



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 303 OF 2013

AMOS CHERUIYOT TOO.....CLAIMANT

v

NAROK UNIVERSITY.....1ST RESPONDENT

MAASAI MARA UNIVERSITY.....2ND RESPONDENT

JUDGMENT

1. Amos Cheruiyot Too (Claimant) was appointed on promotion as a Senior Quantity Surveyor Assistant by Moi University through a letter dated 5 November 2008.
2. Although it is was not disclosed under what circumstances the Claimant moved or changed employers, the Claimant applied to Narok University College (1st Respondent) through a letter dated 18 July 2009 to be considered for the position of Senior Quantity Surveyor Assistant II Scale 12.
3. The 1st Respondent responded to the application through a letter dated 20 July 2009 in which the Claimant was informed that subject to the approval of the University Council, he was being offered the position of Senior Quantity Surveyor Assistant 1, at a salary entry point of Kshs 61,792/- Grade XII.
4. About 4 years later, 4 June 2013 to be precise, Maasai Mara University (2nd Respondent) informed the Claimant that after a meeting of the Staff and Students Appeals Committee of the Council held on 7 May 2013, it had decided that he be downgraded from Grade 12 to Grade 10 due to an *irregular placement*.
5. The Claimant's new designation was stated as Quantity Surveyor Assistant and remuneration was given as Kshs 47,547/-. The house allowance also went down.
6. The Claimant was not happy with the action of the 2nd Respondent and in a rejoinder dated 12 June 2013, he asked for the suspension of the decision to downgrade him for 10 days to allow his challenge to be considered.
7. It appears there was no resolution of the down grading complaint for on 11 September 2013, the Claimant commenced legal action against the Respondents alleging breach of contract because of the downgrading.
8. At the same time, the Claimant also sought restraining orders against the reduction of his remuneration pending hearing of the Cause.
9. The motion was compromised by consent of the parties on 29 October 2013 in which they agreed that

the downgrading and designation be suspended pending hearing of the Cause among other orders, including the filing of an amended Memorandum of Claim.

10. Consequently, an *Amended Statement of Claim* was filed on 30 October 2014 in which the Claimant introduced a cause of action of unfair termination of employment.

11. An *Amended Memorandum of Response* was filed on 19 March 2015 and a Statement of Agreed Issues was filed on 24 March 2016.

12. The Cause was heard on 17 January 2017 and the Claimant filed his written submissions on 30 January 2017 while the Respondents filed their submissions on 23 February 2017.

13. The Court has given due consideration to the pleadings, evidence and submissions and adopted the *Issues* as agreed by the parties.

14. The Court will advert to the relevant and material facts while examining the issues as agreed.

Whether the termination of the Claimant's employment was unfair

Procedural fairness

15. The law on the process to be undertaken by an employer before terminating the employment of an employee on account of *misconduct, poor performance or physical incapacity* is primarily found in section 35 of the Employment Act, 2007 which contemplate written notice; section 41 which envisage a notification of allegations and a hearing (procedural fairness) and sections 43 and 45 of the Act which place a burden upon the employer to prove the reasons for termination and that the reasons are valid and fair.

16. The reasons set out the letter informing the Claimant of the termination of his employment in brief were *threatening to break into an office previously occupied* and *insulting a Departmental head*. These were the allegation on which the Claimant ought to have been heard.

17. According to the letter of termination of employment, the actions by the Claimant amounted to gross misconduct by dint of section 44(4)(d) of the Employment Act, 2007.

18. Although the Respondents produced records to show that the Claimant had been taken through a disciplinary process in respect of *failing to account for sand* in April 2010 and *negligence in implementation and management of lecture halls project around 2010/2011*, these were not the principal reasons for the termination of employment in 2014 (even the misrepresentation as to academic or professional certificates/qualifications was not a reason given for the termination of employment).

19. The Claimant's testimony that he was not called to answer to the allegations outlined in the dismissal letter was not controverted.

20. In terms of section 41(2) of the Employment Act, 2007 a hearing (either through written correspondence or face to face hearing) was mandatory.

21. As there was no suggestion at all by the Respondents that the Claimant was informed in advance and asked to show cause why he should not be dismissed on account of the 2 reasons given in the termination letter, the action of the Respondents made the dismissal procedurally unfair.

22. Although the Respondent produced a copy of *Terms of Service for Non-Teaching Staff in the Senior Administrative, Catering, Clerical, Hospital, Library and Technical Categories*, none of the parties made reference to it during the hearing.

23. But the document suggests that an oral hearing was required before termination of service.

24. It is also noteworthy that the Respondents did not produce any minutes to show a hearing on the allegations of *threatening to break into an office previously occupied* and *insulting a Departmental head*, like the ones produced in respect of the negligence allegations against the Claimant.

Substantive fairness

25. It is not necessary for the Court to examine whether the Respondents discharged the burden placed them by sections 43 and 45 of the Employment Act, 2007 considering that both the statutory procedural and substantive fairness requirements are exclusive and mandatory.

Whether Claimant has proved his case on a balance of probability?

26. The answer to this issue is self-evident by now.

Appropriate remedies

Reinstatement

27. Although the Claimant expressed a desire to be reinstated, in the view of the Court, reinstatement would not be an appropriate remedy considering his disciplinary history in the workplace.

Reinstatement to grade XII

28. The consent order agreed by the parties preserving the Claimant's position and remuneration, pending hearing of the Cause must have effectively ameliorated any injustice which could have been sustained before the dismissal.

29. And because the Court has declined substantive reinstatement, it would be superfluous to reinstate the grading and remuneration when the employment relationship has not been restored.

Compensation

30. This is a discretionary remedy. The Claimant served the Respondents for about 5 years and considering the length of service and that with his qualifications the chances of securing alternative employment or self-employment are more than average, the Court is of the view that the equivalent of 6 months gross remuneration would be fair (gross pay which was preserved by the consent was Kshs 137,559/-).

Certificate of Service

31. This is a statutory right and the Respondents should issue one to the Claimant within 14 days.

32. Before concluding and for avoidance of doubt, the Claimant is also entitled to the dues referred to in the letter of termination.

Conclusion and Orders

33. The Court finds and holds that the summary dismissal of the Claimant was procedurally unfair and awards him and orders the Respondents to pay him

(a) Compensation **Kshs 825,354/-**

34. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 17th day of March 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Oumo instructed by Oumo & Co. Advocates

For Respondents Mr. Jaoko instructed by Nchoe, Jaoko & Co. Advocates

Court Assistant Daisy