



**Katieno v University of Eastern Africa Baraton (Cause E039 of 2021)
[2024] KEELRC 2730 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2730 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE E039 OF 2021
MA ONYANGO, J
NOVEMBER 7, 2024**

BETWEEN

JEFF STEVE OGANGA KATIENO CLAIMANT

AND

UNIVERSITY OF EASTERN AFRICA BARATON RESPONDENT

JUDGMENT

1. The Respondent is a private university registered in Kenya under the *Universities Act*. The Respondent has among its governing organs, the University Council which by dint of the *Universities Act* is empowered to employ staff of the University.
2. The Claimant was employed by the Respondent in 2008 as an accountant and in 2017 was redeployed to the Respondent's School of Business as a Tutorial Fellow.
3. On 15th September, 2021 the Respondent's Administrative Board recommended to the Council that the Claimant should be summarily dismissed on grounds that the Claimant had, without permission, not reported to campus to attend in-person classes for classes allocated to him, for four weeks.
4. Upon being notified of the recommendation to dismiss him by letter dated 16th September, 2021, the Claimant appealed to the Council, citing among other grounds, that the reasons cited for his dismissal were untrue and that the Board made the decision without affording him an opportunity to be heard. He requested for a review of the decision of the Board and for reimbursement of expenses that he had incurred as a result of the recommendation of the Board.
5. In the same letter the Claimant explained that he had travelled to Mombasa to pursue purchase of a car that he required to facilitate his work as he was living 18 km from campus after failing to secure accommodation within the campus and that the car was also necessary to secure his safety and health in view of the Covid-19 Pandemic.



6. Upon receiving the Claimant's appeal, he was invited by letter dated 21st September, 2021 to appear before the Administrative Board Meeting to take place on the same day the 21st September, 2021 at 10.00 am for a disciplinary hearing, for the hearing of his appeal. The letter of invitation stated that if he failed to attend the would proceed in his absence.
7. It was the Claimant's case that he received the letter after the meeting had started but attended all the same.
8. After hearing the Claimant the Administrative Board sustained its earlier decision recommending the Claimant's summary dismissal to the University Council.
9. On 5th October, 2021 the Claimant received a letter suspending him for 2 months at half salary.
10. By letter dated 21st October, 2021 the Claimant was invited to appear before the University Council on 4th November, 2021 for the hearing of his complaint against the recommendation of his summary dismissal by the Administrative Board.
11. By letter dated 16th November, the Claimant was informed about the decision of the University Council to the effect that he be strongly reprimanded, be issued with a last and final warning, be redeployed under new terms and conditions of service commensurate with the new position, that he submits pending students grades by 15th November, 2021 and that he be warned, advised and be counselled by the University Chaplain against his conduct, his disrespectful language against the Administrative Board both through his letters and submissions.
12. By letter dated 16th November, the Claimant was redeployed as Acting Farm Manager at a salary of 77% of grade 10, on a scale of 73% to 77% effective 16th November, 2021.
13. By letter dated 22nd November, 2021 the Claimant through his advocates, protested the manner in which the Respondent had handled his case starting with the recommendation to dismiss him without a hearing, the suspension on half pay for two months and re-deployment as Acting Farm Manager, a position in which he had no training.
14. The letter demanded the immediate re-instatement of the Claimant to his position prior to the redeployment, that the decision by the Council to redeploy the Claimant be withdrawn and that the Claimant be paid all monies unprocedurally and irregularly deducted on account of his unprocedural suspension.
15. By show cause letter dated 6th December, the Respondent required the Claimant to explain on or before 9th December, 2021 why he had not reported to his new station as Acting Farm Manager.
16. By letter dated 9th December, 2021 the Respondent communicated to the Claimant that following his reservation to accept the position of Acting Farm Manager to which he had been redeployed and the letter from his lawyers, the Respondent had redeployed him instead to the Vice Chancellors Office to serve as Internal Auditor at a basic salary of 80% of grade 11 on a scale of 78% with immediate effect.
17. By his letter dated 14th December, 2021 the Claimant communicated his decision to decline the redeployment as internal auditor on grounds that it was an outcome of a disciplinary action whose process he believed to be unfair, unprocedural and ill-intentioned. He stated that he was unable to take the position unless the charges against him were withdrawn and rescinded.
18. By a letter dated 15th December, 2021 the Respondent informed the Claimant that "the university council decided that your redeployment is required and necessary and you shall not be reinstated to your previous position of Tutorial Fellow because the Council shall not reverse its decision."



19. By an email sent on 5th January, 2022 the Claimant requested the following:
1. Clarification on the designated physical office, preferably which accords to the confidentiality and sensitivity of the office.
 2. Availability of the following resources
 - a. Computer
 - b. Cabinet/Desk with lockable drawers
 - c. Stationery, specifically a notebook/diary and pens (red and blue/black).
 - d. An A-4 size hard-cover exercise book.

The Pleadings

20. In the Statement of Claim dated 8th December, 2021 and filed on 9th December, 2021 the claimant seeks the following reliefs:
1. A declaration that the Claimants rights to a fair hearing have been grossly violate by the Respondent contrary to the laws.
 2. A declaration that the decision by the Respondent to suspend the Claimant and afterwards redeploy the Claimant to the positon of a Farm Manager was unjust, irregular and unprocedural.
 3. An order to reinstate the Claimant to his former positon of a Tutorial Fellow with immediate effect.
 4. An order for restitution of the half ($\frac{1}{2}$) salary retained by the Respondent as the suspension for two months was unfair.
 5. A declaration that the Respondent actions were in breach of the rights to fair labour practices and fair administrative action.
 6. A declaration that the Respondent was bound to observe and adhere to the provisions of Article 41 and 47 of the Constitution of Kenya the unlawful disciplinary process commenced, the unlawful recommendation for summary dismissal of the Claimant, then followed by unlawful suspension and finally unlawful redeployment of the Claimant was unconstitutional, unlawful irregular and null and void abinition.
 7. An order directing the Respondent vide chancellor to size and desist from insinuating that the Claimant is fighting him on tribal grounds.
 8. Any other relief that this Honourable Court may deem fit to grant.
21. The Respondent filed a Memorandum of Response to the Statement of Claim denying the averments therein. According to the Respondent the recommendation of the Respondent's Administrative Board to the University Council to summarily dismiss the Claimant was in accord with the Employment Act and the Respondent Employee Handbook section 4.6.1.
22. It was the Respondent's averment that it engaged one, Sharon Chepkosgei Waley, a part-time lecturer, to take over the Claimant's classes.



23. It was further the Respondent's case that the Claimant lodged an appeal to the Administrative Board against the decision of 16th September, 2021 at which he was granted an opportunity to present his case and the Administrative Board upheld its earlier decision recommending the dismissal of the Claimant. That while awaiting the decision of the Council the Administrative Board decided to suspend the Claimant. That the allegation that the Claimant was not accorded a hearing was thus not correct.
24. In response to the Claimant's averment that his suspension for 2 months was in contravention of the Respondent's Employee Handbook the Respondent stated that suspension of 28 days provided for in section 4.7.5.3(g) of the Handbook was not applicable to the Claimant's case as he was on half pay.

The hearing

25. At the hearing the Claimant testified and called one witness. The Respondent also called one witness. The parties largely restated the averments in the pleadings as already summarized above. Parties thereafter filed and exchanged written submissions.
26. The Claimant set out the issues for determination as follows:
 - i. Whether the purported disciplinary action against the Claimant was procedural fair and in accordance with the law.
 - ii. Whether the disciplinary action undertaken by the Respondent contravened the Respondent's Hand Book.
 - iii. Whether the Claimant has proved his case and deserving the orders/reliefs sought.
27. The Respondent on its part identified the following issues for determination:
 - i. Whether the Claimant was accorded fair hearing during the disciplinary proceedings?
 - ii. Whether the claim herein has been overtaken by events?
 - iii. Whether the Claimant has proved his case on balance of probabilities?

Analysis and Determination

28. I have considered the pleadings, evidence on record and submissions filed by the parties. The issues arising for determination are the following:
 - a. Whether the disciplinary action against the Claimant complied with the [Employment Act](#);
 - b. Whether the Claimant is entitled to the prayers sought.
29. Section 41 of the [Employment Act](#) provides for disciplinary proceedings against an employee as follows:
 41. Notification and hearing before termination on grounds 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.
 2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an



employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

30. The Respondent's Employee Handbook provides for an Employee Hearing Committee to investigate cases of misconduct, violation of terms and conditions of employment, unsatisfactory performance in the workplace or other unacceptable practices among employees of the University. The Committee submits its report and recommendations to the Vice Chancellor and the Administrative Board which takes appropriate action.

31. The Handbook further provides at section 2.3.7.10 and 4.7.5.1 as follows:

2.3.7.10 Employee Hearing Committee

In order to protect the interests of its employees and those of the institution, the university strives at all times to act ethically, transparently, equitably and within the rules of the labour laws. The University regards its disciplinary procedures as an action to correct rather than to punish conduct.

Formal action must be taken without prima facie evidence of misconduct, violations of terms and conditions of employment, unsatisfactory performance in the workplace or other unacceptable practices. Where the Vice Chancellor believes that there is an allegation which requires formal investigation he/she must appoint an Adhoc Employee Hearing (Disciplinary) Committee.

4.7.5.1 Hearing Committee

The Administrative Board may constitute a Disciplinary Committee also called Hearing Committee when there is need for investigations before taking disciplinary action. The Disciplinary Committee shall be required to make recommendations including suggested penalties and the report shall be submitted to the Chair of the Administrative Board for necessary action.

- a. An employee shall be entitled to appear before the Disciplinary Committee for the purpose of explaining and defending his conduct. He/she shall also be entitled to call witnesses and to hear testimony of witnesses called by the committee. When evidence is presented or oral argument is made, the member may refute the allegations made by the witness testifying against him/her. The employee shall be given an opportunity to submit any evidence which he/she wishes to be considered before disciplinary decision is taken.

32. Suspension is provided for in the Employee Handbook as follows:

Employees who commit offences or misconduct specified in section 4.6.1; the employee may be suspended from active duty for periods varying from one day to 28 working days. Some examples of situations that may be grounds for suspension are:

1. When there is a breach in discipline as stated in section 4.6.1.
2. While an investigation of an offense is in progress, when final action could be dismissal.
3. When an employee is arrested and/or charged with a felony, until final disposition of the case. Suspension shall be recorded in the employee's personal file.

33. In the instant case there is no evidence that a hearing committee was constituted to investigate the allegations against the Claimant. It is on record that the Respondent's Administrative Board acted on



the report of the Claimant's Head of Department by recommending the dismissal of the Claimant to the Council without either a report of the Hearing Committee or hearing the Claimant.

34. It is not disputed that the Respondent's Administrative Board met and made a decision to recommend the summary dismissal of the Claimant to the Respondent's Council without hearing the Claimant. It was only after the Claimant appealed to the University Council that he was summoned to appear before the Administrative Board. What the Board did was uphold its earlier decision. It is the same decision that the Respondent's Council reviewed and recommended redeployment of the Claimant.
35. The suspension of the Claimant for a period of two months was a further violation of the Respondent's Employee Handbook which provides for suspension for a period not exceeding 28 days. The letter of suspension is reproduced below:

University Of Eastern Africa, Baraton

October 05,2021

Mr. Katieno Jeff Steve Oganga

Tutorial Fellow

Department of Accounting & Finance

School of Business

Dear Mr. Katieno

Re: Suspension For Two Months

This is to inform you that on September 27, 2021, the university administrative board took the following action: -

Whereas on September 15, 2021, the Administrative Board recommended to the University Council your summary dismissal due to failure to report on duty on time and failure to teach the required hours due to your absence.

Voted to relieve you from your duties and to suspend you for two months effective September 15, 2021 and to pay you half salary effective October, 01, 2021 to November 15, 2021. (Action Number 1312-45-2021)

Your Sincerely.

Signed

Mrs. Judith B. Kibirango

AG. Human Resource Manager

Xc: Vice Chancellor

DVC Academics

DVC Finance

Payroll Accountant

Head of Accounting & Finance Department

Dean, School of Business

36. As if this was not already bad enough, the Respondent's Administrative Board again demoted the Claimant, an accountant by profession, to the position of farm manager, an area that was completely



unrelated to his qualifications. It took a protest letter from the Claimant's lawyers for the Respondent to redeploy the Claimant to an area relevant to his qualifications.

37. From the forgoing, the Respondent was acting in violation of both the *Employment Act* and its own Employee Handbook from the time its Administrative Board recommended dismissal of the Claimant without giving him an opportunity to respond to the charges. Section 44(4) of the *Employment Act* provides for absconding duty as follows:

44. Summary dismissal

1.
2.
3. Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.
4. Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—
 - a. without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

38. The section is clear that “the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal...”
39. This is the reason why an employee has to be given an opportunity to dispute the averments of an employer on the ground of summary dismissal.
40. Further, subsection 44(4)(a) provides that the employee is only liable if he is unable to give a lawful explanation for his absence, essentially meaning that the employee must be given an opportunity to explain his absence.
41. Section 41 is further emphatic that before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) the employer must hear and consider any representations which the employee and the person accompanying him to the disciplinary hearing may make.
42. From the very beginning, the Respondent made very grave blunders in handling the Claimant's case. It failed to comply with its own Employee Handbook and the *Employment Act* in recommending dismissal without first giving the employee an opportunity to explain himself. When the Claimant appealed against the decision to the Council, the Administrative Board decided to hear the Claimant's Appeal which had not been addressed to it and purported to confirm its own earlier decision. The Administrative Board has no power to hear appeals from its own decisions under the under the Employee Handbook.



43. The Council thereafter perpetuated the position by reviewing the unlawful decision of the Administrative Board which again made a further blunder by demoting the Claimant to the position of Acting Farm manager that was completely outside his qualifications and which he was obviously not qualified to hold.
44. While in the process of doing so the Administrative Board suspended the Claimant for a period of two months while the Employee Handbook provided that suspension should not be for a period longer than 28 days.
45. The Claimant was not a saint as is evident from the record, but even a devil deserves his day in court, if I may be excused for using those terms in respect of the Claimant and the disciplinary hearing. In this case the Respondent completely got caught up into the theatrics of the Claimant hook, line and sinker, to its own detriment.
46. An administrative body is supposed to be objective and to consider any matter before it objectively. This test completely eluded the Administrative Board of the Respondent. It is apparent that the members of the Administrative Board became emotionally engaged and therefore subjective in the handling of the Claimants case in complete disregard of its own internal regulations and the law.
47. In conclusion I find that the process undertaken by the Respondent in disciplining the Claimant was unlawful and in breach of the law and its own internal procedures. I thus make the following orders:
 - a. A declaration be and is hereby made that the Respondent actions were in breach of the rights to fair labour practices and fair administrative action.
 - b. A declaration be and hereby made that the decision by the Respondent to suspend the Claimant and afterwards redeploy the Claimant to the position of a Farm Manager was unjust, irregular and unprocedural.
 - c. An order that the Respondent reinstates the Claimant to his former position of a Tutorial Fellow with full benefits until the date on which his employment was terminated.
 - d. The Respondent shall bear the Claimant's costs of this suit.
 - e. Interest to accrue on the decretal amount at court rates should the same not be paid within the next 30 days.

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

MAUREEN ONYANGO

JUDGE

