



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 352 OF 2016

JOSPHAT K. Z. MWATELAH.....CLAIMANT

VS

**TECHNICAL UNIVERSITY OF MOMBASA COUNCIL.....1ST
RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF
EDUCATION,**

SCIENCE AND TECHNOLOGY.....2ND RESPONDENT

**THE PRINCIPAL SECRETARY, STATE DEPARTMENT OF
HIGHER**

**EDUCATION MINISTRY OF EDUCATION, SCIENCE AND TECHNOLOGY...3RD
RESPONDENT**

JUDGMENT

INTRODUCTION

1. The claimant was employed by the 1st respondent (herein after called ‘TUM’) as Vice chancellor under a fixed term contract of five years starting from 8.7.2013. Under 39 (1) (a) of the Universities Act, all the Vice Chancellors of the public universities like TUM are recruited competitively by the respective university councils and thereafter appointed by the 2nd respondent (hereinafter called ‘CS’). The said law is however silent on whether or not the CS has the legal power to terminate the contract of employment of the Vice Chancellors of the public universities.

2. On 15.12.2015, the 3rd respondent (hereinafter called PS) wrote a letter to the Chairman of the TUM Council directing him to investigate allegations of fraudulent activities by senior staff of TUM, and interference with the running of the university by some TUM Council members. The said allegations were made to the PS vide anonymous letters which she enclosed with her said letter to the chairman TUM council. Subsequently, the claimant was served with a show cause letter dated 28.1.2016 outlining several offences and he responded vide his letter dated 4.2.2016. Thereafter the chairman of TUM Council responded to the letter from the PS dated 15.12.2015 by his letter dated 18.2.2016 stating that the allegations in the anonymous letters were unfounded. However the matter did not end there.

3. By a letter dated 25.2.2016 the claimant was suspended by the council to allow it make a decision on his letter dated 4.2.2016 by which he replied to the said show cause. The suspension was indefinite and all the claimant's benefits and allowances were suspended save for half of his basic salary. An ad hoc committee was set up to investigate the allegations made against the claimant and it presented its investigations reports to the Council. On 3.4.2016, the claimant was invited to a personal hearing by the Council and on 3.5.2016 the Council unanimously found the claimant guilty in 8 out of 10 charges and by a majority decision made on 4.5.2016 the council sentenced him to receive stern warning and then resume work.

4. For unexplained reason the Chairman of the Council wrote a letter to the CS communicating the council's decision on the claimant and enclosed the minutes of the council dated 3.5.2016 and 4.5.2016; a dissent by three members of the council who dissented to stern warning in favour of termination; plus a report of internal Auditor Ministry of Education for the TUM dated 5.4.2016, Auditor Generals reported for TUM for all the year ending 30.6.2015. The chairman of the council also called the claimant and informed him of the decision of the council but shortly thereafter he was shocked to receive the news of the termination of his contract by the CS through the mass media.

5. The claimant was aggrieved by the said news and brought this suit praying for the termination to be declared null and void, and that he be allowed to resume duty with full benefits from 25.2.2016 when he was suspended from work. In the alternation the claimant prayed for declaration that the termination of his employment was unfair and that he should be fully compensated under the Terms of Service in the Contract signed on 8.8.2014 plus damages to be calculated and paid by the respondents.

6. Simultaneously with the suit the claimant filed an application for, and obtained interlocutory injunction to stop TUM from declaring his position vacant or from recruiting his successor. Thereafter the claimant was served with the letter dated 11.5.2016 by the CS terminating his employment contract with TUM on ground of lack of integrity and maladministration in the office of the Vice Chancellor. The injunction was confirmed by consent of the respondents in order to hasten the trial and determination of the suit.

7. The respondents are unanimous in their defence that the CS being the appointing authority of the Vice Chancellor of the TUM under the Universities Act, he also has the power to terminate the said appointment. They have also unanimously denied that the termination of the claimant's contract of employment by the CS was unlawful and unfair, both substantively and procedurally. They are also unanimous that the claimant had committed gross misconduct and violated the constitutional provisions on leadership and integrity, and that he was given a chance to defend himself before the termination.

8. The issues for determination herein are:

(a) Whether the CS had legal or contractual authority to terminate the claimant's contact employment with the TUM.

(b) Whether the termination of the claimant's employment by the CS was unlawful, null and void.

(c) Whether the termination of the claimant's employment by the CS was unfair.

(d) Whether the reliefs sought by the claimant should be granted.

9. The suit was heard on 17.8.2016 and 30.8.2016 when the claimant testified as CW1 while the respondents called Professor Laila Uweso Abubakar and M/S Faith Chirchir as RW1 and RW2 respectively. All the documentary evidence filed by each party were admitted and produced by consent. Thereafter the counsel filed written submissions and alighted them on 16.11.2016.

ANALYSIS AND DETERMINATION

Whether the CS had authority to terminate claimant's employment

by TUM.

10. The claimant contends that the CS had no authority to terminate his employment by TUM and maintained that the termination letter dated 11.5.2016 is null and void. He further maintained that he is still Vice Chancellor of TUM and should be allowed to resume work as resolved by his employer through her council. He further contended that the role of the CS in termination process under his contract of employment was only limited to determining appeals made by the claimant from the decision of the council. In this case however the claimant never filed any appeal against the decision of the council dated 3.5.2016 and 4.5.2016.

11. The respondents have admitted that the CS never received any appeal against the decision by the council to serve the claimant with stern warning as opposed to termination of his employment. According to the defence, the CS merely reviewed the minutes of the council, the dissent recorded from the three council members and Audit reports by the Internal Auditor of the Education Ministry and the Auditor General and found that grave issues of lack of integrity, abuse of office and maladministration in the office of the VC by the claimant and consequently he decided to terminate his employment contract.

12. According to the respondents , the CS had the power to terminate the services of the clamant under section 39 (1)(a) of the Universities Act read together with section 51 of the interpretation and General provisions Act CAP 2 Laws of Kenya. It is the respondents' contention that, the power to appoint a Vice Chancellor under the Universities Act presupposes power to terminate the appointment by the CS. They therefore prayed for the suit to be dismissed because the termination of the claimant's contract by the CS was lawful.

13. The respondents have further contended that TUM being a public university run by public funds, the claimant's contract had to be terminated because his conduct was an affront: the national values and principles of governance vide Article 10 of the constitution, principles of leadership and integrity under chapter 6 of the constitution, the principles of public Finance order chapter 12 of the constitution, values of public service under chapter 13 of the constitution; section 8,9 and 17 of the Public officers ethics act CAP 183; and section 3,10,11, 12 & 13 of the leadership and integrity Act CAP 182.

14. After careful consideration of evidence and submissions made by the parties, it is clear that termination of the claimant's employment by the CS was not done under any appellate proceedings preferred by the claimant under clause 28.3 of his contract of employment. The termination was therefore done in exercise of the power allegedly donated by section 39(1) (a) of the Universities Act read with Section 51 of the Interpretation and General Provisions Act. The claimant has however submitted that such powers do not exist in view of section 51 (2) of the interpretation and General Provisions Act.

15. Section 51 of the Act provides that:

(1) Whereby or under a written law, a power or duty is conferred or imposed upon a person to make an appointment or to constitute or establish a Board, commission, committee or similar body, then, unless a contrary intention appears, the person having that power or duty shall have the power to remove, suspend, dismiss or revoke the appointment of, and to reappoint or reinstate, a person appointed in the exercise of the power or duty.

(2) Where the power or duty of a person under this section is exercisable only upon the recommendation or is subject to the approval or consent of another person, then the power shall, unless a contrary intention appears, be exercisable only upon that recommendation or subject to that approval or consent”

16. The appointment of VC in Public Universities like TUM is provided for under section 39 (1)(a) of the Universities Act which provides that:

“39. (1) The Vice Chancellor of a University shall be appointed

(a) in the case of a Public University, competitively by the Cabinet Secretary on recommendation of the Council”

17. After considering the provisions of section 39(1)(a) of the Universities Act and section 51(1) and (2) of the Interpretations and General Provisions Act, I agree with the claimant that the CS lacks the power to either appoint a VC of any Public University in Kenya without recommendation to appoint. Going by section 51(2) of the Interpretation and General Provisions Act, it is obvious that because the power to appoint a VC under section 39(1)(a) of the Universities Act is subject to recommendations by the University Council, it follows therefore that his power to terminate would naturally be subject to recommendation by the council. The foregoing view is however not supported by the letter and the spirit of the Universities Act because the said Act has established the University councils with the exclusive power to recruit, prescribe the terms and conditions of service, and discipline the VCs just like any other members of staff of the Universities under section 35(1)(a)(1) & (b) and 39(1)(a).

18. On the other hand section 40 of the Act recognizes the University Charter as the primary document that provides for the staff of the university. Under section 24 of the TUM charter, the VC is one of the members of staff for TUM and under subsection (4) (a), his terms and conditions of services are to be prescribed by the TUM statutes. Section 3 of statute v of the TUM statutes provides:

“3 subject to the provisions of the Act and these statutes, the conditions of appointment of the Vice Chancellor shall be as set out in the terms of service and as may be amended by the council from time to time”

19. The power to make the said terms and conditions of service for the VC is donated to the council by section 7(iv) of the XX1 statute of the TUM statutes which provides that:

“7 the council shall:

(iv) Make the appointments authorized by the charter and the statutes and determine the terms and conditions of service for all staff of the University”.

20. In exercise of the said power the council for TUM made the terms of service for the Vice Chancellor on 8.8.2014. Clause 28(1) of the said terms of service provided that the council shall take disciplinary action against the VC under the Employment Act for breach of the University’s statutes, Regulations and policies. That the disciplinary action to be taken against him shall under clause 28(2) include warning, suspension, termination or dismissal. Finally under clause 28(3) the disciplinary action to be administered is subject to right of appeal to the CS herein but under clause 28(4) the appeal is to be heard by a committee appointed by the CS before who the VC must appear.

21. In view of the foregoing summary of the powers of the University Council under the Universities Act, TUM Charter and the statutes, it becomes quite clear that the parliament did not intent to give any powers to the CS to fire the VC, the power to appoint him notwithstanding. If the legislature intended otherwise, the drafters of the law would just have stated so in the Act. Instead the CS was only given the power to appoint 5 out of 8 members of the council to ensure that the institution was run by his trusted soldiers and in the manner the CS prefers. In that respect the CS is reasonably expected to maintain constant consultation with his appointees to ensure that proper decisions are made by the university Councils, including disciplinary actions, because they form the majority in the council. Consequently, it is my considered opinion that the CS in this case lacked authority to terminate the service of the claimant both under the Universities Act and the TUM Charter, TUM Statutes, the Terms and Conditions of service for the Vice Chancellor of the TUM.

Unlawful Termination by the CS

22. In view of the foregoing finding that the CS lacked legal and contractual authority to fire the claimant, the letter by the CS dated 11.5.2016 terminating the claimant’s contract was done *ultra vires* the said law, TUM Charter, TUM statutes and the terms and conditions of service. Consequently, I find and hold that

the termination of the claimant's contract by the said letter was unlawful because it was not written by claimant's employer. It was an illegal punishment because the CS had no privity of contract in the contact between the claimant and the TUM. By terminating the claimant's contract, the CS had illegally descended from his throne of rendering advice or policy guidance to the council, and wallowed into the private contractual relationship between the claimant and his employer.

23. It is of interest to note that the CS illegally terminated the claimant's contract against the express legal advice given on 4.4.2016 by the same Attorney General (AG), who is representing him herein. The AG's legal opinion on matters employment and discipline of university workers was that:

“11. from the foregoing the relationship that exists between the council and the University staff is one of an employer and employee which is governed by the following legal instruments:

(a) The Constitution;

(b) The Statute; and

(c) The contract of Employment.

12. Accordingly, it is the mandate of the council as the employer to undertake disciplinary action against the staff”.

24. The AG has not demonstrated why he has abandoned the said legal opinion he gave to the University of Nairobi and copied to the CS herein on 4.4.2016. In my view the said legal opinion represented the correct interpretation of the law in relation to the appointment and termination of the appointment of Vice Chancellors of all the Public Universities including TUM.

Unfair Termination

25. In this case, the employer never terminated the claimant's services on 4.5.2016 even after finding the claimant guilty in 8 of 10 offences. Instead she punished him with service of a stern warning. It appears, however, that she has since changed her mind and constructively terminated the claimant's employment contract prematurely. The reasons for the foregoing being that, she has by her conduct, pleadings, testimony of RWI and submissions by her counsel ratified the unlawful termination of the claimant's contract by the CS, and indeed she is one who effected the service of the termination letter on the claimant.

26. Under section 45(2) of the employment Act, termination of employment contract by the employer is unfair if the employer fails to prove that, the termination was founded on a valid and fair reason(s) and that it was done after following a fair procedure. In this case, there is no doubt that the claimant found the claimant guilty of 8 out of 10 offences charged during the disciplinary hearing and the claimant never appealed against the said convictions to the CS or challenged the finding in any other forum. I therefore find that the TUM (1st respondent) has proved on a balance of probability, as required by section 43 (1) of the Act, that there were valid reason(s) for terminating contract of service for the claimant. The reasons were also fair because they related to his conduct and the operational requirement of the TUM as a Public entity.

27. However the procedure followed by the employer in terminating the claimant's contract was unfair because it is not provided for in the law or in his contract of employment. Having followed a fair procedure all the way to conviction and later sentencing of the claimant to stern warning, the employer was estopped from enhancing the sentence without any just cause and without first according him another fair hearing. Consequently, I find and hold that, the enhancement of the initial sentence of stern warning to termination of the contract of employment, was unfair and tantamount to condemning him unheard. Under section 45(4), of the Act termination of employment shall be unfair where:

“(b) It is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee”.

28. In this case, the TUM council did not handle the claimant’s case fairly and has remained aloof and even ratified the illegal decision by the CS, instead of rising to the occasion and state her mandate under the law, her charter, her statutes and the contract of employment between her and the claimant. In my view, universities are the highest institutions of learning playing a central role of paving the future development of the nation and humanity and cannot be left at the disposal of one person, the CS, to be dismissing the officers of the universities without following the law. The CS has the power to appoint five out of eight members of the university council, therefore he should whip his representatives to deal with misconduct on the part of the university staff and not to personally descend there because the law does not authorize him to do that.

RELIEFS SOUGHT

Injunction

29. This prayer is dismissed because it was a relief sought on interim basis and not as a final relief.

Declaration of termination as null and void

30. I have already held herein above that the termination letter by the CS to the claimant was done *ultra vires* and cannot find any basis either in law or the contract of employment. I will however not declare it null and void because the employer has supported it by all the pleading, evidence and submissions she presented herein. In other words, she has associated herself with, the wrongs done by the CS and ratified the termination.

Unfair termination

31. In view of the foregoing and my earlier finding herein above that the TUM has constructively terminated the claimant's contract of service by ratifying termination letter by the CS, I make declaration that the said termination was unfair because the procedure followed was unfair within meaning of section 45(2) (4) & (5) read with section 41 of the employment Act.

Compensation & pay in lieu of notice

32. Under section 49(1) of the Employment Act, if the court finds that the contract of employment has been unfairly terminated by the employer, the court can award the employee salary in lieu of notice plus up to twelve months gross pay as compensation for the unfair termination. In this case, the claimant is awarded 6 months' salary in lieu of notice as provided under his contract of employment. He will get 12 months' gross salary as compensation for the unfair termination. In granting the maximum compensation, I have considered the fact that, even with due diligence, the claimant may not be able to secure any other job with similar terms within the period of 12 months cushioned by the said compensation. In addition, I have considered the fact that he had reasonable expectation to work for more than the 12 months awarded before his contract term lapsed.

Accrued Benefits

33. In addition to the foregoing, the claimant will be paid all the dues and benefits that have accrued under his contract of employment. The said accruals shall be calculated by the 1st respondent in writing and the tabulation be filed herein within 30 day of today, and served on the claimant, for adoption by the court.

Disposition

34. For the reasons stated above, I enter judgment for the claimant declaring the termination of his

employment unfair and directing the 1st respondent to pay him the following:

- (1) Six month gross salary in lieu of notice.
- (2) Twelve months gross salary as compensation for unfair termination.
- (3) All benefits and terminal dues accruing from his contract of employment as directed herein above.
- (4) Cost of the suit plus interest.

Signed, dated and delivered at Mombasa this 27th day of January 2017.

O.N. MAKAU

JUDGE