



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT AT NAIROBI**  
**CAUSE NO. 19 OF 2013**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 31<sup>st</sup> May, 2017)**

**STEPHEN MUTHINI NZIOKA.....CLAIMANT**

**VERSUS**

**MOUNT KENYA UNIVERSITY.....RESPONDENT**

**JUDGMENT**

1. Before the Court is a Memorandum of Claim dated 2<sup>nd</sup> November 2012 and filed on the 9<sup>th</sup> of January 2013 where the Claimant prays for judgment against the Respondent for:

A) A declaration that the termination was unlawful, untimely and an order that the Claimant be paid his dues and benefits of Kshs 325,000.00 being:

<b>a) compensation for loss of future earnings</b>	<b>Kshs 300,000.00</b>
<b>b) service pay</b>	<b>Kshs 10,000.00</b>
<b>c) Salary in lieu of Notice</b>	<b>Kshs 15,000.00</b>
<b>TOTAL</b>	<b>Kshs 325,000.00</b>

B) Costs of the clam plus interest therein.

**Facts:**

2. The Claimant was appointed by the Respondent as a Security Guard for a two year contract from 1<sup>st</sup> June 2011 and worked for a period of four months before his contract was verbally terminated. He was thereafter issued with a termination letter dated 1<sup>st</sup> December 2011 without any justifiable cause stating that the Claimant failed to execute his duties effectively which caused the student riot that ensued on the night on 17<sup>th</sup> November 2011, which allegations have never been proved.

3. The Claimant stated that the termination was in breach of his contract and that he was not paid his terminal dues. The Claimant states that his termination was procedurally and substantively unfair.

4. The claimant states that he was not given an opportunity to be heard or defend himself from the said

allegations and reiterates that his termination was illegal, entitling him to the compensation sought within the claim.

5. The Respondents have filed a Statement of Response dated 8<sup>th</sup> April 2013 and filed on the 10<sup>th</sup> of April 2013. They admit that the Claimant was in their employ as a security guard on a consolidated salary on Kshs 8,500.00 a month and that he was to serve for a period of two years.

6. They submit that the Claimant's contract stipulated that:

***(i) The Claimant was required to abide by the University Principles, code of regulation and other terms of service and instruction;***

***(ii) That employment could be terminated by either party giving the other one month's notice;***

***(iii) In the event of gross misconduct, on the part of the Claimant, the Respondent could terminate the Claimant's services anytime without notice.***

7. They state that on or about the 17<sup>th</sup> of November 2017, the Claimant without instruction attempted to unlawfully search one of the rooms in the student hostel. The said search triggered off a riot in the university where the student became rowdy and barricaded roads leading to the university.

8. They state that students destroyed the gate and lit fires on the road using office tables and chairs and security office books. The students even stole the Claimant's bicycle. They state that it took the Chairman and DVC of the University to calm the students down and that the university requested the Claimant and his colleagues for a detailed explanation of what led to the riot which the Claimant gave on the 22<sup>nd</sup> of November 2011.

9. They state that upon deliberations, and due to considerations by the Respondent Management Board, the Claimant's services were terminated on the 30<sup>th</sup> of November 2011 and communication to that effect delivered to him. His actions were found to have amounted to gross misconduct and he was paid three months' salary in lieu of notice which was credited to his bank account.

10. The Respondent states that Section 41 and 43 (1) of the employment Act Cap 226 were duly complied with when terminating the claimants employment and that his termination was lawful and did not violate the Constitution, Employment Act or any other provision of law.

11. They ask that the Court dismiss the claim.

12. In support of his case, the Claimant filed written submissions which reiterated his pleadings, and testified in open Court. He stated that on that on the 17<sup>th</sup> of November 2011, he got to work at 6 pm and was guarding the male hostels, he found a letter addressed to him from Central Accommodation that there was a girl who was sleeping in the male hostels. He had been instructed not to allow girls in male hostels after 9 pm, he then proceeded to the said room with 2 guards, and knocked on the door. While awaiting an answer a student approached them enquiring as to the nature of their visit. After he explained what they were doing, the said student accused them of interfering with the student life and a riot started.

13. When the riot began, he called the chief security officer who tried to calm down the situation however, the students demanded to see the chair who came and restored calm. He was asked to go home, which he did, and came back the next day to record a statement. The Claimant testified that he was told that he would be transferred to another campus but no letter to that effect came. He was dismissed with over a year and a half left on his contract. He was only offered his notice pay.

14. The Respondent filed written submissions dated 17<sup>th</sup> January 2017, where they stated that the termination of the Claimant's employment was lawful as he mishandled the situation on the fateful day. They submit that due regard was given to his statement and that he was paid all his dues in tandem with

the contract. They submit that the Claimant received a cheque from the Respondent after his employment was terminated.

15. They submit that on cross examination the Claimant was unable to inform the Court how he arrived at Kshs.325,000.00 and that special damages must be specifically pleaded and strictly proved. They submit that the Claimant is leaving the job to prove to the Court.

16. They cite the case of **Shaban vs. Nairobi City Council (1982 – 1988) 1KAR 681** where the Court held that:

***a) Plaintiffs must understand that if they bring actions for damages it is for them to prove damages.***

***b) It is not enough to write down the particulars and so to speak throw them at the Court saying that this is what I have lost. I ask you to give me these damages, they have to prove it.***

17. Further in **Hann vs. Singh, Civil Appeal Number 42 of 1038 KAR 738** it was held that special damages must be specifically pleaded and strictly proved.

18. They submit that the claimants failed to prove his special damages and they pray for the same to be dismissed.

19. Having considered evidence and submissions from both parties, the issues for determination are as follows:

***1. Whether there were valid reasons to warrant termination of the Claimant's services.***

***2. Whether due process was followed before Claimant was dismissed.***

***3. Whether the Claimant is entitled to remedies sought.***

20. On the 1<sup>st</sup> issue, Appendix 3 terminating the Claimant's service dated 1/12/2011 stated as follows:

**NOTICE OF TERMINATION**

***Reference is made on the incident that occurred on Thursday, 17<sup>th</sup> November 2011 it was apparent that you failed in your execution of your duties by commission or omission that led to the aggrieved students to go on strike on the fateful night. They caused insecurity in the institution and your personal security was also highly at stake.***

***On behalf of the University Management Board, I wish to inform you that the University Management considered your case and resolved to terminate your services with effect from 30<sup>th</sup> November 2011-----“.***

21. The Respondent proceeded to terminate the Claimant's services and offered to pay him 3 months' salary in lieu of notice.

22. The question then is whether the events occurring on 17<sup>th</sup> November 2011 would have necessitated the termination of the Claimant's services. From the Claimant's evidence, he acted on a letter from Central Accommodation Board to go and check the male hostels. The students however became unruly and started rioting.

23. The Respondent contends that the Claimant mishandled the situation and this is what led to the strike. Whereas there could have been a lapse in the way the whole incident of the riot degenerated, blame cannot be placed upon the Claimant as he was doing his work as expected. The Respondents have not

explained what he did out of order that could be blamed upon him.

24. Under Section 43 (1) & (2) of Employment Act:

***“(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”.***

25. Such reason must be proved by the Respondent but Respondents have not explained why they blame the Claimant for the strike.

26. I therefore find there were not valid reasons for terminating the Claimant’s services.

27. On the 2<sup>nd</sup> issue, due process expected is as envisaged under Section 41 of Employment Act which states 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”.***

28. There is no evidence that the Claimant was subjected to due process as above.

29. This implies that the termination of the Claimant was unfair and unjustified as provided for under Section 45 (2) of Employment Act 2007 which states as follows:

***(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.***

30. In the premise, I find the Claimant has established his case as envisaged and I award him as follows:

***1. Damages equivalent to 12 months salary for unfair termination = 12 x 15000= 180,000/=;***

***2. 1 months’ salary in lieu of notice = 15,000/=;***

***3. 1 year leave not taken = 20,000/=;***

**Total 195,000/=**

***4. The Respondent will also pay costs of this suit and interest at Court rates with effect from the date of this judgment.***

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

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ongoto holding brief for Gakoi for Claimant – Present

F.N. Kimani holding brief for Ndungu Mwaura for Respondent – Present