



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 165 OF 2015

MICHAEL NJOROGE MUGO.....CLAIMANT

v

LAIKIPIA UNIVERSITY..... RESPONDENT

JUDGMENT

1. Michael Njoroge Mugo (Claimant) instituted legal proceedings against Laikipia University (Respondent) on 5 June 2015 and he stated the Issues in Dispute as

1. Wrongful dismissal of the Claimant from employment by the Respondent.
2. Respondent's failure to follow the laid down procedure in the disciplinary process.
3. Respondent's failure to accord the Claimant a fair hearing.

2. The Memorandum of Claim was accompanied with a motion under certificate of urgency. The motion was determined in a ruling delivered on 31 July 2015.

3. The Respondent filed its Response on 15 December 2016. The parties also filed documents (some were not relevant or material) and witness statements.

4. The Cause was heard on 8 March 2017, 22 March 2017 and 29 November 2017 and judgment was reserved for 19 January 2018 (because of my transfer, the judgment could not be delivered as scheduled).

5. The Claimant filed submissions on 14 December 2017 while the Respondent filed its submissions on 29 December 2017.

6. After considering the pleadings, evidence and submissions, the Court has identified the Issues for Determination as, *whether there was unfair termination of employment and appropriate remedies including entitlements accruing from the employment relationship.*

Unfairness of termination

The law

7. Section 41 of the Employment Act, 2007 provides the bare minimums of protection an employee is entitled to before termination of employment if the reasons are grounded on *misconduct, poor performance or physical incapacity*. The Court will bear in mind the statutory protections in mind.

8. In terms of sections 43 and 45 of the Employment Act, 2007, the employer is under a statutory obligation to prove the reasons for terminating the services of an employee, and that the reasons were valid and fair.

9. Further, the Claimant was a member of a Union which had a collective bargaining agreement with the Respondent and the Court will also consider its provisions as regards termination of employment.

Procedural fairness

10. On 23 January 2015, the Claimant's Medical Officer requested the Vice Chancellor to consider taking disciplinary action against the Claimant for *insubordination* (instructing clinical officers to defy a duty roster prepared by the Medical Officer).

11. On receipt of the request from the Medical Officer, the Vice Chancellor wrote to the Claimant on 5 February 2015 informing him that he had been interdicted with immediate effect and further that he should show cause within 7 days why he should not be dismissed for *refusal to take lawful instructions from your supervisor/insubordination*. The letter was copied to the Secretary of the Union.

12. On 17 February 2015, the Registrar, Administration wrote to the Claimant inviting him to attend a disciplinary hearing on 4 March 2015 (the hearing aborted because the Claimant moved Court and secured interim relief).

13. On 24 April 2015 the Respondent sent out an invitation letter to the Claimant to appear before its Council Disciplinary Committee on 8 May 2015 to answer to allegations of *gross misconduct/insubordination contrary to clause 5.3 of the collective bargaining agreement and section 44(4)(e) of the Employment Act, 2007*. The letter was also copied to the Secretary of the Union.

14. After the hearing, the Claimant was dismissed.

15. In challenging the process, the Claimant contended that he was not informed in advance of the allegations to confront before the interdiction/dismissal; that the Kenya University Staff Union was not involved; that there was conflict of interest among members of the Disciplinary Committee and that the complainant was not a witness before the Disciplinary Committee.

16. Clause 5.2 of the collective bargaining agreement between the *Inter Public University Councils Consultative Forum* and the *Universities Non-Teaching Staff Union* which was filed by the Claimant empowered the Principal to interdict/suspend an employee.

17. The said clause does not provide that an employee is entitled to advance notice or a hearing before interdiction/suspension.

18. The Court therefore finds no merit on the claims of an entitlement to a hearing before interdiction/suspension.

19. On the assertion that the Union was not involved in the process, the Court notes that the Claimant did not draw the attention of the Court to the clause which requires the involvement of the Union and at what stage.

20. The Court is however aware that the question of Union involvement in a disciplinary process is usually provided for in a recognition agreement. The parties here did not produce the applicable recognition agreement.

21. In the instant case, the minutes of the Human Resource Management Committee meeting held on 8 May 2015 show that both the Chairman and Secretary of the Union were present and that the constitution of the Committee was noted as being in consonance with the Laikipia University Statutes (Human Resource Management Committee and the collective bargaining agreement).

22. On the question of failure to call the University Medical Officer, it is now accepted that a disciplinary hearing is not a mini-court where the strictures of a court room trial must be observed.

23. In any case, the Claimant did not demonstrate that the failure occasioned him any injustice or prejudice.

24. The Court also notes that although the Claimant submitted that the University Medical Officer was part of the hearing on 8 May 2015, the minutes do not corroborate that submission.

25. The Court finds that the process followed by the Respondent was substantially in compliance with the statutory requirements and contractual agreement.

Substantive fairness

26. The charge or allegation against the Claimant was gross *misconduct/insubordination* and the particulars were that the Claimant had through an email dated 18 January 2015, a meeting held on 20 January 2015, letter dated 21 January 2015 and text message(s) instructed the Respondent's clinical officers to defy the duty roster prepared by the University Medical Officer.

27. Copies of the correspondences were produced in Court.

28. In the email of 18 January 2015, the Claimant wrote ... *Meanwhile pls ignore the duty rota which was done by Dr. Mulongo. He as a Medical Officer is not authorised to make a duty rota for clinicians unless he is part of that rota.....*

29. The Respondent also produced previous correspondences in which the Claimant had been accused of insubordination and had been found guilty and issued with a warning.

30. It is clear from the evidence presented before Court that the University Medical officer was the overall in charge of the Respondent's health facilities and therefore administratively the Claimant's supervisor.

31. The relationship between the Claimant (acted in absence of substantive holder of the office) and Dr. Mulongo was acidic.

32. Despite the acidic relationship, the Claimant was expected, in the pecking order, to defer to the University Medical Officer. He did not and went as far as mobilising his colleagues not to follow the roster prepared by the University Medical Officer.

33. In all reasonableness, if the Claimant felt the University Medical Officer was meddling in his duties, as a senior officer, he should have sought the intervention of the Respondent's higher management. He did not.

34. The conduct of the Claimant, in the view of the Court amounted to insubordination warranting summary dismissal.

35. The Court finds the termination of the Claimant's contract was for a valid and fair reason.

Appropriate remedies/contractual entitlements

Gratuity/service pay

36. The Claimant sought gratuity/service pay amounting to Kshs 3,402,000/-.

37. The Claimant however did not lay any contractual, evidential or legal foundation for payment of gratuity or service pay.

38. The dismissal letter advised the Claimant to follow up on his pension with the Egerton University Pension Scheme for his benefits.

39. The head of claim was not proved.

Damages for 10 years to end of contract

40. The Claimant did not lay any evidential/legal foundation to the claim for payment of remuneration he would have earned had he served up to end of his contract/retirement. The claim is therefore legally untenable.

Compensation

41. The Court having found the separation was fair, compensation is not available.

Reinstatement

42. With the conclusion reached on fairness of the separation, reinstatement would not be a remedy to consider.

Certificate of Service

43. A certificate of service is a statutory right. The Respondent should issue one to the Claimant forthwith.

Conclusion and Orders

44. In light of the above, the Court finds no merit in the Claimant's case and orders that the Memorandum of Claim herein be dismissed with no order as to costs.

45. File to be transmitted back to Nakuru.

Delivered, dated and signed in Nairobi on this 23rd day of February 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kahiga instructed by Mirugi Kariuki & Co. Advocates

For Respondent Mr. Mwangi instructed by Mwangi Mukira & Co. Advocates

Court Assistants Nixon/Martin