



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 609 OF 2013

ANTHONY MUGETHA IRUNGU..... CLAIMANT

- VERSUS -

THE CO-OPERATIVE UNIVERSITY COLLEGE OF KENYA..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th October, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 12.06.2013 through C.M. Ongoto & Company Advocates. The claimant prayed for:

- a. A declaration that the claimant was a permanent employee of the respondent by virtue of section 42(2) of the Employment Act.
- b. A declaration that the termination of the claimant's employment by the respondent was unlawful, malicious, unprocedural and an infringement of his constitutional rights.
- c. Maximum compensation for wrongful termination.
- d. Damages for injuries in the claimant's profession.
- e. An order for the re-engagement of the claimant without loss of benefits or in the alternative the payment of the respondent's full salary and benefits calculated on his gross salary accruing from the date of dismissal to the date of the judgment.
- f. Payment of prospective earnings.
- g. Cost be awarded to the claimant.
- h. Interest on principal amount and costs at Court rates.
- i. Any other relief that the Court may deem fit to grant in the interest of justice.

The memorandum of defence was filed on 29.07.2013 through J.N. Namasake & Company Advocates. The respondent stated that the termination of the claimant's employment was proper and prayed that the suit be dismissed with costs.

The suit was listed for hearing on 04.07.2018 when by consent of the parties it was ordered that the suit be determined on the basis of the pleadings and documents filed for the parties as well as the final submissions to be filed for the parties. Parties filed and served their respective submissions.

The respondent employed the claimant to the position of Lecturer III by the letter dated 17.02.2011. Clause 4 of the letter stated that the normal period of probation is six months but may be extended or the appointment may be terminated before completion of the period. Clause 8 provided that the claimant was subject to all regulations for officers of the Co-operative College of Kenya then in place or which may be changed from time to time. By the letter dated 21.02.2011 the respondent conveyed to the claimant his job description.

By an undated letter, the claimant was invited to a consultative meeting in the respondent's boardroom said to take place thus, **"....tomorrow 10th November 2011 at 9.00am. The meeting will discuss communication flow and security of office documents."** The letter was signed by the respondent's director. The respondent's case is that in the months of August to October 2011 the respondent was faced with false allegations of mismanagement and abuse of office flowing from misinterpretation and misconception of the respondent's confidential information given to un-authorized persons; the objective, according to the respondent, being to tarnish the name of the respondent and its

management. Thus the CID approached the respondent on 14.10.2011 to shed some light on the allegations. The allegations were supported with some documents the respondent states had been illegally obtained from the respondent. The respondent suspected the claimant and other officers to have been culpable of divulging the information. The consultative meeting of 10.11.2011 was part of the respondent's efforts of finding out truth about the allegations and the source of such information. The respondent interviewed all the suspected employees. The claimant admits at paragraph 8 of the verifying affidavit that the consultative meeting was an interrogation of sorts centred on the claimant and a few other employees. It was the claimant's case that he knew nothing about the issues in the interrogation.

The respondent delivered to the claimant the show-cause letter on alleged indiscipline dated 11.11.2011. The letter alleged that the claimant had been divulging the respondent's confidential information to unauthorised persons for malicious purposes. The allegation entailed removing college file folios, photocopying folios and giving out council and interview minutes to unauthorised persons in collaboration with other respondent's employees with the aim of seeking personal gains. The letter stated that the misconduct amounted to breach of confidentiality and trust as provided in section 8.2.6.1 of the respondent's Human Resource Policies requiring employees to uphold strict standards in regard to confidential information. Divulging confidential information may lead to summary dismissal as per section 8.2.6.2. The letter concluded that the respondent intended to take disciplinary action against the claimant and he had to reply in 14 days.

The claimant replied by his letter dated 23.11.2011. The claimant set out in detail that he was entitled to natural justice and stated that the consultative meeting of 10.11.2011 had been unfair and illegal because his accusers were absent. He stated that he had not been in control of the respondent's non-academic confidential documents or information and his accusers or co-conspirators had not been disclosed. He denied the allegations and stated that the suspicion was unfounded.

On 14.11.2011 the claimant's advocates wrote to the respondent demanding full details of the allegations and evidence against the claimant in view of the show-cause letter of 11.11.2011. In the circumstances, the respondent's case is that the claimant failed to reply to the show-cause letter on merits, the management concluded that the claimant was involved illegally in obtaining college documents, misinterpreting them and giving them to unauthorised officers. Thus by the letter dated 02.12.2011, the claimant's appointment was terminated.

The letter of termination referred to the letter of appointment dated 17.02.2011 appointing the claimant on probation as Lecturer III Job Group COCK 7. The letter then stated that the respondent did not wish to confirm the claimant in appointment. The letter stated that as per clause 7 of the letter of appointment, the college was terminating the probationary appointment by giving payment of one month's salary in lieu of notice and effective the date of the termination letter. The letter asked the claimant to clear with the respondent to facilitate payment of final dues.

It is not in dispute that the claimant had filed Judicial Review Application No.1958 of 2011 in the High Court at Nairobi seeking judicial review orders thus:

- a. An order of certiorari to move the Court and quash the decision to terminate him; and
- b. An order of prohibition, prohibiting the respondent from suspending and or terminating the claimant.

The application had been filed prior to termination and after the letter of termination the claimant filed the suit – the termination decision having rendered the judicial review application nugatory.

The **1st issue** for determination is whether as at the time of termination, the claimant was on probationary service. The claimant was appointed on 6 months' probationary service starting 01.03.2011 so that the 6 months were lapsing on or about 01.09.2011. The termination letter was dated 02.12.2011 long after the lapsed probationary period. It is clear that the probationary period was never extended as per clause 4 of the letter of appointment. It is also clear that the claimant's supervisor or head of department failed to submit to the respondent's human resource management section the relevant progress reports indicating the claimant's performance during the probationary service and as envisaged in section 3.9.1.2 of the Human Resource Policies and showing whether the probation period ought to have been extended. In absence of such reports the Court returns that the claimant's service must have been satisfactory and the probationary period having lapsed, the claimant was entitled to confirmation in appointment. Accordingly, as at termination, the contractual provisions on termination of probationary service did not apply.

The **2nd issue** for determination is whether the termination was unfair. In this case, the respondent served a show cause letter and initiated a disciplinary process against the claimant. In the process the respondent abandoned the disciplinary process without notice to the claimant and purported to terminate the claimant's service under clause 7 of the letter of appointment on termination of probationary appointment by paying one month's salary in lieu of termination notice. First the Court returns that the said clause 7 was not available because the probationary period had lapsed. Second, the respondent was not entitled, unilaterally and without notice to the claimant, to abort the disciplinary process that had been commenced – such unilateral abortion of pending disciplinary process, in the opinion of the Court, amounted to unfair labour practice in contravention of Article 41 of the Constitution of Kenya, 2010. The Court follows its opinion in the recent judgment in **Jadiah M. Mwarania –Versus- Kenya Reinsurance Corporation Limited [2018]eKLR**, **“Thus, if a disciplinary process is allowed to abort at the employer's unilateral instance like in the present case, the employee's record of service is left with the scar of unanswered allegations which subsequently may be used adversely to deny the affected employee future job opportunities. The Court finds that such outstanding questions due to disciplinary proceedings that are not concluded at the employer's unilateral instance are obviously adverse to the employee's plight and shall therefore not be permitted as they amount to an unfair labour practice in violation of Article 41 of the Constitution of Kenya, 2010.”**

To the extent that the reason for termination was exercise of provisions of clause 7, the Court returns that the termination was unfair for want of a valid reason as envisaged in section 43 of the Employment Act. Similarly, the Court returns that provisions of section 42 of the Act on termination of probationary service did not apply because the probationary period had lapsed and the respondent had failed to extend the same as per the contractual provisions including reliance on progress reports that were required to be submitted by the claimant's supervisor during the probationary period. The Court further finds that the respondent failed the procedural test when it terminated on account of termination provisions applicable during a probationary period or on account of purported gross misconduct and, on either account, the

respondent failed to establish a genuine reason for termination as envisaged in section 43 of the Act but acted contrary to fairness as per the test in section 45 of the Act.

The respondent has invoked section 45(3) of the Act which provides thus, “**45(3). An employee who has been continually employed by his employer for a period of not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.**” It is clear that the claimant had not served for more than 13 months but the Court returns that the section does not say that an employee who has not served for more than 13 months cannot complain that he has been unfairly terminated. Accordingly and for the reasons stated, the termination was unfair.

The **3rd** issue for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

- a. As already found, the claimant’s probationary period had lapsed and is entitled to the declaration that the claimant was a permanent employee of the respondent by virtue of section 42(2) of the Employment Act, 2007 which provides that probationary period can be extended for not more than six months with the agreement of the employee. Such agreement on extension of probationary service has not been shown to have been invoked and the probationary period had lapsed. There was no effort on the part of the respondent to extend the period in line with the section and the contractual provisions. The permanent service or confirmation had therefore accrued and the Court returns as much.
- b. The Court returns that the claimant is entitled to the declaration that the termination of the claimant’s employment by the respondent was unlawful, malicious, and unprocedural as it was a breach of the contract of service and Article 41 of the Constitution on fair labour practices.
- c. The claimant prays for maximum compensation for the offensive termination. The claimant desired to continue in employment. The Court has considered the aggravating factor that the respondent initiated disciplinary proceedings and has failed to substantiate the allegations by way of evidence. It has not been shown that the claimant contributed to his termination in any manner. The report on the claimant recommended his confirmation in appointment. The Court has further considered that the probationary period had just lapsed and the period so far served by the claimant. To balance justice for the parties the claimant is awarded 10 months’ gross salaries in compensation for the unfair termination.
- d. The claimant prayed for damages for injuries in the claimant’s profession. No submissions were made in that regard including on the quantum and the prayer is deemed abandoned.
- e. The claimant prayed for an order for the re-engagement of the claimant without loss of benefits or in the alternative the payment of the respondent’s full salary and benefits calculated on his gross salary accruing from the date of dismissal to the date of the judgment. The salaries and benefits claimed were not computed and no justification was provided. The Court returns that the claimant failed to establish reasonable ground attributable to the termination that would render him unable to mitigate his circumstances by engaging in alternative employment. The prayer for the salaries and benefits will therefore fail and the same applies to the prayer for payment of prospective earnings. There were no submissions urged to support the prayer for re-engagement and the same is deemed surrendered.
- f. As the claimant has substantially succeeded the costs of the suit are awarded to the claimant.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a. The declaration that the claimant was a permanent employee of the respondent by virtue of section 42(2) of the Employment Act, 2007.
- b. The declaration that the termination of the claimant’s employment by the respondent was unlawful, malicious, and unprocedural as it was a breach of the contract of service and Article 41 of the Constitution on fair labour practices.
- c. The respondent to pay the claimant 10 months’ gross salaries in compensation for the unfair termination at the last gross monthly pay (less tax) and to pay by 01.12.2018 failing interest to run at Court rates from the date of this judgment till full payment.
- d. The respondent to pay costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 19th October, 2018.**

BYRAM ONGAYA

JUDGE