



**Nyakiri v Moi University (Cause 11 of 2020)  
[2023] KEELRC 2577 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2577 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE 11 OF 2020  
MA ONYANGO, J  
OCTOBER 5, 2023**

**BETWEEN**

**LILY NYAKIRI ..... CLAIMANT**

**AND**

**MOI UNIVERSITY ..... RESPONDENT**

**JUDGMENT**

1. Vide a Memorandum of Claim dated 6<sup>th</sup> February 2020 and filed in court on 14<sup>th</sup> February 2020, the Claimant seeks compensation against the Respondents for unlawful termination.
2. The Respondent filed a Memorandum of response dated 21<sup>st</sup> December 2020 to which the Claimant responded vide a reply to memorandum of response defence and filed in court on 19<sup>th</sup> March 2021.
3. The matter was then set down for full trial.

**The Claimant's Case**

4. The Claimant testified on 23<sup>rd</sup> November 2022 as CW1. She adopted her witness statement recorded on 29<sup>th</sup> January 2022 as evidence in chief and relied on her bundle of documents filed in furtherance of her case. According to the Claimant, she was employed by Respondent and has worked for 25 years as a bookshop manager. She averred that her work entailed rendering services to the respondent and the community around. She stated that they used to source books for Margaret Thatcher library which books were procured using the Respondent's procurement procedure. She averred that she worked with the Respondent at the Main campus until 2010 when they moved to Zion Mall and she set up a business on behalf of the Respondent. It was her testimony, that she worked with her colleague, Stanley Kosgey was her assistant.
5. The Claimant averred that after a while, she had disagreement with her assistant and as her supervisor, she issued the said Kosgey with a warning memo on his absenteeism, lateness and drunkardness while at



work. The claimant stated that the said memo triggered issues between her and her employer leading to her subsequent termination from employment. CW1 stated that Mr Kosgey connived with the other staff to turn things against her whereupon the claimant was issued with a show cause letter. She further stated that she responded to the show cause letter and that she was suspended thereafter. She further stated that she was thereafter invited to a disciplinary hearing where she attended and defended herself.

6. It was Claimant's testimony that the disciplinary hearing committee relied on Kosgey's statement and that although investigations were done by the Respondent's security which showed that the allegations made against the Claimant were untrue, the chair of the disciplinary recommended for the Claimant's termination. CW1 stated that she was terminated on the allegation that she had stolen laptops. According to the Claimant, the laptops and phones were sold and there was evidence confirming the same. The Claimant stated that they did not single source but she followed the Respondent's financial procedures. The Claimant sought to be paid all her benefits including pension, withheld salary as well her salary up to retirement.
7. On cross examination, CW1 stated that she was terminated on 19<sup>th</sup> December 2018 and that she could have retired in June ,2020. She stated that her half salary was withheld when she was suspended. CW1 stated that she was denied the opportunity to call her witness Mr Kaptich during the disciplinary hearing. She further stated that even at the appeal, she was not given a hearing despite being accompanied by her advocate.
8. Samuel Kaptich testifies as CW2. He stated that he used to work for the Respondent as a bookshop accountant but retired in June 2020. CW2 stated that the procedure of procuring books required the bookshop to provide a list of books to be purchased; that there was a procurement officer in the bookshop who would liase with procurement department to procure books; the procurement office was to analyse the list and issue LPO to be processed and the books purchased; and that once the LPO's are approved, they were released to suppliers. CW2 stated that although investigations were carried out, he never recorded a statement on the allegations made against the Claimant and that he never gave evidence at the disciplinary hearing despite accompanying the Claimant as a witness.
9. According to CW2, he was shown the audit report which according to him was an investigation report. He stated that the report was done out of the allegations made by Mr Kosgei. CW2 disagreed that the said audit was done from 2011 to 2017 and maintained that audits are usually done annually. He further stated that although his duties entitled keeping books of accounts for the bookshop, he was sidelined in the investigations.
10. He further contended that the safaricom products were laptops and phones which were either sold at Zion mall or main campus. He stated that the investigator did not take into account sales at the main campus which were manual. It was CW2's evidence that laptops and phones sold to staff at main campus were done manually and therefore not taken into account.
11. CW2 denied having knowledge of the claimant running a parallel shop.
12. On cross examination, he maintained that he was assigned to the bookshop.

### **The Respondent's case**

13. The Respondent called Patrick Kimutai Ngeny who testified as RW1. He relied on his witness statement dated 16<sup>th</sup> February 2023 as his evidence in chief. He also relied on the Respondents bundle of documents filed in court.
14. On being cross examined by Counsel Omwenga, RW1 stated that the first institution to investigate the disagreement between the Claimant and her assistant was the department of security and safety;



that at the same time, the audit department was directed to file a report; that both of them filed reports and that the security office's report was presented before the disciplinary committee and was given to the Claimant during her appearance. He stated that the security team was not called to give evidence during the hearing.

15. RW1 stated that the Bookshop is the property of the Respondent and being a public institution, it is subject to audit by auditor general every year. He stated that he had not read the said audit report and as such he was not aware if there were any anomalies.
16. RW1 testified that the University Bookshop had a Bookshop Committee and that Prof Rotich was the Chair in that Committee. It was his evidence that the Claimant did not make use of the Committee in the procurement of the books. He further admitted that Prof Rotich did not give a statement to the auditor and was neither called as a witness.
17. On re-examination, RW1 confirmed that Mr Kosgei's memo was used as the starting point to verify the allegations levelled against the Claimant but that the internal audit report was the major basis.
18. At the end of the trial, the court directed parties to file written submissions. The Claimant filed her submissions on 20<sup>th</sup> June 2023 whereas the Respondent filed its submissions on 15<sup>th</sup> August 2023.

### **Determination**

19. I have considered the pleadings, the evidence and submissions of the parties, and I find that the issues that arise for my determination are: -
  - a. Whether the Respondent had a valid and fair reason for terminating the Claimant
  - b. Whether due process was followed in terminating the Claimant's employment;
  - c. Whether the Claimant is entitled to the remedies sought;
20. With respect to the first issue, it is now trite that in matters termination of employment, the court should consider and determine whether the reasons given by the employer for termination were valid and also, that there was procedural fairness.
21. The Claimant was issued with a termination letter dated 19<sup>th</sup> December 2018 which I which to reproduce hereunder;  
PfNo. 03231 19<sup>th</sup> December ,2018  
Mrs Lily K. Nyariki  
Box 5445,  
Eldoret  
Dear Mrs Nyariki,  
RE: Termination Of Appointment  
Reference is made to our letter dated 24<sup>th</sup> September ,2018 and your subsequent appearance before the Council Staff Disciplinary Committee on Wednesday, 14<sup>th</sup> November, 2018  
This is to inform you that after careful consideration of your case, the Council Staff Disciplinary Committee was convinced that you were guilty of the following charges;
  - i. Negligence in the performance of your duties as a Bookshop manager contrary to Section 44(4) (c) of the Employment Act



- ii. Single sourcing contrary to Section 31(3); 37(1); 45 and 88 of the Kenya Public Procurement and Disposal Act 2005 and S. 9 and S. 59 of the Kenya Public Procurement and Disposal Act Regulations, 2006
- iii. Conflict of interest by conducting business with your employer contrary to the provisions of the Public Procurement and Disposal Act Regulations, 2005, sec 43, and the Public Officer Ethics Act, 2003

It was therefore decided that;

- i. You be dismissed from the service of the University without benefits with immediate effect
- ii. You forfeit the half salary withheld during suspension
- iii. You are surcharged Kshs 1,118,221 for unaccounted for computers that were purchased and were not sold and were not in the store
- iv. That you are also surcharged Kshs 60,000 for the excess value of safaricom products and other monies you owe the university

Please arrange to clear with the University. Clearance forms are obtainable from our personnel Registry, Main Campus. Also remember your Staff Identity Card.

On behalf of the University, I wish you well in your future endeavours.

Yours sincerely,

Signed

Prof. Nathan O. Ogechi

Ag. Deputy Vice Chancellor, (Administration, Planning & Development

22. From the above letter, it would appear that the reason given for the termination of the Claimant's employment was gross misconduct. The question then that this court seeks to answer is whether the aforementioned reasons were valid and fair to warrant the termination of the Claimant's employment.
23. The Claimant on the other hand denies that she was engaged in misconduct in the performance of her duties and that her issues were castigated by her disagreement with her colleague, Stanley Kosgey, her assistant, after she issued him with a warning in form of a memo for coming to work late and drunk.
24. RW1, in his testimony stated that after the disagreement with the Claimant, Mr Stanley Kosgey levelled accusations against the Claimant which were; that the Claimant deleted his signature from the daily clocking attendance register at the bookshop to portray him as someone not serious in his work; that the Claimant was competing with the Respondent in respect to the bookshop customers which was a direct conflict of interest, that she owned a private bookshop at Zion mall; that the Claimant had decided to single source bookshop procurement committee of the respondent; that the Claimant used the bookshop space at Zion mall to run her own private business, being an Mpesa shop without paying rent to the Respondent for three years; that the Claimant took home LPOs excess value on laptops and other safaricom products which was a pilferage to the Respondent's property and products.
25. RW1 maintained that it was on the basis of these accusations that it launched investigations to verify the veracity of the allegations and as a result, a report was prepared by the Security and the Auditor's office.



26. I have also looked at the Chief security officer report dated 4<sup>th</sup> May 2017 which was on the misunderstanding between the Claimant and Mr Stanley, the assistant bookshop manager. The said report was majorly on the alleged illegal occupation of office space by the Claimant and it recommended that the Claimant shows cause why she should not be charged for acquiring a business space within the university premises to her husband without knowledge of the university causing the university to lose a lot of money through payments of electricity and unpaid rent since the time she illegally acquired the space and further that the university should allow the audit to be taken to ascertain the allegation on excess value worth Kshs 65,895/= as per the LPOs No. 08728,08732,08738 and 08729.
27. I have also looked at the Audit report dated 16<sup>th</sup> May 2017 from the Deputy Chief Internal Auditor. The auditor concluded that some of the allegations made against the Claimant as raised by the assistant bookshop manager had been confirmed.
28. Lord Denning in the case of *British Leyland UK Ltd v Swift* (1981) I.R.L.R91 described the test of reasonableness in the following words: -
- “The correct test is; was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”
29. Having looked at the audit report in particular, and the allegations levelled against the claimant, I am convinced that the respondent terminated the claimant on valid and fair reasons as espoused by Section 45(2) of the [Employment Act](#).
30. It is therefore my finding that the Respondent was justified in terminating the Claimant from employment.
31. The next issue I need to address is whether there was procedural fairness in the termination of the Claimant from employment.
32. Section 41 of the [Employment Act](#) provides as follows:-
- “Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”
33. The import of the above provision of law is that the employer before terminating an employee from employment should;
- i. provide the employee with details of the accusations against the employee;
  - ii. allow the employee an opportunity to respond to the charges;



- iii. allow the employee to be accompanied by a shop steward or co-employee of his choice during the process;
  - iv. finally provide the employee with a decision either terminating or saving the contract of service.
34. RW1 in his testimony maintained that due process was followed before the Claimant was terminated from employment. The Claimant on her part averred that she was not accorded a fair hearing as her witness did not testify in the disciplinary hearing. This was confirmed by CW2 in his testimony that he was not given audience at the disciplinary hearing.
35. I have had the advantage of looking at the minutes of the Council staff disciplinary committee meeting held on 4<sup>th</sup> October 2018. From the said minutes, it is evident that the Claimant was accompanied by her legal representative, Counsel Oribo and two union representatives, Mr Katama and Mr Akura. From the foregoing, it is evident that the Claimant was accorded a fair hearing as provided by section 41 of the *Employment Act* and that as such, the termination was done in accordance with a fair procedure as required by section 45(2)(c) of the *Employment Act*.
36. It is worth noting that from the termination letter issued to the Claimant, the terms of the said letter were among others that the Claimant be surcharged Kshs 1,118,221 for unaccounted for computers that were purchased and were not sold and were not in the store. I have noted from page 4 of the audit report that the although the auditor found that the university had lost Kshs 1,118,221, she recommended that the bookshop should be asked to account for the computers not in the store. Notably, the Claimant was not found to be directly culpable for the above loss. In fact, as regards the issue of undeclared businesses in Zion mall bookshop space at page 6 of the audit report, the auditor was categorical in her recommendation that the bookshop manager, who is the Claimant herein should be surcharged for rent, electricity and water charges for her personal business accommodated in the university premises.
37. Based on the findings of the Audit report and in as much as the Respondent was justified in terminating the Claimant, I do not think it would be fair that she be surcharged for the unaccounted laptops.
38. In the end, the suit succeed to the extend that the Claimant should not be surcharged Kshs 1,118,221/ = for unaccounted for computers. The rest if the claim is dismissed.
39. There will be no orders as to costs.

**DATED, DELIVERED AND SIGNED AT ELDORET THIS 5<sup>TH</sup> DAY OF OCTOBER, 2023.**

**M. ONYANGO**

**JUDGE**

