



**Too v University of Eastern Africa, Baraton (Cause E023 of 2021)
[2024] KEELRC 42 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 42 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE E023 OF 2021
MA ONYANGO, J
JANUARY 25, 2024**

BETWEEN

SAMWEL KIPKEMBOI TOO CLAIMANT

AND

UNIVERSITY OF EASTERN AFRICA, BARATON RESPONDENT

JUDGMENT

1. Vide his Statement of Claim dated 22nd June 2021 and filed in Court on 25th June 2021, the Claimant avers that his employment was unfairly terminated by the Respondent and further that, he was not paid his terminal benefits. He seeks the following reliefs against the Respondent:
 - i. A declaration that the Claimant’s services were unprocedurally, unlawfully and unfairly terminated and in the circumstances the Claimant is entitled to compensation of his terminal dues as outlined in his Statement of claim
 - ii. The sum of Kshs 2,797,200 set out in the statement of claim
 - iii. Certificate of service
 - iv. Cost of this suit and interests at court rates from the time of filing the suit until payment in full
 - v. Any other further and better relief the Honourable Court may deem just and fit to grant.
2. In his statement of claim, the Claimant particularized the compensation he is seeking from the Respondent as follows:
 - a. 3 months in lieu of notice.....Kshs 466,200
 - b. Compensation for unfair termination...Kshs 1,864,800
 - c. Unpaid five months salary.....Kshs 777,800



3. The Claimant states that he was employed on permanent terms by the Respondent as an Assistant Lecturer with effect from 1st January 2012 at a salary of Kshs 106,000 per month and that as at the time his employment was terminated he was earning Kshs 133,000 and a house allowance of Kshs 22,400 per month.
4. It is the Claimant's case that he served the Respondent with loyalty, diligence and with full dedication until 6th February 2020 when the Respondent wrongfully, unprocedurally and unlawfully terminated his services.
5. According to the Claimant, on 27th January 2020 he felt dizzy and found himself in the hospital where he was admitted and discharged on 2nd February 2020 and advised to take a bed rest for 3 days.
6. He avers that he went back to work on 6th February 2020 and upon arrival at the gate, he was directed to wait for the Chief Security Officer, a Mr Korir, who came and informed him that he (Mr. Korir) had been directed to lead the Claimant to the office of the Deputy Vice Chancellor (DVC) Academics immediately he resumed.
7. The Claimant states he was escorted to the office of the DVC who inquired about his absence from work. The Claimant explained that he was indisposed and even showed the DVC the medication and medical reports.
8. The Claimant further contends that the DVC told him to go back home and that all the subjects he was teaching had been assigned to someone else.
9. He maintains that he was later on served with a letter addressed to the University Council recommending that he be summarily dismissed on account of absconding duty from 27th January 2020 to 5th February 2020.
10. The Claimant states that on 14th July 2020 he received a dismissal letter dated 25th June 2020 which dismissal according to him was illegal, unfair and or unlawful and violates the provisions of sections 41(1), 44(4), 45(2) and 43 of the [Employment Act](#).
11. In summation, the Claimant contends that the termination was unprocedural, unlawful and illegal on the following grounds: -
 - a. The Respondent terminated the Claimant's employment without following the laid down procedure in the [Employment Act](#)
 - b. The Respondent did not give the Claimant termination notice as provided under section 35 of the [Employment Act](#)
 - c. The Respondent dismissed the Claimant without proving that the reason for the dismissal was valid
 - d. The Respondent failed to pay the Claimant his 12 months' salary for loss of employment as provided under section 15(c) of the Labour Institution Act
 - e. The Respondent did not act in accordance with justice and equity in terminating the Claimant's employment contrary to section 45 of the [Employment Act](#)
 - f. No valid warning notices if at all were ever issued to the Claimant for breach of duty
 - g. No certificate of service was issued to the Claimant contrary to section 51 of the [Employment Act](#).



12. On 26th August, 2021 the Respondent filed a Response to the Memorandum of Claim dated 24th August 2021 denying the averments in the claim in totality.
13. According to the Respondent, it informed the Claimant of the reasons for his termination from employment, heard and considered the Claimant's representations before the decision was made and the termination was well founded and fair, it avers that it duly discharged its obligations and mandate under the Employment Act and did not violate any Constitutional provision in terminating the Claimant's employment.
14. The Respondent further stated that the Claimant is not entitled to the reliefs he is seeking as the termination of his employment was justified and procedural.
15. The Claim was heard on 7th June 2023 when the Claimant testified as CW1 in furtherance of his case.
16. CW1 relied on his witness statement as well as his documents filed in court as his evidence in chief. In his testimony, CW1 reiterated the contents of his Statement of Claim. It was his evidence that he did not appear before any administrative board, was never issued with a show cause letter and that he was never invited to appear before any university body for a disciplinary hearing. He also stated that the Respondent stopped his salary for 5 months before his dismissal.
17. According to CW1, he did not abscond duty and in as much as he was sick and admitted in hospital, he went on to interact with the students and gave them instructions online.
18. On cross examination by Counsel Momanyi for the Respondent, the Claimant admitted that he did not communicate to the university about his absence. CW1 also conceded that he did not discharge his duties during his absence.
19. The Respondent called Paul Kiplimo Kirwa, who testified as RW1. RW1 introduced himself as the Director of Alumni and Development, and a member of the Respondent's Administrative Board. He adopted his witness statement dated 27th April 2023 as part of his evidence in chief.
20. RW1 in his testimony stated that the Claimant absconded duty from 27th January 2020 to 5th February 2020 which concern was raised by the Head of Department in the School of Humanity and Social Sciences. RW1 stated that the Head of Department in which the Claimant was serving recommended his summary dismissal to the University Board.
21. RW1 told the court that the Respondent summarily dismissed the Claimant since absconding duty is gross misconduct which according to the Respondent's policy, attracts summary dismissal.
22. RW1 stated that the Claimant tendered a falsified document, being the Discharge Summary from Nandi Hills Hospital where the Respondent conducted investigations and established that the Claimant was not admitted at the said hospital as alleged.
23. The Respondent's witness informed the court that the Claimant had a habit of absconding duty and that he had been issued with several warning letters dating back from 2018.
24. On being cross examined by Counsel Kirwa, RW1 conceded that the Claimant was not given any notice prior to the termination and that no documentation had been produced in court to prove that the Claimant was taken through a disciplinary process. RW1 however maintained that the Respondent followed the laid down procedure in dismissing the Claimant from employment.
25. RW1 also stated that the Claimant was issued with the dismissal letter in June 2020, about 5 months from 5th February 2020 and that he was not paid his salary during the said period. He also testified that the Claimant was not issued with a certificate of service.



26. With that evidence, the Respondent closed its case and the court directed the parties to file submissions. The Claimant's submissions were filed on 27th July 2023 while the Respondent's submissions were filed on 20th August 2023.

The Submissions

27. In his submissions, the Claimant framed the issues for determination to be:
- i. Whether the Claimant was unlawfully, unprocedurally and unfairly terminated from employment by the Respondent,
 - ii. Whether the Claimant is entitled to compensation for unlawful, unprocedural and unfair termination from employment,
 - iii. Whether the Claimant is entitled to an award of certificate of service,
 - iv. Who should pay costs and interest of the suit.
28. In addressing the first issue, the Claimant submitted that the Respondent falsely accused him of absconding duty yet the Claimant had already informed the university that he was feeling unwell.
29. It is the Claimant's submission that despite the Respondent accusing him of absconding duty, it never issued any notification asking him to show cause why disciplinary action should not be taken against him. The Claimant also submitted that he was not issued with a 3 months' notice as provided for in the Employee Handbook.
30. According to the Claimant, the Respondent is statutorily required to have a disciplinary mechanism where employees facing disciplinary action are given an opportunity to defend themselves.
31. In the end, the Claimant sought to be awarded compensation for the unfair termination as prayed for in the Memorandum of claim and the submissions.
32. The Respondent on the other hand in its submissions identified the issues for determination to be:
- i. Whether the summary dismissal was substantively fair,
 - ii. What reliefs are available to the Claimant if any in the circumstances of this matter,
 - iii. Who should shoulder the costs of this claim.
33. On the first issue, the Respondent submitted that the Claimant in his evidence did not refute the fact that there was no evidence of any communication made to the Respondent of his whereabouts. It was also submitted that the Claimant did not provide any evidence that he performed any duty during the period he absconded duty.
34. It is the Respondent's submission that the Claimant's allegation that he held virtual classes is not true as according to the Respondent's witness, the Respondent had not started holding virtual classes during the period the Claimant absconded duty.
35. The Respondent submitted that the Claimant's conduct negatively affected quality education for its students as they were left untaught, unattended and unsupervised between January 27, 2020 and February 5, 2020.
36. The Respondent further submitted that considering the circumstances of this matter, including but not limited to the industry that the Claimant was working in, the nature of the relationship between



the Claimant and the Respondent, the alleged misconduct of the Claimant, the court should find the dismissal on the account given by the Respondent to be valid, tenable and unfair.

37. with regard to the reliefs that the Claimant is seeking in this claim, the Respondent submitted that since the Claimant's summary dismissal was substantively fair owing to the circumstances of this case, the Claimant is not entitled to the same.
38. Lastly, the Respondent in its submission proposed that should the court find that the dismissal was unfair, the Claimant should be awarded one month basic salary plus house allowance less statutory deductions.

Determination

39. Upon considering the pleadings herein, the evidence of the respective parties, the submissions and as well as the authorities cited, I find that the issues for determination are: -
 - i. Whether the Claimant was unlawfully terminated or he absconded duty,
 - ii. Whether the Claimant is entitled to the remedies sought.
40. On the first issue, it is the Claimant's submission that he was unprocedurally and unlawfully terminated from employment by the Respondent after he failed to go to work from 27th January 2020 to 5th February 2020 while he was unwell.
41. The Claimant produced the discharge summary from Nandi Hills Hospital as evidence that he was indeed unwell during the said period.
42. The Respondent on the other hand maintained that the Claimant did not inform it of his whereabouts during the period he alleges to have been unwell and that the discharge summary from Nandi Hills Hospital was a falsified document.
43. In order to determine whether the termination of the Claimant's employment was fair and lawful, it is incumbent on this court to establish if the reasons advanced by the Respondent for the said termination were valid and whether that there was procedural fairness before the said termination.
44. It is not in dispute that the Claimant did not communicate his indisposition to the Respondent. The failure to communicate the reason for his absence from duty, in my view gave the Respondent the impression that the Claimant had absconded duty. An employee is obligated to inform an employer of his absence from work and give reasons for the absence.
45. Section 43 of *Employment Act* 2007 provides as follows:
 - " 43. Proof of reason for termination
 - (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee".



46. Section 44(4) (a) of the *Employment Act* 2007 provides as follows:
- (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—
- (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;
47. The section is specific that absence from work per se do not constitute a ground for dismissal unless it is without leave or other lawful cause. In this case it is not contested that the absence was without permission. The Claimant however states that the absence was for lawful cause. That he was unwell and had been admitted in hospital. He produced documents to support his averments.
48. For an employer to determine if the absence is for lawful cause or otherwise, it has to give the employee an opportunity to explain the reason for the absence. Section 43 of the *Employment Act* demands that the employer proves the grounds for dismissal. Further, Section 30(2) is specific that “For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.”
49. In the instant case the Claimant testified that he was admitted in hospital and thereafter discharged with sick leave for 3 days. That as soon as his sick off ended he reported to work with the discharge and treatment notes. The Respondent alluded to the fact that the documents were forgeries according to their investigations but this was never communicated to the Claimant to enable him confirm or rebut the same. Further, no evidence was produced in court to prove the said allegations of forgery. I therefore find that the Respondent did not prove valid reason for termination of the Claimant’s employment.
50. The next issue for determination is whether due process was followed by the Respondent before the termination of the Claimant’s employment.

Section 41 of the *Employment Act* provides:-

“Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

51. From the evidence of the parties in court and particularly that of RW1 who alleged that due process was followed in the termination of the Claimant’s employment, no evidence was tabled before the court to satisfy itself that the Claimant was indeed taken through due procedure as required by law.
52. The Court of Appeal in the case of Janet Nyandiko –vs- Kenya Commercial Bank Limited[2017] eKLR held that an employer is enjoined to comply with the mandatory provisions of Section 41 and 45 of the *Employment Act* in terminating an employee’s employment, and that failure to do so renders the termination unfair.
53. In the absence of evidence that the Claimant was subjected to a fair disciplinary process before termination of employment, the termination was unprocedural and therefore unfair.



What reliefs should then issue?

54. The Claimant sought the following reliefs which I proceed to address in separate heads:

a) Salary in lieu of notice

Having made a finding that the Respondent had no valid reason to terminate the Claimant's employment on account of absconding duty, I find that the Claimant is entitled to pay in lieu of notice and award him the same. According to the Claimant's terms of appointment an employee with more than 5 years' service is entitled to 3 months' notice or pay in lieu thereof while one with less than 5 years' service is entitled to one month's notice. Having worked from 2012 to 2020 which is more than 5 years, I award the Claimant 3 months' salary in lieu of notice in the sum of Kshs. 466,200.

b) Compensation for unlawful termination

The Respondent having failed to prove the reasons for termination of the Claimant's employment, and the termination having been unprocedural and unlawful, the Claimant is entitled to compensation in terms of section 49 of the *Employment Act*. Taking into account his length of service, the circumstances under which he lost his job, the conduct of the Respondent in the process of terminating the Claimant's employment and all other relevant factors under section 49(4) of the Act, I award the Claimant 8 months' salary as compensation in the sum of Kshs. 1,243,200.

c) Unpaid five months salary

From the evidence of the Claimant and of RW1, the Claimant was not paid his salary from the time the Respondent recommended the termination of his employment up to the time he received the letter of termination. I therefore find that the Claimant is entitled to compensation under this head. I award the Claimant the salary for the 5 months in the sum of Kshs 777,000.

d) Certificate of Service

The Claimant is entitled to be issued with a Certificate of Service pursuant to Section 51(1) of the *Employment Act* 2007. The Respondent is directed to issue the same.

55. In conclusion, judgment is hereby entered in favour of the Claimant against the Respondent as follows in the total sum of Kshs. 2,486,400.

56. The Respondent shall issue a Certificate of Service to the Claimant within thirty days of this judgment.

57. The Respondent shall bear the Claimant's costs of this suit.

58. Interest shall accrue at court rates from date of judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 25TH DAY OF JANUARY 2024.

MAUREEN ONYANGO

JUDGE

