



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 638 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JOSEPH MUTUURA MBERIA.....CLAIMANT

VERSUS

THE COUNCIL, JOMO KENYATTA UNIVERSITY

OF AGRICULTURE AND TECHNOLOGY.....RESPONDENT

JUDGMENT

The Claimant commenced this suit vide the Memorandum of Claim filed on 20th April 2015 challenging the termination of his employment. He seeks the payment of his dues and compensation for breach of his rights. He prays for the following reliefs:

- a. That the Claimant be reinstated to his previous post and rank without loss of any benefits whatsoever and be paid benefits and salary increments that colleagues of his calibre and grade have benefited since his suspension.
- b. Damages for breach of constitutional rights and discrimination in the sum of Kshs.10,000,000.00.
- c. Half pay for the duration of his suspension period (6 months x 180,028.00) ½ in the sum of Kshs.540,084.00.
- d. Cost of the suit.
- e. Interest on 2 and 3 above at Court Rates.

In the alternative to the prayers above:

- a. Compensation for loss of employment (180,028.00 x 12 months) in the sum of Kshs.2,160,336.00.
- b. One month's salary in lieu of notice in the sum of Kshs.180,028.00.
- c. Terminal dues for the 25 years served 180,028.00 x 25 x ½ in the sum of Kshs.2,250,350.00.
- d. Damages for breach of constitutional rights and discrimination in the sum of Kshs.10,000,000.00.
- e. Half pay for the duration of his suspension period (6 months x 180,028.00) ½ in the sum of Kshs.540,084.00.

The Claimant was employed by the Respondent as a tutorial fellow and rose through the ranks until he became a Chairman of the Department of Biological Science. It is his case that upon his election as the Secretary General of UASU – JKUAT, he became *persona non grata* as his position entailed fighting for the rights and wellbeing of the academic staff members.

It is his case that he instituted *Petition No. 33 of 2013, Joseph Mutuura Mberia & Another –V- The Cabinet Secretary Education, JKUAT & 2 Others*, and won both at first instance and on appeal. As a result, the respondent suspended him by letter dated 6th September 2013

without prior notice citing inimical conduct as the reason for suspension. He was on suspension for almost 5 months without any investigations being carried out and without payment of his salary.

On 7th May 2014, he received a hearing invitation scheduled for 13th May 2014. During the disciplinary hearing, the charge of breach of confidentiality was added without outlining the instances and specific documents whose confidentiality he had breached. He demanded for specific details of the charge to enable him respond but his demand was declined and the hearing proceeded to conclusion. On 16th May 2014, the Claimant received a summary dismissal letter. The reasons for dismissal was wanting conduct that was not disclosed. He was by the same letter notified of his right of appeal.

It is the Claimant's case that the Respondent's acts breached his statutory and constitutional rights and worsened his medical condition as he was being denied the medical attention enjoyed by other staff. At the time of termination, the Claimant was earning a gross monthly salary of Kshs.180,000.00 which included a basic salary of Kshs.118,861.00, house allowance of Kshs.53,167.00 and commuter allowance of Kshs.8,000.00.

During trial, the Claimant testified that he was unemployed and could not teach at any other university because the Respondent had ruined his reputation. On cross examination, he admitted that he was paid 3 months' salary in lieu of notice and half pay withheld during suspension. He admitted that he had not been copied in the memo dated 25th February 2014, nor was it forwarded to him but denied obtaining the document illegally. He admitted that the Respondent had not hindered him from getting employment elsewhere. During re-examination he clarified that the cases he filed in court related to union matters and not his personal matters, that he had obtained the confidential letters through the union and that the issue was dealt with and he was found not to be in breach. He also stated that he was dropping his claim for payment in lieu of notice and half pay.

The Respondent in its Memorandum of Reply filed on 25th July 2016, contends that it is the Claimant who had a personal vendetta against the Respondent since he was left out as member of Council, something he demonstrated by filing multiple suits against the Respondent and the University.

It is the Respondent's case that the delay in granting the Claimant a hearing was occasioned by the litigation instituted by the Claimant. It is its position that the charge sheet supplied to the Claimant was elaborate and clear. Further, that the Claimant did not make any written representations as he opted to institute proceedings. Further, that in the course of this debacle, the Respondent realized that the Claimant had obtained confidential information through covert means.

It is the Respondent's case that it does not wish to engage in litigation as it is expensive in terms of legal costs incurred and that cases distract it from its core mandate.

During cross examination, Prof. Joseph Ombogi and **RW1**, testified that the main reason for the Claimant's dismissal was due to breach of confidentiality. He also stated that due to the Claimant's union activities, the university did not have peace. Lecturers boycotted class because of the influence the Claimant had on them. However, order was restored once he was dismissed. He admitted that the cases were filed in the name of the union chapter.

Submissions

The Claimant submits that he was discriminated against by virtue of being a union official. That this is proved by the reinstatement of Claimant's deputy while he was subjected to hostile treatment.

The Respondent submits that the Claimant has failed to meet the threshold set in *Anarita Karimi Njeru vs. The Republic [1976 – 1980] KLR 1272* as he failed to outline and itemize how his constitutional rights were violated, did not elaborate how he was subjected to discrimination neither has he made reference to the relevant constitutional provisions pertaining to the breach of his rights. He relies on the case of *Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR*.

The Respondent maintained that the CBA provisions were followed and where they were not followed, there was reasonable justification for the same. For instance, the suspension of the claimant exceeded 90 days because the Respondent was trying to dispense with the injunction case against it. Further, that the claimant's appeal was not heard since it was filed 25 days after the stipulated period thus the respondent was under no obligation to hear it.

Analysis and Determination

The issues for determination by the court are whether the termination of the Claimant's employment was lawful and if he is entitled to the remedies sought.

Due Process

The Claimant has submitted that he was not accorded due process as the suspension period exceeded the 90 days stipulated in the CBA and the allegations in the charge sheet varied from the allegations in his suspension letter. I am of the opinion that the Claimant has been dishonest as to the reason for such extension. He admitted that he had sued the Respondent concerning his suspension. The letter dated 24th March 2014, from UASU-JKUAT Chapter confirms the Respondent's case was that the delay was occasioned due to the pending case as the Claimant had sought to restrain them from suspending them from employment. To this end, the Claimant was the author of his own misfortune. He further submits that the panel in the disciplinary proceedings constituted of the apex body in the university, as such there was no higher body that could hear his appeal since he would still go before the same individuals. His dismissal letter was clear that his appeal lay with the Chairman of the University Council.

Reason for Termination

Section 41(1) of the Employment Act provides that an employer should explain to the employee, in a language the employee understands, the reason for which the employer is considering termination before terminating employment on the grounds of misconduct. The Claimant's suspension letter indicated the reason for suspension as his "*inimical conduct on your part that has affected the smooth running of the university.*" The Claimant alleges that he did not understand this charge as it was not explained to him. However, a look at the suspension letter shows that it was equated to gross misconduct. Further, it is defined as hostile conduct which RW1 explained to loosely mean being at loggerheads with the employer through filing multiple cases. This caused friction at the work place thus hampering smooth running of the Institution. From the wording of the letter, I find it hard to believe that the Claimant did not understand the charge.

Section 43(1) of the Act requires an employer to prove the reason(s) for termination, and failure to do so, the termination shall be deemed to have been unfair. The Respondent has not proved the validity of the reasons for termination as the reasons for the Claimant's dismissal differed from the reasons indicated in the suspension letter and the charge sheet. This is a fact evident from documents adduced before this Court as evidence. RW1 admitted that the Claimant was dismissed for lack of discipline and commitment, an allegation he did not have the opportunity to respond to since the allegations he responded to at trial were different from the reasons that led to his termination. In addition to the charges of inimical conduct, paragraph

(iii) of the charge sheet read:

"In breach of JKUAT Staff Code of Conduct and Ethics, XI. Integrity

(d) A member of staff shall not knowingly give false or misleading information to members of the public or to any university employee or students."

In view of the foregoing, I am of the view that the termination was unfair.

Discrimination

It was the claimant's case that he was discriminated because of his work as a union official. That before he became a union official the environment under which he worked was friendly but after his election as Chapter Secretary the environment became so hostile that he never enjoyed working at the university anymore.

The claimant did not state the specific instances that constituted discrimination as he was treated in the same way as Naphtali Muga Rugara, the only difference being that Mr. Rugara moved to court immediately and was reinstated by the court.

I find that the claimant did not adduce sufficient evidence to support his claim of discrimination.

Reliefs

1. During trial, the Claimant abandoned the claim for salary in lieu of notice and half pay as he had already been paid.
2. The Claimant was a member of a pension scheme hence he is not entitled to service pay. The Claimant did not dispute this fact.
3. Three years have passed since the institution of this suit hence the claim for reinstatement can longer be granted. In addition to this, the Claimant and Respondent do not have a good working relationship as demonstrated by the circumstance that led to the dismissal of the Claimant. As such, it would be impossible for them to work together.
4. He is not entitled for damages for breach of constitutional rights and discrimination as his claim was not specific in how his rights were violated and which constitutional provisions were infringed. Further, the instances given do not necessarily involve a constitutional question since the Respondent did not hinder the claimant's participation in union activities. The Claimant admitted that when he was denied access to the University, he moved to court and an order was issued allowing union officials access.
5. The claim for compensation for loss of employment succeeds. Taking into account the claimant's position before he was dismissed, the length of service and the fact that the dismissal related to his activities as a union official, **I award him maximum compensation of 12 months at Kshs. (180,028.00 x 12 months) = Kshs.2,160,336.00.**

The respondent shall also pay claimant's costs of this suit.

Interest shall accrue on decretal sum from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE