



**Keiyo v Moi Educational Centre (Cause 104 of 2019)
[2023] KEELRC 2378 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2378 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 104 OF 2019
M MBARŪ, J
SEPTEMBER 28, 2023**

BETWEEN

SALLY KEIYO CLAIMANT

AND

MOI EDUCATIONAL CENTRE RESPONDENT

JUDGMENT

1. The claimant is an adult and trained teacher. The respondent is a limited liability company running an educational institution.
2. In May 2008 the respondent employed the claimant as a teacher and confirmed her in this position on 24 October 2008 and she rose through to the position of Senior Teacher (Upper Primary).
3. The claimant was appointed acting Deputy Principal from 16 May 2017 for a period of one year during which she reported to the principal of the centre. On 21st January 2019 the claimant was summoned by the principal for a meeting and notified that another teacher had been appointed to her position as Senior Teacher (Upper Primary).
4. The claim is that the respondent was in breach of the claimant's terms and conditions of employment and the *Employment Act* on the grounds that, on 24 January 2019 the respondent circulated to all members of staff a memo informing them that one Leonard King'oo had been appointed in the claimant's position as the Senior Teacher (Upper Primary). On 29 January 2019 the respondent issued the claimant with letter directing her to hand over to Mr King'oo who would be the acting Senior Teacher (Senior School) with effect from 1st February 2019.
5. On 4 February 2019 the respondent issued the claimant with letter giving her two months' notice to vacate the house that she was occupying and located within the respondent's premises and where she had resided for over 9 years for which she had a House Rent Agreement with the respondent.



6. The claim is also that the respondent issued the claimant with a revised job card, a demotion, as she was required to teach class five west while previously she was teaching class eight and six.
7. On 8 February 2019 the respondent issued the claimant with notice that she had failed to give a handing over as required and by a letter dated 11 February 2019 the claimant responded and noted that she had done the handing over with documentation as proof to Mr King'oo. Through letter dated 12 February 2019 the claimant was served with a show cause notice for alleged failure to hand over and that she should give her responses by 5pm.
8. The claimant responded and reiterated that she had done the handing over to Mr King'oo but on 13 February 2019 she received notice that she was found guilty of engaging in gross misconduct and that she was suspended with immediate effect for one month to allow for investigations.
9. The claim is that the decision to suspend the claimant was unlawful and without due process and the claimant had not been given any opportunity to defend herself. The contract of employment and Human Resource Policy did not provide for suspension and therefore, the claimant ought to have been taken through the due process before such a sanction could be issued.
10. On 14 February 2019 the claimant received an email from the respondent that she would not be allowed within the precincts of the school until the suspension period was over. On 18 February 2019 the claimant was denied entry to her house which is located within the school compound by the guards at the gate. She had to seek police intervention, and the guards allowed her access on 19 February 2019 when she also received notice requiring her to appear before the Board of Directors at 9am on 21st February 2019 and apprehensive, the claimant filed suit to protect her rights.
11. The claimant attended before the respondent's board as directed with her representative who was denied access and the board issued her with threats and warnings with regard to her employment. Without being given a hearing, the claimant was sent away and told that she would receive communication from the board later.
12. On 1st March 2019 the claimant was served with notice of summary dismissal dated 28 February 2019 which was unfair and unjustified. Since, the respondent has persisted and issued threats to her. Termination of employment was in breach of the claimant's rights and fundamental freedoms and denied her employment unfairly. The claimant is claiming the following;
 - a. A declaration that employment terminated unfairly;
 - b. 12 months' compensation for 125,500 x 12 = Ksh. 1,506,000;
 - c. Damages for diminished employability for 10 years Ksh. 15,060,000;
 - d. Exemplary damages/aggravated damages;
 - e. Damages for violation of fundamental rights and freedoms Ksh. 5,000,000;
 - f. Costs of the suit.
13. The claimant testified in support of her case that upon employment by the respondent she worked diligently and was promoted to the position of Senior Teacher and Acting Deputy principal for a year but on 21st January 2019 when schools opened, she was summoned by the principal and informed that from 1st February 2019 there would be a new Acting Deputy Principal and was required to hand over to Mr King'oo which the claimant did but the respondent issued her with notice to do the handing over and the claimant responded that she had already done so. Before the changes, the claimant had not been consulted and upon the handing over, she was demoted to the position of class teacher,



lower classes. This was an illegal designation since the claimant had progressed through the ranks and was then teaching class 6 and 8 and the acting Deputy Principal. A return to the lower classes was a demotion and done with malice without any good cause. For the period the claimant served as Acting Deputy Principal, no issue had been raised and she ought to have been confirmed in such position in terms do the human resource policy.

14. The claimant testified that on 5 February 2019 the Deputy Principal – Academics called her to the office and asked her to look for another job and she felt threatened and when she consulted with family, it was agreed on the need to seek legal advice and on 8 February 2019 a demand letter was done to the respondent by her advocates. This was on a Friday, and that evening, the claimant got a visitor at her house within the respondent's premises with a letter which stated that the claimant had given an incomplete handing over the previous day. The claimant refused to take the letter that night but on 9 February 2019 she took it from the respondent and replied that she had done the handing over as directed. But on 12 February 2019 she was issued with a notice to show cause and directed to reply by 5pm which she did and this was followed up with a suspension for a month.
15. The claimant testified that she was denied entry to her house and had to call the police to assist. On 19 February 2019 she was summoned before the Board for a hearing but her representative was denied access and on 1st March 2019 she received notice dismissing her from employment. Despite moving the court and seeking protection, she was forcefully evicted from the respondent's premises, her property destroyed and has since been unable to secured commensurate employment despite all efforts. Every time she secures new employment, the respondent has interfered and should pay for the remainder of her employment period until retirement.
16. In response, the respondent's case is that the claimant was employed as a teacher in the year 2008 and appointed as acting senior teacher. Her terms of employment did not change despite the acting role save for additional duties, and an allowance was paid.
17. In the year 2019, the respondent new policy was to have the position of senior teacher occupied for a minimum of 3 years and hence the decision to restructure and re-shuffle its management by appointing new teachers to take over as senior teachers in pre-school, junior school and senior school where the claimant previously served. Heads of departments in games, Kiswahili were also reshuffled.
18. A meeting was held and the three senior teachers were informed of the board's decision to reshuffle its management and appoint new senior teachers. This was later communicated in writing to all teachers and the appointments announced.
19. The decision of the respondent to reshuffle its management and appoint new persons was done in good faith with the purposes of improving both the running and academic performance. The claimant's withdrawal as a senior teacher was not a demotion and only responsibility was removed and she retained her contractual terms. She lost the responsibility allowance but her salary was increased from Ksh. 102,500 to Ksh. 110,000 and paid class 8 subject allowance.
20. The outgoing senior teachers were on 29 January 2019 directed to handover to the newly appointed senior teachers by 1st February 2019 but the claimant was reluctant without giving any reasons and hence she failed to completely handover all necessary files.
21. The response is also that the claimant had applied to be allocated a house in the school when she became a senior teacher which was allowed on 1st January 2018 and was given Unit B. The claimant entered into a tenancy agreement with a condition that notice of termination by the landlord was allowed upon 60 days' notice in writing.



22. The claimant having been withdrawn from the position of a senior teacher no longer fell within the management and the house allocated was only available to management team and the respondent found it fit to terminate the tenancy agreement. Notice issued on 4 February 2019 and the claimant was required to vacate by 4 April 2019 which was 60 days' notice. However, the court ruling on 6 May 2019 ordered that the claimant should not be evicted from the house for 8 months pending the hearing of her claim. The claimant was at liberty to apply for any other house within the respondent housing units which was subject to availability.
23. The claimant was assigned duty by the respondent and required to teach class 5 or CRE or mathematics and this did not amount to a demotion.
24. The claimant was not victimized or discriminated against as alleged. After the reshuffle and reorganization, the claimant was re-allocated duties and her role as senior teacher changed. She failed to handover to the new senior teacher leading to a show cause notice and disciplinary hearing on 21 February 2019 and a decision was taken for summary dismissal for gross misconduct and the claims made are without merit. As of 1st July 2019 the claimant was already employed as a head teacher at St. Bakita School, Nairobi and as such the claimed damages diminished.
25. In evidence, the respondent called Mathews Echoka the acting Principal and a teacher with the respondent and testified that the claimant was dismissed for gross misconduct when she became unfriendly and refused to cooperate when the respondent did a reshuffle of senior teachers. The claimant was supposed to do a handing over to the newly appointed senior teacher of the office she was holding but she refused to cooperate and proceeded to delete 2017 exam materials that was to help the newly appointed senior teacher.
26. For the gross misconduct, the claimant was taken through a disciplinary hearing and found guilty and summary dismissal was justified. Other two senior teachers were affected by the reshuffle and they handed over their duties and took over their new roles. There was no discrimination against the claimant as alleged since the responsibility given was on acting basis. The allocated houses in the premises were not enough for all teachers and the board gives preference to those in management and once the claimant left management, she could apply for other available houses. The rent agreement provided for termination notice of 60 days which issued to the claimant and lapsed on 4 April 2019.
27. Upon cross-examination, the witness testified that he took over the acting role as principal on 1st July 2022. This was after the claimant had left the respondent's employment. In the year 2019 he was acting deputy principal and not a member of the board and not in the decision making process.
28. The witness testified that he was not the one who decided to suspend the claimant. The acting principal did and has since left the service of the respondent.
29. All teachers were affected by the reshuffle and reorganization but there was no consultation. He was not involved in such matters. The claimant failed to handover. Physical copies were handed over after a lot of efforts and the claimant was not cooperative and leading to her disciplinary hearing.
30. At the close of the hearing, parties filed written submissions which are analyzed and the issues for determination are identified as follows;
31. Whether there was unfair, unlawful and wrongful termination of employment;
Whether the remedies sought should issue;
Who should pay costs.



32. Through letter dated 28 February 2019, the respondent terminated the claimant in her employment through summary dismissal on the grounds that she;
- ... failed to completely hand over to the newly appointed Senior Teacher as you were directed was not acceptable and or satisfactory. You acknowledged to having lost some data which you allege were in a flash disk and that you deleted some of the 2017 files without any authorization. You have also misconducted yourself within the entire period when you were required to hand over.
33. In response, the respondent offered a background to the notice of summary dismissal that in early 2019, a management decision was taken to have;
- ... [a] new policy to have the position of a senior teacher to be occupied for a minimum of 3 years, made a decision to restructure and reshuffle its management by appointing new teachers to take over as Senior teachers in pre-School, Junior school and in Senior School, where the claimant had previously been appointed as a Senior Teacher. Even the heads of Departments like the Games Academy, Kiswahili were re-shuffled.
34. In employment and labour relations, unlike a commercial and other transactions, certain words, actions and practices of the employer have distinct and legal meanings. These cannot be applied casually.
35. Where an employer identifies a matter for restructuring or reorganisation and need for reshuffling of employees, these implicates compliance with the mandatory provisions of Section 40 of the *Employment Act, 2007* (the Act). Such is also defined under Section 2 of the Act as a redundancy. Some employees, due to the need of the employer to restructure, reorganize and re-strategise the business to productivity and better management and planning, some employees are affected and hence need to reshuffle them or move them within the business as necessary. This principle is addressed within the context of sections 10(5) 17 and 18 of the Act as held in *Joseph Makau Munyao & 4 others v Kenya Ports Authority & another* [2016] eKLR that where any matter of employment changes or is revised, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.
36. The context of any change, revision or change in employment terms and conditions, consultations with the employee is required. Save for the issuance of a written notice, the mandatory provisions of Section 10(5) of the Act is to ensure consultations with the employee.
37. Even though the employer has the prerogative to transfer, reshuffle or move its employees within the business towards better management and productivity, employees are not chattels. The decision to restructure, reshuffle or reorganize the business should not be arbitrary and sufficient notice should issue within a reasonable framework as held in *Henry Ochido v NGO Co-ordination Board* [2015] eKLR. The essence of such notice is to be found under Section 45(2) of the Act that requires the employer, based on the operational requirements of the business, to inform the employee(s) of the reasons for, and the extent of, the intended restructuring, reorganisation and or reshuffle. The employees well informed are bound to give the employer support and work toward high productivity.
38. In this case, the claimant was directed to handover to the new Senior Teacher. The handing over was noted as incomplete on the basis that the same was missing historical data of the school, therefore, rendering the operations of that office ineffective.



39. In the notice to show cause on 12 February 2019 the same matter is repeated with additional information that the claimant failed to hand over data in soft copy of the following;
- a. KCPE merit list prepared in collaboration with the H.O. Ds
 - b. KCPE analysis reports per subject for all the years the school has presented candidates.
 - c. Targets and projects based on KCPE results. ...
The baselines for such directions is not gone into.
The process became purely subjective.
40. The responses by the claimant gone into, hard copies of the data given was now required in soft copies. The context of the demands issued and the changed environment was no longer made conducive for the claimant to undertake her duties. A restructuring and reshuffling of employees in such a manner was bound to be counter-productive.
41. Ultimately, whatever misconduct may have arisen, the claimant, faced with a disciplinary hearing, her rights under Section 41 of the Act ought to have been secured. The elements being the entitlement of an employee to have a representative of his choice when the explanation of grounds of terminations is being made; Hearing and considering any representation made by the employee and the representative chosen by the employee as held in the case of *The German School Society v Helga Ohany Civil Appeal No. 325 of 2018*.
42. Any lapse with regard to a legal requirement negates the entirety of the disciplinary process. The respondent called Mathews Echoka as the witness but could not explain why the claimant's representative at the disciplinary hearing was denied attendance. He was not part of that process. He could not explain why the board of the respondent failed to accord the claimant her rights under the law.
43. Even where the claimant was alleged to be of gross misconduct, the mandatory provisions of Section 41(2) were to be secured;
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
44. The court finds, termination of employment was procedurally unfair.
45. With regard to the claim that the claimant's constitutional rights to fair labour practices and non-discrimination were violated, each case must be looked at on the merits. The respondent submitted at length with regard to its power to summon a witness to respond to matters before it and relied on the case of *Dahir Sadik AUSAAD v Modogashe Construction Ltd & 3 others [2016] eKLR* and *Kenya Revenue Authority v Maringa Salim Morgana [2010] eKLR* but to enjoy such prerogative, the respondent as the employer was bound to ensure fair labour practice and protect the claimant's rights secured under Section 41 of the Act. Allow her to attend such summons and disciplinary hearing in the company of her representative. Where the respondent found the chosen representative unacceptable, recourse was to secure such right for the claimant by allowing her time to get another employee of her choice. Her right to choice on who to attend with her at the disciplinary hearing is couched in mandatory terms under Section 41(1) of the Act.



46. Further, the Court of Appeal in defining what entails fair labour practices in the case of *Bomas of Kenya v Thiriku* (Civil Appeal 379 of 2019) [2022] KECA 795 (KLR) (24 June 2022) (Judgment) held that what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept. And in *Elizabeth Washeke And 62 Others v Airtel Networks (k) Ltd & another* [2013] eKLR the court held that whether conduct is fair or not necessarily involves a degree of subjective judgement.
47. In this regard, the claimant, faced with a restructuring that affected her position without notice or reasonable cause to appreciate the circumstances leading to such policy change, was bound to be apprehensive about her rights in employment. Called upon to hand over, she gave the materials in her possession, some in soft copies and others in hard copies. The back and forth was not taken kindly by the employer who viewed this as gross misconduct.
- Objectively reviewed, a warning should have sufficed.
48. The claimant had served the respondent well to the senior position of Acting Deputy Principal. Such should count. Such high position of responsibility is built over time. To reshuffle employees without consultations and expect the claimant to walk away happy was not a reasonable expectation. To call her for gross misconduct was too harsh, the circumstances objectively reviewed.
49. What existed for the claimant was not a case of discrimination against her by the respondent but a case of a flawed process resulting in unfair labour practices and termination of her employment through alleged gross misconduct couched to remove her from employment.
50. The summary dismissal of the claimant by the respondent is hereby found unfair and not justified in terms of Section 45 of the Act. Notice pay and compensation are due.
51. The claimant was last earning Ksh. 110,000 per month. Such is due in notice pay.
52. The claimant worked for the respondent from the year 2008 to 2019 and had she been allowed fair labour practices; she would have well served until retirement. A compensation of ten months' gross salary is hereby found appropriate. Based on the last salary of Ksh. 110,000 per months' total compensation is hereby awarded at Ksh. 1,100,000.
53. On the claim for compensation for diminished employability, for the unfair termination of employment, the claim is addressed and compensation awarded. The claimant is a trained teacher and upon exit from the respondent, she has put her skills into good use and secured alternative employment. This may not earn her a similar salary but the unfair termination of employment by the respondent is addressed.
54. As noted above, the claim for damages for discrimination or violation of constitutional rights is largely in unfair labour practices. Such is addressed.
- As the claim is successful, costs are due.
55. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
- a. a declaration that the respondent terminated the claimant's employment unfairly;
 - b. Compensation awarded at Ksh. 1,100,000;
 - c. Notice pay Ksh. 110,000;
 - d. Costs of the suit.



The file shall be returned to ELRC Nairobi Registry.

DELIVERED IN OPEN COURT AT MOMBASA THIS 28TH DAY OF SEPTEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

