



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1156 OF 2011

KUDHEIHA WORKERS CLAIMANT

VERSUS

TECHNICAL UNIVERSITY OF KENYA RESPONDENT

JUDGEMENT

1. The issue in dispute is the wrongful termination of the grievant, Sarah Anyangu Indech-Ochieng.
2. The memorandum of claim was filed on 12th July 2011. The claim was against KENYA POLYTECHNIC UNIVERSITY COLLEGE. The claim was amended upon the changed status of the Respondent vide Legal Notice No.159 published on 27th August 2007, and the establishment of the Respondent entity as a university college under the name of Kenya Polytechnic University College, a constituent college of the University of Nairobi and then gained full status and autonomy upon grant of full Charter in January 2013.

Claim

3. The Claimant, Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA Workers) is a registered trade union and represents workers in both private and public institutions including primary and secondary schools, polytechnics, training centres, universities and university colleges. The Respondent is an institution of higher learning.
4. The claim is that the grievant (Sarah) was employed by the Respondent on 1st December 2002 as a Clerical Officer and at the time of termination she had been deployed at the Deputy Registrar – Academic office and department. On 26th March 2004, Sarah asked to be granted time off in the evening to pursue Diploma in library and Information Studies at the University of Nairobi and on 23rd July 2004 she was deployed to the library.
5. On 11th April 2005, Sarah applied for study leave which was granted on 11th May 2005. She however developed health problems and upon advice by the doctor requested for a transfer and was then deployed to achieve from 25th September 2006. Following further medical advice, Sarah was deployed in the Deputy Registrar Academic office. The grievant was then supervised by Mr Mathagu.
6. On 16th October 2007, Sarah was issued with memo accusing her of lateness. She replied and noted that her mother-in-law was hospitalised. The mother died after 5 days and was given 10 days for compassionate leave. On 6th March the grievant got one (1) day compassionate leave to attend burial upcountry. On 10th March 2008 she was accused of failing to open the office on time at 2.30pm on 7th

March 2008 since she had travelled. The matter was reported to the Respondent then Principal, Muthwale. The supervisor, Mathagu then threatened the Sarah with termination. That there was a spirited effort to frustrate her and in the performance of her work to ensure that she gave in to sexual advances. Therefore Upon the transfer and deployment to the admissions office, on 10th July 2008 Sarah was issued with an internal memo by Mr Mathagu charged with the duty of keeping the office keys to the main door of the admissions office. Other female employees were not given the key. This did not go well with her and therefore wrote to management requesting that the key be deposited with the security office. On 14th July 2008 Mathagu directed her to pick the key assigned to her.

7. Matters took a different turn On 12th August 2009 when the Principal, Mr Muthwale met Mr Ochieng, husband to Sarah when he had come to pick her after work, and Muthwale asked to see him in the office. The following day there was a meeting and Ochieng did not take kindly the issues raised by Muthwale at their meeting and on 13th August 2008 he wrote an email to Muthwale with regard to the conduct of Mathagu to his wife and asked the Principal to conduct investigations.

8. On 18th May 2009, Sarah applied for 2 years study leave to be able to complete a degree course at Moi University, Nairobi campus but was declined. On 16th June 2009 she requested for permission to attend a doctor's appointment due the next day. On the morning of 29th October 2009 the grievant went to see the Principal over sexual harassment by Mathagu who was her immediate supervisor but did not manage to talk to him. She went to the Principal's office in the evening to report the same but was assaulted by the security officer, Madei. She screamed after being beaten causing a commotion which attracted students and staff. The matter was reported to Railways police Station, a P3 form was issued and she did her statement with the Respondent security office. On 2nd November 2009 she was suspended from duty on allegations of absenteeism and causing a commotion at the Respondent premises. The Claimant union made enquiries following up on the police report but was told the criminal investigations department was dealing with the case. There was no further communication.

9. On 28th January 2010 Sarah was invited to attend disciplinary hearing on 3rd February 2010. On 3rd March 2010 the Claimant union lodged a complaint with the Respondent that at the hearing of the case, Sarah was never given a chance to state her case but the Respondent was emphatic that there was fair hearing and she was accompanied by the shop steward who was allowed to represent her.

10. On 9th March 2010, Sarah was terminated from her employment with the Respondent through a letter sent by registered mail which was never received. Sarah then wrote asking for her salary on 12th March 2010 as there was no deposit at her bank, on 13th April 2010 the Respondent wrote to her advocates stating that by registered mail a letter of termination had been sent. On 31st March 2010 the Claimant wrote seeking payments due from production unit allowances for November 2009 but the Respondent replied and stated she was not entitled to such allowances as she was on suspension.

11. On 14th April 2010, Sarah filed an appeal, a reminder was done but there was no reply. The matter was reported to the Claimant union seeking to have negotiations meeting on 8th June 2010 but the Respondent insisted that the matter had been handled professionally and concluded. On 9th June 2010 the matter was reported to the Minister, a conciliator was appointed and on 7th March 2011 the conciliator filed his report.

12. The claimant's case is also that the grievant problems started when she refused to take charge of the office keys as directed by her supervisor, Mathagu whereas he knew she was a part time student in the evening and required to leave early. At the hearing of her case on 2nd March 2010 present were junior staff of the Respondent while she had a union representative. At the hearing the grievant was asked to produce witnesses of which she had not been told in advance and had no chance to source for any as she had been barred from the university premises. Her supervisor, Mathagu was not at the meeting to highlight pertinent issues touching on the case which was meant to intimidate her. The security officer who had assaulted her, Madei was also not at the hearing. That Sarah had been made to report her every

movement and whereabouts to Mathagu, when going to the toilet or to attend to any personal matter while at work. When she protested the manner of her treatment, he commenced efforts with allegations and accusations without any basis. This matter reached her husband, Ochieng who sent an email on 13th August 2008 asking for an investigations on Mathagu especially on the issue of sexual harassment. When she went to see the Principal, Mr Aduol, she was assaulted at the door by the security officer, Madei. This was with the intention to cover up the matter as a bad labour practice. There was no show cause issued and the Respondent did not follow the disciplinary policy in place.

13. The Claimant is seeking the reinstatement of the grievant.

14. On 27th February 2013 the Claimant filed further documents and Verifying Affidavit and also amended the claim. The amended claim is of the nature that Sarah was never given reasons for her termination under section 46(g) of the Employment Act or given any show cause prior to the same. Upon suspension she was then terminated on matter that had nothing to do with the letter of suspension and dwelt on matters between the Principal and her husband. This was contrary to the Bill of Rights article 27, 28 and 29. The claim is also that Sarah was sexually harassed and when she resisted she was put in very intimidating work environment. During the disciplinary hearing on 2nd March 2010, the panel was composed of persons whose presence was challenged; Fred Oduogi had severally sexually harassed Sarah; and Cosmas Kanyadudi was abetting the vice as he had once asked her to see him between 6am and 6.30am. He had also wanted to help her with her work problems and to bring her private medical records to him contrary to article 31 of the constitution. The chair of the panel, Cleopas Ondieki was biased and never gave Sarah a chance to state her case or the shop steward, George Nyatieno to defend her. The Disciplinary Committee under the University Council per the university statute was supposed to hear the case but this was ignored. The council never ratified the minutes of the hearing panel as required. At the time of termination the Respondent had new terms and service due to the changes to a university but these were never provided to her. The two appeals were never considered.

15. The amended claims are for benefits due for 7 ½ years; a re-engagement without loss of benefits and career progression; and in the alternative a payment for loss of future earnings to age 60 under section 16 of the Respondent university Act and the applicable CBA. The Claimant had been enrolled with the university Pension Scheme but was terminated before age 40 and in awarding compensation the Court to take this into account. Due to filing the suit, the grievant has been stigmatised, isolated and emotionally distressed and has been unable to secure new employment and therefore seek compensation. Sarah had obtained HELB loan to pursue her education but due to her termination, this was not possible as she was barred from the Respondent premises where she was undertaking her research. She was never absorbed into the Respondent University despite presenting her documents.

16. Amended claims are based on the CBA dated 29th September 2011 and seeking;

- a. *Loss of future earnings;*
- b. *Gross pay 14,552 x 240 months = 3,492,480*
- c. *Pension 3,171 x 240 = 761, 04*
- d. *House allowance 10,000 x 240 = 2,400,000*
- e. *Car allowance 10,000 x 240 = 2, 400, 00*
- f. *Medical allowance 429 x 240 = 118,800*
- g. *Baggage 4,838 x 240 = 1,161,120*
- h. *Passage allowance 2,538 x 240 = 609,120*
- i. *Leave allowance 28 days x 20 for 560 days x 2500 = 1,400,000*
- j. *Production unit 9,000 x 240 = 2, 1600,000*
- k. *Dental and spectacles allowance 4,500 x 20 years = 90,000*

17. In her evidence in Court, the grievant (Sarah Anyango Indeche-Ochieng) testified in support of the claim an submissions set out. Sarah testified that she was being harassed at her work place and suffered intimidation by her supervisor who kept issuing her with memos. She decided to report to her senior, the Principal at the Respondent, Mr Aduol. On 27th October 2009 she went to the office in the morning but

was not able to see the Principal. Upon return in the evening, the security officer Mohammed Madei refused her entry and assaulted her. She was screaming which attracted students and staff and the matter was reported at the Railways Police station. A P3 was issued and filed and a statement recorded with the police and Respondent security. However upon report to work the grievant was suspended on the grounds that she had caused a commotion and being absent from work. This was despite the fact that she had been assaulted and made to report to the police and record statements.

18. Sarah also testified that while at work, several people were sexually harassing her or abetting the harassment directly or indirectly. The Principal, Mr Oduogi had touched her and the personal assistant was verbally sexually harassing her. He assigned her duties outside work hours and due to her health condition that she had filed a doctor's letter on, she could not be able to attend to some duties. The personal assistant would send her outside to fetch water for making coffee; asked her to contribute cash to buy a water dispenser yet she could not afford due to her low salary but he offered to pay for her and in return she should repay in kind. The grievant felt that she was required to compromise her dignity. She was made to write down every movement she made and when absent for any reason, this was reported to the personnel office. She was given office keys to open and close but she protested as these were supposed to remain with the security office. She was a student at the time and required to attend evening classes.

19. The Principal, Mr Muthwale called Sarah and wanted to know if she had any problems, wanted to know how she was able to pay for her bills; and insinuated that if she could confide in her he was going to attend to her just like her husband. Other colleagues continued to harass her and she was under a lot of stress. Mr Kanyadudi, the personal assistant to the Principal called Sarah with information that Mathagu had reported her absence from office severally without due cause and intimated that he would help. That since he was a busy person, she had to meet him between 6am to 6.30am. She decided to see the Principal as she wanted to stop the sexual harassment. On 27th October 2009 she made effort to secure an appointment but this was not possible. She later met him along the corridor and agreed to have a meeting the next day at 8.30am but the secretary refused to let her in. Her husband, Ochieng came and told Mathagu to stop harassing his wife. Later at 4.30pm Sarah went back to see the Principal, the security guard advised her to wait at the entrance where there were 2 other guards – one from Kenya Railways and another from the Respondent – since Sarah wanted to be attended and go away when she made effort to get in, the guard from the Respondent pushed her away. He punched her on the breast and she started screaming. People started gathering around her attracted by the screaming. Her husband who had come to pick her came and advised she should go away and the matter was reported to the police.

20. Sarah also testified that she resumed work but on 3rd November 2009 she was suspended on the grounds of causing a commotion and being absent from work. She was called for a hearing and later terminated. Before the hearing could start she asked one member, Oduogi to leave since he had sexually harassed her. She was not comfortable with his presence. She also wanted Kanyadudi to leave as he had also sexually harassed her when he asked her to see him at odd hours at 6 to 6.30am. She asked for her supervisor, Mathagu to be present as he had issued memo and for Madei to be present as he had assaulted her, but her requests were not allowed.

21. She lodged an appeal but this was never addressed.

22. Sarah also testified that at the admissions office, the staff in the unit were all paid for registration of students but since 2009 she was never paid. The failure to pay the allowances from the production unit was meant to exert pressure on her to give in to sexual harassment that she resisted.

Defence

23. In response, the Respondent case is that Sarah was employed by Kenya Polytechnic until her termination as her disciplinary case coincided with the changes at the Respondent to university status and her contract was never changed. The letter allegedly issued and dated 17th August 2004 is disputed as having been authorised by the Principal, Muthwale as it does not have the folio number as with all Respondent communications. On 16th October 2007, Mathagu being the supervisor of the Claimant did a

memo on her lack of adherence and flagrant disobedience to work hours. On 27th July 2006 the Claimant had presented a medical report indicating that she should be allocated lighter duties and was promptly deployed to achieve. The Respondent also got a medical report on Sarah dated 21st September 2006 from Mbagathi hospital. On 16th October 2007 Sarah got compassionate leave for burial of her mother-in-law. On 22nd August 2008, the Chief Principal wrote to Sarah noting her role in souring working relations within the academic registry-admissions. Sarah refused to keep the office keys despite a meeting where it was agreed that such keys should not be left with the security office. It was not in her place to challenge the decision. Sarah's husband wrote to the Respondent Principal on work issues which was contrary to protocol.

24. The defence is also that in a memo dated 8th April 2009 Sarah was invited to a disciplinary hearing for insubordination and was at all times aware of her charges. Sarah was not denied study leave as she was advised to await the university council approval of the staff training and development policy. The requirement by Mathagu that she should report her absence from office was an operational requirement and not done with malice.

25. On the allegations made about sexual harassment, Sarah filed a case on sexual harassment and assault in **CMCC 1318 of 2010** against the Respondent who has counter-claimed for defamation and the matter is *sub judice*. There are no criminal charges against Mohammed Madei and the police only opened a general inquiry file on the case. Sarah forced her way into the Principal's office necessitating action against her by Madei as a guard on duty manning his station.

26. Sarah was invited to the disciplinary hearing vide letter dated 9th March 2010. The Claimant union by then had not recognised the Claimant, resulting in **Industrial Cause No.408 of 2011**. The termination letter was issued to Sarah as she had the documents relating to its posting in her possession. The Claimant had at this time no mandate to invite the Respondent to a meeting as there was no recognition.

27. The Respondent also submitted that at the time of filing the claim, the Respondent had not recognised the Claimant union and therefore *lack standing*. Such are matters subject in **Cause No.408 of 2011**. Matters averred by the Claimant are outside the purview of the claim as termination was on the basis of Sarah causing a commutation within the Respondent premises and absenteeism. The averment with regard to her health are not shown to have been impeded by the Respondent and the case at hand does not relate to sexual harassment. There was an ongoing tussle with Sarah concerning insubordination at work but was dismissed for a different reason – Sarah had an appointment with the Principal at 8.30am on 29th October 2009 but was absent. Mathagu as his supervisor was asked to issue memo with regard to her absence and for her to state her whereabouts. Sarah opted not to reply but proceeded to the Principal's office at 12pm but there was an ongoing meeting. She returned at 4pm but the Principal remained in a meeting but she insisted that she had to go in where she was restrained by the guard as his duty required. Sarah started screaming and disrupted the entire administration building as this attracted students and staff. She was suspended and later called for a hearing and she was accompanied by a shop steward. Upon deliberation, a decision was taken to terminate Sarah's employment.

28. The claim for reinstatement is disputed as Sarah has set out the Respondent as a hostile place to work at. She has accused several senior and junior employees of sexual harassment despite not having any evidence. To seek reinstatement into such an environment would not be in the best interests and in any case, the termination was procedural and lawful. To return Sarah to the Respondent would upset social climate. Reinstatement should selectively be allowed upon consideration of all circumstances. The case herein does not deserve such a remedy.

29. There was a conciliator's report that recommended that the case herein is pegged against the outcome in the sexual harassment and assault case filed by Sarah. The claim for reinstatement is not available in this case and there are no alternative remedies sought.

30. The Respondent called 4 witnesses – Cleophas Ondieki, Patrick Muchina Mathagu, Mohammed Madei and Ruth Kirui.

31. **Cleophas Ondieki** testified that he is currently the Director Centre for Education with the Respondent and worked closely with Sarah as the Administrative Registrar of the Respondent. He handled the case of Sarah arising out of indiscipline for causing a commotion at the premises on 29th October 2009. He chaired the disciplinary panel. Other present was a union representative, George representing the Claimant. Each panel is on an *ad hoc* basis based on the need of each case. The Respondent had other cases together with that of the Claimant. There are minutes for each case. She denied being absent from work without permissions but the Respondent relied on correspondence between the Sarah and her supervisor. The Claimant denied causing a commotion but she was found guilty and an infringement of the Employment Act. The panel recommended a dismissal but the Principal had to look at the case and make a recommendation. He changed it to the less harsh sanction and opted to terminate the Claimant so that she could access her benefits. At the time the Claimant had not signed the new terms of service as these were done after she had left the Respondent employment.

32. Mr Ondieki also testified that the case by Sarah that she was discriminated against was not the subject of her disciplinary hearing. She tried to introduce the subject but this was not the charge for consideration. There were reasons given as to why Sarah could not get study leave as the policy had not been approved by the council as it had not been constituted until later. The CBA between the University of Nairobi and the Claimant was not applicable to the Respondent. The matter of recognition was subject of Court in a different case.

33. That Sarah has never cleared with the Respondent for her due terminal benefits to be computed.

The second witness was **Patrick Muchina Mathagu**. He testified that he was appointed as Deputy Registrar by the Respondent and worked closely with Sarah who was a clerk who was changed in different offices within the same departments. They all worked in an open office but had to install a new lock with 3 keys where one was given to Laboso, the other to Sarah and one to himself. The key was to be kept on rotational basis and for all those who went on leave, he kept the keys. In any event he would be at the office by 7.30am while Laboso reported by 6.30am. The office would be opened by either Laboso or he would. Sarah refused to take the key and he issued her with a memo as she was uncooperative and refused instructions. He then waited for the Principal to give directions on the matter. The keys were not rotated as duplicates were done and issued to all staff save for Sarah who refused to take any.

34. Mathagu also testified that Sarah would report to the office at 8.30am and leave by 4.30pm. There were procedures set by the Respondent for staff attending to matters outside the office and the supervisor must be approved upon request. Sarah was never told to do a memo with regard to attending to her mother at Kenyatta Hospital or at her children school for PTA meeting. He never made any advances at Sarah or seek sexual favours or harassment and they talked very little if at all. The work relations were not good and since they do sensitive duties, he decided not to allocate Sarah any work. The sour relations started with refusal to take the office keys and there had been student's complaints on daily basis. Sarah's interpersonal relations with students and other staff was poor as she kept on shouting and being very rude to appoint that he decided to take up her duties and leave her to herself. Sarah was never punctual at work, he asked her to improve but only got worse. Sarah never reported any case of sexual harassment to him and had she done so and he failed to act, she was the kind of person who would move and report to the Principal. She filed a case with Chief Magistrate on sexual harassment and assault, but Mr Mathagu is not listed as a Respondent. The allegations of sexual harassment has only arisen in this matter. Sarah's husband had accused Mathagu of sexually harassing his wife and on 29th October 2009 during the commotion caused by Sarah, such incidents of sexual harassment were stated.

35. On 29th October 2009, Mathagu was at his office attending to members of the public and students. The office had been redesigned to give direct access to anybody seeking assistance without having to go through the secretary. There were 2 door to the office. A man came to the office and closed the door. He told him to leave the door open but he banged the door and accused Mathagu of sexually harassing his wife since 2006. Mathagu demanded to know who he was or who the wife was but he became violent both physically and verbally. He called for backup from the Principal's office and the security guards came and led the man away from the Respondent premises. On 13th August 2008 an email had been sent to the Principal by a Mr Ochieng, husband to Sarah and asked that Mathagu be investigated for sexually

harassing his wife. This email was sent to Muthwale directly and he never called Mathagu an only learnt about the email later in these proceedings. He was never called over any investigations as there was no truth in it.

36. The witness also testified that Sarah was called for a disciplinary hearing on charges of causing a commotion and absenteeism and not on sexual harassment. Sarah had duties allocated to her like all staff and had no claim for extra payments. Her movements were never restricted but when she kept away for long, as the supervisor he had to ask. She was a hard person to work with and had no respect for authority. The incident at the Principal's office on 29th October 2009 only occurred as Sarah did not want to follow order and address her issues procedurally and opted to go to high office. There was a lot of insubordination. The incident and commutation had taken shape the previous day when Sarah booked an appointment with the Principal at 8.30am. The Principal indicated that he would call Sarah later but Sarah insisted that she is the one who wanted to meet the Principal and not the other way round. Later Sarah reported to Mathagu that the Principal had given her an appointment the next day in the morning. At 8am the Principal called to find out where Sarah was but she had not arrived. At 8.30am he called again but she had not arrived. Efforts were made to trace her through the secretary but she had not reported to work. The Principal directed Mathagu to issue memo to Sarah seeking to know her whereabouts and her failure to attend the appointment. When she got the memo, she caused a commotion. In the afternoon she made effort to see the Principal but caused another commotion. The disciplinary committee addressed matters of the commutation and being absent without permission and such did not require Mathagu to be present.

37. There were changes to the Respondent status commencing in 2007 to 2009. Within this period there were no promotions and payments until 2010 to 2011 when the transition commenced and in 2012 when all structures were in place, new policies commenced operationalisation. By this time Sarah had left her employment with the respondent.

38. Mathagu also testified that he did not ask that Sarah to be terminated. He only wanted her out of his department. On 22nd August 2008 he did a report and noted that there was tension in the department and recommended that Sarah be transferred from Admissions office to ease the same.

39. Sarah was able to cross-examine Mathagu who testified that on 29th October 2009 he had screams while in his office, he came out and found her screaming and tearing her blouse outside the Principal's office. He was not called or invited at the disciplinary committee hearing the case. He did not allocate Sarah work to avoid shouting and rude responses with members of the public and students. He opted to take over all her duties. This was not to frustrate her but to ensure that the department was running smoothly and to avoid further complaints. Sarah refused to heed to advice to use civil language with students.

40. The third witness was **Mohammed Madei**. He testified that he has served as security officer with the Respondent for the last 30 years. At the material time he was based at the Principal's office until the Respondent status changed to have a vice-chancellor. His duties were to guide visitors to this office. There were visitors that he knew had appointment with the Principal and those who did not have and each were directed accordingly.

41. On 29th October 2009 at 9am, Sarah passed through the gate to the Principal's office. She then left. She came back at 4pm. The Principal told George Papai that he did not want to see Sarah and was not to be allowed inside. On these instructions Madei held the door and Sarah remained outside the metal door. She tried to force through to avoid it being locked. Sarah held the door and started screaming crying that she had a right to get inside. This was at first floor of the Respondent premises. The screaming was loud forcing students and lecturers to get out to attend to the same. They all came towards the noise at the Principal's office. There were also many visitors at the office. Other security officers came and took Sarah away. Madei kept at his station of work as the other security officer's Respondent to the screaming. He did not touch Sarah as she remained outside the metal grill door. When she was led away, he did not know what became of her but was called to record a statement at the police station. He was not charged. He has remained with the Respondent to date. He only stopped Sarah from entering the Principal's office as he was directed to attend. He had no prior knowledge of the reasons as they were work colleagues. He

had no reason to beat her up or touch her breasts as alleged or sexually harass her. This commotion attacked a huge crowd as the screaming was very loud.

42. The 4th witness was **Ruth Kirui**. She testified that she is the Respondent Legal officer and secretary. On 1st March 2010 she was appointed and her first duty upon reporting for work was the disciplinary case for Sarah and other employees. There were 2 offences;

- a. Being absent without permission and
- b. Causing a commotion.

43. The Principal had briefed her, she also had talked to Mr Ondieki in administration and Mathagu, the supervisor at the time. The panel was hearing two cases, Sarah and James Njue. Sarah was called first at 10.30am and the hearing went on until 12.30pm. Present at the meeting was Ondieki as chair; Kanyadudi and Orwa who knew what had the history of the matter. Njekebu was the highest ranking human resource officer and held the memory of Sarah's employment. George Nyatieno was present as a shop steward. At the time the Respondent had no gender policy as this was introduced in the constitution 2010 promulgated in August 2010.

44. Ms Kirui also testified that she met Sarah for the first time at this hearing, she kept on diverting attention from her charges to personal details, details that were private and embarrassing to the entire panel. She refused to address the matters at hand or mitigate her case. She did not give direct defence on the charge of causing a commotion or why she was absent from work. At the disciplinary committee, this was not a judicial process where witnesses are called to be cross-examined and the Respondent procedures met the minimum threshold on how to conduct a disciplinary hearing. Sarah was called and advised to bring the union representative, she was given a hearing to defend herself and despite effort to give her sufficient time, she spent 2 hours on issues not related to her case. Mr Nyatieno for the union was present and made these observations. Where the proceedings were conducted unfairly, the union representative had the chance to raise objections. The charges against Sarah warranted summary dismissal but the Principal reduced this to termination.

45. Ms Kirui also testified that before legal Notice No.159 of 2007, the Respondent was a polytechnic under the Education Act which covered secondary schools under the Teachers Service Commission. It was headed by a board of governors under TSC. On 14th November 2010 the Principal was gazetted and May 2009 a Council was constituted but did not take effect immediately. It was not until July 2010 when the Respondent statutes were passed to take full autonomy. In transition there was a council under university of Nairobi vice chancellor, Prof. Magoha. When the Claimant was terminated, the terms of service at the time, under legal Notice No.159 of 2007, the Respondent was to take over all assets of Kenya Polytechnic and in the absence of new legal order and statutes the old had to apply. The TSC terms and conditions of service were in force at the time of termination.

46. Ms Kirui also testified that Sarah was entitled to her terminal dues on condition she cleared. Once such clearance is done, all owing dues shall be paid.

47. In March 2010 Sarah filed **CMCC 1318 of 2010** against the Respondent claiming that there was no sexual harassment policy but the Respondent has made all effort to make the work place a safe environment. The case was dismissed. The case was a first of its kind as its basis was the application of section 5 of the Employment Act on non-discrimination. At railways police station, report No. 1 of 2010 by Sarah against Madei, upon police investigations, they found no case.

48. The Claimant lodged an appeal, but she directed that all her communications should be channelled through her advocates which the Respondent did. Her dues were not paid as she refused to undertake clearance, which once done, all owing terminal dues shall be paid.

49. On the two charges that Sarah faced, causing a commotion was a matter that had a prima facie case, witnesses recorded statements with the police and she did not defend herself. On the charge of being absent from work, she failed to attend at the appointment with the Principal and when her supervisor

asked to explain, she opted to go and see the Principal herself which led to the commotion. The remedy sought for re-engagement is not possible as Sarah had a poor record, her work ethos working in different departments was poor and can only be classified as a problematic employee.

50. A certificate of service is due once the clearance process is done.

51. The case filed by Sarah on sexual harassment got wide media attention. Every time the case was in Court it was extensively covered. This caused a lot of anxiety as Sarah mentioned 10 senior employees of the Respondent and alleged that they all sexually harassed her. These officers are still in employment with the Respondent and it would not be possible for Sarah to fit in in a case she is reinstated or re-engaged. It would be in her best interests not to be re-engaged. The media coverage of the case was traumatising to so many employees of the Respondent. The termination was lawful and Sarah is not entitled to future loss of earning. Sarah was not part of the Respondent employee given new terms of service to claim any benefits therein.

Submissions

52. Hearing closed on 1st December 2015. Both parties agreed to file written submissions and mention on 25th February 2016 to confirm and take a date for judgement. On the due date the Claimant had filed written submission on 15th January 2016 but the Respondent had not. Counsel present for the Respondent submitted that Mrs Tongoi who had conducted the defence case as since travelled for further studies. The exchange of submissions had been agreed upon by the parties, the Court gave a period of over to months for the filing, which I find to be sufficient and ample time for the Respondent to have organised themselves to file such submissions. This is an old case that has taken very long to conclude and only fair that further delays stop at this point for judgement.

53. The Claimant submitted by restating their case and replied on the case of **Beatrice Achieng osir versus Board of Trustees Teleposta pension Scheme, Cause no.665 of 2011.**

Determination

54. The Claimant union has set out several issues in the process of the case but the only issue set out in dispute is that of unfair termination. During the hearing it emerged that the grievant, Sarah strongly felt that her termination was as a result of sexual harassment and assault while at work, but this issue will be addressed separately. The issues I find for determination herein are;

Whether there was a CBA in force;

Whether there is a case for unfair termination; and

Whether the remedies sought are available.

55. Both parties admit that prior to the filing of the current claim, there was **CMCC No.1318 of 2010, Sarah Anyango ochieng versus Kenya polytechnic University College & Others**, where the grievant herein, Sarah Achieng was the plaintiff claiming she was sexually harassed and assaulted, but this case has since been dismissed. This was confirmed by Ms Kirui for the Respondent and there was no challenge to this evidence. Also on record is evidence that there exists **Cause No. 408 of 2011, KUDHEIHA versus Kenya Polytechnic University College**, the basis of the claim regards the recognition of the Claimant by the Respondent. There are no submissions on this issue at all. What is apparent is that the Claimant has relied on the CBA they had with University of Nairobi as the basis of the claims set out in the memorandum of claim and the amended claim. Indeed the attached CBA is for the period 2006 to 2008 and 2008 to 2010 between the Claimant union and University of Nairobi.

56. The legal import of the claim being filed by the Claimant union in the absence of a CBA or recognition agreement between parties was not addressed instantly. Despite knowledge of **Cause No.408 of 2011** and the issues raised therein, parties have proceeded without the challenge of standing. Each

party has relied on the submitted CBA at their convenience. The basis of the claimants set out are largely arising from the CBA and the conciliators report, relate to the dispute filed by the Claimant to the Minister. I take it the Respondent participated and recognise the report filed by the conciliator on the understanding that there existed a relationship between the parties. That however does not address the core of the legal technicality of the Claimant union lacking standing on the basis the claim was filed before **Cause No.408 of 2011** was concluded and that the proceedings herein have been undertaken in disregard of this very important legal hurdle not being addressed by the Respondent.

57. Legal Notice No.159 of 2007 in its nature established Kenya Polytechnic University College, a constituent of University of Nairobi. The Respondent thus became *University College* as defined under the Legal Notice No.159 of 2007 to be;

“University College” means the Kenya Polytechnic University College established under section 3 of the Act.

58. The entity therefore established as the University College was to have a corporate status with perpetual succession and with a common seal and with capacity to sue and be sued; take, purchase, received, an perform all duties of a legal entity as done by a corporate body. At section 3(3) and (4) of the Legal Notice No.159 of 2007 states;

(3) The university College shall [be] the successor to the Kenya Polytechnic constituted under the Education (Board of Governors) (Kenya Polytechnic) Order.

(4) All rights, liabilities and assets held by or by any body on behalf of the Kenya polytechnic, existing at the commencement of this order, shall be automatically and fully transferred to the University College.

59. For all intents and purposes, the Respondent did not cease its autonomy to the University of Nairobi. It remained a corporate entity of its own. Whatever structures and facilitative systems were put in place, I find no corporate linkage with University of Nairobi with regard to capacity to sue or be sued. Such remained with the Respondent corporate. Had that been the case, the current suit should have been filed against university of Nairobi with whom the Claimant union held a CBA.

60. This is not a legal technicality that can be addressed by the application of article 159 of the constitution or with reference to section 20 of the Employment and Labour Relations Court Act that permit this Court to avoid technicalities and address the substantive issue. The filing of a suit by the wrong party cannot be legitimised, cured or validated under the above provisions of the constitution or the law. Even with the best effort to make a finding on this basis and despite the parties having failed to address the same from the start, there exists a claim filed by a party other than the alleged wronged party, Sarah Anyango Indech-Ochieng who is the employee who had a relationship with the Respondent as the employee. At the time of filing suit, the Claimant union had no recognition with the Respondent nor did they have a CBA. That in itself made them a wrong party to file the current suit.

61. The effort made by the Court to have the Claimant amend the suit, time take out for this purpose was not well utilised. I take it the Claimant union had all along under the mistaken belief that they are rightly before Court. The Respondent has not helped either. The issue of *standing* was addressed in the statement of defence but was never pursued at all. Such is a matter, had it been addressed way back in 2011, this should have been resolved. The Respondent has led on the Claimant in pursuit of this case – there was exchange of demand letters and notices with the Minister on the matter; before the dispute was reported Sarah was heard in the disciplinary hearing in the presence of the Claimant representative as a shop steward, George Nyatieno - This suit has been sustained through the system despite the Claimant being the wrong party to sue. Such invalidates the claim in its entirety.

62. However, before summing up, I must address the following - Recognition of a trade union by the employer is a legal process. There exists legal requirements to address such recognition under the Labour Relations Act and with recognition, a union can commence negotiations for and on behalf of the

employees they represent. Without recognition, the union lacks the *locus standi* to engage an employer for and on behalf of the employees even where the employee has exercised their constitutional right to associate and join a particular union. The right of the union to then engage the employer is regulated in law and not assumed. This is the equivalent of how advocates must be members of the Bar and registered with the Law Society of Kenya and issued with a Practising Certificate before they can seek to represent any client in Court. The standing of any advocate is on the basis that they hold a valid Practising Certificate. The trade union as well must hold the Recognition agreement upon meeting the required stipulated status in law. Such are lawful processes set out under section 54 of the Labour Relations Act. See **Amalgamated union of Kenya Metal Workers versus Dathley Industries Ltd, Cause no.2098 of 2011**. The import of a recognition agreement is given meaning by this Court in the case of **KUDHEIHA versus the Aga Khan University Hospital, Cause No.815 of 2015** thus;

... Recognition Agreement gives the Claimant the sole role of representing employees to raise any issue with the Respondent issues which may have negative impact on them and therefore the question of outsourcing may be barred by the Recognition Agreement as it says, the Claimant reserves the right to negotiate the procedures to be followed. The Claimant has the right to question any practice undertaken against its members within the Respondent employment. The Respondent should consult with the Claimant before taking any negative action against its members. [Emphasis added].

63. On 12th July 2011 when the claim was filed, the Claimant had no recognition with the Respondent. Indeed the descriptive paragraphs of the claim do not set this out. The question as to whether there existed recognition as at this date I find to be the core subject in **Cause No.408 of 2011** filed by the Claimant union against the Respondent herein.

64. That as it may, Sarah has gone to great lengths to argue her case. The Respondent having failed to address the legal matters set out above, and in the interests of justice, I will set out the claim in court.

65. The cause of action arose upon the termination of Sarah by the Respondent on 9th March 2010. Despite evidence that the termination letter was not issued, the Claimant has attached the same as annexure 38 in the memorandum of claim and paragraph 30 of the memorandum of claim speak to the fact that there is a certificate of posting code vide the mail sent with the termination letter. The termination letter was therefore received by Sarah. She filed an appeal on 14th April 2010 and did a reminder on 19th May 2010. I take it the basis of these efforts were with regard to the termination that Sarah was aware of. The appeals directly speak to the matters set out in the termination letter.

66. The termination of Sarah was on the basis that upon a disciplinary hearing on 2nd March 2010, the Respondent observed that her services were no longer required and consequently terminated. The reason(s) for termination are not set out. The claim herein is a challenge as to the termination being unfair and not based on valid reasons.

67. Before Sarah was terminated, she was suspended on 3rd November 2009 on the grounds that;

- a. *Without leave or other lawful authority you absented yourself from your place of work*
- b. *You caused a commotion which not only interrupted official operations in the Administration Block but also brought the name of the institution into disrepute.*

The above offences infringed section 10 and 19 of the Public Officer Ethics Act.

You are therefore hereby suspended with immediate effect pending further investigations as per section 44(4), (a), (d) and (e) of the Employment Act.

68. At this point, Sarah was faced with very serious accusation. Serious in the nature that where she failed to defend herself, the application of section 44 of the Employment Act would apply by the sanction of summary dismissal. Subsequently, she was called for a hearing of her case vide letter dated 28th

January 2010 with the hearing scheduled for 3rd February 2010. Sarah's advocate wrote back and noted the notice was too short which the Respondent agreed to change and rescheduled to 2nd March 2010. At the hearing was Sarah and George Nyatieno a shop steward for KUDHEIHA. The proceedings of the disciplinary hearing are clear, Sarah was given a chance to state her case, the facts to the charges against her were set out and finding made that she was absent from work and had caused a commotion.

69. In her evidence in Court, Sarah does not challenge the validity of the charges against her. She was only keen address the reasons as to why she felt she was not treated well. On the charge of being absent from work on 29th October 2009, she explained that she had an appointment with the Principal and was not able to see him as scheduled. Upon return to her office, Mathagu issued her with a memo noting that the Principal had been waiting for her at 8 to 8.30am as scheduled but she remained absent. Sarah did not make any effort to explain where she was between 8 to 8.30am where the Principal had an appointment with her. I take it normal work hours start at 8am to 5pm and being absent from work as required without due cause and or authorisation, is a matter that can warrant disciplinary action. I take note of the records with regard to Sarah's work attendance. It does not mitigate this fact of late reporting to work. Where indeed the Principal had an appointment with Sarah at 8 to 8.30am and she was unable to attend, upon issuance of the memo to explain herself, the least she should have done was to give such details with reasons for late reporting to work. The work colleagues could not have all been against Sarah and without any witness to support her case that indeed she was early at work as required of her. In any case she was employed for a specific job and such a job required her presence to be attended to. Failure to attend as directed and without due cause warranted summary action.

70. On the case of causing a commotion at the administration block of the Respondent, the proceeding at the disciplinary hearing are of the nature that Sarah cried out upon being assaulted and sexually harassed by Madei. In evidence, Sarah recreated the scene as follows – she had visited the Principal's office earlier in the morning and was not able to see him. She went to the office and met Mathagu and was issued with a memo on lateness. She opted to go back and see the Principal. Upon arrival at the door, Madei locked it and refused her entry. Madei remained holding the door as Sarah made effort to access through the door. She was assaulted and started screaming.

71. The above scene was also recreated by Madei – he stated that early on 29th October 2009, Sarah came to the Principal's office but he did not know what transpired inside. She came back in the afternoon but George Papai told him not to let Sarah into the Principal's office. He held the metal grill to the door to prevent Sarah entry. She remained outside as he was inside holding the door. She started screaming that it was her right to access the office.

72. Mathagu also made some effort to recreate the same scene – around 4 to 4.30pm on 29th October 2009 he was at his office attending to students and members of the public. He heard screams coming from 1st floor at the Principal's office. He went toward the screaming and found Sarah with her blouse torn. She was screaming and holding her blouse. She was led away by security guards.

73. The above statements looked at their totality and noting the circumstances of the case, I discern that on 29th October 2009, Sarah was not happy with her treatment by all around her. She had arrived at the Principal's office late after her appointment hour had gone and remained at the reception with the secretary waiting to be granted access to the principal' she wanted to explain her case of victimisation by Mathagu for the continued issuance of memos and what she perceived to be a requirement to report to him her every movement even while going to the washroom. She was also keen to report her sexual harassment case. She left to go back to her office only to find Mathagu with yet another memo on lateness. Later at 4pm and before leaving early to attend her evening classes, she went back to see the Principal but was denied entry by madei. I take it at this point she was agitated, anger was building up and the denial of entry into a public office caused her to shout or scream that she had a right to access the office as Madei testified. Anybody in Sarah's shoes would be upset by a denial of what seemed to be an obvious right to access a public office. With Madei standing on one side of the door, I imagine Sarah stood on the other side pulling the same door to gain entry. She was not prepared for this tussle but Madei was as he had been warned by George Papai not to allow Sarah in. she must have been unable to gain

entry hence her frustrations and screaming that caused a commotion and screaming. It must have been a sight.

74. Whatever the scene that took place at 4 to 4.30pm at the Respondent premises on 29th October 2009, the result of it was Sarah was left screaming, which attracted attention from students and other members of the public. Her explanation for making noise is that she was assaulted and sexually harassed. She confirmed that indeed she was screaming after being assaulted and sexually assaulted when her breasts were pushed. The details of the assault and sexual harassment are matters of fact that were reported to the police station for their investigations. The outcome of such investigations was for the police to establish which is not for this Court assessment. The same of sexual harassment and assault on her person are admitted to be matters subject in **CMCC 1318 of 2010**. Such are not details for this Court to review as this is a labour dispute based on evidence before this Court.

75. The upshot of it, Sarah does into explain to the disciplinary committee and to this Court why she caused a commotion by screaming and attracting attention of students and staff of the Respondent. On the material before the committee, which I cannot fault as these are the parties that held the primary evidence they made a finding.

76. What is disheartening in this case is the trend approach Sarah opted to take at the disciplinary hearing. She was keen to ensure that the panel members were all disqualified. That Ondieki had indirectly tried to sexually harass her when he asked that she should report to work at 6am; Fred Oduogi had sexually harassed her; Kanyadudi had abetted the sexually harassed against her; and absent were Mathagu and Madei whom she had wanted present as they were the cause of her problems. At this point Sarah failed to appreciate that the case that faced her was against her and not Mathagu or Madei. The person who needed to defend herself was Sarah and not these other officers.

77. The issue in dispute registered in this case by the Claimant was that of wrongful termination of Sarah. There is no case for sexual harassment or assault which Sarah opted to address instead of the issue in dispute. I find the disciplinary panel arrived at the decision to terminate her employment on the basis of her failure to controvert what allegations stood against her. At the end of it, Sarah was afforded a hearing in the presence of her union representative which has not been challenged as being inappropriate or against her choice. Failure to therefore address the issues that Sarah faced at her disciplinary hearing cannot be said as an unfair process.

78. What is apparent from the pleadings and the evidence in Court is that, Sarah had little regard to the persons seating at her disciplinary hearing. Unfortunately, at this point this was not her choice to make. The disciplinary panel was constituted by the Respondent and could decide which members to preside. Sarah as the subject of the disciplinary hearing had her rights under section 41(1) of the Employment Act secured when she was allowed to bring her representative. Despite not having a recognition agreement or a collective agreement in place, George Nyatieno was present at the hearing. The Claimant union or Sarah had no capacity to decide for the Respondent as to which panel member was to seat and preside. Where Sarah needed more time to organise her defence, she had the right to ask for time extension.

79. I therefore find the disciplinary panel, as constituted and presided over by Mr Ondieki was proper. The proceedings though faulted by virtue of some member being accused of sexually harassing Sarah, the issue at hand had nothing to do with such allegation and with the presence of the Claimant union representative, were proper proceedings.

80. I hasten to add the conduct and demeanour of Sarah in Court. She went out on her own without guidance of the Claimant officer leading her in evidence. She was keen to state her case as she deemed necessary and sensational. Despite efforts to guide and ensure relevance to the issue in dispute, she deviated and meandered in different directions. She ended up not addressing the core issue in dispute – wrongful termination of employment. The Court was patient and allowed her to vent, but at the end of the day, the moral of everything said must be within the issue in dispute, the legal and constitutional import of the evidence given. As much as there exists allegations and claim for sexual harassment or assault, both parties admitted that such are matters subject of a different suit and while this matter was pending, such

allegations and claims have since been dismissed. I therefore do not find relevant to their reference here outside the issue in dispute that required prove on a balance of probabilities, which the Claimant and Sarah failed to advance.

81. The practice that a termination letter is sent to the last known address of an employee is outdated. Upon suspension of an employee, she is deemed to be away from office to facilitate investigations or hearing. The employee is therefore physically away from work with the knowledge of the employer. In most cases, upon employment an employee shares their permanent addresses and it is not common practice to share telephone number, Mobile line or an email address, for ease of communication. Where an employer then makes a decision to send a termination letter to the last noted permanent address of the employee, such though not improper, the implication of it may be to send the letter to an address to a rural home that the employee ordinarily does not use or rarely uses it or would take many months for the employee to visit the rural home to be able to access such a crucial communication. Where technology has changed, it would be a good practice for the employer to send such a letter to the email address of the employee or cause the employee to attend and collect such a letter. To avoid such a situation as that befell Sarah where her letter was sent by registered mail to her last known permanent address and to her rural home, employee should equally update their bio-data with the employer to facilitate and ease of communication. Such I find to be good practice at the work place. I however find no error on the part of the Respondent by sending the letter to Sarah's last known permanent address, though more proactivity was necessary.

82. In the penultimate, the suit must fail. However, upon termination, the Claimant was given notice pay and her terminal dues are available for her collection upon clearance with the Respondent. I find these reasonable terms that the Sarah and her former employer can address outside of these proceedings.

83. Before conclusion, I must mention one challenge observed by the Court in the entire proceedings. Representation of an employee through the trade union is a right enjoyed under article 41 of the constitution but more fundamentally under the provisions of section 22 of the Employment and Labour Relations Court Act. This however poses a challenge to union officials not conversant with legal proceedings and process of the Court or not willing to go the extra mile and study a case keenly and articulate themselves. The pleadings drafted herein for the Claimant posed a major challenge. Even on the face of the Court making effort to avoid legal technicalities and concentrating on the substantive issue, proceeding had to stop on several occasions for the Claimant officer to organise her case. many are the times where proceedings had to run at the pace of the grievant, as the union official simply put her on the stand and let go, doing nothing to guide her witness on the stand so as to articulate the case with clarity and methodically. I made a clear observation that the Claimant officer did not take any notes and this was telling in the re-examination of her witness and in the cross-examination of the Respondent witnesses. No case was set out for the grievant or challenge made to all the Respondent witnesses. Faced with a well-trained Counsel, articulate in her cross-examination and with clear pleadings, the Claimant official made a poor case.

84. At some point, the grievant, Sarah had to conduct cross-examination for herself. She had to constantly keep the union official on her feet with handwritten notes for her to be able to ask relevant questions. She was simply not effective.

85. This is a call to the Claimant union, seek to set out the case in the clearest of ways possible. It is not the huge bundle that matters, rather the quality and clarity of the case. Unlike the previous count, Industrial Court prior to 12th July 2012 that only allowed unions to conduct litigation before the Court, the open representation has invited senior advocates trained to conduct cases and represent their clients. Those officials of Trae union representing their members in Court, as they enjoy this right, reason must be given to undertake training to facilitate the course of justice. It is not the Court to aid the Claimant in their case, otherwise the impartiality required will be marred in the process. I must add, the case was poorly prosecuted and I have to go out of my way to scan through different documents haphazardly filed to sift through and set out the nature of claim.

For the reasons and analysis above, the claim is hereby dismissed. Each party shall bear their own

costs.

ORDERS ACCORDINGLY.

Read in open court at Nairobi this 17th day of March 2016.

M. Mbaru

JUDGE

In the presence of

Court Assistant: Lilian Njenga

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