



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**  
**CAUSE NO.46 OF 2013**  
**(Formerly Nairobi Cause No. 2543 of 2012)**

**WALTER NYAMWEYA NYAIRO.....CLAIMANT**

**-VERSUS-**

**NAROK UNIVERSITY COLLEGE.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 26<sup>th</sup> July, 2013)**

**JUDGMENT**

The claimant **Walter Nyamweya Nyairo** was employed as a cleaner and messenger Grade II by the respondent Narok University College on 27.07.2009 for a period of six months effective 1.10.2009 by the letter WN1 on the memorandum of claim. The letter stated that the appointment could be terminated by either party giving one month's notice or one month's salary in lieu of notice. The claimant was eligible to monthly house allowance of Kshs.5,887/=, salary of Kshs.7,350/= and to 13 days leave per completed period of service. The claimant remained in the employment of the respondent beyond the initial six months and without a formal letter renewing the temporary employment.

The claimant was verbally terminated on 8.9.2011 without a formal termination letter. At termination, he was earning Kshs.18,515/= per month. The reasons for termination were not given. On 8.9.2011, the claimant was called to the Deputy Registrar's office and asked to report on duty on 9.09.2011 so as to clear and collect his final dues with a view of leaving employment to do business. The claimant objected to the termination and demanded for reinstatement through his trade union. By the letter of 01.08.2012 being WN5 on the memorandum of claim, the claimant appealed against the termination. By the letter dated 5.09.2012 being WN7 on the memorandum of claim, the respondent replied to the appeal. The respondent stated that it had been considering the claimant's case of uttering false documents after he appeared for an interview on 9.06.2010. The respondent stated that it could not engage the claimant's services due to his production of a forged certificate, his apology and subsequent warning notwithstanding. The respondent took the view that it had paid all days worked and had therefore complied with all the legal requirements. The respondent's letter further stated that even if the claimant had been on permanent terms of service, he would have been dismissed for gross misconduct in view of producing the forged certificate.

It is not disputed that the claimant submitted a forged certificate at the interview panel that was responsible for assessing the claimant's suitability for permanent employment. The claimant wrote a letter

of apology and enclosed the genuine form four academic certificate.

On 20.12.2012, the claimant filed the memorandum of claim praying for judgment against the respondent for:

- a. A declaration the termination was unfair and the claimant is unconditionally reinstated without loss of benefits, position or status.
- b. A declaration that the claimant was the respondent's employee for two years.
- c. The claimant be paid terminal dues comprising:
  - i. One month pay in lieu of notice being Kshs.18,515/=.
  - ii. Twelve months salary compensation for loss of employment being Kshs.222,180/=.
  - iii. Leave for two years being 37, 030.
- d. Certificate of service.
- e. Costs and interest at court rates.
- f. Any further and better relief as the court deems fit to grant.

The respondent filed the statement of reply on 08.02.2013 and prayed that the claim be dismissed with costs.

The court has considered the pleadings, the evidence, the submissions and makes the following findings on the issues in dispute:

1. The first issue for consideration is whether the warning given by the respondent at folio 6 on the statement of reply after the claimant apologized for submitting forged certificate as per folio 5 on the reply amounted to conclusive punishment so that the subsequent verbal termination was unfair and not tenable because it was double punishment. The letter stated that any further omission or commission against the employment terms would lead to termination without further reference to the claimant. The court finds that the warning was the conclusive punishment that the respondent decided to impose and the subsequent dismissal was as a result of exercising fictitious powers to terminate on account of the same misconduct. The court holds that the employer's power to impose a punishment is exhausted once the decision to punish or not to punish is imposed and in absence of clear and fair revision, review or appeal process, the employer cannot revisit the matter. Thus, in this case the respondent did not invoke any fair and known revision, review or appeal process before the dismissal and the court finds that the dismissal was unfair as there was no due process before imposing the dismissal.
2. The next issue for determination is whether the claimant is entitled to the remedies as prayed for. The court has considered the claimant's prior action of submitting forged certificates and finds that act of serious dishonesty irreparably strained the confidence and trust between the parties necessary for continued employment relationship. Thus, the court finds that the prayer for reinstatement shall fail. The court finds that the procedure for dismissal was unfair but the reasons are undisputedly, genuine and the court finds that three months gross salaries for the unfair termination shall balance justice in this case. The court finds that the claimant is entitled to the statutory leave and notice pay as well as the certificate of service.

In conclusion, judgment is entered for the claimant against the respondent for:

- a. A declaration the termination was unfair.
- b. The respondent to pay the claimant Kshs.111,090.00 by 1.9.2013, failing interest to be payable at court rates from the date of the judgment.
- c. The respondent to deliver to the claimant the certificate of service by 1.9.2013.
- d. The respondent to pay costs of the case.

**Signed, dated and delivered in court at Nakuru this Friday, 26<sup>th</sup> July, 2013.**

**BYRAM ONGAYA**

**JUDGE**