



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISUMU

CAUSE NO. E094 OF 2024

LEONARD

NDUGU

OKAL....

.....**CLAIMANT**

VERSUS

TOM MBOYA UNIVERSITY.....**RESPONDENT**

JUDGMENT

1. Vide a memorandum of claim dated 13th December 2024 the Claimant instituted this suit against the Respondent seeking resolution of the following issues: unlawful termination of employment, payment in lieu of notice, unpaid salary, prorated leave and issuance of a certificate of service. He

avens that he was employed by the Respondent on 10th November 2023 as a security officer at a gross monthly salary of Kshs. 81,500/-. It is his case that he served diligently till the 5th of July 2024, when he was interdicted while undertaking investigations on examination malpractice. Following the interdiction, he avers that he was subjected to an unfair disciplinary process during which he was denied the opportunity to cross-examine his accusers. He states that he was thereafter issued with a termination notice on 29th August 2024. It is his further case that in March 2024 his request for leave was orally declined, and that he was not paid any salary during the interdiction period. In view of the foregoing, he prays for the following reliefs:

- a. A declaration that his termination was unlawful.
- b. An award of Kshs. 1,202,125/- representing pay in lieu of notice, prorated leave, unpaid salary, and compensation for unlawful termination.
- c. Costs of the suit.
- d. Interest on the sums at court rates from the date of filing suit until payment in full.

e. Any other relief the Court may deems just.

2. In response, the Respondent filed a memorandum of response dated 13th January 2025 denying the averments in the claim and putting the Claimant to strict proof. Without prejudice, the Respondent maintained that the termination was undertaken in accordance with the Employment Act and its terms and conditions of service. It averred that the Claimant was issued with a show cause letter dated 19th June 2024 for solicitation of a bribe from a student; he responded to the show cause on 20th June 2024; he appeared before the disciplinary committee on 9th August 2024; he was found culpable; and his services were consequently terminated.

3. At the hearing, each party called one witness. The Claimant testified on his own behalf, stating that upon reporting to duty on 21st December 2023 he sought and was granted two months' leave to clear with his former employer. However, his subsequent request for leave in March 2024 to transport his household goods from Nairobi was declined. He narrated that while investigating examination malpractice, he

contacted an implicated student named Steve Oyambu to extract information, believing this necessary due to suspected collusion between students and security personnel and the unexplained withdrawal of two malpractice charges. It was his further testimony that after making representations at the disciplinary hearing he was told to step out denying him the chance to cross-examine his accuser and other witnesses.

4. On behalf of the Respondent, Mr. Washington Odhiambo, a Senior Registrar and Head of Human Resource, testified that the disciplinary process was conducted properly. He asserted that the Claimant did not appeal his dismissal as claimed, insisting that the email addresses to which the Claimant allegedly sent his appeal did not belong to the Respondent. During cross-examination, he maintained that the Claimant's explanation that he solicited money merely to obtain an MPESA message as evidence was illogical.

5. At the close of hearing, both parties filed written submissions.

Claimant's Submissions

6. The Claimant maintained that his dismissal from employment was unlawful. He asserted that he requested for the money as part of investigations on cover up of exam irregularities involving the student, Mr. Steve Oyambu, and two security staff members, Mr. Willis Wandei and Ms. Esther Elica. He contended that he took this course of action after discovering that two other cases of examination malpractice had not been escalated to the Respondent's management. On procedure, he submitted that the Respondent failed to comply with section 41 of the Employment Act, particularly because he was not allowed to cross-examine witnesses during the disciplinary hearing. He asserted that he was removed from the room after making his representations, yet the same persons he was investigating were the key witnesses. Additionally, he averred that whether or not his appeal was proper was irrelevant to the validity of the dismissal. He relied on **Loice Otieno v Kenya Commercial Bank Ltd [2013] KEELRC 271 (KLR)**, which held:

"The only conclusion I am able to reach is that the termination of the Claimant was not carried out in

compliance within the parameters set out in section 41 of the Employment Act and therefore was procedurally unfair. The fact that the Claimant appealed against the termination cannot cure the fact that the termination was not in accord with section 41 of the Employment Act.”

7. On the substantive justification, the Claimant submitted that the alleged solicitation of money fell within his investigative mandate as a security officer. He submitted that the Respondent had failed to demonstrate that he acted outside the scope of his employment, and therefore had no valid justification for terminating him. To support this view, he relied on **David Gichana Omuya v Mombasa Maize Millers Ltd [2014] KEELRC 526 (KLR)**, which emphasized that an employer must justify and prove valid and fair reasons for termination. He therefore urged the Court to find that he had proved his case on a balance of probabilities and to grant the reliefs sought.

Respondent's Submissions

8. The Respondent identified two issues for determination:

- a. whether the termination was lawful and fair, and
- b. whether the Claimant is entitled to the remedies sought.

9. On the first issue the Respondent maintained that the Claimant's dismissal was procedural, noting that a show-cause letter was issued, the Claimant responded, he appeared before a disciplinary committee, and a decision was thereafter rendered. It relied on the decision in the cases of **Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR**, and **Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR**, both of which underscored the following parameters as vital for lawful termination; explanation of the grounds of termination, accordance of an opportunity to the employee to respond to the charges, allowing the employee to be accompanied by a person of his choice during the hearing and communication of the decision. The Respondent further submitted that it was not bound by strict rules of evidence, citing section 63(2) of the Universities Act. It referred to **Sotik Highlands Tea Estate Ltd v Kenya Plantation and Agricultural**

Workers Union [2017] eKLR, where the Court held that disciplinary proceedings are not criminal in nature and therefore do not require a high standard of proof.

10. On substantive justification, the Respondent maintained that the reason for dismissal met the requirements of section 45 of the Employment Act, as it was grounded in the Claimant's conduct and the Respondent's operational needs. Concerning the second issue the Respondent maintained that the Claimant's dismissal was both substantively and procedurally fair, hence he wasn't entitled to the reliefs sought.

11. On the monetary compensation sought the Respondent submitted that the Claimant had failed to tender evidence supporting the sums sought. It asserted that having been on probation the equivalent of one months' salary in lieu of notice would be sufficient compensation. Regarding the certificate of service, the Respondent noted that it is a statutory entitlement and would be issued once the Claimant completed the clearance process. On costs, the Respondent argued that none should be awarded given the lawfulness of

the termination. It therefore urged the Court to dismiss the claim in its entirety.

Disposition

12. The Court has considered the pleadings, evidence adduced, the law and authorities cited in making this decision. The Claimant was from all accounts one of the officers employed by the Respondent to serve in the security docket. It is asserted that as one of the key responsibilities in addition to security was to stamp out examination malpractice. The Claimant asserts he worked diligently for the Respondent until 5th July 2024 when he was interdicted while ostensibly undertaking investigations on examination malpractice. The Claimant averred that following his interdiction he was subjected to an unfair disciplinary process during which he was denied the opportunity to cross-examine his accusers. The disciplinary process culminated in the termination notice dated 29th August 2024. The Court distils the following issues to be for determination in this suit:
- a. Whether the Claimant was subjected to a fair process as required under section 41 of the Employment Act?

b. If the answer to the above is in the negative, what remedies lie?

c. Who is to bear the costs?

13. The Claimant did indicate he was notified of the reason for his interdiction. The interdiction was on account of alleged malfeasance in relation to his service. A show-cause letter was issued, the Claimant responded, he thereafter appeared before a disciplinary committee, and a decision was consequently rendered. It was common ground that there was money sent to the Claimant by a student named Steve Oyambu. According to the Claimant, there was a withdrawal of charges by his colleagues prompting him to believe there was suspected collusion between students and security personnel. He asserts he sought to have the student send him money in his quest to demonstrate the sudden and unexplained withdrawal of two exam malpractice charges. The Respondent countered this by asserting the Claimant's explanation that he solicited money merely to obtain an MPESA message as evidence was illogical.

14. Whereas the Claimant seemed to pursue the investigation as a Lonewolf it was apparent he was trying to nab his colleagues. However, it seems his approach was altogether amateurish as an Mpesa message to him would not implicate his colleagues Mr. Willis Wandei and Ms. Esther Elica on their failure to escalate the previous two cases of examination malpractice to the Respondent's management. In this effort, he reaped nothing but sorrow as his employer did not believe he had *bona fides* in soliciting funds from a student. There was no investigation diary indicating the steps he was taking and who was clued in. That would have been his saving grace.

15. The Respondent subjected the Claimant to a disciplinary hearing. The Claimant contends that after making representations at the disciplinary hearing, he was told to step out thus denying him the chance to cross-examine his accuser and other witnesses lined up against him. Whereas the inquiry under section 41 is not akin to a criminal trial, it would seem odd that the Respondent did not allow the Claimant to ask the witnesses arrayed against him any questions as one would be expected to in a case such as his.

Whereas the Respondent may have had substantive justification for the action taken, there was procedural lapse in not permitting him to ask the questions of his accusers. In that regard I would find the dismissal was unfair as it did not permit the Claimant to ask questions of the people who had been lined up to give the Respondent's case some flesh. In the case of **Galgalo Jarso Jillo v Agricultural Finance Corporation** (*supra*) Manani J. held as follows:

*...the law is not just concerned about ascertaining the validity of the reason for termination. It is also concerned with ensuring that the employer processes the separation in a manner that is procedurally fair to the Claimant. Indeed, this position has now been made clear by the court in several pronouncements. For instance, in **National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR** the Court of Appeal (referring to its previous decisions) said that in determining whether a decision by the employer to terminate is just and equitable, "**the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching***

the decision to dismiss the employee.” I will therefore consider whether the Respondent met this second requirement.

54. Just as is the case with proving the validity of the reason for termination, section 45 of the Employment Act also requires the employer to prove that **“the employment was terminated in accordance with fair procedure”**. It is therefore not sufficient for purposes of determining the lawfulness of termination of employment for the employer to only show that he/she had valid reasons to support her decision. He/she must demonstrate that he/she complied with the procedural strictures set out under section 41 of the Act.

16. The employer was therefore required to demonstrate it had complied with the procedural strictures to permit a finding in favour of the employer. The employer though it had a valid reason to terminate, failed to ensure procedural fairness in his termination.

17. In my considered view this lapse though significant did not detract from the niggling doubts as to the provenance in obtaining an Mpesa message from Steve as evidence of prior malpractice relating to exams. In view of this contribution by the Claimant to his termination, a modest sum of one month salary as compensation would be more than adequate. Had the Claimant not embarked on a foolhardy quest, there would have been no case against him.

18. Having found there was partial failure on the part of the Respondent to follow the law, who is to bear the costs on the suit? The Respondent is culpable but only to the extent of Kshs. 50,000/- which is adequate and reasonable in the circumstances as costs.

19. In the final analysis I enter judgment for the Claimant as against the Respondent for:

a. Kshs. 81,500/- being one month's salary as compensation.

b. Costs of Kshs. 50,000/-.

c. Interest on the sum in (a) above at Court rates from the date of judgment till payment in full.

Orders accordingly.

Dated and delivered at Kisumu this 19th day of

November 2025

**Nzioki wa Makau, MCI Arb.
JUDGE**

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