



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Daystar University & another (Petition E092 of 2024)
[2024] KEELRC 13497 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13497 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E092 OF 2024
B ONGAYA, J
DECEMBER 19, 2024
IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTION
AND
IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 22, 23, 27, 28, 41,
43, 47, 159 AND 162 OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF ILLEGAL SUSPENSION
AND
IN THE MATTER OF VIOLATION OF THE PETITIONER'S RIGHTS TO
FAIR ADMINISTRATIVE PROCESS AND PROCEDURES, PRINCIPLES OF
PUBLIC SERVICE DIGNITY AND PROTECTION FROM DISCRIMINATION
AND
IN THE MATTER OF RULES 4 AND 10 OF THE CONSTITUTION
OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013
AND
IN THE MATTER OF SECTION 47 OF FAIR ADMINISTRATIVE ACTION ACT, 2012
AND
IN THE MATTER OF SECTIONS 6 & 26 OF EMPLOYMENT ACT, 2007
AND
IN THE MATTER OF SECTION 12 OF THE EMPLOYMENT
& LABOUR RELATIONS COURT ACT, 2011
AND
IN THE MATTER OF DAYSTAR UNIVERSITY HUMAN
RESOURCE POLICIES AND PROCEDURES MANUAL



BETWEEN

CAROLINE MWANGI PETITIONER

AND

DAYSTAR UNIVERSITY 1ST RESPONDENT

**PROF. MUTURI WACHIRA, DEPUTY VICE-CHANCELLOR (FINANCE,
ADMINISTRATION AND PLANNING) 2ND RESPONDENT**

JUDGMENT

1. The petitioner filed the petition dated 05.06.2024 through Tonge Yoya & Associates Advocates praying for:
 - a. A declaration that notice to show cause letter and suspension of the petitioner was irregular, unprocedural, illegal, unconstitutional null and void ab initio.
 - b. An order directing the 1st respondent to unconditionally revoke the suspension of the petitioner from employment and order for her immediate reinstatement.
 - c. An order directing the 1st respondent to pay the petitioner any pending salaries, allowances and benefits accrued to her while on suspension.
 - d. An order revoking the 2nd respondent's letter dated 21.05.2024 and its correction thereof suspending the petitioner.
 - e. An order for the 1st respondent to pay the petitioner damages for failure to accord the petitioner procedural fairness in the process leading to her suspension.
 - f. An order restraining the respondents either by themselves, employees, servants or agents from harassing, arresting, intimidating or terminating the employment of the petitioner on the basis of the illegal suspension.
 - g. Costs of this petition be borne by the respondents.
2. The petitioner's case was that:
 - a. On 21.05.2024, the 2nd respondent, acting on behalf of the 1st respondent, issued her a letter referenced 'show cause letter and suspension' purportedly suspending her for four (4) weeks from the date of the letter. In the letter, she was accused of gross insubordination among five other allegations and was required to concurrently show cause why disciplinary action should not be taken against her within seven (7) days. The same being both a suspension and show cause letter, she had was placed on disciplinary without being accorded an opportunity to respond to the allegations.
 - b. The manner in which the subject letter was sent to her was contrary to procedure set out in the 1st respondent's Human Resource Policies and Procedures Manual (hereinafter "HR Manual"), which requires an employee deemed to have committed a major offence be served with a statement of charges indicating the nature of offence and possible disciplinary action,



in the presence of another employee of her choice. In her case, the 2nd respondent sent an email on 21.05.2024 at 12:29pm attaching the said letter through his personal assistant.

- c. She responded to the show cause letter on 27.05.2024 requesting evidence for the allegations. In response, the respondents provided various internal memos written by the 2nd respondent and she was asked to provide a detailed report and evidence, together with witness statement, on her allegation of sexual harassment and related issues.
 - d. As pleaded in her supporting affidavit to the application herein, she had gone through sexual harassment while being supervised by the 2nd respondent. She filed a complaint with the Office of Vice Chancellor vide internal memo dated 14.10.2022 and 27.02.2024 albeit without response or action, and with Kenya Police vide Occurrence Book No. 4/16/2/2024.
 - e. The 1st respondent's failure to reverse the 2nd respondent's action before commencing investigation into the sexual harassment was an attempt to sanitize the 2nd respondent. Unfortunately, the 2nd respondent is the complainant, investigator and part of the jury in his instigated disciplinary case. She is therefore apprehensive that the respondents have a predetermined decision and are keen on locking her out from the seat and wheel of justice.
 - f. The mandate to hear and determine her suspension lies with the 1st respondent's disciplinary committee, which never sat to make such deliberations against her.
 - g. On violations of *the Constitution*, the petitioner pleaded that the 2nd respondent violated her right to fair administrative action by outrageously suspending her concurrently with notice to show cause thereby blatantly violating Article 47 and Article 41 on the right to fair labour practice. The respondents adopted unfair labour practices by denying her an opportunity to be heard by independent tribunal before the suspension and instead suspended her on unproven allegations by the 2nd respondent, meant to defeat justice and completely destroy her career.
3. The 1st respondent filed a replying affidavit of Esca Juma sworn on 19.09.2024 and filed through Oloo & Oloo Advocates LLP. It was stated as follows:
- a. The petitioner was given a show cause letter and suspended from office to allow for investigation and disciplinary hearing. She faced charges, classified as major or serious offences in the 1st respondent's HR Manual, which charges are: gross insubordination; abuse of office and harassment or bullying of junior staff; harassing and taking bribes from suppliers; poor performance in her department; fraud and mismanagement of resources; and, reporting late and absence from work without permission.
 - b. The simultaneous issuance of the suspension and show cause letter does not constitute any form of violation and in fact aligns with the rights to a fair hearing and fair administrative action. The petitioner had narrowly interpreted section 14 of the HR Manual, neglecting sections 14.7.3.1, 14.10, 14.11 and 14.11.1, which ensure a fair hearing and the opportunity for an appeal. She has not experienced any prejudice by being requested to step aside until the hearing is concluded. This Court should therefore find the notice to show cause and the suspension of the petitioner as regular, procedural and lawful.
 - c. As far as the 1st respondent is concerned, the 2nd respondent is competent and discharging his duties diligently, and there is no record of the misconduct alleged against him in the petitioner's response to the show cause and suspension letter. On the allegations of sexual harassment, the disciplinary committee prioritized the same and requested the petitioner to furnish her complaint as detailed under sections 19.6.2, 19.6.4 and 19.9 of the HR Manual.



She subsequently filed her complaint dated 10.06.2024, which the 2nd respondent responded to on 14.06.2024.

- d. On 27.05.2024, the 1st respondent's Vice Chancellor set up a disciplinary committee to review and report on the petitioner's case. The petitioner appeared before the disciplinary committee on 05.07.2024 accompanied by her counsel on record and was requested to provide specific evidence on her claims of sexual harassment. Following her request to produce phone call logs, the committee granted her 21 days and scheduled its next hearing on 26.07.2024.
 - e. In a demand letter dated 22.07.2024, the petitioner's counsel stated that the petitioner duly retracts her sexual harassment complaint and would not attend the disciplinary hearing that was scheduled for 26.07.2024. The 1st respondent's Vice Chancellor responded to the demanded letter vide a letter dated 30.07.2024.
 - f. Consequently, the petitioner failed to utilize and comply with the 1st respondent's grievance policy, particularly section 19, regarding her complaint of sexual harassment. She cannot be apprehensive as no predetermined decision was made as she withdrew from the disciplinary process on her own volition. Having made allegations of sexual harassment against the 2nd respondent, which is a grave matter, she ought to be prepared to prove her case lest further disciplinary charges are preferred against her.
 - g. The petitioner's rights have not been violated and she is on full salary while out of office. She has shown contempt to this Court by failing to compromise the dispute with a view to recording a consent as per the Court's directions. She is also aware of the disciplinary committee to which she already submitted herself and can confirm that the 2nd respondent is not a member of the committee.
 - h. Either the Court should affirm and maintain the notice to show cause requiring the petitioner to participate in the disciplinary process, or, if she chooses to withdraw as she has done, the Court to instruct the 1st respondent to proceed against her according to its established HR Manual.
4. The 2nd respondent filed an answer to petition and cross petition dated 17.09.2024 through Musyimi & Company Advocates. He urged that the suit be dismissed with costs and averred as follows:
- a. According to section 14.10 of the 1st respondent's HR Manual, suspension is not a form of punishment and therefore the petitioner has not been sanctioned in any way. The disciplinary process for major or serious offences is set out in section 14.7.3 of the HR Manual to be read with section 14.10 which recognizes that suspension is applicable where an employee has committed a serious offence.
 - b. In issuing the show cause letter to the petitioner, he acted as an employee of the 1st respondent and not in his personal capacity. Further, they adhered to the law and the HR Manual in issuing her the said letter.
 - c. The allegations of sexual harassment made against him by the petitioner are without foundation and had never been raised prior to the issuance of the show cause letter. He has never threatened, intimidated or harassed the petitioner who is using the said allegations including that of threats to life to cover for her infractions. Neither the referenced correspondence of 14.10.2022 and 27.02.2024, nor the Police OB Report contain any allegation of sexual harassment.



Cross-Petition

5. In the cross-petition, the 2nd respondent prayed for the following orders against the petitioner or respondent:
 - a. That a declaration be made that the respondent has conducted herself in a manner that is disrespectful, defamatory and unlawful towards the petitioner who is her supervisor.
 - b. That a declaration be made that the respondent has falsely and with malice accused the petitioner of sexual harassment and making threats to her life.
 - c. That general damages for emotional distress and reputational damage caused to the petitioner by the respondent be awarded.
 - d. That exemplary damages be awarded to the petitioner in light of the respondent's ill intended and injurious actions of falsely accusing the petitioner of sexual harassment and making threats to her life.
 - e. That the costs of the cross-petition be awarded to the petitioner.
 - f. That the Court grant any other relief it may deem just and fit to grant the petitioner in the circumstances.
6. The supporting affidavit of the cross-petitioner sworn on 15.10.2024 was filed through Musyimi & Company Advocates. His case was that he has wrongly been enjoined as a party to this suit yet he has never been the respondent's employer. That despite the respondent being repeatedly summoned, issued with warning letters, show cause letters and questioned about the various allegations made against her, her responses have remained unchanged from 2019. The cross-petitioner produced various email correspondence from the respondent to junior staff members and colleagues to demonstrate her harassing and insulting nature. He averred that the respondent also sent unkind emails to the Procurement and Contracting Manager and to the Dean of Students dated 09.12.2020 and 29.12.2020 respectively. There was also proof she had been absent without permission in January and November 2021 and severally failed to attend meetings at work.
7. The cross-petitioner pleaded that following a warning letter by the University's Vice Chancellor to the respondent on 03.03.2023, the respondent submitted an apology to the cross-petitioner on 06.03.2023 seeking forgiveness and requesting an opportunity to improve her working relationship with him. He acknowledged her apology on 07.03.2023 but informed her that the matter of gross insubordination remained serious, but which she continued to exhibit against him. It was for this reason that the University's Board directed him to issue the respondent with the impugned show cause letter.
8. It was the cross-petitioner's averment that on 22.05.2024, he requested the respondent to attend a handover meeting at his office that eventually happened on 27.05.2024. However, on the same day, the petitioner responded to the show cause letter alleging he had sexually harassed her but did not provide any evidence to support her claim. He averred that Article 35(2) of *the Constitution* of Kenya stipulates that, every person has the right to the correction or deletion of untrue or misleading information that affects them. That the respondent submitted false information to both the disciplinary committee and this Court, which she has neither retracted nor corrected. This is despite having withdrawn her allegations of sexual harassment before the disciplinary committee of the University. He contended that the respondent's allegations of sexual harassment are contrived, defamatory and intended to cause embarrassment so that he withdraws the complaints in the show cause letter.



9. The cross-petitioner's further case was that by falsely accusing him of threats to her life and sexual harassment, the respondent committed the following infractions:
 - a. Infringement of the cross-petitioner's right to dignity under Article 28 of *the Constitution* of Kenya;
 - b. Exposing the cross-petitioner to psychological torture and distress contrary to Article 29 of *the Constitution*;
 - c. Abusing the right of expression in contravention of Article 33(3) of *the Constitution*;
 - d. Propagating an unfounded accusation to the detriment of the cross-petitioner thereby placing his employment relationship with Daystar University in jeopardy and hence prejudiced his right to fair labour relations under Article 41 of *the Constitution*;
 - e. Actuating acts intended to cause conflicts within the cross-petitioner's family thereby undermining the protection of family he is entitled to under Article 45 of *the Constitution*; and
 - f. Providing false information to the police.
10. The parties filed their respective written submissions. The Court has considered the parties' respective positions and the material on record and returns as follows.
11. To answer the 1st issue, there is no dispute that the parties are in employment relationship. The 1st respondent is the petitioner's employer and the 2nd respondent the petitioner's supervisor.
12. To answer the 2nd issue, as submitted for the respondents, in Geoffrey Mworira –Versus- Water Resource Management Authority & 2 Others [2015] eKLR the Court held as follows: "The principles are clear. The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of *the Constitution* or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process." Those are the guiding principles on whether the Court should intervene in the impugned and initiated disciplinary process against the petitioner.
13. The 2nd respondent issued the petitioner with a letter to show cause and by which letter a suspension was imposed. Section 14.7.3.1 of the 1st respondent's Human Resource Manual and Policies (the Manual) provides that an employee who is deemed to have committed a major offence as per the provision of the policy or any other written law shall:
 - a. Be served with the statement of charges indicating the nature of the offence and possible disciplinary action. The charges shall be explained to the employee, in a language that the employee understands. The employee shall be entitled to have another representative or staff association representative of his or her choice during explanation.
 - b. The employee concerned will be required to submit a response to the charges within 7 days of receipt of the statement of charges.
 - c. Depending on the response to the charges, the case may be concluded with a warning letter or referred for hearing; or, the employee may be interdicted or suspended.



14. Section 14.10 of the Manual defines suspension thus, “This is not a punishment by itself but a process of establishing the authenticity of accusations levelled against an employee. The employee in either case is asked to vacate his or her office or pave way for investigations....Suspension is applicable where an employee has committed a serious offence which if proved would warrants dismissal. Where an employee is suspended, investigations should be concluded within four weeks. The officer shall be on half salary pending investigation and determination of the case. Where an employee vacates the office for more than forty eight hours or where an employee is convicted of criminal offence that is likely to lead to dismissal, they shall be suspended and no salary is payable during the period of suspension.
15. To answer the 3rd issue, the Court finds that while the petitioner allegedly committed an offence (misconduct) deemed as major, there is no dispute that the letter to show cause and the letter for suspension was one and the same. The contractual agreement per the cited clause 14.10 was that the particulars of the charges are served; the employee is given 7 days to respond; the response is then evaluated and a suspension may issue. Thus, while suspension may be a preliminary process in the administrative disciplinary proceedings, in the instant case the parties must be bound by their own procedural regime. The Court finds that to that extent the petitioner has established that the concurrent suspension and show-cause letter was issued in contravention of the cited provision of the manual and it amounted to unreasonableness and unfair administrative decision in violation of the right to fair administrative action in Article 47. It also amounted to unfair treatment or discrimination contrary to Article 41 on fair labour practices and section 5 of the *Employment Act*, 2007 as was alleged for the petitioner. The extent of the violation was mistreatment and discrimination because of inequality in the application of the cited provision of the manual to the claimant’s disciplinary case. As relates the sexual harassment claims as urged for the petitioner, the Court will make appropriate findings later in this judgment as is intertwined with the cross-petition.
16. The 4th issue is whether the petitioner is entitled to the remedies as prayed for. The Court returns as follows:
 - a) The petitioner is entitled to a declaration that notice to show cause letter and suspension of the petitioner was irregular, unprocedural, illegal, unconstitutional null and void ab initio.
 - b) The petitioner is entitled to an order directing the 1st respondent to unconditionally revoke the suspension of the petitioner from employment and order for her immediate reinstatement.
 - c) The petitioner is entitled to an order directing the 1st respondent to pay the petitioner any pending salaries, allowances and benefits accrued to her while on suspension.
 - d) The petitioner is entitled to an order revoking the 2nd respondent’s letter dated 21.05.2024 and its correction thereof suspending the petitioner.
 - e) The petitioner prays for an order for the 1st respondent to pay the petitioner damages for failure to accord the petitioner procedural fairness in the process leading to her suspension. The Court considers that the claimant will be paid all withheld payments in view of the irregular suspension and the payment is considered sufficient compensation for the petitioner’s injury in that regard.
 - f) The petitioner prayed for an order restraining the respondents by either themselves, employees, servants or agents from harassing, arresting, intimidating or terminating the employment of the petitioner based on the illegal suspension. Section 46 (g) of the *Employment Act*, 2007 provides that it is not a fair reason to dismiss or impose a punishment upon an employee on account of an employee’s initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and



without foundation. In view of the provision, the order will issue as prayed because the issuance of the suspension letter has been shown to have been unfair and culmination in the instant petition.

17. The 5th issue is whether the 2nd respondent or cross-petitioner is entitled to the reliefs prayed for or whether, the 2nd respondent sexually harassed the petitioner.
- a. The 2nd respondent prayed for a declaration be made that the respondent has conducted herself in a manner that is disrespectful, defamatory and unlawful towards the petitioner who is her supervisor.
 - b. The petitioner received the letter to show cause and the suspension letter dated 21.05.2024. The letter made allegations against the petitioner including gross-insubordination; abuse of office and harassment or bullying of junior staff; harassment of and asking for bribes from suppliers; poor performance in her department; fraud and mismanagement of resources; and, reporting late and missing work without permission. The letter set out the particulars of each leveled allegation. In response to the letter by her letter, dated 27.05.2024 addressed to the 2nd respondent and copied to the VC, DVC – ARSA, and, CHRM. She stated in the second last paragraph ‘You also know too well that your hatred towards me started the day I asked you to stop calling me late into the night seducing me into a sexual relationship with you. You further extended your hatred to my innocent children. In April 2024, I requested for permission to attend my Children’s closing day school event but permission was denied, and I had to re-route and report to work in the company of my children (attached).’
 - c. The petitioner wrote the internal memo dated 10.06.2024 addressed to Dr. Martin Oloo, Chairperson, Disciplinary Committee. The memo was titled “ Re; Sexual Harassment and Intimidation By DVC FAP Prof Muturi Wachira”. It was a repoer of sexual harassment by the petitioner against the 2nd respondent. Paragraph 3 stated “Specifically, for the period between August 2019 and December 2021 or thereabouts. The DVC FAP Prof Wachira took advantage of my single parenthood and insisted on calling me through my mobile at late night to entertain me through singing Kikuyu traditional love songs popularly known as Mugithi and for several occasion verbally asked me for night outs and sexual intercourse with a promise to return favours through preferential treatment at the workplace. A behavior that created an uncomfortable and intimidating environment for me taking into consideration that he, the DVC – FAP Prof Wachira, is my immediate supervisor hence interfering with my ability to do my job effectively. (Attached and marked CM-3 are copies of my email correspondence and a demand letter from my advocate to Safaricom PLC for call logs with Prof Wachira between the period of January 2019 to December 2021 which I shall make available immediately upon production as requested.)”the internal memo states that the petitioner had approached the 2nd respondent and politely requested him to desist from the unwelcome advances. The petitioner further wrote in the memo “Coupled with my complaints through internal memo dated 14th October 2022 and 27th February 2024, I also recorded a statement with the police on 16th February 2024 aand obtained an Occurrence Book number 4/16/2/2024 (Attached and marked CM-4 is a copy of OB recorded statement, I further undertake to provide written statement from Mr. Dalizu within 3 days from the date herein)”. She stated that firm and stern disciplinary action be taken against the 2nd respondent. The petitioner further stated “Please safeguard the rule of law by terminating an illegal attempt to dismiss me from employment for standing up against sexual predator/aggressor and entrench a culture against abuse of office and power.”



- d. The 2nd respondent has exhibited as EJ-4 the minutes of the Disciplinary Committee meeting held on 05.07.2024 whose agenda was to hear the sexual harassment case against the 2nd respondent as alleged by the petitioner. The 2nd respondent had responded by his internal memo of 06.06.2024. The petitioner requested to be given a time of 14 days to consolidate her evidence. The request was granted and the meeting was to reconvene on 26.07.2024 at 10.00am. On 26. 07.2024,
- e. The petitioner's advocate wrote the letter dated 22.07.2024 addressed to the 1st respondent's Vice-Chancellor about the petitioner's reported case of sexual harassment against the 2nd respondent. The letter stated that the chair person of the 2nd respondent's Disciplinary Committee Dr. Martin Oloo had conflicted himself when he filed a notice of appointment of advocate in the instant petition to represent both respondents. Thus, the Disciplinary Committee had been institute to sanitize the 2nd respondent with respect to the sexual harassment allegations by the petitioner against the 2nd respondent. The advocates' letter further stated "TAKE NOTICE That on that backdrop, our client hereby withdraw with immediate effect the sexual harassment and intimidation complaint filed with the disciplinary committee through Dr. Martin Oloo dated 10th June 2024 and shall endeavor to properly file the same at a later date with the office of the Vice Chancellor who is her appointing authority for proper consideration by an independent and impartial committee chaired by someone else other than Dr. Martin Oloo who is currently the lawyer for Pro.Wachira."
18. The Court has considered the foregoing flow of events and returns that both the petitioner's claims of sexual harassment and the 2nd respondent's claims of defamation and breach of rights in that respect are premature. The two parties are yet to exhaust the procedure for handling allegations of sexual harassment in accordance with the 1st respondent's sexual harassment policy. The claims will collapse.
19. The Court has considered that parties are still in the employment relationship. The Court has also considered that the 1st respondent's position as an employer with respect to the petitioner's and 2nd respondent's transactions as disclosed in the instant petition. The Court considers that 1st respondent will pay petitioner's costs of the petition and the 2nd respondent will pay the petitioner's costs of the cross-petition.

In conclusion, the petition and the cross-petition are hereby determined with orders:

- a. The declaration that the notice to show cause letter and suspension of the petitioner was irregular, unprocedural, illegal, unconstitutional null and void *ab initio*.
- b. The order directing the 1st respondent to unconditionally revoke the suspension of the petitioner from employment and order for her immediate continued service, unless terminated in accordance with the contract of service and law.
- c. The order directing the 1st respondent to pay the petitioner any pending salaries, allowances and benefits accrued to her while on suspension.
- d. The order revoking the 2nd respondent's letter dated 21.05.2024 and its correction thereof suspending the petitioner.
- e. The order restraining the respondents by either themselves, employees, servants or agents from harassing, arresting, intimidating or terminating the employment of the petitioner based on the illegal suspension or proceedings in the instant petition.
- f. The 1st respondent to pay petitioner's costs of the petition.



- g. The 2nd respondent will pay the petitioner's costs of the cross-petition.
- h. The declaration that the 1st respondent to handle the petitioner's allegations of sexual harassment against the 2nd respondent fairly and in accordance with the relevant provisions of law, the 2nd respondent's contract of service, and, the 1st respondent's sexual harassment policy and disciplinary control policies.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 19TH DECEMBER 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

