



**Okello & another v Kenya Education Management Institute (Employment and Labour Relations Cause 846 & 845 of 2012 (Consolidated)) [2023] KEELRC 2079 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2079 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 846 & 845 OF 2012 (CONSOLIDATED)**

**MN NDUMA, J**

**JULY 31, 2023**

**BETWEEN**

**BARRACK OKELLO ..... 1<sup>ST</sup> CLAIMANT**

**BERNARD MBULO ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**KENYA EDUCATION MANAGEMENT INSTITUTE ..... RESPONDENT**

**JUDGMENT**

1. The consolidated suit was filed as ELRC Cause No. 846 by the two claimants on 21<sup>st</sup> May, 2012 in which the claimants seeks the following reliefs:-
  - a. Declaration that the decision by the respondent to terminate the claimants' employment was unlawful, invalid, null and void.
  - b. The claimants to be reinstated to the service of the Respondent with all the attendant Rights and Privileges.
  - c. In the alternative the claimants be paid full dues as follows:-
    - i. Bernard Mbulo
      - a. Salary that the claimant would have earned to retirement date Kshs 6,975,504.
      - b. One month salary in lieu of notice Kshs.32,294.
      - c. Service or severance pay for every year of service for 39 years Kshs.1,259,466
      - d. Payment in lieu of unpaid leave for 45 days in 2009 and 2010 Kshs.42,945.



- e. Lost income during suspension Kshs.195,86 maximum compensation for unlawful termination equivalent to 12 months salary in the sum of Kshs.387,508.

II Barrack Okello

- a. Salary that the claimant would have earned to retirement date Kshs.4,819,320.
- b. One month's salary in lieu of notice Kshs.26,774.
- c. Service or severance pay for 19 years' service Kshs.776,446.
- d. Pay for the period while in wrongful suspension for 18 month Kshs.151,056.
- e. Payment in lieu of untaken leave Kshs.42,945.
- f. Equivalent of 12 months salary in compensation for the unlawful and unfair termination of employment Kshs.34,288.

**Facts of the case**

2. Bernard Mbulo was employed by Government of Kenya on 31<sup>st</sup> January, 1992 on temporary terms on grade DG 'D' with effect from 23<sup>rd</sup> October, 1991 at a salary of Kshs.1,565 per month. The claimant was later appointed on permanent and pensionable terms as an accounts clerk by a letter dated 5/2/1992. The claimant first worked at the Ministry of Education Narok Teachers Training College. He was later deployed to Highridge Teachers College as Bursar Grade III in job Group 'a'.
3. On 31/12/1988, the respondent was established vide Legal Notice No. 563 of 1988 named at the time Kenya Education Staff Institute (KESI). The claimant was absorbed by KESI in 2006 in Job Group JI and the terms of service of the claimant comprised of Kshs.32,294, including basic salary, house allowance, commuter allowance and medical allowance.
4. Gazette Notice No. 565 of 1988 was repealed by Gazette Notice No. 19 of 2010 dated 1/2/2010 which established KESI as a body corporate capable of being sued and suing in its own name.
5. The claimant worked for KESI diligently until 24<sup>th</sup> November, 2010 when he received a notice of interdiction dated the same date on allegations of having prepared a voucher No.00177 amounting to Kenya Shilling Twenty Two Thousand (Kshs.22,000) for double payment with a view to defrauding the employer.
6. The claimant testified that himself and Mr. Barrack Okello were flushed out of the office at gun point by the Acting Deputy Director, Finance and Administration Mr. Elijah Ngugi accompanied by three police officers.
7. That the claimants did not attend any hearing before the interdiction nor had they been given any warning letter.
8. That the claimants' job had already been advertised in the Daily Nation of 3<sup>rd</sup> November, 2010 prior to the interdiction.
9. That the interdiction was indefinite contrary to Government regulations that require investigations to be completed in 30 days.
10. The claimant wrote a letter exonerating himself from the matter dated 24/11/2011 addressed to the Chairman of the Council's Human Resource Committee.



11. The claimant testified that he had received a claim form prepared and approved by the Course Co-ordinator and prepared a voucher No.0177 for Kshsh.22,000 but the claimant stopped the payment upon realization that the amount would have amounted to a double payment. That the respondent did not contradict this position by the claimant.
12. That by Gazette Notice dated 9/11/2011, the Minister for Education amended the previous KESI Order of 2010 and changed its name to Kenya Education Management Institute, the respondent in this suit.
13. That the claimant received a telephone call requiring him to see the Director and upon arrival at the Director's office, his Secretary issued the claimant with a letter of termination dated 30/4/2012. The reasons provided in the letter for the termination was preparation of a voucher No. 00177 for Kshs.22,000 and preparation of Voucher No. 0052 for Kshs.12,417,600 payable to Milele Beach hotel.
14. The claimant testified that the allegation about Milele Beach Hotel had never been communicated to him and was not contained in the letter of interdiction.
15. The claimant testified that he was condemned without a hearing. However, the claimant told the Court that sometimes in July, 2009, the respondent sought authority of Permanent Secretary, Secretary to the Cabinet and Head of Public Service to hold training of 390 Quality Assurance and Standards officers and Education officers at Milele Beach Hotel in Mombasa. The request was approved at the rate of Kshs.2500 per person.
16. That the procurement department raised a Local Service Order (LSO No. 029448) for the sum of Kshs.19,500,000 for the training.
17. Meanwhile, Milele Beach Hotel sent an offer to the respondent based on a cost of 25,000 per person.
18. A Proforma Invoice for Kshs.19,500,000 was raised by Milele Beach Hotel.
19. That the said Proforma invoice was approved by the Director of the respondent with remarks.

“ Please process ½ payment to pay balance on actual.”
20. The same was then approved by the then accountant -in- charge Mr. Arisa.
21. That the half payment cheque was collected by the Director from the accounts department.
22. That the final invoice for Milele Beach was approved by the Director on 24/9/2009 and by Mr. Arisa on 6/10/2009 for accounts to process.
23. This final invoice had requested for payment of Kshs.22,167,600 made up as follows:-
  - (a) Accommodation expenses Kshs.19,110,000.
  - (b) VAT Kshs.3,057,600.
24. That upon receipt of instructions to process this payment, the claimant prepared a voucher for the approved figures but with a note tagged to it concerning the VAT issue that was not in the previous invoice.
25. The said payment voucher was approved by the Director on 9/10/2009 and by Mr. Arisa on the same date.
26. That the claimant's query on the voucher were not responded to and instead the Director sent a handwritten note giving account details of Milele Beach Hotel.



27. On 6/10/2009, the Director wrote to accounts demanding an update on the payment to Milele Beach.
28. That the above amounted to duress on the part of the Director to make payment to the Hotel at the rate of Kshs.2,900 per person yet the approved rate was Kshs.2,500 per person.
29. That when this issue was raised by the external auditor, (Kenya National Audit Office) the respondent pushed the blame on the claimants and made them scape goats for matters which the Director and Mr. Arisa were wholly responsible.
30. That the respondent's termination of the claimants was unlawful, unfair and malicious and violated Sections 36,41, 43 and 45 of the Employment Act, 2007. That the claimants were not issued with Certificate of Service contrary to Section 51 of the Act.
31. That the claimant be awarded as prayed.
32. C.W.2, Barrack Okello also testified in the matter and associated himself with the testimony by C.W.1.
33. C.W.2 testified that he was by a letter dated 24/11/2012 interdicted by the respondent on allegations that:-
  - (i) i) He had negligently overpaid Milele Beach Hotel and Kenya Revenue Authority by Kshs.5,693,463 and Kshs.42,738 respectively.
  - (ii) That he had fraudulently issued receipt No. 16433 amounting to Kshs.90,000 to one Robert B. Olodo using cheque No. 018504 belonging to Mahiga Girls' Secondary School being participants' training fees.
  - (iii) That he had abetted double payment attempt vide payment voucher No. 00177 of Kshs.22,000.
34. That C.W.2 was hounded out of the workplace together with C.W.1 at gun point by colleagues accompanied by three armed policemen from Parklands Police Station.
35. That C.W.2 was not afforded any hearing before the interdiction nor was he given any warning regarding the matter prior. That prior to the interdiction, the job of C.W.2 had already been advertised in the Daily Nation of 3<sup>rd</sup> November, 2010.
36. That the interdiction like that of C.W.1 was indefinite contrary to applicable Government regulations which limit interdiction to a period of 30 days.
37. That payments to Milele Beach Hotel and Kenya Revenue Authority were made while C.W.2 was away on official duty between 19/9/2009 and 14/10/2009.
38. That C.W.2 responded to the allegations made against him that he had issued receipt No. 16433 amounting to Kshs.90,000 by a letter dated 24/6/2011 stating that the issuance was done by a junior clerk in the department by the name Mr. David Nyangweso and the same was corrected.
39. That on allegation of abetting an attempted double payment vide Voucher No. 01177 for Kshs.22,000, C.W.2 stated that the voucher was prepared by the Course director and when C.W.2 noticed the anomaly, the voucher was stopped.
40. That on 30/4/2012 C.W.2 was served with a letter of termination of the same date. That the termination is grossly unlawful, wrongful and unfair. That C.W.2 lost means of livelihood and support for his family and is currently indebted to Equity Bank having borrowed a loan to finance some of his



personal obligations in the family which loan had been secured by his salary. That he has suffered dire loss and damage as a result of the unlawful termination.

41. C.W.2 prays to be awarded as claimed. C.W.1 and C.W.2 were subjected to very close cross examination by Mr. Gathumbi, Advocate for the respondents. By and large, the responses by C.W.1 and C.W.2 were consistent with the testimony they had given in chief. C.W.2 in particular stated time and again that he was not involved in the payment of Milele Beach Hotel.
42. C.W.2 stated that the Director approved the payment voucher with respect to a Local Service Order (LSO) for training of 381 persons. That the invoice was for Kshs.19,500,000 for 390 trainees but the number was reduced to 381 trainees hence respondent was to pay Kshs.19,130,000.
43. That upon completion of the training, what was to be paid was the balance. That the balance was paid. In this respect Voucher No. 00252 was raised for Kshs.12,417,600. That the figure was amended by adding V.A.T of Kshs.3,057,600 to the Invoice amount for 381 trainees (Kshs.19,130,000) total Kshs.22,167,600 less the ½ deposit paid of Kshs.9,750,000 leaving balance payable to Milele Beach Hotel and KRA of Kshs.12,417,600.
44. That this particular voucher was a correction to reflect the addition of VAT to the bill and separate payments were made to KRA for VAT and to Milele Beach Hotel. C.W.2 stated that the original voucher of Kshs.12,417,600 was prepared on 9/10/2009 by Bernard Mbulo a colleague and approved by the Director. However, C.W.2 stated that the amount of Kshs.12,417,600 did not include Kshs.3,057,600 paid to KRA as VAT and so he corrected the voucher to reflect a payment of Kshs.15,475,520 being the total amount paid to Milele Beach Hotel and to KRA. C.W.2 admitted that he had no direct authority to correct the voucher amounts aforesaid by the Director who had approved earlier payment.
45. C.W.2 stated that he had documents to support the alteration being payment made to KRA in respect of VAT in the sum of Kshs.3,057,600 whereas Kshs.12,417,600 was paid to Milele Beach Hotel. That the documents at page 71 of the respondent's bundle reflect those transactions. That the two amounts added to Kshs.15,475,500. The voucher was only adjusted to reflect the amount actually paid pursuant to the approval by the Director who was the AIE holder.
46. It was put to C.W.2 under cross-examination that the adjustment distorted the amounts payable and without authority of the Directors. It was also put to C.W.2 that Milele Beach Hotel was overpaid by Kshs.5,693,463.
47. C.W.2 explained that Milele Beach Hotel was supposed to pay V.A.T upon being paid and payment was authorized by Director and that the respondent retained the VAT and remitted to Kenya Revenue Authority directly.
48. C.W.2 was asked about the Kshs.90,000 he had authorized to be paid to one Mr. Olodo. He said he could not recall if Mr. Olodo owed rent to the respondent but as at June, 2010, Mr. Olodo owed Kshs.150,000 in rent to the respondent. C.W.2 said he was in charge of rent payments. That they were three accountants and in-charge assigned them duties. That he kept receipt books and issued receipts upon payment of rent. C.W.1 said on 1/9/2010 he issued Mr. Olodo a receipt for rent payment in the sum of Kshs.90,000. The cheque of 018504 for Kshs.90,000 was paying for a course fee by a participant. C.W.2 said he corrected the anomaly using a voucher on 2/9/2010 the following day when the anomaly was detected. That the payment did not go because as soon as C.W.2 discovered the anomaly, payment was stopped by the accountant in-charge. That this was a process of verification which was a normal process.



49. C.W.2 said that he received the letter of interdiction dated 24/11/2010 and was ejected from office by three armed officers. That Human Resource Committee had sat on 15/10/2010 and recommended interdiction of C.W.2. C.W.2 said he was not called to the hearing of the committee. That the interdiction was unprocedural since C.W.2 should have been called to a hearing first. That he was called to the Human Resource Committee nine (9) months upon interdiction and gave his explanation. That he had also explained himself in writing.
50. C.W.2 said he was then called to receive the letter of dismissal. That it was handed to him by the Secretary. That his employment was terminated by the Council which was the highest authority. That his job had already been advertised which was Accountant Job Group 'K' CPA II. That he did this job for 9 years. C.W.2 said he did not know if other accountants were employed after his dismissal. He said he was in Job Group 'J' and had CPAK. That he had no degree.
51. C.W.2 said he was 47 years old and that he claims to be paid loss of 13 years earnings to the date of retirement at 60 years. That the suit was filed in the year 2012 hence the claim for 15 years then. C.W.2 said he was paid his NSSF dues when he left.
52. In re-examination, C.W.2 reiterated that Milele Beach Hotel was not overpaid. That payment of Kshs.15,475,520 was authorized by the Director. That total payment including VAT was Kshs25,225.200 less the deposit earlier paid.
53. That payment Voucher 170 was corrected because respondent paid 12,417,600 to Milele Beach Hotel and Kshs.3,057,600 to KRA, being VAT. Final payment added up to 15,475,420 therefore. That the correction of the voucher by C.W.2 was then given to Head of Finance to take to the Director for approval. That the Head of Finance had endorsed the corrected voucher and same was approved by the Director. That V.A.T was remitted as per the cheque before Court.
54. C.W.2 said he had explained all the charges made against him before the disciplinary committee on 1/7/2011 and the committee was satisfied. The committee however recommended that C.W.2 be issued with a warning letter and that he be deployed to another department and not accounts or finance department. C.W.2 said he did not appeal this decision. That he was therefore surprised when he received letter of dismissal.
55. R.W.1 Kepha Owino Ogolla testified that he was the Human Resource officer of the respondent. That the claimants Bernard Mbulo and Barrack Okello were accountants of the respondent in Job Group 'J'.
56. That following internal audit report dated 15/10/2010 by the respondent's Human Resource Committee, C.W.1 and C.W.2 were served with notices of interdiction dated 24/11/2010 to facilitate investigations.
57. That the Audit report had revealed serious accounting irregularities in the accounting department in which C.W.1 and C.W.2 were implicated. C.W.1 was implicated in deliberately preparing payment voucher No. 00177 for Kshs.22,000 comprising double payment with an intention to defraud the respondent. That the payment voucher was stopped by the internal Audit after being posted in the books of account for payment with active participation of C.W.1. That had the payment not been stopped, it could have resulted to a double payment as a similar claim had been paid through the Course Co-ordinator Dr. Ruge.
58. The Internal Audit Report dated 15/10/2010 revealed that the signature of the facilitator in the claim had been forged in order for the claim for double payment to go through.
59. R.W.1 denied that C.W.1 had stopped the payment of the voucher since he had participated in preparing, processing and released it for payment with the intention to defraud the respondent.



60. C.W.1 was served with notice of interdiction dated 24/11/2010 without drama or threat as alleged by C.W.1 and C.W.2. That the presence of the police officers in the respondent's premises was routine and was aimed at facilitating a smooth handing over of cash in the cash office and the police had nothing to do with the service of the interdiction notices to C.W.1 and C.W.2. That as a government institution, the respondent is always provided and protected by armed security officers from the relevant police station.
61. That the claimants were paid half salary while on interdiction as required in such situations besides being housed by the respondent.
62. That upon further investigations, it became clear that C.W.1 was involved in the preparation and abetting altering of the payment voucher No. 00252 for Kshs.12,417,600 and later changed to read Kshs.15,475,50 by C.W.2 without authority and supporting documents. That both C.W.1 and C.W.2 were informed about these charges appropriately.
63. That C.W.1 and C.W.2 were both given opportunity to defend themselves and C.W.1 responded in writing on 24/6/2011. C.W.1 also appealed the interdiction to the Chairman of Human Resource Committee. C.W.1 then appeared before the Human Resource Committee on 24/6/2011 and 1/7/2011 to respond to the allegations made against him.
64. C.W.1 had on 1/2/2010 written to the Permanent Secretary, Ministry of Education complaining about his interdiction.
65. With regard to the job adverts in the Daily Nation of 3/11/2010, various job vacancies needed to be filled by qualified Kenyans in an effort to build capacity of the accounts department. It is not true that the claimants' jobs were advertised before they were interdicted because the advert was in response to the undertaking in the Institute and nothing to do with the interdiction of the claimants. The advertised jobs were in Job Group 'K' whereas the claimants were in Job Group 'J'. That this is a continuous process to fill positions as required within the Cadre of the respondent.
66. That the Council found the defence raised by C.W.1 and the explanation in respect of the two allegations unsatisfactory and by a letter dated 30 /4/2012 terminated the employment of C.W.1. C.W.1 collected the letter on 2/5/2012.
67. That the letter clearly sets out the grounds of termination and the reasons were valid and the process was fair. C.W.1 was then issued with a notice to vacate respondent's premises. This position was upheld by the Court in a ruling dated 16/1/2013. The loan given to C.W.1 by Equity was a private matter and had nothing to do with the respondent.
68. With regard to C.W.2 Barrack Okello, following the Internal Audit report, he was equally interdicted on 24/11/2010 and was charged of having negligently altered payment voucher No. 00252 for Kshs.12,417,600 to Kshs.15,475,520 leading to overpayment to Milele Beach Hotel and KRA by Kshs.5,693,463 and 421,758 respectively.
69. C.W.2 was also charged of fraudulently issuing receipt No. 16433 amount to Kshs.90,000 to Mr. Robert B. Olodo using cheque No. 018504 belonging to Mahiga Girls Secondary School being participants training fees.
70. C.W.2 was also charged of abetting double payment attempt by C.W.1 vide payment voucher No. 00177 of Kshs.22,000.
71. R.W.1 stated that payment voucher No. 00252 of Kshs.12,417,600 was altered without approval and supporting documents to reflect the actual payments in the cash book while reconciling the accounts.



72. That a payment voucher is an accounting document and can only be altered with the authority of the accounting authority being the Director/Chief Executive Officer of the respondent and accompanied with supporting documents.
73. R.W.1 stated further that C.W.2 had no authority to alter the amount on the payment voucher No. 00252 for Kshs.12,417,600 to read 15,475,520. This was therefore a manipulation of records designed to facilitate a fraud which led to overpayment of the stated amounts.
74. R.W.1 stated that the denial by C.W.2 that he was not involved in the overpayment because he was away on official duties is without substance because C.W.2 personally altered the amounts in the voucher and signed and collected cheque No. 00287 for Kshs.12,412,600 drawn in favour of Milele Beach Hotel and processed through payment voucher No. 00252 on 14/10/2009 on behalf of the hotel when he was allegedly away in a seminar.
75. Furthermore, R.W.1 testified that C.W.1 was implicated in fraudulently issuing receipt No. 16433 for Kshs.90,000 to Mr. Robert Olodo using Cheque No. 018504 belonging to Mahiga Girls Secondary School being participants training fees as payment of house rent from Mr. Robert Olodo.
76. R.W.1 testified that though C.W.2 stated that receipt No. 16433 for Kshs 90,000 was issued by a junior clerk in account department, C.W.2 was the custodian of the receipt books and the clerk was working under his supervision.
77. C.W.2 proceeded to prepare the receipt voucher No. F017 to demonstrate that the same was paid by Mr. Robert Olodo in reduction of house rent arrears which stood at Kshs.150,000 at the time.
78. C.W.2 further completed the deposit payment slip dated 2/9/2010 and proceeded to bank the cheque No. 018504 for Kshs.90,000 and in the deposit slip disguised it as having been issued by Co-operative Bank Limited, Kakamega Branch when it was clear, it was issued by Equity Bank Limited, Othaya Branch.
79. R.W.1 concluded that it was clear that C.W.2 was the architect of the issuance of receipt No. 16433 for Kshs.90,000 for the benefit of Mr. Robert Olodo fraudulently.
80. C.W.2 just like C.W.1 was issued with a notice of interdiction on 24/11/2010 upon adoption of the Internal Audit Report dated 15/10/2010 by the Respondent's Human Resource Committee. Interdiction was essential to allow smooth investigations of the matter. He was placed on half pay. C.W.2 was afforded an opportunity to defend himself which he did in writing by his letter dated 24/6/2011. C.W.2 just like C.W.1 also appeared in person before the Respondent's Human Resource Committee on 24/6/2011 and 1/7/2011 to respond to the three allegations in the notice of interdiction on letter dated 24/11/2010 contrary to the testimony by C.W.1 and C.W.2 that this did not happen.
81. That on 1/7/2011, C.W.2 thanked the Human Resource Committee for according him a fair hearing when he appeared before it as the minutes before Court shows.
82. C.W.2 had also countersigned the notice of interdiction by a letter to the Human Resource Committee. C.W.2 had also earlier written to the Permanent Secretary, Ministry of Education on 1/12/2010 complaining about the interdiction. R.W.1 concluded that C.W.2 was given a fair hearing before his employment was terminated by a letter dated 30/4/2012.
83. That the advertisement of Accountants positions in Job Group 'K' had nothing to do with the interdiction of the claimants, who in any event were in Job Group 'J'.



84. That their termination was for valid reasons given in the letter of termination and the respondent followed a fair procedure leading to the said termination and the claims have no merit and they be dismissed.
85. Under cross-examination by counsel for the claimants, R.W.1 was candid and very consistent in her testimony. R.W.1 disputed the versions told by C.W.1 and C.W.2, in a consistent and credible manner. R.W.1 brought out the version by C.W.1 and C.W.2 as false explanations which were rejected by the respondent as unsatisfactory hence the termination of employment by Council. R.W.2 Samuel Mawega, the internal Auditor of the Respondent told the Court that that he worked for the respondent from the year 2012. R.W.2 told the Court that the Internal Audit Report was established in the year 2010 to oversight other departments of the respondent and particularly the Finance department. R.W.1 produced the Audit report in which the matters that led to the charging and interdiction of the claimants were revealed. Under cross-examination, R.W.2 explained that he was not part of the team that prepared the Audit report dated 15/10/2010 and 21/12/2010 respectively. R.W.2 also produced the investigation report dated 8/12/2011. R.W.2 testified that the relevant report with respect to this matter is one dated 15/10/2010. R.W.2 corroborated the testimony by R.W.1 on all the matters preferred against C.W.1 and C.W.2 and explained the report in detail though stating that he was not one of the people who prepared the report as he was not working for the respondent then as an Internal Auditor.
86. R.W.3 David Nyangweso testified that he was a clerical officer working in the accounts department of the respondent. R.W.3 said C.W.1 and C.W.2 were his supervisors and C.W.2 was his supervisor. R.W.3 confirmed that C.W.2 was the custodian of receipt books, cheques and books.
87. R.W.3 said he was conversant with the circumstances in which receipt No. 16433 of Kshs.90,000 was issued in favour of one Mr. Robert Olodo against Cheque No. 918504 passed by C.W.2 as payment to reduce Mr. Olodo's house rent arrears with the respondent. R.W.3 said on or about 1/9/2010, C.W.2 handed over to R.W.3 the receipt book and instructed him to write receipt No. 16433 for Kshs.90,000 on account of house rent arrears for Mr. Robert Olodo who occupied Institute's house.
88. That C.W.2 had confirmed to R.W.3 at the time, like in other similar case, he had in his possession Cheque No. 0188504 which he indicated had been paid in favour of the Respondent by Mr. Robert Olodo in reduction of house rent arrears.
89. R.W.3 stated that upon writing the said receipt, C.W.2 instructed R.W.3, to put his initials 'BO' on the signature part to signify ownership. R.W.3 said this was routine work in the accounts department. R.W.3 stated that at the time of writing the said receipt, he was not aware that Cheque No. 018504 of Kshs.90,000 had been paid by Mahiga Girls' Secondly School being fees for training of participants from the school as C.W.2 had made him believe.
90. R.W.3 was closely cross-examination by Counsel for the respondent and was candid, consistent and came forth as a credible witness.

### **Determination**

91. The parties filed written submissions in which they have detailed the facts of the case from their different perspectives and law applicable to the matter. The Court has carefully considered the submissions and the evidence adduced by C.W.1, C.W.2, R.W.1, R.W.2 and R.W.3 and has delineated the following issues for determination:-
- a. Whether the termination of the employment of C.W.1 and C.W.2 was for a valid reason.



- b. Whether the respondent followed a fair procedure before terminating the employment of the claimants.
- c. Whether the claimants are entitled to the reliefs sought.
92. The respondent is mandated under Section 43(1) and (2) of the *Employment Act*, to prove on a balance of probabilities that it terminated the employment of the claimants for a valid reason.
93. The Court has carefully evaluated the evidence adduced by C.W.1 and C.W.2 vis a vis that adduced by R.W.1, R.W.2 and R.W.2 and the Court is satisfied that the claimants were on 24/1/2010 lawfully charged with the stated offences and interdicted pending conduct of investigations and disciplinary processes with regard to the charges preferred against the two. C.W.1 in particular was implicated in deliberate preparation of payment voucher No. 00177 for Kshs.22,000 amounting to double payment with intention to defraud the respondent.
94. The payment of the said Voucher No. 00177 for Kshs.22,000 was detected and stopped by the Internal Auditor. It duplicated similar payment already made by a Course facilitator Dr. Ruge.
95. The Court is satisfied that the respondent demonstrated that C.W.1 was guilty of the framed charge. C.W.1 did not satisfactorily exculpate himself from this charge during the disciplinary hearing or before this Court.
96. Furthermore, C.W.1 together with C.W.2 were found guilty by the respondent of preparing and abetting alteration of payment voucher No. 00252 for Kshs.12,417,600 and later changed to read Kshs.15,475,50 without authority and supporting documents leading to overpayment to Milele Beach Hotel and Kenya Revenue Authority by Kshs.5,693,463 and Kshs.42,738 respectively to the loss and detriment of the respondent.
97. The Court is satisfied that the respondent has demonstrated that C.W.1 and C.W.2 were guilty of the aforesaid misconduct. C.W.2 was the author of this mischief and was abetted by C.W.1 in that respect.
98. Finally, the Court is satisfied that the respondent has demonstrated that C.W.2 wrongfully processed payment of Kshs.90,000 towards reduction of rent arrears of Mr. Robert Olodo, a tenant of the respondent using a cheque made in favour of the respondent by Mahiga Girls' Secondary School towards payment of training fees.
99. The respondent has proved this misconduct by C.W.2 on a balance of probabilities. The Court is satisfied that the respondent had a valid reason to terminate the employment of C.W.1 and C.W.2 taking the above evidence into account.
100. The Court is also satisfied that C.W.1 and C.W.2 were given opportunity to respond in writing to the charges made against them which they proceeded to do. C.W.1 and C.W.2 were also afforded opportunity to defend themselves at a hearing of the Human Resource Committee. That the records before Court clearly show that these proceedings took place before the Council decided to terminate the employment of C.W.1 and C.W.2.
101. The Court is therefore satisfied that the respondent followed a fair procedure before termination of the employment of C.W.1 and C.W.2.
102. The respondent did not violate the provisions of Section 41, 43 and 45 as they had valid reasons set out in the letters of termination to terminate the employment of the claimants and that the respondent followed a fair procedure in terminating the employment of the claimants.



103. The Court has relied on the case of *Peter Gaitbo Ng'ang'a v Board of Management of Banita Secondary School and another* [2015] eKLR to find that the interdiction was a fair step to allow the respondent to investigate and conclude the disciplinary process.
104. The Court has also relied on the decision in *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR in which the Court of Appeal held:
- “In determining whether a decision by the employer to terminate is just and equitable, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee” in reaching the conclusion that the respondent followed a fair and just procedure by giving a notice to show cause upon interdiction followed by a disciplinary hearing held before arriving at the decision to terminate the employment of the claimants in this case.
105. Furthermore, the Court was fortified by the decision in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR in which the Court said:-
- “...For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination” in reaching the conclusion that the termination of the employment of the two claimants was not only for a valid reason but also it was arrived at following a just and fair procedure.
106. In the final analysis, the consolidated suit by the two claimants alleging unlawful and unfair termination of employment has no merit and is dismissed.
107. With regard to the remedies sought by the claimants, the termination of employment having been found to be lawful and fair, the claimants are not entitled to any compensation or payment in lieu of the unserved period to the date of would be retirement. Similarly, the claimants were registered with National Social Security Fund (NSSF) and were pensionable being public servants and are thus not entitled to payment of service or severance pay as claimed or at all.
108. In terms of the letters of termination dated 30/4/2012 to both claimants, the respondent offered to pay the claimants one month salary in lieu of notice. The claimants are therefore entitled to payment of one month salary in lieu of notice as claimed. The respondent did not demonstrate that it had paid the claimants in lieu of leave days not taken at the time of termination. The Court awards the claimants therefore in lieu of leave days as claimed. The rest of the reliefs sought are dismissed in their entirety.
109. In the final analysis, judgment is entered in favour of the claimants as against the respondent as follows:-
- a. Barrack Okello
    - i. Kshs.26,774 in lieu of one month notice.
    - ii. Kshs.42,945 in lieu of unpaid leave days not taken.
  - b. Bernard Mbulo
    - i. Kshs.32,294 in lieu of one month notice.
    - ii. Kshs.42,945 in lieu of 45 leave days not taken in 2009 and 2010.
  - c. Interest at Court rates from date of termination till payment in full.



d. The respondent to pay half the Costs of the suit.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 31<sup>ST</sup> DAY OF JULY, 2023.**

**MATHEWS N. NDUMA**

**JUDGE**

Appearances

Mr. Arwa Advocate for the claimants

Mr. Gathumbi Advocate for the Respondent

Ekale – Court Assistant

