



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISUMU

CAUSE NO. E029 OF 2024

DAPHEN

OTIENO

OJALA.....

.....**CLAIMANT**

VERSUS

RONGO

UNIVERSITY.....

.....**RESPONDENT**

JUDGMENT

1. The Claimant was employed by the Respondent as a Lecturer in Economics on 28th June 2017. He subsequently served as Head of Department in the defunct Department of Arts and Social Sciences from 5th March 2019 and later in the Department of Humanities and Social Sciences from 30th June

2022. On 17th April 2023 at 10:47am, he received an SMS from the Respondent's Human Resource Office summoning him to collect a letter. Upon arrival, he was issued with a letter dated 14th April 2023 authored by the Vice-Chancellor, Professor Samuel Gudu, informing him that his appointment as Head of Department had been revoked with immediate effect. The revocation was attributed to negative reports and alleged improper use of university resources. The Claimant averred that he had performed his duties diligently, with integrity and transparency, and in accordance with the Respondent's policies. He viewed the revocation as unfair, asserting that the letter was ambiguous and devoid of particulars on which the decision was based. He further complained that he was neither issued with a notice to show cause nor invited to a disciplinary hearing prior to the revocation.

2. The Claimant averred that the only incident he could recall involving the use of university resources concerned a letter dated 18th October 2022, in which he was required to surrender Kapsabet maps by 21st October 2022, failing which

the cost would be recovered from him. He maintained that he duly handed over the maps and that the amount of Kshs. 110,336/- earlier surcharged was refunded to him. On this basis, the Claimant asserted that the revocation of his appointment was baseless, unconstitutional, and violated his rights under Articles 41(1) and 47 of the Constitution. He added that the decision caused him financial distress, as he was unable to meet his financial obligations at the Kenya Commercial Bank. Consequently, in his amended statement of claim dated 30th November 2023 he sought for the following reliefs:

- a. A declaration that the termination of his appointment as Head of Department Humanities and Social Sciences was unfair and illegal.
- b. A declaration that his rights to fair administrative action and right to fair labour practices were violated.
- c. General damages for breach of his constitutional rights to fair administrative action, fair labour practices and a fair hearing.
- d. Three months' allowances in lieu of notice (Kshs. 144,000/-)

- e. 12 months' compensation for unfair termination (Kshs. 576,000/-)
- f. Interest on items 4 and 5 above.
- g. Costs of the suit
- h. Any other relief deemed fit by the court.

3. In response via an amended response dated 14th March 2024, the Respondent averred that the Claimant's appointment as Head of Department was merely an administrative assignment of additional responsibilities which did not affect his substantive employment as a lecturer. It averred that the provisions of section 41 of the Employment Act and the relevant clauses of the Human Resource Policy did not apply. The Respondent further averred that appointments to the position of Head of Department were discretionary and did not require application, competition, or the signing of contracts. It was its case that the Claimant's tenure was marred by breach of trust, poor performance, and irregular use of resources, issues that had been discussed internally without resolution. It was also averred that the Claimant had been given several

opportunities to explain himself through internal memos and meetings, but his explanations were unsatisfactory. The Respondent further averred that the Claimant failed to exhaust internal dispute resolution mechanisms, particularly the right of appeal to the Chairperson of the University Council, and thus urged the Court to dismiss the claim with costs.

4. During the hearing the Claimant (CW1) testified on his own behalf while six witnesses testified on behalf of the Respondent. The Claimant adopted his witness statement dated 30th November 2023 and produced the documents on the list of documents dated the same day. He testified that there had initially been some confusion regarding the maps, but after he provided a satisfactory explanation, the matter was settled. He stated since the maps were unavailable from the usual supplier, the Department of Survey, he procured them from Joala Enterprises, and the students were able to sit for their examinations on 22nd April 2022. Later, by a letter dated 18th October 2022, the new Dean requested the maps for safe custody, to which he responded that he had

surrendered them to the Deputy Vice Chancellor, Academics and Students Affairs (DVC ASA). According to CW1, the Respondent nonetheless deducted his October 2022 salary, claiming the maps had not been received, prompting him to write a letter on 6th November 2022 reiterating that the maps had been duly delivered. Following investigations that confirmed his explanation, the Respondent refunded the deducted salary on 14th November 2022. CW1 further stated that he later presented the maps to the Vice Chancellor for inspection, who directed that they be returned to the DVC ASA. On 23rd January 2023, he received a memo from the Vice Chancellor requiring him to submit the ETR receipt from the Surveys of Kenya and the Goods Received Note (GRN). Upon reviewing the documents, he discovered that the GRN had erroneously indicated that the maps were procured from the Surveys of Kenya instead of Joala Enterprises. He wrote to the Store Officer on 25th January 2023 seeking correction but received no response. He testified that the User Report confirmed the maps had been received in proper quality and quantity. In response to the Vice Chancellor's memo, he wrote on 6th February 2023 enclosing a detailed report with

all relevant receipts, invoices, and supporting documents. However, he never received a response, and without any further communication, he was issued with a termination letter dated 14th April 2023. CW1 testified that the issue of the maps had been fully resolved and that the reasons cited in his termination letter were new and baseless. He added that after he filed this suit, the Respondent issued him with a notice to show cause dated 23rd May 2024, long after his termination. He testified that he had not committed any misconduct warranting dismissal and characterized his termination as unlawful and unjustified.

5. The first witness for the Respondent was Dr. Geoffrey Manduku (RW1). He testified that he was the Senior Internal Auditor at the Respondent and had conducted the internal audit concerning the recovery of imprest from the Claimant's salary. He stated that the audit process was conducted verbally, without any written instructions, terms of reference, or formal communication to the concerned offices. He admitted that the audit report was incomplete and that some key supporting documents, such as the imprest forms and

receipts, were omitted. He further conceded that he had no documentary proof showing that the imprest had been refunded, relying only on verbal communication from the accountant-in-charge. He however confirmed that the topographical maps purchased by the Claimant were supplied in a timely manner, as evidenced by the air ticket receipts dated 13th April 2022, and that he processed the recovery of the imprest accordingly.

6. The second defence witness was Professor Jonathan Mulwa (RW2). He testified that he was the Dean of the School of Arts, Social Sciences and Business Studies at the Respondent. He stated that he did not issue any specifications or requirements for the purchase of the maps, and that the letter instructing the Claimant to purchase the same did not specify their quantity or quality. He acknowledged that he was unaware of the exact dates of procurement or delivery of the maps, noting that his letter dated 18th October 2022 seeking delivery was misplaced, as the audit report of 10th October 2022 indicated that the maps were already in the University's custody. He further stated that the auditor did not inform him of the audit exercise or

request any information from him. He also confirmed that there was no record of any warnings or complaints regarding the Claimant's conduct, nor proof that the letter of 6th September 2022 was delivered to the Claimant. He stated that any issues raised in earlier correspondence had been satisfactorily resolved and could not justify termination.

7. The third defence witness was Mr. Denis Midenga (RW3), a Procurement Clerk at the Respondent, testified that he had worked in that department since 2013 and that the topographical maps were received, inspected, and certified for use by the Procurement Department. He stated that the Store Clerk, one Rhoda Mogire, confirmed to him that the maps were in good condition, and that they were subsequently verified by the User Department through one Amos Ouma. He explained that his role was to ensure both the Store and the User Department had confirmed receipt and inspection, after which he signed the Goods Received Note (GRN) as certification. He testified that as at 14th April 2022, the maps had been delivered, inspected, and certified, and that the amount paid, Kshs. 186,750/-, corresponded to

the ETR receipt from Joala Enterprises, thus the University did not suffer any financial loss.

8. The fourth defence witness was Ms. Rhoda Mogire (RW4), a Senior Accounts Assistant in the Procurement Department, testified that her duties included receiving and inspecting goods and preparing GRNs. She testified that although an ETR receipt was required in this case, she issued the GRN without one. She stated that the Respondent did not lose any money in the transaction, as the total cost of the maps matched the amount reflected in the receipt produced in court. She further testified that the delivery note dated 3rd April 2022 indicated that the maps for Kapsabet had been duly delivered, although she denied having seen the documents before. She maintained that the maps were delivered at about noon on 14th April 2022.

9. The fifth defence witness was Mr. Amos Ouma (RW5), a Geography lecturer at the Respondent, testified that he taught the course GEO-120, for which topographical maps were required. He stated that he had indicated the number of maps needed, which were 249. He confirmed that the

maps were delivered, though he did not know by whom or when. He claimed that the maps procured by the Claimant were not used for the GEO-120 course, and that Kapsabet maps were used instead. He also denied verifying or confirming the suitability of the maps.

10. The sixth defence witness was Professor Samuel Gudu (RW6), the Vice Chancellor of the Respondent. He testified that official communication at the University was conducted through signed memos, letters, or emails. He stated that the University Council was the appointing authority for Heads of Departments, and that he only signed appointment letters on behalf of the Council. He further stated that the Claimant's appointment as Head of Department was subject to annual evaluation and governed by the Respondent's HR Policy and Procedure Manual. He testified that the Claimant's removal from the position was lawful and that he had been accorded a fair hearing. He stated that the Claimant's appointment was discretionary and could be terminated at his discretion.

Claimant's Submissions

11. The Claimant submitted that the main issues for determination were whether the termination of his appointment was unfair, unprocedural, unlawful, and/or unconstitutional; whether he was entitled to the reliefs sought; and who should bear the costs of the suit. He submitted that the Respondent failed to comply with the procedural and substantive requirements under sections 41, 43, and 45 of the Employment Act, as he was not notified of the allegations nor accorded an opportunity to be heard. He relied on **Anita Nziso Kirimi v Cancer Care Kenya Limited [2020] KEELRC 257 (KLR)**, where the Court cited **Humble Nelima Lutta v Mumias Sugar Co. Ltd [2017] eKLR** in holding that for a termination to be fair, the employer must satisfy two elements, fair procedure and valid reason. The Claimant maintained that no valid reason was demonstrated for the revocation, and that the Respondent's audit process was flawed and lacked transparency. He relied on **Adelaide Igoki Kiura v Platinum Credit Limited [2017] KEELRC 578 (KLR)**, where the Court held that termination on account of poor performance, without notice and a hearing as mandated under section 41, is both

procedurally and substantively unfair. He further submitted that even though the position of Head of Department was discretionary, termination of such appointment on alleged misconduct required adherence to due process. He submitted that reliance on informal discussions could not substitute the legal requirement for a disciplinary hearing.

12. The Claimant submitted that the Respondent's conduct reflected a deliberate plan to remove the him from his position, and that the purported evidence such as a cash sale receipt from the Survey of Kenya was fraudulent. He thus asserted that the Respondent had not shown any reasonable grounds to justify the termination. On procedural fairness, the Claimant submitted that section 41 of the Employment Act imposes a mandatory obligation upon an employer to explain to the employee the reasons for the contemplated termination and to afford the employee an opportunity to respond in the presence of a representative of their choice. He cited the decision in the case of **National Bank of Kenya v Samuel Nguru Mutonya [2017] eKLR**, which cited the decision of the Supreme Court in **Jenet Nyandiko v Kenya Commercial Bank Limited [2017]**

eKLR, where it was held that the test of fairness includes an examination of how the decision was communicated and how any appeal was handled. Further reliance was placed on the case of **Givens Harrison Joshua v Teachers Service Commission & County Director, TSC, Nakuru County [2014] KEELRC 1008 (KLR)**, where the Court found that a unilateral demotion or transfer without notice, reasons, or a hearing amounted to an irreparable injury and unfair labour practice contrary to Articles 41, 47, and 50 of the Constitution. He therefore asserted that his demotion similarly violated his right to fair administrative action and fair labour practices. It was further submitted that the Claimant's appointment letters of 5th March 2019 and 30th June 2022 clearly provided that the appointment could only be terminated upon unsatisfactory performance or by mutual agreement. The Claimant contended that no performance appraisal was conducted and no mutual termination occurred. The Claimant submitted that therefore, the Respondent's failure to issue a notice to show cause or to conduct a performance evaluation, as required under Clause

14.2(f) of its Human Resource Manual, rendered the termination unlawful.

13. He further averred that the purported show cause letter issued on 23rd May 2023 after the filing of this suit was an afterthought intended to sanitize an already illegal action. The Claimant reiterated that demotion, being a fundamental alteration of employment terms, cannot be affected unilaterally, citing once again the decision in **Givens Harrison Joshua v Teachers Service Commission** (*supra*) where the Court held that demotion without due process violates Article 236 of the Constitution. The Claimant also invoked section 4(3)(d) of the Fair Administrative Action Act, which obligates administrators to give written reasons for their decisions. On remedies, the Claimant cited in aid section 50 of the Employment Act, read together with section 49, which empowers the Court to award compensation and other reliefs where termination is found to be unfair. Reliance was placed on the case of **Kenfreight (E.A.) Limited v Benson K. Nguti [2019] eKLR**, where the Supreme Court affirmed that once a court finds termination

to be unfair or wrongful, it must proceed to determine the appropriate remedies under section 49. On the issue of costs, the Claimant cited section 27 of the Civil Procedure Act, which provides that costs follow the event unless the court orders otherwise. He urged that since he was compelled to institute the suit due to the Respondent's unlawful conduct, he should be awarded the costs of the proceedings. In conclusion, the Claimant submitted that the Respondent's actions were arbitrary and unconstitutional, and that the Court should uphold his right to fair labour practices and grant all the prayers sought in the statement of claim.

Respondent's Submissions

14. The Respondent submitted that the issues for determination were: whether the termination of the Claimant's appointment amounted to unfair termination of employment, breach of contract, or violation of his right to fair labour practices; whether it was a termination of an

assignment of responsibilities given at the discretion of the Vice-Chancellor; and whether the same was procedurally fair. The Respondent submitted that the revocation of the Claimant's appointment as Head of Department did not amount to termination of employment but was merely a withdrawal of an administrative assignment within the Vice-Chancellor's discretion under section 39(2) of the Universities Act (Cap. 210) It relied on the decision in the case of **Republic v The Vice Chancellor, Jomo Kenyatta University of Agriculture and Technology [2008] KEHC 48 (KLR)**, where the High Court held that the University Council, or any person or body acting under its delegated authority, is the best judge of merit when making decisions on academic staff and that courts can only intervene where there is abuse of discretion, improper purpose, breach of fairness, unreasonableness, or irrationality. The Respondent asserted that none of these circumstances had been demonstrated in the present case. The Respondent also relied on the case of **Republic v Vice Chancellor (University of Nairobi) & 5 others Ex parte Kisemei Mutisya [2017] eKLR**, where the Court held that it is not

the role of the court to interfere with the discretion of a university authority in appointments or removals where the decision is lawful and procedurally undertaken. It further submitted that the Claimant had failed to prove that the Vice-Chancellor acted improperly or abused his power in terminating his administrative appointment, hence he had failed to discharge his burden that an unfair termination had occurred. The Respondent submitted that the Claimant failed to properly account for the imprest issued for procurement of topographical maps and that the internal audit revealed missing documentation, including invoices, receipts, and inspection certificates. It submitted that the Claimant's explanations were unsatisfactory, and that his removal was necessary to safeguard institutional integrity.

15. On procedural fairness, the Respondent submitted that the revocation followed several internal engagements and that it was an administrative measure rather than disciplinary action. It cited the case of **Kenyatta University & 2 others v Elena D. Korir [2016] KECA 733 (KLR)**, where it was held that interim administrative measures

taken by a Vice-Chancellor or university body to safeguard institutional integrity pending investigations do not violate the rules of natural justice. The Respondent also cited the case of **Lewis v Heffer & others [1978] 3 All ER 354**, where Lord Denning held that interim administrative actions such as suspension or withdrawal of responsibilities pending inquiry are permissible acts of good administration and do not necessitate a prior hearing. Finally, the Respondent submitted that the Human Resource Manual did not govern administrative appointments such as headship of departments and that the Claimant failed to prove otherwise. It urged that the claim was without merit and should be dismissed with costs

Disposition

16. I have considered the pleadings and the testimony of parties. It is clear that the Claimant sued the Respondent on account of the revocation of his position as head of department. He cited in aid the Constitution, in particular, Articles 41 and 47 as well as section 41 of the Employment Act and section 4(3)(d) of the Fair Administrative Actions Act.

He was relieved of his position as a departmental head. It was at some point seemingly tied to some maps that he acquired for use in the University. Nevertheless, the evidence adduced by the witnesses CW1 and RW1, RW2, RW3, RW4 and RW5 confirmed the maps were delivered to the University and that they were proper for the use of the University and fit for purpose. What therefore is at dissonance is the termination of the appointment as there was no other issue regarding the maps for the Court to determine. The surcharge which had been imposed for the alleged non-delivery of maps was refunded to the Claimant from all accounts.

17. Appointment to a position such as the one the Claimant held, is discretionary. An appointment to the position of Head of Department is on all accounts a discretionary action by the Vice Chancellor. It does not require application, there is no competition for the position nor is such an appointment signaled by the signing of a contract even though there are ramifications in terms of allowances, privileges and obligations etc. that may be due upon such appointment. In

my considered view, discretionary appointments do not fit within the parameters of section 41, as there is no set criteria to apply when making such an appointment. Whereas section 4(3)(d) of the Fair Administrative Actions Act requires a written reason to be given for administrative action, there is no evidence led before me that the Claimant sought to be given a reason before he moved Court. He incorrectly assumed that he was entitled to a fair hearing in terms of section 41 of the Employment Act prior to his removal as head of department. To compound matters, the Claimant treated his removal as head of department as a termination which it was not.

18. As the appointment to a position of head of department is not what sections 41, 43, 45 and 47 of the Employment Act deal with, I decline the invitation to find there was any other relief he could seek as the only relief he could have been entitled to was the refund of the surcharge and there is evidence this was done. In sum, the claim as formulated leaves the Court with only the option to dismiss the suit and order each party to bear their own costs.

Orders accordingly.

Dated and delivered at Nairobi this 4th day of November

2025

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

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