



Owiti v Archdiocese of Nairobi Kenya Registered Trustees (Cause E353 of 2022) [2024] KEELRC 13378 (KLR) (27 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 13378 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E353 OF 2022
DKN MARETE, J
NOVEMBER 27, 2024**

BETWEEN

MAO NCOMO OWITI CLAIMANT

AND

ARCHDIOCESE OF NAIROBI KENYA REGISTERED TRUSTEES RESPONDENT

JUDGMENT

1. This matter was originated by way of a statement of claim dated 25th May, 2022. It does not issue any issue in dispute on its face.
2. The Respondent in a Response to claim dated 26th June, 2022 denies the claim and prays that the same be dismissed with costs.
3. The claimant further answers this in a reply to Response to Memorandum dated 4th July, 2022.
4. The Claimant's case is that at all material times to this action, the Respondent was the sponsor/owner of the school known as St. Mary's School, West Lands registered under the Ministry of Education. She was an employee of the Respondent as a teacher assigned to teach Chemistry and mathematics in the Internal Baccalaureate (IB) Department.
5. The Claimant's further case is that by a letter dated 14th February, 2022 addressed to him, the Respondent's school administration, purporting to act on behalf of the Respondent's Board of Management published defamatory words against him as follows;

“In a report sent via email to the School Administrator on Tuesday, 8th February 2022, the IBDP students accused you of moral misconduct. They specifically asserted that you made comments towards two girls on how their physique looks good and if you were (teaching) in IB, you would date them. This, according to the said students, was embarrassing and



offensive. The School Board of Management is privy to this accusation and therefore requests you to submit a written response addressed to the School Administrator not later than Wednesday, 16th February 2022 at 2.00pm.”

6. This letter was republished to the school staff, Respondent’s Counsel and witness whom were asked to accompany the Claimant as he was liable to the said republication.
7. The claimant’s further case comes out as follows; That this letter was false and deliberately intended to cast aspersions on the person and character of the claimant and had been preceded by threats of sacking and mistreatment on various occasions by the aforesaid school administrator. This was a reference to the claimant and was malicious and calculated to injure his reputation character and good name in society. He has therefore suffered shame and low self-esteem leading to mental anguish for being ridiculed, shunned and avoided by the right thinking members of the society. The Respondent refused to withdraw the letter despite request by the Claimant. He was required to submit a written response by 16th February, 2022. He responded to this and requested for particulars of the accusation in the alleged email, particulars of his accusers and a withdrawal of the false malicious publication and apology. This was declined by the respondent but instead, he was summoned to a disciplinary hearing on 3rd March, 2022. He was denied representation by counsel at the disciplinary proceedings from which he was suspended. His suspension was an afterthought, baseless and overtaken by event in that the hearing had already taken place and it appeared his fate had been predetermined and was fait accompli. On 1st April, 2022, he was summarily dismissed from employment.
8. The Claimant in the penultimate avers that his summary dismissal was unfounded and violated the claimant’s legal and constitutional rights for the following reasons;
 - i. There was no proper or any investigation to the alleged accusations.
 - ii. The Claimant’s right to fair hearing was violated.
 - iii. The said disciplinary process was flawed and malicious
 - iv. The termination was contrary to the law and procedure
 - v. No complainant was availed or evidence tendered against the claimant
 - vi. No right of appeal was given to the claimant
 - vii. No reasons or written investigation report was availed to the claimant
 - viii. The respondent failed to furnish the claimant with the email that was used to send the alleged report to the School Administrator.
9. He prays thus;-
 - i. The Respondent to tender unconditional apology to the claimant which will be deemed as an admission of liability upon which damages will be agreed upon.
 - ii. Declaration that the summary dismissal was illegal, unfair and unprocedural.
 - iii. Certificate of service (Pursuant to section 51 *Employment Act* 2012)
 - iv. Salary for the month of April 2022 Kshs.73,836.65.
 - v. One month’s pay in lieu of notices (Pursuant to section 36 *Employment Act* 2012) Kshs.73,836.65.



- vi. Damages for wrongful dismissal under the (Pursuant to section 49 of the *Employment Act* 2012) Kshs.73,836.65 times 12 months) Kshs.886,039.80.
 - vii. Damages for the violation of the claimant’s constitutional rights above Kshs.7,500,000.
 - viii. General damages for defamation and or malice falsehood Kshs.1,500,000.
 - ix. Punitive damages Kshs.1,000,000.
 - x. Costs and interest
 - xi. Any other relief that the court deems fit and just in the circumstances.
10. The Respondent’s case is that on receiving the alarming accusations against the Claimant, she wrote a letter asking him to respond with a view to clarifying the matter. This did not go outside official communication, or at all. It is indeed the Claimant who published the said letter to other third parties.
11. The Respondent’s further case is that the said sexual harassment allegations were put to the claimant to defend himself. These had been received from his students and therefore do not amount to defamation. There was no malice involved.
12. The Respondent further avers that the Claimant’s disciplinary process was internal affair as is in the practice and customs of the Respondent. No external persons were invited to the proceedings. It only involved members of the disciplinary committee and no more.
13. Again, the Respondent’s case is that the recruitment of new teachers had nothing to do with the Claimant’s disciplinary process, or at all.
14. The issues for determination therefore are;
- 1. Whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful.
 - 2. Whether the Claimant is entitled to the reliefs sought.
 - 3. Who bears the costs of this cause.
15. The first issue for determination is whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful. The parties hold diametrically opposed positions on this.
16. The Claimant in his written submissions dated 31st January, 2024 brings out a case of unfair and unlawful termination of employment in reiteration of his case. He comes out thus;
- The suit revolves around the dismissal of the Claimant, who served as a Chemistry and Mathematics teacher at St. Mary’s School, an institution owned by the Respondent. The Claimant was abruptly dismissed on the 1st April, 2022, on allegations of sexual misconduct. The Claimant avers that the dismissal was riddled with flaws, bias, and illegality, adversely affecting both his professional reputation and exposing him to shame, ridicule, and disgrace amongst his peers, students, and other members of the society.
17. The Respondent seeks to rely on the authority of *Walter Anuro vs Teachers Service Commission* [2013] eKLR where the court held thus;
- “... for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment



of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination . . .”

Again, Section 41(1) of the [Employment Act](#), 2007 comes out as follows;

“Notification and hearing before termination on ground of misconduct

(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. It is the Claimant’s case that he was not properly notified of the reasons for termination of his employment in that the show cause letter dated 14th February, 2022 was casual and shallow. It was not accompanied by the alleged email of 8th February, 2022 or any other evidence or statements from the accusers or their witnesses. The disciplinary process did not address or answer his request for better particulars of the accusations facing him. This was in contravention of section 41 of the [Employment Act](#), 2007 above.

19. In total, the Claimant submits a case of the absence of procedural fairness in the disciplinary proceedings and also lack of a valid reason for termination. On this seeks to rely on the authority of Francis Mbugua Boro vs Smartchip Dynamics Limited [2017] eKLR and Anthony Mkala Chitavi vs Malindi Water & Sewerage Company Ltd [2013] eKLR both of which emphasize the necessity of substantive and procedural justification in a termination of employment.

20. The Respondent submits a case of the Claimant’s being notified of the accusation against him and awarded an opportunity to respond to the same. This is as follows;

. . . the Claimant having been notified of the accusations, he was asked to write the response in the earliest time possible considering that this was a matter that had caused a lot of unrest of the students in the school. Furthermore, the Claimant had begun threatening students of legal actions if they proceeded with the said allegations against him. Due to the emergency, that is why the Claimant was granted time lines to adhere to. We ask the court to consider that the interest of the students (child) is paramount and should be safeguarded at all times.

21. The Respondent further submits that the disciplinary procedure through a panel was in compliance with Section 41(1) of the [Employment Act](#), 2007. This also agrees with Section 43(2) of the Act as the Claimant was offered the reasons by the Respondent. The authority of British Leyland UK Ltd v Swift (1981) I.R.L.R 91 Lord Denning described the test of reasonableness in the following word:-

“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 take 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.”



22. The Claimant was not only notified of the reasons for termination but was also invited to a disciplinary meeting on 2nd March, 2022 in which he was offered an opportunity to defend himself against the accusations levelled against him. He cannot be heard or seen to deny this.
23. The Respondent's case overwhelms that of the Claimant. The Claimant having been reported to involve in untoward sexual misconduct against the school girls, he was taken through appropriate disciplinary procedure through which he was found culpable and dismissed from employment. There are no two way about this. It was procedural and valid reasons for termination were had. I therefore find a case of lawful termination of employment and hold as such. And this answers the first issue for determination.
24. The second issue for determination is whether the Claimant is entitled to the reliefs sought. He is not. Having lost on a case of unlawful termination of employment, he becomes disentitled to the reliefs sought.
25. I am therefore inclined to dismiss the claim with orders that each party bears the costs of the same.

DELIVERED, DATED AND SIGNED THIS 27TH DAY OF NOVEMBER 2024.

D. K. NJAGI MARETE

JUDGE

Appearances:

1. Mr. Muo instructed by Mulekyo & Company Advocates for the Claimant.
2. Mr. Onduso instructed by Mang'erere & Company Advocates for the Respondent.

