



**Litiema v Masinde Muliro University of Science and Technology (MMUST)  
(Cause 33 of 2021) [2022] KEELRC 1320 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1320 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE 33 OF 2021**

**JW KELI, J  
MAY 12, 2022**

**BETWEEN**

**JOHNSON SIMIYU LITIEMA ..... CLAIMANT**

**AND**

**MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY  
(MMUST) ..... RESPONDENT**

**JUDGMENT**

**Issue. Unlawful Termination Of Employment Contract**

1. The Claimant vide a statement of claim dated 27<sup>th</sup> June 2019 and amended on 22<sup>nd</sup> March 2021 seeks the following reliefs:-
  - a. A declaration that the termination of the Claimant services by the Respondent was unlawful.
  - b. An order for reinstatement of Claimant without loss of benefits.
  - c. An order for payment of Kshs 650,920/- as compensation to the Claimant for unlawful termination of his services as an employee of the university.
  - d. Respondent to bear costs of the suit.
  - e. Any further remedy this court deems just and expedient to grant.
2. The Claimant filed together with his claim the Claimant's list of documents dated 27<sup>th</sup> June 2018 and the bundle of documents.
3. The Respondent entered appearance and filed Memorandum of response dated 23<sup>rd</sup> October 2018, Respondent's list of documents dated 23<sup>rd</sup> November 2018 and bundle of documents and witness statement of Benard Ooko dated 14<sup>th</sup> November 2018.



4. The Claimant filed his undated witness statement received in court on the 13<sup>th</sup> May 2019, another witness statement dated 9<sup>th</sup> June 2021 by the Claimant received in court on the 9<sup>th</sup> June 2021.
5. The parties filed written submissions. The Claimant's written submissions dated 17<sup>th</sup> February, 2022 and received in court on the 18<sup>th</sup> February 2022. The Claimant was in person. The Respondent vide its Advocates, Dickens M. Ouma for the Federation of Kenya Employers filed its submissions received in court on the 1<sup>st</sup> April 2022.

### **The Hearing.**

6. The Claimant testified in his own case and did not call another witness. The Respondent called one witness of fact Benard Ooko.

### **Undisputed Facts**

7. The Claimant was a former employee of the Respondent appointed on the 6<sup>th</sup> November 2010. That he was dismissed from service on ground of loss of a mattress placed in an ambulance where he was the driver.

### **Disputed Facts.**

8. The validity of the reasons for the termination of services was in dispute. The procedure for termination was also in dispute.

### **The Claimant's Evidence At Cross Examination.**

9. John Simiyu Litiema (CW) gave sworn evidence and was cross examined by counsel for the Respondent. He produced his documents named as exhibits 1 to 28 under list of documents dated 27<sup>th</sup> June 2018. The Claimant also adopted his witness statement as amended on 22<sup>nd</sup> March 2018.
10. On cross examination CW said no mattress was lost. He had no prove that no mattress got lost by way of inventory, he confirmed that he knew Jackline Makokha the University Nurse, he did not recall her as a witness at the disciplinary hearing. CW confirmed the nurse was on duty when he transferred the patient out. CW confirmed he knew Felix Abuche, a clinical officer and said he was the one who prepared the patient for evacuation and further said the ambulance has a couch.
11. The said Felix accompanied the patient to the hospital. CW said he did not call Felix to the disciplinary hearing. CW confirmed he knew Atunde, a fellow driver and further confirmed he was on duty on the material day and added he was asked by Lucy to evacuate the patient to Royal Hospital and that there were 2 ambulances.
12. CW said that when he went back, he continued using the ambulance the balance of the night hence did not handover.
13. CW confirmed he was a member of KUDHEIHA. He recalled his letter to EACC, confirmed there was a letter of complaint against Prof. Atieno the Vice Chancellor, and that the Professor had since passed on. He could not tell if the Professor was ever charged with corruption.
14. CW confirmed a letter of show cause was addressed to him in respect of loss of mattress of the University, CW confirmed his response in letter dated 14<sup>th</sup> November 2018, CW agreed that the reason for the disciplinary invite was because the employer was not satisfied with his response. He confirmed he alluded to witch hunt and victimization in his response but did not allude to corruption.



15. CW Stated that the letter of KUDHEIHA dated 5<sup>th</sup> January 2018 on postponement of proceedings included him by referring to ‘2 others appearing on 11<sup>th</sup> January 2018’. CW did not agree with the Respondent’s Counsel that the period between 2016 -2018 there were hostile industrial relations between KUDHEIHA and University Management.

#### **Defence Evidence On Cross Examination**

16. DW (Bernard Ooko) gave evidence on Oath and adopted his statement dated 14<sup>th</sup> November 2018. DW produced documents under the Respondent’s list of documents dated 23<sup>rd</sup> November 2018 and marked appendix 1 to 5 and associated himself with matters of fact as stated in the Memorandum of Response.
17. DW relied on the report of the internal security as proof of lost mattress. DW said they did not report to the police as they use their security office. The ambulance left with the mattress and did not come back with it. DW said he does not know whether the ambulance has a couch and added a mattress was used due to the condition of the patient.
18. DW said it was the work of the nurse to make a decision on the mattress and space and the work of the Claimant was to drive .
19. On whether he responded to the letters by EACC on reinstatement DW said he was not in a position to know.

#### **Determination**

20. The Claimant identified the following as follows:-
- a. Whether termination of the Claimant’s employment by the Respondent was unlawful.
  - b. Whether the Respondent indeed lost a mattress or the Claimant could not account for one, which is a public property as alleged.
  - c. Whether the Claimant was discriminated, harassed, intimidated and suffered irreparable damages.
  - d. The typing error in the claim as total earnings of Kshs 32,546/- ( thirty two thousand, five hundred and forty six shillings ) per month instead of Kshs 42,546/- ( forth two thousand, five hundred and forty six shillings ) as evident in the claimant’s list of documents, January 2018 pays lip
21. The Respondent in its submissions addressed the reasons for dismissal and due process. The court taking into consideration the issues addressed by the parties and the facts of the case is of the considered opinion that the issues placed before it for conclusive determination of the dispute are as follows:-
- i. Whether the termination of the Claimant’s employment was lawful and fair .
  - ii. Whether the Claimant was discriminated, harassed, intimidated and suffered irreparable damages.
  - iii. Whether the Claimant is entitled to reliefs sought.

#### **Whether The Termination Of The Claimant’s Employment Was Lawful And Fair .**

22. It is a considered position of the court that for termination of employment to be said to be lawful it must comply with the requirements of Section 43 of the [Employment Act](#).



Section 43 requires proof of reason for termination by the employer. Section 43(2) guides the court on the prove of reasons by providing as follows,

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- (2) the reasons or reasons for termination 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.

The termination is unlawful if the reasons did not exist.

23. Section 45 further expounds on the reasons by providing as follows: -

- (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 and capability or (ii) based on the operational requirements of the employer
  - c. That the employment in termination is in accordance with fair procedure.

24. The criteria of fair procedure is provided under Section 41 of the [Employment Act](#) and the court finds three ingredients are to be met under the namely:-

- i. The employer, before the termination of employment ought explain to the employee in a language they understand , the reason the employer is considering termination. The court considers issuance of a letter to show cause giving reasonable time and in a language the employee understands sufficient compliance with condition.
- ii. Secondly the employee is entitled to have another employee or a shop floor union representative of his choice during this explanation. The court considers that this right must be reflected in the letter of invitation to the disciplinary hearing.
- iii. Thirdly the employee and his representative must be afforded opportunity to be heard and the employer must consider their representation on the grounds in its finding.

25. The burden of proof of valid reasons lies with the employer as stated under section 43 of the [Employment Act](#) outlined above . The Respondent relied on show cause letter dated 1<sup>st</sup> November 2017 titled loss and misuse of university property. The particulars of the charge were as follows:-

“on 21<sup>st</sup> July 2016 at around 12.30 hrs you were requested to urgently transfer a sick member of staff (Mrs. Roselyne Wanyama) to Royal Gardens Hospital, Kakamega for further treatment. One new high density mattress was added for comfort of the patient. At the end of the duty when handing over the ambulance registration No. KBN 100E you did not account for the mattress.

On 21<sup>st</sup> July 2016 at around 1340hrs you signed out University Ambulance Registration No. KBN 100E to take a patient (Ms. Roselyne Wanyama) to Royal Garden Hospital – Kakamega for further treatment and signed in at 7.39pm. This is despite the fact that



admission at Royal Gardens Hospital took about 30 minutes. Additionally the ambulance covered a total of 22kms for a distance that is less than 5 kms.

You above action is contrary to the provisions of section 44 sub section 4(c) of the Employment Act 2007 as read together with Clause 5 d(iii) of the KUDHEIHA CBA part II section 5(2), section 8(1 and 2) mad part III section 8, 9(a), and 15(1) of the code of conduct and ethics for Public Universities 2003.

You are required to show cause why disciplinary action should not be taken against you for professional misconduct.”(Appendix 2)

26. The Claimant responded to the show cause letter vide his letter dated 14<sup>th</sup> November 2017 and among others indicated the show cause came 16 months after the event hence witch-hunt, intimidation, victimization, harassment and frustration , stated his role was ambulance driver and the ambulance had other members of staff , that the ambulance has a stretcher, that there was no gate pass from security on the alleged loss of mattress as is the practice before taking out of the university precincts, that there was no misuse of the property as the work ticket was duly authorised by Ms Lucy Mwangi, that his work involved response to distress calls by students and staff all night.
27. The Respondent being not satisfied with the Claimant’s response invited him for disciplinary hearing vide letter dated 19<sup>th</sup> December 2017 reiterating the reasons under the show cause letter and asked him to bring witnesses if he had any. The letter was copied to the Shop Steward KUDHEIHA MMUST chapter among others.
28. The Respondent produced minutes of the disciplinary hearing held on 8<sup>th</sup> February 2018. 5 union representatives are recorded as present. It is recorded that the Claimant objected to the presence of the acting Registrar Administration on ground he had threatened to teach him a lesson and the objection was overruled as the said person was the secretariat of the committee and his withdraw would be tantamount to derailing the committee. It was also noted there was no prove the said registrar uttered those words. It was decided the said staff would participate in cross-examination and not in decision making.
29. It is recorded the charge under the show cause letter was read out and the Claimant read out his response word by word. The minutes record further observation that when items leave the university a gate pass is normally raised by the department, the Claimant was not shown the gate pass, that he helped load the patient to the ambulance stretcher and according to him there was nothing added on to the stretcher. The Claimant also explained count 2 of the charge.
30. On witness accounts it is recorded in the minutes that the Claimant requested to be present when the witnesses recount the events of the day and even to cross examine them. It is recorded that the committee discussed and agreed to decline the request of the Claimant to be present and cross examine the witnesses since he was ably represented by KUDHEIHA union officials who would cross examined witnesses on his behalf. The committee also noted his presence might intimidate the witnesses.

### **Findings and determination on issue of whether the termination was lawful and fair.**

31. On reasons for proof of loss of mattress DW relied on the report of the internal security (Appendix 1). The report is dated 17<sup>th</sup> October 2017. The court considered the report which indicates a new density mattress was handed over to Mr. Litiema(the Claimant )by the nurse on duty. That Felix the clinical officer signed off duty at the hospital leaving the mattress with the driver to return to MMUST clinic. The security observes that the unaccounted time and distance of 22kms by the Claimant was used to dispose off the missing mattress.



32. The Claimant annexed letter of transfer from the health services department to the transport pool dated 3<sup>rd</sup> July 2017 (page 40 of the Claimant's bundle of documents). There is no mention of the lost mattress. Indeed, the letter thanks him for good service. This was almost a year after the alleged loss. The Claimant annexed a handing over report internal memo dated 7<sup>th</sup> September (page 42 of the Claimant's bundle) where the issue of a lost mattress belonging to the clinic comes up. The Claimant responded to the memo by letter dated 14<sup>th</sup> September 2017 and denied the allegation and asked to be supplied with information.
33. Prior to the internal memo on the handing over the Claimant addressed the Regional Coordinator Ethics and Anti Corruption Commission on complaint of corruption and delay in the investigation which he claimed had led to victimization harassment and intimidation of staff perceived as whistle blowers ( letter dated 21<sup>st</sup> August 2017 at page 43 of Claimant's documents). The Commission responded to the letter and assured of investigations (at page 48 of the Claimant's documents).
34. DW at cross examination did not know the size of the alleged mattress. DW at the hearing noted there was no gate pass of the alleged mattress. At the disciplinary hearing the Claimant was denied the opportunity to be present when the witnesses of the Respondent recounted the events and also was denied the right to cross-examine them by the Committee on allegation that the Claimant would intimidate the witnesses and that he was represented. The Court finds that investigation report was based on speculation. For example there was no evidence of type of mattress and that the nurse handed it over to the Claimant as stated at paragraph 3 of the findings (page 2 of the Respondent bundle of documents). It was stated under the evidence of the nurse recorded in the minutes that she placed the new mattress in the ambulance and it was the clinical officer who sat with the patient at the back of the ambulance. DW stated that the work of the Claimant was to drive not deal with the issue of the couch which the Claimant had said was sufficient. There was no evidence of the mattress having been handed over as an item to the Claimant. A gate pass would have sufficed as evidence of the mattress having been in the ambulance. It was said to be a practice as recorded in the minutes. The court believes the Claimant's position this was a case of victimisation for whistle blowing considering the claim came after his clearance for transfer and almost a year after the alleged loss. DW states in his statement that on 30<sup>th</sup> August 2016 the senior medical officer wrote to the Claimant on loss of the mattress. The alleged memo was not produced in court by the Respondent.
35. The court has considered the submissions of the Respondent. The Respondent submits that Claimant during the process from the time the loss was reported to the time of disciplinary process was ongoing came across as an employee whose relation with his supervisor was wanting and incompatible. It was manifestly clear that he demonstrated rashness and came across as errant worker who had no respect or little regard to authority if his tone of the correspondence was anything to go by. The court finds that this submissions is not reflected in the letter of dismissal. The letter indicates he was dismissed on the count of the loss of mattress only. The Respondent cited the decision of *Benard Shem Koweru v United Millers Limited* (2020) eKLR. The court finds the authority not relevant as in the said case that employee had failed to respond to show cause letter and attend hearing and was dismissed for attending work while drunk and there was previous record. The instant case is very different.
36. The court finds and determines that there was no valid reason for the termination of employment. The court finds that the disciplinary process was not procedurally fair on ground of refusal by the disciplinary Committee of the Claimant's presence and of his right of cross examination of the respondent's witnesses. There is no evidence on record that the said union representatives cross-examined the witnesses. The provisions of section 41 of the *Employment Act* do not envisage a situation where the Claimant would be replaced by his representatives at the disciplinary hearing and most



important against his will (page 58 of Claimant's bundle is a letter of protest by the Union dated 9<sup>th</sup> February 2018). An accused employee must be afforded opportunity to face his accuser and challenge their information. The court finds that the Respondent violated the sacred right of the Claimant to be heard by denial of right to be present when the respondent's witnesses recounted the events of the incident and by being denied the opportunity to question their story before a decision is made on the charges.

37. It is the finding and determination of the court, based on the foregoing reasons, that the termination of the employment of the Claimant was unlawful and unfair.

### **On Whether The Claimant Was Discriminated, Harassed Intimidated And Suffered Irreparable Damages**

38. The Claimant stated that the Respondent did not give explanation for disciplinary proceedings on alleged offence that took place 17 months before the cause of action. The Respondent submits that 18 months or so was not such a long time to open up investigations on account of alleged loss of mattress. That this was an issue of lack of integrity and failure to account for university property however cheap or insignificant. The court has already made a finding that the Respondent did not prove the reason of loss of mattress as a valid basis of the termination.
39. The Claimant relied on the letter by Ethics and Anti Corruption Commission dated 23<sup>rd</sup> February 2018 which stated that it had grounds to believe that the reason for dismissal may have been related to the whistle blowing activities and complaints to the Commission, the Commission's letter further states, 'we are fortified in this believe by the fact that the punishment is disproportionate to the offence allegedly committed 18 months ago.' The letter requested the Respondent to review its decision and reinstate the Claimant (page 67 of the Claimant's documents). The Court finds that letter is relevant to the claim of victimization. DW told the court that the Commission had no supervisory powers over the university hence the reason they did implement the recommendation to reinstate.
40. The court finds and determines that the Claimant was victimised and harassed for his whistle blowing complaints or activities to the Ethics and Anti- Corruption Commission. Such conduct by the Respondent amounts to harassment of employee which is contrary to the provisions of section 5 (3)(b) of the *Employment Act*, 2007 which reads:- "5 (3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee— (b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.""

### **Whether The Claimant Is Entitled To Reliefs Sought**

41. The court finds and determines that the termination of the Claimant's employment services by the Respondent was unlawful and unfair.

### **Prayer For Order Of Reinstatement Of The Claimant Without Loss F Benefits**

42. Section 49 of the *Employment Act* provides for the criteria for reinstatement of employees. "4(a) the wishes of the employee; (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and (c) the practicability of recommending reinstatement or re-engagement. (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances"
43. Section 12(3)(vii) of the *Employment and Labour Relations Act* provides that the court has power to make the following order:- " an order of reinstatement of any employee within three years of dismissal,



subject to such conditions as the court thinks fit to impose under circumstances contemplated under the written law”

The letter of dismissal from service is dated 16<sup>th</sup> February 2018 (page 62 of the Claimant’s documents). Three years have since lapsed. The relations between the parties appear to have broken down.

44. The court finds that the remedy of reinstatement is not available to the Claimant 3 years having lapsed since dismissal.

#### **Claim For Compensation Pay For Unlawful And Unfair Terminations And Damages For Victimization .**

45. Section 49 of the *employment Act* guides the court on the compensation being 3(e) the employee’s length of service with the employer; (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination; (g) the opportunities available to the employee for securing comparable or suitable employment with another employer; (h) the value of any severance payable by law; (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee; (j) any expenses reasonable incurred by the employee as a consequence of the termination; (k) any conduct of the employee which to any extent caused or contributed to the termination; (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and (m) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.”
46. The Court found that the Claimant was victimised and harassed for whistle blowing activities, and denied right to fair trial, he is 45 years old, he was employed on 9<sup>th</sup> November 2010.
47. Taking into consideration of the foregoing the court exercises its powers under the provisions of section 12 (3) of the *Employment and Labour Relations Court Act* and awards the equivalent of the maximum 12 months last salary compensation for unlawful and unfair termination. The compensation to be based on his January 2018 payslip of gross salary of Kshs 42,546 (page 57 of the Claimant’s documents). Total compensation pay awarded at Kshs 510,552/- (Kshs 42,546x12 months)
48. The Court of Appeal in *Standard Group Limited v Jenny Luesby* [2018] eKLR agreed that this court can award damages on finding there was victimization of the employee. The court further awards a nominal award as damages for victimization of the Claimant of Kshs 100,000/-

#### **Claim For Service Pay**

49. The Claimant told the court he was under pension scheme. Under section 35(6) of the *Employment Act*, where the claimant was under pension fund then service pay is not awardable.

#### **Notice Pay In Lieu/**

50. The court having found that the termination of employment was unfair the Claimant is entitled to notice pay in lieu. The Claimant was under the union (KUDHEIHA). Under clause 5 of the CBA the notice in lieu on termination for employees who have service for more than 3 years and less than 10 years is 3 months (page 6 of the Claimant’s documents). The Claimant falls under this category. Notice pay in lieu is awarded at 3 months salary total sum of Kshs 127,638/- (Kshs 42,546x3months)



### **Certificate Of Service**

51. The Respondent to issue the claimant with certificate of service pursuant to section 51 of the *Employment Act*

### **Conclusion and Disposal**

52. The Court determines that the Claimant's dismissal from service by the Respondent was unlawful and unfair and grants the following orders:-

- a. Compensation pay at the equivalent of 12 months salary total Sum awarded for the sum of Kshs 510,552/-
- b. Notice pay in lieu at equivalent of 3 months salary awarded for the sum Kshs 127,638/-
- c. Damages for victimization Kshs 100,000/-  
(above award in a,b,c are payable subject to statutory deductions)
- d. The Respondent to issue the Claimant with certificate of service pursuant to section 51 of the *Employment Act*
- e. Each party to bear own costs
- f. Interest is awarded on the award amounts(a,b,c) at court rate from date of judgement until payment in full.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 12<sup>TH</sup> DAY OF MAY 2022.**

**J.W.KELI,**

**JUDGE.**

In the presence of:-

Court Assistant- Brenda Wesonga

For Claimant – In Person

For Respondent – Dickens M. Ouma

