



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.215 OF 2014

PROF. JOSEPH MUNGAI KERIKO.....CLAIMANT

- VERSUS -

KIRINYAGA UNIVERSITYCOLLEGE.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 16th November, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 19.02.2014 through Riunga Raiji & Company Advocates. The amended memorandum of claim was filed on 03.10.2016. The claimant prayed for judgment against the respondent for:

- a) The declaration that the claimant was constructively dismissed.
- b) A declaration that the said dismissal was unlawful and unfair.
- c) Reinstatement with full salary and benefits from the date of suspension (19.03.2013) to the date of reinstatement.

In alternative:

- d) Special damages totalling to Kshs.44, 175, 390.00 being pay for the unexpired term of his contract with the respondent.
- e) Kshs. 1, 391, 244.65 being unpaid dues up to the time of dismissal including Gratuity Kshs. 454, 004.00; transfer made on 21.03.2013 Kshs. 389, 703.00; medical claim of Kshs. 54, 675.00; and unpaid council allowance Kshs. 240, 000.00.
- f) Interest on (d) and (e) above at Court rates from 2.5.2013 (date of dismissal) up to the date of full payment.
- g) Costs of the suit with interest at Court rates.
- h) The report leading to the claimant's dismissal dated April 2013 was unfair and malicious and the same be expunged (and the prayer being introduced by consent order at the hearing of 19.04.2018).

The respondent's reply to the memorandum of claim was filed on 22.05.2014 through Kamotho Njomo & Company Advocates. The respondent prayed that the claimant's case be dismissed with costs and the counterclaim be allowed as prayed. The amended respondent's reply to the memorandum of claim and counterclaim was filed on 25. 10.2018. The respondent counterclaimed for Kshs. 4, 865, 760.39 being:

- a) Tax Kshs. 206, 001.39.
- b) Irregular Council meeting allowance Kshs. 39, 650.00.
- c) Irregular mileage claim Kshs. 254, 811.00;
- d) Pension paid Kshs. 155, 700.00.
- e) Unrecoverable amount from irregularly recruited staff Kshs. 155, 975.00.

f) Three months basic salary in lieu of notice Kshs. 1, 169, 109.00.

g) Irregular payment on projects Kshs.2, 884, 514.00.

The claimant filed on 12.06.2014 the reply to respondent's reply to memorandum of claim and reply to the respondent's counterclaim.

By the letter dated 26.11.2012 the respondent appointed the claimant to the position of Principal of the respondent. The appointment was for a period of 5 years effective 27.11.2012. Thus the 5 years were ending on or about 27.11.2017. The respondent suspended the claimant from performing duties of the Principal effective 19.03.2013 until investigations on the claimant's conduct had been carried out and completed. The letter stated that despite the opportunity given to the claimant to present a Principal's report, the claimant had failed to do so and the verbal explanation given by the claimant about the matters of concern had been contradictory, unprofessional, unconvincing and laced with many instances of untruth. The matters of concern to the respondent's Council as set out in the letter included the following alleged irregularities:

- a) Unauthorised recruitment of staff on six months contracts.
- b) Unauthorised recruitment of staff to posts already advertised and applications received and not yet processed.
- c) Unauthorised payment of allowances made to some staff.
- d) Unauthorised and unbudgeted for expenditures.
- e) Failing to carry out instructions given by Council.

The suspension letter stated that the claimant had to be available during the suspension period to clarify any issues to the Investigating Team whenever required. Further, at conclusion of the investigations the claimant would be given an opportunity to respond to the issues that would come out. While on suspension, the letter stated that the claimant would be paid house allowance and half of his basic salary. The letter directed that the claimant hands over to the Deputy Principal, Administration and Finance one Professor Mary W. Ndung'u and to do so with immediate effect. The letter was signed by one Judith M. Bahemuka, Chair of the respondent's Council.

The claimant replied to the suspension letter by his letter dated 19.03.2013. The claimant replied to each of the issues of concern in detail.

An Adhoc Committee of the respondent's Council was appointed to investigate the allegations and it presented its report of April 2013. The findings by the Committee were as follows:

- 1) The claimant without approval or recommendation of the Council irregularly recruited 58 staff members into contracts including 28 staff members directly placed on contract terms and their services were not required; 21 casuals employed between September 2012 and end of January 2013 but whose services were not required; 4 casuals employed in February 2013 but their services were not required; and 5 casuals employed in March 2013 but their services were not required.
- 2) There was no short listing or interviews for advertised jobs but out of 58 staff members employed, 6 were employed in the posts that had been advertised.
- 3) The claimant had authorised payments of irregular allowances to 17 members of staff resulting into a loss of Kshs. 1, 729, 472.00 in February 2013.
- 4) The claimant had authorised payment of full salaries for the month of February 2013 to 14 members of staff resulting into a loss to the respondent of Kshs.608, 752.00 – in circumstances whereby some staff were paid using salary scales or grades not corresponding to their qualifications.
- 5) The claimant had authorised payment of Kshs. 7.2 million to a contractor for the tuition block occasioning the respondent a loss of Kshs. 2.6 million.
- 6) The claimant had authorised payment of allowances to himself including attending Council meetings Kshs. 39, 650.00; mileage from Juja to the respondent's premises and back Kshs. 254, 811.00; and pension Kshs. 233, 550.00 making a total of Kshs. 528, 011.00.

The Committee made recommendations as follows:

- 1) The claimant be invited to react to the findings in the report and there after give a report to Council.
- 2) Kshs. 528, 011.00 be recovered from the claimant as irregularly paid to him.
- 3) The respondent's management to recover all monies paid irregularly to staff as allowances and salaries.
- 4) The respondent's management terminates contracts for all 58 irregularly recruited members of staff.

5) The respondent's management to regularise recruitment of the 30 members of staff whose prevailing services required to be on 6 months' contracts and to do so through appraisal and interview process. Their salaries and grades were to be commensurate with their full qualifications and experience.

6) The respondent's management to urgently finalise the recruitment process of the advertised positions.

The Adhoc Committee met on 25.04.2013 at View Park Towers from 10.30am. The record shows that the claimant had been invited to respond to the findings of the Committee on the allegations leading to the suspension of the claimant. The claimant attended the meeting starting 12.30pm. The claimant was invited to reply to the allegations in the suspension letter. The record shows that the claimant was given an opportunity to answer each allegation and was released at 05.15pm. The Committee resolved that the claimant had committed all the 5 allegations as levelled against him. The Committee noted that the claimant was not in control of the respondent's human resource, he was not in control of the financial processes, he was apportioning blame to junior officers, and he had owned up to his mistakes and apologised. The Committee recommended that the deficiencies amounted to gross misconduct and the Committee recommended dismissal of the claimant.

The respondent's Council met on 30.04.2013 at View Park Towers. Council upheld Committee recommendation that the claimant be dismissed. The Executive Committee of Council was scheduled to meet on 02.05.2013 at 9.00am at View Park Towers and the claimant would be invited to attend the meeting starting 9.30am.

The Committee met on 02.05.2013 as was scheduled. The agenda of the meeting was to present to the claimant the decision by Council on the gross misconduct on his part as College Principal. The claimant was invited in the meeting at 10.48am. The record of the meeting shows that the claimant was informed about Council's decision to dismiss him. The record further shows that the claimant requested if he could be allowed to resign instead of being dismissed. Upon deliberation, it was agreed that Council could as well accept his resignation. The claimant requested to go and draft a letter of resignation and which he presented to the Chairperson after a short while. The letter addressed to the respondent's Council Chairperson stated as follows:

"Re: RESIGNATION AS PRINCIPAL

I write to let you know that due to the prevailing conditions of work as the Principal, Kiriinyaga University College, I have decided to tender my resignation from the date of this letter. I take this opportunity to thank you very sincerely for giving me the chance to serve this prestigious University College as the pioneering Principal from December 2012.

Once again, thank you very much and God bless you and your team.

Yours Faithfully,

Signed

PROF. JOSEPH M. KERIAKO

PROFESSOR OF CHEMISTRY, JKUAT

CC: Minister of Education"

The minutes of the meeting of 02.05.2013 state that the chair read the letter out to the Council members. The Chair asked the members if they accepted the resignation and they stated that they accepted the resignation. The Chairperson then replied to the claimant accepting the resignation. The letter of acceptance was presented to the claimant and the Chairperson thanked the claimant for services he had rendered to the respondent. The acceptance of resignation letter addressed to the claimant stated as follows:

"RE: RESIGNATION FROM THE POSITION OF COLLEGE PRINCIPAL

Your letter on the above subject dated 2nd May, 2013 refers.

On behalf of Kirinyaga University College council, I regrettably accept your resignation from the position of Principal of the College.

I take this opportunity to thank you for your services to Kirinyaga University College between December, 2012 and March, 2013.

Please visit the Deputy Principal (Administration, Planning and Development) for clearance, on or before the 15th of May, 2013.

I wish you well in your future endeavours.

Yours Sincerely

Signed 2/5/013

Judith Mbula-Bahemuka

Chairman to the Council

CC:

- 1. Head of Civil Service.**
- 2. Minister, MOHEST.**
- 3. Chief Executive Officer.**
- 4. Inspectorate of State Corporations.**
- 5. Vice- Chancellor, JKUAT”**

The Court has considered all the material on record and answers the issues in dispute as follows.

First, the Court returns that the parties to the contract of service evaluated their respective positions. They agreed to separate. The terms of their separation were constituted in the resignation letter by the claimant and the acceptance thereto by the Chairman of the respondent's Council. The parties are bound by the terms of the separation. The Court will not rewrite the parties' contract of separation. It was submitted for the claimant that the Court should examine the procedural deficiencies such as lack of a show cause letter and an evaluation that the allegations in the suspension letter had not been established as at the time of termination and as envisaged in sections 41, 43 and 45 (2) (c) on substantive and procedural fairness prior to termination. The Court returns that once parties agreed to separate in the manner they opted to do, the disciplinary process that had commenced was thereby frustrated by the parties' own agreement to separate by way of the resignation agreement. The claimant voluntarily accepted to resign and there was no established factor to diminish the claimant's free will to resign. There is no reason to doubt the flow of events as documented at the meeting of 02.05.2013 leading to the resignation. The resignation was voluntary and valid after parties opted to enter the separation agreement by resignation. The Court has considered its opinion against the principle of soft landing in Malachi Ochieng Pire – Versus- Rift Valley Agencies, Industrial Cause No. 22 of 2013 at Nakuru [2013]eKLR where in the judgment it was stated thus, **“The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employer from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination. Whereas, such soft landing is open to employer's discretion, it is the court's considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee in determining the genuine cause of the termination.”**

In the present case, it is clear that the parties understood their respective positions in view of the allegations that had been levelled against the claimant and the findings thereof. The Court returns that being fully aware of their respective gains and losses in view of the disciplinary process that had been initiated against the claimant, the parties nevertheless opted to separate through the resignation agreement. The Court returns that in line with the cited opinion, the parties must be taken to have surrendered their strict positions and opted to separate by resignation agreement without further obligations and rights.

Accordingly, the Court returns that parties opted to separate through the resignation agreement, they are bound accordingly, and the termination was not unfair or unlawful. While making that finding the Court further finds that there was no dispute that the appointing authority was the Cabinet Secretary responsible for higher education and in no way was it shown how that would vitiate the parties' agreement to separate. It was clear that the respondent's Council exercised disciplinary control and supervisory powers over the claimant. The Court finds that there was nothing before the Court to nullify the separation agreement and in any event, the respondent and not the Cabinet Secretary had been sued in the matter. It is clear that the respondent's Council knew that the appointing authority was the Cabinet Secretary and its role was to recommend a dismissal in line with Council's functions and powers. The claimant then opted to resign. The Court returns that the resignation was valid and the respondent's Council did nothing to usurp the powers of the Cabinet Secretary to terminate the contract of service. The parties' intentions to separate were clear and they are bound accordingly.

Second, the Court returns as follows on the other remedies as prayed for the claimant:

- (a) As submitted for the respondent, 3 years have lapsed since the resignation on 02.05.2013 and an order for reinstatement is accordingly time barred under section 12(3) of the Employment and Labour Relations Court Act, 2011. Further, as submitted for the respondent, the respondent has since been chartered to a fully fledged University so that the position held by the claimant has since been abolished and there would be no vacancy in that regard. The Court follows the holding in Professor Elijah Biama –Versus- University of Eldoret & 2 Others [2014]eKLR thus, **“The 1st issue for determination is whether the petitioner has valid claims under the contract of service as the Principal of Chepkoilel University College. The court finds that upon the elevation of the Chepkoilel University College to a fully fledged university under the name University of Eldoret, the office of Principal as held by the petitioner was thereby abolished. The abolition of the office, in the opinion of the court, was an overriding circumstance that superseded any claims by the petitioner to continued employment in the office of Principal.”** Thus, the prayer for reinstatement will fail.

(b) The claimant prayed that the report by the Adhoc Committee and dated April 2013 be expunged. It was submitted for the claimant that the allegations had not been established in a due process as genuine so that the report should be expunged. The Court has considered the several meetings at which the report was discussed. It is not prayed that the report be expunged with all proceedings flowing from it – the consequence being that even if the report was expunged, the findings based on the report as per the record of the subsequent meetings will remain on record. The Court considers that the parties by the resignation agreement agreed not to act on the report but to separate per the resignation agreement. It is the agreement on resignation that in the opinion of the Court overrides the disciplinary process which became thereby aborted. In the interest of balanced justice, the Court finds that the parties are bound by the separation agreement and there would issue a declaration that the separation agreement by way of resignation superseded the disciplinary process that had otherwise been initiated against the claimant by the respondent. The Court returns as much.

(c) As submitted for the respondent, payment of Kshs. 44, 175, 390.00 being the payment under the unexpired period of service is not justified. First the Court has found that the parties separated by agreement and there is no basis to pay for the unexpired term as there was no agreement to that effect in the separation agreement or in the initial contract of service. Second, the claimant resumed his employment at JKUAT as a Professor of Chemistry. Third, the claimant has not raised any ground attributable to the respondent that could justify the payment of the remuneration for the unexpired period that the claimant did not work subsequent to the resignation. The Court follows its opinion in **Ronald Sigey –Versus - Chemosit Water and Sanitation Company Limited & Another [2018]eKLR**, thus, “...The claimant testified that he was employed by the Githunguri Water Company from December 2011 to 30.06.2013 earning Kshs. 140, 000.00. The claimant having obtained alternative employment and having not established diminished capacity to do so attributable to the 1st respondent, the Court once again returns that the claimant would not be entitled to 35 months’ pay for the remainder of the 3 years’ service. The prayer for Kshs.4, 550, 000.00 in that regard will fail.” Again, and as submitted for the respondent, in **Cyprian Kinoti M’huriungi –Versus- County Government of Meru & 2 Others [2016]eKLR**, the Court held, “The court considers that reinstatement and payment for the unexpired term are not justified prayers in the circumstances of this case especially that the claimant confirmed that he had already reverted back to his service in the national government. As submitted for the respondents, under section 73 of the County Government Act, 2012 the claimant has reverted to his service prior to the secondment and in the court’s opinion that is a mitigating factor in favour of the respondents against reinstatement or payment for unexpired term of the contract of service as prayed for.” The prayer for payment for unexpired term will therefore fail. Gratuity attributable to that unexpired term that was not served at all will also be declined by the Court as unjustified.

(d) The claimant is entitled to salary for April 2013 and up to 2nd May 2013 being **Kshs. 252, 892.65** as prayed for. He is also entitled to gratuity for the period served from 19.12.2013 to 02.05.2013 as per the contract of service and is awarded **Kshs.454, 004.00** as computed in the amended memorandum of claim. Further the claimant testified that he transferred on 21.03.2013 a sum of **Kshs.389, 703.00** from his bank account to the respondent on account of mental confusion. The Court finds that he is entitled to the refund and is awarded accordingly. The medical claim appears not to have been specifically disputed in the respondent’s submissions and he is awarded **Kshs.54, 675.00** as prayed for. The claimant showed that he was entitled to Kshs. 80, 000 for remunerative allowance per circular dated 01.08.2012 for role in the Council and is awarded **Kshs 240, 000.00** as such unpaid allowances as claimed and prayed for.

Third, for the prayers in the Counterclaim the Court makes findings as follows:

a) The respondent claims Tax Kshs. 206, 001.39. It is submitted that the claimant should be ordered to pay the money as payable to Kenya Revenue Authority. As submitted for the claimant it is not explained why the money is due from the claimant and the prayer will fail.

b) The respondent claims irregular Council meeting allowance **Kshs. 39, 650.00**. The claimant’s submission was that it was an adjustment to meet the circular provisions on payment of Kshs. 80, 000.00 per month to him as College Principal and as per prevailing circular provisions. However, in his evidence he admitted that the amount was irregularly paid and should be refunded and is awarded accordingly.

c) The respondent prays for irregular mileage claim **Kshs. 254, 811.00**. The claimant explained that he claimed the money as due because he was not provided housing at the respondent’s premises as the house was under renovation. He incurred the cost to travel from JKUAT to the respondent’s premises and the claim was valid. The respondent’s case is that the claimant was paid 30 days’ per diem to settle and the mileage claim was irregular. The Court finds that the mileage claim was outside the terms of service and is recoverable as irregularly paid. It is awarded as prayed for.

d) The claimant paid for himself pension **Kshs. 155, 700.00** for January and February 2013 outside the contract of service. It is clear that the claimant was entitled to 31% gratuity and not pension contribution. The amount is awarded as prayed for.

e) The respondent prays for unrecoverable amount from irregularly recruited staff Kshs. 155, 975.00. The amount was paid to the staff who worked and if they did not, it is not clear why it would be recoverable from the claimant. The prayer will fail as not justified.

f) The respondent prays for three months basic salary in lieu of notice Kshs. 1, 169, 109.00 on account that the claimant resigned and the amount is due under contractual term for pay in lieu of termination notice. The Court has found that the parties agreed to separate by voluntary resignation agreement. The Court finds that the agreement superseded the contractual term to pay in lieu of notice. The claimant had not resigned unilaterally but it was agreed he resigns immediately and parties are bound accordingly. The prayer will fail.

g) The respondent prays for irregular payment on projects Kshs.2, 884, 514.00. The Court considers that there was no reason why the cash was not recoverable from the known contractors who may have been irregularly paid. The prayer will fail.

h) While making the findings in (e) and (g) above the Court notes that the respondent's evidence was that the other signatories to the respondent's accounts as at the time of effecting the payments in issue were not subjected to disciplinary process and it was not clear why only the claimant had to be liable for the alleged losses.

The claimant is awarded a sum of Kshs.1, 391, 274.65 less the amount found due to the respondent Kshs.450, 161.00 making a balance of **Kshs.941, 113.65** payable by the respondent to the claimant. The Court has considered the parties' margins of success and considers that the respondent will pay 50% of the claimant's costs of the suit.

In conclusion judgment is hereby entered for the parties for:

- 1) The declaration that the separation by way of the resignation agreement superseded the disciplinary proceedings that the respondent had initiated against the claimant as the disciplinary proceedings thereby aborted by parties' own agreement.
- 2) The respondent to pay the claimant a sum of **Kshs. 941, 113.65** by 31.12.2018 failing interest to be payable thereon at Court rates from the date of the judgment till full payment.
- 3) The respondent to pay 50% of the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 16th November, 2018**.

BYRAM ONGAYA

JUDGE