



**Kanyungi v Ruaraka Academy (Cause 260 of 2018)  
[2023] KEELRC 271 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 271 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 260 OF 2018  
SC RUTTO, J  
FEBRUARY 3, 2023**

**BETWEEN**

**ANDREW MWANGI KANYUNGI ..... CLAIMANT**

**AND**

**RUARAKA ACADEMY ..... RESPONDENT**

**JUDGMENT**

1. The claimant avers that he was employed by the respondent as a teacher with effect from 9<sup>th</sup> February, 2015. That on 26<sup>th</sup> July, 2017, he was served with a notice of termination from employment. That prior to his termination, the respondent had never raised any complaint or expressed any dissatisfaction with his services. That in fact, he diligently executed the tasks assigned to him and due to his hard work, and commitment, he was appointed to head the English Department.
2. That further, since he joined the respondent's employment, the school's general performance in English improved tremendously over the years. According to the claimant, his termination was unlawful and irregular to the extent that it did not comply with the stipulated disciplinary procedures including warnings before dismissal. It is for this reason, that the claimant seeks against the respondent general damages for unlawful and unfair termination, compensation for loss of office, costs of the suit and interest.
3. The respondent opposed the claim through its Statement of Defence dated 23<sup>rd</sup> May, 2018. It avers that the claimant's performance was found wanting hence he was issued with two warning letters dated 25<sup>th</sup> January, 2016 and 10<sup>th</sup> July, 2017. That in his letter dated 11<sup>th</sup> July, 2017, the claimant admitted that performance in English was not satisfactory. The respondent further contends that the claimant's termination from employment was lawful with the reasons for termination being provided. Consequently, the respondent has asked the Court to dismiss the claim with costs.



4. The matter proceeded for part hearing on 12<sup>th</sup> May, 2022 and subsequently on 27<sup>th</sup> July, 2022, when the respondent presented and closed its case. During the trial, each side presented oral evidence through one witness respectively.

### **Claimant's Case**

5. The claimant testified in support of his case and at the commencement of the hearing, sought to adopt his witness statement, to constitute part of his evidence in chief. He also produced the bundle of documents filed together with his claim as his exhibits before Court.
6. It was the claimant's evidence that he diligently executed his duties hence his termination was irregular and unlawful. That he had done nothing wrong to warrant such a drastic measure by the respondent. That to the best of his knowledge, he made efforts to resolve the matter amicably to no avail.
7. The claimant further testified that he found the reason for his termination as unjustifiable. That he joined the respondent school so as to help improve performance in the English subject. That in particular, there was improvement in the English subject in the 2015 Kenya Certificate of Primary Education (KCPE) and that this was noted in his performance appraisal.
8. The claimant attributed his termination from employment on the personal differences he had with Mr. George Thuo, the Headteacher of the respondent school. That their erstwhile friendship and closeness ended in the second term of 2017. That he was demotivated and demoralised as Mr. Thuo would confront him in a very personal manner and everyone could tell that they had personal differences.
9. It was his further testimony that the climax was when he was issued with a warning letter by the Director of the respondent. That the same was in regards with the performance in the English subject. That he responded to the warning letter and was remorseful hence he promised to improve performance in the subject.
10. That he was shocked when he was given his letter of termination. That he was not called for a meeting or a sitting prior to his termination hence he did not understand the reasons for his termination. The claimant further denied marking compositions for another school.
11. That after his termination from employment, he approached the respondent's Director to allow him continue teaching in the school and these were her words; "Teacher Andrew, this was not my decision, I was instructed to do it. So, there is nothing I can do." That that is when it dawned on him that he had actually been terminated hence sought legal intervention.
12. That following his termination he was stressed as he had children in school, a loan to repay and rent to pay. That further, he was out of a job for 1 year 3 months.

### **Respondent's case**

13. The respondent called oral evidence through its Headteacher Mr. George Thuo Karanja, who testified as RW1. At the outset, he also adopted his witness statement to constitute his evidence in chief. He proceeded to produce the respondent's bundle of documents as exhibits before Court.
14. RW1 told Court that the claimant was dismissed from employment on account of performance and engaging in other duties. That the claimant was given the best performing classes being class 6, 7 and 8 but his performance was not good.
15. It was his evidence that in 2016, the school Director was concerned about the claimant's poor performance hence requested him to check the issue. That he checked the books of the students in class



7 Red and found that the students had only done three compositions in the 2<sup>nd</sup> term of 2016 and one composition in 3<sup>rd</sup> term of 2016. That the claimant, just like the other English teachers, were required to give one composition per week. That in 2017, the claimant had only given two compositions to class 6 Red in the 1<sup>st</sup> term and two compositions to class 7 Red in the 2<sup>nd</sup> term.

16. That therefore, the claimant was not complying with the requirements that English teachers give three compositions per week. That the minutes from the English department confirm as much. That generally, the claimant's performance was the lowest compared to the other teachers, yet he was the head of the English Department.
17. RW1 further stated that the claimant was issued with a warning letter and he acknowledged that he had failed and vowed to change his work ethic and improve. That the claimant did not improve his performance and to top it off, he caught him marking compositions for Camellville Catholic School, in the computer room. That he had noted that the claimant would leave the school premises late and on enquiry, he said it was because he was marking compositions. That the disparity between the compositions the students wrote and the claim that the claimant was marking compositions prompted him to check the computer room sometimes in July, 2017 and that is when he found him marking the compositions for Camellville Catholic School.
18. RW1 further denied having personal differences with the claimant and added that todate, he has no grudge against him. It was his further testimony that the claimant secured a job immediately after his termination and since then, he has been to three different schools.
19. He further termed the general working environment at the respondent school as good and that employees are rarely terminated from employment. Therefore, according to him, the claim is unjustified.

### **Submissions**

20. The claimant submitted that the respondent violated all the procedures for termination of employment as set out in the [Employment Act](#) and his appointment letter, hence his termination was unlawful, unprocedural, irregular thus null and void.
21. That by the respondent terminating his employment without giving him a chance to defend himself, it violated his constitutionally guaranteed right to a fair hearing and the principles of natural justice. In support of his submissions, the claimant placed reliance on the cases of Kenya Union of Commercial Food & Allied Workers v Meru North Farmers SACCCO Limited Cause no. 74 of 2013 and Ol pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR.
22. It was further submitted that the claimant was not given one month notice prior to his termination hence his rights were violated. That further his right to fair administrative action was violated.
23. On its part, the respondent submitted that the claimant breached a term of his contract hence it was within the law to summarily dismiss him but it issued him with an ordinary termination, with notice and benefits. The cases of James Mchovoti Nalisi vs Eclipse International Limited (2019) eKLR and Amos Kitavi Kivite v Kenya Revenue Authority [2020] eKLR were cited in support of the respondent's submissions
24. Citing the provisions of section 47(5) of the [Employment Act](#), the respondent submitted that the claimant had the burden to prove his allegations but did not do so. It was its further submission that the claimant's termination was justified and lawful. To support its argument, the respondent cited the case of John Munyao v Teachers Service Commission [2018] eKLR.



## Analysis and determination

25. Flowing from the pleadings, the evidence presented by both parties as well as the opposing submissions, it is clear that the Court is being called to resolve the following issues: -
- i. Whether there was a justifiable reason to terminate the employment of the claimant;
  - ii. Whether the claimant was afforded procedural fairness prior to termination; and
  - iii. Is the claimant entitled to the reliefs sought?

### Justifiable reason for termination?

26. The point of entry in determining this issue is Section 43(1) of the *Employment Act* (Act) which requires an employer to prove the reasons for termination and in default, such termination is deemed to be unfair. In addition, Section 45 (2) (a) and (b) of the Act provides that a termination of employment is unfair if the employer fails to prove: -
- a) that the reason for the termination is valid;
  - b) that the reason for the termination is a fair reason-
    - i. related to the employees conduct, capacity or compatibility; or
    - ii. based on the operational requirements of the employer; ...
27. Essentially, the reason for the termination of an employee ought to pass the fairness and validity test. Therefore, over and above proving existence of reasons to justify termination, an employer is required to prove that the said reasons were fair and valid.
28. Turning to the case herein, it is evident that the claimant was terminated on grounds related to his performance. This can be discerned from his letter of termination dated 26<sup>th</sup> July, 2017, which is couched as follows: -

“Re: Termination of Services

Please refer to our letter dated 10<sup>th</sup> July, 2017 and reference “last warning”.

Further to that letter, we have checked standards six and seven Composition books and were shocked to note that they have not written any Composition from January to date.

According to your report, you claim to give them a composition every fortnight. In addition, you leave this place as late as 8:00 p.m marking their Compositions. It makes us wonder whose Compositions you mark.

Due to the foregoing, we are now left with no other option other than to terminate your services with immediate effect.

You will however be paid your August salary (cheque enclosed) in lieu of notice.”

29. What manifests from the letter reproduced above is that the claimant’s termination was triggered by his failure to comply with the requirements relating to giving his students compositions.
30. In support of its position, the respondent exhibited minutes of the English department in which the issue of the compositions was deliberated. The first meeting was held on 22<sup>nd</sup> January, 2015, and it was recorded at Min 4/2015 as follows: “composition writing modality should be agreed among the



- teachers of every class. At least one composition with its corrections was to be written every week during the 1<sup>st</sup> term.” Notably, the minutes were approved by the claimant, who was the head of the head of department.
31. In another departmental meeting held on 17<sup>th</sup> May, 2016, it was recorded at Min 5/16 that “the teachers agreed on one composition every week”. Once again, the claimant approved the minutes being the head of the department. The significance of composition writing was also emphasized in another departmental meeting held on 3<sup>rd</sup> May, 2017 in which the teachers were urged to give at least one composition per week.
  32. Testifying under cross examination, the claimant admitted that the issue of the compositions was deliberated in the meetings. However, he denied that they were required to give the compositions to students as alleged by the respondent. He contended that there was no formula in that regard.
  33. The respondent further exhibited extracts of the compositions from the books of the students who were under the claimant at the time. The compositions are in respect of 2016 and 2017.
  34. In May, 2016, the compositions were two while in June, 2016 only one composition was given. In September, 2016, one composition was exhibited while in June and July 2017, the compositions given were two. In September, 2017, the composition was one while in January, 2017, they were two.
  35. Notably, the claimant neither disputed these assertions in his Reply to the Statement of Defence nor in his evidence in chief. Further, he did not challenge the evidence presented by the respondent. Coupled with the foregoing, it is worth noting that the claimant did not address the issue of composition writing in his claim. As it was, this was the real issue behind his termination hence it is rather odd that he was silent about it.
  36. From the record, it is evident that contrary to the claimant’s assertion that there was no requirement or formula as to the number of compositions to be given to the students, there was indeed a resolution within the English department that teachers were to give the students one composition per week. Taking this into account and noting the extracts of the students’ compositions exhibited by the respondent, it is clear that the claimant was not compliant and had fallen short of the departmental resolutions. This is further noting that he was the head of the English department hence should have been at the forefront in implementing the resolutions arrived at with his fellow staff members.
  37. What manifests from the foregoing is that the respondent had a reason to take disciplinary action against the claimant. Therefore, it discharged its burden under sections 43(1) and 45(2) (a) and (b) of the Act and the claimant’s termination cannot be said to be substantively unfair.
  38. Having determined as such, was the claimant’s termination in accordance with fair process?

### **Fair process?**

39. Pursuant to Section 45 (2) (c) of the *Employment Act*, an employer is required to comply with the provisions of fair process and prove that it accorded an employee a fair hearing prior to terminating him or her from employment. The specific requirements of a fair hearing are provided for under section 41 of the Act which is in the following manner: -

“(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.”

40. It was the claimant’s case that he was not afforded an opportunity to be heard prior to his termination. In this regard, he contends that there was no meeting or any sitting between himself and the respondent prior to his termination. On its part, the respondent avers that the allegations levelled against the claimant warranted summary dismissal.
41. What is notable from the record is that there was no indication or suggestion that the respondent subjected the claimant to the process contemplated under section 41 of the *Employment Act*.
42. It further bears to note that the notice contemplated under section 41(1) of the Act is one that is explicit and which clearly notifies an employee that the employer is considering terminating his or her employment, on account of the specified reasons. The employer is further required to give the employee an opportunity to render an explanation in his defence to any allegations against him or her.
43. Therefore, regardless of the allegations levelled against the claimant, he was entitled to be notified of the reasons for which the respondent was considering terminating his employment and to be granted an opportunity to defend himself and give his side of the story.
44. Indeed, in the event the respondent was unsatisfied with the general performance of the claimant, it ought to have given him an opportunity to defend himself.
45. There being no evidence that the claimant was accorded a fair hearing prior to his termination, I am led to conclude that the respondent did not comply with the requirements under section 41 of the Act hence is at fault.
46. In the circumstances, I cannot help but find that the claimant’s termination was procedurally unfair hence unlawful within the meaning of section 45 (2) (c) of the Act.

### **Reliefs?**

47. As the Court has found that the claimant’s termination though substantively justified, was procedurally flawed hence unlawful, he is awarded compensatory damages equivalent to three (3) months of his gross salary. This award has further taken into account the length of the employment relationship.

### **Orders**

48. Against this background, I enter Judgment in favour of the claimant against the respondent and he is awarded compensatory damages in the sum of Kshs 265,500.00 being equivalent to three (3) months of his gross salary. Interest shall apply on the award at court rates from the date of Judgement until payment in full.
49. The claimant shall also have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2023.**

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Kaburu

For the Respondent Ms. Mungai

Court Assistant Abdimalik Hussein

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

