



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 112 OF 2019

ANNE ORINDA AYIEKO.....CLAIMANT

v

MASENO UNIVERSITY RESPONDENT

JUDGMENT

1. Anne Orinda Ayieko (the Claimant) sued Maseno University (the University) on 6 December 2019, alleging unfair termination of employment and breach of contract.
2. The Claimant filed an Amended Statement of Claim on 23 July 2020, which prompted the University to file an Amended Response on 12 March 2020.
3. The Cause was heard on 10 May 2021 and 8 February 2022.
4. The Claimant, an Assistant Registrar and Clinical Officer with the University testified.
5. The Claimant filed her submissions on 4 March 2022 and the University on 4 April 2022.
6. The Court has considered the pleadings, evidence, and submissions.

Unfair termination of employment

Procedural fairness

7. The Claimant was offered the position of Clinical Officer by the university on or around 7 October 2008, and her employment was terminated on 26 February 2018.
8. Section 35(1)(c) of the Employment Act, 2007 requires the employer to give the employee a written notice of termination of employment while section 41 of the Act contemplates affording the employee an opportunity to make representations.
9. On or around 23 February 2017, the Chair of Health Services notified the Vice-Chancellor about the Claimant's chronic absence from duty. The Chair recommended that the Claimant be dismissed or retired on medical grounds.
10. On 27 February 2017, the Chair of Health Services requested the physician handling the Claimant's case to provide a report on her medical status.
11. The Chair received the report and shared it with the Vice-Chancellor on 2 March 2017. He recommended the termination of the Claimant's employment.
12. The Claimant continued to absent herself from work, and on 20 April 2017, the Chair of Health Services wrote to the Vice-chancellor seeking to have her replaced.
13. On 24 May 2017, the University issued a show-cause notice to the Claimant setting out allegations and requested her to respond (absenteeism).
14. The Claimant responded on 30 May 2017, and on 11 January 2018, she was invited to appear before a Staff Disciplinary Committee on 30 January 2018.

15. The hearing did not take place and was rescheduled to 13 February 2018. The Claimant attended the hearing, and the Committee recommended the termination of her employment.

16. The Claimant's employment was terminated through a letter dated 26 February 2018, and the given reason was *persistent absenteeism*.

17. The Claimant appealed on 27 February 2018, and an Appeal Committee was constituted, and the Claimant appeared before it. The Committee submitted a report on 26 June 2018 recommending that the appeal be dismissed. The Claimant was informed of the dismissal of the appeal on 7 January 2019.

18. The Claimant was informed of the contemplated termination of employment. She was alerted of the allegations to confront and was requested to respond in writing. She was later afforded an opportunity to make representations during an oral hearing as well as before an Appeal's Committee.

19. The Court is satisfied that the University complied with the requirements of procedural fairness.

Substantive fairness

20. Sections 43 and 45 of the Employment Act, 2007 obligate an employer to show valid and fair reasons to terminate an employment contract.

21. The reason given for the termination of the Claimant's employment was *persistent absenteeism* and this was the reason the University was expected to prove.

22. The records placed before the Court show that the Claimant had a history of absenteeism from work from early as 2012.

23. Absence from work without lawful cause or permission is a ground for summary dismissal.

24. The Claimant put before the Court medical records to demonstrate that she had lawful cause to be away from work (sick-offs by her attending doctors. She was also admitted to the hospital on other occasions).

25. The Claimant testified that she used to call her immediate supervisor to alert him of her situation.

26. The charge against the Claimant was not specific on which dates the Claimant was absent without lawful cause or permission.

27. Considering the records placed before the Court spanning many years and that the allegation against the Claimant did not set out or isolate the specific days or periods of absence, the Court finds the charge was general and vague. It was not possible for the Claimant to adequately defend herself.

28. Without specifying the periods of absence in contention, the Court finds that the University did not prove the existence of valid and fair reasons to terminate the Claimant's employment.

Compensation

29. The Claimant had a chequered disciplinary history. She had served the University for about 10-years.

30. In consideration of the above, the Court is of the view that the equivalent of 3-months gross wages as compensation would be appropriate (gross monthly wage was Kshs 128,909/-).

Pay in lieu of notice

31. The University offered the claimant 3-months' pay in lieu of notice, and nothing turns on this head of the claim.

Discrimination on health grounds

32. In the submissions, the Claimant urged that the termination of her employment was discriminative and was based on her health status.

33. The Claimant did not prove this allegation or plead a remedy, and the Court dismisses the allegation.

Breach of contract

Loss of future earnings

34. The Claimant prayed for damages for loss of future earnings. She did not provide any contractual, evidential, or legal foundation for this head of the claim and relief is declined.

Service benefits

35. On account of service benefits, the Claimant sought Kshs 482,346/-. Copies of the payslips produced by the Claimant show that she contributed to the National Social Security Fund and a pension scheme.
36. The pension scheme was not made a party to the proceedings.
37. Considering section 35(5) & (6) of the Employment Act, 2007, relief is declined.

Accrued leave

38. The Claimant sought Kshs 1,570,602/- on account of 11-years of accrued leave.
39. Section 28(4) of the Employment Act, 2007 circumscribes how many leave days can be carried forward.
40. The Claimant also pleaded a sum of Kshs 87,789/- stated to be leave based on basic pay.
41. Without evidence that the leave was accumulated with the approval of the University, the Court finds that the accrued leave, if any, was forfeited.

Extraneous allowance

42. The Claimant did not plead or place an evidential foundation to this head of the claim before the Court, and relief is declined.
43. The Court also notes that the copies of the payslip produced in Court indicate the Claimant was earning an extraneous allowance.

Baggage allowance

44. Part of the terminal dues offered to the Claimant included baggage allowance, and further award is declined.

Certificate of Service

45. A Certificate of service is a statutory entitlement, and the University should issue one to the Claimant within 21-days if one was not issued.

Conclusion and Orders

46. The Court finds and declares that the Respondent did not prove valid and fair reasons to terminate the Claimant's employment.
47. The Claimant is awarded:
- (i) Compensation Kshs 386,727/-

48. Respondent to issue a Certificate of Service to the Claimant within 21-days.

49. Claimant to have costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 27TH DAY OF APRIL 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant	Lugano & Lugano Advocates
For Respondent	P.D. Onyango & Co. Advocates
Court Assistant	Chrispo Aura