



Ochieng v Great Lakes University of Kisumu(GLUK) (Cause E036 of 2022) [2023] KEELRC 1073 (KLR) (4 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1073 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E036 OF 2022**

CN BAARI, J

MAY 4, 2023

BETWEEN

CAROLYNE AKINYI OCHIENG CLAIMANT

AND

GREAT LAKES UNIVERSITY OF KISUMU(GLUK) RESPONDENT

JUDGMENT

1. The Claimant filed this suit through a Memorandum of claim dated August 27, 2022, and filed on August 29, 2022. The Claimant seeks a declaration that her services were unprocedurally, unfairly and unlawfully terminated by the Respondent vide a letter of summary dismissal dated October 27, 2019. She thus seeks compensation for unfair termination, payment of terminal dues and benefits amounting to Kshs 2,153,036, an order compelling the Respondent to issue her with a certificate of service, costs of the suit and interest thereon from the date of filing the suit till payment in full and any other relief(s) that this Honourable Court may deem fit and just to grant.
2. The Respondent filed their response to the Memorandum of Claim dated October 17, 2022, wholly denying the Claimant's claim.
3. The matter was set down for hearing, wherein the Claimant, Carolyn Akinyi Ochieng (CW1) testified in support of her case. She adopted her witness statement and produced documents filed as exhibits in the matter. The Respondent's witness, Mary Anne Atieno, (RW1) also testified and produced documents in support of the Respondent's case.
4. Both parties filed submissions.

The Claimant's Case

5. The Claimant's case is encompassed in her pleadings and her witness statement both of August 27, 2022. The Claimant testimony is supported by documents produced and marked as Cexh-1-26 with



exception of item number 24 as they appear on the Claimant's List of Documents dated August 27, 2022, filed alongside the Memorandum of Claim.

6. It is her testimony that she was employed by the Respondent vide an appointment letter dated September 25, 2009, in the position of Accounts Assistant, and which contract was renewed for a further period of 2 years vide contract renewal letter dated September 15, 2010.
7. The Claimant states that she was subsequently promoted to the position of Assistant Accountant and thereafter, appointed as Acting Treasury Accountant vide a letter dated April 24, 2014, and that her contract renewed again for a further 2 years vide a letter dated September 12, 2014.
8. The Claimant's states that her terms of employment were revised to permanent and pensionable vide a letter dated May 22, 2015, and was later deployed to the office of the Quality Assurance as an Internal Auditor vide letter dated April 27, 2017. The Claimant stated that she was later appointed as Acting Finance Officer vide letter dated.
9. It is the Claimant's case that she was subsequently appointed the Chief Accountant in May, 2018, and thereafter, vide letters dated May 15, 2018, November 14, 2018, November 22, 2018 and March 13, 2019, she was appointed a member of the University Procurement Committee, Quality Assurance Steering Committee, Education Trust Fund Committee and Staff Selection and the Remuneration Committees respectively.
10. It is her testimony that on or about June 4, 2019, she was issued with a letter to show cause why disciplinary action ought not be taken against her on alleged diversion of the university funds from salary arrears of university employees to student fees on pretext of guardianship on 3 specific instances. She states that she was subsequently suspended from work through a letter dated June 7, 2019, to allow the Respondent to carry out further investigations.
11. It is the Claimant's position that she responded to the show cause vide a letter dated June 11, 2019, giving a proper explanation and specific details on the charge of diversion of university funds. The Claimant further states that she laid down the University procedure on transfer of funds and affirmed that she complied with the entire procedure and did not divert and/or transfer any funds as alleged by the Respondent.
12. It is the Claimant's further testimony that she was not a signatory to any of the University bank accounts as to authorize any so transfer as alleged by the Respondent.
13. The Claimant states that the notice to show cause issued to her, did not mention any charge relating to the alleged double chequing of University Air tickets, and which charge, she only learnt of upon receipt of the letter dated October 27, 2019, summarily dismissing her services.
14. It is the Claimant's case that she was invited to attend a disciplinary hearing scheduled for October 16, 2019, vide a letter dated October 9, 2019, and which letter only mentioned the charge of diversion of university funds on 3 instances as laid out in the notice to show cause.
15. It is the Claimant's further case that she was neither informed of her right to be accompanied by a colleague or representative during the disciplinary hearing, nor was she given the reasons for which the Respondent was contemplating terminating her services.
16. The Claimant further states that she attended the disciplinary hearing but was not granted a fair hearing, as new issues other than those in the show because letter were brought up and she was denied an opportunity to respond to the issues. The Claimant further states that she did not have a colleague present during the disciplinary hearing as the requirement was not captured in the letter inviting her to the hearing.



17. The Claimant states that she was dismissed from service vide a letter of summary dismissal dated October 27, 2019.
18. The Claimant states that upon perusal of the letter of summary dismissal, she established that she was dismissed on grounds other than the those stated in the Show Cause. It is her case that the summary dismissal letter indicated that she was dismissed for double checking of air tickets which charge was never brought to her attention prior to her dismissal.
19. It is her further case that the other ground upon which she was dismissed was a general offence relating to refusal to obey lawful and proper command, and not the diversion of funds charge contained in the notice to show cause.
20. The Claimant states that upon clearing with the Respondent, she registered a complaint of unfair and unlawful dismissal from employment and requested payment of her salary arrears, pension dues and terminal benefits vide her letter dated June 7, 2022.
21. It is her case that she instructed her Advocate to issue the Respondent with demand letter, which letter was sent to the Respondent via their official email address, but the Respondent declined to respond to the demand letter hence necessitating institution of the suit herein.

The Respondent's Case

22. The Respondent confirmed that it employed the Claimant on contract sometime in September 2009, as an Accounts Assistant, and that her contract was subsequently renewed various times till the year 2015.
23. The Respondent further confirmed that the Claimant's terms of service were revised to permanent and pensionable in May, 2015. It is the Respondent's case that the Claimant was to be bound by the Human Resource and Finance Manuals of the Respondent.
24. It is the Respondent's case that the Claimant was deployed to the Office of the Quality Assurance as an Internal Auditor vide a letter dated April 17, 2017, where her role included identifying indicators of potential fraud, waste or mismanagement of resources.
25. The Respondent confirmed that the Claimant was again promoted to the position of Acting Finance Officer, sometime in September, 2017, and that the roles attached to the position were ensuring data integrity in all financial transactions and ensuring remittance of statutory deductions and contributions to the relevant statutory bodies.
26. It is the Respondent's case that as a reward for her long service, the Claimant was appointed to the position of Chief Accountant. The Respondent states that under this role, the Claimant reported directly to the Vice-Chancellor, and was responsible for remitting statutory deductions, personnel matters in her department, efficiency and effectiveness of the finance department and coordinating financial activities within the university.
27. The Respondent's further case is that it expected that the Claimant would perform these roles with due diligence, efficiency and in accordance with the highest professional standards.
28. The Respondent states that it had a policy which allowed staff members who wished to transfer their overdue gratuity payments to the students they sponsored, and which payments, would be used to settle the students' fee arrears. The Respondent states that due to issues emanating from this arrangement, it suspended the policy.



29. The Respondent stated that through its Human Resource Manager, it issued a letter for Notice to Show Cause to the Claimant for reasons that a sum of Kshs 3,598,687 had been diverted from the Respondent's bank accounts to particular staff member pockets. The Respondent further states that the letter also enumerated particular transactions where monies were transferred from its Accounts to Staff Salary Accounts domiciled at various banks.
30. It is the Respondent's case that indeed the Claimant responded to the Show Cause Letter on June 11, 2019. The Respondent further states that it reviewed the response to the Show Cause letter and noted that it did not address the issue of financial impropriety satisfactory, and hence the need to invite the Claimant to a disciplinary hearing on issues raised.
31. It is its case that prior to the invitation to the disciplinary hearing, the Claimant was suspended from duty to allow full investigations into the issues that were before the Disciplinary Committee.
32. The Respondent states that the actions of the Claimant were against the Respondent's Human Resource Manual and such acts and omissions, involving embezzlement of finances and/or impropriety committed by the Claimant are regarded as major misconduct and subject to the termination process provided under clause 22.4 of the Human Resource Manual.
33. The Respondent states that it wrote a letter dated October 27, 2019, to the Claimant after the disciplinary proceedings, to inform her of the termination of her Employment Contract with Respondent. It is the Respondent's case that the letter stated the reasons for termination of the employment which were gross misconduct.
34. The Respondent states that the Claimant wrote them a letter demanding payment of her terminal benefits. The Respondent states that some of the dues claimed, are beyond the statutory time limit of three years, and are thus time barred.
35. It is the Respondent's position that the Claimant as the Chief Accountant of the Respondent was in charge of remitting pension dues to the statutory bodies hence, she cannot come to court claiming against her own omissions. It is further stated that the Claimant neither lodged a compliant about these unremitted statutory deductions, pension funds and unpaid salaries.
36. The Respondent finally states that the Claimant's suit does not disclose a cause of action and should be dismissed with costs to the them.

The Claimant's Submissions

37. It is the Claimant's submission that she was issued with notice to show cause in the absence of a witness or any employee, and was not informed of her right to be accompanied by a colleague during the disciplinary hearing which is unlawful, and unprocedural and contrary to the express provision of Section 41 of the *Employment Act*.
38. It is further submitted for the Claimant that indeed, the Respondent's witness (RW1) confirmed in her testimony, that the Claimant did not have a representative or witness at the time of being issued with the show cause letter. She sought to rely in *Gilbert Mariera Makori v Equity Bank Limited* [2016] eKLR to buttress this position.
39. The Claimant's submits that she was not afforded a chance to put forth her representations during the disciplinary hearing on the new or additional allegation of double queuing of air tickets which renders her dismissal was unprocedural.



40. It is the Claimant's further submission that she has demonstrated on a balance of probabilities that her dismissal was unjustified, unlawful and unfair, on the basis that she was dismissed on invalid reasons which were neither brought to her attention nor granted an opportunity to defend herself against.
41. It is her submission that the Respondent utterly failed to prove the grounds for her dismissal existed, were fair and applicable to her, and hence the Respondent failed to discharge its burden under Sections 43, 45 and 47(5) of the *Employment Act*. The Claimant had reliance in *James Ondima Kabesa v Trojan International Limited* [2017] eKLR.
42. The Claimant submits that she worked for the Respondent for more than a decade and that she served diligently in various departments, committees and rose through the ranks from Accounts Assistant to the position of Chief Accountant. It is her further submission that by virtue of her long service she has proved a case for the maximum compensation and hence the Court should award her 12 months' salary in compensation for unfair termination.
43. The Claimant submits that she is entitled to an award on account of her unremitted pension contribution amounting to Kshs 596,254.00 as at October, 2019, and that this Court is clothed with the jurisdiction to make the award. The Claimant sought to rely in *Samuel Kamau Mubindi v Ivesco Assurance Company Limited* [2014] eKLR to buttress this position.
44. The Claimant prays that the Court allows her claim.

The Respondent's Submissions

45. The Respondent submits that the Claimant was well conversant with the procedure at the disciplinary hearing for employees charged with gross misconduct, and that she confirmed during hearing that she did not call any other employee to accompany her to the disciplinary hearing. The Respondent further submits that it did not deny the Claimant an opportunity to appear with a representative at the hearing of her disciplinary case.
46. The Respondent submits that it has demonstrated that the termination of the Claimant's employment was justified and procedural and that she was summarily dismissed, thus not entitled to pay in lieu of notice. It sought to rely in *Vincent Abuya Obunga v Mast Rental Services Limited* [2019] eKLR) to support this position.
47. The Respondent further submits that the Claimant cannot claim for actions that were committed or omitted before August 29, 2019. Under Section 90 of the *Employment Act*.
48. The Respondent submits that Section 51 of the *Employment Act*, entitles the Claimant to a certificate of service and which was in fact issued, received and signed for by the Claimant.
49. The Respondent prays for the dismissal of the Claimant's claim.

Analysis and Determination

50. I have carefully considered the pleadings herein, the witnesses' oral testimonies, and the parties' submissions. The issues that arise for determination are:
 - i. Whether the Claimant was wrongfully dismissed from service
 - ii. Whether the Claimant deserves the remedies sought
 - iii. Who bears the costs of the suit?



Whether the Claimant was unfairly Terminated

51. The question of whether or not the Claimant was unfairly terminated, is deduced from the Respondent's adherence or lack thereof to the requirements of both the Constitution and the Employment Act, 2007, in respect of procedural fairness and the existence of valid reasons for her termination.
52. Fair hearing is both a Constitutional and statutory requirement demanded of an employer in a termination process. Procedural fairness 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.”
53. Further, Article 47(1) of the Constitution guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Management decisions have been classified as administrative actions within the province of Article 47 (See David Mbugua v Registered Trustees of the Presbyterian Church of East Africa, ELRC Cause No 1518 of 2011.)
54. By the foregoing provisions, it is abundantly clear that employment is no longer at the will of the employer. The employer is under duty to meet the tenets of fair process before he can be said to have terminated fairly.
55. The Claimant's case is that she was unfairly, unprocedurally and unlawfully terminated for not having been granted an opportunity to defend herself.
56. The Claimant denies having been given a fair opportunity to defend the charges against her on the basis that she was not told to appear with a representative of her choice at the hearing, and that the charges against her changed during the hearing from those listed in the show cause letter.
57. The Respondent's position in this respect, is that the Claimant held a management position and had sat in other disciplinary committees, and is thus conversant with the disciplinary procedures.
58. Ms MaryAnne Atieno (RW1) testifying for the Respondent, told the Court that the Claimant was an employee of the Respondent who at the time of dismissal was earning a monthly gross salary of Kshs 94,200. RW1 further told the Court that the Claimant was issued with a show cause letter but that letter did not cover the charge of Air tickets which formed the basis for her summary dismissal. It is her testimony that the letter inviting the Claimant for disciplinary hearing, did not require that she do so with a representative of her choice.
59. Section 41 of the Employment Act, expressly provides that an employee is entitled to be represented at the disciplinary hearing by another employee, or a shop floor representative. It is not disputed that the Claimant was not accorded this opportunity.
60. The Respondent's assertion that it did not require to inform the Claimant to attend the hearing with a representative for reason that she held a management position, and was conversant with the procedure, does not hold. She was the one on trial at the time, and the law demands that she is informed of her right to appear with a representative whether or not she was familiar with the disciplinary procedures.



61. In *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2013] eKLR the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.
62. Further, in *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR, the Court observed as follows:
- “The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.
- Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.
- Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”
63. I find and hold that the Respondent’s action in dismissing the Claimant, failed the procedural fairness test.
64. On the issue of whether the Claimant’s termination is substantively fair, the Notice to Show Cause letter issued to the Claimant, lists three reasons for the intended disciplinary action, all relating to transfer of the university funds to various employees’ salary accounts. The letters suspending the Claimant from service and the invitation to the hearing, reiterated the grounds for the disciplinary process as being those in the show cause letter.
65. The letter dismissing the Claimant from service lists the grounds for the termination as refusal to obey lawful orders in relation to the transfer of staff salary arrears and defrauding the university through issuing double cheques for air tickets.
66. The dismissal letter and the RW1’s admission, confirms that the Claimant was dismissed for reasons that did not form part of the charges against her.
67. In determining whether reasons for dismissal are fair, the employer is required to show that at the time of dismissing the employee, he believed that the employee was guilty; that he has reasonable grounds to sustain the believe, and finally, that he carried out investigations on the matter. In *Charles Musungu Odana v Kenya Ports Authority* [2019] eKLR the Court stated,
- “It is now clear that the burden placed on an employer by Section 43 of the Employment Act is to establish a valid reason that would cause a reasonable employer to terminate employment.”
68. The Claimant’s testimony and which was confirmed by the Respondent through RW1, is that the Claimant was not a signatory to the Respondent’s accounts. This, coupled with the fact that the reasons for the Claimant’s dismissal were not spelt out to her before the hearing, render the dismissal substantively unfair.



69. In my considered view, the Respondent's handling of the Claimant's case, fell short of the minimum statutory standards set under Sections 41, 43 and 45 of the Employment Act, which without a doubt render the summary dismissal unfair, and so I hold.

Whether the Claimant deserves the remedies sought

70. The Claimant seeks an award for 12 months' salary for unfair termination, one-month salary in lieu of termination notice and an order for payment of her unremitted pension.
71. The finding that the Claimant was unfairly dismissed does entitle her to compensation in accordance with Sections 49 and 50 of the Employment Act. In Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR the Court held that in determining an award of compensation, the Court is to consider the 13 factors set out under Section 49 (4) of the Employment Act.
72. The Claimant was in the service of the Respondent for over ten (10) years. Although the record indicates that she was previously issued with a warning letter, the grounds upon which her dismissal was premised were not proved.
73. The Claimant did not however show the effort she made to reasonably mitigate her losses. Taking this into consideration, and the opportunities available to the Claimant to secure comparable employment I deem an award of seven months' salary sufficient compensation for the unfair dismissal and is hereby awarded.
74. On the claim for one month's salary in lieu of notice, the Respondent's only defence was that the charge against the Claimant was gross misconduct and having been summarily dismissed, she was not entitled to either notice or pay in lieu thereof.
75. Section 36 of the Employment Act, requires that either party terminating the contract without notice, pays the other one month's salary in lieu of the termination notice. The Claimant's dismissal herein has been found unfair and hence the exception under Section 44 (1) in respect of notice does not apply.
76. In the premise, the Claimant is awarded one month's salary in lieu of notice.
77. On the claim of the unremitted pension benefits, the Respondent's assertion that the Claimant cannot claim for reason that she was in charge of accounts and the failure to remit is attributed to her, is not tenable. What the Chief Accountant or any other officer holder remits as deductions is money from the employer and not their own. That she did not remit is only because the employer did not avail her the funds to be remitted.
78. It is an unfair labour practice for an employer to deduct money from an employee's salary and not remit it to the rightful agency/body. The Claimant having proved by her pay slips that deductions were made from her salary on account of pension, entitles her to the claim.
79. Payment of pension under a defined contribution scheme, is regulated under the Retirement Benefit Act and the Regulations made thereunder. For this reason, I do order that the Respondent remits all pension contributions deducted from the claimant's salary, together with the employer's portion to the respective pension scheme, and that the same be released to the Claimant by the trustees of the scheme in accordance with the RBA Act.
80. The Claimant's claim for unpaid salaries was not satisfactorily proved. It is dismissed.
81. In whole, I make the following orders in favour of the Claimant and against the Respondent: -
- i. A declaration that the Claimant was unfairly dismissed.



- ii. Payment of One-month salary in lieu of dismissal notice at Kshs 94,200/-
- iii. 7 months' salary as compensation for unfair termination at Kshs 659,400/-
- iv. That the Claimant's pension deductions be remitted to her pension scheme, and she be paid by the scheme trustees in accordance with the *RBA Act*.
- v. Costs of the suit and interest thereon until payment in full.

82. 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. Mbeka present for the Claimant

Mr. Ndolo present for the Respondent

Ms. Christine Omolo- C/A

