



**Gakumo v Thika Technical Training Institute (Cause E185 of 2021)
[2024] KEELRC 2408 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2408 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E185 OF 2021
L NDOLO, J
OCTOBER 3, 2024**

BETWEEN

SAMUEL THUO GAKUMO CLAIMANT

AND

THIKA TECHNICAL TRAINING INSTITUTE RESPONDENT

JUDGMENT

Introduction

1. On 28th February 2018, the Respondent wrote the following letter to the Claimant:

“Re: Relieve of Duties as an Institute Finance Officer.

The Board of Governors has decided to relieve you of your duties due to misconduct specifically conflict of interest which is against the Public Officer’s Ethics Act.

Consequently you are expected to hand over to Jane Wamaitha the Account’s Clerk with immediate effect.

We wish to thank you for the good work and exemplary performance you have exhibited during the probation period.

We wish you well in your future endeavours.

(signed)

Mary Micheni

Principal/Secretary BOG”



2. This letter is what triggered the present dispute between the Claimant and the Respondent. The Claimant states his case in a Statement of Claim dated 25th February 2021 and the Respondent states its defence in a Memorandum of Response dated 11th March 2021.
3. At the trial, the Claimant testified on his own behalf and the Respondent called its Human Resource Officer, Elijah King'ori. The parties also filed written submissions.

The Claimant's Case

4. By a letter dated 17th November 2017, the Claimant was employed by the Respondent as a Finance Officer, effective 1st December 2017 subject to a three (3) months' probation period.
5. The Claimant claims to have had a clean employment record until the termination of his employment on 28th February 2018. He accuses the Respondent of using an unfounded allegation of conflict of interest to terminate his employment. He adds that he was not afforded an opportunity to defend himself.
6. The Claimant lays a claim of unlawful and unfair termination of employment and therefore seeks compensation, notice pay, general and exemplary damages, as well as costs and interest.

The Respondent's Case

7. In its Memorandum of Response dated 11th March 2021, the Respondent admits having employed the Claimant, as pleaded in the Statement of Claim.
8. The Respondent however defends the termination of the Claimant's employment. In this regard, the Respondent accuses the Claimant of engaging in professional misconduct, by fast tracking payment to his own business known as Flyoverdeck Suppliers, which amounted to conflict of interest.
9. The Respondent maintains that the termination of the Claimant's employment was justifiable, lawful and fair, stating that the Claimant fundamentally breached his obligations under the probation period.

Findings and Determination

10. There are two (2) issues for determination in this case:
 - a. Whether the termination of the Claimant's employment was lawful and fair;
 - b. Whether the Claimant is entitled to the remedies sought.

The Termination

11. The letter issued to the Claimant on 28th February 2018 gives the reason for termination of his employment as conflict interest. The Memorandum of Response gives the particulars as the Claimant's fast tracking of payment to his business known as Flyoverdeck Suppliers. The testimony adduced before the Court goes further to accuse the Claimant of failing to disclose that he was a supplier to the Respondent.
12. On his part, the Claimant states that by the time he was employed by the Respondent, he had ceased being a supplier and that the payment received by him was on account of past supplies that had not been paid for. In support of his case, the Claimant produced a letter dated 25th September 2017 by which he opted out of any further business from the Respondent.



13. Although the reason given for the Claimant’s decision cited failure by the Respondent to honour its obligations and not the employment relationship between the parties, it is not in dispute that after his employment, the Claimant did not do any business with the Respondent.
14. Further, the Respondent’s Human Resource Officer, Elijah King’ori admitted that the payment made to the Claimant was in respect of goods previously supplied by the Claimant. King’ori further admitted that in processing the payment, the Claimant played his properly assigned role.
15. It seems to me therefore that the allegation of conflict of interest was not supported by any evidence and it could not therefore pass as a valid reason for termination of employment as required under Section 43 of the *Employment Act*.
16. Regarding procedural fairness as provided under Section 41 of the *Employment Act*, the Respondent submits that because the Claimant’s employment was terminated before the end of his probation period, he was not entitled to procedural fairness. In pursuing this line, the Respondent relies on Section 42 of the *Employment Act*. I will say two things on this issue; first, the termination letter makes no mention of the Claimant having failed to satisfactorily complete his probation; in fact, the letter commends the Claimant for exemplary performance during probation and the Respondent’s witness told the Court that the Claimant had indeed completed his probation satisfactorily; second, there is now firm jurisprudence that employees serving probation are entitled to the procedural fairness processes set out under Section 41 of the *Employment Act*.
17. In its decision in *Evans Kiage Onchwari v Hotel Ambassadeur Nairobi* [2016] eKLR this Court held that:

“ Article 41 of *the Constitution*, 2010 guarantees employment and labour rights for all. To my mind these rights may only be limited to the extent that is permitted under Article 24 of *the Constitution*. To limit enjoyment of a right by the mere reason of the length of service does not in my view, meet the threshold set in Article 24.”
18. This position was affirmed in *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR where a three judge bench of this Court stated as follows:

“...we find no reasonable and justifiable cause in the exclusion of an employee holding a probationary contract from the procedural safeguards of Section 41 of the *Employment Act*.”
19. From the evidence on record, the Respondent did not take any step towards compliance with the disciplinary procedure set out in law and the only conclusion to make is that the Claimant was condemned unheard.

Remedies

20. Ultimately, I find and hold that the termination of the Claimant’s employment was substantively and procedurally unfair. I therefore award him four (4) months’ salary in compensation. In arriving at this award, I have considered his short stint in employment, accentuated by the fact that the Claimant did not in any way contribute to the termination.
21. I have further taken into account the Respondent’s failure to avail the Claimant an opportunity to defend himself against the accusation levelled against him.
22. In addition, I award the Claimant one (1) month’s salary in lieu of notice.



- 23. No basis was established for the claims for general and exemplary damages which therefore fail and are disallowed.
- 24. Finally, I enter judgment in favour of the Claimant in the following terms:
 - a. 4 months' salary in compensation.....Kshs. 305,296
 - b. 1 month's salary in lieu of notice.....76,324
 - Total.....381,620
- 25. This amount will attract interest at court rates from the date of judgment until payment in full.
- 26. The Claimant will have the costs of the case.
- 27. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OCTOBER 2024

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JUDGE

Appearance:

Mr. Wathuta for the Claimant

Mr. Munene for the Respondent

