



Mambo v Masinde Muliro University of Science & Technology (Cause E039 of 2024) [2025] KEELRC 893 (KLR) (20 March 2025) (Ruling)

Neutral citation: [2025] KEELRC 893 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
CAUSE E039 OF 2024
DN NDERITU, J
MARCH 20, 2025**

BETWEEN

FIDELIS ARAMBE MAMBO CLAIMANT

AND

**MASINDE MULIRO UNIVERSITY OF SCIENCE &
TECHNOLOGY RESPONDENT**

RULING

I. Introduction

1. In a notice of motion (the application) dated 23rd December, 2024 the claimant, through Makonjo, Nyaberi & Co Advocates, is seeking for the following orders –
 1. Spent.
 2. Spent.
 3. Spent.
 4. That pending the hearing and determination of the suit, an order be issued reinstating the claimant to his position as Senior Lecturer Grade XIII in the Department of Medical Laboratory Sciences at the Respondent institution.
 5. The costs of this application be provided for.
2. The application is expressed to be brought under Section 12 of the *Employment and Labour Relations Court Act*, Sections 40, 43, 44, 45(2), 49, 50, & 51 of the *Employment Act* and based on the grounds stated on the face of it. It supported with the affidavit of the applicant sworn on even date with several annexures attached.



3. In response to the application the respondents, through Malalah & Co Advocates, filed a replying affidavit sworn by Prof. John Kuria Thuo sworn on 22nd January, 2025.
4. By consent, the application was canvassed by way of written submissions. Counsel for the claimant filed written submissions dated 20th January, 2025 while those by the counsel for the respondent are dated 5th February, 2025.

II. The Evidence

5. In the supporting affidavit, it is deposed that the claimant was on 4th September, 2024 un-procedurally, arbitrarily, and unlawfully terminated by the respondent from his employment as a senior lecturer Grade XIII without payment of terminal dues, salary arrears, allowances, and all other outstanding benefits that were due and payable to him.
6. It is further deposed that on 20th November, 2024 and again on 16th December, 2024 the claimant requested the respondent to constitute an appeals board to review the termination but no action had been taken as at the time this claim was lodged in court. It is stated that attempts by the Universities Academic Staff Union (UASU) to intervene for and on behalf of the claimant bore no fruit.
7. It is deposed that the claimant was not afforded a fair hearing before the termination and that representatives from the union objected to the disciplinary hearing as the claimant had not been served with the evidence that was in custody of the respondent.
8. It is further deposed that the claimant is not guilty of the charges levelled against him and that by terminating him in the manner that the respondent did his rights to fair labour practices under Article 41 of *the Constitution* were grossly violated.
9. It is the claimant's position that based on the foregoing depositions and the documentary evidence attached to the affidavit as filed with the claim he has prima facie case against the respondent with a high probability of success and he therefore prays that he be reinstated to his employment pending the hearing and determination of the cause.
10. The deponent in the replying affidavit is the deputy vice chancellor (administration & finance) of the respondent. It is deposed that the claimant was terminated on grounds of gross misconduct. It is further disposed that prior to his termination the claimant was issued and served with a show-cause letter on 3rd July, 2024. It is deposed that the charges against the claimant concerned massive deletion and alteration of student's marks effected using the claimant's login credentials.
11. It is deposed that the response to the show-cause by the claimant was found unsatisfactory and as such the claimant was invited for a disciplinary hearing vide a letter dated 23rd July, 2024. The disciplinary hearing was conducted on 7th August, 2024 with the claimant attending with two union representatives of his choice.
12. It is further deposed that upon the conclusion of the hearing session the panel retreated to consider the matter and on 3rd October, 2024 it was unanimously decided that the claimant be terminated on grounds of gross misconduct.
13. It is further deposed that the claimant requested for a review of the termination but before an appeal board was constituted he filed this cause in court effectively rendering the appeal process nugatory.
14. It is deposed that the termination was fair, procedural, and lawful and that the respondent shall be prejudiced if an order for reinstatement is made before the cause is heard on merits.



III. Submissions By Counsel

15. Counsel for the claimant submitted that the termination of the claimant by the respondent was unlawful for failure to comply with the law as provided for in the statutory provisions cited in the application and recited above as well as Article 47 of *the Constitution* on fair administrative action. It is further submitted that the respondent violated Article 41 of *the Constitution* for denying the claimant fair labour practice and natural justice.
16. Besides the denial of fair hearing, it is submitted that the claimant was denied right of appeal. It is further submitted that the claimant was denied access to the evidence that was used against him during the disciplinary hearing and that this prejudiced his defence to the charges that he faced.
17. It is further submitted that the claimant's right to legitimate expectation to continue serving the respondent was violated as the unfair and unlawful dismissal interrupted his many years of service.
18. Counsel for the claimant cited various decisions on the application and award of the remedy of reinstatement and the place of fair hearing both in substance and procedure. In that regard counsel cited *Mary Chemweno v Kenya Pipeline Company Limited* [2014] eKLR and *Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 Others* [2014] eKLR amongst other decisions.
19. It is submitted that the claimant has at this interlocutory stage demonstrated prima facie case with a probability of success and stands to suffer irreparable harm beyond monetary compensation if the orders sought are not granted.
20. Counsel for the respondent submitted that reinstatement is an order of specific performance that may only be granted upon the court hearing both sides on merits of the cause.
21. It is further submitted that the allegation that the claimant was denied access to the evidence against him is completely false as he was allowed to access all information and supplied with logs to do so following his request made on 29th July, 2024 long before the disciplinary hearing was held. It is submitted that the claimant was supplied with the logs on 6th August, 2024 which gave him ample time to prepare his defence.
22. Further, it is submitted that upon the investigation report being tabled during the disciplinary hearing, the claimant, as per the minutes of the meeting, was asked whether he needed more time to respond to the same but he answered in the negative. It is submitted that the allegations made by the claimant in the application and indeed in the entire cause are an afterthought and that the respondent shall demonstrate as such during the hearing.
23. It is submitted that the respondent has no issue settling any terminal dues owed to the claimant upon his clearing with its departments as per the applicable procedure.
24. On the allegation that the claimant was denied a chance to appeal the termination, it is submitted that it is the claimant who abandoned the process and instead opted to file this cause in court. It is the respondent's position that the appeal process was initiated by the claimant who subsequently abandoned the same and filed this cause in court. It is submitted that the review of the termination was to be completed within six months and that the respondent was ready and willing to abide with the timelines were it not that the claimant abandoned the process and instead filed this claim in court.
25. Citing the Court of Appeal in *Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union* [2018] eKLR it is submitted that reinstatement is a substantive remedy that should be awarded after a hearing of the cause, not a temporary relief.



26. It is further submitted that whatever loss or damage that the claimant may suffer during the pendency of this cause is quantifiable in monetary terms and hence compensable by way of award of damages. It is submitted that employment is a special form of contract that involves personal relationship akin to a marriage. It is thus submitted that it would be grossly unfair to force either party to remain in a relationship that has irretrievably broken down.
27. It is submitted that the decisions cited by counsel for the claimant concerned reinstatement as a final substantive remedy and not grant of the same at an interlocutory or interim stage of the proceedings. Counsel cited *Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union* (supra) to the effect that reinstatement should be a final substantive remedy as opposed to an order for temporary or interim relief.
28. It is submitted that notwithstanding that the claimant was charged with gross misconduct, he was nonetheless afforded a fair hearing in accordance with the law and the human resources policy and guidelines applicable. It is urged that the court should dismiss the application and allow a hearing of the cause on merits for substantive and final resolution of the same.

IV. Issues For Determination

29. In the considered view of the court there is only one main issue for determination in this application – Should the court allow the application as prayed and hence reinstate the claimant to his employment pending the hearing and determination of the cause?
30. The court agrees with the observation by the Court of Appeal in *Kenya Tea Growers Association & Another v Kenya Plantation & Agricultural Workers Union* [2018] eKLR wherein the decision of Rika J in *Alfred Nyungu Kimungi v Bomas of Kenya* [2013] eKLR was cited with approval, to the effect that reinstatement should ordinarily be granted as a substantive final remedy as opposed to an interim or interlocutory relief.
31. This is so because where reinstatement is allowed as an interlocutory relief it overturns the decision of the employer and therefore in some way, even though in the interim, prejudices the dispute. Unless in the clearest of the causes, a court should be careful and cautious in making an order for reinstatement in the apprehension that if it finally finds and holds that the termination was fair and lawful it shall have to reverse the order it made and send the employee home altogether. Unless for good reasons shown and demonstrated, it is paramount that a court maintains and retains the status quo as at the time of the filing of the cause, without making any substantive orders or findings, pending the hearing and determination of the cause upon hearing both sides on merits.
32. In this cause, the evidence on record is that the claimant was terminated on alleged misconduct concerning deletion, manipulation, and interference with marks awarded to students. The respondent considered the misconduct gross and upon what it considered to be a fair hearing it terminated the claimant. On the other hand, the claimant alleges that the hearing was neither fair nor lawful.
33. The above central issue, on fair hearing, goes to the core of substantive and procedural fairness or due process before termination. That is an issue that may only be canvassed and determined upon a hearing and adduction of evidence from both sides in support of their now obviously diametrically opposed views and positions.
34. In the interest of justice and fairness, the court orders and directs that this cause be heard on priority basis to beat the deadline of three years within which reinstatement may be ordered under Section 12(3)(vii) of the Employment and *Labour Relations Act*, just in case the court finds in favour of the claimant upon full hearing.



35. In any event, the salary, allowances, and other emoluments payable to the claimant are known, documented, and quantifiable. The issue of irreparable loss or damage should not arise. The balance of convenience shifts in favour of the court not granting the orders sought at this stage.
36. For now, and for the reasons cited above, the application by the claimant for reinstatement in the interim is denied.

V. Orders

37. The court makes the following orders –
 - a. The notice of motion dated December 23, 2024 is hereby dismissed.
 - b. This cause shall be fixed for hearing on merits and on priority basis.
 - c. Costs in the cause.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 20TH DAY OF MARCH, 2025.

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DAVID NDERITU

JUDGE

