Mutwol v Moi University (Civil Appeal 118 of 2019)
[2022] KECA 537 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KECA 537 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL 118 OF 2019

DK MUSINGA, SG KAIRU & F SICHALE, JJA

APRIL 28, 2022

BETWEEN

MILCAH J. MUTWOL ..... APPELLANT

AND

MOI UNIVERSITY ..... RESPONDENT

(An appeal from the judgment of the Employment and Labour Relations Court of Kenya at Eldoret (D. K. Njagi Marete, J) dated 14th March, 2019 in ELRC NO. 247 OF 2018)

JUDGMENT

1. The appellant, Milcah J. Mutwol, filed a statement of claim dated 24th July, 2018. The respondent herein, Moi University, was the respondent. In her claim, the appellant averred that on 4th May, 2016, she was sent on compulsory leave on the basis that her performance "...was dissatisfactory ...while it reviewed the availed accounts of 2013/2014 and 2014/2015 financial years." At the time she served as a Finance Officer. She detailed the sequence of events as follows:

    (1) On September 1, 2016(after a period of about 4 months, she was issued with a Notice to Show Cause which detailed a total of 19 infractions. She was to respond within 14 days. She did so on September 12, 2017.

    (2) On September 27, 2016, she was invited to appear before the Human Resource & Governance Committee of the Council onOctober 6, 2016at 10 a.m.

    (3) The appellant attended the meeting. However, on October 13, 2016, she was placed on suspension on half (½) salary. The suspension was subsequently extended on November 7, 2016.

    (4) On November 28, 2016the University council informed the appellant that she would be notified of the disciplinary hearing in due course.

(5) On December 7, 2016, the Ag. Vice Chancellor issued a notice requiring the appellant to appear before the disciplinary committee which was indefinitely postponed onDecember 19, 2016.

(6) On January 20, 2017, she was invited to attend the disciplinary committee on January 27, 2017with "5 novel charges".

(7) The appellant was further invited for hearing on August 1, 2017 and August 31, 2017. She was thereafter unlawfully terminated on July 9, 2018.

2. It was the respondent's action of terminating the appellant that provoked the suit filed by her at the Employment and Labour Relations Court in which she sought:

> "(a) A declaration that the respondent engaged in unfair labour practices, breached the law and the employment contract by compelling her to proceed on compulsory leave on the May 4, 2016coupled with an award of damages for the breach of article 41 of *the Constitution* of Kenya 2010.
>
> (b) A declaration that the respondent breached the employment contract the law, its recognized terms as incorporated from the Collective Bargaining Agreement and subjected the claimant to unfair labour practices by denying her the right to be accompanied by a friend or legal representative, imposing an unlawful suspension, extending the same and carrying on with a disciplinary process beyond the statutory timeline of 6 months coupled with damages under article 41 of *the Constitution* of Kenya, 2010.
>
> (c) A declaration that the termination from the employment as communicated by the letter dated the July 9, 2018was unfair and unlawful coupled with an order for reinstatement to employment without loss of benefits and/ or seniority in rank for failure to comply with the Collective Bargaining Agreement made on 14th November,2013 between the respondent's Council and the Kenya Universities Staff Union (KUSU) quoted by the respondent in the termination letter, it breached the right to fair labour practices under article 41 of *the Constitution* of Kenya, 2010, the right to fair, efficient and expeditious administrative action as embodied in article 47 of *the Constitution* of Kenya, 2010 and as recognized by section 63 of the *Universities Act*, No. 42 of 2012, the Statutes of Moi University, 2013 and the *Employment Act*, 2007.
>
> (d) Damages for the breach of the rights to fair labour practices and fair administrative action under articles 41 and 47 of *the Constitution* of Kenya 2010 which the respondent was bound by the Statutes of Moi University, 2013, the *Universities Act*, 2012 to observe but breached by persisting to carry on the unlawful disciplinary process commenced by an unlawful compulsory leave to the unlawful and unfairly termination from employment for over a period of 2 years and 2 months from the May 4, 2016 to the July 9, 2018.
>
> (e) Damages for the unfair and unlawful termination as follows:
>
> a). 3 months notice pay @ shs. 193,628 - sh. 580,884 b). 12 months salary @ sh. 193,628 - sh. 2,323,536

(f) ½ of the withheld salary during the period of suspension from the 13th October, 2016 to the 9th July, 2016 @ sh. 906,814

(g) Costs and interests.

(h) Any other relief the Honourable court may deem fit to grant."

3. In a response dated September 18, 2018, the respondent denied having wrongfully and unlawfully terminated the appellant's services. It maintained that there was both procedural and substantive fairness in the termination of the appellant.

4. The dispute between the appellant and the respondent was heard and determined by Marete, J. who in a judgment dated March 14, 2019rendered himself as follows:

> "I commend the claimant for bringing out a formidable case in his (sic) favour. This was plausible and interactive. The authority cited clearly brought out a good case in circumstances of unlawful termination of employment. Unfortunately, this is not the case here and the authorities became misplaced and inapplicable in the circumstances. This is because, at the close of the day, he (sic) does not establish a concrete case of unlawful termination of employment. He (sic) falls short of the requirements of section 47(5) of the *Employment Act*, 2007 which comes out as follows:
>
> > 47(5) "For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer"
>
> A case of lawful termination of employment therefore ensues and I find as such. This answers the 1st issue for determination.
>
> The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is not. Having lost on a case of unlawful termination of employment, she becomes disentitled to the relief sought.
>
> I am therefore inclined to dismiss the claim with orders that each party bears the costs of the same."

5. It is the above outcome that provoked the appeal filed vide a memorandum of appeal dated June 26, 2019listing 36 grounds of appeal. However, during the plenary hearing on May 18, 2020, Mr. Kigamwa, learned counsel for the appellant, whilst relying on the appellant's written submissions filed on 30th April, 2020, reduced the grounds into 4 main areas.

6 Firstly, in urging grounds 1-7, counsel faulted the respondent for placing the appellant on compulsory leave vide its decision of 4th May, 2016 whilst there was no statutory basis for doing so. In support of this proposition, he relied on the decision of Ezra Chiloba vs. Wafula Wanyonyi Chebukati & 7 others [2018] eKLR in which Radido, J. held that compulsory leave does not exist under the law and can only be invoked if it is expressly provided for in the contract of employment.

7. Secondly, in respect of grounds 8-12, counsel submitted that there was no fair hearing as the appellant attended the meeting of October 6, 2016without a friend or legal representative contrary to section 41 of the *Employment Act*, 2007. Further, that Section 63 (3) of the University Act places a maximum period of 6 months within which a dispute must be heard and resolved and yet in her case, the

respondent took over 2 years to determine the appellant's fate. In addition, the respondent was faulted as by its letter dated October 13, 2016, it unlawfully used suspension as a form of disciplinary sanction. Counsel posited that the Collective Bargaining Agreement signed on November 14, 2013 did not have a provision for extending a suspension period beyond 21 days. Reliance was placed on the decision of *Almond Kibiwott Kutto vs. Masinde Muliro University of Science & Technology* [2017] eKLR in which Maureen Onyango, J. held:

> "In this case the Respondent clearly breached its own disciplinary procedure by failing to reinstate the Claimant or obtaining the Claimant's union's consent to extend the suspension beyond 21 days. From the foregoing the suspension of the Claimant was unlawful from the moment the 21 days allowed in the CBA lapsed as there was no agreement for extension. I therefore find and hold that the suspension of the Claimant for 16 months was in breach of the CBA and therefore unlawful."

8. Thirdly, in urging grounds 13-16, it was contended that there was neither procedural nor substantive fairness as the appellant was not culpable of any wrong doing and the procedure followed therein was unlawful. The decision of *Samson Ole Kisirkoi vs. Maasai Mara University & 3 others* [2018] eKLR was cited wherein Maureen, J. held:

> "However, I must add that the common law situation on which our current law is founded did not anticipate situations like are common place in our employment circles and circumstances. It did not anticipate cases of impunity where employers for no reason whatsoever send employees home and proceed to feign and manipulate circumstances and conditions justifying such termination of employment. Courts are therefore duty bound to lift the veil of termination and temperate this with the common law position as espoused in our law to come up with a case of justice for the employees."

9. In conclusion, counsel urged us to find that the respondent engaged in unfair labour practices, breached the law and the employment contract by placing the appellant on compulsory leave on May 4, 2016; by denying her the right to be accompanied by a friend or legal representative and finally, in imposing and extending an unlawful suspension. He urged us to order reinstatement of the appellant as 3 years had not lapsed from the date of dismissal. We were also asked to award damages under section 47 of the *Employment Act*.

10. In response, Learned counsel, Miss Odwa for the respondent maintained that there was procedural fairness in the manner that the appellant was dealt with; that the appellant appeared for the disciplinary hearing with her advocate; that contrary to the appellant's assertion, the Council of the respondent was fully constituted as at December, 2016; that the delay in finalization of the dispute is partially attributed to the appellant as there are instances when her counsel sought an adjournment to enable him prepare for the hearing and finally, that the appellant should have challenged the decision of the Council by way of an appeal in terms of clause 5.4 of the Collective Bargaining Agreement signed by Kenya University Staff Union (KUSU) and the respondent, an option she waived and instead opted to file suit.

11. On whether there was justification for the action taken by the respondent, counsel pointed out that the appellant, as the supervisor in her department, conceded to the fact that there were Bank accounts that were opened without the requisite approvals; that indeed cheques had been issued which cheques upon presentation were dishonoured by the bank and that all concerned officers, including the Deputy Vice Chancellor were taken through the disciplinary process and terminated. Reliance was placed on several decisions of this Court including *Kenya Revenue Authority vs. Reuwel Gutahi & 2 others*,

Nairobi Civil Appeal No. 66'A' of 2019, for the proposition that the standard of proof in determining whether termination of employment was justified is on a balance of probability, *CFC Stanbic Limited vs. Danson Mwashako Mwakuwona* (Mombasa Civil Appeal No. 3 of 2014), for the proposition that lack of diligence on the part of an employee is sufficient cause for dismissal and *Kenya Power and Lighting Company Limited vs. Aggrey Lukorito Wasike* (Nyeri Civil Appeal No. 79 of 2016), for the holding that:

> " Much as Courts are right to be solicitors of the interest of the employee, they must remain a fora where all, irrespective of status can be assured of justice. Employers are Kenyans too and have rights which Courts are duly bound to respect an uphold."

12. In a brief rejoinder, Mr. Kigamwa pointed out that the appellant was 63 years old and had not attained the retirement age of 65; that she was not notified of the right of appeal; and that section 63(3) of the *Universities Act* on fair administrative action was not adhered to.

13. We have considered the record, the rival written and oral submissions made before us, the authorities cited and the law. The appeal before us is a first appeal and our mandate as a first appellate court is as set out in *Selle v. Associated Motor Boat Co. of Kenya & others* [1968] EA 123 wherein it was stated:

> An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
>
> In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –vs-Ali Mohamed Sholan (1955)22 EACA 270".

14. The undisputed facts of this matter are that the appellant was the respondent's employee having been employed as a Senior Accountant in the year 2003 and rising to the position of a Finance Officer, upon promotion, on February 10, 2010.

15. The respondent denied having wrongfully or unlawfully terminated the services of the appellant. The respondent contended that it was justified in its actions as the appellant was found guilty of negligence in the performance of her duties and that given the accusations levelled against her for which she failed to exonerate herself, the respondent had lost trust and confidence in her. The respondent gave the sequence of events as follows: on January 6, 2016, the appellant was served with an internal memo raising queries on the accounts for the years 2013/2014 and 2014/2015; the appellant gave a response on 15th January, 2016 which the respondent found to be insufficient; in a memo dated February 9, 2016, and a reminder dated April 12, 2016, the respondent sought from the appellant, an explanation to the issues raised by the audit committee as stated in the internal memo of 6th January, 2016; the appellant requested for more time to be able to retrieve documents from the archives; on May 4, 2016, a Special Council meeting reviewed the audited accounts for the financial years 2013/2014 and 2014/2015 vis-à-vis the appellant's response; the respondent found the appellant's response to be unsatisfactory following which the appellant was sent on compulsory leave on May 4, 2016 in order to pave way for further investigations; on 1st September, 2016, the appellant was served with a Notice to Show Cause following a special meeting of the Council of August 30, 2016; there were 19 accusations levelled against the appellant who was to respond to the issues raised within 14 days; the appellant

responded to the NTSC on 19th September, 2016; the appellant was subsequently invited to appear before a disciplinary committee on October 6, 2016; the appellant appeared before the disciplinary committee which resolved that the appellant be suspended with effect from 13th October, 2016, as per Clause 5.2 of the C.B.A between Moi University and KUSU; the suspension was extended on November 7, 2016 and on account of the suspension, the appellant was put on half-pay.

16. According to the appellant, the invitation to the meeting of 6th October, 2016, the suspension of October 13, 2016 and the extension of the suspension on November 7, 2016 were unlawful, unfair and amounted to unfair labour practices. The appellant contended that suspension was not part of the prescribed employment sanction, and finally that there was breach of Clauses 52 and 53 of the Collective Bargaining Agreement signed on November 14, 2013 as it did not provide for extension of suspension period beyond 21 days.

17. The appellant further contended that Section 41 of the *Employment Act* and Statute XVII of the Statute of Moi University 2013 was flouted in the meeting of 6th October, 2016 as she was not represented by a person of her choice and that Section 63(3) of the *Universities Act* provides that a disciplinary process had to be completed within 6 months.

18. What is the law regarding the issue of compulsory leave? The *Employment Act*, 2007 does not define compulsory leave, otherwise referred to as "administrative leave" in some foreign jurisdictions.

19. The existing jurisprudence from the local courts on this subject is diverse. Whereas some judges have taken the view that compulsory leave is necessary in order to allow for investigations to be carried out in respect of any alleged misconduct on the part of an employee, other judges have equated compulsory leave to suspension and interdiction, especially where it does not have contractual authority or any statutory underpinning. In the circumstances therefore, such compulsory leave has been said to amount to an unfair labour practice.

20. In *Bernard Mwaura Mbuthia v Nyahururu Water & Sanitation Company Limited, County Government of Laikipia (Interested Party)* [2019] eKLR, Mbaru, J. held as follows:

> "Therefore, the sending of an employee on compulsory leave where the circumstances warrant it and provided it is an interim measure is within the purview of the employer. Such action only removes the employee from the workplace temporarily without interfering with his terms of service. Where the employer finds it necessary to thus remove the employee from the workplace to undertake comprehensive investigations into a matter or alleged misconduct, by allowing the same to conclude could vindicate the employee or allow for him to be invited to show cause over specific allegations following the investigations. See *Ezra Chiloba versus Wafula Wanyonyi Chebukati & 7 others* [2018] eKLR and *Humphrey Makokha Nyongesa & another versus Communications Authority of Kenya, & 2 others* (2018) eKLR."

21. A similar position was taken by Onyango, J. in *Thomson Kerongo & 2 others v James Omariba Nyaoga & 3 others* [2017] eKLR where she held thus:

> "My considered opinion in respect thereto would be that there is no law prohibiting an employer from sending an employee on compulsory leave where the circumstances warrant it and provided it is an interim measure. Compulsory leave has the effect of only removing an employee from the workplace temporarily without interfering with his terms of service. An action is only illegal if it is prohibited by law. Not all lawful matters are prescribed by law. On the contrary it is only that which is prohibited by law that is illegal or unlawful."

22. In *Shedd Dennies Simotwo v Speaker, Narok County Assembly & another* [2015] eKLR, Radido, J. was of the view that for a suspension of an employee to be lawful, it must have either a contractual authority or statutory underpinning (see also *Kenya Plantation & Agricultural Workers Union v Finlays Horticulture Kenya Ltd* (2015) eKLR and McKenzie v Smith (1976) IRLR 345).

23. We associate ourselves with the position taken by Onyango, J. in the Thomson Kerongo case (supra). In our view, we are not persuaded that there must be provision in the contract of employment providing for compulsory leave before an employee can be sent on such leave. The flip side of it is that there is no law that prohibits the placement of an employee on compulsory leave. It is our further view that it was necessary to have the appellant sent on compulsory leave to enable the respondent to carry out meaningful investigation. It is not possible for an employer to carry out effective investigations against an employee who, in spite of accusations of wrong doing, continues to occupy her/his office. In any case, looking at the circumstances of this matter, the appellant was informed and understood that she was being placed on compulsory leave to allow for investigations and she was given the opportunity to show cause why disciplinary action should not be taken against her. We do not find any good grounds to impugn the decision of the respondent which in our view was fair, reasonable and justifiable.

24. On the issue of alleged unlawful suspension, we do not agree with the appellant that her suspension and the subsequent extension of her suspension were unlawful. The import of suspending an employee against whom an allegation of a work-related misconduct may have arisen was aptly put forth by Lord Denning MR, in the English case of *Lewis v Heffer and others* [1978] 3 All ER 354 (CA) at 364, thus:

> "Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay pending enquiries. Suspicion may rest on him; and he is suspended until he is cleared of it. No one, as far as I know, has ever questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of defending himself and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or office is being affected by rumours and suspicions. The others will not trust the man. In order to get back to proper work, the man is suspended. At that stage the rules of natural justice do not apply...."

25. *Halsbury's Laws of England, 3rd Edition, Volume 25* at paragraph 989 (page 518) states as follows:

> " 989. Suspension. Whether or not the master has power to suspend a servant during the duration of the contract of service depends upon the construction of the particular contract. In the absence of any express or implied term to the contrary, the master cannot punish a servant for alleged misconduct by suspending him from employment and stopping his wages for the period of the suspension. Where, however, such a term is included in the in the contract, it is not rendered void by the statutory provision restricting deductions from workmen's wages for or in respect of fines, for the intention of the parties is taken to have been that for the period of suspension mutual duties and rights, including the right of wages, would be suspended."

26. In Member of the Executive Council for Education, North West Provincial Government v Gradwell (2012) 33 ILJ 2033 (LAC),the South Africa Labour Appeals Court dealt with the question of the purpose of precautionary suspension and said:

> " .... When dealing with a holding operation suspension, as opposed to a suspension as a disciplinary sanction, the right to a hearing, or more accurately the standard of procedural

fairness, may legitimately be attenuated, for three principal reasons. Firstly, as in the present case, precautionary suspensions tend to be on full pay with the consequence that the prejudice flowing from the action is significantly contained and minimized. Secondly, the period of suspension often will be (or at least should be) for a limited duration. .... And, thirdly, the purpose of the suspension - the protection of the integrity of the investigation into the alleged misconduct - risks being undermined by a requirement of an in-depth preliminary investigation...."

27. In the Canadian case of *Cabiakman v. Industrial Alliance Life Insurance Co., 2004 SCC 55*, [2004] 3 S.C.R. 195, where an employee had been suspended by his employer without pay pending resolution of the charge of conspiracy to extort money from his securities broker, the suspension was found to have been justified, as the employer had imposed it for legitimate business reasons relating to the company's image and reputation. The Supreme Court laid down several factors that can guide the courts in determining whether an employer was justified in deciding to temporarily suspend an employee at paragraph 62 of its judgment thus:

> " This residual power to suspend for administrative reasons because of acts of which the employee has been accused is an integral part of any contract of employment, but it is limited and must be exercised in accordance with the following requirements: (1) the action taken must be necessary to protect legitimate business interests; (2) the employer must be guided by good faith and the duty to act fairly in deciding to impose an administrative suspension; (3) the temporary interruption of the employee's performance of the work must be imposed for a relatively short period that is or can be fixed, or else it would be little different from a resiliation or dismissal pure and simple; and (4) the suspension must, other than in exceptional circumstances that do not apply here, be with pay"

28. We respectfully agree with the views expressed by the Supreme Court of Canada. In the present case, the suspension of the appellant had contractual underpinning on Clause 5.2 of the Collective Bargaining Agreement between KUSU and the respondent. The respondent submitted that several bank accounts had been opened without the necessary approval under the watch of the appellant. Several cheques issued under the appellant's watch were dishonoured upon presentation for payment. It is our view that such acts or omissions reflect badly on the respondent and had the potential to hurt its business name and reputation as an institution of higher learning. With this in mind, we are of the view that the suspension of the appellant was necessary so as to protect the legitimate business interests of the respondent. The actions by the respondent were not devoid of good faith on its part. We take note that other employees of the respondent including the Deputy Vice Chancellor were also subjected to the disciplinary process and terminated. The respondent did not therefore single out the appellant, neither were its actions marred with any bad faith nor can the respondent be said to have acted unfairly against the appellant. The suspension of the appellant was therefore lawful and, in any case, what the appellant seems to be taking issue with in this appeal is not her suspension but the prolonged extension of her suspension.

29. In the Canadian case of Potterv.New Brunswick Legal Aid Services Commission, 2015 SCC 10, [2015] 1 S.C.R.500, an employee had been placed on indefinite suspension. The Supreme Court held, *inter alia,* that a prolonged or indefinite suspension could amount to constructive dismissal of an employee.

30. Such suspension therefore should be definite and ought not to be for a lengthy period of time. In any case, the essence of suspension is to allow for investigations into an alleged misconduct by an employee. In the present case, it is our view that there is no law or regulation that outlawed extension of the suspension period. To this extent, we are not persuaded by the decision of Maureen Onyango, J. in

Almond Kibiwott Kutto vs. Masinde Muliro University of Science & Technology (supra) that the suspension cannot be extended unless and until the respective union's consent is obtained.

31. It is true as contended by the appellant that the Council's term came to an end in **February, 2017** before the conclusion of the dispute and a new Council was put in place in **March, 2017**, following which a hearing took place on **27th January, 2018** (although this is wrongly stated as **27th January, 2017**). The appellant presented her case on **13th April, 2018** together with her witnesses, in the presence of her advocate and a Union representative. Thereafter, the appellant's counsel sought an adjournment to enable him file submissions. The Council acceded to the appellant's counsel's request. Subsequently, the appellant was found guilty on **July 9, 2018** and her services terminated. In our view, the appellant contributed to the delay in the determination of the complaints against her as she sought several adjournments during the hearing. In particular, she sought for extension of time when served with the Notice to Show Cause on **January 27, 2017** and her counsel sought an adjournment to enable him fully prepare for his brief. Additionally, the appellant's counsel failed to adhere to the timelines for filing of submissions thus necessitating further delays. We are in agreement that the appellant substantially contributed to the delay in the determination of her matter as demonstrated above. She cannot therefore be heard to complain that the determination of the dispute took a period of more than 6 months contrary to Section 63(3) of the University's Act when she herself contributed to the delay. We also appreciate that once the life of the Council that was initially seized of the matter came to an end, it took time before a new Council was constituted. This also caused further delay.

32. As to the procedural fairness, we find that the respondent essentially complied with the procedure leading to the termination of the appellant. The appellant was served with a Notice to Show Cause and given time to respond. The appellant sought for extension of time and an extension was granted. She appeared before the disciplinary committee and was thereafter suspended. She took part in the hearing of the matter in presence of her lawyer and a Union representative. The respondent cannot therefore be said to have failed the test of procedural fairness.

33. As regards the appellant's contention of wrongful termination, we find that during the hearings, the appellant was taken through the allegations made against her and the respondent found her guilty of negligence in the performance of her duties. In our view, the termination was well founded and we are in agreement with the trial Judge when he came to the conclusion that the appellant //**"... fell short of the requirements of Section 47(5) of the *Employment Act*, 2007 which comes out as follows:

> 47(5) "For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer"."

34. The respondent justified the appellant's dismissal on account of her dereliction of duty.

35. On the competency of the suit, the respondent contended that the appellant had failed to exhaust all the chances for redress as set out in Clause 5.4(a) of the CBA between Moi University and KUSU. Clause 5.4 of the CBA between the respondent and KUSU provides as follows:

> "5.4 Appeals
>
> (a) If the aggrieved employee is dissatisfied with the decision of the disciplinary committee, he/she shall appeal in writing within twenty-one (21) days as follows:
>
> Grade 5 to 15 to the Chairman of Council.

(b) The Chairman of Council shall cause the Appeals Board of Council to be convened within twenty-one (21) days of receipt of the appeal.

(c) Two Union representatives shall be invited to the proceedings and the employee shall be allowed to be accompanied by a friend. The decision of the appeals board of Council shall be final."

36. The appellant's rejoinder on the competence of the suit before the respondent was that she was not informed that she could file an appeal before the Appeals Board of the Council.

37. In our view, the avenue available to the appellant is clearly spelt-out. She ought to have appealed to the Chairman of the Council who would then have caused the Appeals Board of the Council to convene within 21 days. She failed to do so. Her contention that she ought to have been advised of this procedure is misplaced.

38. We believe we have said enough to show that this appeal is without merit. It is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

D.K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR