REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL NO. 744 OF 2019

(Before D.K.N. Marete)

SAMUEL TERRA……...……..…..……APPELLANT

VERSUS

CATHORLIC UNVERSITY OF EASTERN AFRICA…….…...RESPONDENT

JUDGMENT

This matter was originated by way of a Statement of Claim dated 5th November, 2019. The issue in dispute is therein cited as;

Non-payment of terminal benefits and damages for unlawfully and unfair summary dismissal.

The Respondent in her Response to Claim Dated 5th November, 2019 dated 12th February, 2020 denies the claim and prays that it be dismissed with costs.

The Claimant's case comes out as follows;

- On or about 14th December, 2009, he was offered employment by the Respondent for one year at a starting salary of Kshs.44,599.00.
- On 22.02 2021, the claimant was engaged on a permanent basis as Accountant.
- On 07.05.2015 the claimant was appointed Administrative Officer at the Respondent's GABA Campus in Eldoret.
- On 15.06.2015, after a restructuring process, the claimant served the Respondent as an Assistant Account and Administrative Officer at a salary of Kshs.104,413.00.
- On 03.04.2017, in the course of duty and with a view to improving the Respondent's Institution the claimant highlighted and notified the Respondent's Management of the

challenges the institution was undergoing and which required serious consideration and action.

- On 25.07.2017, the claimant requested for change of appointment/work station.
- Due to insight of work, the Respondent promoted the claimant to the position of Administrative Officer II.
- On 27.02.2019, the claimant further aired his grievances to the Respondent about challenges he was facing in the discharge of his duties.
- The claimant served the Respondent with diligence and loyalty until the 08.07.2019 when he was served with a notice to show cause for alleged anomalies in the Finance Department regarding part-time lecturers.
- On 30.08.2019 the claimant was summarily dismissed on unjustifiable grounds and in violation of the Respondent's standards.
- This termination was wrongful, unfair and without any justifiable cause or notice.
- He was not awarded a right to be heard nor was he served with a warning letter contrary to section 43 of Employment Act, 2007.
- He was not paid any terminal dues or severance pay.
- At this time he earned Kshs.100,413.00. his salary was never increased from Kshs.48,413.00 from 2015 in disgard to the Human Resource Manual on annual increment.
- He claims underpayment from 2015 to 2019 all amounting to Kshs.172,807.00.
- This includes unpaid leave allowance from 2015 all amounting Kshs.132,441.00.
- Despite demand, the Respondent has neglected to pay the claimant his terminal dues and severance pay.
- This also includes damages for wrongful termination and or lawful dues entitled to him.
- The claimant had had a blemish free and diligent service spanning over 10 years.

He prays thus;

1. *THAT the courts do find the reasons and procedure for termination of the Claimant's services was wrongful.*
2. *THAT the court do find that the Respondent's action of continued withholding and failing refusal and or neglecting to pay the claimant's has rightful terminal benefits and other unpaid dues unlawful an untenable.*
3. *THAT a result the court do ORDER that the Respondent to pay the Claimant all his terminal benefits and other unpaid dues computed as hereunder*

    a. *12 months' salary in compensation for unfair termination at Kah.1.204.956.*
    b. *3 month pay in lieu of notice at Ksh. 301.239.*
    c. *Payment for 10 years worked at Ksh.1,004,130/10 years X Ksh.100,430]*
    d. *Underpayment of Ksh.172.807 from 2015 to 2019 computed as follows [2015- Ksh. 50,201, 2016-Ksh. 51. 590, 2017-Ksh.52, 978, 2018-Ksh.54.357 & 2019-Ksh. 55,759]*
    e. *Unpaid leave allowance of Ksh.132.442 computed as follows; [2015- Ksh.2015- Ksh.25, 100, 2016 Ksh.25,795; 2017- Ksh.26,489, 2018-Ksh. 27,178 and 2019-Ksh. 27,879]*
    f. *Costs of this suit.*

The Respondent's case is the denial of the claim.

The Respondent does not contest the particulars of the claim as enumerated at paragraphs 1 – 4 of part C of the claim relating to the particulars of the employment of the claimant by the Respondent. The Respondent however pleads that this should be struck off with costs in that the claimant has not exhausted the internal mechanism for solving disputes *inter partes.* It their case that the claimant was dismissed after a discovery of anomalies with some of the lecturer's account that he was handling and on such dismissal, he appealed to the Respondent's council which is yet to consider the

appeal – it must now be added that the claimant's appeal was through the direction of this court revisited, heard and determined to finality with a confirmation of the decision to dismiss the claimant as was in the earlier disciplinary panel.

The Respondent's further case is that the claimant was transferred due to his mis-apprehension with other colleague in his department thereby leading to constant change of work station. He had been confirmed as Administrative Officer in March, 2015 because the person who served in the position had resigned a year earlier.

The Respondent's other case is the denial of diligent service on the part of the Claimant. He was not able to fully explain anomalies found in the lecturer's account the claimant was handling thereby leading to dismissal of his employment. This was upon awarding reasons for such dismissal. It is their averment that the claimant is not entitled to any compensation for unfair termination of employment as he was dismissed as per the provisions of Respondent's Human Resources Policies and Procedures Manual which only called the Respondent to provide him with benefits, allowances and any other monies due and owing at the time of such dismissal. This was done and the Respondent is not owing of the claimant.

In the penultimate the Respondent opines and avers that this claim is bad in law for non-disclosure of material fact which comes out thus;

(a) The claimant contravened sections 1.1.1.2(iii) and (iv), 1.6.1 of CUEA's Human Resources Policies and Procedures Manual which amounted to gross misconduct by;

(i) Failing or refusing to uphold the Core Values of the Institution

(ii) Knowingly giving false or misleading information

(iii) Exposing the Respondent to unwarranted losses as a result of the Claimant's conduct and negligence.

(b) *That the Respondent's action for dismissing the Claimant is justified.*

(c) *That the claim is an afterthought and a waste of this Honourable court's time since the dues procedure was followed in the termination of the claimants' employment with the Respondent in line with the provisions of the Employment Act 2007 and the CUEA Human Resources Policies and Procedures Manual.*

The matter came to court variously and took turns and diversions until the 6th December, 2023 when the parties agreed that it be returned to the Respondent with a view to exhausting the internal appeal mechanisms and system *inter partes*. This did yield positive result for the claimant and a report of a confirmation of the claimant's dismissal was made to court on 16th April, 2024 thereby compelling further proceeding in the cause. The matter was ultimately heard on 29th October, 2024 with each party reiterating their respective cases.

The issues for determination therefore are;

1. Whether this court has jurisdiction to hear and determine claims arising from contracts for the period 1st December, 2009 to 6th May, 2015.
2. Whether the claim is premature on grounds of failure to exhaust internal disputes/grievance mechanism.
3. Whether the claimant's fix term contract dated 7th May, 2015 with the Respondent terminated after the lapsed of three (3) years and what was the implication of the expiry on the employment relationship
4. Whether the termination of the employment of the claimant by the Respondent was wrongful, unfair and unlawful.
5. Whether the claimant is entitled to the relief sought
6. Who bears the costs of this cause.

The 1st, 2nd and 3rd issues for determination are borne out the Respondent written submissions dated 26th June, 2023 in which they are thrashed out in style and detail. However, these do not form part of the Respondent's pleading. It is no wonder that the claimant does not answer or address them in any way throughout the pleadings, hearing and written submissions in support of their case. It is not even clear as to what purposes the Respondent intended to put this limb of submissions to. Are these preliminary objections to the suit or merely intended to augment the Respondent's case for unlawful termination of employment?

If they are preliminary objections to the suit, then this should have come out clearly and at the opportune moment. In the absence of this, these materials should and are treated as casually as they come in or arise. These are mere appendices to the case for lawful termination of employment and no more. This is the safer and just approach to address the issues. This court therefore takes this as the right treatment of the issues raised by the Respondent in their written submissions. They are not worthy of any consideration in the circumstances. Issue numbers 1, 2 and 3 are thus treated and deemed as spent. They are not otherwise acceptable as preliminary objections for lack of outright pleading and timeliness.

The 4th issue for determination is whether the termination of the employment of the claimant by the Respondent was wrongful, unfair and unlawful. The claimant in his written submission dated 10th January, 2025 submits a case of unfair and unlawful termination of employment. Besides opening with a summary of his case which is a narration of the facts of the case, the claimant sought to rely on authority of **Oyatsi vs Judicial Service Commission (Petition E111 of 2021) [2022] KEELRC 3 (KLR)** where the court recited that place of HR manual and unequivocally held thus;

105. It is the court's finding that the Human Resource Policies and Procedures Mammal of the Judiciary is an employment policy or Labour practice recognized under section 5(7) (c) of the Employment Act, 2007, which provides that;-

> *"an employment policy or practice includes any policy or practice relating to recruitment procedures, advertising and selection criteria, appointment, and the appointment process, job classification and grading, remuneration employment, job assignments, the working environment and facilities, training and development. performance evaluation systems, termination of employment and disciplinary measures*

106. The manual therefore is an internal mandatory guide, with statutory underpinnings and is in the court's judgment a kingpin of good corporate governance in any organization worth its salt. The court finds without any hesitation that the respondent is bound by its own Human Resource Policies and Procedures Manual the same way, the employees are bound to abide by its terms in their daily work deposition and behavior Indeed, employees of the judiciary who fall foul of the provisions of the Human Resource Policies and Procedure Manuals would be subjected to disciplinary action in terms of the manual Equally, the respondent cannot be heard to say that they are at liberty to cherry pick what to adhere to and what not to respect in the manual.

107. In ***Cause No 273 of 2019 Edah Cherono Maiywa versus University of Nairobi Enterprises & Services Limited,*** where the court *had following to say as regards employer policy document;*

> *"The above provision of the Human Resource Policy and Procedures manual cannot be wished away as it is founded on the law and it is incorporated into the contract of service of every employer of the respondent, Cw2, RW1 and Rw2 confirmed in their testimonies that the claimant as an efficient HR professional who had no performance issues in the HR docket.*

She had acted for fairly long period as the SHRAO and as such, nothing prevented the employer from conducting internal recruitment under Chase 2.6 (iv) of the HR Policy and Procedures Manual as she did to RW2."

Again,

108. In ***Civil Appeal No 114 of 2016-Heritage Insurance Company Limited-vs-Christopher Onyango & 23 Others [2018] eKLR,*** *the Court of Appeal observed that;*

"…It is axiomatic that companies as employers do from time to time come up with new Staff Handbooks or Staff Manuals to reflect new regulations in the area of employment of their own staff. In practice, employment contracts do make reference to staff manuals or staff Handbooks as forming part of the terms of employment.

Further,

109 It cannot be gainsaid therefore, that the provisions of the Judiciary Human Resource Policies and Procedures Manual are impliedly incorporated in the Contractual terms and conditions of service of all Judiciary staff, including the petitioner.

A view of the above would come out clear when looked at in juxtaposition with the Respondence HR manual at paragraph 14.3 which provides as much. The Disciplinary Policy of the Respondent comes out as follows;

- Clause 14.3.6 provides for a notice to show cause to the alleged offending employee with specific charges by the Head of Department. The employee is expected to explain why disciplinary action should not be taken against him within fourteen (14) days of the date of such notice.

- Clause 14.3.7 provides that where the Head of Department is satisfied with the staff explanation, he/she shall a letter to the Vice Chancellor recommending the disciplinary action to be taken against the employee.
- Clause 14.3.8 states that in cases of serious misconduct where dismissal or termination of employment or service is likely and where interdiction or suspension from duty is deemed necessary to facilitate a full investigation into the case the Vice Chancellor shall issue a show cause letter to the staff through which the staff shall be interdicted or suspended depending on the nature of the case.

The claimant submits that the Respondent's Human Resource Manual was never followed in the case of his disciplinary proceeding and eventual termination of employment. This is because the show cause letter dated 20th July, 2019 and addressed to the claimant is authored by one, James Theuri – Special Advisor to the Vice Chancellor as opposed to the Head of Department who was supposed to write a letter in accordance with Clause 14.3.6 of the HR manual. Clause 14.3.7 is clear that the Head of Department was supposed to write to Vice Chancellor which was not the case as there no such letter adduced in evidence before this court. It was the onus of the Head of Department to initiate, guide and direct the initiation of the disciplinary process all dependent on the gravity of the allegation make against the employee and the likely course the matter would take – all depending on the gravity of the case.

Clause 14.3.8. of the manual provides that the Vice Chancellor was duty bound to issue a notice to show cause to the claimant. This is coached in mandatory terms with the term *shall* and not *may*. It is not delegable as was the case here where this onerous assignment was, by presumption delegated to James Theuri. This letter therefore becomes a nullity and is unenforceable. Again, there was no letter by the Head of Department of the claimant to the Vice Chancellor recommending his termination.

Further, Clause 14.5 of the HR manual provides for investigations and interview as part of the disciplinary process. Sub Clause 14.5.2 state that the investigation should consider provide the following;

- Background information leading to the relevant incident.
- Inputs from the witness(es),
- The employees's response to the allegation,
- An analysis of the fact and the conclusion as to whether or not misconduct has taken place.

The Notice to show cause letter dated 8th July, 2019 has no iota of evidence from the two witnesses who allegedly led to the loss of funds to the Respondent. Besides, there is no investigations report filed before this court as envisaged by Clause 14.5 above said. These were critical witnesses to the claimant's case of loss of funds. They were to confirm to court as to whether they were overpaid but the Respondent chose not to call them to testify. The lack of evidence on an investigating report and testimony of the two lecturers implicated in this matter is fortified by the authority of **Charles Ochieng Ogola vs Bhole Kondele Limited [2017] eKLR** where the court in citing the Court of Appeal in **Kenya Akiba Micro Financing Limited v Ezekiel Chebii and 14 Others [2012] eKLR** observed the paramount place of Section 112 of the Evidence Act, Chapter 80, Laws of Kenya which provides as follows;

> *"Section 112 of the Evidence Act Chapter 80 of the laws of Kenya provides; In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him... where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be averse to such a party."*

The claimant further faults the disciplinary meeting of 7th August, 2019 for being incomplete in formation and composition. In the witness statement of Erick Omondi Njiiri are the disciplinary minutes of even dates. Whereas the impugned meeting had fifteen (15) members present, only 16 of those attended the meeting appended their signatures to validate it. Interestingly, these 6 members appended their signatures on 28th and 29th August 2019, three weeks down the line of the meeting. Further, the minutes taker (secretary) Faith Amwayi never believed or had confidence the minutes to the extent that she opted not to sign and validate the minutes on 7th August, 2019.

The claimant further submits that in as much as they have no quarrel with the task Erick Njiri and Esther Nyangaresi. However, these were all conflicted bearing in mind their previous altercations with the claimant on personnel and personal matters in the past. Their participation in the disciplinary hearing was therefore improper for their being a high likelihood of bias on their part. These acted as judges in their own cause as was established in the authority of **Republic v Kenya School of Law Ex-Parte Thomas Otieno Oriwa [2015] eKLR.**

The Claimant further supports his case by reference to his narration on the CUEA INSIDE STORY dated 4th April, 2017 and his letter dated 25th July, 2017 both of which corroborate his email dated 28th July, 2016 dubbed the REQUEST FOR CHANGE OF STATION AND OR APPOINTMENT. It is the claimant's submission that he had complained against RW1 on work related issues before his termination. Though this is rubbished by the Respondent for being inauthentic, unrelating and unfounded for lack of address, this goes along way in defining the claimant's relationship at his world of work.

Again, the claimant, in the documents titled CUEA INSIDE STORY above cited raised various administrative and operational issues touching on the institution of the Respondent and particularly

his work station; the Account Section. Here, the Claimant narrated of various anomalies at his work place and that he had reported and highlighted these to the authorities concerned but these were all together ignored, side-lined or condoned. This, the claimant submits tallies well with the Respondent's disciplinary committee proceedings which recommended a facelift and automation of the university payroll system for part-time claim.

The claimant therefore submits and argues that the issues complained of, unreal as they may sound were issues of system failure and not personal failure in any event. On this the claimant relied on the authority of **David Wanjau Muhoro vs Ol Pejeta Rancing Limited**, **Cause Number 1813 of 2011** where the court urged courts to exercise caution in applying judicial precents uniformly due the personalize nature of such dispute. On this, like in this case, the claimant had variously raised issues on the inequities and failures of the account systems at his work place. He had also highlighted management issues where failure was rewarded and due diligence was snubbed, subdued, ignored and disregarded. The claimant therefore atones his case on this premises.

The claimant was terminated from employment on the following grounds;

I. *Not upholding core values of the institution*
II. *Knowingly giving false or misleading information*
III. *Exposing the university to unwarranted losses as a result of the claimant's conduct and negligence*

The Respondent therefore employed the provision of section 44(4)(g) of the Employment Act, 2007 as read with sections 1.1.1.2(iii) and (iv), 1.6.1, 1.6.2,1.14.1(vii) and (xii) of CUEA's HR Policies and Procedures Manual in fomenting and administrating a case of dismissal for the claimant. The claimant submits that Clause 1.1.1.2(iii) and (iv) provides for Catholic Identity while sub clause 1.1.1.2(iii) and (vi) provided for truthfulness and honesty. Clause 1.6.1 brings out integrity as core

value of the Respondent. This is the calling theme in all the operations and factions of the Respondent. These provisions remain advisory and not penal and therefore the fallacy of action of the Respondent against the claimant. These are also an illustration of the core values and attributes of the Respondent which ultimately should have elevated the Claimant to the realms of a star worker but not material for disciplinary action.

The Claimant further faults his dismissal vide section 44(g) of the Employment Act, 2007 and submits that no loss was occasioned to the Respondent as a result of anomalies he was accused of. There were still outstanding dues in terms of salaries for the two allegedly overpaid lecturers which could possibly have been recovered at a future date. Ultimately, the issue of loss would have been solved through an audit report but this was never adduced as evidence. the burden of proof as provided by sections 107 and 109 of the Evidence Act, Chapter 80, Laws of Kenya was always on the Respondent to brings this out. In the absence of such proof, the Respondent acted recklessly in relying on the unproven allegation of loss in dismissing the claimant.

The Respondent in their written submission dated 26th June, 2023 bring out a case of lawful termination of employment. It is their case and submission that the Respondent in his stint of employment had frosty relationships with colleagues leading to numerous transfers upon his requests.

The Respondent further submits that the claimant admitted the errors that were flagged by the Chief Finance Officer in both his response to show cause letter and also during the disciplinary hearing. However, the claimant took this casually despite their impact and eventual loss to the Respondent.

The Respondent in all submits a fair termination of the employment of the claimant which was communicated vide a letter dated 30th August, 2019. This was in compliance with provisions of

sections 41, 43(2) and 45(1) of the Employment Act, 2007 in which due process and reasons for such termination, based on the employer's operational requirement were observed. This is supported by the court's finding in the authority of **Mary Chemweno Kiptanuu v Kenya Pipeline Company Limited, [2014] Eklr.**

The Respondent also discounts the numerous allegations of the claimant's frosty relationship with his co-workers. In as much, the Respondent admits that this was the case and occasioned to the numerous transfers during his stint of service. Again, the claimant had the same poor relationship with the Human Resource Manager and had sent an email to Mr. Omondi but did not support this by way of evidence. This, they submit was not escalated to the next level for the Respondent's attention and would not be an excuse for his errors at work. The claimant therefore has failed to discharge the burden of proof of unfair termination of employment imposed upon him by section 47(5) the Employment Act, 2007.

A look at the respective cases of the parties reveals a different story. The Respondent's denial of a case of unlawful termination of employment becomes untenable *in toto*. From the onset, one notes procedural defects in the disciplinary process. Whereas the Respondent's Human Resource Policies and Procedures Manual is loud and explicit on the procedure for initiating the disciplinary process, this was never pursued by the Respondent. The letter onsetting the disciplinary process did not follow the requisite steps from the Head of Department to the claimant or even a furtherance of this by the said Head of Department to the Vice Chancellor in the event of dissatisfaction with the answer(s) by the claimant or the import of the matter. The action of the Head of Department was determined by the veracity of the issues at stake.

Again, whereas the nature of this case called for a show cause letter emanating from the desk of the Vice Chancellor, the claimant show cause letter was authored by one, James Theuri – a special

advisor to the Vice Chancellor. This process in all transgressed the provision of the Clauses 14.3.6, 14.3.7 and 14.3.8 of the coveted Human Resource Policies and Procedures Manual which explicitly provides the procedure for initiating the disciplinary procedure of the Respondent, again based on the gravity of the issues raised against him.

Other issues dementing the disciplinary process touch on its incompleteness. The record, according to claimant's submission indicates that there were fifteen (15) attendees but only six (6) of these appended their signatures to validate the meeting. This was done on 28th and 29th August, 2019, three weeks down the date of the meeting. The minutes taker (secretary) called Faith Amwayi has not as yet signed these minutes casting doubt as to her confidence in these proceedings.

The composition of the membership of the disciplinary proceedings meeting also raises issues on its independence. The claimant raises issues with the presence of Erick Njiiri and Esther Nyangaresi who had earlier on participated in an investigation of the issues raised in the show cause letter and now under investigation and enquiry. This was delimiting and a dent on the process for being an abrogation to the rules of natural justice. All this blots the disciplinary process which is the Respondent's magical tool in proving a case of lawful termination of employment.

The Respondent downplays the place of the claimant's relationship with his colleagues and co-workers on his termination of employment. This may also not stand the test of evidence. It is clear that from day one, the claimant was a questioning employee who raised issues as and when it was necessary in relation to the institution and his place of work. This occasioned various brush-ups with his line colleagues and even the Human Resource Manager, a Mr. Omondi. In as much as this is down played by the Respondent for lacking in evidence, it cannot be wished away. The entire scenario paints a picture of an officer who was marked and only tolerated at the work place. He was

not wanted and material for good riddance at the earliest opportunity. This is demonstrated by the resounding goofs of the Respondent in not only constituting this committee but also in accounting for it end product – the committee's report and finding which sound not convincing for their various anomalies.

The composition and conduct of the disciplinary committee come out as an exercise to rid of the workplace of an incorrigible and undesired team mates. It was demonstrably pre-meditated and the process was *fait accompli*. The claimant had nil chances.

Workers are at all time entitled to their individual personalities and the gaps arising thereof. One cannot be faulted or even victimized for raising issues at the work place. This is proper and human. It also an exercise of democratic space in the context of the world work. The work place is also an open society guided by the principles of openness, truthfulness and honesty as provided for by Clauses 1.1.2(iii) and (iv) of the Respondent's Human Resource Policies and Procedures Manual. Clause 1.6.1 on integrity underscores the place of honesty and integrity as critical cogs and values by the workers to employ in their day to day activities at the work place. A situation that demonizes critical thinking and hawk-eyed overtures by any worker is diabolic, to say the least. It does not yield any positive results. Yet this is the normal practice at most work places.

On these premises and the overwhelming expression of the claimant's case, I find a case of wrongful, unfair and unlawful termination of employment of the Claimant. On a preponderance of evidence, this surpasses the defence by miles. I therefore find a case of unlawful termination of employment of claimant by the Respondent and hold as such. This answers the 4th issue for determination.

The 5th issue for determination is whether the Claimant is entitled to the relief sought. He is. Having won on a case of unlawful termination of employment, he become entitled to the relief sought.

I am therefore inclined to allow the claim and order relief as follows;

(i) A declaration be and is hereby issued that the reasons and procedure for termination of the claimant's employment by the Respondent was a wrongful, unfair and unlawful.

(ii) A declaration be and is hereby issued that the Respondent's action of continued withholding failure and or refusal to meet and pay the claimant rightful terminal benefits and other dues is unlawful and untenable.

(iii) One (1) months salary in lieu of notice, ……..Kshs.104,413.00.

(iv) Eight (8) salary as compensation for unlawful termination of employment ……Khs.104,413.00x8…….Kshs835,304.00.

Total of Claim ……..Kshs.939,717.00

(v) The cost of this cause shall be borne by the Respondent.

(vi) Interest on (iii) and (iv) above at court rates from the date of this judgment of court till payment in full.

Delivered, dated and signed this 22nd day of October 2025.

D. K. Njagi Marete

JUDGE

Appearances:

1. Mr. Amutallah instructed by Amutallah Robert & Company Advocates for the Claimant.
2. Mr. Situma instructed by KW EW Advocates LLP for the Respondent.