



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1539 OF 2013

PROFESSOR FRANCIS M. NJERUH.....CLAIMANT

- VERSUS -

JOMO KENYATTA UNIVERSITY OF

AGRICULTURE AND TECHNOLOGY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 2nd November, 2018)

JUDGMENT

The claimant's case is based on the amended claimant's memorandum of claim filed on 15.03.2016 through Dennis Anyora Moturi & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent's action of suspending the claimant on 14.08.2013 amounts to the phenomenon of attempted constructive, unlawful dismissal of the claimant.
- b) A declaration that the respondent has contravened the claimant's right under Articles 27, 28, 30, 41 and 47 of the Constitution.
- c) A declaration that the respondent's action was done in pure disregard and is ultra vires the provisions of section 65 of the Universities Act No.42 of 2012.
- d) An injunction order directed at the respondent not to bar, hinder or refuse the claimant access to his place of work and office at Jomo Kenyatta University of Agriculture and Technology campus, Juja.
- e) An injunction order directed at the respondent not to interfere and hinder the claimant in the performance of his duties.
- f) A permanent injunction to stop the respondent from terminating the claimant's service or victimizing him in any way for filing this suit.
- g) An order directing the respondent to return to the claimant all documents and framed photographs confiscated from the claimant at the time of suspension.
- h) An order that the respondent pays the claimant:
- i) In the alternative to prayer (h) above, an order directing the respondent to reinstate the claimant to his employment and payment of all unpaid dues to him.
- j) Any other or further relief that the Honourable Court may deem fit to grant.

The respondent's case is based on the amended statement of reply filed on 06.12.2017 through Lutta & Company Advocates. The respondent prayed for:

- a) The claimant's claim to be dismissed.
- b) The claimant's suspension and dismissal be upheld.

c) The Honourable Court refuses the claim with costs to the respondent.

d) Alternatively the Honourable Court to make such orders as it deems expedient to meet the ends of justice.

The claimant was appointed by the respondent to the position of Deputy Vice Chancellor (Administration, Planning and Development) – DVC,APD, effective 17.07.2006 for a period of 5 years. The claimant successfully served the 5 years' term and was reappointed to the same position for a period of 5 years effective 07.11.2011. The five years' term was to lapse on or about 07.11.2016.

The claimant was suspended from duty by the resolution of the respondent's Council passed on 14.08.2013 to pave way for further investigations into the allegations levelled against the claimant. By the letter dated 27.08.2013 the respondent informed the claimant that the suspension was on half pay effective 14.08.2013 until further notice. By the letter dated 04.09.2013 the claimant's advocates Z.N. Gathara & Company Advocates demanded that the respondent provides full information about the disciplinary case.

By the letter dated 06.09.2013 the respondent issued a show cause notice for the claimant to show cause why he should not be removed from the office of DVC, APD on account of the stated allegations including financial mismanagement; insubordination; failure to act in the best interest of the university; intimidation and harassment of staff; lack of integrity, and, conflict of interest; and lack of professionalism. For each of the allegations (referred to in the letter as charges), the detailed particulars were set out in the letter. The letter asked the claimant to reply to the show cause letter within 14 days by writing to the Chairman of the University Council. The claimant replied by his advocates' letter dated 25.09.2013.

The respondent's case is that the Court order of 26.09.2013 delayed the disciplinary process against the claimant. The respondent's further case is that after the Court allowed the respondent to proceed with disciplinary proceedings against the claimant, the claimant was invited for a disciplinary hearing on 08.01.2014. The claimant attended together with his advocate Dr. Gibson Kamau Kuria and the claimant opted to remain silent during the disciplinary hearing. The minutes of the proceedings show that the claimant declined to address the meeting as was expected and instead his advocates protested and the claimant and his advocates left the meeting threatening to move the Court. The Committee deliberated the case and observed that it had complied with section 63 of the Universities Act, 2012 on fair administrative action. The disciplinary committee informed itself that the disciplinary case against the claimant had commenced on 14.08.2013 and had to be concluded by February 2014 being within 6 months prescribed under section 63 of the Universities Act, 2012. The committee recommended the summary dismissal of the claimant with immediate effect. The same 08.01.2014 the full Council met and resolved that the claimant is summarily dismissed from employment on account of the allegations in the show-cause letter.

The court has considered the pleadings, the evidence and submissions on record. The Court makes findings on the matters in dispute as follows.

The **1st issue** for determination is whether the suspension amounted to constructive dismissal. It is clear that subsequent to the suspension, the respondent proceeded to conclude the disciplinary process by issuing the show-cause letter, inviting the claimant to a disciplinary hearing and subsequently dismissing the claimant by way of summary dismissal. There was evidence that the parties had agreed upon suspension as an interlocutory disciplinary process. Thus the Court returns that the suspension was not such respondent's conduct that would be construed to mean a fundamental breach of the contract of service upon which the claimant was entitled to consider himself terminated. In any event the Court subsequently allowed the claimant to remain on suspension with pay until determination of the suit or the disciplinary process, whichever was earlier. Thus, the Court returns that the suspension did not amount to constructive termination.

The **2nd issue** is whether the termination of the claimant's contract of service by way of summary dismissal amounted to unfair termination. The evidence is that the claimant was accorded due process of a notice and hearing as provided in section 41 of the Employment Act, 2007 and as per due process of fair administrative action in section 63 of the Universities Act, 2012 as well as the contractual provisions on disciplinary process. The Court has considered the record of the disciplinary hearing as well as the proceedings before the Court. It has been established for the respondent that as at the time of termination, the respondent had valid reasons to do so. First, the claimant declined to substantively offer his explanations at the disciplinary hearing instead opting to remain silent – thereby leaving the respondent to conclude that in absence of exculpatory explanations, the claimant was culpable. Second, the evidence in court showed that the claimant awarded himself overtime allowance whereas he was in management and not subject to the CBA which entitled unionisable staff to overtime pay. Third, the evidence showed that the claimant appointed staff to university hospital maternity project without approval by the Vice-Chancellor and there had been delays in issuance of a letter of appointment to the finance officer thereby delaying implementation of Council decision in that regard and which was within the claimant's docket. Respondent witness No. 2 (RW2) testified that the claimant harassed him and he wrote complaining to the Vice-Chancellor.

Taking into account that evidence, the Court returns that as at the time of termination the respondent had valid grounds to terminate the claimant as per section 43 of the Employment Act, 2007 as read with section 45(2) (b) of the Act as the reasons related to the claimant's conduct, capacity, compatibility and, the respondent's operational requirements. The Court returns that the termination was not unfair in substance and procedure.

To answer the **3rd issue** for determination, the Court returns that it has considered the claimant's final submissions and finds that the prayers made were not justified at all especially in view of the foregoing findings on the 1st issue for determination. In particular, in view of the finding that the termination was not unfair, the remedies as prayed for will fail as not justified at all. The respondent has conceded that the claimant is at liberty to collect his personal belongings from the respondent's premises and to be paid terminal dues consequential to the dismissal as per the contract of employment. In such circumstances, the Court considers that each party will bear own costs of the proceedings.

In conclusion judgment is hereby entered for the parties for:

a) The claimant to collect his personal belongings from the respondent's premises.

b) The respondent to pay the claimant the terminal benefits consequential to the summary dismissal as per the contractual provisions.

c) Each party to bear own costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 2nd November, 2018**.

BYRAM ONGAYA

JUDGE