



**Wekesa v Mombasa (Cause E015 of 2024)
[2024] KEELRC 2295 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2295 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E015 OF 2024
M MBARŪ, J
SEPTEMBER 26, 2024**

BETWEEN

ERICK WANJALA WEKESA CLAIMANT

AND

THE AGA KHAN ACADEMY, MOMBASA RESPONDENT

JUDGMENT

1. The claimant is a male adult and a medical practitioner. The respondent is a private school (academy) located in Mombasa.
2. The respondent employed the claimant as a medical officer on 15 May 2022 at a monthly gross salary of Ksh.250, 000 per month. It was not inclusive of the house allowance. The salary was increased to Ksh.262, 500 without a house allowance.
3. During his employment, the claimant was working with nurses, a clinical officer and an emergency medical technician who were supporting him in his role as a resident medical officer.
4. The claim is that the claimant was subjected to choreographed disciplinary proceedings after complaining with the line manager against the clinical officer who was a member of his staff for insubordination and disregard to directions. On 12 September 2023, the claimant received a notice to show cause where he was accused of breach of duty of care and misuse of organization property. He was directed to respond by 2 pm on 14 September 2023 contrary to the stipulated 3 days under the human resources policy.
5. Upon issuance of the notice to show cause, the respondent directed security guards to trail him while within the school. This brought him embarrassment and ridicule among other employees.
6. The claim is that the notice to show cause had no basis and perpetuated discriminatory treatment. It was occasioned after making a complaint against a member of his staff but instead, the claimant was



victimized. No action was taken against the subject employee due to existing relations with the human resources manager, a fact well-known to the respondent.

7. On 15 September 2023, a disciplinary hearing was conducted by a committee that was not well constituted including the human resources manager and head of finance. The claimant had expected an independent panel including a medical expert since the complaints raised concerned the professional practice of a doctor except for the allegations of misuse of organization resources. This was followed by the notice of summary dismissal for alleged gross misconduct on fabricated grounds.
8. The claimant filed an appeal despite the hostile environment. His request to be represented by his advocate was denied and on 26 October 2023, he received an incorrect date for the hearing of the appeal for 25 October 2023. The hearing was rescheduled to 2 November 2023 but the human resources manager sent numerous links which confused him. On the day of the appeal hearing, the claimant was denied a chance for a hearing leading to unfair termination of his employment.
9. The claim is that the disciplinary hearing could not address the allegations made against him as per the Kenya Medical Practitioners and Dentists Council guidelines to assess the situation and reach a conclusion. There was a conflict of interest in the disciplinary committee as the persons who complained to him, the supervisor and the line manager were part of the disciplinary hearing and hence were not impartial. The purported gross misconduct was not valid to justify.
10. The claimant's case is that he was discriminated against. There was a predetermined decision to terminate his employment choreographed by the medical staff under his supervision. This is demonstrated by the fact that there existed no valid grounds for summary dismissal, there was no due process and was denied a right to a hearing in the presence of his advocate. His complaint against a clinical staff was not addressed and instead, he became the victim actively demonstrating discriminatory treatment against him.
11. The claim is also that the claimant was mistreated during the disciplinary process lowering his reputation as a medical doctor among members of staff and students leading to defamation. The basis is that the claimant was subjected to a disciplinary process on fabricated grounds and spreading information to the rest of the school. He was confronted with questions from students and members of staff wondering what he had done. The claimant had to deal with false rumours in a school where students have access to social media and information spreads quickly. By ordering guards to trail the claimant around the school, this damaged his reputation and standing in the community.

The claimant is seeking the following;

12.
 - a. 12 months' pay in compensation for unfair termination of employment at Ksh.3,150,000;
 - b. 3 months' notice pay Ksh.787,500;
 - c. Unpaid house allowance for 16 months Ksh.1,200,000;
 - d. Damages for defamation Ksh.5,000,000;
 - e. Compensation for pain, suffering and loss of employability at ksh.20,000,000;
 - f. Unpaid accrued risk allowance Ksh.1,200,000;
 - g. Costs of the suit;
 - h. Certificate of service.



12. The claimant testified that before being employed by the respondent he was employed at Gertrude's Children's Hospital, Mater Hospital, and Nairobi Women's Hospital with a clean record.
13. The claimant testified that upon employment by the respondent, he was diligent in his duties but he noted subtle discrimination against him by the management. When the nurses were awarded a monthly risk allowance, he was not awarded anything. Being their supervisor, he was exposed to more risks than the nurses. He expected this would be corrected but his concerns only led to unfair termination of employment.
14. In September 2023, a nurse, Eunicate Karimi gave him difficulties through insubordination and failure to follow instructions. He reported these incidents to management but nothing was done to address this misconduct. On 11 September 2023, the claimant reported the matter to the head of the academy, Colin Webster and the head of finance, Patrick Wambua but nothing was done. Instead, On 12 September 2023, the claimant was issued with a notice to show cause and after a hurried disciplinary hearing, he was issued a notice of summary dismissal. He filed his appeal but was not given a hearing leading to unfair termination of employment.
15. The claimant testified that he was accused of failing to handle a student professionally and failing to involve the parents to assist but no evidence was produced. The subject student or parent was not called during the disciplinary hearing to state any complaint against the claimant as alleged.
16. The claimant was also accused of using the school guest house, a place that every staff would use without hindrance. There were no regulations prohibiting its use. His supervisor showered in the guest house and encouraged him to use it to relax whenever he wanted. If there was any intention to prohibit the claimant from using the guest house, his supervisor would not have encouraged its use.
17. The claimant was accused of leaving prescription forms and his authorization stamp unattended yet these tools were manned by the nurses. They were placed at a point without access to others save for the nurses. He would instruct the nurses to only order medication and not through any other person. The claimant explained to the disciplinary panel that nurses are allowed to handle a doctor's stamp as for guided prescription, which is not subject to misconduct. Nurses are under a professional body that governs their conduct and the complaint made against him had no factual or professional basis.
18. The claimant testified that he was accused of allowing a non-medical staff to accompany students to the hospital for medical visits. However, the person was an intern sent to his department by the human resources manager who was in charge of recruitment. There was no incident reported arising from such person and the allegations made were baseless only choreographed to terminate his employment.
19. The claimant noted the incident leading to the notice to show cause arose when a student came to the clinic complaining of illness. He had learned that the students would use illness to avoid some classes and hence he asked the nurse to let him be as he observed the student and attended to other duties. The nurse opted to escalate the matter and decided to take the student to the hospital contrary to his instructions which was insubordination. Nothing was done to the nurse despite his reporting the matter to management. The incident relating to a non-medical person accompanying students to the hospital arose after the human resources manager placed an intern in his department. He was the only available person who accompanied students to the hospital but the claimant was alleged to have allowed a non-authorized person to take up that role. The practice was to have a nurse or driver accompany a student to the hospital outside the school and not necessarily by a person who was medically trained. No injury or incident was reported out of the intern accompanying the student to the hospital in the company of the school driver.



20. The claimant testified that following the notice to show cause, the respondent spread information about him that was defamatory to students and security guards were sent to trail him around the school. This caused him embarrassment and ridicule and has caused him mental anguish and distress. Following the termination of his employment, he went into depression and had to secure professional service to address the same. He has been unable to secure new employment due to the notice of summary dismissal that had no justification and hence affected his employability. The claims made should be awarded with costs.
21. The claimant testified that he was invited to the appeal hearing but could not afford to travel to Mombasa from his home. He requested to attend virtually but at the appointed hour, he had challenges with internet connectivity and lost 20 minutes. When he was unable, he called the secretary who alerted the appeal panel that he was waiting and unable to join the hearing but by the time he was able to join, the panel had logged off. This denied him a right to a hearing and an unfair labour practice.

Response

22. In response, the respondent admitted that the claimant was employed as a medical officer on 15 May 2022 reporting to the head of administration at a consolidated salary of ksh.250, 000. He was also governed under the respondent's Non-Teaching Terms and Conditions attached to his letter of appointment. He had a detailed job description and was required to perform his duties professionally and in the best interests of the respondent and the students.
23. In August 2023 the respondent became aware that the claimant was not following the safeguarding policy by authorizing a non-teaching professional, without the necessary training to accompany students to the hospital. The claimant left the prescription forms and his authorization stamp at a place where they were accessible and useable by anyone. He asked nurses to ignore students.
24. The response is also that the respondent found that the claimant was misusing the organization's resources. He was using the school guest house, which is a private facility for personal use including washing machine for laundry and taking tea without authorization.
25. Through a letter dated 12 September 2023, the claimant was invited to show cause why disciplinary action should not be taken against him and on 14 September 2023 he replied but this was found unsatisfactory. He was invited to a disciplinary hearing on 15 September 2023 to make his representations and present was the head of human resources, the head of finance head of administration and a representative from human resources. The representations made by the claimant were found unsatisfactory. On 26 September 2023, he was issued with a notice of summary dismissal under the provisions of Section 44 of the Employment and Clause 1.21 of his contract of service.
26. During the disciplinary hearing, the claimant did not show an attitude or willingness to learn, he remained non-cooperative and admitted that he left prescription forms and his authorization stamp with nurses. His assertion that this was approved by KMPDC guidelines but he failed to produce any evidence.
27. The claimant was advised about his right of appeal and a panel was constituted. He was invited to attend the hearing but failed to do so.

The claims made are without merit and should be dismissed with costs.
28. In evidence, the respondent called Stella Njagi the head of human resources who testified that the claimant was employed and issued his contract that had a negotiated gross salary and was consolidated inclusive of house allowance at Ksh.250, 000. He had no other benefits as the salary was all-inclusive.



29. The claimant was also issued with the Aga Khan Academy, Mombasa Kenyan Non-Teaching Terms and Conditions which regulated his employment terms and conditions.
30. Under the detailed job description, the claimant was responsible for his staff and was further required to ensure the safeguarding of students and those accessing the health facility and not to leave prescription forms and his authorization stamp in an accessible place. In the breach, the claimant asked nurses to ignore students at the clinic. He also misused the guest house where he visited to do laundry and take tea without authorization.
31. MS Njagi testified that the claimant was taken through the due process and allowed to attend a disciplinary hearing. He failed to give satisfactory responses and took the view that he was not ready to learn. He was allowed a right to appeal and on the day of the scheduled hearing, the claimant was invited to attend physically but he opted to attend virtually. At the appointed time, the claimant failed to join through the shared link and after 20 minutes, the hearing was called off.
32. MS Njagi testified that the claimant breached the safeguarding policy by allowing his prescription forms and authorization stamp to be left in an open place. The claimant admitted that under his professional body, this was allowed but he failed to produce the guidelines. It was dangerous for students who were accessible to the facility to have the prescription forms and the doctor's authorization stamp at an accessible place. This would facilitate access to prescribed drugs. The witness was able to get a sample from the facility with ease.
33. The claimant also sent an intern taken for records to accompany a student to the hospital outside the school. The intern had no training in first aid and this placed the student in danger. Such conduct was not allowed and the claimant, as a medical doctor should have ensured strict adherence to the policy.
34. The claimant admitted to using the guest's house to clean his clothes and drink tea. This was not allowed since such a facility was for private use by the school.
35. During the disciplinary hearing, the claimant remained non-cooperative and refused to admit to his conduct and hence, the panel recommended summary dismissal as the conduct committed was defined as gross misconduct.

At the close of the hearing, both parties filed written submissions.

Determination

36. Through notice dated 26 September 2023, the respondent terminated the claimant's employment through summary dismissal because following a disciplinary hearing on 15 September 2023 the allegations made against him were sufficiently proved.
37. The claimant's case is that he had complained about the conduct of his staff who was insubordinate, but instead of the matter being addressed, he was victimized through disciplinary proceedings leading to the unfair termination of his employment. That he was discriminated against for lodging his complaint and that other staff in his department and who he supervised were paid health risk allowances but he was not. He was also not paid a house allowance.

Through a notice to show cause on two major grounds;

- a. Safeguarding – failing in the duty of care by authorizing a non-health professional to accompany students to the hospital, leaving prescription forms at authorization stamp to be accessed and used by anyone, and asking nurses to ignore students; and
- b. Misuse of organization resources where he used the school guest house for personal use.



38. In response, the claimant noted that, on the safeguarding, Salim Sally was attached to his office on internship by the office of human resources which had a duty to induct him with the internal policies and not him. He evaluated all the students who needed to be taken to the hospital and noted that unless clinically unstable, Salim could accompany them. No incident was reported.
39. The claimant noted that his office was fully accessible to everyone and as part of his professional duties would be assisted by nurses who had access to his office. Hence, the prescription forms and authorization stamps were accessible to them since they were professionals regulated as such.
40. On the alleged failure to treat a student, he noted that he received the student on 5 August 2023 and spoke to the mother and father on his clinical diagnosis and the attendant issues. The student noted that he had homesick with details that he is not professionally allowed to disclose for breach of doctor-patient confidentiality. On the given background, the claimant opted to keep the student under observation but the nurse, Eunicate ignored any instructions and escalated the matter. This was insubordination. He reported the matter but was not addressed.
41. On the issue of use of the guest house, he admitted that he had been using the facility since his employment commenced had washed his uniforms and taken drinking water from the dispenser. He did so in the company of his supervisor and no issue arose until he reported the case of insubordination by the nurse. He apologized for using the guest house without authorization since he had not been aware that it was not allowed.
42. These matters arose during the disciplinary hearing on 15 September 2023. The claimant gave the same responses as he had articulated in response to the notice to show cause. These were found unsatisfactory.
43. In the contract of employment dated 10 May 2022, the claimant was bounder under its terms and conditions together with the attached Terms and Conditions of Service attached to the letter.
44. Indeed, an employer is allowed the latitude to lay out the employment terms and conditions necessary for the business. This is allowed under the provisions of Section 12 of the *Employment Act*. Where the respondent was running a school with students who required safeguarding, a policy was issued in this respect as held in *Erastus Sifunjo Kisaka v University of Nairobi [2020] eKLR*. The court should therefore not take over and exercise managerial prerogative at the workplace unless the process is marred with irregularities and that court could not stop the process but only put things right as held in the case of *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR*.
45. In the respondent's Aga Khan Academy, Mombasa Kenyan Non-Teaching Staff Terms and Conditions, summary dismissal is addressed under clause 1.21 of the policy. This arises where the employee is found to be of gross misconduct for negligence, breach of confidentiality, criminal conviction, violation of terms and conditions of employment, and being engaged in other employment.
46. The respondent had the human resource policy and procedure which outlined the various procedures to be applied in the event of an incident of misconduct or gross misconduct.
47. Under this policy, gross misconduct is defined to include various acts and conduct but does not include safeguarding or use of the guest house as addressed under the notice to show cause.
48. Where is the safeguarding policy that MS Njagi testified to at length? Was it known to all employees including the claimant? Was it made available to him upon employment?



These are grey areas that the respondent failed to address.

49. What emerged during the hearing, the respondent as a learning institution with minors and school-going children is keen to safeguard them particularly while ill or sick. For this reason, the claimant was employed as the in-house medical doctor to be fully available within the school. He had a department manned by nurses and clinical officers. He had an intern placed in his department. He was the most senior officer. Under his directions, these employees were answerable to him.
50. There is no dispute that the claimant attended to student “CC” and obtained confidential information. As a medical doctor, he had a responsibility to the employer but owed the duty of confidentiality to “CC” as part of his professional duty. Under him were nurses including Eunicate. In the line of duty, she was answerable to the claimant before escalating any medical issue to human resources. This nurse, went outside such professional duty and in breach of confidentiality, escalated the case of “CC” to third parties. The claimant reported the insubordination but this was not addressed. According to MS Njagi, the claimant refused to wait for her to address and escalated the matter before she could address it administratively. However, she did not take the same position when it came to addressing the claimant over his alleged gross misconduct. She acted promptly and without hesitation. When called to account in cross-examination, the witness could not properly state what became of the complaint the claimant had made against Eunicate.
51. In the case that the claimant sent a non-medical person to accompany students to the hospital, indeed, as the claimant submitted, the duty to induct and train employees of the respondent was on the human resources manager, MS Njagi. She placed Salim Sally at the health facility. The claimant put his availability into good use.
52. There is no policy produced by the respondent regulating who was to accompany students to the hospital.
53. In the case that the claimant left the prescription form and his authorization stamp to be accessed and used by anyone, the claimant as an employee of the respondent was under a contract of service as a medical doctor. He was also regulated under his profession. Operationally, the claimant was the best-placed person to address the issue of handing over his prescription forms and authorization stamps. The case made by MS Njagi that students who had drug problems could access and use these working tools for access to prescribed drugs and medicine is abhorred and subjective. Where MS Njagi knew of students who had drug problems and could access the health facility and use the forms and stamp, such is criminal conduct to be addressed administratively. The claimant was categorical in his response that at any given time, the nurses at his disposal had access to his office. The prescription forms were under the letterheads of the respondent and the stamp was through his, he was using it while on duty. These work tools were to be found at the health facility where nurses and clinical officers had access. Where the administrator and human resources managers were aware of misuse, this should have been addressed administratively.
54. On the use of the guest house, the claimant readily admitted that he used this facility to wash his uniforms and take tea. No policy was submitted on the use of this guest house.
55. Operationally, the respondent cannot be found to rely on matters that were not addressed in the Aga Khan Academy, Mombasa Kenyan Non-Teaching Terms and Conditions, the Terms and Conditions of Employment, or the contract of service against the claimant and urge a case of gross misconduct. Such being outside the policy documents issued and outside the provisions of Section 44 of the [Employment Act](#), the respondent failed to demonstrate any breach. However passionate the respondent



- felt about matters of safeguarding, without sharing a policy document on the procedures to be gone into by an employee upon recruitment, these cannot be applied ad hoc in this case.
56. The foundation of safeguarding and use of the respondent's property is lost in the absence of the respondent adhering to the provisions of Section 12 of the *Employment Act*.
 57. The respondent has heavily relied on the case of *Bamburi Cement Limited v Farid Aboud Mohammed* [2016] eKLR on the proposition that where the employer has valid and reasonable grounds to justify termination of employment, the court should not substitute the same with its view. In the case of *Bamburi Cement Limited v Kilonzo* [2016] eKLR the court held that upon a claim that there is unfair termination of employment by the employee, the employer bears the burden to justify that the reasons leading to termination of employment were valid and justified. This position is reiterated in the case of *Ochieng' v Unilever Kenya Ltd* [2018] eKLR. Before termination of employment, an employer must be satisfied that there exist valid grounds with regard to the competence; performance; and physical capacity of the employee in the execution of the assigned task. Where there is alleged gross misconduct, the same burden applies.
 58. Substantive grounds justifying the action of dismissal from employment that have observed all procedural requirements leading to the decision to terminate must be adhered to. A dismissal that overlooks these requirements is unlawful as held in the case of *Chege v Nairobi City Water and Sewerage Company* [2017] eKLR.
 59. In this case, without a policy regulating safeguarding and use of the respondent's property being placed at the disposal of the claimant or the court, the was an unlawful and unfair termination of employment. The claimant is entitled to notice pay and compensation.
 60. The claimant made a case that he was discriminated against. He lodged a complaint that was not addressed. Other employees in his department were allocated risk allowances while he was left out. That at the doctor in charge, he was exposed more but he was not considered for a risk allowance. He also made a case that following the disciplinary hearing, he was treated unfairly and not allowed the right to a hearing all compounding his claim that there was discriminatory treatment against him.
 61. Discrimination at work is specifically prohibited under Section 5 of the *Employment Act*. Where the employee alleges that he is discriminated against, the employer has the burden to despite such matter under Section 5(7) of the Act.
 62. In this case, the basis of the claim is that the claimant lodged a complaint that was not addressed. The employer has the prerogative to address workplace misconduct upon a report. The option not to address the reported insubordination of Eunicate as reported by the claimant is a matter to be addressed by the respondent. The counter to this is that upon the claimant making his report, instead of the respondent addressing it, he was issued with a notice to show cause. As the subject employee, he was bound to address and the lapse in the respondent not addressing the report against Eunicate cannot be applied to stop him from addressing his case.
 63. The claimant admitted in evidence that his salary was negotiated before employment. Indeed, he started at Ksh.250,000 and lastly earned Ksh.262,500. This increase insulated the claimant. He cannot justify a claim for risk allowance outside his negotiated salary and claim that he was discriminated against where other employees in his department were allocated such allowance. There is no evidence as to how the respondent addressed the payment of such an allowance. Whether negotiated or as a professional requirement, the claimant had his salary negotiated and agreed upon.



64. The claimant has made a case that he was defamed where the respondent spread information about him and also directed security personnel to trail him. Defamation in employment is prohibited. In the case of *Naqvi Syed Omar v Paramount Bank Limited & Another* [2015] eKLR the court held that;
- In Employment Law defamation takes place when the Employer publicizes or causes to be publicized, statements which stigmatize the Employee. The manner of dismissal and the negative publicity attached to the Petitioner had the potential to damage his employability. ... In employment-related, defamation is based on the old tort of defamation but with a new spin: the employee's injured or damaged employability and not merely the personal stigmatization must be compensated.
65. In this case, although the claimant particularised various grounds for alleged defamation, he was general in these averments. The students or persons who used social media or security persons trailing him within the facility were not outlined. The social media engagements on his case and the persons who published are not linked with or to the respondent. Save to state that the respondent raised the matter that he was of gross misconduct, the fact of his unemployability and where he has made an application that such information arose is not gone into. The respondent as an entity has persons behind it. The particulars of who published any defamatory matters were not gone into.
66. On the findings above, the claimant was last earning ksh.262, 500 which is due in notice pay.
67. On the compensation claim, the claimant worked for the respondent for under two years. He had a promising career that spans several other institutions. The claim herein arose amid a complaint he had initiated against his subordinate, Eunicate whom the respondent opted to safeguard and instead initiated disciplinary proceedings against the claimant leading to unfair termination of employment. Under the provisions of Section 46 of the *Employment Act*, an employee should feel secure while addressing workplace misconduct. The punishment metered out to the claimant for addressing insubordination led to loss of employment. Taking into account these circumstances, an award of 6 months gross salary is hereby found justified. On the salary of ksh.262, 500 compensation is awarded at ksh.1, 575,000.
68. On the claimant for house allowance, the claimant was on a negotiated salary. He had a contract giving his gross salary. The salary paid is not a minimum wage subject to the Regulation of Wage Orders and allocation of a house allowance.
69. On the claim for damages for discriminatory treatment, the finding that all matters taking place on the shop floor resulted in unfair termination of employment, the compensation allocated is appropriate. The court finds no matter of defamation.
70. On the claim for pain and suffering and loss of employability, the claimant stood out as a highly sought-after employee having worked at other facilities of great repute. Upon termination of his employment by the respondent, he is expected to mitigate the loss by securing new employment as held in the case of *Mbewa v Ezeotec Limited* (Appeal E072 of 2022) [2024] KEELRC and *Richard Kashero v Kilifi Mariakani Water and Sewerage Company Limited (Kiriwasco)* [2017] eKLR that the *Employment Act* requires Employees who lose their jobs to move on, and mitigate the loss of employment.
71. On the claim for accrued risk allowance, as outlined above, the claimant had a negotiated gross salary.
72. The claim for a Certificate of Service should be issued at the end of employment under the provisions of Section 51 of the *Employment Act*.



73. On the claim for costs, the court finds the claim herein with a good foundation and resulted from unfair termination of employment that was not justified. Had the respondent taken time to address the case lodged against Eunicate by the claimant, things would have unfolded differently. This was not to be. The option to dismiss the claimant led to these proceedings. The costs claimed are justified.
74. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
- a. A declaration that the respondent terminated the claimant in his employment unfairly;
 - b. Compensation awarded at ksh.1,575,500;
 - c. Notice pay Ksh.262,500;
 - d. Costs of the suit;
 - e. Certificate of service to issue.

DELIVERED IN OPEN COURT AT MOMBASA THIS 26 DAY OF SEPTEMBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

