



**Nyamwaro v County Government of Nyamira (Appeal E041 of 2023)
[2024] KEELRC 1535 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1535 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E041 OF 2023
CN BAARI, J
JUNE 19, 2024**

BETWEEN

FANE BINSARI NYAMWARO APPELLANT

AND

THE COUNTY GOVERNMENT OF NYAMIRA RESPONDENT

(Being an appeal from the Judgment/Decree of Hon. W.K. Chepseba Chief Magistrate at Nyamira delivered on 25th July 2023 in Nyamira ELRC Case No. E001 of 2021)

JUDGMENT

1. Before Court is an appeal arising from a Judgment rendered on 25th July, 2023, wherein, the Trial Court struck out the Appellant’s entire claim with costs.
2. The Appellant being dissatisfied with the decision of the Trial Court, lodged an appeal dated 24th August, 2023.
3. The appeal is premised on the grounds that:
 - i. The Hon. Magistrate failed to consider fully the evidence and documents presented to the Court before arriving at the conclusion and that the principles of Natural justice were never adhered to as per Article 47 of the 2010 Constitution and the Fair Administrative Action Act, 2015.
 - ii. The Hon. Magistrate failed to consider and find out that the purported disciplinary hearing was an appeal hearing done by the Nyamira County Public Service Board, and they lack appellate Jurisdiction to hear disciplinary appeals and review of appeals under Article 234 (2) (i) of the 2010 Kenya Constitution. It is also reflected under the County Government Act, section 77(1).



- iii. There was no notification for the disciplinary hearing and there was no hearing at all before the summary dismissal as provided for under the *Employment Act* 2007, it all started with interdiction, the purported appeal hearing, then rejection of the appeal.
 - iv. The Appellant was employed and served under probation terms and her appointment was confirmed to permanent and pensionable scheme.
 - v. Under the *County Government Act* and the *Public Service Commission Act*, it is provided that no appointments to the public service are done before ascertaining and determining qualifications.
 - vi. The Appellant's appointment under probation and confirmation of the appointment shows that she was validly and lawfully recruited.
4. The Appellant prays that the appeal be allowed and the judgment of the Learned Magistrate be set aside, and that the Court proceeds to grant her the following reliefs:
- a. A declaration that the summary dismissal was unconstitutional, null and void.
 - b. A declaration that the termination was unfair therefore illegal and unlawful.
 - c. A declaration that her right to fair administrative action has been breached.
 - d. A declaration that her right to a fair hearing has been breached.
 - e. An order for reinstatement in the County Government of Nyamira.
 - f. An order to be adequately compensated for the delayed administration process, wrongful termination and time lost out of employment.
5. The appeal was canvassed by way of written submissions, and both parties filed their submissions.

The Appellant's Submissions

6. It is the Appellant's submission that after the Nyamira Director of Criminal Investigation(DCI) officers closed the investigations and set her free without charging her of the alleged offence of forgery due to lack of evidence, another move to dismiss her from service was made and she was accused of absenteeism without reasonable cause. She submits that she was on duty on the very day she was accused of absenteeism.
7. It is the Appellant's submission that all disciplinary matters under the delegated powers are to be handled by the County Human Resource Advisory Committee as per Sections 65, 66 and 69 of the *Public Service Commission Act* and part 4 of the PSC Discipline Manual.
8. The Appellant further submits that under Article 234(2)(i) of the *Constitution*, it is the Public Service Commission that should hear and determine appeals in respect of county government public service, and therefore, the Nyamira County Public Service Board lacked jurisdiction to hear disciplinary appeals at the County Level.
9. She submits further that the Nyamira Public Service Board acted beyond jurisdiction as under Section 77(1) of the *County Government Act* a person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer, may appeal to the Public Service Commission against the decision.



10. It is her submission that she was denied the right of appeal to the Public Service Commission as per Article 234(2) (i) of the Kenya Constitution 2010 and Section 77(1) of the County Government Act. She submits that the Respondent did not conform to the Constitution and statutes thus a breach of the principles of natural justice.
11. The Appellant submits that the trial Magistrate failed to determine that she was served with a letter referenced 'Appeal Against Summary Dismissal' dated 7th April, 2021, which was a violation of Article 236 (h) which provides that, a public officer shall not be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.
12. It is her submission that the trial Magistrate failed by not finding that from the evidence of Godfrey Kiriago and documents presented to court, there was no notification of the hearing and there was no hearing at all as provided for under section 41 of the Employment Act 2007.
13. She submits further that the purported hearing notification was actually a notification of the summary dismissal which also required her to appeal to the County Public Service Board (CPSB) against the decision.
14. The Appellant contends that the DCI Nyamira in the initial investigations were not able to establish that she forged the certificate or altered the grades, and that is why there was no charges preferred against her and the matter was closed.
15. The Appellant asserts that she was validly recruited in the year 2016, her qualifications determined and later on confirmed to permanent and pensionable service after serving under probation as per under the County Government Act. She emphasises that there was no reason to engage in forgery since she met the requirements of the job.
16. In support of her claim for reinstatement, the Appellant urges the court to consider the anguish she has undergone since she was terminated. She cites the case of Kudheiba v Nairobi Club Cause No.77 of 2005.
17. The Appellant equally stakes her claim to damages together with reinstatement based on the decision in the case of Kenya Ports Authority v Silas Obegele
18. The Appellant urges the court to quash the decision of the trial court and allow her appeal as prayed.

The Respondent's Submissions

19. The Respondent submits that through an authentication process with the Kenya National Examinations Council (KNEC), it was discovered that the Appellant's KCSE certificate presented during recruitment had altered grades. It is its further submission that the KNEC report showed that the Appellant had altered her mean grade from D (plain) to C (plain) and had also increased grades in four subjects.
20. It is the Respondent's contention that the Appellant's action constituted a criminal offence deserving of summary dismissal under section 44 (g) of the Employment Act.
21. The Respondent submits that the disciplinary procedure was followed to the letter. It avers that it issued a show cause letter on 2nd November, 2018 detailing the forgery charges, which the Appellant replied to. The Respondent submits that the Appellant's response was considered at the disciplinary hearing of 16th June, 2020 after which she was dismissed as evinced by the letter dated 30th November, 2020.



22. It is submitted for the Respondent that they afforded the Appellant a chance to appeal, and which appeal was unsatisfactory.
23. The Respondent asserts that it should not be held responsible for the delay in criminally charging the Appellant as that was outside its mandate.
24. It is the Respondent's submission that the Appellant is not entitled to the reliefs sought having been summarily dismissed from service.

Analysis and Determination

25. I have considered the Memorandum of appeal, the Record of Appeal and the parties' submissions. The following issues fall for determination: -
 - i. Whether the Appellant was unfairly dismissed.
 - ii. Whether the Appellant is entitled to the remedies sought.

Whether the Appellant was unfairly dismissed

26. Section 41 of the *Employment Act*, 2007 demands that before terminating an employment contract on the grounds of misconduct, poor performance or physical incapacity, the employer must grant the employee an opportunity to make representations, either in the presence of a colleague or representative of a trade union.
27. The facts of this case as gleaned from the record, is that the Appellant was served with a letter of summary dismissal dated 30th November, 2020 informing her of the decision to dismiss her for forgery of academic documents.
28. Under the letter dismissing the Appellant, she is notified of her right of appeal, which right she was expected to exercise within 7 days of the dismissal.
29. It is now settled that even in cases of summary dismissal, the employee is entitled to a hearing in accordance with Section 41 of the *Employment Act*, 2007 and Section 4 of the *Fair Administrative Actions Act*.
30. Section 41 (2) of the *Employment Act* states thus: -

“(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
31. The Respondent's contention is that it considered the Appellant's reply to the Show Cause Letter, and thereafter summarily dismissed her from service citing alteration and/or forgery of academic documents. At no point did the Respondent even alleged to have taken the Appellant through a disciplinary process prior to summarily dismissal.
32. It is also the Respondent's evidence that it issued the Appellant a show cause letter on 2nd November, 2018 and subsequently on 30th November, 2020, it issued her a letter of summary dismissal, which by simple arithmetic is two years down the line. To have an employee wait for a decision for an entire two years, is no doubt an unfair labour practice and a violation of Article 47 read with Section 4 of the Fair



Administrative Actions Act, which entitles the Appellant to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

33. It is therefore evident that the Appellant was not invited for a disciplinary hearing of any nature or form prior to the dismissal, and the process was anything but expeditious, which without doubt renders the dismissal procedurally unfair, and so I hold.
34. On the issue of substantive justification, the reason for the Appellant's dismissal as gleaned from the letter of 30th November, 2020, is forgery of academic documents. In support of this contention the Respondent called the Deputy County Secretary Godfrey Kiriago Nyangau. He testified that following concerns by the Governor over unqualified employees, an investigation was commissioned in conjunction with the Kenya National Examination Council.
35. It is his testimony that the KNEC report found that the Appellant had falsified grades in her KCSE certificate. I have taken a glance at the report by KNEC. It states that the Appellant presented a KCSE certificate that had altered grades. Specifically, the report indicates that the English grade was altered to B+ from D+, Geography from D (plain) to B (plain), CRE from D+ to B+, Commerce from D (plain) to C (plain) and the overall grade from D (plain) to C (plain).
36. In refuting the forgery claims, the Appellant indicated that investigations by the CID did not find her culpable. She contended that the fact that she was not prosecuted in court for forgery was concrete proof that the certificate was genuine.
37. The Appellant however, did not impugn the findings of the Kenya National Examination Council. The evidence of having falsified her grades remain unshaken.
38. Forgery is deemed a reason for summary dismissal identified under Section 44 of the *Employment Act*. Falsification of grades in order to obtain employment is a grave undertaking and amounts to fraud, rendering the Appellant susceptible to criminal liability.
39. Section 45 of the *Employment Act* behoves the Employer to prove that the reasons for dismissal are valid and fair. In the circumstances of this case, the reason for the summary dismissal has in my view been sufficiently proven and which leads me to the finding that the reason for Appellant's dismissal was fair, valid and justified.

Whether the Appellant is entitled to the orders sought.

Reinstatement

40. Under the *Employment Act*, the factors to consider in a claim for reinstatement are enumerated in Section 49 (4) of the *Act*. The Court of Appeal in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR, while addressing the issue of reinstatement, cited the case of *New Zealand Educational Institute v. Board of Trustees of Auckland Normal Intermediate School* on the issue of practicability as follows:

“Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.”



41. Further, Section 12(3) of the *Employment and Labour Relations Court Act* provides for reinstatement as follows: -

“In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

.....

(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law.”

42. The Appellant was dismissed on 30th November, 2020 which is more than three (3) years today since that dismissal. The remedy of reinstatement is therefore not available to the Appellant for the reason aforesaid.

Pay In Lieu of Notice.

43. No evidence was led to show that the Appellant was issued notice or paid in lieu thereof, and having found the dismissal procedurally unfair entitles her to 1 month pay in lieu of notice. It is hereby awarded.

Leave Days

44. The Appellant has not laid any evidentiary basis in support of this claim. It is not clear to the Court how many unutilized leave days the Appellant had at dismissal and which issue was also not addressed both in the appeal and in the claim at the lower court. The claim thus fails.

45. In whole, I make the following orders: -

- a. That the Appeal partially succeeds and orders granted as follows:
 - i. That the finding of the Trial Court is set aside.
 - ii. A declaration that the Appellant was unfairly dismissed.
 - iii. An award of 6 months’ salary as compensation for unfair termination at Kshs. 61,260/-
 - iv. One-month salary in lieu of notice at Kshs. 10, 210/-
 - v. The appeal having partially succeeded, parties are ordered to bear their own costs of both the appeal and the claim before the lower court.

46. Judgment accordingly.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 19TH DAY OF JUNE, 2024.

C. N. BAARI

JUDGE

Appearance:

N/A for the Appellant

Ms. Kemunto present for the Respondent



Ms. Anjeline Wanjofu - Court Assistant

