



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 203 OF 2018

JANETH CHEPKEMOI MACHIRA.....1ST CLAIMANT

FREDRICK ODHIAMBO ANGIL.....2ND CLAIMANT

VERSUS

LAIKIPIA UNIVERSISTY.....RESPONDENT

JUDGMENT

1. The Claimants herein filed a Memorandum of Claim dated 18th June, 2018 on the 25th June, 2018 through the firm of Rodi Orenge and Company Advocates alleging unfair termination, reinstatement, unpaid terminal dues, gratuity and issuance of certificate of service. He therefore sought for judgment against the Respondent as follows:-

- a) **The Honourable Court do find that their termination was unfair and unlawful.**
- b) **This Honourable Court do issue Orders compelling the Respondent to reinstate the claimants to work in their respective positions and stations.**
- c) **Compensation for unfair and unlawful termination and gratuity pay as follows;**

Janet Machira

- i. **Compensation for unfair termination under section 49© of the Employment Act, 12 months..... Kshs. 836,028.00.**
- ii. **Gratuity pay.....Kshs.1881063.00.**
- Total.....Kshs. 2,717,091.00**

Fredrick Odhiambo

- i. **Compensation for unfair termination under section 49© of the Employment Act, 12 months..... Kshs. 477,468.00.**
- ii. **Gratuity pay.....Kshs.795,780.00.**
- Total.....Kshs. 1,273,248.00.**

- d) **Certificate of service.**
- e) **Cost of claim.**
- f) **Interests in (c) and (e) above at Court rates.**

g) Any other relief this Honourable Court deems. fit and just to grant in the circumstances.

2. The Claimants aver that, the 1st Claimant was employed as a procurement assistant on 1st July, 1990 on permanent and pensionable terms while the 2nd Claimant was employed as a farm foreman in the year 1997 on contractual basis which was converted to permanent terms on the 5th July, 2016.
3. They stated that the 1st Claimant till her termination was earning a salary of Kshs. 69,669, while the 2nd Claimant was earning Kshs. 39,789/-.
4. They contended that they diligently worked for the Respondent till 3rd May, 2017 when their services were illegally terminated.
5. That prior to termination, they received letters dated 16th March, 2017 titled, "Gross Misconduct" alleging that the 1st Claimant was found in possession of firewood and off cuts in her homestead without authorization, while the 2nd Claimant was found to have purportedly stolen Respondent's timber and were immediately suspended from employment.
6. The Claimants indicated that they were invited to a disciplinary hearing conducted on 2nd May, 2017 however they state that they were not accorded fair hearing as not witnesses were summoned to support the said allegation and that their union representatives were not accorded an opportunity to defend them. Subsequently, the disciplinary committee found them culpable and were dismissed from employment on 3rd May, 2017.
7. Dissatisfied with the said decision, the Claimants state that they Appealed to the Respondent's Council's Appeal Committee which hearing was conducted on 27th July, 2017. They contended that one Mr. Kairu who was a member at the Disciplinary Committee was also present in the Appeals committee contrary to schedule III of the University Statute that provides for 3 independent members nominated by Council to hear Disciplinary Appeals.
8. They stated that the Appeal decision was delivered on 7th December, 2017 more than 7 months from the date of hearing which was contrary to clause 5.4 of the CBA between the Respondent and KUSU and also Clause 6 of the CBA between the Respondent and KUDHEIHA which provided for Appeals to be heard within 90 days.
9. The Respondent entered Appearance on 17th July, 2018 and filed a Memorandum of Defence dated 15th August, 2018 and filed in Court on 23rd October, 2018. The Respondent basically denied the entire claim by the claimant and put them to strict proof thereof. It was contended that the claimants committed acts of gross misconduct which warranted their dismissal in accordance with section 44(4) (g) of the Employment Act.
10. The Respondent stated that the Claimants were accorded fair hearing in accordance with the law and their dismissal was only arrived at after they were subjected to disciplinary hearing.
11. The Respondents contends that the Claimants are not entitled to the claim as their dismissal was not unfair but based on gross misconduct which warrant their summary dismissal. Further that the claimants were members of the NSSF scheme thus are not entitled to gratuity prayed.
12. The claimants challenged the respondent's reply and filed a reply to the memorandum of response dated 30th January, 2019 and in essence reiterated the averments in their memorandum of claim.

Hearing

13. This cause proceeded for hearing on the 4th March, 2021 when both claimants testifying. The 1st Claimant **Janet Chepkemai Machina, CW-1** adopted her witness statement dated 18th June, 2018 and testified that she was the secretary of KUSU who entered a CBA with the Respondent. She testified that she was invited for disciplinary hearing and a Union representative was present but was not allowed to defend her. She stated that the Appeal council was not independent as anticipated and that the verdict of the Appeal took more than 7 months to be communicated to them contrary to the CBA which required the Appeal to be delivered within 90 days. She stated that she never took firewood from the Respondent and prayed that the Court Compels the Respondent to reinstate her as she has worked for it for 25 years and in essence allow the claim as prayed.
14. On cross-examination by **Mr. Mwangi Advocate**, the claimant testified that he was dismissed on grounds of being in possession of firewood which firewood were taken by the Respondent's security guards in her absence and the matter was reported to the police however she was never summoned by the police and also that there were no witnesses who affirmed that she took the firewood from the Respondent therefore the charges against her were unfounded.
15. The 2nd Claimant **Fredrick Odhiamabo CW-2** took to the stand and sought to adopt his witness statement dated 18th June, 2018 and filed in Court on 25th June, 2018 and testified that the charges before the disciplinary committee which led to his termination were not valid and requested to be reinstated back to employment. He stated that he was not issued with a certificate of service upon dismissal and that the dismissal was unlawful.
16. On cross examination by **Mr. Mwangi Advocate**, he testified that he was dismissed on allegation of stealing firewood which he stated he did not steal. He testified that he was issued with a Notice to show Cause and was subjected to disciplinary hearing but that he was not accorded an opportunity to defend himself. He stated that Union official were present but did not talk. He contends that he is entitled to

gratuity as he worked for the Respondent from 1997 and that the CBA between the Respondent and the Union which he is a member of provides for gratuity payment.

17. The claimants also called a third witness, **Kibet Komen, CW-3**, who testified that he was forced to sign a statement on the alleged theft of firewood by the claimants and that a security guard had written the same and was instructed to sign it without being given an opportunity to read the same. he distanced himself from the contents of the statement implicating the claimants.

18. The Respondent's case proceeded for hearing on 6th May, 2021, with the Respondent calling one Witness, **Mugo Mureithi, RW-1**, the acting registrar of Administration of the Respondent who sought to adopt his witness statement filed on 11th March, 2019 together with the Respondent documents filed on 23rd May, 2019.

19. On cross examination by **Kabalika Advocate**, he testified that the claimants do not qualify for gratuity as the 1st Claimant was paid gratuity when she was promoted to her current position which is currently under a pension scheme while the 2nd Claimant was absorbed to permanent terms on 1st July, 2016 and had only worked for 10 months and had not reached the 5 years needed under the CBA for one to be eligible to gratuity.

20. He stated that the claimants were culpable of gross misconduct and that they were not reported to Police as alleged but only subjected to internal disciplinary process and admitted taking the said timber and firewood.

21. He contends that the Appeal was determined on 20th September, 2017 and not 5th January, 2018 as alleged and stated that as much as the CBA indicate that the Appeal ought to be heard within 90 days it did not include the time of communicating the findings of the appeal and therefore stated that the communication was done late but the determination was done within the requisite 90 days.

22. He testified further that the claimants were afforded ample time to defend themselves and even heard during the appeal and that the dismissal was procedural and warranted for the gross misconduct of being found culpable of theft of the Respondents property.

Claimants' Submissions

23. The claimants through their advocate submitted that the Respondent dismissed them from employment of alleged charges which were not substantiated as such their dismissal was unfair within the meaning of section 45(2) of the Employment Act and prayed to be compensated 12 months' salary in accordance with section 49(1) of the Employment Act.

24. It was submitted that the claimants are entitled to gratuity upon termination of employment as provided for under clause L on page 11 of the KUDHEIHA CBA having both worked for more than 10 years.

25. On whether the receipt showing purchase of the timber from Yako Timber yard and the OB Number 4/21/3/2017 should be expunged from records having not been produced during disciplinary hearing, it was submitted that the Claimants testified that they were not given an opportunity to explain themselves or offered an opportunity to produce any documents therefore they Respondent cannot fault them for not producing the said documents. additionally, it was submitted that the claimant had denied all charges against them during disciplinary process hearing, as evidenced by the Respondent minutes attached therefore the claim that the claimants confessed stealing the said timber and firewood is baseless.

Respondents submissions

26. The respondent filed submissions on 31st May, 2021 and submitted that the 1st Claimant was paid gratuity upon her promotion and that her position before termination placed her in same level with employees who are covered by the university retirement scheme/ pension scheme as such is not entitled to gratuity. The 2nd Claimant on the other hand was admitted under pensionable terms on 5th July, 2016 and on his termination on 3rd May, 2017, he had not attained the 5 years required for one to be eligible to gratuity pay, accordingly, it was submitted that both claimants are not entitled to gratuity.

27. The Respondent submitted that the claimants were found with gross misconduct and were subjected to due process therefore were only dismissed in accordance with Section 44(4)(g) of the Employment Act, thus their termination was not unfair according to the Act.

28. Counsel submitted that since the termination followed due process and the claimant found culpable of gross misconduct, they were duly dismissed and are therefore not entitled to compensation as prayed in their claim.

29. I have examined all the evidence and submissions of the parties. The issues for this court's determination are as follows:-

1. Whether there were valid reasons to warrant dismissal of the claimants.

2. Whether due process was followed before his termination.

3. Whether the claimants are entitled to the remedies sought.

30. On the issue of reason for termination, the claimants were terminated apparently on account of theft of some firewood. The claimants denied involvement in this offence.

31. The respondents insisted that the claimant stole and called 1 witness Mugo Mureithi the Ag Registrar Administration of the respondent.
32. The respondents witness also stated that the claimant's termination was anchored on gross misconduct and that the claimants were accorded a fair hearing.
33. When cross-examined, this witness stated that the issue complained of was criminal in nature but also admitted that the claimants were never charged for any criminal offences.
34. He averred that they admitted taking away the timber in question but also admitted that he had no evidence of the said admission in court.
35. In the circumstances of the evidence before me, there is no evidence that the claimants stole the respondent's timber as alleged.
36. The witness who saw or witnessed the theft or recovery were never called as witnesses, even the security guards who apparently arrested the claimants.
37. Section 43 of the Employment Act States as follows;

43.

Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of [section 45](#).

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

38. It is imperative that the respondent produce evidence to prove the reason for the termination.
39. In the current case the claimants failed to prove they had valid reasons to terminate the claimants.
40. On issue of due process the claimants have submitted that they were never accorded a fair hearing. The respondents on their part insist that the claimants were accorded a fair hearing.
41. The respondents App 26 & 83 are letters addressed to the claimants informing that they would be required to appear before a disciplinary committee meeting on 2/5/2017 to answer to charges of gross misconduct on accusations/allegations of thefts of university property.
42. The claimants admit attending to the disciplinary hearing but deny being accorded a fair hearing. They aver that no charges were read against them.
43. The respondent aver that the claimants were given a fair hearing.
44. They produced minutes of the meeting held on 2/5/2017. In the minutes no evidence was called against the claimants and no witness testified against the claimants.
45. The claimants denied any culpability on their side.
46. Section 41 of Employment Act 2007 states as follows;

41. Notification and hearing before termination on grounds of misconduct

(1) 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.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any,

47. As per this section, parameter of a fair hearing are explained.
48. These include being explained to in a language the employee understands, the reason for the intended termination.
49. The employee is entitled to bring a union official or witness to give evidence on their behalf.
50. My understanding of Section 41 of Employment Act is that the employee is entitled to a fair hearing. The gist of the fair hearing includes knowing the charges against you, hearing evidence presented by any witness and cross examining such witness and also calling one's own witness.
51. In the case of the claimants no witnesses were even called to testify against them. It is as if they were told you committed an offence of theft which they denied and then a determination to dismiss them was made.
52. This in my view falls below a fair hearing and it is my finding that the claimants were denied a fair hearing.
53. On remedies the respondents have submitted that the claimants are not entitled to the remedies sought and in particular gratuity.
54. They aver that the 1st claimant was paid her gratuity upon promotion and now placed under the retirement benefits scheme. They also submitted that the 2nd claimant was admitted vide pensionable terms on 3rd May, 2017 and had not attained the 5 years requirement to be eligible for gratuity pay.
55. From the evidence before me the only claim by the claimants in contention is unfair termination and gratuity.
56. Having found that the claimants were terminated without following due process and without valid reasons as envisaged under Section 45 (2) of the Employment Act, their termination was unfair and unjustified.
57. I therefore find for them and award them compensation for the unfair termination of 10 months each. The 10 months is premised on the fact that the 2 had served respondents for a long period of time and given their current age, cannot be employed in another organization. This comes to:-

1st claimant

10 months x 69,669 = 696,690/=

2nd claimants

10 months x 39,789 = 397,890/=

58. The 1st claimant indicated that she had been paid her gratuity when she moved from one grade to another and at grade 5 she was permanent and pensionable. She is therefore not entitled to gratuity.
59. As for 2nd claimant, he indicated that he was a union member and worked for respondent from 1997 to 2017 a period of 20 years.
60. I find that he is entitled to gratuity as per clause L of the CBA. Which comes to 3 weeks salary for each year worked

$$= \frac{3}{4} \times 39,789 \times 20$$

$$= 596,730/=$$

1. Total awarded is as follows:-

1st claimant – 696,690/=

2nd claimant – 596,730 + 397,890 = 994,620/=

All less statutory deductions.

2. Each claimant is also entitled to costs and interest at court rates with effect from the date of this Judgment.

Dated and delivered in open Court this 27TH day of JULY, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ndichu holding brief Mwangi for respondent – present

Kabalika for claimants

Court Assistants – Fred and Wanyoike