



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NUMBER 1932 OF 2016

(CONSOLIDATED WITH 1933 OF 2016)

BEATRICE KINANU KARUTI.....CLAIMANT

VERSUS

TECHNICAL UNIVERSITY OF KENYA.....RESPONDENT

RULING

1. By a motion dated 20th September, 2016 the applicant sought orders among others that:

i. That pending the hearing and determination of this application, interpartes the court issues an order of stay/suspension of the implementation of the letter dated 14th September, 2016 by the Respondent purporting to interdict the claimant/applicant, put her on half pay and withhold her allowances and other benefits.

ii. That the court be pleased to suspend the interdiction of the claimant pending the hearing and determination of the suit herein.

2. The application was based on the grounds that:

i. That a letter dated 14th September, 2016 the respondent interdicted the claimant and consequently put her on half pay, withheld her allowances and other benefits through a flawed process which infringed on the claimant's rights.

ii. That the interdiction is actuated by malice and is based on unfounded and unsubstantiated claims.

iii. That the said interdiction is in contravention of the provisions of the Constitution, Employment Act and Labour Relations Act.

iv. That the respondent has not given the claimant a chance to be heard on the baseless and unsubstantiated allegations against her prior to making the unilateral decision to arbitrarily interdict her.

v. That the said interdiction amounts to a witch-hunt against the claimant by the respondent.

vi. That the respondent ignored the provisions of the collective bargaining agreement signed between itself and the claimant's union which does not provide for interdiction but instead based the interdiction on terms of service which have long been ousted by the aforesaid agreement.

vii. That the respondent has no power under the collective bargaining agreement to interdict the claimant.

3. The application was further supported by the affidavit of Beatrice Karuti and Catherine Kihumba. Beatrice deponed among others that;

i. That I am employed as a lecturer in the respondent's school of Business Management studies in which position I have been engaged since my appointment on 22nd December, 2009.

ii. That my duties in the respondent's employ include giving lectures, administering examinations and marking examinations amongst other duties.

iii. That the respondent's end of semester examination were administered on 4th April, 2016 upto 15th April, 2016 and the examination for my unit was carried on the 4th April, 2016 on which day I picked the examination and answer booklet from the Departmental Examination Officer's office and signed that I had picked, administered the exams, invigilated and signed that I had returned the scripts to the School Examination Officer's office after the exams.

iv. That it is the respondent's policy that lecturers should collect the examination scripts for marking within 2 weeks of the date of the last exam.

v. That in line with the respondent's requirements I proceeded to the Respondent's examination officer and picked my scripts for marking.

vi. That my problems with the respondent started on 27th april, 2016 when my colleague Catherine Wanjiru Kihumba requested me to pick her scripts on Financial management. I however, found the office locked upon which I called the Departmental Examination Officer, Mr Karungani on phone and he informed me that he was not around and that the scripts could be picked the following day on which he would make arrangements with a Mr Nyerere to open the office.

vii. That the following day on 28th April, 2016 I went back to Mr Karungani's office where I found Mr Nyerere but after searching he did not find the scripts that my colleague had sent me to pick for her.

viii. That I texted Mr Karungani to ask him about my colleague's missing scripts and he informed me not to worry since sometimes lecturers picked the wrong scripts only to return them later and assured me that someone must have picked them by mistake.

ix. That I proceeded to mark my scripts and returned them to the School Examination Officer's office together with the marks sheet.

x. That after sometime the missing scripts had not been returned and announcements were made on the staff's whatsapp group for the person who had picked the scripts to return them and Mr Karungani himself sent out an appeal during a school meeting for anyone who may have picked them to return them.

xi. That I was asked by the Executive Dean to write a report to the Vice chancellor on the missing scripts which I did.

xii. That I did not hear from the Executive Dean or the Deputy Vice-Chancellor (ARS) after the report. On 14th September, 2016 I got letter from the Vice Chancellor purporting to interdict me

with immediate effect.

xiii. That the Vice chancellor purported to exercise his power under clause 12.2 of the Terms of Service for Teaching, Senior Technical, Senior Library and Senior Administrative Staff which have been ousted by the collective bargaining agreement signed between the respondent and my union.

xiv. That I was not involved in the disappearance of the scripts in any way and if anything it is Mr Karungani who ought to explain where the scripts disappeared to since there is evidence to prove that the scripts were returned to his office and that they could not be traced when I went to pick them.

4. Catherine on her part deponed that:-

i. That I am employed as a lecturer in the respondent's school of Business and Legal studies in which position I have been engaged since my appointment on 1st July 2009.

ii. That my duties in the respondent's employ include giving lectures, administering examinations and marking examinations amongst other duties.

iii. That on 4th April, 2016 the end of semester exams started and I was supposed to collect examinations for my unit from the School of Examinations Officers' Office, administer them to the students and invigilate and then return the scripts to the same office.

iv. That I proceeded to the School Examination Officer's Office and picked the exams and answer booklets, administered the exams, invigilated and thereafter returned the scripts back to the same office.

v. That it was the respondent's policy that lecturer's should pick the scripts for marking within two weeks from the date of the last exam.

vi. That the exams concluded on 15th April, 2016 and on 27th April, 2016 I sent my colleague Beatrice Kinanu Karuti to the school examination officer's office to pick my scripts for marking on my behalf but she found the office locked and tested the school examination officer, Mr Karungani who informed her that he was not around but a certain Mr Nyerere would be around the following day in the Examination office.

vii. That the following day on 28th April, 2016 my colleague went back to Mr Karungani to ask him about the missing scripts and he informed her not to worry since sometimes lecturers picked the wrong scripts only to return them on realizing that they had erred and assured her that someone must have picked them by mistake.

viii. That on April, 2016 I proceeded to Mr Karungani's office to collect the scripts and I found Mr Nyerere in the office and after searching he could not trace the scripts. Mr Karungani requested me to wait for the person who had erroneously picked them to return them and cited previous cases where lecturer's had mistakenly picked scripts only to return them later.

ix. That after sometime the missing scripts had not been returned and announcements were made on the staff's whatsapp group for the person who had picked the scripts to return them and Mr Karungani himself sent out an appeal during a school meeting for whoever may have picked the scripts to release them.

x. That despite the announcements and appeals, the missing scripts could not be found and on 20th June, 2016 I made a formal report to the Director School of Business and Management Studies on the missing scripts.

xi. That on 22nd June, 2016 I received a memo from the Executive Dean requesting me to explain why I had not entered results for my unit after which I wrote to her and explained that my scripts had been missing and that I had reported the same.

xii. That I was requested by the Executive Dean to write a report about the missing scripts which I did on 13th August, 2016.

xii. That on the 2nd August, 2016 I was summoned to the Deputy Vice-Chancellor's (ARS) office to shed light on the missing scripts and I narrated the same story to him.

xiv. That I did not hear from the Executive Dean or the Deputy Vice-Chancellor (ARS) until 14th September, 2016 when I got a letter from the Vice-chancellor purporting to interdict me with immediate effect.

xv. That the Vice-Chancellor purported to exercise his power under clause 12.2 of the Terms of Service for Teaching, Senior Technical, Senior Library and Senior Administrative Staff which were ousted by the collective bargaining agreement between the respondent and my union.

xvi. That the respondent does not have any powers to interdict an employee under the collective bargaining agreement.

5. The respondent through its legal officer Mr Ruth Kirwa deponed on the main that:

i. That as rightly pointed out by the claimant in her supporting affidavit, the respondent is a reputable academic institution that is inclined to rendering the best academic services to its students and came up with policies as to how examination matters are to be handled by the lecturers mandated to offer the exams to students.

iii. That under the policies, it is a requirement that each and every lecturer becomes accountable for the student's scripts to guard against any carelessness that might be orchestrated by the lecturers.

iii. That one of the respondent's policies is that every lecturer mandated to administer exams to the students to tasked to report to the departmental Examination office to pick the examination and answer booklets upon which they are issued with an invigilator's sheet evidencing that the scripts have been picked as is explained in paragraph 5 of the supporting affidavit.

iv. That contrary to the assertions of the claimant in paragraphs 6,7 & 8 the claimant herein, I state that on the day that she was to administer exams, she did not report to work and requested a fellow lecturer, Catherine Wanjiru Kihumba to pick the examination scripts on her behalf and administer the exam to the students taking her course. That in order to cover up for the claimant herein, Catherine Wanjiru Kihumba did not write her name nor sign on the invigilator sheet to signify that she had picked the said scripts for the claimant.

v. That I am informed by School Examination Officer, Mr Karungani, which information I rely on, that the invigilator sheet is not always kept in the school examination office but is in the custody of the Departmental Examination Officer and that he believes that the claimant must have upon her return to the institution, sneaked into the said departmental examination and signed the invigilators' sheet as he later discovered that the space next to her name which was hitherto blank had been filled prompting Mr Karungani to put a star next to her name.

vi. That in further opposition to paragraph 6 of the said affidavit, the procedure during the examination is that once the lecturers have administered the exams, it is the policy of the respondent that marking of the papers should start immediately to beat the two weeks deadline given to return the marked scripts. The claimant herein collected the scripts from the examination office on 26th April 2016 almost three weeks after the examination had been conducted.

vii. That the claimant herein is attempting to hoodwink this honourable court that her problems with the respondent began when she was sent by Catherine Wanjiru Kihumba to pick for her the scripts as is alleged in paragraph 8 of the supporting affidavit because from the records annexed it shows that the claimant personally picked the papers but has never returned the same causing anxiety and anguish specifically to the students who sat for the exams and generally to the respondent whose academic potential is now put in question due to such conduct by the claimant.

viii. That the allegation that the scripts got lost in custody of the examination officers office is a fallacy that has no place since the documents attached shows that the scripts were taken by the claimant for marking but has never returned them after marking.

ix. That the actions of the claimant and her colleague of shifting the blame of the missing scripts to the examination office is a regrettable move and the actions of the claimant have left the respondent in a quandary despite its valiant efforts to put measures in place to curb the incidences of missing scripts by lecturers. The students concerned are in the dark about the marks they obtained in financial management, a core unit, for no fault of their own.

x. That indeed it is true that Mr Karungani made attempts as asserted in paragraph 10,11 12 and 13 of the supporting affidavit but the attempts made were in the nature or inquiries to any lecturer who might have seen the scripts anywhere after the claimant had collected them from the examination office for marking. The efforts to retrieve the scripts were not made before the claimant picked the scripts.

xi. That in the TOS, the evidence of the employee is weighed against the committee's findings before a case is decided. The disciplinary process is extremely fair as an employee is allowed to adduce evidence or statements on their character and conduct that would otherwise be inadmissible in court of law. The issue of fair hearing does not arise before one is taken through a disciplinary process.

xii. That the claimant has not been transparent on her part by barring any disciplinary session to deliberate on the truth of the matter. Such a sitting would undoubtedly be the best place to exonerate herself as there is already firm evidence that she lost the scripts.

6. This is an interlocutory application hence the concern of the court is whether the applicant has demonstrated a prima facie case with probability of success and further whether damages would not be adequate remedy in the event that the applicant is successful. If not sure, the court will decide the matter on a balance of convenience.

7. The claimants herein seek in the main claim a declaration that their interdiction was unprocedural and that they be reinstated to employment without any loss of benefit. They further seek the payment of their full salary and withheld allowances.

8. Pending the determination of the main claim the claimants pray that the court do order a stay or suspension of the implementation of the letter dated 14th September, 2016 interdicting the claimants and putting them on half pay. The letter of interdiction set out a raft of accusation against the claimants. These included undermining the academic integrity of the respondent by engaging an unauthorized person to teach and handle student examination scripts, conspiring to give false information on disappearance of examination scripts. The interdiction was stated to be pending further investigations into the allegations against the claimants. The interdiction was further carried out pursuant to Section 12.2 of the respondent terms of service for Teaching, Senior Technical, Library and Senior Administrative Staff and the Code of Ethics for Public Universities 2003.

9. The claimants dispute the applicability of the said Terms of Service contending they contradict the CBA between the respondent and their union. However, section 6.2 of the CBA too provides for suspension with half pay pending investigations into alleged misconduct for a period not exceeding ninety days.

10. Allegations have been made against the claimants. They require to be investigated. They are allegations which the respondent consider serious and could if proved amount to gross misconduct and result in termination of the claimants services.

11. The court is not concerned at this point with the truth or otherwise of the allegations. The respondent is expected to investigate the allegations and if necessary call upon the claimants to explain their side of events. There seems to be no denial on either side that some students examination scripts went missing and the claimants are being held responsible by the respondent. The claimants on their part deny responsibility. The issue will therefore have to be inquired into.

12. To prevent the respondent from proceedings with the inquiry would amount to interference with the management's discretion to discipline staff when necessary. The claimants have not said that the accusations against them are non-existent. All they are saying is that they are not culpable. This can only be known after the disciplinary process is conducted and concluded. The claimants must be given an opportunity to defend themselves at the disciplinary hearing.

13. In the circumstances the court will not interdict the respondent from conducting what is within their mandate as an employer. The application is therefore found unmerited and is hereby dismissed with costs.

14. It is so ordered.

Dated at Nairobi this day of2017

Abuodha J. N.

Judge

Delivered this 28th day of April 2017

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge