



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.224 OF 2017

PETER WANGAICLAIMANT

VERSUS

EGERTON UNIVERSITY.....RESPONDENT

JUDGEMENT

Issues of the claim - *unlawful termination, accrued annual leave, salary arrears and increments, annual gratuity, house allowance, reinstatement with benefits.*

The claimant is seeking the following;

Judgement against the respondent for;

- i) General damages;*
- ii) Reinstatement with benefits;*
- iii) Costs of the suit;*
- iv) Interest on (i) above;*
- v) Any other relief that this court deems fit to grant.*

Claim

1. The claimant is a legal consultant and a medical Doctor, who was employed by the respondent as permanent and pensionable employee on 19th November, 2009. The claimant was employed in the respondent university in the Faculty of Health Sciences.
2. On 19th September, 2011 members of the Faculty of health Sciences (the Faculty) commenced procedures against the claimant with intent to endorse candidates that had failed pathology examinations to pass without any basis. The claimant resisted these attempts to unfairly pass or the endorsement of students who had failed pathology examinations.
3. By letter dated 21st September, 2011 the claimant was invited to attend a meeting on 22nd September, 2011 at 8.30am which he did but found no meeting. The claimant later learnt that the meeting took place but at 2.00pm and in his absence. Such meeting related to his character and a recommendation was passed to take disciplinary action against him. the claimant also learnt that the re-sits and or special exams were to be conducted on the 10th and 14th October, 2011 and his annual leave which was to commence on 14th October to 18th November, 2011 was approved.
4. On 22nd December, 2011 the claimant was issued with a show cause notice for gross misconduct on the grounds that he was involved in behaviour that amounted to gross misconduct in contravention of the CBA, section 44(4) (c) and (e) of the Employment Act. the reasons given were;
 - (a) Insubordination; and
 - (b) Sexual improprieties and academic intimidation to students

5. On 12th June, 2012 the claimant attended a disciplinary meeting with the University Council Disciplinary Committee (UCDC) which recommended that the charges were not specific and should be redrafted and be charged afresh in accordance with the terms and conditions of service.

6. On 18th June, 2015 the claimant was invited to the UCDC to answer to charges of;

(a) Insubordination contrary to the CBA and section 44(4) of the Employment Act;

(b) Neglect of duty contrary to the CBA and section 44 of the Employment Act; and

(c) Sexual inappropriateness and academic intimidation to students.

7. On 26th June, 2015 the claimant responded and requested to be furnished with documents and statements to be relied upon. Such documents were not supplied and the claimant filed **Petition No.6 of 2015** on 2nd July, 2016 which was heard and Judgement delivered on 23rd March, 2016 and following the same the claimant was invited before the UCDC for 11th May, 2016.

8. On 19th October, 2015 the claimant was issued with a letter dismissing him from the service of the respondent for alleged gross misconduct on the grounds that he had been found guilty of all charges of insubordination, negligence of duty and sexual inappropriateness with students. The claimant rejected such findings and protested his dismissal and requested for the minutes leading to such a decision which the respondent ignored forcing the claimant to **file Judicial Review No.7 of 2016** to access the documents. The claimant also challenged the reasons leading to his dismissal on the grounds that what the respondent's Council had ratified as amounting to insubordination was on the grounds that on 9th August, 2011 and 20th September, 2011 he intimidated the Dean faculty of health sciences by way of writing threatening emails and threatening to sue the dean. That the claimant neglected duty by combining 3rd and 4th year students and administering the same exam contrary to the Dean's instructions. That the claimant was insubordinate by frustrating the Council committee from carrying its mandate since 2012.

Judgement in Judicial Review No.7 of 2016 was delivered on 25th November, 2016 and the court struck it out.

9. The claim is also that the respondent's actions against the claimant were unfair, unlawful and illegal as they were actuated by malice, spite and contrary to the rules of natural justice and the Employment Act. Such actions were unlawful for the reasons that the faculty management committee did not exist prior to 14th June, 2012. By holding a meeting without the chairman of the pathology department over a matter relating to the Faculty was irregular. Also the recommendations that the claimant be dismissed from service was without the requisite authority. The UCDC had no power to recommend for dismissal of the claimant and such findings were arrived at contrary to findings that the claimant was not insubordinate. The alleged threats to the dean lacked basis as such officer is not immune to being sued. There was no union official or representative invited to attend at the disciplinary meetings.

10. The recommendations made against the claimant were wrongful as the allegations leading to the dismissal were devoid of any merit on the grounds that no student complained or appeared before the UCDC to give evidence; the dean did not attend to give evidence; the alleged examination papers taken by a combined group of students were never produced, no member of the Faculty attended to give evidence and the findings of the Council were at variance with the UCDC findings.

11. The reasons thus leading to dismissal from employment lacked validity, contrary to fair labour practice and not justified. Such action should be redressed by judgement being entered as prayed for general damages, reinstatement with benefits and costs of the suit.

12. The claimant testified in support of his claims.

13. The claimant was dismissed from employment on 6th July, 2016 following what he testified to be concerted efforts by the respondent to deny him justice.

14. The claimant also testified that matters culminating to his dismissal commenced following a complaint made against him on 6th December, 2011 alleging that he was insubordinate and had engaged in inappropriate conduct against his students and had intimidated them. He was issued with a show cause notice to attend before Council on 12th June, 2012 on the grounds that there were complaints from the Faculty to which he had not been informed.

15. Noting the allegations made against him were serious and meant to injure his character and reputation, the claimant filed **High Court Case No.304 (a) of 2012** for defamation. He was then suspended from duty.

16. The claimant also testified that Dr Obure who had improperly been appointed as acting chairman of the Department of Pathology to which he protested as he was not member of the Faculty. The claimant had raised concern that Dr. Obure could not be chair to two (2) departments and on this basis Dr Obure took offence and commenced complaints against the claimant on the grounds that he had refused to add some students marks which was contrary to ethical conduct and such addition of marks would result in students who had not passed their examination and courses being let out into the market as Doctors without proper qualifications.

17. When the claimant was invited before the disciplinary committee, Dr Obure was also present. The Legal Officer Ms Janet Bii who had drafted the charges was also present. Such attendance was irregular and denied the claimant a fair hearing.

18. The claimant also testified that the claims made for payment of damages are for pain caused by the respondent by the actions taken

which are devoid of any merit. He has had to carry the burden of the false allegations for the last 6 years and been forced to move the court to assert his rights in various matters following unfair practices by the respondent. All the charges made were concocted and are bad to remain on the record. Where the Respondent's Council had dismissed the charges and then the same were used to effect dismissal, such conduct is with malice and the court should redress in payment of damages.

19. The claimant testified that he is seeking reinstatement back to his job and payment of damages and any other relief that the court may find necessary fit to grant. Such payment and orders should put into account the applicable CBA, leave that is due, CBA arrears and increments and costs.

Defence

20. The respondent has denied all allegations made by the claimant and further avers that they received complaints against the claimant through the Faculty of Health Sciences Management Committee raising various offences, inter alia neglect of duty, insubordination and sexual inappropriateness with some female students and staff members. Upon considering these offences, recommendations were made to the effect that the claimant be referred to disciplinary proceedings with a view of establishing the truth to the complaints raised.

21. The defence is also that the respondent was unable to conduct disciplinary proceedings as scheduled since the claimant filed various suits with a view of blocking any disciplinary proceedings against him and more particularly on 2nd July, 2015 he filed Petition No.6 of 2015.

22. The claimant attended the Special Finance, Human Resource and General Purposes Committee of Council (Staff Disciplinary) where he faced 3 charges and during such hearing he admitted to the charges of insubordination and neglect of work. The committee made observations that the claimant was guilty on the charges of insubordination, neglect of duty and sexual inappropriateness with students. The committee then made a recommendation to council to dismiss the claimant.

23. On 26th May, 2016 a Special Council Meeting was held where the respondent Council considered the deliberations and recommendations made and on 6th July, 2016 it issued the claimant with letter of dismissal setting out the grounds thereof.

24. The respondent complied with the applicable law, the CBA and fair procedure in addressing the claimant's case. He was informed of charges against him and invited to a hearing by an impartial body and which found him to have committed the alleged offences and therefore dismissal from employment was justified.

25. The claimant was advised of his right of appeal.

26. The claimant is a vexatious litigant taking into account the various suits he has filed against the respondent consequently hindering the disciplinary proceedings from taking place for a period of 7 years.

27. There was no notice issued before filing suit and the claimant is therefore not entitled to costs.

28. In evidence Dr Thomas Serrem, Registrar Human Capital and Administration testified that he is conversant with the claim and competent to testify for the respondent.

29. The claimant was an employee until 6th July, 2016 when he was dismissed.

30. Dr Serrem also testified that the genesis of the claimant's case was in the year 2011 where the respondent, through the Faculty received complaints against the claimant and following preliminary investigations a sub-committee was formed to determine whether the claimant had a case to answer. The committee thereafter convened and the allegations tabled at a meeting held on 22nd September, 2011. The claimant had been duly informed of the meeting.

31. When the claimant failed to attend the meeting scheduled for the 22nd September, 2011 he was invited to a council meeting on 12th June, 2012 where he challenged the allegations made and a recommendation was taken that the same be redrafted. The claimant was then invited to a meeting for 31st July, 2012 but he instead filed **Nakuru HCCC No.403 (a) of 2012 – Prof. Kiama Wangai versus Dr. Pamela T. Simbili & 9 Others** which was a suit against 8 members of the disciplinary committee and related to him seeking damages for defamation. The respondent was enjoined as an interested party.

32. Together with **HCCC No.403 (a) of 2012** the claimant also filed another suit to stay the disciplinary proceedings. Upon inter parties hearing, on 7th August, 2013 such application was dismissed on 28th February, 2014 and vacated the stay orders.

33. On this basis the respondent issued the claimant with hearing notice for 6th March, 2014 but instead he filed **Judicial Review No.7 of 2014** and which gave stay of disciplinary proceedings. The application was heard and dismissed on 11th June, 2015. The claimant lodged **Nakuru Civil Appeal No.176 of 2015** at the Court of Appeal. Such Appeal was dismissed on 30th October, 2015 for lack of merit and jurisdiction.

34. When the claimant failed to obtain stay orders before the Court of Appeal, he instead filed **ELRC Petition No.6 of 2015** with the purpose to obtain the listed document and material to enable him prepare for the disciplinary proceedings against him. The Petition was heard and dismissed on 23rd March, 2016 and the court noted that the claimant had been fully informed of allegations against him and been supplied with the relevant materials. The claimant was also directed to appear before the disciplinary committee when invited to do so.

35. By letter dated 28th April, 2016 the respondent invited the claimant to attend disciplinary hearing on the 11th May, 2016.

36. Dr Serrem testified that upon hearing of the claimant's case the Committee observed that the claimant admitted to insubordination, neglect of duty and inappropriate conduct with students. A recommendation was made to dismiss the claimant from his employment with the respondent. Such committee decision was ratified by Council and by letter dated 6th July, 2016.

37. Upon cross-examination, Dr Serrem testified that the allegations by the claimant that the students/staff who complained against him were not called during the disciplinary hearing are an afterthought since he never raised the matter during the hearing. The claimant was supplied with all documents relating to the charges he faced and he never indicated that he required to cross-examine the complainants.

The respondent at this stage was not bound by the strict rules of evidence to conduct the internal disciplinary hearing like a criminal trial.

38. with regard to the specific charges and allegations facing the claimant, Dr Serrem testified that;

On the first charge about insubordination, there was no specific complaint sent from the Pathology department that the claimant had failed to obey lawful orders or directions. In the committee meeting held on 22nd September, 2011 to deliberate on these allegations, there was no representative from the Pathology Department to urge such a claim;

On the second charge over alleged academic intimidation to student there were no specific student's complaints. There were no statements by any student in this regard. No statement has been filed herein to confirm such allegations; and

On the third charge on sexual inappropriateness with students and staff, there is no complaint filed. No statement of any nature in this regard has been supplied to the claimant.

39. In the minutes from the committee meeting of 22nd September, 2011 it was noted that that the claimant did not attend. It was also noted that the claimant had failed to table moderation report on the basis that such would be leaked. The invitation to the meeting stated that it would be held at 8.30am but this was not the case. The invitation had no agenda and Dr Serrem testified that this was deliberate as matters facing the claimant were gross and required to be discussed with him. However the complaints made and leading to the gross misconduct allegations were not submitted. No investigation reports have been filed with regard to the allegations made and resulting in the drafting of the charges against the claimant.

40. Dr Serrem also testified that during the various hearings where the claimant was invited and attended, there was no union representative as provided for under the CBA.

41. Before the internal disciplinary committee, the claimant denied all the allegations made against him but the sub-committee decided to escalate the matter to the Council.

42. At the close of the hearing, both parties agreed to file written submissions.

From the pleadings, the evidence and document and records filed by either party or the written submissions by the claimants the issue which emerge for the court for determination can be summarised as follows;

Whether there is unfair dismissal from employment;

Whether the claimant is a vexatious litigant; and

Whether there are any remedies available.

43. It is common cause that the parties herein were under a Collective Agreement (CBA) which regulated the terms and conditions of employment. The claimant was unionised under UASU and although such unionised did not participate in these proceedings, this fact is not challenged.

44. By letter dated 6th July, 2016 the respondent dismissed the claimant from its service on the following grounds;

RE: DISMISSAL FROM SERVICES

Refer to the hearing which was convened by the University Council Staff Disciplinary Committee meeting of 11th May, 2016 wherein you were invited and indeed you attended and regret to inform you that it was resolved that you be dismissed from the services of this institution with effect from 6th July, 2016 for gross misconduct. The committee found you guilty of all the charges of insubordination, negligence of duty and sexual inappropriateness with students details of which are within your knowledge. ...

45. As to whether there were fair grounds for dismissal, the court is guided by the provisions of section 47 of the Employment Act, 2007 (the Act) which provides that;

5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.

46. The law places the burden of prove upon the employee to demonstrate that the termination of employment was unfair or wrongful. On the other hand upon the employee satisfying the court that there was unfair termination or wrongful dismissal from employment, the employer is then required to justify the grounds leading to termination of employment or wrongful dismissal.

47. The Court of Appeal in addressing the question of burden of proof and provisions of section 47(5) of the Act in the case of **Cooperative Bank of Kenya Limited versus Banking Insurance & Finance Union (K) [2017] eKLR** held that;

*... under Section 47(5) of the Employment Act the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer. It is a shared burden, which strictly speaking amounts to the same thing. Consequently, as noted by this Court in **Iyego Farmers' Co-operative Sacco vs. Kenya Union of Commercial Food and Allied Workers [2015] eKLR**, whenever an issue of wrongful or unfair dismissal arises, the court looks at the validity and justifiability of the reasons for termination and also interrogates procedural fairness.*

48. The burden placed upon the employer is posted under section 43 (1) of the Act and which requires the employer

... 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.

49. In this regard, the claimant contested the reasons given for his dismissal on the grounds that the findings by the University Disciplinary Committee were arrived at before he could get audience to urge his defence and the charges and particulars were modified contrary to what had been initially presented. In any event, the claimant testified that on the alleged insubordination and particulars thereof, the allegation of not attending meetings does not constitute insubordination and the person allegedly insubordinate did not give evidence as to the nature of such a charge.

50. With regard to the alleged neglect of duty, the claimant testified that the particulars that he combined students in examinations is not true and he never administered the same examination and there were no directions by the Dean that examination regulations were not followed.

61. With regard to alleged intimidation of the Dean by filing suit in **Nakuru HCCC No.403 (a) of 2012** such allegations are without basis as the Dean and members of the disciplinary committee are not immune to being sued and the claimant exercised his rights within the law.

52. With regard to alleged sexual inappropriateness with students and staff, the claimant testified that no student made complaint or appeared before the University Council to give evidence, and no statements were supplied to him for him to respond or cross-examine the alleged complainants. The claimant also testified that the dean did not appear to testified over any allegations, the purported examination papers taken by a combined group of students were not produced, no member of the faculty or department attended before the disciplinary committee of council to give evidence on his/her intimidation and therefore the findings of the council were without basis, merit and amounted to an illegality.

53. Thus challenged, the respondent as the employer had to justify that the alleged grounds and reasons leading to the dismissal of the claimant from his employment were valid and fair. The respondent submitted that upon the employment of the claimant, his conduct was regulated by the rules and regulations of the respondent. as a lecturer, the claimant failed to attend to his duties with diligence and his conduct to his students and superiors was inappropriate and which led to the grounds for his summary dismissal.

53. The respondent also submitted that when the claimant was faced with the threat of disciplinary action being taken against him, he ensured that the process was stalled through numerous court proceedings. He finally appeared before the disciplinary committee on 11th May, 2016 where he was given a fair hearing and his defence was given consideration and a decision taken that he was guilty of the charges put forth against him.

54. The decision to dismiss the claimant from his employment with the respondent was crystallised at the respondent's Council Meeting held on 26th May, 2016 where the report and recommendations from the Staff Disciplinary Committee held on 11th May, 2016 was submitted for the Council consideration.

55. The Staff Disciplinary Committee had made the following findings;

... recommendations from the 284th Special Finance, Human and General

Purposes (Staff Disciplinary) Committee ... met on 11th May, 2016 to deliberate on the disciplinary case of Dr Peter Kiama Wangai... Senior

Lecturer, Department of Pathology, Faculty of Health Sciences.

The charges levelled against the defendant were:

1. Insubordination contrary to section 16(b) iii of the CBBA ... read together with section 44 (e) of the Employment Act...

It was alleged that:

(a) He failed to attend Faculty Board Meetings to discuss crucial academic issues. He only attended two meetings held

on ... out of a total of eleven meetings convened during the period.

(b) He failed to recognise Dr Samson O Obure as chairman of department in the meeting held on 9th September, 2011 and 20th September, 2011.

(c) He failed to attend examination moderation meetings held on 6th October, 2011 and 10th October, 2011 convened by the moderation committee chaired by the Dean of the faculty alleging that if the exams were moderated than it was a sure avenue of leaking exams.

(d) On 14th October, 2011 he proceeded on leave without the authority and approval of the Dean, Faculty of health sciences.

(e) He used abusive language and lack of respect, vulgarism and insubordination in his various emails and sms to chairman of Department of the Dean Faculty including an External Examiner.

2. Neglect of duty contrary to section 16(b0 iii of the CBA read together with section 44 (c) of the Employment Act, 2007.

It was alleged that:

(a) He failed to forward examinations for the courses (Pathology and Microbiology) which he taught for moderation as was expected of him as part of his duties leading to the cancellation of the said re-sit examinations.

(b) He failed to hand over the marking scheme for the re-sit examinations (pathology and Microbiology) forcing the Faculty to source for other examiners who prepared the scheme and later marked the scripts.

(c) He combined 3rd year, 2011 and 4th year, 2012 students in 2010/2011 academic year classes and attempted to administer the same examination against the Dean's instructions.

(d) He failed to collect and make corrections on the end of year pathology examinations for MBChB students as suggested by the external examiner, thus inconveniencing students since the said examination was deferred from 23rd July, 2013 to 29th July, 2013. ...

3. Sexual inappropriateness and intimidation of staff and students: It was alleged that;

(a) He was involved in inappropriate sexual conduct with female students of 4th and 5th years.

(b) he often gave an example of a student of the University of Nairobi who did not please her lecturers and she had to spend another year in medical school, thus intimidating the students giving into his sexual proposals in exchange of assurance that they would not fail their exams.

(c) He showed the students his photographs with prominent people like the Chief Justice to further intimidate them creating an impression that he is untouchable and well connected.

(d) Intimidation by threatening to sue Dean, Faculty of Health Sciences and other staff while in the course of their duty.

56. Before the respondent's Council, the Staff Disciplinary Committee had a single paragraph on the outcome as follows;

The defendant responded to all the three charges above levelled against him by the University and he admitted to the charge of insubordination by not attending meetings held on various dates apart from the one held on 9th August, 2011 and 20th September, 2011; intimidation of the Dean, Faculty of Health Sciences by way of writing threatening emails and threatening to sue the Dean; Negligence of duty by combining 3rd and 4th year students and administering the same exam contrary to the Dean's instructions.

57. On these recommendations and outcome, the respondents Council held as follows;

The defendant in subordinated the Council Committee by frustrating the ... to carry out its mandate since 2012 as appertain to his case.

Approved:

The dismissal from service with immediate effect of Dr Peter Wangai Kiama, Senior Lecturer, Pathology department for insubordination, negligence of duty and intimidation of staff and students in the Faculty of Health Sciences.

58. Before the Staff Disciplinary Committee held on 11th May, 2016 which heard the claimant and where allegedly he admitted to the allegations made against him, present were the followings;

Dan N Nguchu, chairman,

Josiah O Okumu, Member,

Paul Mwangi, rep, Principal Secretary, State Department of Higher Education...

Joy M Murithi, rep. Principal Secretary, National Treasury,

Prof Rose A Mwonya, Vice Chancellor/Secretary

In attendance

Prof. Njenga Munene J – Deputy Vice-chancellor

Prof. Josiah O Omolo – Re. Deputy Vice-Chancellor

Dr Samson O Obure – Dean, Faculty of Health Sciences

Dr. Steven Muthui – Chairman, Pathology Department

Dr. Thomas Serrem – Registrar,

Ms Janet Bii – Legal Officer

Dr. Kiama Wangi – Senior Lecturer, pathology Department/defendant

Mr Kipng'etich Cheronno – Ag. Deputy Registrar.

60. The same charges as presented to the Council on 26th May, 2016 were replicated.

61. On the charge of insubordination, the claimant accepted that he did not attend all the Faculty Board meetings because he was having lecturers and he was still new in his employment. On alleged failure to recognise Dr Obure as chairman the claimant's defence was that he was chairman Physiology Department as a Physiologist and hence he could not purport to moderate pathology examinations and the claimant had not been invited to the moderation committee. The claimant also testified that he proceeded on his annual leave as approved by the chairman of Physiology Department.

62. The claimant also gave his defence that in his email communications to the Dean and external examiner his choice of words was not abusive but noted he wrote out of frustrations he underwent in the faculty where new departments like Paediatrics were being created rather than pathology which should have been established first.

63. Did these defences constitute admission to insubordination as alleged?

64. Failure to attend several meeting on the grounds that the claimant was attending to his lectures is a reasonable defence and looked at visa-a-vies the allegations, such attendance to lecturers was part of the core duties for which the claimant had been appointed to undertake.

65. On the challenge to Dr Obure as chairman of a department for which he was not professionally qualified, the respondent ought to have addressed such matter with caution and diligence instead of applying it as a disciplinary measure against the claimant. looked at by the court on the allegations made, the evidence submitted, where the claimant protested, urged or challenged Dr Obure for holding such office(s), any reasonable person attending ought to have done similarly and by the claimant voicing his concerns, as part of the Faculty, to issue sanction is to muffle openness free speech.

66. On alleged negligence of duty, the claimant gave his defence that;

He forwarded the pathology examination for moderation but he did not hand over the making schemes for the re-sit examinations;

He was officially on leave at the time of the re-sit of examinations and the person responsible should have taken this up;

The claimant accepted combining 3rd year, 2011 and 4th year, 2012 classes because he was the only lecturer teaching the course and the course content was the same for the two groups; and

He also gave his defence that the Dean, Faculty of health Sciences refused to hand over the draft examination for the end of the year pathology examination corrections.

67. Are these defences reasonable in the circumstances of the allegations made?

68. The claimant maintained in his evidence that his tribulations with the respondent started in the year 2011 when Dr Obure required of him to add marks to some students so that they could pass their examinations. The claimant declined on the basis that such was contrary to professional ethics, it was immoral to allow students to pass and be released to the public without proper qualifications and as a pathologist, and such would not suffice. Such a stand put him at loggerheads with Dr. Obure. Together with the issue of being asked to add marks to some students by Dr. Obure, the claimant had challenged the continued holding of office by Dr Obure who was not a pathologist yet he was chairman in the department whereas he was a Physiologist. Such resulted in bad blood between the two and the allegations and complaints which followed were a witch-hunt to remove the claimant from his employment.

69. With this background, the alleged neglect of duty weighed and defences given, the same are found by the court as reasonable and justified. Where the claimant was moderating his examinations and feared sharing marking schemes would result in a malpractice, to prevent the same, he withheld the same. Such cannot be equated to negligence of duty as properly so defined.

70. The claimant did not fail to attend to work when he took annual leave with approval from the department chairperson.

71. As the sole lecturer and examiner in pathology, the rationale given as to the combination of students is fair and reasonable. Where the examinations had been moderated and returns made, it would have been apparent to the person responsible in evaluation that they related to the same matter(s) and by placing the students in a combined class there was no loss, damage or act contrary to what a reasonable lecturer should or ought to have attended.

72. On alleged sexual inappropriateness and intimidation of staff and students, the claimant gave his defences that he was not involved in any acts of sexual inappropriateness with his students and asserted that such a charge was injuries to him. no staff or students were called to support such allegations in all the previous disciplinary hearings. In his classes both sexes failed or passed in their examinations and hence he could not be accused of targeting either or favouring any. He never showed his students his photographs with the Chief Justice and he accepted to filing suit against the Dean, Faculty of Health Sciences in pursuance of his rights and such did not amount to intimidation.

73. The Disciplinary Committee putting into account the allegations made and the defence given by the claimant made its findings that; the claimant was insubordinate for failing to attend 9 out of 11 meetings and failing to recognise Dr obure as chairman, failing to attend moderation meetings, use of abusive language and that he failed to recognise university structures.

74. The Committee also held that the claimant neglected duty when he failed to hand over pathology re-sits examination for moderation which made the university to cancel the examination and he combined students contrary to instructions.

75. The claimant was also found guilty of threatening the Dean and making good his threats by filing suit against him. and also he was found guilty of sexual inappropriateness in the following terms;

... guilty of sexual inappropriateness with two female students because he failed to appear before the Faculty Management Team despite the fact that he was invited to do so and the witness statements from the two female students collaborated the evidence of sexual harassment.

76. As noted above, the allegations made and the defences given weighed all had reasonable defence and had such been put into account as set out above, the findings and recommendations made to Council well addressed should not have resulted in a finding of gross misconduct or dismissal from service.

77. On the last charge of sexual inappropriateness, the details with regard to the complaints by the two female students and their evidence before the Faculty Management Team are lost. Nothing was submitted in this regard.

78. These are serious allegations and where true, an investigation into the allegations ought to have been conducted to ascertain the veracity of the same instead of the simple and baseless finding which have been repeated in every letter and documents without any evidence. Where indeed there were such allegations, the respondent ought to have moved with haste and firmness to deal and address.

Where investigations into the claimant's conduct were undertaken, the details as to the same, outcome and responses is denied of this court. these allegations are left bare and empty. Such can only translate to the use of serious allegations without basis so as to injure and damage the character and career of the claimant. Such should not be sanctioned by the court. for whatever reasons the respondent allowed these allegations to flourish under its mandate, the damage to the claimant is clear, he stood in court humiliated, dehumanised and keen to clear his name from such allegations.

79. The subsequent filing of suit on the basis of defamation, though this is not for this court to address herein, emerge from the background of this matter and the claimant cannot be crucified for protecting his name, career, character and person. To do so by filing suit is what a reasonable person ought to do.

80. Therefore when the respondent's Council received the recommendations of the Disciplinary Committee and present were the same members presiding before the Disciplinary Committee, The Council proceeded to find the claimant had admitted to the allegations made against him and therefore made a decision to dismiss him. such finding of admissions to all the charges made against the claimant was erroneous. He did not admit to any charge. He gave a defence to each.

81. Had such defences been interrogated by the respondent's Council and addressed on their merits, the outcome decision to dismiss the claimant ought not to have been arrived at. Had the case been reviewed on its merits, a different decision ought to have been arrived at.

82. What constitutes gross misconduct under the CBA?

83. Under Clause 12 (iii) of the CBA dismissal from employment was agreed by the parties to be a sanction taken after according the employee due process and upon a finding that one was absent without approval, being guilty of a criminal offence, use of abusive language, one is drunk while at work, neglect of duty and failure to obey lawful orders.

84. Clause 12(iii) of the CBA is largely a replica of section 44(4) of the Act.

85. The findings thus made against the claimant that he was of gross misconduct and warranted dismissal required interrogation and justification as to why the allegations of insubordination, neglect of duty, intimidation and sexual inappropriateness warranted such sanction where true. The sanction of dismissal where appropriate should follow the steps that CBA parties had committed to follow before it applied. Such required the attendance of the union at the hearings, warnings, suspension or an interdiction. Such steps were to allow for investigations and a chance to have that employee attend and give his defence.

86. It is also important to revisit the provisions of Section 43(2) of the Act which provides that;

(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

87. The reasons leading to termination of employment must be what an employer genuinely believes to exist and upon giving the employee a fair chance to a hearing before a representative of his choice and upon considering the defence given, then the employer good basis to effect termination of employment. Without a genuine reason, the employer should give the employee the benefit of doubt and allow them in employment by taking any other sanction other than termination of employment.

88. The provisions of section 43 of the Act must also be weighed with those of section 45 where an employer is required to prove that;

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility;

or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

89. Where there is no genuine reasons leading to termination of employment, to proceed and dismiss the employee such amounts to unfairness as there is no valid or fair reason existing to justify the same. Even where all procedural requirements are followed, such does not negate the lack of a substantive reasons r=leading to termination of employment.

90. A fair process in addressing any allegations against an employee does not sanitise the invalidity and unfairness of the reasons. Procedural safeguard are just the last element to section 45(2). Procedural fairness should only arise where there is a substantive reason to justify termination of employment and not the other way round.

91. A sham trial process does not sanitise an unfair termination of employment.

92. In this case, the allegations made against the claimant were without basis, they lacked material evidence and the findings by the Council to Dismiss the claimant from service for gross misconduct was at variance with the findings and defences made. Such resulted in unfair termination of employment and contrary to section 43 and 45 of the Employment Act, 2007.

93. On the second issue for determination as to whether the claimant is a vexatious litigant, this arose in his letter of dismissal from employment where the claimant was alleged to have frustrated the respondent in its efforts to hold disciplinary action against him. the claimant admitted to filing various suits to protect his rights;

He filed Nakuru HCCC 304 of 2012 on the basis that on 6th January, 2012 he received a show cause notice for gross misconduct and was required to appear before the disciplinary committee on 12th June, 2012 to answer to various charges which had been publicised and were malicious in the nature of being defamatory;

He filed JR No. 9 of 2014 seeking order of Certiorari and to quash the decision of the respondent contained in letter dated 6th March, 2014 inviting him to disciplinary committee;

He filed Petition No.6 of 2015 seeking to stop disciplinary proceedings against him by the respondent; and

He filed the current suit seeking damages, reinstatement and payment of his dues under the CBA.

94. The above suits have been addressed on their merits by competent courts. Some before the high Court, one went to the Court of Appeal and the current matter is before this court. each matter has its merits.

95. Where the respondent is aggrieved, a defence, count-claim, cross-petition can well address each cause on its merits as the claimant is before this court as a former employee of the respondent and while his employment subsisted and ending on 6th July, 2016 he was protected under the provisions of section 46(h) of the Act;

46. Reasons for termination or discipline The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty—

...

(h) an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation; or

96. In the court humble view, such provisions were passed by parliament in recognition of the position held by a person similar to the claimant, and where faced with work relations and environment as he was faced at various points before filling HCC No. 304 of 2012, JR No.9 of 2014, Petition No.6 of 2015 and JR No.7 of 2016 he required to assert his rights and thus should be protected from victimisation, intimidation, harassment and frustrations. Such is to ensure an employee who seeks to assert his rights at work receives the protection of the court and is able to urge his court on good foundation.

97. Where the suits filed are found without basis, the respondent as the employer or defendant has resource to the same courts. The claimant on good cause filed various suits and in each he received guidance of each court. he cannot be said to be a vexatious litigant as in each case he urged a cause that was appropriately addressed by the courts.

98. The committee meeting held on 22nd September, 2011 where the claimant was invited but he did not attend as the invitation noted the time to be 8.30am but he later learnt the meeting was held at 2pm. The court reading of the issued notice and the minutes for the meeting confirm the difference in timelines. Where the claimant was invited to the meeting to be held at 8.30am but held at 2pm, such was not reasonable time and his non-attendance was due to no fault of his own, rather the respondent should bear responsibility.

99. Following this meeting, extensive findings against the claimant were made. The spiral effect was that, at the shop floor and during such preliminary investigations level, he was denied justice. Had such a committee honoured its own invitation in terms of time to allow for the claimant to attend as scheduled, he would have had a fair chance to argue his case against the very serious allegations made against him, that of insubordination, neglect of duty and inappropriate sexual misconduct.

100. Moving forward from such lapse there was no longer a fair playing ground for the claimant, as it were. He filed several suits to assert his rights. The suits were heard on their merits. The respondent attended and defended each case.

101. In this regard, The claimant was forced to file various suits to assert his rights.

102. From the defence at paragraphs 21 and the evidence of Dr Serrem, the action by the claimant filing various suits was taken as an attack to the employer, the respondent. He was perceived as a vexatious person. Hindrance to actions taken by the respondent. an irritant to the process leading to his dismissal from employment.

103. Such conduct by the respondent is addressed in under article 41 of the constitution as unfair labour practice. It is further expounded under sections 41, 43 and 47 read together with section 45 of the Employment Act, 2007 as both procedural and substantive unfairness.

104. On the above findings, the court will deal with the remedies.

105. The claimant is seeking general damages, reinstatement with benefits and costs. The award for general damages has been left for the court to determine based on the evidence and submissions made.

106. The claimant asserted his right to reinstatement as his main remedy and following the unfair and unlawful termination of his employment. The claimant also testified that despite his case starting in the year 2011 he remained in the service of the respondent and worked diligently until his dismissal on 6th July, 2016. During such period he was of good performance and rendered service to the Department of

107. Pathology professionally and as directed by the respondent. save for matters relating to this case he had no warning, sanction or other disciplinary matter against him with the respondent and thus the remedy of reinstatement would be most appropriate and resumption of duty would help his students and the respondent's workforce.

108. Upon the findings of the court that there was unfair termination of employment for lack of substantive grounds and the claimant's main remedy being that of reinstatement, section 49(3) of the Act provides as follows;

(3) Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to—

(a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated;

or

(b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.

109. The above provisions must be read together with section 49(4) which requires the court to put into account *any* or *all* of the provisions there. Of importance and in the court humble opinion is that section 49(4) (a) that;

(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—

(a) the wishes of the employee;

110. Other considerations which the court may put into account are the circumstances leading to termination of employment and which the court has made a finding was unfair, the practicability of reinstatement or a re-engagement and whether the employee had contributed to the termination of employment, put into consideration that such a remedy at common law should only issue in exceptional circumstances, length of employment, length of term in continued employment, other opportunities available to the employee, value of any severance payable in law, total terminal dues payable to the employee, any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and any compensation, including *ex gratia* payment, in respect of termination of employment paid by the employer and received by the employee.

111. This is an interrogation of the employee upon the finding that the remedy of reinstatement is appropriate and should redress the unfairness committed against him by the employer. In addressing such consideration, the court is invited to ensure fairness to both parties and fundamentally the provisions of article 41 of the Constitution that the right to fair labour relations is part of the Bill of Rights due to every employee.

112. As correctly submitted by the respondent, the court in addressing the remedy of reinstatement should ensure the balance of interests between the employee and the employer. The Court of Appeal in the case of **Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** held as follows;

The remedy of reinstatement is discretionary. However the Industrial Court is required to be guided by factors stipulated in section 49(4) of the EA which includes the practicability of reinstatement or re-engagement and the common law principle that specific performance in a contract for employment should not be ordered except in very exceptional circumstances. The court should also balance the interest of the employees with the interest of the employer. Thus, the court could consider in a redundancy situation whether reinstatement would be a surplus to employer's requirements; whether the employer will be required to dismiss other employees and whether it would perpetuate the problems of the employer. The court appreciated that the Airline was faced with a cyclic economic down turn but said that it had not faced a downfall. The court also appreciated that the Airline had offered generous redundancy and VER packages. ... The EA has enacted the common law principle that the remedy of reinstatement should not be given except in "very exceptional circumstances". The factors taken into account by learned Judge, are not, looked at objectively "very exceptional". There was evidence that roles had been abolished and services in some cases outsourced.

113. The above suit arose out of a redundancy. The employer had laid off a big number of its employee. In considering the exceptional circumstances, the court reversed the order of reinstatement. However, in my humble view, the provisions of section 49(3) and (4) are not competing rights. The remedy of reinstatement is lawful and where this is the appropriate remedy to grant in a given case upon the evidence of the parties, and this being the primary wish of the employee, the court should not hesitate from granting reinstatement. Shying away from making such an order would defeat the course of justice sought by an employee unfairly terminated from his employment for no justifiable cause. It is a lawful remedy. There is a legitimate expectation that the court should issue such a remedy.

114. In the case of **Parliamentary Service Commission versus Christine Mwambua [2018] eKLR** the Court of Appeal in addressing the reasons leading to termination of employment and in confirming the remedy of reinstatement held as follows;

To compound matters, the termination letter dated 9th May, 2014 gave the reason for termination as "gross misconduct" and listed four grounds. The grounds were never served on the respondent for her response before the decision was made. Now, 'gross misconduct' is one of the provisions under the Regulations upon which an employee may undergo disciplinary proceedings. It is in Regulation 26 that various punishments are prescribed for it. It is not explained anywhere why the ultimate punishment of termination was resorted to when other modes of punishment were available for the infractions found to have been committed. Indeed, at some level, the appellant suggested a 'severe reprimand and re-deployment' for punishment which would mean there was neither consistency nor unanimity in the manner the appellant chose to proceed. The respondent's letter dated 13th May, 2014 appealing against the termination was not denied, but nothing was said about it before she was ordered to return the appellant's property. ... The court was clear in its findings that the termination of employment was most illogical, unlawful and unfair. We have affirmed that it indeed was. The court also considered the recommendations made by appellant's Staff Welfare and Senior Management Committees that the punishment of reprimand and re-deployment be meted out to the respondent. If the recommendation had been adopted, it would have been possible to retain the respondent in employment even if it be in a different part of the organization.

115. In the case above, the court was clear to the extent that where there is an illegality, termination of employment is illogical, unlawful and unfair and, the remedy of reinstatement is available to redress the illegality and unfairness. The remedy of reinstatement is available in the law.

116. In the case of **Sotik Highlands Tea Estates Limited versus Kenya Plantation and Agricultural Workers Union [2017] eKLR** the

court reversed an order of reinstatement on the sole ground that;

*The learned Judge erred by placing too high a burden on the appellant to show that it had accorded Siro fair administrative action before it took the decision to terminate his services. The disciplinary proceedings were not criminal in nature or such as to require such a high standard as the learned Judge employed in the matter before him. This Court in the case of **Judicial Service Commission v Gladys Boss Shollei** [2014] eKLR held inter alia that disciplinary proceedings between an employer and an employee are civil in nature and the standard of proof as in other civil proceedings is on a balance of probability and the burden of proof lies on the party who alleges.*

117. In view of the above and putting the above into account the elements for unfair termination of employment should encompass substantive and procedural fairness as analysed above, even where there is due process, substantive justice is a legal requirement. A wrongful and unfairness termination of employment cannot be corrected by undertaking a sham hearing process. Such would erode justice.

118. Indeed as noted by the Court of Appeal in the **Sotik Highlands Tea Estates Limited case, above** cited, the internal disciplinary hearing should not be akin to criminal proceedings. Such should result from a case of misconduct that is addressed at the shop floor and from it the employee be given a fair chance to defend himself. The gross misconduct should be apparent. It should not be a matter sourced from the hearing itself. Rather it should be the other way round. Where there is gross misconduct, a hearing should follow. The employer should interrogate the allegations made against the employee at the shop floor where the best evidence is to be found.

119. Based on the analysis above I therefore find no justifiable reason to deny the claimant the primary remedy of reinstatement. Such shall redress the unfairness against him by taking him back to the position he ought to have maintained as at 6th July, 2016. Such remedy is found appropriate to cover the damage occasioned to the claimant. To order otherwise would not appropriately address the unfairness against him as to quantify the damage caused in monetary terms would leave the respondent in more damage than in ordering a reinstatement.

120. The order for reinstatement is issued as the primary remedy claimed by the claimant and is available under the provisions of section 12 of the Employment and Labour Relations Court Act, 2011 read together with section 49 of the Employment Act, 2007. The other remedies claimed for general damages is taken into account with the order for reinstatement.

121. There was no evidence by the respondent that the position of Senior Lecturer, Pathology Department has been filled by any other person. As an educational institution the claimant can be deployed appropriately and the respondent shall continue to enjoy the vast knowledge of the claimant in his field of expertise which he continued to offer during the subsistence of the disciplinary hearings from the year 2011 to the year 2016.

122. Such reinstatement shall be with all back wages, increments and benefit under the applicable CBA.

Accordingly, Judgement is hereby entered for the Claimant against the Respondent in the following terms;

a) A declaration that the termination of employment was unfair;

b) The Claimant is hereby reinstated back to his position as Senior Lecturer, Pathology Department without loss of benefits and any lawful entitlement(s) to be paid within 30 days; and in accordance

with the applicable Collective Bargaining Agreements regulating the employment of unionisable employees of the respondent;

c) The Claimant shall report back to work on 1st February, 2019 at 8.30 hours to the accounting officer and Vice-Chancellor for allocation of duties; and

d) Costs of the suit

In the alternative to the above;

a) The Respondent shall pay the Claimant salaries due for 3 years;

b) Compensation amounting to 3 months' salary at the last gross salary due on 19th January 2016;

c) Costs of the suit.

Delivered at Nakuru and dated this 24th day of January, 2019.

M. MBARU JUDGE

In the presence of:

.....