



**Omutsani v Great Lakes University of Kisumu (Cause E071 of 2021)
[2023] KEELRC 744 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 744 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E071 OF 2021
CN BAARI, J
MARCH 28, 2023**

BETWEEN

SOLOMON M. OMUTSANI CLAIMANT

AND

GREAT LAKES UNIVERSITY OF KISUMU RESPONDENT

JUDGMENT

1. The Claimant's Memorandum of Claim is dated October 19, 2021, and filed in court on similar date. He seeks a declaration that he was unfairly terminated, an award for payment of salary arrears, compensation for unfair termination and specific performance of his two-year contract.
2. The respondent entered appearance on January 10, 2022, and subsequently filed a Response to the claimant's claim on March 29, 2022, through the Firm of Owiti, Otieno & Ragot Advocates, wholly denying the Claimants' claim.
3. The case was first heard on November 8, 2022, when the claimant testified in support of his case. He adopted his witness statement and produced a bundle of documents filed in the suit as exhibits in the case.
4. The respondent's case was heard on November 16, 2022. The Respondent presented one Ms. MaryAnne Atieno, their Human Resource Officer to testify on their behalf. Ms. Atieno adopted her witness statement and produced documents filed in support of the Respondent's case. The Respondent likewise closed its case on this date.
5. Submissions were filed for both parties.

The Claimant's Case

6. The claimant's case is that he was employed by the respondent on or about the 12th day of March, 2018, as a Manager of Great Lakes University of Kisumu Enterprise Service Unit. It is his case that his



employment was for a contract period of two (2) years beginning from March 12, 2018 and ending on March 11, 2020, subject to a satisfactory performance and a six (6) – month probation period.

7. The claimant states that he earned a monthly basic salary of Kshs.99,000.00, a House Allowance of 40% of the basic salary and Transport allowance of Kshs.7,000.00.
8. The claimant states that he diligently, efficiently and without any disciplinary hearing, served the respondent for about two (2) months, when his employment was unfairly and illegally terminated in June, 2018. It is his case that upon this termination, he was forced to look for alternative employment, and that he got a job in the Republic of Southern Sudan.
9. The claimant further states that in the year 2019, he communicated with the respondent both in written and unwritten medium over his dismissal, but the respondent kept informing him to await communication from their Lawyers, and that the Respondent promised to settle his issue amicably but never did.
10. The claimant contends that the respondent's actions of dismissing him from service, is unlawful and un-procedural and offended the provisions of *the Constitution* of Kenya 2010, the *Employment Act* 2007, the tenets of fair Labour practices and the principles of natural justice.
11. It is the claimant's prayer that this court awards him the reliefs listed in his statement of claim

The Respondent's Case

12. The respondent's case is that the claimant's employment as the Manager GLUK Enterprise vide letter dated March 12, 2018, was an irregularity as the appointment was made by one Professor Atieno Amadi Ndede who was under suspension and was expected to vacate office to allow for investigations, but refused to vacate office and continued to run the affairs of the university including recruiting employees.
13. The Respondent states that its management changed and the new Vice Chancellor Prof. Hazel Miseda Mumbo, took over from Prof. Amadi Ndede, and that staff aligned to Prof. Amadi Ndede in a bid to frustrate the university, took away all records of the university and stopped coming to work. It is the respondent's position that the new management could not access staff files and other crucial documents.
14. The respondent states that the claimant was one of the employees aligned to Prof. Amadi Ndede, and thus he voluntarily stopped coming to work. The respondent further submits that the claimant admitted that he sought for alternative employment and started working in South Sudan before the probation period ended.
15. The respondent states that it is not true that the claimant was terminated from employment, and that the very first time the respondent's new management got to know about the claimant, was the year 2021, when summons to enter appearance was served upon it in respect of this case.
16. That respondent states that the claimant has never cleared with the university and neither has he handed over his Institutional Identification card or prepared a handing over note as well as an inventory of the Respondent's property entrusted to him by virtue of his employment.
17. It is the respondent's position that the claimant deliberately left employment on his own without communication or trace, and that he is part of the former Respondent's staff who have caused the University a lot of losses.



18. The respondent finally states that the claimant is not entitled to the prayers sought and this cause should be dismissed with costs to the respondent.

The Claimant's Submissions

19. The claimant submits that at the time he joined the respondent, he did not have any knowledge of then VC Prof Atieno A. Ndede – Amadi, being under suspension and/or being an illegal employee.

The Respondent's Submissions

20. The respondents submits that there is proof that the person who appointed the claimant had no mandate to do so, and the claimant should not be allowed to benefit for an irregularity. It is their further submission that in order to seek redress from court, the claimant ought to come with clean hands. The respondent sought to rely in *Jackson Cheruiyot Rono v. County Secretary Bomet & another* [2017] eKLR to buttress this position.
21. The respondent further submits that the claimant has not proved his case as pleaded on a balance of probability. It is its further submission that without prove that he was unlawfully or unfairly terminated, this case must collapse.

Analysis and Determination

22. I have considered the pleadings, the witnesses' oral testimonies and the parties' submissions. The issues for determination are:
- i. Whether the claimant was an employee of the Respondent.
 - ii. Whether the claimant is deserving of the reliefs sought.

Whether the Claimant was an employee of the Respondent

23. This question arises from the respondent's assertion that the claimant was appointed into the service of the respondent's university by a Vice-Chancellor who was facing a disciplinary process, and who was/ or is supposed to have been on suspension at the time the claimant is alleged to have been employed.
24. The claimant has presented in evidence an appointment letter dated 12 March, 2018, appointing him to the position of Manager of the Respondent's university enterprise service unit. The Respondent challenged the legality of this appointment on the basis that it was made by a person without authority.
25. The Respondent has supported its position by a letter of March, 2017, summarily dismissing one Prof. Atieno Ndede-Amadi, the then Vice-Chancellor of the university, and who signed off the letter appointing the claimant herein on March 12, 2018.
26. The claimant's evidence in chief, is that he was aware that there was no vacancy at the Respondent's university when he was hired. He further admitted that he was aware of the management wrangles facing the Respondent and further knew that the person who hired him had no authority to do so.
27. It is the claimant's position that he was terminated while on probation, but the letter terminating his services was not produced before court.



28. In *Isuzu East Africa Limited (Formerly General Motors East Africa Limited) v Joseph Likoe Nyangweso* [2020] eKLR. The court stated thus:

“I have carefully considered the pleadings, evidence and submissions on the question of the employment relationship between the parties herein. It is trite law that he who alleges the existence of a fact must prove.....

The question that arises is whether or not during the trial of the suit the respondent adduced sufficient evidence to prove on a balance of probability that he was employed by the appellant under a contract of service on the fateful day. The appellant was categorical in her pleadings and the testimony of the DW1 that the respondent was never her employee and she did not owe him any duty of care.

The Respondent never produced any written evidence of employment or called any witness to confirm that he was indeed employed by the appellant on the fateful day. I therefore find that the respondent failed to discharge his burden of proving employment relationship between him and the appellant and proceed to return that the trial court erred both in law and fact in finding that the respondent was employee of the appellant on the fateful day. I further find that the trial court erred in law and fact by shifting the burden of proof when she found that the appellant had failed to prove by employment record that the respondent was not her employee on the fateful day. In my view the default to produce the employment record did not make the respondent an employee of the appellant.”

29. In the same breath, although the claimant has produced a letter showing that he was appointed to the service of the respondent, he did not prove that he was terminated, even after stating in his evidence that he was issued a letter to vacate his office. He also did not say that the termination was verbal so that the court does not expect him to produce evidence of the termination.

30. Consequently, I am inclined to go by the Respondent’s position, which is that the claimant left on his own volition, when the Vice-Chancellor who appointed him into office left, and which further confirms the Respondent’s assertion of staff aligning with a particular Vice-Chancellor during the period the University was faced with management wrangles. In *Monica Kanini Mutua v Al-Arafat Shopping Centre & another* [2018] eKLR the court stated:

“.....The claimant must establish the existence of an employment relationship with the respondent as a preliminary issue before establishing the alleged unfair termination of the employment.”

31. It is my opinion that an appointment that is unprocedurally handed, is not a valid appointment. The appointment letter issued to the claimant by a dismissed Vice-Chancellor, did not create an employment relationship.

32. The claimant having admitted knowing that the respondent’s university was experiencing management wrangles, and further knowingly accepting an appointment from a person without authority, cannot now run to the aid of the law. The law as we know it, does not aid a volunteer.

33. I considerably arrive at the conclusion that the claimant was not an employee of the respondent, legally recruited and appointed. His claim of unfair termination therefore, cannot hold.

34. The Claimant’s Memorandum of Claim dated October 19, 2021, is dismissed.

- Whether the Claimant is entitled to the reliefs sought.



35. Having made a finding that the Claimant was not an employee of the Respondent, renders the claims for unpaid salaries and compensation for unfair termination moot.
36. In whole, the Claimant's claim is accordingly dismissed in its entirety with no order on costs.
37. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 28TH MARCH, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Solomon Omutsani the Claimant present in person

N/A for the Respondent

Ms. Christine Omolo- C/A

