



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1942 OF 2017

HELLEN AMUNGA.....CLAIMANT

VERSUS

KENYATTA UNIVERSITY.....RESPONDENT

JUDGMENT

INTRODUCTION

1. This is a claim for the following Orders-

(a) A declaration and finding that the Claimant was unfairly dismissed.

(b) An Order directing the Respondent to pay the Claimant all outstanding dues as pleaded in paragraph 34 of the claim.

(c) An Order directing the Respondent to pay the Claimant general, punitive and exemplary damages for the breach of contract and for the loss of career progression, negative publicity and for the pain and suffering experienced.

2. The respondent avers that she dismissed the Claimant from employment on 7.3.2016 but after appeal she reinstated the Claimant to her employment on 28.9.2016 on humanitarian grounds and although she has not yet reported back to work she still treats her as her employee. She therefore prays for the suit to be dismissed with costs.

3. When the suit came up for pre-trial directions on 14.3.2018 the Counsel for the two parties agreed to dispense with oral testimonies and instead file written submissions to dispose of the suit on the basis of the pleadings and the supporting documents.

Undisputed facts

4. The Claimant was employed by the respondent as a tutorial fellow on 12.10.2009 and rose to become a Lecturer on 16.4.2015. Her salary was Kshs.173,668 per month. On 7.10.2015 and 14.10.2015, the Claimant failed to teach her respective classes and on 21.10.2015 she was served with a Show Cause letter in connection with the said offence. Thereafter she was suspended from work on half pay for engaging in acts of insubordination, professional misconduct and negligence of duty as a Lecturer effective from 13.1.2016. On 3.3.2016 she was accorded disciplinary hearing by the Senior Board of Discipline after which she was dismissed from employment on 7.3.2016 for the said misconduct.

5. The Claimant appealed against the dismissal on 23.3.2016 and the appeal was heard on 19.9.2016. The Staff Appeal Committee allowed the appeal and reinstated the Claimant to her job on condition that she is placed on a probation for one year during which period she was to undertake counseling at the respondents' Wellness Centre. The Claimant protested the conditional reinstatement but the protest was ignored. The respondent contends that the Claimant is still her employee but she is deducting all her

salary under Section 19(c) of the Employment Act for the days not worked.

Claimants Submissions

6. The Claimant submitted that her termination on 7.3.2016 was substantively and procedurally unfair. She contended that the reasons cited for the termination were not valid and that is why, in her view, the termination was rescinded on appeal. She further contended that her reinstatement subject to undergoing counseling at the Wellness Centre meant that she was of unsound mind, a matter that was unrelated to the reasons cited for her termination. She further contended that her reinstatement without payment of salary arrears was unfair labour practice.

7. On the other hand the Claimant submitted that the procedure provided under Section 41 of the Employment Act was not followed before her termination on 7.3.2016. She further contended that she was not accorded the right to have another employee or a shop floor union Representative of her choice present during the disciplinary hearing. She therefore contended that the failure to grant her the right to representation by her union rendered the termination unfair. She therefore prayed for the benefits and compensation tabulated under paragraph 50 of her Memorandum of Claim totaling to **Kshs.7,238,950** plus costs and interest at court rates.

Respondent's Submissions

8. The respondent submitted that the Claimant was dismissed for a fair reason under the law and Section 9.4 (111) of the term of service. She contended that under Section 44 (4) of the Employment Act, she was entitled to summarily dismiss the Claimant for engaging in acts of gross misconduct including failing to teach classes assigned to her and threatening, insulting and undermining the Chairman of her Department at the University. That the Claimant failed to teach her classes on 7.10.2015 and 14.10.2015 which amounted to negligence of duty, and further failed to respond to a Show Cause Memo served in connection with the said missed classes.

9. The respondent further submitted that the termination of the Claimant's contract of service on 7.3.2016 was done in accordance with fair procedure as provided under Section 45 and 41 of the Employment Act. That the Claimant was notified of the reason for which termination was being considered and thereafter she was afforded a hearing before the Respondent's Senior Board of Discipline. That the Claimant was never denied the right to call a fellow employee or union representative of his choice to accompany her to the hearing and the Board considered her representations before making its decision to terminate her services.

10. The respondent further submitted that the Claimant was informed of her right to appeal and she indeed appealed and was accorded a hearing by the Staff Appeals Board. That after considering the Appeal, the Board upheld the finding of the Senior Board of Discipline that the dismissal of the Claimant was justified, but purely on humanitarian grounds, it decided to reinstate her to her employment subject to one year probation during which time she was to attend counseling at the respondent's Wellness Centre.

11. The respondent also submitted that the circumstances of this case warranted conditional reinstatement to provide the Claimant with counseling and emotional support to deal with the stress from her alleged work overload. In the respondent's view, the Claimant had physically threatened and attacked a fellow staff member and as such, it was necessary to consider the welfare of the other employees. That despite the fact that Claimant has not reported back to work, the respondent contended that she is still her employee because she has not yet served any termination notice.

12. Finally the respondent submitted that the Claimant is not entitled to the reliefs sought in the suit. That the Claimant was paid 3 months' salary in lieu of notice as indicated in the termination letter. That the Claimant's prayer for leave days not utilized should be calculated based on the basic pay and not gross salary. That the half salary withheld during suspension period is not payable because the Claimant was not exonerated of the charges she faced. That salary for part time teaching is a matter of course once students' marks are submitted and the payment requested for. Finally, the respondent contended that the

claim for Kshs.8000 Workshop allowance was a departmental issue and not a managerial affair and as such, the Claimant should deal with organisers of the workshop. She urged the Court to dismiss the Claimant's claims because they have not been specifically proved.

Analysis and Determination

13. There is no dispute that the Claimant was employed as a Lecturer by the respondent until 7.3.2016 when she was terminated for gross misconduct. There is further no dispute that the Claimant appealed against the said termination and despite the same being found justified, the Appeals Board set aside the termination on humanitarian grounds and reinstated the Claimant to her employment subject to one year probation, during which period she was to attend Counselling at the respondent's Wellness Centre. There is further no dispute that the Claimant has to date not reported back to work and has instead protested to the respondent that the conditions attached to the reinstatement is unfair and it did not relate to the reasons cited for the termination.

14. The issues for determination herein are therefore:-

- (a) Whether the termination of the Claimant's contract of service on 7.3.2016 was unfair and unlawful.
- (b) Whether the Claimant is still in the respondent's employment.
- (c) Whether the reliefs sought should be granted.

Unfair and unlawful termination

15. Under Section 45 (a) of the Employment Act, termination of employment of an employee is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. A reason is fair if it relates to the employees' conduct, capacity and compatibility, or the employer's operational requirements. The procedure is fair if it complies with section 41 and 51 of the Act, which basically entails, granting of the employee a hearing before termination and issuing him/her with certificate of service.

Reasons for termination

16. The reasons cited in the termination letter dated 7.3.2016 were:-

- (a) Failure to teach ECT 202 on 7th, 14th and from 21st of October, until the end of the Semester.
- (b) Threatening the Chairman of the Department that she would cause crisis in the department if work load was not reduced from her.
- (c) Insulting, undermining and nearly physically attacking the Chairman of the Department, during a departmental meeting on 6.1.2016.

17. The Claimant admitted that she failed to teach on 7th and 14th October, due to either other official commitments or sickness but contended that she arranged make up classes and gave students continuous assessment exam. After considering the said admission and the tone in some of the correspondences, on record, exchanged between the Claimant and her Departmental Chairman, I find that the termination of the Claimant's employment on 7.3.2016 was grounded on a valid and fair reason and therefore justified.

Procedure followed

18. After considering the evidence and the pleadings on record, it is clear that the Claimant was terminated after following a fair procedure. She was notified of her misconduct and later invited to a hearing before the Senior Board of Discipline on 3.3.2016 where she was afforded a chance to defend

herself. The defence was considered before the determination but was found wanting. She was accorded a right of appeal and indeed the appeal was successful although on humanitarian ground since the impugned termination was found justified. Consequently, it is my opinion that the termination of the Claimant's employment on 7.3.2016 was substantively and procedurally fair and done within the law. Although she said that she was denied the right to representation by her union, she is deemed to have waived that right by not raising it in time. The claimant was a senior officer who knew disciplinary procedures of the University.

Claimant's employment Status

19. The Claimant's appeal failed on the merits but on humanitarian grounds, the claimant was reinstated upon certain conditions. The decision of the Staff Appeal Board in the letter dated 28.9.2016 stated thus:-

“The Appeals Board after hearing you and considering your written ground of appeal, your oral presentation and all evidence tendered before the Appeals Board of Discipline, it was agreed that the finding of the Senior Board of Discipline of guilty was justified.

On humanitarian grounds, it was decided you be given a chance to improve by reinstating you to your previous employment subject to undertaking Counseling at the University Wellness Centre under probation for one year.

Note that you will be required to report to your department immediately upon receipt of this letter. For avoidance of doubt, you will only be paid your dues from the date you report to work.”

20. In response, the Claimant wrote to the chairman of the respondent's University Counsel, on 14.11.2016 protesting against the said decision by the Staff Appeal Board and stated thus: -

“... I still feel very aggrieved by the openly oppressive, harsh and inhuman decision of the Staff Appeals Board even after exhausting the due Process following months of waiting, financial deprivation and loss of professional opportunities...”

21. Considering the foregoing correspondences, it is clear that there was no meeting of mind between the employer and the employee. The employer reinstated the employee subject to specific conditions but the employee protested and failed to report back. Even as late as mid this year, the respondent demonstrated the willingness to receive the Claimant back to work and she fondly considers her still to be her employee. However, the Claimant has remained adamant that the said conditional reinstatement is harsh, oppressive and unfair, and she has only submitted herein for payment of her accrued benefits under her terminated contract of service plus compensation for unfair termination. Consequently, I find on a balance of probability that the Claimant does not wish to be reinstated and therefore she is no longer employed by the respondent and that has been so effective 7.3.2016 when she was discharged by the respondent.

Reliefs

22. In view of the finding herein above that termination of the Claimant's services by the respondent on 7.3.2016 was fair and lawful, the Claim for two months' salary in lieu of notice plus 12 month's salary compensation for unfair termination is dismissed by dint of Section 49 and 50 of the Employment Act.

23. Likewise, the Claim for half salary arrears for the period of suspension is dismissed because that Claim is only available upon the employee being exonerated from the charges she faces. In addition, the claim for salary from the March, 2016 when she was dismissed is declined for lack of any legal and contractual basis. Such salary is only payable to an employee who is reinstated unconditionally.

24. The Claim for leave has not been denied save that the respondent contended that it is payable based on the basic pay only. According to the payslip for December 2015, the Claimants basic pay was

Kshs.95,501. Consequently, I award her 21 leave days x 1/26 x Kshs.95,501 = Kshs.73,904.65. I further award her Kshs.8000 being allowance for workshop facilitation for 4 hours on 13.10.2015. The said workshop and the facilitation have not been disputed by the defence.

25. Finally, I allow the Claim for unpaid salary for part time teaching as follows:

ECT 202 (December, 2014),

ECT 702 (July, 2015),

ECT 817 (IBP April, 2015),

ECT 803 (IBP April, 2015),

ECT 803 (IBP August, 2015)

ECT 804 (IBP August 2015) and ECT 300 (IBP August, 2015) which was not disputed save that the respondent contended that it is paid as a matter of course upon submission of students marks. The said Claim will therefore be assessed and paid subject to confirmation by the employer that the Claimant complied with the condition precedent to earning the same namely, that the Claimant actually submitted the students' marks for the said units. The said assessment and verification is to be done within 30 days of today and a report of the assessment is to be filed in this court within the said period.

Conclusion and Disposition

26. I have found that the termination of the Claimant's contract of service by the respondent on 7.3.2016 was fair and lawful. I have further found that the Claimant is no longer an employee of the respondent after having turned down an offer of conditional reinstatement. I have further found that the claimant is entitled to 21 days leave, workshop facilitation allowance for 4 hours done on 13.10.2015 and unpaid salary for part time teaching done in respect of 7 units between December, 2014 and August, 2015. The said awards shall be paid subject to statutory deductions. The Claimant is awarded half costs because the suit is partially successful. The award will also attract interest at Court rates from the date of filing suit.

Dated, Signed and Delivered in Open Court at Nairobi this 26th day of October, 2018

ONESMUS N. MAKAU

JUDGE