



**Murungi v Principal, Kenya Utalii College & 2 others (Cause  
1 of 2015) [2023] KEELRC 941 (KLR) (26 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 941 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1 OF 2015  
MA ONYANGO, J  
APRIL 26, 2023**

**BETWEEN**

**KEZIA KANAKE MURUNGI ..... CLAIMANT**

**AND**

**THE PRINCIPAL, KENYA UTALII COLLEGE ..... 1<sup>ST</sup> RESPONDENT**

**THE BOARD KENYA UTALII COLLEGE ..... 2<sup>ND</sup> RESPONDENT**

**THE KENYA UTALII COLLEGE ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant filed a Memorandum of Claim in 2015 which was amended and Further Amended on October 9, 2018 where she avers that she was employed by the 3<sup>rd</sup> Respondent in 1986 and confirmed on April 2, 1987 on permanent and pensionable terms as a serving lecturer in the Respondent's School of Business.
2. The Claimant avers that during the course of her employment, she diligently performed her duties/ obligations in accordance with the terms of employment.
3. It is her contention that vide a letter dated December 5, 2014, she was summarily termination from employment without any prior notice as required by the Employment Act.
4. The Claimant avers that the termination of her employment was unfair and unprocedural as she was not given sufficient reasons for the summary termination and no notice was given to her, Further, that she was not given an opportunity to defend herself on the allegations of insubordination as stated in the letter of termination.
5. The Claimant therefore prayed for judgment against the Respondents for;
  - a. A declaration that the termination was unlawful



- b. 2 months' salary payment in lieu of notice
- c. General damages
- d. Special damages
  - i. Item 1 (Teaching parallel program) Kshs 472,500
  - ii. Item 2 (Other Claims) Kshs 1,244,864
  - iii. Item 3 (Medical Reimbursement) Kshs 451,322
  - iv. Item 4 (Underpayment for teaching 5 years that is 15 semesters and 4 Years that is 12 semesters Thika Road and Town Campus respectively) Kshs 1,124,100

TOTAL Kshs 5,469,286
- e. Costs of this suit
- f. Interest on the above at court rates
- g. Any other or further relief the court may deem just and fit.

The Respondents' Amended Reply to the Statement of Claim and Counterclaim

6. In their Amended Statement of Response and Counterclaim the Respondents averred that the Claimant's employment with the 3<sup>rd</sup> Respondent was terminated in line with the provisions of the Employment Act as read together with the provisions of the contract of employment entered into between the parties and that further, the Claimant was paid three months' salary in lieu of notice.
7. It was contended that prior to the issuance of the termination letter, the Claimant had severally been requested by the relevant department of the Respondents through the offices of the Head of Department and Director of Studies to observe strict timelines under which various examinations were administered and results released to the College but the Claimant had consistently failed to do so leading to several instances where the schedules of students proceeding to in-training were upset and disorganized.
8. According to the Respondents, the Claimant was given several warnings to conclude the timely administration of examinations and release the results to avert student unrest but she consistently failed to do so. That the Claimant was frequently in breach of the terms and conditions of her employment.
9. It was asserted that the termination of the Claimant's employment was within the law for reasons that;
  - a. The Claimant failed to administer exams on the designated date and time after collecting examination papers from the examination office.
  - b. Unilaterally changing set institutional procedures and time frames without consulting the relevant departments.
  - c. Failure to submit examination marks on the expected dates which in turn severely affected the running of the college and resulted in students complaints to Quality Assurance;
  - d. Failure to follow set procedures and guidelines on administration and submission of examinations.
  - e. Failing, despite several requests, to submit individual work plans, course outlines and schemes of work.



- f. Undermining the integrity of examinations in the College by failing to follow the laid down procedures of exam invigilation.
  - g. Failure to submit examination marks for TO-12, FO-12, FBSP-12, FP-12, FPSP-12 and SB-12 on time which affected the operations of the examinations office since they could not release the results.
10. It was the Respondents case that the Claimant was given numerous chances to respond to complaints and /or allegations of insubordination which she failed to respond to.
  11. By way of counterclaim, the Respondents claimed that the Claimant entered into a tenancy agreement dated May 14, 2011 with the 3<sup>rd</sup> Respondent in respect of the Respondent's premises known as House No-11 under which the Claimant was obligated to meet all her obligations in the said agreement.
  12. It was averred that, as per the terms of the said tenancy agreement, the Claimant was required to make monthly payments of the rent chargeable and that the Claimant refused to meet her rent payment obligations on the premises leading to accrual of rent arrears.
  13. The Respondents maintained that the Claimant was eventually legally evicted vide a court order and that upon the said eviction, the Respondents established that the Claimant had misused and damaged the premises causing the Respondents substantial loss.
  14. The Respondents' claim against the Claimant therefore is Kshs.443,000 for outstanding rent arrears as at June 28, 2016, Kshs 250,000 as auctioneers' charges for executing the eviction order and repair costs for the premises at Kshs 77,950.
  15. The Respondent also prayed for interest thereon at court rates from June 28, 2016 until payment in full in filing the suit and costs of the suit.

#### **Claimant's Evidence**

16. The Claimant, Keziah Kanake Murungi testified as CWI on May 19, 2021 and relied on her witness statement and the documents filed in support of her case as her evidence in chief. She stated that on December 17, 2014, she received a letter of termination dated December 5, 2014. According to CW1, the said termination letter referred to a show cause letter which was alleged to have been sent to her but that she did not respond to. She testified that it had been sent to a post office address that she had stopped using since 2012.
17. CW1 maintained that she did not received the said show cause letter and further, she was not subjected to a hearing nor issued with a warning letter.
18. The Claimant further testified that she did not receive a bonus in the year 2014 as was a tradition and as was provided in her terms of service.
19. On being cross examined by Counsel Gichuru for the Respondents, the Claimant denied being paid 3 months' salary in lieu of notice.

#### **Respondents' Evidence**

20. RW1, Judith Atieno Okech, the Respondent's Human Resource and Administration Manager, testified and adopted her witness statement recorded on February 5, 2020 as her evidence in chief. She also relied on the documents filed in court in response to the claim.



21. RW1 maintained that the Claimant was issued with a notice to show cause letter after it was established that she was persistent in non-performance of her duties.
22. It was the contention of RW1 that it was after the Claimant failed to show sufficient cause and started making various unsubstantiated allegations which culminated in the issuance of the termination letter.
23. On the issue of bonus which the Claimant was not paid, RW1 stated that the Claimant was not paid the said bonus in the year 2014 as she had a case of conflict of interest where it is alleged that the Claimant was offering her services to other institutions and as a consequence she was not able to effectively perform her duties.
24. It was the Respondents case that bonuses was paid at the rate of 100% if one did not have a disciplinary issue and that it was only paid subject to the availability of funds.
25. With regard to the housing issue, the Respondents' witness maintained that the Claimant was allocated a house as a member of staff and that she was required to pay monthly rent.
26. RW1 maintained that the Claimant defaulted in remitting her rent as a result of which the Respondents were compelled to distrain for rent.
27. On cross examination by the Claimant's Counsel Mr Alosa, RW1 conceded that there was no memo denying lecturers from teaching in other universities.
28. RW1 further conceded that the employment contract was totally different from the tenancy contract. She further conceded that a breach of one would not necessarily affect the other.
29. The Respondents called one Wilson Kamau Mwangi, the 3<sup>rd</sup> Respondent's Director of Studies who testified as RW2. He adopted his witness statement recorded on February 5, 2020 and his documents filed in court as his evidence in chief.
30. According to RW2, sometime in 2014, the Respondents began receiving numerous complaints from various quarters and departments about the manner in which the Claimant was rendering her services and carrying out her duties which included insubordination, misconduct, failure/refusal to administer examinations, failure/refusal to prepare work plans and failure to submit examinations marks in good time. RW2 maintained that the Claimant's performance was generally wanting as different offices wrote memos on the said non-performance.
31. On cross examination, the witness stated that ideally, the proper procedure to be followed in such a case would have been to carry out investigations before the said termination.

### **Analysis and Determination**

32. After close of hearing the court directed the parties to file written submissions. I have considered the said submissions together with the attached authorities. From the pleadings on record, the evidence of the parties and the submissions filed, the issues that arise for determination in this case are as follows:
  - a. Whether the Claimant's employment was terminated was justified.
  - b. Whether the procedure followed was in accordance with section 41 of the Employment Act.
  - c. Whether the reliefs sought are merited.
33. It is now trite law under Section 45(2) of the *Employment Act* that an employer should not terminate the contract of employment of an employee except where there are valid and fair reasons.



34. Further, Section 43 of the *Employment Act* provides that the burden of proof in employment claims is for the employer to prove valid reason for the termination.
35. It is not in dispute that the Claimant was issued with a termination letter dated December 5. The said letter which formed part of both parties documents is reproduced below:

“Mrs Kezia K. Murungi,

Kenya Utalii College

NAIROBI

Dear Mrs Murungi,

RE: TERMINATION OF EMPLOYMENT

We refer to the various correspondences regarding the performance of your duties culminating in our letter sent to you by registered mail No. 179 Ref: KUC/2462/Vol II/(67) dated 14<sup>th</sup> October 2014 sent to Box No. 16650-00620 Nairobi which you were asked to show cause why your services should not be terminated. To date, the college has not received a response to the letter.

During September to December, 2013 semester, you failed to submit examination marks for TO-12, FO-12, FBSP-12, FP-12, FPSP-12 and SB-12 on time which affected the operations of the examinations office since they could not release the results as scheduled which affected scheduling of student proceeding on in-training. In January to April, 2014 semester you submitted marks for Human Relations units OF PBSP-2013 group late which resulted to a complaint by students. In May to September, 2014 semester you failed to submit the examination on Principles of Organization for FBSP-13 and TTM -12 course group which led to postponement of examination for the three campuses. You failed to attend a meeting scheduled on Friday 4<sup>th</sup> July, 2014 to discuss student’s matters. You also failed to submit individual work plan, course outlines and schemes of work as outlined in our ISO procedures.

We note that even after the receipt of the said letter, this semester you failed to hand in examination, moderate and proof read examination on time for MA-13 to TO/TG-13 which affected planning of the Examinations Department. You collected the MA 2012 examination on Monday 1<sup>st</sup> December, 2014 at 2:30 p.m and gave it on Tuesday 2<sup>nd</sup> December, 2014 instead of the scheduled date of 1<sup>st</sup> December, 2014 contrary to the laid down examination procedures. All the above acts amount to gross insubordination, gross misconduct and disobedience of lawful orders as stipulated in the Employment Act, 2007.

Be advised that your services as an employee of Kenya Utalii College are hereby terminated with immediate effect. Although the circumstances entitles the College to terminate your services summarily, it has been decided that you be paid three months’ salary in lieu of notice purely on ex gratia basis.

Please hand over all college property in your possession and settle all liabilities due to the college by completing a Staff Exit Form obtainable from the Office of the Human Resource Manager. You are also required to hand in as a matter of urgency all scripts and marks for the examinations you have administered.

Yours sincerely,

Dr Kenneth S Ombongi OGW



Principal”

36. It is evident from the termination letter that the Respondents had valid reason to terminate the employment contract of the Claimant.
37. The evidence adduced establish that the termination of the Claimant’s employment was as a consequence of her persistent failure to submit examinations, administer the exams and submit marks on time. There are on the record several memos written to the Claimant by her Head of Department and the Human Resource Department regarding the issue.
38. According to the Respondents, the failure of the Claimant to perform her duties as a lecturer resulted in rescheduling of examinations thereby inconveniencing students and disrupting the College’s academic calendar.
39. The Claimant on the other hand has maintained that the reasons given for her termination do not hold any water as she did not teach the subjects which she is accused of failing to submit marks for. As examples she refers to the Jan –April 2014 semester PBS-P1-2013 and May-August 2014 semester FBSP13 and TTM-12 units.
40. An analysis of the communication between the Claimant and the Respondents, particularly the internal memos from the various departments addressed to the Claimant and the responses thereto by the Claimant, and taking into consideration the industry in which the parties herein were engaged in, that is, the operations of a learning institution with timelines for examinations and in-training learning programs, there was valid reason for the Respondents to take disciplinary action against the Claimant. I therefore find that the reasons advanced by the Respondents for the termination of the Claimant’s employment were valid.
41. With respect to procedural fairness, Section 41 of the *Employment Act* provides: -
  1. Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
  2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”
42. The Claimant averred that due process was not followed in the termination of her employment.
43. In the case of *Alphonse Machanga Mwachanya Vs Operation 680 Limited* (2013) eKLR, the court summarized the legal fairness requirements set out in Section 41 of the Employment Act as follows;
  - a. That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered.
  - b. That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
  - c. That the employer has heard and considered any explanations by the employee or their representative.



- d. Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.
44. In the instant case, the Claimant was not taken through disciplinary hearing in accordance with Section 41 of the Employment Act. According to the Respondents this was because the Claimant failed to respond to the show cause letter. The Claimant on the other hand states that she did not receive the show cause letter which was sent to an address that she had stopped using for about 12 years.
45. I have noted from the record that the addresses used for the show cause letter is P O Box 16650 – 00620 Nairobi which the Respondents aver and the Claimant admitted, was the address for contact on the Claimant’s employment records which she had not changed. On the other hand, the letter of termination is addressed to the Claimant care of Kenya Utalii College. The Respondents did not explain why they used different addresses for the two letters.
46. From the foregoing I will give the Claimant the benefit of doubt and hold that she did not receive the show cause letter and therefore was unaware and could not respond to the same. The fact that the Claimant did not respond to the show cause letter was also not a reason not to subject her to a disciplinary hearing. Section 41 of the Act is explicit about a disciplinary hearing and the nature of the hearing. A show cause letter cannot suffice for a disciplinary hearing in the manner anticipated in the Act. I thus find that the Respondents failed to comply with procedural fairness in the termination of the Claimant’s employment contract therefore and the termination was unfair.

#### **What reliefs should then issue?**

47. The Claimant prayed for several heads of damages which I now wish to address.

##### **a. 2 months’ salary in lieu**

48. The Claimant sought to be paid 2 months’ salary in lieu. However, RW2 in his evidence stated that the Claimant was given 3 months’ salary in lieu of notice. This is also stated in the termination letter. I further note from the Respondents list of documents and particularly the document titled “KUC12” being the Pay Change Advise, the remarks by the author of the document shows that there was a directive that the Claimant be paid 3 months’ salary in lieu.
49. The payment was made but used to offset the debts owed by the Claimant to the Respondents. The prayer is therefore without basis and is declined.

##### **b. General Damages**

50. The Employment Act does not specifically provide for general damages. What is provided for in section 49 is payment of compensation for unfair termination or dismissal. Having found that the Claimant’s employment was unfair for failure to comply with fair procedure, she is entitled to compensation.
51. Section 49(4) governs assessment of compensation in cases of unfair or unlawful termination. Under the section, the contribution of the employee to the termination is material. In this case I have found that there was valid reason for termination. Balancing this with the Claimant’s long service and the fact that she had only a couple of years to serve before retirement, I award her 4 months’ salary as compensation in the sum of (99,500 x 4) Kshs 398,000/= .

##### **b. Special damages**

52. I decline to make any of the prayers under this head as none of the claims on special damages were proved.



### **The Respondent's Counterclaim**

53. The court record does not reflect that the Claimant responded to the Respondents counterclaim. During cross examination the Claimant admitted that she received the Respondents letter dated January 15, 2015 tabulating her terminal dues and monies she owed to the Respondent. The letter is reproduced below:

15<sup>th</sup> January 2015

Mrs, Kezia K Murungi

O. Box 12280-00400

NAIROBI

Dear Mrs Murungi

RE: AMOUNT OWED TO THE COLLEGE AT 15<sup>TH</sup> JANUARY 2015

Further to our letter Ref: KUC/2462/Vol.II (84) dated 5<sup>th</sup> December 2014 regarding your termination we would like to bring to your attention the following liability computed as here below which you are required to clear.



PAY	KSHS	
December 2014 Gross Salary (17 days)	99,550/30*17	56,411.60
3 months' salary in lieu of notice	67,050*3	201,150.00
13 <sup>th</sup> Salary	67,050	67,050
5 leave days not taken for FY 2014/2015	67,050/30*5	11,175.00
TOTAL	335,786.60	
Less: Payee	94,668.40	
Library books due	29,672.00	
College debts	295,948.15	
House rent December 2014 and January 2015	43,400.00	
Water bills not cleared	75,990.10	(539,678.65)
Amount due to the college	(203,892.05)	

Please make arrangements to clear the debt totalling Kshs 203,892.05 (Read: Kenya Shillings Two Hundred Three Thousand Eight Hundred Ninety Two Cents Five Only) as soon as possible in order to enable us balance your records.

ABDALLAH R. RANDANI

Ag. Human Resource Manager

cc. Financial Controller

53. From the letter the Claimant was aware of what the Respondents were claiming from her. Having not objected to the contents of the letter, I find that she owed the money set out therein. I have further perused the record and especially documents 14, 15, 16 and 18 of the Respondents' bundle. I am persuaded that the Claimant was indebted to the Respondents as set out in the documents.
53. Consequently, I enter judgment in favour of the Claimant in the following terms:
- Compensation for unfair termination Kshs 398,000
  - I also enter judgment in favour of the Respondent in the sum of Kshs 203,892 as set out in the letter dated January 15, 2015.
  - Each party shall bear its costs.



53. Orders accordingly

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF APRIL 2023**

**MAUREEN ONYANGO**

**JUDGE**

