



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

ELRC CAUSE NO. 1790 OF 2015

KENNEDY MUTINDA KAVEMBA.....CLAIMANT

VERSUS

THE PRINCIPAL, KIAMBU INSTITUTE OF

SCIENCE & TECHNOLOGY.....RESPONDENT

JUDGMENT

1. The Claimant, Kennedy Mutinda Kavemba instituted this suit vide a Memorandum of Claim dated 6th October 2015 against the Principal, Kiambu Institute of Science and Technology for unlawful and wrongful termination of employment and failure to pay terminal dues. He claims a total sum of Kshs. 283,352/- being payment of one-month's salary in lieu of notice, severance pay for five years, 2 hours overtime for four years, acting allowance for 3 years and compensation for the unlawful termination of employment. He avers that on or about 25th August 2011, he was employed by the Board of Management, Kiambu Institute of Science and Technology (the Board of Management) as a Senior Security Officer. The Claimant averred that he was assigned the duties of a Chief Security Officer between the years 2012 and 2015 in acting position as the previous holder of the position had been transferred without a replacement and that his contract of employment was at all material times renewed annually and was governed by both the provisions of labour laws and the Terms and Conditions of Service for Board of Governors Employees (terms and conditions of service). Further, that the latest renewal of his contract took effect from 27th January 2015 to 31st January 2016 at a monthly salary of Kshs. 20,214/- including house allowance and outpatient medical allowance. He averred that the said contract clearly spelt out his duties and responsibilities and that he worked until 4th June 2015 or thereabout when his services were suspended without any lawful cause and his employment was subsequently terminated on 3rd August 2015 for alleged insubordination and failing to obey instructions. He also contends that he was never paid overtime for the two hours he worked daily outside the normal working hours, for the whole employment period and was never issued with a Certificate of Service. The Claimant avers that his services were summarily unlawfully terminated since he was never given an opportunity to be heard contrary to the law and the rules of natural justice. The Claimant averred the Respondent surpassed the powers of the Board of Management in terminating his services and had also suspended him contrary to the procedure set out in the terms and conditions of service. He also asserts that he was not issued with a warning letter prior to his services being terminated and that his appeal against the Respondent's decision is pending before the Board of Management.

2. The Respondent was opposed to the suit and filed a Defence dated 11th November 2015 averring that he is mandated to issue such letters of appointment and dismissal on behalf of the Board of Governors and that the Claimant's most recent contract renewal was on 1st February 2015 and not as asserted in the Claim. He denied that the Claimant is entitled to acting allowance as the Claimant did not satisfy the requirements of qualifications and experience to perform the duties of a Chief Security Officer. He further avers that the reasons for dismissal were based on the law and the terms and conditions of service for employees and were clearly spelt out in the dismissal letter issued to the Claimant. He asserts that the Claimant was given a chance to address himself to the charges levelled against him in writing but his reasons were found unsatisfactory. The Respondent further avers that with delegation of the Board's duties to the Principal under the terms and conditions of service, he is allowed to dismiss the Claimant from employment. Further, that the Claimant had been acting in consistent breach of his employment contract which culminated in the eventual repudiation of his contract and his dismissal from employment. He also avers that the Claimant has been paid his final dues including his total earnings for July and August, less salary advanced and that the Claimant is not entitled to overtime allowance or compensation for unlawful employment. The Respondent prays that the Claimant's suit be dismissed with costs.

3. In his Witness Statement made on 10th November 2015 and filed on 11th November 2015, the Respondent asserts that the Claimant extorted money from students, was negligent in carrying out his security duties and was unable to work cohesively with fellow colleagues. More particularly, that Security during the Claimant's tenure had deteriorated and the students reported feeling unsafe and that with such consistent breach it was therefore his responsibility as the Principal to act. He points out that the Claimant had failed to report two illegal routes into the Institute and further handed back a confiscated work ticket for a lorry at the Institute contrary to the instructions given. He further states that the Claimant's appeal to the Board of Governors against his dismissal was deliberated upon and the termination of his

contract upheld. He contends that for the sake of mutual confidence in the running of the Institute, it would be improper for the court to get involved with the day to day running of institutions and management of staff. He asserts that he is not the Claimant's employer and cannot thus be sued in person.

4. The Claimant adopted his filed witness statement as part of his evidence and further produced a copy of his payslip for January 2015. He stated that the reasons given for his suspension were insubordination and failure to perform duties and that he was later unprocedurally and unlawfully dismissed by the Principal of the Respondent. The Claimant contended under cross-examination that there were no minutes of delegation of powers to the Principal and admitted to having received and responded to the show cause letter. He further stated that the Principal gave him work which was not part of his jurisdiction and denied that the vehicle in issue was being misused. He testified that the Respondent has a Board of Trustees and Board of Management and that the Board of Governors managed the institute. On the issue of the work ticket, he stated that he confiscated the work ticket and took it to the Principal's Secretary but the Farm Manager grabbed it from the said Secretary. He also stated that the said vehicle did not belong to the Respondent but had no proof in Court to prove the same. He admitted having not recorded a statement in response to the allegation of extorting money from a student and while he asserted having reported the two illegal routes to the Principal and recorded in the OB, he confirmed that the said OB was not in Court. In re-examination, the Claimant reiterated that there is no communication that the Board delegated power to dismiss him to the Principal and that there was also no report he was extorting money from students.

5. The defence case was closed on 12th July 2021 as the defendant had not filed a witness statement. Parties were directed to file written submissions.

6. The Claimant duly filed his written submissions and in the said submission submits that his services were terminated without him being accorded the right to be heard in contravention of Clause 6:20 of the terms and conditions of service which provides that before the decision to dismiss an employee is taken, the employee shall be given a hearing. He submitted that the procedure of dismissal of his employment was further contrary to the provisions of Section 41 of the Employment Act, 2007 as the Respondent failed to explain to the employee the reason for which termination is being considered, in a language of the employee's understanding and in the presence of another employee or shop floor union official and the employer must consider the views of the employee and the chosen companion before deciding to dismiss the employee. He further submits that the Board of Management is the one vested with the powers to appoint, demote, interdict, suspend or dismiss its employees and even where such power is delegated, Clause 6:2 provides that any action taken out by the Principal in delegation should be reported to the said Board for endorsement. He submitted that further, Clause 2:8 of the terms and conditions of service provides that the Principal shall form a Staff Advisory Committee to advise him on matters relating to discipline, appointments, performances and appraisals. It is the Claimant's submission that the Principal's actions of suspending and dismissing him were thus unlawful as they were never endorsed by the Board of Management and that no such Staff Advisory Committee was constituted before his suspension and dismissal. It is the Claimant's further submissions that he was never charged and/or convicted of any criminal offence and there were no proceedings for dismissal carried out in line with the laid procedure. To this end, he cites Clause 6:14 of the terms and conditions of service which provides that:

"The powers of suspension should only be exercised where an officer has been convicted of a serious criminal offence or as a result of the proceedings for dismissal taken against them, and the Principal considers that the officer ought to be dismissed."

7. The Claimant cited a number of authorities in support of his case. He relied on the case of **Joshua Tako Aluondo v Xfor Security Solutions Kenya Limited [2019] eKLR** where O.N. Makau J. held that as the respondent's witness had admitted there being no evidence to prove the claimant was served with the invitation to attend the hearing and declined, the claimant was terminated without being accorded a fair hearing as required by Section 41 of the Employment Act. The Claimant submitted that the Court further held that the dismissal was unfair within the meaning of Section 45 of the Employment Act after finding that the respondent had failed to prove that the claimant was found sleeping on the job and it had followed a fair procedure before dismissing him from employment.

8. The Claimant submitted that having demonstrated that the Respondent contravened the laid down procedure of suspending and dismissing an employee, this Court should make a declaration that the Claimant was irregularly and unlawfully terminated. He relied on the case of **Mwende Mbiti v Citrus Inn Limited [2018] eKLR** where Onyango J. cited with approval the authority of **Nicholus Muasya Kyula v FarmChem Ltd [2012] eKLR** where the court held that:

"It is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at."

9. The Claimant submitted that the Respondent has not controverted his claims as particularized in the memorandum of claim and having established that the Respondent dismissed him without following due procedure, he has proved his claim for grant of the prayers sought. He further submits that he is entitled to notice pay as under Section 35(1) (c) of the Employment Act, 2007 and relies on the case of **Samuel Mutuku Mutunga v Steel Makers Limited [2019] eKLR**.

10. The Respondent duly filed submissions in which it submitted that according to Clause 2.1 of the terms and conditions of service, all employees of the Board of Governors are to be accountable to the Principal and which is also the position of the Institute. He submits that the Claimant's contract of service was terminated lawfully in accordance with Sections 41 and 43 of the Employment Act since the reasons for termination were explained to him before termination of employment and he was given a chance to respond to the charges levelled against him in writing as per Clause 6.4 of the terms and conditions of service. He relies on **Judicial Review No. 29 of 2012: Republic v Public Service Commission of Kenya & 4 Others [2014] eKLR** where the Court (Ngenye J.) held that there is no rule that fairness always requires an oral hearing and whether an oral hearing is necessary will depend on the subject matter and circumstances of the particular case and upon the nature of the decision to be made. The Respondent further submitted that it would be erroneous for the Court to get involved with the day to day running of institutions and management of staff.

11. The Claimant sued the Principal of Kiambu Institute of Science and Technology who was his supervisor and a delegate of the Employer

and not the Claimant's employer. It is asserted by the Respondent that he exercised delegated authority from the Claimant's employer to interdict and dismiss the Claimant. That in my considered view did not elevate the Respondent to the position of employer of the Claimant. The Claimant ought to have moved against his employer and the Respondent perhaps made a co-respondent. As this was not done the suit was untenable and as such cannot result in the reliefs the Claimant seeks as against his employer as the Respondent was not the one who was required to pay notice, severance pay or any underpayments of salary during the Claimant's service. The suit against the Respondent is dismissed with costs to the Respondent as he filed a defence in the matter and ultimately filed submissions in the cause. Such costs to be capped at Kshs. 30,000/- which in my estimation would adequately compensate the Respondent for having to seek legal representation in this matter.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2021

NZIOKI WA MAKAU

JUDGE