



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT KISUMU

INDUSTRIAL CAUSE NO. 22 OF 2016

(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)

HUMPHREY AYIRO ONGANYA..... CLAIMANT

VERSUS

MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY.....RESPONDENT

JUDGMENT

The Claimant herein is an employee of Masinde Muliro University of Science and Technology the Respondent. By letter dated 17th June 2015 he was suspended from duty on grounds that he was involved in mismanagement of student finance records leading to loss of revenue in form of unpaid student fees, whose magnitude was yet to be established. While on suspension, the Claimant was to be on half salary until the case was determined. He was required by the letter of suspension to keep off the university premises. At the time of suspension the claimant was also a student at the university.

By letter dated 22nd September 2015 the Claimant received a letter from the Respondent accusing him of professional misconduct. The letter informed the Claimant that investigations had revealed that -

- i. That on 1st of September 2014, he conspired with Mr. Benson Odhiambo to make unsupported invoice adjustments into his fees account registration no.BBM/056/11 of Kshs.20,000/- and Kshs.150,000/- all amounting to Kshs.170,000/- with the intention to defraud the university of the said amount of money and confer a benefit to himself.
- ii. That on unspecified date in the month of May 2015, the Claimant knowingly presented and used a fees statement showing that he had cleared his fees and had an overpayment of Kshs.22,550/- for purposes of clearance to sit for end of semester examinations a fact that he knew was false and misleading and meant to allow him to sit for university examinations without paying fees.

The letter required the Claimant to show cause within 14 days why disciplinary action should not be taken against him. The Claimant responded to the letter on 4th October 2015, denying any involvement in any professional misconduct as alleged in the notice to show cause.

Following his response to the notice to show cause no further action was taken by the University until the Claimant sent a letter dated 22nd October 2015 reminded the Respondent of the delay in concluding the case. The reminder did not elicit any response or action from the Respondent and the Claimant sent a further reminder on 3rd December 2015 following which the Claimant was invited for a disciplinary hearing on 18th December 2015. The letter inviting the Claimant for the disciplinary committee hearing is dated 9th December 2015 and advised the Claimant to collect supporting documents for the disciplinary hearing from the office of the Registrar (Administration). When the Claimant went to collect the

documents on 17th December 2015 no documents were available and he was informed that the disciplinary hearing had been postponed and he would be notified of the new date.

On 18th December 2015 the Claimant again wrote to the Respondent asking to be informed of the date of the disciplinary hearing and when he could collect the supporting documents. He did not receive any response and sent a reminder on 5th January 2016 but still no response was forthcoming.

The Claimant thereafter decided to seek the services of an advocate and on 21st January, 2016 his advocates wrote a letter to the Respondent demanding that the Respondent informs the Claimant of his fate. Still no response was received from the Respondent prompting the Claimant to file the instant suit.

By his Memorandum of Claim dated 3rd February 2016 and filed on 5th February 2016, the Claimant states that he is a member of the Universities Non Teaching Staff Union which has a Collective Bargaining Agreement (CBA) with the Respondent and which makes the following provisions regarding suspension;

Clause 12.2 - Suspension

- i. Where misconduct by an employee requires investigations, the employee may be suspended from duty with half pay for a period **not exceeding 21 days** whilst an inquiry is being carried out.
- ii. Depending on the circumstances, all suspension letters shall be accompanied by show cause letters **within seven days**.
- iii.
- iv. No suspension period **shall exceed 21 consecutive days**. If exceeding the employee shall be reinstated except (not relevant here)

The Claimant contends that he had been under suspension for over 8 months which was illegal and a blatant breach of the above quoted provision of the CBA and he had suffered and continued to suffer loss and damage.

The Claimant further claims that the Respondent has been in breach of Article 47(1) of the Constitution for failing to afford him fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

He seeks the following orders -

- a). A declaration that the continued suspension of the Claimant is unlawful.
- b). An order lifting the Claimant's suspension made by a letter dated 17-6-2015.
- c). Payment of the half salary arrears.
- d). An order restraining the Respondent from terminating the Claimant's employment until this suit is heard and determined.
- e). Costs of this suit.
- f) Any other relief this Honourable Court may deem fit to grant.

Together with the Memorandum of Claim the Claimant filed a notice of motion under Certificate of Urgency seeking the following orders -

- 1. **THAT** this application be certified urgent and service thereof be dispensed with in the first

instance.

2. **THAT** upon prayer 1 being granted, a temporary injunction do issue restraining the Respondent from committing a breach of contract by unfairly terminating the Claimant's employment until this application is heard inter-partes.

3. **THAT** upon prayer 2 being granted, a temporary injunction do issue restraining the Respondent from committing a breach of contract by unfair terminating the Claimant's employment until this claim is heard and determined.

4. **THAT** the Claimant's suspension through the Respondent's letter dated 17/6/2015 be and is hereby lifted.

5. **THAT** the costs of this application be provided for.

The Respondent filed a Defence to the Memorandum of Claim and a Replying Affidavit to the notice of motion. The replying affidavit is sworn by IRINE NANZALA LUMATETE the Respondent's Acting Finance Officer in which she states that the Claimant who was undertaking studies at the Respondent University was suspected of colluding with another staff of the University to make adjustments in his Student Fees payment records to show that he had paid fees which in actual fact had not been paid. Ms Lumatete further states in the replying affidavit that the Claimant's case was to be discussed at a Disciplinary Committee meeting that was scheduled to be held on 11th February 2016 but was postponed on the request of his union.

In the Memorandum of Reply and Defence, the Respondent states that the Claimant who was employed as an accounts clerk in Finance Department was also a student undertaking a Bachelor of Business Management Degree at the University. It is stated in the Defence that the Claimant who had a fee balance of Shs.225,418 conspired with another staff member, Mr. Benson Odhiambo Obonyo to make false credit adjustments of Shs.20,000 and Shs.150,000 respectively to his fees statement. That on discovery of the illegal adjustment the Claimant was suspended by letter dated 17th June 2015 on half pay while investigations were undertaken. The Respondent states that on 22nd September 2015 the Claimant was issued with a show cause letter which he responded to on 4th October 2015 denying the charges but he did not give reasons to exonerate himself of the charges. The Respondent avers that the Claimant was invited for disciplinary hearing by letter dated 9th December 2015 but the disciplinary hearing slated for 18th December 2015 did not take place for unavoidable circumstances.

The Respondent avers that by a letter dated 3rd February 2016 the Claimant was invited for a disciplinary hearing on 11th February 2016 but the Claimant came to Court on 5th February 2016 in an effort to stop the disciplinary process. It is further averred that the Claimant's disciplinary case was not heard as his union asked for further consultations with Management.

The Respondent avers that the offence of irregularly wiping out fees is a serious offence requiring thorough investigations that could not be completed in 21 days, that the offence is against the Public Finance Management Act, that the Claimant is still an employee of the Respondent and will not suffer irreparable harm as all the withheld salary will be released to him should he be absolved of blame and the suspension lifted. The Respondent avers that it has not breached Article 47(1) of the Constitution.

The Respondent prays that the suit be dismissed and the Respondent be allowed to take disciplinary action against the Claimant.

At the hearing of the case the Claimant testified on his behalf. The Respondent did not call any witness. The parties thereafter filed written submissions.

In his testimony the Claimant reiterated the contents of his affidavit sworn on 3rd February 2016 whose contents I have already summarized above.

Determination

The issues for determination are whether the suspension of the Claimant was unlawful and whether he is entitled to the prayers sought.

The terms of engagement of the Claimant are provided for in the Collective Bargaining Agreement (CBA) between the Respondent and Universities Non-Teaching Staff Union (UNTESU). The CBA provides for suspension at Clause 12.2 as follows:-

12.2 Suspension

(i) Where misconduct by an employee requires investigations, the employee may be suspended from duty with half pay for a period not exceeding 21 days whilst an inquiry is being carried out.

(ii) Depending on the circumstances, all suspension letters will be accompanied by show cause letters within seven days.

(iii) All suspension/show cause letters shall be copied to the Union Chapter Secretary within seven (7) days. Where such letters may not be copied for whatever reasons as provided, the union shall take up the matter in accordance with the grievance handling procedures.

(iv) No suspension period shall exceed 21 consecutive days. If exceeding the employee shall be reinstated except where the Union and Management have both agreed that more time is required to complete the investigation or where the investigation is done by the police or the case is pending before a court of law, when the employee will continue to receive half pay.

(v) If it is proved that the employee has committed an offence, he/she shall be dismissed or terminated as from the date of determination.

(vi) If the offence does not warrant dismissal or termination of service, the employee shall be served with a written warning letter copied to the Union Branch Secretary.

(vii) If the offence is not proven the employee shall be reinstated to his/her job, with full pay and benefits from the date of suspension.

(viii) An employee on suspension shall not be subjected to daily reporting unless otherwise required.

(ix) Security investigations reports touching on suspended employee may be availed to the Union where necessary.

It is not contested that the Claimant was suspended by letter dated 17th June 2015. The CBA has a self acting clause on suspension. It states that suspension is resorted to for purposes of investigations and that should investigations not be concluded within 21 days the employee shall be reinstated. The only exceptions are in the following cases-

(i) Where the union and management agree that more time is required to complete investigations.

(ii) Where investigation is done by the police.

(iii) Where the case is pending before a Court of Law.

In the present case, there is no agreement between the union and the Respondent that more time is required for investigations, nor was there police investigations or a court case. The show cause letter which was supposed to be served upon the Claimant within 7 days was issued on 22nd September 2015, more than 3 months after the suspension. Even after the show cause letter was issued and the Claimant

responded thereto, nothing was done until 9th December when he was invited for a disciplinary hearing to take place on 18th December 2015.

The Respondent's averments that the charges leveled against the Claimant are serious are not supported by the actions of the Respondent. The Respondent did not explain why it did not report the case to the police or other public body charged with the responsibility of investigating such cases .

In the Respondent's submissions and in the replying affidavit, it did not explain why it did not reinstate the Claimant within 21 days. It has not even shown that there were ongoing investigations between the time of suspension and show cause letter, or after the show cause letter. The Claimant's first invitation for disciplinary hearing was on 18th December 2015, 6 months after the suspension. No explanation was given to the Claimant for the delay even after he sent several reminders to the Respondent raising concern over the indefinite suspension. The arguments by the Respondent that the Claimant's union requested for consultations on 11th February 2016 does not explain the delay from the date of suspension to that date.

The Respondent has submitted at length that the intention of the Claimant's application filed with the Claim is to stop and or halt the disciplinary process. The Respondent referred the Court to the case of **Miguna Miguna V. Permanent Secretary, Office of the Prime Minister & Another.**

The Respondent has further submitted that the investigations were complex and involved a large number of students, and referred to the Claimant's additional bundles which refer to an estimated 700 students. The Respondent further submitted that investigations are over and management has strong evidence against the Claimant.

The Respondent referred the Court to the decision in **JOSEPH MUTUURA MBERIA V. COUNCIL OF JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY (JKUAT) [2013]eKLR** where the Court observed that -

"...It is important to note that all employees are bound by the terms and conditions of their employment and at all material time subject to any disciplinary action by the employer in case of misconduct, gross misconduct or for any justifiable reason necessary for the smooth running of the affairs of the employer. This right as due to an employer must however be exercised in a reasonable fair manner so as not to be found unfair and to ensure employees are not victimized."

The Respondent further referred the Court to the case of **GREGORY OTIENO OWUOTH V. MUMIAS SUGAR CO. LIMITED ELRC KISUMU CAUSE NO. 295 OF 2015** in which the Court observed that -

"The Employment Act does not intend that courts takes away managerial prerogatives from employers. To give the interim orders would have effect of shifting the management prerogative in staff administration. It would mean the employers does not have any say in the contract of employment it has authored. This would be contrary to the intention of the Employment Act, which seeks to merely protect the weaker of the bargaining partners, not to deprive the employer the power to run its business altogether."

The Respondent submitted that the disciplinary process against the Claimant stopped after the Court order restrained the Respondent from terminating the Claimant's employment until this suit is determined.

All the foregoing submissions by the Respondent still do not explain why the Claimant was suspended beyond the 21 days provided in the CBA. If the Respondent needed more time for investigations, why did it not engage the claimant's union as provided in the CBA? Why didn't the Respondent respond to the Claimant's reminders and explain to him the reasons for the delay?

These are questions that have not been answered by the Respondent.

The wording of the CBA provisions on suspension are in mandatory terms; That no suspension period

shall exceed 21 consecutive days. And that if it exceeds, the employee shall be reinstated. In the present case the employee should have been reinstated on 9th July 2015. By then he had not even been issued with a show cause letter. He had not been charged with any offence.

The suspension became unlawful on the date when the 21 days provided for in the CBA lapsed. The Claimant should have been reinstated on the 22nd day after the suspension letter. The CBA Clause 12.2 does not bar the Respondent from continuing with the disciplinary process after reinstating the Claimant. The Respondent has not stated that it was not possible to carry out the disciplinary process while the Claimant was at work. The Clause does not even bar the Respondent from sending the Claimant back on suspension once it had concluded negotiations and was ready to convene the disciplinary hearing and make a determination within the 21 days provided for in the CBA.

The cases that the Respondent referred the Court to do not support its case. On the contrary the case of **GREGORY OTIENO OWUOTH** supports the Claimant's case. In that case the Court ordered the withdrawal of a letter of suspension where the employer kept the employee on suspension beyond the 21 days provided for in its procedure manual.

For the foregoing reasons I find the suspension of the Claimant beyond the 21 days provided for in the CBA to be unlawful. Consequently I order that the suspension letter be withdrawn forthwith and the Claimant be paid all salary withheld during the suspension.

The Respondent shall pay the Claimant's costs in this suit.

JUDGMENT DATED SIGNED AND DELIVERED THIS 16TH DAY OF FEBRUARY, 2017

MAUREEN ONYANGO

JUDGE