

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. 144 OF 2020

AUGUSTINE KITIKU NZIOKI.
CLAIMANT

VERSUS

KENYA INSTITUTE OF MANAGEMENT.....1ST
RESPONDENT

MURIITHI NDEGWA.....2ND
RESPONDENT

JUDGMENT

Introduction

1. The Claimant lodged this claim through a Memorandum of Claim dated 3rd March, 2020, and filed on 9th March, 2020. He seeks the following reliefs: -
 - i. That the 2nd Respondent issues an unequivocal apology for the disparaging statements and commits to the withdrawal of the said statements unreservedly.
 - ii. That the 1st Respondent pay, in full, the Claimants' salary for the remainder of the contract period, being 17 months, totaling to Ksh.6,290,000/=.
 - iii. The 1st Respondent to pay the Claimant outstanding leave days totaling Ksh.616,666.67.
 - iv. The 1st Respondent to pay the Claimant's Gratuity for the entire duration of his contract, calculated as

follows $31/100 \times (370,000 \times 12) \times 3 \text{ years} = \text{Ksh. } 4,129,200/=$.

- v. The Respondents to jointly and severally pay the Claimant general and exemplary damages on account of the defamation, to be assessed by the court.
 - vi. Compensatory damages on account of the unlawful, unfair, and unprocedural termination and abrupt loss of employment, computed at 12 months' salary, being Ksh.4,440,000/=.
2. The Respondents entered an appearance on 10th June, 2020, and subsequently filed Responses to the Claim, both dated 11th August, 2020, denying the Claimant's claim. The Claimant further filed a Reply to the responses.
 3. The Claimant's case was first heard on 18th March, 2025, when the Claimant testified in support of his case. He adopted his witness statement dated 3rd March, 2020, and produced his list and bundle of documents of even date and a supplementary list and bundle dated 30th July, 2024 as exhibits in the matter.
 4. The Claimant's second witness (CW2) was subsequently heard on 1st October, 2025. He adopted his witness statement dated 5th July, 2023, as his evidence in support of the Claimant's case.
 5. The Respondents' case was similarly heard on the same date when Mr. Raymond Mwangi Ndirangu, the Head of Shared Services, testified in support of the Respondents'

case. He adopted his witness statement dated 27th September, 2023, and produced a list and bundle of documents of even date as the Respondents' exhibits.

6. Submissions were filed for both parties and have been duly considered.

The Claimants' Case

7. The Claimant's case is that he was employed by the 1st Respondent as a Human Resource Manager and that, after years of exemplary performance, he was appointed Head of Shared Services on a three-year contract effective 1st February 2018, earning a final salary of Ksh.370,000.
8. It is his case that due to his good performance record, he received positive appraisals and served on various committees overseeing the institute's operations.
9. The Claimant states that on 12th July 2019, he was summoned to a meeting by the CEO, Mr. Muriithi Ndegwa, the 2nd Respondent herein, which meeting was attended by senior management staff, and was surprised to learn that the meeting concerned allegations against him, including claims of sexual harassment of staff at the Nairobi campus and other branches.
10. The Claimant asserts that he was unaware of these serious and defamatory allegations and requested evidence to

substantiate them so he could respond, but instead, the CEO ended the meeting abruptly and instructed him to report back on 15th July 2019 with his decision in light of the allegations.

11. The Claimant states that he was never issued a formal notice to show cause regarding the serious allegations, nor was he provided with any supporting evidence, and, being convinced of his innocence, he was confused about what response the CEO expected from him.
12. The Claimant avers that as Head of Shared Services, his role involved coordinating several departments and overseeing the institution's daily operations, which required careful advance scheduling. He states further that on Monday, 15th July 2019, he had prior commitments, including attending the heads of departments' meeting, representing the institute at an ISO meeting, and leading a change management project, and asserts that failing to attend or properly hand over these responsibilities would have jeopardized operations and risked the institute's ISO certification progress.
13. The Claimant states that after completing the ISO meeting and preparing to report to the CEO's office as directed, he began receiving calls from colleagues inquiring about circulating allegations that he had engaged in sexual harassment, the same accusations raised during the 12th July 2019 meeting. He avers that he was further alarmed

when his junior, Ms. Verah Olweya, informed him that she had been summoned by the CEO and senior managers and allegedly coerced into implicating him in sexual harassment, and was also reportedly accused of failing to act on complaints against him in her capacity as Human Resource Officer.

14. It is the Claimant's further case that the said Ms. Verah Olweya, considering the alleged coercion unethical and unprofessional and knowing the accusations were unfounded, refused to falsely implicate him, and, being unable to withstand the pressure, she resigned from the institute.
15. The Claimant contends that the 2nd respondent acted maliciously by falsely accusing him of sexual harassment before his peers and junior staff and by attempting to coerce another employee into fabricating allegations against him. He argues that these actions were intended to tarnish his reputation and force him out of employment.
16. It is the Claimant's case that the situation escalated and threatened his professional reputation, and he wrote to the CEO seeking clearance of his name. He avers that instead of addressing the sexual harassment allegations, the CEO allegedly issued him a Memo/Notice to Show Cause dated 16th July 2019, in what the Claimant describes as a clandestine attempt to sidestep the issue and frustrate him. He avers that the Memo/Notice to Show Cause titled

“Performance Gaps” was based on further unsubstantiated allegations and was convoluted and intended to vex and frustrate him.

17. He avers that he wrote to the CEO, pointing out discrepancies in the memo and requesting sufficient time and relevant materials to adequately respond to the allegations, but the CEO acted high-handedly, declined to grant him a fair opportunity, and insisted that he respond within the limited time initially provided.
18. The Claimant further states that, as Head of Shared Services and the lead in the ISO certification process, the unresolved sexual harassment allegations placed him in a precarious position, and he found it difficult to issue instructions or lead programs while his name remained tainted. He avers that he wrote to the CEO requesting clearance on the sexual harassment issue to enable him continue performing his duties effectively, a request the CEO declined, prompting him to escalate the issue to the Institute’s Council.
19. The Claimant avers that before the matter could be resolved, he was sent on one month’s compulsory leave effective 24th July 2019, which action he argues removed him from his workstation and denied him access to the necessary documents required to respond to the notice to show cause, further frustrating his employment.

20. The Claimant avers that he was subsequently invited to review documentation relating to the performance queries raised against him, and that although he honoured the invitation on 2nd August 2019, he was presented with a box of documents and instructed not to make or carry any copies, which he implies hindered his ability to prepare an adequate response.
21. The Claimant avers that the documentation provided to him was excessively bulky, making it humanly impossible to review, comprehend, and respond effectively within the short timeframe given. He contends that this was a premeditated attempt to frustrate him, especially since none of the specific documents he requested were supplied.
22. He avers that, faced with these challenges, he wrote to the CEO seeking permission to make copies of the documents and requested seven days to respond adequately, but the request was declined arbitrarily. He further states that some of the issues raised in the notice to show cause required him to interview staff members regarding actions taken in May 2019 while he was on leave, but this was not feasible as he had been placed on compulsory leave.
23. It is his case that before completing the initial one month compulsory leave, he was issued with another show cause letter, backdated to 20th August 2019, introducing new disciplinary issues and again granting minimal time to

respond. He avers that his compulsory leave was also extended by another month.

24. The Claimant contends that the entire disciplinary process, issuing multiple unjustified notices to show cause, denying him adequate time and opportunity to respond, and placing and extending him on compulsory leave without justification, was part of a preconceived plan to frustrate and constructively force him out of employment.
25. The Claimant maintains that the Respondents breached the rules of natural justice, principles of fair labour practices, and employment laws, and that the process was malicious, unfair, and unlawful from the outset.
26. The Claimant contends that the disciplinary process was unfair and unlawful as the CEO failed to follow the procedures set out in the Institute's Human Resource Policies and Procedure Manual. He argues that Chapter Six of the Manual provides a clear framework for performance management, including an annual performance cycle with quarterly appraisals (Article 6.2) and prescribed appraisal procedures (Article 6.3.1), all of which were ignored.
27. He further states that under Article 6.4.5, steps relating to poor performance, such as appraisals, written warnings after two successive unsatisfactory quarterly reviews, and performance counseling, must precede disciplinary action, but no such appraisals or warnings were conducted prior to

issuing the notices to show cause, despite his record of positive appraisals and committee appointments.

28. The Claimant further asserts that the CEO disregarded constitutional principles, including the right to fair labour practices under Article 41 and the right to access information under Articles 35(1)(b) and 35(2). He maintains that the CEO ignored established guidelines and acted unilaterally and arbitrarily in initiating disciplinary proceedings and expelling him, thereby breaching both institutional policy and constitutional protections.

29. The Claimant avers that the repeated issuance of show cause letters, shifting reasons for the charges, and denial of adequate time and access to relevant materials to respond were all maliciously intended to force him out of employment. He further states that after completing his compulsory leave, he resumed work on 3rd October 2019 pursuant to a court order, but the CEO issued another show-cause letter dated 25th October 2019, withdrew all staff assigned to him, and removed files from his office, leaving him without duties.

30. He contends that these actions amounted to victimization and were designed to frustrate his employment, culminating in constructive summary dismissal.

31. It is his assertion that the termination was unlawful and unprocedural, violating the Constitution of Kenya 2010, the

Employment Act 2007, principles of natural justice, and established labour practices.

32. In examination in chief, the Claimant told the court that when he insisted that his name be cleared of sexual harassment claims, the issue of performance was brought up, yet he never before received any letter on poor performance, and that the Respondent's Policy provides for the manner in which to deal with performance issues.
33. On cross-examination, the Claimant told the court that he was terminated from service on 6th November, 2019, having served for a year and nine months. He further testified that he was entitled to gratuity for the term served, and that he was paid 3 months' salary in lieu of notice and a service gratuity for the term served at dismissal.
34. The Claimant further confirmed that he attended the disciplinary hearing and that all issues raised were discussed, and further that he asked for documents to enable him to respond to some of the issues in the show cause letters.
35. He confirmed that he was reinstated to work pursuant to a court order, but he found that the documents he needed to use had been moved and were not returned to him.
36. It is his testimony that the final notice to show cause was scheduled for hearing on 5th November, 2019, and that he was invited for the hearing and advised to appear with a

representative. He confirmed that he participated in the disciplinary hearing and responded to the issues raised.

37. CW2, one Verah Adhiambo Olweya, told the court that she was not aware of the sexual harassment claims against the Claimant. She further confirmed that no names were given in the meeting of 12th June, 2019, on who complained against the Claimant, and having been acting in the Claimant's position while he was on leave, no complaints of sexual harassment were brought to her attention.

38. The Claimant prays that his claim be allowed.

The Respondents' Case

39. The 1st Respondent states that due to numerous performance gaps, it issued the Claimant with a Show Cause letter dated 16th October 2019 outlining allegations of failure to follow laid down procedures, including procurement irregularities and breach of the HR Policy Manual and Section 44 of the Employment Act, insubordination contrary to the HR Manual and the Employment Act, and lack of diligence in the performance of duties, including issues affecting leave records and audit processes.

40. It states that the Claimant was required to respond by 31st October 2020, but instead, on 4th November 2019, he replied claiming lack of access to relevant documents and indicated that his lawyers would respond on his behalf. The

Respondent maintains that the Claimant's assertion that he lacked access to documents was false.

41. It states that an earlier show cause letter had been issued in July 2019 and extensions granted at his request, that he had been on paid compulsory leave in accordance with the HR Manual, and that upon resumption of duty on 3rd October 2019, he had adequate time to review the necessary documents.
42. The 1st Respondent further avers that as Head of Shared Services, he was the custodian of the relevant records. The Respondent further contends that the Claimant, through his advocate, accused it of contempt of court and appeared to pre-empt the disciplinary outcome.
43. It avers that a disciplinary committee was constituted and scheduled to hear the matter on 5th November 2019, but the Claimant refused to attend and instead wrote a letter making unsubstantiated allegations against the Respondent.
44. The 1st Respondent states that it had no option but to summarily dismiss the Claimant after he allegedly failed to participate in the disciplinary process despite being given an opportunity to be heard. It maintains that the dismissal, effected by a letter dated 6th November 2019, was on account of gross misconduct as provided under the Employment Act.

45. The Respondent states that the dismissal letter also informed the Claimant of his right of appeal, but the Respondent asserts that no appeal was lodged. The Respondent further contends that the correspondence from the Claimant and his advocate, including a letter dated 5th November 2019, demonstrated a lack of candour and was aimed at intimidating his supervisors and laying the groundwork for litigation.
46. It is the Respondent's assertion that upon termination, all dues payable to the Claimant were settled in full.
47. On his part, the 2nd Respondent states that, though he is the Executive Director of the 1st Respondent, he was not the employer of the Claimant and cannot therefore be sued in an employment court, hence this claim is wrongly before this court. He further states that he has never made any defamatory publications or utterances against the Claimant.
48. It is the 2nd Respondent's position that he has always acted professionally in the course of his duties and that the accusations of defamation levelled against him are false.
49. RW1 told the court that there were no accusations of sexual harassment against the claimant, and that the Respondents followed due process in dismissing the Claimant.
50. On cross-examination, RW1 told the court that he had evidence of inappropriate relationships with juniors against the Respondent, but no cases of sexual harassment. He

further testified that he had no minutes of the meeting of 12th July, 2019, before the court.

51. It is RW1's testimony that the letter to the Claimant dated 16th July 2019 was not a show cause. He confirmed that the show cause notices were issued on 20th August, 2019, and 25th October, 2019. It is his evidence that the show cause letters concerned performance gaps.

52. He avers that the performance appraisals show that the Claimant was performing well. It is his testimony that the Claimant was appointed branch champion in May 2019, two months before the issuance of the show cause letter. He denied that the accolades contradicted the allegations in the show-cause letters.

53. RW1 further confirmed that the Claimant wrote a letter expressing frustrations.

54. RW1 further told the court that a number of their documents support the allegations of poor performance, but that the documents were not produced before the court.

55. The Respondent prays that the Claimant's suit be dismissed and costs awarded in its favour.

Analysis and Determination

56. The following issues fall for determination:

- i. Whether the Claimant was constructively dismissed; if not
- ii. Whether he was lawfully and fairly dismissed
- iii. Whether the Claimant is entitled to the reliefs sought; and
- iv. Whether the 2nd Respondent is personally liable for defamation.

Whether the Claimant was constructively dismissed

57. The ingredients of a constructive dismissal were clearly set out in ***Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR***, where the Court of Appeal held that constructive dismissal occurs where the employer's conduct fundamentally breaches the contract, leaving the employee with no option but to resign.

58. In the Claimant's case, however, the Claimant did not resign. He was summarily dismissed. It therefore follows that the Claimant can only claim to have been wrongfully dismissed rather than constructively dismissed.

Whether the termination of the Claimant's employment was lawful and fair

59. Section 41 of the Employment Act codifies the right to procedural fairness, where it requires that an employee must be informed of allegations against them in a language the employee understands, and allowed an opportunity to respond in the presence of a fellow employee or union representative.

60. The Claimant's assertion is that his termination from the service of the 1st Respondent was unlawful, unprocedural, and that it violated the Constitution of Kenya 2010, the Employment Act 2007, principles of natural justice, and established labour practices.
61. The evidence before the court shows that the Claimant received show cause letters dated 20th August 2019 and 25th October 2019 and attended a disciplinary hearing on 5th November 2019. Indeed, during cross-examination, the Claimant admitted that he participated in the disciplinary hearing and addressed the issues raised. There is, therefore, no doubt that strictly speaking, a hearing did occur.
62. Procedural fairness is, however, not a ritual. In ***Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR***, the Court of Appeal clarified that compliance with Section 41 must be substantive and not cosmetic.
63. The Claimant consistently raised concerns that he was denied access to relevant documents necessary to prepare his defence. The Respondent's own witness admitted that supporting documents were not even produced in court. That admission reinforces the Claimant's complaint that the material forming the basis of the allegations was never properly availed.

64. Further, the sequence of events starting from the allegations of sexual harassment raised informally before peers without formal charges, followed by performance related accusations, compulsory leave, removal of staff and files upon reinstatement, paints a picture of a fractured employment relationship and shifting grounds of discipline.
65. It is also not lost on this court that though the Claimant was reinstated to his position in October 2019, the subsequent show cause letter of 25th October 2019 and the ensuing disciplinary action followed in quick succession.
66. In light of the circumstances surrounding the Claimant's exit, the court is not persuaded that the process met the threshold of fairness contemplated under Section 41 of the Employment Act and Article 41 of the Constitution.
67. Accordingly, I find and hold that the termination was procedurally unfair.
68. On whether the termination was substantively justified, Sections 43 and 45 of the Employment Act place the burden of proving the reasons for termination and that those reasons were valid and fair on the employer. In ***Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR***, the Court of Appeal reaffirmed that an employer must demonstrate both substantive justification and procedural fairness. Further, in ***Walter Ogal Anuro v Teachers***

Service Commission [2013] eKLR, the court held that fairness requires proof of a valid reason and fair procedure.

69. The Respondent's case is that the Claimant was summarily dismissed for gross misconduct grounded on procurement irregularities, insubordination, and lack of diligence under Section 44 of the Act.
70. RW1 admitted that performance appraisals showed the Claimant was performing well. He confirmed that the Claimant was appointed branch champion in May 2019, just two months before the issuance of the first notice to show cause. The Respondents' witness further stated that documents supporting poor performance existed but were not produced before the court.
71. The Court of Appeal in ***Cooperative Bank of Kenya Ltd v Banking Insurance & Finance Union (Kenya) [2017] eKLR*** emphasized that reasons for termination must not only exist, but must be demonstrable before the court. In this case, the Respondents did not place before the court the documentary evidence demonstrating procurement breaches or audit losses. Assertions without proof do not discharge the statutory burden, and the court cannot uphold a dismissal on mere allegations.
72. Further, there is a troubling inconsistency in that the Claimant is said to have been performing poorly, yet his performance appraisals were positive, coupled with the fact that he was entrusted with significant responsibilities

shortly before disciplinary action commenced. This contradiction, in my view, was not satisfactorily explained.

73. It is also telling that an employee would be sent on compulsory leave for poor performance, instead of being placed on a performance improvement plan to help the employee improve.

74. In my considered view, and based on the totality of evidence before this court, the Respondents have not proved valid and fair reasons for dismissing the Claimant as required under Sections 43 and 45 of the Employment Act.

75. Accordingly, I find and hold that the Claimant's dismissal is both procedurally and substantively wrongful and unlawful.

Whether the 2nd Respondent is personally liable for defamation

76. The Claimant contends that the 2nd respondent acted maliciously by falsely accusing him of sexual harassment before his peers and junior staff and by attempting to coerce another employee into fabricating allegations against him. He argues that these actions were intended to tarnish his reputation and force him out of employment.

77. In this regard, the Claimant seeks that this court order the 2nd Respondent to issue an unequivocal apology for the disparaging statements and commit to unreservedly withdraw the said statements.

78. The 2nd Respondent's position is that he was not the employer of the Claimant and cannot be sued in the employment court.

79. It is settled that employment obligations lie primarily with the employer entity. In ***Victor Mabachi & Another v Nurtun Bates Ltd [2013] eKLR***, the Court of Appeal held that directors or officers of a company are generally not personally liable for acts done within the scope of their employment unless specific personal wrongdoing is established.

80. The Claimant alleges defamation based on statements made in the course of internal disciplinary proceedings. The Court notes that no independent publication outside the employment context was proved, and further that no specific defamatory words were pleaded with precision.

81. The Claimant has also not demonstrated any evidence of publication beyond internal management. In the premise, the claim for defamation against the 2nd Respondent therefore fails.

Whether the Claimant deserves that reliefs sought
Salary for the remainder of the contract

82. The Claimant seeks anticipatory earnings for the unexpired portion of his contract. The remedies available to an employee under Section 49 of the Employment Act, 2007, do not include payment for the unexpired term of the contract, unless the contract expressly provides so. Further,

salaries/wages are paid for work done, and to award for services not rendered would amount to unjust enrichment of the Claimant.

83. In the case of ***Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR***, the court declined to award for the balance of the contract. Similarly, in ***Nduru v Avenue Service Station Ltd (30 June 2025)***, the court held that the Claimant's termination was unfair, but declined to award salary for the unexpired term of the contract, and instead awarded compensation for unfair termination.

84. This claim therefore fails and is dismissed.

Compensatory damages

85. Sections 49 and 50 of the Employment Act empower this court to award up to 12 months' salary as compensation for unfair termination/wrongful dismissal.

86. In ***Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR***, the Court held that in determining an award of compensation, the court is to consider the 13 factors set out under Section 49 (4) of the Employment Act. Further in ***Moi Teaching and Referral Hospital v James Kipkonga Kendagor [2019] eKLR***, the Court of Appeal held that a judge who awards the statutory maximum of 12 months' salary without justification has exceeded his powers.

87. Considering that the Claimant served the Respondent for 1 year and 9 months, where he held a senior managerial role, and the Respondent failed to prove valid reasons for terminating his services, coupled with the unsubstantiated allegations of sexual harassment which had potential to tarnish his reputation and future employment prospects, I deem an award of nine (9) months' salary sufficient compensation for the wrongful dismissal.

Gratuity

88. The Claimant admitted on cross examination that gratuity for the period served and notice pay were settled. This claim thus fails on that account.

Leave Pay

89. The Claimant did not lead any evidence on the outstanding leave entitlement. CW2 also testified that the Claimant had taken his leave during the period she was acting as the Head of Share Services. This leaves the court with questions about the number of unused leave days the Claimant still had at the time of dismissal, if any.

90. This claim, therefore, fails for want of proof.

91. In conclusion, the Claimant's claim succeeds in terms of the following orders: -

- a) A declaration that the Claimant's dismissal was wrongful and unlawful.
- b) The claim against the 2nd Respondent is dismissed.

- c) That the 1st Respondent shall pay the Claimant 9 months' salary as compensation for the wrongful dismissal at Kshs.3,330,000/-
- d) The 1st Respondent shall bear the costs of the suit and interest at court rate from the date of this judgment until payment in full.

92. Judgment of the Court.

DATED, SIGNED, AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 20TH DAY OF FEBRUARY, 2026.

**C. N. BAARI
JUDGE**

Appearance:

Mr. Wanyangu h/b for Mr. Namada for the Claimant

Ms. Watiri h/b for Ms. Christine Githii for the Respondent

Ms. Esther S - CA