



Chemtai v Koitalel Samoei University College (Employment and Labour Relations Cause E015 of 2023) [2024] KEELRC 2771 (KLR) (7 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 2771 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS CAUSE E015 OF 2023
MA ONYANGO, J
NOVEMBER 7, 2024**

BETWEEN

FLORENCE CHEMTAI CLAIMANT

AND

KOITALEL SAMOEI UNIVERSITY COLLEGE RESPONDENT

JUDGMENT

1. By her Statement of Claim herein dated 26th June 2023 and filed on 5th July 2023, the Claimant accuses the Respondent of unfair and unlawful termination of her employment.
2. According to the Claimant, she was initially employed by the Respondent as an Assistant Registrar Grade 12 vide an employment letter dated 13th April 2022 for a fixed period of 1 year with effect from 2nd June 2022 at a monthly salary of Kshs. 202,831.00. She states that her employment terms changed from contract to permanent and pensionable on the 1st July 2022, following her successful interview and recruitment to the position of Assistant Registrar (Administration).
3. It is the Claimant's case that the terms of the previous employment contract set out in the letter dated 13th April 2022 automatically lapsed when the Claimant's terms of employment were changed vide the letter dated 17th June 2022.
4. The Claimant contends that despite the change of employment terms, the Respondent did not effect the changes in the Claimant's remuneration in line with the terms set out in the letter of appointment.
5. She states that on 2nd June 2023, the Respondent issued her with a letter purporting that the Claimant's employment as set out in the letter dated 13th April 2022 had lapsed and thus directed the Claimant to vacate her office and the Respondent's premises.
6. The Claimant contends that on 6th June 2023, she informed the Respondent that the decision to lock her out of her office on the basis of the letter dated 2nd June 2023 was unprocedural and constituted



- constructive termination of her employment as set out in the letter dated 17th June 2022 without giving her a hearing.
7. It is her case that there was no notice or warning prior the termination and that the said termination breached the internal disciplinary procedures of the Respondent, rules of natural justice and the *Employment Act*.
 8. The Claimant maintains that the termination was unfair for want of valid reasons and fair procedure. She seeks the following reliefs:
 - i. A declaration that the Respondent's decision to lock out the Claimant from her office and the premises of the Respondent constituted constructive dismissal, and abuse of office by the Respondent.
 - ii. A declaration that for reasons stated in the letter dated 2nd June 2023 do not constitute proper ground for termination. (sic)
 - iii. The Respondent to withdraw the letter of termination and issue the Claimant a letter clearing her of any wrongdoing.
 - iv. That in the alternative, the summary dismissal be declared unlawful and unfair.
 - v. Damages for wrongful dismissal.
 - vi. Aggravated damages for violating the claimant's constitutional rights; and
 - vii. Payment of the withheld salary for the period between 17th June 2022, till such time as the court may determine.
 - viii. Leave allowances.
 - ix. Interest on the monetary orders from the date of the filing of the Claim.
 - x. Costs of the Claim; and
 - xi. Any other order the Court may find it fit to award.
 9. In reply, the Respondent filed a Memorandum of Response and Counterclaim dated 24th July 2023 denying the averment that the Claimant was unprocedurally terminated. It is averred that in terminating the Claimant's illegal and irregular employment contract the Respondent's Council acted on the basis of law and data collected from the State Corporation Advisory Committee and Head of Public Service.
 10. The Respondent particularized the unlawful recruitment and appointment of the Claimant as follows:
 - i. Willful and careless failure to comply with the Respondent's Order, 2018, the State Corporations Advisory Committee requirements and Head of Public Service and Council guidance on recruitment, appointments and promotions.
 - ii. Being recruited and appointed by the Management contrary to Council,
 - iii. Being recruited against non-existent staff establishment and institution budget,
 - iv. Changing an application for a position of a lecturer to that of an administrator,
 - v. Attaching the Claimant to the office of the Principal as an Assistant Registrar Grade 12 and personal assistant to the Acting Principal of the College,



- vi. Holding two positions in Public Universities (Kisii and Koitalel) at the same time,
 - vii. Converting an irregular and illegal temporary appointment into permanent and pensionable terms,
 - viii. Being attached to the office of the Principal as Personal Assistant for personal gains against no known institutional establishment,
 - ix. Being transferred and appointed to act as Head of Procurement without the approval of the Council,
 - x. Gaining irregular employment through lop-sided job indent and advertisement procedure and processes contrary to Council directions and guidance,
 - xi. Being recruited on career progression based on internal job advertisement position that was in contradiction with the Public Service Commission guidance and guidelines,
 - xii. Being recruited on exaggerated entry points that exposed the Respondent to huge financial and wage bill implications,
 - xiii. Being appointed through administrative craft and abuse of position/process that do not reflect integrity, gender, religion, ethical background and inclusion,
 - xiv. Being irregularly and unlawfully paid Kshs. 8,398,221.80.
11. In the Counterclaim, the Respondent avers that the Claimant was allegedly hired by an entity without the powers and functions to hire staff of the University College, and that the contracts of employment and renewal thereof were in violation of the law governing staff appointments and were null and void from inception. The Respondent in the Counterclaim therefore prays for:
- i. A declaration that the Claimant was not an employee of the Respondent's Council,
 - ii. Recovery of all public monies, allowances and benefits of Kshs 8,398,221.80 irregularly paid to the Claimant from 14th April 2020 to 1st June 2023,
 - iii. Interest on (b) at thirty percent from 14th April 2020 till payment of the refund in full,
 - iv. Costs of the suit,
 - v. Any other relief this Honourable Court may deem fit.

Claimant's Case

- 12. The Claimant testified on 30th October 2022 as CW1. She relied on her witness statement recorded on 26th June 2023 as well as her supplementary bundle dated 3rd August 2023 as her evidence in chief.
- 13. The Claimant stated that when she took up the temporary appointment with the Respondent, she took leave of absence from Kisii University. She thus denied the Respondent's claim that she was holding and being paid for two separate jobs in the government at the same time.
- 14. It was her evidence that prior to taking up employment with the Respondent, she was employed by Kisii University from 25th May 2015 on permanent and pensionable terms and that in 2020, she was given an offer to take up temporary employment at the Respondent's university to assist in establishing the performance department upon which she took leave from Kisii University.



15. She stated that she resigned from Kisii University and was surprised when she was later on terminated by the Respondent.
16. It was her testimony that sometimes in June 2023, she received a letter from the principal informing her that her previous contract had lapsed and that the contract was not going to be renewed. It was her evidence that this was contrary to her appointment letter through which she had been absorbed in the Respondent's institution on permanent and pensionable terms.
17. She stated that the reason for termination of her employment was never given to her and that she was not taken through a disciplinary process.
18. On cross examination, CW1 stated that she resigned from Kisii University in August 2022 and she received the response on 6th September 2022. That by then she was on leave of absence which was lapsing on 5th September 2022.
19. The Claimant explained that when she got her appointment letter from the Respondent, she resigned from Kisii University but did not clear immediately with Kisii University because the University first had to accept her resignation. She testified that she was given a list of what she needed to do which she did and was eventually issued with a clearance certificate after attending an exit interview in August 2022, a confirmation that she had handed over.
20. It is the Claimant's case that she was given an offer letter by the Respondent which was issued to her by the Principal of the Respondent after being interviewed in a panel comprised of the Principal as the chair, the current principal who was the deputy principal at the time, 2 directors of School of Business and School of Education, the Acting Registrar, Administration, Deputy Registrar Planning, Deputy Finance Officer, a Council member and external examiners from Moi University.
21. She stated that her letter of invitation to the interview only indicated that she had been invited for an interview and not state whether the panelists were staff or Council members.
22. She explained that the offer was by the office of the Registrar but signed by the Principal, that she had applied for 2 positions, that of a lecturer and public relations officer. She testified that she was called by the Registrar Administration in September, 2022 and offered a temporary job.

Respondent's Case

23. The Respondent called Kenneth Kimutai who testified as RW1 and introduced himself as the Deputy Administrator at the University of Nairobi. He outlined his duties among them being custodian of all staff records and all policy documents. He stated that the University communicates with staff on all policies and offers secretariat services to all boards. He stated that the Respondent is a constituent college of the University of Nairobi and as a policy, it is the Council that employs staff.
24. With regard to the instant case, it is the Respondent's case that the Claimant herein was issued with the appointment letter by the Principal but the Council did not give such authority to the Principal. According to RW1, the statutory mandate of appointment of staff is the role of the University Council both in the University Act and the Koitalel Samoei University College Order.
25. RW1 further testified that the Council may delegate to the Vice Chancellor or his designee the responsibility to conduct interviews for appointment to positions at levels 14 and below. That in the Claimant's case, the Vice Chancellor was not involved in the interview of the Claimant and at no point did the Council delegate to the Principal the duty of appointing the Claimant.



26. RW1 stated that under section 25 and 36 of *Universities Act*, 2012 and section 11 and 13 of Koitaleel Samoei University College Order 2018, the appointment of staff is a collective resolution of the Council and the management had no responsibility to recruit staff and particularly, the Claimant in this case.
27. On cross examination, RW1 stated that the Principal sits as secretary to the Council and as the secretary, issues communication on behalf of the Council. He stated that the Council speaks through resolutions contained in its minutes.
28. RW1 admitted that an interview was conducted by the University and from the minutes of the meeting, it was agreed that the appointment of the Claimant and other staff members that had been interviewed be done in phases. It was his testimony that the said resolutions were from the Council and is what formed the basis for the Claimant's appointment. RW1 admitted that the Claimant did not participate in any irregularity. He stated that the Council made a decision to revoke her permanent and pensionable appointment.
29. The Respondent's witness confirmed that the Claimant was not given a letter to show cause why her appointment should not be revoked. That she was never invited for any disciplinary hearing before the decision to revoke her appointment was made.
30. It was the evidence RW1 that prior to the revocation of the Claimant's employment, there were no disciplinary issues against the Claimant and that the revocations had nothing to do with her qualifications.
31. RW1 agreed that the Claimant worked for the Respondent and rendered a service to the university. He confirmed that the terms of her employment were changed to permanent and pensionable on grounds of her exemplary performance.
32. On re-examination, RW1 maintained that the recruitment of the Claimant was not regular as the persons who recruited her were not recognized by law.
33. At the close of the Respondent's case, the court directed parties to file written submissions. The Claimant filed her final submissions on 16th November 2023 and supplementary submissions on 11th December 2023. The Respondent on its part filed its submissions on 27th November 2023. Supplementary submissions were also filed on 29th January 2024.

The Claimant's submissions

34. In her submissions, the Claimant framed the issues for determination to be;
 - a. Whether the dismissal of the Claimant was unfair, unlawful and illegal and whether in effecting it, the Respondent complied with the law
 - b. Whether the Claimant should be reinstated
 - c. Whether the Claimant is entitled to the reliefs sought
 - d. Who should pay costs and interest of the suit.
35. On the first issue, it is submitted that the Respondent locked out the Claimant from her office and thereafter declined her re-entry. The Claimant submitted that her dismissal was unlawful and unfair as the Respondent did not comply with the guidelines set in law to be followed when dismissing an employee.



36. It is the Claimant's submission that her dismissal offends the mandatory provisions of sections 41(1) and 2, 43, 44(4 and 45(2) of the Employment Act. In support of this position, the cases of Pius Machofu Isindu vs Lavington Security Guards Lomited(2017)eKLR and Walter Ogal Auro vs Teachers Service Commission (2013)eKLR were cited.
37. The Claimant submitted that the reasons given for the termination of her employment are materially different from the reason advanced in the course of the hearing of this suit. According to the Claimant, the procedural lapses cited by RW1 were not the reason the Claimant's employment was terminated which in the Claimant's view offends the mandatory provisions under the Fair Administrative Actions Act.
38. The Claimant contended that the Respondent in an attempt to shield itself on the basis of alleged irregularity by the Management of the Respondent has cited section 35(1) of the Universities Act which provides that the employment of university staff shall be done by the Council. In citing section 17(6) of the Kotaleel Samoei University Order, 2018, the Claimant submits that it provides that the Council may delegate to any person, committee or body the power to appoint any member of staff of the University College.
39. It is also the Claimant's submission that from the minutes of the Council held on 14th July 2021, at paragraph 10.2.2, titled implementation of the Council resolution on internal recruitment of December 18th 2020, the Council sanctioned the management to identify positions to be filled through a competitive process and that as a result, the management advertised and filled those positions and the Claimant was a successful Applicant. It is the Claimant's submission that the minutes of 14th July 2021 was a follow up by the Council to determine the implementation status.
40. It is therefore the Claimant's submission that the Council did delegate the power to appoint to the Management and that as a consequence, the recruitment of the Claimant followed a competent process
41. The court was urged to make an award for compensation for wrongful and unfair termination.
42. Regarding the second issue on reinstatement of the Claimant, it is submitted that having shown the court that the summary dismissal of the Claimant was tainted with illegality, the Claimant is entitled to be restored to the position she previously held at the Respondent's institution with full prevailing pay and other responsibilities. It is submitted that prior to the termination of her employment, the Claimant had exemplary record with the Respondent. That she had resigned from her employment at Kisii university to take up the job offer at the Respondent's institution. In support of this position, reliance was placed in the case of Aggrey Lukorito Wasike vs Kenya Power & Lighting Company Limited (2016) eKLR
43. On the issue whether the Claimant is entitled to the reliefs sought, it is submitted that since the Claimant's dismissal from employment was tainted with irregularity, the Claimant is entitled to maximum compensation for wrongful dismissal at twelve months gross salary subject to statutory deductions as well as aggravated damages for violation of her constitutional rights.
44. In the supplementary submissions filed by the Claimant on 11th December 2023, the Claimant submitted on three issues namely:
 - a. Whether the Council gave authority to the management committee to conduct interview
 - b. Whether the Claimant voluntarily handed over
 - c. What are the grounds of termination of the Claimant?



45. On the first issue, the Claimant submitted that the Respondent in its submissions admitted that the Council had approved advertisement and recruitment at grade 11 but failed to produce the resolution of Council which according to the Claimant, would have confirmed that the Council had authorized the management to carry out the recruitment that led to the employment of the Claimant.
46. It is the Claimant's submissions that as per the University of Nairobi Human Resource Policies and Procedures Manual produced by the Claimant in support of her case, the Council may delegate to the Vice Chancellor or his designee (Human Resource Committee) the responsibility to conduct interviews for appointment to positions at level 14 and below. According to the Claimant, as an Assistant Registrar Grade 12 the Human Resource Guidelines allowed her to be interviewed by the Human Resource Recruitment Committee.
47. On the second issue, the Claimant submitted that contrary to the allegations by the Respondent that the Claimant voluntarily handed over after her employment was terminated, the Claimant the handing over brief that is upon by the Respondent at page 79-80 of the Respondent's bundle of documents does not amount to a handing over report as the date of the alleged handover is not indicated, and the document availed to the court is incomplete.
48. The Claimant reiterated her position that she was locked out of the office by the Respondent who thereafter declined her re-entry. According to the Claimant, the Respondent created a hostile work environment for the Claimant which made it difficult to discharge her duties thereby constructively dismissing her from employment. In support of this position, reliance was placed on the case of Thomas Olum Miyago & another vs v S.C Johnson & Son Kenya Limited [2020] eKLR.
49. Lastly, regarding the grounds of termination of the Claimant, it is the Claimant's submission that the Respondent vide a letter dated 17th February 2023 informed the Claimant that the alleged changes were irregular, tainted with illegality and unlawfulness from inception and was incapable of enforcement. That from the proceedings in court, the Respondent had given the reason for termination to be because her contract had lapsed and the Respondent did not wish to be renew the contract. Thus, according to the Claimant is a contradiction in the proceedings and the submissions.
50. It is the Claimant's submissions that the Respondent's decision to terminate her employment is not borne of good reason, hence the Respondent is to date uncertain about the grounds for the termination. According to the Claimant, the Respondent is seeking to rely on acts of omission and commission by its own staff to escape liability for the termination.
51. The Claimant submit that the Respondent cannot rely on lapses, if any, on its part, to disadvantage an innocent party.
52. The Claimant urged the court to allow this claim.

Respondent's submissions

53. The Respondent on its part identified the issues for determination to be:
 - a. Whether the recruitment and appointment of the Claimant was regular and lawful
 - b. Whether the claim is merited/founded on any legal or contractual basis
 - c. Whether the reliefs sought are justified
 - d. Who is to bear the costs of the suit



54. On the first issue, the Respondent submitted that the Claimant was irregularly and unlawfully recruited and appointed as an Assistant Registrar Administration on 13th April 2022 for a fixed period of one year with effect from 2nd June 2022. It is the Respondent's submission that the Claimant initially applied for the position of a lecturer on 15th May 2020 and that this position was then irregularly and unprocedurally turned into Assistant Registrar Grade 12 in the Principal's office for a period of six months.
55. The Respondent further submitted that on 10th March 2021, the Claimant requested for the renewal of her illegal and unlawful change of terms which was granted without the involvement of the Council. It is also submitted that on 16th June 2021, an internal job advert was placed on the Notice Board on 21st June 2021 and that on 14th July 2021, the Council met and noted that the advertised positions had serious administrative shortcomings where six positions were advertised but approvals by management were for eight positions which was not in tandem with the advert. According to the Respondent, the Council noted that in the case of the Claimant, the Council had approved advertisement and recruitment at grade 11, however, the management irregularly and through administrative craft advertised for grade 12. It is also contended that the Council resolved that there was need to have an approved staff establishment and that the entire process be annulled because the whole process was unprocedural and unlawful.
56. It is averred that thereafter, on 13th April 2022 without referral to the Council, the Claimant's request for renewal of her contract was granted by the then Acting Principal and on 17th June 2022, her terms were changed from contract to permanent and pensionable by the Acting Principal without any authority from the Council.
57. The Respondent therefore submits that since the Claimant was not recruited and appointed by Council, her alleged contract of employment was unenforceable and hence she is not entitled to any interest or right arising therefrom
58. On whether the claim is merited, the Respondent submitted that the Claimant's contract was void ab initio for want of compliance with the Universities Act, 2012 and Koitaleel Samoei University College Order, 2018 and that she cannot rely on the same to mount a claim against the Respondent. In support of this position, the Respondent cited the case in Kenya Airways Limited v Satwant Singh Flora (2013) eKLR.
59. It is therefore the Respondent's submission that the Claimant cannot enforce her claim and remedies on the basis of rights purportedly accruing from an illegal and unlawful recruitment and appointment processes and procedures and that as such, the claim ought to be dismissed with costs.
60. On its counterclaim, the Respondent contended that the Claimant should refund Kshs 8,398,221.80 as her recruitment and appointment was tainted with illegalities and irregularities. The Respondent submitted that the refund was specifically pleaded and proved.
61. In the Respondent's supplementary submissions, the Respondent reiterated that the mandate of the Management Committee was limited to conducting advertisement and putting in place a pre-Selection Technical Committee drawn from Administrative arm of the Respondent with the main responsibility to prepare advertisement and recruitment paper work and shortlisting of suitable candidates after ensuring that they met the minimum academic qualifications. According to the Respondent, the Council Human Resource & Administrative Committee was tasked to come up with a list of selected candidates to fill the various lower cadre posts and thereafter make recommendations to Council arising from pre-Selection Technical Management Committee report on advertisement and recruitment process and procedure and that the final phase of the recruitment exercise was to be



overseen by the Council as a whole upon consideration of the Human Resource & Administrative Committee report to Council.

62. It is the Respondent's submission that the Management Committee went ahead and recruited several persons including the Claimant and that as a result, arising from the integrity and misgivings of the Management Committee on advertisement and recruitment and the entire process, the Council on July 14th, 2021, met and noted that the advertised positions had serious administrative shortcomings which was not in tandem with the advert. It is submitted that in the case of the Claimant, the Council had approved advisement and recruitment at grade 11 but the management irregularly and through administrative craft advertised for grade 12. The Council also noted that there was need to have an approved staff establishment and that the entire process be annulled because the whole process was unprocedural and unlawful.
63. The Respondent contended that the Council never delegated its core functions of recruitment and appointment of staff to Management and that in any event such delegation cannot hold where the statutes specifically puts the duty to recruit and appoint staff to the Council. As such, the Claimant having been hired by an entity other than Council, her recruitment and appointment was null and void from inception and she cannot seek protection by or enforcement in law.
64. The Respondent also submitted that the Claimant's employment was not terminated and maintained that the Claimant voluntarily left employment as a result of want of form and procedure in her recruitment.

Determination

65. Upon considering the pleadings herein, the evidence of the respective parties, the submissions and as well as the authorities cited, I find that the issues for determination are: -
 - i. Whether the Respondent's Management Committee had the capacity to employ the Claimant
 - ii. Whether the Claimant's employment was unlawfully terminated
 - iii. Whether the Claimant is entitled to the remedies sought.
66. On the first issue, parties are not in agreement on the authority of the Management Committee to recruit and employ the Claimant. The Claimant submits that the Management Committee that recruited and employed her was given the authority to do so in accordance with the delegated function donated by Council to the Management Committee. The Respondent on the other hand has denied that the Management Committee had authority to employ the Claimant.
67. The Respondent contends that the power it donated to the Management Committee was limited to advertise, recruit and produce the names of shortlisted candidates and give a technical report highlighting how the advertisement and recruitment exercise was conducted in line with the Respondent's Council's and its Human Resource & Administrative Committee.
68. Section 35 of the [Universities Act](#) provides
 35. Governing organs of a university
 - (1) In addition to the provisions of its Charter, a university shall establish the following organs of governance or their equivalent—
 - (a) a Council, which shall—
 - (i) employ staff;



- (ii) approve the statutes of the University and cause them to be published in the Kenya Gazette;
- (iii) approve the policies of the University;
- (iv) approve the budget;

69. The Management Board is established under section 35(1)(c) with the functions to:

- (i) be responsible for implementation of the policies of the university;
- (ii) assist in the day-to-day management of the university; and
- (iii) undertake such other functions as shall be set out in the Charter.

70. The Koitalel Samoei University College Order 2018 defines “Council” as the Council of the University College established under paragraph 11.

71. Paragraph 11 of the Order establishes the Council. The paragraph 11 reads:

1. There shall be a Council of the University College which shall be appointed by the Cabinet Secretary in accordance with section 36 of the Act.
2. The Principal shall be the Secretary to the Council.
3. Subject to subparagraph (4), a member of the Council other than an ex officio member shall hold office for a period of three years but shall be eligible for reappointment for one further term.
4. The Office of a member of Council shall become vacant
 - a. if, not being an ex officio member, the member resigns from office in writing addressed to the Principal;
 - b. if the Council is satisfied that the member is, by reasons of physical or mental infirmity, unable to exercise the functions of the office; and
 - c. upon death of the member.
5. Where the office of a member of the Council becomes vacant, the Principal shall forthwith notify the vacancy to the appointing authority.
6. The Procedure, conduct and regulation of the affairs of the Council shall be in accordance with the Order and the Statues.
7. The Council shall exercise prudent leadership, innovative enterprise, and good judgment in directing the University College in the best interest of the University College.

72. Paragraph 12 of the Order provides for the functions of the Council as follows:

- (1) Subject to this Order, the Council shall be the governing body of the University College through which the University College shall act and—
 - (a) shall administer the property and funds of the University College in a manner and for the purposes which shall promote the interest of the University College; but the Council shall not charge or dispose of immovable property of the University College except in accordance with the procedures laid down by the Government of Kenya;



- (b) shall receive, on behalf of the University College, donations, endowments, gifts, grants or other moneys and make disbursements therefrom to the University College or other bodies or persons;
 - (c) shall approve the appointment criteria and the terms and conditions of service of staff;
 - (d) shall provide for the welfare of the staff and students of the University College;
 - (e) may enter into association with other universities, university colleges or other institutions of learning, whether within Kenya or otherwise, as the Council may deem necessary and appropriate; and
 - (f) may, after consultation with the Academic Board, make regulations governing the conduct and discipline of the students of the University College.
- (2) All documents, other than those required by law to be under seal, made on behalf of the Council, and all decisions of the Council may be signed under the hand of the Chairperson, the Principal or any other members of the Council generally or specifically authorized by the Council in that behalf
- (3) The Council shall ensure that a proper management structure is in place and that the structure functions to maintain corporate integrity, reputation and responsibility of the University College.
- (4) The Council shall monitor and evaluate the implementation of strategies, policies, and management criteria and plans of the University College.
- (5) The Council shall constantly review the viability and financial sustainability of the University College, and shall do so once every year.
- (6) The Council shall ensure that the University College complies with all the relevant laws, regulations, governance practices, accounting and auditing standards.
73. Regulation 14(1) establishes the Management Board. Its functions are spelt out in Regulation 14(2) as follows;
- (2) The functions of the Management Board shall include assisting the Principal in the day to day management of the University College and shall, in this respect, be responsible for—
 - (a) the efficient management of the human, resources, programmes, facilities and finances of the University College;
 - (b) planning for the development and needs of the University College
 - (c) developing strategies for the generation of revenue to secure adequate financial support for the University College;
 - (d) making proposals to the Council and the Academic Board on policies that have University-wide application;
 - (e) the coordination of the University College strategic and development plans; and
 - (f) any other matters related to the management of the University College.
74. Regulation 12(c) of the Order provides that the mandate of the Council with regard to recruitment is to approve the appointment criteria and the terms and conditions of service of staff.



75. Regulation 14(2)(a) provides for the function of the Management Board to include the efficient management of the human, resources, programmes, facilities and finances of the University College.
76. Regulation 17 of the Order provides for staff of the University college as follows:
1. The academic staff of the University College shall consist of—
 - a. the Principal;
 - b. the Deputy Principals;
 - c. Deans and Directors;
 - d. Chairpersons of Departments;
 - e. the Librarian; and
 - f. all members of staff who are engaged in teaching, research and outreach.
 2. The administrative staff of the University shall consist of—
 - a. the Principal;
 - b. the Deputy Principals;
 - c. the Registrars;
 - d. the Chairpersons of Departments;
 - e. the Finance Officer;
 - f. the Deans;
 - g. the Directors; and
 - h. such other members of staff, not engaged in teaching or research, as the Council may from time to time determine.
 3. The technical staff of the University College shall consist of the staff engaged in laboratory, field instruction, workshops and such similar environs in the teaching departments under the general direction of the heads of the teaching departments, and as the Council may from time to time determine.
 4. The support staff of the University College shall consist of those staff engaged in general duties and as the Council may from time to time determine.
 5. All members of staff of the University College shall, subject to this Order, be appointed either —
 - a. in the manner and upon the terms and conditions of service prescribed by the Statutes; or
 - b. in the case of a person seconded to the service of the University College from the service of another institution, the Government or any other public service, on terms and conditions agreed upon between the Council and the seconding body.
 6. The Council may, subject to such restrictions as it may impose, delegate, either generally or specially, to any person, committee, or body, the power to appoint any member of the staff of the University College.



7. All members of staff of the University College shall—
- a. be subject to the general authority of the Council and of the Principal; and
 - b. be deemed to be employed in accordance with the statutes or as otherwise specifically provided by the statutes or by the terms of a particular appointment.
77. From the foregoing the recruitment of Staff of the Respondent in the Order is as provided in the “Statutes of the University College made by the Council under this Order”. Paragraph 24 of the Order provides for the making of Statutes by the Council.
78. It is also clear that the Council of the Koitalel Samoei University College is not the same as the Council of the University of Nairobi.
79. It is the submission of the Respondents that “the Council Human Resource and Administrative Committee was tasked to come up with a list of selected candidates to fill the various lower cadre posts and thereafter make recommendations to Council arising from pre-Selection Technical Management Committee report on the advertisement and recruitment process and procedure. The final phase of the recruitment exercise was to be overseen by the Council as a whole upon consideration of the Human Resource and Administrative Committee report.” This is verbatim from the last paragraph at page 1 of the Respondent’s Supplementary Submissions dated 29th January 2024
80. In the first place, the Respondents have not stated the source of this information or adduced evidence thereof. The Respondents do not state whether this information is backed by the University College Order, the [Universities Act](#) or statutes made by the Council of the Respondent.
81. Secondly, the minutes of the meeting of the Respondent’s Council held on 14th July, 2021 refer to Council Resolutions on internal recruitment of 18th December, 2020. The said resolution was not produced in court to enable this court determine if indeed the resolution was breached by the Respondent’s Management Committee which authorized internal recruitments. It is alleged in the said minutes that the recruitment was flawed and the process should be initiated afresh yet it is not stated what was wrong with the said recruitments or what was flawed about the said recruitments.
82. Although the Order states that recruitments shall be in accordance with the statutes, the Respondent has not submitted to the court any statutes it made that provides for the recruitment of Staff.
83. It was the Claimant’s case that she was initially offered a temporary contract by the Respondent which was a new university, to assist in establishing the performance department. In order to take up the contract she took leave of absence from Kisii University where she was working as an Assistant Lecturer Grade II scale 6.
84. The Claimant was appointed to the position that is the subject of this suit by letter dated 13th April, 2022. The employment was on a fixed term contract commencing 2nd June 2022 and expiring on 1st June 2023.
85. The letters reproduced below:

Koitalel Samoei University College
Office Of The Principal
PF/NO:23038 June 13, 2022
Ms. Florence Chemtai



PO BOX 3030 -30100

ELDORET

Dear Ms. Chemtai

RE: Appointment

On behalf of Koitaleel Samoei University College (KSUC) Council, I am pleased to offer you employment as an Assistant Registrar Grade 12 in Koitaleel Samoei University College (KSUC) attached to the Principal's Office as a Personal Assistant for fixed period of one (1) year, with effect from June 2, 2022 up to and including June 1, 2023.

You will be paid a salary at the rate of Ksh.129,962.00 per month: in addition you will be paid a non-accountable Housing Allowance at the rate of Ksh.55,286.00 per month: and a House to Office commuting allowance of Kshs.13,333/= per month. You will be entitled to medical benefits offered by Koitaleel Samoei University College.

You will be entitled to earned annual leave exclusive of Saturdays, Sundays and Public Holidays at the rate of 30 days per annum which must be taken within the period of appointment.

In addition, KSUC will pay you the equivalent of 31% as gratuity of your basic salary on successful completion of your contract. No other benefits will be attached to the appointment.

The employment can be terminated due to either non-performance or failure to obey rules and regulations governing the University College. The contract can also be terminated by either party giving a notice of one (1) month or payment of one (1) month's salary in lieu of notice.

If you accept the employment on these terms, please sign the attached three (3) copies of this letter and return two (2) to the undersigned. Thereafter, report to the Deputy Registrar, Human Resource (KSUC) for issuance of the Staff Movement Advice and allocation of duties.

Yours sincerely

Signed

Prof. Jackson K. Too

Ag. Principal

Koitaleel Samoei University College

I accept appointment on the terms of this letter.

Signature: Signed Date: 19/04/2022

Copy to: Deputy Registrar, Human Resource (KSUC)

Deputy Finance Officer (KSUC)

86. Before the contract lapsed the Respondent advertised for the same position and the Claimant applied, attended an interview and by letter dated 17th June, 2022, was offered the same position on permanent and pensionable terms. The letter of appointment is reproduced below.

Koitaleel Samoei University College



Office Of The Principal

PF/NO:23039 June 17, 2022

Ms. Florence Chemtai

Administration Office

KSUC

Dear Ms. Chemtai

RE: Change Of Terms

In recognition of your exemplary work Performance as an Assistant Registrar (Administration), Grade 12 and your appearance before KSUC Management Interview Committee on July 2, 2021 and the Committee recommendation thereof I am pleased to inform you that your terms of service has changed from Contract to Permanent and Pensionable and subject to Probationary period of Six (6) months effective July 1, 2022. This is in accordance/conformity with the University of Nairobi Career Progression Guideline (Schemes of Service) which KSUC fully subscribes to at the meantime.

You will be paid a basic salary at the rate of Ksh.134,212.00 per month in addition you will be paid a non-accountable Housing Allowance at the rate of Ksh.55,286.00 per month and house to OFFICE Commuting Allowance of Ksh. 13,333.00per month you will be eligible to Medical benefits offered by Koitaleel Samoei University College.

You will be entitled to earned annual leave exclusive of Saturdays, Sundays, and Public Holidays at the rate of 30 days per annum which must be utilized within the calendar year.

In addition, you will be admitted to a Pension Scheme of which KSUC contributes equivalent of 20% of your basic salary on monthly basis on successful completion of probation. No other benefit will be attached to this appointment.

The employment can be terminated due to either non-Performance or failure to obey rules and regulations governing the University College. The Contract can also be terminated by either party giving a three (3) months notice or payment of one month's salary in lieu of notice.

If you accept employment on these terms, please sign the attached three (3) copies of this letter and return two (2) to the undersigned. Thereafter report to the Deputy Registrar, Human Resource KSUC for issuance of the Staff Movement Advise and allocation of duties.

I take this opportunity to wish you all the best in your duties.

Your Sincerely

Signed

Prof. Jackson K. Too

Ag. Principal

Kotialeel Samoei University College (KSUC)

I accept appointment on the terms of this letter.

Signature: signed Date: 24/06/2022



Copy to: Deputy Registrar, Human Resource (KSUC)
Deputy Finance Officer (KSUC)

87. On 2nd June 2023 the Claimant was served with a letter titled Conclusion of the Contract. The letter is reproduced below.

Koitalel Samoei University College

Office Of The Principal

Ref: KSUC/PO/PF/No.23038 Date: June 2, 2023

Ms. Florence Chemtai

Koitalel Samoei University College

Box 5 – 30307

MOSORIOT

Dear Ms. Chemtai

RE: Conclusion of the Contract

The above subject matter refers.

This is to inform you that your one-year contract came to an end on June 1 of 2023. We further wish to inform you that the said contract will not be renewed.

You are hereby advised to hand over to the office of the Registrar Administration and clear with the University College with immediate effect but not later than June 7, 2023.

You will be paid your gratuity as per the University of Nairobi CBA which KSUC subscribes to.

I take this opportunity to thank you for the services you rendered to the University College and wish you all the best in your future endeavors.

Your sincerely,

Signed

Prof. Winston J. Akola

Principal, KSUC

CC: Deputy Principal

Registrar, Administration

Deputy Finance Officer, KSUC

Security Officer

88. The Claimant stated that she vacated the office to avoid confrontation with the Respondent.
89. The meeting of the Council in which a resolution was made to initiate the whole process afresh which the Respondent relies on was held on 14th July, 2021, before the Claimant's appointment which was by letter dated 17th June, 2022. The letter referred to the interviews that the Claimant attended on 2nd July 2021.



90. In the meeting of the Human Resource and Administration Committee of the Council held on 7th July, 2021 it was agreed that the appointment of the successful candidates to be staggered in phases and 2021/2022 budget be rationalized to guarantee payment of salaries upto and including 30th June 2022. The Claimant was among the successful candidates referred to. At the council meeting held on 14th July the decision was made to nullify the whole process.

91. On 10th August, 2021 the Respondent's Acting Principle issued a circular as follows:

Koitalel Samoei University College

Office Of The Principal

Ref: KSUC/PO/1/7/Vol.1/020 August 10, 2021

Circular 28:2021

To All Staff

Recruitment Of Staff

It is in the interest of the KSUC Management and Council to create a conducive working environment as well as favorable terms to all the employees. In respect to this the Council approved advertisement of eighteen (18) critical positions which were to be implemented in three (3) phases.

The recruitment process for the first six (6) posts was rolled out and an internal job advertisement was put up on 10th June, 2021. The short listing Committee was identified and the Interviews conducted successfully. The results of these interviews were presented to Human Resource Committee of Council, whose verdict was that the entire process be put on hold until the State Corporation Advisory Committee (SCAC) approves the KSUC Organogram, Human Resource Policy Manual, Staff Establishment and the Budget for FY 2021/2022.

A letter to this effect was sent to the State Corporation Advisory Committee (SCAC) on August 4, 2021. You are all requested to stay calm and patient as we await the response from SCAC.

Thank you.

Signed

Prof. Jackson K. Too

Ag. Principal

Koitalel Samoei University College (KSUC)

92. In the meeting of the Human Resource and Administration Committee of the Council held on 7th July, 2021 at which the appointment of the Claimant and 5 others was discussed, the Committee observed that:

- i. In line with the UoN recruitment process, the mentoring University was not involved in the internal recruitment process.
- ii. That the hiring process was not in accordance with Council resolutions on internal recruitment of December, 18, 2021.



- iii. That the career progression based on the advertised positions were in contradiction with the Public Service Commission.
 - iv. That the entry point of various positions was exaggerated and would have implications on the wage bill.
 - v. That in reference to item (iv) the appointments of the successful candidates could be staggered in phases based on the availability of funds.
 - vi. That there was need for adequate representation of staff in terms of (gender, religion and ethnic background) during the shortlisting process.
 - vii. That Management avails the following reports to the Committee for members to apprise themselves. Approved Staff Establishment Ratio of Teaching staff vis-à-vis Non-Teaching Staff at KSUC Ethnic Composition Report of KSUC staff
93. The Committee thereafter agreed that:
- i. That Council recommended Management to review the entry points of the advertised positions to be in line with Council resolutions on internal recruitment of December 18, 2021, and the 2021/2022 Budget.
 - ii. That the appointments of the successful candidates to be staggered in phases and 2021/2022 budget be rationalized to guarantee payment of salaries up to and including June, 30 2022.
 - iii. That Management avails to the Committee the following reports in the subsequent meeting:- Approved Staff Establishment Ratio of Teaching staff vis-à-vis Non-Teaching Staff at KSUC Ethnic Composition Report of KSUC staff
 - iv. That going forward, Management should create group e-mail address to facilitate timely communication.
94. At the Council meeting held on 14th July 2021, the Council discussed the recruitment and resolved that:
- i. Recruitment process was flawed and hence the whole process be initiated afresh.
 - ii. To return the Human Resource and Administration Committee to work with Management and address the concerns raised before submitting the paper to the Council for further deliberation and approval.
 - iii. A proposal to have the recruitment function regressed to Council for proper oversight and control be provided to Council for further deliberation and approval.
95. It is not clear what happened between the date of the Council meeting on 14th July 2021 and the date of the change of the Claimant's terms of appointment to permanent and pensionable terms by letter dated 17th June 2022, exactly 11 months later.
96. The Ag. Principal who issued the Claimant's letter of 22nd June 2022 changing the terms of her appointment from contract to permanent and pensionable, Prof. Jackson K. Too was present at the 2 meetings of 7th and 14th July, 2021 where the issue was discussed. It is inconceivable that he would go against the resolutions of the two meetings, the former of which he chaired while he was secretary to the latter.



97. The Respondent did not produce minutes of the Council meetings held between 14th July 2021 and 22nd June 2022 when the Claimant’s impugned letter was issued. The College Council must have met several times during that period.
98. No letter was issued to the Claimant withdrawing the impugned letter or alerting her about the alleged invalidity thereof until she requested for implementation of the terms thereof by her letter of 3rd February 2023, seeking implementation of the terms of the impugned letter.
99. In the reply dated 17th February, 2023 the Respondent informed the Claimant that the letter “was irregularly awarded contrary to section 12 of the Legal Notice No. 177 of 6th September, 2018 of Koitalel Samoei University College”.
100. As has been discussed above, section 12 of the Legal Notice No. 177 of 6th September, 2018 of Koitalel Samoei University College does not give the Respondent’s Council the authority to employ staff but rather, the authority to approve appointment criteria and the terms and conditions of service. Further, in the minutes of the Human Resource and Administration Committee of the Council held on 7th July, 2021, it is stated that the Council approved internal advertisement of 18 posts. The minutes read in part: i) that on Friday, December, 18, 2020, KSUC Council approved 18 posts to have them internally advertised and substantively filled; ii) that the College Management Board on its sitting prioritized six (6) positions to be internally advertised as follows;

Position	Grade
Assistant Registrar Academics (Admissions.)	12
Assistant Registrar Administration	12
Chief ICT	12
Assistant Librarian	11
Accountant	CD
Driver	B

- iii) That the internal advertisement attracted fifteen (15) applicants;
- iv) That the following candidates were interviewed and found appointable.



Sno.	Name	Position	Grade
1	Ms. Chatity Bett	Assistant Academics (Admission)	12
2	Ms. Florence Chemtai	Assistant Registrar Administration	12
3	Mr. James Lochomin	Chief ICT	12
4	Ms. Agnes Cheptoo	Assistant Librarian	11
5	Ms. Lydia Samoei	Accountant	CD
6	Ms. Ruth Mesis	Senior Administrative Assistant I	EF
7	Mr. Noah Limo	Senior Administrative Assistant II	CD
8	Mr. Richard Mutai	Driver	B

- v) That a staff in Finance Department was encouraged to apply for the internally advertised post but did not show interest.

101. From the forgoing it is not true that the recruitment process under which the Claimant was appointed was not authorized. What was noted was that the entry point was above that approved by the Council. As I have already mentioned herein above, the said Council resolutions were not availed to the court by the Respondent.
102. The lapses in the process of appointment of the Claimant, if any, were therefore of the Respondent's own making which should not have been visited upon the Claimant. If there was any irregularity in the appointment of the Claimant the resolution of the same should have been done in a lawful manner with proper explanation and notice to the Claimant.
103. The foregoing being the case, it is my finding that the termination of the Claimant's appointment by the Respondent was unlawful.

Remedies

104. The Claimant prayed for several remedies which I now consider under separate heads
- a. The Claimant prayed for a declaration that the Respondent's decision to lock her out constituted constructive dismissal.

I do not find this to be the position as the Claimant was issued with a letter informing her that her contract had come to an end and notifying her of the intention not to renew the same. This



is not the same as constructive dismissal where the dismissal is covert as opposed to termination which is overt. In this case it was a termination and not a constructive dismissal.

- b. A declaration that the reasons stated in the letter dated 2nd June did not constitute a termination.

The reasons stated in the Claimants letter constituted a termination as I have already stated in (a) above. This prayer is therefore declined.

- c. That the Respondent withdraws the termination letter and issue a letter clearing the Claimant of wrongdoing or in the alternative the termination be declared unlawful and unfair

Having found the termination unfair, I declare the same.

- d. Damages for wrongful dismissal

Having found the termination of the Claimant's employment unfair, she is entitled to compensatory damages. Taking into account the circumstances under which the Claimant's employment was terminated, the length of service and all other relevant factors under section 49(4) of the Employment Act it is my view that 4 months' salary is reasonable compensation. I accordingly award the Claimant the same at Kshs.

- e. Aggravated damages for violating the Claimant's constitutional rights

The Claimant is not entitled to aggravated damages as she did not prove malice on the part of the Respondent. As was stated by the Court of Appeal in the case of Miguna v The standard Group Ltd & 4 others [2017] eKLR while quoting the case of John v GM Limited [1993] QB 586: "Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize."

- f. Payment of the withheld salary for the period between 17th June 2022, till such time as the court may determine.

The Claimant did not lead any evidence in support of this prayer. The prayer is declined for want of proof.

- g. Leave allowances

The Claimant did not adduce any evidence in support of this prayer. The same is declined for want of proof.

- h. The Claimant is awarded costs and interests n decretal sum at court rates.

Counterclaim

105. The Respondent prayed for a declaration that the Claimant was not an employee of the Respondent's Council. The Respondent's Council is not a distinct party from the Respondent as sued in this case. The Claimant was not an employee of the Respondent's Council but an employee of the Respondent. As I have found above, the Claimant's employment was valid and was recognized by the Council. The payer is thus untenable and is dismissed.

106. The prayer for recovery of salary paid to the Claimant in the sum of Kshs. 8,398,221 must fail on two grounds. The first is that the Claimant was a bona fide employee of the Respondent and that is why the Respondent wrote the letter dated 2nd June, 2023 which recognized that she had an employment contract which had come to an end. Secondly, even had I found that the contract was



invalid, the Claimant would still be entitled to her salary as she earned it through services rendered to the Respondent.

107. The counterclaim is accordingly dismissed with costs to the Claimant.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 7TH DAY OF NOVEMBER, 2024

MAUREEN ONYANGO

JUDGE

