



**Khainga v Kenya Utalii College (Cause 2240 of 2016)
[2022] KEELRC 4092 (KLR) (4 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4092 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2240 OF 2016**

M MBARŪ, J

APRIL 4, 2022

BETWEEN

ELIZABETH NJERI KHAINGA CLAIMANT

AND

KENYA UTALII COLLEGE RESPONDENT

JUDGMENT

1. On April 26, 2006 the respondent employed the claimant as assistant captain and her contracts renewed following good work performance. The last contract was renewed through letter dated November 19, 2014 for the period of one (1) effective from January 1, 2015 at a wage of ksh 15, 270 per month.
2. In January, 2015 at 7.20 PM when the claimant was leaving work, the security check found 5 plates which she was carrying. She was supposed to inform the security to check in the staff property book that if the vendor of the plates had recorded that he was bringing plates into the premises as she had forgotten to ask him. The plates were with the claimant in a polythene bag.
3. The security did a body search of the claimant and found nothing. As the claimant attempted to leave the premises with her property the security took the plates and headed to the chief security office and when the claimant tried to explain herself that she had bought the plates they refused to believe her. She was directed to put her explanation in writing, and to bring the person who had sold the plates to her the following day.
4. On December 23, 2015 the respondent issued the claimant with notice that her contract would not be renewed.
5. The claim is that the employment was terminated unfairly. Such action was illegal and contrary to fair labour practices and claims the following;
 - a) Notice pay ksh 23,270;



- b) Damages for unfair termination of employment ksh 279,240;
 - c) Service pay per completed years ksh 104,715;
 - d) Public holidays worked at 11 days each year ksh 177,210;
 - e) Unpaid leave days Ksh,23,270;
 - f) Costs.
6. The claimant testified in support of her claim that upon employment by the respondent in the year 2006 she worked under various one year term contracts and the last contract was effective from January 1, 2015 she was placed at Kenya School of Monetary Studies. While at work a colleague sold plates to her and while leaving for home carrying them she was stopped at the gate and a search conducted on her bags and body. She had wrapped the plates in polythene papers to avoid breakage. She was sent to the chief security officer since the plates had not been recorded in the book and who made her to write a statement and confirmed that a colleague had sold them to her. The policy was to record all items passed through the gate. The plates had not been recorded and the owner was allowed to bring them inside the premises.
 7. On January 16, 2015 the claimant was suspended from duty following the incident of the plates and she was kept away from work for 8 months. She wrote to the ministry seeking for assistance and she was afraid that her contract was about to come to an end. The respondent called her for a disciplinary hearing and she attended alone and was then issued with a letter that her contract would not be renewed.
 8. The claimant also testified that she was issued with a notice to show cause dated January 15, 2015 to which she replied and a second notice dated November 24, 2015 before attending the disciplinary hearing.
 9. The respondent has a huge stock of plates. Employees were not allowed to mix their own property with that of the respondent and had to obtain clearance before exit at the gate.
 10. There was unfair termination of employment and the claims made should be awarded.

Response

11. In response, the respondent's case is that the claimant was first employed by the respondent in 2006 and lastly was serving under a one year contract with effect from January 1, 2015.
12. On January 15, 2015 during routine security search at the main gate the claimant was found in possession of 5 plates wrapped in cling foil and concealed on the left side of her chest while attempting to exit the premises. The claimant attempted to resist a search by security and two female guards did the search and found the plates.
13. The claimant recorded a statement with security office and admitted having concealed the items the property of the respondent. The security officers who were involved also wrote their statements.
14. On January 16, 2015 the claimant was issued with a notice to show cause and then suspended to allow for investigations. Security did investigations and filed a report. Human resource requested for clarification on April 22, 2015 and a memo dated June 2, 2015 was issued and an investigations team was constituted and the claimant was interviewed.
15. The claimant requested for renewal of her contract on November 12, 2015.



16. After the investigations the claimant was issued with another notice to show cause on November 24, 2017 and she replied and in a letter dated December 23, 2015 the respondent informed the claimant that her contract would not be renewed. Such decision was lawful and in accordance with the term contract. The claimant was invited to clear and be paid her dues but has failed to oblige.
17. Moses Nyagudi the senior human resource officer of the respondent testified that while the claimant was an employee of the respondent he was the Assistant human resource officer and has been working for the respondent for the last 30 years and conversant with the matter. He testified that the claimant was on term contract of one year each running from 1st January to 31st December each year.
18. On January 16, 2015 the claimant was found exiting the workplace with 5 plates and property of the respondent. Statements were taken by the security guards manning the gate and the claimant was allowed to write her statement. The matter was placed with human resource office and a notice to show cause was issued. The claimant was suspended to allow for investigation and on the findings the claimant was issued with another notice to show cause to which she responded and allowed to attend disciplinary hearing. It was established that the claimant was found in possession of respondent's property while exiting the premises which was contrary to set policy and the respondent decided not to renew the employment contract. The respondent had lost confidence in the claimant. The claimant has since failed to clear and collect her terminal dues.
19. On the claims made, the claimant's contract ended and was not renewed and there is no case of unfair termination of employment. The respondent is closed on public holidays and when there is work on such a day the employee is given an extra day off. The respondent was paying to NSSF and service pay is not due.
20. At the close of the hearing, both parties filed written submissions. Determination
21. The claimant was suspended from duty to allow for investigations on January 16, 2015 following an incident that she was found exiting the workplace with the property of the respondent. The claimant maintained that the plates were sold to her by a colleague and had not been registered in the entry book. The respondent's case is that the plates found on the person of the claimant were company property and the claimant had attempted to resist a search by security and when investigations were done, it was established that the claimant had tried to exit the premises while hiding such property.
22. An employer is allowed to suspend an employee to allow for investigation.
23. The purpose of the suspension must be given as held in *Elizabeth Cheronu Kurgat versus Kenya Literature Bureau* [2014] eKLR the court in addressing the issue of sending an employee on suspension held as follows;

... The claimant was suspended on being suspected to have committed the employment offence. it is not a material departure, that the respondent termed this action as compulsory leave, instead of suspension or interdiction under the terms and conditions of employment. All are terms that may be used by an employer on sending an employee on administrative leave. She understood she was being placed on administrative leave to allow for investigations and the disciplinary process to take place. She was given the opportunity to show reasons why disciplinary action should not issue against her. She did this. She was called to a disciplinary hearing, and was accompanied by a trade union representative at the shop floor level. She was heard, her representations considered, and a decision made to terminate her contract of employment.
24. A suspension is just but an intervening measure to remove the employee from the shop floor to allow for investigation and if the employee is not found culpable to be recalled back to work and if there is



an issue(s) to be addressed, the employee must be issued with a notice to show cause and be allowed a hearing in terms of section 41 of the Employment Act, 2007 (the act);

1. 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.
25. In this case, the claimant was called to assist in investigations and after which she was issued with a second notice to show cause dated November 24, 2015 and the claimant responded on November 27, 2015 and by letter dated December 23, 2015 the respondent wrote the noted that following the incident of January 10, 2015 where the claimant was found with 5 plates and was suspended there were investigations and she was found culpable and for these reasons would not renew her employment contract ending December 31, 2015.
26. Whereas the employer is justified to undertake disciplinary measures against the employee, such must be done within the confines of due process in terms of Section 41 of the Act as outlined above. Upon the employee being issued with notice, a hearing of her case and where she should have attended in the company of another employee should have been the right action to be followed. On the other hand, the employee who had a fixed term contract, such had a start and end date and hence completed on its term.
27. The claimant applied for renewal of her contract and was not given a response until letter dated December 23, 2015.
28. Each process ought to have ended/completed on its own merits.
29. The disciplinary process was not allowed to mature with a hearing in terms of Section 41 of the act. Such negated the very reasons for calling for the claimant to show cause and her suspension. For lack of due process, employment terminated unfairly.
30. The term contract was not renewed for the reasons that the claimant had a disciplinary matter.
31. The claimant does not contest that on January 10, 2015 as she was exiting the workplace security found her with 5 plates and these were not recorded on an entry book and following investigations she was called to respond and these were found to be the property of the respondent. section 44(4) (g) of the act allow an employer to summarily dismiss an employee commits a criminal offence to the detriment of the employer's property;
 - (g) An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.
32. Save for ant of due process, the claimant was of gross misconduct and the reason given for non-renewal of contract was genuine, legitimate and readable in the circumstances. Concealing he property of the employer with the intent to remove it from the workplace is not diligent and justifies summary dismissal but the claimant was allowed to complete her term contract.
33. On the remedies sought, notice pay is not due in a case where a term contract ended on its term.
34. For failure of due process with regard to the disciplinary matter, to award compensation would be to reward gross misconduct. No amount shall be assigned.



- 35. Service pay claimed for the duration of employment is not based on any written law; contract and every term contract started and ended the employment relationship. As correctly submitted by the respondent, the claimant was registered with NSSF and pursuant to section 35 of the *act*, service pay is not due.
- 36. The claim for pay during public holidays is on the grounds that each year the claimant enjoyed 11 public holidays. Such days are gazetted and are not general. These have not been particularised to justify such a claim. As noted above, the claimant was at all material times under a written contract and each ended and a new employment relationship commenced. The claim for days for the entire work period of 7 years is not justified.
- 37. Leave days claimed for one year is due pursuant to section 28 of the *act*. The respondent took the option of keeping the claimant on suspension for the entire duration of her term contract. It was not a choice and or a compulsory leave. The time taken to conclude the disciplinary process cannot be visited against the employee. Leave pay is due at basic wage of ksh 15, 270.
- 38. In *Rebecca Ann Maina, Monica Nyambura Wainaina & Joshua Patrick Macharia v Jomo Kenyatta University of agriculture and Technology* (2015) eKLR, the court while quashing disciplinary proceedings on the ground of delay held that;
- 39. The protracted disciplinary inquiry against a government employee, should, therefore be avoided not only in the interests of the government employee but in the public interest and also in the interests of inspiring confidence in the minds of government employees.

... to have disciplinary proceedings hanging over the head of an employee for close to a year much like the sword of damocles or the tongue of an unforgiving spouse, amounts to unfair labour practice within the meaning of article 41(1) of the *constitution*. Disciplinary proceedings should not be allowed to persist so as to acquire the character of an employer’s core business. They must be dealt with expeditiously to allow both the employer and employee to move on.

- 40. These findings resonate in this case.
Accordingly, the claims made are found without merit save for leave pay at ksh 15, 270. Each party shall bear own costs.

DELIVERED IN COURT AT NAIROBI THIS 4TH DAY OF APRIL, 2022.

M. MBARU JUDGE

In the presence of:

Court Assistant: Okodoi

..... and

