



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
MISC. APPLI. 343 OF 2005

EVANS MUSA CHEPTUMO.....APPLICANT

Versus

THE JOMO KENYATTA UNIVERSITY

OF AGRICULTURE & TECHNOLOGY & ANOTHER.....RESPONDENT

JUDGMENT

This is a Judicial Review application in which the ex parte Applicant, Evans Musa Cheptumo who was an employee of the 1st Respondent, Jomo Kenyatta University of Agriculture & Technology (hereinafter referred to as JKUAT) seeks an order of certiorari to remove into this court and quash the decision dated 1st November 2004 made by the 2nd Respondent, the Vice Chancellor of the Jomo Kenyatta University of Agriculture & Technology, Professor Nick G. Wanjohi, terminating the services of the Applicant. Alternatively, the Applicant prays that an order of certiorari do issue to remove into the High Court and quash the decision of the 2nd Respondent terminating his services (dated (1/11/04) which was endorsed by the 1st Respondent.

The Notice of Motion is supported by the affidavit of the ex parte Applicant sworn on 7th March 2005 and filed in court on 9th March 2005, a statement dated 7th March 2005, skeleton arguments filed in court on 22nd November 2006 plus a list of authorities. The Motion was opposed and two replying affidavits were filed by George Bari, the chief Security Officer of the 1st Respondent and another by Professor Nick Gatheru Wanjohi, the 2nd Respondent and both are sworn on 11th July 2005. The Respondents also filed skeleton arguments on 21st October 2008 and a list of authorities on 8th November 2005. Mr. Kilukumi urged the Notice of Motion on behalf of the Applicant while Mr. Mburu appeared for the Respondents.

Briefly the facts underlying this dispute are that the Applicant was employed by the 1st Respondent on 22nd January 1990 as an administrative Assistant. As at 1st March 2000 he had risen through the ranks to become a Deputy Registrar. On 30th April 2004, the 2nd Respondent suspended the Applicant on allegations that he was meeting with the student leaders and planning for a strike when the institution reopened. The letter of suspension is annexure EMC 2.

By a letter dated 1st November 2004 addressed to the Applicant, annexed at page 39 of the bundle to the

verifying affidavit of the Applicant, (EMC 6) his services were terminated and the same was communicated to him by the 2nd Respondent, despite the Applicant objecting to the false allegations levelled against him. The Applicant complains that the decision to suspend and terminate his services was not procedural and it offends S.29 of the 1st Respondent, JKUAT Act vesting power in the Council for promulgation of Rules and Regulations on discipline (EMC 5) and that there is a Staff Disciplinary Committee to which the matter should have been referred for determination but he was never called before such a committee to answer any charges or allegations.

On 16th December 2004 and 4th February 2005 he wrote to the Respondent asking for copies of the minutes of the Staff Disciplinary Committee but none were availed (EMC 7) and the reminders yielded no results. That the Staff Committee never gave him a chance to be heard pursuant to Statute XIV Regulation 23. That his terms of employment were governed by JKUAT Act 1994 and the Regulations made there under and his services could be terminated on the whims of one person. Despite an appeal to the 2nd Respondent's Council, there has been no response elicited. It is also the Applicants case that the Vice chancellor has no power to deal with matters of dismissal of staff. That the powers of the 2nd Respondent are spelt out under S.12 of the Act.

That pursuant to the powers given to the Council to promulgate Regulations under S. 29 of the Act, the University has published statutes and statute 14 deals with the functions of the Council generally. Paragraph 4 thereof deals with recruitment, appointment and promotion of staff and paragraph 5 deals with terms and conditions of service. Statute 14 paragraph 23 deals with removal from office and other disciplinary issues and the procedure includes being heard by a Council or by a person to whom the powers are delegated, call and examine witnesses and to appeal to the full Council. That the Council then delegates its functions to the Disciplinary Committees (page 62 of the statutes). He contends that he never appeared before any of these Staff Disciplinary Committees. Reliance was made on the cases of,

1. **PAUL KIPKEMOI MELLY V P.S. TREASURY HMISC 1179/03**, in which the Minister's decision to terminate the Applicants employment was quashed for his failure to give the Applicant a hearing;
2. **KADAMAS V MUNICIPALITY OF KISUMU (1985) KLR 954 (CA)** where the court observed that the Parliament can underpin the position of public authority employees by directly restricting the field of the public authority to dismiss and that gives the employee public rights and making public law remedies available;
3. **ERIC MAKOKHA & OTHERS V LAWRENCE SAGINI CA 20 OF 1994** where the five judge bench observed that laid down procedures should be followed and that some contracts are statutorily underpinned and that procedure has to be adhered to in matters of termination;
4. **R V DISCIPLINARY COMMITTEE OF MASENO UNIVERSITY HCC 227/03**, adopted the decision in the **ERIC MAKOKHA CASE**.
5. **KANDA V GOVT OF MALASYA (1962) AC 322** where the court held that the accused person know the case and evidence against him and be given a chance to correct or contradict them.

In opposing the motion Mr. Mburu argued that the Applicant was involved in serious acts of indiscipline and an urgent decision had to be taken to terminate his services. That he was suspended but did not stop the said acts of indiscipline and there is no material to show that procedure was not followed and that the burden of proof is on the applicant to do so. That they rely on the doctrine of estoppel and relied on the case of **JEMIMA MOGERE MUTURA V VICE CHANCELLOR JKUAT HMISC 3203/1995** where the court held that in a contract of service the court cannot order reinstatement as it would be forcing parties to contract and that likewise in this case, parties cannot be forced to contract. Reliance was also made on **HARRISON GITHINJI V KIRIRIMA HCC 586/1991** where Justice Osiemo said that Judicial Review does not apply in contracts of service.

3) **BATTAN ENGINEERING WORKS V WHITELINE RETREAD DEPOT C.A. 159/1977** The court held that once a party acts in a particular manner, he is estopped from denying it and that in this case since the Applicant had received his terminal dues he cannot come back and allege that the dismissal was unprocedural.

4) **GATUNE V THE HEADMASTER, NAIROBI TECHNICAL HIGH SCHOOL & (1988) KLR 56**, in that case was not list filed in time as parties attempted a settlement. The Attorney General was estopped from claiming that the Limitation of Actions Act applied. Mr. Mburu submitted that the application is misconceived, an abuse of court process. He urged this court to dismiss the application.

The Security Officer of the 1st Respondent, Mr. George Bari deponed that there had been recurrent strikes at the institution and in April 2001 when students were on holiday, he discovered that the Applicant was holding meetings with the student's leaders with a view to staging a strike. This is because the Applicant hated the present political regime since 2002 having been connected to the earlier regime. That despite the suspension, the Applicant continued with the subversive activities. He learnt this information from investigation and reported to the authorities. According to him, the termination of the Applicant's services was lawful. Prof. Wanjohi got information of the Applicants involvement in incitement of students from Mr. Bari and that due to the volatile situation at the institutions he held consultations with the Chairman and Vice Chairman of the University Council and the Chancellor and it was decided that he exercises his powers under S.12 (1) (d) of the JKUAT Act 1994 and Rule 3 of Statute 5 of the Statutes and dismissed him.

It must be clarified from the on set that this court is not concerned with whether or not the Applicant is guilty of meeting with students leaders of JKUAT with a view to holding a strike. What is in issue here is whether the procedure leading to the termination of the Applicant's services was procedural and in conformity with rules of natural justice. This is because Judicial Review is not concerned with the merits of the decision but the decision making process itself.

The grounds upon which the application is brought are that the 2nd Respondent does not have the legal power/authority to terminate the Applicants employment (decision an illegality); the decision to terminate the Applicant was made without jurisdiction; the decision contravened Regulation 23 of Statutes XIV of JKUAT and That the Applicant was not accorded the right to be heard contrary to rules of natural justice.

Judicial Review is a public law remedy and for it to lie, the Applicant must demonstrate that a public law right which they enjoyed has been infringed. The Applicant is challenging his dismissal from employment which employment came about following a contract of service. The courts will normally not intervene in contracts of service and have said so repeatedly. In the case of **R V EAST BERKSHIRE ex parte WALSH 1985 QB 152**, a man was dismissed from work for misconduct and he moved the court for Judicial Review remedies. The court held that the Applicant was not seeking to enforce a public law right but a private contractual right under his contract of employment and that the application amounted to an abuse of the court process. That court said:

“An applicant for Judicial Review had to show that a public law right which he enjoyed had been infringed; ... but a distinction had to be made between infringement of statutory powers giving rise to public law rights and those that arose solely from breach of a contract of employment.”

In another case **REP V BBC ex parte LAVELLE (1983) 1 ALL ER 241** an employee of the BBC challenged his dismissal by way of Judicial Review and the court held that the court had no jurisdiction to interfere with an employee's dismissal in a purely master and servant situation where there was no protection of the employment beyond that offered by Common Law.

In the **KADAMAS CASE (supra)** the court also held that the remedy of Judicial Review is only available where an issue of public law is concerned and is not available in an ordinary relationship of master and servant with no element of public law. In the same case however at page 980, the court quoted the case of **MALLOCH V ABERDEED CORP (1971) 2 ALL ER 1778** where that court held **“..... Parliament can underpin the position of public authority employees by directly restricting**

the field of the public authority to dismiss thus giving the employee public rights and at least making him a potential candidate for administrative law remedies.....” That is what the court referred to as “**statutory underpinning**” in the case of **ERIC MAKOKHA (supra)**.

As to what statutory underpinning means, that court said “**the word ‘statutory underpinning’ is not a term of art. It has no recognized legal meaning. If it has, our attention was not drawn to any. Accordingly, under the normal rules of interpretation, we should give it its primary meaning. To underpin, is to strengthen. In a case in which the issue is whether an employer can legitimately remove his employee, a term which suggests that his employment is guaranteed by statute is hardly of any help.**

As a concept, it may also mean the employee’s removal was forbidden by statute unless the removal met certain formal laid down requirements”. That is the Applicants case, that the laid down procedure was not followed in his removal from employment. I will therefore examine the JKUAT Act and the Regulations made there under to establish whether the Applicant’s contract was statutorily underpinned and whether the Respondents followed due process in terminating his contract of service or whether the 2nd Respondent had the discretion to terminate the contract without necessarily following the laid down procedure considering the peculiar circumstances of this case, that the termination was done urgently due to acts of indiscipline.

But before I examine the Act and Regulations it is important to consider the Respondent’s submission that the burden is upon the Applicant to prove that procedure was not followed and that the Applicant is estopped from challenging the procedure of removal since he accepted to be paid this dues. The Applicant has alleged that the procedure laid down in the JKUAT and Statutes was not followed. The Respondents are of a different view. The burden automatically rests on the Respondent to demonstrate that the termination of the Applicant’s services was procedural but the burden cannot rest on the Applicant. The fact that the Applicant received his dues does not create any estoppel. If the termination of his services is unprocedural or contrary to statute estoppel can not be invoked to oust clear provisions of the law.

In the case of **ARTHUR KAINDI NZIOKI V KENYATTA UNIVERSITY MISC APPLICATION 316/07** the Respondent claimed to have followed procedure but had nothing to show for it – for example minutes or proceedings of the disciplinary committee. This court quashed the decision that had discontinued the Applicant from completing his studies at the said institution.

JKUAT is a creature of the JKUAT Act, 1994. The University is governed by a Council by virtue of S. 16 of the Act which provides that the governance control and administration of the University shall vest in the Council. Under S. 29 of the said Act, the Council is empowered to make Regulations for the governance, control and administration of the University. Under paragraph (f) thereof, the Council is empowered to make Regulations in respect of terms and conditions of service, discipline, dismissal, retirement, remuneration of the staff of the University. The Regulations made under the said Section 29 are called Statutes and Statute 14 deals with the Council, its composition in terms of S. 15 and 16 of the Act and its functions. Statute 14 and paragraphs 4 and 5 provide that subject to the Act, the Statutes will determine the method of recruitment, appointment and promotion of all staff of the University and determine terms and conditions of service of all staff.

Paragraph 23 provides the procedure for removal of staff from office it reads;

“23 subject to the Act, these statutes and any other written law to exercise powers of removal from office and other disciplinary control over the academic staff, the senior administrative staff, and all other staff in the University. In the case of academic and other Senior administrative staff this power shall be exercised for the reasons on the grounds and in the manner pursuant to the procedures set out in the statutes which procedures shall include the following rights for the member of staff;

(i) to appear and be heard by Council or any person or body to ;

- (ii) to call and examine witnesses;
- (iii) to appeal to the full Council.”

The Applicant falls within the staff that this paragraph applies to.

The above paragraph introduces the observance of rules of natural justice in disciplinary matters especially that of removal from office. Under paragraph 24 the Council can empower any Committee to act jointly with any committee approved by the Senate.

Council Committees are set up under schedule IV of the statutes and all staff Disciplinary Committees are at paragraph 7 of the schedule. Paragraph 7 (a) provides for composition of the Staff Disciplinary Committee which is chaired by the Vice Chairman of Council and the Vice Chancellor also sits on it. Paragraph 7 (b) provides for the composition of the no-academic staff’s terms of service and their terms of reference which include to consider the charges, and evidence on staff disciplinary cases and recommend to Council the appropriate action to be taken. In the case of academic staff like the Applicant herein, the Committee would take action on behalf of the Council. From an examination of the above provisions, it is apparent that there is an elaborate procedure under the Statutes for disciplining a non academic staff and key on this is that the accused person has to be notified of the charges against him and evidence has to be taken in whatever form. In this case, there is no evidence that the Applicant was notified of any charges against him nor was he called upon to defend himself against the charges as required. In addition, there is no evidence that he was allowed to call and examine witnesses.

It is a tenet of natural justice that one should not be condemned unheard. In the **KANDA CASE (supra)** the court at page 337 observed **“if the right to be heard is to be a real right which is worth anything, it must carry with it the right in the accused person to know the case against him. He must know what evidence has been given and what statements have been made affecting him and thus he must be given an opportunity to correct or contradict them.”**

The next question is whether the summary procedure the 2nd Respondent claims to have followed is allowed under the Statutes. Basically, the Vice Chancellor relied on purported investigations carried out by George Bari the Security Officer. The investigation report has not been shown to the court. The Vice Chancellor claims to have invoked S. 12 (1) (d) of the JKUAT Act. The said Section reads;

12 (1) There shall be a Vice Chancellor of the University who shall be appointed by the President on the advice of the Council.

(2) The Vice Chancellor shall be the CEO of the University and shall

(a)

(b)

(c)

(d) be responsible to the Council for the general conduct and discipline of the students and staff of the University”

That Section gives the Vice Chancellor the overall control of the discipline but that does not preclude him from following the laid down procedures in doing so. The powers under the Section are broad and general. In this case reliance on the evidence of the Security Officer, whose report the court was not shown as to what he had found against the Applicant and failure to accord the Applicant an opportunity to correct or contradict the one sided report was a serious breach of rules of natural justice. The investigating evidence which was not tested on cross examination cannot be a basis for the drastic steps taken by the Vice Chancellor to dismiss the Applicant in a summary manner. At least the Vice Chancellor should have attempted to substantially comply with the provisions on removal. S. 12 (1)(d)

should be invoked sparingly. In any case, the Applicant was suspended on 30th April 2004. I believe it was to pave way for investigations before the procedure under R 23 could be followed and it was not until 1st November 2004 when he received the letter of suspension of his services. The court has not been told why for the period between April to November 2004, the Vice Chancellor never saw it fit to comply with the procedure for removal of the Applicant from office. There was no urgency in removing the

Applicant when 4 months of inaction had gone by. The Applicant was removed from his employment without knowing the charges against him and this court will find that the Respondent flouted the rules of natural justice and breached the provisions of Statute 14 R 23 of the JKUAT Statutes. The Applicant's employment was statutorily underpinned in that the statutes provided the procedure to be followed prior to any disciplinary action being taken. Despite the Applicant having appealed against the flawed decision, it has not elicited any response from the Council from November 2004 when the appeal was made. The Respondents are guilty of procedural impropriety and have breached the rules of natural justice.

The Applicant's contract of employment was statutorily underpinned in the JKUAT Act and the Regulations (Statutes) made thereunder and the procedure set out thereunder had to be followed. Though generally, courts have been reluctant to interfere in such institutions as the University, where there is flagrant breach of the law by the institution for failure to follow due process, the court cannot sit back and fold its hands and say it is helpless and can do nothing. In **NYONGESA & 4 OTHERS V EGERTON UNIVERSITYH COLLEGE (1990) KLR 602** confronted with such a situation it had this to say "**the courts are loathe to interfere with decisions of domestic bodies and tribunals including college body. However, the courts will interfere to quash decisions of any bodies when moved to do so where it is manifest that the decisions have been made without fairly or justly hearing the person accused or the other side.**"

In the instant case there was no attempt by the Respondent to hear the Applicant or comply with the Statutes that govern the said institution as relates to discipline or removal. The rule of law not only demands that the letter and spirit of the law be obeyed but procedure which constitutes due process must be adhered to by the Respondent and the Respondent having failed to do so, I find that this case falls squarely under the purview of Judicial Review. Consequently this court must call for the flawed decision of 1st November 2004 and quash it by an order of certiorari. Either the Respondents should follow due process under the J.K.U.A.T Act or the Applicant should revert to what he was before the suspension and subsequent dismissal. The Notice of Motion is allowed. The Respondents to bear the costs of this Notice of Motion.

Dated and delivered this 4th day of December 2008.

R.P.V. WENDOH

JUDGE

Present:

Mr. Muriuki present for the Applicant holding brief

No appearance for Mr. Kilukumi for the Respondent

Court Judgment delivered and countersigned on behalf of Wendoh J. by Dulu J.

G.A. DULU

JUDGE