



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 73 OF 2018

MOFFAT OYUNGE RAMANICLAIMANT

VERSUS

MOUNT KENYA UNIVERSITY..... RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for his alleged unfair and unlawful termination employed and the Respondent's refusal to pay his terminal benefits. The Claimant averred that he was employed by the Respondent on 14th January 2010 as an Assistant Librarian at its Nairobi Branch earning a gross salary of Kshs. 34,000/- per month. The Claimant averred that he worked diligently and successfully to the satisfaction of the Respondent and was thus retained as its employee through successful renewal of contracts between 2010 and 2019. The Claimant averred that as a result of the foregoing, he obtained loan facilities from different banks and in particular Family Bank Ltd using his employment as security. The Claimant averred that on 10th April 2017 without any reason or colour of right, the Respondent terminated his services. The Claimant averred that the Respondent's actions amounted to unfair, unjustified, inhumane and unlawful dismissal as he was not issued with any notice of termination and the Respondent ignored his rights and legitimate expectation as an employee, thus irreparably injuring him. The Claimant averred that he never had any disciplinary issues or prior warnings as he strictly served according to the Respondent's terms of service and the Respondent approved his services as it renewed his contract for a period of more than 7 years. The Claimant prayed for judgment against the Respondent seeking a declaration that the termination/dismissal of his employment was unfair, unjustified, illegal and unlawful and that he is entitled to his due terminal benefits and damages. He also sought an order for payment of his terminal dues and compensatory damages for breach of a contract for 22 years and gratuity for 22 months totaling Kshs. 822,800/- plus costs of the suit and interest.

2. The Respondent in its defence denied each and every allegation in the claim and invited strict proof thereof. The Respondent averred that the Claimant's termination was fair, justified and strictly based on the express provisions of the contract of employment. The Respondent averred that the termination was also the direct, natural and inevitable consequence of legal and intervening circumstances. The Respondent averred that the suit herein is bad in law, discloses no cause of action and is a mere grievance, frivolous, vexatious and amounts to abuse of the process of this court. The Respondent averred that the Claimant is not entitled to the prayers sought as he is on a fishing expedition for financial support. The Respondent urged the dismissal of the suit with costs.

3. The Claimant testified that he was employed in 2010 and his contract would be renewed from time to time. He stated that in February 2015 he got a renewal of the contract for a period of 4 years but he was however shocked when he received a termination letter on 10th April 2017 with the Respondent citing the reason of re-organization. He testified that he was not issued with any notice and his terminal dues were not paid. He said that the library is still in existence and other people were employed and they still work there.

4. The Respondent's witness was Lucy Maina who testified that the reason why the Claimant's services were terminated was because of reorganization according to the termination letter. In cross-examination she said it was because on non-attendance of duty. She testified that the Claimant had absconded duty for 6 months but this was not included in the termination letter. She stated that the Claimant was given time to explain himself and he appeared before the disciplinary committee. She stated that he gave family issues as the reason but that was not satisfactory and the committee resolved that he be dismissed. She testified that the Claimant was paid a total of Kshs. 262,963/- being salary in lieu of notice, accrued wages despite him not working, accrued leave and gratuity. She maintained that due legal procedure was followed and the Claimant does not have any reason to approach the court. In re-examination she stated that the Claimant was issued with a notice to show cause to which he responded to and he was notified to appear before a disciplinary committee.

5. The Claimant submitted that the Respondent never raised the defence of desertion in its pleadings and that the issue for obvious reasons was raised after the Claimant had testified and closed his case. The Claimant submitted that from his evidence and specifically the letter dated 10th April 2017 his services were terminated due to job reorganization and not due to desertion of duty. He submitted that the procedure laid down under Section 40 of the Employment Act was never followed. The Claimant submitted that the score sheet was filed by the Respondent to show that the Claimant scored poorly as compared to his colleagues in the same department. The Claimant submitted that whether he dismissed due to redundancy or misconduct none of the procedures were followed as nothing was shown that a hearing was

conducted and the Respondent failed to show how information to dismiss him was communicated to him. The Claimant submitted that essentially, the provisions of Sections 40, 41, and 45 of the Employment Act were not complied with. The Claimant submitted that agreements are binding and must be respected by parties and it would therefore be prejudicial to any employee to be granted a periodic contract which can be terminated willfully by his or her employer as that will defeat the very essence as to why written contracts are entered into. The Claimant submitted that the Respondent is not very clear on the kind of termination that it exercised on the Claimant. The Claimant urged that should the court find that the Respondent breached the employment contract with him, he was supposed to work up to January 2019 and that he was therefore eligible to be paid 12 months. He submitted that alternatively, if the court finds that he was declared redundant which was illegally done, he prayed that he be compensated according to Section 49(1)(c) of the Employment Act. He submitted that he is eligible for severance pay and gratuity based on the provisions Section 40(g) of the Employment Act. He relied on the case of **Kenya Airways Limited v Aviation and Allied Workers Union Kenya & 3 Others [2014] eKLR** and that of **Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR**.

6. The Respondent did not file any submissions and the matter was set for judgment. In the claim, the Claimant asserts unfair dismissal. The termination letter is dated 10th April 2017 and provides that the Claimant's services were not required effective 12th April 2017 on account of reorganization in the University. The letter provided he would be paid his terminal benefits as enumerated in the letter. Clearly, this being a redundancy differently worded, the Claimant was entitled to the safeguards under Section 40 of the Employment Act. Section 40 provides as follows:-

40. (1) *An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—*

(a) *where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;*

(b) *where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;*

(c) *the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;*

(d) *where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;*

(e) *the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;*

(f) *the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and*

(g) *the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.*

7. The letter to the Claimant was neither copied to the Labour Officer nor was notice given in terms of Section 40(1)(a). He was not told of the intended redundancy prior to it being meted out with only 2 days' notice contrary to the law. The termination was thus *ipso facto* unfair and unlawful and the Claimant entitled to recover in terms of the law as follows:-

- a. One month's salary in lieu of notice – Kshs. 34,000/-
- b. Salary for the 12 days in April 2017 – Kshs. 13,600/-
- c. Severance pay at the rate of not less than fifteen days' pay for each completed year of service – Kshs. 119,000/-
- d. 6 month's salary compensation for the unlawful and unfair termination – Kshs. 204,000/-
- e. Costs of the suit
- f. Interest at court rates on the sums in a), b) and c) above at court rates from the date of filing suit till payment in full
- g. Interest on the sums in d) above at court rates from the date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 20th day of February 2020

Nzioki wa Makau

JUDGE