



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 135 OF 2013**

**(Before Hon. Justice Hellen S. Wasilwa on 19<sup>th</sup> June, 2018)**

**DAVID NJIHIA MWAURA ..... CLAIMANT**

**VERSUS**

**THE MANAGEMENT**

**UNIVERSITY OF AFRICA (MUA) .....RESPONDENT**

**JUDGEMENT**

1. The Claimant filed suit on 24<sup>th</sup> January 2014 through the firm of C/o J. M Njenga & Co. Advocates seeking damages for unfair, unlawful and wrongful termination and payment of his terminal benefits as well as outstanding dues.

2. The Claimant avers that he first joined Kenya Institute of Management (KIM) Nairobi on 3<sup>rd</sup> September 2001 as an Internal Auditor and after stringent continuous assessment and annual performance appraisal he rose through the ranks up to the level of Director Operations at KIM until on or about 31<sup>st</sup> January 2012 when his services were terminated with benefits and service period and employed by the Respondent vide a letter dated 31<sup>st</sup> January 2012.

3. He further avers that on 16<sup>th</sup> February 2012, he received an oral communication from the VC inquiring about some alleged double payment of leave allowance. He gave a basic explanation to the VC and on 21<sup>st</sup> March 2012 the Respondent wrote a letter to him on salary increment with an indication that his salary would remain at Kshs. 477,000 p.m until otherwise advised. On 30<sup>th</sup> March 2012 he was sent on compulsory leave on alleged gross misconduct in relation to the issue of a bank overdraft.

4. He states that on 15<sup>th</sup> May 2012, he received a letter enquiring him to appear before the Respondent's Board on 22<sup>nd</sup> May 2012. The letter brought out issue of leave allowance which was not part of his being sent on leave which he appealed.

5. He wrote a letter dated 28<sup>th</sup> May 2012 to the Respondent regarding outcome of his appearance before the board and the fact that he was still on compulsory leave. By a letter dated 29<sup>th</sup> May 2012 from the Respondent he was given 3 options:-

***i) 3 months' notice to leave employment,***

***ii) the option of resigning and***

***iii) the option of retiring. He responded vide a letter dated 31<sup>st</sup> May 2012 requesting for a negotiated settlement pleading innocence on any allegations leveled against him.***

6. His services were terminated vide a letter dated 4<sup>th</sup> June 2012 on the basis that he was guilty of fraud and unauthorized variation of the Respondent's Governing Council's decision on a bank overdraft.

7. The Respondent filed their Replying Memorandum where they admit that the Claimant was their employee but deny all the allegations and prayers set out in the Memorandum of claim and put the Claimant to strict proof.

8. They aver that while fully aware, the Claimant caused the sum of Ksh. 166,950 to be paid to him as leave allowance twice, this was done

deliberately and with the intention to defraud when he submitted his personal duplicate copy to the Respondent on 27<sup>th</sup> December 2011 before the payroll was transferred to KIM for payment and failed to inform KIM that he had already received the payment.

9. They further aver that at a Council meeting of the Respondent held on 15<sup>th</sup> December 2011, the Council approved an overdraft of Kshs. 50 million which decision was communicated to their bankers, Barclays Bank of Kenya Limited via a letter dated 23<sup>rd</sup> January 2012. Between January 2012 and March 2012, the Claimant communicated and corresponded with officers of the Respondent banker which eventually lead to a variation of the approved overdraft facility from Kshs. 50 million to:-

*i. Kshs. 25 million overdraft facility*

*ii. Kshs. 15.5 million term loan commercial*

*iii. Kshs. 10 million credit facility asset finance*

10. They aver that the unilateral and unauthorized actions of the Claimant amounted to gross insubordination. They state that on 24<sup>th</sup> February 2012, they wrote to the Claimant and asked him to explain the double payment of leave allowance but he failed to give satisfactory and/or sufficient explanations and he was sent on compulsory leave on 30<sup>th</sup> March 2012 to allow comprehensive investigations.

11. On May 2012, the Claimant was invited to and he attended a disciplinary session before the University Governing Council disciplinary panel where he was given a chance to be heard. A final verdict of the Council, after a thorough and careful examination of the facts, was to disengage the Claimant from employment but in strict compliance with the law.

12. They state that on 23<sup>rd</sup> May 2012, the VC of the Respondent in a meeting at the offices in which the Claimant was present, communicated the verdict of the Governing Council to the Claimant and provided him with 3 options which was to communicate back his response but failed to do so by 4<sup>th</sup> June 2012 as had been requested. Vide a letter dated 4<sup>th</sup> June 2012 they terminated the Claimant's services and on 9<sup>th</sup> August 2012, the Respondent drew a cheque for Kshs.570,663.80 on favour of the Claimant but he has failed to collect the same despite having notice and the cheque is still available for collection.

#### **Submissions**

13. The Claimant filed his submissions where he submits that on the issue of fraudulent receipt, there was uncontroverted evidence and which was even admitted by the Respondent's witnesses and the double leave payment was not only an apparent issue of human error by Kim and devoid of the Claimant's influence or intervention. Therefore the Claimant cannot be held culpable for the acts of omission or commission and particularly so by KIM staff who did the double payment.

14. He further states that he was not given a fair hearing and based on the law and facts, thus he is entitled to all reliefs sought. He relied on the case of **Jacob Okal Odor Vs Kenya Institute of Management in Nairobi Industrial Court Case No. 1764 of 2011.**

15. He avers that he is also entitled to certificate of service to be issued unconditionally by the respondent and pray for judgement as sprayed in the statement of claim.

16. The Respondent filed their submissions where they submit that the issues for determination in a claim of this nature will naturally flow from Section 45 of the Act, they state that the Claimant instructed his junior to process leave payment of Kshs. 166,950 using the wrong form which was paid on 27<sup>th</sup> December 2011 by cheque signed by himself then deliberately and with the intention to defraud proceeded to process his leave allowance while knowing or having reason to know that the same would be processed at KIM leading to payment and upon receipt of double leave allowance, the Claimant failed to bring it to the attention of the Deputy Finance Officer and only owned up when other people discovered the double payment.

17. They aver that the Claimant engaged the officers of the Respondent bankers without the authority of the VC and/or the Governing Council on financial matters whose effects would drastically affect the financial status of the Respondent which actions occasioned the Respondents' bankers to expend unnecessary time and energy in preparing documents for approval and execution by the Respondent which amounted to gross insubordination. This led to the termination of the Claimant's services. They relied on the case of **Thomas Sila Nzivu Vs Bamburi Cement Limited Case No. 117 of 2013.**

18. They further aver that the Claimant is not entitled to the reliefs sought as the termination was fair and in strict compliance with the Labour Laws, the staff regulations and the contract of employment. They state that the amount claimed in the submissions is different from the amount pleaded in the Statement of Claim rendering the claim incompetent.

19. They further state that a certificate of service has been ready for collection by the Claimant and therefore urge the Court to dismiss the claim with costs to the Respondent save for the claims admitted and offered by the Respondent.

20. I have examined all the evidence and submissions of the parties herein. The issues for determination are as follows:-

*1) Whether there were valid reasons to warrant termination of the Claimant.*

*2) Whether the Claimant was subjected to due process before being terminated.*

### **3) Whether the Claimant is entitled to the remedies sought.**

21. The Respondent have explained the reasons for terminating the Claimant as being fraud stemming from double payment of leave allowance and insubordination by varying the Respondent's Board directive to its bankers.
22. In respect of the double payment of leave allowance, the claimant has explained that he was paid in error by Respondent's staff and so the error should not be loaded upon him. He avers that he had been paid leave allowance by cheque approved by the VC but that the same leave allowance was credited to his account with his salary by the Respondent's staff.
23. He avers that when he was informed of the double payments, he asked one Doreen – Deputy Finance Officer to recover the entire amount from his February 2012 salary. The VC also asked him to explain the issue in writing and he did on 27.2.2012.
24. On bank overdraft facility the Claimant stated that the bank had a prerogative on how to effect the same and when the bank communicated to the VC he was very annoyed and that is when the Claimant was sent on compulsory leave and later subjected to a disciplinary committee hearing and then terminated.
25. The Respondent was in charge of Finance then and he knew the leave form that went to Respondent was the one that would have him paid. He however used this form to process another leave allowance to himself.
26. On the overdraft, the Respondent submitted that the 3<sup>rd</sup> Council meeting of the Respondent held on 15/12/2011 resolved that an overdraft of 50 million be taken by the Respondent. That the Claimant however gave the bank different instructions without consulting the VC and Chairman of the Council.
27. From this analysis, it is clear that Claimant was in charge of Finance at the time. He was fully aware of all financial processes of the Respondent. The Claimant has alluded to the error but also stated that he was not to blame for the mistake but it was an error on the Respondent's part. He even paid back the 238,500/= he had received in error the same month the error was discovered.
28. In this case then it was not proper to have the Respondent insists that there was fraud on Claimant's part. The circumstances under which the double payments were made are not clear. In the circumstances and in view of the fact that the Claimant refunded the double portion of what he had been paid, punishing him with a termination on the same facts was double punishment and therefore not a valid reason for termination.
29. On the issue of the bank overdraft, the Respondents had approved an overdraft facility of 50 million. This decision was communicated to the Respondent's bankers vide a letter dated 23.1.2012 and was signed by the VC and Chairman of the Council.
30. Between January 2012 and March 2012 however the Claimant communicated and corresponded with officers of the Respondent's bank which eventually lead to a variation of the approved overdraft facility from 50 million to Kshs.25 million overdraft facility – 15.5 million term loan commercial and Kshs.10 million Credit facility Asset Finance.
31. The fact that the initial offer was made by the Respondent, it was imperative that the Claimant could not unilaterally vary the terms of the overdraft facility without approval from the VC and Chairman of the University Council.
32. I agree that the Claimant acted in gross insubordination to his superiors. This was an act that was punishable under the Respondent's Rules and Regulation. I therefore find that there were valid reasons to warrant disciplinary action against the Claimant. The offence is covered by Clause 3.2 of the Respondent's Rules and Regulations. Clause 3.1 of Respondent's Rules and Regulations provided as follows:-
- “When an employee violates or breaks any of the Rules, Regulations and commits any of the offences stipulated and is found guilty, the management will depending on the gravity of the case impose the following measures:-***
- 1) Give two written warnings.***
  - 2) Give a final warning.***
  - 3) Salary deductions for loss of the University, property in order to recover the costs of the missing items.***
  - 4) Termination of employment”.***
33. These rules were however introduced in April 2012 when Claimant was on compulsory leave and never resumed duty then it is safe to say these Rules and Regulations were never brought to his attention.
34. Assuming even that the rules are valid, having been promulgated when the Claimant was still in Respondent's employment, the procedures stipulated above were never followed.
35. The Claimant was subjected to some form of disciplinary action but not as provided for by the Respondent's Rules and Regulations under Clause 3.1 above.
36. In view of this finding, and in view of the provision of Section 45(2), the termination of the Respondent was not fair. Section 45(2) of

Employment Act provides as follows:-

- (2) *“A termination of employment by an employer is unfair if the employer fails to prove:*
- (a) *that the reason for the termination is valid;*
  - (b) *that the reason for the termination is a fair reason:-*
    - (i) *related to the employee’s conduct, capacity or compatibility; or*
    - (ii) *based on the operational requirements of the employer; and*
  - (c) *that the employment was terminated in accordance with fair procedure.*

37. Given that proper disciplinary processes were never followed, it is my finding that due process was not followed. I therefore find for Claimant and award him as follows:-

1. *3 months’ salary in lieu of notice as per the Rules and Regulations = 477,000 x 3 = 1,431,000/=.*

2. *Salary for 3 days worked upto 3/6/2012 = 47,700/=.*

3. *Unpaid leave for 41 days = 477,000/=.*

4. *6 months’ salary as compensation for unfair termination = 6 x 477,000 = 2,862,000/=.*

**TOTAL = 4,817,700/=**

5. *The Claimant is also entitled to his Certificate of Service.*

6. *The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.*

Dated and delivered in open Court this **day of 19<sup>th</sup> June, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Kiragu holding brief for Njenga for Claimant – Present

Thagei for Respondent – Present