



**Mberia v Council, Jomo Kenyatta University of Agriculture and Technology  
(Civil Appeal 430 of 2019) [2025] KECA 730 (KLR) (2 May 2025) (Judgment)**

Neutral citation: [2025] KECA 730 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 430 OF 2019  
F TUIYOTT, AO MUCHELULE & GV ODUNGA, JJA  
MAY 2, 2025**

**BETWEEN**

**OSEPH MUTUURA MBERIA ..... APPELLANT**

**AND**

**THE COUNCIL, JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND  
TECHNOLOGY ..... RESPONDENT**

*(Being an appeal against the whole judgment and decree of  
the Employment and Labour Relations Court at Nairobi (M.  
Onyango, J.) dated 5th July 2019 in ELRC Cause No. 638 of 2015)*

**JUDGMENT**

1. On 5<sup>th</sup> July 2019 the claim by the appellant, Joseph Mutuura Mbera, against the respondent, the Council of Jomo Kenyatta University of Agriculture and Technology, was partly allowed by the Employment and Labour Relations Court (M. Onyango, J.). There was no dispute that the appellant had worked for the respondent between 1989 until 16<sup>th</sup> May 2014 when he was summarily dismissed. During this employment, he had risen from a tutorial fellow to the Chairman of the Department of Biological Sciences, and elected as Secretary General of the UASU – JKUAT Chapter and National Vice Chairman of the Union. At the time of the termination, the appellant was earning a gross monthly salary of Kshs.180,028/= which comprised of basic salary of Kshs.118,861/=, house allowance of Kshs.53,167/= and commuter allowance of Kshs.8,000/=.
2. The appellant’s complaint in the memorandum of claim filed on 20<sup>th</sup> April 2015 was that he had been unlawfully terminated from employment, his constitutional rights had been violated and that he had been discriminated against had been breached. He sought to be reinstated to his previous post and rank without any loss to his benefits whatsoever and salary increment that colleagues of his calibre and grade had benefitted since his suspension for six months before he was terminated. For the breach of his constitutional rights, he claimed general damages of Kshs.10,000,000/=. During the suspension he



was on half pay. He claimed a total of Kshs.540,084/=. In the alternative, he asked to be compensated for loss of employment by being paid for 12 months, totaling Kshs.2,160,336/=; one month's salary in lieu of notice, being Kshs.180,028/=; termination dues for 25 years served, which is Kshs.180,028/= x 25 ½ making Kshs.2,250,350/=; damages of Kshs.10,000,000/= for breach of his constitutional rights and for discrimination; and half pay for the 6 months he was on suspension, being Kshs.180,028/= x 6 ½ which makes Kshs.540,044/=. Then costs and interest.

3. The appellant's case was that he was targeted for dismissal because of his Union activities of representing academic staff members, and which activities included calling for strikes and/or filing suits against the respondent. He stated that in dismissing him, the respondent had breached his constitutional and statutory right to belong to, and represent the rights of a trade union. He was summarily dismissed for engaging in "inimical conduct", but he deponed and testified that this was the official reason but he was always a target for dismissal because of the Union affiliation. In any case, he stated, the "inimical conduct" had not been substantiated in the proceedings leading to his dismissal.
4. In the memorandum of reply, the respondent stated that the appellant had been properly and lawfully dismissed when his conduct was inimical to the good organisation of the University. The conduct included engaging the University in endless litigation, inciting members of staff and obtaining confidential materials from the University administration. It was pleaded that the appellant had been taken through a fair disciplinary process before his dismissal. The claim that he had been discriminated against was denied. The claims in the prayers were all denied.
5. The appellant testified before the trial court while the respondent testified through Joseph Ombogi, the Registrar of Administration of the University. Upon hearing the parties, and considering their evidence and the applicable law, it was found that the respondent had not proved the validity of the reasons for termination as the reasons for the termination differed from the reasons indicated in the suspension letter and the charge sheet the appellant faced during the disciplinary hearings. The court found that although the appellant claimed that he had been discriminated against, the specific instances that led him to believe he was being discriminated against had not been given and or substantiated; that the respondent did not hinder the appellant's participation in Union activities; and that the appellant had admitted during cross examination that when he was denied access to the University, he moved to court and an order was issued allowing Union officials access.
6. In the cause of trial, the applicant abandoned his claim for salary in lieu of notice and half pay for the period that he was on suspension as he had been paid these dues before the filing of the claim. The appellant was a member of a pension scheme and therefore it was determined that he was not entitled to service pay.
7. On the question of reinstatement, this is what the learned Judge found:-
  - “ 3. Three years have passed since the institution of this suit hence the claim for reinstatement can longer be granted. In addition to this, the Claimant and Respondent do not have a good working relationship as demonstrated by the circumstance that led to the dismissal of the Claimant. As such, it would be impossible for them to work together.”
8. On the claim for compensation for loss of employment, he was given the maximum compensation of 12 months, which meant Kshs.180,028/= x 12 = Kshs.2,160,336/=. Then costs, and interests from the date of the judgment.



9. The appellant was aggrieved by this decision and came before this Court on the following grounds:-

- “1) The learned judge erred in fact and law in failing to find that the appellant did not contribute to his prolonged suspension over and above the 90 days stipulated in the Collective Bargaining Agreement yet there was overwhelming evidence on the same.
2. The learned judge erred in fact and law in relying on extraneous facts to find that the appellant was the author of his own misfortune yet there was clear violation of the Law and provisions of the Collective Bargaining Agreement by the respondent.
3. The learned judge erred in fact and law in misrepresenting the law as it relates to observance of due process by the employer before termination.
4. The learned judge erred in fact and law in failing to evaluate and determine the issues raised in the claim and the appellant’s submission but proceeded to dismiss the prayer on reinstatement yet the ingredients for grant of such an order were available.
5. The learned judge erred in fact and law in failing to consider and analyze the evidence adduced by the appellant but solely relying on the evidence adduced by the respondent on the aspect of reinstatement of the appellant.
6. The learned judge erred in fact and law in failing to find that the appellant had proved his case on reinstatement and discrimination a balance of probability yet evidence on record and the law points to the same.
7. The learned judge erred in law and fact in dismissing the claim on reinstatement and damages on discrimination despite overwhelming evidence to support the granting of the same.
8. The learned judge erred in law and fact in failing to find that the illegal and unprocedural convening of a disciplinary hearing without affording the appellant an adequate opportunity to defend himself was a violation of the appellant’s constitutional and statutory rights.
9. The learned judge erred in law and fact in failing to appreciate the provisions of the Collective Bargaining Agreement in respect to appeal against disciplinary proceedings.
10. The learned judge erred in fact and law in failing to find that the reasons for terminating the claimant had not been explained and the meaning of “inimical conduct” was not explained to the appellant prior to the disciplinary hearing.
11. The learned judge erred in law and fact in equating “inimical conduct” with gross misconduct without giving any justification or basis in law.
12. The learned judge erred in law and fact in finding that the appellant did not prove discrimination and violation of his constitutional rights yet evidence adduced clearly showed discriminatory treatment as against his colleague



Naphtali Muga Rugara and the fact that he was dismissed for being a union member.

13. The learned judge erred in law and fact in failing to find that the appellant having been dismissed for being a union member is discriminatory and a violation of his constitutional rights under article 41 of *the Constitution*.
14. The learned judge erred in law and fact in contradicting herself when she rightly held that the appellant was dismissed for being a union member but found that the same was a violation of *the Constitution's* rights and discriminatory.
15. The learned judge erred in law and fact in declining to grant the remedy of reinstatement on the ground that three years had passed from the time of dismissal yet no law limits the period within which a remedy of reinstatement can be granted.
16. The learned judge erred in fact and law in declining to grant the remedy of reinstatement on the basis of poor working relationship between the appellant and the respondent yet no evidence to support the same was adduced and the fact that the respondent is a corporate entity which is incapable of harboring emotional feelings as alleged.
17. The learned judge erred in fact and law in failing to find that dismissal of an employee on account of his own union activities is a constitutional violation and discriminatory and should have entitled the appellant to the damages sought.”

It was prayed that the judgment and decree of 5<sup>th</sup> July 2019 be set aside and that they be substituted with an order allowing the appellant’s claim in the superior court with costs.

10. After the learned Judge found that the appellant was unfairly dismissed and ordered the payment of compensation for loss of employment, it was conceded that the respondent had paid one month’s salary in lieu of notice and six months half salary during the period of suspension and given that service pay was not payable given the pension scheme, we discern that the only issues for determination were whether the Judge was right in not ordering reinstatement, and whether, on the evidence, the Judge had erred in not finding that the appellant’s constitutional rights were violated or that he was discriminated against.
11. In dealing with these questions, we reiterate that our jurisdiction entails revisiting the evidence tendered before the trial court, and analyzing it to be able to arrive at our own conclusions thereon while noting the advantage that the trial court had of seeing and hearing the witnesses as they testified. (See *Seascope Ltd -vs- Development Finance Company of Kenya* [2009]KLR 384). If we find that the conclusions that the trial court arrived at were based on no evidence or that the evidence was misapprehended or that the learned Judge demonstrably acted on wrong principles, we are enjoined to interfere with the conclusions. (See *J.S.M. -vs- E.N.B.* [2015]eKLR).
12. During the virtual hearing, learned counsel Ms. Nyakundi was present for the appellant while learned counsel Ms. Sekele held brief for Mr. P. Lutta for the respondent. Both counsel elected to rely on their written submissions filed on 27<sup>th</sup> July 2020 and 20<sup>th</sup> June 2024, respectively.
13. On the question of reinstatement, it was submitted that the learned Judge had erred in declining to grant the remedy on the ground that three years had passed from the time of dismissal yet no law limits



the period within which reinstatement can be ordered. It was further submitted that reinstatement was declined on the basis of non-working relationship between the appellant and the respondent, and yet the latter was a corporate entity which was incapable of harboring emotional feelings.

14. In response, it was submitted that section 12(3)(iii) of the Employment and *Labour Relations Act* provided that an order of reinstatement of an employee can be made within three years of dismissal, subject to such conditions as the court deems fit to impose under circumstances contemplated under any written law. The respondent's counsel urged that, the appellant having been dismissed on 16<sup>th</sup> May 2014 and judgment delivered on 5<sup>th</sup> July 2019, the appellant had been out of service for five years and two months and therefore the remedy of reinstatement was not available; that since the time of dismissal, it was now about ten years and therefore this Court cannot grant the remedy on appeal. Further, that the remedy of reinstatement was a discretionary one, and the court would not force specific performance of a contract of employment on parties whose employment relationship was hostile. The Court was referred to the decisions in *Kisii University -vs- Kenya University Staff Union* [2024] KECA 656 (KLR) and *Kenya Airways Ltd -vs- Aviation & Allied Workers Union Kenya & 2 Others* in which it was observed that reinstatement is not an automatic right of an employee. This is a discretionary remedy and each case has to be considered on its facts based on the spirit of fairness and justice and in keeping with the objectives of industrial adjudication. The remedy can only be ordered in exceptional circumstances, bearing in mind whether it was practicable to reinstate, also whether any compensation has been paid by the employer and whether there are chances of the employee securing alternative employment.
15. Section 12(3)(iii) of the Employment and *Labour Relations Act* and section 49(3)(a) of the *Employment Act* provide for the remedy of reinstatement. In deciding whether to reinstate the employee, the Court will be guided by the provisions of section 49(4) and take into account the following:-

“(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following

—

- a. the wishes of the employee;
- b. the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
- c. the practicability of recommending reinstatement or re-engagement;
- d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
- e. the employee's length of service with the employer;
- f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
- g. the opportunities available to the employee for securing comparable or suitable employment with another employer;



- h. the value of any severance payable by law;
- i. the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
- j. any expenses reasonably incurred by the employee as a consequence of the termination;
- k. any conduct of the employee which to any extent caused or contributed to the termination;
- l. any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
- m. any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.”

16. It is trite that the trial court had the discretion to reinstate or not reinstate the appellant, but even before exercising the discretion, the court acknowledged that the remedy was being sought when the appellant had been out of employment for over three years. It is clear to us that under section 12(3)(iii) of the Employment and *Labour Relations Act*, reinstatement could not be granted. The court observed as follows:-

“3. Three years have passed since the institution of the suit hence the claim for reinstatement can (no) longer be granted  
.....”

The claim itself had been filed about five years following the dismissal. By operation of the law, we find, the appellant could not be reinstated, and therefore the court’s decision could not be faulted.

17. On the question whether or not the appellant was subjected to discrimination or that his contractual rights were violated, the trial court, while citing *Anarita Karimi Njeru -vs- The Republic [1978 – 1980]KLR 1272*, observed that the appellant had –

“failed to outline and itemize how his constitutional rights were violated, and did not elaborate how he was subjected to discrimination neither has he made reference to the relevant constitutional provisions pertaining to breach of his rights...”

In the grounds of appeal, it was contended that the learned Judge had erred in law and fact by failing to find that the appellant having been dismissed for being a Union member, this was discriminatory and a violation of his constitutional rights under Article 41 of *the Constitution*.

18. In the appellant’s claim, the following were the complaints in paragraph 33 to 35:-

“33. The Claimant states that the ground of “inimical conduct” was just a cover-up to enable the respondent terminate the Claimant’s employments summarily. The source of the animosity towards the Claimant was the Claimant joined the Trade Union-UASU (JKUAT Chapter) towards representing the rights of his fellow Academic Staff Members and allegedly filing a case to challenge the manner in which the Council had been appointed back January 2013.



34. The treatment that the Claimant was subjected to was a breach of the Claimant's constitutional right to join a Trade Union. The Claimant's relationship with the Respondent had been smooth and without any problems. It is clear from the chain of events that the Claimant's election as the Secretary General UASU (JKUAT CHAPTER) was the cause of sudden change of attitude by the respondent towards the Claimant.
35. The Claimant herein states that the respondents act of summarily dismissing him under the unclear circumstances and unprocedurally was discriminatory as the Claimant was singled out to be dismissed without any valid reason or cause as is provided for under the *Employment Act.*"

19. The respondent denied these allegations.

20. On the question of discrimination, the trial court observed as follows:-

“Discrimination

It was the claimant's case that he was discriminated because of his work as a union official. That before he became a union official the environment under which he worked was friendly but after his election as Chapter Secretary the environment became so hostile that he never enjoyed working at the University any more.

The claimant did not state the specific instances that constituted discrimination as he was treated in the same way as Naphtali Muga Rugara, the only difference being that Mr. Rugara moved to court immediately and was reinstated by the court.

I find that the claimant did not adduce sufficient evidence to support his claim of discrimination.”

21. Subsequently, the court found as follows:-

“4. He is not entitled to damages for breach of constitutional rights and discrimination as his claim was not specific in how his rights were violated and which constitutional provisions were infringed. Further, the instances given do not necessarily involve a constitutional question since the respondent did not hinder the claimant's participation in union activities. The Claimant admitted that when he was denied access to the University, he moved to court and an order issued allowing union officials access.”

22. In the submissions by learned counsel for the appellant, it was urged that one instance in which his client was discriminated against was when he was singled out for unfair punishment by way of suspicion and dismissal when the entire Union office had called the strike. The second instance was when he was dismissed whereas his deputy had filed a case and had been reinstated. The two instances were when he was denied access to his work place and had to seek court orders to be allowed back. These instances, it was submitted, amounted to discrimination under section 5(3) of the *Employment Act.* In response, the learned counsel for the respondent submitted that the appellant had been suspended from being a member of the University staff, which did not stop him being a member of the Union. Secondly, that when he was denied access to the university premises, he had been duly suspended by the respondent.



23. We reiterate that the appellant was required to indicate which provisions of *the Constitution* had been infringed or violated in his case, and to give instances and particulars of how the rights had been infringed or violated. This did not come out in his statement of claim. We also wish to agree with what Justice James Rika of the Employment and Labour Relations Court stated in *East Africa Portland Cement Company Limited - vs- The Attorney General & Another* [2013]eKLR as follows:-

“Courts must guard against the distortion, or manipulation of the constitutional rights regime. Characterizing every dispute as a constitutional violation, trivializes *the Constitution*, transforming it from a blueprint of fundamental freedoms and rights, into a document for litigating everyday dispute. The Constitutional’s moral force is diminished, when day to day effronteries, raise potential constitutional claims. If every legal question is constitutionalized, the overall effect is the delusion of constitutional protections. Not all actions that impugned on constitutional values call for a constitutional answer.”

24. On our own independent reconsideration of the dispute between the appellant and the respondent, we find that there was nothing therein that raised the circumstances that required a constitutional intervention. We do not find that the trial court

erred when it reached the decision it did on the question of allegation on violation of the constitutional rights, or on the question of discrimination.

25. In conclusion, we find no merit in the appeal and dismissed it with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF MAY 2025.**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**A.O. MUCHELULE**

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**JUDGE OF APPEAL**

**G.V. ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**

