



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 638 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 20th January, 2020)

JEREMY KIRIMI RITHAA.....CLAIMANT

VERSUS

THE TECHNICAL UNIVERSITY OF KENYA.....RESPONDENT

JUDGEMENT

1. Vide his Memorandum of Claim dated and filed on Court on 3rd April, 2017, the Claimant avers that his employment was unlawfully and unfairly terminated by the Respondent herein, an institution of Higher Learning duly established under the Universities Act No. 42 of 2012.
2. His Case is that he was trained as a teacher and was employed by the Teachers Service Commission in the year 1988, a position he held until 1st May, 2009 when he was absorbed by the Respondent when the institution was upgraded to a University College and subsequently to a University. The Claimant further contends that he did execute the terms of Service on 23rd December, 2009.
3. The Claimant avers that during the subsistence of his employment with the Respondent that he was attached to the Department of Industrial and Engineering Mathematics, a department he worked in until his termination.
4. The Claimant further avers that his monthly salary as at May 2014 was Kshs. 134,471/-, which amount he contended was subject to annual increments as negotiated by the Union and the signed terms of service.
5. The Claimant contends that on or about August 2013 to May 2014 the Respondent without any reason stopped the payments of his salary and allowances. He further contends that during the same period the Respondent through its Head of Department reduced the allocation of lessons to the Claimant on allegation that more lecturers had been deployed to the department.
6. The Claimant further contends that he did follow up with the Respondent on the non-payment of his salary and allowances and that the same culminated in his Advocates demanding for payment of the said salary vide the letter dated 1st March, 2016 and a subsequent reminder made on 25th May, 2016.
7. The Claimant avers that the Respondent did not respond to the said demand and instead issued him with a Notice to Show Cause letter dated 12th April, 2016, which letter clearly indicated the Respondent's intention to terminate the Claimant's services.
8. The Claimant further avers that he did respond to the Notice to Show Cause letter vide his memoranda, which the Respondent declined to have received and instead invited him for a disciplinary hearing. He (the Claimant) further contended that his representation at the said hearing was not considered by the Respondent herein and that his services were eventually terminated on 24th May, 2016.
9. The Claimant maintains that he did through his letter dated 13th June, 2016 appeal the Respondent's decision to terminate his services but the Respondent declined to hear his Appeal as communicated in their letter dated 15th August, 2016.
10. The Claimant further contends that he did request for records of the disciplinary hearing and proceedings vide his letter dated 25th August, 2016, which request was declined by the Respondent through its letter dated 25th August, 2016.
11. The Claimant asserts that his termination was unfair and unlawful as the Respondent failed to follow the mandatory provisions of Section 41 of the Employment Act, 2007.
12. Aggrieved by the decision of the Respondent to unlawfully and unfairly terminate his employment the Claimant filed the instant Claim

seeking the following reliefs:-

- a) Kshs. 6, 402,135/-**
- b) General Exemplary Damages for wrongful dismissal and unfair treatment**
- c) Certificate of Service**
- d) Costs of this suit.**
- e) A declaration that the Claimant is entitled to records of the proceedings recorded during the purported hearing**
- f) Interest on (a) (b) and (d) above at Court rates**
- g) Any other relief that this Honourable Court may deem fit and just to grant.**

13. The Respondents were served with summons and the Memorandum of Claim and the Federation of Kenya Employers filed a Memorandum of Appearance on 20th April, 2017. They however failed to file a Response to the Claim despite being granted leave to do so on 13th July, 2017.

14. The matter thereafter proceeded for hearing on 14th October, 2019 with the Claimant testifying on his own behalf as CW1.

Evidence

15. In his evidence in chief the Claimant (CW1) sought and was allowed to have his witness statement dated and filed in Court on 3rd April, 2017 adopted.

16. In his statement, CW1 reiterated the averments made in his Memorandum of Claim. He further sought and was allowed to have the documents 1 to 24 in his list of documents adopted as exhibits in this matter.

17. CW1 further testified that prior to his termination the Respondent had not paid his salary for a total of 29 months.

18. CW1 contended that he is entitled to 3 months' salary in lieu of notice prior to termination of his employment which was equally not paid by the Respondent prior to his termination.

19. He further urged this Honourable Court to allow his Claim as drawn.

20. The Claimant was thereafter directed to file his written submissions to the Claim.

Submissions by the Claimant

21. The Claimant submitted that his termination was wrongful and unfair as it was precipitated by the fact that he had made demands for payment of his salary that had been unfairly and for no just cause withheld by the Respondent herein.

22. The Claimant further submitted that he is entitled to payment of three months' salary in lieu of notice as the Respondent while terminating his employment through his letter dated 24th May, 2016 offered to pay him three months' salary in lieu of notice but failed to make the said payment

23. The Claimant further maintains that in absence of any defence his Claim has not been rebutted and therefore urged this Honourable Court to allow the same as pleaded.

24. The Claimant further submitted that he is entitled to the reliefs as sought in his Memorandum of Claim by dint of Section 49 of the Employment Act, 2007 and therefore urged this Court to allow the same.

25. I have examined all the evidence and submissions of the Claimant. This matter proceeded ex parte as the Respondent never filed any defence after filing a Memorandum of Appearance on 20/4/2017.

26. The Claimant's evidence is that his salary was stopped abruptly and he wrote to the Respondents through his Counsel to ask why and is when he was invited for a disciplinary hearing vide a letter dated 22.4.2016.

27. The Claimant avers that he attended the disciplinary hearing on 5/5/2016 where the main complaint was absconding duty and failing to provide examination results for the academic year ending 2015/2016.

28. There is no indication as to what happened during the disciplinary hearing as Minutes of the said hearing were never availed to this Court. He requested for them but none were supplied.

29. The Claimant contended that the hearing was a sham and that he was not allowed to defend himself.

30. He was thereafter terminated vide a letter dated 24.5.2016.

31. In absence of any evidence to the contrary from the Respondent, there is no proof as to reasons if any that led the termination of the Claimant. There is also no evidence that he was subjected to a fair disciplinary process.

32. I therefore find for the Claimant as per his evidence. I find he was unfairly terminated as per Section 45(2) of Employment Act 2007 which states as follows:-

2) ***“A termination of employment by an employer 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”.

33. In terms of remedies, I find for the Claimant and I award him as follows:-

1. 3 months’ salary in lieu of notice as per the termination letter = 3 x 134,471 = 403,413/=

2. Salary arrears not paid before termination with effect from December 2014 to May 2016 = 18 months = 134,471 x 18 = 2,420,478/=

3. Leave allowance for 3 years = 11,000 x 3 = 33,000/=

4. Maximum 12 months’ salary as compensation for the unlawful and unfair termination = 12 x 134,471 = 1,613,653/=

TOTAL = 4,470,543/=

less statutory deductions

5. The Claimant is also entitled to payment of his pension dues.

6. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 20th day of January, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mbabu for Claimant – Present

Kilonzo for Respondent – Present