



**Murundu v Tom Mboya University College (Cause E029 of 2022)
[2023] KEELRC 1072 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1072 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E029 OF 2022**

CN BAARI, J

MAY 4, 2023

BETWEEN

ZADOCK OBUCHERE MURUNDU CLAIMANT

AND

TOM MBOYA UNIVERSITY COLLEGE RESPONDENT

JUDGMENT

Introduction

1. The Claimant's Memorandum of Claim is dated June 27, 2022, and filed in Court on July 5, 2022. The Claimant seeks a declaration that termination of his services is illegal, unfair and against the provision of the law, payment of Kshs 1,976,340.00 in damages for the unlawful termination of employment, a Certificate of Service, costs of this suit and interest, and any other remedy this court may deem just and expedient to grant.
2. The Respondent entered appearance on July 28, 2022, and proceeded to file a Response to the Memorandum of Claim on August 17, 2022, through the Firm of Olel, Onyango, Ingutiah Advocates.
3. The Firm of Ileri & Co Advocates filed yet another Memorandum of appearance on behalf of the Respondent on August 19, 2023, and filed a Statement of Defence on August 30, 2022. During hearing, the two Firms indicated that they were both instructed and would both act for the Respondent in matter.
4. The matter was heard on November 23, 2022, when the Claimant testified in support of his claim. He adopted his witness statement and produced documents filed as exhibits 1-16 in the matter.
5. The Respondent's case was heard on January 24, 2023. A Mr Charles Omondi testified in support of the Respondent's case. He adopted his statement and produced the Respondent's amended list and bundle of documents filed in the matter.



6. Both parties filed submissions in the matter.

The Claimant's Case

7. The Claimant was employed by the Respondent on February 8, 2018, as a grade 12 lecturer on a permanent and pensionable basis. It is the Claimant's case that he served the Respondent until February 10, 2020, when the Respondent suspended him on allegation of leaking out examination papers to the students, interfering with the investigation process and failure to obey lawful and proper command.
8. The Claimant states that on February 28, 2020, he was invited to appear before the Staff Disciplinary Committee meeting scheduled for March 10, 2020.
9. The Claimant further states that after the hearing, the Respondent resolved to terminate his services on grounds of carelessly and improperly performing his duties, which led to exam leakage, interfering with the investigation process and failure to obey lawful and proper command.
10. The Claimant states that he lodged an appeal through the Respondent's internal disciplinary procedure, which he is yet to know the outcome of necessitating the filing of this suit.
11. The Claimant through his pleadings and oral testimony, challenges his termination as being unfair and unlawful, and prays that the Court awards him the reliefs listed in his statement of claim.

The Respondent's Case

12. The Respondent's case is that it employed the Claimant as a Lecturer at Grade 12, and terminated him from employment on grounds of misconduct within the institution.
13. The Respondent states that the Claimant was investigated on allegations of negligence, carelessness and failing to perform his duty carefully and properly contrary to Article 17.5.2 (iii) of terms and conditions of service of the Respondent.
14. The Respondent states that a Security Report indicates that the Claimant on November 27, 2019, while lecturing third year students, left his bag containing exam papers on a chair in front of the class room to attend to PHD students. It is the Respondent's further case that the class representative one, Collins Kibet, was according to the evidence of Frankline Kipngetch, also a student in the same class, seen taking photos of the lecturer's files which were later discovered to be exam papers.
15. The Respondent states that the Security Office conducted its investigations and found that the Claimant had negligently and carelessly left his bag in the Lecture Hall, and recommended that he appears before the Disciplinary Committee to deliberate on his conduct.
16. It is the Respondent's case that it invited the Claimant on February 28, 2020, to appear before the disciplinary committee on March 10, 2020, where he was accorded a fair hearing and had representation pursuant to Article 19 of the CBA and Article 17 of the TMUC terms and conditions of service for employee.
17. It is the Respondent's case that after the hearing, the committee found that the grounds for misconduct were not substantiated and warranted summary dismissal of the Claimant.
18. The Respondent further avers that the Claimant was subsequently terminated from employment effective March 10, 2020, vide a termination letter dated 17th, March, 2020.



19. It is the Respondent's case that the Claimant appealed against that decision to the chairperson, Tom Mboya University Council. It is its further case that the Appeal was heard by the Executive and Human Resource Committee of Council on August 28, 2020, in the presence of his UASU Union Representative, and that after careful consideration of all facts and evidence, the Council upheld the decision of the Staff Disciplinary Committee.
20. It is the Respondent's case that the University Council also resolved that the Claimant be paid three month's salary in lieu of notice, which sum was paid together with pension dues.
21. The Respondent prays that the claim be dismissed.

The Claimant's Submissions

22. It is submitted that there is no evidence that he Claimant leaked out examination papers or that he intimidated students, as the Respondent did not lead any evidence.
23. The Claimant further submits that no evidence was led to show that he was issued with a show cause letter, and that the suspension letter issued to him does not direct him to explain himself or issue a report on the alleged leakage, but it, instead, suspended him and directing him to await a disciplinary hearing on a date to be communicated.
24. The Claimant submits that he was not given a warning letter before the disciplinary proceedings were commenced, and that a warning letter is a prerequisite to disciplinary proceeding under the Collective Bargaining Agreement.
25. The Claimant further submits that the decision of the Respondent to terminate his services without a good reason was unfair and contrary to Section 45 of the Act and Article 47(1) of the [Constitution of Kenya](#) on fair administrative action.

The Respondent's Submissions

26. The Respondent submits that the Claimant was accorded a fair hearing and that disciplinary procedures were instituted and conducted in accordance with Article 47 & 50 of the [Constitution of Kenya](#), the [Employment Act](#) and the University's policies. The Respondent further submits that it complied with Section 43 of the [Employment Act](#), on valid reasons for terminating the Claimant.
27. It is submitted for the Respondent that the Claimant did not give a reasonable excuse as to why he carried exam paper to the lecture hall and left the bag unattended for 25 – 30 minutes, whilst he had been allocated an office with lockable drawers where he could have kept the exams safely.
28. The Respondent further submits that the Claimant's action amounted to negligence and carelessness as he owed the Respondent a duty of care to ensure that the exams are handled with utmost care.
29. The Respondent submitted that the Claimant did at the disciplinary hearing admit and acknowledged that the exams were leaked and even so, he neglected and/or failed to provide a report of the incident both to the deans and the investigation committee despite having being severally asked to do so by the dean.
30. It is the Respondent's submission that it did discharge its burden of proof in dismissing the Claimant on grounds of gross misconduct and pray that the Court finds that there were valid reasons for the summary dismissal of the Claimant.



Analysis and Determination

31. I have considered the pleadings herein, the witnesses' oral testimonies and the rival submissions. The issues for determination are:
- i. Whether the Claimant was unfairly terminated.
 - ii. Whether the Claimant is deserving of the remedies sought.

Whether the claimant was unfairly terminated.

32. The Claimant was summarily dismissed from the service of the Respondent on the grounds of negligence and careless performance of his duty. Specifically, the Claimant was charged with carelessly exposing university examinations to leakage, when he left a bag carrying the examination papers in a lecture hall unattended.
33. The *Employment Act, 2007*, provides that an employer shall not terminate/dismiss the services of an employee unfairly. By dint of this provision, the Act obligates an employer to initiate various fair procedure mechanisms of discipline in the work place, and ensure fairness in every step of a discipline process.
34. Failure to meet the stringent requirements of the law in respect of a termination/dismissal, renders the dismissal or termination unfair and wrongful.
35. In determining whether or not a termination/dismissal is fair, the Court considers the twin issues of procedure and the existence of valid, fair and justified reasons for the termination/dismissal.
36. Fair hearing is both a Constitutional and statutory requirement demanded of an employer in a termination/dismissal process. It is anchored on Section 41 of the *Employment Act*, which provides as follows: -
- “41(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.”
37. The Claimant at cross-examination admitted being issued with a notice to show cause. He also admitted writing a response to the show cause letter and appearing before a disciplinary committee of the Respondent for the hearing of his case, accompanied by a student as his witness, in addition to a Dr Kinzi, from his union.
38. It is the Claimant's further testimony before this Court, that he presented his case and asked questions.
39. In the case of *Postal Corporation of Kenya v Andrew K Tanui* [2019] eKLR, the Court of Appeal stated:
- “Section 41 of the Employment Act, provides the minimum standards of a fair procedure that an employer ought to comply with. The Section provides for notification and hearing before termination on grounds of misconduct.

The court stated that four elements must be discernible for the procedure to pass:



- a. an explanation of the grounds of termination in a language understood by the employee;
 - b. the reason for which the employer is considering termination;
 - c. entitlement of an employee to the presence of another employer of his choice when the explanation of grounds of termination is made
 - d. hearing and considering any representation by the employee and the person chosen by the employee.”
40. The Court of Appeal in *Postal Corporation of Kenya v Andrew K Tanui* Supra set out what has come to be known as the irreducible statutory minimums principles of fair hearing.
41. Further in, *Hosea Akunga Ombwori v Bidco Oil Refineries Limited* (2017)eKLR the Court expounded on the provisions of Section 41 in the following words: -
- “To satisfy the requirements of Section 41 of the Employment Act, 2007, an employer issues what is called in ordinary parlance a show cause notice/letter. Such a letter or notice should outline the allegations or charges against the employee and also request him to respond within a reasonable time.
27. The notice also ought to inform the employee that disciplinary action which might lead to termination of employment is under consideration.”
42. In my view, the Claimant having been issued a show cause letter, an opportunity to respond to the letter both in writing and by his physical appearance before a disciplinary committee, and even having a chance to engage/question witnesses at the hearing, meets the statutory threshold set under Section 41 of the *Employment Act, 2007* .
43. Consequently, I find and hold that the Claimant’s dismissal was procedurally fair.
44. On whether the dismissal was substantively fair, Section 45 of the *Employment Act*, states thus: -
- “No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer 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; and
 - (c) that the employment was terminated in accordance with fair procedure.”
45. The reason the Claimant was dismissed, was on a charge of negligence and carelessness and failing to perform his duty carefully and properly contrary to Article 17.5.2 (iii) of the terms and conditions of service of the Respondent. The Claimant’s act of negligence led to the leakage of examinations to students who were yet to sit the exam.



46. The Claimant admitted both on cross-examination and at the disciplinary hearing, that indeed two exam papers of courses that he was teaching at the Respondent's university leaked. He further admitted that though he was not aware of the leakage until exams were done, the results from one of the papers confirmed the leakage as the particular paper was fairly done compared with other exams.
47. Sections 43, 45 and 47(5) of the *Employment Act*, require that an employer must prove the reasons for termination/dismissal, prove that the reasons are valid and fair and prove that the grounds are justified. (See *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR)
48. Reasons for termination have generally been agreed to be matters that the employer at the time of termination of contract, genuinely believed to exist, and which caused the employer to terminate the employee. Courts have held that the decision to dismiss ought to be hinged on an objective test, such as whether a reasonable employer in similar circumstances, would have dismissed the employee. (See *Mwanajuma Juma Kunde v KAPS Municipal Parking Services Limited* Cause No 57 of 2012.)
49. Integrity of examinations in a university set up, is at the core of such an institution. Public trust and confidence in a teaching institution is founded on how examinations are handled.
50. In my view, the Claimant's admission of leakage of exams, justifies the reasons for his dismissal. I find and hold that the Claimant's termination was premised on fair and valid reasons related to his conduct and capacity.

Whether the claimant is entitled to the remedies sought.

51. The Claimant's prayers before this Court are for a declaration that termination of his services by the Respondent is illegal, unfair and against the provision of the law, payment of Kshs 1,976,340.00 in damages for the unlawful termination of employment, a Certificate of service, costs of this suit and interest, and any other remedy this court may deem just and expedient to grant.
52. The reliefs sought herein, are only tenable upon a finding of an unfair termination. This Court having found the Claimant's termination both procedurally and substantively fair, the reliefs sought fail.
53. The Claimant is however entitled to issuance of a certificate of service in accordance with Section 51 of the *Employment Act*.
54. The rest of the Claimant's claim is dismissed with no order on costs.
55. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 4TH DAY OF MAY, 2023.

C. N. BAARI

JUDGE

Appearance:

Mr. Zadock Murundu the Claimant present in person

Mr. Ireri present for the Respondent

Christine Omolo- C/A

