



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 658 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

MICHAEL KINYANJUI MBURU

CLAIMANT

VERSUS

KENYATTA UNIVERSITY

RESPONDENT

JUDGMENT

The Claimant, Michael Kinyanjui Mburu instituted this claim vide a Memorandum of Claim dated 3rd May 2018 against the Respondent, Kenyatta University. He prays for the Orders that:

- (a) A declaration that the Suspension letter dated 1st November 2016 be declared illegal, unjust, irregular, null and void and unconstitutional.*
- (b) Payment of Kshs.277,340 being gratuity for 2015 to 2017.*
- (c) Payment of full salaries from May, 2017 to date until payment in full.*
- (d) The Claimant to resume to work immediately without any loss of benefits, victimization and/or interference of Claimant's employment contract of service by the Respondent without due process of the law being followed.*
- (e) Any other further reliefs that this Court may deem fit to grant in the interest of justice.*

The Claimant avers that the Respondent engaged him by a letter of appointment dated 19th March 2013 in the position of Information Technology Support and Maintenance Officer at its main campus in Kiambu County. That his contract of service was a two year renewable contract with a gratuity earning at the end of each contract. That his salary rose from an initial monthly salary of Kshs.67,003/= in 2013 to Kshs.81,901/= in 2015 due to annual increments. That as required of him under his second Letter of Offer and Contract dated 19th May 2015, he worked for the Respondent faithfully and diligently until the Respondent's Deputy Vice Chair in charge of Administration expressly suspended him on 1st November 2016.

It is averred by the Claimant that upon suspension, he was entitled to half salary until completion of investigations and/or determination of disciplinary proceedings within a period of 6 months. That he however received his half salary from November 2016 until April 2017 when the same was illegally stopped by the Respondent who had neither called him for disciplinary hearing nor served him with the investigations report on the matter. That his suspension letter should therefore be nullified since the 6 months' period for disciplinary proceedings lapsed in April 2017 by dint of the CBA for 2013/2017 between the Kenyatta University Council and the Kenya Universities' Staff Union (KUSU) dated 24th November 2016. That he was consequently also entitled to his full salary upon expiry of the 6 months of disciplinary proceedings together with gratuity.

The Respondent filed a Statement of Response dated 2nd November 2018 admitting to have engaged the Claimant but denies that his contract of service was renewable. It avers that the Claimant was suspended after he inter alia transferred details of a graduated student to an illegally registered student; illegally printed and absconded with transcripts for himself and other students. Further, that registered for an MBA and did not declare he was a student meaning he continued to handle sensitive registration, examination and other on-line data.

It further avers that the Claimant's contract with the Respondent expired on 9th April, 2017 while he was still on suspension and that it could

not make a decision on the renewal or otherwise of his contract as the disciplinary process was and is still pending. That on 27th November 2017 the Claimant was invited to appear before the Senior Board of Discipline on 29th November 2017 and that though he had confirmed attendance he failed to turn up and later informed the Respondent that he had other engagements in Nyeri. That another scheduled date of 4th December 2017 also failed to materialise because the Chair of the Senior Board of Discipline Committee who is also the Respondent's Vice Chancellor was summoned for a meeting by the Cabinet Secretary of the Ministry of Education. Further, that the University Council and the Vice Chancellor's Office have been in transition over the last two years hence the difficulties in constituting the Senior Board of Discipline Committee.

It is the Respondent's averment that the Claimant's salary was stopped due to the expiry of his Contract of Service which is also the reason why the Claimant cannot be reinstated. The Respondent prays that the suit be dismissed with costs.

The Respondent filed a Witness Statement made by its HR Manager, Nderitu Gikaria who states that the Claimant's contract was not subject to automatic renewal. That this was communicated to him by the Respondent vide the letter dated 8th March 2018, to the effect that the decision to either renew or decline to renew his contract of service was hinged upon the outcome of the disciplinary process.

Claimant's Submissions

The Claimant submits that his letter of suspension was not copied to the Union Secretary General and the Branch Secretary as provided in Section 7.3 (c) of the CBA which thus left him vulnerable to an unfair process. Further, that the charges brought against him in the suspension letter were strange to him and that he was looking forward to defend himself in the Disciplinary proceedings. That it is clear he was not invited to any disciplinary proceedings as alleged since the Respondent failed to produce the invitation letter before the Court. That even if the said allegations were true, he ought to have been given five (5) days' notice to appear as under Section 7.20 of the CBA and further, the invitation for 29th November 2017 came over one year after his suspension, contrary to the provisions of the CBA.

He submits that he had legitimate expectation that at the lapse of the six months after suspension, the charges would automatically be dropped as per the provisions of Section 7.3 of the CBA. That the Respondent has instead demonstrated bias against him and violated his rights - under the CBA; Articles 41, 47 and 50 of the Constitution of Kenya, 2010; Fair Administration Actions Act No. 4 of 2015 and the Employment Act, 2017 by not reinstating him back to his position and paying his withheld salaries.

That on 7th August, 2018 the Court through Ongaya J. issued a partial decree by consent of parties whereat Order No. 2 was made against the Respondent for payment of the half salaries accrued throughout the period of the suspension together with due gratuity. That this is an indication that the Hon. Judge had seen that the half salaries and gratuity were being withheld illegally against the provisions of the CBA.

It is the Claimant's submission that RW1 who was also the HR Manager was not able to explain to the Court why the Respondent did not bring the charges before him despite indicating in the suspension letter that the Respondent had done an in-depth investigation on the matter. That the Respondent should have listed Dr. Mburu as a witness to shed more lights on the allegation that the Claimant had called him to negotiate for signing of transcripts which were irregularly printed. That he had never been availed any policy which was against staff members of the Respondent pursuing further studies without approval and neither was the same presented in court. He refers to CBA Section 11(h)(i)(j) which expressly encourage staff members to pursue career development and places a responsibility on the Respondent to financially support such further education/personal development for its staff.

He notes that his colleagues who were employed in the same batch as him were upgraded from contract to Permanent and Pensionable upon completing their second contracts and that the illegal suspension thus denied him that opportunity. The Claimant further refers to the Copy of Investigation Report relied upon by RW1 which absolves him of any culpability and clearly states in part (iv) of the brief that the alleged illegal transfer of students was done by Cyrus Kamau, who also confirmed the said allegations. That the said Cyrus Kamau mentioning the Claimant's name in his interview cannot be a basis to condemn him since the rule of natural justice dictates that he should have been given an opportunity to give his side of the story in defence.

The Claimant submits that it is clear the charges levelled against him have no basis and he has been subjected to an illegal suspension for four (4) years now with no gainful employment. That being a civil servant, he cannot look for alternative employment as he requires clearance from his former employer. He prays for this Court to grant all his prayers and order that the Respondent bears the cost of this suit.

Respondent's Submissions

The Respondent submits that pursuant to the said Consent Order, it paid the Claimant half salary for 6 months being Kshs.245,703 and gratuity being Kshs.277,340.88 totalling Kshs.523,043.88, and which fact the Claimant confirmed on cross-examination. That the same thus disposes of prayers (b) and (c) of the Memorandum of Claim as the Claimant has been appropriately redressed and his final dues fully settled by the Respondent.

It is the Respondent's submission that the Claimant's offences warranted his suspension under **Section 6.3 (iii) of the University Council Terms of Service** providing for when a staff member commits conduct of scandalous and disgraceful nature. Further, that the said offences also amounted to abuse of office and gross misconduct under **Section 44(4)(c) of the Employment Act**. That **Clause 7.3 (a) of the CBA for 2013-2017** also provided for suspension of an employee for a period not exceeding 90 days pending investigation into alleged misconduct. That **Clause 7.3 (e)** provided that if no action or decision shall have been taken against an employee after expiry of 6 months of suspension, the suspension will have been deemed to have automatically expired and the employee shall be reinstated with full salary.

That the said 6 months' period from 1st November 2016 ended on 30th April 2017 by which date the contract of employment of the Claimant had already expired on 9th April 2017. That having also explained in detail the problems it encountered in convening the disciplinary board, the suspension of the Claimant cannot therefore be deemed to have been illegal as it was done with due regard to the offences he was accused

of. That nevertheless, its letter to the Claimant dated 8th March 2018 (*pg. 1 of the Respondent's list of documents*) is evidence that it tried to grant him a hearing before the Senior Board of Discipline.

The Respondent submits that the Claimant failed to show which part of the two Contracts he had with the Respondent provided for automatic renewal. That the first paragraph of the Contract states, "**Subject to the approval of Kenyatta University Council...**" which means that the same is not automatically renewable but conditional upon approval by the University Council. That there exists no contract of employment between the Claimant and the Respondent within which this Court can order the reinstatement of the Claimant, referring to the provisions of **section 12 (3)(vii) of the Employment and Labour Relations Court Act** which states

"In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders: an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law;"

It cites the Court of Appeal case of **Sotik Highlands Tea Estates Limited v Kenya Plantation and Agricultural Workers Union [2017] eKLR** which stated that Parliament in its wisdom capped the period for reinstatement at three years and there is no provision or proviso qualifying Section 12(3)(vii) of the Employment and Labour Relations Court Act to say that time stops running or is interrupted by an action filed in court. The Respondent submits that the order of reinstatement being an order of specific performance against a contract of employment is incapable of being granted herein as the Claimant's contract expired and the facts of this case do not further support granting such an order.

The Respondent further refers to **Kenya Revenue Authority v James Omondi Were [2020] eKLR** where the Court of Appeal stated that the remedy of reinstatement is not an automatic right for an employee and that it is discretionary as each case depends on its own set of facts and circumstances.

That in the case of **Rose Aoko Ogwang Odhiambo v National Gender & Equality Commission [2018] eKLR**, the Court found that it would not be appropriate to reinstate the claimant in terms of section 12 of the ELRC Act as read with section 49 (3)(a) of the Employment Act 2007 as both the three years' statutory period and the contract period had expired.

It is the Respondent's submission that payment of the Claimant's withheld salaries and gratuity should have rested this matter and it urges the Court to find as such and not grant prayers (a), (d) or (e) of the Memorandum of Claim. It further notes that for the sake of certainty and finality, the Claimant is bound by his own pleadings and cannot be allowed to raise a different or fresh cause of action without due amendment properly made as held by the Court of Appeal in the case of **Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR**.

In response, the Claimant filed Supplementary Submissions dated 5th January 2021 submitting that the money paid by the Respondent only disposes prayer (b) entirely and partly prayer (c) to the extent of the half salaries payable until April 2017. That he still seeks payment for the full salaries from May 2017 to date since the contract was automatically renewed after the dropping of charges as per **Section 7.3(e) of the CBA**. That the Respondent has wrongly created an impression that it had 6 months to process the disciplinary case against him while Section 7.3(a) expressly allows for 90 days (3 months) with an exception given in Section 7.3(b) to a maximum of 6 months strictly where there are complex processes involved and the same is communicated to the employee in writing. That since he was never informed in writing, it implies that the Respondent had only 90 days which ended on 31st January 2017, upon which date he should have been unconditionally reinstated with full salary.

The Claimant further questions why the Respondent opted to allegedly invite him to appear before the disciplinary committee on 29th November 2017 if indeed he was no longer an employee by dint of his contract having expired.

He further submits that it was indeed part of his job in the ICT Department to change student statuses from "Active" to "Graduate" immediately after they graduated to facilitate printing of transcripts and that the case referred to by the Respondent is therefore not unique and is meant to create an impression that the same was done maliciously.

Analysis and Determination

The first issue for determination is whether the suspension letter issued to the Claimant was illegal, unjust, irregular, null and void and unconstitutional. The second issue for determination is whether the Claimant's contract was automatically renewable. The third issue for determination is whether the Claimant is entitled to an order of reinstatement by the Respondent.

Clause 7.3 in the said CBA between Kenyatta University Council and the Kenya Universities' Staff Union (KUSU) provides that:

- a) *The employer reserves the right to suspend an employee from employment with half pay for a period not exceeding ninety (90) days pending investigation into the alleged misconduct.*
- b) *Where the matter requires complex processes of investigation, the employee will be informed in writing but the suspension should not exceed a period of six (6) months.*
- c) *A letter of suspension shall be copied to the Secretary General and the Chapter/Branch Secretary.*
- d) *Where an employee's suspension has been lifted and the employer has exonerated himself from any blame, he/she shall be paid withheld salary.*

e) At the expiry of six (6) months of suspension, if no action or decision shall have been taken against the employee, then the suspension shall be deemed to have automatically expired and the employee shall be reinstated with full salary.

In the case of **Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR** as quoted in **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR**, the Court stated:

“...Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence...The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

While it is the Respondent's case that it invited the Claimant to appear before the disciplinary board, it only produced a letter it wrote to the Claimant dated 8th March 2018, almost 1 year after the alleged expiry of his contract and 1 year 4 months after he was suspended. The said letter summarised the fact that it had without success tried to set up a disciplinary hearing for the Claimant. However, the Respondent did not produce any documents to show that it had invited the Claimant for a hearing as pleaded. The Respondent has therefore failed to discharge the evidentiary burden that it had taken adequate steps to deal with the Claimant's matter during his suspension.

On whether the Claimant's contract was automatically renewable, a perusal of the same indicates that the said contract dated 21st May 2016 but which took effect on 27th May 2015, was renewable subject to approval of Kenyatta University Council. This means that the Claimant's contract expired on 26th March 2015 which was 5 months into his suspension period and the same would only be renewable upon approval of the Council.

The Respondent has pleaded that since the Claimant's contract expired while he was still on suspension, his contract could not be considered for renewal as the disciplinary process was still pending. However, it was not the Claimant's fault that the disciplinary process had not been completed so as to warrant non-renewal of his contract. Nevertheless, the same was remedied in the partial decree recorded by parties before Ongaya J as the Claimant was paid the withheld half salaries from November 2016 to April 2017 and which sum was well beyond the contract expiry period.

The Claimant seeks to be reinstated back to the employment of the Respondent citing bias as his colleagues with similar terms of engagements had their contracts renewed. The Court of Appeal has affirmed in the case of **KRA v James Omondi Were** above that the remedy of reinstatement is discretionary and dependent on the facts and circumstances of each case.

Considering the seriousness of the allegations against the Claimant and taking into account that his terms of engagement were contractual in nature, he does not meet the conditions for reinstatement under Section 49(4) of the Employment Act which provides that reinstatement would only apply in cases where an employee has been unfairly terminated and in exceptional cases only. This Court however has the discretion to compensate the Claimant in the interest of justice, for the irregular suspension by the Respondent which did not comply with the CBA applicable to the claimant.

I thus award the claimant three (3) months' salary as compensation in the sum of Kshs.245,703/=. The claimant is not entitled to salary to date of payment having already been paid what was payable to him following the interim orders of this court. There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF JANUARY 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this+ court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE