



**Musyimi v Daystar University (Cause 231 of 2019)
[2023] KEELRC 1898 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1898 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 231 OF 2019**

**L NDOLO, J
JULY 27, 2023**

BETWEEN

JOSHUA MUNYAO MUSYIMI CLAIMANT

AND

DAYSTAR UNIVERSITY RESPONDENT

JUDGMENT

Introduction

1. The theatre of this dispute is Day Star University where the Claimant, Joshua Munyao Musyimi, worked as University Services Manager. The Claimant brought this claim following the termination of his employment on 2nd May 2019.
2. The claim is contained in a Memorandum of Claim dated 8th April 2019 and amended on 1st July 2019. The Respondent's Defence is dated 18th September 2020. The matter went to full trial where the Claimant testified on his own behalf. The Respondent called its Acting Deputy Vice Chancellor, Prof Michael Bowen and Phillippe Bimenyimana who described himself as a businessman. The parties further filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as University Services Manager in the year 2015. He claims to have doubled up as Acting Manager of Daystar Enterprises Limited, a subsidiary of the Respondent, for a period of three months from April 2017.
4. On 5th September 2018, the Respondent issued a letter to the Claimant, directing him to proceed on compulsory leave for a period of one month from 6th September 2018 to 5th October 2018.



5. By an email dated 9th October 2018, the Respondent extended the Claimant's compulsory leave period by another one month. By a return email dated 10th October 2018, the Claimant took issue with the process initiated by the Respondent. In particular, the Claimant pointed out that he had not been adversely mentioned or implicated in two reports which formed the basis of the investigations; being, a forensic audit report and a Council of University Education (CUE) report.
6. By a subsequent letter dated 13th November 2018, the Respondent extended the Claimant's compulsory leave by a further two months.

Upon reporting back to work, the Claimant was issued with a letter dated 6th December 2018, suspending him from duty, on allegations of misconduct and abuse of office.
7. The suspension letter accused the Claimant of unprocedural hiring of buses during the period that he was overseeing the operations of Daystar Enterprises Limited. The Claimant was also accused of failing to ensure installation of water and electricity meters at the cafeterias and kitchens at the Respondent's Nairobi and Athi River Campuses. Further, it was alleged that the Claimant was receiving bribes from service providers.
8. The Claimant was required to show cause why disciplinary action should not be taken against him and he responded by his letter dated 13th December 2018.
9. Regarding the allegation on unprocedural hiring of buses, the Claimant gave an account of how buses were hired and the amounts deposited in the Respondent's bank accounts. The Claimant stated that he had raised the issue of water and electricity metres with the Procurement Department. He added that in the meantime, the respective cafeterias and kitchens were duly billed for their utility consumption.
10. On the allegation of bribery, the Claimant requested for better particulars; including the persons making the allegations, the persons alleged to have given the bribes and the recipients of the alleged bribes. The Claimant also requested for a copy of the forensic investigations report. He states that the Respondent did not accede to his request.
11. The Claimant claims to have duly responded to the allegations levelled against him and on 19th January 2019, he wrote a demand letter to the Respondent, asking for lifting of his suspension.
12. By letter dated 30th January 2019, the Respondent invited the Claimant to a disciplinary hearing scheduled for 5th February 2019. The Claimant states that the disciplinary proceedings were adjourned by the chairperson of the Disciplinary Committee and on 1st March 2019, he was issued with another letter inviting him to another disciplinary hearing on 6th March 2019.
13. The Claimant avers that he attended the disciplinary hearing and rendered an explanation on the issues raised upon which the Respondent asked for time verity the information given by the Claimant. The Claimant also sought to be furnished with signed copies of utility bills from the persons charged with the responsibility of billing.
14. The Claimant further avers that in order to respond to the allegation that utility bills in respect of service providers had not been raised, he sent an email to the staff responsible for raising the bills requesting them to provide billings for water and electricity for Murigi's Kitchen, Mucharo Lodges and Practice Management Solutions, from the year 2015.
15. The Claimant states that he was issued with another invitation letter dated 14th March 2019 for another disciplinary hearing scheduled for 20th March 2019. He adds that on 15th March 2019, he was issued with a report authored by the Acting Deputy Vice Chancellor, exonerating him from all allegations



save for electricity and water bills in respect of Practice Management (Sironi) for the period between August 2017 and January 2018, which according to the Respondent were not billed.

16. The Claimant attended the disciplinary meeting scheduled for 20th March 2019 and explained to the Disciplinary Committee that it was not his job to raise bills although the person responsible for billing reported to him.
17. According to the Claimant, the only bills that needed clarification were in respect of Practice Management (Sironi) for the period between August 2017 and January 2018. He states that he explained to the Disciplinary Committee that in this period, the contract for service had not been signed and that there was student unrest at the time.
18. The Claimant avers that on 26th March 2019, he received a call from the Chief Human Resources Manager, Pius Muia directing him to attend a meeting at 3.00 pm. The meeting was attended by the Ag. Deputy Vice Chancellor (Finance and Administration) Prof. Bowen and the Chairperson of the Disciplinary Committee, Mrs. Nyambura Musyimi. The Claimant claims that he was pressurised to resign but he declined to do so.
19. The Claimant states that on 4th April 2019, he received another invitation for a disciplinary hearing on 23rd April 2019. He adds that at this meeting, it was alleged that he had demanded for a bribe from a service provider. The Claimant asked for an opportunity to face the service provider but the Respondent did not oblige.
20. The Claimant goes on to state that at the meeting of 23rd April 2019, the Respondent summoned Boaz Bichange who was said to have alleged that the Claimant had compelled him to raise utility bills for purposes of misleading the Disciplinary Committee that they had been appropriately raised. According to the Claimant, Bichange denied these allegations and stated that it was his responsibility to raise utility bills.
21. On 2nd May 2019, the Respondent issued a summary dismissal letter to the Claimant, on allegations of unprocedural hiring of buses, failing to install water and electricity metres for cafeterias in Nairobi and Athi River Campuses and soliciting and receiving bribes from service providers.
22. The Claimant takes issue with the disciplinary process he was subjected to; he states that his representative of choice was not allowed into the disciplinary meetings and that the Disciplinary Committee was not properly constituted. The Claimant takes the view that the disciplinary process was a mirage and accuses the Respondent of having made a decision to dismiss him even before the suspension.
23. Regarding the suspension, the Claimant complains that he was suspended for close to eight (8) months and adds that it was only after the Court issued orders directing the Respondent to finalise the disciplinary process that a decision was made.
24. The Claimant's claim is as follows:
 - a. A declaration that his dismissal was unlawful, wrongful and unfair;
 - b. An order directing the Respondent to reinstate the Claimant to his position without loss of benefits from the date of dismissal to the date of reinstatement;
 - c. An order compelling the Respondent to pay the Claimant Kshs. 52,000 being withheld allowances;
 - d. Damages for unfair labour practices;



- e. Kshs. 3,649,200 in compensation;
- f. General damages for defamation;
- g. Unremitted pension contributions (January to April);
- h. Interest on pension contributions (January to April);
- i. Proper certificate of service;
- j. Costs plus interest.

The Respondent's Case

- 25. In its Defence dated 15th September 2020, the Respondent admits having employed the Claimant, in the position of University Services Manager.
- 26. The Respondent however denies the Claimant's claim of unlawful and unfair termination and states that his employment was terminated on the ground of misconduct, which was duly proved.
- 27. The Respondent admits that the Claimant was sent on compulsory leave on 5th September 2018 and that the period of leave was subsequently extended twice on 9th October 2018 and 13th November 2018. The Respondent states that the extension was necessitated by the time required to investigate the allegations of misconduct imputed upon the Claimant at a time when the Respondent was experiencing student unrest.
- 28. The Respondent denies the Claimant's averment that it failed to respond to his queries.
- 29. The Respondent further denies sharing the Claimant's photo or injuring his character in any way.
- 30. The Respondent concedes having suspended the Claimant for irregularly hiring out buses during his tenure as Manager, Daystar Enterprises Limited. The Respondent cites the following reasons for the Claimant's suspension; his failure to ensure that monies due from hiring of buses were promptly paid and banked, failure to ensure that third party service providers were billed for utilities used and soliciting bribes from external service providers.
- 31. The Respondent agrees that the suspension letter dated 6th December 2018, required the Claimant to show cause why disciplinary action should not be taken against him. According to the Respondent, the Claimant's reply dated 13th December 2018 required more clarification and he was therefore asked to tender evidence in support of his rebuttals.
- 32. The Respondent admits that the Claimant was invited to several disciplinary hearings on 5th February 2019, 6th March 2019 and 20th March 2019. The Respondent asserts that no hearing was adjourned for unclear reasons.
- 33. The Respondent accuses the Claimant of posturing by hoodwinking the employer into thinking that he had done the tasks required of him towards ensuring that external service providers paid their utility bills.
- 34. The Respondent denies the Claimant's allegations that the Disciplinary Committee was not properly constituted and that he was not afforded a fair hearing.

Findings and Determination

- 35. There are two (2) issues for determination in this case:



- a. Whether the termination of the Claimant's employment was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Termination

36. The termination of the Claimant's employment was communicated by letter dated 2nd May 2019 stating as follows:

"Dear Mr. Musyimi,

Ref: Termination Of Employment

Greetings.

Please refer to the suspension letter issued to you on 6th December 2018. In that letter, the accusations leveled against you were clearly spelt out as listed below;

- a. Unprocedural hiring of Daystar Enterprises Limited (DEL) buses during his (sic) tenure.
- b. Failing to install water and electricity meters for the Cafeterias both in Nairobi & Athi River Campuses thereby leading to loss of revenue and not billing for these services
- c. Soliciting Bribe and receiving bribes from service providers during the tender award process

You responded to the charges on 13th December 2018. In the view of the University, the response was not satisfactory and it commenced investigation and disciplinary hearings.

The Council Disciplinary Committee invited you for three disciplinary hearings on 6th March 2019, 20th April 2019 and lastly on 23rd April 2019 during which you presented your case. On all the three dates you were represented by two officials from the senior staff association as provided by the Human Resource Policy.

The allegations against you of soliciting bribes from service providers, negligence of duty in failing to ensure that proper records were kept by officers under you, that water and electricity bills were issued on time amount to serious offences under the University Human Resource Policy Clause 14.7.3 (c), (g) and (n). After the committee's hearings and your responses as well as the evidence adduced from the internal audit and other sources, the committee came to the well-considered conclusion that the offences were committed. These offences have greatly eroded your credibility as an employee and manager and as result the University has lost trust and confidence on (sic) you to oversee the responsibilities of University Services.

Daystar University has therefore decided to terminate your employment services in accordance with section 44 of the [Employment Act](#) with effect from May 2 2019. Kindly note that you have the right to appeal against this decision to the Vice-chancellor through your immediate supervisor as per the current HR Policy manual.

You will be paid all your dues in line with University HR Policy Manual. Please make arrangements to clear with the University in order to facilitate the processing of the final dues.



We thank you most sincerely for your services to Daystar University during the last two years.

Yours Faithfully,

(signed)

Prof. Bernard Boyo

Ag. Vice-Chancellor”

37. This letter lays out three (3) charges against the Claimant; unprocedural hiring of buses, failure to install utility meters and raise bills on account service providers at the University Campuses, and soliciting bribes from service providers.
38. Prior to the termination letter, the Claimant had been issued with a suspension letter dated 6th December 2018. The suspension was preceded by a letter dated 5th September 2018, by which the Claimant was sent on compulsory leave which was extended by letter dated 13th November 2018.
39. The suspension letter explained the offence of unprocedural hiring of Daystar Enterprises Limited buses by pointing to untraceable income. The suspension letter also accused the Claimant of failure to ensure installation of utility meters in cafeterias and kitchens at Athi River and Nairobi Campuses. The Claimant was further accused of collecting bribes from service providers.
40. While denying all the claims levelled against him, the Claimant accused his former employer of subjecting him to a prolonged disciplinary process characterised by mutating charges, with the sole aim of forcing him to resign from employment.
41. The charges levelled against the Claimant fall within the province of gross misconduct and the standard for handling such cases requires that the employer must first, demonstrate a valid reason for terminating the employment of the employee and second, that in executing the termination, due procedure was adhered to. This is the essence of Sections 43 and 41 of the *Employment Act*.
42. The Claimant proceeds against his former employer on two fronts; that the charges levelled against him were not proved at the shop floor and second, that the Respondent not only failed to observe due process as set out in law but also breached its own procedural rules.
43. It is not in contest that the Claimant was subjected to three disciplinary sittings on 6th March 2019, 20th April 2019 and 23rd April 2019. It is also on record that the Respondent only concluded the disciplinary process pursuant to an order of the Court issued by my brother Ongaya J on 8th April 2019.
44. Disciplinary proceedings are by nature stressful and disruptive. They therefore ought to be determined expeditiously to allow the parties to move on. In its decision in *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [2015] eKLR this Court stated as follows:

“...To have disciplinary proceedings hanging over the head of an employee for close to a year much like the sword of Damocles or the tongue of an unforgiving spouse, amounts to an unfair labour practice within the meaning of Article 41(1) of *the Constitution*. Disciplinary proceedings should not be allowed to persist so as to acquire the character of an employer’s core business. They must be dealt with expeditiously to allow both the employer and the employee to move on.”
45. In the present case, the Respondent appears to have set in motion a disciplinary process before completing investigations. This was confirmed by RW1, Prof Michael Bowen, who at the material time was the Acting Deputy Vice Chancellor, Finance and Administration.



46. Prof Bowen told the Court that although both the compulsory leave and suspension slapped on the Claimant were to pave way for investigations, no investigation report was generated. This begs the question as to what informed the Respondent's decision to subject the Claimant to a disciplinary process.
47. It seems to me that by the time the Respondent kicked off the disciplinary process against the Claimant, it had no concrete charges against him. This would explain why the Claimant was kept on compulsory leave for four (4) months followed by suspension for three (3) months. Prof Bowen confirmed that there was no provision for compulsory leave in the Respondent's Human Resource Manual.
48. There is also the complaint by the Claimant that the charges levelled against him mutated in the course of the disciplinary process. In this regard, the Claimant points out that the charge of failure to keep records was not part of the show cause letter issued to him. He further submits that the charge of failure to install water and electricity meters later mutated to failure to bill service providers.
49. In his final submissions, the Claimant made reference to the decision in *Thomas Joseph O. Onyango v State & another* [2014] eKLR where it was held that variation of charges in the course of a disciplinary process amounts to violation of the right to due process.
50. The Claimant also accused the Respondent of relying on the charge of unprocedural hiring of buses, of which he was cleared, to dismiss him from employment.
51. Regarding the charge of receiving bribes from service providers, the Claimant told the Court that this was a wild allegation that was not supported by any evidence. He accused the Respondent of failing to avail him an opportunity to meet his accusers on this charge.
52. A record of the disciplinary proceedings discloses that that the Chairperson of the Disciplinary Committee met the alleged complainants separately and instructively, in the Claimant's absence. This modus operandi not only flew in the face of the procedural fairness requirements of Section 41 of the [Employment Act](#) but also confirmed the Claimant's assertion that the Disciplinary Committee as set up was both an investigative panel and a jury.
53. RW2, Philippe Bimenyimana sensationally stated that the Claimant asked him for some money in form of a bribe in order for him to retain a transport service contract he had with the Respondent. The witness was however unable to produce any independent evidence to confirm his allegations against the Claimant.
54. It was not lost on the Court that RW2 had in fact lost his contract with the Respondent on account of complaints made by students on the condition of the buses he had provided, leading to court proceedings for breach of contract. The Court therefore formed the opinion that this witness had his own scores to settle and his uncorroborated testimony could not be relied on for the charge of bribery. In any event, he was not presented at the disciplinary hearings for examination by the Claimant.
55. Moreover, it was common cause that the Claimant had only one vote in the Respondent's Tender Committee and was not the final authority in award of service contracts. To suggest therefore that the Claimant, by himself, was capable of tilting award of contracts to service providers is far-fetched and unbelievable.
56. The Claimant further complained that he was not allowed to exercise his right to be accompanied by a representative of his choice at the disciplinary hearings as provided by Section 41 of the [Employment Act](#).



57. According to the record of the disciplinary proceedings, there were two representatives of the Staff Association namely; Abok Ager and Richard Maswili who were de facto members of the Disciplinary Committee. To my mind, these two could not serve as the Claimant's representatives as contemplated under Section 41 of the *Employment Act*. Consequently, I have reached the conclusion that the Claimant was denied the opportunity to be accompanied by a representative of his choice as required by law.
58. The Court was referred to the decision in *Onjira John Anyul v University of Nairobi* [2019] eKLR where the requirements of procedural fairness were restated in the following terms:
- “...the principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker...The ingredients of fairness or natural justice...are firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected...secondly, that no one ought to be a judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision...”
59. Finally, the Claimant took issue with the composition of the Disciplinary Committee. His case is that he ought to have been subjected to a Disciplinary Committee made up of Senior Staff Members and that the Disciplinary Committee being composed of members of the University Council was incompetent to handle his case. In advancing this argument, the Claimant relied on Clause 14.11 of the Respondent's Human Resource Policies & Procedures Manual.
60. The Respondent did not adduce any evidence to counter the Claimant's assertion in this regard, and the conclusion that easily presents itself is that in setting up the Disciplinary Committee to hear the Claimant's case, the Respondent breached its own internal policies and procedures. This heaps on the infraction of sending the Claimant on compulsory leave and prolonged suspension contrary to the provisions of the Human Resource Policies & Procedures Manual.
61. On the whole, I find and hold that the Respondent missed the mark for lawful and fair termination of employment as the allegations made against the Claimant were not proved at the shop floor and in executing the termination, the Respondent violated both the procedural fairness requirements set out in law and its own internal policies and procedures.

Remedies

62. In the result, I find for the Claimant and award him eight (8) months' salary in compensation for unlawful and unfair termination of employment. In arriving at this award, I have considered the Claimant's length of service as well as the Respondent's unlawful conduct in bringing the employment to an end.
63. I find no basis for the claim for unfair labour practices which is disallowed.
64. The Claimant abandoned the claims for withheld allowances and general damages for defamation.
65. The claims for pension contributions plus interest thereon was not proved and is therefore also disallowed.
66. Finally, I enter judgment in favour of the Claimant in the sum of Kshs. 2,432,800 being eight (8) months' salary in compensation for unlawful and unfair termination of employment.
67. This amount will attract interest at court rates from the date of judgment until payment in full.



68. The Claimant is also entitled to a certificate of service in accordance with Section 51 of the *Employment Act* plus costs of the case.

69. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JULY 2023

LINNET NDOLO

JUDGE

APPEARANCE:

MR. MULI FOR THE CLAIMANT

MR. LIGAMI FOR THE RESPONDENT

