



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. 94 OF 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

**RONALD WAMALWA.....1<sup>ST</sup> CLAIMANT**

**COSMAS RUTTO CHEPTOO.....2<sup>ND</sup> CLAIMANT**

**-Versus-**

**MASINDE MULIRO UNIVERSITY OF**

**SCIENCE AND TECHNOLOGY.....RESPONDENT**

**JUDGMENT**

The Claimants are both former employees of the Respondent Masinde Muliro University of Science and Technology. The 1<sup>st</sup> Claimant RONALD WAMALWA was employed as Senior Laboratory Technologist by letter of appointment dated 22<sup>nd</sup> January and reported on 18<sup>th</sup> March 2013 while the 2<sup>nd</sup> Claimant COSMAS RUTO CHEPTOO was employed as a Senior Stores Clerk by letter dated 1<sup>st</sup> November 2011. They were dismissed from service on 15<sup>th</sup> November 2016. The reasons for summary dismissal according to the letters are that-

**A. RONALD WAMALWA**

That on Monday 13<sup>th</sup> August 2016, in the company of two (2) other staff he stormed into a meeting in the Vice Chancellor's Boardroom, disrupted the meeting while shouting and banging on tables. Additionally he threatened to physically assault a member of staff.

That on Friday 1<sup>st</sup> April 2016, he posted on the staff Intranet information captioned 'sacking of Mr. Bruno' information that he knew was false, misleading and meant to cause annoyance, inconvenience or needless anxiety to members of staff and with the intention to disparage the reputation of the university management.

**B. COSMAS RUTTO CHEPTOO**

That on Monday 13<sup>th</sup> August 2016, in the company of two (2) other staff he stormed into a meeting in the Vice Chancellor's Boardroom, disrupted the meeting while shouting and banging on tables. Additionally he threatened to physically assault a member of staff.

That between 28<sup>th</sup> and 29<sup>th</sup> November 2013, while working as a Senior Stores Clerk to Procurement Department, he raised three (3) purchase requisition notes (PRN) numbers 6297, 6298, 6299 for the supply of photocopy page A3 white 80 grams in favour of M/S Cabrando Enterprises P.O. Box 760 – 50100 Kakamega at a unit cost of Kshs.1,250/= very well and he was not the lowest evaluated bidder. The lowest bidder at unit cost of Kshs.950/= was M/S Conard Limited. This transaction led to loss of Kshs.300,000/= to the university.

It is the Claimants' case that they were victimised for being union members, were not given a fair hearing and the termination is unfair. They seek the following remedies-

- (i.) A declaration that the termination of the client's officials Ronald Wamalwa and Cosmas Rutto Cheptoo services by the respondent was unlawful.
- (ii.) An order to the unconditional reinstatement of the claimant's officials Ronald Wamalwa and Cosmas Rutto Cheptoo back to the respondent's service.
- (iii.) Payment to the 1<sup>st</sup> claimant Ronald Wamalwa of Kshs.2,074,948/= as particularized at paragraph 8 above.
- (iv.) Certificate of service.
- (v.) Costs of this suit plus interests.
- (vi.) Any other or further remedy this court deems just and expedient to grant.

The Respondent filed a memorandum of defence in which it denies that the allegations in the Claim and aver that the Claimants were dismissed on 15<sup>th</sup> November 2016 following their refusal to present themselves for disciplinary hearing on 18<sup>th</sup> 21<sup>st</sup> October and 11<sup>th</sup> November 2016. The Respondent further avers that the Claimants were charged with offences of The Respondent avers that after dismissal the Claimants appealed against the dismissal on 28<sup>th</sup> November 2016 and attended the disciplinary hearing on 1<sup>st</sup> and 2<sup>nd</sup> February respectively for the and were by letters dated 24<sup>th</sup> February 2017 informed of the decision of the Respondent to uphold the decision to dismiss them.

The case came up for mention for directions on 30<sup>th</sup> March 2017 when it was referred to County Labour Officer Kakamega for conciliation. The report of the Labour Officer was received on 7<sup>th</sup> June 2017. In the Report the County Labour Officer made the following findings and Recommendations-

### **Findings by County Labour Officer**

That Ronald Wamalwa (1<sup>st</sup> claimant) was elected Branch Secretary and Cosmas Rutto Cheptoo (2<sup>nd</sup> claimant) was also elected Organising Secretary of Masinde Muliro University of Science and Technology (MMUST) Chapter on 18<sup>th</sup> February, 20106 in an election presided over by the County Labour Officer in charge of Kakamega.

That they are bonafide union officials of MMUST Chapter registered by the Registrar of Trade Unions.

That the dismissed union officials did not storm the meeting between the University Management and Kudheihia but they were invited by the Kudheihia on MMUST leadership on 15<sup>th</sup> August 2016 vide their letters dated 9<sup>th</sup> and 12<sup>th</sup> August, 2016 respectively and signed by Edwin Wafula (Chairman), Martin Wabwile (Secretary) and lastly Mark Komen (Shop steward)

That the dismissed union officials attended the meeting between university management and Kudheihia on 15<sup>th</sup> August 2016 as bonafide officials but not in their capacity as MMUST employees.

That Article 4 (h) of the KUSU Constitution allows officials to co-operate with other similar unions on matter of common interest with a view to taking a common or uniform action whenever necessary or desirable.

That the due process of disciplining the union officials was not followed as required by the KUSU Constitution (Article 20) since the MMUST management never wrote to KUSU Secretary General to complain about the conduct of KUSU – MMUST Branch Secretary and Organising Secretary respectively.

That there was general business, malice and discrimination in the dismissal of the two union officials as initially they were three – Ronald Wamalwa and Cosmas Cheptoo who were dismissed whereas Lydia Nandemu (female) was reinstated. The question is which criteria were used in her reinstatement?

That there was a conflict of interest as the person who was the complainant is the same one who wrote letters of suspension and summoning union officials for disciplinary committee meeting and further to that one of the witnesses against the dismissed officials Prof. J. K. Rotich (Deputy Vice Chancellor – Administration and Finance) is the one who wrote dismissal letters to the union officials.

That the Vice Chancellor of MMUST has no respect for the Employment and Labour Relations Court as he disobeyed the orders of the County Labour Officer – Kakamega to forward his written proposal despite receiving a written request vide letter reference: MLEAA/KAKA/IR.5/17 dated 4<sup>th</sup> May 2017 and received and signed for by one Wanjala an Officer in the Vice Chancellor's Office on 5<sup>th</sup> May 2017. In essence, he has no regard for the due process of the law and his action amounts to "contempt of court" and deserves a deterrent action to stem out such behaviour which is inconsistent with the good Industrial Relations Practice.

That the Vice Chancellor of MMUST has no iota of idea about the Industrial Relations Charter and the roles to be played by the Unions, Management and the Government (Ministry of Labour) in amicably resolving the trade disputes.

That the management of MMUST is out to frustrate, victimize, coerce and dismiss union officials thus stifling union activities in the institution. This can be seen in summary dismissal of the Branch Secretary, organizing Secretary and the transfer of Meshack O. Mulongo the MMUST Chapter Branch Chairman to Turkana University College in unclear circumstances.

That the citation of Articles 28 and 29 (c) of the Constitution of Kenya, Section 44 (4) (d) of the Employment Act, 2007, Clause 11 3 (iii) of the KUSU CBA and the code of conduct and Ethics for public universities in summarily dismissing the two union officials is not merited and lacks substance as the same cannot be proofed to the contrary and is being used as a tool of victimizing the said officials for the management's own gain and in bad faith.

That the management of MMUS disregards the role of trade unions as enshrined in Article 41 of the Constitution of Kenya, 2010 and also fair hearing under Article 50 of the same Constitution.

The summarily dismissal of the union officials was not just and equitable contrary to Section 45 (5) (a) to (f) of the Employment Act, 2007 as the factors stated therein were not adhered to thus making it unfair, termination and that also Section 44 (d) (d) of the Employment Act, was chosen selectively to suit their strategic manoeuvre of dismissing the union officials

### **Recommendations of County Labour Officer**

From the submissions and findings, it is crystal clear that the management of MMUST victimized the two union officials through unfair labour practices contrary to the spirit and letter of the Industrial Relations Charter, relevant ILO Conventions no. 87 and 98. Articles 41 and 50 of the Kenya Constitution 2010, the Employment Act, 2007 and the Labour Relations Act, 2007 among others.

And therefore, I hereby recommend -

- (i.) The reinstatement to work of Ronald Wamalwa (1<sup>st</sup> claimant) and Cosmas Rutto Cheptoo (2<sup>nd</sup> claimant)
- (ii.) The payment of the claimants' salary for the period they have been out of employment.
- (iii.) The MMUST Management to pay cost of this suit plus interest as you the court will determine.
- (iv.) Damages for unlawful termination.
- (v.) Any other or further remedy the Employment and Labour Relations Court deems just and expedient to grant.
- (vi.) The management of MMUST be reprimanded for disobeying the orders granted by the Honourable Court.

The Claimants accepted the report as a basis of resolution of the dispute but the Respondent in the submissions on the report filed in court on 31<sup>st</sup> July 2017 rejected the report. In the submissions filed on 31<sup>st</sup> July 2017 the Respondent submitted that it made its written submissions to the Labour Officer on 5<sup>th</sup> June 2017. It submitted that it is not familiar with the process of conciliation and had expected the County Labour Officer to summon the parties for oral submissions and were thus caught unawares by the report filed in court. The Respondent further submitted that –

It is the respondent's submissions that the two staff engaged in acts of gross misconduct on campus on the 15<sup>th</sup> August 2016. They stormed into an ongoing meeting in the Vice Chancellor's boardroom and disrupted the meeting while shouting and banging tables. They further threatened to physically assault a member of staff (Registrar – Administration).

It would be good to note the reason behind the said acts. The 2<sup>nd</sup> claimant was a staff in the Procurement Department at the time and had been invited for a disciplinary hearing following the conclusion of investigations into anomalies in a certain procurement process during the normal nature of his work in which fraud was suspected. The transaction had involved a number of staff in procurement and all them had been scheduled and invited for a disciplinary hearing on the matter. The 2<sup>nd</sup> claimant upon receiving his letter however tactfully hoped to twist the story and say he was being summoned for disciplinary in his capacity as a union official. After picking his letter from the registry, he marched straight to look for the Registrar (Administration) from whose office the letters of invitation had emanated and then to the Deputy Vice Chancellor, Administration and Finance's office who is the chair of the disciplinary committee to demand for answers why he was being summoned for disciplinary yet he is a union official.

In both offices, the claimants were informed that the person they were looking for were attending a meeting with KUDHEIHA officials in the Vice Chancellor's boardroom and that is when they stormed into the Vice Chancellor's boardroom and disrupted the meeting demanding for answers, shouting, banging tables and threatening to assault the Registrar (Administration) for writing invitation letters to disciplinary claiming they were union officials and thus could not be disciplined for anything under the sun as long as they remained officials.

The same was the case with the 1<sup>st</sup> claimant who had been invited for a disciplinary hearing for dishonest and misleading information he had posted and communicated to staff on the intranet thus causing unnecessary anxiety.

After the disruption of the meeting and after being forcefully removed by guards who man the Vice Chancellor's office, the claimants realized what they had done was wrong but rather than apologize, they resorted to make things worse by colluding with Kudheihha officials and fabricated letters in a bid to twist the story and allege that they had been invited to the meeting. As had been pointed out before, it should

be noted that KUSU and Kudheihia are two distinct unions that represent different cadres of staff and as such, it is quite unlikely that CBA pre negotiations between management and one union would be of interest to another union to necessitate their presence. There was an attendance list that had been circulated and signed by both management and Kudheihia officials when the meeting began at 10 a.m. and do it was obvious KUSU officials had a different agenda when they stormed into the meeting at about 12 noon. Lastly it would be good to note that the meeting between management and Kudheihia officials was to-chaired and at no one point did the co-chair from Kudheihia mention or indicate to management that they had invited KUSU officials to join the meeting and that they would be arriving much alter.

What followed thereafter was a series of invitations to disciplinary hearings, six (6) to be precise which the claimants together with the National Union Chapter that they invited to represent them ensured aborted due to mischievous tactics applied aimed at stopping the hearings from proceeding to prevent the management from making of a decision.

The claimants were suspended from office on the 17<sup>th</sup> August 2016 to pave way for further investigations.

The claimants were thereafter served with notice to show cause why disciplinary action should not be taken against them on 23<sup>rd</sup> August, 2016 and their response received on 1<sup>st</sup> September, 2016.

They were invited for the 1<sup>st</sup> hearing on 18<sup>th</sup> October 2016 where they refused to appear raising an objection against the Vice Chancellor chairing. The Vice Chancellor s was to chair because the Deputy Vice Chancellor who is the substantive chair of the disciplinary committee was both a victim and witness in the matter. In any circumstance, the Deputy Vice Chancellor usually chairs on behalf of the Vice Chancellor as it is the Vice Chancellor who is responsible for ensuring law, order and discipline is maintained at the university. Nevertheless, the Vice Chancellor stepped aside and allowed a different Deputy Vice Chancellor in charge of planning, research and innovation to chair. Even after that, the union still blocked the claimants from appearing by dilly-dallying on other matters that did not have any co relation to the current cases.

The 2<sup>nd</sup> hearing was scheduled for 21<sup>st</sup> October 2016. Both the union and the claimants applied the same tactic and successfully sabotaged the hearing with the claimants refusing to appear before the committee.

The 3<sup>rd</sup> hearing was scheduled for 25<sup>th</sup> October 2016. The claimants did not appear but rather sent apologies and gave different excuses as to why they could not appear and the meeting did not therefore take off for the 3<sup>rd</sup> time.

The 4<sup>th</sup> hearing was scheduled for 4<sup>th</sup> November 2016. Both the union and claimants once more applied the same tactic of delaying and derailing the process and once more successfully sabotaging the hearing with the claimant refusing to appear before the committee.

The 5<sup>th</sup> hearing was scheduled for 11<sup>th</sup> November 2016. One of the three accused staff appeared before the committee and was heard. Her matter was dealt with and the committee in fact discovered that she had played a very minimal role from the charges labelled against her. The other two accused who are the two claimants in this matter once more refused to appear before the committee.

The 6<sup>th</sup> hearing was scheduled for 14<sup>th</sup> November 2016 and the committee proceeded to make a determination on the matters based on the evidence eon record and taking into account the submissions of the one who had been heard. The committee found the claimants culpable of the charges that had been labelled against them and proceeded to make a determination on all 3 matters.

The two claimants were dismissed on 15<sup>th</sup> November 2016 while the third co accused received a written warning. It would be good to note that the decisions were not made based on who appeared and who did not appear before the committee but rather on careful and meticulous analysis of the evidence on record.

Witnesses were further called to give an oral testimony.

Both parties agreed that the court uses the County Labour Officer's report and submissions in respect thereof by the Respondent to prepare judgement.

### **Determination**

I have carefully considered the pleadings and documents on record, and further considered the report of the County Labour Officer and the submissions in respect thereof by the Respondent.

The issues in dispute are in my opinion whether the dismissal of the Claimants was unfair and if they are entitled to the remedies sought.

It is not disputed that both Claimants were at the time of dismissal officials of Kenya Universities Staff Union (KUSU). It is further not in dispute that the two Claimants in their capacity as union officials attended the negotiation meeting between the Respondent and Kenya Union of Domestic Educational Institutions Hotels and Allied Workers (KUDHEIHA WORKERS) held on 15<sup>th</sup> August 2016 at the Respondent's Vice Chancellor's Boardroom on the (apparent) invitation of KUDHEIHA but without prior notification to the Respondent. It is further not in dispute that there was disruption of the said meeting due to the arrival of the Claimants together with another union official, Lydia Nandemo.

It is further not in dispute that the Claimants were invited for disciplinary meetings five (5) times but did not attend. Lydia Nandemo who attended the disciplinary meeting was heard and absolved.

The Claimants allege that they were being persecuted for union activities. Apart from the fact that they were union officials they have not submitted any evidence that they were dismissed because of union activities. The reason for dismissal was that the Claimants refused to submit themselves to the disciplinary process.

Section 41 of the Employment Act provides for an employer to hear an employee who has committed an act considered by the employer to constitute gross misconduct to be given a hearing before a decision is made to terminate employment. In the present case the Claimant was summoned for disciplinary hearing 5 times. On the 5<sup>th</sup> invitation only Lydia Nandemo presented herself. The two Claimants did not. The fact that the Lydia Nandemo who was charged together with the two Claimants was presented herself and accorded a fair hearing means that there was opportunity for the Claimants too to present themselves and be accorded a fair hearing. They however chose not to present themselves and cannot be heard complaining about not having been heard.

In the case of **Mathew Lucy Cherusa v Poverelle Sisters of Belgano T/A Blessed Louis Palazzalo Health Centre [2013] eKLR** the court held that the Respondent had powers to summon the Claimant to answer to charges levelled against her and could not complain that she was not given a hearing after failing to attend the disciplinary hearing. Further in the case of **Jackson Butiya v Eastern Produce Cause 335 of 2011** in which the court held that-

*An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to court and say "I refused to talk with those people and therefore I was not heard. order them to pay me. ... The procedural fairness requirements under section 41 of the Employment Act are fulfilled by asking an employee facing disciplinary proceedings to respond to a show cause letter and to attend an oral disciplinary hearing. The employee is not at liberty to decline to respond to the charges levelled against them and if they have any issues with the process, they must raise them directly with the employer within the timelines provided.*

In this case as in the cases referred to the Claimants refused to present themselves for disciplinary hearing after being given the opportunity not once, but 5 times as admitted by the 1<sup>st</sup> Claimant in his appeal against dismissal in which he states:

*“In all the five times I have been invited for disciplinary, I have always been availing myself except for the disciplinary hearing scheduled for 25<sup>th</sup> October which I did not up because I was unwell and I communicated officially of the same to the Office of Registrar Administration.*

*For the other four invitations, there was an outstanding issue of contestation about the role of the union representatives and management members I the disciplinary panel. This made disciplinary proceedings to be non-responsive, hence I was never accorded conducive atmosphere for me to present my oral defence; this is evident in the minutes that were submitted in Josephine Renee Osiros’s affidavit on October 26<sup>th</sup>, 2016 to Kisumu Industrial Court.”*

The minutes of the disciplinary hearing also bear witness to the refusal of the Claimants to submit themselves to the disciplinary hearing.

I must hear state that the Respondent had valid reason to find that the Claimants had not absolved themselves from the charges against them as they did not attend the disciplinary hearing to submit their defence.

I therefore find that there was valid reason to dismiss the Claimants under Section 41, 43 and 47 of the Employment Act and the dismissal was to that extent not unfair.

### **Remedies**

The Claimants prayed for a declaration that the termination of their services was unlawful and an order for their unconditional reinstatement back into the Respondent’s service. As I have stated above, the Claimant’s failed to avail themselves for disciplinary hearing and left the Respondent with no option but to terminate their employment. The Claimants further prayed for damages for unlawful termination which they are not entitled to, the court having found that their termination was not unlawful. The Claimants are not also entitled to service pay as they were pensionable and were also members of NSSF.

The Claimants are however entitled to salary and allowances up to the date of dismissal and any leave due as at that date. They are also entitled to certificate of service in terms of section 51 of the Employment Act. The Respondent is directed to issue the same and pay salary and leave due to the Claimants within 30 days failing which interest shall accrue from date of judgment.

**DATED AND SIGNED ON THIS 22<sup>ND</sup> DAY OF DECEMBER 2017**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED ON THIS 1<sup>ST</sup> DAY OF FEBRUARY 2018**

**MATHEWS NDERI NDUMA**

**JUDGE**