

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 99 OF 2018

DR. ELIJAH OYOO OKOTH.....CLAIMANT

VERSUS

VICE CHANCELLOR KARATINA UNIVESITY.....1ST RESPONDENT

KARATINA UNIVERSITY.....2ND RESPONDENT

JUDGMENT

1. The Claimant sued the Respondents for unfair termination of employment. The Claimant averred that he was employed as a lecturer on the 8th April 2013 earning a basic salary of Kshs. 81,536/- per month, house allowance of 51,775/-, a commuter allowance of Kshs. 10,000/- and was enrolled in a pension scheme of 22.5% on monthly basis. He was also entitled to medical benefit and annual leave among other benefits. He averred that he completed the probationary period and was confirmed with effect from 1st October 2014. He asserts that he anticipated working with the Respondent from the time of engagement till retirement at the age of 70 years. He states that he performed his duties with diligence, loyalty, honesty professionalism and a lot of dedication. He averred that on 22nd July 2016 he was summoned to attend a disciplinary hearing on a charge of soliciting money from students but the hearing did not take place because the Respondent's committee claimed it was still gathering evidence. He a averred that he was summoned to attend a disciplinary hearing on 1st September 2016 and he was presented with more unknown charges of soliciting money from 3 other students without a letter from the Head of Department. He stated that the panel was very hostile to him and he was not allowed to ask questions or defend himself. He also was not accorded any opportunity to be represented at the hearing. He averred that the hearing had a predetermined outcome and he was not allowed to cross-examine Mary Kibue one of the students. He received a letter of 21st September 2016 which summarily dismissed him from employment. He asserts that the letter lacked reasons for the dismissal and that there was a witch hunt by senior members of the department. He appealed the decision and was notified that his appeal was unsuccessful on 6th February 2017 and the reasons for the dismissal were not communicated as promised. He averred that the decisions reached by the Respondent had never been supplied to him. He thus sought the grant of the 3 month's salary in lieu of notice – Kshs. 450,000/-, compensation for unlawful dismissal of service and punitive damages – Kshs. 20,000,000/-, sums of money arising from CBA – Kshs. 94,770/-, backdated basic salary for 45 months – Kshs. 750,402/-, basic salary were it not for the dismissal – Kshs. 40,119,120/-, lump sum house allowance were it not for the dismissal – Kshs. 20,201,760/-, pension – Kshs. 7,200,000/- making a total of Kshs. 88,816,052/-. He also sought a certificate of service as well as costs of the suit plus interest thereon from date of filing suit till payment in full. He amended his claim and sought an additional sum of Kshs. 310,800/- being his claim for part-time undergraduate teaching.

2. The Respondents filed a defence in which they averred that contrary to the expectation of the Respondents, the Claimant failed to be loyal, diligent, honest and professional in execution of his duties. The Respondents asserted that the Claimant solicited money from students and that by the time he was to face the charges he had indeed solicited more money from the students and therefore had to answer the charges. The Respondents averred that the Claimant contributed 7.5% of the pension on a monthly basis while the 2nd Respondent was to contribute 15% to the pension scheme. The Respondents assert that the Claimant was given an opportunity to respond to the accusations of gross misconduct and that the Claimant did not request to call any witness or present any evidence at the hearing that was humane and fair to him. It was averred that the Claimant was given an opportunity to appeal and on appeal he was allowed to raise additional evidence and raise fresh grounds of appeal. The Respondent asserts that the reasons for the decision were communicated and the termination was therefore substantively and procedurally fair. The Respondents aver that it was the Claimant who fundamentally breached the terms of the code of conduct amounting to gross misconduct warranting summary dismissal. The Respondents thus sought the dismissal of the claim with costs.

3. The Claimant replied to the memorandum of reply and asserted that at the hearing only one accuser Mary Kibue appeared and he was not allowed to cross-examine her. He averred that clause 8.4 which was cited as the clause he had infringed in the alleged solicitation of money from students does not exist in the code of regulations of the 2nd Respondent. The Claimant asserts that the charges in respect of which he was dismissed do not constitute a charge in terms of the code and that if he indeed had breached the code of conduct then the matter would have been heard by the Karatina University Council as stated in Clause 19.2.1 of the code and not by the Respondents' staff disciplinary committee which had no such powers. The Claimant averred that the charges had no criminal culpability and therefore there was no criminality disclosed against him. The Claimant asserts that the refusal to issue him with a certificate of service had denied him any opportunity of obtaining another employment and also greatly damaged his reputation.

4. The Claimant and the Respondents' witness Ann Mumbi testified in tandem with the pleadings of the parties. The parties were availed an opportunity to give submissions and the Claimant submitted that there was failure to follow the correct procedure in according him a hearing. He relied on the case of **Standard Group Limited v Jenny Luesby [2018] eKLR** where the Court of Appeal held that procedural fairness is mandatory. He also cited the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** and that the Respondents failed to observe the requirements under the provisions of Section 41 of the Employment Act. He submitted that the student he was accused of soliciting money from was not a PhD student as she did not have a post graduate degree in the first place and that the dean therefore sought to settle scores with him using the student. The Claimant submitted that the Respondents failed to inform him that the outcome of the disciplinary hearing could result in his termination and him relying on the case of **Nairne v Highland Fire Brigade [1989]**

I.R.L.R. 366 which cited the book **Modern Employment Law Eighth Edition** by Michael Whincup at pages 176 and 186 published by Butterworth Heninemann that failure to tell an employee beforehand that the outcome of an interview may result in the dismissal of the employee may lead to a finding of unfair dismissal. He submitted that he was ambushed for the offences the Respondents relied on for his dismissal and the decisions thus were drastic and draconian. He relied on the authority of Michael Whincup's book **Modern Employment Law Eighth Edition (supra)**. The Claimant submitted that because he had proved the Respondents had not given him sufficient opportunity to defend himself, he was entitled to recover damages. He cited the case of **Ezekiel Nyangoya Okemwa v Kenya Marine & Fisheries Research Institute [2016] eKLR** where Rika J. awarded a sum of Kshs. 20,000,000/- as coalesced damages for unfair and unlawful termination. The Claimant relied on the case of **Kenya Union of Commercial Food & Allied Workers v National Cereals & Produce Board, Kisumu E&LRC Cause No. 117 of 2014 & 118 of 2014** (unreported) where Onyango J. held that a court may allow evidence to be called and may base its decision on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision. He submitted that the court was clothed with jurisdiction to determine the issue of discrimination and award reasonable compensation.

5. The Respondents submitted that the Claimant was afforded the opportunity to be heard prior to his dismissal in terms of Section 41 of the Employment Act and in keeping with the code of conduct and ethics for public universities and the general code of conduct and ethics. They relied on the case of **John Kisaka Masoni v Nzoia Sugar Co. Limited [2016] eKLR** where Onyango J. held that the respondent in that case had valid and sufficient reasons to take disciplinary action against the Claimant although the procedure was unfair. The Respondents argued that they had taken the Claimant through the principles enunciated in Section 41 as required. They placed reliance on the case of **John Rioba Maugo v Riley Falcon Security Services Limited [2016] eKLR** and **CMC Aviation Limited v Mohammed Noor [2015] eKLR** on procedural fairness and urged the dismissal of the claim with costs.

6. In coming to this decision, I have considered the pleadings, testimony and evidence adduced in support and opposition of the claim. The Claimant was dismissed for alleged misconduct. He asserts that the dismissal was unlawful and unfair and that it was arrived at without affording him an opportunity to be heard. On their part, the Respondents assert that the dismissal was in accordance with the law and the code of conduct which bound the Claimant. The Claimant prior to being dismissed was given accusations relating to his conduct. In the response to the Respondent he dealt in detail with the claims against him relating to one Mary Kibui Muthoni. He referred to her as a PhD student and denied being allocated or assigned the student to supervise. He admitted in the letter of 17th December 2015 that he had discussed her project at her initiative and that the Kshs. 50,000/- that was to be paid was for the preliminary data analysis which to be conducted abroad. He admitted receiving Kshs. 40,000/- from the student paid through Mpesa. As per the Terms and Conditions of Service, the Staff Disciplinary Committee for the Claimant who was in grade 12 was to be chaired by the vice chancellor. The minutes of the hearing conducted on 8th September 2016 clearly show the Vice Chancellor was chairing the seating. The record indicates the Claimant was aware of the accusation levelled against him in the letter of 1st September 2016. This contradicts his assertions that he was ambushed. He responded through his correspondence and his appearance before the committee. His case was not to be heard by the council but the appeal was. That is what actually happened and at the appellate stage of the process he attended accompanied by his lawyer. The record shows that after he was heard the accuser Mary Kibue was called. He was not sent out. He made final remarks after her hearing and the resolution was a finding of guilt. Whereas it is clear some of the evidence that was stacked against the Claimant was recanted by the students, the claims against him seemed to have been sufficient cause for his dismissal. I am persuaded by the evidence before me that the Claimant was heard extensively both orally and in writing and his dismissal accorded with the law. The fact that one letter misquoted the clause applied did not warrant a finding that the dismissal was unlawful. In regard to an award for a matter not pleaded, I am not persuaded by the authority cited which was a decision by my sister Onyango J. the Principal Judge of this court. The upshot of the foregoing is that I find no merit in the suit by the Claimant as it is unproved on a balance of probability. The only outcome is dismissal of the suit with costs to the Respondents.

It is so ordered.

Dated and delivered at Nyeri this 26th day of March 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar