Kenya Union of Domestic, Hotels Educational Institution and Hospital Workers v Murang'a University of Technology (Cause E015 of 2020) [2022] KEELRC 4135 (KLR) (28 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 4135 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

CAUSE E015 OF 2020

DKN MARETE, J

SEPTEMBER 28, 2022

BETWEEN

KENYA UNION OF DOMESTIC, HOTELS EDUCATIONAL INSTITUTION AND HOSPITAL WORKERS ..... CLAIMANT

AND

MURANG'A UNIVERSITY OF TECHNOLOGY ..... RESPONDENT

JUDGMENT

1. This matter was originated by way of a memorandum of claim dated August 20, 2020. The issue in dispute is therein cited as;

   Wrongful dismissal of Mr John Muchiri Munene

2. The respondent in a statement of response dated February 11, 2021 denies the claim and prays that it be dismissed with costs.

3. The claimant's case is that the respondent is an educational institution formerly known as Murang'a University College established in September, 2011 as a constituent college of JKUAT. The university is a successor of the college.

4. The claimants other case is that on transition, all rights, assets and liabilities owed to Murang'a college of Technology were transferred to Murang'a University pursuant to article 4 of the said legal notice.

5. The claimants other case is that the parties are bound by various CBA's culminating in one of November 24, 2016. This matter has undergone all labour relations exercises including conciliation whereby this matter was referred to court.

6. The claimant's further case is that the grievant was employed by the BOG of Murang'a College of Technology on May 11, 1981 as a cook on a salary of Kshs 500. This was *vide* a letter of appointment

dated July 13, 1982. He worked in various departments of the institution until his interdiction.. He had a 32 year stint of service.

7. The claimant further avers that on September 11, 1982 a water pump and mortar were purportedly stolen from the respondents' premises. For this, the grievant was charged and arraigned in court over the theft.

The claimant's further case is as follows;
January 2, 2013- interdiction letterDecember 28, 2016- grievant acquittedFebruary, 2007- Sought reinstatement from the Vice ChancellorDecember 27, 2017- wrote to VC demanding outstanding salaries during interdiction and reinstatement on May 18, 2017, the respondent replied that he did not sign a staff movement from college to university and .....liability on prosecution.July 7, 2017 – claimant's demanded for reinstatement.November 8, 2017-A trade dispute reported and subsequent disagreement on March 6, 2019

8. Again, the university is on record *vide* their letter dated May 18, 2017 admitting that they wronged the grievant and on their behalf, the government should compensate him for damages. One, Professor Clifford Machogu, PhD *Ag* Deputy Vice Chancellor (AFP&D) recommended that the grievant seek damages from the ATtorney General purporting that the university did not arrest, investigate or prosecute the grievant. We submit that the matter that made the grievant loose his employment and eventually arraigned in court was on the basis of a report to a police station by the university management/council. It would therefore be fallacious for the university to divert consequences which they should face to the Attorney-General. We submit that since the university was not sure of who committed the offence purported to have been committed by the grievant, it was wrong and far-fetched to implicate the grievant just to be seen of having acted. We submit that the respondent are the ones liable to compensate the grievant accordingly and not the attorney general.

He claims as follows;

i. Service gratuity for 32 years he worked for Murang'a College of Technology 8,900 x 32=284,800

ii. The grievant was interdicted with effect from January 2, 2013 and later he was acquitted by the court rendering him to be innocent for the allegations of crime that were lodged against him. The C.B.A under the interdiction clause provides that one be paid half of his salary while under interdiction and thereafter be refunded the withheld salaries if not guilty. Prior to his interdiction he was earning Kshs 9,575. Kshs 9,575 x 12 months x 7 years +6 months upto July 2020= Kshs 861,750/-

iii. The grievant did not proceed for his annual leave for two years Kshs 9,575 x 2=Kshs 19,150

iv. The respondent did not reinstate the grievant after his case was closed and neither did the respondent pay his terminal benefits for the period he worked. We submit that the grievant is entitled to a maximum compensation for inordinate/unjustified delay in discharging the grievant benefits being 12 months gross salaries compensation contemplated by section 49(10)(c) of the *Employment Act*, 2007. Kshs 9,575 x 12= Ksh 114,900 grand total =KSHS 1,280,600/-

46. Interest to be charged at court rates as from January 2, 2013 up to date because the respondent has not yet legally terminated his services nor paid the grievant's terminal benefits.

The respondent case is that;

a. Although all rights, liabilities, and assets held by MCT at the commencement of the legal notice were automatically and fully transferred to the university college by dint of order 3(4) of the legal notice, the staff of MCT existing prior to the commencement of the legal notice order were not automatically transferred.

b. On the contrary, order 16(1) entitled 'staff of the University College' provided that " the staff of the (MCT), existing prior to the commencement of this order including those on secondment are eligible for employment by the university college subject to appraisal by the council in accordance with the statutes."

c. The legal notice was issued under Section 5 of the *Jomo Kenyatta University of Agriculture and Technology Act* No.8 of 1994 Laws of Kenya (Repealed).

d. The *Universities Act*, No.42 of 2012 Laws of Kenya, under which the respondent is established, provides at section 80(4) that "Except as the institutions established under the repealed Acts otherwise direct, all persons who were members of the staff of respective institutions established under this Act and shall be deemed to have been appointed under this Act on the terms and conditions of service applicable to them immediately before the commencement of this Act."

e. It therefore follows that in respect to the respondent, whether or not staff members under MRUC became their staff depended on the legal regime under the repealed Act by dint of the 'otherwise direction' of order 16(1) that provided that employment will not be automatic but rather be subject to an appraisal.

7. In reply to paragraphs 10-12 of the claim, which are in toto hereby denied, the respondent replies as follows;

    a. The Board of Governors of the Murang'a College of Technology employed the grievant as a cook with effect from May 11, 1981 at a salary of Kshs 500 per month vide an appointment letter dated July 13, 1982. (Annexure 1 respondent's Bundle ('RB')).

    b. The grievant was issued with a warning letter on March 21, 1984 on account of 'lack of respect (indiscipline)'. (Annexure 3 RB).

    c. The grievant was further issued with a warning letter on November 1, 1985 on account of 'bad behaviour- abusing students.' (Annexure 3 RB).

    d. The grievant was further issued with a warning letter on June 15, 1989 on account of 'letting outsiders into the kitchen and serving them food without permission.' (Annexure 4 RB).

    e. On August 4, 1998 and August 6, 1998, the grievant gave a 3 month notice of service Retirement to the B.O.G of Murang'a College of Technology citing 'unavoidable circumstances family wise'. (Annexure 5 RB).

    f. On September 18, 1998, the grievant wrote to the institution revoking the earlier resignation citing the fact that he 'was psychologically disturbed by domestic affairs' at the time of issuing the notice. (Annexure 6 RB).

    g. On February 20, 2006, the Deputy Principal of Murang'a College of Technology requested the professional certificates of the grievant, and he did not provide the same. (Annexure 7 RB).

h. On February 11, 2007, the grievant wrote to the Murang'a college of Technology, informing the principal that he had been absent from work for 5 days on account of being arrested and detained at a police station due to domestic problems. (Annexure 8 RB).

i. The Principal Murang'a College of Technology transferred the grievant from the catering department to the housekeeping department on May 11, 2007. (Annexure 13 RB).

j. The grievant was interdicted from service on January 2, 2013 for an incident of theft while he was on duty on September 13, 2012. (Annexure 9 RB)

The respondent further states as follows;

a. The grievant has never been a staff of the respondent. He was employed by the Murang'a College of Technology ('MCT') which was succeeded by the Murang'a University College ('MRUC') which was later succeeded by the Murang'a University of Technology ('the respondent')

b. Staff members of MCT did not automatically become staff of MRUC. They only became 'eligible for employment by the University College subject to appraisal by the council in accordance with the statutes' by dint of order 16(1) of the Legal Notice No 129 of September 16, 2011 ('the Legal Notice')

c. MCT transitioned to MRUC between 2012-2013, in which period the council and management was set up and MRUC operationalized.

d. MRUC through an established committee evaluated the matter from January 15, 2013 to March 21, 2013 and subsequently did publish a report of the proposed guidelines of converting Teachers Service Commission (TSC) staff and Murang'a College of Technology Board of Governors (BOG) staff to Murang'a University College staff which was to partially implement order 16(1). (Annexure 10 RB).

e. Appraisal of all staff was also conducted which culminated in the accepted staff members being awarded appointment letters subsequent to them signing a staff movement form on or about 1st and April 2, 2013. (Annexure 11 RB).

f. The grievant never signed the staff movement form nor was he granted an appointment letter by MRUC, meaning that he failed the appraisal and was not considered for appointment nor appointed by MRUC when the process was undertaken in March-April 2013.

g. The grievant's employment with MCT, thus, lapsed naturally and by the effluxion of its legal existence in or around March 2013 when the transition from MCT to MRUC was complete.

h. Since he never became an employee of MRUC, the grievant could equally not become an employee of its successor- the respondent herein.

i. At any rate, the transition of staff from MRUC to the respondent was equally not automatic. section 80(4) of the *Universities Act*, No 42 of 2012 Laws of Kenya provides that the appointment of employees under the previous institutions is subject to the direction of the intervening legal regime, in the case order 16(1) of the legal notice.

a. The grievant was interdicted from service on January 2, 2013 for an incident of theft while he was on duty on 13th September 2012. (Annexure 9 RB).

b. Since he was interdicted for an offence of theft which by its nature involves the loss and/or misappropriation of funds, MCT was under no obligation to pay half of his salary during interdiction by dint of the provisions of the MCT scheme of service for all B.O.G employees. (Annexure 002 claimant's Bundle ('CB').

c. If at all he was entitled to his withheld salary after acquittal, which is denied and the claimant hereby called to prove, then the said withheld salaries by MCT are only in respect of the months of January to March 2013.

d. The grievant failed to apply for appointment with MRCU in March 2013 like all other employees did at the time despite knowing the process was scheduled for this period and ongoing. He actually and constructively abdicated his opportunity to apply and effectively terminated his employment with MCT as other staff were transitioned to MRUC on application. In any case, he failed the appraisal process on account of his numerous disciplinary issues while at MCT and further on account of the lack of academic and professional credentials that were required of him on February 20, 2006.

e. Interdiction pending a criminal case for theft by its nature requires that the grievant be asked to handover and keep off the premises. It, however, does not mean that the grievant could not communicate with the institution by correspondence nor show up to sign the staff movement forms and apply to be transited to MRUC. In any case, the grievant has not pleaded that he was prevented from applying to be appointed as a staff of MRUC.

    a. As per the MCT's scheme of service for all B.O.G. employees (annexure 002 CB), whose applicability the claimant is put to strict proof of, service gratuity is payable to a retired employee. The grievant never retired from MCT, and he only chose not to apply to be transitioned as a staff of MRUC. He is not entitled to service gratuity whatsoever.

    b. If at all grievant is entitled to withheld salaries, which is denied, the same should be paid only for the months of January to March 2013. The grievant's employment with MCT ended by operation of law and by the inevitable affluxion of its legal existence. The grievant never applied to be appointed by MRUC nor was he so appointed as required by order 16(1) of the Legal Notice.

    c. The grievant has not particularized his untaken annual leave days sufficiently to invite an informed response. The respondent asserts that he often absconded work while in the employ of MCT.

    d. The respondent never employed the grievant, is not mandated to pay any terminal benefits, and is not liable to pay any compensation thereof. The grievant relinquished his entitlement to be considered for employment by MRUC by failing to apply. In any case, he failed the MRUC council's appraisal process on account of his disciplinary record and lack of academic and professional certificates, rendering him unsuitable for employment under MRUC's new elevated mandate.

    e. The respondent did not need to terminate the grievant's services as he is not their employee and has never been.

9. The issues for determination therefore are,

    1. Whether the claimant was ever an employee of the respondent.
    2. Whether there was a termination of the employment of the claimant by the respondent.
    3. Whether the termination of the employment for the claimant by the respondent, if at all, was wrongful, unfair and unlawful.
    4. Whether the claimant is entitled to the relief sought.
    5. Who bears the costs of the claim.

10. The 1st issue for determination is whether the claimant was ever an employee of the respondent. The claimant's case and submission is one of employment by the respondent. This was formed through successive employment stints from Murang'a College of Technology who is the predecessor to the respondent. He narrates and submits a long history of employment and how trouble arose and he was arraigned before the police and charged for loss of a water pump and mortar at Murang'a College of Technology.

11. The respondent denies employment of the claimant. It is her case and submission that when she took over and succeeded Murang'a College of Technology, she set up a re-organization of the employment portfolio through regularizing and entering into fresh and renewed employment contracts with all employees of her predecessor. The claimant did not partake of this and therefore no subsisting employment contract exists between them.

12. The claimant has not ably answered or controverted this. Overall, a claim on unlawful termination of employment must clearly demonstrate employment in the first instance. In a situation where this is disputed, it is the onus of the party claiming it to lay this on the table. The claimant has not done this and therefore a claim of employment would not arise. I therefore find that there is no demonstrable case of employment inter partes and hold as such.

13. On a finding of no case for employment of the claimant by the respondents, all subsequent issues for determination fall by the wayside.

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

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF SEPTEMBER 2022.

D.K.NJAGI MARETE

JUDGE

Appearances

Mr. Samuel Munyua for the claimant union.

Mr. Akatch instructed by Abdulhakim & Company Advocates for the Respondent.