



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

CAUSE NUMBER 665 OF 2016

BETWEEN

TYSON SANGURA WANYAMA.....CLAIMANT

VERSUS

PWANI UNIVESRITY.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Omollo Onyango & Company Advocates for the Claimant

Lawrence Mungai & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on 13th September 2016. He states he was employed by the Respondent University as a Registry Supervisor, on 28th May 2011. His starting salary was Kshs. 12,000 per month. He was promoted later, to become a Library Assistant. He states he was summoned for a disciplinary hearing by the Respondent on 19th February 2016. The nature of the allegations made against him, are not disclosed in the Statement of Claim. He avers he was denied a fair hearing. A decision was made to terminate his contract. He appealed the decision to the Appeals Committee. The decision to terminate Claimant's contract was confirmed by the Respondent without considering his grounds of appeal. He holds that termination was based on ill-motive and personal differences between the Claimant and the Deputy Vice-Chancellor. Dismissal was meant as punishment for the Claimant, for having been elected as the Employees' Union Chapter Chairman. The Respondent failed to promote the Claimant in March 2015 after he obtained an undergraduate degree, and continued to underpay monthly salary to the Claimant. He urges the Court to find termination was unfair, and grant him Judgment against the Respondent in the following terms:-

- a. Declaration that termination was unfair.
- b. Underpayment of salary at Kshs. 217,283.
- c. Compensation for unfair termination at Kshs. 825,360.
- d. Service pay at Kshs. 247,608.
- e. Costs.
- f. Interest from the date of filing Claim.

2. The Respondent filed its Statement of Response on 28th October 2016. Its position is that the Claimant was employed by the Respondent as Registry Supervisor Job Grade A, in 2011; he was promoted to Registry Supervisor Job Grade B effective 1st November 2013; he was redeployed to the Library as Library Assistant in September 2014, still in Job Grade B; and only rose one Job Grade, from A to B. He was summoned to appear before the Staff Disciplinary Committee for hearing on 19th February 2016. There were various allegations made against him by various individuals. His Union Representatives were notified about the hearing. The Claimant was notified and given adequate time to prepare. A decision was made to terminate his contract. He appealed against the decision to the Appeals Committee. He was

heard before the Appeals Committee in the presence of his Union Representative. At no time did the Claimant fault the hearing at any forum, and allege hearing was unfair. The Appeals Committee upheld the decision of the Staff Disciplinary Committee. The Respondent denies that the Claimant was victimized for his trade union activities or for having personal differences with the Deputy Vice-Chancellor. He did not meet criteria laid down for promotion. He was not underpaid salary. He was paid all his terminal dues, and given his Certificate of Service. He was not eligible for service pay. The Respondent prays the Court to dismiss the Claim with costs to the Respondent.

3. The Claimant testified on 7th November 2017, and 21st February 2018 when he rested his case. Human Resource Officer, Betty Chadziru Saleri testified for the Respondent on 11th June 2018, bringing the curtain down on the hearing. The matter was last mentioned in Court on 27th July 2018 when Parties confirmed filing and exchange of Closing Submissions.

4. **The Claimant** confirmed he was employed as Registry Supervisor. His letter of appointment is dated 9th October 2009. He earned a starting salary of Kshs. 12,000 and house allowance of Kshs. 14,400. He was confirmed after probation. He held a diploma in information science and technology. He had worked at Kenyatta University for 3 years. He studied online for an undergraduate degree in information technology at Methodist University. He was promoted as a Registry Clerk. His salary was adjusted. He was paid basic of Kshs. 19,814, house allowance of Kshs. 19,882 and commuter allowance of Kshs. 5,000. He was for long stuck on this rate.

5. He was employed as Librarian Grade 3. The position had more responsibilities. The Claimant's salary did not change. This was an academic position. The salary for this position was supposed to be Kshs. 68,000. By February 2016, Claimant's basic salary was Kshs. 23,111, house allowance Kshs. 20,416 and travel allowance at Kshs. 5,000- total Kshs. 49,027. The Claimant noticed there was discrepancy from salary scale document shown to him by the Head of his Department.

6. Employees were expected to upgrade. The Claimant wrote to the Respondent asking for promotion. His Supervisor advised him he would be considered for promotion.

7. The Claimant received a letter dated 11th February 2016 from the Respondent inviting him to a disciplinary hearing. He was alleged to have violated the University Code of Conduct by: giving false/misleading information to a member of the public; making a false accusation against a member of staff; and borrowing money from colleagues and failing to pay. He did not respond. He was asked in the letter, to attend disciplinary hearing on 19th February 2016. He was a member of a trade union called KUSU. He was at the time campaigning for the position of Chairman of the University Chapter.

8. He asked at the hearing, for details of the member of public to whom the Claimant gave false information. He did not give any information to the Police. There was no Occurrence Book Number showing any report made. No student or staff gave evidence against the Claimant. He did not owe money to Dr. Shiundu. He only owed Dr. Sigler and Dr. Alice money. The money borrowed by the Claimant from these colleagues was a private arrangement. The Claimant was not granted the chance to call the alleged complainants. The Respondent alleged that the Claimant was a national intelligence officer. No evidence was produced showing this. He was asked to go back to work after hearing. He was later given a letter of termination dated 23rd February 2016.

9. The letter informed the Claimant that he was found guilty of:-

- Borrowing money from colleagues and students, and failing to honour obligation to repay.
- Neglecting to settle financial obligations, thus causing ridicule to the University.
- Failing to conduct his private affairs in a way that maintained public confidence in the integrity of his office.

10. The Claimant appealed and explained why he had not been able to pay his debts. He was listed by Credit Reference Bureau [CRB]. He had guaranteed a loan to a member of staff. The staff owed the Bank about Kshs. 680,000. There was default and the Claimant was listed by Credit Reference Bureau. He owed the other member of staff about Kshs. 14,000. Due to listing by CRB, the Claimant could not get a loan to repay his debts. The Claimant and his colleagues nonetheless paid the loan guarantee. He had given undertaking to pay his colleague Kshs. 14,000.

11. The Appeal Committee had a mindset. He was not given a chance to explain his position at the Committee. The Appeal was not properly heard. Termination decision was sustained. He was paid pension of about Kshs. 257,000. He was paid terminal dues of about Kshs. 25,000 after a long struggle. He was asked to move out of the University residence. He was dismissed because of his trade union activities.

12. Cross-examined, the Claimant testified that he was summoned to appear before the Staff Disciplinary Committee. The notice was short. It should have been a notice of at least 30 days. He asked for more time from the Committee. He was advised that the Respondent has a busy schedule. He should have been given time to consult the Employee who was to accompany him to the hearing; more time to seek legal redress; and more time to understand the allegations against him. He should have been allowed the company of a colleague.

13. The grounds stated in the letter of termination, as justification for the decision, were fabricated. He borrowed money from only 2 persons. He did not borrow money from students. He was not an Officer of the National Intelligence Service.

14. He was familiar with the University Code of Conduct. His financial problems did not affect his ability to work. He was elected chairman of KUSU in 2010. He did not know that the Union alleged at page 26 of Respondent's documents, that the Claimant was never its Chapter's Chairman. He insisted he went through tribulations because he was once the Chapter's Chairman. He raised this issue during the disciplinary hearing. He complained to the National General Secretary Dr. Mukwaya.

15. The Claimant obtained undergraduate degree in the year 2011. His gross salary was Kshs. 49,000. He is demanding for underpayment based on a monthly salary of Kshs. 68,000. He made demand for this before he left employment. Other Employees were promoted. He was

not.

16. He prays for service pay at Kshs. 247,608. He was a member of the University Pension Scheme. He paid all utilities on vacating the University residence.

17. On redirection, the Claimant told the Court he was not given the Code of Conduct on employment. He did not sign it. He was not aware about it. His last pay slip of February 2016 shows a gross monthly salary of Kshs. 49,700. The figure claimed at Kshs. 68,000 monthly, is what the Claimant would have earned on promotion. No students gave evidence to say the Claimant borrowed money from them, and failed to repay.

18. **The Respondent's** Human Resource Officer, Betty Chadziru Saleri, confirmed the Claimant's employment history with the Respondent, and the terms and conditions of service, as contained in the Statement of Response. He was permanent and pensionable, and a member of the University Pension Scheme.

19. There were complaints against the Claimant in February 2016. Complainants recorded statements with the Respondent. The Respondent summoned the Claimant to a disciplinary hearing. He attended hearing. The charges were read to him. He answered all the charges. He was found guilty of misappropriating money sent by parents. He breached Public Officer's Ethics Act 2008. He appealed against dismissal, alleging he was unable to pay his debts because of CRB listing. He was heard at all times, in the company of Trade Union Representatives. His appeal was rejected.

20. There is no job grade at the University, which is paid a monthly salary of Kshs. 68,000. There is a standard set for promotion. One has to make an application. Qualifications are assessed by a Committee. The Claimant did not meet this standard. He was not victimized. The Respondent has 3 workplace Trade Unions. It relates well with all 3.

21. Cross-examined, Saleri told the Court that the Claimant last held the position of Library Assistant Grade B. His last basic salary was Kshs. 23,111, house allowance of Kshs. 20,416 and commuter allowance of Kshs. 5,000 monthly.

22. There were verbal complaints from Dr. Shiundu and from the students against the Claimant. There were complaints from parents also. Dr. Alice and Dr. Baraza made written complaints. These were availed to the Claimant during the hearing. Baraza complained that the Claimant had given false information to the Police. He also complained that he lent the Claimant money, which he failed to refund. Professor Zigler and Professor Alice all complained about money which the Claimant had failed to refund to them. The complaints have not been exhibited before the Court. The Claimant's Union submitted at the hearing that the complaints about non-refund of money were of a private nature. Saleri conceded these were private arrangements. University became involved upon default.

23. According to Claimant's letter dated 16th November 2015, he applied for promotion. The University did not receive the letter. Promotion was not automatic. There were several matters to be considered before promotion decision was made.

The Court Finds:-

24. The Claimant's employment history with the Respondent University, his terms and conditions of service, are not largely in dispute. It is also not disputed that the Respondent terminated the Claimant's contract through the letter of termination, dated 23rd February 2016. The Parties agree that the Claimant was heard initially by the Staff Disciplinary Committee, and heard on appeal by the Appeals Committee. A decision was made by the Staff Disciplinary Committee to terminate Claimant's contract with effect from 24th February 2016. This decision was sustained by the Appeals Committee. These facts are commonly agreed. The reasons justifying termination are given in the letter of termination.

25. The issues that the Court must resolve are whether termination was based on valid reason, and fairly carried out, as demanded by Sections 41, 43 and 45 of the Employment Act 2007; secondly, whether the Claimant was entitled to promotion and salary increment; and lastly whether he merits the prayers sought.

26. The Claimant stated in his evidence-in-chief that he was asked by the Respondent to advise the Respondent on how he wished his pension to be paid. He gave advice and was paid about Kshs. 257,000 in pension. The Respondent states that the Claimant was a member of the University Pension Scheme. The Claimant has no legal basis to claim service pay under Section 35 of the Employment Act. He is not eligible for service pay having benefited from a Social Security Plan established by the Respondent. The prayer for service pay is declined.

27. The Claimant did not establish that he was entitled to promotion upon obtaining an undergraduate degree. He states he was entitled to be promoted to Job Group C, and earn a monthly salary of Kshs. 68,700. He did not provide the Court with any material which obligated the Respondent to promote him, and raise his salary. He testified he saw a document on salary structures with his Head of Department. Such document was not exhibited before the Court, or his Head of Department availed to the Court as a Witness.

28. The Claimant had been previously promoted as shown in his letter of promotion of 16th October 2013. There was a procedure on promotion, which included an application made by the Employee, assessment by a Committee of the applicant's qualifications, and approval by University Council. The Claimant applied for promotion on 16th January 2015, when he was still undertaking his undergraduate studies. He had not graduated. It is hard to see how promotion could have been considered while the Claimant was still a candidate for an undergraduate degree. It is not clear to the Court whether the Claimant had graduated by the time of termination. All he has shown is that he was an undergraduate student, who was making progress towards obtaining a first degree. Such evidence cannot warrant demands for promotion. He has not established that he was entitled to promotion; that he was denied promotion unfairly; and that he was entitled to a higher salary of Kshs. 68,700. The prayer for underpayment of salary is rejected.

29. Was termination unfair, and is the Claimant entitled to compensation? There is evidence that the Claimant was informed in writing of the allegations against him. He was notified to attend disciplinary hearing. He attended hearing in the presence of his Trade Union Representatives. He was heard, and a decision taken to terminate his contract. He appealed against the decision to the Appeals Committee. He was heard before the Appeals Committee again in the presence of his Trade Union Representatives. There was no requirement under the law that he is accompanied to any hearing by an Employee of his choice, in addition to being accompanied by Trade Union Representatives. Trade Union Representatives accompanied him at every turn. The Appeals Committee upheld the decision of the Staff Disciplinary Committee to terminate Claimant's contract. Procedure was fair, and in conformity with the minimum standards of fairness under Section 41 and 45 of the Employment Act 2007.

30. Was there valid reason shown and was termination substantively fair, under Section 43 and 45 of the Employment Act? The reasons given by the Respondent in justifying termination are that the Claimant borrowed money from Colleagues and Students and failed to refund; he failed to settle financial obligations causing the University ridicule; and failed to conduct his private affairs in a way which maintained public confidence in the integrity of his office.

31. There was no evidence given at any forum establishing that the Claimant borrowed money from Students. No Student gave evidence anywhere about this. The Witness for the Respondent alleged in her evidence that a Parent complained against the Claimant, and that the Claimant was found guilty of misappropriating money sent by Parents. This evidence is at a variance with the contents of the letter of termination. There was no mention of Parents in the letter of termination. No Parent appeared at any forum alleging the Claimant misappropriated money sent by the Parent. The Claimant stated he was also alleged to be a National Intelligence Officer. The Debtors the Claimant is alleged to owe money did not give evidence at any forum. There were no written complaints exhibited before the Court. It was also alleged that the Claimant had given false information about a Colleague to the Police. It was alleged in the notice of the first disciplinary hearing that the Claimant gave false/misleading information to a member of the public. The allegations against the Claimant were not consistent. They were not established. The Claimant alleges he was victimized for his Union activities. He alleged termination was influenced by bad blood between him and Deputy Vice-Chancellor. There is no evidence of bad blood between the Claimant and the Deputy Vice-Chancellor. There is no evidence that he was victimized. He was never elected Chairman of the KUSU Chapter. His candidacy ended in failure. There was no reason for the University to victimize him for his trade union activities. The University is engaged to 3 Trade Unions, with Members all over the place. Why would the Claimant, a failed Trade Union candidate, be selected for victimization? There was no link between Claimant's dismissal and his trade union activities.

32. It is true he conceded before the Appeals Committee to owing some debts. He gave a reason for being unable to pay. The Court's view is that the debts owing were in the realm of civil debts, upon which the Creditors could sue the Claimant for recovery. These private arrangements between Members of Staff could not be seen as acts of gross misconduct attributable to the Claimant. He gave an explanation, how he ended up in debt, and explained he was making efforts to get himself out of the gum-pot of debt. He acknowledged his civil indebtedness. There was no evidence that the University was called in to collect debt by any of the Creditors, or that any such debt, resulted in the University being ridiculed. Ridiculed by whom? The Court finds termination was unfair for want of valid reason.

33. The Claimant is granted compensation for unfair termination, equivalent of 7½ months gross salary, at Kshs. 43,527 x 7.5 = Kshs. 326,452.

34. *Costs to the Claimant.*

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

IN SUM, IT IS ORDERED:-

a. Termination was unfair for want of valid reason.

b. The Respondent shall pay to the Claimant equivalent of 7 ½ months' gross monthly salary at Kshs. 326,452 in compensation for unfair termination.

c. Costs to the Claimant.

d. Interest allowed at 14% from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 26th day of October, 2018

James Rika

Judge