



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**ELRC CAUSE NO. E011 OF 2021**

**PROF. DR. FREDRICK NYONGESA KASSILLY.....CLAIMANT**

**VERSUS**

**TURKANA UNIVERISTY COLLEGE.....1<sup>ST</sup> RESPONDENT**

**THE COUNCIL,**

**TURKANA UNIVERISTY COLLEGE.....2<sup>ND</sup> RESPONDENT**

**THE COUNCIL CHAIRMAN,**

**DR. SOLOMON J.M MUNYUA.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the Claimant/Applicant's application dated 23rd March, 2021 filed under certificate of urgency pursuant to Article 23 of the Constitution of Kenya 2010, Rule 17(1)(2) & (3) of the Employment and Labour relations Court (Procedure) Rules 2016, seeking the following orders;

**1) Spent**

**2) Spent**

**3) Spent**

**4) Spent**

**5) Spent**

**6) That the 2<sup>nd</sup> Respondent herein be compelled by way of a mandatory injunction to reinstate the Claimant to his position of Deputy principal, Academic and Student Affairs along with all attendant salary and benefits pending the hearing and determination of this case.**

**7) That an Order of Injunction do issue restraining the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents , their servants, employees and or any agents from advertising, interviewing, recruiting, filling or in any other way appointing any one to the position of Deputy principal , Academic and students affairs pending hearing and determination of this case.**

**8) That an order of injunction do issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, their agents, servants, officers, assignees or any other person howsoever acting under their authority from implementing or enforcing the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents decision dated 6<sup>th</sup> January, 2021 pending hearing and determination of this claim.**

**9) Any other order that the Honourable Court may deem fit to grant.**

**10) Costs of this application be Borne by the Respondents.**

2. The application is supported by the grounds on the face of the application and the affidavit sworn by the Applicant, **Prof. Dr. Fredrick N**

**Kassily** on 24<sup>th</sup> March, 2021 and based on the following grounds: -

- a) THAT, by an advertisement dated 30<sup>th</sup> March, 2018, the 1<sup>st</sup> Respondent advertised the position of deputy principal academics and students' affairs (DP A& SA) which the claimant applied for and was shortlisted for an interview held on 9<sup>th</sup> May, 2018.
- b) That he passed the interview and was appointed by a letter of offer dated 18<sup>th</sup> July, 2018 for a period of 5 years (Renewable) with effect from 18<sup>th</sup> July, 2018 which offer he accepted on even date.
- c) That on 29<sup>th</sup> January, 2020 while he was in Vienna Austria for official duties he was appointed by the then 2<sup>nd</sup> Respondent council as the Acting Deputy principal as the then principal Prof. Thomas Ekamais Akuja was sent on compulsory leave.
- d) That due to the claimant's absence Prof Tom Mokwena Nyamache was appointed as the interim acting deputy principal from 30<sup>th</sup> January, 2020 to 7<sup>th</sup> February, 2020 when he came back from Vienna and took over his duties on 7<sup>th</sup> February, 2020 although he was not issued with an appointment letter to the new position.
- e) That the Respondents' last board meeting was held on 2<sup>nd</sup> March, 2020 and their tenure came to an end on 5<sup>th</sup> March, 2020 and a new council formed vide appointment by gazette Notice Number 3646 dated 30<sup>th</sup> April, 2020 and published on 19<sup>th</sup> May, 2020. The appointed members were sworn into office on 27<sup>th</sup> May, 2020.
- f) That sometimes in June 2020, the 2<sup>nd</sup> Respondent met and formalized his appointment as the acting principal and issued him with appointment letter dated 17<sup>th</sup> June, 2020 for a fixed period of 6 month retrospectively commencing 29<sup>th</sup> January, 2020 which he continue to serve the Respondent as they awaited the substantive principal.
- g) That, he took his annual leave sometimes in September and while on leave, the 3<sup>rd</sup> Respondent issued him with a Show cause letter via email on the 17<sup>th</sup> September, 2020 which he learnt of on 24<sup>th</sup> September, 2020 and immediately requested for more time to respond which request did not elicit any response. That he immediately prepared a response to the Show cause letter within the limited time and served the Respondent on 30<sup>th</sup> September, 2020.
- h) That the substantive charges level against him are attributable to the then principal Prof Thomas Akuja. As the alleged accusation occurred between 2018/2019. These charges are insubordination of council resolution by reinstating staff to pay roll, unlawful, illegal and irregular recruitment, hiring 2 casuals against clear HRCC Min 10/14/02/2019, appointing and sanctioning the appointment of 2 nurses, failing to provide documentation of the need for the head hunted staff hired in the period which are 5 casuals, 5 interns, 2 short term contract workers and 2 nurses, Appointing of CPA Florence Ndinda as internal Auditor Grade 12, Appointment of Mr. Shadrack Muyesu as the legal officer and Appointment of Ms. Violate Simiyu as Huma Resource Officer.
- i) That, these charges were equally levelled against the then Principal who was equally summarily dismissed. also that the NTSC was issued and signed by the 3<sup>rd</sup> Respondent contrary to Clause D.5.2.3(b) of the 1<sup>st</sup> Respondent Human Resource Manual which provides that NTSC is to be issued by the Registrar Administration.
- j) That No investigations were carried out before the Show Cause letter was issued.
- k) That the committee found him culpable after a disciplinary hearing held on 21<sup>st</sup> October, 2020 which dismissal was communicated to him on 6<sup>th</sup> January, 2021. That most charges were attributable to the former principal Prof Akuja and the other charges against him were not substantiated.
- l) He stated that he appealed the decision of the disciplinary committee which was rejected and chose not to review the Appeal as provided for under Clause D.58 of the Human Resource Manual as he belief the outcome is pre-determined.
- m) He alleges that the charges against him were instigated by some Members of staff like Prof. Stephen Odebero whom he had decline to approve his payment of Kshs. 30,000,000/- and CBA arrear cause the college did not have such colossal sum of money in their reserve.
- n) He stated that he has never been charged with gross misconduct during his 20 years' career working in Kenya and abroad. He contends that he is 58 years old and securing another job as a lecture will be difficult in light of the trumped up charges against him
- o) He prayed for the application to be allowed.

3. In opposing the application, the Respondents through its' the 1<sup>st</sup> Respondent's chairperson, **Dr. S.J Muchina Munyua**, swore a replying affidavit on 3<sup>rd</sup> May, 2021 and filed in this Court on even date on the following grounds;

- a) That, the Notice of motion is incurable defective, incompetent and a non-starter and devoid of merit one ripe for dismissal.
- b) He stated that the Claimant being a staff member of the 1<sup>st</sup> Respondent was under duty to perform his duties accordance with the universities Act and was answerable to the 1<sup>st</sup> Respondent who is mandated under section 16 of the Turkana University College Order, 2017 to exercise disciplinary control over all its staff.

- c) It is stated that the Claimant was subjected to due process as envisaged under the law as he was issued with a Notice to show cause letter and given 14 days to respond before the hearing was conducted.
- d) That the disciplinary hearing was scheduled for 21<sup>st</sup> October, 2020 and on 14<sup>th</sup> October, 2020 the Claimant requested for more particulars and requested to be represented by a counsel of his choice which request was allowed. Consequently, the Claimant was represented by a counsel of his Choice together with UASU representative and were afforded ample time to defend the claimant's case.
- e) That the disciplinary committee found the Claimant guilty of 5 charges and exonerated him of 2 charges but the general verdict was that he was dismissed for gross misconduct.
- f) That the Claimant Appealed against the said decision which was equally dismissed and instead of Reviewing the said Appeal in accordance with clause D.7.7.1 of the Turkana University College Human Resource Manual, he opted to file this suit in Court.
- g) That the suit was filed prematurely before the Claimant exhausted all internal disciplinary control measures provided for by the Respondent.
- h) The Respondents averred that the Claimant was dismissed after following all the Procedure required of it including issuing a Show cause letter, conducting disciplinary hearing and eventually terminating the claimant service.
- i) That the prayer 5 asking for the Minutes of meeting held on 17<sup>th</sup> June, 2020 and 21<sup>st</sup> October, 2020 contravenes Article 35 of the Constitution and provisions of Access to Information Act as they do not have the basis and use of the requested information.
- j) He contends that the application does not meet the threshold for grant of an injunction and prayed that the same be dismissed.

4. The Claimant on 24<sup>th</sup> May, 2021 filed a rejoinder in response to the Respondents replying Affidavit and stated that the Respondents are in contempt of Court Orders by failing to supply him with the minutes of meeting held on 17<sup>th</sup> June, 2020 and 21<sup>st</sup> October, 2020 when the Court had ordered on 25<sup>th</sup> March, 2021.

5. It was contended that the Show cause letter was issued by an unauthorized person contrary to section D.5.2.3(b) of the Human Resource Manual and therefore the entire Show cause letter is a nullity.

6. He stated that the charges against him included for concealing information in and deliberately hiding information from council members including an alleged list of 41 employees illegally recruited in the year 2019/20 which list was non-existent save for a list of 32 employees recruited within the said period which document is in possession of the Respondents.

7. He insisted that his termination was instigated by the failure of him to approved various payment to one Stephen Odebero which monies the Respondent did not have.

8. He alleges that minutes 09/21/10/2020 is not reflective of the meeting that took place of the said date but that the same have been manipulated.

9. He stated that the Respondent did not prove any of the charges that were allegedly committed by him and that the trumped up charges were not substantiated. further that the disciplinary committee had recommended he be rebuked but the charges were changed and he was dismissed.

10. The application herein was disposed of via written submissions with the Applicant filing on 24<sup>th</sup> May, 2021 while the Respondents filed their on 10<sup>th</sup> June, 2021.

#### **Applicant's submissions**

11. The applicant submitted that the appointment letter provides for termination of the Claimants service by stating that the Council shall recommend to the Cabinet Secretary, in charge of university education for termination of appointment by giving the claimant 6 months' salary in lieu of Notice and the termination ought to be conducted as per the University Human Resource Manual Section D that gives the procedure to carry out Disciplinary hearing. He argued that the Respondent contravened its' Human Resource manual as there was no investigations carried out regarding the charges leveled against him as per Section D.2.3(a). Also that the show cause letter was issued by the 3<sup>rd</sup> Respondent instead of the Registrar of administration as provided for under section D. 5.2.3(b) and that the charges against him relates to year 2018/2019 when he was not the principal of Turkana University College. He submitted that the charges in the summary dismissal letter were not there in the Show cause letter which letter together with the dismissal letter and the letter rejecting the appeal were all signed by the 3<sup>rd</sup> Respondent contrary to the HR manual.

12. It was submitted that the Respondents acted in contravention of the Human Resource Manual in carrying out disciplinary proceedings and arriving at the dismissal.

13. It was submitted further that the claimant has meet the conditions for issuance of injunctive orders as envisaged under the celebrated case of **Giella –v- Cassman Brown & Co ltd (1973) EA 359**. He argued that the charges against him were not substantiated therefore he has a case with immense chances of success and prayed that the interim orders be granted to save the main suit.

14. On the prayers sought, the Applicant argued that this Court has powers under Rule 17(10) of this Court Rules to order reinstate him interpartes and cited the case of **Hamisi Bweni Dzila –v- County Assembly of Kwale and another [2020] eklr**.

15. He argued that the entire disciplinary process was flawed and prayed for this Court to intervene and to issue the interim Orders.

**Respondent's submissions.**

16. The respondents on the other hand submitted that it did not violate the provisions of its Human Resource manual rather that the disciplinary process was conducted according to the letter of the constitution and its Human Resource Manual.

17. It was argued that before the Show cause letter was issued to the Claimant, the cabinet secretary was duly informed vide the letter marked MM-2 which Cabinet secretary allowed the Respondent to continue with the disciplinary hearing therefore the decision arrived at by the Respondents was proper. Nevertheless, it was argued that even if the Respondent did not make any recommendation to the Cabinet secretary they are still empowered under section 51 of interpretation and general provisions Act to discipline the Claimant. He reinforced this argument by citing the case of **Dominick Obel Odongo & Another –v- County Director of Education, Siaya County and another [2019] eklr** and the case of **Christopher Mogambi Omonyana & Another –v- Attorney General and another [2015] eklr**.

18. On whether the Show cause letter was improperly issued by the 3<sup>rd</sup> Respondent instead of the Registrar Administration, it was submitted that, the 3<sup>rd</sup> Respondent being the spokesperson for the 1<sup>st</sup> Respondent is mandated under Statute XXVII of Turkana University College to issue any communication to person above grade 14 and the Registrar Administration to person below Grade 14. Therefore, the claimant being a very senior officer of Grade 16 any communication was to be made by the 3<sup>rd</sup> Respondent.

19. The Respondent submitted that even if the 3<sup>rd</sup> Respondent lacked authority to issue any Show cause letter, there was no prejudice that was visited upon the Applicant.

20. It was submitted further that the allegation by the Applicant that preliminary investigations were not carried out are without basis, as the investigations contemplated under Clause D.5.3 of the University Human Resource Manual is not compulsory and are merely inquisitive in nature with no formalities.

21. It is the Respondents submissions that the Claimant has not made out a case with any chances of success as envisaged in Giella v cassman brown case and prayed that the same be dismissed in limine.

22. On whether the prayer for reinstatement can stand at this stage, it was submitted that jurisdiction to reinstatement of an employee is donated by section 49 (3) of the Employment Act, which matter can only be conclusively determined after the matter is heard in the main claim and cited the Court of Appeal case of **Kenya Airways Limited –v- Aviation workers Union Kenya & 3 others [2014] eklr**.

23. He submitted that there are no exceptional circumstances that have been demonstrated by the Applicant to warrant this Court to exercise its discretion at this stage and reinstate the Claimant to employment.

24. The Respondent therefore urged this Court to disallow the application herein for lacking merit.

25. I have examined the averments of the parties herein. The applicant needs to establish he has a prima facie case with likelihood of success in order to be granted the injunctive reliefs sought.

26. The petitioner applicant contends that the respondents did not comply with then HR Manual and that the 3<sup>rd</sup> respondent (Chairman of the council was also the Judge and executioner).

27. The petitioner avers that from the time of his appointment, it is the cabinet Secretary in charge of education who had powers to terminate his employment and not the respondent herein.

28. He also avers that the 3<sup>rd</sup> respondent is one who issued him with a NTSC letter of 17.9.2020 when he did not have powers to do so.

29. The claimants therefore contends that the entire disciplinary process offends the Turkana University HR Manual. The Employment Act 2007 is therefore tainted with illegality.

30. The respondents opposed the application averring that the claimant's appointment was subject to the provision of the University's Act and the University HR Manual. They also aver that the claimant was still accountable to the 1<sup>st</sup> respondent's internal processes including disciplinary process and hence it cannot be faulted for discharging its oversight note over its staff such as the claimant herein.

31. The respondents further aver that Turkana University College is a constituent college under the Universities Act hence does not have a Chancellor or Vice Chancellor and its decisions are made by the council and communicated by the 3<sup>rd</sup> respondent.

32. From the letter of appointment of the claimant, he was appointed as Deputy Principal Academic and Student Affairs for a term of 5 years on 18/7/2018.

33. The letter under reference was written by the Council Chairman Dr. Mussolini Kithoma but refers to an appointment letter by the cabinet Secretary of Education Reference No.MOEST/CONF/2/IVON V (26). In the body of the letter it is indicated that the contract could be

terminated by;

**“a.....**

**(b) The council may recommend to the Cabinet Secretary, in charge of University Education to terminate your appointment by giving you six (6) month’s basic salary and in lieu of notice.**

**(c) The termination of this contract shall be done in accordance with the provisions of the university college Human Resource Manual, the Employment Act or any other relevant regulation.....”**

34. What becomes pertinent herein is that there was a route to be followed before the claimant could be terminated which route the claimant avers was not followed.

35. The claimant avers that the respondents did not comply with the HR Manual. The claimant referred court to clause D 5.2.3(b) of the respondent’s HR Manual 2020 which indicates that;

**“The Registrar (Administration) will issue a notice to show cause defaulting the nature of the offence and giving the staff a period of not less than fourteen (14) days from the date of service”.**

36. The claimant avers that his NTSC was issued by the 3<sup>rd</sup> respondent and he was also the same one who sat on the disciplinary committee as chairman and thus becoming the complainant and the Judge.

37. The claimant also avers that no investigations were carried out before he was condemned. He referred court to Clause 5.2.3(a) of the HR Manual which provides as follows;-

**“carry out a preliminary investigation and consultation as to the circumstances surrounding the act of conduct....”**

38. A cursory view and consideration of the complaints by the claimant show that there may have been breach of procedures envisaged before dismissing or terminating the claimant.

39. It is also apparent that the claimant could only be terminated after the court had recommended to the Cabinet Secretary the need for the termination as per the letter of appointment.

40. The dismissal letter issued to the claimant dated 6.1.2020 App 10, however is written by the chairman of council but without resource to the Cabinet Secretary Education as per the appointment letter.

41. It is apparent on the face of the record that there were flaws in the disciplinary process and later the summarily dismissal meted against the claimant applicant herein.

42. The applicant sought orders to be reinstated to work in view of the flawed disciplinary process.

43. I do not however find it plausible to order a reinstatement of the claimant at this stage as the order will in any case dispose the entire claim at this interlocutory stage.

44. I will therefore confirm prayer 1, 4 and 5. I also allow prayer 7 as follows;-

**i. THAT this application be certified urgent and be heard *ex-parte* in the first instance.**

**ii. THAT an order of injunction do issue restraining the Respondents, their servants or agents or whomsoever from advertising, interviewing, recruiting, filing or in any other way appointing any person to the position of the Deputy Principal, Academic and Student Affairs of the 1<sup>st</sup> Respondent pending the hearing and determination of this application *inter-partes*.**

**iii. THAT the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents do furnish the Petitioner with the Council Minutes of 17<sup>th</sup> June 2020 and Minutes of the Disciplinary Hearing of 21<sup>st</sup> October 2020 pending the hearing and determination of this application *inter-partes*.**

**iv. That an Order of Injunction do issue restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, their servants, employees and or any agents from advertising, interviewing, recruiting, filling or in any other way appointing any one to the position of Deputy principal, Academic and students affairs pending hearing and determination of this case.**

**v. Costs in the cause.**

**RULING DELIVERED VIRTUALLY THIS 21ST DAY OF SEPTEMBER, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

## **JUDGE**

### **In the presence of:-**

Lutta for claimant - present

Odongo for the respondent – present

Court Assistant - Fred