



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT BUNGOMA
ELR CAUSE NO. 46 OF 2018
(FORMELY KISUMU ELRC CAUSE NO. 162 OF 2017)

RHODA OLWENYO MOMBO.....CLAIMANT

VERSUS

MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY.....RESPONDENT

JUDGMENT

Issue: Whether termination of employment was lawful and fair.

1. The Claimant herein instituted this suit against the Respondent vide Memorandum of Claim dated 31st March 2017 seeking the following orders:-

- (a) A declaration that the termination of the Claimant's services by the Respondent was unlawful.
- (b) An order for the unconditional reinstatement back into the Respondent's Service.
- (c) Kshs. 4,489,056/-
- (d) Certificate of service
- (e) Cost of the suit plus interest
- (f) Any other or further remedy this court deems just and expedient to grant.

2. The Claimant in addition filed Verifying Affidavit sworn on the 31st March 2017, plaintiff's list of documents dated 31st March 2017 and annexed the bundle all filed with the Claim on the 21st April, 2017.

3. The Respondent entered appearance and filed Memorandum of Appearance dated 2nd October 2017, memorandum of defence and documents dated 2nd October 2017 and bundle of documents. The Respondent also filed witness statement of Bernard Ooko dated 2nd May 2019 and filed 9th May 2019.

4. The Claimant's case was heard with only the Claimant as witness by my brother Justice Nduma Nderi on the 25th July, 2018. The court will rely on the said proceedings.

5. The Defence case was heard on the 15th November 2021 with Defence calling one witness, Bernard Ooko.

6. Parties filed submissions. The Claimant's submissions were filed on the 6th December 2021 by her Advocates Bruce Odenyo & Co. Advocates. The Respondent's submissions were filed by the Federation of Kenya Employers their legal representatives on the 2nd March 2022.

ISSUES FOR DETERMINATION.

7. The Claimant identified the following as the issues for determination in the Claim:-

- a) Whether the Respondent had valid reasons to terminate the Claimant's employment.
- b) Whether the termination of the Claimant's service was unlawful.
- c) Whether the Claimant is entitled to the relief's sought.
- d) Who should bear the costs of this suit.

8. The Respondent in their submissions identified the following as the issues for determination in this suit:-

- (a) Whether the Respondent had a valid reason to dismiss the Claimant?
- (b) Whether the Claimant was put through a fair procedure prior to termination.
- (c) Whether the Claimant's entitled to any of the prayers sought.

9. The court considered the issues identified by both parties and having considered the case was of the opinion that the issues that the parties had placed before the court for determination under the suit were as follows:-

- (a) Whether the Respondent had a valid reason terminate the Claimant's employment.
- (b) Whether the Claimant's termination of employment was unlawful and unfair.
- (c) Whether the Claimant is entitled to reliefs sought.

CLAIMANT'S CASE

9. The Claimant was employed by the Respondent as Accounts Assistant on 18th August, 2003 and promoted on the 5th September 2011 to the top position of Procurement Officer Grade XII in the Procurement Department earning Ksh. 187,044 per month. She attributes her promotion to her exemplary work performance and ethics. The Claimant stated that on the 9th December 2015, the Respondent served her with a Notice to show cause why disciplinary action should not be taken against her for violating the provisions of the Public Procurement and Disposal Act by the Respondent for awarding a tender for supply of stationary to a bidder who was not the lowest bidder. The Claimant stated that she Responded to the show cause letter within the stipulated time set in the show cause letter by denying the allegation of violating any procurement rules and justified the award of the tender to the said successful bidder which justification was supported by documentary evidence. That on the 6th February, 2017 the Respondent terminated the services of the Claimant based on ground of alleged violation of procurement procedures. The Claimant said that the specific provision of the said Procurement Act the Claimant is alleged to have violated was never specified. The Claimant denied the accusation and further stated that there were other staff in the Claimant's department who faced similar charges but were cleared without explanation. The Claimant produced bundle of documents under list of

documents dated 31st March, 2017 in support of her case.

THE RESPONDENT'S CASE

10. The Respondents in defence admits Claimant was their former employee as claimed, denies that the Claimant was unfairly terminated and stated that the Claimant was summarily dismissed on account of gross misconduct that caused the employer to lose faith in her after she caused to be approved three purchase requisition notes contrary to procurement law and in effect exposing the Respondent to loss of kshs.300,000/-. The Respondent produced documents on the process of termination which it says was lawful and based on valid reasons. The Respondent states that it followed a fair process during the termination of employment by giving the Claimant opportunity to be heard. The Respondent produced documents in support of their defence denying any wrong doing.

DETERMINATION

11. Whether the Respondent had a valid reason terminate the Claimant's employment.

Section 43 of the Employment Act, 2007 provides as follows:-

'(1)In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

(2)The reason or reasons for termination of employment of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

12. The court will apply the above provision of the law in determining whether the Respondent had a valid reason to dismiss the Claimant from employment. The Respondent's witness (RW) told the Court that on or around the 9th December 2015, the Claimant (together with her colleagues) was issued with a letter and asked to show cause why disciplinary action should not be taken against her .

13. The said show cause letter was produced by the Claimant (page 47 of the Claimant's bundle of documents) and by the Respondent (Appendix 3 of Respondent's list of documents) . The letter dated 9th December 2015 addressed to the Claimant stated as follows:-

“ Reports reaching this office indicate that between 28th and 29th November 2013 (while working as the Procurement officer, you approved three (3) Purchase Requisition notes (PRN) Numbers 6297, 6298, 6299 for the supply of photocopy paper A3 white 80 grams in favour of M/S Cabrando Enterprises P. O. Box 760 -50100 Kakamega at unit cost of Kshs. 1,250/- knowing very well that he was not the lowest evaluated bidder. The lowest bidder at unit cost of Kshs. 950/- was M/S Conart Limited. This transaction led to a loss of Kshs. 300,000/- to the University. Your above action is contrary to the Provisions of Section 44 Sub Section 4 (c) of the Employment Act 2007 as read together with Section 27 (1 & 3) of the Public Procurement and Disposal Act Cap 412 c Clause 1.2 (i) of the KUSU CBA, Part II Section 8 (2) and Part III Section 9 (a) of the code of conduct and Ethics for Public Universities 2003.”

The letter gave the Claimant 14 days to respond.

14. The Respondent replied and produced (at page 49 of Claimant's bundle) the response which justified the action for inability of the lowest bidder to supply. The impugned act was discovered by the Respondent's Internal Audit Department who came across a questionable payment when imprest was sought to buy the papers on cash basis from the 4th lowest bidder. The evidence was led that the Claimant did not seek necessary approvals from the procurement committee. The Claimant was the procurement officer and faced the disciplinary action with others. The Respondent claims the authenticity

of letter produced by the Claimant at page 95 of her bundle of documents and states it was not produced at the Disciplinary Committee. The document being a letter allegedly by the lowest bidder refusal to supply. Further the Chairman of the Procurement Committee denied the alleged minutes to ratify the use of lowest bidder.

15. The court considered into the Memorandum from the Procurement officer to the Finance Officer. It states the suppliers with the orders have not supplied due to the shortage of the same in the market. That the few available in the market is on cash basis... The letter does not disclose that lowest bidder had refused to supply at quoted process and that the procurement officer had negotiated with 4th Lowest bidder to supply as alleged.

16. The court having considered the show cause letter and response and having considered the viva voce evidence of both parties is of the considered opinion that there existed a valid reason in terms of Section 43 of the Employment Act to terminate the Claimant. Consequently, the court finds the reasons provided for the termination by Respondent were valid as provided for under Section 43 of the Employment Act.

Whether the dismissal was unlawful and unfair.

17. The Section 45(1) of the Employment Act provides that “ *No employer shall terminate the employment of the employee unfairly. A termination of employment by an employer is unfair if the employer fails to prove:-*

a) That the reason or reasons 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 was that the Employment was terminated in accordance with fair procedures”.

18. The court already found there existed a valid reason for the termination of the employment of the Claimant. The court then considered the issue of procedural fairness.

Section 45 (4) of the Employment Act further states: -

“ The termination of Employment shall be unfair for the purpose of this part where:-

“(a) The termination is for one of the reasons specified in Section 46 or

(b)It is found that in all circumstances of the case the employer did not act in accordance with Justice and equity in terminating the employment.”

19. The procedure for termination of the employment of an employee is outlined under Section 41 of the Employment Act, 2007 as follows:-

“an employer shall before termination the employment of an employee, on grounds of misconduct, poor performance or physical incapacity explain to the employee in a language the employee or shop floor Union Representative of choice present during this explanation ...

20. The Court of Appeal has held the provisions of Section 41 of the Employment Act to be conducted in mandatory terms. The *Court of Appeal in Postal Corporation of Kenya -vs- Andrew K. Tanui (2019)* eKLR pronounced itself unprocedural fairness as herein under:-

(i) Four elements must thus be dispersible for the procedure to pass muster:-

(ii) The reason for which the employer is considering termination

(iii) Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made and

(iv) Hearing and considering any representation made by the employee and the person chosen by the employee”.

This Court upholds the above decision of the Court of Appeal and applies the criteria to find out if there was fairness in dismissal of the Claimant from employment.

21. The Claimant submits that the Respondent failed to consider her response to the show cause a violation of her right to fair hearing and further discriminated against her as her colleagues facing same charges were left to go scot free. The Claimant submits that the employer must consider the representations made by and or on behalf of the employee before making the decision whether or not to dismiss or terminate the services of the employee and relies on the authority in Gilbert Mariera Makori v Equity Bnak Lim(2016)Eklr. That is a sound reasoning and consistent with the provisions of section 41 of the Employment Act,2007. During the hearing of the Claimant’s case it was established the Claimant was invited and attended disciplinary hearing. The invitation letter produced by the Claimant (page 44 of Claimant’s bundle) indicates she was to attend a disciplinary Committee meeting on 23rd November 2016 to answer charge which is stated therein and is consistent with the show cause letter (supra) and was informed where to obtain supporting documents and was informed of entitlement to be accompanied by a Union official of her choice or staff at hearing and was free to call witnesses.

22. The Respondent told the Court that there were 2 disciplinary meetings on the Claimant. The Respondent produced minutes of meeting held on 1st December, 2016 where the Claimant was heard and also the Chairman of the tender Committee 2013 one Prof. Simiyu testified and denied the purported minutes ratifying the LPOS in question and stated the minutes produced at the meeting by Claimant were not valid. A union representative was present.

The meeting was adjourned to enable Claimant produce documents on delivery of the procurement paper. The Respondent produced minutes of further disciplinary Committee meeting of 14th December 2016 where again a Union Representative was in attendance. In that meeting the Senior Internal Auditor testified and the Claimant submitted in further response, the KUSU Representative submitted and stated he was satisfied the matter was handled satisfactory.

23. The Committee after the second meeting with the Claimant then made recommendations among others, that all the 3 suppliers who are alleged to have written to the procurement officer declining to supply at the respective prices all wrote before the quotations were evaluated on the 28th November 2013 including the 4th Lowest Kaprado who expresses willingness to supply on 24th October 2013 before the quotations had been evaluated. That although in her reply the Claimant in her show cause letter had indicated that all the three LPO’s were presented to the purported 30th Tender Committee held on 3rd December 2013 for ratification. The following were noted by the Committee among others:-

“ That Prof. Simiyu who was the Chair of the Tender Committee then, disowned the signature in the minutes and said his signature was forged. That Miss Mumbo (Claimant) who availed the minutes as part of her defence also said her signature on the minutes are forged. The Committee made a finding that the ratification meeting did not take place. The committee also found that the exam papers were delivered after the exam, there were no documents for second floatation and no justification to buy the papers for Kaprada, the 4th lowest bidders

24. The Committee further asked the Claimant to produce genuine minutes of the ratification, request for user departments, signed attendance of the ratification meeting. The Committee stated it would then make its recommendations in next meeting to be held in January 2017. The Respondent produced minutes of 23rd January 2017 which has the recommendation and observed that the Claimant was unable

to provide the documents requested for at last meeting being signed attendance list of purported 30th tender committee and genuine minutes ratifying the 4th lowest bidder and the request by user department.

The Committee then found the Claimant was guilty of gross negligence of duty, misrepresentation, the Committee found there was no meeting of tender Committee held to ratify the 4th lowest bidder, that Claimant presented to the Committee forged minutes, that she was not remorseful, that there was no justification to buy papers from the 4th Lowest bidder, and that the Claimant was guilty of contravening Section 44 (4) © of the Employment Act, Section 27 (1 & 3) of the Public Procurement and Disposal Act 2017, Section 47 (2) 69 (6) and 176(1) Clause 11.2 (i) of the KUSU CBA and the code of Ethics from Public Universities 2003.

The Committee recommended the Claimant to be dismissed from service. The court finds that unto that stage the Respondent fully complied with Section 41 of the Employment Act on Procedural fairness and that the representations of the Claimant were considered.

25. The Claimant appealed against the dismissal vide a letter dated 8th February 2017 challenging the findings. On the 21st April, 2017 the Claimant filed this appeal. During the hearing of the Claimant's case the issue of appeal came up where the Respondent's counsel state she rushed to court before the appeal was determined. The Claimant answered "Not true, Union followed up by writing to the Chairman of the Council severally. She told the court the suit was filed 2 months after her appeal. The court perused entire bundle of documents and did not find the said follow up letters by the said union or even a demand letter. The issue of the appeal is not raised in the claim. The court finds that this was not a pleaded issue and the claim being dated 31st March 2017 after appeal dated 7th March 2017, the court finds that the Claimant did not give reasonable time for the Respondent to process the appeal.

26. The Claimant stated that the Vice Chairman should have signed her letter of dismissal and not acting Registrar. RW told the court the Registrar is a rank higher than the procurement officer and there was no policy as to who writes dismissal letter. That the Registrar of administration is an department of Human Resource. The court is satisfied the letter of dismissal emanated from authorized officer of the Respondent, the employer.

27. The Claimant alleged discrimination on basis that other officers facing same charges were let scot free. The Claimant did not lead evidence on the alleged discrimination against the Respondent for being dismissed on same charges facing colleagues who were retained. However, during the Respondent's case the issue was brought up. RW told the court that Cosmas Ruto was charged with same offence as Claimant. RW denied that the said Cosmas Ruto was absolved of same offence. He said the officer was not dismissed on these charges but that he was dismissed for another offence. The court examined the summary dismissal letter of Cosmas Ruto (at page 32 of the Claimants bundle) and noted that the charge faced in common with the Claimant was not dealt with in the proceedings. The said officer appears to have misconducted himself during the said process and was dismissed on account of that misconduct. The court opines that the earlier charges then aborted or were overtaken by events as the officer was dismissed before conclusion of the process on those similar charges he faced with the Claimant. The court finds that a claim of discrimination must be pleaded specifically and details given to enable response. The Claimant during her testimony did not lead any evidence as to the discrimination. There were valid reasons for dismissal as a procurements officer. The court finds no basis of the allegation of discrimination by the Claimant.

28. The Claimant submits that the Respondent never notified the Claimant of its contemplation to terminate the Claimant on grounds set out. The court finds that the Claimant did not produce her dismissal letter which the court found strange as she produced dismissal letter of the said Cosmas Ruto at page 32-33. It is obvious that the Claimant received the dismissal letter as it is referred in her appeal letter.

29. The Respondent produced the letter dated 6th February, 2017 dismissing the Claimant from

employment. The said dismissal letter states the offence she was charged with, the violated laws, the finding of her guilty of the charges and reasons for dismissal. . The court has already held that the reasons by employer were valid. The court finds there was procedural fairness. The Respondent relied on decision of Court of Appeal in *Kenya Revenue Authority -vs- Rewel Waithaka (consultants & 2 others (2019) eKLR* where the court stated as follows:-

“the standard of proof on a balance of probability not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist”. Causing it to terminate the employee services”. That is a party subjective test. In the case of *Bamburi Cement Limited -vs- William Kilonzi (2016) eKLR* This court expressed itself on the nature of proof required as follows:-

*“The question that must be answered is whether the appellants suspicion was based on reasonable and sufficient grounds. According to section 47 (1) of Employment Act the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal vests on the employer. It is a shared burden, which strictly speaking amounts to the same thing.... The test to be applied is now settled. In the case of *Judicial Service Commission -vs – Gladys Boss Shollei Civil Appeal No. 50 of 2014* the court cited with Approval the following passage for the Canadian supreme court decision in *MC KINLEY -VS B.C. TEL (2001 0 2 SCR 161. “ whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically the test is whether the employee’s dishonestly gave rise to a breakdown in employment relationship . The test can be expressed indifferent ways. One could say for example, that just cause for dismissal exists where the dishonesty violates an essential condition of employment contract breaches the faith inherent to the work relationship or is fundamentally or directly inconsistent with the employees obligation to his or her employer.’**

The court upholds the above jurisprudence on standard of proof of lawfulness of termination of employment by Court of Appeal . The court in conclusion finds that there existed valid reasons for the dismissal of the Claimant and that there was compliance with the provision of Employment Act, 2007 sections 41,43 and 45 in the process of dismissal and that the dismissal or termination of the Employment of the Claimant was justified, lawful and fair.

Whether the Claimant is entitled to reliefs sought.

30. The Claimant sought reliefs as outlined in paragraph 1 of this judgment. The court has found the dismissal to have been on valid reasons thus lawful. The court also found there was procedural fairness in the process of termination of the employment of Claimant. The reliefs sought are remedies under section 49 of the Employment Act. The Claimant is thus not entitled to reliefs sought save for the certificate of service.

CONCLUSION .

31. The Claim dated 31st March, 2017 is dismissed with costs to the Respondent.

32. The Respondent is hereby ordered to issue the Claimant with Certificate of Service under Section 51 of the Employment Act.

DATED, SIGNED AND DELIVERED IN BUNGOMA THIS 16TH DAY OF MARCH, 2022.

J. W KELI

JUDGE.

IN THE PRESENCE OF:-

COURT ASSISTANT: BRENDA WESONGA

CLAIMANT:-MS IMBAYA

RESPONDENT:- MS OBONYO