**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 62 OF 2018**

**(Formerly Nakuru Cause No. 278 of 2016)**

**(Originally Nakuru High Court Civil Case No. 6 of 2007)**

**DR. JOSEPH GITILE NAITULI.....CLAIMANT**

**v**

**EGERTON UNIVERSITY.....1st RESPONDENT**

**PROFESSOR JAMES K. TUITOEK.....2nd RESPONDENT**

**JUDGMENT**

1. Dr. Joseph Gitile Naituli (Claimant) instituted legal proceedings against Egerton University (1st Respondent) and Professor James K. Tuitoek (2nd Respondent) before the High Court, Nakuru on 11 January 2007 alleging majorly, breach of contract.

2. Around the same time, the Claimant moved the High Court through a certificate of urgency seeking certain interim injunctive reliefs (the High Court dismissed the application).

3. The Respondents filed a *Defence* on 8 February 2007.

4. On 22 July 2009, the Claimant filed an *Amended Plaint* after consent and leave by the Court. A cause of action of unfair termination of employment was introduced and the Respondents filed an *Amended Defence* on 5 August 2009.

5. On 26 January 2016, the High Court upon the Claimant's application, transferred the file to this Court because of jurisdictional concerns.

6. On 21 December 2016, the Claimant filed an *Amended Amended Plaint* after securing leave of Court. Among the contentions introduced were malice on the part of the 2nd Respondent, violations of the then Constitution (torture, degrading/inhuman treatment and freedom of expression/academic freedom).

7. The Respondents filed a *Further Amended Statement of Defence* on 20 January 2017.

8. The parties also filed witness statements and voluminous documents in the course of time.

9. Although the Court directed the parties to file *Agreed Issues*, the parties did not comply as a consequence of which the parties consented to the adoption of the Issues as proposed by the Claimant and filed on 30 January 2017.

10. The hearing commenced on 10 July 2017 and continued on 11 July 2017, 11 October 2017, 6 November 2017, 25 April 2018, 19 July 2018 and 26 February 2019.

11. The Claimant filed his submissions on 26 March 2019 while the Respondents filed their submissions on 29 April 2019.

12. The Court has considered the pleadings, evidence, and submissions.

13. The Issues as proposed by the Claimant and adopted by the Court listed some 15 items as arising for the Court's determination, but after evaluating the pleadings and record, the Court has distilled and condensed them as itemised hereunder.

**Jurisdiction of the Court**

14. The question of whether the Egerton University Act ousted the jurisdiction of the Court was raised as Issue 14.

15. The parties did not address the jurisdiction question either during oral evidence or in the submissions, and in the circumstances the Court will decline to examine it, as such an exercise may only amount to an academic foray into the provisions of the Act and the statutes establishing and granting jurisdiction to this Court.

16. The Court will also not examine Issue 1 as proposed by the Claimant as it is too general in its terms (the Issue was questioning whether there was an implied term of contract that the Claimant would not be victimised).

**Whether the suspension of the Claimant on 25 October 2006 was illegal and in bad faith**

17. Issue 5 questioned the lawfulness of the Claimant's suspension.

18. On 25 October 2006, the 2nd Respondent wrote to the Claimant to inform him that it had been decided to suspend him without salary or any other benefits on account of participating in an illegal strike and being absent from duty without authority in contravention of the *Terms of Service for Senior Academic, Library and Administrative Staff.*

19. The suspension letter also requested the Claimant to show cause within 7 days why disciplinary action (dismissal) should not be taken.

20. The Court has looked at the *Terms of Service for Senior Academic, Library and Administrative Staff* filed in Court by the Claimant.

21. Clause 15 thereof authorised the Vice-Chancellor to suspend a member of staff on no salary pending investigations which could lead to removal for good cause.

22. In so far as there was contractual agreement to suspend a member of staff pending disciplinary action, the Court is satisfied that the action of the Respondents to suspend the Claimant without salary was lawful as it had a contractual anchor.

**Whether the Special Human Resources Committee of Council had disciplinary control over the Claimant**

23. Issues 4, 6, 7, 8 and 9 related to the competence of the *Disciplinary tribunal* convened to address the allegations against the Claimant, and how it conducted the disciplinary process.

24. The Claimant was of the view that the *Special Human Resources Committee of Council* had no disciplinary mandate over him and that the proper disciplinary tribunal should have been the *Senior Staff Disciplinary Committee of Council.*

25. The Claimant faced two disciplinary processes.

26. The first disciplinary process (in the second round of disciplinary proceedings, the Claimant was invited through a letter dated 21 May 2007 to appear before the *Council Disciplinary Committee,* but he did not appear).

27. During the first disciplinary process, the Claimant was invited through a letter dated 13 November 2006 to appear before the *Council Disciplinary Committee.*

28. The minutes of the hearing held on 27 November 2006 shows the name of the Committee as *Special Human Resources Committee of the Council.*

29. Clause 15 of the *Terms of Service for Senior Academic, Library and Administrative Staff* provided that the Vice-Chancellor would refer any disciplinary cases to the *Senior Staff Disciplinary Committee of Council*. An appeal under the clause was to the University Council.

30. The *Terms of Service* produced in Court did not enumerate the members of Council who would sit in the *Senior Staff Disciplinary Committee of Council,* and because the Claimant did not demonstrate that the members of the *Disciplinary Committee* he appeared before were not members of Council or that it was not a *Committee of Council* ,but given the nomenclature of *Special Human Resources Committee of Council*, the Court is of the view that the variation of nomenclature could not and cannot vitiate the disciplinary proceedings.

31. The Court will next consider the Respondent's plea that there was misjoinder of the 2nd Respondent

**Misjoinder of 2nd Respondent**

32. As a legal principle, no suit ought to be defeated because of misjoinder.

33. The Claimant in the Cause at hand pleaded specific tortuous acts against the 2nd Respondent, and whether such pleas had no factual/evidential foundation was a matter for the trial on the merits.

34. The misjoinder defence, in the view of the Court could not and is not determinative/decisive in the determination of the Cause herein.

**Was there constructive dismissal on 28 November 2006?**

35. The doctrine of *constructive dismissal* was discussed in detail initially in the case of *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344.

36. The Court discussed the rival tests in approaching *constructive dismissal* and ended up endorsing the contract test.

37. The test, essentially as to what amounts to *constructive dismissal* as endorsed in the authority is that

the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must, in either case, be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

38. The Claimant contended that the Respondents made the work environment hostile and intolerable because of the threats by the 2nd Respondent at the *Merica Hotel* on 22 December 2004 (purportedly because he had assisted some employees in reporting a *non-existent payroll fraud* ); the 2nd Respondent accosted him on 22 March 2005 at the office of the Senior Assistant Registrar where he had gone to get a loan facilitation recommendation letter; withholding of a promotion letter to position of senior lecturer in 2005; threat of and transfer to Kisii campus in October 2005; the suspension on 25 October 2006 allegedly for participating in a strike and the disciplinary process which followed and the consequent *issuance of a final warning on 28 November 2006* despite the Disciplinary Committee having cleared him of any wrongdoing.

39. According to the Claimant, he treated himself as discharged on account of *constructive dismissal* on 28 November 2006.

40. The Court has considered the conduct of the Respondents which the Claimant contends led to the *constructive dismissal* severally and in totality.

41. An employer ordinarily reserves the authority to transfer an employee. The Respondents had contractual authority to transfer the Claimant.

42. The mere fact that the Respondents had not (according to the Claimant) exercised the power to transfer lecturers previously could not be a significant breach of contract as it is possible that the 1st Respondent did not have a multitude of campuses spread all over the country.

43. The Court also notes that the transfer of the Claimant was effected before the 2nd Respondent became the Vice-Chancellor, and that the Claimant did not lead any evidence as to the role he might have played in the transfer.

44. The Claimant also alluded to threats by the 2nd Respondent as having made the work environment hostile.

45. The threats, if at all at Merica Hotel, were made in December 2004 while the purported withholding of the Claimant's promotion letter and the events in the office of the Senior Assistant Registrar were in March 2005.

46. According to the Court, if these amounted to create a hostile work environment, the Claimant should have made his mind sooner rather than wait until November 2006.

47. It is noteworthy that the date that the Claimant treats as the effective discharge from employment is the date that the Respondents notified him of the outcome of the disciplinary process, yet he contends that the Respondents had started to make the work environment hostile in 2004.

48. It apparently took the Claimant up to about 2 years to consider himself as discharged on account of *constructive dismissal*, and only at the point he disagreed with the terms upon which he had been given a *final warning* in November 2006.

49. In the view of the Court, and in consideration that the Claimant did not make up his mind sooner despite alleging a hostile work environment which he endured for over 2 years, this was not a case of *constructive dismissal*.

**Natural justice**

**A judge in own cause**

50. The Claimant also complained that the 2nd Respondent should not have sat in the *Disciplinary Committee* which looked at his case, and that because there was bias, the decision reached to give him a *final warning* was null and void. The Claimant found umbrage in *R v Chief Justice of Kenya & Ors* (2010) eKLR.

51. The classic doctrine of *natural justice* does not apply within the ordinary employment sphere for, it would not always be practical for the

employer to outsource the disciplinary control over his employees to an impartial person or body.

52. However, where an employer has internal disciplinary procedures, it should scrupulously adhere to the provisions.

53. The Claimant did not demonstrate that the 1st Respondent's Disciplinary Code and/or *Terms and Conditions of Service* excluded the 2nd Respondent from sitting as a member of the *Council Disciplinary Committee.*

**Misfeasance in public office and improprieties in the disciplinary process**

54. In the view of the Claimant, and he so framed it under Issue 10, the conduct of the Respondents during the disciplinary process amounted to misfeasance in public office

55. According to the Claimant, the disciplinary process was under the office of the 2nd Respondent, and the Respondents also caused the minutes to be captured in a manner not reflecting the true position of what transpired at the hearing.

56. The Claimant asserted that though the *Disciplinary Committee* cleared him of the allegations he was facing, the Respondents communicated to him the exact opposite of the resolution of the *Disciplinary Committee.*

57. He also alleged that the charge upon which he was allegedly found guilty (of absence from duty without authority) was not one of the charges laid against him.

58. The Court has perused the letter of 28 November 2006 and the minutes.

59. The letter indicated that the Claimant had been found guilty

to have been actively involved and participated in the unlawful strike which took place at Egerton University from 23rd October 2006 during which period you were absent from duty without lawful authority.

60. The show cause dated 25 October 2006 issued to the Claimant had the same allegations.

61. The letter dated 13 November 2006 inviting the Claimant to appear before the *Council Disciplinary Committee* had in substance, similar allegations.

62. The minutes show that the charge against the Claimant related to *participation in an illegal strike and absence from duty,* and that the Council observed that *there was no concrete evidence on the charges raised against him* and resolved that a final warning be given and the suspension be lifted.

63. There appear to have been an inconsistency between the raw minutes of 27 November 2006 and the *final warning letter* sent to the Claimant.

64. The Respondents explained the discrepancy by stating that there was another meeting of the *Special Human Resources Committee of Council* on 28 November 2006 where the minutes of the hearings of the previous day were confirmed, and that during the confirmation of the minutes, the errors made in respect of the Claimant's case were rectified.

65. The Court has looked at the minutes of 28 November 2006 which were produced by the Claimant. The minutes indeed indicate that there were corrections made to show that the Principal of Kisii Campus had personally seen the Claimant inciting students.

66. The minutes also show that the resolution was amended from

> *That he be given a final warning and that the suspension be lifted from 25/10/06* to
>
> *That the suspension be lifted with effect from 25/10/06 and he be given a final warning.*

67. The substance of the minutes of 28 November 2006 was that the Claimant was found guilty by the *Committee of Council*, with a sanction of final warning being agreed on.

68. The Court, therefore, cannot find any material departure in the letter under the hand of the 2nd Respondent on 28 November 2006 from the minutes as corrected on the 28 November 2006.

**Unfair termination of employment on 26 June 2007**

***Employment Act, 2007***

69. The Claimant questioned the lawfulness of the second disciplinary process and its outcome as Issues 11 and 12.

70. The Employment Act, 2007 commenced on 2 June 2008 and therefore is not implicated in the termination of the Claimant's employment through the letter dated 26 June 2007, and the process leading thereto.

71. The lawfulness of the dismissal (unfair termination of employment was not introduced in our jurisdiction as a cause of action through the Employment Act, 2007), therefore, stands to be examined against the then applicable legal framework, being the contract, the common law, and the Employment Act, cap 226 (now repealed).

***Lawfulness of the dismissal of 26 June 2007***

72. After the Respondents letter of 28 November 2006, it appears that the Claimant did not resume duty (he sought legal advice, and his advocates questioned the *final warning*).

73. On 22 December 2006, the Respondents caused a show cause letter to be issued to the Claimant to explain why he had not resumed duty from 4 December 2006 despite the lifting of his suspension.

74. The letter informed the Claimant of a fresh suspension pending his showing cause within 14 days.

75. On 11 January 2007, the Claimant moved the Court to seek an order declaring the suspension of 25 October 2006 as illegal, and an order of reinstatement.

76. On 23 January 2007, the Claimant was invited to appear before the *Council Disciplinary Committee* on 7 February 2007 but instead, the Claimant moved the High Court on 5 February 2007 (initial Plaint was amended) to interdict the hearing. Among the pleas was *sub judice*.

77. The High Court interdicted the intended disciplinary hearing pending *inter partes* hearing but after an *inter partes* hearing, the High Court discharged the interim orders on 11 May 2007.

78. With the injunctive orders out of the way, on 21 May 2007, the Respondents issued to the Claimant a letter inviting him to appear before the *Council Disciplinary Council* for a hearing on 7 June 2007. The allegation subject of the hearing was

Absence from duty without permission with effect from 4th December 2006 contrary to clause (15) of the terms of service.

79. The Claimant failed to attend the hearing and on 26 June 2007, he was issued with a dismissal letter. He was informed of a right of appeal.

80. The allegations which the Claimant was called upon to respond to during the second disciplinary process were separate from and distinct from the allegations which culminated in a final warning on 28 November 2006.

81. The disciplinary process which resumed after the vacation of the injunctive orders cannot have been *sub judice.*

82. The Claimant denied receiving the show cause letter of 22 December 2006, and asserted that the letter was manufactured for purposes of the suit. The Respondents contended that the *show cause* was mailed to the Claimant.

83. Despite contending that he did not receive the second show cause, the Claimant admitted that he never resumed duty after suspension on 25 October 2006/or after 4 December 2006.

84. In the view of the Court, the conduct of the Claimant after 28 November 2006 and more particularly the letter of 30 November 2006 evinced an intention not to fulfil his contractual obligations on the belief that he had been *constructively dismissed*, and therefore he cannot validly claim he was unlawfully or wrongly dismissed.

**Violation of the right to academic freedom**

85. The Claimant contended in Issues 2 and 3 that the Respondents curtailed and interfered with his exercise of academic freedom.

86. The Claimant took the position that the failure to correctly communicate to him the findings and decision of the *Disciplinary Committee* showed a pattern of untruths and dishonesty on the part of the Respondents amounting to an infringement of his right to academic freedom.

87. According to the Claimant, the letter of 28 November 2006 was part of a travesty of justice and was actuated by malice thus falling under the cause of action of misfeasance in public office.

88. It was, urged the Claimant, conduct targeted at injuring his person as a scholar/academic career.

89. It is a fact that there was a strike by lecturers in public universities in 2006. The public universities went to Court and the Court stopped the strike.

90. It was alleged that the Claimant participated in the strike. Whether the allegations were factual or not, the Respondents cannot be indicted for having initiated investigations and a disciplinary process against the Claimant.

91. The allegation of participating in a strike, on the face of it comprised a reasonable ground to initiate investigations and in the view of the Court did not breach any right to academic freedom of the Claimant.

**Right not to be held in servitude and torture**

92. Issue 13 as proposed by the Claimant sought the Court's examination as to whether the conduct of the Respondents violated the Claimant's constitutional right against torture and inhuman and degrading treatment.

93. The Claimant contended that he was hunted and persecuted for over 2 years during which period he was subjected to capricious exercise of public power and that the decision conveyed in the letter of 28 November 2006 was a trap, setting the stage for his ultimate dismissal, and thus he rejected the terms of the final warning on 30 November 2006.

94. The Claimant also took the view that the failure to approve his sabbatical leave after 5 years of continuous service, or release him for the sabbatical was a violation of his constitutional right(s).

95. Clause 21(iii) of the *Terms of Service* made provision for sabbatical leave up to a maximum of 12 months.

96. The Claimant applied for a two-year post-doctoral studentship on 16 September 2006. There was no response, and he wrote a reminder on 4 October 2006.

97. The studentship was to commence on 25 September 2006.

98. On the face of the application for sabbatical, the Claimant was seeking leave for more than the stipulated 12 months.

99. Whether the Claimant's application was meritorious or not, the Respondents should have as a matter of transparency and openness made a response.

100. The failure to respond or consider the application on the merits was, in the view of the Court in bad faith, but not a violation meriting a remedy as pleaded.

101. The Claimant sought Kshs 2,844,000/- on account of the loss of sabbatical allowance.

102. This was in the nature of special damages and was not proved to the required standard.

**Breach of contract**

**Leave**

103. Leave is a statutory entitlement. The Claimant sought a total of Kshs 895,818/- on account of 231 accumulated leave days up to 2006. The Respondents did not produce any leave records or submit thereof and the Court will allow the head of claim.

**Leave travelling allowance**

104. On account of leave travelling allowance, the Claimant sought Kshs 6,192/- and because the *Terms of Service* provided for leave traveling allowance, and the Respondents did not rebut the head of the claim, the Court will allow it.

**SSP courses**

105. The Claimant taught the self-sponsored students and claimed Kshs 270,000/- for courses taught but not paid.

106. The Respondents did not rebut the claim by the production of appropriate records and again the Court will allow the relief.

**Lost computer**

107. The Claimant did not provide any evidence that the computer which was confiscated had a value of Kshs 120,000/- and the relief is declined.

**Certificate of Service**

108. A certificate of service is a statutory entitlement and the 1st Respondent should issue one to the Claimant within 15 days.

**Conclusion and Orders**

109. From the foregoing, save for the awards made herein on account of breach of contract, the Court finds no merit in the Cause.

110. The Claimant is awarded and the 1st Respondent is ordered to pay him

(a) Leave Kshs 895,818/-

(b) Leave travelling allowance Kshs 6,192/-

(c) Unpaid SSP pay Kshs 270,000/-

TOTAL **Kshs 1,172,010/-**

111. 1st Respondent to issue a Certificate of Service to the Claimant within 15 days.

112. Claimant to have costs based on the awarded amount.

**Delivered, dated and signed in Nairobi on this 31st day of May 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Dr. Kuria, SC instructed by Kamau Kuria & Co. Advocates

For Respondents Mr. Kisilah instructed by Sheth & Wathigo Advocates

Court Assistants Lindsey/Nixon/Martin