



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT NAIROBI**

**CAUSE NUMBER 2108 OF 2012**

**MAURICE KAMWILWA.....CLAIMANT**

**VERSUS**

**SOUTH EASTERN UNIVERSITY COLLEGE.....RESPONDENT**

**JUDGMENT**

1. The Claimant in this suit disputes his dismissal from the Respondent's employment stating the same was wrongful, null and void.
2. According to his memorandum of claim filed on 18<sup>th</sup> October, 2012 he avers that in March, 2012 the Respondent made allegations that in October, 2011 he, in the company of others received and signed for firewood against procurement procedures of the Respondent.
3. He was on 2<sup>nd</sup> March, 2012 summoned to appear before the Respondents Disciplinary Committee in regard to the issue which he did. He was subsequently sent a warning letter and another notifying him of his deployment to a different section within the Respondent institution.
4. In the warning letter, the claimant was surcharged for the 13 tonnes of firewood purportedly delivered and required to change his attitude towards authority and fellow members of staff. He appealed against the decision to surcharge him but the appeal was unsuccessful. Consequently he was dismissed from the Respondents service but on condition that he could appeal against the dismissal within 14 days.
5. Prior to his dismissal, the Claimant was working for the Respondent as a Senior Store Clerk in the Respondent's Institution earning a salary of Kshs.34,904/- per month.
6. Considering that his termination was unfair and unlawful, he seeks from this Court an order for reinstatement, in the alternative, damages for wrongful dismissal.
7. The Respondent on its part regarded the termination justified and in its memorandum of response filed in Court on 5<sup>th</sup> February, 2013 avers that the dismissal was lawful after the Claimant refused to comply with the conditions set by Senior Staff Disciplinary committee.
8. The Respondent further averred that the Claimant having not appealed against the dismissal, he did not fully exhaust the available internal dispute resolution mechanisms hence the claim as filed was premature.
9. In his submission before the Court, Mr. Musyoki for the claimant submitted that the Claimant

was unlawfully dismissed from employment when he chose to appeal against the decision of the disciplinary committee to surcharge him for 13 tonnes of firewood received on 6<sup>th</sup> November, 2011.

10. Counsel further submitted that his client's dismissal was not because the Respondent suffered any loss but rather because the firewood was delivered on a Sunday without following due procedure.

11. Mr. Musyoki submitted that his client was dismissed without the proper notice of 3 months in accordance with his employment contract and terms of service. According to Mr. Musyoki, in dismissing the Claimant, the Respondent did not afford him a disciplinary hearing to enable him ventilate his grievances concerning the Respondent's decision to surcharge him for the said 13 tonnes of firewood.

12. Mr. Makori for the Respondent on the other hand submitted that the Claimant was dismissed as the Respondent was not left with any other option having found him guilty and issuing him with a warning letter which contained conditions not agreeable to him. Counsel further submitted that the Respondent at all times observed rules of natural justice, fairness and equity and that no principle of natural justice was violated as the Claimant was accorded the chance to present his case and be heard. It was his contention that the investigations, findings and conclusions reached by the disciplinary panel were valid dismissal reasons. Counsel in this respect relied on the case of *Obonganwan Mary Ntewo v. University of Calabar Teaching Hospital & Anor (2013) LPELR – 203329* – Nigerian case. Regarding burden of proof counsel cited the cases of *Daniel Toroitich Arap Moi v. Mwangi Stephen Muriithi & Anor (2014) eKLR* and *Nigerian case of Patrick Tenumah v. Owella global Services Limited (2012)*.

13. Employment contracts though operate under similar principles that govern law of contract generally, are in a sense unique. Whereas in an ordinary commercial contract a party may decide to terminate the contract without assigning any reason, a party to an employment contract is enjoined by law to assign a reason for terminating the contract and the employee has a right to question the validity of such reason or reasons once given.

14. This special protection accorded to the employment contract can be understood in the context that termination of employment usually have socio-economic impact that extend beyond the affected employee alone. Loss of employment usually means change of social and financial status however temporary which obviously affects those who may depend on the affected employee for a living.

15. Section 43 (10) of the Employment Act provides:-

***43(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.***

What this section implies is that the onus of proof lies on the employer and not the employee to prove the reason or reasons for termination. Proof of reason or reasons means the employer must show on the scale of proof in civil claims that the reason or reasons for termination are valid and that they are fair reasons related to the employees conduct, capacity or compatibility or based on the operational requirements of the employer. The employer must additionally prove that the employee was terminated in accordance with fair procedure.

16. On the other hand, on a complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for termination of employment or wrongful dismissal shall rest on the employer.

17. In the case before me, the claimant services were terminated on account of the allegation that (I quote).

***“On Sunday, 6<sup>th</sup> October, 2011, you in the company of others received and signed for firewood against procurement procedures. This is contrary to your Terms of service sections 6(d) (i) and (iii), the Employment Act section 44(4) (g) and Code of Conduct and Ethics for Public Universities (Legal Notice 170 of 2003) Part II section 7 (i).***

The Claimant was consequently called for a disciplinary hearing over these allegations on 1<sup>st</sup> March, 2012.

18. As per the minutes dated 7/3/2012 the disciplinary hearing actually took place on 2<sup>nd</sup> March 2012 after postponement and which the Claimant attended, it was observed that the supplier of the firewood had been sourced by prequalification and further that she was to supply 30 tonnes of firewood. She had delivered previously two consignments of 10 and 7 tonnes respectively leaving a balance of 13 tonnes.

19. According to the minutes, the investigations' came up with the claim by the supplier that she was called by someone she did not know to deliver the firewood on Sunday 6<sup>th</sup> November, 2011 but could not retrieve the number as she had lost her mobile telephone. The Claimant and his two other colleagues accused of the offence, denied knowledge of the phone call.

20. The Claimant on his part stated that he was on duty on the material Sunday as other Sundays when around 12.00 p.m. firewood was delivered. According to him, he did not commit any mistake since he had previously received goods on Sunday including mattresses and food stuff.

21. In his view, the signing of the delivery note did not mean acceptance because if the committee did not accept the goods, they could be returned to the supplier. According to the Claimant, after receiving the firewood, it was offloaded in two locations namely kitchen 1 and hostels kitchen. He ensured the consignment was 13 tonnes and his colleagues Margaret and Bella concurred. He called the acceptance committee the next day which was Monday since they were not available on Sunday to inspect the firewood.

22. It was his testimony before the Panel that the acceptance committee could not inspect the delivery since it had already been offloaded and partly used.

23. The Claimant's colleague Ms. Tunya Rabella who faced similar charges informed the panel that on the material day when she was about to board the bus going home, Margaret and her were called by the Claimant to verify the quality of the firewood since the cooks had previously complained that a previous delivery was of wet firewood. She and her colleague checked the firewood and were satisfied that they were dry and fit for use in the kitchens. They were however never consulted on the tonnage of the firewood.

24. At the conclusion of the disciplinary hearing, the panel reached the conclusion to warn the Claimant, retain his services but on condition that he be surcharged for other 13 tonnes of firewood which he signed for without the authority of the acceptance committee. He was however granted leave to appeal against the decision within 30 days which he did.

25. According to the letter, dated 7<sup>th</sup> March, 2012, the claimant accepted to change his attitude towards authority and fellow members of staff but did not agree to be surcharged for the 13 tonnes of firewood he signed for and consequently lodged his appeal as was advised by the aforesaid letter.

26. There is no record of the hearing of the appeal, however, by a letter dated 16<sup>th</sup> March, 2012

the Respondent acknowledged the Claimant's appeal but without reacting and or rejecting the issues raised therein, dismissed him for the reason that he refused to accept fully the verdict of the disciplinary committee.

27. To this extent, the Court is satisfied that the hearing process up to the point of issuing the Claimant with the warning letter dated 7<sup>th</sup> March, 2012 was procedural and he was accorded reasonable opportunity to defend himself against allegations against him. The panel further acted reasonably when they granted the Claimant leave to appeal against their decision within 30 days, to Appeals Committee of the Council.

28. The Court however, views the response of the Appeals Committee contained in their letter of 16<sup>th</sup> March, 2012 as unreasonable and contrary to the principle of fair hearing.

29. The Senior Staff Disciplinary Committee heard the claimant over the accusations against him. They evaluated the charges vis-à-vis the evidence and the Claimants' rebuttal thereto and reached a verdict. The verdict contained an aspect that touched on the claimant's income.

30. He felt aggrieved and consequently exercised his right of appeal as advised by the Committee. Therefore when the Appeals committee of the Respondent took the view that the Claimant be dismissed for refusing the verdict of the Senior Staff Disciplinary Committee, it abdicated its role as an appellate organ over the verdict of the Senior Staff Disciplinary Committee. The letter in essence created the impression that the Claimant had no right to appeal over the verdict of the Senior Staff Disciplinary committee and had to accept the verdict as it is or be dismissed.

31. To this extent, the Court reaches the verdict that the dismissal of the Claimant without hearing him on his appeal over the decision to surcharge him was procedurally unfair with the consequence that his dismissal on that ground contravened section 45 of the Employment Act.

32. Concerning the reason for terminating the claimant services, the Court reverts to section 43 (1) of the Employment Act and asks; were the reasons for terminating the Claimant proved? The answer to this question is in the affirmative since the Claimant himself has conceded that he accepted the firewood without the authority of the acceptance committee.

33. But section 35 (4) of the employment Act provides that:-

***35(4) nothing in this section affects the right of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46.***

34. The Claimant whereas admitting that he received the firewood without prior approval of the acceptance committee has justified his action by the fact that it was a Sunday and being a weekend the acceptance committee would not be available until the following day Monday. Second he attempted to have them accept the goods at the first opportunity on Monday but they refused. The sum total of the Claimant's defence is that the exigency and the convenience of the moment demanded that he acted the way he did.

35. In assessing whether it is proper case for dismissal, the test is usually that, would a reasonable employer having the facts consider dismissal as the best option. That is to say would dismissal be the only reasonable option in the circumstances?

36. It is in evidence before the Court that the supplier had previous dealings with the Respondent. She was a prequalified supplier and that she had previously supplied 17 tonnes of firewood out of the target 30 tonnes. The impugned 13 tonnes was the final delivery.

37. The questions then would be; was there allegation of fraud? Was it impossible to verify the

actual weights of the consignment? Could the matter be resolved with the supplier prior to settling the bill? How about the fact that the firewood despite the issue over tonnage; was actually delivered and consumed by the Respondent?

38. These question and related matters, if probed by the Respondent may have yielded different results or even made strong, a case for the Claimant's dismissal.

39. Whereas the Court is cautious not to impose its views on how the matter could have been handled by the Respondent, the Court is of the respectful view that the dismissal of Claimant was not the most reasonable option in the circumstances.

40. In conclusion, the court reaches a finding that the Claimant's services were wrongfully and unfairly terminated and awards him as follows:-

***(a) Eight month's salary as compensation for unfair termination of services.***

***(b) Termination of contract in accordance with his contract service. That is to say the Claimant will be paid salary in lieu of notice period for termination of service provided in his contract of service.***

***(c) The Claimant shall be paid all his terminal dues as if his contract of service was ended normally.***

***(d) The Respondent shall issue the Claimant with certificate of service in accordance with section 51 of the employment Act.***

***(e) The Claimant shall have costs of the suit***

***(f) Parties to liaise with the Deputy Registrar of the Court for the computations under (a), (b) and (c) above.***

41. It is so ordered.

Dated at Nairobi this 20<sup>th</sup> day of January 2015

Abuodha J. N.

Judge

Delivered this 20<sup>th</sup> day of January 2015

**In the presence of:-**

.....for the Claimant

and

.....for the Respondent.

Abuodha J. N.

Judge