



**Rachuonyo v University of Science and Technology (Cause E053 of 2022)  
[2024] KEELRC 2474 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2474 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E053 OF 2022  
CN BAARI, J  
OCTOBER 11, 2024**

**BETWEEN  
GEORGE ONYANGO RACHUONYO ..... CLAIMANT  
AND  
UNIVERSITY OF SCIENCE AND TECHNOLOGY ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. Before Court is the Claimant’s Statement of Claim dated 14<sup>th</sup> December, 2022, and filed on 12<sup>th</sup> January, 2022. Under the claim, the Claimant seeks the following reliefs:-
  - a) A declaration that the termination of the Claimant from employment was unlawful and unfair.
  - b) 12 months compensation for wrongful and unlawful termination of employment. (12months\*61 = 7,416,000.)
  - c) Full payments of salary for the time the Claimant was on suspension (1 month = Kshs 309,000).
  - d) An order of payment of all dues to the Claimant in the period he would have served up to the end of his term (14 months)
  - e) Exemplary damages
  - f) Costs of the suit
  - g) Certificate of service.
  - h) Payment in lieu of Notice (Kshs 618,000).



- i) Compensation for unused leave days of 25 days having worked for 10 months with an annual leave of 30 days in his contract amount of Kshs 772,500
  - j) A service gratuity of Kshs 618,000
  - k) Any other relief that this Honourable court may deem just to grant.
  - l) Interests on (e) and (f) at court rates.
2. The Respondent entered appearance on 8<sup>th</sup> February, 2022, but did not file a defence despite the court granting it several opportunities to do so.
  3. The Claimant's case proceeded undefended and the Claimant tendered his evidence on 18<sup>th</sup> October, 2023. He sought to adopt his witness statement and produced a list and bundle of documents filed in support of his case. The Claimant closed his case on the first hearing paving way for filing of submissions.
  4. Just before judgment was delivered, the Respondent filed a motion dated 15<sup>th</sup> December, 2023, seeking to arrest the judgment and further sought to be allowed to file their defence. This court in a ruling delivered on 27<sup>th</sup> June, 2024, allowed the Respondent to file a response and to defend the suit.
  5. The matter was mentioned severally to confirm the Respondent's compliance with the orders of 27<sup>th</sup> June, 2024, but there was no attendance for the Respondent, and at the last mention on 18<sup>th</sup> September, 2024, the Respondent had still not filled his statement of response.
  6. The Claimant sought that court proceeds to render judgment on the matter, their case having been heard earlier. The judgment date was then set for 11<sup>th</sup> October, 2024.

### **The Claimant's Case**

7. The Claimant's case is That: -
  - i. In September 2021, he signed a two-year contract with the Respondent for the position of Finance Manager for a USAID-funded project, which was to run from 7/9/2021 to 30/09/2023. It is his case that he was issued an appointment letter dated 29/9/2021, which indicated his gross monthly salary as Kshs 618,000.
  - ii. On 27/6/2022, the Claimant reported to work normally and was asked to join the University Management Board meeting, which was already ongoing and chaired by the Respondent's Vice Chancellor, where he was asked to proceed on a suspension.
  - iii. On the very day of 27/6/2022, he received a suspension letter dated 24/6/2022 and, he in turn wrote an inquiry letter about the suspension and the Respondent responded by stating that the University Registrar will get back to him.
  - iv. On 13/7/2022, the Claimant received an email from the Registrar (Planning and Administration), inviting him to attend a disciplinary hearing on 18/7/2022, via a letter dated July 8/7/2022, together with a copy of undated charge sheet listing 13 counts.
  - v. It is his case that he was only given 3 working days to respond to the charges and no access to his office or emails, which would have aided in gathering evidence. He further states that he was not he provided with documents to support the allegations against him.



- vi. On 22/7/2022, the Claimant received a termination of employment letter from the Respondent which only stated that he was found guilty of the charges without providing details, reasons and evidences used against him.
- vii. On 25/7/2022, the Claimant appealed the decision of the disciplinary committee terminating his employment, and on 15/8/2022, he received a response from the Respondent upholding the decision of the Disciplinary Committee.
- viii. It is the Claimant's case that he has not utilized his annual leave of 30 days, and that he is also entitled to 10% of his gross salary as Service Gratuity payable at the end of the contract period as per the Terms and Conditions of Employment signed on 1/10/2021.
- ix. In his examination in chief, the Claimant told court that since the termination, he has been unable to secure employment which has caused him phycological torture as he is also unable to explain the reasons for his termination to potential employers.
- x. It is his prayer that he be awarded the reliefs listed in his statement of claim.

### **The Claimant's Submissions**

- 8. It is submitted for the Claimant that his termination lacked both procedural and substantive basis. It is further submitted that the grounds of the termination were unclear at every stage of the disciplinary process, as the suspension letter sent to the Claimant on 24/06/2022 only cited gross incompetence and lack of professionalism.
- 9. It is the Claimant's submission that while poor performance has been held to be a valid ground for termination, it is only so, after necessary efforts have been made to improve the employee's shortcomings. The Claimant had reliance in the case of *Jane Wairimu Machira v Mugo Waweru & Associates* [2012] eKLR for the holding that: -
 

“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.”
- 10. It is submitted that having been terminated, the Claimant is entitled to all payments due by statute and his contract of service, especially compensation for unlawful termination. Reliance was had to the decision in *Mwaniki Nganga v United Millers Limited* [2022] eKLR to support this position.
- 11. It is the Claimant's submission that his termination was unfair as he was not given an opportunity to know the case against him. For this he relied on the case of *DK Njagi Marete v Teachers Service Commission* [2020] eKLR.

### **Analysis and Determination**

- 12. I have considered the pleadings together with the Claimant's oral testimony, and his submissions. The issues that arise for determination are: -
  - i. Whether the Claimant was unfairly terminated
  - ii. Whether the Claimant is entitled to the prayers sought



## Whether the Claimant was unfairly terminated

13. A termination is unfair, where the employer fails to adhere to the tenets of fair process provided for under Section 41 of the *Employment Act*, 2007, as well as the Rules of Natural Justice enshrined in Article 47 of the *Constitution*. Further, even where fair process is adhered to, the law demands that an employer proves that the reason(s) for terminating an employee are valid, fair and justified as clearly set out under Sections 43, 45 and 47(5) of the *Employment Act*, 2007.
14. The Claimant's position in regard to the procedure, is that he was not accorded sufficient time to prepare for the hearing, since he was only given three (3) working days to prepare for the hearing.
15. The Claimant was suspended vide a letter dated 24<sup>th</sup> June, 2022. The reasons for the suspension were listed as gross incompetence, misconduct, negligence and lack of professionalism. The Claimant was then invited to a disciplinary hearing vide a letter dated 8<sup>th</sup> July, 2022. The hearing was scheduled for the 18<sup>th</sup> July, 2022.
16. The invitation letter included an annexure with 13 charges levelled against the Claimant. The invite informed the Claimant of his right to have a representative present during the hearing, and further that at the said hearing, he will have an opportunity to make any presentation that he wished to make in relation to the charges.
17. Section 41 of the *Employment Act*, 2007 states: -
  - “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”
18. In the case of *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR, the Court had this to say on procedural fairness:-
  - “The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.
  - Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.
  - Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”
19. The Claimant's only issue with the process adopted in his termination, is that he was only allowed 3 days within which to prepare and present himself for the hearing. The letter inviting the Claimant to the hearing is dated 8<sup>th</sup> July, 2022, and which indicates the hearing date as 18<sup>th</sup> July, 2022. The period between the invitation and the hearing is nine (9) calendar days and five (5) working days.



20. In my view, I would not consider nine (9) days as being an insufficient period within which to prepare for hearing. In any event, the Claimant has not alluded to having sought more time to prepare, and which time was denied.
21. In the premise, I find the Claimant's termination procedurally fair.
22. On whether the Claimant's termination meets the substantive justification test, the question is whether the reasons for the termination are matters the Respondent believed to exist at the time of termination, and which constituted reasonable ground to dismiss.
23. In *British Leyland UK Ltd v Swift* (1981) I.R.L.R. 91 Lord Denning described the test of reasonableness in the following words:-

“The correct test is; was it reasonable for the employers to dismiss him” If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”

24. Section 43 of the *Employment Act* states: -

- “(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

25. The Respondent did not defend the suit, and therefore the burden placed upon it by Section 43 remains undischarged. By reason that the claim herein was undefended, the Claimant's assertion that his dismissal was unfair on account of substantive justification holds.
26. I thus find that the Claimant's termination is unfair.

### **Whether the Claimant is entitled to the reliefs sought**

#### **Compensation for the unfair Termination**

27. The Claimant's termination has been found to be unfair for failure of the Respondent to lead evidence to show that it had fair and justified reasons to terminate/dismiss the Claimant. This finding no doubt entitles the Claimant to compensation.
28. In *Kenya Ports Authority v Festus Kipkorir Kiprotich* [2014] eKLR the Court held that the measures of compensation should be guided by the statutory capping at the time of termination.
29. The Claimant's termination has been found to be unfair only on account of substantive justification premised on the fact that the suit was undefended. In *Moi Teaching and Referral Hospital v James*



Kipkonga Kendagor [2019] eKLR, the Court of Appeal held that a judge who awards the statutory maximum of 12 months' salary without justification has exceeded his powers.

30. Further, in *Ol Pejeta Ranching Limited v David Wanjau Muhoro* Civil Appeal No 42 of 2015, the Court of Appeal expressed itself as follows on compensatory awards:-

“..Was the award of Kshs 3,489,084/- representing the Respondent’s 12 months gross salary as compensation for unfair termination justifiable” Remedies for wrongful dismissal and unfair termination are provided for in section 49 of the Act. They include payment equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employees at the time of dismissal. In deciding whether to adopt some of the remedies, the court has to take into account a raft of considerations such as .....the conduct of the employee which to any extent caused or contributed to the termination.....”

31. Guided by the provisions of Section 49 of the *Employment Act*, the foregone decisions of superior courts, and the fact that the finding of an unfair dismissal is for reason only that the suit was undefended, I deem an award of five months' salary sufficient compensation for the unfair termination.

#### **Salary withheld during suspension period**

32. The letter suspending the Claimant, indicated that he was to be on half salary until the disciplinary process was concluded. The suspension commenced on 24<sup>th</sup> June, 2022 and ended with the dismissal on 22<sup>nd</sup> July, 2022.
33. Ideally, an employee is only eligible to recover withheld salary where they are cleared of the charges against them. The Claimant's termination having been held unfair in my view, entitles him to the withheld salary.
34. I thus hold that the claimant is entitled to payment of the half salary withheld between 24/6/2022 and 22/7/2022.

#### **Salary for the remainder of contract**

35. The Claimant claims salary for the period he would have served had his contract not been terminated. For starters, there is never a guarantee that an employee will serve to retirement or to the end of their contract.
36. Further, the *Employment Act* at Section 49(4), encourages employees who lose jobs to move on and mitigate their losses and not sit and expect to collect salary for the remainder of the expected working years.
37. Rika J in the case of *David Mwangi Gioko & 51 others v Nairobi City Water & Sewerage Company Limited*, held that employees are paid salaries for contributing labour and when there is no contribution, there is no compensation.
38. Further, this court has variously held that Section 49(4)(f) of the *Employment Act*, did not open an avenue for this court to award damages equivalent to the remaining term of contract for reason of unfair termination.
39. The letter appointing the Claimant does not provide for such payment, and hence to allow this claim, would amount to payment for work not done and unjustly enriching the Claimant. (See *Aisha Omar Ramadhan v Chairman, Langata Constituency Development Fund* [2019] eKLR).



40. The claim is devoid of legal basis and is dismissed.

### Exemplary Damages

41. The general rule is that exemplary damages are not payable in cases of breach of employment contract (See *Margaret Omondi v Kenya Revenue Authority*).

42. There are however instances that have been held to warrant the award of exemplary damages in addition to compensation for unfair termination. Lord Devlin in *Rookes v Barnard* (1964) AC 1129, summarized the three instances where exemplary damages may be awarded as follows:

- i. For tortious intrusion or trespass that are profit motivated such as a landlord's wrongful eviction of her tenants;
- ii. Where there is oppressive conduct by government agents;
- iii. Where acts of the defendant have caused distress and intolerable anxiety."

43. No evidence was led to prove a claim for exemplary damages, and the court is not satisfied that the Respondent's actions were so arbitrary and oppressive as to justify an award of exemplary damages.

44. The claim fails and is dismissed.

45. The claim for leave not taken succeeds as no evidence was led to show that the Claimant utilized his leave days, and being the employer's obligation to keep employee records.

46. The Claimant's contract with the Respondent, does not provide for payment of service gratuity. In *John Karanja Mbogo v Leah Wangui t/a Gilgil Distributors Limited* [2020] eKLR the court in dismissing a prayer for gratuity stated that: -

"The claim for gratuity is not due. The Claimant had no written contract giving him such benefit. The Respondent was paying statutory dues and even where a service pay was claimed, with such payment of PAYE, NSSF no service pay is due."

47. The claim for gratuity fails and is dismissed.

48. In whole, the court makes orders as follows: -

- i. A declaration that the Claimant's termination is unfair
- ii. An award of five (5) months salary as compensation for the unfair termination at Kshs 3,090,000/-
- iii. Payment of one month salary in lieu of notice at Kshs 618,000/-
- iv. Payment of the salary withheld during suspension at Kshs 309,000/-
- v. Payment on account of leave not taken (25days) at Kshs 515,000/-
- vi. An order that the Claimant be issued with a certificate of service.
- vii. Costs of the suit.

49. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 11<sup>TH</sup> DAY OF OCTOBER, 2024.**



**C. N. BAARI**

**JUDGE**

Appearance:

Mr. Okumu present for the Claimant

N/A for the Respondent

Kirui- C/A

