



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CASE NO. 182 OF 2016**

**MATHEWS ODUOL OTIENO & ANOTHER.....CLAIMANTS**

**VERSUS**

**JARAMOGI OGINGA ODINGA**

**UNIVERSITY OF SCIENCE AND TECHNOLOGY.....1<sup>ST</sup> RESPONDENT**

**STEPHEN G. AGONG.....2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

The suit commenced vide a Memorandum of Claim filed on 29.6.2016 by the 1<sup>st</sup> and 2<sup>nd</sup> Claimants against the Respondents.

The Claimants prays for the following reliefs:-

- (i) Declaration that the Respondent breached the collective bargaining agreement of 30<sup>th</sup> October, 2015 between the 1<sup>st</sup> and 2<sup>nd</sup> Claimant.
- (ii) Damages for breach of the CBA.
- (iii) Payment of dues prior to the period of suspension in the sum of Kshs 35,888.50
- (iv) Payment of dues during the suspension period the sum of Kshs 131,692.50
- (v) An order of reinstatement unconditionally to the position of Games Tutor.
- (vi) In the alternative:-
  - (a) Payment of damages for unlawful termination.
  - (b) Payment of pension benefits as constituted by the 1<sup>st</sup> Claimant Kshs 804,951.
  - (c) Costs and interest.

**Facts of the Claim.**

The 1<sup>st</sup> Claimant was employed by respondent as a Games Tutor on 17<sup>th</sup> September, 2010 on a short term basis.

On 23<sup>rd</sup> May 2012, the 1<sup>st</sup> Claimant was confirmed to position of games tutor on permanent and pensionable basis. Terms and conditions of service for Senior Clerical, Technical and Administrative staff appeared. On 28.2.2011 applied to the 1<sup>st</sup> Claimant.

The 1<sup>st</sup> Claimant was also a member of the 2<sup>nd</sup> Claimant Kenya Universities staff Union (KUSU) herein after the (union) which is the 2<sup>nd</sup> Claimant.

The 1<sup>st</sup> claimant testified under oath and told the court that he was 47 years old as at 23<sup>rd</sup> 6.2016. that he was a games tutor at Jaramogi Oginga Odinga University of Science and Technology and also the Branch Secretary of the Union. That on 8<sup>th</sup>/2/2016 whilst performing his duties as the Union Secretary, the 2<sup>nd</sup> Respondent Stephen G. Agong assaulted him. That the 1<sup>st</sup> Claimant reported the assault to the police and the 2<sup>nd</sup> Respondent threatened that if the 1<sup>st</sup> Claimant did not withdraw the case, he would have it rough.

That the 2<sup>nd</sup> Respondent used his influence to have the criminal case withdrawn.

Shortly thereafter and on 22.4.2016, the 1<sup>st</sup> Claimant was suspended from duty for more than 60 days. That during the period, the Respondent withdrew his wages which have not been paid to date.

That on 23<sup>rd</sup> June, 2016 the 1<sup>st</sup> Claimant was summarily dismissed without due regard to procedure and has not been paid his terminal benefits to date.

That the 2<sup>nd</sup> Respondent chaired the disciplinary tribunal that dismissed the 1<sup>st</sup> Claimant despite protestation by the 1<sup>st</sup> and 2<sup>nd</sup> Claimants.

The action by the Respondents was unlawful and unfair and amounted to harassment and intimidation.

That the 1<sup>st</sup> Claimant has lost his livelihood and has suffered loss and damage.

The 1<sup>st</sup> Claimant rely on the terms and conditions contained in the CBA produced before court. The 2<sup>nd</sup> Respondent was the vice chancellor at the time he assaulted the 1<sup>st</sup> Claimant. The 1<sup>st</sup> Claimant testified that despite reporting the assault, no action was taken against the 2<sup>nd</sup> Respondent. Prof. Washington Olima signed the letter of summary dismissal. That the 1<sup>st</sup> Claimant was not given opportunity to be heard at the disciplinary hearing.

1<sup>st</sup> Claimant states that despite that the minutes of the disciplinary hearing having shown that Prof. Joseph Bosire chaired the meeting the Claimant stated that he did not see him. It was 2<sup>nd</sup> Respondent who had assault the 1<sup>st</sup> Claimant chaired the meeting. The 1<sup>st</sup> Claimant testified that union members attended the hearing. Under cross examination the 1<sup>st</sup> Claimant insisted that the 2<sup>nd</sup> Respondent chaired the meeting in the morning despite protestation by the union.

Claimant admitted that the ladies hand ball team was suspended for one year for loudness and indiscipline.

1<sup>st</sup> Claimant said that the captain of the team had led protests by the team during the games held at Eldoret. That the 1<sup>st</sup> Claimant had made a report to the director regarding the matter.

The 1<sup>st</sup> Claimant prays that he was victimized and that he be reinstated to his job and /or be compensated for the unlawful dismissal and he be paid terminal benefits.

CW2 was Mutanda Edwin Enock Otuoma. He testified that he was a colleague of the 1<sup>st</sup> Claimant and was also an official of the Union. That 1<sup>st</sup> Claimant was the Secretary whereas CW2 was Vice Secretary. CW2 stated that the 1<sup>st</sup> Claimant was unfairly dismissed. CW2 said he attended the disciplinary hearing. CW2 stated that the 2<sup>nd</sup> Respondent attended the disciplinary hearing and he chaired it.

CW2 stated that the disciplinary process did not take place. Only preliminary issues were dealt with while the 1<sup>st</sup> Claimant had been asked to step outside. The disciplinary hearing was adjourned but the next thing CW2 heard was that the 1<sup>st</sup> Claimant had been dismissed.

Under cross examination, CW2 insisted that it was wrong for the vice chancellor to chair the disciplinary hearing. He said that the vice chancellor was supposed to appoint a chairperson other than himself. The vice chancellor should not even be present during the disciplinary hearing according to the university statutes for staff in Grade 12 and below. The vice chancellor refused to step aside upon protestation by union representatives. The vice chancellor continued to chair the meeting. There were about 9 committee members. CW2 concluded that CW2 was dismissed without following due process and the dismissal was not for a valid reason.

CW3 was Joseph Shisoka Akaka. He told the court that he was the games tutor at Masinde Muliro University. He said he knew the Claimant. He testified that he was present at the games of 19<sup>th</sup>/20<sup>th</sup> March 2016. CW3 testified that some teams protested inclusion of unauthenticated players in the teams from Mount Kenya. That there was stand-off and the match was not played. CW3 said he did not see the 1<sup>st</sup> Claimant incite the players. CW3 testified that he saw the 1<sup>st</sup> Claimant trying to intervene to ease the stand-off and get the game to go on. CW2 saw 1<sup>st</sup> Claimant personally urge the captain to leave the pitch with his players so that the game could proceed. CW3 said just the semi final game was not played. Others were played. CW3 said he saw the 1<sup>st</sup> Respondent's team play. CW3 stated police men came to preserve order and ensure the games went on.

#### **Defence:**

RW1 was professor Joseph Bosire, Deputy Vice Chancellor in charge of Academic Affairs at the 1<sup>st</sup> Respondent University. RW1 testified that he knew the 1<sup>st</sup> Claimant well as a games tutor of the 1<sup>st</sup> Respondent. That the 1<sup>st</sup> Claimant was dismissed after a disciplinary process that he participated in. That he relied on a witness statement dated 5.12.2016 as his evidence in chief. That the reason for the dismissal was the suspension of women handball team by Kenya University Sports Association. When the team travelled to Eldoret between 19 –

20/3/2016 under supervision of the 1<sup>st</sup> Claimant. That the university learnt of the suspension much later after the team had returned when they received a letter dated 22/3/2016 from the Association addressed to Director of Sports at the University. The suspension was for one year. according to the letter, the hand ball team invaded the Arena when they were not scheduled to play in protest. That they held play for over 2 hours and used vulgar language against officials. That the 1<sup>st</sup> Claimant had incited the students to protest. That the 1<sup>st</sup> claimant had refused to intervene to calm the situation but had instead walked away.

That the 1<sup>st</sup> Claimant did not immediately report the incident, upon return from the games. That RW1 wrote to the 1<sup>st</sup> Claimant to explain. That 1<sup>st</sup> Claimant did not respond. That the 1<sup>st</sup> Claimant was suspended pending disciplinary hearing for 14 days and was extended for 30 days.

That the 1<sup>st</sup> Claimant was found guilty of gross misconduct. The mis conduct at a national event was taken very seriously by the 1<sup>st</sup> Respondent.

The university was excluded from the games for one year. that the disciplinary hearing took place on 23/6/2016 and the 1<sup>st</sup> Claimant did not attend the hearing although RW1 saw him outside the board room.

That the 1<sup>st</sup> Claimant was represented by union representatives. That the union officials walked away with the Claimant in protest. That Rw1 called him on his cell phone but he did not respond.

That the vice-chancellor did not attend the disciplinary hearing. That the vice chancellor left the meeting after RW1 was appointed chair of the disciplinary hearing. RW1 said he did not know why the union representatives walked away. That the committee waited for two (2) hours and even sent one member to go and call the Claimant but he did not attend.

The committee found the 1<sup>st</sup> Claimant guilty of four (4) counts out of seven (7) preferred against him. The 1<sup>st</sup> Claimant was summarily dismissed. RW1 said the decision of the committee was not influenced by the vice chancellor. That the proceedings strictly followed university statute.

RW1 under cross examination stated that the disciplinary action was based on a complaint from the sports Association. That Director Sports forwarded the complaint to RW1. RW1 said he was not aware of any previous record of misconduct by the Claimant. RW1 Insisted that he was appointed to chair the disciplinary committee and that the vice chancellor did not chair the same. RW1 said that Director Sports was not a member of the committee. The Director was asked to step out of the meeting as a witness. RW1 said he did not know if the Claimant was owed terminal benefits by the 1<sup>st</sup> Respondent. RW1 prays that the suit be dismissed with costs.

### **Determination**

The issues for determination are:

- a) Whether the summary dismissal of the 1<sup>st</sup> Claimant was for a valid reason and effected following a fair procedure
- b) Whether the 1<sup>st</sup> Claimant is entitled to reinstatement and in the alternative to payment of terminal benefits.

### **Issue (a)**

The summary dismissal of the 1<sup>st</sup> Claimant followed a complaint to the university from Kenya University Sports Association by a letter dated 22.3.2016 to the 1<sup>st</sup> Respondent via Director of Sports, who was the immediate supervisor of the 1<sup>st</sup> Claimant

It is not in dispute that the 1<sup>st</sup> Claimant was the officer in charge of the student teams from the 1<sup>st</sup> Respondent that attended inter university sports at Eldoret between the 19<sup>th</sup> and 20<sup>th</sup> March 2016. It is also not in dispute that the women handball team of the 1<sup>st</sup> Respondent started a protest and descended onto the pitch and held play for over two hours. It was established also that following its action, the women handball team of the 1<sup>st</sup> Respondent was suspended from all KUSA competition for one (1) year from the date of the said letter being 22.3.2016. Pursuant to the complaint, charges were laid against the 1<sup>st</sup> Claimant and he was called upon to respond to the same in writing.

The 1<sup>st</sup> Claimant was also invited to attend a disciplinary hearing and was suspended pending investigation of the disciplinary proceedings.

It has been established that the 1<sup>st</sup> Claimant did not respond in writing to the charges levelled against him. It is also established fact that the disciplinary hearing did not proceed as scheduled because the 1<sup>st</sup> Claimant did not participate in the disciplinary hearing upon protestation by his union representative regarding the composition of the disciplinary committee and the manner it was being conducted.

The union representatives walked out in protest. However, the committee considered the charges against the 1<sup>st</sup> Claimant in his absentia and found him guilty of gross misconduct in respect of four (4) counts out of the seven (7) leveled against the 1<sup>st</sup> Claimant and the 1<sup>st</sup> Claimant was summarily dismissed from employment of the 1<sup>st</sup> Respondent.

The court has considered various documentation that formed the basis of the charges against the Claimant in particular the complaint from the Kenya University Sports Association stated;

*“Mr. Oduol (the 1<sup>st</sup> Claimant) incited the students into this unwarranted behavior. The Executive implored him severally to take charge of his students but he ignored them, stayed aloof and even moved away. This happened in the presence of a sponsor who had just started a relation with KUSA. This uncalled for act has caused grievous harm to the Association in its effort to attract support and partnership with the corporate.”*

The 1<sup>st</sup> Claimant did not respond to these charges when given opportunity to do so by the 1<sup>st</sup> Respondent. Instead the Claimant declined to respond in writing to the charges and did not participate in the disciplinary hearing.

In court the 1<sup>st</sup> Claimant blames all his woes on the differences between him and the 2<sup>nd</sup> Respondent the vice-chancellor of the 1<sup>st</sup> Respondent who the 1<sup>st</sup> Claimant accused of having assaulted him and threatened to make sure he would lose his job unless he withdrew the report of the assault the 1<sup>st</sup> Claimant had made to the police.

Evidence before court shows that indeed the 1<sup>st</sup> Claimant had reported assault case to the police in Bondo. It is also established that the case was closed on 24<sup>th</sup> February, 2016 by the police. The 1<sup>st</sup> Claimant had complained about the closure of the case to the union and Ombudsman by a letter dated 7.4.2016.

It is therefore not correct for the 1<sup>st</sup> Claimant to state that he was charged for misconduct, suspended and ultimately dismissed due to his refusal to withdraw the criminal charges against the 2<sup>nd</sup> Respondent.

To the contrary, complaints that led to the charges, suspension and eventually dismissal of the Claimant arose from an independent organization on happenings that took place away from the university at Eldoret during KUSA sports.

In terms of Section 47(5) of the Employment Act, 2007 and Section 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya the 1<sup>st</sup> Claimant has the onus of establishing that the summary dismissal was wrongful and unfair.

The Respondent bear the evidentially burden of rebuttal in terms of Section 43(1) and (2) of the Employment Act as read with Sections 45 and 47(5) of the Act to show that it had a valid reason to summarily dismiss the 1<sup>st</sup> Claimant from Employment and that it complied with Section 41 of the Act as read with university internal procedures in effecting the summary dismissal.

The testimony by RW1 has fully rebutted the allegations by the Claimant that there was no valid reason to charge him with misconduct.

RW1 has also demonstrated that the 1<sup>st</sup> Claimant failed to provide any written response to the charges made against him.

RW1 has further demonstrated and fully rebutted testimony by CW1 and CW2 that no disciplinary meeting took place to provide the 1<sup>st</sup> Claimant with opportunity to explain his case. RW1 has proved that he chaired the disciplinary committee contrary to allegations by CW1 and CW2 that 2<sup>nd</sup> Respondent chaired the meeting. The minutes before court corroborate testimony by RW1.

It is clear that the 1<sup>st</sup> Claimant and his union representatives chose to walk away from the disciplinary proceedings and therefore the 1<sup>st</sup> Claimant missed opportunity to clear himself of the charges levelled against him.

It is apparent that there was bad blood between the 1<sup>st</sup> Claimant and the 2<sup>nd</sup> Respondent. However, the bad relationship was not an issue in the charge sheet that faced the 1<sup>st</sup> Claimant. The committee had about nine (9) members of high academic ranking in the university.

It is inconceivable that they could not apply their minds independently to the case faced by the 1<sup>st</sup> Claimant.

The 1<sup>st</sup> Claimant and the union officials denied the committee opportunity to evaluate the 1<sup>st</sup> Claimant's side of the story.

Accordingly, it is the considered finding by the court that the summary dismissal of the 1<sup>st</sup> Claimant was for a valid reason and the decision to summarily dismiss the 1<sup>st</sup> Claimant followed a fair procedure.

### **Issue (b)**

Following the decision in issue (a) above the reliefs sought by the 1<sup>st</sup> Claimant for reinstatement and award of damages are unmerited and dismissed.

### **Terminal Benefits.**

The letter of summary dismissal dated 23<sup>rd</sup> June 2016 directed the 1<sup>st</sup> Claimant to fill clearance forms available at the Registry. That upon clearing the Claimant would be paid the half (1/2) salary withheld up to and including 23<sup>rd</sup> June 2016, plus any other benefits due to the 1<sup>st</sup> Claimant.

The Claimant has prayed he be paid Kshs 35,888.50 being the dues withheld prior to the period of suspension and Kshs 131,692.50 withheld during the period of suspension.

It would appear that the 1<sup>st</sup> Respondent intended to pay the aforesaid sums upon clearance by the 1<sup>st</sup> Claimant. Accordingly the court awards the Claimant Kshs 35,888.50 and 131,692.50 being dues duly owned to him by the 1<sup>st</sup> Respondent up to the date of dismissal.

Further more, the 1<sup>st</sup> Respondent is directed to cause to be released to the 1<sup>st</sup> Claimant pension benefits as contributed by the 1<sup>st</sup> Claimant in the sum of Kshs 809,951.

The Respondents are further directed to provide the 1<sup>st</sup> Claimant with a certificate of service if it has not been released to him to date.

In the final analysis, judgment is entered in favour of the 1<sup>st</sup> Claimant as against the 1<sup>st</sup> Respondent as follows:

- a) Kshs 167,581 being dues withheld by the 1<sup>st</sup> Respondent during the period prior to the suspension and after suspension to the date of dismissal.
- b) 1<sup>st</sup> Respondent to facilitate payment of pension benefits contributed by the 1<sup>st</sup> Claimant in the sum of Kshs 804,951.
- c) The award in (a) above to be paid with interest at court rates from date of filing suit till payment in full.
- d) The 1<sup>st</sup> Respondent to pay half the costs of the suit.
- e) The 1<sup>st</sup> Respondent to provide certificate of service in 30 days.

For the avoidance of doubt, the summary dismissal of the 1<sup>st</sup> Claimant was lawful and fair.

**DATED, SIGNED and DELIVERED at BUNGOMA this 30<sup>th</sup> day of MAY, 2019.**

**HON. M. N. NDUMA, JUDGE**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**BUNGOMA**

**Appearances:**

M/s Mukwana for Claimant

Mr. Onyango for Respondent

Chrispo: Court Assistant.