



REPUBLIC OF KENYA



**KENYA LAW**  
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**Omboga v Mpesa Foundation Academy (Cause 1496 of 2018)  
[2024] KEELRC 685 (KLR) (28 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 685 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1496 OF 2018  
J RIKA, J  
MARCH 28, 2024**

**BETWEEN**

**SKASTINA BONARERI OMBOGA ..... CLAIMANT**

**AND**

**MPESA FOUNDATION ACADEMY ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed her Statement of Claim, on 5<sup>th</sup> November 2018. She states that at all material times, she was employed by the Respondent as an Admissions Assistant. She reported to the Head of Academics.
2. Her duties included review and updating of all manuals for the first admission process; overseeing archiving of application forms; research and development of a list of potential scholarship opportunities from County Governments; and conducting student interviews and admissions.
3. On 23<sup>rd</sup> July 2017, the Claimant reported a complaint to the Human Resource Manager, regarding the uncomfortable working environment, that had been created for her, by the Student Life Manager.
4. The Claimant was suspended on 1<sup>st</sup> August 2017, on the ground that she influenced the admission of her purported relative, Elvis Nyangara into the Academy, and failed to disclose that Nyangara was her relative.
5. She was invited for disciplinary hearing, scheduled for 31<sup>st</sup> August 2017. She was accused of manipulating the admission process and reports; and making fraudulent per diem claims.
6. A decision was taken at the end of the hearing, to dismiss the Claimant, with effect from 14<sup>th</sup> September 2017.
7. Other allegations not communicated to the Claimant before the hearing, were added at the hearing. These included falsification of academic and admission records.



8. The hearing was a sham. The Respondent treated the Claimant unfairly by charging her, instead of investigation her complaint against the Student Life Manager; she was suspended unfairly; she was victimized for raising her complaint; the Human Resource Manual was disregarded; she was not given sufficient time to prepare for the hearing; and the decision to dismiss her was made hurriedly, on the same date of the hearing.
9. She filed an Appeal on 8<sup>th</sup> September 2017, which was not considered at all, before the letter of summary dismissal issued on 14<sup>th</sup> September 2017.
10. She prays for Judgment against the Respondent for: -
  - a. Declaration that the entire disciplinary process was null and void, and the letter of summary dismissal illegal and unlawful.
  - b. 3 months' salary in lieu of notice at Kshs. 360,000.
  - c. 12 months' salary in compensation for unfair termination, at Kshs. 1,440,000.
  - d. Costs.
  - e. Interest.
  - f. Any other suitable relief.
11. The Respondent filed its Statement of Response on 30<sup>th</sup> January 2019. It describes itself as an institution devoted to the service of talented, but economically disadvantaged students, who have demonstrable leadership skills.
12. Accountability is a core value at the Respondent.
13. It is true that the Claimant lodged a complaint against the Student Life Manager, in July 2017. Due to the gravity of the complaint, the Human Resource Manager escalated it to the Respondent's Director, Teaching and Learning.
14. The Director investigated the complaint, finding it completely unfounded. There were allegations against the Claimant, that she was related to one of the admitted students, Elvis Nyangara. The Claimant was therefore suspended, to allow for investigations on the admission.
15. Investigations disclosed that the Claimant manipulated the admission process; she shared doctored data; she changed recommendations for Nyamira County, to facilitate the admission of Nyangara; and, there were numerous fraudulent financial reconciliations done by the Claimant.
16. She was invited through a letter dated 29<sup>th</sup> August 2017, for disciplinary hearing, scheduled for 31<sup>st</sup> August 2017. The charges were communicated to the Claimant. She was advised of her right to be accompanied to the hearing. She was given adequate time to prepare.
17. She was fairly heard, on 31<sup>st</sup> August 2017. She was accompanied by a colleague, the Deputy Head of Academics. It was determined that the Claimant is summarily dismissed for gross misconduct.
18. She lodged an Appeal as pleaded, which was considered by the Respondent's Chief Executive Officer, and declined.
19. Termination was fair and lawful. The Respondent lost trust and confidence in the Claimant. Reinstatement would not be reasonable. The Respondent prays the Court to dismiss the Claim with costs.



20. The Claimant, and Respondent's Human Resource Manager, both gave evidence on 13<sup>th</sup> October 2023, when the hearing closed. The Parties confirmed filing and exchange of their Closing Submissions at the last mention before the Court, on 24<sup>th</sup> November 2024.
21. The Claimant adopted her Witness Statement and Documents [1-7] as her evidence-in-chief. She restated the contents of her Statement of Claim, as summarized above. Cross-examined, she told the Court that she participated in student interviews. Recommendation of admissions was made by a team. She was the team leader. She only saw the investigations report, when she filed the Claim. She was aware about the allegations. She was heard and a decision to dismiss her made.
22. Human Resource Manager Denis Ogada, similarly adopted his Witness Statement and Documents filed by the Respondent [1-10], as his evidence.
23. Cross-examined, Ogada told the Court that the Claimant was suspended on one ground. She was related to a student named Elvis Nyangara. Investigation report did not show evidence of family relationship.
24. The letter of summary dismissal gave 3 grounds, in justifying dismissal. There was evidence that she manipulated the admission of Nyangara. There was evidence of document manipulation. The reports stated that other members were shocked, that the Claimant went against their own recommendations. This is a finding, not evidence.
25. The second accusation was that the Claimant recommended students who were rejected. There was no evidence on this; just a finding. There was no documentary evidence, to support this finding.
26. Thirdly, it was alleged that she made inaccurate per diem claim. There was no document to support this.
27. She was engaged in acts of gross misconduct.
28. She appealed against the decision to dismiss her. Her Appeal was rejected on the same grounds, the disciplinary committee summarily dismissed her. Ogada conceded that the Respondent did not have documentary evidence to support these grounds, from the inception.
29. Redirected, he explained that suspension only opened the way, for investigations. Other issues emerged on investigations. The notice inviting her to disciplinary hearing, gave the same accusations over which she was summarily dismissed. Investigations were carried out by an Independent Party. The Respondent has zero tolerance on corruption. The Claimant was involved in acts of gross misconduct.
30. Cross-examined further on his evidence about independent investigations, Ogada told the Court that his name appeared in the report, but he was not involved in its preparation. The Claimant acted with others in her admissions team.
31. The issues are whether termination was procedurally fair; whether it was based on valid ground; and whether the Claimant merits the remedies sought.

### **The Court Finds**

32. The Claimant was employed by the Respondent as an Admissions Assistant. Her letter of probationary employment is dated 1<sup>st</sup> April 2016.
33. She was fully employed at the end of probation, through a letter of appointment dated 25<sup>th</sup> October 2016. The effective date was 1<sup>st</sup> November 2016.



34. The dispute between the Parties appears to have its roots, in the admission of a form one student, Elvis Nyangara. The dispute came to surface, through a complaint lodged by the Claimant in writing, received by the Human Resource Department on 25<sup>th</sup> July 2017.
35. The Claimant complained that a Ms. Elishibah Poriot, had requested for the personal file of student Nyangara, sometime in June 2017. Nyangara was having challenges coping both in class and socially. Poriot intended to relook into the admission process of the student, to understand his interview process, and home visits, preceding admission.
36. Poriot summoned the admissions team comprising Edward Kisaka, Duncan Dajo and Jared Momanyi. The Claimant complained that she was head of the team, but was left out. She felt that Poriot was on a witch hunt against her. According to the Claimant, Poriot implied that the Claimant manipulated the team, to admit Nyangara irregularly. She was being isolated for blame in the problems surrounding Nyangara. It was alleged, that the Claimant assisted Nyangara in his unmerited admission, because she was his relative, and from the same community.
37. The Claimant's complaint in short, was that she was being condemned as lacking in integrity without being heard; she had not been told if she was under investigation; and her professionalism in conducting student admissions, had been traduced.
38. After her complaint, the Claimant received a letter dated 1<sup>st</sup> August 2017, from Dr. Stephen Mark Walker, Director, Teaching and Learning.
39. She was suspended for 30 days with full pay. She was told that the reason for suspension, related to the irregular admission of Elvis Nyangara. It was disclosed that there was an allegation against that the Claimant, that she was an aunt to Nyangara, and she had failed to disclose conflict of interest, in accordance with the Respondent's policy. The Claimant was advised that the allegation would be fully investigated.
40. In her Statement of Claim, she pleads that her complaint was against the Student Life Manager [Poriot], and that she was victimized for bringing a complaint against Poriot.
41. The Court does not think that this argument by the Claimant, is merited. Her complaint against Poriot, was that she was not being involved in the investigation concerning the admission of Nyangara. According to her, she was being blamed selectively. She complained that she was head of the team, and leaving her out, while her team members were being summoned, would result in condemning her without a hearing.
42. The letter of suspension simply addressed this concern. It brought the Claimant into the picture. It opened way for her interaction with the investigation and disciplinary processes. It is disingenuous for her to claim that she was victimized, because she made a complaint against Poriot. The letter of suspension, in the respectful view of the Court, simply addressed her concerns, about being condemned unheard. It was not a victimization letter. Suspension was in accordance with clause 7.5 of the Respondent's Human Resource Policy and Procedure Manual, 2017. There was no breach of fair procedural standards, in her suspension.
43. Investigations took place during the period of the Claimant's suspension. There is a 33-page Investigation Report, signed by Denis Ogada, Victor Onsarigo and Charles Sibena. The Court has not found anything done by the Investigators, that would be deemed to have resulted in breach of fair procedure. The team was constituted by the CEO in accordance with the Respondent's Human Resource Manual. It comprised Charles Chacha Sibena, Head of Security and Safety, Dennis Ogada,



- Human Resource Manager and Victor Onsarigo. The team was to be assisted by the Director of Teaching and Learning, Dr. Stephen Walker.
44. Statements were taken from admission Intern Frida Wanza; Teachers Jackline Malaba, and Anthony Ngunjiri; Communications Assistant Miriam Nyokabi; Farm Assistant and team member Jared Momanyi; Resident Parent Ezekiel Maritim; Security Supervisor Benard Ngotho; Cook Joshua Mutua; Nurse Jane Kariuki; Accountant and team member Edward Kisaka; Driver Duncan Dajo; Deputy Head of Academic Anne Muchoki; Daniel Muthee Senior Teacher; and, Admissions Interns Nancy Njeri and Rehema Juma.
  45. The Statements were painstakingly recorded, and all pointed to irregularity, in the admission of Elvis Nyangara, among others.
  46. The Claimant's own statement was taken. She stated that she did not fill physical forms at Nyamira. She worked on her iPad, but refused to share with the investigators, the entries she made at Nyamira. Nyangara's mother also recorded a statement, and confirmed that the Claimant had been in communication with her. She told the Investigators that she was ready to withdraw Nyangara from the Respondent, to save the Claimant's job. The findings, made against these comprehensive witness statements, included that, admission process was manipulated in many counties; some students were fraudulently admitted at the expense of other meriting students; there were repeat visits by admission teams to certain Counties, subjecting the Respondent to additional costs; there were fraudulent home visits; the student test results were manipulated in certain cases, including Nyangara's, to gain admission; and some team leaders' recommendations on admissions, were ignored by the Claimant.
  47. The Claimant was issued a Memo by Human Resource Manager Denis Ogada to attend disciplinary hearing on 31<sup>st</sup> August 2017. The accusations against the Claimant were threefold: that she manipulated the admission process of Elvis Nyangara; she ignored recommendations of her team members on admissions; and that she made fraudulent per diem claims. The invitation advised the Claimant that she may be accompanied to the disciplinary hearing, by a colleague of her choice.
  48. She attended the hearing accompanied by a colleague, Head of Academics Anne Muchoki, on the appointed date.
  49. The Claimant conceded at the hearing that she changed original report on admission of Elvis Nyangara. She also confirmed that she had been in contact with Nyangara's mother, while not admitting that there was any family relationship. There were questions posed to the Claimant regarding admissions in other Counties, and claims of unjustified per diem.
  50. The disciplinary committee reached the conclusion that the Claimant acted against the Respondent's Human Resource Manual and the *Employment Act*. She was engaged in acts of gross misconduct.
  51. She was summarily dismissed through a letter dated 14<sup>th</sup> September 2017. The Court does not think that procedure can be faulted, on the ground that the decision to summarily dismiss the Claimant, was made the same date the Claimant was heard. There is no rule against fast and expeditious disposal of disciplinary hearing.
  52. The letter dated 31<sup>st</sup> August 2017 informed the Claimant that after hearing, it had been concluded that she should be summarily dismissed. She was given an opportunity to appeal, and the final decision to summarily dismiss her, came after the appeal, through the letter of summary dismissal dated 14<sup>th</sup> September 2017.



53. To sustain the claim that she was prejudiced, by the letter of 31<sup>st</sup> August 2017, the Claimant should have placed before the Court, details of prejudice. There were no details to show that summary dismissal was procedurally unfair. The Claimant was given a proper and fair hearing, before summary dismissal.
54. The reasons were stated. The Claimant manipulated the admission process of Elvis Nyangara; she disregarded recommendations of her team members; and made fraudulent per diem claims.
55. While it is true that the letter of suspension did not raise exactly the same allegations against the Claimant, as the reasons given in justifying summary dismissal, the Court agrees that the letter inviting the Claimant to disciplinary hearing, set out accusations that tallied with the reasons given in the end, in justifying summary dismissal.
56. The letter of suspension was clear, that the decision was taken to enable the Respondent, carry out full investigations. Disclosures from the investigations would warrant expanded list of charges, and the Claimant was not prejudiced. She was notified about the expanded list upon invitation to the disciplinary hearing, and heard on all the allegations.
57. She lodged an Appeal, which was considered and dismissed. The decision to dismiss her Appeal, was communicated to her by Chief Executive Officer Les Ballie.
58. The Court has not found any significant flaws in the procedure employed by the Respondent, in the summary dismissal of the Claimant. Procedure was in conformity with the [Employment Act](#), and the Respondent's Human Resource Manual.
59. There was clear evidence gathered upon investigations and the hearing, to justify the grounds relating to manipulation of student admissions, in particular with respect to Elvis Nyangara. While there was no evidence that the Claimant was an aunt to Elvis, she was shown to have been in contact with the boy's mother. There was familiarity, if not familial ties. She conceded that there was error on the shortlist of applicants for admission in Nyamira County. She decided to alter the original report. She was unwilling to share her iPad entries on the admission of Nyangara, with the Investigators. She did not fill any physical forms, capturing details of Nyangara's admission.
60. It is not correct that there was no evidence, to support summary dismissal. There were numerous witness statements, taken from a broad spectrum of the Claimant's workmates, and beyond.
61. Frida Wanza was an eye-witness, to the tampering of the Nyamira County admission report by the Claimant, to favour Nyangara. Frida was working with the Claimant and confirmed the allegations of admission irregularities, against the Claimant. The Teachers who were educating Nyangara, confirmed that the boy could not cope academically. A Teacher Jackline Malaba, revealed that Nyangara had confided in her, that he was hooked to pornographic videos and was a member of a gang at their Kayole residence. It was disclosed that the boy had moved from Kayole in Nairobi, to do the admission interview, at Nyamira County. The list of witnesses against the Claimant was broad, including Teachers, a Driver, Parents, as well as a Cook.
62. All the challenges Nyangara faced, were occasioned in part because the Claimant did not properly perform her role, as a team leader, on his admission. Admission of students, especially in specialized Institutions, such as the Respondent, whose objective is to empower brilliant but poor children, ought to be carried out in strict adherence to the laid down admission criteria. Admitting undeserving students, tends to defeat the institutional *raison d'être*. Once high performing institutions for poor but brilliant children, have their student admissions manipulated, such as was the case with Elvis Nyangara, they gradually fall from the summit of academic excellence, into the ignominy of academic minnows. Such Institutions and the children they are meant to serve, do not meet their objectives. There is an



opportunity lost on other deserving children, once admitting officers irregularly take in the likes of Elvis Nyangara. It is never fair to the concerned Institution and the child.

63. The Court is convinced that at the very least, one reason given in justifying termination, was established firmly. It was a very substantive ground. The Claimant was involved in admission of a student or students, contrary to the Respondent's admission policy.
64. Termination was procedurally and substantively fair. It was in accordance with Sections 41, 43 and 45 of the *Employment Act* and the Respondent's Human Resource Manual. The Respondent established valid reason under Section 43 of the *Employment Act*, and discharged its evidential burden, under Section 47 [5] of the *Employment Act*.

It Is Ordered

- a. The Claim is dismissed.
- b. No order on the costs.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS 2020, THIS 28<sup>TH</sup> DAY OF MARCH 2024.**

**JAMES RIKA**

**JUDGE**

