



**Mutongu v St Paul's University (Employment and Labour Relations Petition E081 of 2023) [2024] KEELRC 2690 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2690 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E081 OF 2023  
MN NDUMA, J  
OCTOBER 31, 2024**

**BETWEEN**

**REV DR ZABLON MUTONGU ..... PETITIONER**

**AND**

**ST PAUL'S UNIVERSITY ..... RESPONDENT**

**JUDGMENT**

- 1 The petition was filed on 17/4/2023 against the respondent seeking the following orders: -
1. A declaration that the petitioner's fundamental rights and freedoms have been violated by the respondent.
  2. A declaration that the respondent summarily dismissed the petitioner's employment unfairly.
  3. A declaration that the respondent discriminated against the petitioner
  4. An order directed to the respondent to reinstate the petitioner to his position of Deputy Vice Chancellor, Finance and Administration.
  5. Aggravated damages.
  6. General damages for constitutional breaches and violations
  7. Costs of, and incidentals to, these proceedings be borne by the respondent.
  8. Any other relief that this honourable court may deem just to grant.



## Facts of the petition

2. The petitioner was employed by the respondent university as a lecturer on the 1/8/2005 and confirmed on 29/10/2007. The petitioner served continuously for 18 years until his termination from employment on 6/4/2023 as respondent's DVC – Finance and Administration.
3. Petitioner states he rendered exemplary service to the respondent and all his promotions were based on merit.
4. That on 27/1/2023, the respondent issued a notice to show cause to the petitioner dated 27/1/2023. That the letter contained false allegations against the petitioner that he facilitated the payment of Kshs. 402,696/= from a St. Paul's University staff termed as "commission" in relation to the hiring of SPU Business facilities by the IEBC; made mass photocopies of documents; carried a safe from office at odd hours and altered minutes of the BoM and SPEU Committee causing mis-representation of issues discussed. That the petitioner was immediately suspended from office pending disciplinary hearing.
5. That the petitioner responded to the notice to show cause by a letter dated 30/1/2015 where he denied the allegations made against him in the notice to show cause.
6. That the respondent interfered maliciously with the editors of the petitioner's publications by giving them false information. The advocates of the petitioner wrote a demand letter dated 6/2/2023 to the respondent asking them to stop their malicious actions.
7. The respondent then issued the petitioner with a 2<sup>nd</sup> notice to show cause dated 8/2/2023 requesting the petitioner to appear before the respondent's council disciplinary committee on 18/2/2023 at the Jumia Conference Centre at 11:30 a.m.
8. That the petitioner attended the hearing as scheduled with his advocates. The committee then made their final decision that the petitioner was guilty of the allegations made against him and summarily dismissed the petitioner from employment by a letter dated 6/4/2023 effective same date.
19. That the dismissal was unlawful and unfair.
10. The summary dismissal was preceded by an invitation by the respondent of the petitioner to a meeting through WhatsApp dated 31/3/2023 which the petitioner attended on 4/4/2023 where the respondent attempted to coerce the petitioner to resign but he declined.
11. The petitioner states that the conduct by the Respondent is a violation of the petitioner's rights enshrined under Articles 41 and 47 of [the Constitution](#) as read with section 4 of the Fair Administrative Actions Act, 2010;
12. That the conduct by the respondent was arbitrary, high handed and was unlawful and unconstitutional. That the respondent contravened the principles of natural justice.
13. That the summary dismissal violated the petitioner's legitimate expectation based on his contract of employment and the statutory and constitutional provisions protecting his continued employment. That the petitioner suffered great economic loss and mental stress as a result of the unlawful conduct by the respondent. The petitioner has suffered unrest, anxiety, stress, mental torture, apprehension and instability.
14. That the petition be granted as prayed.



## **Replying Affidavit**

15. The respondent filed a replying affidavit sworn to by Jared Ogutu a member of the respondent's University Council on 13/3/2024 to the petition.
16. The deponent opposes the petition stating inter alia that the summary dismissal of the petitioner was informed by the following reasons: -
17. An audit report for the period 31/3/2022 and a report of the Risk Management and Audit Committee dated 28/11/2022 revealed questionable payment of Kshs. 402,696/= to one Elizabeth Wanjiku Ndabi, member of staff of the respondent. That the said payment was termed 'commission' in relation to hiring of respondent's business facilities by IEBC.
18. Following the report, the respondent held a meeting on 20/12/2022 in which a committee to investigate the matter was appointed. The deponent was appointed chairperson of the committee. The committee investigated the matter and prepared a report to the University Council which was submitted to a special meeting held on 27/1/2023. The committee observed levels of culpability of the petition in the matter of irregular payment. That the respondent had not observed internal financial control measures in the said payment since the payment was not verified by the finance manager and was not authorized by the Vice Chancellor. The respondent issued the petitioner with a notice to show cause in which the petitioner was suspended, asked to respond to the allegations and a disciplinary committee was appointed to hear the matter. The petitioner replied to the notice to show cause on 30/1/2023.

## **Supplementary Affidavit**

19. In the supplementary affidavit the Petitioner deposed, inter alia, that he did not authorize the payment of the cheque as the VC is the one with authority to do that. The VC had authorized the payment and declared the letter of information to him as the basis of the contract. The payment voucher is signed by all authorized signatures on the same date and the VC was given proper information to help him make an informed decision and take responsibility for the payment which he did. That the summary dismissal displays discrimination and unfair treatment as there was no prior notice given to him. That the Committee clearly ignored clauses 15.2 to 15.3.1 (iv) of the HR Procedure Manual which gives the disciplinary process and for over 18 years his work integrity have never been questioned and he has never been given even a verbal warning.

## **Submissions**

20. The parties filed written submissions which the Court has considered and shall where appropriate make references to the same in determination of the present petition.

## **Determination**

21. The following issues fall for determination in the present claim:-
  - i. Whether the Petitioner was unfairly dismissed from employment
  - ii. The remedies, if any, the court should grant the Petitioner
22. The Respondent University's case leading to the termination of the Petitioner is that the Petitioner authorized the payment of a sum of ksh 402,696.00 to EWN who was then said to have transmitted it to an unknown third party without an invoice or any contract in support of the payment. This approval is said to have been done prior to verification by the Respondent's finance manager and the Petitioner



- advised the VC to authorize the payment knowing well that the same was irregular and unsupported by any financial documentation or policy.
23. Section 47 (5) of the *Employment Act*, 2007 requires of the claimant to ex facie bring out a case of unfair termination of employment to which the Respondent shall adduce evidence in justification.
  24. Section 45 (4) (b) of the *Employment Act*, 2007 provides that ‘termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employee.’
  25. In *Walter Ogal Anuro versus Teachers Service Commission 2013 Eklr* the court held that for termination to pass the fairness test, there must be both substantive justification and procedural fairness and that substantive fairness has got to do with the establishment of a valid reason for termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.
  26. In terms of section 43 of the *Employment Act*, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken.
  27. On the application of section 47(5), the court in *Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR*. held that ‘The interpretation given to the section by courts is that all the employee needs to do in order to discharge the burden of proof on him/her is to place before the court prima facie evidence suggesting that a termination has occurred and that the said termination lacks a substantive justification and or is procedurally flawed. Once the employee makes a prima facie case, the burden of proof shifts to the employer to justify the termination. In *Josephine M. Ndungu & others v Plan International Inc [2019] eKLR*, “Under section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the four corners of the legal threshold set out by section 45 of the Act.”
  28. The Court of Appeal in the case of *Ken freight (EA) Limited v Benson K. Nguti [2016] eKLR*, held that: -

“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee’s conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure ...”

Was the decision to summarily dismiss the Petitioner unfair?

29. The Court is of the considered view that the decision to summarily dismiss the petitioner was indeed invalid and unfair. This Court has looked at the Petitioner’s response to the show cause letter which demonstrates that he was made to understand that the already negotiated commission was premised on the undertaking to give providers the job. That upon enquiry by the petitioner as to justification of the commission non was forthcoming. The Petition say this information was coming too late as the training had already been completed and money had already been paid. This defence was not explained away at all by the respondent.
30. The Court has also gone through the letter dated the 29/09/2021 from the Petitioner to the Respondent’s VC and is satisfied that the VC was actually fully aware of the circumstances relating to the payment of ksh. 402,696 as commission for the business given to SPUEU since circumstances



under which the commission is said to arisen are exhaustively explained. Also, it is stated at the close of the letter that this was not the normal practice of the University Enterprise Unit hence the need to seek special authorization.

31. The VC therefore had all the information required before making the decision to authorize the payment and it cannot be said that he was in anyway misled in making the decision to authorize the commission. The Court has also considered the role played by the VC and is of the considered view that the VC in giving the approvals/authorization was exercising independent judgment, and was at liberty to ask for more information or decline the said payment. The decision to terminate the Petitioner was therefore discriminatory, unfair and in breach of section 41 of the *Employment Act* 2007.
32. Granted the explanations given in answer by the Petitioner to the accusations were not duly considered, the termination was both substantively and procedurally defective.

**The Court turns to consider the remedies the Petitioner is entitled to following the unfair termination.**

33. This Court further finds that the issues before Court are conclusively covered under the *Employment Act* 2007 and do not deserve to be elevated to constitutional issues for consideration by the Court. This is a mundane wrongful breach of contract of employment for no valid reason.
34. The Petitioner is, inter alia, seeking reinstatement to his position of Deputy Vice Chancellor, Finance and Administration.
35. In Civil Appeal No 46 of 2013 Kenya Airways Limited versus Aviation & Allied Workers Union Kenya and 3 others 2014 the Court of Appeal had the following to say on the remedy of reinstatement: -

“The remedy of reinstatement is discretionary. However, the Industrial Court is required to be guided by factors stipulated in section 49(4) of the EA which includes the practicability of reinstatement or re-engagement and the common law principle that specific performance in a contract for employment should not be ordered except in very exceptional circumstances. The court should also balance the interest of the employees with the interest of the employer. Thus, the court could consider in a redundancy situation whether reinstatement would be a surplus to employer’s requirements; whether the employer will be required to dismiss other employees and whether it would perpetuate the problems of the employer. The court appreciated that the Airline was faced with a cyclic economic down turn but said that it had not faced a downfall. The court also appreciated that the Airline had offered generous redundancy and VER packages. The court was however influenced by unproven factors such as bad faith in retrenchment process, that the real reasons for restructuring was to get rid of employees involved in trade union activities; that the decision to outsource labour was not driven by valid commercial reasons; that the Airline had recruited foreigners while retrenching Kenyans; that roles had not been abolished and that the Airline was guilty of corporate insensibility. Most of the factors taken into account by the Industrial Court did not form the substance of the claim. The EA has enacted the common law principle that the remedy of reinstatement should not be given except in “very exceptional circumstances”. The factors taken into account by learned Judge, are not, looked at objectively “very exceptional”. There was evidence that roles had been abolished and services in some cases outsourced. One cannot help concluding that the learned Judge did not consider the issue of reinstatement objectively and that the order for reinstatement was designed to punish the Airline for the wrongs that the learned Judge erroneously believed it had committed. No consideration was given to the fact that many shareholders of the Airline expect to make a



fair return for their investments and that it was the general good of everyone including the many remaining employees that long term sustainability of the Airline should be promoted. There was also no assessment of the number of the retrenched employees who had exited through VER or had obtained other jobs. There was evidence that some employees had been absolved by the contracted outsourcing firm with assistance of the Airline.

36. The Petitioner left the employment of the Respondent in April 2023 and was the DVC finance and administration. This being an important office within the Respondent institution the position has most likely been filled. Also, due to the nature of the allegations, he is unlikely to have harmonious relationship with the Respondent institution should reinstatement be ordered. Reinstatement is therefore not an appropriate remedy.
37. The court considering factors under section 49 (4) including the long service given by the petitioner; the petitioner did not contribute to the termination; the petitioner was not compensated for the lost career and income, the petitioner suffered loss and damage and had not attained alternative employment awards the Petitioner the equivalent of 12 months gross salary in compensation in the sum of Ksh.  $(708,806 \times 12) = 8,505,672$
38. In the final analysis judgment is awarded for the Petitioner as against the Respondent as follows;
  - a. 12 months gross salary in compensation for unfair and unlawful termination in the sum of Ksh. 8,505,672
  - b. One month salary in lieu of notice the petitioner having been summarily dismissed in the sum of Ksh, 708,806  
Total sum: Ksh. 9,214,478
  - c. Interest at court rates from date of judgment till payment in full
  - d. Costs of the Petition is awarded to the Petitioner

**DATED AT NAIROBI THIS 31<sup>ST</sup> DAY OF OCTOBER 2024**

**MATHEWS NDUMA**

**JUDGE**

Appearance:

Mr. Ngele for Petitioner

Mr. Koganga for Onyango for respondent

Mr. Kemboi – Court Assistant

