



**Ondieki v Vice Chancellor, Maasai Mara University & 2 others; Chairman Audit Committee Maasai Mara University (Interested Party) (Employment and Labour Relations Cause 2234 of 2017) [2024] KEELRC 254 (KLR) (13 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 254 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2234 OF 2017  
AN MWAURE, J  
FEBRUARY 13, 2024**

**BETWEEN**

**MOSE NYAMBEGA ONDIEKI ..... CLAIMANT**

**AND**

**VICE CHANCELLOR, MAASAI MARA UNIVERSITY ..... 1<sup>ST</sup> RESPONDENT**

**CHAIRMAN OF COUNCIL, MAASAI MARA UNIVERSITY .... 2<sup>ND</sup> RESPONDENT**

**MAASAI MARA UNIVERSITY ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**CHAIRMAN AUDIT COMMITTEE MAASAI MARA UNIVERSITY ..... INTERESTED PARTY**

**JUDGMENT**

1. The Claimant filed a Further Amended Memorandum of Claim dated 21<sup>st</sup> June 2018.

**Claimant’s Case**

2. The Claimant avers that he was employed by the Respondent as a Senior Internal Auditor Scale 13 on 21.09.2010. The employment was on permanent and pensionable terms, earning a monthly salary of Kshs 245,272.
3. The Claimant avers that he worked diligently until 23.02.2016 when he was unlawfully, unfairly and maliciously suspended from employment on non-existent and never substantiated allegations.



4. The Claimant avers that he was placed under suspension with half basic salary and he responded to the letter of suspension vide a letter dated 01.03.2016 replying to every allegation made against his work.
5. The Claimant avers that since his suspension on 23<sup>rd</sup> February 2016, the Respondent has failed or neglected to inform him of the outcome of the investigations carried out regarding his conduct which led to his suspension.
6. The Claimant avers that he was wrongfully and maliciously suspended with the intention to punish him and cause trauma and maximum damage to his reputation as a professional.
7. The Claimant avers that after instituting this claim, the Respondents purported to invite him to a hearing on 10<sup>th</sup> February 2017, however, they did not copy the letter to his trade union, thus denying him his mandatory right to attend the hearing in the company of the union's representative.
8. The Claimant avers that the Respondents have never availed to him the investigation reports and any other evidence they may have against him.
9. The Claimant further avers that the letter of suspension and invitation to a hearing preferred different grounds hence altering the offences levelled against him.
10. The Claimant avers that the Respondent advertised his position via an advertisement in the Daily Nation newspaper on 24.03.2017 despite them not issuing him a letter of termination.
11. The Claimant avers that the Respondent through incessant interference, deployed staff to his department without consulting him with the intention of compromising its independent oversight function.
12. The Claimant avers that regarding the allegation that he failed to detect issues at the Kilgoris Learning Centre, he states that he requested for facilitation in order to audit the centre but the same was declined. Further, detective work was not a primary objective of the internal audit department.
13. The Claimant avers that after his suspension, the Respondents unlawfully recovered Kshs 111,450 from him being monies defrayed in the proper and ordinary conduct of his duties.
14. The Claimant avers that the Respondent (s) asked why he was auditing the institutional systems and demanded he should not audit or verify anything concerned with the Chairman of the Council and the Vice Chancellor contrary to the internal standards issued by the Institute of Internal Auditors (IIA), advisories and other relevant standards for accountants.
15. The Claimant avers that the 1<sup>st</sup> Respondent has failed to substantiate the allegations contained in the letter of suspension, and he was unlawfully, maliciously and without any reason as per the terms of employment, Maasai Mara University Statutes, 2013 and CBA suspended from his employment.
16. The Claimant avers that since his suspension he has been left in a state of anxiety and has been forced to relocate residence and change schools for his three children.
17. The Claimant avers that he was 38 years old at the time of his suspension hence he had 22 years to work for the Respondents till retirement.
18. The Claimant avers that on 25<sup>th</sup> January 2017, the Respondents invited the Claimant for a hearing on 10.02.2017 and once again on 26.03.2018 and thereafter issued him with a termination letter.
19. The Claimant avers that the hearing was a sham as the issues in the NTSC had been changed and was based on extraneous issues not within the work mandate of the Claimant. Further, he was never given any documents to appraise himself of the evidence that the Respondent had collected against him.



20. The Claimant avers that after the sham disciplinary hearings, the Respondent eventually summarily dismissed him on 03.04.2018.

### **Respondent's Case**

21. In opposition to the Claim, the Respondent filed its further amended response dated 7<sup>th</sup> June 2019.
22. The Respondent avers that the Claimant was appointed as a Senior Internal Auditor by the 3<sup>rd</sup> Respondent vide a letter dated 21.09.2010 earning a monthly salary of Kshs 76,371 and house allowance of Kshs 51,600.
23. The Respondent avers that the Claimant's duties included but was not limited to undertaking all lawful instructions given through authorised officers such as the Deputy Vice Chancellor and Vice Chancellor in accordance with the *Universities Act* and Statutes as amended from time to time with the assignments being performed in the interest of the University and Kenya at large.
24. The Respondent avers that the Claimant was suspended due to his incompetence and misconduct in discharging his duties but retained half his basic salary and full allowances and other benefits.
25. The Respondent avers that the Claimant incompetence and misconduct were:
- a. Failure to follow due procurement procedures – the Claimant single sourced the Student Management Information System (SMIS) software for the 3<sup>rd</sup> Respondent without following procurement procedures
  - b. Visit to university campuses – the Claimant facilitated by the 3<sup>rd</sup> Respondent to audit the satellite campuses and collaborating centres to a tune of Kshs. 153,500 but he did not submit any report of his findings e.g. Kilgoris satellite campus.
  - c. Missing documents during hand over
  - d. Failure to detect an act of fraud
  - e. Conniving with the former finance officer to hide suspense accounting documents
  - f. Insubordination – the Claimant wrote a letter to the ODPP concerning forgery of cheques in the university in breach of protocol on his part.
  - g. Misappropriation of funds meant for processing title deed.
  - h. Obtaining money on false pretence.
  - i. Forgery of reimbursement of optical glasses.
  - j. Theft and un procedural acquisition of 2 university laptops.
  - k. Illegally claiming for payment of practicing subscription to the Institute of Certified Public Accountants of Kenya.
26. The Respondent avers that the Claimant was clearly informed the reasons of his suspension and the particulars of his incompetence and professional misconduct to which he attempted to respond to some of them.
27. The Respondent avers that the Claimant was availed all evidence against him and was given adequate and reasonable opportunity to answer to the same.



28. The Respondent avers that the 3<sup>rd</sup> Respondent did not alter the offences as the grounds in the letter of suspension were not different from those contained in the invitation to a hearing which was merely giving more details of the Claimant's misconduct and incompetence.
29. The Respondent avers that the 3<sup>rd</sup> Respondent is not precluded by law or contractual provision from increasing the number of Senior Internal Auditors hence the advertisement made by the Respondents is within their prerogative and discretion. If the Claimant is reinstated by the university or this court he does not stand to suffer any prejudice or harm.
30. The Respondent avers that the Claimant was availed all resources to undertake his duties and by virtue of his qualifications he was reasonably expected to have known and prevented the 3<sup>rd</sup> Respondent from financial loss and damage, which he failed to discharge accordingly leading to his suspension.
31. The Respondent avers that the Claimant was informed of the outcome of the investigations and he has participated in a disciplinary hearing at the 3<sup>rd</sup> Respondent's institution.
32. The Respondent avers that the Claimant was notified of the charges of misconduct he faced vide letters dated 25<sup>th</sup> January 2017, 30<sup>th</sup> June 2017 and 14<sup>th</sup> March 2018 addressed and received by the Claimant.
33. The Respondent avers that vide a letter dated 14<sup>th</sup> March 2018, the Claimant was invited to appear before its disciplinary committee on 26<sup>th</sup> March 2018 which particularised the charges while referring to the previous letters sent to him.
34. The Respondents aver that the letter informed the Claimant that he was at liberty to appear with witness(es) and/or document(s) that he may have wished to rely upon and he may be accompanied by a representative of his choice and he appeared with James Ofwaya who was allowed audience before the disciplinary committee.
35. The Respondents aver that the Claimant did not raise any issue or objection that he was not given any document to enable him properly apprise himself of the evidence collected against him nor did he seek time or adjournment to peruse any of the documents used in the disciplinary hearing.
36. The Respondents aver that the disciplinary committee made the following findings:
  - i. The Claimant ought to have noticed the anomaly in the irregular water tank construction payment of Kshs 5,000,000 during reconciliation as the payment occurred on 28.08.2013 before separation of Audit and Compliance departments when he was the sole examiner of payment vouchers. The money was paid to a different party other than the contractor.
  - ii. The Claimant did not furnish the Committee with the hand over report. He was the custodian of the Audit Committee minutes and had the university laptop.
  - iii. The Claimant violated section 44(1)(h) and 73 of the Public Procurement & Asset Disposal Act, 2015 by purchasing a laptop by way of single sourcing and obtaining a refund.
  - iv. The Claimant used to get subsistence allowances for going to conduct audits at the Kilgoris campus but he never gave any report of his assessment. The campus was high risk and the Claimant failed to audit and was liable for this incompetence.
  - v. The Claimant made the university pay his annual subscription as a practicing member contrary to section 19(2) of the Accountants Act which states salaries government employees are not allowed to practice.



- vi. The Claimant confessed he is a silent partner at Olsen Partners in breach of section 19(1)(2) of the [Accountants Act](#) and Section 12(2) of the [Public Officer Ethics Act](#).
  - vii. The Claimant was exonerated from charges of insubordination & obtaining money by false pretence on account of no direct evidence was availed linking him to the charges.
37. The Respondents aver that the disciplinary committee was of the view the Claimant's dishonesty during the hearing destroyed the core of the terms of service as he had committed a gross offence under the [Employment Act](#).
38. The Respondents aver that the disciplinary committee considered article 4.7 of the Discipline Manual for Public Service on punishment for gross misconduct and article 19.1.3 of the CBA between Maasai Mara University and Kenya University Staff Union (Maasai Mara Chapter) which vouches for removal on good cause.

## **Evidence in Court**

### **Claimant**

39. The Claimant (CW1) testified and adopted his witness statement dated 20.7.2017 as his evidence in chief and list of documents dated 27.12.2016, 28.12.2016, 6.4.2017 and 7.4.2017 as his exhibits.
40. CW1 testified that he was employed in September 2010, worked with a number of councils until his termination in April 2018 which was preceded by his suspension in February 2016.
41. CW1 testified that on 23.2.2016, he was given 7 days to respond and although the letter was not specific he responded on 26.2.2016. The university put a publication confirming the letter was erroneous.
42. CW1 testified that he was suspended on grounds that he had not audited some issues and there were publications in the media where the university's reputation was infringed.
43. CW1 testified that he was to receive half pay during his suspension and was paid for about 3 months and the rest was recovered from CBA payments.
44. CW1 testified that he filed a suit on 28.12.2016 and was called for a disciplinary hearing on 10.2.2017 whoever the issues that led to his suspension were different from the issues raised in the hearing and were not communicated to him.
45. CW1 testified that he was terminated in 2018 vide a letter signed by the Vice Chancellor (VC), Prof Mary Walingo, instead of the Council's audit committee which he worked under. The VC was not to direct what he was to audit or not but could request for the same.
46. CW1 testified that he fell out with the VC because of compliance procedures. The finance director left and in 2016, the VC terminated him due to a number of violations which he tried to discuss but was denied an opportunity. The Council held they had no evidence against him and he should go home in February 2017.
47. CW1 testified that he was served with a further notice to show cause which had totally new items and he responded to it timely, however, he waited till April 2018 when he got the termination letter.
48. During cross examination, CW1 testified that he received half salary for about 3 months but the same was stopped.



49. CW1 testified that he was suspended in February 2016 and moved the court in December 2016. The Respondents did not conduct any investigations as the publication he alluded to had nothing to do with him and did not mention his name.
50. CW1 testified that he did not procure any spectacles and did not sign the receipts; he did not refer any matter to the police or document examiner as alleged.
51. CW1 testified that he does not know the source of the Respondents' document 34-36 and could not produce the documents in the disciplinary hearing.
52. CW1 testified that he did not procure the battery bought for the university as the Procurement Act has a procedure for small items therefore the purchase was done in consultation with procurement.
53. CW1 testified that he attended the disciplinary hearing and was informed the outcome of the hearing, however, the reasons of his termination in the letter were not the same as the notice to show cause.
54. CW1 testified that the letter dated 26.03.2017 was not presented to the union and he did not attend the hearing with a union representative.
55. CW1 testified that he was the head of internal audit and other auditors worked under him. The Respondents advertised to employ auditors and also his position while he was still in suspension.
56. CW1 testified that the Respondent recovered Kshs 11,000 from his salary for official transport expenses. The money had been expended and he could not explain as they came one year later.
57. CW1 testified that he was told by the VC not to audit some institutions in relation to the Mara heist.
58. CW1 testified that section 5.2 refers that indefinite suspension should not take more than 90 days unless its pending in court. In his case, he filed this suit in December 2016 while he was suspended in February of that year.

## **Respondents**

59. The Respondent's witness (RW1) David Tiampati is the Deputy Registrar HR at Maasai Mara University. He adopted his witness statement dated 10.06.2019 as his evidence in chief and list of documents dated 10.06.2019, 15.02.2017 and 07.06.2019 as his exhibits.
60. During cross examination, RW1 testified that the Respondents invited the Claimant to show cause vide a letter dated 23.02.2016 accompanied by the suspension letter. He was expected to respond within 7 days and he responded on 01.03.2016.
61. RW1 testified that the HR manual provided that the matter should be dispensed within 90 days. However, the Claimant was terminated on 16.04.2018, 2 years after his suspension, therefore, the period exceeded in breach of the HR manual and CBA which guard the process of termination.
62. RW1 testified that the HR manual provides that the suspension letter should be issued by the DVC Finance and Administration, however, the suspension letter and further notice to show cause issued on 30.06.2017 were issued by the VC.
63. RW1 testified that that the two notice to show cause were different, however, the second notice had distinct charges.
64. RW1 testified that that the Claimant was invited to appear before the disciplinary committee vide a letter dated 14.03.2018 and is not aware of the invitation dated 25.01.2017.



65. RW1 testified that the Claimant was paid 50% of his basic salary and house allowance and medicals and is not aware of any recovery of CBA deductions he was not paid.
66. RW1 testified that he was aware of the allegation that the Claimant made payment to an individual account instead of the company. RW1 did not check his response, however, payment to individual accounts are authorised by the VC who also issued the notice to show cause.
67. RW1 testified he is not aware of the audit reports of April 2017 made by the auditor or that the reports referred to the VC.
68. RW1 testified that there was an exception of the 90-day suspension period being whether the matter was undergoing investigation. There was no court order stopping the internal investigation.

### **Claimant's Submissions**

69. The Claimant submitted that it was an express term in the employment agreement that he would work for the Respondent on a permanent and pensionable terms that is up to his retirement age set at 60 years.
70. The Claimant submitted that the termination letter dated 16.04.2018 was irregular and it emanated from the VC's office contrary to the University's Human Resource Management Procedure Manual ('Manual') no. 2.1.6 which bestows such responsibility upon the DVC (Administration and Finance).
71. The Claimant submitted that the procedure 2.1 of the Manual provides guidelines on staff disciplinary and handling such cases. Further, clause 5.0 of the CBA made extensive provisions on disciplinary matters.
72. The Claimant submitted that the decision to terminate his employment was to be arrived pursuant to the aforementioned procedures within 90 days from the date of suspension. However, he was suspended on 23.02.2016 and terminated on 16.04.2018 which was ultravires procedurally as it was done outside the prescribed timelines without justification.
73. The Claimant submitted that procedure 2.1.6 of the Manual vests the power to institute disciplinary proceedings upon the DVC (Finance and Administration). In this case, the VC authored the suspension letter which was unlawfully extended for the sole purpose of humiliating the Claimant and torture him without availing him closure on the allegations and disciplinary proceedings against him.
74. The Claimant submitted that RW1 testified that the VC is the Chief Accounting Officer of the University such that it is not far fetched that the 1<sup>st</sup> Respondent was getting back at him for the audit queries raised during his ordinary conduct of work as the auditor. This should be related with the fact that the 1<sup>st</sup> Respondent acted ultra vires authoring the disciplinary correspondences and not the DVC (Finance and Administration).
75. The Claimant submitted that from Section 45 of the *Employment Act*, the law contemplates a termination that is both substantively and procedurally fair. Therefore, even if the Respondent proves one of the requirements and fails to prove the other, the court is enjoined to find the termination as unfair.
76. The Claimant submitted that the disciplinary processes leading to the termination of the Claimant's employment was fatally defective procedurally as they were done outside the prescribed timelines in the Manual and CBA.



77. The Claimant submitted that the Respondent did not have any cogent reason to suspend the Claimant. The Claimant comprehensively responded to the suspension letter yet the Respondent failed to give him its verdict demonstrating its ill will and baseless nature of the allegations.
78. The Claimant submitted that it came out clearly that \*it was not the Claimant's duty to detect each and every anomaly while conducting an audit as it is done on a small patch. Further, the Respondent did not produce any evidence pointing to actual loss of money and the attached documents emanated from Narok University College and not Maasai Mara University.

### **Respondent's Submissions**

79. The Respondents submitted that the Claimant has failed to discharge the burden of proof under Section 47(5) of the *Employment Act*.
80. The Respondents submitted that the Claimant challenged his suspension through Kwengu & Co Advocates vide their undated letter to which the 3<sup>rd</sup> Respondent replied vide a letter dated 27.09.2016 in the pendency of conclusive disciplinary action. The Claimant was informed of the outcome of the investigation and participated in a disciplinary hearing.
81. The Respondents submitted that the Claimant was adequately notified of the charges of misconduct vide letters dated 25.01.2017, 30.06.2017 and 14.03.2018 which were received by the him. The Claimant was also informed of his right to appear with a witness or documents he may wish to rely upon and he may be accompanied by a representative of his choice. The Claimant appeared with James Ofwaya before the disciplinary committee on 26.03.2018 who was allowed audience.
82. The Respondents submitted that due process was followed and the Claimant's suspension prior to his dismissal was necessitated by the anticipation of completion of forensic investigations on his conduct subsequent to which conclusive internal disciplinary action conducted in accordance with the university and public service statutes and regulations.
83. The Respondents submitted that the 3<sup>rd</sup> Respondent has proved by evidence that the reason for terminating the Claimant's employment was valid and justified.
84. The Respondents submitted that after following due process and hearing the Claimant's explanations and defences, the Respondents proceeded to determine on the merits and facts of the matter that the Claimant was in gross misconduct and appropriately opted to recommend the Claimant's dismissal on good cause instead of summary dismissal.
85. The Respondents submitted that the 3<sup>rd</sup> Respondent demonstrated with evidence, the Claimant was in gross misconduct in as far as he misappropriated monies belonging to the 3<sup>rd</sup> Respondent on various occasions by failing to follow due process. They relied on the case of Amos Kitavi Kivite V Kenya Revenue Authority [2020] eKLR.
86. The Respondents submitted that the Claimant's employment was terminated in accordance with Section 44(4)(c) of the *Employment Act* which provided the employer the right to summarily dismiss an employee who wilfully neglects to perform any work which was his duty to perform.
87. The Respondents submitted that the Claimant was insubordination by wastefully doing unnecessary and unwarranted activities outside his mandate and not authorised to do and continuing with the same even after being instructed not to.



88. The Respondents submitted that the CBA allegedly entered into between the 3<sup>rd</sup> Respondent and Kenya Universities Staff Union is unsigned and unregistered and as such its terms are not legally binding or enforceable against the 3<sup>rd</sup> Respondent.

### **Analysis and Determination**

89. The issues raised for determination are:
- a. Whether the dismissal was substantively justified.
  - b. Whether the dismissal was procedurally fair.
  - c. Whether the Claimant is entitled to the reliefs sought.

### **Whether the dismissal was substantively justified**

90. Section 43 of the *Employment Act* provides as follows:

- “(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.”

91. Additionally, Section 47(5) of the *Employment Act* stipulates that: -

“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.”

92. In *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR the Court held as follows in respect to substantive justification:

“Section 47(5) of the *Employment Act* sometimes presents a challenge regarding how to navigate the aspect of the burden of proof in addressing disputes arising from terminations. It does suggest two burdens: the employee has the burden of proving the unlawfulness of the termination; and the employer has the burden of justifying the termination.

The interpretation given to the section by courts is that all the employee needs to do in order to discharge the burden of proof on him/her is to place before the court prima facie evidence suggesting that a termination has occurred and that the said termination lacks a substantive justification and or is procedurally flawed. Once the employee makes a prima facie case, the burden of proof shifts onto the employer to justify the termination. In *Josephine M. Ndungu & others v Plan International Inc* [2019] eKLR, the court said this of the foregoing:

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“Under section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee. The said burden is discharged once he



establishes a prima facie case that, the termination did not fall within the four corners of the legal threshold set out by section 45 of the Act.”

Indeed the overall design of the law is that the employer has the duty to provide evidence to establish the validity of the termination in terms of sections 43 and 45 of the Act absent which a presumption of fact arises in favour of the unlawfulness of the termination. Commenting on the interplay between sections 43 and 47(5) of the *Employment Act*, the Court of Appeal in *Muthaiga Country Club v Kudheih Workers* [2017] eKLR said the following:

“The grievants having denied, through their witness, the reasons given for their dismissal, discharged their obligation under Section 47(5) of the Act by laying the basis for their claim that an unfair termination of employment had occurred. This brought into play Section 43(1) and 47(5) of the Act that places the burden upon the appellant to prove the alleged reasons for termination of the grievants’ employment, and justify the grounds for the termination of the employment.”

I will come back to this question regarding the burden of proof later on in this judgment.

In terms of section 43 of the *Employment Act*, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken. In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must in fact be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists even if it later turns out that it, in fact, did not. In my view, what the law is concerned with here is whether the circumstances surrounding the decision to terminate would justify a reasonable man on the street, standing in the same position as the employer, to reach a similar decision as him/her regarding the termination.

Commenting on this question, the Court of Appeal in *Kenya Revenue Authority v Reuvel Waithaka Gitahi & 2 others* [2019] eKLR said as follows: -

“The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee’s services. That is a partly subjective test.”

93. In the instance case, the Respondents herein laid a number of allegations of the Claimant’s misconduct, however, they did not produce before this court any report showing the findings of its investigations in respect to the said acts of misconduct by the Claimant.
94. Further, the respondent witness (RW1) testified that he was not aware of the contents of the Claimant’s responses to the both notice to show cause or the evidence he rendered to the Respondents in response to the allegations laid against him.
95. The Claimant testified that his dismissal was orchestrated by the 1<sup>st</sup> Respondent due to a dispute between themselves emanating from the conduct of his duties as an auditor investigating the Mara heist.
96. From the evidence in court and RW1’s testimony this may be true as the 1<sup>st</sup> Respondent is the one who suspended the Claimant and authored all correspondences leading to his termination rather than the DVC (administration and Finance) as set out in the Respondents’ own Human Resource Manual.



97. Additionally, the Claimant was suspended for nearly 2 years without any communication of the status of the investigation and/or his wrong doing in the said matters.
98. In view of the foregoing, the Claimant's dismissal was not substantively justified and the long suspension was in opposition to fair labour practice.

**The issue of whether the dismissal was procedurally fair**

99. Section 41(1) of the [Employment Act](#) provides as follows: -

“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.”

100. Section 45 of the Act provides in part as follows: -

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove: -
- (a) That the reason for the termination is valid;
- (b) That the reason for the termination is a fair reason:
- Related to the employees conduct, capacity or compatibility; or
  - Based on the operational requirements of the employer; and
  - That the employment was terminated in accordance with fair procedure.”

101. The Respondents have satisfied this court that Claimant's dismissal from employment was done in accordance with Section 41 of the [Employment Act](#), however, the Claimant raises issue with why he was dismissed after being on a 2-year suspension without being given any communication of their internal investigation on the matter contrary to the University's HR Manual.

102. Procedure 4.2.1.3 of the HR Procedure Manual states:

- “2.1.3. Upon receipt of the report, and taking into account the HR brief on the staff, the DVC (A&F) shall:
- a. Suspend the employee and copy the suspension letter to the relevant Union officials.
- b. Request the employee to show cause why he should not be disciplined within 7 days.
- c. Forward the case to the disciplinary committee within 14 days and invite the defendant and members of the committee for hearing and determination of the case.



2.1.4. The disciplinary committee shall meet and determine the case within 14 days of receipt of the case from the Administration and Finance DVC (A&F).”

103. In *Jacqueline M. Mutiso vs Kenya Revenue Authority* [2021] eKLR the court held as follows :

“28. The Claimant testified that she was on suspension for almost five years and that this was contrary to the 6 months limit provided in the Respondent’s Code of Conduct. The Claimant further averred that the case against her dragged for long which contravened her rights under Article 47 of *the Constitution* and the Guidelines issued on 24.5.2010 by the then Secretary to the Cabinet and Head of Public Service.

104. However, the Respondent contended that the sophisticated and serious nature of the offense and extensive multi-Agency investigations were the cause of the delay in concluding the claimant’s case. She further testified that Clause 8.2.7 of the Code of Conduct allows for extension of the suspension period if the case is not concluded within 6 months. Clause 8.2.7 deals with interdiction and therefore the correct provision is clause 8.4.7 which provides that:

“Suspension cases will be determined within six months as much as may be possible.”

105. Having considered the evidence on the chronology of events herein, I have no doubt that the disciplinary process against the claimant took unreasonably long time before conclusion. First the claimant was swiftly suspended and invited to show cause why disciplinary action should not be taken against him. Second, although the claimant responded to the show cause promptly, the respondent delayed to call him for hearing for two years without any good cause or formal extension of the suspension beyond the 6 months provided under the respondent’s own Code of Conduct. Third, the respondent delayed its verdict for over two years after the hearing without any good cause before communicating to the claimant vide the letter dated 29.6.2018.

106. The said prolonged process, in my view, does not accord with fair procedure contemplated under section 45 of the *employment Act*, and Clause 8.4.7 of the respondent’s Code of Conduct and Article 41 and 47 of *the Constitution*. Article 41(1) provides that every worker has the right to fair labour practices while Article 47(1) provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

107. The explanation given for the delay in finalizing the disciplinary process, to say the least, is hollow. The respondent did not require the outcome of a multi-agency investigations to conclude the disciplinary case against the claimant. It is now trite law that criminal process and internal disciplinary process are parallel and their respective outcomes do not necessarily bind the other. Therefore, I reiterate that the delay in concluding the claimant’s disciplinary process for over 4 years was without proper basis and it rendered the termination unfair and unlawful within the meaning of section 45 of the *Employment Act* which bars employer from terminating the services of his employee unfairly.”

108. Furthermore in the collective bargaining agreement between the University and the Union clause 5.0 provided that suspension of an employee was to be for 90 days. If after the 90 days no decision is arrived by the employer then the suspension would automatically lift up.

109. The claimant was in suspension therefore from 23<sup>rd</sup> February 2016 until he was terminated on 16<sup>th</sup> April 2018. This was clearly a violation of fair labour practice of an employee.



110. And even when termination letter was issued there were no verified and substantial reasons given for the said termination. The respondent would have presented documents to prove the charges against the claimant. The court is convinced the respondent failed the fairness test well articulated in the case of Walter Ogal Onuro vs Teachers Service Commission Cause 955 of 2011 where court held:

“for termination to pass the fairness test, it ought to be shown that there was not only substantive justification of the termination but also procedural fairness.”

111. The dismissal of the Claimant’s employment was unlawful and unfair as the delay in concluding the disciplinary process was unsatisfactorily explained. The minutes of the outcome of the said internal investigations were not even tabled before this court to begin with. It is not clear therefore what decision the respondents arrived at to reach the conclusion to terminate the claimant for cause.

112. Having established, the dismissal was both procedurally and substantively unfair, the court proceeds to render judgment in favour of the claimant and orders respondent to compensate claimant appropriately as hereunder.

- a. For compensation for wrongful termination claimant is awarded 5 months equivalent of his salary as follows  $245,272 \times 5 = 1,226,360/-$
- b. On month salary in lieu of notice kshs 245,272/-
- c. Pension funds to be followed with the pension fund with the respondent’s co-operation and come to court advise on progress by 15/5/2024.
- d. The prayer for compensation for unfair termination is well covered in prayer 1 so is not granted.
- e. Service pay for unpaid years is granted unless there is proof of remittance of the same to NSSF (parties to work it out) and present to court on 14/3/2024.
- f. Withheld salary since February 2016 to 2018 April = parties to agree on the same as court is not privy to whether he was being paid 50% or nothing at all during his suspension.
- g. The prayers for imprest surcharged by council is not proved and is declined.
- h. 2017 leave pay is one month equivalent kshs 245,272/-
- i. The court orders the respective parties to submit an accurate account on prayers E, and F and present to court by 14/3/2024 to enable court to issue final award.

113. The report on the pension dues if applicable to be presented to court on 15<sup>th</sup> May 2024.

114. Claimant is awarded:

- a. Costs
- b. Interest at court rates from date of judgment till full payment
- c. Certificate of service within 30 days from date of judgment.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**ANNA NGIBUINI MWAURE**



## **JUDGE**

### **ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

