



**Muyah v Agakhan Education Services Kenya (Cause 1202 of 2017)  
[2023] KEELRC 1087 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1087 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1202 OF 2017**

**SC RUTTO, J  
APRIL 28, 2023**

**BETWEEN**

**PATRICK MUYAH ..... CLAIMANT**

**AND**

**AGAKHAN EDUCATION SERVICES KENYA ..... RESPONDENT**

**JUDGMENT**

1. The instant suit was brought by Patrick Muyah through a Memorandum of Claim filed on June 27, 2017 in which he averred that he was employed on January 1, 2008 by the respondent as a Physical Education (P E) teacher at its Aga Khan Junior Academy.
2. On May 31, 2022, the Court allowed the Application for substitution of Patrick Muyah as the claimant, with his personal representative being Rose Wangari Munangwe. The Application was made on the premise that Patrick Muyah (deceased) passed away on April 6, 2021.
3. The claim against the respondent is for the sum of Kshs 5,369,237.53 being notice pay, salary for 15 days worked in December, 2015, compensatory damages, salary deductions and service pay as well as a declaration that the deceased's dismissal was wrongful, unlawful and unfair.
4. The claim was opposed with the respondent stating that it contracted a business known as "Proactive Concepts" to provide coaches to train the Saturday Soccer Club members. That on or about December, 2016, it was discovered through the respondent's internal audit department that the deceased was the sole proprietor of "Proactive Concepts", a fact he had not disclosed. The respondent further avers that the deceased was accorded substantive and procedural fairness and was justified in taking the action it took against him. The respondent has further contended that the deceased is not entitled to the reliefs sought hence has asked the Court to dismiss the Claim with costs.



### **Claimant's Case**

5. During the trial which took off on October 12, 2022, Ms Rose Wangari Munangwe testified in support of the claimant's case. To start with, she adopted the Memorandum of Claim and witness statement on record to constitute her evidence in chief. She further produced the documents filed with the Claim as exhibits before Court.
6. Ms Munangwe told Court that the deceased was her husband and that she came to know of the instant case through him. It was her evidence that the deceased was running the respondent's Saturday Soccer Programme from 2009 solely for the respondent. It was her testimony that there was no conflict of interest as the programme was for pupils of the respondent institution. She further stated that the deceased had declared that he was running Proactive Concepts.
7. Ms Munangwe further testified that the deceased was given a show cause why appropriate should not be taken against him on account of allegedly undeclared personal and conflicting interest in Proactive Concepts. On November 24, 2016, he responded to the show cause letter and disclosed the manner in which Proactive Concepts came to be. He further disclosed that it was mischievous for the respondent to claim that he had undeclared interest yet it had asked him to take over the Saturday Soccer Programme which later bore into Proactive Concepts. He was later suspended from employment to allow comprehensive investigations and was advised to report to the Regional Human Resource Manager on December 13, 2016.
8. On the said December 13, 2016, he appeared before the respondent's Regional Human Resource Manager and was shocked to find that a whole panel awaited him for the hearing of his case. He was not given time to prepare and was not accorded an opportunity to have another employee or other representative at the hearing. On December 15, 2016, the respondent sent him a letter communicating its decision to terminate his services at the school. He filed his appeal on November 24, 2016 but it was not considered on merit and the respondent upheld its decision to terminate his services. The dismissal was baseless and illegal as the respondent did not offer plausible reasons for the same.
9. Concluding her testimony in chief, Ms Munangwe asked the Court to allow the Claim as prayed.

### **Respondent's case**

10. The respondent called oral evidence through its Human Resource Officer, Ms Constance Imbimi Mwoni, who testified as RW1. At the outset, she adopted her witness statement to constitute her evidence in chief. She further produced the documents filed on behalf of the respondent as exhibits before Court.
11. RW1 stated that at the time of his termination, the deceased was occupying the position of Sports Coordinator. It was her evidence that the deceased was contracted separately to facilitate the Saturday Soccer Programme at the school at an agreed allowance with the last contract being for the period between September 10, 2016 and December 3, 2016.
12. The deceased's contract was subject to the terms and conditions stipulated in the contract as well as the existing rules and regulations such as the conflict of interest policy. The deceased signed the conflict of interest policy on July 6, 2016.
13. The respondent contracted a business known as Proactive Concepts to provide coaches to train the Saturday Soccer Club members for the period September 10, to December, 2016. The business was to be paid Kshs 224,400/= in consideration of the services to be offered. The contract was delivered by the deceased who was acting as the liaison between the respondent and Proactive Concepts. Through an



internal audit, the respondent discovered that the proprietor of Proactive Concepts was the deceased, a fact he had not disclosed.

14. The deceased was notified of the allegations against him being failure to declare his interest in the business. He was asked to show cause why disciplinary action should not be taken against him for contravening the express terms of the policy. the deceased submitted a written response on November 24, 2016 and was thereafter accorded an opportunity to make oral representations at a disciplinary hearing held on December 13, 2016.
15. The disciplinary committee found the allegations against the deceased were satisfactorily proved hence recommended termination of his employment. The deceased exercised his right of appeal and at the appeal hearing on January 16, 2017, before an independent committee, the initial sanction was upheld after due consideration.
16. It was RW1's further testimony that the deceased was accorded both substantive and procedural fairness in accordance with the spirit of the *Employment Act*, 2007 and the respondent was justified in taking the action it took.

### **Submissions**

17. It was submitted on behalf of the claimant that the respondent was aware of Proactive Concepts and in any event, the receipts issued were by the deceased and bore his phone number. It was further urged that the respondent did not exhibit how the deceased acted in conflict with its business. It was the claimant's further submission that it had been proved that the deceased was fired without good reason. In further submission, it was stated on behalf of the claimant that in as much as the deceased was heard on appeal, the said appeal emanated from a contaminated process. That the respondent failed to take the deceased through a fair and procedural hearing as per the tenets of the law. In support of the claimant's submissions, the cases of *John Florence Maritime Services & another vs Cabinet Secretary Transport & Infrastructure & 3* KESC 39 (KLR), *Mary Chemweno Kiptui vs Kenya Pipeline Company Limited* (2014) eKLR and *Anthony Mkala Chitavi vs Malindi Water & Sewerage Co Limited* (2013) eKLR were cited.
18. On its part, the respondent submitted that failure by the deceased to declare that he was the sole proprietor of another organisation that was doing business with the respondent was a clear violation of its Conflict of Interest Policy for which it was entitled to take disciplinary action. It was further submitted that Proactive Concepts offer a host of services hence such an extensive portfolio negates the contention that the organisation's sole reason for being in existence, was to service the respondent's Saturday Soccer Programme. The respondent further argued that the deceased had a continuing duty and responsibility to inform it that he was the sole proprietor of Proactive Concepts. In support of its arguments, the respondent placed reliance on the case of *Arnold Muoki vs Local Production Kenya Limited* (2021) eKLR.
19. It was further submitted that the process utilised by the respondent in terminating the deceased is compliant with the requirements of Section 41 of the *Employment Act*.

### **Analysis and determination**

20. Flowing from the pleadings on record, the documentary and oral evidence presented as well as the opposing submissions, the following issues stand out for determination: -
  - i. Whether the respondent has proved that there was a justifiable reason to terminate the employment of the deceased.



- ii. Whether the deceased was afforded procedural fairness prior to termination.
- iii. Is the claimant entitled to the reliefs sought?

### **Justifiable reason for termination?**

21. Section 43(1) of the *Employment Act* (Act) requires an employer to prove the reasons for termination and in default, such termination is deemed to be unfair. Further to the foregoing, 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; ...
22. The import of the provisions of Section 45 (2) (a) and (b) is that the reason for termination must be both fair and valid and related to the employee's conduct, capacity and compatibility.
23. With regards to the case herein, it is evident that the deceased was terminated on the basis that he failed to disclose a conflict of interest with regards to the ownership of Proactive Concepts. To put the issue in context, I will reproduce in part, the letter of termination, thus:

“RE: TERMINATION-GROSS MISCONDUCT”

...The allegations against you are as follows: -

1. Undeclared conflict of interest in ownership of a trading entity by the name Proactive Concepts that manages soccer activities within the Aga Khan Academy, Junior School; and
2. Allowing the said business entity to contract with the school, offer services and receive payment without declaring the conflict of interest to the company through the school management.

The Committee has considered the above allegations against the evidence, your written and oral representations and are of the view that the allegations have been proved.... there was a clear intention to withhold facts relating to the conflict of interest on the policy which you signed on 6<sup>th</sup> July, 2016 where you mentioned your interest in the Swimming Federation but left out your Proactive Concepts. As a result of the above, you are hereby informed of the termination of your employment...”

24. In support of its case, the respondent exhibited its Conflict of Interest Policy which provides at clause “b” as follows: -

“Full time employees of Aga Khan Education Services Kenya are not permitted to be engaged in employment, business or service with another organisation or have any financial/ business interest with any other organization/entity even on a part time or temporary basis. This will include owning, directly or indirectly a business/enterprise or having a material interest in the business of any competitor, supplier, contractor sub-contractor or any other organization or person doing business with the institution.”



25. The Policy further illustrated the types of conflict of interest to include; “Serving in an executive or managerial capacity or holding significant financial interest in entities doing business with the institution.”
26. The said Policy goes ahead to provide for the form and manner in which an employee is to declare conflict of interest. From the record, the deceased declared his interest on July 6, 2016 with the Kenya Swimming Federation.
27. The deceased did not dispute being the owner of the business entity known as Proactive Concepts. His contention was that the respondent was aware of his ownership of Proactive Concepts and that there was no conflict of interest in that regard.
28. On her part, the claimant exhibited temporary contracts in which the deceased had been engaged by Aga Khan Junior Academy, Junior School as a contractual soccer coach from September 8, 2012 upto December 8, 2012 and subsequently from January 19, 2013 to March 23, 2013. Another contract which was to run from September 10, to December, 2016 was executed between Aga Khan Junior Academy, Junior School and Proactive Concepts was exhibited.
29. What is notable from the contract executed by Proactive Concepts is that the said entity has been identified as “employee”. More importantly, the said contract is similar to the other temporary contracts in all respects. Further it contains the identity card number of the deceased, which is the same as in the other previous contracts. In addition, all the contracts have been co-signed by the deceased and the respondent’s head teacher, Dorena Maina. It is also noteworthy that the respondent admitted that the deceased had been engaged separately to facilitate the Saturday Soccer Programme at the school.
30. What can be deduced from the foregoing is that the respondent was aware of the deceased’s ownership of Proactive Concepts. Therefore, the respondent cannot feign ignorance of its knowledge with regards to the ownership of the said Proactive Concepts. Therefore, in as much as the deceased did not formally disclose his interest in Proactive Concepts, he did not conceal it either.
31. Be that as it may and despite the respondent being in the know with regards to the ownership of the said Proactive Concepts, he ought to have complied with procedure and formally declared his interest, seeing that he was being paid separately for the same. The kind of service he was offering under the said contract was one that required disclosure as contemplated under the respondent’s Conflict of Interest Policy. The fact that the respondent was aware of the deceased’s ownership of Proactive Concepts, did not preclude disclosure. It was a procedural policy requirement which was binding on all employees of the respondent. By failing to comply with the said policy requirement, the deceased was at fault.
32. Besides, the invoice from Proactive Concepts captures the services it offers as being sports service providers, training and performance improvement, team building, motivation, experiential learning, team tours and travel and adventure planning. It is therefore evident that the said Proactive Concepts had a wider scope and extended to other services hence was not solely for the purposes of the respondent as alleged. It was therefore prudent that the deceased declares his interest formally in Proactive Concepts.
33. In light of the foregoing, it is my finding that failure by the deceased to declare his interest in an entity that was doing business with the respondent, availed a fair and valid reason for his employer to take disciplinary action against him hence his termination cannot be termed as substantively unfair.



## Fair process?

34. Pursuant to Section 45 (2) (c) of the Act, an employer is required to comply with the provisions of a fair process and prove that it accorded an employee a fair hearing prior to termination. The specific requirements of a fair hearing are provided for under Section 41(1) of the Act, 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.

35. From the record, the deceased was issued with a notice to show cause dated November 23, 2016 detailing the allegations against him. He responded to the same comprehensively. Thereafter, he was suspended and advised to report to the Regional Human Resource Manager on December 13, 2016 for further communication. As it turned out, this was the day the disciplinary hearing had been scheduled to take place.

36. Indeed, there is no evidence that going in for the disciplinary hearing, the deceased was well aware of what lay ahead of him. Noting that the disciplinary hearing was to culminate in his termination from employment, it was only fair that the deceased be notified of the significance of his meeting with the respondent's Regional Human Resource Manager to allow him prepare psychologically. Afterall, the source of her livelihood was at stake. On this issue I will follow the determination in the case of *Nebert Mandala Ombajo vs Institute of Certified Public Accountants of Kenya* (ICPAK), Nakuru Civil Appeal No. 62 of 2018, where the Court of Appeal had this to say: -

“Disciplinary proceedings are a grave matter for an employee as the consequences may be catastrophic to the employee's life. In the case of the appellant, the complaints against him were serious, and there is no doubt that he needed sufficient time to prepare psychologically, and if need be, get the best advice that he could.”

37. I wholly apply and reiterate the above determination to the instant case. The respondent would not have suffered prejudice in any way by informing the deceased of the import of the meeting of December 13, 2016. This way, he would have prepared himself sufficiently prior to the said hearing. Indeed, the disciplinary hearing of December 13, 2016 can at best be termed as an ambush.

38. Therefore, in as much as the respondent appears to have initially complied with the procedural requirements under Section 41 of the Act, it was marred by the manner in which the deceased came to be aware of the disciplinary hearing of 13<sup>th</sup> December, 2016. In the end, the process was procedurally unfair against the deceased.

39. To this end, I cannot help but conclude that in as much as the respondent had a justifiable cause to take disciplinary action against the deceased, the process applied rendered the termination unlawful.

## Is the Claimant entitled to the reliefs sought?

40. As the Court has found that the summary dismissal of the deceased although justified, was procedurally unfair hence unlawful, the Court awards compensatory damages equivalent to two (2) months of the deceased's gross salary.



41. The respondent avers that the deceased was paid three months' salary in lieu of notice as per his contract of employment. To this end, it exhibited a cheque in favour of the deceased. On this score, the claimant exhibited copies of the deceased's pay slips for the months of February, 2017 and January 2017. The said pay slips indicate that he was paid notice pay in respect of one month through the January 2017 pay slip and notice for two months through the pay slips for the months of February, 2017. Indeed, one wonders why the claimant would exhibit the said pay slips if at all the deceased was not paid. Seeing that it is the claimant who presented the said pay slips, I am led to conclude that the deceased was paid salary in lieu of three months' notice, hence the relief is declined.
42. With regards to the salary for 15 days in December, 2016, the deceased's pay slip confirm that he was paid full salary for the month in December, 2016 hence this claim to that extent collapses.
43. On the issue of deductions for the months of December, 2016, to Utabibu SACCO and Utabibu Investment Cooperative Society, there is evidence that the same was deducted from his December, 2016 pay slip. The statement exhibited by the claimant from the deceased's SACCO does not reflect a credit entry being remittance from the respondent in the month of December, 2016. Further, the respondent did not produce any evidence to prove that it remitted the deductions to the said SACCO. Therefore, the claimant is entitled to reimbursement in respect of the said deductions.
44. The claim for service pay is declined as it is evident that the deceased was a registered member of the National Social Security Fund hence he fell within the exclusions under Section 35(6) of the [Employment Act](#).

#### **Orders**

45. Against this background, Judgment is entered against the respondent and the Court makes the following award in favour of the claimant: -
  - a. Compensatory damages in the sum of Kshs 432,276.00 being equivalent to two (2) months of the deceased's gross salary.
  - b. Refund of salary deductions in respect of Utabibu SACCO and Utabibu Investment Cooperative Society being Kshs 86,225.00.
  - c. The total award is Kshs 518,501.00
  - d. Interest on the amount in (c) at court rates from the date of Judgement until payment in full.
  - e. The claimant shall also have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL, 2023.**

**STELLA RUTTO**

**JUDGE**

**Appearance:**

**For the Claimant Ms Mwangi**

**For the Respondent Mr Weru**

**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.

