



**Muliro v Kibabii University (Cause 61 of 2018)
[2022] KEELRC 13377 (KLR) (1 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13377 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 61 OF 2018
JW KELI, J
DECEMBER 1, 2022**

BETWEEN

WALUBENGO SINGORO MULIRO CLAIMANT

AND

KIBABII UNIVERSITY RESPONDENT

JUDGMENT

1. The claimant by statement of claim dated October 25, 2018 against the respondent alleged unfair termination and sought reliefs of declaration of violation of his rights under articles 10, 27, 41 and 47 of the *Constitution* as well as a declaration of violation of the provisions of *Employment Act* and sought compensation for unpaid salaries, payment in lieu of notice and compensation for unfair termination as well as gratuity and exemplary damages, cost and interest.
2. Together with the claim the claimant filed his verifying affidavit, his witness statement, list of documents all dated October 25, 2018 and the bundle of documents.
3. The claim was opposed. The respondent entered appearance through the Federation of Kenya Employers and filed memorandum of response dated May 23, 2019 and filed in court on the May 28, 2019 together with their bundle of documents.
4. The respondent on the January 21, 2022 filed its witness statement by Prof Isaac Ipara Odeo dated December 10, 2021.

Hearing.

5. The claimant's case was heard on June 29, 2022 with claimant testifying as witness of fact in his case, adopting witness statement as his evidence in chief and producing his filed documents and was cross-examined by Dickens Ouma advocate for the respondent. The respondent's case was heard on the July 25, 2022 with Prof Isaac Ipara Odeo testifying on oath as witness of fact for respondents, adopting his



witness statement as his evidence in chief and producing documents for the respondent. He was cross-examined by counsel for the claimant Ms Aluso Ingati.

The claimant's case in summary

6. The claimant was employed on March 7, 2016 as a Tutorial Fellow Computer Science Scale II by the respondent . On June 19, 2018 he received his payslip but no salary was credited to his account. He was also part time lecturer and was owed other monies.
7. The claimant notified the respondent and on same day was issued with show cause for absconding duties since June 1, 2018. That he responded to the show cause *vide* his advocate Cheptumo Advocates by letter dated July 25, 2018.
8. The respondent *vide* letter of August 1, 2018 informed the advocates, the claimant was required by law to appear in person specifically the UASU CBA and the [Employment Act](#) 2007.
9. The claimant was issued with notice dated August 7, 2018 to attend disciplinary hearing. The claimant communicated to the employer he was unable to attend *vide* letter dated August 13, 2018 and attached sick note by doctor to confirm the same. That he requested to attend the meeting *vide* video conferencing which was denied. The disciplinary meeting was rescheduled to September 10, 2018 and claimant was asked to reply to the show cause letter.
10. The claimant replied the show cause letter *vide* letter dated September 7, 2018 . The head of department *vide* letter dated August 8, 2018 confirmed the claimant attended to his duties as required.
11. The respondent issued the claimant with summary dismissal letter dated August 8, 2018 on grounds of absenteeism.
12. The claimant avers the process was unfair as did not comply with 3 warning letters before disciplinary hearing and further the chairman and secretary of UASU ought to be present and this was not done. That there was no valid reason for the dismissal.

respondents Case.

13. That the claimant was employed on March 7, 2016 worked until end of May 2018 when he absconded duty never to be seen again. That by time of leaving he was earning basic salary of Kshs 89,927, Housing allowance of Kshs 51,601 and commuter allowance of Kshs 6,250 or car allowance of Kshs 12,500 whichever was applicable to him. (Appendix B).
14. The respondent's case was that the claimant was dismissed after opportunity to be heard was granted on grounds of absenteeism from June 2018 when students lodged complaint for his absence from class for 2 weeks. That having been absent he was not entitled to salary.
15. The respondent's case was that the claimant was out of the country hence his response through the advocate and the request to attend disciplinary hearing *vide* video conferencing. The respondent's case was that it complied with procedural fairness.
16. The respondent further raised a preliminary objection that the verifying affidavit sworn on October 25, 2018 and attached to the claim and witness statement of October 25, 2018 offend provision of [Oath & Statutory Declarations Act](#) cap 15 Laws of Kenya thus the claim was void ab initio.
17. After the close of the hearing the court gave directions for filing of written submissions . The parties complied.



Determination

Issues for determination.

18. The claimant identified the following issues for determination.
 - a. Whether the claimant was granted fair hearing .
 - b. Whether the disciplinary procedure was followed by the respondent.
 - c. Whether the respondent owes the claimant monies namely part-time allowances, gratuity, imprest and paid leave allowances.
 - d. Whether the claimant absconded his duties.
19. The respondent in their submissions addressed the following issues:-
 - a. Competence of the claim
 - b. Validity of the reason
 - c. Procedural fairness
 - d. Prayers sought.
20. The court having considered the submissions by the parties and their pleadings is for the opinion the issues placed before the court for determination are as follows:-
 - a. Competence of the claim
 - b. If ((a) above) in the affirmative ,Whether the termination of claimant from employment was lawful and fair.
 - c. Whether the claimant is entitled to reliefs sought.

Competence of the claim

21. The respondent in statement of defence and submissions state that the claimant's verifying affidavit sworn on October 25, 2018 and witness statement of even date adopted in court were not executed by the claimant and offend the provisions of *Oath and Statutory Declaration Act* hence claim was *void ab initio*. That the document titled authority to swear affidavit and pleadings executed by claimant be struck off.
22. The claimant did not respond or submit on this legal point raised against their claim.
23. This is a serious issue which the claimant ought to have responded by reply to defence. The document titled written authority to swear affidavit and pleadings is dated October 25, 2018 addressed to 'whom it may concern' purporting to authorize one Regina Nafula Lumumba to swear and sign all and any affidavits and pleadings on his behalf.
24. The verifying affidavit dated October 25, 2018 is stated to have been sworn by the claimant yet the signature therein is at great variance with signature under authority letter. The said affidavit was not sworn by the claimant but his representative.



That is not only misleading but also an illegality.

25. The claimant at the hearing adopted as his witness statement document dated October 25, 2018 signed as his by the appointed person. The court finds that the letter of appointment dated March 7, 2016 signature is similar on face value to one on the document of authority by the claimant. The claimant's signature appears in different exhibits by the claimant.
26. The court holds that the recognized agents are as defined under order 9 rule 2 *Civil Procedure Rules* and the appointee by the claimant did not fit in that category. order 19 rule 4, states: "Every affidavit shall state the description, there place of abode and postal address of the deponent". Order 19 rule 7 affidavit ought not to be struck out for want of form. This was not an issue of want of form. Order 4 rule 1 states that a plaint shall be accompanied by an affidavit sworn by the plaintiff to verify the corrections of the averments in the plaint. Order 2 rule 16 every pleadings shall be signed by an advocate or recognized agent under order 9 rule 2.
27. The *Employment and Labour Relations Court Rules* of 2016 rule 4 (2) require a statement of claim to be accompanied by verifying affidavit. The upshot of the foregoing is that the verifying affidavit verifies facts in the claim and has to be done by the claimant. In the instant case the claimant purported *vide* letter filed with claim dated October 25, 2018 to appoint one Regina Nafula Lumumba to swear and sign all and any affidavits or pleadings as may be necessary on his behalf. The court finds the said Regina Nafula Lumumba not only the recognized agent under order 9 rule 2 of the *Civil Procedure Rules*.
28. The court holds that the signature on the verifying affidavit is tantamount to a forgery as the deponent is indicated as the claimant yet his purported agent signed. That the witness statement is adopted by claimant as his evidence in chief amounts to a forgery having been signed by a third party in the name of the claimant. The court finds the verifying affidavit and the witness statement all dated October 25, 2018 to be fatally defective having been signed by unauthorized third party in the name of the claimant. The court strikes out the said verifying affidavit and witness statement all dated October 25, 2018 for being illegalities.
29. The court holds that it cannot determine merits of a case founded on illegalities on face of its record. The claim dated October 25, 2018 is dismissed with costs to the respondent for being fatally defective.
30. It is so ordered.

DATED, SIGNED AND DELIVERED IN BUNGOMA IN OPEN COURT THIS 1ST DAY OF DECEMBER, 2022

J W KELI,

JUDGE

In the Presence of :-

Brenda Wesonga: Court Assistant

claimant : Akulo Ingati

respondent: Jude Okecho holding brief for Ouma Advocates

COURT: Leave of court is granted to appeal or review.

