



**Silali v Maseno University (Cause E014 of 2023)
[2024] KEELRC 967 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 967 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E014 OF 2023
CN BAARI, J
FEBRUARY 22, 2024**

BETWEEN

MAURICE BARASA SILALI CLAIMANT

AND

MASENO UNIVERSITY RESPONDENT

JUDGMENT

1. The Claimant lodged a statement of claim against the Respondent dated 8th March, 2023, and filed on 9th March, 2023. Under the claim, he seeks the following reliefs: -
 - i. A declaration that his dismissal was unlawful, unprocedural and unjustified.
 - ii. Three months salary in lieu of notice.
 - iii. 12 months gross salary as compensation for unlawful termination.
 - iv. In the alternative an order for reinstatement to his former or equivalent position.
 - v. Service pay for ten years work.
 - vi. Interest at court rates on (b), (c) and (e) from the date of filing suit till payment in full.
 - vii. Costs and interest at court rates from the date of judgment till payment in full.
 - viii. Any other relief that this court may deem fit to grant.
2. The Respondent entered an appearance on 23rd March, 2023 and subsequently filed a Statement of Response to the Claimant's claim dated 4th April, 2023 and filed on 6th April, 2023. Under the response, the Respondent generally denied the averments in the claim, and affirmed that the termination process was above board.



3. The Claimant's case was heard on 17th July, 2023, when he testified, adopted his witness statement and produced documents filed as exhibits in support of his case.
4. The Respondent's case was heard on 27th September, 2023. It presented one Millicent Madara, the Human Resources officer to testify on its behalf. Ms. Madara sought to adopt her witness statement and produced a list and bundle of documents filed in support of the Respondents' case.
5. Submissions were filed for both parties.

The Claimant's case.

6. The Claimant's case is that he was employed by the Respondent on the 16th June, 2011 as a Senior Technologist, Human Anatomy on a monthly salary of Kshs 40,492/= and a house allowance of Kshs 30,960/=. He states that his term of employment was permanent and pensionable.
7. It is his contention that due to his diligence and resilience, he was promoted on various occasions resulting in his gross salary rising to Kshs 196,611/=.
8. It is his case that on 6th September, 2021, he was invited to show cause why disciplinary action should not be taken against him for disrupting postgraduate examinations, and harassing a female student, which allegations he states are false and unfounded.
9. It is his further assertion that at the disciplinary hearing of the 8th July, 2022, he was neither supplied with the Respondents documents nor allowed to cross-examine his accusers.
10. It is his claim that the hearing was cobbled up with the sole aim of finding him culpable given that no warning letters were issued in accordance with the CBA.
11. It is his case that his eventual termination on 22nd July, 2022, was illegal and unfair. He states that his appeal against the dismissal was dismissed, and the decision to terminate his services upheld.
12. In examination in chief, the Claimant maintained that he never attacked the alleged student, nor did he disrupt any examinations.
13. On cross-examination, the Claimant admitted receipt of show cause and that he did respond to the letter. The Claimant further confirmed on cross that he was invited for a disciplinary hearing, but that he did not see his union representative at the hearing.
14. Although the Claimant told court that he did not know what he was paid, he at the same time admitted receiving all his dues.
15. It is his prayer that he be compensated for unfair termination.

The Respondent's Case

16. The Respondent's case is that the Claimant was under its employment between 1st August, 2011 and 22nd July, 2022. It further states that the Claimants employment was marred by numerous complaints from colleagues, students and university section heads.
17. It is the Respondent's case that on the 27th August, 2021, the Claimant stopped an exam midway by taking the students' booklets. The Claimant is further accused of harassing a student by the name Ms Stella Papa.
18. It is the Respondent's further contention that the Claimants termination was fair on the basis that he was issued with a show cause letter dated 29th September, 2021, and given 14 days to respond.



19. It is the Respondent's case that the Claimant responded to the show cause on 6th October, 2021, and appeared before the staff disciplinary committee on 18th July, 2022, for hearing in the company of two union officials.
20. It states that the Claimant was granted ample opportunity to defend himself, but chose instead, to just deny the charges against him and never requested to examine any witnesses.
21. The Respondent contends that the decision of the disciplinary committee was communicated to him, which he appealed against, albeit unsuccessfully.
22. The Respondent states that the Claimant has since cleared with the university and all outstanding dues have been settled. It states that the Claimant was also issued a certificate of service.
23. On cross exam, the Respondent's witness (RW1) told court that the CBA between the Respondent and the Claimant's union, provided for a 6 months' notice or equivalent pay in lieu thereof.
24. It is RW1's further testimony that the Claimant was issued various warning letters from the department. She further confirmed that the complainant did not appear before the disciplinary committee and that it is he (Dr. Marera) who corrected the error on the incident date, the course and the examination venue.
25. RW1's further evidence is that one Stella Papa, the post graduate student said to have been harassed by the Claimant is not captured in the minutes as having appeared before the disciplinary committee.
26. RW1 further confirmed that neither the Claimant nor his accuser were interviewed by the incident investigators.
27. The Respondent prays that the Claimant's suit be dismissed with costs.

The Claimants Submissions

28. It is the Claimant's submission that the reason and procedure for his dismissal was fundamentally flawed.
29. It is the Claimant's further submission that the Respondent's reasons for dismissing him were not valid. He submits that there were no examinations on 20th August, 2021.
30. He submitted that the accusation of harassment of the student is not true, as the statements he uttered were merely an expression of his opinions which are protected by Article 32 (1) of *the Constitution*, on freedom of expression.
31. He submits that the principles of natural justice were not adhered to in respect of his hearing as he was not allowed to cross-examine his accusers and secondly, none of the students whose exam was disrupted was interviewed or called to testify at the hearing.
32. It is the Claimant's submission that as per clause 17.2.1 of the CBA, he was entitled to 6 months salary in lieu of notice, meaning a deficit of Kshs 589,833/= was still outstanding. He further averred that given his 10 years of service and the fact that it was proving difficult to get employment, he was entitled to 12 months' salary as compensation for the unfair termination.
33. In support of reinstatement, the Claimant submitted that it be considered an alternate remedy which is also provided for by section 49(3) of the *Employment Act*.
34. The Claimant submits further that the CBA provided for 31% of the basic salary as service pay.



35. It is his final submission that he is entitled to costs of the suit based on the Respondent's disregard of the issues raised in the demand letter.

The Respondent's Submissions

36. The Respondent's submission is that the Claimant's dismissal passed the procedural fairness test stipulated in Section 41 of the Employment Act, and re-emphasised by the Court of Appeal in *Postal Corporation Of Kenya vs Andrew Tanui* [2019] eKLR.

37. It is its further submission that it explained the grounds for termination in a language the Claimant understood, explained the reason why it was considering termination and allowed the presence of another employee at the hearing. It submits further that it fully complied with its terms and conditions of service, and the Human Resource Policy and Procedure Manual.

38. It is the Respondent's further submission that being a University whose core business was imparting knowledge, the Claimant's action of disrupting examinations amounted to gross misconduct.

39. It is its further contention that the disruption was sufficiently proven by the incidence report, and the harassment of the student also proved by the student's complaint lodged on 10th July, 2021.

40. The Respondent's further submission is that on the threshold of the evidence required to dismiss, the general evidence would suffice as provided for in Section 63(2) of the Universities Act which states that: -

“A university council may act on general evidence the character or conduct of the person concerned and shall not be bound by the rules of evidence as set out in the Evidence Act.”

41. The Respondent further sought to rely on the Court of Appeal decision in *Sotik Highlands Tea Estates Ltd vs Kenya Plantation and Agricultural Workers Union* [2017] eKLR, where the court was of the opinion that disciplinary proceedings were not criminal in nature, hence did not require a very high standard of proof.

42. The Respondent submits that the termination was fair and the Claimant had already been paid 3 months salary in lieu of notice. It submits further that the prayer for 12 months gross salary as compensation, is not tenable given the fairness of the dismissal.

43. The Respondent submits that the reinstatement is not practical, the Claimant having been found guilty of two counts of gross misconduct. Moreover, it averred that its confidence in the Claimant had been irretrievably eroded.

44. The Respondent submits that the claim for service pay for the ten years worked, is not payable as the Claimant was a member of NSSF.

45. It urged that the Claimant's claim be dismissed with costs.

Analysis and Determination

46. The issues that crystallize for determination are: -

- i. Whether the Claimant's termination was fair.
- ii. Whether the Claimant is entitled to the remedies sought.



Whether the Claimant's termination was fair

47. Section 45 of the *Employment Act* provides that no employer shall terminate the employment of an employee unfairly. According to the Act, a termination is fair where the employer adheres to fair process and on prove of the validity and fairness of reasons for termination.
48. Section 41 demands that an employer before terminating an employee on the grounds of misconduct, poor performance or physical incapacity, explains to the employee in a language the employee understands the reasons for which the employer is considering termination.
49. On 29th September, 2021, the Claimant was served with a notice to show cause, and for which he was required to respond within 14 days. Pursuant to the notice, the Claimant submitted his response on 6th October, 2021.
50. Subsequently on 20th April, 2022, the Claimant was summoned to appear before the Respondent's staff disciplinary committee. The hearing was adjourned severally at the Respondent's behest, but finally took place on 18th July, 2022. The minutes of the disciplinary hearing indicate that the Claimant responded to the charges and made representations.
51. It is also apparent that the union was present during the hearing and made their statement in the Claimant's defence.
52. Following the hearing, the Claimant was issued with a termination letter on 22nd July 2022.
53. Going by the chronology of events relating to the disciplinary process, it is clear that the Respondent adhered to the provisions of Section 41 to the letter. In *Silvester Malei Kyengo v Kenya Meat Commission* (2019) eKLR, the court had this to say on fair procedure:

“In this case the Claimant was first served with a show cause letter stating the charges against him, interdicted pending investigation, accorded an oral hearing in the company of another employee of his choice and finally served with a termination letter confirming that his defence was considered but his services terminated for reasons cited in the letter. Such procedure in my view passes the test of procedural fairness and I so hold.”
54. I thus find and hold that the Claimant's termination is procedurally fair.
55. On the question of validity and fairness of reasons for termination, the law demands that the employer proves that the reasons upon which a dismissal/termination is premised, are fair, valid and justified. In *Kenfreight (EA) Ltd v Benson K. Nguti* [2016] eKLR the Supreme court stated:

“Termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination is itself not fair”
56. The reasons for the Claimant's termination revolved around disruption of an exam on 27th August, 2021, and frequent harassment of a student named Stella Papa. Although the Claimant disputed the dates when the examination in issue took place, RW1 told court that the date of disruption of exams was 27th August, 2021 and not, 20th August, 2021 and that the error was corrected.



57. In *Charles Musungu Odana v Kenya Ports Authority* [2019] eKLR, the Court stated,

“It is now clear that the burden placed on an employer by Section 43 of the *Employment Act* is to establish a valid reason that would cause a reasonable employer to terminate employment.”

58. In my view, integrity of examination is critical to any university or learning institution for that matter. For one to withdraw examination papers already issued to students in an examination session, is no doubt an act of gross misconduct, and which justifies the termination of the concerned employee.

59. On the second reason for the termination, which is frequent harassment of Stella Papa, the Respondent produced an email in which she avers that the Claimant subjected her to constant negative attacks. The Respondent equally produced a statement by Philip Muga who stated that sometime in June, 2020, the Claimant had a bitter verbal exchange with Stella Papa that threatened to turn physical.

60. In my view, the reasons foregone, are prove on a balance of probabilities that the Claimant was abrasive, rash and antagonistic to the student, which together with the prove that he disrupted the Respondent’s examinations, justify the termination.

61. I thus return that the Claimant’s termination is not unfair.

Whether the Claimant is entitled to the remedies sought Compensation

62. An award of compensation is only tenable upon a finding of an unfair termination. Having found the Claimant’s termination fair, the claim fails and is dismissed.

Salary in lieu of Notice

63. The Claimant submitted that he was entitled to 6 months’ salary as provided under the CBA. On cross exam, the Respondent’s witness (RW1) told court that the CBA between the Respondent and the Claimant’s union, provided for a 6 months’ notice or equivalent pay in lieu thereof.

64. The CBA produced in evidence indeed provides for a six (6) months’ termination notice or payment of six months salary in lieu of notice. The Court however notes that the period of the CBA is 2013-2017, while the Claimant was terminated on 22nd July, 2022, long after the life of the CBA.

65. The CBA is therefore not applicable, and the Claimant having acknowledged payment of 3 months salary in lieu of notice, means that he is not entitled to any more on this account. The claim fails.

Service Pay

66. The Claimant sought for 10 years’ service pay. The pay slips he produced show that he was contributing to the National Social Security Fund. For this reason, he is not eligible for service pay as per the provisions of Section 35(5) and (6) of the *Employment Act*.

Reinstatement

67. The prayer for reinstatement is an alternative remedy to compensation. The Claimant’s termination has been found to be fair, hence, the prayer for reinstatement cannot stand. It is dismissed.

68. The upshot is that the Claimant’s claim is devoid of merit and is dismissed in its entirety with no orders on costs.

69. Judgment of the Court.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 22ND
DAY OF FEBRUARY, 2024.**

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Brian Otieno present for the Claimant

Ms. Rama h/b for Ms. Akinyi for the Respondent

Erwin Ongor - Court Assistant.

