



**Muchoki v Mpesa Foundation Academy (Cause 2219 of 2017)
[2023] KEELRC 708 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 708 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2219 OF 2017
JK GAKERI, J
MARCH 15, 2023**

BETWEEN

ANNE WAITHERA MUCHOKI CLAIMANT

AND

MPESA FOUNDATION ACADEMY RESPONDENT

JUDGMENT

1. The Claimant initiated this suit by a Memorandum of Claim filed on 8th November, 2017 alleging unlawful dismissal, constructive demotion and unfair labour practices.
2. The Claimant avers she was employed by the Respondent as Senior Teacher in 2016 and was subsequently promoted to the position of Deputy Head Academics earning a monthly salary of Kshs.400,000/=.
3. It is the Claimant's case that in May 2016, teachers voted her as their representative on the Board of Governors and in Mid-June-2016, the Chief Executive Officer (C.E.O) asked her to take charge of Academics and was later appointed Acting Head of Academics and was in charge of Academics, Admissions, Student Life and Humanities and was assessed as exceeding expectations.
4. That on 12th September, 2017, the Human Resource Manager proposed a new job description for a demoted role via email and gave the Claimant two days off to think through it in readiness for a meeting on 14th September, 2017.
5. The Claimant avers that on 14th September, 2017, she attended a meeting with the CEO and the Human Resource Manager who gave her the demotion letter which she declined to sign and was dismissed on 15th September, 2017.



6. It is in the Claimant's case that she discharged her duties in accordance with the contract of employment and was not given time to respond to the letter dated 14th September, 2017 under the reference "Final Warning Letter."
7. The Claimant prays for;
 - i. Reinstatement to the position of Deputy Head of Academics.
 - ii. Damages for unfair termination of employment.
 - iii. Severance pay of 15 days per year Kshs.800,000/=
 - iv. Unemployability arising from dismissal Kshs.14,400,000/=
 - v. Damages for unfair labour practices Kshs.4,800,000/=
 - vi. General damages.
 - vii. Costs of this suit.

Respondent's case

8. The Respondent admits that it offered the Claimant employment as a Senior Teacher *vide* letter dated 31st December, 2015 and the Staff Manual and Policies was part of the contract, under which the Respondent could change the conditions of the Claimant's employment at will by giving written notice. That it confirmed the Claimant's appointment on 1st May, 2016.
9. It is the Respondent's case that during the Mid-Year Performance Review in 2017, it raised concerns that the Academic Department was underperforming for a number of terms and the Manager had noted the Claimant's non-commitment to her role and notified her that if her performance did not improve by the end of term 3, she would be dismissed.
10. The Respondent admitted issuing a Notice to Show Cause after the disciplinary investigation against one Skastina Omboga who was reporting to the Claimant in that she failed on her professional supervision.
11. The Respondent avers that it gave the Claimant an opportunity to respond to the allegations in that she responded to the Notice to Show Cause, issued a final warning on 14th September, 2017 and a dismissal letter on 15th September, 2017 for the Claimant's failure to attend a scheduled meeting without justification.
12. That it withdrew the Claimant's managerial responsibilities and reinstated her as a senior teacher.

Claimant's evidence

13. In her written statement, the Claimant stated that during the End of Year Party 2016, the CEO announced her promotion to the Deputy Head of Academics and was in charge of admissions, a rigorous process and one Skatina, the Administrative Assistant was in charge of the process and a total of 194 students were admitted in January 2016.
14. That the Department had originated an admissions policy which it forwarded to the CEO but it remained unsigned.
15. The Claimant admitted that she did not disclose that one Steve Mbogo, an intern, was her relative.
16. That the Claimant had not been informed of the issue as Head of Admissions.



17. The Claimant testified that the Director of Teaching and Learning (DTL) accused her of having informed Skastina of her impending suspension, an issue raised in the Notice to Show Cause.
18. That during the Mid-Year Review on 28th July, 2017, the DTL agreed with the objectives and achievements for the 6 months under review good but thereafter informed the Claimant of his disappointment with her performance as the department had been declining under her watch.
19. That she was uncommitted, unmotivated and lacked leadership and her team had raised issues.
20. The Claimant stated that the DTL was emphatic that she had to consider whether she wished to retain the position of Deputy Head of Academics in which case targets would be set and failure to meet them would lead to replacement in October 2017 and DTL would include the additional information in the appraisal.
21. The Claimant testified that he submitted the appraisal form to the DTL for completion.
22. It was the Claimant's testimony that on 31st July, 2017, Skastina and her were interviewed by a panel comprising the Head of Security, Human Resource Manager and the DTL and thereafter Skastina was suspended for 30 days pending investigation. That she admitted that Steve Mbogo was her relative.
23. It was her testimony that the DTL accused her for not protecting the Student Life Manager from attacks during a meeting attended and chaired by the Human Resource Manager. That the Claimant had engineered it.
24. CWI testified that on 31st July, 2017, she requested not to participate in the Annual Prize giving day so as to conclude Collection of admission forms from the 47 counties but the DTL declined as was the request for a secondment of a person to assist the admission intern since the academy was closing on 4th August, 2017.
25. That on 2nd August, 2017, DTL confirmed in writing that the Claimant would participate in the Prize Giving Day and would be the master of ceremony.
26. That the evaluation form received from the DTL had no rating and had additional comments and the Claimant declined to sign it for clarification which though initially scheduled for 23rd August, 2017 did not materialise.
27. The meeting held on 28th August, 2017 focused on academic matters as the Claimant had notified the CEO of the poor performance of the school.
28. That a meeting on admissions took place on 30th August, 2017 to chart the way forward on admissions and the Claimant was directed to amend the documents by close of business.
29. The Claimant testified that she appeared as the witness for Skastina during the letters disciplinary hearing on 31st August, 2017.
30. That the proceedings were intimidatory, biased and hurried and Skastina was summarily dismissed and the Claimant given a Notice to Show Cause to which she replied and responded to the issues raised by the DTL.
31. That the Claimant was relieved of the department during a meeting and without explanation.
32. It was her testimony that one Miriam who had been seconded to step in for Skastina informed her that she had instructions not to send any report to her and the Human Resource had no response to her inquiries.



33. That on 6th September, 2017, the CEO informed the Claimant that she would be demoted on disciplinary grounds and would be put on a performance improvement plan and closely monitored.
34. That the CEO was emphatic that it was either a demotion or resignation and additionally commented on the evaluation.
35. The Claimant testified that she applied for time off to consider the issues and was accorded 2 days.
36. That on 7th July, 2017, the Claimant received a message that the CEO wanted to discuss the termination package which was explained on phone as well as the offer after demotion, that of entry Senior Teacher and a copy of the contract would be forwarded by the Human Resource but never was.
37. It was the Claimant's testimony that on 12th September, 2017, she received an email from the Human Resource Manager inviting her for a meeting with the CEO and attached the proposed Job Description (JD) for the new position.
38. The Claimant testified that she requested for a reply to the response to the notice to show cause and time to appreciate the JD and was given 2 days off and a meeting slated for 14th September, 2017 at 4.00 pm. The meeting was attended by the CEO, Human Resource Manager and the Claimant who informed the Claimant that she would be given a final warning, put on probation and demoted.
39. That the Claimant was surprised by the turn of events as no notice of disciplinary hearing had been given or a previous warning. That she informed the meeting that her minimums were;
 - i. Promotion should not be curtailed.
 - ii. The JD be discussed as it was heavy.
 - iii. The contract be pensionable and open.
 - iv. No salary reduction.
40. The witness testified that the last issue did not go down well and the two insisted on a pay cut. It was at this juncture that the warning letter was handed over which she declined to sign as it raised issues not included in the show cause letter.
41. That her request to involve her counsel was declined and the Human Resource Manager took back the warning letter and declined to hand it over but did so after the two conferred outside.
42. That at about 3.15 pm, the Human Resource Manager informed her on phone that a letter was being sent to her house.
43. That her counsel dispatched the response to the warning letter to the Respondent but was received on 18th September, 2017.
44. That the Human Resource Manager and one Mr. John Gathua (a driver) delivered the termination letter.
45. On cross-examination, the Claimant testified that she admitted some of the allegations in the notice to show cause and had not declared that one Steve Mbogo was her relative and had thus violated the Respondent's Human Resource Manual. That Steve Mbogo was on paid allowance yet he had not left the office.
46. That she received a final warning after the notice to show cause and was the Deputy Head of Academics before termination.



47. The witness confirmed that the additional comments inserted in the Mid-Year Evaluation form were the opinion of the DTL.
48. That the letter of appointment provided for a 3 months' notice on termination.
49. That she did not agree with the demotion and although issues of performance were raised in the Mid-Year Evaluation, they had not crystallized.
50. On re-examination, the Claimant testified that Steve Mbogo was her cousin and was an intern in Admissions engaged by the Human Resource and had not received additional allowance.

Respondent's evidence

51. The Respondent's witness, Mr. Denis Ogada testified that he was the Respondent's Human Resource Manager.
52. He testified that the Claimant joined the Respondent on 5th January, 2016 and that the Respondent's Staff Manual and Policies were part of the contract of employment.
53. That the Respondent reserved the right at its discretion to change the conditions of the Claimant's employment from time to time by written notice.
54. It was his testimony that the Claimant was confirmed on 1st May, 2016 and appointed Acting Head of Academics on 13th June, 2016 and was promoted to Deputy Head of Academics effective 1st January, 2017 after the annual performance review.
55. RWI testified that during the Mid-year appraisal, concerns were raised that the Academics Department was underperforming and the Claimant was uncommitted, unmotivated and disaffected.
56. The witness testified that during the disciplinary proceedings of one Skastina Omboga, who was reporting to the Claimant, it emerged that certain issues could only be responded to by the Claimant and that she had failed to offer professional supervision to Skastina Omboga, thus misleading the CEO on the 2016/2017 admission process and had employed or allowed her relative to be employed and assigned duties in her department.
57. The witness further testified that a show cause letter was issued and the Claimant responded and due to unsatisfactory response, a final warning letter was issued on 14th September, 2014.
58. That after the management withdrew managerial responsibilities and offered the Claimant the position of Senior Teacher, the Claimant declined and the Respondent terminated her employment.
59. On cross-examination, RWI confirmed that he joined the Respondent in 2016 and was the Human Resource Manager during the Claimant's employment.
60. That the Mid-Year Review was conducted in June 2017 by the Line Manager, Mr. Stephen Muoka.
61. He confirmed that neither Dr. Muoka's name nor comment appeared on the Draft Performance Review Form on record.
62. That there was no response to the Claimant's comments on the form.
63. The witness stated that the additional notes on paragraph 5 of the form were added by the Director of Teaching and Learning (DTL) though unsigned and made no reference to Mr. Muoka.
64. It was his evidence that the form was neither dated nor signed and was incomplete.



65. The witness testified that the additional notes were communicated to him and Mr. Les by the DTL and no reason was given for the addition.
66. That he authored the show cause letter and he did not respond to the Claimant's response.
67. It was his testimony that bullet 4 and 5 of the final warning were allegations not included in the show cause letter.
68. The witness testified that the final warning letter was handed over to the Claimant on 14th September at 4.00 pm and she was accorded one day to respond and employment was terminated the following day by letter sent on email at 4.59 pm and hand delivered on the same day.
69. On re-examination, the witness testified that it was the duty of the Line Manager or Supervisor, Dr. Stephen Walker to conduct the performance review.
70. That the Line Manager would put in a comment in the review form.
71. That demotion was a disciplinary sanction.
72. It was RWI's testimony that the reason for termination was failure to respond to the warning letter on 15th September, 2017.

Claimant's submissions

73. The Claimant's counsel submitted that although poor performance was a valid ground for terminating the Claimant's employment, the Respondent adduced no evidence to demonstrate that the Claimant was a poor performer and had to be demoted.
74. The decision in *Jane Samba Mukalla V Ol Tukai Lodge Ltd* was relied upon to urge that the law placed a higher bar on a Respondent who alleged that termination of employment was based on poor performance.
75. As regards procedure, counsel relied on the provisions of Section 41 of the *Employment Act* to urge that the procedure adopted by the Respondent fell short of the statutory threshold.
76. The decision in *David Gichana Omuya V Mombasa Maize Millers Ltd* (2014) eKLR was relied upon to reinforce the submission.
77. The court was urged to award damages for unemployability of the claimant.

Respondent's submissions

78. The Respondent's counsel identified two issues for determination;
 - i. Whether termination of the Claimant's employment by the Respondent was fair, justified and lawful.
 - ii. Whether the remedies sought by the Claimant ought to be granted.
79. As regards termination, counsel urged that in arriving at its decision on whether termination was fair or justified, the court was obligated to examine the procedural and substantive fairness of the process.
80. Reliance was made on the provisions of Section 41 of the *Employment Act* as well as the decision in *Anthony Mukala Chitavi V Malindi Water & Sewerage and Co. Ltd* (2013) eKLR to highlight the procedural precepts of a fair termination of employment.



81. Counsel urged that the Claimant was summarily dismissed in accordance with the provisions of Section 44 of the [Employment Act](#) after a disciplinary process commenced with a show cause letter dated 31st August, 2017 and she responded to on 4th September, 2017 and concluded on 14th September, 2017 when the Claimant failed to attend a disciplinary hearing.
82. Section 43(2) of the [Employment Act](#) was cited to show that the Respondent had reason(s) to terminate the Claimant's employment.
83. Reliance was also made on the Court of Appeal decision in [Reuben Ikatwa & 17 others V Commanding Officer British Army Training Unit Kenya & another](#) (2017) eKLR to urge that the test applicable was whether a reasonable employer could have decided to dismiss an employee on the facts of the case and whether the sanction was reasonable. The decision in [Iyego Farmers Co-operative Sacco V Kenya Union of Commercial Food and Allied Workers](#) (2015) eKLR was also relied upon.
84. The sentiments of Rika J. in [David Wanjau Muhoro V Ol Pejeta Ranching Ltd](#) (2014) eKLR were also relied upon to urge that the court should employ the test of a reasonable employer in similar circumstances.
85. Counsel submitted that the Respondent's decision was based on the Claimant's conduct and incompatibility with the academy.
86. It was submitted that the Claimant failed or refused to obey a lawful and proper command which was within the scope of her duty to obey.
87. That she had refused to disclose that an intern in her department was a relative which was mandatory under the Respondent's staff manual.
88. Counsel rehashed the contents of the notice to show cause and warning letter in support of the submission.
89. As regards the effect of Staff Manual and obedience to order, counsel relied on the decisions in [Kenyatta Maita Mwawashe V Plan International Kenya](#) (2017) eKLR and [Heritage Insurance Company Ltd V Christopher Onyango & 23 others](#) (2018) eKLR.
90. It was urged that the Claimant had received, read and signed the Respondent's Human Resource Policies and Procedures.
91. Counsel relied on Clauses 2.6 and 2.8 on requirement of confidentiality and disclosure of close family or romantic relationships with job applicants.
92. Counsel further submitted that the Respondent scheduled a disciplinary hearing on 14th September, 2017 and 15th September, 2017 and those scheduled to attend were the Claimant, Denis Ogada and CEO Les Baillie and the Claimant was given an opportunity to be heard in person but the Claimant neither attended the proceedings nor respond which culminated in the final warning letter which imposed sanctions and demoted the Claimant on 14th September, 2017.
93. That the Claimant failed to attend the disciplinary on 15th September, 2017.
94. According to counsel, the Claimant squandered the internal grievance handling mechanism and could thus not be heard to say that he was not given an opportunity to defend herself as held in [David Njeka V Lavage Dry Cleaners Ltd](#) (2013) eKLR cited by counsel.
95. That the claimant declined to accept the disciplinary action imposed by the Respondent.
96. Finally, counsel submitted that the Respondent had discharged the evidential burden of proof.



97. As to whether the Claimant is entitled to the reliefs sought, counsel for the Respondent submitted that the remedy of reinstatement was not only discretionary but had a statutory limitation period of 3 years under Section 12(3)(vii) of the *Employment and Labour Relations Court Act*, 2011 and was thus not available. The decisions in *Teachers Service Commission V Timothy Onyango Olale* (2022) eKLR and *Lawrence Onyango Oduori V Kenya Commercial Bank Ltd* (2014) eKLR were relied upon to buttress the submission.
98. On damages for unfair termination, counsel urged that the Claimant had not laid the basis for the maximum award of 12 months salary.
99. Counsel urged that should the court find that termination of the Claimant's employment was unfair, it should hold that the 3 months salary paid by the Respondent in lieu of notice was sufficient as the objective of Section 49 was to compensate the employee not to punish the employer.
100. Counsel urged that the claim for severance pay was not properly founded.
101. That the claim for unemployability was subsumed in Section 49 of the *Employment Act* and general damages were not available in this case as was held in *Kenya Broadcasting Corporation V Geoffrey Wakio* (2019) eKLR.
102. The court was urged to dismiss the suit with costs.

Determination

103. The issues for determination are;
 - i. Whether termination of the Claimant's employment was unfair and unlawful.
 - ii. Whether the Claimant is entitled to the reliefs sought.
104. As to whether termination of the Claimant's employment was unfair, counsel for the parties adopted diametrically opposed positions. While the Claimant's counsel submitted that it was unfair, the Respondent's counsel asserted that the Respondent had valid and justifiable grounds to terminate the Claimant's employment and did so in accord with the law.
105. As held by the Court of Appeal in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR, various provisions of the *Employment Act*, 2007 address the essentials of termination of employment, such as prove of reason(s) for termination (Section 43), prove that the reasons were valid and fair (Section 45), justification for termination (Section 47(5)) and compliance with the mandatory procedure provided by Section 41 of the *Act*.
106. The foregoing and other provisions of the Act must be complied for a termination of employment to be deemed fair.
107. Section 45(2) of the *Employment Act*, 2007, the bedrock of fair termination of employment provides that the employer must prove that the reason(s) for termination are valid and fair, relate to the employees conduct, capacity or compatibility or operational requirements of the employer and the termination was conducted in accordance with fair procedure.
108. Both this court and the Court of Appeal have construed the foregoing provisions to the effect that for a termination of employment to be deemed fair, it must be substantively justifiable and procedurally fair. In *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR, Ndolo J. stated that while substantive justification was concerned with the reason(s) for the termination procedural fairness related to the process employed by the employer in the termination.



109. A similar holding was made by the Court of Appeal in *Naima Khamis V Oxford University Press (E.A) Ltd* (2017) eKLR as follows;

“ . . . the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also Section 45(2)(c) requires a termination be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also substantively unfair where the employer fails to give valid reasons for the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required.”

110. The court is guided by these sentiments.

111. I will now proceed to apply the foregoing provisions and propositions of law to the facts of the instant case.

Reason(s) for termination

112. Although the Respondent’s counsel submitted that the Claimant’s employment was terminated because she failed to attend the disciplinary hearing or obey lawful orders by the Respondent among other reasons, the Respondent did not state so in its termination letter.

113. The termination letter dated 15th September, 2017 under the Reference Termination of Employment Contract stated inter alia,

“Reference to the discussion held on 14th September, 2017 on your final warning letter and withdrawal of managerial responsibilities owing to disciplinary action on yourself which you declined to respond to. The Mpesa Foundation Academy is left with no option but to terminate your employment contract effective 5th September, 2017.

Your final dues will be prepared . . .

We would like to take this opportunity to wish you well in your future endeavours.

Yours sincerely

For and on behalf of Mpesa Foundation Academy

Signed

Les Baillie.

Chief Executive Officer – Mpesa Foundation Academy.

114. On re-examination, RWI testified that the reason for termination was the refusal to respond to the final warning letter dated 14th September, 2017.

115. Instructively, the final warning to the Claimant made no reference to a response or queries or concerns being raised by the Claimant and there was no time limit and neither party testified on the issue of timing or response. The letter simply communicated the Respondent’s decision to the Claimant.

116. Surprisingly, the final warning letter to the Claimant was issued to the Claimant at 4.00 pm during a meeting on 14th September, 2017 and had been written before the meeting.



117. The Claimant testified that she declined to acknowledge receipt evidence the Respondent did not controvert.
118. The Respondent did not produce its copy of the letter.
119. But even assuming that the parties had agreed that the Claimant was supposed to respond within the 24 hours, unilaterally fixed by the Respondent's Human Resource Manager and Dr. Stephen Walker in the Claimant's absence, was it reasonable bearing in mind that the Claimant had on the 14th September, 2017 requested to consult her counsel on the issue during the meeting? The court is not persuaded it was.
120. Although email communication between the Claimant and RWI, Mr. Denis Ogada suggests that the Claimant actually responded to the final warning letter, neither the Claimant nor the Respondent produced a copy of the response. However, the Claimant testified that the response was delivered to the Respondent's premises after 5 pm but was received on 18th September, 2017, evidence the Respondent did not controvert. The Claimant's employment had already been terminated.
121. It is common ground that the Final warning letter to the claimant raised additional issues not included in the notice to show cause and the Claimant had reason to respond though the letter had no time limit.
122. The final warning letter dated 14th September, 2015 communicated the Respondent's sanction on the Claimant and the Claimant had the right to respond or appeal but does not appear to have been accorded the opportunity to do so.
123. The Respondent's mind appear to have been made up and the Claimant's response was inconsequential as evidenced by the speed at which employment was terminated.
124. The Respondent's witness confirmed that the Claimant requested for time to respond to the final warning and the Respondent had accorded her one day to do so. The Claimant testified that she was asked to respond as soon as possible. It is unclear as to what the duration was.
125. Although the witness testified that the termination letter was prepared on 15th September, 2017, he did not disclose whether he drafted it in the morning or afternoon bearing in mind that the Claimant was not in the office and the letter had to be delivered from Thika to Nairobi where she lived.
126. From the evidence on record, the court is unpersuaded that the Claimant's employment was terminated because she did not respond or react to or appeal the decision communicated on 14th September, 2015. The timing of the termination was in the court's view suspicious.
127. Why then did the Respondent terminate the Claimant's employment?
128. While the Claimant's counsel submitted that the Respondent had not demonstrated that the Claimant was a poor performer, owing to the incomplete Mid-Year Performance Review, 2017, the Respondent's counsel did not submit on this issue and opted to rely on breaches of the Respondent's Human Resource and Procedure Manual, 2017 to justify the charges made against the Claimant in the notice to show cause and Final Warning letter.
129. Counsel, however faced serious challenges in submitting that these were the reasons the Respondent relied upon to terminate the Claimant's employment as the Respondent, as the employer did not expressly state so.
130. More significantly, the allegations about breach of confidentiality, non-disclosure that Steve Mbogo was a relative, failure to supervise and guide Skastina effectively, promises to influence Skastina's promotion being "untouchable", non-cooperation with the supervisor, to complete the Mid-Year



- Performance Appraisal, inciting remarks and several others were all highlighted in the final warning letter and the sanctions for all these transgression were outlined on page 2 of the letter.
131. Similarly, the letter from the Human Resource Department to the CEO dated 5th September, 2017 stated that the transgressions warranted a warning letter.
 132. The penultimate and concluding bullets of the letter on page 2 are unambiguous that;

“Any other offence or misconduct committed during this disciplinary period will warrant outright dismissal without notice.

You are expected to desist from any further misconduct which may lead to termination of your contract as an employee of the academy.”
 133. Evidently, the Final warning letter did not express or impliedly require the Claimant to respond. It was a matter of choice. Equally, the Claimant does not appear to have committed any other offence or misconduct after 4 pm on 14th September, 2017 to justify termination of employment on 15th September, 2017.
 134. It is common ground that the Claimant gave a detailed response to the notice to show cause and the Respondent adduced no evidence to demonstrate that it regarded the responses unsatisfactory or insufficient, not even the termination letter alluded to that fact.
 135. Finally, a word on the Mid-Year Performance Review, the draft of which was availed by the Respondent to show that the Claimant was unco-operative with the supervisor. RWI confirmed on cross-examination that the Director of Teaching and Learning at the time was one Dr. Stephen Muoka, the Claimant’s supervisor, yet neither his name nor comment appeared anywhere on the document and the additional comment was inserted by Dr. Stephen Walker, Director Teaching and Learning, as the email from him to the CEO and Denis Ogada shows. The email is dated 28th July, 2017 at 15.47 pm.
 136. From RWI’s evidence, it is unclear who the Claimant’s supervisor was and why the performance review was not completed.
 137. It is also unclear why Dr. Stephen Walker had to notify the Human Resource Manager and the CEO that he was making an addition to the Claimant’s Mid-Year Performance appraisal if the alleged under performance of the Claimant’s department had been “terrible” for a number of terms.
 138. Be that as it may, the appraisal was never concluded. However, it demonstrates the totality of the circumstances in which termination of the Claimant’s employment took place.
 139. From the evidence on record, it is decipherable that the Claimant had fallen out of favour with the Director, Teaching and Learning.
 140. For the above-stated reasons, it is the finding of the court that the Respondent has failed to demonstrate on a balance of probabilities that it had a valid and fair reason to terminate the Claimant’s employment.
 141. Since the final warning letter had not prescribed any duration within which the Claimant was to respond, comment or appeal, the less than 24 hours purportedly imposed by the Respondent without intimating the same to the Claimant cannot, in the court’s view pass the test of reasonableness.

Procedure

142. While the Claimant’s counsel submitted that termination of the Claimant’s employment was procedurally flawed for non-compliance with the provisions of Section 41 of the [Employment Act](#), the Respondent’s counsel urged that the Respondent complied with the requisite principles in that



- a notice to show cause was issued, and a disciplinary hearing took place on 14th and 15th September, 2017, but the Claimant refused to attend on 15th September, 2017 and was accordingly dismissed.
143. It is common round that the Respondent issued a notice to show cause to the Claimant on 31st August, 2017. The letter itemised seven charges and had no annexures. The Claimant responded by letter dated 4th September, 2017.
 144. RWI acknowledged that he received the response but neither acknowledged receipt nor responded.
 145. Copies of email communication on record reveal that on 12th September, 2017 at 12.13 pm, RWI informed the Claimant that they had scheduled a meeting at 4.00 pm at the CEO's office and attached the Claimant's proposed job description for her review.
 146. The Claimant by an email at 12.37 pm sought 48 hours to prepare for the meeting and the request was acceded to by email from RWI to the Claimant at 15.52 pm and the new meeting was scheduled for Thursday 14th September, 2017 at 4.00 pm at the CEO's office.
 147. The Claimant was issued with the final warning letter at the end of the meeting but had been made aware of it earlier and had even read it. RWI confirmed that no discussions took place after the letter was handed over to the Claimant. The witness further confirmed that none of the requirements stated in the letter had a timeline.
 148. According to the Respondent's counsel, the meeting convened by Mr. Denis Ogada and the CEO on 14th September, 2014, was a disciplinary meeting and was followed by another on 15th September, 2017 which the Claimant allegedly refused to attend which occasioned termination of her employment.
 149. From the evidence on record, while the Claimant was invited for the meeting slated for 14th September, 2014, there is no evidence on record to show that the CEO or Human Resource Manager scheduled a meeting on 15th September, 2015.
 150. Contrary to the Respondent Counsel's submission that the meeting scheduled on 14th September, 2017 was a disciplinary meeting, the contents of RWI's email to the Claimant dated 12th September, 2017 are explicit on the agenda of the meeting and it was undoubtedly not a disciplinary meeting.
 151. Similarly, the final warning letter was prepared before the meeting as RWI confirmed and was thus not a consequence of the meeting.
 152. Section 41 of the *Employment Act*, 2007 prescribes elaborate procedural steps to be complied with before termination of employment.
 153. In *Pius Machafu Isindu V Lavington Security Guards Ltd (Supra)*, the Court of Appeal held that the procedural requirements set out in Section 41 of the Act were mandatory.
 154. In *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR, the Court of Appeal held as follows;

“ Four elements must thus be discernible for the procedure to pass muster:-

 - i. an explanation of the grounds of termination in a language understood by the employee;
 - ii. the reason for which the employer is considering termination;
 - iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination are made;



- iv. hearing and considering any representations made by the employee and the person chosen by the employee.”

155. The court is guided by these sentiments.
156. Applying the foregoing principles to the facts of the instant case, it is evident that the provision of Section 41 of the Employment Act were not complied with in this case. The Respondent terminated the Claimant’s employment without notice or invitation to a disciplinary hearing or any hearing at all.
157. It is problematic to argue that the meeting scheduled for 14th September, 2017 was a disciplinary meeting for the simple reason that there was no formal invitation by the Respondent.
158. Notice of invitation to a disciplinary hearing must at least state the reason for the meeting, date and venue of the meeting as well as the employee’s right to be accompanied by another employee of his choice or a shop floor representative.
159. The Respondent adduced no such evidence and more fundamentally, had no minutes of the alleged meeting to buttress its case.
160. For the above-stated reasons, it is the finding of the court that the Respondent has failed to prove on a balance of probabilities that termination of the Claimant’s employment was conducted in accordance with the provisions of the Employment Act and thus fair.

Reliefs

161. Having found that termination of the Claimant’s employment by the Respondent was unfair within the meaning of Section 45 of the Employment Act, the Court proceeds as follows;

a. Reinstatement

162. The remedy of reinstatement is provided for by the provisions of Section 49(3)(a) of the Employment Act, read with Section 12 (3)(vii) of the Employment and Labour Relations Court Act, 2011.
163. The court is in agreement with the Respondent counsel’s submission that the remedy is discretionary and regard must be had to all circumstances of the case.
164. More significantly, the remedy is only available within 3 years of dismissal or termination of employment and in this case, the Claimant’s employment was terminated on 15th September, 2017 more than 5 years ago. The remedy is unavailable.

The prayer is declined.

b. Damages for unfair termination Kshs.4,800,000/=

165. Having found that termination of the Claimant’s employment was substantively and procedurally unfair, the Claimant is entitled to compensation under the provisions of Section 49(1)(c) of the Employment Act subject to the provisions of Section 49(4) of the Act.
166. The court has taken into consideration the fact that;
 - i. The Claimant was an employee of the Respondent for a duration of one (1) year, and 7¹/₂ months, a fairly short time.
 - ii. The Claimant wished to continue as exemplified by the prayer for reinstatement.



- iii. The Claimant had no previous record of misconduct or warning letter. During the 2016 Annual Performance Review, the Claimant was rated as one who exceed expectations and was promoted to the position of Deputy Head of Academics at Kshs.400,000/= per month.
- iv. The Claimant contributed to the termination of her employment by inter alia failure to disclose that Steve Mbogo was a relative.
- v. The Claimant did not appeal the decision of the CEO to terminate her employment.

167. In light of the foregoing, the court is satisfied that the equivalent of 3 months gross salary is fair.

c. Severance pay at 15 days per year Kshs.800,000/=

168. The court is in agreement with the Respondent Counsel's submission that severance pay is only available under the provisions of Section 40(1)(g) of the Employment Act where an employee loses employment on account of redundancy and the Claimant did not.

The prayer is declined.

d. Unemployability for 5 years Kshs.14,400,000/=

169. The Claimant is seeking compensation for the duration she remained without employment owing to the Respondent's default. This claim is unsustainable under the provisions of the Employment Act.

170. More significantly, the loss claimed is compensated under the provisions of Section 49(1)(c) of the Employment Act, 2007.

The prayer is declined.

e. Damages arising out of unfair labour practices

171. The Claimant adduced no evidence of entitlement to the remedy of damages.

The prayer is declined.

f. General damages

172. The particulars of this prayer were not articulated.

The prayer is declined.

173. In the upshot, judgement is entered for the Claimant against the Respondent as follows;

- a. Equivalent of 3 months' salary.
- b. Costs of the suit.
- c. Interest at court rates from the date hereof till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15TH DAY OF MARCH 2023

DR. JACOB GAKERI

JUDGE

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 15th March 2020 and subsequent directions of 21st 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 has 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.

DR. JACOB GAKERI

JUDGE

