



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

ELRC CAUSE NO. 67 OF 2018

PROF. AUGUSTINE OTIENO AFULLO.....CLAIMANT

VERSUS

UNIVERSITY OF KABIANGA.....RESPONDENT

JUDGMENT

1. The claimant sued the respondent for unlawful termination and unpaid terminal dues.
2. The claimant avers that he is a Holder of a Doctor in Philosophy Degree (PhD) in Environmental Science and was employed by the Respondent on the 19th May, 2015 as an Associate Professor on permanent and pensionable terms which employment was confirmed by the Respondent on the 25th December, 2015.
3. He stated that he served the Respondent diligently which earned him several appointments; as a member of shortlisting committee for senior lecturers, lectures, tutorial Fellow and clinical instructors on the 26th July, 2016; an academic leader for Bachelor of Science (Environmental Health) program from 10th January, 2017; a member of Research and Extension Monitoring Committee on 21st February, 2017 and an internal examiner for postgraduate Thesis.
4. The claimant states on 11th January, 2018, he was served with a Show Cause Letter why disciplinary action should not be taken against him for allegedly absenting himself from work from 2nd January 2018 without any reason which he responded to on 15th January, 2018.
5. He stated that while the said Notice to Show Cause was pending his response, the Respondent demanded for a recognition letter of his PhD from the Commission of University Education.
6. The claimant states that the Respondent without hearing him or subjecting him to disciplinary hearing issued him with a dismissal letter dated 16th January, 2018.
7. He stated that 6 months prior to the termination the Respondent had withheld his salary wrongfully.
8. He avers that during the 3 years of employment with the Respondent, he was instrumental in getting the respondent to have an established institutional review Board (IERB) which was duly registered by the National Council for Science and Technology and Innovation (NACOSTI) and obtained other internal registrations for research purposes.
9. He contends that his dismissal was motivated by the fact that he had demanded for accountability with regard to funds which had been remitted to the respondent by International Development Research Center (IDRC) in Canada and National Institute of Health of the United States of America for health and pollution research project GEO Health East African Hub which had been awarded to the Respondent through his influence and research credential.
10. The claimant therefore contends that his termination was unfair and prayed for the following reliefs; -
 - a) **Compensation or damages as set out at paragraph 13 of the statement of claim**
 - b) **An order that the Respondent do issue to the claimant a certificate of service.**
 - c) **Cost of this suit and interest.**
11. The Respondent entered Appearance on the 25th July, 2018 and filed its response on the 13th August, 2018 stating that the claimant was

lawfully terminated from employment.

12. It was stated that on various dated between April, 2017 and July, 2017 the Respondent requested the claimant to submit a recognition status of his PhD from Commission of University Education which the claimant failed to submit. Consequently, the Respondent reminded the claimant of the need to submit the said status via internal Memo of 22nd August, 2017 failure to which his salary would be stopped which memo did not elicit any response forcing the Respondent to seek for the said information.

13. That in January, 2018 the Respondent received complaints that the claimant was not attending classes neither was he seen in the vicinity of the University prompting it to issue a NTSC why disciplinary action should not issue for absenting himself without cause.

14. That the actions of the claimant of absconding duty for more than 7 days went contrary to university terms of service for staff in grades 11-15 clause 20-2(v) and section 44(4)(a) of the Employment Act, warranting summary dismissal.

15. Nevertheless that the Respondent demanded for an explanation for the absenteeism through its internal Memo of 11th January, 2018 and further reallocated the claimants Courses to another lecturer and asked the director Kapakatet Campus to confirm the said allegation which the said director affirmed that the claimant had absconded duty.

16. The Respondent stated that the Claimant's services were summarily terminated in accordance with section 44 (4)(a) of the Employment Act since the claimant was negligent in handling his duties.

17. The Claimant vide an Affidavit filed on 15th February, 2015 replied to the Response to claim and stated that he was never served with the letters asking him about status recognition of his PhD by the Respondent and all the correspondence produced therein he was made aware of when this suit was filed.

18. On the issue raised by the Respondent of his PHD not being recognized by Commission of University education, the claimant contends that they are sideshows aimed at diverting this Court's attention from the claim herein. Further that he attained the said PhD after serious work which PhD is recognized by CUE.

19. The claimant dismissed the allegation that he absconded his duties and pointed out to the minutes of 9th January, 2018 attached to the Respondent documents filed on 31st January, 2019 which shows that he had sent an apology for failing to attend a meeting schedule for that day as he travelling to Nairobi for a GEO health meeting. Also that he had set questions to be taken by the student for January and February, 2018. In addition, that his termination letter indicated 9th January, 2018 as his last day of service.

20. The Claimant also took issue with the register of attendance produced by the Respondent and alleged that there was no such register kept by the Respondent's, kapakatet campus, further that the dates are jumbled up an indication that the said register was concocted to suit the Respondent case.

21. He maintained that the last salary he received from the Respondent was for July, 2017 and the Respondent withheld his salary without informing him the reasons for the same. Nonetheless, he continued rendering his service to the Respondent till his termination in January, 2018.

22. The claimant's case proceeded for hearing on the 3rd March, 2020 when the claimant, **Prof. Augustine Otieno Afullo (CW-1)** testified that he was employed by the Respondent as an associate professor till January, 2018 when his services were terminated. He stated that prior to the dismissal he received on 15th January, 2018 a NTSC dated 11th January, 2018 which alleged that he had absconded duty. He responded on the same day but was dismissed from employment on 16th January, 2018. He sought to produce all his documents attached to the claim, in the supplementary list of documents dated 25th October, 2018, 12th November, 2018 and 15th December, 2019 and prayed for the court to allow the claim as prayed.

23. On cross examination he testified that when he inquired on why his salary was not paid, he was informed that the same was a result of an error which was to be corrected. He told court that he saw the requests of his PhD status in court for the first time. He testified also that he was at work throughout January, 2018 teaching his students and on 9th January, 2018 he travelled to Nairobi to attend a GEO health meeting which the Respondent was aware of.

24. The Respondent's case proceeded for hearing on the 26th May, 2021 with the Respondent calling one witness, **Lilly Langat (RW-1)** who testified that she is the administrator in the Human Resource department and adopted her statement dated 14th April, 2021.

25. On cross examination she stated that the Respondent learnt of the claimant's absenteeism through the head of Department who informed the Respondent that the Claimant had absconded duty. She testified that the letter from HOD is not addressed to the claimant neither was it copied to the claimant. She admitted that the claimant was not subjected to any hearing since he had absconded work for more than 7 days. She testified that she does not know why the Claimant was not paid for 7 months.

Claimant's submissions.

26. The Claimant submitted that he was unfairly terminated from employment as the Respondent failed to accord him any hearing as contemplated under section 41 of the Employment Act. He argued that the reasons for termination was for allegedly absconding duty when evidence was produced to the contrary indicating that the claimant was teaching and even set exams which students sat for in January, 2018. Also that the Head of Station on 9th January, 2018 had a meeting and minutes were taken and in the minutes the claimant was indicated to be

absent with apology.

27. The claimant thus submitted that he has made out a case on a balance of probability and prayed that the claim be allowed as prayed.

Respondent's submissions.

28. The Respondent maintains that the Claimant was dismissed from employment for absconding duty for more than 7 days which dismissal was in line with terms of service of staff in grade 11-15 which provides that an employee who absconds duty for more than 7 days shall forfeit its employment.

29. It was argued that the Claimant was accorded procedural fairness when he was served with the Show cause letter but choose not to respond to the said letter forcing the Respondent to terminate his service.

30. The Respondent submitted that section 47(5) of the Employment Act vest the burden of proving unfair termination on the claimant and the Respondent in tasked with giving justification for the termination in this he cited the case of **Cooperative Bank of Kenya Limited –v- Banking Insurance and Finance Union [2017] eklr.**

31. Accordingly, it was submitted that the Respondent has justified the termination of the claimant in that he absconded duty an act which warrant his dismissal in accordance with the Respondent staff code of conduct and therefore urged this Court to find in its favour and dismiss the Claim herein to the Respondent.

32. I have examined the evidence and submissions of the parties herein. The issues for this court's determination are as follows;-

1. Whether there were valid reasons to warrant claimant's termination.

2. Whether the claimant was subjected to due process.

3. Whether the claimant is entitled to the remedies sought.

ISSUE NO. 1

33. From the letter of dismissal issued to the claimant dated 16/1/2018, the claimant was dismissed on account of absenteeism from duty from 2nd January 2018 without cause.

34. It was indicated that he had breached the terms and conditions of employment for staff in Grad 11 – 15 and subsequently his service had been terminated for absenting himself from duty for over seven consecutive days without permission in accordance with clause 20.2(v) of the Terms of Service for Staff in Grades 11 to 15 and the Employment Act 2007 Section 44 (49).

35. He was terminated with effect from 9th January 2018. Prior to this termination, the claimant had been issued with a show cause letter dated 18/1/2018. The show cause letter did not give him timelines within which to respond.

36. He however responded vide a letter date 15/1/2018 denying he had been absent from work. The termination followed the following day on 16/1/2018. From the response of the respondents they aver that the claimant is not qualified as stated. They also aver that between April and July 2017 the respondent requested the claimant to submit his recognition status by the Commission of University Education (CUE) for his PhD qualifications but he failed.

37. The respondents aver that the claimant never responded to the request to provide recognition from CUE and they sought an explanation from the CUE which responded that the PhD of the claimant was not recognized by CUE.

38. The claimant denied receiving any letter asking him to explain his recognition from CUE. Indeed RW1 also admitted that there is no proof that the claimant was asked to show the issue of claimant's accreditation with CUE and that did not form part of his dismissal.

39. From the communication with the parties herein, the issue of the claimant abscondment from duty is an issue that needs proof.

40. When the claimant was asked to defend himself on this he denied absconding duty. The respondents didn't go ahead to submit evidence of the claimants absenteeism at all.

41. Section 43 of the Employment Act 2007 envisages that where there is a termination, the employer must prove they have valid reasons. The reason assigned to the termination of the claimant relating to absenteeism need to be established.

42. The respondents have however failed to establish that the claimant absented himself from duty, as alleged I therefore find that there was no valid reason to warrant dismissal of the claimant.

ISSUE NO. 2

43. As concerns the due process, the RW1 admitted that the claimant was not subjected to any due process.

44. Section 41 of the Employment Act provides as follows;

“41. Notification and hearing before termination on grounds of misconduct

(1) Subject to [section 42\(1\)](#), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under [section 44\(3\)](#) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within [subsection \(1\)](#), make”.

45. Given that the respondents didn't have valid reasons to dismiss the claimant and given that they didn't subject him to any disciplinary process then it follows that the dismissal of the claimant was unfair and unjustified as per Section 45 (2) of the Employment Act 2007 which states as follows;-

“45. (1).....

(2) A termination of employment is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure”.

ISSUE NO.3

46. As concerns remedies given my findings above, I find for the claimant and award him as follows;-

1. Salary for the month of August 2017 to January 2018 = 5 x 240, 507 = 1,202,535/=

16/30 X 240,507 = 128,270/=

TOTAL = 1,330,805/=

2. 2 unpaid leave for 3 years = 703,843 as prayed

3. 10 month's compensation for unfair and unjustified termination

= 240,501 x 10 = 2,405,070/=

TOTAL awarded = 4,439,718/=

Less statutory deduction plus costs and interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED VIRTUALLY THIS 5TH DAY OF OCTOBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Amuga for claimant – present

Respondents – absent

Court Assistant - Fred