



**Mongare v Kisii University & 3 others (Petition 16 of 2016)
[2022] KEELRC 13037 (KLR) (2 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13037 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION 16 OF 2016**

S RADIDO, J

NOVEMBER 2, 2022

**IN THE MATTER OF ARTICLES 20, 21(1), 22(1), 23, 27(1),(2), 28, 41(1),
47(2), 50(1), 54, 56 & 165 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

DR NYANGAU NYACHIEO TOM MONGARE PETITIONER

AND

KISII UNIVERSITY 1ST RESPONDENT

PROF JOSEPH T. MAITHULA 2ND RESPONDENT

ANAKALO SHITANDI 3RD RESPONDENT

**CHAIRMAN, UNIVERSITY COUNCIL, KISII UNIVERSITY 4TH
RESPONDENT**

JUDGMENT

1. Dr Nyangau Nyachieo Tom Mongare (the Petitioner) was offered an appointment as a Lecturer by the Kisii University College through a letter dated 30 July 2012.
2. On or around 1 April 2016, the Petitioner was appointed as acting Registrar Academic Affairs. The Petitioner was informed that he would continue to discharge his other duties.



3. Shortly thereafter, on 26 April 2016, the Deputy Vice-Chancellor wrote to the Petitioner informing him of the receipt of an anonymous letter dated 31 March 2016 stating that he had a fraudulent PhD degree from a non-existent university (Clayton University in the United Kingdom).
4. The Deputy Vice-Chancellor requested the Petitioner to respond to the allegations in the anonymous letter.
5. The Petitioner responded on 28 April 2016, indicating that he had successfully undertaken PhD studies at North London College in 2009 (in collaboration with Clayton University (USA) and graduated in February 2010.
6. The Petitioner called upon the University Council to verify and authenticate his testimonials.
7. On 6 April 2016, the Deputy Vice-Chancellor tasked the 3rd Respondent to investigate the authenticity of the Petitioner's academic credentials.
8. On 5 May 2016, the Standard newspaper published a story headlined:
Varsity starts auditing staff qualifications.
9. On the same day, the Petitioner sent an email to the Vice-Chancellor, attaching a resignation letter (from the office of the acting Registrar).
10. The Human Resource Committee of the University Council met on 6 May 2016. On 9 May 2016, the Deputy Vice-Chancellor, Administration and Planning, informed the Petitioner that his resignation from the position of acting Registrar had been accepted and further that the Council had decided that he be suspended for 30 days from the position of lecturer pending investigations into his academic qualifications.
11. Alarmed with the trajectory of events, the Petitioner moved the Court on 25 May 2016, alleging a breach of his rights and seeking orders:
 - (1) A declaration be issued to the effect that the Petitioner is entitled to protection under *the Constitution* owing to the malicious, unfair labour practice by the Respondent.
 - (2) A declaration that the decision of the Respondent to unilaterally relieve the Petitioner of all his work position and portfolios was unlawful and a breach of the Petitioner's constitutional rights.
 - (3) A declaration that suspending the Petitioner from duty and denying the same access to his duty while sparing the 2nd Respondent and/or failing to act against the 2nd Respondent, who equally has pending investigatory issues amount to selective application of the 1st Respondent's Disciplinary policies and double standards thus discriminatory and violate the mandatory provisions of Article 27 of *the Constitution*.
 - (4) An order for damages for libel and defamation of character.
 - (5) A declaration that the Respondents' decision to withhold the Petitioner's salary before the alleged investigation are completed amount to unfair labour practice.
 - (6) An order of exemplary damages.
 - (7) An order declaration that the alleged investigation as commenced by the Respondent is unconstitutional, biased, and vindictive, and the 1st Respondent be directed to re-constitute



a fair, objective, and impartial committee to investigate the Petitioner if there is any need to investigate the Petitioner.

- (8) An order of injunction restraining the Respondents from or any persons from continuing with the publication, republication, dissemination of libellous and scandalous material touching on the reputation of the Petitioner, whether through electronic means or print media.
 - (9) An order directing the Respondent to apologise to the Petitioner against the false and malicious through the very mode, means and media that were used while publishing and disseminating false and malicious claim against the Petitioner.
 - (10) An order quashing, rescinding and/or vacating the decision of the Respondents to suspend the Petitioner from duty based on the contents of the alleged anonymous letter dated the 31st day of May 2016 and consequential decision taken thereafter affecting.
 - (11) That the Petitioner be reinstated to his work with the same position and benefits he enjoyed and attendant to his employment as at the date when he was allegedly suspended.
 - (12) The Respondents be compelled to pay the costs of these proceedings.
 - (13) Any further and/or such orders that the Honourable Court may deem fit and just to grant in the circumstance.
12. The Petition was accompanied by a Motion (which was determined on 15 September 2016).
 13. On 22 June 2016, the 3rd Respondent released an investigation report on the Petitioner's academic qualifications. The Respondent then issued a show-cause letter to the Petitioner. The letter set out 5 allegations.
 14. An attempt by the Petitioner to stop the disciplinary process failed, and the Petitioner appeared for a disciplinary hearing on 20 March 2017.
 15. On 27 March 2017, the Respondent wrote to the Petitioner informing him of the termination of his employment.
 16. The Respondents filed a replying affidavit in opposition to the Petition on 15 September 2016.
 17. Pursuant to leave granted on 8 June 2017, the Petitioner filed an Amended Petition on 13 July 2017, and the Respondents filed an Amended Response on 3 October 2017. The Petitioner filed a further affidavit on 5 October 2016.
 18. In the Amended Petition, the following amended or additional remedies were sought:
 - (2) A declaration that the decision of the Respondents to unilaterally relieve the Petitioner of all his work position and portfolios and ultimate termination of his employment was unlawful and a breach to the Petitioner's constitutional rights as envisaged under Articles 27, 31, 41, 47 and 50 of *the Constitution of Kenya, 2010*
 - (6) An order of exemplary damages for violation of the Petitioner's constitutional rights.
 - (7) An order declaration that the alleged investigation as commenced and concluded by the Respondent is unconstitutional, biased, and vindictive, and the 1st Respondent be directed to re-constitute a fair, objective, and impartial committee to investigate the Petitioner.
 - (10) An order quashing, rescinding and/or vacating the decision of the Respondents to suspend the Petitioner from duty based on the contents of the alleged anonymous letter dated the 31st



day of May 2016 and flawed investigation process culminating in the Petitioner's termination from the 1st Respondent's employment.

- (12) Declaration that the termination of the Petitioner from employment was unlawful.
- (12B) Compensation for unlawful termination.
- (12C) A declaration that the Human Resource Manual relied and acted upon by the Respondents to suspend the Petitioner is unlawful, discriminatory and constitutes unfair labour practice contrary to Articles 27, 41 and 47 of *the Constitution* of Kenya as it attracts ambiguous interpretation, thus subjecting the Petitioner to the whims and mercy of the Respondents.
19. On 15 February 2018, the Court directed that the Petition be determined based on the record and written submissions to be filed, but the Court revised the directions on 6 June 2018.
20. Before the reversal of the directions, the Petitioner had originally filed submissions on 11 May 2018, wherein he identified 5 Issues for determination:
- i. Whether the Petitioner's disciplinary proceedings, in this case, were conducted fairly and in consonance of the mandatory provisions of Articles 27, 31, 41, 47 and 50 of *the Constitution*?
 - ii. Whether the Respondents published libellous material against the Petitioner and whether they are liable to pay damages, and what is the quantum thereof?
 - iii. Whether the termination of the services of the Petitioner was unlawful?
 - iv. What orders should issue?
 - v. Who should bear the costs of these proceedings?
21. The Respondents had filed submissions on 6 June 2018, and the Issues identified were:
- i. Whether the Issues raised by the Petitioner are constitutional in nature?
 - ii. Whether the Petitioner has proved defamation?
 - iii. Whether the Petitioner's rights complained of were infringed?
 - iv. Whether the Petitioner is entitled to the reliefs sought?
22. The hearing commenced on 16 May 2019 and continued 16 March 2021, 31 January 2022, 14 March 2022, 26 April 2022, and 7 June 2022.
23. The Petitioner filed further submissions on 6 September 2022 (should have been filed and served on or before 26 August 2022) and the Respondents on 28 September 2022.
24. The Court has considered the pleadings, evidence, and submissions.

Whether issues raised are of a constitutional nature?

25. The Respondents contended that the Issues raised by the Petitioner were of a civil nature which could be remedied under civil law, and comfort was found in *Damian Belfonte v the Attorney General of Trinidad & Tobago* C.A. 84 of 2004 where the Court stated:

where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least,



arguably indicates that means of least redress otherwise available would not be adequate. To seek constitutional relief in the absence of such feature would be misuse, an abuse of the court's process.

26. The main complaints and reliefs sought by the Petitioner herein were with respect to damages for defamation and compensation for unfair termination of employment.
27. These are disputes ordinarily resolved by resorting to common and statutory law. Therefore, the Court agrees with the Respondents that the route invoked by the Petitioner to get remedies was an abuse of the court process.

Unconstitutional investigations

28. The Petitioner contended that the investigations conducted by the Respondents were unconstitutional and biased and violated his rights to a fair hearing, administrative justice, and labour practices.
29. The Human Resource Manual of the University envisaged investigations as part of the disciplinary process. The Respondents invited the Petitioner to respond to the allegations in the anonymous letter as part of the investigations. He was served with a show-cause notice and requested to respond in writing.
30. Thereafter, he was invited to attend an oral hearing.
31. The Petitioner did not, and the Court has been unable to decipher any unconstitutionality in the investigations conducted by the Respondents.

Unlawful suspension

32. The Petitioner also contended that his suspension was unlawful because investigations had not been concluded by the time of the suspension and that he was denied his salary. He further asserted that he had not been convicted of any criminal offence by the time of suspension.
33. Clause 14.4.5.1 of the Kisii University Human Resource Manual envisages the suspension of an employee under three different conditions, and these include when proceedings for dismissal have been instituted, and the University considers the employee should be dismissed.
34. Under the clause, an employee on suspension is not entitled to any salary.
35. The Petitioner was suspended on no pay after being issued a show-cause letter informing him of contemplated disciplinary action. The Court finds that the suspension had a contractual foundation and was thus not unlawful.

Suspension: Discrimination

36. The Petitioner further asserted that his suspension was discriminatory because the Respondents had not suspended the 2nd Respondent, who had a complaint from aggrieved parents, staff, youth, and other stakeholders.
37. The Petitioner did not place before the Court any evidence that the anonymous letter was formally delivered to the University authorities, and the Court would be hesitant to find discrimination in treatment.



Unfair termination of employment

Procedural fairness

38. The statutory elements of procedural fairness within the arena of termination of an employment contract are outlined in sections 35(1) and 41 of the [Employment Act, 2007](#).
39. The Petitioner challenged the procedural fairness of the termination of his employment on the grounds that it did not meet the test of impartiality, fair administrative action, or fair hearing and that investigations into the allegations had not been completed by the time of disciplinary action.
40. The Respondents notified the Petitioner of the complaints raised in the anonymous letter and called upon him to respond as part of the investigations.
41. The investigations report was released on 22 June 2016, and the Petitioner was then issued with a show cause dated 30 June 2016, which outlined 5 allegations he was required to respond to.
42. The Respondents requested the Petitioner to respond in writing, which he did, and after that, he was invited to attend an oral hearing.
43. The Petitioner attended the hearing and made oral representations. An official of the University Academic Staff Union was present during the hearing.
44. Based on the above, the Court is satisfied that the Respondents were in compliance with the elements of procedural fairness and that the Petitioner's rights to fair administrative action and hearing were not breached.
45. Just for clarity, the Court finds that the Petitioner did not prove that the 3rd Respondent who conducted the investigations was conflicted or participated in the disciplinary hearing as a panellist.

Substantive fairness

46. Where an employer terminates an employment contract, and there is a legal challenge, sections 43 and 45 of the [Employment Act, 2007](#) impose a burden on the employer to prove the reasons' validity and fairness.
47. The allegations against the Petitioner were set out in the show cause letter, and these were in brief: forgery of a PhD degree certificate, uttering/submitting a false PhD degree certificate while seeking employment, holding himself as a PhD degree holder, presenting himself as a graduate of Clayton University and obtaining employment by false pretences.
48. In the termination letter, the Respondents gave the particulars leading to the decision as follows:
 - i. That Clayton University from which you obtained your PhD degree is non-existent as per the letter of recognition from the Commission for University Education.
 - ii. That the documents you submitted in your defence during the disciplinary meeting had glaring discrepancies in dates as follows:
 - (a) Your PhD certificate indicates that you graduated from Clayton university on the June 14, 2009, whereas you studied in North London College. That there is no evidence of collaboration between Clayton university and North London College as alleged.
 - (b) That North London College awarded you a certificate confirming that you were awarded a PhD in Clayton University at a congregation held on February 18, 2010.



- (c) North London College acknowledges receipt of your thesis for onward transmission to the examiners on October 13, 2009, whereas you had graduated on June 14, 2009.
- (d) Your PhD transcript issued on June 16, 2009 indicated that you had a mark awarded for the thesis, yet your thesis was submitted to examiners on 13th October 2009.
- iii. That you intentionally presented the PhD degree for employment from an institution that awarded your PhD, which is not listed in the Directorate of Higher Education Institutions available at the Commission for University Education.
49. To discharge the burden imposed on it, the Respondents called its then-acting Deputy Vice-Chancellor, who conducted investigations and the Deputy Vice-Chancellor, Administration and Finance.
50. Among the documents produced by the witnesses was a letter dated 20 May 2016 from the Commission for University Education.
51. The letter categorically stated that Clayton University was not listed in the directories of higher education institutions available to the Commission and that Clayton University was not accredited in the United Kingdom.
52. One of the functions of the Commission under section 5(1)(g) of the *Universities Act, 2012* was to recognise and equate degrees, diplomas, and certificates conferred or awarded by foreign universities and institutions in accordance with the standards and guidelines set by the Commission from time to time.
53. The Commission was, therefore, performing a function placed on it when it wrote the letter.
54. The Petitioner attempted to discredit the letter from the Commission on the ground that it was signed by a person without authority. However, the Petitioner did not present any facts or evidence to support the contention.
55. Prima facie, this Court has no reason to doubt the letter or the contents of the letter.
56. The Respondent also produced correspondence from an entity in the United States of America it had collaborations with called Minnesota Kenya International Development Agency, which indicated that there was no university in the United States of America called Clayton University and that it could only trace an institution called Clayton State University which did not offer PhD studies.
57. The Court has also looked keenly at the Petitioner's documents.
58. In one of the documents, North London College acknowledged receipt of copies of his doctoral thesis through a letter dated 13 October 2009. It stated that they would be handed to external examiners for moderation.
59. In yet another document produced by the Petitioner, it is indicated that he was conferred with a Doctor of Philosophy degree on 16 June 2009. This conferment appears to have been made before the moderation of his thesis.
60. Further documents produced by the Petitioner show that the award ceremony was set for 26 February 2010, while another indicates that a PhD degree was awarded on 18 February 2010.
61. It is apparent to the Court that the Petitioner presented a suspicious, forged PhD degree certificate to obtain employment at Kisii University.



62. The Petitioner's documents show contradictions and inconsistencies which were not satisfactorily explained and which lead to a conclusion of dishonesty and intentional misrepresentation.
63. Dishonesty in an employment relationship negatively impacts the trust expected and would be a valid and fair reason to bring the relationship to an end (see *Department of Home Affairs & Ar v Ndlovu & Ors* (2014) 35 ILJ 3340 and *LTE Consulting (Pty) Ltd v CCMA and others* (2017) 12 BLLR 1259 for comparative case law).
64. The Court is satisfied that the Respondents had and have proved valid and fair reasons to terminate the Petitioner's employment.

Defamation

65. The Petitioner further contended that the Respondents had defamed him by causing to be published the contents of the anonymous letter dated 31 March 2016 on 26 April 2016 and an article in the Standard newspaper on 5 May 2016.
66. To succeed in an action for defamation, the person asserting should demonstrate that there was a publication of a defamatory article, the publication referred to him, the words were published, and malice.
67. The Court has looked at the anonymous letter. It was addressed to the Vice-Chancellor of Kisii University but was copied to some 12 offices within the University.
68. The Court has also perused the newspaper article. The author gave the source or informant as a senior member of the university administration.
69. Since the Petitioner asserted that the Respondents were liable for the publication, it was incumbent upon him to provide an evidential nexus between the anonymous letter, the publication and the Respondents, to the exclusion of the other officers of the University, who were copied on the letter.
70. The Petitioner did not provide such evidence or explain why he isolated the Respondents and not the 12 persons copied on the letter.
71. The Court finds defamation was not proved to the required standard.

Unlawful Human Resource Manual

72. The Petitioner did not lead any evidence or arguments to support the allegation that the Kisii University Human Resource Manual was unlawful.

Conclusion and Orders

73. The Court finds no merit in the Petition. It was also an abuse of the court process as the Petitioner's remedies lay in common and statutory law.
74. The Petition is dismissed with costs to the Respondents.

DELIVERED VIRTUALLY FROM MOMBASA, DATED, AND SIGNED ON THIS 2ND DAY OF NOVEMBER, 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances



For Petitioner O.M. Otieno & Co. Advocates
For Respondents Nyairo & Co. Advocates
Court Assistant Chrispo Aura/Everlyne Nyaboke

