

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

CAUSE NUMBER 1634 OF 2018

RACHEL ESHIWANI.....CLAIMANT

VERSUS

KENYATTA UNIVERSITY.....RESPONDENT

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. Vide an amended memorandum of claim dated the 8th of February 2023, the Claimant sued the Respondent and sought the following Orders:-
 - a) **A declaration that the suspension of the Claimant for an indefinite period of time, from 30th May 2016 to date, is unfair and unlawful.**
 - b) **A declaration that the rights of the Claimant to fair administrative action have been violated contrary to Article 47 of the Constitution of Kenya 2010.**
 - c) **A declaration that the rights of the Claimant to a fair hearing as envisaged under Article 50 (1) (e), (i) and (k) of the Constitution of Kenya 2010 has been violated and continues to be violated.**

- d) A declaration that the Respondent violated the principles of natural justice and all their actions against the Claimant are null and void.**
- e) An order reinstating the Claimant to her employment position with the Respondent forthwith.**
- f) An order that the Claimant be reinstated to her job position with the Respondent obtaining as at April, 2016.**
- g) An order that the Claimant shall not be victimized in any manner whatsoever for and because of suing the Respondent in court.**
- h) Payment of used costs by the Claimant that remains un-refunded at Kshs. 5,000/-**
- i) Costs of this suit and interests at court rates.**
- j) Any other or further relief that this Honourable Court may deem just and fit to award to the Claimant in the circumstances.**
- k) IN THE ALTERNATIVE AND WITHOUT PREJUDICE TO THE ABOVE PRAYERS, a declaration that the Claimant is entitled to maximum compensation being her salary per month for the next 12 months, i.e. Kshs. 161,382.00 x 12 months x 5 years (calculated from the time of suspension being May, 2016) until payment in full, being Kshs. 9,682,920/-.**

2. The Claimant in support of the claim filed her list of documents dated 8th February 2023 with the bundle of documents attached, list of witnesses of even date, and witness statement of 14th May 2024.

3. The Respondent entered appearance through the law firm of Kinoti & Kibe Advocates and filed a statement of response and counterclaim dated 2nd July 2019. In the counterclaim the Respondent sought the following Orders:

- a) **A declaration that the Claimant is liable for the delay in the conclusion of the disciplinary case against her.**
- b) **A declaration that the Claimant's remedy in law lies in a claim for judicial review to compel the Respondent to discharge its statutory duty.**
- c) **An order of mandatory injunction be issued to compel the Claimant to appear before Senior Board of Discipline for the hearing of allegations against her relating to exam malpractice using her account in Campus View.**
- d) **Costs of this counterclaim.**

4. In support of the said statement of response, the respondent filed a list of witnesses dated 2nd July 2019, a list of documents dated 9th July 2019 with the bundle of documents attached, and a witness statement of VERONICA GITAU dated 10th December 2024.

5. To counter the statement of response and counterclaim, the Claimant filed a Reply dated 5th November 2019.

Hearing and evidence

6. The claimant's case was heard before me on December 11, 2024, when she testified as the sole fact witness in her case. She presented as her main evidence her witness statement dated May 14, 2024, the amended memorandum of claim dated February 8, 2023, and exhibits on pages 19-182

of her bundle. On February 19, 2025, the claimant was cross-examined by the respondent's counsel, Mr. Kibe Muigai, and re-examined by her own counsel, Mr. Jaoko.

7. The respondent's case was heard before me on March 17, 2025, where Veronica Gitau was called as RW1, a fact witness. She relied on the defense and counterclaim dated July 22, 2019. She produced documents listed in the filed list dated July 9, 2019, which were presented as R-exhibits 1-3. RW1 adopted her witness statement dated December 10, 2024, as her evidence in chief. RW1 was cross-examined by the claimant's counsel, Mr. Jaoko, and re-examined by the respondent's counsel, Mr. Muigai.

The Claimant's case in summary

8. The Claimant's case is that she was employed by the respondent from January, 2013 at the position of Lecturer, Department of Private Law at the School of Law. The Claimant avers that her salary varied from month to month as follows: from January, 2013 to August, 2013, the Claimant earned a gross salary of Kshs. 117,811/=. In September, 2013 the Claimant's salary was increased to a gross salary of Kshs. 129,811/=. then again to a gross salary of Kshs. 147,811/= in October, 2013; a gross salary of Kshs. 150, 370/= in December, 2013; and to a gross salary of Kshs. 319,453/= in January 2014, which sum was inclusive of salary arrears. In the months of March and April, 2014, the Claimant earned a gross salary of Kshs. 147,311/- per month; a gross salary of Kshs.277,694/= in May 2014; a gross monthly salary of Kshs. 155,955/= from the months of June, 2014, to December, 2014; and a gross salary of Kshs. 156,310/= in January,2015. In February, 2015 the Claimant earned a gross monthly salary of Kshs.158,668/=;

Kshs.206,668/= in March,2015; and Kshs. 158,668/= from April, 2015. At the time of the Claimant's suspension in May 2016, the Claimant's gross salary amounted to Kshs. 161,382/=.

9. On 5th May, 2015, the Claimant was appointed as the Examinations Co-coordinator for the Department of Private Law after being nominated by the then chair-person of the Department of Private Law, with a gross salary of Kshs.158,668/= on permanent and pensionable terms. On 30th May 2016, the Respondent unfairly suspended the Claimant from employment purportedly for the reason that her Account in CampusView, the Respondent's Examination System at the time, had been used in examination malpractice. The Claimant was issued with a suspension letter dated 30th May, 2016. Upon receiving the suspension letter on 2nd June, 2016, the Claimant sought clarification on the meaning of paragraph 1 of the said letter, which alleged that the Claimant's CampusView Account had been used to tamper with online examinations, and requested clarification on a series of data quoted in the said paragraph. The respondent sent the Claimant, via an e-mail received on 26th August, 2016, an invitation to appear before the Senior Board of Discipline of Kenyatta University, on 7th September, 2016 at 9:00am. The Claimant responded via email confirming that she would attend the meeting. Later on, the meeting was postponed by the Respondent indefinitely, which fact was communicated to the Claimant via telephone call. The Claimant was informed that a new date for the meeting would be communicated to her in due course, and she was again invited to appear before the Senior Board of Discipline of Kenyatta University, on 28th September,2016 at 9:00am. In the intervening period, the Claimant had requested via email for copies of the documents that the Respondent intended to rely on during the proceedings, in order to help her prepare my defence. The copies of documents were not availed to her.

10. On 28th September, 2016, the Claimant appeared before the Senior Board of Discipline of Kenyatta University. She reiterated her requests for the Respondent was relying on during the hearing, and for clarification on the meaning of the data quoted at paragraph 1 of the suspension letter dated 30th May, 2016. The respondent ignored the Claimant's queries, and only furnished her with a photocopy of a document titled "Grades Audit Report". The Respondent, again, adjourned the hearing to an unknown date to be communicated, and covenanted to provide the Claimant with the documents she had sought. The Claimant was later on invited to collect the subject documents and visited the Respondent's establishment on 7th October, 2016 at 11:00am to collect the said documents. However, instead of being furnished with the documents, she was issued with a letter referencing the Senior Board of Discipline of Kenyatta University meeting of 28th September, 2016 which had been adjourned. The Claimant was also issued with photocopies of some pages of a CBA (about 2 pages, plus the Cover), and a sheet of paper titled "Report by the University Marks Investigation Committee-May, 2016".

11. The Claimant maintains that the respondent never responded to her request for clarification and provision of documents. On 2nd September, 2016 the Claimant sent a reminder to the respondent via email and requested for a response to the letter that she wrote to the Registrar Administration on 2nd June, 2016, the Investigation report which I believed formed the basis of the suspension, a copy of all or of the proceedings of the KU student disciplinary committee hearings, in which the Claimant's name was adversely or in any way mentioned in relation to said investigations. On 6th September, 2016 the Claimant sent another reminder to the Respondent again requesting for the following: the Kenyatta University (Respondent's) Employee Handbook and the Senior Board of Discipline Procedure; the interpretation of certain sections of the suspension letter dated 30th May 2016 which was handwritten; copy of the findings of the investigating committee that was

conducting the investigation whose report formed the basis for the suspension letter; and a copy of all the proceedings of the KU student disciplinary committee hearings in which my name was adversely or in any way mentioned in relation to said investigations.

12. Vide letters dated 2nd November, 2016 and 16th November, 2016, the Respondent purported to invite the Claimant for disciplinary hearings, but the hearings did not take place. On 2nd December, 2016 the Claimant received, via telephone call, an invitation to attend a hearing before the Senior Board of Discipline on 9th December, 2016 at 9:00am. The Claimant confirmed her availability but requested the Respondent to confirm at least 2 days before the 9th December, 2016 whether the meeting would go ahead so that she could notify her Advocate. This was never done. On or about 9th December, 2016, the Claimant received an abrupt call from the then Chairperson of the Private Law Department of the Respondent, one Carol Kago, asking her to attend the disciplinary hearing scheduled to take place before the Board on the same day. The said Carol Kago claimed that the Respondent's Officers had looked for the Claimant in vain, despite that the Respondent having her email address, phone number and being aware of her place of residence. The Claimant responded by sending an email to the Respondent querying why no written notice of the disciplinary hearing had been given to her, especially since one condition of her suspension was that she was not allowed into the university premises unless invited by the University.

13. It is the Claimant's case that the respondent intentionally refused to supply her with the documentary material demonstrating the accusations levelled against her repeated requests for the same; and issued a notice for disciplinary proceedings scheduled for 23rd November, 2016, through a letter dated 16th November, 2016, which was not convenient to me and my Advocate. I

wrote a letter to the respondent on 16th November, 2016 personally and subsequently through my advocate communicating the same to the Respondent on 22nd November, 2016.

14. She complains that the actions of the respondent are in violation of the Claimant right's to a fair hearing as envisaged under Article 50(1) (e), (i) and (k) of the Constitution of Kenya, 2010 as read with the Fair Administration of Actions Act Section 4; violated the principles of natural justice and the Claimant's right to information contrary to article 35 (a),(b) of the Constitution of Kenya,2010. She avers that her suspension by the Respondent was unfair, malicious, and unlawful and also infringed on her Constitutional right to fair administrative action. She has not been informed in writing of the charges made against her, and has not been granted an opportunity to defend herself.

Respondent's case in brief

15. The Respondent admits that there existed an employer-employee relationship between the Claimant and the Respondent. The Claimant was indeed suspended on 30th May, 2016 pending investigation and hearing before the Respondent's Senior Board of Discipline. The reason for suspension was professional misconduct in that the Claimant's account in Campus View Online was used to tamper with online examination data of some units of students. This irregular activity on the Claimant's account was discovered upon a routine audit of students' academic records.

16. It is the Respondent's case that the Claimant was invited to appear before the Senior Board of Discipline severally in 2016 and 2017 to defend herself against the charge of using her Campus View account as the examination coordinator to tamper with online examination data as had been indicated in the Claimant's suspension letter and subsequent letters. The Claimant was also

informed that she could submit a written defence (if any) before the hearing date(s). However, those hearings were **adjourned at the Claimant's insistence**. Specifically, the Claimant was first invited to appear before the Senior Board of Discipline on 7th September, 2016 but the hearing was postponed due to a University Accreditation exercise by the Commission for University Education (CUE). For a second time, the Claimant was invited to appear before the Respondent's Senior Board of Discipline on 28th September, 2016 but the same was adjourned due to the Claimant's request to be supplied with documents. The Claimant was provided with copies of all the documents she required in preparation of her defence before 7th October, 2016. For a third time, the Claimant was invited vide a letter dated 2nd November, 2016 to appear before the Respondent's Senior Board of Discipline on 16th November, 2016 but that hearing was, one again, adjourned at the Claimant's request. For a fourth time, the Claimant was invited to appear before the Respondent's Senior Board of Discipline on 23rd November, 2016 but that hearing did not proceed as the Claimant's advocate then, Mukele Moni & Company Advocates, vide a letter dated 22nd November, 2016 informed the Respondent that the Claimant was not going to be available and proposed dates between the 7th and 12th of December, 2016 when she would be available. The Claimant was then invited to appear before the Respondent's Senior Board of Discipline on 9th December, 2016, being one of the dates suggested by her advocates. However, the said hearing did not proceed as the Claimant did not attend. The Claimant was also invited to appear before the Respondent's Senior Board of Discipline on 20th January, 2017 but the hearing failed to take place, as she did not attend yet again.

17. In the period between 2017 and 2018, the Claimant was not invited to appear before the **Respondent's Senior Board of Discipline due to the transition of the Respondent's University Council as well as the staff strike of 2017 and 2018 where union officials and**

members stated that they would not participate in disciplinary hearings because they were participating in intermittent staff strikes. She was, however, invited to appear before the same Board **on 24th May 2019**, but the Claimant failed to appear and instead, her Advocates wrote a letter to the Respondent stating that “*she will not come for your purported disciplinary proceedings.*” Since then, the Claimant has been invited to appear before the Respondent's Senior Board of Discipline but has chosen not to attend due to the proceedings herein.

18. The Claimant remains on suspension and on half-salary pending hearing and determination of this suit before this Honourable Court and/or the Respondent's Senior Board of Discipline. The allegations against the Claimant are grave as they encompass the Respondent's statutory mandate that is, academic excellence and integrity of its student body's academic performance.

19. The Respondent urges the court to be allowed to exhaust its internal dispute mechanism processes in lieu of intervening at this stage.

DETERMINATION

Issues for determination

20. The claimant outlined the following issues for determination –

- A. Whether the Claimant Was unfairly suspended by the RESPONDENT for an indefinite period without subjecting her to any lawful Disciplinary Proceedings and/ or without according her the opportunity for a fair hearing.

B. Whether the Claimant was subjected to a constructive dismissal without any justifiable ground, when the Respondent failed to follow lawful procedures, thus denying the Claimant her employment under the guise of suspension.

C. Whether the Claimant's rights have been violated contrary to the provisions of a. Articles 47, (1) and (2), and Article 50(1) (e), (i) and (k) of The Constitution of Kenya, 2010, as read together with b. Section 4 (1), (2), (3), (4), (5) and (6) of The Fair Administration of Actions Act Whether The Claimant's Rights have also been violated contrary to the provisions of Article 35 (A), and (B) of The Constitution of Kenya, 2010.

21. The respondent outlined the following issues for determination-

- a) Whether the impugned disciplinary process against the Claimant was unfair and unlawful?
- b) Whether the impugned disciplinary process amounted to constructive dismissal?
- c) Whether the Claimant's rights under Articles 47(1) & (2) and Article 50(1)(e), (i) & (k) of the Constitution, as read with Section 4 (1), (2), (3), (4), (5) & (6) of the Fair Administrative Action Act were violated by the Respondent?
- d) Whether the Claimant's Rights under Article 35 (A) & (B) of the Constitution were violated by the Respondent?
- e) Whether the reliefs sought by the Claimant should be granted.
- f) Who should bear the costs of this suit?

22. The court finds the parties are in agreement on the issues for determination by the court. The respondent in submissions did not address its counterclaim as an issue. The court finds the issues to be –

- i. Whether the impugned disciplinary process amounted to constructive dismissal?
- ii. Whether the Claimant's rights under Articles 47(1) & (2) and Article 50(1)(e), (i) & (k) of the Constitution, as read with Section 4 (1), (2), (3), (4), (5) & (6) of the Fair Administrative Action Act were violated by the Respondent?
- iii. Whether the reliefs sought by the Claimant should be granted.
- iv. Whether the counterclaim was merited.

Whether the impugned disciplinary process amounted to constructive dismissal?

The claimant's submissions

23. The Claimant submits that her case is of a denial of the right to be heard as well as Constructive Termination, and so she doesn't have to file any such application for a Judicial review application to compel the respondent to carry out a disciplinary hearing against her. The respondent's constructive termination of the Claimant employment contract, is clearly demonstrated that she was accused of exam malpractice and suspended for a period of 3 years post filing the case. Subsequently, the respondent stopped paying her any salary or giving her any work to do from end of the year 2019 to date. The Claimant submits that constructive termination of the employment contract is defined in Black's Law Dictionary (9th Edition) defines constructive dismissal as: "A termination of employment brought about by the employer making the employee's working conditions so intolerable that the employee feels compelled to leave." The Claimant submits that the respondent wrongly argued that the Claimant ought to have filed a Judicial review application to compel the respondent to carry out disciplinary hearing against the Claimant, this is misinterpretation of the purview of judicial review. That in order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the

decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles. The Claimant submits that the respondent stopped giving her work, directed her not to step into the respondent compound while at the same time suspended her indefinitely for 3 years post filing of this claim. This was constructive termination of an employment contract. The Claimant submits that the "Constructive dismissal has its roots in the law of contract under the doctrine of 'discharge by breach.' Under this doctrine, an employee was entitled to treat himself as discharged from further performance of his obligations where the employer's conduct was a significant breach going to the root of the contract. The termination would be due to the employer's conduct. Such conduct may include unilateral reduction in pay or failure to pay the employee. In England, constructive dismissal was given statutory clothing through the Redundancy Payments Act 1965 and later the Trade Unions and Labour Relations Act, 1974 and the same was discussed in WESTERN EXCAVATING (ECC) LTD V SHARP [1978] ICR 221. "The doctrine and principles developed in other comparative jurisdictions would be equally applicable in Kenya because of the entrenchment of a justiciable right to fair labour practices under Article 41 of the Constitution." In the above quoted case of Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 Lord Denning MR noted that an assessment of what was a constructive dismissal applied the ordinary 'contract test' so that a dismissal must first be established as follows: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct." i. The employer making a unilateral alteration or breach of the employment contract to the detriment of the employee. ii. The employer making or

otherwise permitting working conditions of the employee to be intolerable for him to continue working. The Claimant's circumstances fall squarely under both limbs. That is her employment contract was unilaterally terminated by the Respondent through its action of falsely claiming and suspension of the claimant that on 30th May,2016, wherein the respondent unfairly and without just cause suspended her claiming that her Account in Campus View, the respondent Examination System at that time had been used in exam malpractice. To the contrary, in the respondent's Defence and their Witness Statements, they alleged that the claimant was suspended because of "professional misconduct" which has not been proved to date and was Not in the suspension letter. And the Respondent (i) stopped giving the Claimant work, (ii) directed her not to step into the respondent compound without an invitation, (iii) refused to remit her mandatory statutory payments and her income tax forms that would have facilitated her tax reporting obligation, yet at the same time kept the Claimant suspended for Three (3) solid years before she was forced to file this claim. Constructive Termination of the Claimant under both limbs is established as follows: "It is trite law that when an employer by action or omission materially breaches the contract or otherwise makes it impossible for an employee to perform his contract of employment then the contract is deemed to have been constructively terminated by the employer." On this the Claimant relies on JOSEPH ALEPER and TIMOTHY EKIDOR VS. LODWAR WATER AND SANITATION COMPANY LIMITED, CAUSE NO.6 OF 2014 (Formerly Cause No.1400 of 2012 at the Industrial Court in Nairobi.) at the EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT KERICHO, Coram; (Hon. Mr. Justice, D.K. Njagi Marete, dated 29th day of July 2015.

Respondent's submissions

24. From the onset, the Respondent wishes to restate that the Claimant was not terminated from her employment with it as the disciplinary process that would have led to her dismissal or otherwise was never concluded. Further, the Claimant has introduced the issue of constructive dismissal at the submission stage despite not specifically pleading it in her Amended Claim and not seeking any orders in the line of constructive dismissal. It is trite that parties are bound by their pleadings and the Respondent submits that it would be unjust and inequitable to it were the court to make any pronouncement on the said issue. This is because the Respondent had no notice of the same from the pleadings and could not therefore respond to it in its Response to Memorandum of Claim. Being an unpleaded issue, we urge the court to refrain from making any considered pronouncement over the same and granting any relief thereto. Determination on it would be gravely prejudicial on the Respondent for want of notice and opportunity to respond. The above submissions notwithstanding, should the Honourable Court be inclined to determine the same, we wish to make the following submissions with regard to the said issue. The legal principles relevant to determining constructive dismissal include the following: a. What are the fundamental or essential terms of the contract of employment? b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer? c. The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. d. An objective test is to be applied in evaluating the employer's conduct. e. There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e. causation must be proved. f. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination. g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time

terminate the employment relationship pursuant to the breach. h. The burden to prove repudiatory breach or constructive dismissal is on the employee." i. Facts giving rise to repudiatory breach or constructive dismissal are varied.

25. In common law, which has been embraced in our law through Section 12 of the Labour Institutions Act Number 12 of 2007, treats constructive dismissal as a repudiatory breach by the employer of the contract of employment. The employer's behavior in either case must be shown to be so heinous, so intolerable, that it made it considerably difficult for the employee to continue working. The employee initiates the termination, believing herself, to have been fired. The employee needs to show that the employer, without reasonable or proper cause conducted himself in a manner likely to destroy or seriously damage the employment relationship. Resignation is regarded as constructive dismissal if the employer's conduct is a significant breach of the contract of employment and that the conduct shows the employer is no longer interested in being bound by the terms of the contract. It is the Respondent's submission that, in the circumstances of this case and as submitted elsewhere above, conducted itself properly in initiation of disciplinary proceedings against the Claimant for just cause. The Respondent set about to ensure that the charge against the Claimant would be processed in compliance with due process and proceeded to supply her with the evidential material to be used at the hearing, where she had been allowed to be accompanied by her legal representative. Knowing that the charges against her were serious and likely to be proven thus leading to her summary dismissal, she conjured up reasons, time and again, so as not to appear before the Respondent's Senior Board of Discipline and defend against her charges. The ensuing delay in hearing her case, largely caused by her failure to attend scheduled hearings, was exacerbated by the transition of the University Council of the Respondent as well as the staff strikes of 2017 and 2018 where union officials and members

stated that they would not participate in disciplinary hearings. Further, by the Claimant filing the suit herein, the disciplinary process had to be further put on hold, at the Claimants own insistence. No formal resignation has been received by the Respondent from the Claimant alluding that the conduct of the Respondent had forced her hand. This we submit is because she could not impute any ill doing of the Respondent to justify the said resignation. In the circumstances, we pray that the Honourable Court finds that the Claimant has not been constructively terminated by the Respondent, which remains eager procedurally get to the bottom of this matter. Penultimately, as no termination has been proven, no determination of the satisfaction of the procedural requirements thereof is demanded in this case and the Respondent need not submit on the fairness of a termination that has not taken place.

Decision

26. The employment relationship between the claimant and the respondent was not in dispute. The Claimant submits that on 5th May,2015, she was appointed as the Examinations Co-coordinator for the Department of Private Law by the respondent, after being nominated by the then Chairperson of the Department of Private Law, with a gross pay of Kshs. 158,668/=under permanent and pensionable terms. As at the time she was suspended by the Respondent on 30th May 2016, the Claimant's gross Monthly salary was Kshs. 161,382/=. (see the amended Memorandum of claim dated 8th February, 2023, at pages;19-42,44, and 176). The Claimant submits that on 30th May, 2016, the respondent unfairly and without just cause suspended the Claimant, alleging that her Account in the Kenyatta University Academic system, known then as CAMPUS VIEW, had been used in alleged exam malpractice. The period of the suspension was never clarified to the Claimant. The Claimant submits that when she was issued with the suspension letter (dated 30th

May,2016) which she received on 2nd June,2016, she immediately raised issues with the respondent with regard to the suspension letter and its contents, wherein she sought clarification relating to paragraph 1 of the said letter, seeking to understand the bearing of that paragraph and therefore the cause of her suspension. (see the amended Memorandum of claim dated 8th February, 2023, at pages;46-to-49).

27. The Claimant submits that she wrote to the Registrar, Administration on 2nd June 2016 (see the amended Memorandum of claim dated 8th February at pages;48-to-49), requesting clarification on the reason for the suspension as well as details of the purported [Investigation] report which she believed would have formed the basis of the suspension as contained in the suspension letter dated 30th May 2016. The Respondent did not respond to the Claimant's letter requesting clarification on the contents of the suspension letter, particularly on the claim that the Claimant's "Campus View password, the respondent System access systems account had been used to tamper with online examinations. The Claimant submits that neither the Respondent's Registrar of Administration nor any relevant officer of the respondent provided the Claimant with any official proceedings of an investigative body that had arrived at the conclusion that she was guilty of any purported malpractice, nor did they brief the Claimant on the manner and means by which the Respondent had arrived at the decision to suspend the Claimant. The Claimant submits that the actions of the respondent are in violation of her right to a fair hearing as envisaged under Article 50(1) (e),(i) and (k) of the Constitution of Kenya,2010 as read with the Fair Administration of Actions Act Section 4.The Claimant was never presumed innocent until the contrary was proved by a robust investigation of the charges of the respondent, nor was the Claimant informed of the charges by the Respondent with sufficient detail to adduce or challenge the allegation or answer or prepare for any disciplinary proceedings.

28. There was much correspondence in the material period, and the court picked up the Notice that was sent to the Claimant on Saturday, 7th January 2017, requiring her to appear before the Disciplinary hearing on 12th January 2017, which she submitted was again rescheduled indefinitely by the Respondent through a phone call made on the 9th of January 2017. The respondent went silent till the year 2019, after the case was filed and reinstatement orders dated 20th February 2019 were given by Hon. Mr. Justice S. Radido. Having been served with the order dated 20th February 2019 requiring the reinstatement of the Claimant on the Respondent on 21st February, 2019, the Respondent on 7th May 2019, which she contends was in bad faith, wrote to the claimant asking her to attend a disciplinary hearing. This attempt to subvert the Claimant's rights attracted a strong response from the claimant through her advocates, reminding the Respondents to obey the court orders reinstating the claimant which they disobeyed, dated 20th February, 2019 duly served upon them on 21st February, 2019 as per the affidavit of service filed in court on 22nd March, 2019. This invitation was sent by the Respondent Four (4) solid years since the Claimant was suspended. The Claimant submits that the ill-minded attempt at pursuing disciplinary action by the respondent lacked any basis in Law due to pendency of the same issues in Court. That in fact, the Respondent's purporting to invite the claimant for disciplinary action on 7th May 2019 was a mockery of the ongoing Court proceedings.

29. Conversely, the respondent submitted that- It is the Respondent's submission that, in the circumstances of this case and as submitted elsewhere above, it conducted itself properly in initiation of disciplinary proceedings against the Claimant for just cause. The Respondent set about to ensure that the charge against the Claimant would be processed in compliance with due process and proceeded to supply her with the evidential material to be used at the hearing, where

she had been allowed to be accompanied by her legal representative. Knowing that the charges against her were serious and likely to be proven, thus leading to her summary dismissal, the claimant conjured up reasons, time and again, so as not to appear before the Respondent's Senior Board of Discipline and defend against her charges. The ensuing delay in hearing her case, largely caused by her failure to attend scheduled hearings, was exacerbated by the transition of the University Council of the Respondent as well as the staff strikes of 2017 and 2018 where union officials and members stated that they would not participate in disciplinary hearings. Further, by the Claimant filing the suit herein, the disciplinary process had to be further put on hold, at the Claimants own insistence. No formal resignation has been received by the Respondent from the Claimant alluding that the conduct of the Respondent had forced her hand. This it submitted was because she could not impute any ill doing of the Respondent to justify the said resignation. In the circumstances, the respondent urged the court to find that the Claimant has not been constructively terminated by the Respondent, which remains eager procedurally get to the bottom of this matter. Penultimately, as no termination has been proven, no determination of the satisfaction of the procedural requirements thereof is demanded in this case and the Respondent need not submit on the fairness of a termination that has not taken place.

30. The court agreed that the respondent had a prerogative right to invoke its internal disciplinary proceedings on suspicion of misconduct in the exams by the claimant as held in Republic -vs- Kenyatta University and 2 Others Ex Parte Jared Juma, HC Misc Civil App No. 90 of 2009 where the court held as follows: *"Discipline at the Respondent's University is necessarily an internal process conducted using internal personnel. It would be impractical to sub-contract or delegate as it were, this function to an outside agency. Most bodies established under statute also establish disciplinary committees. Kenyatta University is no exception. The composition of the*

disciplinary committee is set out in the Statute, and it comprises University officers. The University has jurisdiction to conduct its own disciplinary proceedings. This must necessarily be so. The suggestion that disciplinary proceedings are a matter for courts is untenable...the existence of such a disciplinary committee has always been recognized by the courts. The courts also recognize that their relationship with such committees is limited to supervision." The court understood the claimant's issue, was not a challenge on the power of the respondent to exercise the disciplinary process against her for the alleged misconduct but the failure to do so in fair manner. The claimant said she was subjected to indefinite suspension and not accorded opportunity of fair hearing. What was the truth?

31. The respondent issued the claimant with a letter of suspension dated 30th May 2016 which suspended her with half salary until further notice. The court finds that the letter disclosed the reason for suspension as follows- *'RE: SUSPENSION*

It has come to the attention of the University Management that during the 2015/2016 routine audit of student's academic records in the campusvue system, it was noted that your account was used to tamper with online examination data and some units changed as follows:

ECD 319 from 31 to 71, PPH 102 from 50 to 70, UCU 103 from 49 to 79, HEH 209 from 45 to 75, BAC 100 from 40 to 70, EAE 100 from 47 to 67, UCU 100 from 46 to 76, UCU 103 from 44 to 64, BBA 102 from 41 to 61, EET 101 from 41 to 71, BAC 200, from 40 to 60, EES 200 from 40 to 60, EES 201 from 40 to 70 and ECU 100 from 0 to 70.

This is a serious offence which amounts to professional misconduct and breach of your obligations contrary to Section 44 (3) of the Employment Act, 2007 which provides inter alia for summary dismissal if an employee is involved in gross misconduct i.e if an employee has by his

conduct fundamentally breached his obligations arising under the contract of service and Section 11.4 (iii) (b) & (c) of your Terms of Service where the University Council reserves the right to terminate appointment without notice where an employee has committed an offence that is scandalous or disgraceful in nature.

Consequently as a result of the above, you are hereby SUSPENDED pending further investigation and/or appearance at the Senior Board of Discipline where you will be invited to defend yourself against the above charges and any other charges that might come up after further investigations...' The claimant received the letter on the 2nd June 2016 and on even date asked to be provided with the exact details of the examination date and unit changed as stated in the letter. The employer vide letter dated 4th October 2016 indicated that the senior board disciplinary meeting held on 28th September 2016 was adjourned to enable the claimant better prepare for the defence and indicated the claimant had sought for copies of the CBA, investigation report forming basis of the investigation and audit trail confirming her account was used to change marks. The letter by Prof Mwai indicated that as the examination coordinator, the claimant's account was used to change marks as per the attached audit trail. (Pages 45-155 of the claimant's bundle was the letter and the requested documents annexed).

32. The claimant annexed various correspondence on the invitation to the disciplinary hearing. The Respondent contended, with evidence of communication from both the claimant and her advocates, that both parties caused the delay in the hearings in 2016. RW1 in her witness statements stated that the claimant was not invited for hearing in 2017 and 2018 due to transition of the respondent's disciplinary council and staff strike. The claimant said this was not true as the university's activities continued and there was even a graduation.

33. During the cross-examination, the claimant told the court that in July 2018, the respondent stopped her salary, hence she had no relationship with the university after being told not to step into the campus. The claimant stated that she had not sought an order of constructive dismissal. The claimant confirmed her attendance at the meeting on December 9, 2016, via her email dated December 2, 2016, had requested notice, which was not issued. She said she had been called before being asked why she could not just appear, being aware of the date. The claimant was aware that the disciplinary hearings could be halted due to the lack of union representatives, who the respondent stated were on strike in 2017 and 2018. The claimant confirmed that via letter dated 7th May 2019, she was invited for a disciplinary hearing and admitted her advocates responded that the respondent should stop inviting her to the hearing. During re-examination, the claimant told the court that as at the receipt of the invite in 2019, she had a Court Order of reinstatement of 20th February 2019. The claimant was not reinstated.

34. RW1 agreed the claimant was on suspension for 3 years before the issuance of the letter in May 2019. RW1 refused to disclose to the court the procedural period of suspension. RW1 was aware of the Court Order by Justice Radido. RW1 confirmed that the claimant was removed from the payroll. The Court through Justice S. Radido issued an interim order dated 20th February 2019 as follows- '(In Court Before Hon. Justice S. Radido on 20th February, 2019)

ORDER

THIS MATTER COMING UP for interparties hearing of application dated 24th December, 2018, and upon hearing Counsel for the claimant and in the absence of the respondent;

IT IS HEREBY ORDERED

1. THAT pending Hearing and determination of the main suit filed on 21 December, 2018, Respondent is hereby directed to reinstate applicant/ claimant to her job position of Lecturer, Department of Private Law at the Respondent School of Law (Examination Coordinator)

2. THAT costs in the cause

GIVEN under my hand and seal of this Honourable court on 20th February, 2019.’’ The Court Order was served on the respondent, and instead of compliance, the Respondent issued the Claimant with an invitation to a disciplinary hearing. The court finds that the action by the respondent was in contempt of court. The claimant was right to reject the belated invitation to the hearing before reinstatement. The Respondent on removal of the claimant from the payroll in July 2017 constructively dismissed her from employment. Having failed to obey the court order and reinstate the claimant the respondent stands to be in contempt of the court. The foregoing conduct by the Respondent amounts to constructive dismissal as held in the decision relied on by the respondent under which the legal principles on constructive dismissal were stated by the Court of Appeal in Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga (2015) eKLR.

Whether the Claimant's rights under Articles 47(1) & (2) and Article 50(1)(e), (i) & (k) c the Constitution, as read with Section 4 (1), (2), (3), (4), (5) & (6) of the Fair Administrative Action Act were violated by the Respondent?

35. The court found there was a case of constructive dismissal. It is the employer's duty to conduct disciplinary procedures fairly, as outlined in section 41 of the Employment Act, which enforces the right to fair administrative action under article 47 and the right to a fair hearing under article 50 of the Constitution. Section 41 states: ‘41. Notification and hearing before termination on

grounds of misconduct (1) Subject to section 42(1), an employer shall, before terminating an employee's employment on grounds of misconduct, poor performance, or physical incapacity, explain to the employee, in a language the employee understands, the reason for considering termination, and the employee shall be entitled to have another employee or a union representative of their choice present during this explanation. (2) Notwithstanding any other provision of this Part, an employer shall, before terminating or summarily dismissing an employee under section 44(3) or (4), hear and consider any representations the employee may make on grounds of misconduct or poor performance, along with the person, if any, chosen by the employee within subsection (1)." The essence of articles 47 and 50 of the Constitution focuses on the right to a fair hearing, which is adequately addressed in section 41 of the Employment Act. The three-year suspension period before Justice Radido issued the Court Order of reinstatement was excessive and unjustified. The alleged university staff strike did not justify this delay. RW1 stated the delay was due to an industrial strike. RW1 confirmed that the university held graduations in 2017 and 2018. These graduations serve as court evidence that the respondent was operational and fulfilling its mandate during 2017 and 2018, when the contested disciplinary hearing was not conducted. The claimant was suspended with half pay, with the last payment made in August 2018, without justification, which the court finds inhumane.

36. The court upholds the decision in Patrick Wafula Kuloba V Director/Chief Executive Officer, Kenya Industrial Research & Development Institute [2021] eKLR (before Hon. Lady Justice Maureen Onyango), delivered on July 16, 2021, where the Court held that the Respondent's actions of keeping the claimant on suspension for two years before filing the claim were unlawful and inhumane. The court was satisfied that there was a violation of fair administrative action and the right to a fair hearing, as disciplinary process should be conducted in a timely manner. The

Respondent had a statutory duty under section 41 of the Employment Act to conduct the hearing and cannot blame the employee for the delay. It was demonstrated that there was no valid reason for the salary stoppage in 2018. RW1 stated she treated the salary stoppage as dismissal. The court finds there was a violation the procedural fairness under section 41 of the Employment Act, as read with article 50 of the Constitution, and article 47 of fair administrative action.

Whether the claimant is entitled to the relief sought

37. The claimant raised a plethora of prayers. The court had already ordered Reinstatement, and that Order was never set aside. The claimant has sought reinstatement. Pursuant to the Court Order of Justice Radido, the Court reiterates the Order of reinstatement. The suspension was illegal post the Order of the Court, and the claimant is deemed to have been reinstated to employment from February 2019 to date. The court enters judgment for the claimant against the respondent as follows-

- l) A declaration that the suspension of the Claimant for an indefinite period of time, from 30th May 2016 to date, is unfair and unlawful.**
- m) A declaration that the rights of the Claimant to fair administrative action have been violated contrary to Article 47 of the Constitution of Kenya 2010.**
- n) A declaration that the rights of the Claimant to a fair hearing as envisaged under Article 50 (1) (e), (i) and (k) of the Constitution of Kenya 2010 has been violated and continues to be violated.**

- o) A declaration that the Respondent violated the principles of natural justice**
- p) An order is issued reinstating the Claimant to her employment position with the Respondent forthwith.**
- q) An order is issued, that the Claimant be and is reinstated to her job position with the Respondent obtaining as at April, 2016 within 30 days of this order.**
- r) An order is issued that the Claimant shall not be victimized in any manner whatsoever for and because of suing the Respondent in court.**
- s) An order of Payment of used costs by the Claimant that remains un-refunded at Kshs. 5,000/-**
- t) An order is issued that the claimant be paid her half salary for months of September 2018 to 20th February 2019.**
- u) An order that the claimant be paid full salary from 21st February 2019 pursuant to the reinstatement Court Order by Justice Radido to date of judgment.**
- v) Costs of this suit.**

On the counterclaim

38. It is the prerogative of the Respondent to carry out disciplinary proceedings against its employees. The employee has never been terminated, so the court can consider the merits of the reason for the termination. It could only be an issue of constructive dismissal, which the court found merited and upheld the reinstatement. The court, having reinstated the claimant to employment with full salary, having found the suspension was unfair, and pursuant to the reinstatement order of Justice Radido of 20th February 2019, the court finds that it is the prerogative of the respondent to proceed with the disciplinary proceedings while the claimant is in employment. On the orders sought-

39. Order (a) is held in the negative as it was the role of the respondent to conduct a fair procedural hearing under section 41 of the Employment Act.

40. Order (b) is held to be of no relevance in the counterclaim. The claimant was properly before the court vide the memorandum of claim.

41. The court on prayer c of the counterclaim finds that, having reinstated the claimant, it is the prerogative of the respondent to comply with section 41 of the Employment Act and is at liberty to proceed with the impugned disciplinary process.

42. The court, for the foregoing reasons, finds that costs are not due in the counterclaim. Each party to bear its own costs in the counterclaim.

43. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH
COTOBER, 2025.**

J. W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Claimant: Jaoko

Respondent: Muturi h/b Kibe Muigai

ORIGINAL