



**Mbugua v Multimedia University of Kenya (Employment and Labour Relations Cause 542 of 2015) [2024] KEELRC 2272 (KLR) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2272 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 542 OF 2015**

**K OCHARO, J  
SEPTEMBER 24, 2024**

**BETWEEN**

**MICHAEL MUNGAI MBUGUA ..... CLAIMANT**

**AND**

**MULTIMEDIA UNIVERSITY OF KENYA ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Memorandum of Claim dated 27<sup>th</sup> February 2015, the Claimant sued the Respondent seeking the following reliefs: -
  - a. A declaration be issued that the Respondent unfairly terminated the Claimant's employment;
  - b. A declaration be issued that the Respondent has violated the Claimant's rights to fair labour practices under Article 41 of *the Constitution*;
  - c. Special damages amounting to Kshs. 3,947,234.04 being 12 months' pay due to the Claimant;
  - d. Special damages amounting to Kshs. 328,936.17 being payment in lieu of notice of termination of employment;
  - e. General damages for unfair termination;
  - f. General damages for violation of the Claimant's right to fair labour practices under Article 41 of *the Constitution*;
  - g. Costs of the suit;
  - h. Interest on (c), (d), (e), and (f) above at court rates until payment in full;
  - i. Any other and or further relief that this Honourable Court may deem just and fit to grant.



2. The Respondent resisted the claim through a Reply to Memorandum of Claim dated 2<sup>nd</sup> June 2015. It denied that it terminated the Claimant's employment unlawfully, asserting that the termination was a result of his gross misconduct- failure to adhere to procurement procedures that caused it to suffer substantial loss.
3. After hearing the parties on their respective cases, this Court directed that they file their written submissions, a direction which they obliged. Thus, this Judgment is with the benefit of the submissions.
4. Following the Court's direction that parties file and serve their written submissions, the Claimant filed submission dated 16<sup>th</sup> February 2024; while the Respondent filed submissions dated 10<sup>th</sup> July 2023.

### **Claimant's case**

5. The Claimant's case was encompassed in his affidavit evidence affidavit sworn on 17<sup>th</sup> December 2020] that was adopted in court as part of his evidence in chief, the brief oral testimony in court, evidence under cross-examination and re-examination, and the document that were by consent admitted as his documentary evidence.
6. He stated that he joined the employment of the Respondent as a Finance Officer under a Letter of Appointment dated 15<sup>th</sup> July 2011, for three years. His contractual remuneration was set out as; a basic salary of Kshs. 143,253/-; transport/car allowance of Kshs.50,000/-; entertainment allowance of Kshs. 47,500/-; house allowance of Kshs. 69,033/- and a responsibility allowance of Kshs. 16,500/-.
7. On or about 19<sup>th</sup> February 2014, he received a letter from the Respondent's Internal Auditor requiring him to respond to allegations of failure to adhere to the Respondent's laid down financial regulations while effecting payment. He made a response through a letter dated 26<sup>th</sup> February 2014. On 20<sup>th</sup> March 2014, the Respondent suspended him from office on half pay pending investigations.
8. He further stated that through a letter dated 27<sup>th</sup> March 2014, he was asked to appear before the Respondent's Council Sub-committee on 31<sup>st</sup> March 2014 for an inquiry with a written response to the internal audit and to answer questions regarding the provision of Engineering Complex Services, provision of legal services, provision of legal services, and provision of public relations services.
9. Through his letter dated 30<sup>th</sup> March 2014 he gave a detailed response, expressing that any decisions that he had made as concerns the matters raised were raised, that the payments that were made were based on proper documentation and were fast-tracked through the intervention and instructions of the then Vice-Chancellor for the sake of the good reputation of the Respondent. His action[s] were a product of consultations with the relevant departments whenever it was necessary for him to.
10. He further contended that through its letter dated 5<sup>th</sup> May 2014, the Respondent informed him that its full Council had deliberated on the inquiry report and concluded that he had a case to answer before the Disciplinary Committee on the allegations that had been levelled against him. He appeared before the Committee on 23<sup>rd</sup> May 2014. Subsequently, he was issued with a letter dated 6<sup>th</sup> June 2014, terminating his employment.
11. He alleged that the foregoing notwithstanding, there was another termination letter, dated 17<sup>th</sup> June 2014, which was never served on him, but which set out the reason for the termination of his employment as failure to advise the Respondent on Financial matters which resulted to mismanagement of University funds.



12. The Claimant further stated that unsatisfied with the decision, he appealed. In its letter dated 17<sup>th</sup> September 2014, the Respondent informed him that his appeal had failed.
13. The termination of his employment was not preceded by any notice. Further, the Respondent did not make payment in lieu of notice. The Respondent neglected and or refused to pay him his terminal dues.
14. The Claimant asserted that the termination was illegal and unjustified. The termination was contrary to the recommendation by the Council's Disciplinary Committee of 23<sup>rd</sup> May 2014. The Committee had recommended his demotion but not termination of his employment. The Respondent's failure to act per the Committee's recommendation is a testament that it acted maliciously and unreasonably.
15. He contended that the processes before the Disciplinary Committee and the Appeals panel were unfair and conducted in bad faith. They were cosmetic as the outcomes thereof were predetermined. The composition of the Committee and the Panel tells it all. Some members sat in the Committee again in the Panel. Further, some sat in the 35<sup>th</sup> Council Committee and in the Special Sub-Committee inquiry meeting and special meeting of 28<sup>th</sup> April 2014.
16. Cross-examined by the Respondent's Counsel, the Claimant testified that an internal audit was carried out, and a resultant audit report dated 19<sup>th</sup> February 2014 was made. During that time, he was the Respondent's Finance Officer, and thus in charge of its finance matters, generally. The report touched on his responsibilities as a Finance Officer. In his view, the report was faulty.
17. He further testified that he responded in detail to the issues that were raised in the Respondent's letter dated 22<sup>nd</sup> March 2014. One of the issues raised was regarding the Engineering complex. According to him, the project processes were per the relevant procedures. Further, the payments that were made to JKUAT experts, were on the strength of raised fee note. The fee note was not on a letterhead. He proceeded to make the payment that notwithstanding. The payment was for Kenya shillings one Hundred and Ten Million.
18. As regards the settled legal fees to four law firms, it was alleged in the report that there were no payment vouchers. The assertion was not true. He testified further that in his response concerning the payment of legal fees, he didn't bring forth the voucher numbers. He didn't produce in court any voucher, as all of them, at all material times remained in the possession of the Respondent. He couldn't access them.
19. Pressed further under cross-examination, he stated that at the time he was responding to the letter that required him to, on the matters raised in the report, he was still in the office. During this time, he had the opportunity to access information that could aid his response.
20. Through the letter dated 5<sup>th</sup> May 2014, the Respondent invited him for a disciplinary hearing. In the letter, the accusations against him were set out. He appeared before the Disciplinary Committee and presented his case. However, he didn't place before the Committee, vouchers or documents, that could disabuse the conclusions that had been made in the Report. None of the Committee members asked him about the vouchers.
21. In his evidence under re-examination, the Claimant testified that his letter of appointment did not set out his job description.
22. In their minutes dated 28<sup>th</sup> May 2014, the Disciplinary Committee recommended that he be demoted. It never made a recommendation for termination of his employment. The decision of the Committee was overturned in the 35<sup>th</sup> Council meeting held on 29<sup>th</sup> May 2014. He was neither invited to this meeting nor notified that it was going to take place.



23. Though he appealed against the decision to terminate his employment, a decision was made on it, without him being heard first.

### **Respondent's case**

24. The Respondent presented Ms Mumbi Mwihuri to testify on its behalf. The witness adopted her Affidavit evidence sworn on the 26<sup>th</sup> of October 2021, as her evidence in chief and produced the documents filed herein as the Respondent's exhibits. She stated that the Respondent employed the Claimant under the terms and conditions that were set out in the letter of appointment dated 15<sup>th</sup> July 2011. His tenure commenced on the 10<sup>th</sup> October, 2011.
25. The witness stated that in January 2014, the Respondent's Internal Audit Department carried out an audit. As a result, a report dated 19<sup>th</sup> February 2014 was prepared. The audit report implicated the Claimant in making payments to various entities without payment vouchers, against the Respondent's laid down internal procedure.
26. Following the audit, the Auditor through his letter dated 19<sup>th</sup> February 2014 asked the Claimant to explain his failure to adhere to the Respondent's said procedures. The Claimant responded vide an Internal Memo dated 26<sup>th</sup> February 2014. The Memo was subsequently tabled before the Audit Committee of Council for consideration. The Claimant's response was found to be unsatisfactory and tabled for consideration before the Special Full Council Meeting held on 20<sup>th</sup> March 2014. The Council resolved to immediately suspend him from office per the Terms of Service for Non-Teaching Staff in the Senior Administrative, Catering, Clerical, Hospitality, Library and Technical Category (Grade 5-15), which entitled him to half salary, full house allowance and medical allowance while on suspension. The suspension was communicated to the Claimant through the letter dated 20<sup>th</sup> March 2014. The purpose of the suspension was to enable investigations to be carried out concerning the Claimant's actions.
27. Through a letter dated 27<sup>th</sup> March 2014, the Respondent invited the Claimant to appear before the Council Sub-committee on the 31<sup>st</sup> of March 2014, to answer questions relating to the provision of Engineering Complex services, Legal services, and Public Relations services, questions that had been raised in the audit report.
28. The witness stated that before the Claimant appeared before the Sub-Committee, he was allowed to submit a written explanation, which he did under cover of his letter dated 20<sup>th</sup> March 2014. Through its report, the Sub-Committee recommended that the Claimant be subjected to internal disciplinary proceedings. The deliberations and recommendations of the Sub-Committee were tabled before the Respondent's full Special Council meeting held on 28<sup>th</sup> April 2014. Upon considering the same, the Council directed that charges be drawn against the Claimant and that he be taken through the Respondent's disciplinary process.
29. In a letter dated 5 May 2014, the Claimant was informed of the outcome of the inquiry and invited to a disciplinary hearing scheduled for 23 May 2014. The Respondent reacted to the invitation letter in a letter dated 12 May 2014. He admitted the infractions but justified them as either error or not so-serious and easily explainable. He stated that he made payments without vouchers following orders from above.
30. The witness testified that the Claimant attended the disciplinary hearing on 23<sup>rd</sup> May 2014 and was given ample opportunity to defend himself against the charges brought against him. The Council Disciplinary Committee found him culpable and recommended termination of his employment for



incompetence, inefficiency, and poor management, amounting to gross misconduct. The Claimant's services were terminated on 6<sup>th</sup> June 2014 following this recommendation.

31. By a letter dated 11<sup>th</sup> June 2014 received by the Respondent on 19<sup>th</sup> June 2014, the Claimant appealed against the decision. The appeal was considered by the Respondent's Appeal Committee of the Council and dismissed by a unanimous decision of the committee. The decision was communicated to the Claimant through a letter dated 17<sup>th</sup> September 2014.
32. The witness was emphatic that the decision to terminate the Claimant's employment was valid and fair, and that the Respondent followed due procedure before dismissing him. The Claimant has never cleared with the Respondent to enable payment of his terminal dues.
33. Cross-examined by the Claimant's Counsel, the witness stated that the root of the disciplinary process against the Claimant was the audit report, which raised questions over payment for services unprocedurally.
34. The Respondent had a procurement Committee in place in 2014. The Committee consisted of members from different departments of the University. Though a member of the Committee, the Claimant was not its chairperson. The decisions of the Committee were made corporately. Other members of the Committee were subjected to internal disciplinary processes. Three out of the five officers had their contracts of service terminated.
35. The witness testified that on 31<sup>st</sup> March 2014, the Claimant was invited to a Special Sub-Committee of Inquiry. The Committee recommended that he be taken through a disciplinary hearing. Subsequently, there was a special Council meeting held on 28<sup>th</sup> April 2014. The Council recommended that a disciplinary process be undertaken against the Claimant.
36. On the 23<sup>rd</sup> of May 2014, he appeared before the Disciplinary Committee accompanied by a Union representative. He was allowed to make representations against the accusations that he was facing. Asked to comment on the resolution [iii] of the minutes of the Committee, the witness admitted that thereunder it was recommended that the Council redeploy him elsewhere outside the Finance Department. The Committee didn't recommend termination of his employment.
37. After the disciplinary proceedings, the full Council met on the 29<sup>th</sup> of May 2014. At this meeting, it was directed that the Claimant's employment be terminated on the grounds of his incompetency. The Claimant did not attend the Council meeting.
38. Though the Disciplinary Committee had recommended that the Claimant be demoted, it was within the authority of the Council to review the verdict by the Committee as it did and give a more severe sanction. The authority derives from statute.
39. According to the relevant statute, the Appeals Committee had the power to consider the appeal as presented without taking oral representations from the appealing employee.
40. The witness admitted that some members appeared at all stages in the disciplinary process against the Claimant.

### **Claimant's Submissions**

41. The Claimant's Counsel submitted that on the 23<sup>rd</sup> May 2014, the Council Disciplinary Committee found the Claimant guilty of all the allegations levelled against him save for allegation D (knowingly failing and neglecting his duty to advise the University that development funds could not be used for



- recurrent budget), and recommended that he be demoted, his rank/seniority be reduced and that he be removed from the Finance Department and reassigned to another Department.
42. Inexplicably, a 360-degree turn was made from this resolution in the 35<sup>th</sup> Council Meeting held on 29<sup>th</sup> May 2014, when it was resolved that his services be terminated on the grounds of, incompetence, inefficiency, and poor management. A resolution that was arbitrary, improper, opaque, and amounted to a usurpation of powers, in light of the recommendations of the Council Disciplinary Committee.
  43. It was further submitted that the outcome of the disciplinary process appears to have been pre-determined, and the decision to terminate his employment reached bad faith. This was retaliatory, it was thought the Claimant had decided to implicate the University's Vice Chancellor in unbecoming conduct. This is revealed by the fact that the same members sat on the Special Sub-Committee Inquiry Meeting, the Disciplinary Meeting, the Special Meeting, the 35<sup>th</sup> Council Meeting, and the Appeals Committee Meeting of 31<sup>st</sup> March 2014, 23<sup>rd</sup> May 2014, 28<sup>th</sup> April 2014, 29<sup>th</sup> May 2014, and 4<sup>th</sup> September 2014 respectively.
  44. In light of these premises, it should be concluded that the termination was unfair and unlawful and that the Respondent acted contrary to the fair labour practices enshrined in Article 41 of *the Constitution*.
  45. It was further submitted that the disciplinary actions taken against the Claimant constituted administrative actions by the Respondent in the eyes of the Fair Administrative Actions Act. Section 4[3] thereof provides that where an administrative action is likely to affect the right[s] or fundamental freedoms of any person, the tenets of natural justice must be embraced.
  46. The Claimant's disciplinary process had five stages. At all the five stages, 14 members variously sat in the meetings thereof. It should be concluded that this was a testament to unfair and oppressive treatment by the Respondent against the Claimant. Further, the inexplicable countermanding of the Disciplinary Committee's verdict by the Council without first hearing the Claimant was unfair and against his right to fair administrative action.
  47. The circumstances of the instant case clearly show that the Respondent didn't act with justice and equity contrary to the provisions of section 45[4][b]. Further, the Respondent didn't prove as it was obliged to that the termination of the Claimant's employment conformed with the tenets of fair procedure. Where the employer fails to discharge the duty, the Court can conclude that the termination was unfair, notwithstanding the presence of substantive justification for the termination. To buttress this submission, reliance was placed on the decision in the case of Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR.
  48. The Claimant's Counsel argued that the Claimant proved that his Constitutional rights under Articles 27, 28, 41, 47, and 50 of *the Constitution* were violated. The evidence was not challenged by the Respondent, at all. Further, on the strength of the various decisions cited this Court should be guided and award general damages of KShs. 2,500,000 for each of the violated rights.
  49. The Claimant sufficiently demonstrated that his dismissal was unfair as the due process was not adhered to. Additionally, the Respondent violated his constitutional rights. As a result, he is entitled to the remedies sought. Relying on the case of Gichuru vs Package Insurance Brokers Ltd KCSC 12 KLR, it was submitted that compensation equivalent to twelve months' gross salary would suffice.

### **Respondent's Submissions**

50. The Respondent's Counsel identified two issues for determination in this matter; whether the termination of the Claimant's services was fair; whether the Claimant is entitled to the reliefs sought; and who is to bear the costs of the claim. He submitted that the Respondent was justified to dismiss,



- the Claimant summarily from his employment on grounds of gross misconduct. The Respondent adhered to the mandatory procedure under Section 41 of the Act in the process before it decided to dismiss him from employment. He was allowed an opportunity to defend himself.
51. Notably, the Claimant was accorded an opportunity to respond to the findings in the audit report dated 19<sup>th</sup> February 2014 and did so vide his letter dated 26<sup>th</sup> February 2014. The claimant was then invited to appear before the Council Sub-Committee on 31<sup>st</sup> March 2014 to answer questions relating to the audit, which he did. Further, the Claimant was invited to and attended a Disciplinary hearing held on 23<sup>rd</sup> May 2014. In the invitation to the disciplinary hearing dated 5<sup>th</sup> May 2014, the Claimant was informed of his right to be accompanied by a union representative. During this disciplinary hearing, the Claimant admitted to making the unprocedural payments but blamed his superiors and other people for his missteps without producing proof of his allegations. Having found his explanations unsatisfactory, the Respondent terminated the Claimant's employment vide a letter dated 6<sup>th</sup> June 2014, which set out the reasons for termination. The Claimant appealed against the dismissal. The appeal was then considered and declined.
  52. Considering the premises, it cannot be difficult to conclude that the disciplinary proceedings pass the test of procedural fairness under Section 41 of the Act, as it embodied the elements that were elaborately set out in the case of *Postal Corporation of Kenya vs Andrew K. Tanui Civil Appeal No. 127 of 2015 [2019]* eklr, thus, information, hearing, and consideration.
  53. It was further submitted that the dismissal was with a valid and fair, reason. The Respondent therefore discharged its obligation under Section 45 of the Act. There was clear evidence that indeed as claimed by the Respondent, the Claimant made payments to various entities and persons without payment vouchers being issued and examined. This included a payment of Kshs. 30,000,000/- to Jomo Kenyatta University of Agriculture and Technology (JKUAT) consultants; and payments to legal service providers. Further, he raised two payment vouchers bearing different amounts concerning Winners Frontiers Limited. Owing to his actions, the Respondent suffered losses of Kshs. 8,321,521/-.
  54. The Claimant therefore acted negligently and improperly in discharging his duties. He admitted as much in his letter dated 30<sup>th</sup> March 2014 and in the answers to questions asked in the meetings of 31<sup>st</sup> March 2014 and 23<sup>rd</sup> May 2014. It cannot be denied that the reason for termination was related to the Claimant's conduct and capacity. Reliance was placed on the case of *Janet Nyandiko vs Kenya Commercial Bank Limited [2017]* eklr, to buttress this submission.
  55. Considering the totality of the facts and circumstances of the case, there should be any hesitating to conclude that the Claimant's conduct fits in the description of gross misconduct under Section 44 of the Act, therefore, the sanction of summary dismissal against him was justified. Further, the Court shouldn't lose sight of the fact that the Claimant admitted the misconduct, and for this, the decision in the case of *Vincent Abuya Obunga vs Mast Rental Services Limited Cause No. 1589 of 2013 [2019]* eKLR, becomes very applicable to the instant case.
  56. On the reliefs sought, Counsel for the Respondent submitted that having failed to establish that the termination of his employment lacked substantive justification and or procedural fairness, the Claimant cannot be granted the reliefs sought in his pleadings. Granting the compensatory relief sought could be tantamount to penalizing the Respondent for doing the right thing.
  57. It was further submitted that the remedies sought by the Claimant based on the alleged breach of the Claimant's Constitutional rights are not available for grant in his favour, as the Respondent duly demonstrated that there was no infringement and that the termination of his employment passes both the substantive justification and procedural fairness tests.



58. On payment instead of notice, it was submitted that this was not payable as the Claimant was summarily dismissed from employment. Finally, the Respondent submits that it is trite that a person cannot benefit from his transgressions. This suit should therefore be dismissed with costs.

### **Issues for Determination**

59. I have reviewed the pleadings, oral and documentary evidence, and submissions filed by both parties and authorities in support thereof. I find that the issues for determination are as follows: -
- a. Whether the Respondent unfairly terminated the Claimant's employment; and
  - b. Whether the Respondent violated the Claimant's constitutional rights set out in his pleadings or any of them.
  - c. Is the Claimant entitled to the reliefs sought?

### **Whether the Respondent unfairly terminated the Claimant's employment**

60. A clear reading of Section 45 [1] and [2] of the *Employment Act* 2007, reveals that for any termination of an employee's employment or summary dismissal of an employee from employment to pass the fairness test, two components must be seen to be present, procedural fairness and substantive justification. The Section provides:
1. No employer shall terminate the employment of an employee unfairly.
  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.”
61. It is imperative to state, therefore, that the absence of both or any of the components, shall on the strength of the deeming clause under the Section render the termination or summary dismissal unfair. In the case of *Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR*, the Court aptly put it:
- “.... For termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with the establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”
62. Section 41 of the *Employment Act*, 2007 elaborately and in a mandatory manner sets out a procedure that an employer contemplating terminating an employee's employment must adhere to. The procedure embodies vital components. The absence of any of the components in a process leading to the termination or dismissal will render the termination or dismissal procedurally unfair, resulting in attracting the deeming effect referred to hereinabove. The components are; the notification component, the employer contemplating any one of the actions referred to hereinabove, must inform the affected employee of the intended action and the grounds spurring the intention; the hearing component, the employer must accord the employee an adequate opportunity to prepare and make



a representation on the intention and the grounds. Tightly conjoined with this component is the employee's right to accompaniment, the employee must be allowed to be accompanied by his or her colleague [if not a member of a trade union] or a trade union representative [if he or she is a member of a trade union]; lastly, the employer must consider the representations made by the employee and the accompanying person [where applicable] before taking a final decision.

63. I have carefully considered the material placed before me by the parties, relating to the events of the period between the date when the Claimant was placed on the investigatory suspension and the date the decision to dismiss him from employment was made, and it came out clearly that; throughout, he was kept abreast of the allegations that were levelled against him; throughout the multilayered investigatory and disciplinary process, he was allowed to make representations on the allegations; his right of accompaniment was honoured; and his representations were considered.
64. If one were to just look at procedural fairness from the lens of Section 41, of the *Employment Act*, it could be easy for a conclusion that in the premises of the foregoing circumstances [para. 56], the dismissal of the Claimant was procedurally fair. But if it were to be remembered that in considering the presence or absence of procedural fairness in a dispute regarding the termination of an employee's employment or summary dismissal of an employee from employment, the provisions of the Section shouldn't be read in isolation from, the relevant stipulations of *the Constitution*- Article 47 [right to fair administrative action] and Article 50 [right to a fair hearing], the stipulations of the Fair Administrative Actions Act, and the tenets of natural justice, a contra conclusion shall be arrived at, as I hereunder do for reasons.
65. Undeniably, the Claimant appeared before the Council Disciplinary Committee on 23<sup>rd</sup> May 2014. Further, under minute C/DC/3/05/2014: Verdict of the proceedings thereof, the Committee resolved;
- I. "That Mr Micheal Mbugua was guilty of all the allegations levelled against him save the allegation C [Knowingly failing and neglecting his duty to advice the University that development funds could not be used for recurrent budget] in which the Committee also lacked evidence that he advised University Management Board.
  - II. That in line with disciplinary measures 1 to 3 on pages 151 and 152 of the statute [attached], Mr. Micheal Mbugua be demoted and his rank/seniority be reduced.
  - III. Management recommends where to place Mr Mbugua in the next Council meeting.
  - IV. That Mr. Mbugua be sternly warned and reprimanded to follow relevant rules and regulations.
  - V. To write to Jomo Kenyatta University of Science & Technology requesting them to refund KShs. 2.4 Million being withholding tax for Engineering Complex consultancy fees paid to them"
66. In their 35<sup>th</sup> Council meeting held on Thursday 29<sup>th</sup> May 2014, the Council deliberated on the above-mentioned Committee's report under Minute / C/ 09/ 05/ 2014[1], noted thus:
- I. " That Mr Mbugua was the first signatory to the cheques and the former Ag. Vice-Chancellor, the second signatory.
  - II. That the decision couldn't make economic value since demotion in seniority or rank would mean putting the Council in problems of double payments of salary and allowances.
  - III. That there was a problem with the subcommittee's recommendations as the severity of the offence didn't match the verdict.



- IV. That the allegations were strong enough to warrant dismissal.
- V. That Mr Mbugua was guilty of allegation C for putting the University at risk by not advising on the standard financial regulations which forbid using development funds for the recurrent budget.
- VI. That there was no evidence that the former Ag. Vice -Chancellor instructed him to use development money for salaries or a letter from Mr. Mbugua advising the Ag. Vice Chancellor that using development funds for the recurrent budget was unprofessional.”
- And resolved;
- I. That as per Schedule VI of MMU Statutes 2014 governing disciplinary procedures, the services of Mr Micheal Mbugua, Finance Officer be terminated on grounds of incompetence, inefficiency and poor management.
- II. That the letter should clearly show there was no embezzlement of funds on his part but was incompetent.
- III. That a letter terminating Mr Mbugua’s contract be sent to the Chair of the Students Committee and the Chairman of the Council before it is dispatched.”
67. Following the above-stated deliberations and resolution, the Claimant was issued with a letter dated 6<sup>th</sup> June 2024, which read in part;
- “Following your appearance before the Council Disciplinary Committee on 23<sup>rd</sup> May 2014 and the subsequent presentation of the Disciplinary Committee Report to Full Council, you were found guilty of the charges preferred against you. The University has therefore decided to terminate your services effective immediately.”
68. In so far as the letter of termination dated 6<sup>th</sup> June 2014 terminated the Claimant’s services with immediate effect, in my view, this to a summary dismissal under Section 44[1] of the Act, which provides;
1. Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.”
69. There can be no doubt that the sanction, summary dismissal is the gravest sanction that an employer can impose on an employee. It is so livelihood-threatening and so serious. This explains why the law, as can be discerned from the provisions of section 44[3] and [4] of the Act, deliberately sets out the matters, acts of commission and omission, on the part of the employee that must be demonstrated if the employer has to succeed in an assertion that the sanction was justified.
70. It is at this point that I must note and point out that it was common cause that the Claimant did appear before the Respondent’s Council’s Disciplinary Committee and that after considering the material placed before it, the Committee decided that the most appropriate sanction that could be meted on the Claimant in the circumstances of the matter, was a demotion and transfer from the Finance Department. Further, the Council in its meeting mentioned hereinabove, went against the resolution of its Committee, and directed the gravest sanction mentioned above.
71. For the foregoing premises, the Claimant took the position that the Council’s decision was procedurally unfair and lacked equity and justice. The Respondent on the other hand asserted that its



decision to enhance the gravity of the sanction that the Committee had identified as appropriate was premised on its powers under “university statutes”. Statutes, which it is difficult for one to consider, understand and deduce their relevance in this matter to enable a decision that the Respondent had authority bestowed on it to defy the sanction recommended. Difficult, as neither the Respondent’s witness’s evidence nor the Respondent’s submissions provided specificity as regards the “University Statutes”.

72. In a matter like the instant, where the authority of the Council over decisions by its Committee is a contested issue, a reasonable employer having in his or her mind the duty to prove imposed on the employer under the *Employment Act*, could be expected to tender clear evidence, demonstrating; the powers and functions of the two as regards disciplinary matters; whether the disciplinary committee had authority to recommend a sanction as they did; whether the Council had power to change the resolution by the Committee on the sanction, and if so under what circumstances, and how. The tragedy of this matter is that the Respondent didn’t find it necessary to elaborately or at all, explain these aspects.
73. It is pertinent to point out that none of the combatants herein placed forth any document for instance a Human Resource Policy and Practice manual, from which this Court can gauge whether the Council had the right to alter the decision by the Disciplinary Committee on account that it was lenient.
74. I take a clear view that the decision by the Council to alter the decision by the Disciplinary Committee was an administrative action, in the definition afforded under Section 2[2] of the Fair Administrative Actions Act. As such, the Claimant was entitled to a hearing before the Council. The possibility of the Council altering the severity of the sanction, and the grounds the basis thereof, should have been brought to the attention of the Claimant, and an opportunity availed to him to make representations on the intended dismissal. It wasn’t enough for the Respondent to just state reasons why it disagreed with the Committee’s decision and direct termination of the Claimant’s employment. This was procedurally unfair. See *South African Revenue Service vs- CCMA and 2 Others* [2015] ZALACA 52.
75. Section 43 of the *Employment Act*, places a duty on the employer to prove the reason[s] for the termination of an employee’s employment or summary dismissal of his or her employee from employment. Where the employer defaults in discharging this legal burden contemplated in the provision, the termination or dismissal shall be deemed unfair by dint of the provisions of Section 45.
76. From the material placed before this Court it comes out that the Respondent’s Internal Auditors, through an audit they carried out, identified issues of concern which were linked to the Claimant in his position as the Finance Officer of the Respondent. In his evidence under cross-examination, the Claimant indeed admitted that the issues of concern that were raised and captured in the Auditor’s report touched on his responsibilities and that during the material period, he was in charge of finance matters of the Respondent University.
77. The issues revolved around three areas namely, the Provision of Engineering Complex Services; the Provision of Legal Services; and the Provision of Public Relations Services. Throughout the multilayered process that was undertaken by the Respondent, commencing with the inquiry by the Council Special Sub-Committee, through to the Appeals Committee deliberations, there was consistency on the part of the Respondent, that the infractions that the Claimant was being accused of, flowed from his actions and inactions relating to these matters.
78. Under its letter dated 5<sup>th</sup> May 2014, the Respondent informed the Claimant of the outcome of the inquiry, the resultant deliberations, and recommendations by the Full Special Council meeting on 28<sup>th</sup> April 2014 on the report by the Inquiry Sub-Committee. The Council had recommended that Disciplinary proceedings be undertaken against him by the Disciplinary Committee per his terms of



service. Further, infractions emanating from the areas of concern mentioned above were broken down and set out with specificity:

1. Fundamental breach of your obligations for failure to adhere to the laid down financial regulations of the University;
2. Knowingly failing and refusing to inform the University Management Board that they had surpassed their budget for the provision of Legal Services and Provision of Services for the Public Relations Firm as per the University Budget for the year 2013/2014;
3. Knowingly failing and neglecting your duty to advise the university that development funds could not be used for recurrent budget;
4. Knowingly and fraudulently failing to withhold tax amount to Kshs. 2,400,862.07 while making payments to JKUAT for Consultancy Services of the Engineering Complex;
5. Wilfully neglecting, carelessly and improperly paying out monies to the service providers without ensuring that all the documents required were made available.”

The Claimant was expected to make representations on the infractions in the disciplinary hearing that was slated for the 23<sup>rd</sup> of May 2014.

79. I have carefully considered the Claimant’s letter dated 30<sup>th</sup> March 2014, which was in response to the Respondent’s dated 27<sup>th</sup> March 2014, and note his admission that he approved the payments for the JKUAT consultants on the system on 7<sup>th</sup> June 2013, without a verified payment voucher. Further, notwithstanding, the absence of the voucher he, together with the Vice Chancellor, instructed the bank to transfer the money from the University’s account to JKUAT’s account on 7<sup>th</sup> June 2013.
80. Further, in his letter dated 12<sup>th</sup> May 2014, which was in response to Respondent’s dated 5<sup>th</sup> May 2014, he admitted that payments were made without payment vouchers, first being verified. He alleged that he proceeded to approve the payments and had the same effected under instructions from the Vice-Chancellor, on account of the Vice-Chancellor’s perceived urgency for the payments.
81. The position of Finance Officers of an institution, or any enterprise, is one of trust and confidence. The Officer bears the fundamental duty of ensuring financial sanity and mitigating risk exposures against the institution or enterprise at all material times of his tenure of service. It won’t be available for the officer to, in situations of departure from the fundamental duty, and breach of trust and confidence, assert that the departure and or breach was influenced by a powerful quarter. They should not readily subject themselves to manipulation and unreasonable influence. When push comes to shove, liability is often personal.
82. In sum, any reasonable employer would terminate an employee’s employment in the circumstances of the matter as was in the hands of the Respondent to deal with. The dismissal of the Claimant from employment was with valid and fair reason[s]. Therefore, substantively fair.
83. Following the above analysis, I return that the Claimant only managed to prove that his right to a fair administrative action[s] was violated, but failed to demonstrate how his other alleged constitutional rights were.

#### **Whether the Court should grant the prayers sought by the Claimant.**

84. I have hereinabove found, that the dismissal of the Claimant from employment was procedurally unfair but substantively justified. The question that springs up then is, what do the circumstances of this case dictate as regards the compensatory relief sought by the Claimant for unfair dismissal? Section



49[1][c] of the Employment Act bestows upon this Court the power to order compensation in favour of an employee who has successfully assailed his or her employer's decision to terminate his or her employment or summarily dismiss him or her from employment. However, it is imperative to point out at this stage that the power is discretionarily exercised, influenced by the facts of each case.

85. I have carefully considered the fact that; liability against the Respondent attaches against it on the procedural misstep hereinabove mentioned; the dismissal was substantively justified; the length of service on his fixed term contract; his contract was at the tail end of its life and; the Claimant contributed to the dismissal, and conclude that he is entitled to a minimal award of one month's gross salary as compensation for unfair dismissal and breach of his right to a fair administrative action.

86. In the upshot, Judgment is entered against the Respondent in the following terms:

- i. A declaration that the termination of his employment was procedurally unfair.
- ii. Compensation pursuant to Section 49[1][c] of the Employment Act, 2007, one month's gross salary, KShs. 326, 286.
- iii. Interest on the sum awarded above, at court rates, from the date of this Judgment till full payment.
- iv. Costs of this suit, instructions fees to be assessed on the awarded sum, shall be for the Claimant.

**READ, DELIVERED AND SIGNED AT NAIROBI THIS 24TH DAY OF SEPTEMBER 2024.**

**OCHARO KEBIRA.**

**JUDGE**

In the presence of:

Mr Mugwe for Claimant

Ms Akinyi for Respondent:

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**OCHARO KEBIRA**

**JUDGE**

