



Yego v Bukura Agricultural College (Employment and Labour Relations Cause E044 of 2022) [2023] KEELRC 1287 (KLR) (24 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1287 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E044 OF 2022**

S RADIDO, J

MAY 24, 2023

BETWEEN

STEPHEN MUREY YEGO CLAIMANT

AND

BUKURA AGRICULTURAL COLLEGE RESPONDENT

JUDGMENT

1. Stephen Murey Yego (the Claimant) was employed by Bukura Agricultural College (the Respondent) as an Accountant through a letter dated November 11, 2016.
2. On March 2, 2020, the Respondent issued a show cause to the Claimant.
3. The allegations were unauthorised school fees credit transfers; falsified credit postings to student accounts and back-dating of credit transactions on student fees accounts.
4. The notice called upon the Claimant to respond and he responded on March 9, 2020 (the year was explained as a typographical error and should have read 2021).
5. In the response, the Claimant sought certain clarifications and the Respondent relied on March 12, 2021, giving the clarifications and forwarding a copy of an Internal Audit report. The Claimant was requested to respond within 7 days.
6. The Claimant responded on March 16, 2021 and on April 6, 2021, he was suspended pending appearance for a disciplinary hearing.
7. On April 12, 2021, the Respondent instructed the Claimant to attend a disciplinary hearing on April 19, 2021.
8. The Claimant sought legal advice and on April 16, 2021, his advocates requested for postponement of the hearing.



9. The hearing was postponed to May 13, 2021, when the Claimant attended with his advocate. The advocate was denied audience.
10. On September 1, 2021, the Respondent issued another show cause to the Claimant and he responded on September 3, 2021. This was followed with a letter dated October 12, 2021, notifying the Claimant of the termination of his employment.
11. The Claimant appealed against the termination on November 12, 2021 and December 17, 2021.
12. In the course of time, the Claimant requested the Respondent to furnish him with several documents to enable him pursue the appeal. The request was denied.
13. On October 14, 2022, the Claimant sued the Respondent and he stated the Issues in Dispute as:
 - i. Unfair termination of employment.
 - ii. Unlawful termination of employment.
 - iii. Discrimination.
14. The Respondent filed a Response and Counterclaim on January 19, 2023, and the Claimant filed a Reply to the Response and Counterclaim on February 17, 2023.
15. The Cause was heard on February 23, 2023, after which the Claimant filed his submissions on May 16, 2023 (should have been filed and served by April 14, 2023). The Respondent filed its submissions on April 28, 2023.
16. The Court has considered the pleadings, evidence and submissions on record.

Unfair termination of employment

Procedural fairness

17. The Claimant primarily challenged the procedural fairness of the termination of his employment on the grounds that the audit report which triggered the disciplinary process was an interim inconclusive and not final report which was not brought to his attention nor discussed by the Board; the suspension was not lawful; the investigations (committee) did not conform to the requirements of the Human Resources Manual; there was no due process and that his appeal was not considered.

Representation during disciplinary hearing

18. The Court has looked at section 11 of the Respondent's Human Resource Policy and Procedures Manual.
19. Section 11.4.1 of the Manual envisages that an employee facing disciplinary action is entitled to an opportunity to be heard, to attend a hearing with an expert of his choice, to cross-examine persons giving adverse evidence, notice of right of legal representation, right of appeal and information and documents to be relied on during the hearing.
20. The Respondent did not inform the Claimant of the right to attend the hearing in the company of his advocate and when the advocate appeared, he was denied audience.



Suspension as part of disciplinary process

21. Under section 11.13 of the Manual, the Respondent is given the discretion to suspend an employee where disciplinary proceedings have been instituted and the Disciplinary Committee advises the Principal that the employee ought to be dismissed.
22. At the time the Claimant was suspended on April 6, 2021, disciplinary proceedings had already been initiated through the show cause notice of March 2, 2021.
23. The suspension, therefore, did not taint the disciplinary process.

Composition of Investigations team

24. With regard to the investigations team, section 11.9.15 of the Manual requires the Principal to constitute a team of at least 3 and where the membership is more than 3, it should be an odd number.
25. The investigations team comprised of 5 members and a secretary. Since the role of the secretary was to take minutes, the assertion by the Claimant that the team membership violated the odd number requirement is without merit.

Discrimination

26. The Claimant further contended that the Respondent discriminated against him because he was the only staff from the Accounting department who was fingered and dismissed.
27. The Claimant also asserted that the other staff who had access to the Electronic Resource Platform (ERP) were only given warning letters or reprimanded (Oliver Kaino, Moses Adegu and Rachel Chepyego).
28. The Court has looked at the Audit report.
29. There is no particular part of the report which fingered the 3 persons named by the Claimant.
30. The Claimant also failed to present any evidence that the 3 named persons were involved in fraudulent transactions and were not taken through a disciplinary process.
31. The Claimant failed to prove discrimination.

The appeal

32. The Claimant appealed and in the course of appeal, he requested for certain records.
33. The Respondent declined to furnish the records but by the time the Claimant moved to Court, the Respondent had not determined the appeal.
34. The failure to determine the appeal, the Court finds, tainted the procedural fairness of the termination of the Claimant's employment.

Substantive fairness

35. By dint of sections 43 and 45 of the *Employment Act* 2007, the Respondent had the burden of proving as fair and valid the reasons for terminating the Claimant's employment.
36. To discharge the burden, the Respondent called a witness who produced copies of an audit report and the investigations report.



37. The audit and investigations reports leave no doubt that the Claimant had access to the ERP, and that he credited the account of Muhindi Elisha and Ibrahim Abdi Gure with non-existent cheques/money orders on October 14, 2019, February 25, 2020, March 16, 2020 and March 18, 2020, and also issued receipts.
38. The discretions by the Claimant bordered on dishonesty and, therefore, the assertions that trainings on the ERP system had not been conducted or that the system was not integrated, or that there were no policies in place cannot absolve the Claimant.
39. The Court is satisfied that the Respondent had and has proved valid and fair reasons to terminate the Claimant's employment.

Counterclaim

40. The Respondent counterclaimed Kshs 596,400/- against the Claimant being the monies said to have been lost as a result of the Claimant fraudulently crediting students school fees accounts and receipting the same when no monies were paid.
41. The Counterclaim was in the nature of special damages and required strict proof.
42. To prove that the Claimant was responsible for the loss, the Respondent relied on the Audit report which established that the school fees cash book for the year ended June 30, 2020, had fictitious entries amounting to Kshs 677,700/- out of which Kshs 596,400/- was attributable to the Claimant.
43. The Claimant had, however, in his response to the show cause explained that no monies had been lost and that there were unexplained bank deposits of around Kshs 6,145,000/-, whose source the internal Audit report did not consider.
44. The Respondent did not attempt to dislodge the explanation by the Claimant. It did not place before the Court any tangible evidence that the sum of Kshs 596,400/- was actually lost to meet the threshold of proving the special damages.
45. The Counterclaim was not proved.

Appropriate remedies

Reinstatement or compensation

46. The Claimant sought reinstatement and in the alternative compensation.
47. The employment relationship requires trust. The trust between the parties herein broke down, and the Court has concluded that the Respondent had valid and fair reasons to bring the relationship to an end.
48. Reinstatement would thus not be a practical or appropriate remedy.
49. In lieu of reinstatement, and considering that the Respondent had valid and fair reasons to terminate the employment relationship but got the process wrong, the Court is of the view that the equivalent of 1-month salary in lieu of notice and 2-months' gross salary as compensation would be appropriate (gross salary was Kshs 56,830/- according to October 2021 pay slip).

Lost income

50. The Claimant prayed to be awarded Kshs 25,231,200/- being the remuneration he would have earned had he served the Respondent up to retirement in 2043.



51. The Claimant did not provide an evidential, contractual or legal foundation to this head of the claim and relief is denied.

52. In reaching the conclusion, the Court endorses the holding by the Supreme Court of Uganda in *Bank of Uganda v Tinkamanyire (2008) UGSC* that:

The contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law. Similarly, claims of holidays, leave, lunch allowances and the like which the unlawfully dismissed employee would have enjoyed had the dismissal not occurred are merely speculative and cannot be justified in law.

Wages for 2021 and 3 months in 2022

53. The Claimant did not establish an evidential anchor to the head of the claim for wages in 2021 and relief is declined.

54. The Claimant and Respondent separated on October 12, 2021. The Claimant did not offer any services in 2022 to be eligible for the wages sought.

Withheld salaries

55. The Claimant was entitled to half-salary during suspension. His testimony that he was not paid was not rebutted and the Court will allow this head of the claim in the sum of Kshs 205,650/- as prayed.

Salary arrears

56. The Claimant did not lay an evidential basis for the sum of Kshs 226,433/- salary arrears and relief is declined.

Certificate of Service

57. A Certificate of Service is a statutory entitlement, and the Respondent should issue one to the Claimant within 30 days, if it was not issued.

Conclusion and Orders

58. The Court has found that the Respondent had valid and fair reasons to terminate the Claimant's employment but the process was tainted with procedural deficiencies.

59. The Claimant is awarded:

- i. Compensation Kshs 113,660/-
- ii. Pay in lieu of notice Kshs 34,830/-
- iii. Withheld salaries Kshs 205,650/-

TOTAL Kshs 354,140/-

60. The award to attract interest at court rates from date of judgment if not paid within 30 days.

61. Respondent to issue Certificate of Service within 30 days.

62. The Claimant filed his submissions way past the agreed timeline. No explanation was offered. He is denied costs.



DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 24TH DAY OF MAY 2023.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Kilomenn Advocates

For Respondent Mr Ouma, Advocate instructed by the Federation of Kenya Employers

Court Assistant Chrispo Aura

