



**Makunjo v Technical University of Kenya (Cause E396 of 2021)
[2023] KEELRC 2685 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2685 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E396 OF 2021
SC RUTTO, J
OCTOBER 27, 2023**

BETWEEN

CHARLES OMOLO MAKUNJO CLAIMANT

AND

TECHNICAL UNIVERSITY OF KENYA RESPONDENT

JUDGMENT

1. The Claimant brought the instant suit through a Statement of Claim dated 2nd September 2020, in which he avers that he was employed by the Respondent with effect from July 2014. According to the Claimant, he served the Respondent with diligence and honesty until 22nd May 2017 when he was suddenly and unlawfully suspended from his employment and eventually dismissed vide a letter dated 1st March, 2018. The Claimant has termed his termination wrongful, malicious and unlawful and consequently seeks the following reliefs against the Respondent:
 - a. A declaration that the Claimant's services were wrongly, maliciously and unlawfully terminated;
 - b. Earnings in full from the date of suspension upto the date of termination;
 - c. Earnings that should have been received by the Claimant upto retirement age of 60 years;
 - d. Benefits from the provident fund;
 - e. General damages for wrongful termination;
 - f. Costs of the claim;
 - g. Interest on (b), (c) and (f) at Court rates; and
 - h. Any other relief as the Court may deem fit and just.



2. The Claim was opposed through the Respondent's Statement of Defence dated 4th July 2022. Putting the Claimant to strict proof, the Respondent denies his assertions that he (Claimant) was dismissed wrongfully, maliciously and unfairly. The Respondent further avers that it followed due process in hearing the matter and the appeal. Consequently, the Respondent has asked the Court to dismiss the Claim with costs.
3. On 22nd June 2023, the matter proceeded for hearing and both sides called oral evidence in support of their respective cases.

Claimant's case

4. The Claimant testified in support of his case. He started by adopting his witness statement to constitute his evidence in chief. He further proceeded to produce the documents filed alongside his Claim as exhibits before Court.
5. In his testimony before Court, the Claimant stated that on 1st March 2017, he was served with a letter dismissing him from employment on allegations that he fraudulently received the sum of Kshs 156,000/= from a student and issued a receipt dated 11th November 2016 for Kshs 1,000/=.
6. He further testified that he was not at the students' counter on 11th November 2016 and that he was handling students' HELB loan at the time.
7. He further denied being at the office when the vouchers were being presented. It was his evidence that the voucher was received by Ms. Susan Simiyu who was together with Mr. James Kinyua.
8. The Claimant further testified that the student in question went and paid the same amount he was being accused of receiving. That the amount was paid at Equity Bank and was received by Ms. Kemunto.
9. He further stated that the Respondent's Chief Accountant approached him to confirm what was received. He had to produce a copy of the receipt hence when he logged into the system, the receipt appeared in his name. He contended that he was not shown the original receipt but the copy had his name.
10. Terming his dismissal from employment illegal and unjustified, the Claimant maintained that he is innocent of the charges levelled against him.
11. Concluding his testimony in chief, the Claimant asked the Court to allow his Claim as prayed.

Respondent's case

12. The Respondent called oral evidence through Dr. Hesbon Nyagawa who testified as RW1. He identified himself as the Respondent's Academic Registrar. Similarly, he adopted his witness statement to constitute his evidence in chief. He further produced the list and bundle of documents filed on behalf of the Respondent as exhibits before Court.
13. It was RW1's testimony that in order to protect its financial integrity, the Respondent had an accounting system known as 'sage' to which the Claimant had access.
14. The 'sage' accounting system was used to record bank slips brought by students after deposits made directly into the Respondent's bank account. It was the Claimant's sole responsibility to receive bank deposit slips from students who had paid fees directly to the bank, corroborate the details in the slips



- with the entries in the Respondent's bank then feed the details into the 'sage' system and generate a receipt that was subsequently issued to the respective student.
15. It was his further evidence that at the close of business at 5.00 p.m every working day, the Claimant was required to download the financial details/trails captured in the sage system the whole day and prepare an Excel sheet tabulating the amount paid and receipts issued to various students.
 16. That the finance officers and in particular the Claimant, were required to forward the Excel sheet data via email to the office of the Academic Registrar and the office of the Chief Accounting Officer.
 17. On 11th November 2016, the Claimant received a Co-operative Bank of Kenya slip from a student by the name Julius Mutiso of Registration No. SBK/02153P/2015 for a deposit amount of Kshs 1,000/= and issued a receipt record No. REC 179524* for a similar amount of Kshs 1,000/-.
 18. At the close of business on 11th November 2016, the daily collection report was done and sent to him (RW1) and copied to the Chief Accountant via email. On perusal, he discovered that the figure on the daily collection was inconsistent with the figures in receipt No. REC 179524* and the Claimant had edited the figures to read that a sum of Kshs 156,500/- had been deposited into the Respondent's account by a student by the name Julius Mutiso of Registration No. SBK/02153P/2015.
 19. RW1 averred that the said student's fees statement amount entered in the daily collection report sent to him did not correspond to the bank deposit made by the said student which caught his attention and he commenced investigations into the subject transaction and discovered numerous anomalies on the students' fees statements.
 20. The fraudulent transaction involved the Claimant where he received a bank deposit slip for Kshs 1,000/- from a student and manipulated the Accounts system of the Respondent to reflect that Kshs 156,500/= had been paid, while in fact, no such sum had been paid into the Respondent's bank account.
 21. According to RW1, the acts and or omissions of the Claimant jeopardized the financial integrity of the Respondent and in exercising its rights under the Terms of Service for Staff, interdicted him vide the letter dated 22nd May 2017 to pave way for further investigation into the fraudulent activities.
 22. After the interdiction and upon conclusion of the investigations, the Claimant was informed of the allegations against him and advised that a Disciplinary Committee would be constituted to hear the charges levelled against him.
 23. Vide a letter dated 23rd May 2017, the Claimant was invited for a hearing before the Disciplinary Committee which was held on 21st June 2017. The notice issued to the Claimant clearly stipulated the charge he was expected to respond to. He was given ample time to prepare and avail any witness during the Disciplinary Hearing.
 24. On 21st June 2017, the Claimant attended the Disciplinary Hearing and was asked to respond to the charge. His response was mere denials and no substantive explanation was tendered to rebut the charge. The only evidence the Claimant provided was a copy of a printout extract of payments made in the name of the alleged student purporting to have made the deposit of Kshs 156,500/-.
 25. The Disciplinary Committee took into consideration the charge against the Claimant which affected the financial integrity of the Respondent, the evidence on record and the explanation that was offered by the Claimant which the Committee found was not satisfactory and found him guilty of all the charges levelled against him. The Respondent exercised its rights under clause 12.1 of the Terms of Service and terminated the services of the Claimant.



26. The decision to terminate his services and right to appeal was communicated to the Claimant vide a letter dated 1st March 2018. He appealed the termination vide a letter dated 4th April 2018. Although the appeal was filed way out of the 21 days stipulated by the Terms of Service, the Respondent in the interests of justice and fair hearing, nonetheless received the appeal.
27. The Respondent set up the Staff Council Appeal Committee to review and determine the appeal. The appeal was heard by the Council which comprised of members from different departments of the Respondent institution.
28. The Appeal Council evaluated the charge, the evidence tabled before the Disciplinary Committee, the Claimant's evidence in defence, the disciplinary process followed, applicable labour laws and implications of the acts and or omissions of the Claimant on the Respondent's financial integrity.
29. The Appeal Council found that the Disciplinary Committee's reasons for termination were proper and the appeal was dismissed.

Submissions

30. It was submitted on behalf of the Claimant that he had proved his case against the Respondent as per the required burden. It was further submitted that although he was given a hearing, the charge was not proved against him. Arguing that the Claimant should have been found innocent of the charge, it was submitted that there was no nexus between him and the offending voucher.
31. Placing reliance on Section 43(1) of the *Employment Act*, it was further submitted that the Respondent never produced evidence to prove the grounds on which the Claimant was given summary dismissal. In further submission on behalf of the Claimant, it was stated that the Respondent has not discharged the burden under Section 47(5) of the *Employment Act* by adducing evidence to prove that his summary dismissal was justified.
32. On the other hand, it was submitted on behalf of the Respondent that it fulfilled the procedural requirements of the *Employment Act* in regard to according the Claimant an opportunity to be heard before the decision of termination was reached.
33. Placing reliance on the case of Kenya Revenue Authority vs Reuwel Waitthaka & 2 Others (2019) eKLR and Section 43 of the *Employment Act*, it was submitted that the Respondent's decision to terminate the Claimant's services is a decision that a reasonable man on the street, being in the same position as the Respondent herein, would have reached. To buttress this position, further reliance was placed on the case of Judicial Service Commission vs Gladys Boss Shollei & another (2014) eKLR.
34. It was further submitted that any manipulation of data which would fraudulently deny or cause loss to the institution funds amounts to gross misconduct which is a sufficient ground for any reasonable employer to summarily dismiss an employee. It was further submitted that the Claimant's actions were detrimental to the Respondent and amounted to gross misconduct.
35. In further submission, it was stated that the Claimant has not discharged his burden of proof as required by law. In support of this position, the Court was invited to consider the determination in the case of Pius Machafu Isindu vs Lavington Security Guards Limited (2017) eKLR.
36. Arguing that he who alleges must prove, it was further submitted by the Respondent that the Claimant has not produced any evidence that he was working at the desk dealing with HELB or nexus between the offending transaction and Susan Simiyu and James Kinyua.



Analysis and determination

37. Having considered the pleadings by both parties, the evidentiary material on record and the opposing submissions, the Court singles out the following issues for determination:
- a. Whether the Respondent had a justifiable reason to terminate the Claimant's employment;
 - b. Whether the Claimant was accorded procedural fairness prior to being terminated from employment.
 - c. Is the Claimant entitled to the reliefs sought?

Justifiable reason?

38. Section 43(1) of the *Employment Act* (Act), requires an employer to prove the reasons for an employee's termination, and in absence thereof, such termination is deemed to be unfair. Closely connected to this provision is Section 45 (2) of the Act, which qualifies a termination of employment as unfair where the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
39. Basically, these are the legal parameters for establishing substantive fairness when it comes to termination of an employee from employment.
40. In this case, the reasons leading to the Claimant's dismissal from employment can be ascertained from his letter of summary dismissal which is couched in part:

“RE: TERMINATION OF EMPLOYMENT

Further to the disciplinary process of the Technical University of Kenya held on 21st June, 2017, it was observed and determined that your services as an officer of the University are no longer required by the institution. You are charged with and found guilty of the following undermentioned offence:

On or about 11th November, 2016 you received fees from a student amounting to Kshs 156,500/= vide voucher number REC179524 which you fraudulently issued a receipt within your knowledge as an officer of the Technical University of Kenya, you acted omitted or abated to hold out the financial processes of the institution in a deceptive manner.

...it has been decided that you be and you are hereby summarily dismissed from the service of the Technical University of Kenya with effect from the date of this letter.”

41. From the Claimant's letter of termination, it is apparent that he was accused of fraudulently receipting the sum of Kshs 1,000/=. The Claimant refuted the allegations and stated that he was not at the counter attending to students on the material date being 11th November 2016. He contended that it was Ms. Susan Simiyu and Mr. James Kinyua who were at the counter.
42. In support of its position, the Respondent exhibited a copy of receipt no. REC179524 bearing the sum of Kshs 1,000/=. The receipt which is dated 11th November 2016, indicates the payee's name as Mutiso Julius and the cashier's name as Charles Omolo. Further exhibited by the Respondent, is a copy of the printout extract of the payments in Excel, indicating that the voucher corresponding the receipt no. REC179524 is Kshs 156,500/=.



43. On his part, the Claimant exhibited a copy of a printout detailing the transactions in respect of 11th November 2016. Notably, the transaction with regards to receipt no. REC179524 indicates the user name as Susan Simiyu with the voucher type being receipt against the sum of Kshs 1,000/=.
44. What is noteworthy is that the Respondent did not speak to the aforesaid transaction and give a plausible reason as to why the name of Ms. Susan Simiyu is appearing against the same receipt number (REC179524), the Claimant was alleged to have issued. Further, it is notable that the Respondent did not state the role Ms. Susan Simiyu played with regards to the transaction at hand.
45. Therefore, if indeed the Claimant was the one who undertook the transaction with regards to receipt no REC179524, why would Susan Simiyu's name appear in the printout for the transaction of 11th November 2016, against the same receipt number?
46. In light of the transaction bearing the name of Ms. Susan Simiyu and considering the receipt exhibited by the Respondent bearing the Claimant's name, I cannot help but question whether it is probable that Ms. Susan Simiyu undertook the transaction in respect of receipt no. REC179524. In my view, the answer is yes. Is it also probable that the Claimant undertook the transaction? Again, the answer is yes.
47. What can be deduced from the foregoing is that as it is, there is no conclusive evidence that the Claimant is the one who undertook the transaction and receipted the sum of Kshs 1,000/= against receipt no. REC179524.
48. Inevitably, this casts doubt on the Respondent's version of events that it is the Claimant who undertook the transaction with respect to receipt no REC179524.
49. This being the case, it would have been prudent for the Respondent to undertake a further inquiry to dispel any doubt that it is none other than the Claimant who undertook the transaction in question.
50. Granted, in an employment scenario, the applicable standard of proof is on a balance of probabilities and it is not practical to expect an employer to carry out investigations with the same precision required in a criminal process.
51. Be that as it may, having been faced with a scenario where either the Claimant or Susan Simiyu possibly undertook the transaction relating to receipt no REC 179524, it was only prudent that the Respondent satisfies itself with regards to the role played by each of the two officers in generating the receipt. This is moreso noting that the Claimant raised this issue in his appeal.
52. Moreover, it was the Claimant's assertion that the reason his name appears on the printout receipt is because he was asked by the Chief Accountant who was his superior, to print out the same. This position was not controverted by the Respondent.
53. Taking into account the totality of the circumstances herein, the evidence presented and the applicable standard of proof, I arrive at the conclusion that the dismissal of the Claimant did not meet the threshold set out under Section 45(2) (a) and (b) of the Act in that it was based on a reason that was valid, fair and based on his conduct hence was unjustified.
54. To this end, the Claimant's termination was substantively unfair.

Procedural fairness?

55. With regards to procedural fairness, Section 45 (2) (c) of the Act, requires an employer to prove that it accorded an employee a fair hearing prior to termination from employment.



56. The specific requirements of a fair process are provided for under Section 41 (1) of the Act. In this regard, an employer is required to notify an employee of the intended termination, the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative.
57. From the record, it is apparent that the Claimant was interdicted on 22nd May 2017. Through the said letter of interdiction, the Claimant was informed of the allegations levelled against him and advised of the possible consequences which included termination of his services.
58. The record also bears that the Claimant was invited to a disciplinary hearing through a letter dated 23rd May 2017. He was further advised of his entitlement to be accompanied by a witness. It is not in dispute that the Claimant attended the disciplinary hearing. Indeed, he admitted as much during cross examination.
59. Applying the standard established under Section 41 of the Act, to the instant case, I am satisfied that the Respondent complied with the minimum requirements stipulated under the aforesaid provision. Therefore, in terms of procedure, the Claimant's termination cannot be termed as flawed.
60. In the end, the Court finds that although the Claimant's termination was procedurally compliant, the Respondent has not satisfied the Court that it had a valid and fair reason to terminate his employment based on his conduct.

Appropriate Reliefs

61. As I have found that the Claimant's termination from employment was substantively unfair hence unjustified, the Court awards him compensatory damages equivalent to five (5) months of his gross salary. This award takes into account the length of the employment relationship and the fact that the Respondent has not proved the basis for the Claimant's termination.
62. The claim for salary during the period of suspension until the Claimant's termination is declined as he exhibited a pay slip for the month of February 2018, which indicates that he was paid his salary in full for that month. This is further noting that he was terminated from employment with effect from 1st March 2018.
63. The claim for earnings upto the age of retirement is declined noting that it is in the nature of an anticipatory relief. In arriving at this finding, I am guided by the determination of the Court of Appeal in the case of D K Njagi Marete vs Teachers Service Commission [2020] eKLR, where it was held as follows: -

“On the expectation of the employee as to the length of time that he would have continued to serve in the employ of the respondent, while it is true that the appellant was employed on permanent and pensionable terms, this, of itself, is not an indication that the appellant would have continued to be employed until the age of 60 years. In Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR (Civil Appeal No. 25A of 2013) this Court dismissed a claim for anticipatory earnings that the appellant would have earned until her date of retirement after adopting with approval the sentiments of the (then) Industrial Court in Engineer Francis N. Gachuri v Energy Regulatory Commission [2013] eKLR (Industrial Cause No. 203 of 2011) which held as follows:

“There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant's contract was referred to as permanent and pensionable does not mean it could



not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. Noemployment is permanent. That is why the *Employment Act* does not mention the word „permanent employment?.”

Thus, it is clear to us that the claim for anticipatory benefits was not anchored in law, and we therefore decline to review the judgment of the trial court on these terms. This ground of appeal therefore fails.”

64. The Claimant has also sought to be paid benefits from the provident fund. In this regard, the Respondent has given any plausible reason why the Claimant should not be paid the said benefits. Therefore, the Claimant is entitled to receive the said benefits.

Orders

65. It is against this background that I enter Judgment in favour of the Claimant against the Respondent as follows:

- a. **A declaration that the Claimant’s termination by the Respondent was substantively unfair.**
- b. **The Claimant is awarded Compensatory damages equivalent to five (5) months of his gross salary being Kshs 280,770.00.**
- c. **Interest on the amount in (b) at Court rates from the date of Judgment until payment in full.**
- d. **The Claimant is entitled to be paid his benefits from the Provident Fund.**
- e. **The Respondent shall also bear the costs of this claim.**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

.....
STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Kanyangi

For the Respondent Mr. Gichuru

Court Assistant Abdimalik Hussein

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act* (**Chapter 21 of the Laws of Kenya**) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE



