



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 131 OF 2017**

**EDWIN E.O. MUTANDA.....CLAIMANT**

**v**

**JARAMOGI OGINGA ODINGA**

**UNIVERSITY OF SCIENCE AND TECHNOLOGY.....RESPONDENT**

**JUDGMENT**

1. Edwin E.O. Mutanda (the Claimant) was offered employment as a driver through a letter dated 24 August 2011 by Bondo University College (later Jaramogi Oginga Odinga University of Science and Technology (the Respondent)).
2. On 27 June 2016, the Claimant was suspended pending disciplinary action on allegations of negligence. The letter instructed the Claimant to show-cause in writing within 14 days.
3. The Claimant responded on 8 July 2016, and on 18 July 2016, he requested that the suspension be lifted.
4. On 25 July 2016, the Respondent invited the Claimant to attend a disciplinary hearing on 10 August 2016. The invitation was copied to a trade union of which the Claimant was a member.
5. On 2 August 2016, the Respondent sent another invitation to the Claimant and informed him of the right to be accompanied. The Respondent attached a copy of 3 charges against the Claimant. The invitation was copied to the trade union.
6. The Claimant attended the hearing, and on 12 August 2016, the Respondent wrote to notify him of summary dismissal.
7. The Claimant appealed on 29 August 2016, and on 31 March 2017, he sued the Respondent alleging unfair termination of employment and breach of contract.
8. The Respondent filed its Response on 6 June 2017, and the parties filed witness statements and documents.
9. The Claimant's and his witness evidence was taken on 6 May 2019, while the Respondent's Deputy Registrar testified on 25 January 2021.
10. The Claimant filed his submissions on 8 February 2017 and 3 March 2021, and the Respondent filed its submissions on 16 April 2021.
11. The Court has considered the pleadings, evidence and submissions.

**Unfair termination of employment**

**Procedural fairness**

12. The Respondent informed the Claimant of the allegations for contemplated termination of service in the suspension letter dated 27 June 2016. The letter asked the Claimant to make a written response which he did.
13. On 25 July 2016 and 2 August 2016, the Respondent invited the Claimant to attend an oral hearing. He was informed of the right to be accompanied. He was also notified of 3 charges. The trade union of which the Claimant was a member was also notified.

14. The Claimant was heard and later notified of the summary dismissal.
15. The Claimant challenged the disciplinary process on several grounds, including that the Disciplinary Committee was not properly constituted because it was co-chaired by the Vice-Chancellor and was thus biased.
16. The Claimant submitted this contravened Article 7.3 of the Respondent's Statute. The submission is misplaced as the cited provision relates to the composition of the Students Disciplinary Committee.
17. Schedule VI of the Statute, which applied to the Claimant, provided that the Vice-Chancellor would appoint the chairperson of the Disciplinary Committee for employees in grades 12 and below.
18. The Claimant was in grade 5. The Respondent's testimony that the chair was the Deputy Vice-Chancellor was not rebutted.
19. Nevertheless, the Court finds nothing in the clause stopping the Vice-Chancellor from chairing the Committee, being the appointing authority.
20. The Claimant also contended that the trade union officials present did not represent him. The Respondent notified the trade union officials to attend the hearing. 5 of the officials, including the National Vice-Chair, are captured in the minutes as having attended.
21. In the view of the Court, it was not up to the Respondent to shepherd the trade union officials on their role in the hearing.
22. Another ground advanced by the Claimant to impugn the hearing was that he was not allowed to present witnesses. The minutes of the hearing shows that the Committee reminded the Claimant of his right to present witnesses.
23. The Claimant further asserted that he was not furnished with necessary documents. The Respondent produced a letter dated 8 August 2016, bringing to the Claimant's attention the relevant documents.
24. The Court is satisfied that the Respondent was in substantial compliance with the statutory procedural fairness requirements as contemplated by section 41 of the Employment Act, 2007 (the Court notes that the Claimant did not exhaust the dispute resolution avenues set out in the Labour Relations Act, 2007 despite his membership of a trade union).

#### **Substantive fairness**

25. The Claimant alleged that he was victimised on the ground of his being a Deputy Secretary of the Kenya Universities Staff Union and for having agreed to be a witness in a criminal complaint against the Vice-Chancellor of the Respondent.
26. The Respondent, however, contended that the dismissal of the Claimant was because of negligence and careless performance of duties as a driver. The particulars given were that the Claimant had falsified a work ticket for a bus assigned to him.
27. The Respondent's witness produced a copy of an audit report dated 23 June 2016 and minutes of the disciplinary hearing.
28. The audit established that the Claimant had made entries in the work ticket no 0558, which did not tally with entries made at the gate.
29. The work ticket indicated that the Claimant left the University at 0630 hours on 14 April 2016 and arrived at Sony Awendo at 1600 hours, and returned on 15 April 2016.
30. The audit established the Claimant had left Sony Awendo at around 6.00 pm and arrived at the University on 14 April 2016.
31. Some of the witnesses during the disciplinary hearing were students who had been ferried by the Claimant to Sony Awendo. They stated that they returned to the University on 14 April 2016 at around 10.00 pm and not on 15 April 2016.
32. The Claimant's colleague also testified and corroborated the evidence by the students.
33. A security guard testified that the Claimant returned with the bus at around 9.52 pm on 14 April 2016, and he made an appropriate entry in the register, but the entry was tampered with to show the bus returned on 15 April 2016 at 2152 hours.
34. The Claimant admitted that he drove the bus to Sony Sugar in Awendo on 14 April 2016. He stated that he did not make entries in the work ticket using the 12-hour mode.
35. In the written response, the Claimant had stated that the work ticket entries of 14 April 2016 had a typographical error.
36. The Court finds the explanation insincere. It cannot be that there was a typographical error since the Claimant had used the same work ticket entry to claim a full day daily subsistence allowance when he was entitled to half a day allowance.
37. The entries in the work ticket were deliberate and were meant to claim a higher daily subsistence allowance.

38. The Court is satisfied that the Respondent proved valid and fair reasons to dismiss the Claimant.

39. Compensation and salary in lieu of notice are therefore not available as remedies to the Claimant.

#### **Breach of contract**

##### **Overtime**

40. The Claimant sought Kshs 285,895/- on account of overtime. He produced a Memo dated 7 April 2015 requesting for payment of overtime accrued over 318 days.

41. The Respondent did not produce any work hour records, and in consideration of section 10(3) of the Employment Act, 2007, the Court will allow this head of the claim.

##### **Leave**

42. On account of leave, the Claimant prayed for Kshs 70,967/- being 9 days leave for 2015 and days worked in 2016.

43. The Respondent's witness testified that the Claimant had 27 leave days and would be paid Kshs 14,422/- and since the Claimant did not disclose the formula he used to compute this head of the claim and considering that the employer is better placed to make this computation, the Court will accept the computation by the Respondent.

##### **Uniform allowance**

44. The Respondent admitted this head of the claim.

##### **Soap allowance**

45. This head of the claim was admitted.

##### **Certificate of Service**

46. A certificate of service is a statutory entitlement, and the Respondent should issue one.

47. The summary dismissal letter advised the Claimant to clear in order to be paid his terminal benefits.

48. The Respondent's witness confirmed in Court that the benefits would be paid.

#### **Conclusion and Orders**

49. The Court finds that the summary dismissal of the Claimant was fair.

50. The Claimant is, however, awarded for breach of contract:

- |                      |                |
|----------------------|----------------|
| (i) Overtime         | Kshs 285,895/- |
| (ii) Uniform refund  | Kshs 36,000/-  |
| (iii) Soap allowance | Kshs 6,000/-   |
| (iv) Accrued leave   | Kshs 14,421/-  |

**TOTAL Kshs 342,316/-**

51. The Respondent to issue a certificate of service within 21 days.

52. Each party has partially succeeded. Each party to bear its own costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 28TH DAY OF APRIL 2021.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For Claimant Oumo & Co. Advocates

For Respondent Olel, Onyango, Ingutiah & Co. Advocates

Court Assistant Chrispo Aura