



**Matseshe v Kenya Institute of Management Limited (Cause  
303 of 2017) [2022] KEELRC 4051 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4051 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 303 OF 2017  
M MBARŪ, J  
JUNE 30, 2022**

**BETWEEN**

**JOHN MATSESHE ..... CLAIMANT**

**AND**

**KENYA INSTITUTE OF MANAGEMENT LIMITED ..... RESPONDENT**

**JUDGMENT**

1. On April 28, 2005 the respondent employed the claimant as a Systems Administrator at a salary of ksh 70, 000 per month. By letter dated February 21, 2006 the claimant was confirmed in his appointment at Job Level IV and his salary increased to Ksh 80, 850 per month.
2. The claimant applied for the position of manager, ICT department and by letter dated December 27, 2006 he was appointed at a salary of Ksh 94, 540 and later confirmed by letter dated July 17, 2007 to the position of ICT manager, Job Grade 8.
3. The claimant was promoted over time and appointed to the Academic Committee and his salary was reviewed over time earning ksh 260, 490.
4. In a letter dated June 15, 2016 the respondent sent the claimant on compulsory leave for an indefinite period over alleged mass failure in the March 2016 exam series.
5. On August 3, 2016 the claimant was issued with a notice to show cause on the grounds that March, 2016 exam series was not properly moderated and that anonymous letters linked to the claimant that the institute stated receiving after his suspension. The claimant replied to the show cause notice on August 11, 2016.
6. On August 26, and September 12, 2016 the claimant was invited and he attended disciplinary hearing where he was issued with the audit report and the anonymous letters and his defence was that it was the role of the awards committee to moderate exams and he was just a delegated chairperson, he



admitted the minutes for the awards committee were not confirmed as the practice was since he was on compulsory leave, and the claimant had reported to the head of department that students were failing in their exams in March, 2016. The release of exams without moderation was not an anomaly and the decision of the awards committee is final and cannot be discussed outside the committee. The audit report confirmed that the marking as it was done was proper.

7. The claimant denied being the author of the anonymous letters set to the respondent on mass failures. The alleged anonymous letters have their authors stated.

On October 10, 2016 the respondent terminated the claimant in his employment over allegations that he neglected his duties despite being issued with warnings which was contrary to the Policies and Procedures Manual of the respondent. The head of department was supposed to have investigated the matter to establish the facts at take witness statements, issue a formal reprimand and then issue a charge to allow the claimant give his defences at the department before being sent to the disciplinary committee. The claimant's work performance had been rated excellent and the allegations he faced at the disciplinary hearing that he chaired the awards committee was clarified by his head of School who admitted that she had delegated to the claimants to chair the committee and after the meeting she had been briefed.

8. The action of the respondent to terminated employment was actuated by malice on the reasons that the Sacco where he was an executive member had written to the Minister because of delayed remittance of members contributions amounting to Ksh.31, 494,909.95 and hence the Ministry froze the respondent's account. This led to bad blood between the executive and the respondent resulting in reduction of number of classes of the 4 lecturers who were committee members and the claimant was dismissed from his employment.

The respondent was also in arrears in paying PAYE which had been deducted from the staff salaries.

9. The claimant had a clean record of employment contrary to what was alleged in terminating his employment.

At the time, the claimant had a credit facility with the bank secured through his salary amounting to Ksh 2,001,825 and had hoped to service the same but was frustrated by the conduct of the respondent. termination of employment was unfair on the grounds that the claimant had no previous warnings, there was no justification, the allegations made were a fabrication and the alleged anonymous letters had known authors. The action was meant to punish the claimant for agitating for workers' rights on Sacco dues, PAYE dues, pension dues all deducted but never remitted. The respondent refused to pay the due terminal dues owing to the claimant.

10. The claimant is seeking for the following dues;
  - a. Gratuity for 11 years Ksh 2,810,390;
  - b. 12 months compensation Ksh 3,125,880;
  - c. Unpaid and unremitted pension dues for February, March, August and December, 2014; January to December, 2015 and January to October, 2016 at Ksh 1,324,446;
  - d. Income due if pension had been remitted on their due dates ksh 969,088;
  - e. Unpaid deducted Sacco dues Ksh 57,475;
  - f. 28 Unpaid leave days Ksh.238,457.33;
  - g. Terminal dues Ksh 1,277,450;



- h. General damages;
  - i. Exemplary damages;
  - j. Full payment of PAYE from January, 2014 to October, 2016 together with penalties;
  - k. Issuance of tax clearance certificate on PAYE payments;
  - l. Damages for lost opportunities on account of lack of tax clearance certificates and inconveniences due to serviced bank liabilities; and
  - m. Costs and interests on the awards.
11. The claimant testified in support of his case that on August 3, 2016 he was issued with a notice to show cause why disciplinary action should not be taken against him for allegations that in March, 2016 the exam series was not appropriately moderated and that he had authorized anonymous letters to and of the respondent while on suspension. The claimant replied and noted his role in the examinations awards committee was delegated to him by the head of the School and that the alleged anonymous letters had known authors and he was not the one.
  12. The claimant was invited to the disciplinary hearing on August 26, and September 21, 2016 where he made his representations and discounted the allegations made against him since his role in the moderation of exams and chairing he awards committee was delegated but on October 10, 2016 his employment was terminated over alleged negligence of duty and authoring anonymous letter which was not true. The reasons given were false. The Head of School was at the disciplinary hearing and admitted to having delegated to the claimant the role of chairing the meeting of the awards committee over which he was accused of having acted negligently.
  13. The claimant also testified that termination of employment was for other malicious reasons since he was a member of the employees Sacco and due to no remittance of dues had reported the respondent to the Minister which led to freezing of bank accounts. the management summoned him to explain the matter and that he was acting contrary to the interests of the institution. The claimant as executive members of the Sacco had a duty to the contributors to engage the respondent and ensure all deductions were remitted which the respondent failed to do and which led to pension losses, interests on the due earnings and a report of the matter to the Minister was justified. The respondent at the time was holding back a sum of ksh 28 million in Sacco contributions.

**The claims made should be awarded as prayed.**

Response

14. In response, the respondent's case is that the claimant was the head of examinations and a member of the academic committee whose role was to oversee the implementation of the management education programmes, examination process and policies, student welfare and alumni activities. The claimant was responsible for ensuring that the agreed objectives of the organisation were met with highest standards of professional and ethical competence and integrity. His key deliverables were reviewing policies, supporting centres in the implementation of policies, planning and marking centres, logistical issues concerning exam marking, and recruitment of examiners.
15. In March, 2016 exam series there were mass failure of students hence resulting to negative impact on the student progression rate hence raising serious queries about the entire process of examination administration and since the claimant was the head of examination he was not on leave to pave way for investigations which were carried out by an audit team and which revealed a lot of irregularities and



the March, 2016 exams were not properly moderated and a number of branches were in the process affected including Nairobi, Embu, Mombasa and Naivasha.

16. The investigations and audit revealed that the claimant was not keen to discharge his duties and therefore he was issued with a notice to show cause to address the issues raised in the audit report. He responded and demonstrated that he has not discharging his duties as head of examination and member of the awards committee as he was now distancing himself from the contract he had signed and the key performance indicators he had signed off.

The response to the show cause notice was found wanting and the claimant was invited to disciplinary hearing on the grounds that there were mass exam failure and anonymous letters sent while the claimant was on compulsory leave. The head of internal audit also presented evidence based on the audit investigations carried out. It emerged that the March, 2016 exam business mathematics was consistently moderated over the years except the March, 2016 which led to mass failure.

17. It also emerged that the manner of releasing the exams in which it as pointed out that the exams were released irregular without authorisation of the Chair of the Awards Committee and the claimant's response was that he did not brief the Chair of the Awards Committee. The claimant used to present results, chair the meeting and release exams contrary to policy.

The claimant's defence that the mass failure of exams was attributed to TIVET requirement of lowering entry qualifications level but among the objectives and key performance deliverables the TIVET curriculum change and competency based exam was squarely a preserve of the claimant and therefore the defence was found wanting.

18. The claimant was also found to have failed to handle the meeting minutes as required minutes were not being signed as per the standards of the respondent and being an ISO certified institution, the practice was gross misconduct.

This led to a decision to terminate the claimant's employment on October 10, 2016 on the ground of breach of regulations and reckless handling of the department and awards committee. The audit investigations carried out and the outcome was clear that the claimant had breached regulations and policies while releasing the march, 2016 exams. As a tradition the business mathematics exams were moderated but for March, 2016 which the claimant was not able to explain the reason for such failure to carry out his duties to the letter. The respondent's business is imparting knowledge and therefore any employee must put all his efforts to protect and preserve the integrity of the institution.

The claimant's conducted warranted summary dismissal being of gross misconduct but this was reduced to normal termination. There was a valid reason leading to termination of employment and the claimant was taken through the due process and the claims made should be dismissed with costs.

19. In evidence, the respondent called Ms Janice Mwangi who testified that the claimant as the head of exams called for a meeting which he chaired and presented results. He was supposed to present results only. He role of the Awards committee is to generally give guidance after exam results were announced and moderate the results and ensure where one student scored 60% and another 30% to moderate the scores up or down to accommodate others. The claimant role in the wards committee was to table the results but he went ahead and chaired the meeting and also presented results and this was prejudicial for being in conflict to the assigned roles. The respondent has a policy in this regard which the claimant ignored.

The claimant's case that he was called by the head of department to chair the awards committee meeting is not correct since he has no letter issued to this effect giving him authority to act as chair. From the minutes of the meeting there was no authentication by anybody. The exams process is highly



regulated by the respondent since it is very delicate and in this case students failed in mass numbers. This compromised the exams process and the role of the claimant.

20. Ms Janince Mwangi also testified that she joined the respondent after the claimant had been terminated in his employment and is relying on the records. There is an audit report following investigations after the claimant was sent on compulsory leave. The report has no matter that the mass failures in exams in March, 2016 were due to the claimant's failures. Nothing of this is noted. The claimant had the role to release exams results and the March, 2016 exams moderation was not the first time the claimant had chaired the Awards Committee meeting and Margaret confirmed that the Head of Exams chaired the Awards Committee and then moderated the scores following a phone call as the supervisor but this ought to have been done in writing. Margaret confirmed that she delegated to the claimant to chair the meeting. There was no protest by the other committee members.

Ms Mwangi also testified that there was a blog with anonymous letters on alleged financial crisis at the respondent. This was posted on July 1, 2016 authored by John Mbaria and Muchemi Wachira. The authors are noted and therefore this is not anonymous.

David Muturi is the respondent's former CEO and is said to have denied accusations made on the respondent and in a letter of June 15, 2016 the claimant was sent on compulsory leave to allow for investigations on the mass failure of students.

21. At the close of the hearing, both parties filed written submissions which the court has put into account and the emerging issues for determination are whether there was unfair termination of employment and the remedies sought ought to issue.

An employer is allowed to terminate employment where there exists a genuine and valid reason to justify termination of employment pursuant to Section 43(2) of the *Employment Act*, 2007 (the Act). the respondent's case is that the claimant failed to moderate business mathematics for the period of March, 2016 when there was mass failure. He had no explanation for such omission. The committee he chaired lacked the checks and balances and therefore he hurriedly released the exams without passing through the chair. There was no trust and confidence in the manner the claimant was performing his duties as held in *Nazareno Kariuki v Feed the Children Kenya* [2013] eKLR.

22. However, even where the employer has genuine reasons which may result in termination of employment, pursuant to Section 45 of the Act, such reason must be valid, fair and justified relating to the conduct, capacity of the employee.

- (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.

23. In the case of *Kusow Billow Issack v Ministry of Interior and Coordination of National Government & 3 others* [2021] eKLR the court 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. ...

24. And in the case of *Lucy Chepkemoi v Sotik Tea Company Limited* [2022] eKLR the court held that an employer must have a valid and fair reasons leading to termination of employment pursuant to section 45 of the Act.

In this regard, the respondent terminated the claimant's employment on three main grounds that he neglected his duties by failing to moderate the March, 2016 exams series, he failed to keep a proper record of minutes and that he was behind anonymous letters after he was suspended and relating to the financial status of the respondent. Such was gross misconduct and justified termination of employment.

25. On the allegations that the claimant failed to properly moderate the March, 2016 exams leading to mass failures, the respondent sent the claimant on compulsory leave to allow for investigations and an audit was undertaken and dated August 2, 2016 chaired by Kimathi K Muchiri. The audit investigations revealed several elements which the court picks as follows;

Exams moderation is done by the awards committee and not the individual;

Factoring in the units/subjects experts who should advise accordingly, which cannot be an individual decision?

26. There was consistent operation of BCM 002 with exception of the March, 2015 exam series and the failure to moderate the unit in the March, 2016 series led to fails increasing to 49.8% up from 14.2% in December, 2015 series;

The issue of tuition as reason for mass failure and the reasons being;

- a. Evidence of non-completion of syllabus in some branches;
- b. low level of lecturer-student contact, evidence showed that for one of the sampled units CCM 111 the candidates were taught 15 lessons against the recommended 20 session;
- c. Actions taken on the failed subjects/courses, examination candidates who failed in the March, 2016 series elected to sit for the failed units as supplementary, repeat the entire course, not to progress nor sit for supplementary/repeat courses; and
- d. Some branches reached out to the students and agreed on ways to help them address the fails.

27. On this evidence, the audit investigation made various recommendations among them being that;

1. Formulation/review of policy guidelines on setting, marking, moderation and award
2. Enactment of a KIMSOM Examination Board that help in managing the examinations
3. Scrapping of retrieval penalty and increase the internal controls
4. Implementation of the Lean Six Sigma Project, 'impact of syllabi coverage on students' examination, performance and progression at the Kenya Institute of management'
5. Increased quality assurance on tuition
6. Improvement of the lecturer's welfare.



28. On the records filed by the respondent is minutes of the meeting held on August 25, 2016 and with regard to exams moderation and when the claimant was called to respond to the issue of moderation of the March, 2016 exam series he noted that as the Head of Exams, prior to release of the results he warned the Executive Director and the Head of KIM School that the March, 2016 candidates were failing as per the reports received from the marking centres and one Margaret confirmed what the claimant had stated.

Before the disciplinary panel, the claimant's case was also that;

... he also confirmed that as the Chair of the Awards Committee he has no powers to moderate any marks without the approval or authorisation of the Committee members. This is because the members have the powers to raise issues during the awards with suggestions to either adjust the marks upwards or downwards and also the Awards Committee discusses possible reasons for failures and possible mitigation factors.

The respondent (the claimant) confirmed that during the said meeting (Awards Meeting) all the three heads present during the hearing were also present. The Head of Finance and Administration confirmed his attendance during the Awards Meeting but stated that he had specific role to play during the meeting and immediately after presenting his submissions he requested to leave the [...] to attend to other duties. ...

29. These submissions correlate and speak directly to the findings by the audit investigations. Moderation of March, 2016 exam series was by a committee, the Awards Committee.

The records it further that;

Margaret confirms that this is correct, and that the Head of Exams presents the raw data as it is. It is upon the Awards Committee to moderate the scores. She also confirms that the Head of Exams even chaired the January, 2016 session.

30. What misconduct or gross misconduct did the claimant commit in this regard?

Had the respondent gone through its procedures, process and the audit report weighed against the disciplinary hearing, it would have been apparent that moderation of the March, 2016 exam series was not an individual matter of the claimant. It related to the Awards Committee functions.

31. There were underlying reasons leading to the mass failure in exams and leading to the March, 2016 series. with moderation or not, which was not the case here, such underlying causes cannot be placed upon the claimant as the Head of Exams.

A crucial witness, Margaret ought to have been called to clarify the role allocated to the claimant with regard to the Awards Committee and results moderation with regard to the March, 2016 exam series. This is the person who confirmed that the data the claimant had presented was correct and there was delegation of duty and that the claimant had appraised the CEO and the head of department on the student's mass failures in the march, 2016 exam series.

On the allegations that the claimant failed to sign minutes as required by the respondent being an ISO certified institution, the respondent in support of these allegations attached Appendix 7, the meeting minutes of August 25, 2016 and this records notes that the meeting was chaired by one Ken Kaunda and the claimant was present as Head of Exams.

32. These meeting minutes are signed on September 21, 2016 by Verah Olwena as the secretary (compiler) and Ken Kaunda who confirmed.



On the filed records, the claimant was sent on an indefinite compulsory leave on June 15, 2016. He never resumed duty after such date. it is highly not possible that he was recalled to sit in the meeting held on August 25, 2016 and confirmed on September 21, 2016 a day when he was attending his disciplinary case. Even in a case where the claimant was attending such a meeting, which is not possible in the noted circumstances, he was not the chair or secretary so as to bear the responsibility of signing off such minutes thereof.

The use such reason to terminate employment lacked justification.

33. The other allegations made against the claimant were that he wrote anonymous letters of the respondent's financial position. Ms Janice Mwangi testified in court that a blog posted on July 1, 2016 was authored by John Mbaria and Muchemi Wachira. The authors are noted and therefore this is not anonymous.

The use of such matter to justify termination of the claimant's employment is therefore without good cause or justification.

On the findings above, notice pay and compensation are due.

In the letter terminating employment dated 10<sup>th</sup> October, 2016 the respondent offered the claimant payment for days worked one months' notice pay and pension's contributions.

34. Whereas pay for days worked and notice pay are addressed, the claimant is seeking payment for unremitted pension contributions, the non-remittance of any dues that an employee has authorised the employer to deduct and remit regulated under Section 19 of the Act, where an employer effects the deduction but fails to remit the same, the employee is left exposed and cannot enjoy the attendant benefits for the purpose of the deduction and remittance. Any late remittance of such deductions should therefore be repaid with interests to secure the employee from any losses incurred due to the deduction and no remittance in time. such matters ought to be reported to the County Labour Officer for action as appropriate.
35. The respondent shall therefore pay ksh 1, 324,446 unremitted pension dues for February, March, August and December, 2014; January to December, 2015 and January to October, 2016 with interests at commercial rates. Where such monies have been remitted, the claimant shall tabulate the interests due for the entire periods of non-remittance on the entire sum due and this shall be paid based on a commercial rate applicable by the Central Bank Of Kenya at of the date of this judgement.

On the claim for income had pension been remitted in time, such is addressed by payment of the same in full and the due interests at commercial rates.

On the findings there was unfair termination of employment the claimant is entitled to his gratuity. The sum of Ksh 2, 810,390 Is not contested and shall be paid.

Compensation for unfair termination of employment is hereby assessed at 3 months gross salary last earned at ksh 260, 490 at Ksh 781, and 470.

36. Payment of Sacco dues deducted and not remitted is both criminal and contrary to the clear provisions of Section 17 and 19 of the Act. any authorised deductions by the employee and for which the amounts are deducted should be removed from the accounts of the employer and placed as directed. The sum of ksh 57, 475 is due to the claimant for Sacco deductions not remitted. Where such monies have since been remitted, the interests due on the unremitted amounts for the period not remitted shall be tabulated and paid based on commercial rates.



The claim for payment of 28 leave days is not particularly addressed by the respondent. The response and the evidence did not address this matter. Leave days are a legal entitlement under Section 28 of the Act and the same of ksh 238, 457.33 is due for 28 untaken leave days.

Terminal dues claimed at Ksh.1, 277,450 are not gone into as to the legal nature, contractual obligation or policy matter.

General damages and exemplary damages are addressed and redressed with payment of compensation for unfair termination of employment. the matter that the claimant had a bank loan while in the employment of the respondent and he was forced to borrow to offset the same, such out to have been addressed formerly and in the pleadings. Such matter ought to have been secured pending the hearing and determination of the main claim. The claimant has since repaid his loan facility. Such matter is addressed.

37. Tax clearance and non-payment of PAYE is a serious matter under the Act, the *Income Tax Act* and other statutes regulating the deduction and non-remittance of statutory dues. such denies the government revenue and the subject employee a fair opportunity to secure government services and other job and employment opportunities for lack of clearance by the Kenya Revenue Authority. it is a serious lapse which should invite the Commissioner of Labour, the County Labour Officer, the Kenya Revenue Authority and the court to call for sanctions. At this junction, the claimants claim found with good foundation, his costs shall be paid by the respondent.

Accordingly, judgement is hereby entered for the claimant against the respondent tin the following terms;

- a. Compensation Ksh 781,470;
- b. Gratuity ksh 2,810,390;
- c. Payment of unremitted pensions dues ksh 1,324,446 with interests at commercial rates;
- d. Payment of unremitted Sacco dues ksh 57,475 with interests at commercial rates;
- e. Where dues (c) and (d) above have been remitted, the claimant shall tabulate the interests due for the period the monies were withheld by the respondent and the same paid at commercial rates;
- f. The respondent is hereby found in violation of Section 17 and 19 of the *Employment Act*, 2007 for failure to remit deductions from the claimant's salaries and the Court Labour Officer shall address as appropriate;
- g. The respondent shall issue the claimant with a Certificate of PAYE (form P9) clearance for the years of service within 14 days from the date hereof;
- h. The claimant is awarded costs of the suit.

**DELIVERED IN COURT AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE, 2022.**

**M MBARÚ**

**JUDGE**

**In the presence of:**

**Court Assistant: Peter Kigotho**

