



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 6 OF 2020

CHRISTOPHER OYUECH OTIENO.....CLAIMANT

VERSUS

KARATINA UNIVERSITY.....1ST RESPONDENT

PROF. MUCAI MUCHIRI, VICE CHANCELLOR.....2ND RESPONDENT

DR. JOHN KOBIA ATAYA,

CHAIRMAN OF THE UNIVERSITY COUNCIL.....3RD RESPONDENT

JUDGMENT

1. At all material times to this suit, the Claimant was a tutorial fellow in the the School of Pure & Applied Sciences, Department of Computer Science & Informatics, at the Karatina University. The Claimant averred that by a Letter of Appointment dated 6th July 2017, he was employed by the Respondent as a Tutorial Fellow for a one year period. The Claimant averred that his letter of appointment was renewed each time it expired and was so renewed on 10th September 2018 and 12th September 2019, and the appointment has been in force until the unlawful and unfair termination of the Claimant's services. The Claimant averred that he earned a salary of Kshs. 89,927/- per month subject to statutory deductions, a house and car/commuter allowance and the Claimant was also eligible to join the Respondent's Pension Scheme. The Claimant averred that on or about 30th October 2019, he received a show cause letter dated 30th October 2019 from the 2nd Respondent accusing him of integrity issues to the effect that he had another employment contract with Kabarak University contrary to the Respondent's terms of service. The Claimant averred that he responded to the show cause letter through a letter dated 4th November 2019, wherein he denied the allegations raised by the 2nd Respondent. Subsequently, by a letter dated 9th January 2020, the Claimant was invited for a disciplinary hearing, which was scheduled for 16th January 2020. The Claimant was also availed with charge sheet containing the charges scheduled for hearing. The Claimant averred that prior to the said hearing date he expressly and/or impliedly reiterated to the Respondents that he had never seen or received a copy of the purported terms of reference he had breached and further denied the allegations against him. The Claimant averred that he attended the disciplinary hearing on 16th January 2020 and that about 30 minutes prior to the hearing he was finally emailed a copy of the purported terms of reference that he had allegedly breached which made the hearing process very unfair and prejudicial to the Claimant. The Claimant averred that during the hearing a lot of reference was made to the purported terms of reference which was thus very unfair to him as he had no time to prepare within such a short time. The Claimant averred that the composition of the Disciplinary Committee was contrary to the Human Resource Policy as it had more than the recommended 5 members as per the Policy. The Claimant averred that upon conclusion of the said disciplinary hearing as per the charge sheet aforementioned, he was again invited for the second disciplinary hearing on purported departmental issues that were never brought to the Claimant's attention prior, and the Claimant's immediate supervisors who were complainants were part of the disciplinary hearing. The Claimant averred that subsequently, by a letter dated 24th January 2020, his services with the 1st Respondent were immediately terminated and in compliance with the disciplinary mechanisms in the policy, by an Appeal dated 6th February 2020 to the 3rd Respondent, the Claimant challenged the termination on grounds that the same was unfair, the charge was just lifted in a blanket form and the same was supposed to be heard within 21 days in accordance with the Human Resource Policy. The Claimant averred that his appeal was not heard by the 3rd Respondent within the recommended 21 days as per the policy and that the Claimant was instead unfairly paid half salary for the month of February without any reason or justification. The Claimant averred that given the nature of this irregularity, he wrote to the Respondents through a letter dated 6th March 2020 requesting an explanation since he was not on suspension/interdiction but no response was received to date. The Claimant averred that instead, the Respondent refused to pay the March 2020 salary or any part thereof. The Claimant averred that he later discovered that the Respondents had already commenced recruitment for his position during the pendency of his disciplinary proceedings as per the Human Resource Policy which was very unfair since the dispute resolution mechanism was incomplete. The Claimant averred that the hearing process conducted by the Respondents in its entirety was unfair, a sham with all odds simply against a fair hearing and actuated by malice in breach of the principles of natural justice. The Claimant thus sought for judgment against the Respondents jointly and severally for:

- (a) Unconditional reinstatement of the Claimant to his employment and former position with the Respondent without loss of any benefits.
- (b) Costs of the Claim and in the alternative
- (c) A declaration that the termination of the Claimant's employment by the Respondent was unlawful, malicious and an infringement of the Claimant's constitutional right.
- (d) Maximum compensation for wrongful dismissal.

2. The Respondents filed a defence in which they averred that the 2nd Respondent was the Vice Chancellor of 1st Respondent and the accounting officer of the 1st Respondent. The Respondents averred that the 2nd Respondent is however accorded protection from any liability arising from this suit grounded under Section 66 of the Universities Act No. 42 of 2012, Laws of Kenya. The Respondents admitted the description of the 3rd Respondent in as far as he was serving as the Chairman of Council vide Gazette notice no. 2336 of 2017. The Respondents averred that however, his term of office lapsed on 9th March 2020. The Respondents averred that the 3rd Respondent is however accorded protection from any liability arising from this suit grounded under Section 66 of the Universities Act No. 42 of 2012, Laws of Kenya. The Respondents averred that the reasons for termination were valid as the Claimant was dismissed for having violated Rule 26 of the Public Service Code of Ethics, 2016. The Respondent averred that the Claimant was holding two gainful employments on a full time basis at Karatina University and Kabarak University. The Respondents averred that the Claimant was given a hearing both in writing and orally and that the notice to show cause was comprehensive and referred to the clauses the Claimant is alleged to have breached. The Respondents denied that the Claimant was entitled to any of the reliefs sought in his claim and sought the dismissal of the suit with costs and interest.

3. Matter proceeded to hearing where the Claimant testified as did the Respondents' witness, Dr. Humphrey Omondi. The evidence tendered by parties was extensively referred to in their pleadings and in the submissions which evidence was reiterated orally. The parties thereafter filed written submissions. The Claimant submitted that the issues for determination are:

- (1) Whether the termination of the Claimant's services was fair?
- (2) What reliefs are the Claimant entitled to if any?
- (3) Is the Claimant entitled to the Part-time claims?
- (4) Who should bear the costs of the Claim?

By way of background, the Claimant submitted that by a letter of appointment dated 6th July 2017, he was appointed Tutorial Fellow in the School of Pure & Applied Sciences, Department of Computer Science & Informatics, at the Karatina University, for a one-year period with renewal of the contract pegged upon the progress of the Claimant's PhD studies. The Claimant submitted that he served the 1st Respondent institution diligently and his contract was renewed in 2018 and 2019 based on his performance and progress with the PhD studies at the University of Nairobi. The Claimant submitted that he performed his duties with utmost professionalism and was not at any point reprimanded for any offence and thus legitimately expected that his contract would be renewed normally until the conclusion of his studies. The Claimant submitted that vide a show cause letter dated 30th October 2019, the Claimant was accused of having another employment contract with Kabarak University allegedly contrary to the terms of service of the 1st Respondent. The Claimant submitted that he duly responded to the show cause letter via a letter dated 4th November 2019 and 15th January 2020 to the effect that he had no contract with Kabarak University.

4. The Claimant submitted that he was subsequently invited for a hearing on 16th January 2020 vide a letter dated 9th January 2020 and a charge sheet attached thereto explaining the allegations against him. The Claimant submitted that his services were subsequently terminated vide a letter dated 24th January 2020 received on 27th January 2020 and the Claimant appealed against the decision in accordance with the Human Resource Manual but the Appeal was never heard and has never been heard to date. The Claimant submitted that he sent a reminder to the Respondent of the pending appeal but the same was never responded to.

5. As to whether the termination of the Claimant's services was fair, the Claimant cited Section 45(2)(a), (b) and (c) of the Employment Act, 2007 which in setting out a case of lawful termination of employment states as follows:

45 (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 employees 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.

The Claimant submitted that based on the aforementioned position of the Law in Section 45(2), the Claimant's employment was unfairly terminated noting the reasons thereto and the procedure were not in accordance with the Law.

6. As to whether the reason for terminating the Claimant fair, the Claimant submitted that the charges as levelled against him in the charge sheet were not clear on which clauses the Human Resource Manual or Terms of Service that the Claimant had contravened. The Claimant submitted that the Court will rightly note that the allegations were put out in "generalized terms". The Claimant submitted that the reason appears to be that the Claimant had two jobs contrary to the Public Officers Ethic Act, 2013 as was stated in the termination letter. The Claimant submitted that it is instructive to note that his services were summarily terminated. He submitted that Section 44 of the Employment Act provides reasons which warrant summary dismissal and the reasons given by the Respondents for terminating the Claimant's services were not among the reasons provided for summary dismissal under Section 44 of the Employment Act. The Claimant submitted that additionally, the Human Resource Manual provided reasons which warrant summary dismissal of an employee, and the reasons for terminating the Claimant were not among them. The Claimant submitted that the Respondent's witness admitted the same during the hearing. The Claimant submitted that reasons for terminating the Claimant summarily as intimated in the charge sheet and termination letter are not recognized in Law and on the basis of this, the Claimant invites the Honourable Court to find in his favour. The Claimant submitted that even if the termination were not a summary dismissal but a purported "ordinary" dismissal, the requirements of the Claimant's contract and the Employment Act were not met to warrant such a dismissal. The Claimant urged the Court to consider the terms of the contract to determine whether the reasons were valid, which reasons are guided by Section 45(2)(d) of the Employment Act which provides as follows:

Reason must be related to the employees conduct, capacity or compatibility

The Claimant submitted that during the hearing, his testimony was that he performed his duty diligently and had never received any warning regarding the performance of his duties. The Claimant submitted that the Respondent's witness confirmed that the Claimant was not at any one point warned by the Respondent regarding the performance of his duties. The Claimant submitted that this confirms that even if the Claimant at some point worked for Kabarak University, it did not in any way affect the performance of his duties as a Tutorial Fellow. Further, there was no conflict of interest whatsoever noting that Kabarak University is a private institution. In light of this, the Claimant submitted that the reasons for terminating the Claimant were not in any way related to the employees conduct, capacity or compatibility and there is no evidence on record to prove otherwise, which thus made the reasons for terminating the Claimant unfair. The Claimant submitted that during hearing, the Respondent's witness, heavily relied on Clause 5.2 of the Terms and Conditions of service to show the Claimant's violation of operational requirements. Clause 5.2 stated that:

Except in the case of part time appointments explicitly so designed, members employed under these terms shall regard their services to the University as whole-time and shall not undertake other work which may encroach upon the time expected to be devoted to university duties without permission of the Vice-Chancellor.

The Claimant submitted that Clause 5.2 when read does not ordinarily prevent employees from undertaking other duties, provided it does not encroach upon the time expected to be devoted to University. Where the other duties will encroach on the time expected to be devoted to the University, one needs permission from the Vice Chancellor. In light of this, the Claimant submitted that at no point was the Claimant given any warning regarding performance of his duties or failure to meet any operational requirements and there is no evidence to the contrary. The Claimant submitted that the Respondent did indicate that in having two employment opportunities, the Claimant violated provisions of the Public Officer Ethics Act, 2013 as read with The Public Service Code of Conduct and Ethics, 2016. The Claimant cited the Public Service Code of Conduct and Ethics in Clause 3 which defines gainful employment as "*gainful employment*" means employment that a public officer pursues or performs for money or for other compensation or remuneration which is incompatible with the responsibilities of his or her office or which results in the impairment of his or her judgment or results in a conflict of interest.

The Claimant submitted that Clause 26 of the Public Service Code of Conduct when read together with the definition in Clause 3, means that an employee is not prohibited from having gainful employment provided that the work is not inherently incompatible with the responsibilities of his or her office, does not result in the impairment of his or her judgment and does not result into a conflict of interest. The Claimant in support of the above position cited the case of **John Okelo Nagafwa v The Independent Electoral & Boundaries Commission & 2 Others [2013] eKLR** as well as the case of **Felix Kiprono Matagei v Attorney General & 3 Others [2016] eKLR**, where the Court held that:

My view and I so hold is that the holding of two public offices simpliciter does not result in a violation of Articles 10 or 73 or 232 of the Constitution. Each case must be viewed on the basis of its own unique facts. It is possible for a public officer to hold two or even more offices where a statute expressly allows and roles clearly defined or where there is a clear correlation between the two offices and no possibility of conflict of interest arises or is foreseeable.

The Claimant submitted that he worked part time in a "private" University which employment he had already left at time of termination and there was no indication at any point of a possible conflict of interest or any evidence that his judgment had been impaired. The Claimant submitted that he always performed his duties exceptionally and the Respondent has not tabled any evidence to show how the Claimant failed in performance of his duties or that the two jobs constituted any conflict of interest to affect the performance of his duties.

7. As to whether the employment was terminated in accordance with fair procedure, the Claimant submitted that the procedure for his termination was unfair, predetermined and in violation of the Respondent's own disciplinary proceedings under the Human Resource Policy. The Claimant submitted that from the onset, he was charged with contravening clauses under the University terms and conditions of service, which was never provided to him. The Claimant submitted that he had admitted having received the University Human Resource Manual, which he adhered to at all material times. The Claimant submitted that the one will note from the contract of employment at clause 8, which clearly indicated that the Claimant would be provided with the same but however, the Claimant was never availed a copy thereof until 30 minutes to the hearing via email correspondence. The Claimant submitted that the practice at the University was that such documents are availed to staff through email and the Respondent indicated that the terms and conditions of service were availed to staff by email, but the email correspondence in the Respondent's bundle is dated 4th October 2016 which was before the Claimant joined the University. The Claimant submitted that this made the hearing very unfair and additionally, the hearing process violated the Respondent's own disciplinary

process in Clause 9.9.3 and the Appeal process in that the Panel constituted more than the required maximum 5 members contrary to Clause 9.9.3(ii)(a) of the Human Resource Manual as it consisted of 7 members, the Panel constituted members of lower grade/subordinates of the Claimant contrary to Clause 9.9.3 (ii)(b) of the Human Resource Manual and that these were Ms. Anne Mumbi and Ms. Monica Njau who was the purported secretary at the meeting instead of Dr. Humphrey Omondi yet he was present. The Claimant submitted that this could have the influence of affecting quorum to reach a decision or their presence was to ensure a particular outcome. The Claimant submitted that his immediate supervisor, the Head of Department, was present contrary to the procedural requirements at Clause 9.9.3 ii(c) of the Human Resource Manual and that the Appeal despite having been lodged before the expiry of the Chairman's tenure on 10th March 2020, was never heard even after the Claimant followed up. The Claimant submitted that it is instructive to note that a disciplinary panel that is not properly constituted cannot make a valid decision. He cited the decision in **Nicholas Mwenda M'Twaruchiu & 7 Others v Ethics And Anti-Corruption Commission & 5 Others [2014] eKLR** where the Court held that:

".....At the time the 1st Respondent undertook the vetting exercise upon which Petitioners' employment was terminated it had only two members and the fact that the 1st Interested Party donned two hats; that of Acting Chairperson and Vice Chairperson cannot cure this fundamental flaw.

The effect of my finding in this regard is that the vetting undertaken by the 1st Respondent that led to the termination of the Petitioners' employment was a nullity. It follows therefore that any decisions arising therefrom, including the termination of the Petitioners' employment were also a nullity.

The Claimant submitted that in light of this, a panel that constituted, the Claimant's subordinates, immediate supervisor, was contrary to the 1st Respondent's Human Resource Policy and the decision arising thereof is a nullity. The Claimant cited the Court of Appeal decision in the case of **Bramuel Dibondo Musundi v Kenya Revenue Authority [2018] eKLR**, where the Court held that violation of one's own internal code amounts to unfair termination. The Claimant also cited the Court of Appeal decision in the case of **Moi Teaching and Referral Hospital v James Kipkonga Kendagor [2019] eKLR** where the Court found no need to disturb the finding of the trial Court for holding that the termination was unfair where the procedures leading to termination of the Claimant were not followed. The Claimant urged the Court to find in his favour and order reinstatement as he was employed on contract which was being renewed annually on account of the progress with his PhD studies. The Claimant submitted that the contract was renewed in 2018, 2019 and the Claimant had reasonable legitimate expectation that the Respondents would continue renewing his contract until he completed his PhD studies. He cited the case of **United Nations Appeals Tribunal (Tribunal D'Appel Des Nations Unies) UNAT, Case No. 2010-125 between Frenchon v The Secretary General of the United Nations**, which was cited in the case of **Margaret A Ochieng v National Water Conservation & Pipeline Corporation [2014] eKLR**, wherein the Tribunal found that the decision of an employer not to renew a fixed-term contract may be challenged on limited grounds which include where the actions of the employer give rise to legitimate expectation on the part of the employee, that there would be renewal; and two, where the decision not to renew is based on improper motives or there are countervailing circumstances. The Claimant submitted that the actions of the 1st Respondent of renewing the Claimant's contract in 2018 and 2019 created a legitimate expectation that his services would always be renewed. The Claimant relied on the case of **Communication Commission of Kenya & 5 Others v Royal Media Services & 5 Others [2015] eKLR** where the Supreme Court stated that:

"legitimate expectation arises when a body by representation or by past practice, has aroused an expectation that is within its power to fulfill.

For an expectation to be legitimate, therefore, it must be founded upon a promise or practice by a public authority that is expected to fulfill the expectation."

8. The Claimant submitted that in the alternative, in the event that the Court is unable to reinstate the Claimant, he sought that the Court grants the alternative prayers as follows:-

- (a) A Declaration that the Termination of the Claimant's Employment by the Respondent was unlawful, malicious and an infringement of the Claimant's constitutional right.
- (b) Maximum compensation for wrongful dismissal – Kshs. 1,097,124/-
- (c) Special damages being One Month's Salary in Lieu of notice – Kshs. 89,927/-
- (d) House Allowance Kshs. 619,212/-
- (e) Salary Arrears for February and March - Kshs. 151,000/-
- (f) 21 days leave Kshs. 269,784/-
- (g) CBA arrears Kshs. 500,000/-
- (h) Allowance (Huawei Training Conference) Kshs. 112,000/-
 - (i) Part time allowance - Kshs. 982,800/-
 - (j) General Damages for Psychological torture.

9. The Respondent in its final submissions filed, submitted that the issues for determination were whether the termination of the Claimant

was fair, whether the Claimant is entitled to the prayer for reinstatement and whether the Claimant is entitled to any relief for the alleged unlawful dismissal. As to whether the Claimant's dismissal was fair, the Respondent submitted that the termination of the Claimant was fair and that the Respondent has met the standard of proof required in Section 45(2) of the Employment Act. The Respondent submitted that the reason for terminating the Claimant is because he held two full-time jobs both at Karatina University and at Kabarak University. The Respondent submitted that the substance of the charges which the Claimant was called to respond to were founded on Regulation 26 of the Public Service Code of Ethics, 2016. The Respondent submitted that the plain reading of Regulation 26 is that it does not allow a public officer on full-time employment to participate in another gainful employment during the term of that employment. The Respondent submitted that gainful employment is defined as "employment that a public officer pursues or performs for money or for other compensation or remuneration which is incompatible with the responsibilities of his or her office or which results in the impairment of his or her judgment or results in a conflict of interest." The Respondent submitted that the Claimant did not deny the fact of holding to full-time positions. The Respondent submitted that the contention by the Claimant is that as much as he held these two positions, he continued to deliver his duties satisfactorily at-least as far as delivering his duties with Karatina University is concerned and further contended that there was no conflict of interest arising by his holding of the two jobs. The Respondent submitted that the impugned conduct of the Claimant was expressly prohibited by a law in the form of a subsidiary legislation applying to him. The Respondent submitted that in this case, the Claimant was on a full-time job at Karatina University and drawing remuneration made up of a salary, house allowance, commuter allowance and pension benefit. At the same time, he was supposed to be on duty at Kabarak University still on a full-time basis and was also drawing a salary, house allowances and other allowances. The Respondent submitted that according to the **Black's Law Dictionary, 2nd Edition**, a conflict of interest is a situation that can undermine a person due to self-interest and public interest. The Respondent submitted that this case is one where a self-interest competes with the public interest. The Respondent submitted that the public interest arises from the fact that the Claimant was a public officer expected to be serving the public under the 1st Respondent which is a State Agency offering services in university education. The Respondent submitted that he was required to be available on a full time basis to dedicate his service to the public through the 1st Respondent. The Respondent submitted that during the same period he was engaged with Karatina University, he was participating in gainful employment at Kabarak University which also required him to be on full-time basis. The Respondent invited the Court to consider the spirit behind enacting Regulation 26 to regulate conduct in the Public Service and referred the Court to the **Public Service Commission, Human Resource Policies and Procedures Manual in the Public Service, May 2016**. The Respondent submitted that the policy manual also lists scenarios of conflict of interests and it clearly states that an officer serving on full time basis shall not participate in any other gainful employment. The Respondent submitted that the Public Service Commission must have been alive to the malpractice in the public service where public officers disappear from their appointed place of works to go run other private interests. The Respondent cited the case of **Evans Kamandi Misango v Barclays Bank Limited [2015] eKLR** on the reasonableness test and in the analysis of the provisions of Section 43 of the Employment Act where the Judge stated:

To my mind the burden placed on the employer by Section 43 is to demonstrate that there was a valid reason which would cause a reasonable employer to terminate the employment of an employee. The HALSBURY'S LAWS OF ENGLAND (4th EDITION VOLUME 16) at page 482 expounds this principle as follows:

In adjudicating on the reasonableness of the employers conduct, an employment tribunal must not simply substitute its own views with those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on the same facts. The basis of this approach (the range of reasonable test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take another; the function of a tribunal as an industry jury is to determine whether in particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; but if it falls outside the band it is unfair.

10. The Respondent submitted that the Claimant was terminated as a result of a conduct which the Claimant himself orchestrated as he had notice that the conduct was impugned and not acceptable under the Terms and Conditions of Service. The Respondent submitted that the Claimant was also seized with the Public Service Code of Ethics which was issued and which he had signed an affirmation to comply. The Respondent submitted that the action of knowingly holding two full time jobs ran into the root of this particular contract and was itself a fundamental breach of contract due to the time conflict presented. The Respondent submitted that it is also immaterial that the Claimant had separated with Kabarak University by the time of the Staff Disciplinary Committee took disciplinary action. The charges related to right from the time he was engaged in 2017 to the time he was discovered which is close to a period of three years during which he was in fundamental breach of both the Public Service Code of Ethics and the terms and conditions of service. The Respondent submitted that the termination was in accordance with a fair procedure and further submitted that in considering this point the Court should note that the particulars for which the Claimant was to answer to, were succinctly and clearly set out together with the applying provisions as to leave no doubt as to what the Claimant was required to answer to. These were set out both in the notice to show cause and in the charge sheet information. The Respondent submitted that the Claimant was given ample opportunities to make his representations while responding to the notice to show cause, upon receiving the invitation to the Staff Disciplinary Committee which forwarded the invitation and even accorded him an opportunity to make representations in writing and before the Staff Disciplinary committee where he made oral representations. The Respondent submitted that the testimony offered by the Respondent's witness Dr. Humphrey Omondi who was Secretary to the committee both orally in court and in his witness statement explained that the attendance of the head of department was of necessity because of the nature of the matter pointing towards the availability of the Claimant. The Respondent submitted that Dr. Omondi explained that the Head of Department did not participate in arriving at the decision but was necessary if she needed to be cross-examined on any matter that the Claimant wished to. The Respondent submitted that Dr. Omondi also explained that as the Secretary to the Staff Disciplinary Committee, he carries along one of his staff serving in his office the "Secretariat" to assist in recording the proceedings and that the persons listed in attendance do not take part in arriving at the decision. The Respondent submitted that the Claimant has also not demonstrated how his decision was prejudiced by the presence of a Secretariat in the meeting. The Respondent submitted that the case of **Bramuel Dibondo Musundi v Kenya Revenue Authority [2018] eKLR** cannot apply in this case as it is distinguishable in the following aspects:

(i) In the Case, The Respondent, Kenya Revenue Authority did not issue a notice to show cause as per its code and neither did it give the Appellant the opportunity to make representations. Those in our view are fundamental breaches of a process that cannot be compared to the case at hand. In this case, the Respondent has demonstrated that it followed all procedures that were within its reach before the Staff Disciplinary Committee decision to terminate the contract of service.

(ii) The Claimant was appealing against summary dismissal. The Appeal Court therefore as a remedy substituted the decision and

decreed that he be terminated with the requisite notice. In this case, the Staff Disciplinary Committee decided to terminate the contract of the Claimant also by giving notice.

11. The Respondent submitted decision by the Court of Appeal cited by the Claimant being **Moi Teaching and Referral Hospital v James Kipkonga Kendagor [2019] eKLR** is also distinguishable as the employee was not accorded the appeal forum. It was blatantly ignored. The Respondent submitted that in this case, the Respondent acknowledges that the appeal forum was at Council level and that Council is a governing organ appointed by the Cabinet Secretary in Charge of Education and is separate from the management of the Respondent. The Respondent submitted that by the time the Claimant moved these proceedings, the Council was not appointed.

12. As to whether the claimant is entitled to the prayer for reinstatement, the Respondent submitted that the Claimant is not entitled to the relief for reinstatement and urged the Court to be guided by the provisions of Section 49(4) set out in the Employment Act, 2007. The Respondent submitted that in exercising this discretion, the Court should take into account the following vital facts; the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and the practicability of recommending reinstatement or re-engagement. The Respondent submitted that the contract was terminated because the Claimant engaged in another gainful venture that presented a substantial time conflict. He did not dedicate himself fully as expected. What would stop the employee from engaging in similar conduct given that he had managed to conceal this fact from his employer since he was first engaged in August 2017? The Respondent submitted that the Court should take note that the Claimant continues to argue in the course of these proceedings that there was nothing barring him from taking the engagement with Kabarak University or any other private venture. The Respondent submitted the Claimant does not appreciate the spirit behind engaging in another gainful employment within the meaning of the Public Service Commission Code. The Respondent submitted that the Claimant has not set out or proved the exceptional circumstances that would entitle him to an order of specific performance leading to reinstatement. The Respondent relied on the Court of Appeal decision in **Amatsi Water Services Company Ltd v Francis Shire Chachi [2018] eKLR** where the Court held:

“In the case of National Water Conservation & Pipeline Corporation v Jayne Kanini Mwanza, Civil Appeal No. 178 of 2014 (UR), this Court stated as follows:

“The general principle, as we understand it, is that a fixed term contract will terminate on the sun set date unless it is extended in terms stated in the contract. A court cannot rewrite the terms of a contract freely entered into between the parties. Once there is a written contract, the court will seek to give meaning to such contract giving ordinary meaning to its terms in determining any issue that may arise. The principle has been considered by several Judges of the Industrial Court (now the Employment and Labour Relations Court) and they are generally in agreement. Indeed this Court was in agreement in the Oshwal Academy (Nairobi) case (supra) when it decided as follows:

“Termination of fixed term contracts has received judicial consideration by the Industrial Court. In Bernard Wanjohi Muriuki vs Kirinyaga Water And Sanitation Company Limited & Another [2012] eKLR, Rika, J, held as follows:

“In the view of the Court, there is no obligation on the part of an employer to give reasons to an employee why a fixed-term contract of employment should not be renewed. To require an employer to give reasons why the contract should not be renewed, is the same thing as demanding from an employer to give reasons why, a potential employee should not be employed. The only reason that should be given is that the term has come to an end, and no more. ... Reasons, beyond effluxion of time, are not necessary in termination of fixed-term contracts, unless there is a clause in the contract, calling for additional justification for the termination.”

The Court also stated thus:

“A general principle that a fixed term contract will continue if not terminated would be a contradiction to the very definition of a fixed term. There is a definite start date and an end date. The contract would logically end automatically without more otherwise it would no longer be a fixed term contract. See the case of SA Rugby (Pty) Ltd vs CCMA & Others (2006) 27 ILJ 1041 (LC) at 1044 par 6).

13. On legitimate expectation, the Respondent submitted that the Claimant has not demonstrated which express terms in the letters of appointment that he relied on as to expect that he will be issued with a fixed contract from time to time. The Respondent submitted that the statement that the Claimant is relying on is one running through the appointment letters which reads. *“This is a training position in which you will be employed on a one (1) year contract subject to your progression in attainment of a PhD”*. The Respondent submitted that reading through the entire appointment letter, there is no indication that it will be renewed and that as much as the Respondent could elect to renew, there was a condition to be met that the employee is making progression towards attaining the PhD. The Respondent submitted that as a matter of fact, during the enquiry by the Staff Disciplinary Committee, it transpired that the Claimant had misrepresented his status on the progression of his doctoral studies (PhD). On this point the Respondent relied on the decision of the Court of Appeal in **Justice Kalpana H. Rawal v Judicial Service Commission & 3 Others [2016] eKLR** where the Court of Appeal stated that:

“A pre-requisite to successful invocation of the doctrine of legitimate expectation is that the person who bases his or her claim on the doctrine has to satisfy that he or she has relied on the decision-maker’s representation to his or her detriment. In the instant case, the appellant has not demonstrated how she relied on the 1st respondent’s decision to her detriment. A claim based on mere legitimate expectation, without anything more in the form of suffered detriment, cannot ipso facto sustain an action founded on the doctrine of legitimate expectation. (See Sethi Auto Service Station & Another v. Delhi Development Authority & Others, (2009) 1 SCC 180).

In the final analysis, we are satisfied that even if the High Court did not determine the issue of legitimate expectation (which we have found it did), in the circumstances of this appeal the appellant’s claim founded on legitimate expectation was not sustainable. For the same reasons, the appellant’s claim of violation of her right to fair labour practices, which is founded on decisions of the 1st respondent that it was not competent to make, is unmeritorious.”

14. As to whether the claimant is entitled to damages for unfair dismissal, the Respondent submitted that in the alternative to the request for reinstatement, the Claimant is seeking damages for unfair dismissal. The Respondent submitted that under Section 47(5) of the Employment Act, for any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer. The Respondent urged the Court to find that the Respondent has discharged its burden of justifying the grounds for termination.

15. The Respondent submitted further that deciding whether to award damages calculated under any or all of Section 49(1)(a), (b) & (c) a Court must exercise its discretion guided on several factors and principles which appear under Section 49(4). The Respondent submitted that the need for the Court to look at all the prevailing circumstances and exercise its discretion was discussed in the Court of Appeal decision in **Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR** where the Court of Appeal relied and affirmed the decision in **Mrao Ltd v First American Bank of Kenya Msa Civil Appeal No. 39 of 2002** and stated

“To the extent that the learned Judge explained that the award of 12 months gross salary was in consideration of the respondent’s rank and the difficulty he was likely to face to obtain another employment, we think that the discretion was judicially exercised. We may only add to this list the treatment of the respondent as explained earlier and the long period of service to the appellant”.

16. The Respondent submitted that the conduct of the Claimant was expressly in breach of Regulation 26 of the Public Officers Ethics Act and was a fundamental breach of contract as he was proved not to have been available on a full-time basis as required of him. The Respondent submitted that the Claimant was not entitled to any of the prayers he sought in the alternative and that in the claim for certificate of service the Claimant needs to comply with the guidelines issued by the University so as to obtain the certificate of service. On the claim for part-time dues, the Respondent submitted that the form of part-time engagements is akin to piece work forms of contracts which means any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance. We submit that to ascertain the amounts payable, the Claimant was required to comply by attaching the claim form with amount together with the support documents required to support such a payment. The Respondent submitted that the Claimant failed to present the claim and the Court should not be used to circumvent the process of lodging such a claim. In regard to the claim for pension dues the Respondent asserts that the contributions for pension were remitted to the Moi University Pension Scheme which is registered under the Retirement Benefits Act and which is a separate legal entity from the University and that the Claimant was therefore expected to liaise with the Pension Scheme for withdrawal of the amounts that he was eligible for under the Retirement Benefits Regulations. The Respondent submitted that the only confirmation that the Pension Scheme needed from the Claimant was clearance from the University confirming that an employee is no longer working with the University and this can be communicated promptly if the Claimant was to comply with the clearance procedures set out.

17. As to whether or not the 2nd and 3rd respondents are protected from any liability arising from these proceedings the Respondent submitted Vice Chancellor of 1st Respondent and the accounting officer. The Respondents averred that the 2nd Respondent is however accorded protection from any liability arising from this suit grounded under Section 66 of the Universities Act No. 42 of 2012, Laws of Kenya. The Respondents further averred that the 3rd Respondent is also accorded protection from any liability arising from this suit grounded under Section 66 of the Universities Act No. 42 of 2012, Laws of Kenya. The Respondents submitted that they had raised the defense under personal liability which the Claimant has not disputed and that there is no personal bias or malice that the 2nd and 3rd Respondents have against the Claimant. The Respondent submitted that the 2nd and 3rd Respondents should be struck off as parties in these proceedings and in the alternative, the Court should not to make any adverse orders against the 2nd and 3rd Respondents.

18. In coming to this decision, I have carefully considered the law, the pleadings, evidence and authorities cited. It is apparent from the pleadings that the Claimant sued the Respondents jointly and severally seeking various reliefs in relation to his dismissal by the 1st Respondent Karatina University. Having looked at the provisions of Section 66 of the Universities Act No. 42 of 2012 which provides as follows:-

66. No matter or thing done by a member of a university or any officer, employee or agent of a university shall, if the matter or thing is done bona fide for executing the functions, powers or duties of the university, render the member, officer, employee or agent or any person acting under the directions personally liable to any action, claim or demand whatsoever.

The officers sued as the 2nd and 3rd Respondents are not liable in any way for the matters the Claimant has sought relief for and they are hereby struck off the suit with no order as to costs. That leaves the University as the only Respondent in the suit.

19. The Claimant was dismissed for allegedly having two remunerative positions in contravention of the Respondent’s Human Resources Policy and the terms and conditions of service as well as being in breach of the Public Officer Ethics Act. The Claimant was accused of holding a lecturer position at Kabarak University which is a private institution. He has not denied this contention and only asserts that the dual positions did not lead to a poor performance on his part or cause any conflict of interest. The Respondent had employed the Claimant as a tutorial fellow and being a public university was bound by the Public Officer Ethics Act, 2013 as read with The Public Service Code of Conduct and Ethics, 2016. The Public Service Code of Conduct and Ethics in Clause 3 defines gainful employment as *employment that a public officer pursues or performs for money or for other compensation or remuneration which is incompatible with the responsibilities of his or her office or which results in the impairment of his or her judgment or results in a conflict of interest.* Conflict of interest is defined by **Black’s Law Dictionary Tenth Edition** as follows, **a real or seeming incompatibility between one’s private interests and one’s public or fiduciary duties.** The Claimant thus was amenable to disciplinary action as undertaken by the Respondent for a real or seeming incompatibility between his public duties and the service at Kabarak University. From the evidence tendered the Claimant was accorded a hearing in terms of Section 41 of the Employment Act as at the hearing he was heard both in writing and orally. He arguably had a pending appeal before approaching the Court but that was no fault of the Respondent nor his as the University does not appoint Council but the Cabinet Secretary in charge of Education. In this instance, the appointments had not been made by the time the case was filed and there was no properly constituted body in place to hear the Claimant’s appeal. As such the Claimant could approach court before the conclusion as it was uncertain when Council would be appointed to consider among others, the Claimant’s appeal against his dismissal. In my considered view, the Respondent had reason to dismiss the Claimant as it did. It paid him salary in lieu of notice and therefore he is not entitled to any other relief. His failure to lodge claims for work done as per the internal policies of the Respondent and having failed to lodge the claims he

cannot succeed through an order of the Court to get recompense for his work which ought to have been documented as required by the Respondent. In the final analysis the suit fails and is dismissed albeit with no order as to costs since the Respondent used in-house counsel who is presumably on either a retainer or salary.

It is so ordered.

Dated and delivered at Nyeri this 15th day of July 2020

Nzioki wa Makau

JUDGE