



**David v Registered Trustees of Scott Christian University (Cause
1215 of 2015) [2022] KEELRC 13001 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13001 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1215 OF 2015
L NDOLO, J
OCTOBER 27, 2022**

BETWEEN

ERIC MWAU DAVID CLAIMANT

AND

**REGISTERED TRUSTEES OF SCOTT CHRISTIAN
UNIVERSITY RESPONDENT**

JUDGMENT

Introduction

1. By a memorandum of claim dated July 10, 2015 and amended on March 26, 2019, the claimant sued the respondent for unlawful dismissal.
2. The respondent filed a statement of defence but did not avail any witness despite being given ample opportunity to do so. The respondent also chose not to file written submissions. The claimant testified on his own behalf and further filed written submissions.

The Claimant's Case

3. The claimant states that he was employed by the respondent on January 20, 2014 in the position of ICT Administrator. He was redeployed as a lecturer on December 2, 2014. He claims that redeployment letter did not set out any terms of reference.
4. The claimant accuses the respondent of adopting a malicious and aggressive stance against him, by issuing numerous warning letters, complaints and notices to show causes aimed at victimising him.
5. The claimant further accuses the respondent of assigning him numerous tasks with no bearing on his assignment as an IT lecturer, which he terms as out rightly unachievable or expressly unattainable.



6. The claimant maintains that he dutifully and diligently performed all his contractual obligations to the satisfaction of the respondent and had been awarded salary increments in recognition of his competence.
7. The claimant avers that on June 30, 2015, he was summoned for a meeting convened for July 1, 2015 to make representations on account of alleged misconduct as per five (5) warning letters. He adds that he was issued with a further warning letter on the same day.
8. The claimant's employment was terminated on July 2, 2015. He terms the termination as unlawful and unfair for the following reasons:
 - a. No valid reason for termination was advanced prior to the termination;
 - b. There was failure on the part of the respondent to communicate the reasons for termination and to conduct a hearing prior to the termination;
 - c. The claimant was not given any opportunity to challenge the accusations and/or complaint leading to his dismissal;
 - d. The respondent used a flimsy and unestablished excuse as a basis for the decision to improperly and illegally convene a malicious and vengeful meeting with the sole agenda of terminating the claimant's employment;
 - e. The respondent failed to follow the laid down procedure for termination of employment and the agreement between the parties;
 - f. The claimant was not informed in advance that he was under investigation with the intention of instituting disciplinary measures;
 - g. The incidences complained about were outside the claimant's job description;
 - h. The meeting was convened on the basis of issues which had long been addressed;
 - i. The claimant was never warned either before convening of the meeting or issuance of notice that he would be liable to summary dismissal.
9. The claimant's claim against the respondent is for:
 - a. 12 months' salary in compensation.....Kshs 777,720
 - b. Notice pay.....64,810
 - c. Service pay for 3 years.....97,215
 - d. Costs plus interest

The Respondent's Case

10. In its response, the respondent denies the claimant's entire claim and asks the court to dismiss it.

Findings and Determination

11. There are two (2) issues for determination in this case:
 - a. Whether the termination of the claimant's employment was lawful and fair;
 - b. Whether the claimant is entitled to the remedies sought.



The Termination

12. The claimant's employment was terminated by letter dated July 2, 2015 stating as follows:

“Dear Mr Mwau

Ref: Termination

I refer to the hearing of the committee appointed by the management board to hear your representations on grounds of misconduct as per the five (5) warning letters issued to you, and to their response to you as per the letter dated July 01 2015.

Based on the committee's overall conclusion that your representations failed to show sufficient cause why you should not be summarily dismissed on grounds of gross misconduct, the University hereby terminates your services as an ICT Lecturer with effect from today, July 2, 2015.

The university shall pay you one month's salary in lieu of notice as per your employment contract, plus any leave days accrued, within five working days, once you have submitted your clearance forms and a written handover.

Please apply to withdraw from the pension scheme to enable us advise the fund managers appropriately.

Yours faithfully,

(signed)

Professor Mumo P. Kisau

Vice Chancellor”

13. This letter accuses the claimant of misconduct but does not provide particulars. instead it makes reference to five warning letters allegedly issued to the claimant.
14. In its decision in *Rebecca Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture & Technology* [2014] eKLR this court held that an employee facing disciplinary proceedings is not only entitled to adequate time to prepare their defence but must also be served with a clear statement of the charges against them and be allowed access to documents in the possession of the employer that may be useful in the preparation of the defence. This position has been affirmed in subsequent decisions (see *Ngatia v Airmac Limited* [2022] KEELRC 1259).
15. From the evidence on record, there appears to have been a long drawn grievance between the claimant and his employer, which was not resolved. The claimant accused the respondent of harassment through issuance of a litany of warning letters.
16. From the outset, I need to state that a warning letter is itself a disciplinary action which must be preceded by a disciplinary process as provided under section 41 of the *Employment Act*. That being the case, once a warning letter has been issued, the charge in issue is extinguished and if the employer wishes to revive it, they must initiate a fresh disciplinary process.
17. As held in *Karisa v Texas Alarms [K] Ltd* [2022] KEELRC 78 a warning letter by itself cannot be used as a basis for termination of employment. Such a letter would however form part of the employee's record and therefore be relevant in assessing an award issued by the court.



18. In this case, the employer appears to have used prior warning letters as the basis for termination of the claimant's employment. The result is that the reason for the termination was blurred in the fog of past accusations. The respondent did not avail any witness to clarify to the court the progression of the multiple disciplinary issues facing the claimant.
19. In the result, I find and hold that the respondent failed to prove a valid reason for termination of the claimant's employment as contemplated by section 43 of the *Employment Act*. Further, the respondent failed the procedural fairness test set by section 41 of the Act. The termination of the claimant's employment was thus substantively and procedurally unfair and he is entitled to compensation.

Remedies

20. Pursuant to the foregoing findings, I award the claimant two (2) months' salary in compensation. In making this award, I have considered the claimant's length of service plus his employment record. I have also taken into account the respondent's unlawful conduct in the termination transaction.
21. The claim for notice pay was not contested and is therefore allowed.
22. By his own admission, the claimant was a member of a pension scheme and the claim for service pay is therefore misplaced.
23. In the end, I enter judgment in favour of the claimant as follows:
 - a. 2 months' salary in compensation.....Kshs 129,620
 - b. 1 month's salary in lieu of notice..... 64,810Total.....194,430
24. This amount will attract interest at court rates from the date of judgment until payment in full.
25. The claimant will have the costs of the case.
26. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF OCTOBER 2022

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JUDGE

Appearance:

Miss Makori for the Claimant

Mr. Malanga for the Respondent

