



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT
KERICHO

CAUSE NO.10 OF 2019

DR PETERSON GUTO ONDIEKICLAIMANT

VERSUS

KISII UNIVERSITY.....RESPONDENT

JUDGEMENT

The claimant is an adult male, a veterinary doctor. The respondent is a chartered university as an educational institution for high learning.

The claim is that the claimant was working for the respondent teaching in the department of agriculture and natural resources from 1st May, 2013. He was teaching animal health courses and paid ksh.60, 000 for teaching in the degree classes, ksh.35, 000 for teaching diploma classes and ksh.25, 000 for certificate classes per unit.

The claim is also that upon filing suit, the claimant was constructively dismissed by being removed from the university timetable and he now wants the court to hold the respondent is retaliatory against him for filing the claim.

The claim is also that the respondent has shown open bias in the recruitment of teachers where some have been given permanent appointment without the claimant being offered the same despite being equally qualified which is unfair and discriminatory, irregular and amount to unfair administrative action. The claimant was subjected to untold suffering by the respondent refusing to pay salary arrears of ksh.2, 010,000 against expectation despite offering his services. The deducted KRA and other dues have not been remitted.

The claim is for a declaration that the respondent has unfairly treated the claimant through unfair labour practices, discriminatory and unconstitutional actions; the respondent be compelled to give the claimant permanent employment terms; the respondents action of withholding pay amounts to stealing and should pay what is due and owing and penalties due to KRA and other statutory bodies. The claimant is also seeking for his costs.

The claimant testified that upon employment by the respondent he would be paid his salary less 30% but without a remittance to KRA. The respondent is thus withholding his ksh.2.1 million not paid in salary.

The claimant also testified that in January, 2019 he asked the respondent for his unpaid salaries which was not addressed and he opted to file suit. In May, 2019 the respondent stopped his employment contract without notice. His name was simply not on the time-table and this was done due to filing the current suit. Other employees would be recruited and issued better terms than him. the veterinary board allowed him to teach but due to nepotism the respondent did not give him better terms and this make the claims set out in the memorandum of claim.

The defence comprise mere denials save that the claimant was appointed as a part-time lecturer which came to an end and there was no dismissal from employment. The claimant was not subjected to misery and there was no refusal to pay the due salary.

Without prejudice the defence is also that there is no law which can compel the respondent to employ the claimant as a permanent employee after the expiry of a certain period of time.

The claims made should be dismissed.

There was no evidence called by the respondent. The respondent opted not to attend at the hearing. Save to file witness statements and to produce the documents required by the claimant.

The claimant filed Notice to produce various documents.

The respondent replied and filed a list of employees in the department of Animal Science and KRA returns with regard to the claimant. There is also a schedule of unpaid salaries pending agreement as the claimant has not claimed or followed due process for the respondent to process the same.

From the pleadings and the evidence available to the court, the issues which emerge for determination can be summarised as follows;

Whether there is a case for unfair labour practice and discrimination against the claimant;

Whether the respondent should be compelled to reinstate the claimant and or payment for wrongful dismissal

Whether there are withheld salaries;

Whether the respondent should be compelled to pay statutory dues with penalties;

Who should pay costs.

The concept of fair labour practice is now entrenched under the constitution Article 41 while prohibition of discrimination against any person is addressed under article 27. Under statute, the Employment Act, 2007 has further expounded on these concepts with regard to employment and labour relations and for connected purposes.

In addressing what is unfair labour practice, the court in **Elizabeth Washeke and 62 Others versus Airtel Networks (K) LTD & another [2013] eKLR** held that;

To determine the ambit of this open-ended right, regard must be had, first, to what is meant by a labour practice, and, thereafter, to what is meant by a fair labour practice. In both issues, reference must be made to the unfair labour practice jurisprudence by the Industrial Court. The Employment Act, 2007 once enacted allowed the court to declare their view on labour relations policy [Section 43. (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.]

This power to give meaning to the concept of fair and unfair labour practices results in the court being used by employers and employees as an arena of struggle. The fruit of this struggle is a body of jurisprudence regulating both individual employment relations and collective labour relations.

*With regard to individual labour relations, the Court has handed down decisions dealing with virtually all aspects of the employment relationship, ranging from unfair dismissals, [**Industrial Cause No. 1616 of 2012, Aviation and Allied Workers Union versus Kenya Airways Limited et al**] ... employment opportunities, [**Industrial Cause No. 567 of 2012, Silas Rukungu Karanja vs. Teachers Service Commission**] ... appointment [**Industrial Cause No. 1065 of 2012, Dr. Anne Kinyua vs. Kenya Tea Development Authority and Others**] ... and selective criteria to promotions. [**Industrial Court, Petition No. 41 of 2012 in Robert Muriithi Ndegwa vs. Ministry of Tourism**] ...*

These pronouncements of the Industrial Court relating to labour practices within the realm of the individual employment relationship indicate something of what conduct constitutes a labour practice. As far as the issue of fairness of a labour practice, regard must be had to the Employment Act, 2007.

Inherently, a case of unfair labour practice must be anchored under the provisions of the Employment Act, 2007 as held in the case of **George Onyango Akuti Versus Security Services Kenya Limited (2013) eKLR**, where the court held that;

An unfair termination could be because no notice was given as required by Section 35 (1); no reasons were given or because the employee was not afforded a hearing as required by Section 41 of the Employment Act. The reasons can be various based either on failure to comply with the statute or the terms of the actual employment contract...

In this regard, the claimant initially filed his Memorandum of claim and claimed that he was unfairly treated when other employees were hired and given better terms than he was. He amended the claim and claimed that there was constructive dismissal for filing his claim. This then changed the character and tempor of his claim. An employee can either be unfair or unlawfully terminated in his employment or be constructively dismissed from his employment and in each case, different and separate sets of evidence are required.

On the one hand, where there is unfair termination of employment as set out above, recourse must be the provisions of section 35, 41, 43 and 45 of the Employment Act, 2007. This element is lacking in the claimant's pleadings and evidence. Even as he argued his claims without the benefit of legal representations, the character of claims made does not lead the court in this regard.

The court finds no case of unfair termination of employment pursuant to the provisions of section 45 of the Employment Act, 2007 as claimed.

On the other hand, constructive dismissal is a concept accepted in employment and labour relations now well expounded by the Court of Appeal in the case of **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR** that;

constructive dismissal occurs where, "an employee terminates the contract under which he is employed, (with or without malice) in

circumstances in which he is entitled to terminate it without notice, by reason of the employer's conduct." ...constructive dismissal as a repudiatory breach by the employer of the contract of employment. The employer's behaviour in either case must be shown to be so heinous, so intolerable, that it made it considerably difficult for the employee to continue working. The employee initiates the termination, believing herself, to have been fired. The employee needs to show that the employer, without reasonable or proper cause conducted himself in a manner likely to destroy or seriously damage the employment relationship. Resignation is regarded as constructive dismissal if the employer's conduct is a significant breach of the contract of employment and that the conduct shows the employer is no longer interested in being bound by the terms of the contract. The employee's resignation is therefore treated as an actual dismissal by the employer and the employee may claim compensation for unfair termination.... The onus of proof in this form of employment termination, unlike in other termination, lies with the employee. While under Sections 43 and 45 of the Employment Act 2007 the duty in showing that termination was fair is on the employer, constructive dismissal demands the employee demonstrates that his resignation was justified. Other collateral issues that must be shown by the employee are; that the employer made a fundamental change in the contract of employment, and that such change was unilateral; that the situation was so intolerable the employee was unable to continue working; that the employee would have continued working had the employer not created the intolerable work environment; and, that the employee resigned because he did not believe the employer would abandon the pattern of creating unacceptable work environment. These are some of the rules governing a claim for constructive dismissal.

[Underline added]

It is therefore not sufficient for an employee to plead constructive dismissal. Evidence in this regard is required to demonstrate the conduct of the employer was intolerable leading to a resignation from employment. In this regard, the court finds no evidence.

On the claim that there was discrimination against the claimant, as noted above, the claimant filed Notice to produce and the respondent replied and filed a list and resume with regard to employees working in the Animal Science department. The claimant did not contradistinguish these documents and records with regard to the purpose for which he had applied and sought for their production. Though produced, there was no effort to address the content and need to have these documents.

Even where the claimant may have wanted to demonstrate a case that he was discriminated against him by the respondent by employing other persons in the same department, a claim for discrimination against him ought to have addressed the principles set out in the case of **Law Society of Kenya versus AG & COTU, Supreme Court Petition No.4 of 2019** where the court relied on the Court of Appeal in **Barclays Bank of Kenya LTD & Another versus Gladys Muthoni & 20 Others [2018] eKLR** held as follows;

...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions... whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description....

Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.

The party claiming to be discriminated against must demonstrate the different treatment and on what grounds. The claimant's case that he was earning less than others hired after him without setting out how this was set out and structured or that he was not issued with permanent terms of employment unlike others newly employed was not gone into. He left his averments bare and without evidence. even where he was allowed by the Veterinary Board to teach at the respondent, the terms of employment subsisting for him as against other newly employed persons does not infer a discriminatory practice.

The initial claim and before amendment was that the claimant had a given rate for teaching degree classes, diploma classes and certificate classes. On this basis, his employment was with defined terms and conditions. He has not set out that he made effort to apply for change of terms and conditions upon the employment of other persons. Even where other persons were employed after the claimant, their qualifications, terms and conditions of service was not gone into. This does not set out a case of discrimination against the claimant.

Even where the claimant was retained under unwritten terms of employment, or was offered terms inferior to other newly employed persons in his department, logic must be given with a demonstration of how this played out for it to amount to discriminatory practice against him. It is not sufficient to simply cite there was discrimination against him and end matters there. See the reasoning in the above cited case from the Court of Appeal in **Barclays Bank of Kenya LTD & Another versus Gladys Muthoni & 20 Others [2018] eKLR**.

The court finds no case of discrimination against the claimant based on his evidence and the records filed by the respondent with regard persons employed in the department of Animal Science.

On whether the respondent should be compelled to reinstate the claimant or have him paid for wrongful dismissal, the context here was that the claimant was not given terms of employment similar to other employees similarly placed. The claimant amended his claim and claimed for constructive dismissal which is addressed above.

Even in a case where the claimant was on terms lower than the other employees, the defence that the claimant was on part-time employment is not challenged. Parties in an employment relationship have the liberty to agree on terms and conditions of employment.

Where employment terms are oral, the employer has the statutory duty to issue the employee with a written contract under the provisions of section 10 of the Employment Act, 2007.

Where the employer fails in its duty under section 10 of the Employment Act, 2007 and the employee is retained in his employment continuously and for work which is not likely to end, such an employee becomes protected under the provisions of section 37 of the Employment Act, 2007 and accrues benefits under the Act similar to those of a full time employee.

It is therefore not for the court to compel the employer to issue the employee with written terms and conditions of employment. Where there is no compliance with the statutory requirements, the employee is automatically protected under section 37 of the Employment Act, 2007 as held in the case of **Rashid Mazuri Ramadhani & 10 others versus Doshi & Company (Hardware) Limited & another [2018] eKLR**;

*Our reading of Section 37 of the Employment Act reveals that before the court can convert a contract of service thereunder, the claimant ought to establish first, that he/she has been engaged by the employer in question on a casual basis and second, he/she has worked for the said employer for a period aggregating to more than one month. See this Court's decision in **Krystalline Salt Limited vs. Kwekwe Mwakele & 67 others [2017] eKLR**.*

Similarly in this case, the claimant ought to have built clarity on his case as to whether he was on oral or written contract. In the initial Memorandum of Claim, he asserted that he had no written terms. This was changed with the amendment to the claim but without clarity and to what terms subsisted. As much as the court sympathises with the claimant, being a person not represented, this was his claim and he chose to prosecute by making an amendment to the original Memorandum of Claim. He cannot be faulted as he is best conversant with the nature of his claims.

Effectively, there is no case for the court to compel the respondent to reinstate the claimant or direct for the payment under alleged wrongful dismissal from employment.

On the claim for unpaid salaries the claim is that the claimant is owed Ksh.2.1 million. He claimed that for various classes he was to earn a different pay;

Ksh.60,000 for teaching degree classes; Ksh.35,000 for teaching diploma classes; and Ksh.25,000 for teaching certificate classes per unit.

On these pleadings, the rationale for the claim for owing dues at ksh.2.1 million is not set out. In the written submissions the claimant does not delve into this issue at all.

There is no basis for these claims.

However, the respondent has produced a list of documents which include the *Payment Guide for Part-Time Lecturers* and which also includes the *sample of a Duly Filled Claim Form for Payment*. There is also the *Part – Time Lecturers Payment Policy*.

Where the claimant is owed salaries for work done, upon application per the respondent's work place requirements, these pending payments should be processed without undue disadvantage to him. Where the claimant has undertaken his part diligently, applied the policy, used the payment guide and based on his teaching claims forms duly filled for payment and there is no attendance, nothing stops him from moving the court as appropriate. Currently as the claims are couched, to award as claimed would deny the respondent a fair chance to administratively attend and address in accordance with the set policy.

The claimant has also made claim that his employment has since been terminated upon filing the current suit.

As noted above, where there are verbal/oral terms and conditions of employment, the employee is protected under the provisions of section 7, 8 and 37 of the Employment Act, 2007. The claims which should arise where there is a violation of sections 7, 8 and 37 of the Act should be pleaded and addressed accordingly.

On the other hand where the claimant amended his claims with regard to having a contract the character of his claims changed and should have been addressed in this regard as to the agreed terms and conditions of employment. This was not gone into at all.

Even where there was no attendance by the respondent to challenge the claims made, with regard to the applicable law, the claims made are found without merit and are hereby dismissed. Each party shall bear own costs.

Delivered at Kericho this 30th day of January, 2020.

M. MBARU

JUDGE

In the presence of: