



Omondi v Technical University of Kenya (Employment and Labour Relations Cause 589 of 2018) [2024] KEELRC 2421 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2421 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 589 OF 2018
K OCHARO, J
SEPTEMBER 26, 2024**

BETWEEN

FELIX MARK OMONDI CLAIMANT

AND

TECHNICAL UNIVERSITY OF KENYA RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 17th June 2020, the Claimant sued the Respondent seeking the following reliefs: -
 - a. A declaration that the Claimant's dismissal from the Respondent's employment was unfair, illegal and unlawful.
 - b. A declaration that the Claimant is entitled to payment of his due terminal benefits and damages as pleaded.
 - c. An order for the Respondent to pay the Claimant his terminal dues and compensatory damages all totalling to Kshs. 3,011,265/- plus interest at Court rates.
 - d. An order for the Respondent to pay the Claimant aggravated and/or exemplary damages as pleaded in paragraph 10 (iv) above.
 - e. An order for the Respondent to provide the Claimant with his Pension funds statement and the abode of the funds for the Claimant's access and a clean Certificate of Service.
 - f. The Respondent to pay the Claimant costs of this cause plus interest thereon.
2. In response to the claim, the Respondent filed a Statement of Defence dated 27th May 2022, denying that the Claimant's employment was terminated unfairly and his entitlement to the reliefs sought.



3. At the close of pleadings, the matter destined for an interpartes hearing on merit. The Claimant's case was heard on 23rd February 2023, whilst that of the Respondent was on 3rd October 2023.

Claimant's case

4. At the hearing hereof, the Claimant adopted his witness statement herein filed as his evidence in chief. It was his case that he was employed by the Respondent's precursor, the Kenya Polytechnic, as a lecturer, in the year 2004. He diligently worked for the Polytechnic which later on became a constituent college of the Technical University of Kenya, where he continued to serve as a lecturer.
5. He dedicatedly served the Respondent up to 11th September 2018 when he was issued with a show cause letter by the Vice Chancellor, setting out two charges against him, namely, undermining the academic integrity of the university by failing to process and release examination results; and taking actions tantamount to failure to comply with the provisions of his appointment. The Claimant responded to the Notice to Show Cause.
6. On 17th September 2018, at 6.10 pm he was served with an invitation to attend a disciplinary hearing scheduled for 9th October 2018 at 2 pm. The invitation to the disciplinary hearing only contained a single charge, undermining the academic integrity of the university by failure to process and release examination results.
7. He stated further that on 8th October 2018, he in a surprise turn of events received an SMS from Professor Mayende informing him that his disciplinary hearing was to be held that afternoon on that day and instructing him to attend. To him, he was ambushed.
8. The Claimant rushed to the Council Room and found a panel ready to proceed with the hearing. His protests that he had previously been informed that the hearing would be held on 9th October 2018 and that he was totally unprepared for the hearing that afternoon as he had no representative present, and documentary evidence to defend himself against the charges, fell on deaf ears. The Disciplinary Panel made the unilateral decision to proceed with the hearing.
9. At the hearing, new charges and matters that he had not been notified of before, were introduced as part of the case against him and was called upon to answer them. Further, other matters raised had earlier on been made an issue against him, deliberated on and concluded.
10. Subsequently, on 4th February 2019, he was served with a termination letter which ambiguously stated that it was being issued in lieu of three months' notice. He lodged an appeal against the termination timeously. However, it took the Respondent one year and one month to communicate the outcome of the same to the Claimant. The appeal notification was to the effect that the appeal had been dismissed, under the letter dated 11th March 2020.
11. He further contended that his dismissal from employment lacked both substantive justification and procedural fairness. The manner of the dismissal contravened the provisions of the *Employment Act* 2007; Article 50 of *the Constitution* of Kenya; the stipulations of the Fair Administrative Act; the customary tenets of good and fair labour practice; the provisions of the University Act; and the University's HR instruments.
12. He asserted that the charges brought against him which were set out in the notice to show cause and the invitation to the disciplinary hearing were so vague, omnibus and ambiguous that it was difficult to effectively respond to them. In particular, there was no mention of the particular examinations that he allegedly failed to process, coordinate and/or release. Examinations were set and marked by the Unit/



- Subject lecturer and only collated by the Coordinator, once marking had been concluded. As such, the Respondent wrongfully held him responsible for the failures of other lecturers.
13. The Claimant further stated that by students were not in respect of his results as he had just like other lecturers given out the results already collated.
 14. The Respondent denied him an adequate opportunity to prepare and defend himself against the accusations, considering that the disciplinary hearing had been slated for 9th October 2018, but inexplicably the Respondent ambushed him and dragged him into a hearing which he was least prepared for, on 8th October 2018. His protests that he wasn't prepared for the hearing didn't attract any change of mind on the part of the Council. Further, he was deprived of the exercise of his statutory right of accompaniment as his colleagues who were set to accompany him during the hearing, were not aware that the hearing could proceed on 8th October 2018.
 15. Cross-examined by Counsel for the Respondent, the Claimant testified, that it was a term of his contract of employment that the Dean had the authority to delegate some duties to him outside those mentioned in the letter of appointment.
 16. He further stated that the Respondent appointed him under the letter dated 31st August 2017 as a Class Coordinator. Part of his duties as the Coordinator was to ensure accurate and prompt release of exams.
 17. By a Memo dated 14th March 2018, addressed to all Tutors, the Respondent required them to release examination results. The Memo dated the Tutors were reminded of the need to release the long overdue results.
 18. The Claimant testified that though he didn't understand the show cause letter fully, he responded to it anyway.
 19. The invitation letter dated 13th September 2018, did set out one charge against him, a charge which he was supposed to answer during the disciplinary hearing. The letter notified him of his right to be accompanied by a colleague of his choice to the hearing. By 8th October 2018, he had not communicated that he intended to call a witness. He asserted that though he attended the disciplinary hearing on 8th October 2018, he did so unwillingly.
 20. The Claimant further testified that during the hearing there were no present union officials. However, pressed further, he stated that he found the two already in the room when he arrived for the hearing.
 21. The Disciplinary Committee didn't bother to explain to him why the disciplinary hearing had been pushed to 8th October 2018, from the 9th October 2018. He wasn't ready to proceed with the hearing as he was mentally unprepared.
 22. The Respondent's decision to terminate his employment was communicated through its letter dated 4th January 2019. In the letter, it was further expressed that he was to be paid three months' salary in lieu of notice. However, the notice pay was never settled.
 23. He admitted that he was paid a salary for the month of January 2019. Further, his outstanding leave allowance was paid.
 24. In his evidence in re-examination the Claimant stated that he only received the notice to show cause without any other material attached to it.
 25. The issues raised in the letters presented before the Court for the period before 2015, were deliberated on and closed.



26. Referred to the internal Memo dated 14th April 2015, that was addressed to him, the Claimant stated that the same concerned processing of examination results. Some part-time lecturers had not entered the examination results into the system. They were contending that they had not been paid their salaries. All that he would do in the circumstances was to write to the management, inform them, and urge them to pay.
27. At the hearing, he was ambushed by some documents which he had not been seen before the hearing date. Specifically, those on pages 27-32 of the Respondent's bundle of documents.

Respondent's case

28. The Respondent presented one witness, Ms. Ruth Kirwa to testify on its behalf. The witness adopted her witness statement dated 14th November 2022 as her evidence in chief. The stated that at all material times, the Claimant was engaged by the Respondent as a teaching assistant in the School of Engineering, Science and Technology. His duties were set out in his terms of service and could also include those that the Dean/Chairman of the School of Engineering on behalf of the Principal, would from time to time specify.
29. On 24th January 2013, the Claimant was appointed as a Course Coordinator for DIP-YEAR 1 SEM 1 course code EECE/12013P in the School of Engineering, Science and Technology with precise instructions on what his job description entailed.
30. The witness stated that the core responsibility, of course coordinators was to facilitate efficient preparations of the exams and the processing of the students' results.
31. It is the Respondent's position that contrary to the Claimant's averments that he served the Respondent University diligently, from the year 2015, the Respondent received numerous complaints from various quarters, departments and students about the Claimant's failure to invigilate examinations and to process and release examination results.
32. The witness further stated that the Claimant's other duties included administering exams, invigilation, marking, collation and releasing of examination results.
33. In 2015, the Respondent started receiving complaints from various quarters, departments, and students, about the Claimant's failure to invigilate and process and release examination results. For instance, on or about 14th April 2015, the Respondent received a complaint that the Claimant had failed to process and release exams and coordinate projects for Course code EECE/2013P Diploma in Technology, Civil Engineering for which the Claimant was a course coordinator. The Claimant was issued with a notice to show cause why disciplinary action should not be taken against him.
34. Despite being informed of the shortcomings in his department, the Claimant continued to neglect his duties which necessitated the issuance of an internal memo to him pointing out the failure to perform his duties, and another internal memo dated 17th September 2015 requiring the Claimant to promptly and swiftly process all pending exams of class ET 307112 and EECE/2013P.
35. On 28th October 2015, a third internal memo was issued by the Respondent owing to the Claimant's failure to process the final year exams for class Et307112 and EECE/2013P. On 20th November 2015, the Respondent issued the Claimant with another notice to show cause why disciplinary action should not be taken against him for evident neglect of his duties. On 2nd August 2016, the Claimant failed and/or refused to invigilate scheduled exams culminating in another internal memo requiring him to explain his actions. On 1st December 2016, the Claimant failed to invigilate Engineering exam papers Eb517113 and Eb517113 and was issued with a notice to show cause dated 13th December 2016.



36. The Claimant's persistent misconduct caused the Respondent's Vice-Chancellor to issue the Claimant with a stern warning. Undeterred, on or about 14th September 2017, the Claimant again failed to invigilate Civil Engineering papers 514112/517113;514113/517113; and EICQ/2014. The aforesaid misconduct culminated in a recommendation by the Chairman of the Department of Civil Engineering at the Respondent University vide an internal memo dated 15th September,2017 that a disciplinary process be initiated against the Claimant.
37. By an internal memo dated 14th March 2018, the Chairman asked all tutors to urgently release 2017 examination results. By 16th May, 2018, the Tutors hadn't complied forcing him to issue another memo to them including the Claimant, requiring them to release the marked examination scripts within a designated period to facilitate the release of examination results to students. The Claimant did not comply with the directive to release exam results. The continued delay in releasing the marked examination scripts to facilitate the release of results to students caused disquiet amongst the students who on 31st May 2018 formally wrote to request for the release of the results.
38. Since the Claimant's misconduct had become repetitive, to avert a looming crisis, the Chairman of the Department referred the Claimant's case to the Deputy Vice-Chancellor vide an internal memo dated 7th June 2018. The Deputy Vice-Chancellor issued the Claimant with a show because letter dated 17th August 2018.
39. Through a letter dated 13th September 2018 the Claimant was invited for a hearing before the Disciplinary Committee. The invitation letter clearly stipulated the charge he was expected to respond to and emphasized to the Claimant his right to be accompanied by witnesses of his choice. Further, the Claimant was given ample time to prepare and avail any witness of his choice, save that he was required to notify the Respondent of such witnesses 48 hours before the meeting. Despite this, the Claimant didn't at any time inform the Respondent that he intended to present a witness[es] during the hearing.
40. On 8th October 2018, the Claimant attended the Disciplinary hearing in the Company of two union officials namely Mr. Muiga Rugara and Mrs Gichunge, officials of the University Academic Staff Union (UASU) to which the Claimant was a member.
41. During the disciplinary hearing, the Chairperson of the disciplinary committee explained the reason why the disciplinary meeting was rescheduled and the Claimant without any objection indicated he understood the reasons behind the re-scheduling and agreed to proceed with the disciplinary proceedings. When called upon to present his defence, the Claimant submitted mere denials and flimsy excuses. He did not tender any substantive explanation to rebut the charge.
42. The Respondent states that after considering the charge against the Claimant, the persistent repetitive misconduct of the Claimant, the evidence on record and the explanation offered by him, which explanation was found to be unsatisfactory, the Disciplinary Committee recommended the dismissal of the Claimant from employment. Per clause 12.1.3 of the Respondent's terms service, the Respondent issued to the Claimant a letter dated 4th January 2019 terminating his employment.
43. Although the Claimant appealed against the said decision through a letter dated 9th February 2019, outside the legally designated 21 days for lodging appeals as set out in the Respondent's Terms of Service, the Respondent received the appeal and set up the Staff Council Appeal committee to review and determine the appeal. The Appeal Council evaluated the charge, evidence tabled before the Disciplinary Committee and counter-evidence in defence against the charges, the disciplinary process followed, applicable labour laws and implications of the acts and/or omissions of the Claimant, and upheld the decision by the Disciplinary Committee. The appeal was dismissed and the decision of the Appeal Council was communicated to the Claimant vide a letter dated 9th March 2020.



44. The Respondent asserted that in light of the foregoing premises, it was within its rights to terminate the Claimant's employment, and did so per the law.
45. With regard to the Claimant's claim for untaken leave days, the Respondent avers that its Terms and Conditions of Service require an employee to seek permission from the Principal in writing to accumulate leave days exceeding half of his or her annual leave entitlement for every year. Any leave days exceeding half of any employee's annual leave entitlement, accumulated without written permission from the Principal, are deemed to be forfeited. The Claimant did not seek, and neither was he granted permission to carry forward his 2017 leave days to 2018.
46. Cross-examined by Counsel for the Claimant, the witness testified that the disciplinary hearing was designated for 9th October 2018. However, the disciplinary proceedings were conducted on 8th October 2018, at 3:00 p.m., a date which wasn't appointed for the purpose as per the invitation letter.
47. The witness further testified that the minutes of the hearing reveal that the Claimant was asked whether he had been informed why the hearing was rescheduled to 8th October 2018, and his answer was in the affirmative. Thereafter, the hearing continued.
48. Pressed further in the cross-examination, the witness changed the forgoing testimony and made an admission that the Claimant didn't admit that an explanation was given to him for the rescheduling.
49. The witness further testified that the hearing proceeded notwithstanding his indication to the Committee that he was not ready to proceed with the hearing.
50. The decision to reschedule the hearing to an earlier date was informed by the reason that there were Council Members who had travelled from as far as Kericho for the Council meeting and wanted to travel back. She ahead to state that the date 9th October 2018, was fixed with the knowledge of the Council Members.
51. The secretariat did not write to him informing him of the change in dates. He was informed by Prof. Mayende on 8th October 2018, through an SMS, which from the documents presented by the Claimant was sent at 11.00 am, and received at 11.02 am. According to the message, the disciplinary hearing was set for noon.
52. The invitation letter for the disciplinary hearing did set out only one charge against him, undermining the integrity of the University by failing to release exams. The document captioned 'Chronology of events' was an internal tool to be used during the hearing. It was not given to the Claimant before 8th October 2018.
53. When he was appointed as a coordinator, for examinations production and marking, he was given a list of what was required of him in the position. Examinations are conducted by individual lecturers, who upon marking, transmit their results to the coordinator for release. There isn't any document or evidence to show that the Claimant received results from the lecturers but refused to release the same to students.

Analysis and Determination

54. I have reviewed the pleadings, oral and documentary evidence, and written submissions of the Claimant, and return that the issues for determination are as follows: -
 - a. Whether the Respondent unfairly terminated the Claimant's employment;



- b. Whether the Claimant should be awarded the terminal dues sought in his Memorandum of Claim dated 17th June 2020.

a. Whether the Respondent unfairly terminated the Claimant's employment

55. Unfair termination is defined under Section 45 (2) of the *Employment Act* 2007 as follows:

- “(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-
 - i. related to the employee's conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.”

56. It becomes clear therefore that faced with a matter for interrogation concerning fairness in the termination of an employee's employment, the Court has to consider two statutory aspects, both of which must be present for the termination to pass the fairness test, substantive and procedural fairness. This position is rightfully appreciated by the parties in their respective submissions.

57. The total unit of fairness as contemplated by the provisions of the *Employment Act*, therefore embodies these two aspects and the absence of any one of them or both of them in the termination of an employee's employment the same unfair placing the employee on the path to be granted any of those many reliefs that the post 2007 law has availed.

58. Section 41 of the Act provides for a mandatory procedure that any employer contemplating terminating an employee's employment or summarily dismissing the employee, on those grounds set out in section 45 [2][b][i][ii] must conform to. The procedure has three pivotal phases, thus:

- I. The notification/ information phase- the employer must inform the employee that he or she intends to take action against him or her, and the reason[s] arousing the contemplation;
- II. The hearing phase- the employer has to allow the employee affected an adequate opportunity to prepare and make a representation on the employer's intention and the grounds thereof. The employee should also be allowed to be accompanied by a colleague of his or her choice, or a trade union representative if he or she is a member of a trade union.
- III. The Consideration phase- the employer must consider the representations made by the employee and or the person accompanying him, before taking a final decision on the matter. Consider the representations as such, for failure to do so shall render the whole essence of hearing the employee worthless.

59. The Respondent contends through its pleadings, evidence it presented before this Court on its behalf and submissions by its Counsel that the procedural cannons contemplated by the law were dully adhered to and as such, the termination of the Claimant's employment was procedurally fair. The Claimant saw it and contended, otherwise.



60. There isn't any doubt that the Claimant was issued with a show cause letter wherein it was alleged that he had misconducted himself in particular manners, and was required to respond to the allegations within a specific time. Further, he responded to the show cause letter, through his letter dated 12th September 2018.
61. Further, the Claimant was invited through a letter dated 13th September 2018, to appear before the disciplinary hearing. In this letter, the one accusation that the Claimant was going to answer to was duly set out. Up to here, I cannot be off the mark to state that the notification/information component of the procedure contemplated under Section 41 of the Act was satisfied.
62. However, there is controversy as to whether the hearing component as contemplated in Section 41 of the Act, the stipulations of the *Fair Administrative Action Act*, Article 50 of *the Constitution*, and the tenets of natural justice were adhered to.
63. In my view, preparation for a disciplinary hearing is an integral part of the hearing component. Employers must be seen to truly allow an employee adequate time to prepare to defend himself or herself against the charges levelled against him or her. Where the enterprise's Human Resource Procedure manual gives a specific time, between date of invitation to the disciplinary hearing and the hearing date, the timelines must be adhered to. Where such provision is not provided for or demonstrated to be in existence, the employee must be allowed reasonable time.
64. It is not contested that the hearing was as expressed in the invitation to disciplinary hearing hereinabove mentioned set for the 9th October 2018 at 2:00 p.m. Without prior notification, the hearing was brought forward to 8th October 2018. The Claimant was asked to attend the hearing a few minutes before the hour that the Disciplinary Committee had decided to proceed with the hearing. The Claimant protested that he was not ready to proceed with the hearing but the Committee members insisted on going on with the hearing. The Respondent in my view, didn't rebut this evidence by the Claimant.
65. It is clear from the minutes in respect of the disciplinary hearing, that the Claimant brought it to the attention of the Disciplinary Committee that he had documents that he intended to refer to answer to the charge, but which document he wasn't having as he had left them at home, considering that the hearing was slated for 9th October 2018.
66. I have really agonized over what informed the Respondent's decision to bring forward the hearing date suddenly without prior information to the Claimant, I see none, and I hold that the one that the Respondent's witness attempted to advance with due respect, makes sense. The decision was arbitrary, and one that cared not, that a disciplinary hearing requires mental preparedness on the part of the affected employee. Employers shouldn't therefore be allowed to ambush employees with disciplinary hearings.
67. It is on this note that I do not get persuaded by the Respondent's submission that this was a minor misstep that didn't affect the procedural fairness of the disciplinary process. The submission by the Respondent that the Claimant had humble time [between 11.00 am and 3.00 pm] to prepare for his defence is not convincing. It ignores the pivotal point that he wasn't staying in Nairobi but in Athi River. In essence, he was saying that he couldn't in readiness for the hearing that day. No bigger prejudice can be occasioned against an employee facing disciplinary proceedings than being unnecessarily deprived of the chance to put reliance on the documents that he thinks are necessary for his defence.
68. In conclusion, I hold that the termination of the Claimant's employment was procedurally unfair.



69. I now turn to the substantive justification aspect. Sections 43 and 45 of the Act speaks to this aspect. Section 43 of the Act requires the employer in a dispute regarding the termination of an employee's employment to prove the reason[s] for the termination. Where the employer fails to prove the reason[s], the termination will be deemed unfair by operation of the provisions of Section 45 of the Act.
70. On substantive justification also referred to as Section 45 of the Act requires that the employer to demonstrate that the reason was valid and fair. A default in showing this renders the decision to terminate the employee's employment unfair. Counsel for the Respondent submitted that to discharge the burden of proof contemplated under this provision, the standard is on a balance of probability, and to support this he placed reliance on the holding in the case of *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [2019] eKLR. True in my view, the degree of proof is as stated in the decision.
71. Citing the same case, Counsel submitted that all that the employer is required to prove are reasons that it genuinely believed to exist, causing it to terminate the employee's services. This Court is fully aware that some judicial decisions have affirmed the reasonableness test as the test to gauge substantive justification in the employers' decision. In my view, [which might not be binding owing to the fact that the Court of Appeal affirming the reasonableness test] the test looked at from this constrained angle, will always require the Court to consider fairness from an employer's perspective at the time of termination only, without allowing it to consider and analyze wholly the material presented before it by the parties in the proceedings.
72. It is my further view, not binding again, but which requires reflection on, that the reasonableness test is not wholly in alignment with the statutory and constitutional structure obtaining in Kenya. For instance, one could wonder whether the 'band of reasonable responses' test should be applied in its existing form where employee's rights under the bill of rights are said to have been violated.
73. Section 45[7], requires the Court to consider whether the employer acted with equity and justice. This in my view, will require assessment of common fairness in the termination/dismissal. How then can this be aligned to the reasonableness test, which only considers the employer's perspective?
74. The reason for the termination of the Claimant's employment was set out in the termination letter dated 4th January 2017 which reads in part:

“Further to the Disciplinary Process of the Technical University of Kenya held on 8th October, 2018, it was observed that your services as an officer of the University are no longer required by the institution. You are charged with and found guilty of the following under-mentioned offences: -

Undermining the academic integrity of the Technical University of Kenya by failing to process and release examination results (Diploma in Technology, Civil Engineering) in the Department of Civil and Construction Engineering, School of Infrastructure and Resource Engineering (SIRE) on various occasions, the facts of which you are aware of since they have been brought to your attention by your Supervisors and/or the Dean of Faculty of Engineering Sciences and Technology (FEST).

Consequently, pursuant to prevailing employment laws of Kenya, Technical University of Kenya (the legal successor of the Kenya Polytechnic University College) Terms of Service for Teaching, Senior Technical, Senior Library and Senior Administrative Staff, the Code of Conduct and Ethics for Public Universities, 2003 and the subsequent requirements of



the Charter of Technical University of Kenya, 2013 the successor of the Kenya Polytechnic University College, it has been decided that you be and you are hereby TERMINATED from the services of the Technical University of Kenya in lieu of three (3) months' notice with effect from the date of this letter."

75. This Court has time and again emphasized that the reason for termination of an employee's employment as expressed by the employer through a termination or dismissal letter must be seen to flow from the documents and or events preceding the disciplinary hearing, the disciplinary hearing, and the verdict of the Disciplinary Panel as expressed in the minutes thereof. Essentially, the employer is not with the liberty to introduce new charges against the employee at the floor of the hearing, charges which didn't form part of investigations [if an investigation done]; notice to show cause; and the invitation to disciplinary hearing letter. Where the was invitation to disciplinary hearing letter contains a lesser number of charges than the previous document[s], the charges for purposes of the hearing shall be those on the last document. Procedural fairness is often interwoven with substantive fairness.
76. However, that is not to state that previous misconducts are irrelevant in disciplinary proceedings regarding subsequent alleged misconduct. The relevance can only be limited to the same, being a factor for consideration when determining the sanction to be handed down by the employer.
77. The reason[s] for terminating an employee's employment must be unambiguously set out. One that can be read and understood with clarity. Generalized ground[s] will seldom be considered valid and fair.
78. By the letter dated 13th September 2018, the Claimant was invited to attend a disciplinary hearing to respond to the charge;
- "Undermining the academic integrity of the Technical University of Kenya by failing to process and release examination results [Diploma in Technology, Civil Engineering] in the Department of Civil and Construction Engineering School of Infrastructure and Resource Engineering [SIRE] on various occasions, the facts of which you are aware of since they have been brought to your attention by your Supervisors and or the dean of Faculty of Engineering Sciences and Technology. [FEST]."
79. Looking at this charge, the conclusion that it was too general, allowing the Respondent to wander into matters of almost a decade before the hearing, and requiring the Claimant to answer to them will not be unmerited. The Claimant couldn't provide answers regarding the matters as he couldn't without the records of 2008. This notwithstanding, the records informed the Disciplinary Committee's decision. On page 9 of the Minutes of the disciplinary hearing, the sub-caption, Committee's Discussions and Findings, the Committee stated; He was found guilty with records spanning from 2008 He is playing the victim of the system He has been doing his masters since 2006 and therefore was not progressing well as an academician He was found to be negligent in his duties."
80. I have carefully considered the contents of the various documents that were placed before this Court concerning the unending problem that was regarding invigilation, administration of examinations and release of examinations under the docket of the Claimant. The Court has not lost sight of the fact that the subject matter of the reason for the termination was limited to the processing and releasing of examinations. The Court notes that all the memos that were tendered as evidence on this subject were addressed to all course Tutors. None was addressed to the Claimant specifically.
81. Further, the Respondent's witness testified under cross-examination that the Claimant as the Course Coordinator would only process and release examinations at the point when each course Tutor



transmitted their subject results to the Coordinator. She had no document to show that the Claimant received transmitted results from the Tutors but failed to compile and release the same. The Claimant's position that the defaults of the other Tutors were being visited on him unjustifiably was not challenged, therefore.

82. By reason of the foregoing premises, I find that the termination of the Claimant's employment was substantively unfair. The Respondent in the circumstances of the matter, didn't act with equity and justice.

(b) Whether the Claimant should be awarded the terminal dues sought in his Memorandum of Claim dated 17th June 2020.

83. Having found as I have hereinabove that the termination of the Claimant's employment was both procedurally and substantively unfair, I now turn to consider the reliefs sought. The Claimant sought inter alia compensation for unfair termination of his employment, twelve months gross salary. Section 49 [1][c] of the *Employment Act*, bestows on this Court the authority to award an employee who has successfully prosecuted his claim for unfair termination a compensatory relief. However, it is pertinent to point out that the authority is discretionarily exercised. The grant depends on the circumstances peculiar to each case.

84. I have considered the; length of service the Claimant rendered to the Respondent; fact that the Respondent inexplicably decided not to adhere to the requirements of the law and more specifically on procedural and substantive fairness; the Respondent didn't act with equity; the industry in which the Claimant was serving and the likely effect of the termination on his prospects of getting another employment, and hold that he is entitled to the relief, 4 months gross salary.

85. I allow the prayer for three (3) month's salary in lieu of notice as termination of the Claimant's employment took effect immediately with the assurance of payment in lieu of notice. This was clearly spelled out in his termination letter dated 4th January 2019. Also Clauses 5.2 and 5.3 of the Collective Bargaining Agreement between the Respondent's Council and the Universities Academic Staff Union makes provision for three months' termination notice for Chairmen, Heads of Department and Staff in Grades XI, XII and XIII.

86. The Claimant further sought for earned but unutilized leave days for half year 2017, and 21 days in 2018. In opposing this claim, the Respondent submitted that clause 7.1 of the Collective Bargaining Agreement provides for annual leave. Sub-clause 7.1[d] prohibited accumulation of leave days without permission, and any leave days accumulated without the permission of the Respondent could be forfeited. The Claimant didn't show that the accumulation of leave days was with the permission of the Respondent, and therefore he cannot anchor his claim or a right forfeited.

Clause 7.1 (d) provides;

“Annual leave shall not be accumulated and any leave not taken in any year shall be automatically forfeited unless prior permission to accumulate such leave shall have been given by the Vice Chancellor. Any such accumulated leave shall be taken in entirety together with the leave earned, in the next eighteen [18] months or otherwise be forfeited; provided a member of staff shall not be allowed to carry forward to the next leave year more than half of his/her annual leave entitlement for a given year.”

87. The Claimant was very deliberate in seeking compensation for earned but not utilized leave days for 2017. In appreciation of the stated provision, he sought only 50% of his entitled compensation for the untaken leave days in the year. This I hold rightfully so. In the circumstances of this matter, the



stipulations of the above stated clause cannot apply to disentitle the Claimant compensation for the unutilized leave days for 2018.

88. As the only basis for the Respondent's objection to the Claimant's claim under this head was the stipulations of the stated clause, which basis I have dismissed, I see no reason to disentitle the Claimant this relief sought. I should also point out that this finding is further buoyed by the fact that the Respondent as the Keeper of employee's record did not place forth any record to show either, that the Claimant utilized his leave days duly, or that he was compensated for the earned but untaken leave days.
89. The Claimant sought that the Respondent be directed to issue the Claimant a complete statement of his Pension fund and money. I have carefully considered the evidence placed before me by the Claimant, I fail to see what informed the seeking of this relief, is it that he requested for the same and it wasn't given? or was it a contractual requirement that the statement issued at certain intervals and the Respondent failed to? The Claimant is inviting this Court to venture into the space of speculation. I am not ready to.
90. Per Section 51 of the *Employment Act* 2007, an employee whose employment has been terminated is entitled as of right to a Certificate of Service. The Respondent didn't demonstrate that one was issued to the Claimant. It is hereby directed to issue one to him.
91. In the upshot, judgment is hereby entered for the Claimant in the following terms: -
- a. A declaration that the termination of his employment was unfair, procedurally and substantively.
 - b. The Claimant be paid;
 - i. Three (3) month's gross salary in lieu of notice
(Kshs. 168,242 x 3) Kshs. 504,726.00.
 - ii. Compensation for earned but unutilized leave days
(Kshs. 168,242 x 54/30) Kshs. 201,890.40.
 - iii. Compensation for unfair termination pursuant to the provisions of Section 49[1][c] of the Employment Act, four months' gross salary, [168, 242 x4], 672, 968.
 - c. The Claimant be issued with a Certificate of Service within 30 days of this Judgment.
 - d. Interest on (b) above at Court rates from the date of this judgment until payment in full.
 - e. The Respondent shall bear the costs of this suit.

READ, DELIVERED AND SIGNED THIS 26TH DAY OF SEPTEMBER 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Emirungu for the Claimant

Mr. Mwangi for the Respondent

