



REPUBLIC OF KENYA



**Mutiso v South Eastern Kenya University (SEKU) (Cause E04 of 2021)
[2024] KEELRC 647 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 647 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
CAUSE E04 OF 2021
B ONGAYA, J
MARCH 15, 2024**

BETWEEN

RAPHAEL K MUTISO CLAIMANT

AND

SOUTH EASTERN KENYA UNIVERSITY (SEKU) RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim dated 03.12.2021 through Prof. Tom Ojienda & Associates. The claimant prayed for judgment against the respondent for:
 - a. A declaration that the respondent unfairly, wrongfully and unlawfully summarily dismissed the claimant's contract of employment.
 - b. An order directing the respondent to reinstate the claimant to his former position as the Assistant Accountant.
 - c. Payment of gross salary to the date of reinstatement plus 20% employer pension and any other accrues benefit within that period.
 - d. Payment of CBA 2017-2021 arrears amounting to Kshs. 100,000 plus 20% of the employer pension for the same period but withheld during trial or disciplinary proceedings.
 - e. Salary arrears for the months of July to September 2020 plus 20% employer pension component.
 - f. Passage baggage of Kshs. 5,700.
 - g. Payment for 45 unutilized leave days.
 - h. In the alternative, twelve months' salary as compensation for wrongful and unfair dismissal amounting to Kshs. 6,542,232.



- i. Issuance of a certificate of service.
 - j. Payment of one-month salary in lieu of notice.
 - k. Payment for his liabilities i.e Sacco and bank loans accrued because of the summary dismissal.
 - l. Interest on (a) – (g) above.
 - m. General damages.
 - n. Costs of this suit.
 - o. Such other and further orders that this Honourable Court deems just and expedient to grant.
2. The respondent filed its reply to memorandum of claim dated 02.02.2022 through Nicole K. Nyamai, Advocate from their legal department. The respondent prayed that the claim be dismissed with costs.
 3. The claimant's case was that he was employed by the respondent as a freelance sales executive between the recruited by the respondent on 22.07.11 as accounts clerk where he rose over the years to become acting head of expenditure as from 01.05.20.
 4. That through a show cause letter dated 25.06.20, the respondent accused the claimant of unlawfully awarding himself a salary increment amounting to Kshs. 144, 430/= contrary to section 44 (4) (g) of the *Employment Act*, 2007, Sections 8, 9 (a) and 11 (1) of the *Public Officer Ethics Act* [2003] and Section 79 of the *Public Finance Management Act* (2012). He outlined the particulars of the amounts as outlined in the show cause letter produced as exhibit.
 5. That he was then told to work from home and not to access the university without authorization, which made him not access information that would help him respond to the show cause letter sufficiently.
 6. That through an undated letter, he responded to the show cause letter justifying himself against the allegations levelled against him.
 7. That the gist of the claimant's response was that the increments are system controlled and he was entitled to the increments based on the university's policy and CBA and the same were counterchecked every month via monthly audits.
 8. That January 2015 and January 2016 increments are the ones that were not procedural and he could not have effected them since there were other persons who has access to the system.
 9. That the senior staff disciplinary committee was dissatisfied with his response and went ahead to dismiss him on 17.09.2020 after which he lodged an appeal which did not succeed.
 10. That during the period he did not receive any pay.
 11. The claimant particularized the reasons for his dismissal being pre-meditated, wrong, unlawful, negligent and malicious as follows;
 - a. Although he had offered an extensive explanation on his non-participation in the entire verification and approval process in the salary increments, same was ignored.
 - b. That his appeal took unnecessarily long and in the meantime, he was not able to seek other employment as he awaited his fate.
 - c. His salary was withheld from July 2020 onwards and he pleaded that it was unlawful and amounted to constructive dismissal.



- d. That the act of withholding his salary and CBA arrears 2017 was an indication that he was not presumed innocent and was already convicted before being heard.
12. That the respondent having not preferred any criminal charges against the claimant meant that the respondent did not have sufficient evidence of the allegations.
 13. The claimant further pleaded that the disciplinary process by the respondent did not meet the standards and provisions of the law under Article 41 of the Constitution and Section 41 of the Employment Act.
 14. The claimant also pleaded that his dismissal was not in conformity with the provisions of summary dismissal under section 44 of the Employment Act. He also pleaded violations of Article 47 and 50 of the Constitution as well as unfair termination within the meaning of section 45 of the Employment Act.
 15. The claimant concluded to pray that his claim be allowed as prayed.
 16. The respondent in their defence pleaded that the termination of the claimant's employment was not unlawful, illegal, or malicious and put the claimant to strict proof.
 17. That as at the time of the disciplinary action, the claimant was the only person in the pay roll section and had the rights to the system for processing employee salaries which right he used to enrich himself.
 18. That when the allegations were read to the claimant, he admitted the anomalies and specifically that the increments of January 2015/16 were not procedural.
 19. The respondent also pleaded that by the claimant not raising the unprocedural increase that only happened to him with the relevant authorities was questionable.
 20. That the respondent was in violation of the law being the Constitution and the Public Finance Management Act of 2012 on use and management of public resources which amounted to gross misconduct thus warranting his dismissal.
 21. The respondent contended that the disciplinary process was carried out in accordance with the law and no information was denied to the claimant.
 22. The respondent concluded by stating that the claimant had not discharged the burden of proof and that the suit lacks merit and hence should be dismissed with costs.
 23. The parties filed their respective submissions. The court has considered the material on record and makes finding as follows.
 24. To answer the 1st issue, there is no dispute that the parties were in a contract of service.
 25. To answer the 2nd issue, the claimant's employment was terminated by the letter of summary dismissal dated 17.09.2020. he was dismissed effective 17.09.2020. The reason for the dismissal was stated as the claimant awarding himself salary increments amounting to Kshs. 144, 430.00 between the period January 2015 and May 2020 contrary to section 44 (4) (g) of the Employment Act, 2007, section 8,9 (a) and 11(1) of the Public Officer Ethics Act 2003 and section 79 of the Public Finance Act 2012. He was to reimburse the university the money within 14 days failing the same would be recovered withheld from his salary. The letter stated that the evidence showed he was culpable and that he had admitted to the allegation levelled. He had a right to appeal in 14 days. He appealed by the letter dated 28.09.2020 but by letter dated 02.08.2021 he was informed the appeal was found to lack merit and decision on summary dismissal was upheld.



26. To answer the 3rd issue the Court returns that the summary dismissal was not unfair both in procedure and merits. The evidence was that the claimant was given a show cause letter, he replied, attended disciplinary hearing, appealed the summary dismissal, attended appeal hearing but summary dismissal was upheld. The respondent adopted a fair procedure as envisaged in sections 41 of the [Employment Act](#) on notice and hearing of the employee. The respondent has also established that the reason was genuine and valid per section 43 of the Act as it existed and it was fair per section 45 of the Act relating to claimant's conduct, compatibility and respondent's operational requirements. In his response to the show cause letter the claimant stated that the impugned salary increase had occurred but it was due to an error and not intentional. He stated he had been diligent and honest in his work and pleaded for leniency. In cross-examination, the claimant confirmed he had received unexplained salary increments in 2016, 2017 and a further increment based on a CBA. He also confirmed that in paragraph 9 of the statement of claim he had pleaded that in July 2015 and July 2016 his salary increments were not procedural. The Court finds that the summary dismissal was not unfair.
27. The 4th issue is on remedies. The Court returns as follows:
- a. Reinstatement or compensation because of unfair termination are not available as there was no unfair termination.
 - b. The respondent withheld CBA dues as a set off to the overpayment which the claimant failed to recover per letter of summary dismissal. In absence of any reconciliation in that regard, on a balance of probability, the claim based on CBA will fail.
 - c. The claimant's summary dismissal was not unfair and in the circumstances there is no established contractual basis for payment for that period he was not working. The respondent's submissions are upheld.
 - d. As submitted for the respondent, the claimant has not justified basis to be paid passage baggage allowance since he was dismissed.
 - e. A month payment in lieu of termination notice is not available and as submitted for the respondent under section 44 of the Act on summary dismissal, it was not available.
 - f. The respondent is not privy to claimant's unliquidated claims on his bank and sacco loans. The claim will fail.
 - g. Certificate of service will issue per section 51 of the Act, the respondent has not, and 45 leave days are due. The respondent submits that the payment is due after clearing but no counterclaim was made. The Court has considered the margins of success and all circumstances of the case. Each party will bear own costs.

In conclusion, judgment is hereby entered for parties for:

- a. Delivery of certificate of service in 30 days hereof.
- b. Respondent to compute and pay 45 leave days within 45 days failing interest to run at Court rates until full payment.
- c. Each party to bear own costs of the proceedings.
- d. The declaration the summary dismissal was not unfair, unlawful or unconstitutional.
- e. The Deputy Registrar to return the case file to Machakos Registry forthwith.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
FRIDAY 15TH MARCH 2024.**

BYRAM ONGAYA

PRINCIPAL JUDGE

