

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 209 OF 2017

MICHAEL CHEGE NDISHU.....CLAIMANT

VERSUS

DEDAN KIMATHI UNIVERSITY OF TECHNOLOGY.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for unfair dismissal from employment and averred that he was an assistant Accountant Grade 7-8 vide a letter dated 18th June 2009 and rose to the position of Accountant II Grade 10 which position he was offered upon a successive interview and through a letter dated 27th October 2011. He averred that on 16th April 2014 he was again promoted to the position of Accountant II Grade 11. The Claimant averred that the interviews and promotions were professionally meritorious and informed by his character, conduct and good work since he joined the Respondent. The Claimant averred that on 16th January 2014 he was appointed acting finance officer for two months which was extended for further periods as follows; two months extension to 19th May 2014 with attendant allowances making a total Kshs. 75,466/-, 1 month's extension up to 3rd June 2014, 6 month's extension up to 30th November 2014 with slashed allowances from Kshs. 75,466/- to Kshs. 30,600/- despite his exemplary services both in his substantive position as well as in acting capacity, another 6 months extension up to 31st May 2015 with the reduced allowances maintained, 6 months extension up to 30th November 2015 and lastly, 6 months extension up to 31st May 2016. He averred that in all this extensions he worked diligently leading to the biggest vote of confidence in his work, character, ability, conduct and capacity that his employer would ever express toward him. The Claimant averred that he was subsequently given an additional special duty allowance of Kshs. 49,007/-. The Claimant averred that he wrote a letter on 3rd March 2015 requesting for a grade review and promotion, having served as acting finance officer for over one year with stunning performance. The Claimant averred that the Respondent responded vide a letter dated 9th July 2015 and observed that he had worked diligently and that his request would be considered and reviewed in line with the appointment and promotion criteria. The Claimant averred that he was invited for an interview for the position of deputy finance officer and he was required to present his original documents and that upon submission of his documents and recommendation letters as required, he was surprised to be served with a suspension letter with a half pay dated 8th June 2016 pending investigations on alleged gross misconduct. The Claimant averred that the allegations included presenting false information to the University's interview panel regarding his employment status at Masinde Muliro University of Science and Technology (MMUST) in order to secure employment, failing to disclose to the interview panel some material facts that he was facing disciplinary charges at MMUST who were his employer then, and finally that he concealed his dismissal from MMUST on disciplinary grounds. The letter directed him to hand over all the University property with immediate effect, and directed him not to transact any business on behalf of the Respondent. He was also invited to make a reply in writing if he so wished. The Claimant averred that he was invited for a disciplinary hearing vide a letter dated 13th June 2016 and that the letter contained an additional allegation that he authorized a bank reversal without the Respondent's knowledge and authority. He was advised to supply a written statement of his defence together with other supporting documents 3 days before the hearing date on 27th June 2016. The Claimant averred that he responded on 20th June 2016 explaining the events that led to his resignation at MMUST and denied having presented any false information as he was still an employee of good standing at MMUST by the time he did the interview on 19th June 2009. He averred that he was employed by the Respondent on 24th June 2009 after which he tendered his resignation from MMUST on 2nd July 2009. He averred that MMUST issued him with a suspension letter on 14th July 2009 which was 12 days after his resignation and 20 days after his job offer by the Respondent and 25 days after his initial interview with the Respondent. He averred that he received a recommendation from his boss at MMUST which he presented at the interview of 19th June 2009 which was enough proof that he had no pending disciplinary issues. The Claimant averred that he explained in his letter that as he had tendered his resignation on 2nd July 2009, the subsequent suspension on 8th July 2009 and the summary dismissal on 8th August on 2011 was irregular and malicious, the allegations against him by MMUST of conspiring and defrauding MMUST of Kshs. 542,850/- was dropped as it could not be proved. The Claimant averred that he had annexed appraisal forms and recommendations from the finance officer of the Respondent and one from ICPAK which gave a candid view of his conduct, character and work ethic as well his professional standing. The Claimant averred that upon presenting his written defence, the hearing slated for 27th June 2016 was adjourned to 13th July 2016. The Claimant averred he received communication from the committee vide a letter dated 21st July 2016 that the committee had dropped the 1st, 2nd and 4th charges based on the Claimant's defence. He averred that they however terminated his employment based on the count of concealing his dismissal from MMUST. The Claimant averred that he lodged an appeal dated 28th July 2016 and highlighted that his purported dismissal from MMUST 2 years after he ceased being on their payroll is malicious and that the alleged offence at MMUST would have been easily discovered through an audit which is usually done in September/October every year. He averred that if indeed he had done any wrong this would not have escaped a thorough annual audit for 2 years. He averred that even after the explanation the Respondent upheld the decision to terminate him. The Claimant averred that he was terminated on matters that had earlier been tried though maliciously and erroneously. The Claimant averred that the committee made a determination on matters that were not in issue before them thereby sitting on appeal over the purported MMUST termination. The Claimant averred he was not given an opportunity to present his defence afresh and that amounted to double jeopardy. The Claimant averred that the Respondent did not have a substantive reason to terminate his employment and the dismissal was contrary to the provisions of the Employment Act and the rules of natural justice. The Claimant averred that it was wrong to import events that were handled in a most unprofessional manner and whose purported conclusion was maliciously and carelessly made from the past yet they bore no relevance to the present at all. The Claimant prayed for a declaration that his termination was substantively unfair and unlawful, a declaration that the Claimant's final pay should be based on the pay for his substantive grade as well as his acting allowance making a total

of Kshs. 181,526/-, a declaration that he had no duty to inform the Respondent of the happenings in his professional life after he was employed without specific requirements to do so in writing, a declaration that the reliance by the Respondent on the decision by MMUST was erroneous by dint of the fact that the same was handled unprofessionally and carelessly being made over two years after the Claimant tendered his resignation, a declaration that the onus of carrying out sufficient background checks lies with the employer and not the employee, a declaration that failure and/or refusal by an employer to carry out a background check at any point during an initial or subsequent interviews followed by subsequent promotions over a period of time automatically amounts to a waiver on the part of the employer over any allegations which might arise over the employees past, payment of 3 month's notice – Kshs. 544,569/-, accrued leave for one year – Kshs. 181,526/-, 12 month's salary as compensation – Kshs. 2,178,312/- all making a total of Kshs. 2,904,407/-, a certificate of service and costs of the suit.

2. In the defence, the Respondent averred that the good reviews, promotions and appointments were based on misinformation and misrepresentation regarding the integrity of the Claimant which the Respondent was not aware of. The Respondent averred that it conducted due diligence before interviewing the Claimant and made findings from the Claimant's former employer MMUST that the Claimant had been dismissed from his employment on grounds of fraud and conspiracy, which necessitated his suspension to pave way for investigations. The Respondent admitted to having received the written defence and after the hearing it made findings that the purported resignation letter was not accepted by MMUST and as such when the hearing commenced he was still an employee of MMUST and that on 8th August 2011 he was found guilty of irregularly declaring to the Ministry of Education that some bursary funds for the year 2006/2007 were unutilized and for communicating MMUST finance matters without authority. The Respondent averred that he conspired and defrauded MMUST of a sum of Kshs. 543,850/- and failed to disclose such illegalities hence he was in breach of Schedule VI Article 11(c),(iii), and (Viii) of the Respondent's university regulations. The Respondent averred that any positive recommendation from the Respondent or its employees was based on the mistaken belief of the Claimant's integrity. The Respondent averred that it was interviewing for the sensitive post of financial officer which required an individual full of integrity. The Respondent averred that the trust that had been built on falsehoods was broken and it resolved to terminate the Claimant's employment. The Respondent averred that it did not rely solely on the dismissal by the former employer but he was faulted for non-disclosure of those facts and that the Claimant never appealed the decision against him by MMUST and that as a public officer he owed a duty to disclose his earlier dismissal on grounds of conspiracy. The Respondent averred that the former employer gave valid reasons for the finding it made against the Claimant through a letter dated 8th August 2011. The Respondent averred that the Claimant was dismissed for gross misconduct, to wit, violation of the Respondent's university statutes and the law relating to public officers and in any case he did not appeal against the decision by MMUST. The Respondent averred that the Claimant's past conviction on account of conspiracy and fraud at MMUST eroded his integrity and trust which made his stay at the Respondent's finance department untenable as the department requires high standards of professional ethics. The Respondent averred that the disciplinary hearing and the subsequent appeal which was found to lack merit were conducted within the dictates of the rules of natural justice, the Constitution, the university statutes and the law. The Respondent averred that at the initial interview it was impossible to know of the allegations since the disciplinary process had not commenced but upon the issuance of the dismissal notice on 8th August 2011 he had a duty to disclose the information to the employer in accordance with the university statutes and legislation. The Respondent averred that the Claimant is not entitled to the prayers sought as his termination was lawful since his conduct was in breach of the University statutes and his integrity had been eroded. The Respondent averred that the Claimant was paid 3 month's salary in lieu of notice and the 36 accrued but unutilized leave days.

3. The Claimant testified that he was employed by the Respondent on 18th June 2009 as an accounts assistant after attending an interview and worked diligently and was promoted to Accountant II, Grade 11. He stated that was later appointed as an acting finance officer and worked in that position for two years. He testified that he wrote a letter requesting for a promotion and the Respondent said that it would consider that and subsequently, the post was advertised and he applied and was called for an interview. The Claimant testified that as he awaited the outcome of the interviews conducted, he was suspended on 8th June 2016. He stated that he wrote a defence and was invited to a disciplinary hearing where he presented his evidence and gave the chronology of events to show that the purported allegations were false. The Claimant testified that at the time he was attending the interview he did not have a disciplinary case and that he resigned from his previous job with MMUST after being appointed by the Respondent. The Claimant said that he worked with MMUST as an assistant accountant for 6 years and as at the time he was applying for the same job at the Respondent he had no disciplinary proceedings that were going on. He testified that he tendered his resignation on 2nd July 2009 and his last day with MMUST was 8th July 2009 since he gave up his accumulated leave days in place of a notice. He stated that MMUST did not reply to his resignation letter immediately until 13th July 2009 and that at the time they were replying the Claimant had already cleared and had already stopped working. He stated that in their reply MMUST said it would not accept the Claimant's resignation but they did not allude to misappropriation and instead said there was work to be done. The Claimant testified that he received a suspension letter after he had left employment to which he responded through his advocate. He stated that he read malice through the letter as he had already been cleared by his boss and had handed over records. He stated that he attended the disciplinary hearing and was told that he was guilty of communicating to the Ministry of Education and was dismissed on that ground. He said that he could not have appealed because after the verdict he was not notified within the 14 days and that these had lapsed and he therefore lost the right of appeal on that ground. He testified that he urged the Respondent not to rely on the letter from MMUST as he was not found guilty of embezzlement of funds. He stated that however, the Respondent relied on the same letter and dismissed him. He stated that he appealed against the decision but the dismissal was upheld. He testified that he was paid his pension and 3 months' salary in lieu of notice. The Claimant testified that he worked with the Respondent for 7 years with recommendations for his good work and each year's performance review showed his good scores. The Claimant stated that he was unfairly dismissed as there was no disciplinary case and there was malice. He testified that he got a job at the Respondent before he was indicted and during the interview he was not asked if he had an issue with his former employer and he only answered what he was asked by the panel. In cross-examination he confirmed that he had a duty to disclose issues to do with integrity but he maintained that he was not asked to explain the history of his former employment.

4. The Respondent called one Nelius Wanjiku Mwangi a senior legal officer of the Respondent to testify on its behalf. She sought for the court to adopt her statement and the list of documents as her evidence and stated that upon being shortlisted by the Committee of Council for the position of assistant finance officer and upon presenting his documents to the committee it came to the knowledge of the council that the Claimant had been dismissed for fraud. She stated that information was submitted by the Chairman of the Council who had received it from MMUST. She stated that the Council had done due diligence by asking for information from the Vice Chancellor of MMUST as the position was so sensitive. She stated the Respondent was notified that the Claimant was dismissed for issues related to fraud and he never appealed against that decision. She was cross-examined and stated that it was within his purview to appeal or not to appeal. She stated that the Claimant was then suspended, taken through a disciplinary process as per the contract of service and was found guilty of non-disclosure of his tainted past. She confirmed that the Claimant had no disciplinary issues for the 7 years he had served the Respondent but stated that he

violated the code of conduct for public universities. In re-examination she confirmed that the Claimant brought a form from the Ethics and Anti-Corruption Commission which showed no fraud and that was dishonest on his part contrary to Article 11(viii) which warranted a dismissal. That marked the end of oral testimony.

5. The Claimant filed written submission and placed reliance on Section 43(1) and Section 47(5) of the Employment Act which places the burden of proving that the reason of dismissal was valid on the employer and the burden of proving unfair termination on the employee respectively. The Claimant submitted that he voluntarily left the employment of MMUST when he received an offer letter from the Respondent and he was not aware of any pending disciplinary issues. He submitted that his services with MMUST ended on 8th July 2009 according to the notice he had issued and that therefore any attempt to issue him with a show cause letter, put him on suspension and subsequently terminate him was illegal *ab initio*. He relied on the case of **Kenya Hotels & Allied Workers Union v Mara Siria t/a Safari Camps (K) Limited [2016] eKLR** where the learned Judge cited with approval the South African Case of **African National Congress v Municipal Manager, George Loyal Municipality & Ors (2010) 3 BLLR 221 (SCA)**, where the Supreme Court of Appeal held that resignation must be effective immediately of from a specific date, and being a unilateral legal act, does not need to be accepted by the intended recipient to be effected. It must however be unequivocally be communicated to the other party. The Claimant submitted that the Respondent failed to discharge its evidentiary burden of proof has no evidence has been tendered to show that it indeed had a valid reason to terminate him. The Claimant submitted that the Respondent's witness had testified that he was a diligent employee and never had any disciplinary issues against him. The Claimant thus submitted that the Respondent's action as against him amounted to double jeopardy. He submitted that the Respondent terminated his services for an alleged offence for which he had already been punished by the previous employer. The Claimant submitted that he was accorded procedural fairness as laid down by Section 41 of the Employment Act but the question the court needs to look at is as to whether the principle of substantive fairness was adhered to before his services were terminated. Relying on Section 43(1) of the Employment Act he submitted that the Respondent's actions were against the principles of natural justice because at the time the Claimant was sent on suspension he was allegedly being investigated for 3 allegations on the suspension notice. He submitted that it was unfair for the Respondent to introduce another charge while he was on suspension yet he had been denied access to the office that contained all the evidence he would have needed to enable him adequately respond to the said charges. He submitted that it would appear that the Respondent was fishing for offences in order to maliciously edge out the Claimant from employment. The Claimant submitted that the Respondent's resolve to terminate was unfair because he was purportedly terminated on account of a decision that was made by MMUST after a process which the Respondent was not privy to and had no control over. The Claimant submitted that the Respondent purported to terminate him for concealing an allegation of fraud while in actual sense the letter of termination as issued by MMUST found the Claimant guilty only of communicating to the Ministry of Education on university financial matters without lawful authority from MMUST. He submitted that in any case if MMUST had found him guilty of fraud, they had neither instituted any criminal proceedings against him nor had they made any formal complaint against him to the Anti-Corruption agency. The Claimant submitted that the Respondent completely disregarded his explanation both at the disciplinary hearing and at the appeal and proceeded to make a decision based on the information it received from MMUST in complete disregard of the Claimant's stellar performance and unquestionable record that had earned him numerous promotions. The Claimant submitted that the Respondent's actions were malicious because it had failed to conduct a background check on him at the time it hired him and at the time it hired him to the position of Acting Finance Officer. The Claimant submitted that he ceased to be an employee of MMUST on 8th July 2009 and therefore any action purported to have been undertaken after the said date is null and void. Relying on the **Kenya Hotels & Allied Workers Union** case (*supra*) he submitted that it is undisputed that he unequivocally communicated his resignation to MMUST and the same was received and that MMUST needed not to accept the same and in effect the last working day of the Claimant was as stated in the resignation letter. He submitted that further, MMUST through their letter to the Respondent dated 28th June 2016 confirmed that the Claimant was in their payroll up to August 2009 hence his relationship with MMUST was severed the moment he stopped receiving his salary. He submitted that subsequently, MMUST could not purport to take him through a disciplinary process and terminate his services. The Claimant submitted that he only attended the disciplinary hearing at MMUST out of good faith, curiosity and the need to clear his name and put the record straight. The Claimant urged the court to find that the Respondent unfairly dismissed him and prayed that he be granted his prayers as stated in his claim.

6. The Respondent relying on Article 260 of the Constitution which defines a public officer submitted that the Claimant being an accountant working in a public university was a public officer by dint of delivering a service within a state organ and that the remuneration and benefits is payable from money provided by Parliament. The Respondent submitted that Rule 13 of the Code of Conduct and Ethics for Public University Legal Notice No. 170 places a duty of disclosure on any public officer working a public university. The Respondent submitted that the Claimant therefore had a duty to make disclosure and the court should disregard his submissions that it is the University that had a duty to conduct its due diligence. The Respondent submitted that the Claimant while accepting his initial appointment accepted to be bound by the terms of service for his job grade and under Paragraph 20 of those terms of service, the Claimant was required to give true and accurate information on all matters failure to which the university under its own discretion may take whatever action it may deem appropriate in the event of submission of inaccurate information. The Respondent submitted that the import of this term of service was to the effect that any information that would be acquired subsequent to appointment must be disclosed hence the Claimant was under an obligation to disclose the decision of MMUST though made two years after his appointment at the Respondent and the failure to disclose amounted to gross misconduct. On procedural and substantive fairness as established in Section 41, 43 and 45 of the Employment Act and the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** the Respondent submitted that the procedure used to terminate the Claimant was beyond reproach hence the Respondent complied with procedural fairness. On substantive fairness the Respondent submitted that the Claimant was terminated for failing to disclose that on 8th August 2011 his former employer found him guilty of misappropriating funds and for making unauthorized communication with the Ministry of Education. The Respondent submitted that it did not attempt to retry the disciplinary process by MMUST and that it was only concerned by the dishonesty and material non-disclosure by the Claimant in all interviews he conducted after the impugned decision of 8th August 2011. The Respondent submitted that the substantive fairness in this case was met and just as per Section 45 of the Employment Act, *the legal test for substantial fairness is thus that the reason for termination is a fair reason related to the employee's conduct, capacity or incompatibility of based on the operational requirements of the law*. The Respondent submitted that the operational requirements of the Claimant's position was sheer honesty and full disclosure which the Claimant fell short of hence the inescapable conclusion is that the reasons to terminate were fair and that fairness in procedure was followed. The Respondent thus prayed that the suit be dismissed with costs.

7. The Claimant's dismissal was on account of an alleged non-disclosure of the disciplinary process at the former employer Masinde Muliro University of Science & Technology (MMUST). The Claimant was an accountant in the Respondent and as such was bound by the Respondent's code codified in the Code of Conduct and Ethics for Public University LN No. 170. The Respondent gave the Claimant a hearing as required under Section 41 and declined to promote him to the substantive position he sought to be promoted to when the issue of

his alleged financial impropriety at MMUST came up. Whereas there was no proof of financial impropriety at MMUST he was duty bound to disclose the process that was undergoing. If he had cleared with MMUST he had no business attending the disciplinary hearing at MMUST out of good faith, curiosity and the need to clear his name and put the record straight. The fact that he did and failed to disclose this fact to the Respondent breached his terms of service and was grounds for the termination that he faced. His suit was therefore unproved and he is therefore not entitled to the orders sought. The claim is dismissed but each party to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 20th day of November 2019

Nzioki wa Makau

JUDGE