



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

ELRC CAUSE NO.E014 OF 2021

(Before D.K.N.Marete)

RICHARD BOIYO.....CLAIMANT

VERSUS

MERU UNIVERSITY OF SCIENCE AND TECHNOLOGY.....RESPONDENT

J U D G M E N T

This matter was originated by way of a Statement of Claim dated 8th April, 2021. It does not disclose an issue of dispute on its face.

The Respondent in a Memorandum of Response and Counter Claim dated 19th April, 2021 denies the claim and prays that the same be dismissed with costs. She also prays for an upholding for the counter claim.

The Claimant's case is that he applied, was interviewed and qualified and was appointed as an Assistant Lecturer of the Respondent on a Permanent and pensionable terms with effect from 10th June, 2013. This was subject to a 2 years probationary period.

The Claimant's further case is that according to the Respondents policies he was entitled to further his studies whenever such opportunities arose and by this he would advance knowledge and scales that would advance the Respondents and the entire Kenyan nation.

The Claimant's other case is as follows;

- That he secured scholarship on 1st September, 2015 to pursue a Phd in the People's Republic of China.
- This study would take 3 years ending on 2nd July, 2018.
- By a letter dated 20th August, 2015 the Respondent released him unconditionally to proceed on study leave.
- On 17th March, 2017 the claimant was requested to furnish a dully filled signed study leave bond agreement which he did unprocedural and inconveniencing.
- That upon completing the Phd study he was awarded another scholarship to pursue a postdoctoral fellowship at Beiging Academy, China.
- This was resisted by the Respondent thereby forcing the claimant to return and resume his duties from the month of October, 2018.
- The Claimant on resumption on duty was promoted to the position of lecturer after a competitive process.
- The Claimant acquired another scholarship to study at Kwazulu-Natal University in South Africa but this opportunity was frustrated by the administrative inertia of the Respondent.
- He was left out of the teaching timetable and an tenable scholarship.
- At this time, he acquired the position of County Chief Officer for Environment, Energy and Natural Resources Vihiga County on a three years contract expiring in June, 2022.
- This was informed to the Respondent who accepted and advised him to take leave of absence.
- That in a communication coming long after the claimant had taken up this appointment the Respondent declined the application for leave of absence without pay and did not offer any directions on resumption on duty or restoring to the teaching timetable.
- The Claimant was served with a notice to show cause letter dated 25th October, 2019 on grounds of desertion. He was served with two letters dated 21st January, 2018 and 28th January, 2018 inviting him to attend a disciplinary committee but on different allegations.

- The Claimant's defence was ignored and the respondent did not give reason or address all the issues in his written explanation.
- The Respondent rationale for termination was that the claimant was not entitled to leave as he had not completed the 3 years bond agreement period.
- In the dismissal letter the respondent advised the claimant to appeal before the vice-chancellor which advice was misleading and misdirecting as the appeal lay before the university counsel and not the vice chancellor.
- He has now been discontinued from his research assignment and the respondent is demanding a refund of the research monies.
- The claimant continues to suffer injustice as is the case with sureties and continues to suffer this.
- The termination of the employment of the claimant by the Respondent is not founded by any known law or by the term of the study bond agreement.
- The refusal to approval to claimant's leave of absence was unreasonable all based on an erroneous apprehension of the correct principles applicable to the bond agreement.
- The charge of "Good Cause" for which the claimant was dismissed and or terminated does not fall within the definition provided in Article 13.3 (iii) of the Respondent's Terms and Conditions of Service for Academic staff which provides-

(iii) for purposes of these rules

"Good Cause" means:

- a. Conviction of a felony or any misdemeanour which the council shall deem to be as to render the member of staff concerned unfair to hold office, or;
- b. Conduct which the council shall deem to be such as to constitute failure or inability of the member of staff concerned to continue to perform his duties or to comply with the conditions of his appointment, or ;
- c. Any other grave offence or gross neglect of duty, or;
- d. Conduct of a scandalous or disgraceful nature which the Council shall deem to render a person unfit to hold his office, or"

The Claimant pleads a contravention of Article 41, 47, 28 of the Constitution as well as Sections 45 and 46 of the Employment Act.

He prays as follows;

- a. The Honourable court do review the decision of the Respondent terminating the Claimant's employment conveyed in the letter dated the 13th day of March 2020 and sets it aside and or vacate it.
- b. The Honourable court do find and declare that the termination of the Claimant's employment conveyed in the letter by the Respondent dated the 13th day of March 2020 is unfair and wrongful, and therefore null and void for all purposes.
- c. The Honourable court do find and declare that the decision by the Respondent declining to approve the Claimant's leave of absence without pay to enable him take up his appointment with the County Government of Vihiga as County Chief Officer amounted to unfair labour practice hence null and void and the Respondent be and is hereby ordered to treat the application as lawful and warranted and the period the Claimant was away working for Vihiga County as leave of absence without pay duly approved, taken and utilized for the said purpose.
- d. The Honourable Court do issue an order compelling the Respondent to unconditionally reinstate the Claimant in his employment as lecturer on the terms applicable prior the date of the termination.
- e. The Respondent to pay the Claimant his dues including the collective bargaining agreement (CBA) entitlement (less the period of leave of absence) from the date they were stopped to the date of full payment.
- f. The Respondent is ordered not to penalize the Claimant or his bond sureties by demanding refunds of money from them or in any other manner whatsoever and not to recover any monies from them on account of the Claimants studies in the People's Republic of China or on account of the sums claimed in the bond agreement.
- g. The Honourable court to grant any other reliefs favourable to the Claimant as to meet the ends of justice including an award of damages for degrading and undignified treatment and compensation for unfair and wrongful dismissal or termination calculated at the loss of expected income for 20 years to the date of the Claimant's expected retirement age of 60 years.
- h. The Respondent to pay costs of the claim.

The Respondent's case is a denial of the claim. It is her case that;

- That the claimant was not released unconditionally for the study leave.

- He knew the conditions on which study leave was guaranteed to members of staff.
- He knowingly failed to execute his bond before leaving for China and was forced to sign the same or forfeit his pay.
- The Respondent declined to authorise another scholarship upon expiry of study leave and the claimant resumed duty accordingly.
- Granting of study leave is not automatic and it is gauged according to the interest of the respondent.
- The claimant was at no one time left without any job engagement.
- His leave of absence application was determined and disapproved.
- Stoppage of salary was issued after a 2 months desertion period.
- The respondent was entitled to terminate all engagements with the claimant and demand refunds on desertion.
- The claimant violated the bond terms and the respondent is entitled to a refund of funds spent thereon.

She raises the following counter-claim;

- Kshs.1,753,966.00 payable by 5th February, 2021 .
- Kshs.393,900.00
- Total Kshs.2,147,866.00

This matter came to court variously until the 9th December, 2021 when the parties agreed on a disposal by way of written submissions.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant by the Respondent was wrongful, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of the cause?

The 1st issue for determination is whether the termination of the employment of the claimant by the Respondent was wrongful, unfair and unlawful. The Claimant in her written submission dated 30th November, 2021 submits a case of unlawful termination of employment.

It is his case and submission that he legitimately partook study leave and executed a bond for his studies and this is not an issue in dispute. His further case is that he required leave to take up his appointment with Vihiga County merely to alert his employer that he would be away temporarily and therefore a stoppage of his pay.

The claimant further submits an allegiance to the Respondent and submits willingness to work and continue working for her till retirement.

The Claimant again submits that the disciplinary proceedings partaken in his case were unlawful and unprocedural because the initiator of these proceedings was not aware of the verbal authority he had received from the vice chancellor to pursue his employment at Vihiga County.

Again, he was served with two letters of invitation to the disciplinary committee dated 25th January, 2020 and another of 28th January, 2020 instant. These cited different provisions of staff case for which he was indicted therefore making it difficult for him to answer. These were not clear either of the accusations against him.

Further, the claimant argues and submits that the decision under which he was found guilty, clause 13.3 of the Terms and Conditions of service is different from summary dismissal provided under clause 12.3. He was therefore found guilty for an offence he was not charged with.

The Claimant further faults the generality of the letter of termination and his call for right of appeal to the Vice Chancellor whereas appeals in this case lay with the University Council.

The Respondent in turn submits a case of lawful termination of employment. He cites the following as salient issues for determination in the circumstances;

1. Did the Claimant sign a valid bond agreement with the Respondent?
2. Was the Claimant required to work for three continuous years for the Respondent upon return from his study leave in China?
3. Was the Claimant required to seek authorization from the Respondent before seeking employment with the county Government and if so is he guilty of deserting his duties?
4. Was the Respondent justified in terminating the Claimant's employment and if so was the termination procedural?
5. Does the Claimant owe the Respondent and if so how much?

She answers all these in the positive and also establishes a case for her counter-claim. It is her case that the claimant's termination of employment was consequential upon his desertion of duty through taking up alternative employment. This was without authorization.

The Respondent's case overwhelms that of the Claimant. At all times, the claimant was bound to work for the Respondent on return from scholarship and on its terms. The claimant cannot be had to come up with excuses for not complying with the terms of his bond. The issue of being removed from the timetable, if at all, was a minor administrative issue which would have been resolved on enquiry.

The Respondent has demonstrated a case of default on the part of the claimant. This is not controverted or rebutted by the claimant.

Overall, the claimant has failed to comply with Section 47 (5) of the Employment Act which provides as follows;

“For any complaint of unfair employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

He has failed to establish a case of unlawful termination of employment on a balance of probabilities or preponderance of evidence. I therefore find a case of lawful termination of employment and hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment he becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same.

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF MARCH, 2022

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mr.Mutuma holding brief for Miss Koskei instructed by Sharon Koskei Advocates for the Respondent.
2. Miss Sijanja holding brief for Musiega instructed ABL Musiega & Company Advocates for the Claimant.