



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 732 OF 2016**

**SHADRACK MUCHEMI MBAU.....CLAIMANT**

**- VERSUS -**

**PRESBYTERIAN UNIVERSITY OF EAST AFRICA..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 16<sup>th</sup> October, 2020)

**JUDGMENT**

The claimant's case is based on the amended memorandum of claim filed on 28.02.2020 through Rakoro & Company Advocates. The claimant has prayed for judgment against the respondent for:

- a. A declaration that the respondent is engaging in unfair labour practices in regard to the claimant.
- b. A permanent injunction to restrain the respondent from harassing the applicant by deploying or redeploying him to sections and or departments in which he lacks qualifications, experience and training to effectively render his services.
- c. A declaration that the respondent has acted unfairly, unlawfully and unconstitutionally in relation to the applicant in the circumstances of this case.
- d. An order quashing or nullifying the respondent's decision to deploy the claimant to serve in the library communicated to the claimant by the respondent's letter dated 09.02.2016.
- e. An order quashing or nullifying the respondent's decision to suspend the claimant communicated to the claimant by the respondent's letter dated 07.04.2016.
- f. An order compelling the respondent to reinstate the claimant to his employment and position as provided in his appointment letter dated 28.11.2014 with full pay and without any victimization or any loss of salary, privileges, entitlements or benefits to be deemed to have taken effect from 01.04.2016.
- g. An order directing the respondent to pay the claimant's salary arrears amounting to Kshs.269, 835.00 for the months of September, October, November and December 2015 and also January, February and March 2016 and which as at 30.03.2020 the arrears are Kshs.4, 509, 835 and to pay the said salary as at when they fall due.
- h. An order for the respondent to settle the claimant's outstanding gratuity amounting to Kshs.272, 160.00 relating to the employment contract for the period of 2011 to 2013 and for December 2014 contract of Kshs.2, 960, 00.00 and pending leave dues of Kshs.128, 000.00.
- i. The respondent be directed to pay general damages to be assessed by the Court for unfair labour practices or general damages for having been listed at the credit reference bureau for failure to make loan repayments which had been deducted from salary yet not remitted to the bank for 26 months or in alternative, a declaration that the claimant was unfairly terminated on or about 10.07.2017 and an order compelling the respondent to pay the claimant his terminal benefits amounting to Kshs.4, 180, 825.00.
- j. The respondent be ordered to meet the costs of the cause.
- k. Any other suitable relief at the discretion of the Court.

The respondent filed the response to the claim dated 14.08.2020 through Muhuhu & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

Parties did not call witnesses. On 25.06.2020 the case was listed and the respondent had not filed the response to the claim and was absent. Counsel for the claimant consented the suit be determined on the basis of pleadings, documents and submissions as undefended suit and the Court made orders accordingly. The response to the claim was filed without leave and the claimant filed the submissions but the respondent failed to file final submissions. On 09.10.2020 counsel for the respondent confirmed no submissions had been filed for the respondent and by consent of the parties, judgment was fixed for 16.10.2020.

To answer the **1<sup>st</sup> issue** for determination, the Court returns that the claimant was employed by the respondent. The claimant was initially employed on contract since November 2008 as an Administrative Assistant. The contract was renewed in November 2010 for 3 months effective 01.11.2010 to 31.01.2011. It was again renewed from 01.02.2011 and on 12.06.2013 the claimant was promoted to the position of Head of Admissions as an Administrative Officer. On 28.11.2014 he was promoted to the position of Assistant Registrar on permanent and pensionable basis. On 26.01.2016 the claimant applied for the position of a part-time lecturer. He was invited for interview on 27.01.2016. On 09.02.2016 the claimant received a letter deploying him to work at the respondent's university to deputise the Senior Assistant Librarian; a job he had not applied for. The claimant was to maintain his designation and job yet he had no training in library services and he protested accordingly. He wrote the letter dated 19.02.2019 to protest the deployment. On 24.02.2016 the respondent replied that it had a right to deploy the claimant as was done and per clause 3(m) of the letter of appointment which states that the claimant's duties included any other duties as assigned by the University Registrar. The claimant's lawyers wrote the letters dated 26.02.2016 and 07.03.2016 seeking justification of the said deployment but the respondent failed to reply.

On 18.03.2016 directed the claimant to proceed to his new station of deployment at the library. He handed over his duties to the Assistant Registrar and reported at the library.

The claimant received on 13.04.2016 a suspension letter dated 07.04.2016. The letter suspended him from employment till conclusion of case with Michere & Associates, the claimant's lawyers who had written seeking justification for the claimant's deployment to the library. The claimant was suspended on half pay on the account of the advocate's letter and until the matter was concluded.

On 03.05.2016 the claimant moved the court in the present case to stay the suspension and the orders were obtained and served. They were disobeyed and a contempt application was successful. On 14.12.2016 parties resolved to settle the matter amicably provided the university terminated the contract of service in accordance with the agreed terms and conditions therein and new contract to issue. Negotiations collapsed. In February 2017 the claimant was removed from the respondent's payroll. On 21.06.2017 the claimant's advocates wrote to remind the respondents that they were still in contempt of the interim orders staying the suspension. On 10.07.2017 the respondent new Vice-Chancellor replied that the claimant had been terminated from employment. The letter stated that the respondent was ready to pay the claimant in accordance with his letter of appointment up to the date he was terminated and the payment would be made once the funds were available.

To answer the **2<sup>nd</sup> issue** for determination the Court returns that in absence of a letter of termination and in view of the undisputed interim orders staying the suspension, the claimant is still in the respondent's employment upon terms and conditions of service prior to the impugned suspension.

To answer the **3<sup>rd</sup> issue** for determination, the Court makes findings as follows on the remedies as prayed for.

a. The Court returns that the claimant is entitled to a declaration that the respondent is engaging in unfair labour practices in regard to the claimant. In particular, the Court finds that under section 46(h) it is not fair reason to dismiss or impose disciplinary penalty (like the suspension in the current case) on account of an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer except where the complaint is shown to be irresponsible and without foundation. The Court finds that the claimant by himself and by his advocates raised a valid and reasonable complaint that he had been deployed to the library on account of an interview for part-time lecturer and further that he lacked knowledge and skills in library services. In view of the unfair suspension and the subsequent disobedience of the interim orders the Court returns that the respondent has subjected the claimant to unfair labour practices in contravention of Article 41 of the Constitution on the right to fair labour practices.

b. In view of the findings in (a), the Court returns that the claimant is entitled to a permanent injunction to restrain the respondent from harassing the applicant by deploying or redeploying him to sections and or departments in which he lacks qualifications, experience and training to effectively render his services.

c. The Court returns that the claimant is accordingly entitled to a declaration that the respondent has acted unfairly, unlawfully and unconstitutionally in relation to the applicant in the circumstances of this case.

d. The claimant has established that the deployment was unreasonable because it was based on his interview for the position of part-time lecturer and the respondent has offered no justification especially that the claimant has shown that he had no qualifications in library services. The Court returns that the claimant is entitled to an order quashing or nullifying the respondent's decision to deploy the claimant to serve in the library communicated to the claimant by the respondent's letter dated 09.02.2016.

e. The suspension has been found unlawful and the claimant is entitled to an order quashing or nullifying the respondent's decision to suspend the claimant communicated to the claimant by the respondent's letter dated 07.04.2016.

f. The Court has found that the contract of service is still in place and therefore the claimant has not established a case for an order compelling the respondent to reinstate the claimant to his employment and position because the contract of service is subsisting. However, the claimant is entitled to report to the respondent's Vice-Chancellor for assignment of duty not later than 15.11.2020 as

provided in his appointment letter dated 28.11.2014 with full pay and without break in service, any victimization or any loss of salary, privileges, entitlements or benefits prevailing prior to the suspension letter dated 07.04.2016.

g. The suspension being unlawful and having been stayed by the interim orders on record the claimant is entitled to an order directing the respondent to pay the claimant's salary arrears and remunerative allowances as outstanding for the period 07.04.2016 (date of suspension) to the date of this judgment to be computed and agreed between the parties and failing agreement to be determined by the Deputy Registrar upon parties' submissions accordingly and the amount to be part of the final decree herein. For avoidance of doubt the money already paid by the respondent over that time shall be taken into account as duly paid accordingly. The prayer for payment of the money amounting to Kshs.269, 835.00 for the months of September, October, November and December 2015 and also January, February and March 2016 and which as at 30.03.2020 the arrears are Kshs.4, 509, 835 and the respondent to continue paying the said salary as at when they fall due, is thereby dispensed with accordingly.

h. The claimant prays for an order for the respondent to settle the claimant's outstanding gratuity amounting to Kshs.272, 160.00 relating to the employment contract for the period of 2011 to 2013 and for December 2014 contract of Kshs.2, 960, 00.00 and pending leave dues of Kshs.128, 000.00. The Court considers that the claim relates to a continuing injury for payments due but not effected under the contract of service. The Court considers that the relevant contract is the one dated 23.10.2008 being exhibit SMM1 but which is incomplete and does not appear to provide for gratuity as prayed for. The Court returns that the prayer will therefore fail because it has not been justified and no relevant evidence has been provided to establish the claim.

i. The claimant prayed that the respondent be directed to pay general damages to be assessed by the Court for unfair labour practices or general damages for having been listed at the credit reference bureau for failure to make loan repayments which had been deducted from salary yet not remitted to the bank for 26 months or in alternative, a declaration that the claimant was unfairly terminated on or about 10.07.2017 and an order compelling the respondent to pay the claimant his terminal benefits amounting to Kshs.4, 180, 825.00. The Court considers that the finding that the suspension was unlawful and the contract of service is in place with full pay and benefits is sufficient remedy for the unfair labour practices established in the case. The payment for terminal benefits does not arise in the circumstance that no termination has been shown to have taken place. The claimant provided no evidence of being listed at the credit reference bureau and further, while the claimant may have had loans, it has not been shown that such loans were part of the contract of service. The prayers will collapse.

j. The respondent will meet the costs of the cause.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1. The declaration that the respondent is engaging in unfair labour practices in regard to the claimant.
2. The permanent injunction to restrain the respondent from harassing the applicant by deploying or redeploying him to sections and or departments in which he lacks qualifications, experience and training to effectively render his services.
3. The declaration that the respondent has acted unfairly, unlawfully and unconstitutionally in relation to the applicant in the circumstances of this case.
4. The order quashing or nullifying the respondent's decision to deploy the claimant to serve in the library communicated to the claimant by the respondent's letter dated 09.02.2016.
5. The claimant is entitled to report to the respondent's Vice-Chancellor for assignment of duty not later than 15.11.2020 upon terms and conditions of service as provided in his appointment letter dated 28.11.2014 with full pay and without break in service, any victimization or any loss of salary, privileges, entitlements or benefits prevailing prior to the suspension letter dated 07.04.2016.
6. The respondent to pay the claimant's salary and remunerative arrears (at the monthly rate prevailing as at before the suspension date and less PAYEE at the rate prevailing as at the date of this judgment) amounting as outstanding for the period 07.04.2016 to the date of this judgment to be computed and agreed between the parties and failing agreement to be determined by the Deputy Registrar upon parties' submissions accordingly and the amount to be part of the final decree herein.
7. In view of the prevailing Covid 19 situation there be stay of execution for the amount in (6) above which shall be payable by the respondent by 01.02.2021 failing execution may issue thereafter and further, failing payment by 01.02.2021, interest at Court rates shall run thereon from the date of this judgment till full payment.
8. The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered by the court at Nairobi by video-link this Friday 16<sup>th</sup> October, 2020.**

**BYRAM ONGAYA**

**JUDGE**