



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1649 OF 2014

ANTHONY OSORO.....CLAIMANT

v

MULTIMEDIA UNIVERSITY OF KENYA.....RESPONDENT

JUDGMENT

1. Anthony Osoro (Claimant) instituted these legal proceedings against Multimedia University of Kenya (Respondent) on 23 September 2014 and he stated the Issues in Dispute as

a) Wrongful dismissal.

b) Non-payment of terminal dues.

2. The Respondent filed its *Memorandum of Reply* on 23 October 2014 and the Cause was heard on 17 January 2018, 6 February 2018, 19 March 2018, 19 November 2018, 1 October 2019 and 31 October 2019.

3. The Claimant and the Respondent's Legal Officer testified (they also adopted their witness statements and produced documents).

4. On 9 February 2018 after the commencement of the hearing, the Respondent filed an application seeking leave to file and serve further documents, an application the Court dismissed on 22 February 2018, with reasons reserved.

5. The Respondent had urged that it had inadvertently filed the wrong documents and needed to introduce the correct documents.

6. The reasons leading the Court to decline to allow the documents were that the Respondent had earlier filed documents in 2014, but failed to serve the same upon the Claimant until the morning of hearing on 17 January 2018.

7. The Respondent again filed documents on 5 February 2018 after the Claimant had concluded his examination-in-chief and the Court had on 6 February 2018 expunged the documents from the record, and therefore it could not revisit the issue.

8. The Court has considered the pleadings and evidence on record and identified the Issues for determination as examined hereafter.

Unfair termination of employment

Procedural fairness

9. The Claimant alleged that he was not afforded an opportunity to be heard before his employment was terminated on 10 June 2014.

10. Prior to the termination of the Claimant's employment, the Respondent caused an audit to be carried out and an Audit Report was released on 19 February 2014.

11. On the same day, the Respondent's acting Chief Internal Auditor sent a Memo to the Claimant seeking his response to several issues identified in the Audit Report.

12. The Claimant responded the same day.

13. On 20 March 2014, the Respondent's Vice-Chancellor wrote to the Claimant to notify him that after the consideration of his response to the audit queries, it had been decided to suspend him to enable completion of investigations.

14. As part of the investigations, the Respondent invited the Claimant to appear before a *Council Sub-Committee* on 31 March 2014 to answer questions arising from the audit. The invitation letter instructed the Claimant to make a written response as well. The Claimant made a written response on 31 March 2014.

15. According to minutes filed in Court, the *Council Sub-Committee* met on 1 April 2014. The Claimant was questioned extensively.

16. On 7 April 2014, the *Council Sub-Committee* met and made a finding that the Claimant had been involved in gross misconduct, and had fundamentally breached his contractual obligations.

17. The *Council Sub-Committee* then prepared a report in which it recommended disciplinary action be taken against the Claimant (and some other employees).

18. The Full Council adopted the recommendation to put the Claimant through a disciplinary process on 28 April 2014.

19. On 5 May 2014, the Respondent informed the Claimant that he would be put through a disciplinary process. The letter set some 9 broad allegations against the Claimant and invited him to attend a disciplinary hearing on 26 May 2014.

20. Upon receipt of the charges/invitation letter, the Claimant formally requested the Respondent to furnish him with the Investigations Report to enable him to prepare a defence.

21. The Respondent forwarded the primary documents upon which the Investigations Report was prepared to the Claimant through a letter dated 14 May 2014.

22. In the meantime, the Claimant had sought legal advice and his advocates wrote to the Respondent on 16 May 2014 contesting the suspension.

23. As a result of the advocate's intervention, the Respondent rescheduled the disciplinary hearing to 3 June 2014 to allow the Claimant more time to prepare.

24. The Claimant made a written statement of defence on 25 May 2014 ahead of the hearing on 3 June 2014. The Claimant attended the hearing.

25. The Disciplinary Committee found the Claimant guilty of all the 9 charges and recommended the termination of his employment.

26. Thereafter, the *Executive Committee of Council* of the Respondent met on 9 June 2014 and it upheld the recommendation of the Disciplinary Committee to terminate the Claimant's employment, and on 10 June 2014, the Claimant was informed of the termination of his contract.

27. The Claimant appealed on 23 June 2014, and on 19 August 2014, the Chairman of the Appeals Committee notified him that the appeal was unsuccessful, and he should clear to enable payment of his terminal dues.

28. Section 35(1)(c) of the Employment Act, 2007 envisages *written notification of termination of employment*. The notification may serve or be referred to loosely as a show-cause.

29. Section 41 of the Act on its part requires the employer to notify the employee of any allegations which may lead to termination of employment and afford the employee an opportunity to make representations, accompanied by a colleague or union representative.

30. The Claimant was taken through an elaborate process right from the inception of the audit. He participated in the audit and was thereafter formally charged and requested to make written representations. He made the representations.

31. The Claimant was then invited to appear for an oral hearing before the Disciplinary Committee and requested to make further written representations. The Claimant made the written representations and was questioned at length. The minutes show that there was a union representative present.

32. The Court, in the circumstances, finds that the Respondent was in compliance with the requirements of procedural fairness as set out in the aforesaid statutory provisions.

Substantive fairness

33. Pursuant to the provisions of sections 43 and 45 of the Employment Act, 2007, an employer has the onerous duty to prove the reasons for terminating the contract of an employee, and that the reasons were/are valid and fair.

34. The Respondent presented some 9 allegations against the Claimant. It is these allegations or even one of the allegations that the Respondent was expected to prove.

35. In order to discharge the burden, the Respondent called its Legal Officer. She testified and produced copious amounts of records/documents.

36. One of the allegations against the Claimant was in respect to the appointment of Architect Musyoka Kioko as a Lead Consultant through a letter dated 2 October 2012 whereas the Tender Committee meeting of 8 August 2012 had approved JKUAT consultants.
37. The Claimant served as the Secretary of the Tender Committee. He wrote to Arch Musyoka Kioko on 2 October 2012 informing him that he had been appointed as a Lead Consultant.
38. When queried on what basis he wrote the letter of award to Arch. Musyoka Kioko and not JKUAT Consultants, the Claimant responded that he did not know, but at the same time contended that it was pursuant to instructions in a letter dated 10 October 2012 from the Vice-Chancellor of JKUAT, and communications between the Respondent's Principal and the Vice-Chancellor of JKUAT.
39. The Claimant did not produce the letter.
40. The Claimant was the procurement professional at the Respondent. He wrote a notification of award to Arch. Musyoka Kioko when the Tender Committee had not approved such form of award. The action of the Claimant was not in tandem with the provisions of the Public Procurement and Disposal Act, 2007.
41. The Respondent proved this reason.
42. Another allegation against the Claimant was in respect to a purported contract between the Respondent and JKUAT for the engineering complex. It was alleged that the Claimant had failed to advise the Respondent to execute a formal contract as required under the Public Procurement and Disposal Act.
43. The Claimant's response to this allegation when he appeared before the Disciplinary Committee was that when he joined the Respondent in 2012, the project was on-going, and the consultants had submitted fee notes for services rendered.
44. The Claimant admitted before the Disciplinary Committee that the Ministry of Education had declined to process the payments and had called for supporting documentation.
45. The Claimant also contended that there was no need for competitive bidding because JKUAT was a government entity.
46. In the view of the Court, the Claimant was aware that a formal contract was a prerequisite even if there was no competitive bidding, and in failing to render such advice was acting negligently.
47. Similarly, the Claimant allowed the Tender Committee to approve a consultancy services contract with JKUAT on 8 August 2012 when the user department had not made any request.
48. It was incumbent upon the Claimant to offer professional advice to the Tender Committee about the irregularity.
49. The Court finds that the Respondent discharged the burden placed upon it by sections 43 and 45 of the Employment Act, 2007 on the examined allegations and in consideration of that conclusion, the Court will not consider the other allegations.

Compensation and pay in lieu of notice

50. The Court having concluded that the termination of the Claimant's contract was fair, holds that he is not entitled to compensation and pay in lieu of notice.

Salary earnings for 8 years till mandatory retirement

51. The Claimant sought Kshs 21,814,272/- stated to be the salary he would have earned had he served to retirement age.
52. The Court cannot do any better than endorse the legal proposition by the Supreme Court of Uganda in *Bank of Uganda v Tinkamanyire* (2009) 2 EA 66 that the contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law.

Service pay

53. On account of *service pay*, the Claimant claimed Kshs 227,232/-.
54. A copy of the Claimant's contract and payslip shows that he was a registered contributor to the National Social Security Fund.
55. By dint of section 35(5) & (6) of the Employment Act, 2007, the Claimant is not eligible for *service pay*.

Unpaid leave days

56. The Claimant sought Kshs 795,312/- being unpaid 70 days leave.

57. By dint of section 10(3) & (7) of the Employment Act, 2007, the Respondent should have placed before the Court the Claimant's leave records. That was not done.

58. In the same vein, the Respondent's witness did not address the question of leave.

59. The Court will, therefore, allow this head of the claim and direct the Respondent to reconcile its records and compute the Claimant's entitlement to commuted leave.

Half salary withheld during suspension

60. The Claimant was placed on suspension on half salary before the termination of the contract. He now seeks the balances of the withheld salaries which he has calculated as Kshs 340,848/-.

61. The copy of terms and conditions of service filed in Court by the Claimant provide that withheld dues are only payable where a suspension has been lifted.

62. The Claimant's suspension was not lifted, and therefore he cannot contractually claim the withheld salaries.

63. If there was any (other) legal foundation to the payment of the withheld salaries, the Claimant did not prove such foundation.

64. Before concluding, the Court had indicated that it would address whether the Claimant had formally cleared with the Respondent to be paid terminal dues as set out in the termination of employment letter.

65. Formal clearance with an employer upon separation should not be an issue of dispute.

66. An employee separating with an employer has a duty when called upon to handover.

67. If at all the Claimant did not clear/handover in a formal way, he should hand over in a formal way. If there was informal handover, he should be permitted to use any informal handover notes he might have kept.

Conclusion and Orders

68. From the foregoing, the Court finds that the termination of the Claimant's employment was fair.

69. Nevertheless, the Claimant is entitled to and is awarded any accrued leave and any other benefits as indicated in the separation letter.

70. The dues/benefits should be paid timeously upon handover, which processes should be concluded within the next 30 days. No order on costs.

Delivered, dated and signed in Nairobi on this 31st day of January 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Matwere instructed by Mang'are & Associates Advocates

For Respondent Ms. Dar/Ms. Kenduiywa instructed by Miller & Co. Advocates

Court Assistant Lindsey/