



**Maji v Judicial Service Commission (Cause 44 of 2020)
[2021] KEELRC 376 (KLR) (25 November 2021) (Judgment)**

Maji James Maji v Judicial Service Commission [2021] eKLR

Neutral citation: [2021] KEELRC 376 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

CAUSE 44 OF 2020

CN BAARI, J

NOVEMBER 25, 2021

BETWEEN

MAJI JAMES MAJI CLAIMANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

JUDGMENT

1. The Claimant lodged a claim against the Respondent on 30th of June, 2020, seeking a declaration that the Respondent wrongfully and unfairly dismissed him; an order for unconditional reinstatement without loss of salary and benefits; damages for wrongful and unfair dismissal; costs of the suit and interests.
2. The Respondent filed a response to the claim on the 2nd September, 2020, wholly denying the Claimant's claim.
3. During the trial, the Claimant testified in support of his case, while the Respondent presented one Mr. Peter Bunde an Assistant Director for Human Resources to testify on its behalf.
4. Parties filed submissions outside the time allowed by this Court and were not considered in this judgment.

The Claimant's Case

5. The Claimant's case is that he was employed by the Respondent as a clerical officer on 5th March, 2001 and posted to Homa Bay Law courts and later to Oyugis Law Courts. It is his case that he was confirmed to this position on 18th October, 2004.



6. It is the Claimant's case that he sat his Kenya Certificate of Secondary Education (KCSE) at Nyanza Christian College in November/December 1993, under Index Number xxxxxx. He states that he obtained a mean grade C Plain and was issued with his KCSE certificate serial No. xxxxx by the Kenya National Examination Council (KNEC).
7. It is the claimant's case that he discharged his duties diligently and in accordance with the terms and conditions of service, all through his time with the Respondent.
8. The Claimant states that he received a letter dated 28th June, 2017 from the Chief Registrar of the Judiciary, notifying him that a document screening exercise had been carried out, which revealed that his KCSE certificate was a forgery. He states that the letter required him to respond to the allegation within 21 days of the date of the said letter.
9. It is the Claimant's case that he responded to the allegations vide his letter of 28th July, 2017, wherein he informed the Respondent that his certificate was genuine.
10. The Claimant states that he was charged with presenting a forged KCSE certificate vide a letter dated 12th October, 2018, written to him by the Honourable Chief Justice, as the Chairman of the Respondent. It is his case that this latter letter required him to respond to the charges within 21 days of the date of the letter.
11. It is the Claimant's case that he was sent on suspension vide yet another letter of 12th October, 2018, pending determination of the disciplinary proceedings that had been set on motion by the Respondent.
12. It is the Claimant's further case that he was invited to appear before a disciplinary committee vide a letter dated 1st February, 2019, but that this letter did not reach the Claimant. He states that he missed the hearing that had been slated for 20th February, 2020 for not having received the invite. He further states that the letter herein was sent to him through the Chief Magistrate Homa Bay Law Courts, while he was stationed at Oyugis law courts at the time. He states that he nonetheless received the letter albeit late after the hearing date was past.
13. The Claimant states that upon receiving the letter inviting him for the disciplinary hearing, he travelled to Nairobi where he wrote a letter to the Director Human Resource, seeking another chance to make his representation.
14. It is the Claimant's case that he was dismissed by the Respondent vide a letter of 8th April, 2019 on ground of gross misconduct. He avers that the certificate he presented to the Respondent at the time he was employed is genuine and that he is not aware of a certificate issued to him in the year 1995, as his certificate is for the year 1993.
15. It is the claimant's case that upon receipt of the dismissal letter, he lodged an appeal against the said dismissal, which appeal did not elicit a response from the Respondent.
16. It is the Claimant's case that the procedure adopted by the Respondent in dismissing him, was not fair and hence the dismissal is wrongful and unfair.
17. On cross examination, the Claimant admitted being given an opportunity to show cause and in response to the show cause, he requested to be retired on medical ground.
18. The claimant seeks that this court awards him reliefs as per his statement of claim.



The Respondent's Case

19. The Respondent's case is that vide a report submitted to it on 14th April, 2016, it was informed that the Claimant's KSCCE certificate was a forgery.
20. The Respondent states that pursuant to this report, the Claimant was suspended and allowed 21 days to respond to a letter of show cause related to the forgery. It is the Respondent's case that the letter was sent through the Senior Principal Magistrate of the Claimant's court station.
21. It is the Respondent's case that the Claimant was afforded opportunity to make representation through both the show cause letter and an invitation to appear before a disciplinary panel. The Respondent states that the letter was posted through postal address 495-Oyugis, being the address, he had provided as his address in his personal file. The respondent further states that the letter was copied to the Senior Principal Magistrate of his station, with instructions to notify the Claimant of the hearing date for his case. It is the Respondent's position that the letter notified the Claimant of the date, venue and time of the hearing.
22. The Respondent states that the Claimant did not attend the disciplinary hearing and the Respondent made a decision based on the evidence before it, which evidence included the Claimant's written representation.
23. It is the Respondent's case that it received the Claimant's appeal and that the same was dismissed in the first instance.
24. The Respondent states that it wrote to the Kenya National Examination Council and in response thereof, it received a letter dated 7th October, 2020, to re-confirm the status of the Claimant's certificate and the verdict from the Council was similar to that given earlier; which is that the Claimant's KCSE certificate was a forgery. The Respondent added that the charges were not based on this latter letter but on previous communications and that this last letter was only a further clarification.
25. On cross examination, the Respondent stated that it undertakes due diligence prior to confirming an employee to the position he is appointed to and that this exercise usually takes about a year.
26. The Respondent confirmed that the Senior Principal Magistrate through whom the Claimant's letter was sent, called to inform him of the letter and the disciplinary hearing, but that the Claimant did not pick the letter as advised.
27. The issues for determination on are:
 - i. Whether the Claimant was wrongfully and unfairly dismissed
 - ii. Whether the Claimant is entitled to the reliefs sought
 - iii. Who bears the costs of the case

Whether the Claimant was wrongfully and unfairly dismissed

28. A determination of whether or not an employee's dismissal is wrongful and unfair, is depended on the employer's adherence or otherwise, to the fairness principles, otherwise called the rules of natural justice enshrined in Section 41 of the Employment Act, 2007 and Article 47 of the Constitution, as well as the question of substantive justification per Sections 43, 45 and 47 of the Employment Act.
29. The Claimant confirmed to this court that he was issued with a show cause letter and 21 days to respond to the charges therein. He also confirmed that he received an invitation to attend a discipline hearing to



make his oral representation on the charges against him. It was the Claimant's evidence that he received his invitation to attend the discipline hearing after the date stated in the said letter and for this reason he did not make his oral representation.

30. The Respondent's evidence is that the letter inviting the Claimant for the hearing, was sent through an address that the Claimant had provided as his address and retained by the Respondent in the Claimant's personal file. It is the Respondent's further evidence that the letter was copied to the Senior Principal Magistrate of the Claimant's station then, who the court was informed, called the Claimant and notified him of the date, venue and time of the hearing, but that the Claimant failed to pick the copy of the letter if indeed he had not received the letter sent to him. He did not attend the hearing.
31. On the issue of the fairness test, the Respondent issued the Claimant with a show cause letter and sufficient time to respond to the charges against him. The Respondent invited the Claimant for an oral hearing which the Claimant did not attend. All indications points to receipt of the letter of invitation for the hearing as the letter was sent in the same way the earlier letters were sent, which letters, the Claimant admitted receiving.
32. In the opinion of this court, the failure by the Claimant to make oral representation was not fatal to the hearing, for reason that he is not the maker of the document subject of that hearing. He would still have gotten a written confirmation from the National Examination Council, to confirm the authenticity of his certificate in response to the charges. Nothing he would have told the committee during the oral hearing would have changed the position that his certificate was a forgery. The Court of Appeal in the case of *Judicial Service Commission v Gilbert Mwangi Njuguna & another* [2019] eKLR, held that an opportunity to produce full and complete written documentation was sufficient and an oral hearing is not always necessary to ensure a fair hearing and consideration of the issues.
33. In the circumstances of this case, written representation was sufficient to clarify the issue subject of the disciplinary proceedings. I find and hold that the Respondent adhered to the mandatory tenets of procedural fairness when arriving at the decision to dismiss the Claimant.
34. On the question of substantive justification, the Respondent's evidence is that the reason they dismissed the Claimant is that his KCSE certificate was a forgery. The Kenya National Examination Council in a letter to the Respondent on a request to verify the Claimant's certificate, responded thus:

“A candidate by the name Maji James registered and sat for the year 1993 KCSE examination at Nyanza Christian College under index number xxxxxx.

However, grades for three (3) subjects have been altered as follows:

 - i. English from D (plain) to C (Plain)
 - ii. Kiswahili from D (Plain) to C (Plain)
 - iii. Mathematics from D- (Minus) to B- (Minus)
 - iv. The mean grade has also been altered from D (Plain) to C (Plain).”
35. The Claimant told the court that he was confirmed to the position of clerical officer on 18th October, 2004. On his part, the discipline proceedings and/or the discovery that his certificate was forged came many years later. Further, in his response to the show cause letter, he requested to be retired on medical grounds; a reason that is unrelated to the charges he faced. The Claimant did not produce any evidence to show that his KCSE certificate was genuine other than stating it in his pleadings.



36. The evidence by the Respondent on the reasons for dismissing the Claimant, is in the opinion of this court valid and fair. The Claimant altered his grades to qualify for a job he would otherwise not have qualified for. The Court of Appeal in the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR held:

“..... 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.”

37. The court follows the holding of the Court of Appeal in the case of Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR, and holds that it was eminently reasonable for the Respondent to dismiss the Claimant, faced with the conduct displayed by him. The court finds the reasons for the dismissal of the Claimant valid, fair and justifiable (See Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union [2017] eKLR).

38. The court finds and holds that the Claimant’s dismissal is neither wrongful nor unfair.

Whether the Claimant is entitled to the reliefs sought

39. The reliefs sought are all tied to the court making a declaration of wrongful and unfair termination. Arising from the holding that the dismissal of the Claimant is fair, the court returns that the claimant is not entitled to any of the reliefs sought.

40. In conclusion, the Claimant’s Claim is dismissed in its entirety

41. The Claimant shall bear the costs of the suit.

42. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 25TH DAY OF NOVEMBER, 2021.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Odhiambo Present for the Claimant

Mr. Robert Mwangi Present for the Respondent

Ms. Christine Omollo- C/A

