



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1610 OF 2013

**DR. CALLEB GUDO.....CLAIMANT**

**VERSUS**

**KCA UNIVERSITY.....RESPONDENT**

JUDGMENT

Introduction

1. The Claimant was employed by the respondent on 1.7.2008 as a Centre Director Kisumu Campus. He was later appointed to the administrative position of Dean of a faculty with an allowance on top of his salary as Lecturer. Initially he performed very well as a Dean but shortly thereafter his performance allegedly deteriorated significantly forcing the employer to redeploy him back to his position of lecturer on 27.6.2013. That around the same period, the respondent received complaints against the Claimant touching on his conduct and misuse of authority which forced his supervisor to demand explanation from him. In response the Claimant wrote a resignation letter on 2.9.2013 citing victimization, blackmail and unfair treatment by his supervisors as the reason for the resignation. Thereafter he brought this suit alleging that he had been constructively terminated and prayed for benefits accruing from his employment contract plus compensatory damages for unfair termination.

2. The respondent denied the alleged constructive termination of the Claimant's employment and averred that the Claimant resigned from employment voluntarily to evade impending disciplinary action from the impropriety complaints leveled against him by her clients. In addition, the respondent denied the reliefs sought by the Claimant and averred that they are not justifiable. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 11.2.2014 and 6.6.2018 when the Claimant testified as C W1 and the respondent called the Human Resource Manager M/s. Jeniffer Musoka as RW1. Thereafter both parties filed written submissions which I have carefully considered herein alongside the evidence adduced.

**Claimant's Case**

4. The Claimant testified that he was employed by the respondent in 2008 by the letter dated 30.5.2008. He started as a Centre Director Kisumu Campus and later moved to Nairobi as a Research Co-ordinator. On 22.12.2011 he was appointed to the position of Dean Faculty of Education by the respondent and worked until 27.6.2013 when he was redeployed the position of full lecturer by the respondent's vice chancellor on allegation of poor performance. He denied the alleged poor performance, and contended that in the biannual performance appraisals done in 2012, he scored good. He contended further that he was never served with any warning letter on the alleged deteriorating performance before the deployment.

He blamed his downfall to the vendetta from his supervisor, Senior Deputy Vice Chancellor who had declared that he would finish his PHD.

5. He further testified that on 19.8.2013 the respondent posted a surcharge of **Kshs. 462,800** without any explanation and the same was only withdrawn after he served summons in this suit. He further stated that the respondent delayed remittance of car loan instalments to National Insurance Company leading to penalty of **Kshs, 6949.88**. He further contended that while serving as Dean he attracted **Kshs 10,502,000** revenue from NGO to train lower primary school teachers in Kajiado but the respondent failed to pay him 40% of the surplus as required under the respondent's policy. He also contended that he secured training of Education Managers in South Sudan but his 40% (**Kshs.6000,000**) agency fees was not paid to him and he was excluded from the team that went to South Sudan to conduct the training. The Claimant further contended that while at Kisumu Campus he had a Desktop computer but when he came to Nairobi he was made to buy a laptop at **Kshs.120,000** but that money was never refunded. Finally, he stated that he was acutely underpaid in terms of salary and allowances and prayed for arrears thereof plus compensation for unfair constructive termination of his contract of service. In total he prayed for **Kshs. 18,954, 066.46**.

6. On cross examination he admitted that the employer wrote to him alleging that his performance as a Dean was below expectation. He further admitted that he received letter dated 14.6.2013 alleging misconduct against him following complaints from clients. He however denied all the alleged misconduct. He admitted that after the redeployment to full lecturer, his salary never changed but some allowances were taken away. He admitted that he had no documents to prove the alleged surcharge or policy to pay agency allowance of 40% of the revenue brought to the respondent or to prove that he was entitled to refund cost of buying a laptop. He contended that his salary was fixed by the employer through appointment letter but he discovered the underpayment of his salary during budget preparations.

### **Defence Case**

7. RW1 testified that the Claimant was employed by the respondent as a lecturer and also as a Dean of his faculty. He however contended that the position of Dean was only an administrative appointment for a specific period. She further testified that the Claimant's salary was **Kshs.180,090** basic per month but the gross pay was **Kshs.290,590**. That initially, the Claimant performed quite well but thereafter his performance dwindled leading to his redeployment to his substantive position full lecturer. Thereafter he was accused of misconduct (impropriety) by the respondent's clients and when he was asked to explain the allegations, he denied all and resigned from his employment.

8. RW1 denied the claim for Agency fee of 40% of revenue brought by the Claimant and contended that the Claimant was employed for a salary based on a negotiated contract with the employer. He further contended that Deans are only entitled to allowances and not salary. She further contended that the Claimant had a Desktop Computer in his office at Nairobi and there was no requirement for him to have a laptop.

9. On cross examination, RW1 maintained that a Dean is appointed for a term of 5 years subject to performance. She however admitted that she had no documents to prove that the Claimant was to serve for only 5 years as a Dean and that he was to recruit students. He stated that the misconduct raised by the letter dated 14.6.2013 were partially investigated but the Claimant resigned before he was given a chance of being heard. She however admitted that the Claimant responded to the alleged misconduct contained in the letter dated 14.6.2013 which was a show cause letter.

### **Analysis and Determination**

10. There is no dispute that the Claimant was employed by the respondent as a Lecturer until 2.9.2013 when he served a resignation letter citing victimization, blackmail and unfair treatment by his supervisor.

The issues for determination herein are:

**(a) Whether the resignation was voluntary or through constructive termination.**

**(b) Whether the Claimant is entitled to the reliefs sought.**

#### **Voluntary resignation or Constructive termination**

11. The Claimant contended that his supervisor, respondent's Senior Deputy Vice Chancellor had declared that he would finish him and his PHD. He further contended that the Senior Deputy Vice Chancellor had persisted in victimizing him and unfairly treating him for no just cause. He denied all the alleged poor performance and the accusations of impropriety levelled against him by the respondent's clients. He also contended that he was not paid equal to other Deans of faculties and he had also been denied allowances, agency fees, wrongfully surcharged and remittance of his car loan payment delayed.

12. The respondent has however described the Claimant as a poor performer and denied the alleged victimization and unfair treatment of the Claimant. She has further accused the Claimant of resigning from employment to evade disciplinary action after clients accused him of impropriety in the course of his duties as the Dean of his Faculty. She therefore denied the alleged constructive termination of the Claimant's employment contract.

13. Constructive dismissal of an employee occurs where an employee is forced to leave his job involuntarily because of his employer's conduct which renders the continuation of the employment relationship intolerable for the employee or where employer's conduct constitutes a repudiatory breach of the contract of service. In this case the claim the Claimant resigned after he was redeployed from the position of Dean to full Lecturer and after being served with a letter calling him to respond to allegations of misconduct levelled against him by the respondent's clients.

14. After considering the weight of the evidence from both sides I find that the Claimant has failed to discharge his burden of proving Constructive dismissal. In my view the Claimant has not proved either that the respondent's conduct had made the continuation of the employment relationship impossible or that it constituted a repudiatory breach of the contract. It is obvious that respondent's clients accused the Claimant of impropriety and when the respondent wrote to him to respond to the alleged misconduct, he denied the same and later resigned from the employment before investigations on the allegations were completed.

15. I do not find the conduct by the respondent wanting in the circumstances of this case because all what she did was to exercise her managerial prerogative of initiating investigation of an alleged misconduct by her employee. Writing a letter to ask the Claimant to defend himself of an alleged misconduct was not and did not anyway render the employment relationship intolerable or amount to repudiatory breach of the same. I therefore agree with the respondent and return that the resignation was voluntary and intended to evade disciplinary action for the alleged misconduct.

### **Reliefs**

16. In view of the foregoing finding I decline to find that the respondent is guilty of constructive dismissal as prayed. Flowing from the foregoing, I dismiss the claim for the alleged loss of earning of **Kshs. 4,053,096** due to Constructive dismissal.

17. The claim for withdrawal of irregular surcharge of **Kshs.462,800** is also dismissed because the Claimant stated in his testimony that the surcharge was withdrawn after the service of summons on the respondent. Likewise the claim for refund of penalty fees paid to National Insurance Company Bank due to delayed remittance of loan money is dismissed because the Claimant has not proved that the delay was deliberate and in bad faith.

18. The claim for Agency fees at the rate of 40% of the surplus income brought by the Claimant is also dismissed for lack of evidence. The Claimant has not proved the actual amount of the income, the actual surplus, and availed contractual proof of his entitlement to the 40% agency fees. All what he stated was that the respondent had the policy for the payment of the said Agency fees but produced nothing to prove the same.

19. The claim for refund of **Kshs.120,000** being cost of buying a Laptop is dismissed because the Claimant never produced any evidence to prove that he was authorized to buy it and seek reimbursement of the cost. Finally the claims for lost earnings due to underpayment and denied payments for curriculum development are also dismissed for lack of evidence that he was entitled to the same.

### **Conclusion and Disposition**

20. I have found that the Claimant voluntarily resigned from his employment to evade disciplinary action for the misconduct levelled against him by the respondents clients. I have also found that the Claimant has not proved the alleged Constructive dismissal by the respondent. Finally I have found that the claim for **Kshs. 18,993,492.69** has not been proved by evidence.

Consequently, I dismiss the suit with no costs.

### **Dated, Signed and Delivered in**

**Open Court at Nairobi this 2<sup>nd</sup> day of November, 2018**

**ONESMUS N. MAKAU**

**JUDGE**