



**Gichane v Pan Africa Christian University (Cause 1240 of 2015)  
[2023] KEELRC 584 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 584 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1240 OF 2015  
SC RUTTO, J  
MARCH 10, 2023**

**BETWEEN**

**JULIUS GICHANE ..... CLAIMANT**

**AND**

**PAN AFRICA CHRISTIAN UNIVERSITY ..... RESPONDENT**

**JUDGMENT**

1. The suit was commenced by way of a Memorandum of Claim dated 15<sup>th</sup> July, 2015, and subsequently amended on 25<sup>th</sup> November, 2020. The claimant avers that he was employed on permanent terms by the respondent with effect from 5<sup>th</sup> September, 2002. That before then, he had served as a part time lecturer and a computer lab assistant and during his service, had been deployed as an IT Manager. That by a letter dated 15<sup>th</sup> April, 2015, he was terminated from employment with effect from 16<sup>th</sup> April, 2015. According to the claimant, his termination was unfair, illegal, null and void as he was not subjected to any disciplinary process as required under the law. On this account, the claimant prays for the sum of kshs 1,611,770.00 being unpaid salary, compensatory damages, salary in lieu of notice, prorated leave travelling allowance and leave allowance. The claimant has further prayed for damages for alleged discrimination.
2. In answer to the Claim, the respondent filed a Statement of Response dated 27<sup>th</sup> August, 2015, through which it avers that the claimant was found unsuitable as he did not have an undergraduate degree in the subject he was supposed to be teaching. That this was following grant of a Charter to the respondent by the Commission of University Education. The respondent contends that it acted within the law and regulations and did not commit any wrong in the process of terminating the claimant's services. Consequently, it has asked the Court to dismiss the suit with costs.
3. The claimant filed a Reply to the Defence through which he denied the respondent's averments and reiterated that his dismissal was unfair.



4. The matter proceeded for hearing on 13<sup>th</sup> October, 2022 with each side presenting oral evidence.

#### **Claimant's case**

5. At the outset, the claimant sought to rely on his witness statement, further witness statement and documents filed together with his claim, to constitute his evidence in chief.
6. It was his evidence that he came to know of his termination on 16<sup>th</sup> April, 2015, the same day he was terminated. That on that day, he was summoned by the Vice Chancellor and the Human Resource Manager and given the letter of termination. That they verbally informed him that he had been terminated.
7. That the letter of termination made reference to Section 40 of the *Employment Act*. That when he read the said statutory provision, he came to learn that the same was in regards to redundancy.
8. He denied ever being asked by the respondent to upgrade his qualifications. That by the time he joined the respondent University, his qualifications were sufficient for his position before the Commission for Higher Education (now Commission for University Education) revised the requirements through an Act of Parliament in the year 2012 *vide* the *University Act* No.42 of 2012. That this law only became operational in October 2014 and it gave the affected persons five years to attain the required qualification.
9. That his termination on account of alleged failure to meet the minimum qualifications was therefore unlawful as the time given by law for attainment of the minimum qualification had not lapsed. That his termination was unlawful and unconstitutional as there were lecturers who did not have first degrees in the subjects they were teaching yet they were not terminated. He gave their names as follows:
  - a. Margaret Kyai (Bachelors of Theology B. TH) – Taught Community Development
  - b. Dr. Anne Wambugu (Bachelors of Arts – BA in Theology) - Taught Psychology.
  - c. Dr. Ciriaka Gitonga (Bachelors of Education B. Ed.) - Taught in Psychology.
  - d. Arthur Shikanda (Bachelors of Technology, B.Th.) – Taught Psychology.
10. That he was therefore discriminated as he was treated differently from other lecturers in a similar situation which is unconstitutional.
11. The claimant further stated in evidence that his termination was without notice and he was neither subjected to any disciplinary proceedings as required by the law, nor did he receive any warning letter regarding his performance as a lecturer.
12. Concluding his testimony, he asked the Court to reinstate him or grant him compensation as prayed in the Claim.

#### **Respondent's case**

13. The respondent called evidence through Ms. Esca Juma who testified as RW1. She identified herself as the respondent's Human Resource Manager and confirmed that she is the one the claimant was referring to in his testimony in chief. She started by adopting the respondent's Response, her witness statement as well as the respondent's documents to constitute her evidence in chief. She told the court that she is conversant with the facts in respect of the Claim.



14. It was RW1's testimony that the claimant was employed in the Computer Lab courses by the respondent on 17<sup>th</sup> February, 2002. That he was promoted as IT Manager on 31<sup>st</sup> July, 2007 and later appointed as a lecturer on 24<sup>th</sup> February, 2014.
15. That between 2014 and 2015 the respondent went through a process of elaborate workload analysis of individual qualification of all its staff in order to comply with the requirements of Commission of University Education (CUE).
16. That after the said exercise it was found out that the claimant had not enrolled for a PhD course which was the basic requirement for a Lecturer in compliance with the guidelines of CUE. That the claimant was requested to indicate when he was starting his PhD in order to be compliant but he declined to communicate the same.
17. That the claimant's services were terminated pursuant to Section 40 (1) (c) of the *Employment Act*. That the staff who left at the time were about 40 in number. That they were aware of what was happening. That there were series of meetings and attendance sheets and the claimant was also aware of the process hence his assertion that he was not aware of the same is untrue.
18. It was her evidence that the claimant had voluntarily participated in the evaluation process and knew that he did not meet the minimum requirements of a lecturer according to the guidelines of CUE. That the respondent communicated the possible outcome of the evaluation exercise. That there are some lecturers who left before as they knew that they were not qualified.
19. She denied that the respondent terminated the claimant's services unfairly and that he was discriminated against.
20. That the claimant has not cleared with the respondent hence is yet to collect his terminal dues.

### Submissions

21. Citing the case of *Kenfreight (E.A) Limited v Benson K. Nguti* (2016) eKLR, it was submitted by the claimant that termination should be based on valid reasons and fair procedure should be followed. That further, the respondent has not proved that he had breached a lawful contractual obligation to warrant summary dismissal. On this issue, the case of *Raymond Cherokewa Mrisha v Civicon Limited* (2014) eKLR. The claimant further submitted that there cannot have been basis for termination of the claimant's employment for failure to meet any qualifications. The claimant relied on the case of *Sarah Wanyaga Muchiri v Rt. Rev. Bishop Henry Kathii & another*.
22. On its part, the respondent submitted that the decision to terminate the claimant was fair, lawful and justified and was properly communicated to him. That the respondent terminated the claimant's services without notice and opted to pay him salary in lieu of notice. To this end, the respondent cited the case of *Joseph Mwaniki Nganga v United Millers Limited* (2022) eKLR. That the respondent was complying with the statutory directive by the body which regulates university education in Kenya, the CUE. That it had further demonstrated that its decision to terminate the claimant's contract was justified since the guidelines required a certain minimum qualification for anyone to be employed as a lecturer. That the decision was reasonable and fair. To buttress its submissions, the respondent cited the case of *Manuel Anidos v Kinangop Wind Park Limited (in receivership)* (2019) eKLR.

### Analysis and Determination

23. Arising from the pleadings, the evidence on record and the opposing submissions, the following issues stand out for determination:



- i. Whether the claimant's termination was fair and lawful.
- ii. Whether there is a case for discrimination.
- iii. Whether the claimant is entitled to the reliefs sought.

**Whether the claimant's termination was fair and lawful.**

24. It is the respondent's case that the claimant's termination was on account of his failure to meet the requisite qualifications for the position of lecturer. The claimant's termination was effected vide a letter dated 12<sup>th</sup> April, 2015, which reads in part: -

“As you are well aware, the university has gone through a process of elaborate workload analysis as well as analysis of individual qualifications against the minimum academic, professional and technical qualifications for each position. The university carried out suitability interviews for each individual employee which you attended on 25<sup>th</sup> February, and 8<sup>th</sup> April, 2015. We have further held briefing meetings on 7<sup>th</sup> April 2015 and 15<sup>th</sup> April, 2015.

As a result of the said elaborate process and in view of the university need to be more efficient, we have had to consider your skills and qualifications as outlined in section 40(1)(c) of the *Employment Act* and the guidelines that have been provided for by the Commission for University Education (CUE).

In this regard, you are among those whose services have been terminated with effect from 16<sup>th</sup> April, 2015....”

25. What the respondent was essentially communicating through the letter of termination, was that it could no longer retain the claimant as a lecturer on account of his skills and qualifications. This had to do with the claimant's capacity and the respondent's operational requirements.
26. In accordance with Section 45 of the *Employment Act*, the respondent was required to prove that indeed, the claimant's termination was fair substantively and procedurally.
27. Substantive justification or fairness refers to the reasons for which the redundancy was effected, while procedural fairness has to do with the procedure applied in effecting the redundancy. I will start by considering substantive justification.
28. In this case, the respondent was required to prove that the reason for the claimant's termination were valid, fair and related to his capacity and its operational requirements in that they could no longer retain his services as a lecturer.
29. It was not in dispute that the respondent had been given a charter hence its status had changed. It was the respondent's case that there were requirements issued by the Commission for University Education (CUE) with regards to the qualifications to be held by persons serving as lecturers and that the claimant was aware of the same. That the claimant did not meet the said requirements.
30. Despite the respondent's assertions, it did not produce in evidence, the said guidelines by the CUE to indeed confirm that the claimant's skills and qualifications were not upto par. Further, there was no evidence of communication from the respondent to the claimant advising him to upgrade his qualifications to the requisite standard.
31. Coupled with the foregoing, there was no evidence of the evaluation exercise undertaken and the output therefrom. Such evidence would have confirmed that following the evaluation exercise, the



- claimant was indeed found unsuitable for retention hence his termination. In addition, the attendance sheets referred to by RW1 were not exhibited in Court.
32. Besides, the respondent did not rebut the claimant's assertions that the relevant law on qualifications came into force in October, 2014 hence the grace period of five years for upgrading his qualifications was not over.
  33. In absence of evidence that the claimant's skills and qualifications were not measuring up to the requirements by the CUE as to remain in the employment of the respondent, as lecturer, I cannot help but find that the claimant's termination has not been substantively justified hence was unfair.
  34. With regards to procedural fairness, the respondent was required to prove that it complied with the provisions of Section 40(1) of the *Employment Act* in effecting the claimant's termination. Under the said provision, the following conditions must precede a redundancy:
    - a. where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
    - b. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
    - c. the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
    - d. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
    - e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
    - f. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
    - g. the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.
  35. It is instructive to note that all the conditions stipulated above are mandatory and it is not open for the employer to cherry pick and selectively apply the same.
  36. To start with, there was no evidence of compliance with the requirement under section 40(1) (b) from the respondent's end. There is no evidence that the claimant was issued with a notice of intention to declare him redundant on account of his skills and qualifications.
  37. The notice contemplated under section 40 (1) (b) is an "intention to declare a redundancy" and is issued before the redundancy itself. In this case, the claimant was terminated with immediate effect



hence there was no notice prior to his termination. As was held by Maraga JA, (as he then was) in the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR: -

“My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties, ....”

38. In this case, the respondent is evidently at fault for not complying with the requirement under Section 40(1) (b) of the *Employment Act*.
39. The respondent further failed the test under the second part of 40(1) (b) when it failed to prove that it issued a redundancy notice to the labour office. Despite the assertion by RW1 that the notice was issued to the labour office, no evidence was adduced to that effect.
40. From the claimant’s letter of termination, he was to be paid one month’s salary in lieu of notice as well as accrued leave days and prorated travelling allowance. This was presumably in accordance with the provisions of section 40 (1) (e) and (f) of the *Employment Act*. However, there was no evidence that the claimant was paid severance pay as required under (g). Notably, the claimant did not pray for the same in his claim.
41. In light of the foregoing, it is apparent that the respondent substantially failed to comply with the provisions of Section 40 (1) of the *Employment Act* hence is at fault.
42. On this issue, I wish to echo the sentiments of the Court in the case of *Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited* (2013) eKLR thus:

“Where redundancy is declared by an employer, the procedure to follow is as set out under the provisions of Section 40 of the *Employment Act* and where not followed, any termination as a result will be deemed unprocedural and unfair. Any termination of an employee following a declaration of redundancy must be based on the law otherwise the same becomes wrong and if the grounds used to identify the affected employees are not as per the law, the same becomes unfair.”

43. Similarly, having found that the respondent did not fully comply with the mandatory requirements stipulated under sections 40(1) of the *Employment Act*, I cannot help but find that the claimant’s termination on account of redundancy was unprocedural hence unlawful.
44. The total sum of my consideration is that the claimant’s termination was unfair and unlawful within the meaning of section 40, 43 and 45 of the *Employment Act*.

### **Discrimination?**

45. The claimant has alleged that he was discriminated by the respondent in that some of his former colleagues did not meet the minimum qualifications yet they were not terminated from employment. As noted herein, there was no evidence of the requirements by CUE, hence it is not possible to discern whether or not the lecturers named by the claimant, met the said requirements. In this regard, I pose to ask, what were the requirements for one to be retained as lecturer, was it a PhD? or was it based on the undergraduate degree vis a vis the courses taught? Without these parameters, it is not possible to establish whether there was discrimination.
46. In this regard, I am unable to find that there was discrimination there being no yardstick with which to measure whether the claimant was treated less favorably than his counterparts. As such, it is my finding that the claimant has not substantiated his claim in respect of discrimination.



### **Available Remedies?**

47. Having found that the respondent did not justify the claimant's termination and failed to adhere to the procedure for redundancy, I will award him compensatory damages equivalent to 7 months of his gross salary. This award has further been informed by the length of the employment relationship which spanned close to 13 years.
48. As the respondent had indicated in the letter of termination that the claimant would be entitled to salary for the days worked, one months' salary in lieu of notice, accrued leave pay and leave traveling allowance, the same are payable to him.

### **Orders**

49. In the final analysis I allow the claim and enter Judgment in favour of the claimant against the respondent as follows: -
  - a. A declaration that the claimant's termination by the respondent was unfair and unlawful.
  - b. One month's salary in lieu of notice being kshs 99,285.00.
  - c. The claimant is awarded compensatory damages in the sum of Kshs 694,995.00 which sum is equivalent to 7 months of his gross salary.
  - d. The claimant is awarded Prorated leave traveling allowance being kshs 18,936.00
  - e. The claimant is awarded 8 days accrued leave allowance being Kshs 4,274.00
  - f. The claimant is awarded Salary for 16 days worked in April, 2015 being Kshs 52,952.00
  - g. The total award is Kshs 790,093.00
  - h. Interest on the amount in (g) at court rates from the date of Judgement until payment in full.
  - i. The claimant shall also have the costs of the suit.

**DATED, SIGNED and DELIVERED at NAIROBI this 10<sup>th</sup> day of March, 2023.**

**STELLA RUTTO**

**JUDGE**

Appearance:

For the Claimant Mr. Gaita

For the Respondent Mr. Kitheka

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 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**

