



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2541 OF 2016**

**JOSEPH OKETCH ODURO.....CLAIMANT**

**VERSUS**

**JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY.....RESPONDENT**

**JUDGEMENT**

1. The claimant brought this suit on the 9<sup>th</sup> of December, 2016 claiming that he was unfairly dismissed from employment by the respondent. The suit seeks the following reliefs:

- a. A declaration that the claimant's dismissal from service was unlawful;
- b. Contractual benefits, which include:
  - i. Relocation and subsistence allowance on being posted to Kigali- USD 17, 475;
  - ii. Relocation and subsistence allowance on being recalled from Kigali to Nairobi- USD 21, 750;
  - iii. One month's basic salary of Kshs. 91, 501 and Kshs. 6,684 being passage and baggage allowance on recall from Kigali;
  - iv. Acting allowance, when the claimant acted as director of the Kigali campus @ 20% basic salary- Kshs. 39, 349.80;
  - v. Part time teaching allowance- Kshs.1, 027, 130;
  - vi. Refund for one way ticket on recall and suspension from duty- Kshs.270;
  - vii. Leave and travelling allowance for the period covering 10<sup>th</sup> August, 2014 to 26<sup>th</sup> April, 2016- Kshs.14, 000;
  - viii. Gratuity allowance at the rate of 20% basic salary for the period covering 10<sup>th</sup> August, 2014 to 26<sup>th</sup> April, 2016- Kshs. 384, 304.2;
  - ix. Withheld half month salary for the period covering February 2016 to 26<sup>th</sup> April 2016- Kshs. 286, 120.5
- c. General damages for unlawful dismissal from service;
- d. Interest on the judgment sums at court rates from the date of this suit until payment in full;
- e. Certificate of service; and
- f. Costs of this suit.

2. The respondent entered appearance on the 12<sup>th</sup> of January, 2017 and filed its Memorandum of Reply on the 7<sup>th</sup> of June, 2017. It admitted that the claimant was its employee from 30<sup>th</sup> of July, 2012 as a tutorial fellow, Grade II on a two-year contract. The contract was renewed for a further two years effective 10<sup>th</sup> August 2014 up to 9<sup>th</sup> August, 2016 on similar terms. The respondent also admitted that on 1<sup>st</sup> of

December, 2013, it appointed the claimant as its Deputy Director, Kigali campus.

3. The respondent stated that the claimant was recalled from Kigali Campus and eventually suspended from duty as the deputy director, vide letters dated the 18<sup>th</sup> of January 2015 and 20<sup>th</sup> January 2016 respectively. The said action was taken to pave the way for investigations after the respondent established that there were various unauthorized and irregular transfer of funds and unlawful procurement practices at its Kigali campus allegedly by the claimant and other members of staff.

4. The respondent averred that it invited the claimant to a disciplinary hearing on 13.4.2016 but he declined and as such he was dismissed from employment on 26.4.2016. It further averred that the dismissal was fair because it was justified by a valid reason and the claimant was afforded an opportunity to defend himself. Therefore it prayed for the suit to be dismissed with costs.

5. The suit was heard on the 25<sup>th</sup> of February 2021 and 15<sup>th</sup> of June 2021, when both sides gave evidence and thereafter filed written submissions.

#### **Claimant's Case:**

6. The claimant testified as CW1 and basically adopted his written statement and supplementary statement dated the 9<sup>th</sup> of December, 2016 and 19<sup>th</sup> of June, 2018 respectively as his evidence in chief. He also produced a bundle of documents as exhibits 1-24.

7. In brief he testified that he was served with the letter of recall on 23.1.2016 and suspension letter dated 20.1.2016. The letters were served on him in his office at Kigali by the secretary on 23.1.2016 and 17.2.2016 respectively. He requested for an Air Ticket and relocation allowances from Kigali vide the Memo dated 27.1.2016, letter dated 17.2.2016 and email dated 31.1.2016 but nothing was availed to him.

8. He further testified that on 30.4.2016, he received via email a Show Cause Letter dated 24.3.2016, undated Charge Sheet and a Summary dismissal dated 26.4.2016. He contended that he was never served with notice to attend disciplinary hearing and the charge sheet before the dismissal and therefore the disciplinary process was undertaken in his absence.

9. He prayed for compensatory damages for the unfair termination plus other benefits arising from his contract as set out in the claim.

10. On cross examination, he stated that he received the Notice to show cause dated the 24<sup>th</sup> of March, 2016, Charge sheet and dismissal letter dated the 26<sup>th</sup> of April, 2016 in his personal email. He contended that he was required to respond to the allegations against him within 14days and thereafter attend a disciplinary hearing but he did not attend the disciplinary hearing as he did not receive the said show cause letter and the charge sheet until 30<sup>th</sup> April 2016, way after the dismissal had been decided.

11. The claimant did not produced any proof to that he had received the said documents on said date. He also confirmed that he neither wrote any protest letter that he was disciplined without being given an opportunity to defend himself, nor did he appeal against the respondent's decision.

12. The claimant stated that whereas he did not know the reasons as to why his senior Dr. Luvanda, was suspended, he admitted that there were issues related to purchase of land in Kigali, which led to his dismissal.

13. The claimant testified that one of the charges against him, was that he had paid four suppliers without following the respondent's procedure. He stated that the payments were done by the Director Dr. Luvanda and he only approved the payments on behalf of the Director. The claimant stated that the authority was given on the 45<sup>th</sup> of January, 2016 but he did the approval on the 5<sup>th</sup> of December 2015.

14. The claimant admitted that he was the chairman of the Procurement Committee but the Director was not a member of the committee. The claimant admitted that it was improper to make payments before the delivery of the goods ordered. He denied ever signing any L.P.O and confirmed that the payment was done on the basis of similar invoices from four suppliers approved by the director.

15. On re-examination, the claimant testified that he received the show cause letter and charges by email after the dismissal instead of hand delivery. He stated that the letter of recall from duty and suspension letter were hand delivered to him in Kigali. He contended that under the terms of service, service of charges and show cause letters ought not to be served by email.

16. He maintained that he paid the four suppliers, on the strength of the letter by the Director, Dr. Luvanda, dated the 45<sup>th</sup> of January 2016, in which the Director was instructing him to approve payments for the four suppliers being AIDEN General Supplies, Jockeys Limited, RKK Valuers Limited and NKK Limited.

#### **Respondent's case:**

17. The respondent's Risk Manager, Njeru Mwaniki Francis, testified as RW-1 and also adopted as his evidence in chief, his statement dated the 8<sup>th</sup> of June, 2021 and the respondent's bundles of documents dated 7.6.2017 and 8.6.2021 respectively.

18. He explained that prior to being appointed a Risk Manager, he was the Chief Security officer for the University and he is the one who carried out the investigations into the matter herein. He further testified that, when he went to Kigali in December, 2015, to carry out investigations, the claimant was the acting Director of the campus, following the suspension of Dr. Luvanda.

19. He stated that in the course of his investigations, he found out that the claimant was the chairman of the Procurement Committee in

Kigali campus, and that he had breached the procurement law and regulations of Kenya, concerning the procurement of land in Kigali. He testified that the claimant and the Director had transferred Kshs. 5, 320, 502.82 from JKUAT account to an account in Consolidated Bank in Nairobi, held in the name of Gelma Agencies (k) Limited. He stated that the account was held by Dr. Anthony Luvanda and Gery Ishiaha Luvanda.

20. He further testified that the claimant and the Director, transferred another Kshs. 2,000,000 from JKUAT account to Gelma Agencies Kigali limited, which account was jointly owned by Ella Kiaya Nyangasi, the university's nurse at Kigali and Eric Uwingiriyimana, the university contracted taxi driver.

21. He stated that the claimant made advance payments to four suppliers, AIDEN General Supplies, Jockeys Limited, RKK Valuers Limited and NKK Limited, without following the laid down procurement procedures and without respondent first receiving the supplies. He maintained that the goods paid for were never received by the respondent.

22. He denied the allegation by the claimant that he did the above while acting on the instructions of the then Director, Dr. Luvanda, and contended that one cannot act on illegal instructions.

23. On Cross examination, the witness testified that the claimant was appointed the Deputy Director of the respondent's Kigali campus on the 1<sup>st</sup> of December, 2013. He confirmed that the claimant's duties as Deputy Director were to be allocated by the Director Kigali campus and by the Vice Chancellor from time to time.

24. He contended that, it would not be insubordination if the claimant had refused to act on illegal instructions from the Director. In his view, the claimant should have reported the Director to a higher authority.

25. He stated that the question whether or not the claimant was entitled to be paid allowance for relocation to Kigali should be a HR and finance matter and as such he was not competent to answer it.

26. He also stated that the disciplinary process against the claimant was initiated by a notice to show cause and a charge sheet which raised weighty issues, which required the claimant's response. Again he stated that he did not know whether the show cause letter and the charge sheet were served on the claimant personally, as that was a HR matter.

27. He confirmed that the approval for procurement of the land at Kigali was done by the University Council but on condition that all possible risks were explored and that all the relevant procurement procedures were followed. He contended that, no consultation was done before procurement and that some of the letters produced were done as an afterthought.

28. He further confirmed that it was the director, Dr. Luvanda who irregularly executed the purchase agreement for the land, and negotiated for funding from I&M bank on behalf of the respondent singlehandedly. He, however contended that the claimant sat in the committee that passed a resolution to use the land as security to secure a loan from I&M bank.

29. He contended that the actions by the Director were irregular but admitted that the land was purchased and registered in the name of the University. He also confirmed that the claimant was not the one who did the consultancy but the Director. He admitted that he had no valuation report to show that the land was overpriced or that the University did not get value for money.

30. He admitted that the payment voucher of RWF 60,000,000 was prepared by the Finance Director and approved by the Campus Director. He stated that the claimant was not compelled to sign any voucher which was illegal. He further stated that any voucher must be accompanied by supporting documents to prove validity and that the claimant was obliged to verify documents even after they had been verified by the finance department.

31. He confirmed that the letter dated the 45<sup>th</sup> of January 2016, was a letter by Dr. Luvanda instructing the claimant to approve payments to four suppliers on his behalf. He contended that the letter was not authentic and that the date on the letter could be either an error or a deliberate act by the claimant. He however admitted that he had not taken the document to a document examiner, to ascertain whether or not it was signed by Dr. Luvanda.

32. He testified that the payments of Kshs. 5, 320, 512.82 and Kshs. 2,000,000 were not to the claimant, but to specific companies. He reiterated that the claimant was the chairman of the procurement committee and he should not have made payments without knowing the directors of those companies.

33. On re-examination, he testified that as at January, 2016, Dr. Luvanda was not the Director of the Kigali campus as he had left in the first week of December, 2015.

**Claimant's submission:**

34. The claimant filed written submissions dated the 5<sup>th</sup> of July, 2021 in which he reiterated the facts set out in the pleadings and evidence above.

35. The claimant submitted that the respondent contrived a deliberate and malicious scheme to deny him the opportunity to be heard in his defense to the charges levelled against him, by failing to serve him with notice in the prescribed manner or at all before the scheduled disciplinary hearing. He stated that this led to him being condemned unheard contrary to elementary principles of natural justice and the basic statutory procedural safeguards set out under section 41 (1) of the Employment Act.

36. The claimant submitted that the respondent's conduct violated his constitutional rights to fair labour practices under Article 41(1) and the right to fair administrative action under Article 47 (1). He stated that he had a legitimate expectation that the defendant would accord him due process as stipulated under the contract and Employment Act, which they failed to do, before terminating his contract of employment. Consequently, he urged that his dismissal from service was unfair since the respondent denied him the right to participate in the disciplinary process against him.

37. On the other hand, he submitted that failure by the respondent to serve him in the prescribed manner before the scheduled disciplinary hearing, amounted to a unilateral variation of a critical term of the contract which had a direct negative impact on the claimant's legal rights.

38. On whether the claimant's dismissal was justified, the claimant stated that there was no merit in his dismissal as Deputy Director, noting that he was administratively and functionally reporting to the then Director, Dr. Anthony Luvanda and as a result he cannot take responsibility for the illegalities of the college Director.

39. He further submitted that, it was the Director's office, which was involved in the purchase of the campus land and not the campus Procurement Committee. He maintained that it was Dr. Luvanda, who personally invited firms to help with identification and negotiation of the purchase of the land; that Dr. Luvanda signed the agreement for purchase of land; and that he also exclusively negotiated and executed the mortgage finance documents on behalf of the respondent.

40. The claimant submitted that he was introduced as a signatory to the University's bank account by the director vide a letter dated the 10<sup>th</sup> of February, 2015 and that this was a routine procedure. He further submitted that the respondent did not tender any evidence to prove any impropriety in the change of the signatories to the account. He maintained that he was obliged to perform the duties assigned to him by the Director, and he therefore he had no reason to decline being a signatory to the accounts.

41. The claimant submitted that payment voucher of RWF 60,000,000 was prepared by the finance department upon approval by the Director. He stated that his role was facilitative as the decision to pay was made by the proper officer being the college Director.

42. The claimant submitted that the payments made to Aiden General Supplies limited, Jockeys Limited, RKK Valuers limited and NKK limited were approved by the Director and any uncertainty in the date of the directors' letter authorizing him to approve advance payments on his behalf can only be held against the Director and not him since he merely executed a delegated authority. He submitted that the respondent's own investigation report vindicated him and consequently he cannot be responsible for the misdeeds of the campus director.

43. As regards the reliefs sought, the claimant submitted that he is entitled to be paid damages equivalent to 12 months gross pay under section 49(1) (c) of the Employment Act, noting that the reinstatement order cannot be made owing by dint of section 12 (3) of the Employment and Labor relations court Act.

44. On whether the claimant is entitled to the contractual claims, the claimant stated that the respondent never paid him USD 17,475, relocation & Subsistence allowance for him and his spouse on being posted to Kigali. He stated that the respondent vide a letter dated the 22<sup>nd</sup> of January 2014, authorized its finance officer to pay him relocation allowance, but he was only paid one-month current basic salary amounting to Kshs. 79,044 and baggage and passage allowance of Kshs. 6, 684. He maintained that the employer failed to pay accommodation allowance for him and his spouse at USD 6990 each and ½ of 6990 for his child as per paragraph 9.8 (ii) of the terms and conditions of service amounting to USD 17, 475.

45. The claimant also submitted that he is entitled to relocation allowance back to Nairobi from Kigali at the same rate as provided for in the letter dated the 22<sup>nd</sup> of January 2014, at the time when he was recalled from duty and subsequently suspended.

46. He further submitted that he is entitled to acting allowance of Kshs. 9, 837.45 for the period 11<sup>th</sup> August 2015 to 2<sup>nd</sup> September 2015 as per the CBA paragraph 16 (e) at the rate of 5% of basic salary of Kshs. 196, 749.

47. He also stated that he is yet to be paid for part time teaching while in Kenya and Kigali being Kshs. 155, 610 and RWF 6, 030,000 respectively.

48. He contended that he is owed USD 270, being payment for one way ticket to Nairobi after being recalled from duty. He also stated that he is yet to be paid leave allowance for 2 years amounting to Kshs. 14,000 as per par 12.4 terms and conditions of service.

49. The claimant submitted that he is entitled to Kshs. 366, 044 gratuity for the 20 months he served the respondent at the rate of 20% of basic pay per month. He also claimed Kshs. 478, 756, being withheld salary during suspension for the period February, March and 13 days in April. The claimant also submitted that he is yet to receive his certificate of service as per section 51 of the Employment Act.

#### **Respondent's submissions:**

50. The respondent submitted that the claimant acted negligently and failed to exercise any reasonable care and skill expected of a Deputy Director, Acting Director and Chairman of the Procurement Committee at Kigali Campus. It contended that the claimant allowed the members of the respondent's staff to participate in the tendering process contrary to procurement laws and procedures of the respondent.

51. The respondent further submitted that in further breach of the procurement laws and its procedures, the claimant handpicked four suppliers who had not been shortlisted by the respondent to supply stationary to the respondent's Kigali campus, approved advance payments of RWF 20, 262, 588 to the four suppliers prior to the performance of their contract, and irregularly approving the transfer of RWF 60,000,000 from the University's KCB Kigali account no. 440150047 to I&M Bank, Rwanda Limited account no. 5046343-01-83 allegedly belonging to the respondent but illegally opened.

52. In view of the foregoing matters, the respondent submitted that the claimant breached the trust bestowed on him by the respondent, warranting summary dismissal under section 44 of the Employment Act.

53. As regards the procedure followed, the respondent submitted that the claimant, though acknowledging to have received notice to show cause letter and dismissal letter via email, he did not show proof that he received the email on the 30<sup>th</sup> of April, 2016. It further submitted that the claimant neither complain of the mode of service until these proceedings nor did he appeal against the dismissal on the grounds that he did not receive the letter dated 24<sup>th</sup> of March, 2016 inviting him to a disciplinary hearing.

54. In view of the foregoing, the respondent submitted that the claimant refused to respond to the charges levelled against him on the notice to show cause and also chose not to attend the disciplinary hearing. Consequently, the respondent maintained that it followed due process in line with the law and its internal disciplinary procedures prior to dismissing the claimant. It fortified that submission by the decision in the case of **Fridah Nyabonyi Abuya versus Virtual HR Services Ltd (2021) eKLR** and **Jackson Butiya versus Eastern Produce Kenya Ltd (industries) cause no. 335 of 2011**.

55. As regards the reliefs sought, the respondent maintained that it followed the right procedure and therefore no remedies accrue to the claimant. It urged the court to look at the conduct of the claimant vis –a-vis the reasons for termination and make a finding that the termination was justified.

56. It further submitted that the claim for relocation and subsistence allowance on being posted to Kigali amounting to USD 17, 475, relocation and substance allowance on being recalled back to Nairobi from Kigali amounting to USD 21, 750, and Kshs. 1, 027, 130.00 being part time teaching allowance are all special damages that must be strictly proved. It contended that the claimant did not produce evidence that he travelled from Kigali to Kenya with his family and also evidence of his class attendance and therefore his claim for these payments should fail. For emphasis it relied on the case of **Francis Nyongesa kweyu versus Eldoret Water and Sanitation Company Limited (2017) eKLR** and **Doughlous Odhiambo Apel & Another versus Telkom Kenya Limited, Nairobi (2014) eKLR**.

#### **Claimant's rejoinder**

57. The claimant filed a response to the respondent's submission dated the 3<sup>rd</sup> of September 2021. The claimant submitted that the disciplinary documents served upon him were not done in accordance to the respondent's internal disciplinary process and that this was not disputed by the respondent. He stated that the respondent did not state why it chose not to serve the show cause letter in the same manner that it chose to serve the recall and suspension letters.

58. The claimant submitted that there was an unexplained noncompliance by the respondent with its own internal disciplinary process, which caused the claimant to lose his job.

59. The claimant submitted that the claim for relocation and subsistence allowance and acting allowance are contractual, which have been proved on sound and admissible evidence. He also stated that he has proved his claim for part time teaching allowance.

60. Finally, he submitted that the respondent has failed to prove its allegations of forgery and/ or fraud by him to the required standard. For emphasis he relied on the case of **Kuria Kiarie & 2 others versus Sammy Magara (2015) eKLR** and **Ahmed Mohammed Noor versus Abdi Aziz Osman (2019) eKLR**.

#### **Issues for determination and analysis.**

61. Having carefully considered the pleadings, evidence and submissions, the issues for determination are:

- i. Whether the reasons for dismissing the claimant was valid and fair.**
- ii. Whether procedure followed was fair;**
- iii. Whether the claimant is entitled to the reliefs sought;**

#### **Reason for the dismissal**

62. Section 45 (1) and (2) of the Employment Act makes the following provisions regarding unfair termination of employment—

**“(1) No employer shall terminate the employment of an employee unfairly.**

**(2) A termination of employment by an employer is unfair if the employer fails to prove—**

**(a) that the reason for the termination is valid;**

**(b) that the reason for the termination is a fair reason—**

**(i) related to the employee's conduct, capacity or compatibility; or**

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.”

63. The Court of Appeal in **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** affirmed the above provision, thus:

**“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”**

64. The reason for the dismissal cited by dismissal letter dated 26.4.2016 was the claimant’s involvement in malpractices, fraud and breach of procurement procedures which led to loss of employer’s funds. The letter accused the claimant of colluding with the Campus Director Dr. Luvanda to misappropriate university funds by transferring 60,000,000 RWF from the university account at KCB Kigali to an irregularly opened university account at I&B Bank (Rwanda) Limited and thereafter paid to consultants who turned out to be linked to the Director and other members of staff.

65. The letter also accused the claimant as the Chairman of the Procurement Committee for awarding tenders to handpicked suppliers who had not been prequalified and then paying them in advance for supplies not delivered and which were never delivered. According to the respondent the claimant breached section 79(1) & (2) of the Public Finance Management Act, and also the provisions of the Public Officers Ethics Act.

66. The claimant denied the alleged accusations and maintained that the procurement of the land was approved by the university council. He further argued that what he did was through instructions of the Campus Director and he was obliged to comply by dint of the contract of employment which required him to do the duties assigned to him by the Campus Director and the Vice Chancellor.

67. I have carefully considered the rival contentions. There is no dispute that the University Council approved for purchase of land and gave condition that risk should be avoided. There is also no dispute that the claimant was the Chairman of the Procurement Committee and also a signatory to the university’s bank accounts at KCB Kigali and I&M Bank Kigali. It is also a fact that 60,000,000 RWF were transferred from the KCB account to the I&M Bank and the funds were then paid out to consultants as alleged by the respondent. Finally the claimant has admitted that he approved and made advance payment to 4 suppliers in December 2015 before the supplies were delivered.

68. The claimant was not a junior officer but the second in command at the Campus and also the Chairman of the Procurement Committee. He not only let the Director mismanage the procurement process and misappropriate the employer’s funds, but also he fully participated in the mess that led to the two officers being dismissed. He condoned the malpractices and also actively participated in it. He may not have benefited from the wrong dealings, but that alone does not make the matters any better. The employer was entitled to dismiss the claimant for loss of trust due to the said malpractices.

69. Section 44 of the Employment Act entitles the employer to summarily dismiss his employee for negligence or careless performance of duty, and for committing a criminal offence or on reasonable suspicion that he committed a criminal offence against the employer or employer’s property. Consequently, I am satisfied that in this case the employer has proved on a balance of probability that the reason for dismissing the claimant was valid and fair.

#### **Procedure followed**

70. The claimant stated that as per clause 6.1 (g) of the terms of service for academic staff, grades AC8-15 of July 2008, he was supposed to be served with the Show Cause letter dated the 24<sup>th</sup> of March, 2016, an undated charge sheet and a summary dismissal letter dated the 26<sup>th</sup> of April, 2016 personally through hand delivery just as it had been done for his recall and suspension letters. He maintained that he was not properly served with the notice to show cause letter and as a result, he missed his scheduled disciplinary hearing leading to his summary dismissal from employment without being heard.

71. Clause 6.1(g) of the Terms of Service states as follows:

**“the employer shall use a delivery book when issuing the warning letter and any appeal thereto shall be delivered by hand personally by the employee to the issuing officer who shall acknowledge official receipt thereof.”**

72. My interpretation of the foregoing is that it is specific to service of warning letters to respondent’s employees and service of any appeal by the employee to the issuing officer. The terms of service are silent on the mode of service of Show cause letters, termination letters or any other disciplinary documents to be served upon employees.

73. Clause 6.1 (a) of the terms of service states as follows regarding a warning letter,

**“an employee whose work or conduct is unsatisfactory or who otherwise commits a misconduct which in the opinion of the employer does not warrant removal for good cause shall be warned in writing.”**

74. A warning letter is therefore not a show cause letter but a form of punishment meted out to an employee after a disciplinary process has

been undertaken and the employer finds that the employee's conduct does not warrant termination of employment. A show cause letter on the other hand outlines the allegations against the employee, it informs him/her that disciplinary action is contemplated and it invited the employee to make a written defence. I therefore do not agree with the claimant's assertions that paragraph 6.1 (g) can be interpreted to mean that correspondences or documents on disciplinary matters must be personally served on the recipient by hand delivery.

75. The question that arises is why the respondent served the claimant physically with the recall and the suspension letters. Another question that pops up is whether service of the show cause letter through personal email was the best method of service in the circumstances.

76. To answer the first question, I think hand delivery of the recall and suspension letters was the most appropriate mode of service because the claimant was still in the office. It was the best way to ensure that the claimant would not dispute service since the secretary who effected the letter would be a witness. However, regarding the show cause letter, the claimant had already been suspended and recalled to Kenya from his office in Kigali. His whereabouts was unknown. Consequently, without any confirmation of his new physical address, the best mode of service of the show cause letter and other correspondences was via email followed by a phone call through his known private number.

77. Another question that arises is whether the said letter and the charge sheet were emailed to him prior to the scheduled hearing on 13.4.2016. The burden of proof of the same lies with the employer who alleges that the claimant was served and failed to attend the disciplinary hearing. If indeed the employer had served the show cause letter before the hearing nothing was easier than to print out the email which forwarded the letter so that the court can confirm that the claimant deliberately failed to respond within 14 days and attend the hearing as directed.

78. Without such evidence, the court is left with no option but to accept the allegation by the claimant that he was not given a fair opportunity to defend himself before the dismissal. He was never served with the show cause letter/invitation to attend the disciplinary hearing in Nairobi on 13.4.2016. Matters were made worse by the failure by the employer to facilitate the claimant to relocate to Kenya and also to attend the hearing. The employer simply abandoned the claimant abroad with a demand for payment of millions of shillings which were allegedly misappropriated under his watch. Unlike the transfer letter, the dismissal letter said nothing about repatriation of the claimant, his family and baggage.

79. In the circumstances, I find and hold that the respondent has failed to prove that it dismissed the claimant in accordance with a fair procedure. Even if the claimant had misconducted himself while in the course of his employment, the employer was obliged to follow a fair process by ensuring that he was availed a fair opportunity to defend himself as required under Article 47 of the Constitution of Kenya and amplified by section 41 of the Employment Act.

80. Section 41(1) of the Employment Act, states 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.”**

81. I gather support from **Kenfreight (EA) Limited V. Benson K. Nguti [2016] eKLR**, where the Court of Appeal held that:-

**“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee's conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure...**

**Apart from issuing proper Notice according to the contract (or payment in lieu of Notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service”.**

**Whether the claimant is entitled to the reliefs sought:**

82. In view of the finding that the dismissal was not in accordance with a fair procedure, I make declaration that, the summary dismissal of the claimant was unfair within the meaning of section 45 of the Employment Act and therefore unlawful.

83. I further find that the claimant is entitled to damages including salary in lieu of notice plus salary compensation for the unfair dismissal by dint of section 49(1) of the Act. Under his contract of service which was contained in the terms of service for Academic Staff Grades 8-15, the notice period is what is provided by the Employment Act. Section 35 of the Act provides for 28 days- notice period and therefore I award the claimant one month salary in lieu of notice.

84. I further award him 4 months' gross salary as compensation for the unfair dismissal considering his service for 4 years and also the fact that he contributed to the dismissal through misconduct.

85. The claimant further claims contractual benefits, which accrued during the course of employment but the respondent failed to pay. The claimant states that he had not been paid for his relocation and subsistence allowance on being posted to Kigali for himself, his spouse and his young child amounting to USD 17, 475.

86. Under schedule XI of the terms of service, relocation allowance comprises of the following allowances:

**i. Accommodation allowance at the rate of thirty nights multiplied by subsistence allowance;**

**ii. One month's current basic salary; and**

**iii. Accountable passage and baggage**

87. Clause 9.5 (ii) of the Terms of Service provides for the payment of travel and subsistence allowance to the respondent's employees who are required to travel outside of Kenya on official duty.

88. Further, Clause 9.8 of the said terms of service, provides for payment of relocation allowance, to a member of staff who has been transferred from one station to another, if the new station is 60 Kilometers from the old station. This clause also indicates that the member of staff transferred to a new station, is eligible to claim for accommodation allowance for a spouse and up to a maximum of five unmarried children under the age of 25 years.

89. The above analysis of the terms of service, confirms that the said allowances are payable to an employee upon taking up a transfer as provided under Clause 9.8 of the Terms of Service. However, I must agree with the respondent that there must be evidence that the allowance claimed is justified. It is common sense that some employees a without a spouse or children, or they may simply want to leave them behind for one reason or another.

90. By a letter dated the 22<sup>nd</sup> of January, 2014, the Acting Deputy Vice Chancellor, approved the payments of accommodation allowance for the claimant and his spouse for up to a maximum of 30 nights at the rate of 233UD. The claimant states that this allowance is yet to be paid to him and the respondent did not dispute that the claimant is owed this allowance. It only submitted that the allowances are special damages that must be strictly proved.

91. There is no dispute that the claimant travelled to Kigali on transfer but there is no evidence that he went with his wife. A copy of the Passport would have been sufficient proof to justify the payment of her allowances. Without such evidence, I am inclined to award the subsistence allowance for the claimant alone being USD 233 x 30 = USD 6,990.

92. It is not clear why the letter dated the 22<sup>nd</sup> of January, 2014 did not also include the payment of accommodation allowance to the claimant's children, whereas the same is payable to his children by virtue of clause 9.8 (ii). However, since no evidence of travel by his children, in this case there is no evidence of any children having relocated with the claimant to Kigali I will not award any subsistence allowances for them.

93. The claimant also prays for payment of relocation and subsistence allowance amounting to USD. 21,750 on being recalled from Kigali to Nairobi. However for the same reason given above that he has not adduced evidence to confirm that he travelled with family, I only award relocation allowance for the claimant being USD 6,990. The claimant is also awarded paid one-month basic salary of Kshs. 91, 501 and passage and baggage allowance of Kshs.6, 684. This award is made under Clause 9.8 and Schedule XI of the said Terms of Service.

94. The claimant was also appointed as the acting director of the Kigali campus, from 11<sup>th</sup> of August 2015 to 2<sup>nd</sup> September 2015, a total of 23 days. Schedule V of the Terms of Service states that the acting allowance for the post of Director of a school is Kshs. 3, 940 per month.  $3,940/30 = Kshs.131.33 \times 23 \text{ days} = Kshs.3, 020.59$ .

95. The claimant has also prayed for Kshs. 1,027,130 as wages for part-time teaching and documentary proof including contracts, time-tables and class Attendance registers. He is therefore awarded Kshs. 1, 027, 130 as prayed.

96. On payment of gratuity, the claimant's contract of employment, provides that the claimant will be entitled to gratuity at the rate of 20% of his basic pay upon successful completion of his employment contract. The claimant was summarily dismissed from employment on the 26<sup>th</sup> of April, 2016, whereas his employment contract was to terminate on the 9<sup>th</sup> of August, 2016. He did not complete his contract term after being dismissed for misconduct. Therefore he lost his right to gratuity.

97. The claimant's claim for Kshs. 286, 120.5 being withheld half salary for the period February, 2016 to 26<sup>th</sup> April, 2016 must also fail. Clause 6.2 (e) of the terms of service provides that an employee shall be paid all dues deducted on account of suspension, where an employee's suspension has been lifted. In this case the claimant was summarily dismissed for a valid reason of gross misconduct and therefore he is not entitled to the withheld salary.

98. The claimant shall be paid leave and travelling allowance of Kshs. 14,000 together with USD 270 refund for one way ticket upon being recalled from his tour of duty abroad. There is no question that he indeed travelled back to Kenya after his tour of duty in Kigali. He cannot be abandoned abroad or walk home on foot.

99. The respondent is also directed to issue the claimant with a certificate of service in line with section 51 of the Employment Act.

100. In conclusion I enter judgment for the claimant in the following terms: -

Notice Kshs. 91,501

Compensation Kshs.366,004

Relocation and subsistence to Kigali	\$6990	Kshs.	789,870
Relocation and subsistence to Kenya	\$6990	Kshs.	789,870
Baggage allowance to Kenya		Kshs.	6,684
One month basic salary on transfer to Kenya		Kshs.	91,501
Acting allowance		Kshs.	3,020.66
Part time teaching allowance		Kshs.	1,027,130
One way air ticket to Kenya	\$270	Ksh.	30,510
Leave and leave travelling allowance		Kshs.	14000
<b>Total</b>		<b>Kshs.</b>	<b>3,210,090.66</b>

101. The items in US Dollars have been converted using CBK exchange rate in today's Daily Nation of Kshs.113 per Dollar. The Award is subject to statutory deductions. The claimant is also awarded costs of the suit and Interest at court rates from the date of this judgement.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 28<sup>TH</sup> DAY OF JANUARY, 2022**

**ONESMUS N. MAKAU**

**JUDGE**

**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 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**