



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 518 OF 2016

BETWEEN

BAKARI HAKOMA BOY.....CLAIMANT

VERSUS

TECHNICAL UNIVERSITY OF MOMBASA.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Ameli Inyangu & Partners, Advocates for the Claimant

Oluga & Company, Advocates for the Respondent

JUDGMENT

Pleadings

1. The Claimant filed his Statement of Claim on 27th June 2016. He states he was employed by the Respondent University as a Tutorial Fellow, for 2 years, effective from 1st January 2014, on a monthly gross salary of Kshs. 143,271. Previously, he was engaged as a Lecturer on 2 successive 1-year contracts, which he completed successfully. His contracts were renewed based on good performance. He was always at work despite the lapse of the preceding contract. His last contract lapsed by effluxion of time on 31st December 2015. The Claimant went on serving on the same terms as given under the outgoing contract. He supervised exams. He continued serving until 2nd February 2016, when he was served with a Certificate of Service. There was no notice of termination of services. He was denied salary for January 2016, and for 12 days worked in February, 2016. The Claimant urges the Court to find termination was unfair, and grant him the following prayers:-

- a) Salary for January 2016 at Kshs. 143,271.
- b) Salary for 12 days worked in February 2016 at Kshs. 57,308.
- c) 1 month salary in lieu of notice at Kshs. 143,271.
- d) Annual leave for 2014 and 2015 at Kshs. 286,542.
- e) 12 months' salary in compensation for unfair termination at Kshs. 1,719,252.

Total.....Kshs. 2,349,644.

- f) Declaration that termination was unfair.
- g) Costs and interest.

2. The Respondent filed its Statement of Response on 7th October 2016. It is conceded the Claimant was employed by the Respondent as indicated in the Claim. His last contract expired on 31st December 2015, and was not renewed. The question of unfair termination does not arise. In 2015, Students went on strike. Consequently the Semester was extended by an additional 1 month, for purposes of examinations. The Claimant took part in examinations. He was bound under his contract to administer, supervise, and mark examinations, and to hand in results before handing over, following the expiry of his contract. His contract was not extended. He was not retained in employment after expiry of his contract. He ceased to exhibit satisfactory performance after renewal of his second contract. He sexually harassed his own Students, in a scandal dubbed 'sex for marks.' Students lodged complaints against the Claimant. He was heard by the Staff Disciplinary Committee and found guilty of sexual harassment. It was decided his contract is terminated with effect from 1st December 2014. He appealed against the decision to the Staff Appeals Committee. The guilty verdict was sustained, but the Claimant was pardoned and recalled with a stern warning against repeating the same offence. Against this background, the Respondent decided not to renew the Claimant's contract when it expired on 31st December 2015. Without prejudice to the foregoing, the Respondent holds that renewal of the contract was fully at the discretion of the Respondent. He is entitled to salary for January 2016 upon clearance with the Respondent. He did not request for annual leave for 2014 and 2015, and the same was forfeited. The Respondent prays the Claim is dismissed with costs to the Respondent.

3. The Claimant testified, and rested his case, on 13th March 2017. Respondent's Legal Officer, Serah Esendi Okumu testified for the Respondent on 7th February 2018, bringing the hearing to a close.

Claimant's Position.

4. The Claimant restated his employment history, and the terms and conditions of service as, pleaded in the Statement of Claim, and largely conceded by the Respondent. He exhibited the various contracts. He confirmed that he had been accused of sexually harassing a Female Student. It was alleged he failed her, because she declined to submit to his sexual advances. He was initially found guilty. He appealed. He was absolved and reinstated. His contract was renewed based on his performance. In 2015, his departmental Head recommended Claimant's contract is renewed, based on good performance. Certificate of Service is issued to an Employee whose contract is terminated. The Claimant's contract had not been terminated. He was not given notice of termination. He was not given reason for termination and was not given a fair hearing before the decision was made.

5. Cross-examined, the Claimant testified his contract did not have provision for automatic renewal. There were specific expiry dates. He was accused of sexual harassment. He was found guilty initially. He appealed, was warned and reinstated. He did not agree that warning meant the Appeals Committee sustained the finding of guilt. The warning letter stated if he repeated the same offence, there would be a severer penalty. He was appraised and granted 47% mark, as shown at page 38 of Respondent's Bundle of documents. The Exam timetable shows the Claimant supervised exams on 14th January 2016, 18th January 2016 and 20th January 2016. These were the only dates he supervised exams. He claims he worked for 12 days in February 2016. He was marking exams during these days. He was under suspension for some days in 2014. He did not apply for annual leave. Exams were pushed to January 2016, because of Student unrest. It was part of Claimant's duties to mark exams. He did not clear with the University.

6. Redirected, the Claimant told the Court there were no new allegations against him, after he was reinstated by the Appeals Committee. His duties were not confined to supervision of exams. He only went on leave in 2012 and 2013. He did not owe the Respondent anything on termination.

Respondent's Position

7. Learned Counsel Serah Esendi Okumu supported the position that the Claimant's contract was not terminated by the Respondent; it expired in December 2015. The Claimant held over to January 2016 to supervise exams. There was a strike by Students in December 2015, which necessitated the moving of exams to January 2016. Administering of exams was part of Claimant's job description. There were no other duties performed by the Claimant in January 2016. He was only involved in exams as shown in the exam time-table. He was not paid in January 2016. Certificate of Service issued on 25th January 2016. The payroll for the month had already been closed. Respondent's page 39 contains a letter of termination of the Claimant's contract. It was not really termination but notification of expiry of contract. His contract had been renewed in the past, but could not be renewed after December 2015, because of poor performance and disciplinary issues. His last evaluation gave him a mark of 47%. It was recommended the contract should not be renewed. He was found guilty of sexual harassment of Students. He was affirmed guilty on appeal, but warned and reinstated. Warning is one of the penalties provided for under Respondent's terms of service. Notice was not required because contract expired. Leave is forfeited if not applied for. The Claimant did not apply for leave in 2014 and 2015.

8. On cross-examination, Okumu testified that administration of exams was part of the Claimant's duties. Exams went on to the end of January 2016. He also marked exams. This did not go on to the month of February 2016. Every faculty had timelines. Salaries are paid monthly. It was not the practice of the Respondent to employ the Claimant effective 1st January of the year, and issue the relevant contract on 30th January of the respective period. He did not commit another offence after he was issued warning on appeal. The letter of termination was not meant to go to the Claimant. It was to be used by the payroll department for record purposes. The appraisal form granting the Claimant 47% was not a manufactured document. The Claimant did not append his signature to the form. The Respondent offered to pay the Claimant salary for January 2016, because of the strike. Page 31 of the Respondent's documents states the Claimant was owed 31 days of annual leave before reinstatement by the Appeals Committee. Redirected, Okumu emphasized that the University was not obliged to renew Claimant's contract, whether there was no poor performance, or allegations of sexual harassment. The Claimant simply held over to administer delayed exams. Termination letter was aimed at assisting payroll department in removal of the Claimant from the payroll.

The Court Finds:-

9. The Claimant was employed by the Respondent as a Lecturer and Tutorial Fellow on various determinate contracts. The last contract commenced 1st January 2014, and would last up to 31st December 2015.

10. Before expiry of this 2-year contract, the Claimant was involved in sex for marks scandal. It was alleged he failed Students, because they denied him sex. The minutes of the Staff Disciplinary Committee exhibited by the Respondent show the Claimant sexually harassed 3 Female Students whose names are given, who lodged complaints with the Respondent. He was found guilty by the Staff Disciplinary Committee, and recommendation made, to terminate his contract of employment. The contract was terminated with effect from 1st December 2014. The Claimant appealed against the decision to the Appeals Committee. He was reinstated with effect from 1st May 2015 by this Committee after hearing, and warned in accordance with Terms of Service for Academic Staff.

11. His contract eventually lapsed on 31st December 2015. The Parties agree there was a strike by Students sometime in December 2015, which interrupted exams, due to take place in December 2015. The exams took place in January 2016.

12. The Court does not think that this occurrence can be viewed as an extension of the Claimant's contract, or as providing the Claimant with legitimate expectation for renewal. This was simply an occurrence that demanded the Claimant holds over to complete a task, which ordinarily, would have been performed within the contract period. Delay in the conduct of exams was occasioned by a supervening event, which the Respondent had no reason to anticipate. The exam time-table shows the Claimant was only at work, to supervise exams, and did not lecture, or discharge the functions of a Tutorial Fellow in any other way. The unrest at the University imposed itself on the Parties, demanding that they adjust terms of completion of the contract, rather than demand that the Claimant's contract is renewed. It was within the Claimant's terms and conditions of service to administer exams, a role he could not just leave undone, after the delay occasioned by students' unrest in December 2015.

13. The Respondent did not have an obligation to give reasons for non renewal of the Claimant's contract. If the Claimant needed to have reasons, it is clear to the Court that such reasons were readily available. The Claimant was engaged in sex for marks scandal. He was heard at length by the Disciplinary Committee, in the presence of his Trade Union Representatives and convicted. The Appeals Committee did not absolve him of these allegations. It affirmed the finding of guilt, but imposed the lesser penalty of warning, under the Terms of Service for Academic Staff. It is hard to see which University, would renew the contract of an Employee, the particular University has adjudged is a sex pest. Such renewal, or an order for compensation in default of renewal, would gravely offend *ordre public*. The Claimant's contracts had been routinely renewed in the past. But, in the past there were no sex scandals hovering over the Claimant, as far as the Court can read from the record. The Court does not think it is necessary to go into the evidence relating to performance evaluation. There was no obligation on the part of the Respondent to renew Claimant's contract after December 2015. If the Claimant needed to be given reason for non-renewal, there was a good reason known to him, why renewal was not given.

15. The Respondent did not justify its withholding of Claimant's January 2016 salary. It is clear that he supervised exams in January 2016, and ought to have been paid his salary for January 2016. He did not have to be on the payroll to receive his salary for the period after the end of his contract. The Respondent ought to have designed a way of paying the Claimant his dues. The Court does not see how the requirement for clearance should have resulted in withholding of salary. The Respondent does not claim anything from the Claimant. There is nothing disclosed to the Court, which would justify withholding of Claimant's dues for January 2016. ***The Respondent shall pay to the Claimant January 2016 salary at Kshs. 143,271.***

16. Having supervised exams in January 2016, the Claimant was expected to mark exams, and hand in results to the Respondent, before he left the University. The Court finds the assertion that the Claimant worked 12 days in February 2016, plausible. He most probably spent 12 days marking and handing in results. ***He is allowed the prayer for 12 days' salary for work done in February 2016, at Kshs. 66,125.***

17. After he was convicted of sexual harassment, the Claimant was issued a letter of termination dated 8th December 2014. The letter acknowledged that the Claimant did not go on annual leave for 2015. He was owed 33 days for the period, which the Respondent undertook to pay. This was not paid. The Claimant's contract was renewed with effect from 1st May 2015, with the advice that other terms of service remained the same. His contract ending 31st December 2015 was therefore reinstated, with all terms, including leave entitlement intact. Did the Respondent pay to the Claimant, annual leave of 33 days after reinstatement? There is no evidence of payment.

18. The Court notes also that the Claimant was not working while the disciplinary process unfurled. He certainly did not work for the period between 1st December 2014, and 1st May 2015, a period of 5 months. It would not be fair or reasonable to grant his prayer for annual leave pay over a period of 2 years, while he did not work for 5 months. ***He is allowed 33 days of annual leave, acknowledged as owing by the Respondent, in the letter of termination dated 8th December 2014. This translates to Kshs. 181,843 in annual leave pay.***

19. Termination was not unfair. The Claimant's contract was determinate. The date of termination was known to all the Parties. There was no reasonable and legitimate expectation of renewal. The prayers for compensation and notice pay have no merit and are rejected.

20. No order on the costs.

21. ***Interest allowed at 14% per annum from the date of Judgment till payment is made in full.***

IN SUM, IT IS ORDERED:-

a) The Respondent shall pay to the Claimant: January 2016 salary at Kshs. 143,271; 12 days' salary for work done in February 2016 at Kshs. 66,125; and 33 days of annual leave at Kshs. 181,843- total Kshs. 391,239.

b) No order on the costs.

c) Interest allowed at 14% per annum from the date of Judgment till payment in full.

Dated and delivered at Mombasa this 6th day of July 2018.

James Rika

Judge