



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT NAIROBI

CAUSE NO. 870 OF 2012

FRED MBECHER MEROKA.....CLAIMANT

VERSUS

PRINCIPAL, MULTIMEDIA

UNIVERSITY COLLEGE OF KENYA.....RESPONDENT

JUDGMENT

1. Fred Mbeche Meroka (Claimant) instituted legal proceedings against the Principal, Multimedia University College of Kenya (Respondent) on 22 May 2012 and he stated the Issue in Dispute as Repayment of remuneration wrongfully withheld and wrongful, vindictive, biased, unfair and unlawful suspension from employment.

2. In a *Reply to Memorandum of Claim* filed on 6 July 2012, the Respondent contended that the Claimant was a *Senior Administrative Assistant* and was paid as such and therefore was not entitled to be remunerated as an *Assistant Registrar*.

3. The Respondent also contended that the suspension of the Claimant was pending investigations of gross negligence and therefore lawful.

4. The Cause was heard on 19 April 2018, 12 July 2018, 30 October 2018 and on 10 December 2018.

5. The Claimant and the Respondent's Senior Assistant Registrar, Division of Administration, Planning & Finance testified.

6. The Claimant did not file submissions as directed while the Respondent filed its submissions on 5 February 2019.

7. The Court has considered the pleadings, evidence and submissions on record and condensed the Issues for determination into 3,

(i) Whether the suspension of the Claimant was lawful

(ii) Whether the Respondent was in breach of contract by withholding the Claimant's remuneration and

(iii) Appropriate remedies/orders.

Unlawful suspension

8. On 1 July 2011, the Respondent issued a warning to the Claimant on account of negligence of duty.

9. The particulars of the negligence were that the Claimant had failed to present a monthly progress report of activities for the Admissions Section at a meeting held on 30 June 2011.

10. A year later, on 16 February 2012, the Respondent wrote to the Claimant informing him that it had been decided to suspend him on account of having failed to attend a 2 day attachment with Jomo Kenyatta University of Agriculture & Technology; producing a fake report on the attachment; fraudulently participating in the preparation of a forged appointment letter to self; failing to produce minutes for an Academic board meeting and being absent without authority.

11. The suspension letter requested the Claimant to show cause within 14 days why disciplinary action should not be taken against him.

12. The Claimant responded to the suspension/show cause on 29 February 2012 but now asserts that the suspension was unlawful.
13. The Employment Act, 2007 being a primary statute setting out and defining the fundamental rights of employees does not provide for any protections for employees against *suspension* pending investigations.
14. Under the common law, *suspension* from work without contractual authority would be unlawful (see *McKenzie v Smith* (1976) IRLR 345 and *McClory v Post Office* (1993) IRLR 159). Such suspension would be in breach of contract.
15. The letter suspending the Claimant did not set out the contractual or any other legal authority for the suspension.
16. However, the Claimant produced a copy of the Respondent's *Terms of Service for Lecturer of Practice & Non-Teaching Staff in the Senior Administrative, Catering, Clerical, Hospital, Library & Technical Categories*.
17. Clause 6.3 of the *Terms of Service* authorise the Respondent to suspend an employee on half pay pending investigations into alleged misconduct for a period not exceeding 90 days.
18. The said clause also requires that a suspension letter be copied to the Union, and that upon lifting of suspension all withheld dues be paid.
19. The Claimant did not claim that he was a member of a Union. He was invited to appear before the Investigating Committee but declined.
20. On 24 May 2012, the Respondent wrote to the Claimant to inform him that the suspension was being lifted. The decision on the suspension was communicated about 10 days after the 90 days window.
21. The Court is satisfied on the material placed before it that the *suspension* of the Claimant pending investigations was founded on contractual authority, and that the 10 day delay in communicating the decision on the lifting of *suspension* did not prejudice the Claimant or render the *suspension* unlawful.

Breach of contract/withheld remuneration

22. Under this head of claim, the Claimant sought Kshs 1,225,213/-.
23. The Claimant anchored this head of claim on the ground that he was appointed to act as an *Assistant Registrar* through a letter dated 8 January 2009, and that he was confirmed in that position in Grade 12 through a letter dated 23 June 2010.
24. According to the Claimant despite the appointment, he served as an *Assistant Registrar* but continued to be remunerated at grade 9. He contended that he should have been paid a monthly salary Kshs 52,164/- instead of Kshs 34,909/-.
25. Upon raising the issue with the Respondent, the Respondent wrote to the Claimant on 30 June 2011 reviewing the salary point to Kshs 52,164/-.
26. The Claimant was not satisfied on the basis that review did not include house allowance and transport allowance, and he wrote again to the Respondent on 12 October 2011.
27. Unknown to the Claimant, the further complaint led to the Respondent reverting back on 25 October 2011 that the adjustment of salary through the letter of 30 June 2011 was in error, and that the correct salary point was Kshs 36,496/- and not Kshs 52,164/-.
28. The reply advised the Claimant that any excess pay would be recovered.
29. In resisting the claim for breach of contract on remuneration and designation, the Respondent contended that the appointment letter dated 23 June 2010 appointing the Claimant as *Assistant Registrar* and produced by the Claimant was a forgery.
30. The Respondent produced an appointment letter of even date appointing the Claimant to the position of *Senior Administrative Assistant 1*.
31. To demonstrate that the letter produced by the Claimant was a forgery, the Respondent's witness drew the attention of the Court to the footer of both letters.
32. The copy of letter produced by the Claimant had *Magadi Road, Off Bomas of Kenya, P.O. Box 15653-00503, Nairobi Kenya, Tel +254 202071391 and email address of principal@mmu.ac.ke* while the copy produced by the Respondent had *Mbagathi Campus, Magadi Road, P.O. Box 30305-00100 Tel + 25420891201/2 and City Centre Campus Telposta Towers 4th Floor* among other details.
33. The Respondent's case was that the letterhead on the appointment letter produced by the Claimant was in use from 2011, and not 2010.
34. The Respondent's witness, to buttress the forgery allegations testified that as of June 2010, the Respondent had a town campus hence the

letterheads in official use then had a footer with details of the town campus.

35. The witness also stated that the Respondent started using the letterhead used by the Claimant in 2011.

36. She further stated that the address of *P.O. Box 15653-00503* started being used in 2011 and not 2010, and therefore it was incomprehensible that the Claimant could have been appointed as an *Assistant Registrar* in 2010 on a letterhead showing a *postal address* which was not in use.

37. The Claimant did not challenge the Respondent's evidence as to when the *letterheads* and *postal addresses* were changed. There was also no explanation why the appointment letter used by the Claimant did not have details of the town campus when the campus was operational in 2010.

38. In the view of the Court, the secondary evidence presented lead to a strong probability that the appointment letter produced by the Claimant was a forgery as the details at the *footer* and *postal address* were not into use in 2010, the purported date of the letter of appointment.

39. And without considering the other issues raised, it is the opinion of the Court that the Claimant's case for breach of contract on remuneration cannot stand, his letter of appointment to the position of Assistant Registrar being a forgery.

40. The Court therefore finds no breach of contract on payment of remuneration/designation of the Claimant.

Conclusion and Orders

41. Arising from the above, the Court finds no merit in the Cause presented herein and orders it dismissed with no order as to costs considering that the Claimant is still an employee of the Respondent.

Delivered, dated and signed in Nairobi on this 22nd day of February 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr Oundo instructed by Oundo , Muriuki & Co.

For Respondent Mr Ndambiri instructed by J. Thongori & Co Advocates

Courft Assistant Lindsey