



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 132 OF 2016**

***(Before D. K. N. Marete)***

**EDWIN KIPCHUMBA KINYOR.....CLAIMANT**

**VERSUS**

**MOI UNIVERSITY.....RESPONDENT**

**JUDGEMENT**

The matter was originated by way of a Memorandum of Claim dated 29th July, 2016. The issue in dispute is therein cited as;

*Unlawful dismissal of the Claimant from employment and refusal by the Respondent to pay the Claimant his rightful dues.*

The Respondent in a Response to the Memorandum of Claim dated 6th September, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that he was employed by the respondent as a Maintenance Officer in the respondent Estate Department on 29th March, 2011. He puts it thus;

*The Claimant was employed by the Respondent as a Maintenance Officer in the Respondent's Estates Department on 29<sup>th</sup> March, 2001 starting at Job Group E and by the year 2015 he had been promoted to Job Group F. The appointment was confirmed on 13<sup>th</sup> June, 2002. He served in that capacity with all diligence and dedication in the best interest of the Respondent.*

It is the claimant's further case that on 27th March, 2015 he was issued with a show cause letter directing him to show cause why disciplinary action should not be taken against him over alleged loss of furniture at the University Eatery. He responded to this by a memo dated 8th April, 2015 denying responsibility and asserting that he did not have the key to the store where this had been kept.

It is his further case that on or about 13th April, 2015, he was suspended from duty pending appearance before the Staff Disciplinary Committee. On 25th of June, his services were terminated for misconduct.

The claimant's other case is that on 12th July, 2015 he appealed against termination to the Vice Chancellor but this was rejected. He further appealed to the chairman of the respondents' counsel and his appeal was heard on 29th October 2015 and dismissed.

It is his penultimate case that his dismissal was illegal, unprocedural and unfair for being based on unfounded allegation and prays for reinstatement forthwith.

He prays for Judgement against the Respondent for;

- a. An order directing the Respondent to re-instate the Claimant to his employment under the prevailing terms of service.*
- b. In the alternative to (a) above, there be a declaration that the termination of the Claimant's services by the Respondent is unlawful and unfair and he is entitled to be compensated as set out at paragraph 19 and 20 above.*
- c. Costs of this Claim and interest thereon at court rates.*
- d. Any other and/or further relief this honourable court shall deem fit to grant.*

The Respondent's case is an admission of the employment of the claimant as pleaded but denies that the claimant served with diligence and dedication as alleged or at all.

The respondent's further case is a denial of lack of substantive and procedural fairness in that the claimant was taken through a hearing before the staff disciplinary committee and therefore the validity of termination. This is as follows;

*In response to paragraph 11 of the Memorandum of Claim the Respondent maintains that contrary to the Claimant's allegation that the hearing before the staff disciplinary committee was a sham due process was followed. In particular the Claimant;*

- Was notified of the charges he faced well in advance;*
- Was afforded an opportunity to present his case/evidence and call witnesses in his defence*
- Was afforded an opportunity to cross-examine the witness who were called to testify*
- Was represented by union official in the meeting.*

The respondent avers that the claim is an afterthought in that he did not raise any misgivings on the inadequacy of the process of hearing and particulars of hearing or at all.

The issues for determination are;

1. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this cause?

The 1st issue for determination is whether the termination of the employment of the claimant wrongful, unfair and unlawful. The claimant in his written submissions dated 6th March, 2017 forments a case of unlawful termination. He relies on the witness statement of Elijah Kiprotich Korir dated 8th December, 2016 which indicates and clarifies that the claimant was not present when the furniture was delivered. The witness indeed was present and gave his phone to Mr. Sigei who used it to call the claimant and informed him of the furniture. The claimant further discounts proof of defence case by documentary evidence as follows;

*Further, no sufficient documentary evidence was presented to prove the case against the Claimant. Florah Kosgei (page 29 of the bundle) admitted that the occurrence book which ought to be signed on dispatch of items for repair was not signed hence it is not clear who actually received the items and whether they were delivered in the first place. Mr. Kandie at page 19 of the minutes admitted there was no record of how and when they were delivered. Leah Samoei*

*(page 23 of the minutes) said she was told it was Mr. Buses who received them.*

The respondent in his written submission filed on 16th March, 2017 brings out a case of lawful termination of employment in that substantive and procedural aspects were undertaken during disciplinary proceedings which were not contested by the claimant. She sought to rely on the authority of **Alphonse Machanga Mwachanya vs. Operation 680 Limited [2013]eKLR** where the court observed as follows;

- i. That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;*
- ii. That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation.*
- iii. That the employer has heard and considered any explanations by the employee or their representative;*
- iv. Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.*

Again, the authority of **Peter Apolo Ochieng v. Amedo Centre Kenya Limited (2016) eKLR at paragraph 39** where Honourable Lady Justice M. Mbaru observed as follows;

*“The provisions with regard to fair procedures leading to a termination under section 41 of the Employment Act are mandatory. Where not followed, a termination becomes procedurally unfair. Without written proceedings setting out how the Claimant was heard at the meeting held on 13<sup>th</sup> August, 2009 and there being no representative to accompany the Claimant, the resulting termination became unfair.*

*44. That was the best forum for the respondent to submit all the evidence now submitted in court in defence for the claimant to address. The claimant should have been notified before the hearing date and he should have been given sufficient time to prepare his defence and advised by the employer to bring another employee/representative of his choice”*

This matter tilts in favour of the respondent. She overwhelmingly presents a case of substantive and procedural fairness in the termination of the employment of the claimant. The claimant’s case on the contrary does not come out to controvert the

respondent’s case. I therefore find a case of lawful termination of employment and hold as such.

The 2nd issue for determination is whether the claimant is entitled to relief sought. He is not. Having lost on a case of unlawful termination of employment is not entitled to the relief sought.

I am therefore inclined to dismiss the claim with cost to the respondent.

Delivered, dated and signed this 16th day of May 2017.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Magut instructed M/S Magut & Sang Associates Advocates for the Claimant.
2. Mr. Isiji instructed by Nyairo & Company Advocates for the Respondent.