



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 340 OF 2014

(Before Hon. Justice Mathews N. Nduma)

ROBERT ADALA OBARE.....CLAIMANT

VERSUS

MASENO UNIVERSITY COUNCIL.....RESPONDENT

J U D G M E N T

1. The suit was brought vide an amended memorandum of claim dated 27th July, 2015. Initial memorandum of claim was dated 3rd December, 2014. The Claimant seeks reinstatement to his job and in the alternative compensation for wrongful termination and payment of terminal benefits. The Claimant further seeks provision of a certificate of service. Costs and interest.

Facts of the Claim

2. The Claimant worked for the Respondent as a procurement officer from 7th May, 2012. He worked for the Respondent diligently for two years until the 4th April, 2014 when he was summoned to appear before the University council meeting held at 12.00 am mid-night.

3. On 7th April, 2014 he received a letter asking him to step aside based on allegations of gross neglect of duty, professional misconduct and incompetence.

4. By a letter dated 6th October, 2014 the University Council levelled 12 charges against the Claimant and asked him to respond before 10th October, 2014. On 30th October, 2014, he appeared before a disciplinary hearing to answer the charges. The Claimant alleges that he was not allowed to call a witness or bring a representative of choice.

5. On 1st December, 2014, the Claimant received a letter of termination dated 28th November, 2014.

6. The Claimant states that the disciplinary process was flawed and a nullity due to failure to follow the statutory requirements. In particular section 18(3) & (4) of the university statute 2013 provided that a staff in the place of the claimant in grade II to 13 is handled by the Vice Chancellor as Chair; Deputy Vice Chancellor; one Senate representative; Dean of respective school, Chair of respective department; Registrar Administrative and Central Services; Legal Officer; One Union representative and Director Human Resource as the secretary.

7. That a decision of this panel, is appealable to the University council within 14 days.

8. That under the University CBA clause 16.2.1 (a) and (c), either party terminating must give 3 months notice and the letter to be copied to the union.

9. That the Respondent violated the above clause and further violated Article 5(i) – (m) of the CBA concerning staff disciplinary procedure.

10. That the matter had to be dealt with within six months in terms of section 63(3) of the University Act, but it took eight months to complete.

11. That the University council acted as the complainant investigator, prosecutor and judge rendering the process completely lopsided, biased and unfair.

12. The Claimant's right to a fair hearing under Article 50(1) of the constitution of Kenya 2010 was violated in that an impartial and independent body as envisaged by law was not availed to hear his case.

13. The Claimant prays that the process be nullified and the prayers set out in the Memorandum of Claim be granted. That despite demand, the Respondent failed to make good the loss.

Response

14. The Respondent filed an amended defence to the Memorandum of Claim on 18th May, 2015.

15. The Respondent admits the employment particulars of the Claimant as a procurement officer in grade 12 and promotion to be in charge of the procurement section of the Respondent.

16. The Respondent denies that the Claimant worked diligently for two years. Respondent admits that the Claimant reported directly to the Vice Chancellor and the Deputy Vice Chancellor in charge of Administration, Finance and Development.

17. The Respondent admits having summoned the Claimant before it on 4th April, 2014 in relation to a tender process for the completion of a new library complex but not at mid-night.

18. Respondent admits issuing to the Claimant letter dated 7th April, 2014 asking him to step aside to allow investigations on the alleged gross negligence of duty, professional misconduct and incompetence.

19. The Respondent further admits charging the Claimant by a letter dated 6th October, 2014 with 12 counts arising from the alleged neglect of duty, professional misconduct and incompetence.

20. The Claimant was required to respond on or before 10th October, 2014 and to appeal in person before the Respondent to defend himself.

21. The Respondent further admits to conducting a disciplinary hearing on 30th October, 2014 in which the Claimant was given a chance to defend himself. That the Respondent considered the case and made a decision to terminate the employment of the Claimant.

22. Respondent states that the Claimant did not request to call any witness or to bring staff union member to the disciplinary hearing. Respondent adds that these were matters within the discretion of the Claimant. That the Claimant did not ask for time extension to do any of the above. That this is but an afterthought.

23. The Respondent asserts that it complied with the University statutes in the conduct of the disciplinary hearing. That at the time the Respondent was still in transition and in the process of implementing the establishment of Disciplinary Committees, whose membership was designated by what office holders would constitute them in terms of the relevant Maseno University Statutes 2013, which came into operation on 30th August, 2013 and in terms of section 18(3) and (4). The Respondent therefore admits that the said Disciplinary Committees had not been constituted nor had their respective members been nominated or put in place.

24. The Respondent however states that in the absence of the committees, as the body with the mandate to govern, control and administer the university, the Council had powers to institute disciplinary proceedings against the Claimant as it did. That the Claimant was given a fair hearing and the allegations of partiality and bias are denied.

25. The Respondent denies that the claimant was entitled to three months notice in terms of clause 16.2.1 since he was summarily dismissed. That the clause is applicable only in a normal termination which was not the case.

26. The Respondent states that the disciplinary process took 7 months and not 8 months as alleged by the claimant, just a little above the 6 months period prescribed by section 63(3) of the University Act, 2012, which cannot be deemed to be unreasonably inexpedient in the circumstances of this case.

27. The Respondent denies it received a demand notice.

28. The Respondent prays the suit be dismissed with costs.

Determination

29. On 1st February, 2018, Mr. Osodo for Mr. Ragot for the Respondent and Mr. Ario for the claimant informed the court that they intended to dispense with oral evidence and proceed by way of written submissions. Mr. Osodo requested that the court adopts the replying affidavit filed on 4th March, 2015 to a notice of motion filed by the Claimant as its witness statement and the court made an order to that effect. Both parties filed their respective submissions. The issues for determination are as follows:-

(i) Whether the disciplinary process was contrary to Maseno University statute 2013 and therefore null and void.

(ii) Whether the claimant is entitled to the reliefs sought.

Issue i

30. The Respondent has admitted to the procedural flaws pleaded by the Claimant seeking to justify the omission to establish a disciplinary committee to hear and determine the case against the claim in terms of section 18(3) and (4) of the Maseno University Statute, 2013 which became operational on 30th August, 2013 on the fact that the University was in transitional period and had therefore not established the mandatory disciplinary committees in terms of the law.

31. The fact of the matter is that, as at 30th October, 2014 when the Claimant appeared before persons purporting to be a disciplinary committee for staff members of Maseno University the Maseno University Statute 2013, had come into operation as at 30th August 2013, more than one (1) year and two months earlier. There was clearly inordinate delay on the part of the Respondent to implement its statute, and it cannot be heard to visit its omissions on the claimant who headed a critical section of the University.

32. By its own admission the University acted *ultra vires* section 18(3) & (4) of the Maseno University Statute, 2013. There was not in place a lawful organ to discipline the Claimant. The body that set to discipline and summarily dismiss the Claimant from his employment was an illegal body. The decision of this body was unlawful, null and void.

Issue ii

33. Is the Claimant entitled to the reliefs sought? The Claimant lost his job on 28th November 2014 about three years and eight months from the date of completion of his contract. The Claimant held a position that required utmost trust by the Respondent. The merits of the allegations made against the Claimant have not been fully canvassed the parties having opted to dispense with oral evidence. It must be remembered all the time that the Plaintiff bears the primary onus of proof of that which he alleges in terms of sections 107, 108 and 109 of the Evidence Act, Cap 80 Laws of Kenya.

34. The court has already determined that the process that led to the summary dismissal of the Claimant was *ultra vires* the statute, and null and void. However, there is no sufficient material before court to determine whether it is safe or not to reinstate the Claimant to his job as the head of procurement at the Maseno University.

35. The summary dismissal of the claimant violated sections 41, 43 and 45 of the Employment Act. The Claimant is entitled to compensation in terms of sections 49(1)(c) as read with subsection 49(4) of the Act.

36. The Claimant had served the Respondent in a most senior position for about two years. The extent of loss and damage must be understood in this context. A good career was lost at the behest of an illegal body. The claimant was not given notice nor paid in lieu of notice. He was summarily dismissed. The Respondent admits that the Claimant was otherwise entitled to three (3) months notice or payment in lieu thereof.

37. The court finds no difficulty in first awarding the claimant three (3) months salary in lieu of notice in the sum of Kshs.(127,253 x 3).

38. The Claimant wished to be reinstated. He received no compensation upon termination. He got no terminal benefits upon dismissal. The claimant did not contribute to his dismissal since he was not subjected to the lawful disciplinary process to determine the issue.

39. Considering the circumstances of the case and the Court of appeal decision in the matter of **Kenfreight (EA) Limited [2016] Vs. Benson K. Nguti eKLR**, which the court upheld 12 months' salary in compensation.

40. The court awards the Claimant ten (10) months salary in compensation for unlawful dismissal in the sum of Kshs.1,272,530.

41. In the final analysis, judgment is entered in favour of the claimant as against the Respondent as follows:-

(a) Kshs.381,759 in lieu of three months notice.

(b) Kshs.1,272,530 in compensation for the unlawful and unfair termination of employment.

Total award is 1,654,289.

(c) Interest at court rates from date of judgment till payment in full.

(d) Costs of the suit.

(e) Respondent to provide Claimant certificate of Service within 30 days.

Dated and Signed in Kisumu this 12th day of July, 2018

Mathews N. Nduma

Judge

Appearances

Mr. Ario for Claimant

Mr. Ragot for the Respondent

Chrispo – Court Clerk