



Mahia v Kenya Universities and Colleges Central Placement Service (Cause E6501 of 2020) [2024] KEELRC 1086 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 1086 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E6501 OF 2020
NZIOKI WA MAKAU, J
APRIL 11, 2024**

BETWEEN

MICHAEL MUNGAI MAHIA CLAIMANT

AND

**KENYA UNIVERSITIES AND COLLEGES CENTRAL PLACEMENT
SERVICE RESPONDENT**

JUDGMENT

1. Through a Memorandum of Claim dated 20th November 2020, the Claimant instituted this suit against the Respondent seeking judgment from this Honourable Court as follows:
 - a. A declaration that his termination from employment was unfair, unlawful and un-procedural.
 - b. Reinstatement of the Claimant in the service of the respondent with effect from 11th November 2020 in the position held before the termination without a break in his service with full prevailing benefits and to continue in that service until the due date of retirement or lawful separation.
 - c. Maximum statutory compensation for the unfair, unlawful and un-procedural termination being Kshs 2,028,000/-.
 - d. General Damages for breach of the Claimant's constitutional rights as specified in the claim at para 66.
 - e. One Month's Pay In lieu of Notice being Kshs. 169,000/-.
 - f. 45 pending leave days.
 - g. An Order that the Respondent do issue the Claimant with a Certificate of Service.
 - h. Costs of Claim.



- i. Any other orders that the court may deem fit and just to grant.
2. The Claimant averred that the Respondent employed him as an ICT Support Grade 10 on 26th January 2015 through a short term 6-month contract, which was subsequently extended for another 12 months. That later in a letter dated 1st July 2016, the Respondent engaged him as an ICT Support Officer- Developer and User Support, KUCCPS 8 and his employment was thereafter confirmed on a permanent and pensionable basis through a letter dated 1st February 2018. That as communicated in a letter dated 12th July 2018, an alignment of tides/grades was done in line with the Board and Ministry's approved structure causing the Claimant's tide to change from ICT Officer Grade 8 to Placement Co-ordination/Career Development Officer, KUCCPS Grade 6. He asserted that his remuneration under his aligned tide was set to basic salary of Kshs. 90,000/-, house allowance of Kshs. 60,000/- and house to office allowance of Kshs. 19,000/-. The Claimant retained the said position until his summary dismissal on 11th November 2020. His case was that his claim arises from a series of actions by the Respondent that were illegal, irregular, unfair and unjustifiable and which can be categorised into the tendering process and the disciplinary process.
3. For the Tendering Process, the Claimant averred that the Respondent's ICT Department requested for the acquisition of 2 servers sometime in 2017, following a need for the extension of its storage capacity. That subsequently, the Respondent invited for bids for the Supply, Installation, Configuration and Commissioning of Servers and Related Accessories, Tender No. KUCCPS/ONT/04/2017-2018, which tender closed on 24th November 2017 with a total of 16 bidders having presented their bids. The Claimant was a member of the ICT Department's Evaluation Committee that sat on various dates in January 2018 to evaluate and confirm the responsiveness of each bidder. That as evidenced in the Minutes of the Evaluation Committee dated 15th January 2018, 10 firms out of the 16 bidders proceeded to the next level after meeting the required specifications. That thereafter, only three (3) firms made it to the Financial Evaluation as follows: Konvergenz Network Solutions who quoted Kshs. 13,980,411.91; Topchoice Surveillance Ltd who quoted Kshs. 17,118,247.81; and Attain Enterprise Solutions Ltd who quoted Kshs. 16,636,13.72. That in the end, Konvergenz Network Solutions was awarded the contract after being declared the most responsive bidder and the firm then delivered the servers on 29th June 2018. It was the Claimant's averment that the said servers have been in use since their delivery and that there have been no complaints on the workings of the servers, which are able to attain a speed of 4.0GHz that is higher than the speed of 3.2GHz that the Respondent tendered for. That through a Report forwarded in a letter dated 14th July 2020, the ICT Authority (from the Ministry of ICT) confirmed that the said servers met the specifications advertised in the Tender document and are compliant.
4. As regards the Disciplinary Process, the Claimant averred that he was informed via two letters dated 20th July 2020 that the Respondent Board's investigation into the procurement process of the two servers found that he had, as a member of both the Evaluation and the Inspection and Acceptance Committees, allegedly violated several provisions of various Statutes. That having been given 21 days to respond and considering the nature of the grievous allegations, he requested for the investigative report the basis of which the Board had taken the decision to commence disciplinary proceedings against him, but the same was not provided to him. He further averred that in a letter dated 27th July 2020, the Directorate of Criminal Investigations (DCI) invited him and other members of the Evaluation and the Inspection and Acceptance Committees to attend their offices on 30th July 2020 for purposes of recording a statement. That he proceeded to the DCI as instructed and duly recorded his statement and that he was never informed that he had been found criminally culpable or that any charges would be levelled against him. The Claimant later presented to the Board a written response to the charges through a letter dated 10th August 2020 and he was subsequently invited to appear before the full



Board for disciplinary hearing. He was finally heard by nine (9) Board Members on 11th November 2020 and who questioned him on his roles in the two impugned Committees. It was the Claimant's averment that on 12th November 2020, he received the decision of the Board through a letter dated 11th November 2020 that he had been summarily dismissed for purportedly violating several provisions of the Public Procurement and Asset Disposal Act (PPAD Act), the Public Ethics Act of 2003 and the Public Finance Management Act of 2012. That additionally, he was alleged to have played a key role in misrepresenting the servers as being compliant to the Tender document, which misrepresentation amounted to fraudulent practice and formed the basis of his dismissal. The Claimant was given 30 days to appeal the said decision of the Board.

5. According to the Claimant, his summary dismissal was manifestly irregular and unfair and did not comply with the Respondent's HR Manual because: he was not provided with the documents he requested for; the disciplinary hearing was conducted by the Board instead of the Human Resource Advisory Committee (HRAC); he was given 30 days to appeal instead of 90 days; and the Acting CEO, who was supposed to hear his appeal, signed off on the outcome of his disciplinary hearing and personally presented him with the dismissal letter. The Claimant's stance was that since the Respondent's HR Manual does not anticipate an appeal from the decision taken by the Board, his only recourse is the Court. He also noted that whilst both the Evaluation and Inspection and Acceptance Committees were composed of seven (7) members who duly evaluated the prospective bidders and declared Konvergenz Systems as the most responsive bidder, only two members were summarily dismissed. Furthermore, the allegations raised against him are baseless and without merit because the ICT Authority confirmed that the delivered servers met the tender requirements and specifications. The Claimant further averred that the Respondent has never cited him for any infraction in the course of his employment, he has never received a verbal or written warning and has always scored highly in his performance appraisals. That in essence, the Respondent failed to consider that he had never had any other disciplinary offence before determining the severity of the outcome of the disciplinary process. It was the Claimant's averment that the Respondent's decision to terminate his employment was therefore manifestly unjust, unfair, unprocedural, illegal and without any basis.

Respondent's Case

- 6 In response, the Respondent filed a Statement of Defence dated 15th February 2021 and wherein it averred that in collaboration with the ICT Department, its Supply Chain Office advertised for procurement of servers and related accessories in two national dailies on 7th November 2017. That contrary to the Claimant's averments, a total of four (4) firms were disqualified at the second stage of technical evaluation for having quoted a speed lower than 3.2GHz and better. That the Evaluation Committee's decision to advance the 10 bidders to the next level was anchored on the understanding that any quote below 3.2GHz was non-responsive. The Respondent contended that as at the time of awarding the Tender to Konvergenz Network Solutions, two (2) other bidders had undertaken to supply servers with a processor specification of 48 Core (2x24 core Intel Xeon E7-8800 V4 processors) 3.2GHz and above and that as such, Konvergenz was only awarded the tender anchored on the representation that it had the lowest quote and their processor had a speed of 3.2GHz and above. It further averred that the Claimant herein personally insisted on acceptance of the goods despite objections from members of the Inspection and Acceptance Committee, which Committee he was also a member of, and in spite of a professional opinion from the Respondent's Internal Auditor - Information Systems that the supplied processor was inferior to the one technically specified and the organization would as such not get value for money. The Respondent also noted that the said servers did not meet the specifications as the Office of the Auditor General also flagged out the said Tender for the subject servers as an anomaly.



7. It was the Respondent's case that the Board's investigation into the procurement process of the said servers recommended disciplinary action as against several persons for various violations of the law. That considering the foregoing, any provision of the Respondent's HR Manual that made any reference to the CEO and the HRAC, which is constituted of heads of departments, would neither have been fair nor tenable in the circumstances. It fronted that the anonymous complaint to the Board with regard to the subject Tender, the investigation carried out by the Ad Hoc Committee of the Board, and correspondence of the letters of charge to the Claimant were all in accordance with the Respondent's HR Manual. That the Claimant exercised his rights of response to the charges against him and personally participated in the disciplinary proceedings before the Board and that he wilfully abandoned the appeal process he was entitled to. The Respondent averred that decisions by the Board were purely anchored on the merits of the individual cases of the employees implicated in the report of the Ad hoc Board Committee. It therefore prays that the suit herein be dismissed with costs to the Respondent.
8. Evidence
The Claimant testified that the said servers were used for three (3) years and are still in use years after their dismissal from the Respondent's service and that the servers therefore exceeded and met the specs and have not been replaced or cancelled. Under cross-examination, the Claimant stated that he was a Placement & Career Co-ordination Officer at the time of his dismissal in November 2020. That the procured servers were meant for processing the placement of university students. He asserted that he responded to the charges levelled against him without getting the evidence he had requested for. He further stated in re-examination that he never received the investigation report and the whistle-blower letter.
9. The Respondent's witness Ms. Christine Lilian Mukhongo, stated under cross-examination that she was also investigated and was then incorporated into the Investigation Committee as an expert. That she had been invited to the Evaluation Committee but was not a member of the said Committee and that through the Internal Audit Manager, she gave the Respondent's CEO a report on the specifications of the servers that were to be procured. She asserted that the two servers that were availed were 2.4GHz while the Respondent wanted 3.2GHz or better and that it was therefore a misplaced argument to say that the servers achieved the necessary speeds.
10. The second Respondent's Dr. Agnes Mercy Muthoni Wahome, is the current CEO of the Respondent. She testified that the former CEO and members of the Management Committee were also involved in the subject procurement anomaly and which is why the Board stepped in and put together an Ad Hoc Committee to look into the issue. That the Claimant was accorded the opportunity to appeal the Board's decision to dismiss him but he refused to exhaust the option and came to Court instead. She asserted under cross-examination that she did not take part in the investigations on the procurement of the servers, and was not part of the Ad Hoc Committee, the Procurement Acceptance Committee or the Disciplinary Committee. She acknowledged having personally handed the Claimant his dismissal letter but denied she was at the time the CEO. She further notified the Court that the Respondent dismissed the two people who guided the acceptance of servers with a lower specs processor because the Respondent is a sensitive institution handling sensitive data and integrity of the same is paramount.
11. The third Respondent's witness Ms. Daina Atieno Kibogo, stated under cross-examination that she is the Head of the Procurement Department. That she however is not a member of the Board, Ad Hoc Committee or Disciplinary Committee and did not participate in the investigations on the procurement process. She stated that after the Board recommended disciplinary action be taken against her, she was cleared after explaining the whole process. She admitted that the bidder had indicated they



would supply the required servers but when the same were delivered, the inspection team discovered that they did not meet the technical proposal in the bid document.

12. Claimant's Submissions

It was the Claimant's submission that the main issue for determination is whether the termination of his employment by way of summary dismissal was justifiably within the law and the terms and conditions of employment attaching to the Claimant. The Claimant noted that section 43(1) of the Employment Act, 2007 requires the employer to prove the reason or reasons for the termination and where the employer fails to do so, the termination is deemed unfair within the meaning of section 45. Section 45(2) of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid and fair and that the employment was terminated in accordance with fair procedure. Lastly, section 41 of the Act sets out the conditions precedent to termination of employment on grounds of misconduct, poor performance or physical incapacity. The Claimant asked the Court to inquire into both the reasons for the termination and the procedure adopted in effecting the termination as affirmed by the Court of Appeal in the case of Iyego Farmers Co-operative Sacco v Kenya Union of Commercial Food and Allied Workers [2015] eKLR. That in the case of Jane Wanja Mutbaura v Ethics and Anti-Corruption Commission [2021] eKLR, Rika J. held that termination of contracts of employment must meet the tests of substantive justification and procedural fairness.

13. Concerning the validity of the reasons given for his dismissal, the Claimant analysed the validity of each of the charges the Respondent brought against him. On the first Charge, he submitted that he was alleged to have illegally qualified Konvergenz Solutions Network whose bid document indicated a proposal to supply 2.4GHz servers as opposed to the tender specification requirements of 3.2GHz or better. He argued that the processor speed of 3.2GHz was a maximum speed and not the base speed of the servers and that with the Report dated 14th July 2020 by the ICT Authority having stated that the processor speeds operate between 2.4GHz to 3.4GHz, the servers were compliant. That in any event, he had produced an extract of Konvergenz Solutions Network bid document clearly showing the said bidder's intention to deliver a server with processor capacity of 3.2GHz or better. That the Respondent did not controvert the said evidence during trial and had all along had the evidence that would have negated the first charge against the Claimant. The Claimant questioned why the Respondent is still using the said servers over 5 years since they were procured if indeed they were not of the required standard. That the Court should thus find that the first charge could not hold against the Claimant. Further, it was the Claimant's submission that the Inspection and Acceptance Committee having found that the supplied servers met the tender specifications, there could not have been a loss of value in terms of payment made to acquire the said servers as alleged in the second Charge. That if this Court however agrees with the Respondent that the servers did not meet the tender specification, it should consider that the Claimant had no authority to direct payment of the sums to the successful bidder as the payment was done by the Respondent's accounting officer. Moreover, the Respondent's witnesses never advanced any evidence to prove fraud against him in terms of financial or other gain by him and he was also not charged in Court. It was the Claimant's submission that it is clear there was no valid reason for his dismissal from employment, which dismissal was therefore unlawful, unfair and illegal.

14. As for procedural fairness, the Claimant submitted that to the extent that his Statement of Claim challenges the Respondent's exercise of carrying out the quasi-judicial function to terminate his employment and to the extent that the decision adversely affected him, he has properly invoked the Court's intervention per the case of Elizabeth Wasbeke & 62 others v Airtel Networks (K) Ltd & another [2013] eKLR. He further submitted that the essentials of procedural fairness are as enumerated under section 41 of the Employment Act. That under clause 11.6 of the Respondent's HR Manual, the



disciplinary process for a person below managerial level entails them appearing before the HRAC made up of five (5) members of the rank of head of department. That as per clause 11.10, all appeals are made to the CEO and should be lodged within 90 days from the date of receiving the warning or dismissal letter. The Claimant also noted that the investigative team was supposed to have been constituted of persons senior to him such as heads of departments. That however, the Investigative Committee was made up of three (3) Board members who forwarded their report to the Board, which issued the charges to the Claimant, thereafter set up the disciplinary committee, heard the Claimant and subsequently summarily dismissed him. That the Board essentially acted as the investigator, the prosecutor and the judge and further wanted to act as the appellate body.

15. It was the Claimant's submission that he had the right to fair administrative action codified under Article 47 of the Constitution of Kenya. That the Respondent's refusal to avail to him the said anonymous complaint and the Board's investigation report meant he could not substantively respond to the Notice to Show Cause, in a clear violation of Article 35(1) of the Constitution on the right to access information. The Claimant argued that this aspect is part of the procedural fairness test and that Radido J pointed out in the case of Patrick Abuya v Institute of Certified Public Accountants of Kenya (ICPAK) & another [2015] eKLR that a case of prejudice is easy to demonstrate where records are available and are not furnished to an employee. That the Respondent's aforementioned actions were thus a breach of his right to fair administrative action and he right to a fair process.
16. The Claimant submitted that the Respondent having only dismissed him and the Head of ICT despite the fact that they did not make any individual decisions, it effectively discriminated against him as he was made to bear the responsibility for the outcome of a collective decision. He posited that the Respondent breached his constitutional rights and subjected him to undue hardships and that justice demands that a remedy be given for the wrongs. The Claimant thus urged the Court to find that the Respondent's actions were a gross violation of the Claimant's rights to a fair hearing and to fair labour practice as well as sections 41, 43 and 45 of the Employment Act. That he is thus entitled to the reliefs sought as provided for in section 49 as read with section 50 of the Employment Act and that by dint of section 49(1)(b), he is entitled to the earned wages.
17. Respondent's Submissions
According to the Respondent, the following are the issues for determination:
 - a. Whether the Respondent's decision to terminate the Claimant from employment was unfair, unlawful and unprocedural contrary to the provisions of the Employment Act.
 - b. Whether the Claimant's constitutional rights and fundamental freedoms as enshrined under Articles 25(a), 27(1), 28, 41(1) and 47(1) were violated.
 - c. Whether the Claimant is entitled to the reliefs sought.
18. The Respondent submitted that the Claimant, an ICT expert, working with Mr. Dennis Rama as the user department, crafted the technical requirements of the servers to be procured, in compliance with section 60 of the PPAD Act. That the Claimant however later illegally and knowingly misled the Acceptance Committee that the servers supplied by the awarded Bidder had complied with the tender application and then added that the processor speeds of 3.2GHz were not available in the market. That as a representative of the user department and being an ICT expert, the Claimant's professional opinion greatly influenced the said Committee into accepting the servers provided by Konvergenz Network Solutions. The Respondent noted that the principles of integrity and maximisation of value property guide public procurement as set out in section 3 of the PPAD Act. It submitted that it is trite law that a procurement process by a state organ ought to strictly comply with the provisions of



Article 227 of the Constitution. The Respondent relied on the Court's analysis on public procurement in Nairobi High Court JR Misc. Application No. 407 of 2018 – Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology.

19. The Respondent submitted that it followed fair procedure to the letter having received an anonymous complaint in accordance with clause 11.3.1(3) of the Respondent's HR Manual. It argued that it was well within its rights to apply the HR Manual with the necessary alterations, adaptations, qualifications, and exceptions to safeguard the element of natural justice after perceived involvement of its top management. That section 15(1) of the State Corporations Act provides that a state corporation board shall be accountable for the moneys, the financial business and the management of the corporation. That it duly issued the Claimant with a letter of charge as under clause 11.3.2 of the HR Manual and that since the Claimant neglected to appeal the Respondent Board's decision to dismiss him, he cannot say he was unfairly dismissed.
20. On the Claimant's constitutional rights and fundamental freedoms, the Respondent submitted that the Constitution of Kenya does not define "torture" or "inhuman" or degrading punishment. That since the said elements were evidently neither pleaded with specificity nor proved, the Claimant's allegation of torture falls flat. It further averred that in the absence of any proof that other employees were treated better than the Claimant, the point that the Claimant's right to equal protection of the law was violated also fails. The Respondent contended that the Claimant had also not argued with precision on how the Respondent violated his right to human dignity. It also denied the assertion that the Claimant's right to fair administration action was violated and further submitted that the Claimant has not adequately laid basis for a grant of the orders prayed for. That reinstatement is untenable due to the risk it poses to the national infrastructure as the Claimant was one of the three officials with credentials to the database used to select students for admissions to universities, national polytechnics, technical training institutes and other accredited learning institutions in Kenya.
21. The Claimant was dismissed for alleged breach of his contract. The Claimant held the position of Placement Co-ordination/Career Development Officer, KUCCPS Grade 6 at the time of termination. He had been engaged as an ICT officer and rose to the position he held. As the Placement Co-ordination/Career Development Officer, the Claimant was a member of the ICT Department's Evaluation Committee. It was his actions in the Committee that led to the case before me. The Claimant was terminated after the Respondent received an anonymous tip in regard to the servers provided by Konvergenz Solutions. The Claimant was alleged to have participated in a scheme that led to the Respondent acquiring less than efficient servers necessitating the Respondent acquire additional servers to make the speed to be within the expected level. It was revealed that the processors acquired were not within the specifications as they could only achieve certain speeds and not fit the expected speed. It was worth noting the company that was awarded the tender even quoted a higher price and was largely non-responsive on the bid in terms of speed of the processors. This lends itself to the finding of the ad hoc committee and the resultant show cause notices in relation to the acquisition of the processors that were not adequate for the job resulting in re-tendering to fit the gap.
22. The Claimant was after the investigations on the processors subjected to a disciplinary process in terms of the Respondent's policies and the law. It is my finding that the Claimant was subjected to a disciplinary process that met all the requirements of the law and natural justice. The Claimant was given his charges and permitted to offer a response after which he was given a hearing. At no point in the process was the Claimant handled in a manner that would permit the disturbance of the process nor was the punishment meted out any different than the Court would expect or require of an employer who has adhered to section 41 of the Employment Act. The dismissal of the Claimant is thus proper



and within the bounds of the law. As such, the claim herein was unmerited and is accordingly fit for dismissal albeit with no order as to costs. Suit dismissed with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF APRIL 2024

Nzioki wa Makau

JUDGE

