



**Muriuki v Kenyatta University (Cause 1550 of 2018)
[2023] KEELRC 864 (KLR) (14 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 864 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1550 OF 2018**

**SC RUTTO, J
APRIL 14, 2023**

BETWEEN

DANIEL MURIUKI CLAIMANT

AND

KENYATTA UNIVERSITY RESPONDENT

JUDGMENT

1. Through a Statement of Claim dated November 21, 2018, the claimant avers that he was employed by the respondent as a pharmaceutical technologist with effect from February 6, 1997. That he was a high performer, diligent, efficient and faithful to his work. That on or about July, 2018, he was falsely accused of colluding with others to steal pharmaceutical products from the respondent's pharmacy. Following a series of events, the claimant was dismissed from employment. The claimant has termed his dismissal as unprocedural and an outright violation of the *Constitution* and the *Employment Act*. Consequently, he seeks against the respondent compensatory damages, notice pay, payment in lieu of leave, general damages for loss of reputation, accrued benefits under the respondent's staff retirement benefits scheme, a certificate of service, interest and costs of the suit.
2. The respondent admitted subjecting the claimant to a disciplinary process and averred that he was given an opportunity to respond to each allegation levelled against him. That the decision to dismiss the claimant was arrived after the Senior Board of Discipline had considered the evidence he adduced. Accordingly, the respondent has asked the Court to dismiss the claimant's suit with costs.
3. Through a Reply to the respondent's Response to the Claim, the claimant denied the averments in the Response and reiterated the averments in his Claim.
4. The matter proceeded for part hearing on July 5, 2022 and subsequently on November 2, 2022 when the defence presented and closed its case, thus marking the end of the trial.



Claimant's Case

5. The claimant testified as CW1 and at the start of the hearing, sought to adopt his witness statement, bundle of documents and supplementary documents to constitute his evidence in chief.
6. It was his testimony that his duties included, but were not restricted to ordering drugs and supplies from the drug store and dispensing drugs to patients. That sometimes in July, 2018, the respondent accused him falsely for allegedly colluding with others to steal pharmaceutical products and drugs from its pharmacy.
7. That on July 23, 2018, he recorded a statement with the respondent's Directorate of Security Services for purposes of conducting investigations. That further, on July 26, 2018, he wrote to the respondent's Deputy Vice Chancellor (Administration), giving a detailed account of his position in regard to the allegations and expressly indicated that the allegations levelled against him were unfounded. That he also attached other supporting documents to the said letter for purposes of verifying his standpoint as regards the issues raised.
8. That on July 30, 2018, he received a letter from the respondent informing him that it had suspended his employment on grounds of the aforesaid allegations. That immediately upon being suspended he was put out of all work and dues and/or salaries payable to him. That his University Medicare cover and that of his family was also discontinued instantly.
9. That by a letter dated August 22, 2018, the respondent invited him to appear before its Senior Board of Discipline for hearing. That he was further required to answer to and/ or defend himself in regard to the following allegations stated therein.
10. That he appeared before the respondent's Board of Discipline on August 27, 2018 as directed. That he went prepared with his defence and supporting documents but the Board refused to let him present his defence and instead, it proceeded to interrogate him without letting him respond to the allegations.
11. That his position was and still is as follows: -
 - a. That there were about thirteen (13) people who worked at the Pharmacy on a rotational basis. However, only Mr. Morogo and him were accused.
 - b. That no other employee within the department recorded statements to assist in the investigation of the matter.
 - c. The allegations against him are based on assumptions, are untrue, misconceived and have been levelled against him out of spite and malice.
 - d. The charges thereof are mere allegations as no evidence was adduced to prove that he was involved in stealing the drugs.
 - e. That the respondent has failed to ascertain the quantity and value of the allegedly stolen drugs and is therefore relying on assumptions.
 - f. He has not been formally charged over the same despite the allegations being of a criminal nature, therefore, this is an explicit indication that the respondent's assertions are baseless.
 - g. He has been an honest and industrious worker with a clean record because during the 21 years that he has served the respondent.
12. That on 29th August, 2018, the respondent wrote to him informing him that the Senior Board of Discipline had found him guilty and that it had resolved to dismiss him from employment.



13. That he believes that the respondent's actions in relation to his employment are un-procedural and an outright violation of the Constitution and the Employment Act as: -
 - a. The Senior Board of Discipline and its constituents acted as the accuser, jury and the executioner during the proceedings.
 - b. He was not given a fair chance and/or environment to counter the false allegations levelled against him.
 - c. The dismissal was unreasonable, without basis and against public policy.
 - d. That the respondent's action of entirely cutting off his salaries, dues, payable benefits and medical cover while on suspension and as investigations were ongoing was irrational and unjust.
14. That as a result of the unlawful dismissal by the respondent, he has suffered loss and mental torture for which the respondent is wholly liable.
15. That at the time of his dismissal, he was 55 years old and was due to retire at the age of 60. That he had therefore hoped that he would be employed at the respondent institution until retirement. That at his age, his chances of getting another comparable or suitable employment are greatly diminished.

Respondent's Case

16. The respondent called oral evidence through Mr. Ndiritu Gikaria who testified as RW1. He identified himself as the Human Resource Manager of the respondent institution. At the outset, he adopted his witness statement to constitute his evidence in chief. He further produced the documents filed on behalf of the respondent as exhibits before Court.
17. It was RW1's testimony that during the course of the claimant's employment, he was attached to the respondent's Health Unit Pharmacy and his duties included but were not limited to ordering drugs and supplies from the drug store and dispensing drugs to patients.
18. That on 11th day of July 2018, between 12.00 pm and 12.30 pm, together with another member of staff and a third male adult known to them, the claimant stole drugs of unknown quantity and cost from the respondent's Pharmacy. That the theft of drugs was captured by CCTV cameras strategically placed within the respondent's pharmacy.
19. That the theft captured on CCTV prompted the respondent's Directorate of Security Services to investigate the circumstances surrounding the theft from the respondent's pharmacy and to issue a report. That this included reviewing the CCTV footage and asking the members of staff identified in the footage to record statements with the Directorate.
20. That the Director for Security Services tabled his findings in the form of an internal memo to the Vice Chancellor dated July 22, 2018.
21. That it was an observation and finding of the investigation report that the claimant, his workmate, Dr. Joseph Kibet Morogo who is the pharmacy supervisor and another third male adult known to them, were inside the pharmacy on July 11, 2018 at 12.09 pm conversing before the third person went out through the pharmacy door. That the claimant was dressed in a white shirt and a black jacket with some brown patches. Thereafter, the claimant, together with his workmate, picked up some drugs five trips handfuls.



22. That the report further observes that the claimant's workmate went outside the pharmacy leaving him inside. That the claimant continued to pick more drugs and the final batch which he took to the dispensing room close to the counter. That this final batch was suspected to have been taken by the third adult who was probably waiting in the dispensing waiting room.
23. That the Report found that the claimant took advantage of a loop hole that existed in the Drug Movement Management System. That during the interrogation of the claimant and his workmate, they divulged information that the current Drug Movement Management System was deficient and it emerged that there had been massive thefts at the Health Unit leading to loss of large amounts of money.
24. That the claimant would requisition the drugs and place them in a holding shelf instead of the dispensing shelves which was suspicious and was in itself a devised plan of stealing the drugs from the respondent's Pharmacy. That the movement of drugs from the drug firms to the university pharmacy and vice versa is questionable and do not follow due process thus creating a fertile ground for felonies to be committed.
25. That the Report recommended that the claimant be immediately suspended pending his appearance before the Senior Board of Discipline. That following this recommendation, the claimant was informed of the charges he faced and was suspended with immediate effect pending his appearance before the Senior Board of Discipline through a letter dated 30th July 2018.
26. That before the letter suspending the claimant with immediate effect, he wrote to the respondent's Deputy Vice Chancellor (Administration). In his letter, the claimant attempted to give a detailed account of his position in regard to the allegations facing him. That the respondent considered this letter by the claimant and found that the explanation given was unsatisfactory hence it took the decision to suspend him from employment.
27. That on 22nd August 2018, the claimant was invited to appear before the Senior Board of Discipline where he would be accorded an opportunity to defend himself against the charges he faced. That once again, the charges facing the claimant were listed against him and he was invited to submit a written defence (if any) to the Deputy Vice Chancellor (Administration) before the day of the meeting.
28. That the disciplinary hearing was held on August 27, 2018 which the claimant attended and confirmed to the Board that he understood the reason why he had been invited to appear. That he proceeded to give his defence to the ten (10) charges levelled against him.
29. That the claimant explained that the only drugs taken out of the pharmacy were the orders for Satellite Campuses, drugs taken to his supervisor's office and expired drugs. That this confirmed that the claimant alongside others were involved in the theft of drugs since the staff from Liaison Office normally picked the drugs from the pharmacy themselves. That members of staff at the pharmacy do not deliver the orders for Satellite Campuses to the Liaison Office.
30. That there had been complaints by members of staff who are the patients at the respondent's Health Centre of lack of drugs in the pharmacy. That this had been occasioned by the theft of drugs by the claimant and his colleagues.
31. That the claimant admitted to the charge of the existence of loopholes in the drug movement system at the pharmacy and that he should have reported the said loopholes to the relevant authority when he realized that his recommendations during weekly meetings were not being implemented by the Head of the Pharmacy.



32. That there was also a possibility of other incidences of theft occurring whereby the claimant and other persons were not caught especially when the CCTV cameras had not been installed.
33. That a bench marking exercise had been carried out in Nairobi Hospital and as a result restructuring was going on at the Health Unit though at a slow rate due to financial constraints facing the respondent. That the restructuring process was aimed at improving the effectiveness and efficiency of the operations at the Health Unit and further aimed at curing the challenges facing the Directorate of University Health Services.
34. That when the restructuring process initially began, there was huge resistance and the claimant was one of the members of staff who resisted the changes made at the pharmacy. That for instance, staff members at the pharmacy were supposed to use the main door to the pharmacy and not the half door. The use of the half door arose during the restructuring process whereby there was resistance from members of staff who refused to use the main door. The upper part of the door was then closed and it was meant to be used as an emergency exit door. The use of the main door by members of staff at the pharmacy enhanced detection of any malpractice hence the resistance by some members of staff.
35. That the Senior Board of Discipline found that the claimant was guilty as charged and recommended that he be dismissed from the respondent's Service. That through a letter dated 29th August, 2018, the respondent informed the claimant of the decision to terminate his employment and his right of appeal within 14 days of receipt of the letter.
36. That the claimant did not appeal against the decision of the Senior Board of Discipline but instead through his advocates on record, chose to write a demand letter dated September 17, 2018 demanding reinstatement and in the alternative, compensation for unfair termination.
37. That the termination of the claimant's employment is therefore justified and he is not entitled to any of the reliefs sought.

Submissions

38. At the time of writing this decision, the claimant's submissions were not on the Court's physical record and could not be traced on the online portal hence I am led to presume that the same were not filed at all.
39. In its submissions, the respondent argued that there were valid and justifiable reasons for the termination of the claimant's employment. That the claimant's position was one of trust that obliged him to report any deficiencies or malpractices at the respondent's pharmacy. That he elected to keep quiet leading to the loss of drugs and medicine. In support of its arguments, the respondent placed reliance on the cases of *Samson Thuku Mutiso vs Diamond Trust Bank Kenya Limited* (2015) eKLR and *Andrew Amatulla vs Kenyatta University* (2019) eKLR.
40. It was further submitted that the claimant was given sufficient notice to prepare written statements and he was afforded an opportunity to appeal the decision for dismissal but he elected to forego his right of appeal. That further, the procedure adopted was in compliance with the disciplinary procedure and the *Employment Act*.

Analysis and determination

41. I have considered the pleadings on record, the documentary evidence, oral testimonies rendered before Court together with the rival submissions and the following issues stand out for determination:
 - i. Was there a justifiable reason to terminate the employment of the claimant?



- ii. Was the claimant accorded procedural fairness prior to being terminated from employment?
- iii. Is the claimant entitled to the reliefs sought?

Justifiable reason?

42. The starting point in determining this question is Section 43(1) of the *Employment Act* (Act) which requires an employer to prove the reasons for termination and failure to do so, such termination is deemed to be unfair. Further, 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; ...
43. Therefore, in terms of Section 45 (2) (a) and (b), it is not enough for an employer to spell out the reasons for termination. The said reasons ought to be fair and valid and the burden rests on the employer to prove as much. This is essentially substantive justification.
44. Turning to the case herein, the claimant was summarily dismissed on grounds that he stole drugs from the respondent's pharmacy. This is discernible from his letter of summary dismissal which is couched as follows: -

“Re: Dismissal

As you may recall you were invited to appear before the Senior Board of Discipline on Monday 27 August, 2018 where you were accorded an opportunity to defend yourself against the charge of being involved in the following acts of misconduct:

1. That on July 11, 2018 at 12.09 pm Dr. Joseph Kibet Morogo, yourself and another third male adult known to Dr. Joseph Kibet Morogo and you were inside the Pharmacy and conversed for some minutes before the third person went out through the Pharmacy door leaving the two of you inside.
2. That on 11/7/2018 at 12.12 pm, Dr. Joseph Kibet Morogo, the Pharmacy Supervisor, picked some drugs three times, handfuls of them, from the holding shelf near Pharmacy door and stuffed some in his socks, some in the black coat lower pocket and some in the left pocket of his pair of trousers.
3. At 12.15pm, Dr. Joseph Kibet Morogo went out of the pharmacy through the lower half door leaving you inside and you continued to pick more drugs and the final batch you took to the dispensing room close to the counter.
4. The last batch you may have taken to the third accomplice who was probably waiting at the dispensing waiting room.
5. Further it was noted that you were aware of the loophole that exists in the Drug Movement System which you both alleged had not been addressed despite your call for changes.



6. These notwithstanding you used the loophole to commit the offence knowingly or maybe to experiment with the system.
7. The act of requisitioning for drugs and placing them in a holding shelf instead of the dispensing shelves is suspicious and was in itself your devised plan of stealing the drugs from the University Pharmacy.
8. It was further noted that during interrogation, in defense of your acts you divulged critical information that showed that the current system is deficient and it emerged that there has been massive theft at the Health Unit leading to loss of large amounts of money.
9. The movement of drugs from the drug firms to the University pharmacy and vice versus is questionable and do not follow due process thus creating a fertile ground for you to commit the felonies.
10. An audit of the requisition process between 11th to July 13, 2018 reveals that huge quantities of drugs were stolen by yourself and others.

The Senior Board of Discipline considered the seriousness of the charge of which you were accused, the evidence adduced and found you guilty of the charge. It was therefore decided that you be dismissed from the University services.

You may appeal against this decision within the next fourteen (14) days upon receipt of this letter.

By a copy of this letter the Chief Finance Officer is instructed to delete your name from the payroll. A copy of the same letter instructs the Director, University Health Services to immediately cancel the University Medicare Cover for you and your dependents'.

Yours Faithfully,

signed

Prof. Fatuma Chege

Ag. Deputy Vice Chancellor (Administration)

45. The claimant distanced himself from the allegations levelled against him and termed the same as assumptions, untrue and misconceived. It was his case that the respondent failed to ascertain the quantity and value of the allegedly stolen drugs hence relied on assumptions. Be that as it may, the claimant admitted that there was a loophole in the drug movement system and that he had made recommendations in that regard but the same were not considered. In this regard, the claimant cited the head of pharmacy in that he would order drugs and store them in his office. That he would then ask members of staff to pick drugs from his office.
46. In its defense, the respondent averred that the claimant was captured by CCTV cameras strategically placed inside the pharmacy, carrying handfuls of drugs out of the pharmacy. That in total, the claimant and the other persons, he was acting with, made five trips handfuls. Therefore, the respondent's case was entirely hinged on the said CCTV footage. As it is, the CCTV footage was the respondent's smoking gun. I say so because the investigation report dated July 22, 2018 is based on the CCTV footage as it gives specific details and narration of the events constituting the allegations the claimant



was later confronted with. As a matter of fact, the charges against the claimant were drawn from the report which was informed by the CCTV footage.

47. Therefore, the CCTV footage was a crucial piece of evidence that was conspicuously missing from the record. Further, there was no evidence from the person who viewed the CCTV footage and prepared the report that incriminated the claimant. Indeed, I find it rather odd that the respondent would fail to produce such crucial evidence which was the basis of the disciplinary action against the claimant.
48. There is a legal procedure under the *Evidence Act*, providing for means through which such electronic evidence would have been adduced. Hence, why didn't the respondent employ this procedure to adduce the evidence in the form of the CCTV footage? In the end, failure to provide the said evidence fundamentally dented the respondent's case.
49. Ultimately, the respondent's allegations against the claimant remained bare and were not backed by concrete evidence.
50. In absence of such evidence, it cannot be established that the reasons for the claimant's termination were fair and valid. Needless to say, the allegations against the claimant were not proved and substantiated.
51. In light of the foregoing, I cannot help but conclude that the respondent has not proved to the requisite standard that there was a valid and fair reason to justify the claimant's termination. The claimant's termination was therefore unfair having failed to satisfy the requirements set out under section 43(1) as read together with section 45(2) (c) of the Act.

Procedural fairness?

52. The requirement for fair procedure is generally provided for under Section 45 (2) (c) of the Act. Further, Section 41 (1) of the Act makes specific requirements in regards to the process to be complied with by an employer. It entails notifying the employee of the allegations levelled against him or her and granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of his or her own choice.
53. From the record, it is evident that the suspension letter dated July 30, 2018 detailed the allegations against the claimant. Further, the invitation to the disciplinary proceedings dated 22nd August, 2018 reiterated the charges against him and through the said letter of invitation, the claimant was given an opportunity to submit a written defence and appear for a disciplinary hearing. As it is, the claimant elected not to submit a written defense but appeared for the disciplinary hearing. From the record, the claimant's verbal responses to the charges were noted in the disciplinary proceedings of 27th August, 2018, exhibited by the respondent. His further explanation was also noted in the disciplinary proceedings. Prior to this, he had recorded a statement and given his version of events.
54. In Considering the import of Section 41 of the Act, the Court of Appeal had this to say in *Postal Corporation of Kenya vs Andrew K. Tanui* [2019] eKLR: -

“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 is made;



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

55. Applying the above decision to the instant case, I am satisfied that the respondent complied with the requirements of Section 41 of the *Employment Act*. Needless to say, the spirit of Section 41 was fulfilled.
56. In the circumstances, I find that the claimant was accorded procedural fairness as he was informed of the allegations levelled against him, given an opportunity to be heard on his explanation to the allegations and had another shot at the Appeal stage. To this extent the respondent cannot be faulted.
57. Nonetheless, having found that the respondent failed to discharge its burden under Sections 43 (1) and 45(2) (a) and (b) of the Act, the claimant’s termination was unfair.

Reliefs?

58. On account of the claimant’s unfair termination, the Court awards him compensatory damages equivalent to eight (8) months of his gross salary. This award has taken into consideration the length of the employment relationship.
59. The claimant is further awarded three month’s salary in lieu of notice. This is pursuant to clause 6.2 of the “Terms of Service” document exhibited before Court.
60. With regards to the claim for annual leave, the same is awarded as pleaded as the respondent did not exhibit the claimant’s annual leave records in line with its obligation under Section 74(1) (f) of the *Employment Act*.
61. The claimant is further entitled to any benefits accrued under the respondent’s Staff Retirement Benefits Scheme.
62. The claim for general damages and the salary and allowances the claimant would have earned until his retirement, is declined.

Orders

63. Accordingly, I enter Judgment in favour of the claimant against the respondent and he is awarded: -
- a. Compensatory damages in the sum of Kshs 1,497,872.00 being equivalent to 8 months of his gross salary.
 - b. Three month’s salary in lieu of notice being the sum of Kshs 561,702.00.
 - c. Accrued leave days being the sum of Kshs 98,387.00
 - d. The total award is Kshs 2,157,961.00.
 - e. Interest on the amount in (d) at Court rates from the date of Judgement until payment in full.
 - f. The claimant is also entitled to any benefits accrued under the respondent’s Staff Retirement Benefits Scheme.
64. The claimant shall also be entitled to a certificate of service in line with Section 51(1) of the *Employment Act*. This shall issue within 30 days from the date of this Judgement.
65. As the Claim has succeeded, I would have awarded costs to the claimant but since no submissions were filed on his behalf, I will order that each party shall bear his/its own costs.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL, 2023.

.....

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Gachoka

For the Respondent Mr. Mungai

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 March 15, 2020 and subsequent directions of April 21, 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.

STELLA RUTTO

JUDGE

