



**Okong'o v Teachers Service Commission (Cause E064 of 2021)
[2023] KEELRC 247 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 247 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E064 OF 2021
CN BAARI, J
FEBRUARY 2, 2023**

BETWEEN

MESHACK OTUNGE OKONG'O CLAIMANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

JUDGMENT

1. By a Memorandum of Claim dated 15th July, 2021, and filed on 20th September, 2021, the Claimant seeks judgment against the Respondent for the following reliefs:
 - a. A declaration that the Respondent's actions to interdict and eventually terminate services of the Claimant without following the procedures laid down in the *Employment Act*, the Public Service Human Resource Manual and the provisions of *the Constitution* of Kenya 2010, is illegal null and void ab initio.
 - b. An order that the Respondent pays the Claimant damages for wrongful termination without justifiable cause.
 - c. An order that the Respondent pay the Claimant gratuity.
 - d. An order that the Respondent do pay the Claimant the salary withheld during interdiction.
 - e. An order that the Respondent do pay the Claimant exemplary damages.
 - f. Reinstatement of the Claimant to his position without loss of benefits.
 - g. A Certificate of service.
 - h. Costs of the suit.
 - i. Interests on b, c, d and e above.



2. The Respondent filed a Notice of appointment of Advocate dated 6th October, 2021, and a Memorandum of Defence dated 16th December, 2021, and filed in court on 17th December, 2021.
3. During the hearing, the Claimant testified in support of his case. He adopted his witness statement and produced a bundle of documents filed in the matter in support of his case.
4. The Respondent presented a total of four witnesses to testify in support of her case. The witnesses adopted their witness statements and produced documents filed in support of the Respondent's case.
5. Submissions were filed for both parties.

The Claimant's Case

6. The Claimant's case is that the Respondent employed him as trained Diploma technical teacher III. It is his case that at the time of his dismissal, he had been deployed as a drafter at the Respondent's pension department doing clerical work.
7. It is the Claimant's case that the head of the pension unit was his supervisor, and he assigned him work on a daily basis. It is his further case that his job entailed keeping information in teachers files, and record files that he had worked on in the daily file register.
8. The Claimant states that the details he used for his work were assigned to him by the digitex and that he could not access teachers files other than through the digitex.
9. It is the Claimant's case that a particular file that he had worked on was returned to him and informed that it had a wrong bank account, and that he cancelled the account and provided the right one.
10. The Claimant further states that the Respondent served him with two letters to show cause why disciplinary action should not be taken against him for negligence of duty.
11. The Claimant states that the accusations against him were breach of clause 112 (4-j) of the Human Resource Policies and Procedures Manual for TSC Secretariat staff, in that while stationed in Pensions Division Digit 4, he worked on documents not bearing official receiving stamps, working out of range, failing to report an impropriety by colleagues, failing to determine the correctness of documents based on handwriting in the files and collusion with unknown persons to divert teacher's pension to wrong bank accounts.
12. The Claimant states that he responded to the allegations on gross negligence of duty and forgery claims, and explained his case vide a letter dated 23/11/2018.
13. The Claimant states that despite the detailed and elaborate response to the gross negligence of duty and forgery claims, the Respondent on 2nd November, 2018, sent him on interdiction.
14. The Claimant avers that documents were received either at the registry or at the various service areas at the Commission, and pensions as a service area at that time, did not have a receiving stamp thus explains why the Claimant did work on documents not bearing official receiving stamps.
15. The Claimant further avers that the work of a drafter was limited to filing the GP178, GP 213, cover page and attaching copies and originals of supporting documents. It is his case that a drafter had a daily set output target as shown in the work plan and it was the duty of the supervisor to ensure this was attained, and this further explains why he worked out of range without authority of the supervisor
16. The Claimant avers that on 23/11/2018, he was invited to an investigative hearing scheduled for 26/11/2018 and chaired by the Director (HRM & D) (DHRM&).



17. The Claimant states that he was questioned in a disciplinary meeting held on 22/10/2019, and the committee did not consider all the letters he wrote to the Senior Deputy Director Pensions (SDDP) and his submission to the HRDIC were ignored.
18. The Claimant avers that the Respondent violated its own procedures as stated in Human Resource Policy and Procedure Manual (HRPPM) Clause 115 on the process of investigation and deliberately abdicated its role of involving a committee in doing investigations.
19. The Claimant further avers that he was unable to authentic the correctness of the documents presented based on the handwriting because he is not an authority and/or expert in the specialized field of examining hand writings.
20. The Claimant contends that the invitation to disciplinary hearing was served upon him on the very day that he was expected to appear before the disciplinary panel.
21. The Claimant avers that the Respondent choreographed trumped up charges against him and stage-managed the disciplinary hearing to sanitize otherwise flawed processes with a predetermined decision to terminate his employment without valid reasons.
22. The Claimant contends that after his interdiction through a fundamentally flawed process, and without valid reasons he requested for certain document from the Respondent and also appealed against the interdiction, but to date he has not received any responses from the Respondent.
23. The Claimant's further case is that the Respondent discriminated against him by targeting only him from the entire pension division digit 4 team, noting that the decision was not a solo decision but a decision of the pension division digit 4 team, and as such the Claimant is entitled to punitive and or exemplary damages from the Respondent.
24. The Claimant avers that at the time of his interdiction his salary was Kshs.133,000.00. The Claimant prays that he be awarded the reliefs listed in his statement of claim.

The Respondent's Case

25. The Respondent's case is that the Claimant's contract of employment was predicated upon the letter of appointment dated 12th October, 2015. The Respondent states that the Claimant was at all material times engaged at the Human Resource Development Directorate of the Respondent.
26. It is the Respondent's case that the Claimant was dismissed from the Service of the Respondent on 22nd October 2019, based on the grounds that while an officer in Pensions Divisions, he colluded with unknown persons to divert teacher's pension benefits to wrong Bank accounts.
27. The Respondent states that the alleged act was in blatant breach of the tenets of Chapter Six (6) of *the Constitution* of Kenya 2010, the Respondent's Human Resource Policies & Procedures Manual for Secretariat Staff, the *Teachers Service Commission Act* Cap 212, Public Policy and interest among other pieces of legislation governing his employment contract with the Respondent.
28. The Respondent's further case is that before the Claimant's dismissal, and as provided under the HR Manual, the Respondent conducted investigations and subjected the Claimant to the due process of law.
29. It is the Respondent's case that her investigations revealed that she had reasons to believe that the Claimant had violated the terms and conditions of his employment.



30. The Respondent states that subsequent to their investigations, the Claimant was interdicted and subsequently dismissed from service on the specific grounds that he breached Clause 112 (4-j) of the Human Resource Policies and Procedures Manual by colluding with unknown persons to divert teachers' pension benefits to wrong bank accounts.
31. The Respondent states that the Claimant being aggrieved with the Respondent's decisions, he filed this claim in this court seeking Orders for reinstatement to service among other reliefs as particularized in his statement of claim.

The Claimant's Submissions

32. It is submitted for the Claimant that where there is variance between the notice to show cause and the charge, it follows that no notice to show cause was issued, and hence a violation of Sections 43 and 45 of the [Employment Act](#).
33. The Claimant submits that Section 43 of the [Employment Act](#), bars an employer from terminating the employment contract of an employee unless there is a valid and fair reason related to the employees conduct, capacity or compatibility or based on the operational requirement of the employer. He sought to rely in *Pius Machafu Isiundu v Lavington Security Guards Limited* [2017] eKLR for the holding that: -

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on the employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for the termination/dismissal (section 43); prove that the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5))...”
34. It is further submitted for the Claimant that a bank account cannot be forged; a bank account is opened with requisite documentations and by persons that exist, and there is no evidence before court that the Respondent obtained account opening documents and that the same had no proof that the initiator of the impugned accounts was the Claimant.
35. It is further submitted that no evidence was tendered to connect the Claimant to the alleged accounts. They sought to rely on the case of *Philip Kimosop Tuitoek v Kingdom Bank Limited* [2022] eKLR, to buttress this position.
36. The Claimant submits that the Respondent may terminate on account of negligence which speaks to gross misconduct, but on issues of fraud, there must be definite proof that the Claimant was party to fraud and was aware of the fraud. It is submitted that the Respondent failed to discharge this duty.

The Respondent's Submissions.

37. The Respondent submits that the Claimant was dismissed on established, reasonable and compelling grounds of infamous conduct, pursuant to a rigorous process outlined under its HR Manual. The Respondent maintains that the dismissal and the manner in which it was arrived at was procedural, lawful and conforms to the [Employment Act](#) 2007, the [Teachers Service Commission Act](#) 2015, and all relevant Regulations.
38. It is the Respondent's further submission that based on the evidence adduced, specifically the compelling evidence encapsulated in their Investigation Report, they sought to establish the veracity of the allegations by the National Treasury. It is the Respondent's submission that the ensuing



Investigation and subsequent hearing discharged the burden of proof required in employment matters, rendering the dismissal of the Claimant proper and based on established reasons.

39. The Respondents submits that the entire actions of the Claimant confirm that he acted contrary to the canons of career and which put his professional integrity into doubt hence, his dismissal was therefore justified.
40. It is submitted that the Respondent has discharged the burden required under Section 43 of the [Employment Act](#), and reiterates that the reason for the Claimant's dismissal was sound, sufficient, compelling and lawful and should be upheld by the court.
41. The Respondent submits that based on both the burden and standard of proof required in employment disputes, the Respondent discharged it as there were valid reasons to believe the evidence against the Claimant, and as such had a justified reason to dismiss the Claimant. The Respondent had reliance in Nyeri Civil Appeal No. 79 of 2016 Kenya Power and Lighting Company Limited vs. Agrey Lukorito Wasike, where the court held thus: -

“It bears repeating that the standard of proof an employer needs to be satisfied about an alleged act of criminality on the part of an employee, is the lesser one of balance of probabilities.”

42. It is the Respondent's submission that the Claimant was accorded a fair hearing and the opportunity to be heard in consonance with the [Employment Act](#) and tenets of Natural Justice. The Respondent further submits that the threshold of an administrative hearing envisaged under the [Employment Act](#) and the TSC Act, was met making to the Claimant's subsequent dismissal a product of a clinical adherence to the spirit and tenor of the law and ought to be upheld.

Analysis and Determination

43. I have considered the pleadings, the witnesses' oral testimonies and the submissions by both parties. The issues that fall for determination are:
- i. Whether the Claimant was unfairly dismissed.
 - ii. Whether the Claimant is entitled to the remedies sought.

Whether the Claimant was unfairly dismissed.

44. A determination of whether or not a dismissal/termination is fair, is deduced from the employer's adherence or lack thereof to the twin requirements of fair procedure and substantive justification of a dismissal/termination process.
45. I will start with the question of whether or not the dismissal of the Claimant met the procedural fairness test. To satisfy the test of procedure, the employer must implement the requirements of Section 41 of the [Employment Act](#) to the letter. Section 41 states: -

“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.”



46. The Respondent's case is that the Claimant was issued with a show cause letter, a letter of suspension, an investigation conducted and that he was heard in a disciplinary hearing in answer to the charges against him. It is their position that the threshold of an administrative hearing envisaged under the *Employment Act* and the TSC Act, was met making the Claimant's subsequent dismissal a product of a clinical adherence to the spirit and tenor of the law, and that the same ought to be upheld
47. The Claimant admitted receipt of the show cause letter and the ensuing disciplinary process. His only contestation in this respect, is that there was a variance between the notice to show cause and the charge against him which he asserts violated the provisions of Sections 43 and 45 of the *Employment Act*.
48. In *Silvester Malei Kyengo v Kenya Meat Commission (2019) eKLR*, the Court opined,:-
- “In this case the Claimant was first served with a show cause letter stating the charges against him, interdicted pending investigation, accorded on oral hearing in the company of another employee of his choice and finally served with a termination letter confirming that his defence was considered but his services terminated for reasons cited in the letter. Such procedure in my view passes the test of procedural fairness and I so hold”
49. Further, in *Hosea Akunga Ombwori v Bidco Oil Refineries Limited (2017)eKLR* the court expounded the provisions of Section 41 thus: -
- “To satisfy the requirements of Section 41 of the *Employment Act*, 2007, an employer issues what is called in ordinary parlance a show cause notice/letter. Such a letter or notice should outline the allegations or charges against the employee and also request him to respond within a reasonable time. The notice also ought to inform the employee that disciplinary action which might lead to termination of employment is under consideration. In other words, the notice should be set out in clear terms”.
50. The court record bears minutes, letters and an investigation report on the charges levelled against the Claimant. Record further show that the Respondent called other witnesses to appear before the disciplinary committee in an effort to establish the matters subject of the Claimant's dismissal, and which together with the investigation, pointed to the Claimant's culpability.
51. The Claimant admitted in his evidence that he received a show cause letter, responded to it and appeared before the Respondent's disciplinary committee. In my view, that there was a slight variance between the show cause letter and the charge at the disciplinary hearing, did not offend the requirements of Section 41, based on the fact that the Claimant was clear on what the charges were, and he answered to them both at the hearing and through his written representation.
52. In *Anthony Mkala Chitavi v. Malindi Water & Sewerage Company Ltd [2013] eKLR*, the Court stated:
- “The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.
- Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.



Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

53. In my view, the procedure adopted by the Respondent in dismissing the Claimant, met the procedural fairness test.
54. On the question of substantive justification, the charge against the Claimant was that of alleged collusion with unknown persons to divert teachers’ pension benefits to wrong bank accounts.
55. Section 45 of the *Employment Act* states:
- (1) No employer shall terminate the employment of an employee unfairly.
 - (2) A termination of employment by an employer 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; and
 - (c) that the employment was terminated in accordance with fair procedure.”
56. As correctly submitted by the Respondent, Section 47(5) of the *Employment Act* requires that an employee proves that an unfair termination of employment or wrongful dismissal has occurred, and leaves the burden of justifying the grounds for the termination of employment with the employer. (See Nyeri Civil Appeal No.97 of 2016: Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another.)
57. The Respondent’s case is that she received complaints of wrongful diversion of pension payments of retirement benefits to wrong bank accounts from the treasury, and that preliminary investigations pointed to the culpability of the Claimant.
58. It is the Respondent’s contention that she convened a Discipline Investigating Committee comprising of eight (8) members who interrogated the officers who worked at her Pension Division who included the Claimant. The Respondent further asserts that in consideration of the evidence adduced, the Committee duly resolved that there was an aspect of collusion between the Claimant and other persons to illegally divert Retirees’ Pension dues, and recommended that he be interdicted.
59. It is the Respondent’s further assertion that further investigations established that indeed all the claims in issue were prepared and computed by the Claimant, out of which, only two (2) ranges fell within his assigned areas of duty, while the rest of the ranges that he worked on, were done without the authority of his Supervisors.
60. The question then is whether the reason for the Claimant’s dismissal stipulated herein is a fair, valid and justifiable reason for the dismissal. In Nyeri Civil Appeal No. 79 of 2016 Kenya Power and Lighting Company Limited vs. Agrey Lukorito Wasike in underscoring the proviso to Section 43, the court held that: -

“Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair.”



61. Further, in Charles Musungu Odana v Kenya Ports Authority [2019] eKLR the Court stated: -

“It is now clear that the burden placed on an employer by Section 43 of the Employment Act is to establish a valid reason that would cause a reasonable employer to terminate employment.”

62. The Claimant admitted both in his oral testimony and through his pleadings that he worked on documents that did not have the Respondent’s official stamp. He also admitted working on files that were out of his range without the authority of his supervisor.

63. The Respondent’s finding of wrongful diversion of pension payments of teachers’ retirement benefits to the wrong bank accounts, and further establishing through persuasive and consistent evidence that the Claimant was on a “balance of probability” culpable, is in my opinion fair, valid and justifiable reason to dismiss the Claimant. The Court of Appeal in the case of Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR, held that it was eminently reasonable for the Respondent to dismiss the Claimant, faced with the conduct displayed by her.

64. In whole, I find and hold that the Claimant’s dismissal was procedurally and substantively fair.

65. On the issue of whether the Claimant is entitled to the remedies sought, the Claimant’s prayers before this court, are all only tenable upon a finding of an unfair/wrongful dismissal. On this premise, the Claimant’s claim against the Respondent fails in its entirety.

66. The suit is dismissed.

67. The Respondent shall have the costs of the suit.

Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS
2ND DAY OF FEBRUARY, 2023.**

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Mabalau h/b for Mr. Abanded for the Claimant

Mr. Langat h/b for Mr. Sitima for the Respondent

Christine Omollo- Court Assistant

