



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

PETITION NO. 18 OF 2018

IN THE MATTER OF ARTICLES 10, 20, 22, 23 AND 165 OF THE CONSTITUTION

AND

**IN THE MATTER OF ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 41(1),
47(1), 50(1) OF THE CONSTITUTION,**

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, NO 4 OF 2015

AND

IN THE MATTER OF EMPLOYMENT AND LABOUR RELATIONS COURT (PROCEDURE) RULES 2016.

JOSHUA ONDURU NYAYIERA.....PETITIONER

VERSUS

EGERTON UNIVERSITY.....RESPONDENT

JUDGEMENT

1. The Petitioner sued the Respondent for unfair termination and compensation for violation of his constitutional rights.
2. The Petitioner averred that he was employed by the Respondent sometimes on the 6th November, 2009 to work as a messenger in various departments and earning a salary of Kshs. 30,730.
3. He stated that he was stationed in the procurement department till 10th January, 2018 when he was transferred to Human Nutrition department.
4. That on 1st February, 2018 he was issued with a show cause letter why disciplinary action should not be taken against him for refusing to respond to a call that required him to go back to work at 7.30pm at night to turn off a running tap that had been left running.
5. He stated that he responded to the show cause letter by letter dated 7th February, 2018 which the Respondent through its acting senior assistant Registrar recommended a strong warning letter. However, on 21st May, 2018 the acting assistant registrar informed him that his response of 7th February, 2018 was unacceptable and gave him a stern warning for negligence of duty and insubordination.
6. That on 16th July, 2018 the Deputy Vice chancellor (Administration, planning and Development) through the Acting senior assistant Registrar (Human Capital) accused him of tampering with security apparatus in the 1st Floor of the Administration Block for unknown reason, and required him to show cause why disciplinary action should not be taken against him.
7. In Response to the Show cause letter the Petitioner, filed a response dated 16th July, 2018 which was received by the Respondent on 20th

July, 2018, while the Investigation reported was submitted to the Respondent on 25th July, 2018 way after the show cause letter was issued and responded to.

8. By a letter dated 6th August, 2018, the Registrar (Human capital and administration) summoned the petitioner for a disciplinary hearing on 17th August, 2018 with the charges reading as follows;

“Entered the main administration building on Sunday 15th July, 2018 at 1100hrs and 1500hrs with unauthorized persons whom you allowed aces the university premises without clearance permissions with the intention of concealing the intention of the said visit.”

And,

“Entering the building and tampered with the CCTV Camera with the sole intention of concealing the activities that were being carried out in the said building by yourself and the strangers that had accompanied you, which actions amounted to gross security risk to the university.”

9. He stated that the hearing was conducted as scheduled, however that the Deputy Vice Chancellor Administration planning and development the complainant was the one who presided over the disciplinary hearing.

10. He stated he was not given witness statements on time to enable him prepare for the said hearing and that no witnesses testified on the accusation against him neither was there evidence tabled in form of video recording and others that demonstrated that indeed he was involved in the alleged offense.

11. The Respondent found the Petitioner culpable and he was dismissed on the 20th August, 2018.

12. The Petitioner, contends that his constitutional rights were violated as he was denied fair administrative Action provided for under Article 47 of the Constitution and section 4 of the Fair Administrative Actions Act stating that the disciplinary action was not properly conducted since the investigation report superseded the show cause letter and that the complainant was the one that presided over the hearing further that he was not given the witness statements and documents to enable him prepare a proper response before the disciplinary committee.

13. He contends that the transfer from procurement department to Nutrition was a ploy aimed at targeting him as several allegations were levelled against him which were unsubstantiated culminating to his dismissal. He stated that the Respondent’s actions were contrary to Article 27 of the Constitution which entitled him to equal protection and benefit of the law.

14. He averred that his dismissal was based on flimsy reasons which is contrary to Article 41(1) and 41(2)(b) of the Constitution on the right to reasonable working conditions.

15. He contends that by the fact that the Respondent failed to supply him with the necessary documents they relied on during hearing and the fact that the complainant was the chair of the disciplinary hearing condemned him unheard as he was not accorded fair hearing under Article 50 of the Constitution.

16. The Petitioner thus prayed for Judgment Against the Respondent for; -

a. A declaration that the show cause letter dated 16th July, 2018 is clouded with irrationality arbitrariness, malice and premature and therefore illegal.

b. A declaration that the staff Disciplinary proceedings held on the 17th August, 2018 was illegal, unfair and a violation of rules of natural justice.

c. An order that the Respondent is in violation of the petitioner right to fair labour practices and reasonable working conditions.

d. An order quashing the show cause letter dated 26th July, 2018 and the staff disciplinary proceedings of 17th August, 2018.

e. An order for reinstatement of the Petitioner to employment on terms as would have applied before the unlawful termination.

f. And order of compensation for general and aggravated damages together with interest thereon for;-

i. Violation of the Constitutional right to fair administrative action in respect of the conduct of the purported disciplinary process.

ii. Violation of the constitutional right to fair labour relations and reasonable working conditions.

iii. Violation of the statutory duty to conduct fair termination proceedings.

g. An order that the Respondent bears the costs of these Proceedings.

17. The Respondent in response to the Petition filed a replying Affidavit on 8th May, 2019, sworn by Janet c. Bii, the legal officer of the Respondent alleging that the Petition as filed does not raise any constitutional issues to warrant the invocation of this Court's constitutional jurisdiction.

18. It was stated that on 16th July, 2018, the Respondent through its security department received several complaints against the Petitioner including the fact that the Petitioner had entered the administration Block with strangers without clearance and further tampering with the CCTV cameras within the main administration Block.

19. That the Petitioner's actions put the Respondent to great security risk which actions were tantamount to gross misconduct and in breach of section 44(4)(g) of the Employment Act and section 7 (ii) and 14(iv) of the staff code of conduct. Consequently, the Petitioner was issued with a show cause letter dated 26th July, 2018 which allegations were denied by the Petitioner by his letter of 16th July, 2018.

20. The Respondent avers that disciplinary hearing was conducted on 17th August, 2018 where the petitioner was found guilty of gross misconduct and the committee recommended him to be dismissed in accordance with section 44(4)(g) of the Employment Act by a verdict of 17th August, 2018 which was communicated to the petitioner on 20th August, 2018.

21. That the Petitioner was accorded a right to Appeal in accordance with the Respondent laid out disciplinary procedure and clause 16(c) of the CBA with KUDHEIHA which the Petitioner failed to utilize and therefore the Petitioner is yet to exhaust all internal disciplinary procedures before filing this suit in Court.

22. The Respondent contends that they complied with section 63 of the Universities Act and Article 47 of the Constitution while carrying out the disciplinary hearing.

23. He stated that the allegation that the petitioner was not supplied with statement and documents is an afterthought as the petitioner did not raise any objection during hearing. Further that the Petitioner was given an opportunity to cross examine witnesses.

24. It was stated that the Petitioner's dismissal was fair in the circumstances and prayed that the Petition be dismissed with costs to the Respondent.

25. The Parties' advocates agreed on 20th April, 2021 to dispose of the Petition by way of written submissions with the Petitioner filing on 21st May, 2021 and the Respondent on 17th June, 2021.

Petitioner's Submissions.

26. It was submitted for the Petitioner that his right to fair administrative action was violated when, the Respondent issued a show cause letter before investigations were carried out. He argued that investigations were carried out between 16th and 18th July, 2018 when the Show cause letter had been issued to him on 16th July, 2018.

27. He argued further that the complainant was the Deputy Vice Chancellor who chaired the disciplinary meeting therefore denying him fair hearing. He added that the Petitioner was not availed with witness statement and documents which the disciplinary committee were relying on thus he was not in a position to mount a good defence during the disciplinary hearing and cited the case of **Obuya Bagaka –v- Kenya School of Government [2021] eKLR**.

28. It was submitted that the Petitioner was denied right to equal protection before the law contrary to Article 27 (1) of the Constitution. He argued that his transfer from procurement to nutrition department was a ploy by the Respondent aimed at targeting him for the sole purpose of getting rid of him. Further that during the first show cause letter of 1st February, 2018, the office responsible recommended that the Petitioner be issued with a strong warning letter instead the Respondent through the acting senior Assistant registrar's office indicated that the explanation of the show cause letter was not satisfactory by it's letter of 21st May, 2018.

29. The Petitioner reinforced its argument by citing the case of **Kenya County Government Workers Union –v- Wajir County Government & another [2020] eKLR** .

30. It was submitted that the petitioner right to fair labour practices under Article 41(1) and right to reasonable working conditions under Article 41(2) of the Constitution was interfered with when the Respondent leveled several charges against the petitioner without substantiating them, stopping the Petitioner's salary before the dismissal was communicated to him and eventually dismissing him on flimsy grounds. He reinforced this argument by citing the case of **Peter Wambugu Kariuki & 16 others –v- Kenya Agricultural Research institute [2013] eKLR**.

31. He also argued that his right to fair hearing as provided for under Article 50 (1) of the Constitution was violated upon when the Respondent Deputy vice chancellor who was the complainant in the charges against him, presided over the disciplinary hearing and further that he was not furnished with the document and witness statements the Respondent used during the Disciplinary Hearing therefore making him unable to respond to the charges. He cited the case of **Anthony Mkala Chitavi –v- Malindi Water & Sewerage Company Limited [2013] eKLR** which gave the ingredients of a right to fair hearing.

32. The petitioner submitted that from the circumstances demonstrated in this suit, the Respondent has unfairly dismissed him from

employment as per Section 49 of the Employment Act and therefore ought to be compensated for breach of his constitutional right and for the unfair termination.

Respondent's submissions.

33. The Respondent on the other hand submitted that the Respondent was terminated on justifiable grounds having been found culpable of gross misconduct of interfering with security CCTV at the Respondents Administration Block and allowing stranger into the Building without clearance.

34. It was argued that that the Respondent having carried out its investigation on the charges against the Petitioner recommended that the Petitioner be subjected to disciplinary hearing which he attended in presence of the secretary of his trade union (KUDHEIHA) and was shown all evidence including the CCTV footage. Furthermore, the petitioner had a right to appeal the outcome of the disciplinary hearing in accordance with section 16(c) of KUDHEIHA but failed to exhaust the internal mechanism and instead opted to filed this suit in Court prematurely.

35. The Respondent submitted that none of the Petitioner's rights were violated as pleaded. He argued that the investigations were carried out and concluded by 16th July, 2018 and a report made to the Police who issued it with OB Number 47/16/7/2018. Further that the fact that the investigations report was compiled later does not mean the investigations were ongoing.

36. The Respondent argued that the complaints that the Claimant had interfered with the CCTV cameras was raised by the security department and not the Deputy vice chancellor. Also that the Deputy vice chancellor only instructed for a Show cause letter to issue. They cited the case of **Paul Kuria Kiore –v- Kenyatta University [2016] eKlr** where the court differentiated the disciplinary process hearing and court proceedings.

37. The Respondent submitted that the petitioner prior to the disciplinary hearing failed to request the documents and statements and they were not mandated in any way to direct the petitioner on how to defend himself, he therefore submitted that the failure to request the documents was the fault of the Petitioner.

38. On the alleged violation of the petitioner right under Article 27 of the Constitution, the Respondent submitted that the Petitioner has not stated with precision how he was targeted for dismissal as was held in the case of **Reuben Njuguna Gachukia and another –v- Inspector General of National Police service and 4 others [2019] eKlr**.

39. On the allegation that the Respondents interfered with the Claimant's application for loan in his SACCO, the Respondent submitted that no evidence has been tendered to affirm such allegation and prayed that this court ignores such unsubstantiated allegations.

40. On whether the petitioner right to fair labour practices were violated, the Respondent submitted by citing the case of **Peter Wambugu Kariuki & 16 others –v- Kenya Agricultural Research Institute [2013] Eklr** and contends that the Petitioner has not led any evidence to substantiate the allegation therein.

41. The respondent concluded that the Petitioner has not proved his case on a balance of probability and prayed that the same be dismissed with costs to the Respondent.

42. I have examined the evidence and submissions of the parties herein. The issues for this court's determination are as follows;-

- 1. Whether there were valid reasons to warrant the petitioner's dismissal.**
- 2. Whether due process was followed before the petitioner's dismissal.**
- 3. Whether the petitioner's constitutional rights were infringed upon by the respondents.**
- 4. What remedies to grant in the circumstances.**

ISSUE NO. 1 – REASONS

43. From the letter of summarily dismissal dated 20/8/2018 issued to the petitioner he was dismissed for gross misconduct. The letter stated as follows;-

“I refer to the staff disciplinary meeting of Friday, 17th August, 2018 in which you appeared to the charges of entering the main Administration building on Sunday 15th July, 2018 before 1100hours and 1500hours with unauthorized person whom you allowed access the university premises without clearance or permission with the intention of concealing the intentions of the said visit and tampering with CCTV Camera with the sole intention of concealing the activities of that were being carried out in the said building by yourself and the stranger who had accompanied you. You said actions amounted to a gross security risk to the university and wish to inform you that you were found guilty as charged....

44. From this letter thus, the reason for dismissal are as explained therein. The petitioner was thereafter invited for a disciplinary hearing on the same allegations. The minutes of the disciplinary hearing were exhibited in court by the respondents as App JCB 5.

45. From the minutes produced, it is not clear what really transpired in the meeting as the minutes as written are not flowing. They run from pages 1, 3, 5, 6 & 7. The even numbers are blank.

46. That notwithstanding, it is not clear who is indicating giving the evidence as indicated as preliminary information and whether this witness was cross examined by the petitioner.

47. Evidence from the CCTV cameras footage was also taken in the absence of the petitioner. The importance of minutes being produced in court is to aid the court to be part and parcel of the disciplinary proceeding and thus assess whether the reasons for the dismissal were established.

48. In the case of the petitioner, it is indeed stated that he accessed the building without permission with strangers and also tampered with the CCTV footage. The court has not been invited to access the evidence that connects the petitioner to this offence.

49. It is also clear that the CCTV footage was examined in the petitioner's absence and it is not clear what was viewed from the footage. The court was also not given any evidence as to what the footage revealed.

50. Section 43 of the Employment Act states as follows:-

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”.

51. The law is clear that an employer must prove reasons for termination and which reasons must be valid. In the case of the petitioner, he contends that the allegation against him were not valid or true. There is however no evidence presented before court to prove that the allegations were proved or established to be valid.

ISSUE NO. 2 – DUE PROCESS

52. On due process the petitioner was indeed expected to be taken through a transparent disciplinary process as envisaged under Section 41 of the Employment Act 2007 which states as follows:-

41(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, chosen by the employee within [subsection \(1\)](#), make”.

53. The minutes produced by the respondents herein are not clear as to what transpired during the disciplinary hearing. It is not clear whether the petitioner even attended the meeting as his name is also missing from the list of attendees.

54. It is my finding that the respondents have not demonstrated that the petitioner was accorded a fair hearing.

ISSUE NO. 3 – CONSTITUTIONAL RIGHTS

55. On this issue, the petitioner submitted that his constitutional rights under the constitution were breached. The petitioner indicated that his rights under Article 27(1) of the constitution, Article 41(1) and Article 50(1) were breached.

56. Article 27 deals with equality and freedom from discrimination. The petitioner in my view did not explain how he was discriminated against and in relation to who. In my view there was no breach of the petitioner's right under Article 27 of the constitution. As relates to Article 41 of the constitution, having found that the petitioner was dismissed without valid reasons and without following due process, it is apparent that his rights under Article 41 on fair labour practices were infringed upon.

57. This will also be true in relation to Article 50(1) on a fair hearing. It is therefore my finding that the petitioner's rights under Article 41 and 50(1) of the constitution were infringed upon by the respondents.

ISSUE NO.4 – REMEDIES

1. Having established that the petitioner was dismissed without valid reasons and without following due process, I find for

the petitioner and award him damages equivalent to 10 month's salary. This amounts to;

$$10 \times 30,730 = 307,300/=$$

2. I also award the petitioner damages for breach of his constitutional rights amounting to 500,000/=.

$$\text{TOTAL awarded} = 807,300/=$$

Less statutory deductions

3. 3. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF SEPTEMBER, 2021

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Oduor for petitioner – present

Mr. Mwangi holding brief for respondent - present