



**Okun v Kenyatta University (Cause 363 of 2019)
[2023] KEELRC 2340 (KLR) (28 September 2023) (Judgment)**

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**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 363 OF 2019
M MBARÚ, J
SEPTEMBER 28, 2023**

BETWEEN

DANIEL OKUN CLAIMANT

AND

KENYATTA UNIVERSITY RESPONDENT

JUDGMENT

1. The claimant is an adult and the respondent is a university established under the Kenyatta University Act.
2. Through letter dated 18 January 2008 the respondent employed the claimant to teach HEH 108 – Environmental Parasitology and HEH 406 – Biotechnology and Health in the Department of Public Health. The respondent appraised the claimant annually and renewed his employment contract severally, the last contract dated 4 October 2012.
3. From 9 January 2013 the claimant was promoted to a lecturer on permanent and pensionable terms in the Department of Biochemistry and Biotechnology. The commencing salary was Ks. 76,552 and a house allowance of Ks. 51,775 per month together with the benefit of full medical cover, retirement benefit and share scheme.
4. By 30 May 2019 when the respondent terminated the claimant in his employment, he was aged 41 years earning a salary of Ks. 197,101.
5. the claim is that, following a complaint by a student against the claimant on 10 January 2019, he was interdicted and placed on suspension on 14 January 2019 pending the outcome of investigations into the complaint. The claimant was to be invited to a disciplinary hearing at the Senior Board of Discipline (disciplinary Committee) where the claimant was to defend himself.



6. The claimant requested for a postponement of the disciplinary hearing through his letter dated 5 March 2019 on the grounds that he had not been supplied with the documents that the Disciplinary Committee intended to use in prosecuting his case.
7. The respondent also invited the Universities Academic Union (UASU) (Kenyatta University Chapter) for the disciplinary hearing pursuant to the CBA between the respondent and UASU but, the respondent failed to adhere to the CBA requirements. The disciplinary hearing was hence postponed.
8. Article 26(d)(iii) of the CBA required that the Council to serve the union with all investigations reports within 14 days before the date of the hearing which was not adhered to as the union only received the notice on 4 March 2019, two days before the hearing dates.
9. The claimant and the union requested to be supplied with the investigations reports that the respondent intended to use at the disciplinary hearing but the respondent refused to do so. In a bid to subvert the process, the respondent served a mutilated investigations report dated 11 January 2019. The union wrote to the respondent on 23 May 2009 and noted that owing to the various lapses the claimant would not be accorded a fair hearing.

There was no further communication.

10. On 30 May 2019 the claimant received a letter informing him that his employment with the respondent had been terminated with immediate effect. The claim is that the respondent acted with impunity and failed to give valid reasons or the true reasons why it terminated the claimant's employment. This was a culmination of a history of malicious and discriminatory actions against the claimant by the respondent through its officers. Such matters are that;
 - a. There was evident bias in the disciplinary process in that, although the respondent claimed that Mr Gikaria had invited the claimant three times to the disciplinary hearing, there were only two such invitations and the response by the union.
 - b. The Senior Board of Discipline was illegal in that according to the CBA, the board ought to have included two members of the union who were not present during the deliberations. The membership excluded the Dean School of Pharmacy on whose docket the student falls and whose presence was critical to provide relevant information. Present was Prof. Fatuma Chege as DVC (Administration) contrary to a court order barring her from holding office from February 2019.
 - c. There was conflict of interest and history of hostility in the membership of the disciplinary committee in that Dr. Daniel Muindi who was the Registrar Administration served as the Secretary to the disciplinary committee and also the prosecutor of the case. The witnesses to be called, Moses Mwarangu and Rachael Mutisya on several occasions consulted Dr. Muindi and the security officer. Owing to the past interactions between the claimant and Dr. Muindi, there was hatred towards the claimant taking note that in December 2014 the claimant's house, Tanzania Street House 3 was broken into while the claimant was away. Investigations were conducted and findings were that the claimant should be compensated for the loss of his properties but on 15 June 2015 Dr. Muindi wrote to him asking that disciplinary action be taken against him for allowing his brother-in-law to occupy the servant quarter.
 - d. The claimant was singled out from a pool of four examiners as the perpetrator in the student's failure. In the course of the complaint made against the claimant, he was alleged to have exchanged sex for marks following a supplementary examination taught by four lecturers of which the claimant contributed 25% but he was the only one targeted.



- e. There was discriminatory treatment and victimization of the claimant for participation in lawful industrial action and exercising his constitutional rights. Being a member of the union, 2% of the basic salary is deducted as union dues and the claimant was entitled to fair labour practices but on 5 March 2018 he was called by union officials to be part of the strike reinforcement team. Despite this being a protected strike, he was suspended by the respondent.
 - f. Wrongful implication on the students' unrest and strike in October 2019. When the students went on the rampage, the respondent accused the claimant of inciting the students where he was summoned to the DCI's office in Kasarani for interrogations for two days.
 - g. The claimant made demands on the need to remit members' deductions to the Sacco as an elected director of Kenvasity Sacco associated with the respondent majority membership, on several occasions the respondent failed to remit members deductions making non-remittances amounting to Ks. 200,000,000 due. Owing to the claimant's position in this matter, the Ministry of Cooperative Society in 2018 closed the respondent's accounts between July and December 2018 and as a result the claimant became a target by the respondent.
 - h. Continued housing distress, eviction attempts, threats despite a court order. On 25 November 2020 the court gave a conservatory order against the respondent evicting the claimant from his allocated house but in breach, the respondent sent its agents to cut off the front rear door and ransacked the house leading to loss of money and property and he reported the matter to Kasarani police station.
 - i. Allowing the violation of the respondent's regulations to the detriment of the claimant. From the disciplinary process, witness number 5, Rachel Mutisya and witness Number 3 Moses Marangu, the students are purported to have sought assistance from fellow students Bernard Karanja, Moses Marangu among others to ascertain whether she had passed or failed. The scheme was hatched by Dr. Muindi in an attempt to gather evidence on the alleged sex-for-mark scheme.
 - j. The respondent aimed at implicating the claimant. From the disciplinary process, witness 6, Lilian Waithaka the departmental secretary and custodian of the department stamp alleged that the claimant never visited the department of the chairman's office to process the exams or make a report. However, she is not the one to receive such a report.
 - k. The jurisdiction of the trailing officers and accountability for time is suspect. The claimant positively identified the persons who laid a trap as Naftali Mwangi and Lameck Mokaya and Korir all who are members of the respondent's internal security team and whose jurisdiction only extends to the premises.
11. The claim is that due to the conduct of the respondent, following termination of employment, the claimant has suffered loss and damage and holds the respondent liable. The claimant has suffered serious consequences following the illegal and discriminatory termination of his employment by the respondent being;
- a. Following termination of employment, the claimant was listed as a high risk person in the credit/business work by the Credit Reference Bureau (CRB) listing.
 - b. Insurance default/termination. The claimant had an educational policy for his children with ICEA-policy number XXX the policy had a default clause of 12 months and consequently terminated.



- c. Post-Graduate student supervision deterioration. At the time employment terminated, the claimant had 11 post-graduate students under his supervision and two PhD students who have since deteriorated in their projects.
 - d. Inability to take care of family. The claimant cannot afford to feed for his family due to financial constraints, is unable to pay school fees for his children and due to the disparaging nature of the allegations made against him by the respondent, he has not been able to secure new employment. The claimant had been shortlisted for the position of senior lecturer in June 2019 at Technical University of Kenya but having received information on the malicious allegations made by the respondent, his interview was stopped.
 - e. Freezing of part-time teaching appointment as Technical University of Kenya following information and allegations made by the respondent.
 - f. Failure of the respondent to pay part-time claims to the claimant. The claimant offered his services to the respondent from August 2018 to January 2019 and an amount of Ks. 120,750 remains unpaid.
12. The claim is that the respondent violated the claimant's rights under Section 45 of the *Employment Act* for lack of any reasonable basis for the termination of employment. This amounted to unfair labour practices contrary to Article 41 of *the Constitution*, Article 27 on non-discrimination, Article 47 on fair administrative action and fundamentally Article 26 on the right to life which has been compromised due to the claimant being unable to fend for self and family.
- The claimant is seeking the following orders;
- a. Declarative orders that employment terminated unfairly and contrary to *the constitution*;
 - b. An order of compensation under Article 23(3) of *the Constitution* for breach of the right to life and right to earn a living for the next 34 years until retirement at Ks. 80,417,208;
 - c. An order of compensation for violation of the claimant's constitutional rights against discrimination;
 - d. Order for payment of damages for unfair termination of employment under Section 12(3)(vi) of the Industrial Court Act;
 - e. Order of compensation at 12 months' salary for unfair dismissal at Ks. 2,365,212;
- In the alternative;
- f. an order of reinstatement;
 - g. payment of severance pay for years worked at $\frac{1}{2} \times 197,101 \times 6$ Ks. 1,773,909;
 - h. payment of Service Charge for early and abrupt termination of employment at $\frac{1}{2} \times 197,101 \times 6$ Ks. 1,773,909;
 - i. payment of costs.
13. The claimant testified in support of his case and called several witnesses.
14. The claimant testified that in January 2019 he was suspended by the respondent over alleged sex-for- marks from female students. On 22 February 2019 the claimant was invited to the disciplinary hearing in March 2019 but he wrote and requested for postponement because under the CBA he was entitled to be represented by the union which had not been invited in terms of Section 26 of the CBA. The



- claimant and the union then asked for the allegations and the details thereof but a mutilated document was served to which the union protested. Later the claimant learnt that the respondent proceeded and held the disciplinary hearing in his absence and his employment was terminated through notice issued on 30 May 2019.
15. The subject of the disciplinary hearing was that the claimant had demanded sex for marks from students who reported a complaint. An OB report had been made at Kahawa Sukari police station by the Deputy director operations and not the subject student. Had the complaint been from the student, that student should have been named and done an OB report.
 16. In the notice terminating employment, the respondent alleged that the claimant had an examination booklet with a marking scheme which were found in a hotel room where he was found with the student soliciting for sex and that before going to the hotel they had passed through a VCT for HIV test but when he requested for these details before the disciplinary hearing, none were supplied to him.
 17. The alleged examination in which the claimant was alleged to have given the student, the unit was being taught by four different lecturers – HMB 320: Biochemistry V Supplementary Examination. The claimant is alleged to have failed the subject student in an attempt to exchange sex for marks but his contribution was only 25% and the student had 75% marks to satisfy with the other lecturers but this was not addressed. The student had 12.5 marks at 50% in the section taught by the claimant and the source of her failure cannot be attributed to the claimant. Other lecturers scored her differently;
 1. Eliakim Mbaka 4/15;
 2. Dr Stephen Ger 13/25;
 3. Peris Amwayi 11/25;
 4. Claimant gave 12/25
Total 40/90 a 44%.
 18. Where the student required a remarking of her scripts, the respondent had a policy with procedures to be followed. A request had to be made to the DVC Academics, payment of Ks. 3,000 for remarking and the DVC was to run this process through the chairperson of the department and then nominate a lecturer from a list of three to do a remarking and finally the DVC was to instruct the entry of the new marks.
 19. The claimant testified that the student had passed and there was no need for him to seek for sex for marks as alleged.
 20. The claimant also testified that the student, Ms Rachel had two other pending supplementary examination and when the results were released at around 1.30pm the student went to his office to confirm her exam marks. As was routine, he had to confirm missing marks to the students on a needs basis as the coordinator but the student came in to his office and lifted off the paper on his desk before he could confirm. She also took the envelope with the marking scheme and took off. The documents she picked have not been recovered since. the claimant never saw them again.
 21. The respondent alleged that the claimant was found with the student at Ruiru in a hotel after attending a VCT test on 10 January 2019 which was not true because of this day he was at Moyos hotel and the student called him to apologise with regard to the envelope she had picked from his office which had the exam booklet. The student directed the claimant to the hotel where she was so that he could pick the booklet and his envelope but upon arrival he found the respondent's officer, internal security,



- Mwangi and Lameck who took photos of him and his vehicle. These were part of the security team only with jurisdiction to investigate matters within the respondent's premises.
22. The claimant testified that, he was aware of the respondent's policy with regard to exam results and transcripts. When the student picked the envelope, the first step was for him to make a security report within 24 hours to the DVC, Academic. That the claimant went to the Head of Department office and asked the secretary about him but was told he was in a meeting and the claimant decided to call the HoD later and made a verbal report on 11 January 2019 about the incident.
 23. The student had picked the envelope and booklet at 2pm on 10 January 2019 and he made his report to security through memo dated 11 January 2019 to the DVC academic through the chair, HoD.
 24. The respondent has a sexual harassment and gender policy and directs all staff to adhere to the code of conduct. Students are required to report any matter of sexual harassment to the HoD and DVC, Academics but in this case, the student did not report but liaised with other students to find out if she had passed her exams. Rachel Mutisya is then alleged to have been the complainant in the disciplinary hearing but these details were not availed to the claimant. The student is said to have made a complaint to the Registrar, Administration who commenced investigations but under the Policy, no such procedures are necessary. At the time, Prof. Adanje was responsible to take any such complaint. Dr. Muindi, Registrar Administration took over the matter which was irregular because he had a history with the claimant over other matters and he was biased.
 25. The claimant also called Dr Kelvin Kahi UASU official who testified that he was a union official, Assistant Chapter Secretary when the claimant's case arose and hence conversant with the CBA with the respondent particularly the disciplinary procedures for academic staff and he was supposed to have been sitting in the disciplinary panel by virtue of his union position. The CBA mandate the union to represent its members in disciplinary hearing and the union had several such cases but in the claimant's case, the union did not participate. The respondent failed to provide the union with documents as per the CBA. The union wrote to the respondent seeking for the investigations report but the one supplied was obliterated and could not read it.
 26. Dr Kahi also testified that the union questioned the composition of the disciplinary panel since an invalid committee could not execute any lawful orders.
 27. When the union received the notice to show cause copy with regard to the complaint against the claimant, the union officials went to the stated hotel for a fact finding where he was alleged to have met a student seeking sex for marks. The union team of three went to Ruiru and got the owner of the hotel who explained what had happened on 10 January 2019 and that in the evening, a lady booked at the hotel and registered as Rachel. The owner gave them a copy of the receipt and CCTV footage which show 3 hooded men rushing to her room number 10 and who came out carrying a brown envelope and accosted the claimant at the lounge by taking his photos to which he protested.
 28. Dr Kahi testified that the respondent has had a history with the claimant and termination of employment is with malice because he had previously been victimized for engaging in union activities. He was accused of inciting students to go on the rampage, his house was broken into and all these matters ended up with termination of employment.
 29. Upon cross-examination, the witness testified that the CCTV footage obtained from the hotel at Ruiru was not filed. The respondent sent several invitations to the union to attend disciplinary hearing but did not honour them. The hearing had been scheduled for 7 and 23 May 2019. The union wrote on 22 May 2019 and declined to attend on the basis that the records supplied were illegible.



30. The claimant called Dr. Sr. Winfrida Itolondo a lecturer and testified that when the cause of action herein arose she was the vice chairperson of the union and member of the legal committee and representative at the disciplinary hearing, a role the secretary general delegated to her. She was therefore in the team that represented the claimant at the disciplinary hearing and attended in two sessions.
31. Dr. Itolondo testified that the Board constitution hearing the claimant had one member who was not supposed to be in attendance, DVC Administration, Prof. Fatuma Chege who was in the disciplinary hearing rendered its proceedings invalid. She is the same person who signed the letter terminating the claimant's employment rendering it invalid as it was signed by a person who had a court order declaring that position illegal.
32. In the year 2018 there was a strike and as a union official she was involved. The claimant together with 3 others were part of the strike but were singled out and suspended. Despite the return to work formula being agreed, the witness was not suspended which meant he was the target.
33. The allegations made against the claimant that he had sexual misconduct with a student were not justified. The respondent has no sexual harassment policy upon which such matters can be addressed.
34. Gideon Omondi testified that he is the chairperson of KUSU representing non-teaching employees of the respondent different from UASU. On 4 October 2019 the DCI Kasarani summoned him together with the claimant and asked for a written statement over alleged students incitement following a strike. At the time, he was not in the campus but he obliged as directed. Later he learnt that the claimant had been dismissed from his employment. This was after 5 months of this incident with the police.

Response

35. In response, the respondent's case is that the claimant was suspended on half salary and on full house allowance following a complaint against him and pending investigations and disciplinary hearing. The complaint was that the claimant was seeking sexual favours from one of his female students, in exchange for marks in a supplementary examination. The respondent provided the claimant with particulars of these allegations and in particular, he had contacted the students and promised to improve her marks in the supplementary examination so long as she agreed to compromise. Upon being satisfied that the claimant had communication with the student, the respondent carried out investigations which involved the claimant's whereabouts with the student. The claimant picked the student in his vehicle and drove her to a medical centre where she was subjected to a HIV test before proceedings to a lounge in Ruiru where he booked a room for the two but under the student's name. The respondent discovered examination material in the said room which included the student's booklet, the exam making scheme, among other documents.
36. The respondent invited the claimant before the Senior Board of Disciplinary (disciplinary committee) on two occasions and accommodated requests to have the proceedings post-poned culminating in a third invitation on 7 May 2019 which the claimant refused to honour. The respondent provided the claimant with the necessary information and material in a timely manner to enable him know the case against him and to prepare his response. Nevertheless, the claimant refused to attend before the disciplinary committee on 23 May 2019 where proceedings were conducted in his absence.
37. The UASU was invited to participate during the disciplinary hearing but declined to attend.
38. The respondent redacted the name of the student from whom the claimant sought sexual favours in order to protect her identity from unauthorized disclosure and whose identity the claimant was fully and personally aware of. The claimant was accorded fair opportunity to be heard but he chose not to attend.



39. Following the disciplinary hearing on 23 May 2019 the committee deliberated on the charges made against him and a decision of summary dismissal was taken. The claimant was allowed his right of appeal but he failed to apply it. His employment was terminated with effect from 30 May 2019 and the claims made should be dismissed with costs.
40. In evidence, the respondent called Naphtali Mwangi Kariuki a security officer in the Directorate of Security Services and conversant with these proceedings. He testified that on 10 January 2019 a female student, Rachel Mutisya, a second year student reported that the claimant was demanding sexual favours from her. The demand was in exchange for marks in one of the supplementary examination which she had taken on 17 December 2018 and supposedly failed.
41. Naphtali testified that earlier on this day, Rachel had recorded a conversation that the claimant had in his office with her in which he told her that he could assist with her results only if she agreed to compromise. The recording was done with a mobile phone.
42. In order to gather more information and ascertain the allegations, the witness and colleagues in the security service made a plan for the student to proceed to meet the claimant off the premises with the assurance of her safety. They drove to the meeting place at Moyos Restaurant in Kahawa Sukari where the student was going to be picked by the claimant. While at the scene and watching from a distance, the student arrived at 7.30pm dressed in a plain black dress and a small black porch and waited in the parking. The claimant arrived in his black Mercedes Benz registration No. KCD XXXF and parked at Moyos Restaurant and the student boarded the vehicle. Both drove off and the witness followed along Thika Super Highway towards Ruiru Shikamoo Medical Centre where the claimant parked and they observed the student enter the medical centre and then left. Later they learnt that she was taken for a HIV test which the claimant also took and the results obtained were kept confidential.
43. Naphtali testified that the claimant and the student drove off to Abbyz Lounge in Ruiru at around 9.30pm and parked at Gospel Outreach Church opposite the lounge and proceeded into the accommodation reception where the claimant booked room No.10 through the student's name.
44. At 10.45pm, the witness and his team went into the room and found the student with various examination material being;
- a. 10 copies of supplementary exam HMB 10 medical biochemistry dated 19 December 2018;
 - b. A copy of examination answer booklet HMB 130 medical biochemistry dated 19 December 2017 bearing registration of P110/1268/2017;
 - c. A copy of marking schemes of the end year exam HMB - medical biochemistry dated 12 November 2018;
 - d. A light blue hard copies of form EA12 - proof reading and corrections form with handwritten information of HMB 130 - medical biochemistry III indicating that the exam was typed by J.O, on 17.12.18 and proof read by the claimant on 15 December 2018. white exam paper HMB 130 marked as soft in a blue pen was attached to the form.
 - e. A copy of the HMB 230 - medical biochemistry V dated 1st December 2018 supplementary exam which had been given to the student to copy answers into her booklet.
 - f. A copy of candidate exam booklet for HMB 230 medical biochemistry bearing the registration P110/16065/2015 dated 17 December 2017 which the student had been given to amend the answers.



45. The witness testified that at this point, the claimant had gone to get food and when he came to the room, he tried to engage him and the team to settle the issue but he was directed to attend and record his statement the following day.
46. The respondent also called Mr Nderitu Gikaria the Human Resources manager who testified that following investigations into allegations that the claimant was seeking sexual favours from one of his female students, the respondent suspended the claimant on 14 January 2019 pending his appearance before the disciplinary committee to respond to the charges. The respondent invited the claimant to appeal before the committee on two occasions, his union was informed to attend but both declined. The claimant and the union asked for records and statements which were provided and the disciplinary hearing post-poned to allow the claimant and the union to prepare responses. This culminated into an invitation to attend before the disciplinary committee on 7 and 23 May 2019.
47. Mr Gikaria testified that on the allocated date and time, the claimant failed to attend his disciplinary hearing or his union. They attended and refused to participate and left without signing the register. The disciplinary proceedings proceeded in the absence of the claimant.
48. Upon deliberations and noting the charges facing the claimant and the evidence produced, the disciplinary committee decided on summary dismissal and notice issued dated 30 May 2019. The claimant was given 14 days right of appeal but he did not apply.
49. During the suspension, the claimant was earning Ksh. 61,407.50 and a house allowance of Ksh. 55,286 and other allowances were ad hoc. The claimant was a member of the respondent's pension scheme.
50. During the disciplinary hearing, the committee is ad hoc and the chairperson was Prof. Okumu. The composition of the committee is by persons appointed and delegated with the authority to conduct disciplinary hearing. The respondent has a policy against sexual harassment and based on investigations, confidentiality is applied especially in this case it related to a female student.
51. Mr Gakaria testified that the composition of the disciplinary committee is per the Kenyatta University Act. The members are required to address, direct and make decision. Prof. Okumu sat as chair and Dr. Njoroge as Council member while Prof. Fatuma Chege was an observer and the respondent was not aware of any court order barring her from sitting in such a committee as DVC, Administration. Part of her duties was to sign the letter of summary dismissal. The basis of the charge against the claimant was that the respondent could not compromise of student security and by the time the claimant was suspended, he had all the details with regard to the complaint made against him. In the letter inviting him to the disciplinary hearing, he was supplied with all the statements and particulars.
52. At the close of the hearing, both parties filed detailed written submissions which are analysed, applied in the findings and the issues which emerge for determination can be summarised as follows;
1. Whether termination of employment was unfair;
 2. Whether there were unfair labour practices committed against the claimant;
 3. Whether there was discrimination against the claimant by the respondent;
 4. Whether the remedies sought should issue.
54. On 30 May 2019, the respondent dismissed the claimant from his employment on the grounds that;
- As you may recall you were invited to appear before the Senior Board of Discipline on Thursday 23rd May, 2019 where you were accorded an opportunity to defend yourself against the charge of sexual harassment specifically that;



“Ms. CK” a second year student who had sat for supplementary examination on 17th December 2018 had attained the mark of 40 out of a possible 90 in HMB 230 Medical Biochemistry a unit you lectured.

That you called the student informing her that she had scored low marks in the said exam and requested that she meets you at your office at 4pm on 10/1/2019

On 10/1/2019 you met the student in your office and you promised to work out the additional marks for her on condition that she made some sacrifices off the campus.

On 10/1/2019 at 8.57pm you picked the student who was waiting for you on your instruction at Moyos Restaurant at Kahawa Sukari in your vehicle Registration Number KCD XXXF, a black Mercedes Benz and you took her to Ruiru Shikamoo Medical Center where she was subjected to a VCT test.

After the test ...

At 10.54pm the Kenyatta University security investigations officers ambushed you and caught you in the Lounge room where they recovered the marking scheme of the Exam HMB 230 - Medical Biochemistry and the Students supplementary booklet which you had taken to the student to copy additional answers in her failed supplementary answer booklet.

...

...

All which is contrary to Section 44(4)(g) of the *Employment Act*, where an employee can be summarily dismissed if she/he commits, or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer’s property. Further the actions are contrary to Section 9.4(i) and (iii) of your Terms of Service where the University Council reserves the right to terminate appointment without notice in case of conduct that is ‘scandalous or disgraceful in nature’. ...

55. At the core of the summary dismissal was the case of sexual harassment of a student by the claimant on 10 January 2019.
56. The claimant testified at length about his interactions with the subject student on 10 January 2019. That the female student, one Ms Rachel was in his class and had passed her examination based on her marks and therefore there was no reason for him to seek sexual favours from her. That there were other lecturers in the same unit, Eliakim Mbaka, Dr. Stephen Nyanjom, Peris Anyan and himself and who allocated examination results separately and independently and in his unit, he had awarded the student 12 of the 25 marks while Ombaka awarded 4 out of 25, Anyan awarded 11 out of 24 and Dr Nyanjom awarded 14 out of 25 all different and unrelated, save for the same student. The claimant had not awarded the lowest or the highest to justify such a claim of sexual harassment for better scores.

In his evidence, the claimant testified that;

... on 10 January 2019 a student Rachel Mutisya came to my office with Kiriago Catherine. Both came to my office to confirm supplementary marks and that she had two other supplementary exams to take in the medical biochemistry HMB 230 and HMB 210. she had failed in both papers. ... she had two pending supplementary examinations. On 9 January 2019 the exam results had been released.

At 1.30pm the student came back to my office and she wanted to confirm her exams. As was routine, I had to confirm missing results to the student on a needs basis as the Exams Coordinator and she picked



the paper I was holding from my hands before I could confirm and left my office. The documents taken by the students I have not seen them again.

57. Upon his evidence, the claimant was cross-examined at length and in his words gave emphasis to the following matters;

... on 10 January 2019 I met Rachel Mutisya and Catherine Kiriago. The meeting related to marks. Rachel had a supplementary exam which had just been released. This is the first time I had spoken to the students. She had called me the day before on 9 January 2019 on the basis that she wanted to confirm her marks and I told her to come to my office.

While in my office [Rachel] she was with Catherine Kiriago. Rachael came back at 1pm and got in alone and claimed that she wanted to confirm the previous marks as advised before.

The consequences of failing an exam is that the student is allowed to write to the Registrar, Academics to resit or have a re-marking by a different lecturer. The lecturer for the unit must submit the marking scheme and the HoD must obtain the student's booklet together with the marking scheme to transmit to the Registrar, Academics and on to the new examiner.

A re-sit or re-marking is allowed.

If a student steals an exam, this is a disciplinary case which warrant a suspension or expulsion which is more drastic...

On 10 January 2019 the incident of the student stealing an exam sheet happened in my office but the Registrar, Academics was not in his office.

On 11 January 2019 I wrote to the Registrar.

In the disciplinary hearing, the chair said I called him on 11 January 2019 and not on 10 January 2019. This was because my previous efforts to call him were not successful. On 11 January 2019 we were in an academic meeting and I told him about the incident. I have not filed my call logs to show that I tried to call him to make a report of the incident.

Exam matters are sensitive and I could not share with the secretary. ...

58. The claimant was employed by the respondent as a lecturer. He had the additional duties of the examinations Coordinator in his department. He testified to the fact that examination materials particularly scripts, marking schemes and results are to be secured and any breach is a security matter which should be reported immediately and within 24 hours.
59. The events taking place at his office at 1.30pm on 10 January 2019 related to a compromise in examination related materials. His evidence was that the student lifted, stole and grabbed from his hands/office the examination scripts and then left with them.
60. According to the claimant on 10 January 2019 the incident of the student stealing an exam sheet happened in my office but the academic registrar was not in his office. On 11 January 2019 I wrote to the registrar. ...
61. In an effort to retrieve these examination materials, the claimant called the student for a meeting to get back the examination transcripts and that;

... it was an issue of academics. I met the security team at 11pm on 10 January 2019 when I went to report to them. This was late into the night. This was an academic issue and could only be cascaded through the same office to security. I know there was a recording between



me and the student which matter arose at the disciplinary hearing. From the minutes, the student alleged that I asked for her compromise in exchange for marks ...

62. The claimant does not deny that the student left with examination materials. This was a security breach. He organized a meeting with the student to retrieve the examination materials. He met the student outside the university premises. Several officers of the respondent followed him and confronted him.
63. Section 6(2) of the *Employment Act*, 2007 (the Act) directs every employer who employs 20 or more employees to have a policy statement on sexual harassment.
 - (2) An employer who employs twenty or more employees shall, after consulting with the employees or their representatives if any, issue a policy statement on sexual harassment.
64. This policy is more so necessary in an institution such as the respondent which hosts the very best in society, its academic staff including non-academic staff and a student body of very vibrant minds and cadres under an institution of higher learning. This fountain of knowledge must be harnessed in an environment where the best train and mentor into various professions under an environment that is free from sexual harassment of the students.
65. Mr Gakaria, Human Resource Manager of the respondent testified that the respondent has a policy statement on sexual harassment but in the entirety of the pleadings submitted, none can be discerned. The dynamism of relations within the academic institution and the alleged sexual favours for marks, without a policy statement by the respondent as the employer and institution, the mandatory nature of Section 6(2) of the Act leaves the respondent grossly exposed.
66. With regard to the claim herein, a case of sexual harassment against a student can still be inferred despite the respondent not having a policy statement in this regard. The power relations between the claimant and his student were in the nature that as the lecturer, he held authority over the student, and any conduct on his part which showed physical behaviour of a sexual nature which directly or indirectly led to the student believing that she could earn favours in her examinations, in that regard, resulted in sexual harassment. This is because, a student in the respondent university is entitled to attend her academic units, classes, and course free of sexual harassment; to attend and undertake examinations and any supplementary examinations free from and without being subjected to sexual harassment; and that where such matter should arise, the employer such as the respondent or the institution where the student is, should take such disciplinary measures as the employer deems appropriate against any person under the employer's direction, who subjects any student or employee to sexual harassment in terms of sexual favours for marks or for such other matters.
67. A best practice is to be found under the Teachers Service Commission Code of Conduct for Teachers, 2015 which in part directs that;

Cases of sexual abuse, whether within or outside the school, should be thoroughly investigated, documented and action taken with expediency. Where the offence is of both criminal and professional in nature, police and other security agencies should be involved in investigations. It is emphasised that Heads of Institution and teachers should be in the forefront in protecting learners against sexual abuse
68. The rationale is that cases of sexual harassment are largely in the realm of privacy and behind doors and can be shrouded in mystery if no mechanisms are employed to discern such conduct. In the case of CNR; FITM & another (Respondent) (Cause E204 of 2021) [2022] eKLR the court held that that written or spoken language of a sexual nature amounts to sexual harassment.



69. The elements of sexual harassment must be looked at on case by case basis. In *Ooko & another v SRM & 2 others* (Civil Appeal 195 & 197 of 2019 (Consolidated)) [2022] KECA 44 (KLR) (4 February 2022) (Judgment) the court held that;

Therefore, the main elements of sexual harassment that applied in this case were firstly, unwanted verbal, non-verbal or physical conduct of a sexual nature. In this respect there was no need to show that the conduct was related to the victim's sex, only that it was sexual in nature. Secondly, the purpose or effect of the conduct was to violate the victim's dignity or create an intimidating, hostile, degrading humiliating, or offensive environment for him or her. In addition, sexual harassment also arises if there is less favourable treatment or detriment that arises as a result of the rejection or submission to the unwanted conduct.

70. In this case, conduct that encourages a student to grab, snatch and to walk away undeterred with examination scripts and materials speak of a carefree camaraderie relationship between the claimant and the subject student.

71. The claimant testified that he had not seen the subject student, Ms Rachael before the 9 January 2019 and when she came to his office with another student, Ms Catherine on 10 January 2019 he directed her to come in later and check her examination results. She came alone and once inside his office, she lifted and grabbed the examinations transcripts and walked away.

What did he do?

72. From the evidence, the claimant called the student to meet outside the university to get the stolen, lifted, grabbed scripts. He alleged to have made efforts to report the matter to the department chairperson but he could not reach him. He went to his office and met the Secretary one Ms Lilian who denied is alleged to refused to confirm that the claimant had visited the office. To the claimant, Ms Lilian was due to retire and wanted her contact renewed. He did not submit evidence as to how such matter related to his case and the stolen examination transcripts from his office.

73. As the officer with authority in examinations coordination, having had an experience of examination security breach, the claimant should have fully appreciated the veracity of the matters at hand. Whatever he did upon the noted conduct of a student grabbing and taking away examinations scripts was a deciding factor here. Instead, he followed up the matter with the student outside the university instead of reporting to security for assistance. His efforts did not yield anything and he noted that to date he has never seen those transcripts.

74. This was direct abdication of duty, subject to summary dismissal in accordance with Section 44(3) and (4) of the Act.

75. The claimant was well aware that under the examination policy, he was required to report the incident immediately and within 24 hours. Following up the student outside the university and the premises was not conduct of a diligent officer keen to address the matter in a professional manner. Following with the student who was in breach of a fundamental part of his employment duty, that of a lecturer and examinations coordinator compromised his conduct and employment.

76. Charged with inappropriate conduct, the claimant had a duty to attend before the disciplinary committee and defend himself. He cannot hide behind the provisions of Article 41 of [the Constitution](#) and claim unfair labour practices against him by the respondent.

77. With justified grounds leading to the disciplinary hearing, was the claimant taken through the due process?



78. Before summary dismissal of an employee, even where the employer has valid, fair and reasonable grounds that speak of gross misconduct, the mandatory provisions of Section 41(2) of the Act must be adhered to;
- (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.
79. The employee must be taken through the due process by being allowed to attend and make his representations in the presence of another employee of his choice and where he is unionized, a union representative.
80. The claimant testified that he was unionized under UASU and this is confirmed by Mr Gikaria that there was a CBA between UASU and the respondent. Under Clause 26 of the CBA, the parties agreed that in disciplinary proceedings, notice of at least 14 days should issue and the union supplied with evidence to be able to represent its member.
81. The sanctity of the due process in undertaking disciplinary process is given emphasis by the court over time. This is affirmed by the Court of Appeal and in the case of *Oyombe v Eco Bank Limited* (Civil Appeal 185 of 2017) [2022] KECA 540 (KLR) (13 May 2022) (Judgment) gave the following steps;
- ... four elements must thus be satisfied for summary dismissal procedure to be said to be fair, being: -
- a. An explanation of the grounds of termination in a language understood by the employee;
 - b. The reason for which the employer is considering termination;
 - c. Entitlement of an employee to have a representative of his choice when the explanation of grounds of terminations is being made;
 - d. Hearing and considering any representation made by the employee and the representative chosen by the employee.
82. On 14 January 2019 the claimant was suspended for seeking sexual favours from a student in his class in exchange for marks in the supplementary examination HMB 230 - Medical Biochemistry done on 17 December 2018. The particulars of this matters were cronologised thereunder with dates, timelines and details thereon.
83. On 7 May 2019 the respondent invited the claimant to a disciplinary hearing scheduled for 23 May 2019. The details of the matters facing him were again reiterated with details and timeline.
84. The claimant wrote back and asked for the postponement of the disciplinary hearing since he required better particulars of the allegations made against him. His union also wrote and sought to apply Clause 26 of the CBA and that the investigations report should be issued.
85. An employee who is faced with a disciplinary matter and is invited by the employer to a hearing cannot hold the employer hostage and demand that things must go his way. The employee must attend together with his representative and seek to agitate his case at the right forum. To keep outside the disciplinary forum and seek to litigate matters which in their nature should be addressed with the employer does not achieve the intended purpose, disciplinary hearing. An employee should attend



- with his representative and urge to be supplied with the required records. Seek that the record to bear his requests. To keep off the disciplinary hearing it to divert attention from the allegations made.
86. An employee who squander the chance given by the employer to attend disciplinary hearing and defend himself pursuant to Section 41 of the Act cannot turn around and claim there was no due process. The employee should seize the opportunity given and attend and urge his case and demand to be either given better particulars or evidence. To keep off is conduct that is tantamount to admission of guilt giving the employer the opportunity to terminate employment. In *Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust* [2017] eKLR the court held that where an employee squanders the opportunity granted for a fair hearing, the employer is justified to terminate employment for gross misconduct as envisaged under Section 44 of the *Employment Act*, 2007. The court held;
- Where the employee has the right to a hearing, the employer has the right to terminate the employee upon following due process. Where an employee squanders the chance to be heard the employer cannot be found to have acted unfairly where great effort was taken and is demonstrated to have been applied to have the employee heard but such employee remained adamant and made irrational demands to avoid a hearing.
87. This position is aptly captured in the case of *Energy Regulatory Commission v John Sigura Otido* [2021] eKLR the court held that;
- An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say “I refused to talk with those people and therefore I was not heard, order them to pay me.” It is not the role of the Court to supervise the internal grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law.
88. Given the chance to be heard, the claimant ought to have seized the moment and attended to agitate his representations.
89. The case that the disciplinary committee was not properly constituted because there was attendance by Prof. Fatuma Chege who had a court order stopping her from acting in the role of DVC, Administration is not based on any orders obtained herein. The Orders attached to the claim related to ELRC Petition No.39 of 2019 Universities Academic Staff Union (UASU) (Kenyatta University Chapter) v Kenyatta University Council & others and an interim order issued On 1st February 2019. The interim order is not followed up with any further matter after it lapsed on 14 February 2019. The court was not appraised as to the next steps through such orders.
90. At the disciplinary hearing, various witnesses were called by the respondent and the matters made against the claimant confirmed as true and the sanction of summary dismissal issued.
91. The court finds the due process was adhered to in hearing the claimant’s disciplinary matter and the sanction of summary dismissal justified.
92. On whether there was unfair labour practices and discrimination against the claimant, the case is that from the events leading to summary dismissal, the claimant noted that there was bias in the invitation to the disciplinary meeting, the disciplinary committee was illegally constituted and its members hostile and conflicted and that he had been singled out from a team of four lecturers covering the units for the student who lodged a complaint of sexual harassment. The claimant’s case was also that he had been victimised due to his unionisation and engaging in union activities and his membership in Kenvasity Sacco. Such matters can be deduced from the respondent harassing him out of his allocated house



within the university premises and being summoned to the DCI Kasarani after students' unrest all meant to harass him, apply threats and all discriminatory.

93. On these assertions, the disciplinary hearing was focused on the single incident and a series of events after the sexual harassment of a student on 10 January 2019. The matters that followed were of the claimant's own doing. He cannot divert attention from himself over matters of housing, Kenvasity Sacco and police directions to record statements over unrelated matters from his personal misconduct, outside his union activities which is protected under Section 46 of the Act. To infer there was discrimination in the case, leading to summary dismissal is without any merit.
94. On the remedies sought, on the findings that employment terminated for good cause and due process applied, the primary orders sought for compensation for 34 years until retirement is not available. There was no discrimination against the claimant and damages and compensation sought is equally not available.
95. The alternative remedies sought addressed on the merits, severance pay is only available in a case of redundancy which was not the case here.
96. Service charge is equally not available in a case where summary dismissal is found justified.
97. Accordingly, on the findings above, the claim is hereby dismissed in its entirety. The matter delayed in conclusion for reasons of accommodating each party and therefore, each to bear own costs.

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

