



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.1 OF 2019

[formerly Nakuru ELRC No.132 of 2016] [formerly Eldoret ELRC No.228 of 2017]

NATHAN KIPRUTO KEMBOI.....CLAIMANT

VERSUS

UNIVERSITY OF ELDORET.....RESPONDENT

JUDGEMENT

On 12th April, 2016 the claimant filed the Memorandum of Claim under Nakuru ELRC No.132 of 2016. On 30th June, 2016 the claim was amended and a further amendment on 6th December, 2016.

The claimant is seeking the following orders;

(1) An order directing the respondent to unconditionally reinstate the claimant to his employment service and former position as assistant accountant and council secretariat as per his previous appointment with the respondent without any loss of benefits or seniority and without any conditionality and he be paid salary arrears;

(a) Salary arrears Ksh.1,792,330.43

(b) Council honoraria per sitting as from year 2014 to date Ksh.6,660.00;

(c) Pssp payment per semester (three semesters in an academic year) based on fee collection.

(2) An order for the claimant to be adequately compensated for time lost out of employment.

(a) list of damages and consequential losses;

(i) KCB loan interest at 25% Ksh.2,007,661.82

KCB loan interest at 15% Ksh.1, 116,456.33 Increment of interest/penalty Ksh.891, 205.49

(ii) KCB legal fee Ksh.346,657

(iii) Sacco penalty interest Ksh.282,567

(iv) Rent penalty interest Ksh.45,990

(v) Pension loss on investment return based on 2014 Ksh.73,724.75

(vi) Insurance loss cash back and policy lapse Ksh.1,825,000

(vii) Higher Education Loans Board penalty for postgraduate Ksh.95,000

(viii) Legal costs during disciplinary proceedings Ksh.450,000

(3) In the alternative and without any prejudice to the foregoing the respondent be ordered to fully compensate the claimant for unfair, unlawful and wrongful termination of employment with the following benefits;

(a) Salary withheld December 2014 to January 2016 Ksh.777,682.00

(b) Three months' notice pay Ksh.339,126

(c) Severance pay 15 days x years worked ksh.395,075

(d) 12 months compensation Ksh.1,452,504

(4) Costs of the suit and interests.

Claim

The claim is premised on the facts that on 2nd July, 2007 the claimant was employed under the then Moi University and on 5th August, 2014 he was issued with a notice to show cause why disciplinary action should not be taken against him based on allegations that he was on previous occasions between the year 2011 to 2012 received imprest advances amounting to Ksh.7, 822,332.0 and which he failed to account for.

On 5th December, 2014 the claimant was suspended from service on the grounds that he had failed to account imprests advanced amounting to Ksh.3, 823,036.00. The suspension from service was illegal on the grounds that the show cause notice was based on an imprest of ksh.3, 823,036.00 and it was contrary to the Collective Bargaining Agreement (CBA) 2012 to 2013 between the respondent and Kenya

Universities Staff Union at clause 5.2(f) and the suspension for 11 months before any disciplinary meeting was scheduled was contrary to the CBA.

The claimant was then served with a disciplinary notice dated 15th October, 2015 indicating that hearing was for 5th November, 2015. Such hearing was irregular and illegal for the reasons that the committee hearing the claimant was without jurisdiction to determine imprest taken during the period when the institution was under Chepkoilel university College and Moi university; the transition clause in the university Charter does not deal with expenditures pursuant to section 3(4) of the charter. The University of Eldoret was not the proper complainant on a matter that arose during the Moi University and Chepkoilel university College period.

The claim is that the disciplinary committee constituted to hear the claimant was chaired by the vice-chancellor and who did not have the capacity to preside over the same. The meeting for 5th November, 2015 was adjourned due to the objections raised by the claimant and his advocate and by letter dated 1st December, 2015 he respondent agreed to charge the claimant a fresh through section 69 to 71 of the Public Finance Management Act, 2012.

The respondent then amended the charges and the claimant requested for documents with regard to the new charges before he could go for disciplinary hearing in his letter dated 4th January, 2016 but the respondent proceeded to set a new hearing date for 19th January, 2016 and refused to give the claimant the requested documents.

During the hearing the respondent declined to give the claimant a fair hearing or the right to respond to the charges made against him and on 25th January, 2016 the claimant's employment was terminated contrary to the provisions of the Employment Act cap 226.

The claimant lodged an appeal under clause 5.4 of the CBA to the vice-chancellor and the respondent held a meeting on 4th March, 2016 in which the claimant was directed to file his appeal with the chairman of the council which he did and to date no hearing has been conducted.

The claim is that the termination of employment was unlawful for the reasons that the respondent failed to follow the provisions of the applicable CBA, failed to give the claimant documents to support new charges forming the disciplinary process and the termination of employment was contrary to section 45 of the Employment Act and the remedies sought should issue.

The claimant testified that he was initially employed under Moi university and then transferred to the respondent on 5th April, 2012 and where he was issued with a notice to show cause in August, 2014 for alleged failure to account for imprest of Ksh.8, 822,332 and to which he replied on 5th August, 2014 but despite showing cause he was suspended. The suspension violated the provisions of the CBA, the code of conduct and the Leadership and Integrity Act and where his case was not heard within 21 days of suspension under the CBA he ought to have been automatically reinstated after 30 days. Upon suspension 21 days lapsed on 23rd December, 2014 and there was no reinstatement.

The claimant also testified that by letter dated 15th October, 2015 he was invited to the disciplinary hearing after a period of 11 months contrary to the CBA term and conditions. The hearing was scheduled for 5th November, 2015 and he attended with his advocate who requested for documents and objected to the fact that the charge sheet was defective and he needed time to prepare the defence. The advocate also challenged the mandate of the disciplinary committee to hear the matter as the allegations forming the basis of the hearing arose during the tenure of Chepkoilel College and Moi University and financial years of 2010/2011 before the respondent came into being and thus had no jurisdiction. The transition clause between the respondent and Moi University and Chepkoilel College did not deal with expenditure but assets and liabilities under clause 32 of the respondent's charter.

The respondent adjourned the disciplinary hearing and new charges were drafted and the claimant invited to a hearing on 19th January, 2016 and the claimant attended and requested for documents but there were not supplied and the claimant opted to exit the meeting with his advocate. The respondent proceeded to take a decision and dismiss the claimant from his employment vide letter dated 25th January, 2016.

The claimant also testified that the summary dismissal has affected him and his family as he lost his livelihood, his integrity came into question and he had on-going loans and liabilities which suffered for not being serviced and thus seek reinstatement or re-engagement and to be paid all his salary arrears. Upon summary dismissal his salaries were withheld and later backdated and he lost half salary during suspension and a reinstatement can be the only remedy to address the same. He defaulted in his loan repayments and was penalised, bank auctioneers sold his security and he has incurred legal fees to defend himself before the disciplinary committee and in court and the respondent should pay these losses and costs due to the unfair termination of employment.

The claimant also testified that following his notice to show cause he was able to respond but he did not have all the required documents but he did not ask the respondent to provide. He was invited to two disciplinary committee hearing and the notices had noted the date, venue and time and he was allowed to attend with his advocate and the union representative was present. Some documents he required were supplied and the others he was told were in the public domain.

In the 1st disciplinary hearing the reason for adjournment related to objection raised by his advocate. He attended the 2nd disciplinary committee hearing and did not sit to the end because he was not happy with how the proceedings were being conducted. He did not shout at the chairman or bang the table but his wrist watch hit the table as he was trying to explain himself.

The claimant also testified that he was employed by Moi University and placed at Chepkoilel College as a constituent college and the respondent was born out of Moi university with some management functions being moved to Chepkoilel especially his office.

The claimant called his **witness Samuel Arap Soi** who testified that he is the union branch secretary, Kenya Union of Universities Staff union (KUSU) Eldoret branch. The union questioned the time the claimant was given for suspension as this was contrary to the terms of the CBA which gives the employer 30 days to complete the disciplinary process and failure to which the employee stands reinstated. The union wrote to the respondent noting there was a violation of the CBA with regard to the claimant's case and the witness attended at the disciplinary hearing on 19th January, 2016 where the advocate demanded for documents to use in the defence but was given a few.

Mr Soi also testified that after the respondent failed to give the claimant's advocate documents during the disciplinary hearing on 19th January, 2016 he left the meeting. The chair to the meeting directed that the claimant and his advocate had the option to leave the meeting and hearing continued and a decision taken to dismiss the claimant from his employment. The claimant had tried to explain himself, he got agitate and enraged and then decided to walk out.

The claimant also called Teresa Morogo as a witness and who testified that she has since left the respondent and during the disciplinary hearing on 19th January, 2016 she was the secretary and took minutes as the human resource for the respondent. That the minutes filed have been distorted and not the record she took but she does not have the original record she took to compare. The vice- chancellor had the soft copy.

Defence

In response the respondent's case is that the claimant was issued with notice to show cause why his employment should not be terminated indicating that he had failed to account for Ksh.7, 822,322 pursuant to notice he accounted for ksh.3, 999,296 leaving a balance of ksh.3, 823,036 unaccounted for and which was subject of his suspension and has since been unable to account for the monies. The suspension of the claimant met all the contractual and legal requirements and although he was on suspension for a longer period the same can be explained on the fact the respondent went through a turbulent period in the year 2014 and 2015 making it impossible to schedule the disciplinary hearing and this events are in the public domain.

The defence is also that the claimant misread the law and the disciplinary procedures on the grounds that the respondent is the successor to the defunct Chepkoilel College and its staff, assets and liabilities. The money held by the claimant on behalf of Chepkoilel College at the time the respondent was established became part of the assets transmitted to the respondent. The complaints made against the claimant arose from an audit report and the vice-chancellor was not the complainant as alleged.

The disciplinary committee was properly constituted and its hearings were procedural and lawful. The claimant was supplied with all documents he requested for; he was invited for a hearing and allowed a fair chance for his defence hearing with his union representative. Upon deliberations the respondent arrived at the decision to terminate employment. His appeal has not been heard due to the claimant's inaction.

Following the disciplinary hearing, it was resolved that the claimant had taken imprests amounting to an aggregate of Ksh.7,822,332 and in reply to the show cause he was unable to account for the full amount. Upon investigations the respondent established there were valid allegation which formed a legitimate basis for disciplinary hearing by application of internal procedures. Hearing could not take off as scheduled due to the non-cooperation of the claimant and his team of advocates who initiated High Court judicial Review Proceedings to block the committee from deliberating the matter and forcing the respondent to adjourn the hearing.

The defence is also that on 1st December, 2015 the claimant's advocate wrote indicating they were ready for the disciplinary hearing and which was scheduled for the 19th January, 2016. The claimant attended with his advocate and where he turned rude, hostile and instead of responding to the allegations made he became arrogant and declined to answer eventually banging tables and opted to exit the hearing prematurely in protest. Despite this conduct, the hearing was conducted and since the claimant had not account for imprests a verdict was taken to dismiss him from service.

The claims made are frivolous; to allow such misconduct is to encourage impunity and claims should be dismissed with costs.

Francis Ikapel Omete the registrar administration testified for the respondent that the claimant was issued with a notice to show cause dated 5th August, 2014 for failing to account for ksh.7,822,332 and in response he only account for part of the monies leaving a balance of Ksh.3,823,036 and which remained outstanding to date. This prompted a suspension to allow for investigations.

Mr Ikapel also testified that the suspension period took longer than expected as the respondent was faced with turmoil but eventually the claimant was invited for hearing vide letter dated 21st December, 2015 for the 19th January, 2016 where he attended with his advocate and union representative. He was supplied with all the necessary documents but he claimant opted not to respond to the questions posed, started banging tables and left the meeting.

The disciplinary committee held deliberations and decided to have the claimant dismissed from service.

The claimant was allowed the right of appeal. The claimant wrote to the vice- chancellor on 22nd February, 2016 and a second appeal to the chair of council. The appeal to the vice-chancellor was irregular having been the chair of the disciplinary committee this ought to have gone to the chair of council. Under the CBA once cannot appeal to the chair of the disciplinary committee.

Upon the claimant failing to account for imprests to him the finance policy allow various sanctions including a surcharge from his salary and there is no provision for a dismissal but following the claimants conduct at the disciplinary hearing, a decision was taken to dismiss him from service.

At the close of the hearing, both parties filed written submissions together with lists of authorities.

The issues which emerge for determination can be summarised as follows; Whether termination of employment was wrongful, unlawful or unfair; Whether the claimant should be reinstated back to his employment;

And whether the alternative remedies should be issued.

In the Memorandum of Claim, The claimant is defined as an adult male while the respondent is defined as a higher learning institution established under the universities Act and granted Charter on 11th February, 2013.

The Charter had the history in that In August 2010 through Legal Notice No. 125 of 13 August 2010 there was an upgrade from campus into a University College under Chepkoilel University College, a Constituent College of Moi University. Under the Charter, the constitutive Act and operational policies the respondent came into being under clear transitional provisions flowing from Moi university, Chepkoilel University College and eventually to a full-fledged entity under the respondent.

The assets and liabilities were lawful and procedurally transmitted to the entity of the respondent. there was no institutional gap.

Under these movements and changes, the claimant's employment did not lapse. His employment became secured under the various changes, legal provisions and thus transitioned to the respondent with full benefits and rights as under the original employment with Moi University.

The due liabilities were therefore carried over by the respondent.

It is also taken into account that the claimant was unionised under the Kenya Universities Staff Union (KUSA) with who the respondent enjoyed recognition and there was an on-going CBA and covering the period 2012/2013. The CBA made provisions for terms and conditions of employment for unionised employees.

By letter of June, 2007 the claimant was appointed by Moi University as the senior accounts assistant. The appointment was revised vide letter dated 2nd October, 2007 and by letter dated 5th April, 2012 the claimant was transferred to Chepkoilel University College, the precursor of the respondent as the senior accounts assistant Grade D. he was promoted on 6th February, 2013 to the position of Assistant Accountant Grade E/F.

Events leading to the suit herein commenced by the show cause notice issued to the claimant by the respondent on 5th August, 2014. He was required to show cause with regard to received imprests advances amounting to Ksh.7, 822,332 in the years 2011 and 2012 and the respondent stated that the claimant had failed to render an account. The details of the received imprests on dates, amounts and payment numbers were cronologised for the claimant to address.

In response, the claimant response was that;

... I wish to inform you that I did account for the above mentioned imprests amounting to ksh.3, 823,036.00 and handed them over to personal claims for clearance as per my register. I wish to let your good office that the imprests were not missing not that they were not accounted for but due to our poor record keeping.

...

Out of 69 imprests I surrendered 60 imprests have been forwarded to audit for verification leaving a balance of 9 imprests

misplaced during external audit exercise and reflect a weak internal control system in record keeping.

In the response, the claimant does not deny he had received the imprests scheduled under the notice dated 5th August, 2014. He explained for the amount of Ksh.3, 823,036.00 only.

As a result, the respondent took the decision to suspend the claimant on 5th December, 2014 under the provisions of the CBA and the Financial Management Policy, the Code of Conduct an Ethics Policy. The respondent also invoked the provisions of the Leadership and Integrity Act and the Public Officer Ethics Act.

In employment and labour relations, the employer has the prerogative to suspend an employee as an administrative action to allow for investigations. Once an employee is placed on suspension It should therefore be seen as an administrative action imposed on an employee with stated reasons.

In the case of **Elizabeth Cherono Kurgat versus Kenya Literature Bureau [2014] eKLR** the court in addressing the issue of sending an employee on compulsory leave instead of a suspension or interdiction held as follows;

the Claimant was suspended on being suspected to have committed the employment offence. It is not a material departure, that the Respondent termed this action as compulsory leave, instead of suspension or interdiction under the Terms and Conditions of Employment. All are terms that may be used by an Employer on sending an Employee on administrative leave. She understood she was being placed on administrative leave to allow for investigations and the disciplinary process to take place. She was given the opportunity to show reasons why disciplinary action should not issue against her. She did this. She was called to a disciplinary hearing, and was accompanied by a Trade Union Representative at the shop floor level. She was heard, her representations considered, and a decision made to terminate her contract of employment.

In Ezra Chiloba versus Wafula Wanyonyi Chebukati & 7 others [2018] eKLR that;

Common sense would dictate that it may be necessary at times to remove an employee from the workplace pending the outcome of a personnel/human resource investigation.

The objective would be to allow investigations to proceed without disruption of evidence, or to preserve a safe, orderly, and professional work environment.

In some jurisdictions, the removal may take the form of a temporary reassignment or administrative leave/investigatory suspension.

Inherently, a suspension is meant to pave way for investigations or as required. The employee is removed from the shop floor to be recalled for a hearing and where the investigations do not requires a hearing, the employee is recalled back to work.

The parties herein having foreseen the nature of employment and labour relations between the parties have a CBA. Under its provisions, a suspension is regulated. Under clause 5 and which requires that the employer has the right to suspend an employee from employment on half pay pending investigations into alleged misconduct for a period of *not exceeding 21 days*.

The CBA also provides that where a suspension is not addressed as under clause 5..2.a. within the stipulated time, the employer has the duty to inform the employee because upon the expiry of 30 days of the suspension *if no action or decision shall have been taken against the employee, then the suspension shall be deemed to have automatically expired and the employee shall be reinstated.*

Parties are bound by their agreement and the CBA is one such agreement. As much as the provisions under clause 5.2 of the CBA are ambitious, both parties are covered to the extent that the employer has the right to suspend an employee to allow for investigation and where there is any matter that is not resolved within 21 days the employer is given a further 21 days to communicate to the employee. On the other had the employee I not left without recourse as where the suspension is not addressed and the employee is placed under half salary for over 30 days and there is no communication, there is automatic reinstatement back into employment.

Where the employer fails to respect the terms and condition of agreement between the parties results into wrongful termination of employment. Where parties have agreed to be bound by the CBA, to go contrary to the same is wrongful.

The respondent offered the defence that in the years 2014 and 2015 there was turmoil and which prevented a sitting to address the claimant's misconduct. that this turmoil was within the public domain. The court was however not appraised of these alleged turmoil's.

The employer who enjoys a prerogative should not abuse it or apply the same to the detriment of the employee. By letter dated 5th December, 2014 the claimant was suspended to allow for investigations over serious allegation. As a result he was placed on half pay as he waited for a recall back. This took a record 11 months. This was wrongful under the terms and conditions of the applicable CBA. See **Narry Philemons Onaya-Odeck versus Technical University of Kenya [Formerly, the Kenya Polytechnic University College] [2017] eKLR** it is the duty of the employer to put in place work place systems to address employment misconduct as and when this should be done. Where the employer is unable to deal as required, the employee has the right to be recalled and informed or addressed as appropriate. This is to encourage the employer to only take a negative action against the employee as and when this is necessary.

In the case of **Evans Rurinja Githuo versus Sunmatt Limited [2017] eKLR** it was held that;

An employer who commences a disciplinary process against an employee is obligated to run it to conclusion. There was no magic in the two weeks suspension period and the Respondent cannot use its lapse as a ground for dismissal.

The suspension was effected in the context of serious allegations of theft against the Claimant who was entitled to feedback on the outcome of investigations into these allegations.

Taking into account the suspension of the claimant from employment was wrongful and contrary to agreed terms of the CBA, belatedly the claimant was invited to a disciplinary hearing on 5th November, 2015. The meeting aborted on the basis that the claimant and his advocate attended and raised preliminary objections to the charges made and particularly with regard to jurisdiction of the respondent to undertake such proceedings noting the alleged imposts were received under a different entity. However, as noted above the respondent being the entity taking over assets and liabilities of its predecessor, there was no lapse.

Additionally, work place misconduct should invariably be addressed within the meaning of section 41 of the Employment Act, 2007.

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

Internal disciplinary proceedings should remain subject to parties at the shop floor. Under such provisions and taking section 41 of the Employment Act, 2007 into account, on the shop floor the employee is allowed the benefit of having another employee or a shop floor union representative present. To open the shop floor to third parties and be allowed to raise preliminary objections, seek statement particulars and the sanction for the charges made only changes the texture and tenure of such proceedings from employment and labour relations to a procedure akin to criminal proceedings where evidence is required to be proved beyond reasonable doubt. Far from it, at the shop floor and where the employee has the benefit of having the trade union representative and availed a the shop floor, parties can source the best evidence within the context of ensuring industrial peace. To bring third parties the employer only invites an escalation of the allegations made to charges and counter-charges.

This is aptly captured in the case of **Thomas B. Miningwo versus Egerton University** that;

The purposes and objectives of a criminal trial are different from disciplinary proceedings within the employment relationship. Different legal principles apply.

In George Musamali versus G4S Security Services Kenya Limited [2016] eKLR the court held that;

.. a disciplinary hearing in an employment relationship is not a Court trial. The rigours of a Court trial therefore cannot be strictly applied without occasioning what is purely a management process, unreasonable difficulty. The Court has considered the manner in which the allegations against the claimant were processed and is persuaded that they were reasonable and in accordance to fair hearing procedures contemplated in the respondent's human resource policies and rules of natural justice generally.

In this case, the respondent allowed advocates secured by the claimant to scuttle the internal disciplinary proceedings and with it a new hearing date had to be scheduled. Things did not improve as on 19th January, 2016 the claimant returned with his advocate and it was clear to the court when the claimant testified that when his advocate was not allowed to raise objections he became agitated, shouted and walked out. He did not wait for the end of his disciplinary hearing. This was confirmed by the claimant's witness Mr Soi who testified that during the hearing, the claimant was wearing a wrist watch and as he was explaining himself it banged on the table and he got agitated. The scenario therefore created was that the chairperson to the disciplinary committee reined order and the claimant and his advocate did not take this kindly and opted to walk out. With it the claimant gave up his right to secure his employment. He cannot blame the respondent for the sanction which followed. A summary dismissal from employment.

Save for the procedural lapse in addressing the suspension of the claimant which is found wrongful, the court finds there were substantive grounds resulting from work place misconduct, the claimant was allowed to show cause and which he failed to address and when invited to a hearing, he opted to frustrate the process and in the end he frustrated his own employment.

On the remedies sought, reinstatement is not available. Even where such was to apply, employment terminated on 25th January, 2016 and section 12(3) of the Employment and Labour Relations Court Act, 2011 requires the court to put the time since employment terminated into account in addressing this remedy.

Equally in addressing the remedy of whether to reinstate the claimant or not, the court notes the claimant was an Assistant Accountant wherein he betrayed his fiduciary responsibilities and put the Respondent at risk by failing to account for received imposts and matters which were addressed with him in the notice to show cause dated 5th August, 2014. See **Sophia Wambui Muthoni versus Muramati Sacco Society Limited Cause No.162 of 2012.**

The remedy of reinstatement is not available to the claimant.

The claim for salary arrears, council honoraria and PSSP payments are also lost in the same vein. The claimant did not set out how he earned such dues save the salary withheld for the duration of suspension from December, 2014 to January, 2016 is due and payable for the reasons that the claimant remained the employee of the respondent until the date employment terminated vide letter dated 25th January, 2016. A total sum of ksh.777, 682.00 is confirmed as due.

On the claims for damages and losses incurred, through pleaded, with termination of employment these losses cannot be at the expense of the employer. With the sanction summary termination of employment through summary dismissal well applied and found justified, the incurred losses set out cannot be visited upon the respondent.

Notice pay is not due in a case where summary dismissal is found justified and the court having addressed the apse in the suspension, this is dealt.

The claimant has sought payment for leave due from the year 2009 to 2016. This issue was not gone into at all. The court finds no basis to award herein.

On the claim for severance pay, this did not stand out as a case premised under the provisions of section 40 of the Employment Act, 2007. No evidence was called in this regard.

Accordingly, judgement is hereby entered for the claimant for the payment of ksh.777, 682.00 monies withheld during the suspension period; such monies shall be paid subject to the provisions of section 49(2) of the Employment Act, 2007. As the claim partly succeeds, the claimant is awarded 25% of his costs.

Delivered at Nakuru this 21st day of November, 2019.

M. MBARU JUDGE

In the presence of:

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