



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**

**COURT AT NAIROBI**

**CAUSE NO. 1180 OF 2015**

(BEFORE HON. LADY JUSTICE HELLEN S. WASILWA ON 31<sup>ST</sup> MAY, 2017)

**DAVIS SOKOTO NANYAMAL..... CLAIMANT**

**VERSUS**

**CHURCH WORLD SERVICE (CWS)/RESETTLEMENT SUPPORT CENTRE (RSC)  
AFRICA.... ..RESPONDENT**

**JUDGMENT**

1. The Claimant Davis Sokoto Nanyamal filed suit through the firm of Moses Odawa and Company seeking damages for wrongful, illegal, un-contractual and unlawful dismissal.
2. He states that he was employed by the Respondent as a Case Processing Assistant on permanent and pensionable terms in 2012 earning a salary of Kshs. 50,000/= per month. He states that he served the Respondent dutifully and diligently leading to his promotion in January 2015, to the position of Senior Case Worker and received a salary increment to Kshs. 60,000/=.
3. It is the Claimant's contention that as part of his duties he submitted a written exam with several components and portions for consideration to the position of Senior Case Worker. That on 8<sup>th</sup> May, 2015, without any statutory or contractual warning or show cause letter the Claimant was summoned for a meeting where he was accused by the Respondent's representative without any basis of falsely representing his capacity and abilities as regards the exam.
4. The Claimant states that thereafter on the same day, without any formal notice, opportunity to be heard, adequate time for preparation for response and taking into consideration the Claimant's protests, interests and rights the Respondent proceeded to purport to terminate the Claimant's services.
5. It is the Claimant's position that the decision to terminate him was unlawful and wrongful as he had never done anything contrary to his contract of employment. He states that no valid reason for dismissal was given and no hearing was conducted prior to dismissal contrary to the rules of natural justice.
6. The Claimant prays for immediate reinstatement or in the alternative, salary until the age of retirement, damages for wrongful dismissal, notice pay and service pay for 3 years worked.
7. The Respondent filed a Memorandum of Response wherein they admit the employment relationship and further state that the Claimant accepted the terms and conditions of employment and confirmed

having understood and accepted to adhere to the principles provided in the Respondent's manuals namely the ACT Alliance Code of conduct and the CWS Code of Conduct.

8. They state that the ACT Alliance Code of Conduct outlined guidelines for the prevention of unethical work practices including fraud, corruption and abuse of power by the Respondent's employees while the CWS Code of Conduct served as a guideline to the Respondent's employees in making ethical decisions in their roles. Both manuals consisted of the detailed version of the obligations placed upon the Respondent's employees in the performance of their duties and the Claimant specifically accepted the consequences on any violation of the provisions of the ACT Alliance Code of Conduct.

9. The Respondent admits that the Claimant was promoted to the position of Senior Caseworker in January 2015 but the circumstances leading to promotion were based on dishonesty and falsehood on the Claimant's part regarding his capacity and abilities, which fact became apparent to the Respondent subsequent to the Claimant's job promotion.

10. The Respondent contend that on 14.11.2014, as part of their internal job promotion exercise, the Respondent invited the Claimant to take a written test in an assessment process towards prospective promotion to the position of Senior Caseworker with the Respondent.

11. That the said test was to be completed individually and the Claimant was expected to provide own original responses to the questions posed. The Respondent contends that the significance of the confidentiality to be upheld by the Claimant in handling the test was reiterated to him by their test administrators.

12. They state that the Claimant was also bound by terms of the ACT Code of Conduct requiring him to be at all times truthful in submitting information in relation to his employment such as the information provided in the test taken by the Claimant.

13. The Respondent avers that after receiving the written test submitted by the Claimant and thereafter reviewing tests submitted by all candidates to the internal job promotion, it came to their attention that the Claimant's test responses were undoubtedly identical specifically the essay section to another candidate's test responses submitted earlier in June, 2014.

14. That the Claimant's test bore striking resemblance with another employee's test led the Respondent to conclude that the Claimant was dishonest in submitting the test. They invited the Claimant for discussions on the similarities in the test where he insisted that he had formulated the responses without any assistance or reference to another staff member's responses. Shortly thereafter he indicated that he had obtained the responses from a computer belonging to his colleague Mr. Jacob Apollo Ochieng.

15. The Respondent contends that by a letter dated 5<sup>th</sup> May, 2015, notified and invited the Claimant to a hearing on 8<sup>th</sup> May, 2015 and in the same letter he was notified that the purpose of the meeting was to show cause why he had been involved in irregularities during the recruitment exercise, giving a false explanation to the Respondent as to the originality of his examination responses and why he later admitted to having taken another staff member's responses and presented them as his own.

16. They further state that the Claimant was informed of his right to attend the hearing accompanied by another person of his choice. That at the hearing the Claimant admitted having copy pasted parts of his responses from another staff member's responses and he proceeded to verbally apologize to the Respondent for his actions and confirmed the apology via an email sent on 8.5.2015.

17. The Respondent contends that they duly considered the Claimant's conduct, his initial untruthful explanations and subsequent apology and found that his actions amounted to gross misconduct, subsequently he was summarily dismissed.

18. It is the Respondent's contention that they had valid reasons to terminate the Claimant's employment which reasons were communicated to him. That the Claimant was accorded an opportunity to be heard

and indeed attended a hearing during which he gave his explanations on the issues listed on the notice inviting him for the hearing. That the Claimant's termination was not discriminatory and neither did it target particular employees as alleged by the Claimant.

19. In evidence the Claimant led evidence as per the pleadings and stated that as part of his job description he was not to write essays so he did not misrepresent himself in an essay. That the Code of Conduct alleged to have been breached is not part of his employment contract and neither did the contract require him to ascribe to a formal Code of Conduct.

20. In cross examination the Claimant admitted knowledge of the Respondent's Code of Conduct which he has never read but he signed it. That he did a test for the purpose of promotion and he passed. He stated that he was later called to explain the similarities in his answers and that of another staff member. He responded to the allegations by stating that the answers in the test were his original work.

21. He admitted that a hearing was conducted and he was given an opportunity to have a 3<sup>rd</sup> party present but he chose not to do so. He then recanted his earlier statement and admitted having copied someone else's essay and willingly apologized for the same. He also admitted that he wrote to the Respondent apologizing for the incident. He also admitted having received reasons for his dismissal.

22. Respondent witnesses stated that the Respondent administered a test for the purpose of promoting their staff and it turned out that two employees who undertook a test had glaring similar answers in the essay section which the Respondent found was not in accordance with its Code of Conduct.

23. When questioned over the same, they admitted having copied the answers from one David Sokoto who is the Claimant herein. This led the Respondent to summon the Claimant and he was informed that investigations were being conducted against him. He admitted that the test which other employees copied from was his.

24. The Respondent conducted further investigations and found out that the test answers for the Claimant submitted in June 2015, were similar to those of another employee submitted in June 2014, and of other employees submitted in November, 2014.

25. It was further stated that the test in question belonged to one Jacob Apollo Ochieng who identified it as his original work. After the meeting the Claimant was issued with a show cause letter dated 6.5.2015, to show why his responses were exactly the same as those submitted by another staff member, why he had impeded an ongoing investigation by providing misleading information, why he was obstructing the fairness and integrity of a recruitment process and falsely representing his capacity and abilities in a written test in order to secure a job promotion.

26. That the Claimant was informed of his right to appear for the meeting accompanied by a person of his choice which he opted not to do. At the meeting the Claimant admitted having copy pasted parts of his responses and apologized for his actions.

27. That the Respondent considered the responses and found that the Claimant was guilty of gross misconduct and summarily dismissed him after explaining to him the reasons for so doing. That they paid the Claimant all his dues for the period worked with the Respondent.

### **Submissions**

28. The Claimant submits that the ACT Alliance Code of Conduct dated 5<sup>th</sup> February, 2011, is not applicable to the Claimant and or the Claimant's employment letter as it is, neither mentioned in the employment letter and neither was it stated anywhere that the Code of Conduct would be amending the letter of employment.

29. That the document signed by the Claimant which refers to Code of Conduct does not refer to any document as it refers to CWS Code of Conduct and there is no document which has been attached which

is referred to as such or which the employment contract referred to expressly. That the alleged codes of conduct are not by the Claimant's local employer and neither have they been domesticated to Kenyan law nor adopted to the Employment contract. Reliance on such codes would amount to introducing extraneous terms which are not provided for in the employment contract nor the Kenyan law.

30. The Claimant further submits that he had never been asked to show cause why he should not be terminated in an untitled email purportedly sent to him did not inform the Claimant the possibility of dismissal and he was not afforded an opportunity to prepare his defence at the show cause meeting.

31. The Claimant submits that indeed he did share his essay with other staff which is not forbidden and should not be an issue which fact they state was also admitted by the Respondent witness in evidence. The Claimant maintained that he was just summoned for a meeting and then dismissed.

32. He urges the Court to allow his claim as the Respondent has failed to meet the test required by Section 43 and 45(1) and (2) of the Employment Act.

33. The Respondent on the other hand submits that there were valid reasons for dismissal which were falsely presenting his capacity and abilities in a written test for purposes of a job promotion and impeding an investigation. That at the hearing the Respondent was able to establish that the exercise of the Respondent's core values are integrity, accountability and transparency which inform all aspects of the Respondent including employment relationships with its staff members.

34. That the Claimant indeed expressly confirmed having read, understood and agreed with the manual and accepted the consequences of any violation of its provisions. That the test in question was submitted by the Claimant as part of his duties and as such it was critical that he provide original responses in the written exam. That the possibility that the Claimant had posed a colleague's work as his own posed a direct risk to the Respondent and its functions.

35. The Respondent urges the Court to find that there is a difference between an open book exam and plagiarizing. The Claimant was found guilty of misconduct and was thus summarily dismissed.

36. On procedure for termination followed, the Respondent submits that they did follow procedure and that the Claimant admitted the same save for the show cause letter.

37. They submit that they issued the Claimant with a clear notice to show cause in the form of a letter dated 6.5.2015 which in their view was sufficient. They cite the case of **Gideon Akwera vs Board of Governors Church on the Rock Academy (2015)eKLR**; where the Court found that there is no specific format for a show cause letter so long as it contains the relevant elements which in the instant case it did. That the Claimant admitted to having been informed of the reasons for termination in the termination letter dated 8<sup>th</sup> May, 2015.

38. The Respondent submits that the Claimant was justifiably dismissed and the claim should as such be dismissed with costs.

39. Having considered evidence of both parties, I find the issues for determination are as follows:

- 1. Whether the Respondent had valid reasons to terminate the Claimant.***
- 2. Whether the Claimant was accorded a hearing before termination.***
- 3. What remedies to award in the circumstances?.***

40. From the dismissal letter to the Claimant dated 8.5.2015, the Claimant was informed that he was being dismissed for:

***“Falsely represented your capacity and abilities in a written test which you used for the purpose***

***of financial gain or obtaining the promotion to Senior Caseworker position with RSC Africa. This is fraudulent representation of your skills and capacity used for personal gain”.***

41. As per the reasons the Respondent gave for terminating the Claimant, they contend that the acts of the Claimant contravened the ACT Alliance Code of Conduct which he had signed and which provide as follows:

***“Never deliberately destroy, falsify, alter or conceal evidence material to an investigation or make false statements to investigators in order to materially influence or impede investigations into corrupt, fraudulent, coercive or collusive allegations”.***

42. From the records provided, the Claimant signed this Code of Conduct on 26/03/2012 and was therefore aware of its existence and/or provisions as provided for under Article 4.3 bullet 4 of the Policy. It was categorically stated that:

***“Violation of this Code of Conduct will not be tolerated and may in accordance with relevant legislation lead to internal disciplinary action or dismissal or even criminal prosecution”.***

43. From the evidence of the Claimant, he knowingly lied to the Respondent as they conducted their investigations and this is evidenced by his email of 8/5/2015 at 12.45 pm to Miro Marinovich in which he stated as follows:

***“.....on the issues of misinformation, I initially provided during the investigation process regarding authoring of the essay, I would say that this happened because I was in a state of shock when I was being asked the question. I had been previously interviewed from another position and therefore when I was called to the director’s office, I naturally thought I was going to sign an offer letter for that position and was shocked to find that it was an investigation instead and that was the reason I hesitated or gave the wrong answer to the question that I was asked but I was able to give the correct answers after composing myself.***

***Finally, I would like to apologize for any inconveniences that may have been caused by my actions because it was never my intention to taint RSC Africa’s integrity in the recruitment process.***

***Regards.....”.***

44. It is my finding from the above analysis that the Respondent indeed had valid reasons to terminate services of the Claimant which reasons existed at the time of termination and which was in breach of the Respondent’s ACT Alliance Code of Conduct. This is as envisaged under Section 43 of the Employment Act 2007 which states as follows:

***“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.***

***(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.***

45. On the second issue, is the question of due process - Due process is envisaged under Section 41 of the Employment Act 2007 which provide as follows:

***“(1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a***

**shop floor union representative of his choice present during this explanation.**

**(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.**

46. On 5/5/2015, the Claimant was informed through a Memo of an intended meeting on 8/5/2015 at 10 am to discuss some breaches he had been involved in. He was asked to bring along a staff member as a witness.

47. The meeting indeed proceeded as per Respondent Appendix at page 26 D27 of their documents and the proceedings are recorded as per Claimant’s own admission in an email on page 27.

48. Having found as above, it is my finding that indeed the Claimant was given a chance to be heard and he was heard and was found to have been involved in misconduct which led to his termination.

49. It is my finding therefore that there were valid reasons to warrant dismissal of the Claimant and this was done after Claimant was accorded a chance to be heard and therefore the dismissal was fair and justified and for that reason, the Claimant’s case must therefore fail.

50. I therefore dismiss the Claimant’s case and find he has no claim against the Respondent. Given the circumstances of the case, I will direct that each party will bear its own costs.

**Read in open Court this 31<sup>st</sup> day of May, 2017.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Odawa for the Claimant - Present

Miss Omenga for the Respondent – Present