



**Masinde v Kenyatta University (Cause 215 of 2017)
[2022] KEELRC 13124 (KLR) (1 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13124 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 215 OF 2017
NJ ABUODHA, J
NOVEMBER 1, 2022**

BETWEEN

PAUL SUNGUTI MASINDE CLAIMANT

AND

KENYATTA UNIVERSITY RESPONDENT

JUDGMENT

The Pleadings

The claimant's case

1. The claimant filed a memorandum of claim dated July 28, 2017 against the respondent where he averred that he was employed on April 19, 2007 as a clerk on a 2 year contract and on April 27, 2013, the respondent changed his terms to permanent pensionable.
2. The claimant averred that *vide* a letter dated May 24, 2016, the claimant herein, was unconstitutionally, illegally and unprocedurally suspended from employment for allegations of altering marks for different students and facilitating recruitment and payment of people involved in the changing marks which allegations are false.
3. He further averred that the suspension was to remain in force pending further investigation and or appearance at the senior board of discipline, where the claimant was to be invited to defend himself against the charges.
4. It is the claimant's contention that he was invited to attend a disciplinary hearing on October 19, 2016 and that he availed himself for the disciplinary hearing where he requested the committee to give him the list of students whom he was alleged to have changed the marks and the list of people he recruited and paid to do the heinous act but the committee did not respond nor avail any such proof to the claimant.



5. He contended that *vide* a letter dated October 26, 2016, his employment was terminated which action he appealed against but the appeal was dismissed.
6. The claimant further averred that his termination was unfair, unprocedural and wrongful as the respondent did not follow the right procedure and prayed for judgment against the respondent for;
 - a. A declaration that the termination process as carried out by the respondent is unlawful and that during his employment with the respondent, he was not remunerated as required by law.
 - b. Payment of his terminal benefits as per the labour laws or as the court may compute or as per the claim.
 - c. General damages for the psychological pain the claimant has suffered due to the wrongful termination of his employment.
 - d. An order that the respondent do reinstate the claimant and in default the claimant be paid extra general damages as the may deem fit.
 - e. Costs and interest.

The Respondent's Memorandum of Response

7. The respondent averred that the claimant was suspended *vide* a letter dated May 24, 2016 and that the same was done constitutionally, legally and procedurally as the respondent adhered to its sound employment policies.
8. It was asserted that the claimant was notified of the reasons for the suspension which included allegations that during the 2015/2016 routine audit of the student's academic records of the respondent institution, it was noted that he used his account to alter marks for different students; that the units which were tampered with included ECT 301 where the mark was changed from 0 to 67 and ECT 301 where it was changed from 0 to 76; that in addition to altering the academic records, the claimant facilitated the recruitment of student past the deadline and received payments to modify the marks in the Campus Vue system.
9. The respondent asserted that due process was followed before the claimant was dismissed and as such he was not entitled to the reliefs he was seeking and prayed for the claim to be dismissed with costs to the respondent.

Claimant's Evidence

10. CWI, Paul Masinde the claimant herein, testified on February 8, 2022 and relied on his witness statement as his evidence in chief and the documents filed in support of his case as. He stated that he was not issued with notice of his dismissal and further, that the process of terminating his employment was not proper. He stated that he had worked for 15 years and therefore he claimed service for the years he had worked; that he was paid half salary while on the 6 months suspension period.
11. The claimant contended that he was accused of altering marks in the system despite not being a lecturer and therefore had no access to the system; that he was also accused of recruiting people to alter the marks but that these people were not disclosed and no student was shown to him whose marks was claimed he altered; that he appeared before a disciplinary committee but didn't appear with his advocate and that the committee was hostile to him and that he was called in the evening and told to appeal before the committee the next day and that this was not adequate time.



12. The claimant maintained that he had a brother in the university who was staying with him and wanted to buy a printer; that the brother asked the claimant to send money to one Samuel Kimani who was selling the printer; that he tried to call the brother after the issue came up but the respondent was not amenable; that he was eventually terminated from employment and his appeal was dismissed.
13. On being cross examined by Mr Mungai, he conceded that he was not aware that in March 2016, his brother was tampering with the marks and that his brother was using his phone and that he found the message on his phone in March and further, that his brother was suspended over the issue of altering marks.

Respondent's Evidence

14. RW1, Ndiritu Gikaria the respondent's Human Resource Manager testified and adopted his witness statement filed in court on February 7, 2019 as his evidence in chief. He also relied on the documents filed in court in response to the claim. On cross examination by Mr Kagunza, he stated that the claimant was employed as a clerk and he had a clear job description; that clerks had different roles depending on the department they worked; that the claimant's work entailed data entry and retrieval.
15. According to RW1, the claimant was suspended on ½ salary and the same was contained in the claimant's contract. RW1 stated that the claimant was not permitted to change marks but he had a password. It was also contended that the claimant was issued with a termination letter.
16. The court directed for the parties to file written submissions. The claimant's submissions were filed on April 1, 2022 while the respondent's submissions were filed on April 12, 2022. The court has had occasion to consider submissions by both counsel.

Determination

17. From the pleadings on record, the evidence of the parties and the submissions filed, the issues that arise for determination in this case are as follows:-
 - i. Whether the termination of the claimant's employment was justified;
 - ii. Whether the procedure followed was in accordance with section 40 of the *Employment Act*;
 - iii. Whether the reliefs sought were merited.
18. On the first issue, section 45(2) of the *Employment Act* is to the effect that an employer should not terminate contract of employment of an employee except where there are valid and fair reasons.
19. The burden of proof in claims for unfair termination as stipulated by section 43 of the *Employment Act* is that an employer is to prove the reason for the termination as valid in any legal proceedings. While the employee has to prove that the termination was unfair.
20. In the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR the Court of Appeal held that: -

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions.



A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

21. The respondent has stated that it terminated the claimant’s employment lawfully after it was established that the claimant had facilitated the altering of students marks which act would result in the respondent churning out half baked graduates.
22. According to the respondent, from the disciplinary hearing conducted, the claimant admitted to having sent money to one Samuel Kimani via Mpesa to facilitate the altering of his brother’s marks and he did not report this to the respondent.
23. It was the respondent’s contention that the claimant’s actions undermined the credibility of the programmes it offered, and as such he fundamentally breached his obligations.
24. The claimant on the other hand averred that the reason for termination of his employment was the allegation that during the 2015/2016 routine audit of the student’s academic records of the respondent institution, it was noted that he used his account to alter the marks of different students and according to him, no proper investigation was conducted to warrant the termination of his employment. He also contended that no evidence was tendered by the respondent to show how much the claimant was paid by each student to change the marks.
25. From the court’s analysis, it is clear that indeed the reasons for termination of the claimant’s employment were justified. The claimant when confronted with the allegation of tampering with the marks did not make an effort to clear his name. In fact, he admitted that he sent money to the said Samuel Kimani who from the evidence tendered in court, was notorious in altering students marks in the university. More surprisingly, the claimant’s password was used to change the marks and he did not feel the urge to report that his password had been compromised.
26. Having considered the evidence and the submissions, I find that indeed , the respondent has to a large extent and on a balance of probabilities proved that the claimant committed an offence set out under section 44(4) of the Employment Act hence the suspension and subsequent termination from employment was warranted.
27. As regards the 2nd issue, section 41 of the Employment Act provides:-

“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.”
28. The claimant averred in his claim that due process was not followed in the termination of his employment. From the record, and particularly, annexure 5, it is evident that the claimant was invited before a university committee on May 2, 2016 where he was required to explain the issues related to posting of student marks online. The claimant while giving evidence stated that he was suspended vide a letter dated May 24, 2016. According to him, the suspension was to remain in force pending further investigations. He further admitted that he was invited to attend a disciplinary hearing on October 14, 2017 where he attended that hearing and defended himself. This was proved by the minutes of the disciplinary committee which was produced as evidence in court. The claimant while giving evidence stated that he appealed the finding of the disciplinary committee to the appeals board which , which appeal was dismissed.



29. I have perused the aforementioned minutes of the disciplinary meeting and the decision of the Staff Appeals Board and it is my finding that the claimant fully participated in the said hearings. As regards the issue of time frame, the suspension letter was issued on May 24, 2016, and the disciplinary hearing was held on October 19, 2016. That's a period of almost five months. What else did the claimant expect the respondent to do? I therefore find that the respondent has proved that the dismissal of the claimant was done in accordance with fair procedure as required by section 41 and 45 of the *Employment Act*.
30. From the foregoing the court finds and holds that the claim is without merit and the same is hereby dismissed with costs.
31. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 1ST DAY OF NOVEMBER, 2022

ABUODHA NELSON JORUM

JUDGE ELRC

