2) (c) of the *Constitution* were highlighted by the Court of Appeal in *Bunny Industries Limited v Tailors & Textiles Workers Union* (Civil Appeal 386 of 2017) [2022] KECA 857 (KLR) where the court held that under the *Labour Relations Act* every employee has a right to participate in forming a union or federation of trade unions.
44. The sum total is that the reason for the Claimant's dismissal is neither valid, fair nor justified.
45. I find and hold that the dismissal is both procedural and substantial unlawful and unfair.

Whether the Claimant is entitled to the remedies sought

Reinstatement

46. The Court of Appeal in *Kenya Airways Limited v Alex Wainaina Mbugua* [2019] eKLR set out the grounds for reinstatement as follows:—"The circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; the practicability of recommending reinstatement or re-engagement; the common law principle that there should be no order for specific performance in a contract of service except in very exceptional circumstances; the opportunities available to the employee for securing comparable or suitable employment with another employer; any conduct of the employee which to any extent caused or contributed to the termination; any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination."
47. Further, Murgor J in *Kenya Airways Limited v Allied & Aviation Workers Union Kenya & 3 others*, Civil Appeal No 43 of 2013 While Citing *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414 held thus on the practicability of the remedy of reinstatement; -

"Whether ... it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence."
48. The Respondents argue that their relationship with the Claimant had irretrievably broken down due to the Claimant's pattern of uncooperative conduct. They have however not shown the ways in which or the basis upon which they reached this conclusion.
49. Considering the circumstances under which the Claimant was dismissed from the service of the Respondents, coupled with the fact that the 1st Respondent is a public entity and which was largely on the wrong as regards the Claimant's dismissal, I deem reinstatement a feasible option. My saying so is guided by the Court of Appeal decision in *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR, where the court in upholding the reinstatement of the Respondent held that the Appellant was at fault.



50. The upshot is that the Claimant is reinstated to the position he held prior to dismissal without loss of salary and allowances.
51. I make no orders on costs in the interest of a better working relationship.
52. Judgment of the Court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 25TH DAY OF JULY, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Oyuko present for the Claimant

Ms. Rama present for the Respondents

Anjeline & Debra- C/As

