



**Kalasinga & 3 others v Moi University (Cause 30 & 56 of 2019  
(Consolidated)) [2023] KEELRC 1454 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1454 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE 30 & 56 OF 2019 (CONSOLIDATED)  
MA ONYANGO, J  
JUNE 15, 2023**

**BETWEEN**

**JOHN K. KALASINGA ..... 1<sup>ST</sup> CLAIMANT  
J.MBAI AZIHEMBA ..... 2<sup>ND</sup> CLAIMANT  
STANLEY K. KIPROP ..... 3<sup>RD</sup> CLAIMANT  
WILSON KIPTARBEI KEMBOI ..... 4<sup>TH</sup> CLAIMANT**

**AND**

**MOI UNIVERSITY ..... RESPONDENT**

**JUDGMENT**

1. The Claim herein was originally filed through a Statement of Claim dated 24<sup>th</sup> July 2019 while cause number 56 of 2019 which was consolidated with this suit was initiated by a Statement of Claim dated 8<sup>th</sup> November 2019. The two causes were consolidated by a consent order recorded on 2<sup>nd</sup> November 2020.
2. *Vide* an amended Statement of Claim filed in court on 26<sup>th</sup> October 2021 the Claimants seek the following reliefs against the Respondent:
  - i. A declaration that the Respondent has breached the Claimants' rights to fair labor practices, discriminated against the Claimants, victimized the Claimants for engaging in union activities and sought to surcharge them unlawfully and unfairly coupled with an order of certiorari to remove into this court and quash the decisions of the Respondent dated 8<sup>th</sup> August, 2018 and 11<sup>th</sup> July 2019 and damages for the breach of the rights under Articles 27 and 41 of the Constitution of Kenya, 2010.
  - ii. An order of injunction against the Respondent restraining it from imposing any surcharge against the Claimants over payments made arising from the engagements in the category III



committee service providers or victimizing them in the continued employment relationship or harassing them.

- iii. Costs and interests.
3. The Claimants aver that at all material times, they were engaged by the Respondent in the positions of a Senior Fixed Asset Marker in the Department of Finance, Senior Computer Operator and currently an acting Assistant Electronic Data Processing Supervisor in the Department of Finance, Clerk in the Department of Estates and Assistant Security Officer respectively.
4. According to the Claimants, in exercise of their rights as provided under Article 41 of the Constitution and Section 4 of the Labour Relations Act, they were elected as the Chairman of the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers Union; Secretary of the Universities Non-teaching Staff Union; Secretary of the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers Union and trade union official, respectively for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Claimants.
5. It is the Claimants case that the Respondent in the month of October 1998 launched the Private Sponsored Student Program (PSSP) to facilitate management of its activities such as equitable sharing and distribution of funds. The program was served by 3 categories of service providers comprising of academic staff whose recognized union is the Universities Academic Staff Union, (UASU), who were in Category I, the administration under the management and council (Category II) and the technical staff under the Kenya Union of Domestic Hotels, Educational Institutions, Hospital and Allied Workers Union (KUDHEIHA) and the Universities Non-teaching Staff Union (Category III).
6. It is further averred that the Respondent initially, over and above the agreed contractual payment entitlement, granted to Categories I and II staff members monthly payments and annual bonuses for services rendered to the PSSP Program. However, however, Category III service providers were not covered.
7. It is contended that the trade unions representing category III service providers took up the issue with the Respondent which through its Council's Executive Committee meeting held on 9<sup>th</sup> September, 2009 considered the proposal to bring on board the segment of staff represented by KUDHEIHA and the Kenya Universities Staff Union as Category III service providers.
8. That upon the said approval, 2% of the total Private Sponsored Student Program revenue was allocated to category III service providers where an approval committee was established to manage the category III funds. The committee was comprised of union officials and representatives from Administration, Finance and the Private Sponsored Students Program coordinating office. The trade union officials were mandated to make decisions on the mode of payment in tandem with categories I and II as committee members.
9. The Claimants state that as trade union officials, they were incorporated in the category III service providers committee where they discharged their duties which included visiting the Respondent's campuses to hear staff grievances and resolve the same thus preventing industrial unrest.
10. The Claimants contended that the Respondent's administration approved payments of all allowances to the Claimants hence the payments were regular. This was until 8<sup>th</sup> August 2018 when the Respondent's acting Deputy Vice –Chancellor Administration, Planning and Development surcharged them over sums that had allegedly been paid to them irregularly as hereunder;

1<sup>st</sup> Claimant Kshs 848,200



2<sup>nd</sup> Claimant Kshs 1,168,000

3<sup>rd</sup> Claimant Kshs 158,000

4<sup>th</sup> Claimant Kshs. 82,000

11. According to the Claimants, the surcharge letters gave them until 14<sup>th</sup> September 2018 to pay the said monies failing which disciplinary action would be taken against them. They lodged an appeal which appeal was dismissed and they were ordered to repay the full sums in the surcharge letter.
12. It is the Claimants' case that the actions of the Respondent are unfair and unlawful.
13. The Respondent filed a Response to the Statement of Claim on 4<sup>th</sup> February 2020 and averred that an internal audit report revealed that the Claimants were irregularly paid Committee allowances.
14. It was further averred that the Claimants were issued with surcharge letters after they failed to give a satisfactory response to the Respondent's letter on irregular payments. That the Claimants were given a chance by the Respondent to give a detailed response and even attach any supporting documents but they failed to give a satisfactory answer.
15. According to the Respondent, the Claimants appealed against the Respondent's decision to surcharge them and after a comprehensive audit by the Chief Internal Auditor, it was confirmed that the Claimants were engaged in fictitious meetings where they were paid allowances.
16. The Respondent maintained that the unlawful acts of the Claimants are contrary to the provisions of Sections 19 of the *Public Ethics Officers Act* on the Code of Conduct and Ethics.
17. The Respondent urged the court to dismiss the Claim with costs.

## Evidence

18. John Kalasinga the 1<sup>st</sup> Claimant testified as CW1 on 1<sup>st</sup> December 2020. He testified on his behalf and on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants. He relied on his witness statement and the documents filed in support of the Claimants' case.
19. According to the CW1, funds were paid through an imprest voucher which had to undergo all the stages of approval. That the allegation of the fictitious meetings paid but not held was neither here nor there, as there had been several meetings since the committee was formed in 2009. That there were no payments for meetings not attended.
20. On cross examination, CW1 testified that he received a notice to show cause letter on why surcharge should not be effected against him, which letter he responded to. He stated that he was also informed of the Internal auditor's report.
21. CW1 maintained that there had never been any queries about the meetings since 2009 until the issue was raised in 2015. He testified that the Claimants could not call for meetings that had not been approved by the Respondent.
22. He stated that they held meetings on weekends but conceded that he did not produce any letter in court showing any urgency for a meeting on weekends.
23. The 4<sup>th</sup> Claimant testified as CW2. He stated that he was issued with the surcharge letter when he was almost retiring from service. It was his testimony that he was served on 25<sup>th</sup> April 2018 with a surcharge letter over an issue that arose between 2013 and 2014. According to the 4<sup>th</sup> Claimant, the decision to surcharge him when he was just about to retire was unfair.



24. CW2 told the court that he was not cleared nor paid his retirement dues because of the surcharge.
25. In cross examination, CW2 stated that he was not called at all to explain the irregularity. That he explained himself in the show cause letter.
26. The Respondent called Petronila Chepkwony who testified on 8<sup>th</sup> March 2023 as RW1. She introduced herself as the Respondent's Senior Legal Officer and a member of Management Board of the Respondent.
27. RW1 adopted her witness statement recorded on 8<sup>th</sup> September 2019 as her evidence in chief. She relied on the documents filed in court in response to the claim and *ELRC No. 30 and 56 of 2019*.
28. Upon cross examination on an imprest at page 105 of Respondent's bundle RW1 explained that an imprest must be signed by various persons approving it and that the said specific imprest was raised by CW1, whereupon money was disbursed. She stated that the said monies were not utilized according to the imprest. That the said imprest was raised for several meetings and upon surrendering it to the relevant department, an irregularity was found and it was established that the imprest related to factitious meetings.
29. RW1 testified that upon surrendering the imprest, it was realized that only one meeting was held and not the four days meetings as indicated by the Claimants. That this was the reason they were surcharged.
30. RW1 stated that the 4<sup>th</sup> Claimant was also surcharged with other staff members who did not contest the surcharge and have already refunded the amounts in the show cause letters. That the 4<sup>th</sup> Claimant had not been paid his retirement benefits as the Respondent is awaiting the determination of this case.
31. CPA Amon Kiptoo Sawe testified as RW2. He introduced himself as the Senior Internal Auditor of the Respondent. RW2 testified that he was not the person who conducted the audit and was producing the report as the author thereof had since retired. He stated that he was conversant with the audit report.
32. He referred to the Respondent's bundle of documents at page 8 of the audit report which was in respect of the 1<sup>st</sup> Claimant. The report recommended that appropriate disciplinary action be taken against the 1<sup>st</sup> Claimant for allowances paid irregularly. For the 2<sup>nd</sup> Claimant the report recommended that he be surcharged Kshs. 1,168,000 while the 3<sup>rd</sup> Claimant was to be surcharged Kshs. 158,000 for irregular allowances paid.
33. With respect to the 4<sup>th</sup> Claimant's claim in *ELRC No. 56 of 2019*, RW2 referred the court to page 6 of the Respondent's bundle of documents and testified that the recommendation by the then Chief Internal Officer was that disciplinary action be taken against him or he be surcharged Kshs 82,000 which he was irregularly paid.
34. RW2 took the court through the process of release of imprest. He testified that the University has guidelines on payments of imprest for meetings. The money is usually released to a specific person who is required to account for the imprest; that the said money is released through the cash office and after the activity/function/meeting has been concluded, the person has to surrender the imprest by giving evidence of how the money was used. He stated that if the said imprest cannot be accounted for the same is treated as not having been surrendered.
35. On cross examination, RW2 stated that from the audit report some people are captured as having attended meetings but from the record of the Respondent, the said persons were engaged in meetings elsewhere at the time and could not have been in meetings as alleged by the Claimants.



## Determination

36. From the pleadings on record, the evidence tendered in court as well as the submissions filed, I find that the only issue that falls for this court's determination is whether the Respondent was justified in surcharging the Claimants.
37. The genesis of this claim is the use of funds set aside for Category III service providers under the Privately Sponsored Students Program (PSSP). Category I service providers under the PSSP were lecturers (represented by UASU union) while Category II service providers were members of management and University Council. Category III service providers constituted employees represented by KUDHEIHA and KUSU trade unions who had previously not been catered for in the program yet they provided services to students under the program.
38. The Claimants were part of the members of the Committee established to manage and coordinate the funds set apart under the PSSP for Category III and comprised union officials and representatives from administration, finance and PSSP coordinating office. The mandate of the Committee was to decide on the mode of sharing of funds set apart for Category III providers from the PSSP funds and to ensure equitable distribution thereof. The funds were used to pay top-up monthly payments and annual bonuses to the staff under Category III providers.
39. A portion of the funds were set aside for facilitation of the Committee members who were paid for communication (airtime), travelling and subsistence, meals and snacks and stationary. The committee met and held meetings in different colleges and campuses of the university hence the need for facilitation. It is these payments that the Claimants together with other Committee members were accused of having been paid for meetings that never took place as disclosed in the audit report referred to during the hearing. The audit report is at Document 1 of the Respondents List and Bundle dated 4<sup>th</sup> February 2020 filed with the Response to Statement of Claim. The document is titled 'Reports on the Analysis of Responses to Irregular Payment of PSSP Allowances' and is dated 4<sup>th</sup> July, 2018. It is prepared by the Chief Internal Auditor, CPA Margaret K Gimaiyo Ag Chief Internal Auditor. There is a separate detailed analysis in respect of each of the Claimants.
40. The dispute herein arose after the Respondent issued to the Claimants notices to show cause why they should not be surcharged or disciplined for the irregular payments. The notices to show cause dated 12<sup>th</sup> June 2019 were follow ups to letters dated 25<sup>th</sup> April 2018 in which the Claimants were notified of the irregular payments and required to either show cause why they should not be surcharged or refund the money. A sample of the letter issued to the 1<sup>st</sup> Claimant is reproduced below:

Ref No. PF/No 03688 25<sup>th</sup> April, 2016.

Mr. J. Kalasinga,  
C/o Dept. of Finance,  
Moi University

Dear Mr. Kalasinga,

Subject: Irregular Payment Of Allowances Made To You

Reference is made to an internal Auditor Report on the Audit of PSSP Payments carried out in the 2014/2015 financial year.

During the audit it was established that you were irregularly paid Ksh, 848,200 on various dates being payment for



- a. Facilitation and Subsistence Allowance Ksh. 494,200
- b. Airtime Ksh. 48,000/=
- c. Transport Ksh. 38,000/=
- d. Secretariat, Meals and Stationery Ksh. 266,000/=

It is also noted that there was no justification for these payments, no evidence that you travelled to the Satellite Campuses and no evidence that there was any meeting held.

The acceptance of these payments contravenes the Moi University Human Resource Manual Clause 9.2 (f) and (s)

You are therefore asked to:

- a. Show cause why you should not be surcharged forthwith
- b. Refund the Ksh.848,200 that was irregularly paid to you with immediate effect.

Signed

Prof. Nathan O. Ogechi

Ag. Deputy Vice Chancellor, Administration, Planning & Development

Cc. Vice Chancellor

Deputy Vice Chancellor (Finance)

41. Similar letters were issued the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Claimants with particulars of the amounts each was required to refund.
42. In their joint response to dated 3<sup>rd</sup> May 2018 (Refer to page 120 of Claimant's bundle in *Cause No. 30 of 2019* and page 96 of the bundle in *Cause No. 56 of 2019*) the Claimants did not address the issues in the show cause letters. What they did was to give justification for the setting apart of funds for Category III service providers under the PSSP program and for the payments they received. They did not give evidence to prove that they attended the meetings which the Respondent alleged to be fictitious.
43. The Claimants were thereafter issued with surcharge notices dated 8<sup>th</sup> August 2018. Following their failure to pay, the notices to show cause were issued on 12<sup>th</sup> June 2019, more than one year later.
44. The Claimants submitted copies of minutes of several meetings which they supposedly attended. According to the minutes, each of the meetings were held over several days lasting between 3 and 6 days. For example, the minutes at page 107 of Claimant's bundle is titled:  
Minutes Of Pssp Category Iii Service Providers Meetings Held From Monday April 20<sup>th</sup> To Wednesday April 22<sup>nd</sup>, 2015, At 10.40am At Mombasa Satellite Campus
45. The minutes at page 110 of the Claimant's bundle are titled  
Minutes Of Pssp Category Iii Service Providers Meetings Held From Tuesday March 24<sup>th</sup>, 2015 To Friday March 27<sup>th</sup>, 2015 At 9.00am At Town Campus
46. The minutes at page 112 of the Claimants bundle are titled:  
Minutes Of Pssp Cat Iii Service Providers Meetings Held From Monday January 26<sup>th</sup>, 2015 To Thursday January, 29<sup>th</sup> 2015 At 9.00am At College Of Health Sciences – Town Campus



I have perused the record and particularly the documents titled 'reports on the analysis of responses to irregular payment of PSSP allowance' dated 4<sup>th</sup> July, 2018 by the Chief Internal Auditor, CPA Margaret K Gimaiyo at length.

47. The minutes at page 114 of the Claimants bundle are titled:  
Minutes Of Pssp Category Iii Service Providers Meetings Held From Monday September, 11<sup>Th</sup> 2015 To Wednesday September 16<sup>Th</sup> 2015 At 10.15am At Coast Satellite Campus -mombasa
48. The minutes at page 116 of the Claimants bundle are titled:  
Minutes Of Pssp Category Iii Service Providers Meetings Held From Monday March 21<sup>St</sup>, 2016 To Thursday March 24<sup>Th</sup> 2016 At 9.45 Am At Town Campus -pdn
49. It was further evident that some of the persons alleged to have attended the meetings and were paid were in actual fact in other meetings at the time of they are alleged to have been in the said meeting.
50. During the hearing the 1<sup>st</sup> Claimant in his testimony stated that category III service providers committee held a meeting from Monday 26<sup>th</sup> January 2015 to Thursday 29<sup>th</sup> January 2015, at the College of Health Sciences where Ms Milcah Mutwol was in attendance. However, the council meeting attendance register indicated that the said Milcah Mutwol was attending a different meeting in Nairobi on the 26<sup>th</sup> January 2015.
51. In explaining this discrepancy, CW1 stated that a staff member did not have to attend all the meetings and that allowances were only paid based on the number of days a member attended a meeting. The summary of the minutes produced by the Respondent at page 40 of the Respondent's bundle gives a different position. A summary of the observations on the analysis of the minutes is given at page 41 of the Respondent's bundle as below:

Observation

- a. In all the cases, meetings were held for three to four days and yet evidence provided is only a single set of minutes of even one page.
  - b. In number 17 above, the meeting extended to the following week.
  - c. In number 12 and 13 above, meetings were held on Saturdays, 15<sup>th</sup> August, 2015 and 12<sup>th</sup> September, 2015 and on a Sunday, 13<sup>th</sup> September, 2015.
  - d. In several cases, there is evidence that officers said to have been present in Union meetings were in fact attending different meetings, as indicated in the last column.
52. From the evidence adduced by the Respondent it is not in doubt that the Claimants received irregular payments that they failed to justify. Under section 19(1)(e) of the *Employment Act* an employer is authorized to deduct any payment made to an employee in error from the salary of the employee. The Respondent is therefore within its right to make the recovery of the amounts irregularly paid to the Claimants by way of surcharge.
53. The claim by the Claimants that they were not given a fair hearing before being surcharged is not born out by the evidence before the court. There is evidence on record that all the Claimants were first notified of the irregular payments and that they all made comprehensive responses to the same. They were further issued with surcharge notices and given time to pay and failed to do so. They appealed against the decision to surcharge them which appeals were dismissed. They were eventually issued with show cause notices which prompted them to file the instant suits. RW1 in her testimony stated that no



- disciplinary action had been taken against the Claimants at the time they filed this suit and obtained orders barring the Respondent from surcharging them. view of this matter being filed in court.
54. The Claimants submitted that the surcharge constituted double punishment. As already pointed out above, surcharge is permitted by law. The Respondent had in the letters to the Claimants clearly stated that they should either refund the money irregularly paid or show cause why they should not be disciplined. At no time did the Respondent indicate that it would impose both the surcharge and disciplinary action against the Claimants.
  55. The foregoing notwithstanding, an employer would be within its right to punish an employee for obtaining money irregularly and at the same time recover the money from the employee. This would not constitute double punishment. The recovery would be for money which the employee wrongfully received while the disciplinary action would be for the offence of wrongfully obtaining the money, in this case, through falsification of minutes.
  56. The averment by the Claimants that the surcharge was discriminatory was not proved. The Claimants did not demonstrate that they were discriminated by being subjected treatment that was less favourable to other employees. They did not demonstrate that persons who were not in any committee but who were members of the management board, human resource personnel and internal audit were paid but not surcharged as alleged. The Claimants also failed to adduce evidence that they were being punished on account of their union activities.
  57. The claimants further submitted that the payments are statute barred. This was not proved. Indeed section 42 of the *Limitation of Actions Act* recoveries of in respect of loss or recoveries of public property.
  58. The submission by the Claimants that the Respondents failed to address their appeals within 6 months as prescribed under section 63 of the *Universities Act* thus making the surcharge a nullity is misplaced as the section does not refer to circumstances like this but to matters before the university council. The Claimants case had not reached the University Council by the time they came to court.
  59. The 4<sup>th</sup> Claimant did not adduce any evidence in support of his claim that the Respondent deducted but failed to remit payments in respect of his loan to the bank.
  60. From the foregoing, it is clear that the Claimants have failed to prove the allegations in their claims. They are thus not entitled to any of the orders sought in their claims. The claims are accordingly dismissed.
  61. In view of the relationship between the Claimants and the Respondent which is still subsisting with the exception of the 4<sup>th</sup> Respondent who has retired, the court orders that each party bears its costs of the suit.
  62. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 15<sup>TH</sup> DAY OF JUNE, 2023**

**MAUREEN ONYANGO**

**JUDGE**

