



Achuora v United States International University- Africa (Cause 734 of 2018) [2023] KEELRC 2823 (KLR) (9 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2823 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 734 OF 2018
L NDOLO, J
NOVEMBER 9, 2023**

BETWEEN

JOHN ODOYO ACHUORA CLAIMANT

AND

UNITED STATES INTERNATIONAL UNIVERSITY- AFRICA ... RESPONDENT

JUDGMENT

Introduction

1. By his Statement of Claim as amended on 18th June 2019, the Claimant alleges that his employment was unlawfully terminated by the Respondent and that he was not paid his terminal dues.
2. The Respondent filed a Memorandum of Defence dated 22nd March 2019 and amended on 16th August 2019.
3. At the trial, the Claimant testified on his own behalf and the Respondent called its Director-Administration, Night Nzovu. Thereafter, the parties filed written submissions.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent on 1st April 2009, in the position of Head of Purchasing. He was confirmed in his appointment by letter dated 4th November 2009. By the time of separation from the Respondent's employment, the Claimant was earning a monthly salary of Kshs. 191,610.60.
5. On 22nd June 2017, the Claimant was issued with a suspension letter on allegations of negligence in the performance of his duties, which according to the Respondent, led to substantial losses.
6. On 11th September 2017, the Claimant was issued with a show cause letter on allegations of gross misconduct. He contends that he immediately requested the Respondent to supply him with certain



particulars, information and documents, including a forensic audit report, investigation findings and audit recommendations, to enable him effectively respond to the show cause letter.

7. The Claimant states that the Respondent did not accede to his request; he nevertheless responded to the show cause letter on 21st September 2017.
8. By a letter dated 20th November 2017, the Claimant was summoned to appear before a Disciplinary Committee and on 22nd November 2017, he was issued with an addendum notice containing further allegations.
9. The Claimant appeared before the Disciplinary Committee on 1st December 2017. He claims to have made representations, exonerating himself from any wrongdoing. On 19th January 2018, he was issued with a summary dismissal. He lodged an appeal on 25th January 2018 but he was not heard on appeal.
10. The Claimant faults the Respondent for failing to complete the disciplinary proceedings within 39 calendar days from the date of suspension as provided by the Respondent's Standard Operating Procedures.
11. The Claimant lays a claim of unlawful and unfair termination of employment and therefore seeks reinstatement or in the alternative:
 - a. General damages for unlawful termination.....Kshs. 3,000,000.00
 - b. Compensation for discrimination.....1,000,000.00
 - c. General damages for psychological trauma & distress.....1,000,000.00
 - d. 12 months' salary in compensation.....2,299,372.20
 - e. 3 months' salary in notice pay.....574,832.80
 - f. Confirmation of monthly remittance of NSSF and NHIF dues
 - g. Pension benefits
 - h. Certificate of service
 - i. Costs plus interest

The Respondent's Case

12. In its Memorandum of Defence as amended on 16th August 2019, the Respondent admits having employed the Claimant as Head of Purchasing, effective 1st April 2009. The Respondent further admits having confirmed the Claimant in his appointment effective 1st October 2009.
13. The Respondent states that pursuant to a restructuring exercise, the Claimant's job title was changed to Manager-Procurement. At the time of separation, the Claimant was the overall Head of the Purchasing Department.
14. The Respondent states that in 2016/2017 its external auditors carried out a forensic audit covering a period of 5 years from 2011 to 2016. According to the Respondent, the audit report revealed that the Claimant had performed his duties negligently, occasioning substantial loss to the Respondent.
15. The Respondent further states that pursuant to a meeting between the Claimant and his immediate supervisor, the Claimant was issued with a suspension letter on 22nd June 2017, to allow for further investigations.



16. The Claimant was subsequently issued with a show cause letter on 11th September 2017. The Respondent concedes having received an email from the Claimant dated 13th September 2017, asking for particular information and documents, to enable him respond to the show cause letter.
17. On 21st September 2017, the Claimant responded to the show cause letter and on 20th November 2017, he was invited to a disciplinary hearing scheduled to take place on 1st December 2017.
18. According to the Respondent, the Claimant chose not to be accompanied at the disciplinary hearing. The Respondent maintains that the Claimant's employment was terminated for justifiable cause and in compliance with due procedure.
19. The Respondent further concedes having received the Claimant's letter of intention to appeal, accompanied by a request for specific documents and information. The Respondent also admits having received the Claimant's letter of appeal dated 25th January 2018. By letter dated 6th February 2018, the Respondent communicated its decision to uphold the Claimant's dismissal.
20. The Respondent avers that the Claimant was paid all his terminal dues and was issued with a Certificate of Service.

Findings and Determination

21. There are two (2) issues for determination in this case:
 - a. Whether the Claimant's dismissal was lawful and fair;
 - b. Whether the Claimant is entitled to the remedies sought.

The Dismissal

22. The Claimant was dismissed by letter dated 19th January 2018, stating as follows:

“Dear Dr. Achuora,

RE: Summary Dismissal

Reference is made to the above matter and to previous correspondence on the same.

On 22nd June, 2017, you were suspended from duty to pave way for further investigations into various issues raised regarding your conduct of certain duties in your role as Manager, Procurement which occasioned substantial financial loss to the university. This followed the conclusion of a forensic audit covering a 5 year period between 2011 and 2016.

After the investigations were concluded, on 11th September, 2017 you were issued with a Notice to Show Cause why disciplinary action should not be taken against you for gross misconduct. You were given an opportunity to make representations in writing in response to the show cause letter but the explanation was unsatisfactory.

Accordingly, on 1st December, 2017, you were accorded another opportunity to explain your actions before the Disciplinary Committee on the charges levelled against you. Your submissions at the hearing were also found to be unsatisfactory and it was concluded that you were grossly negligent in the performance of your duties as the Manager Procurement. Further, that your errors of commission and/or omission led to the university incurring substantial financial loss.



Your actions amount to gross and wilful misconduct and are in violation of the provisions of the University's Human Resources Policies and Procedures Manual and the Laws of Kenya.

Your continued employment with the university is therefore untenable and you are summarily dismissed with effect from 19th January, 2018.

Your final dues (if any), will be paid after clearing with the University and after a satisfactory handing over to your immediate supervisor. Your pension dues will be paid to you upon completion of the pension exit notification forms available at the Human Resources office.

You have the right of appeal against your dismissal within five (5) working days from the date of this letter. If you elect to lodge an appeal, you must do so in writing setting put in full the grounds on which you are appealing. Any appeal will be dealt with in accordance with the University's Disciplinary Procedures as set out in the Human Resources Policies and Procedures Manual.

Yours faithfully

(signed)

Prof. Paul T. Zeleka

Vice Chancellor”

23. This letter cites gross negligence as the reason for the Claimant's dismissal. From the parties' pleadings and evidence adduced in court, it is evident that the allegations against the Claimant arose from a forensic audit commissioned by the Respondent, covering a period of 5 years, running from 2011 to 2016.
24. Upon being issued with a show cause letter on 11th September 2017, the Claimant sought particular information and documents to enable him to respond. This request was reiterated at the appeal stage. From the evidence on record, the Respondent did not respond to the Claimant's requests.
25. In its decision in *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture & Technology* [2014] eKLR this Court stated as follows:

“...in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.”
26. In the present case, the Respondent ignored the Claimant's requests for information and documents that would have assisted him in preparing his defence. What is more, the forensic audit report, which is said to have informed the Respondent's decision to dismiss the Claimant, was not availed either at the disciplinary hearing or in court. The amount of alleged financial loss was also not disclosed.
27. Further, the Claimant was subjected to a prolonged disciplinary process beyond the 39-day period set by the Respondent's Standard Operating Procedures.
28. As held in *Alphonse Maghanga Mwachanya v Operation 680 Limited* [2013] eKLR for an employer to satisfy the procedural fairness requirements of Section 41 of the *Employment Act*, they must demonstrate the following:



- a. That they have explained to the employee, in a language the employee understands the reasons why termination is being considered;
 - b. That they have allowed a representative of the employee, being a fellow employee or a shop floor representative to be present during the explanation;
 - c. That they have heard and considered representations by the employee and/or their representative;
 - d. That the employer has complied with its own internal disciplinary rules.
29. In the case now before me, the Claimant was confronted with general accusations which were not substantiated at the shop floor. His request for more information was denied twice; first at the initial hearing and second at the appeal stage. In addition, the Claimant was not heard on appeal, ostensibly because he did not avail any new evidence.
30. In the circumstances of this case, the only finding to make is that in handling the Claimant's case, the Respondent breached both the law and its own internal disciplinary rules. The resultant dismissal was therefore without justifiable cause as required by Section 43 of the Employment Act and in violation of the fair disciplinary procedure decreed by Section 41 of the Act.

Remedies

31. The Claimant seeks reinstatement as a primary remedy. However, in view of the time lapse since his exit from the Respondent's employment, reinstatement would not be an appropriate remedy.
32. Instead, I award the Claimant ten (10) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service and the Respondent's unlawful conduct in the dismissal transaction.
33. I further award the Claimant one (1) month's salary in lieu of notice.
34. No evidence was adduced to support the claims for general damages, discrimination and pension benefits which therefore fail and are dismissed.
35. The claim for confirmation of monthly remittance of NSSF and NHIF dues was not substantiated and also fails.
36. In the end, I enter judgment in favour of the Claimant as follows:
- | | | |
|----|---|-----------------|
| a. | 10 months' salary in compensation..... | Kshs. 1,916,110 |
| b. | 1 month's salary in lieu of notice..... | 191,611 |
| | Total..... | 2,107,721 |
37. This amount will be paid net of statutory deductions and will attract interest at court rates from the date of judgment until payment in full.
38. The Claimant will have the costs of the case.
39. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF NOVEMBER 2023

LINNET NDOLO

JUDGE



Appearance:

Mr. Awiti for the Claimant

Mr. Ashitiva for the Respondent

