



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2367 OF 2016

SAMSON OMWOYO.....CLAIMANT

VERSUS

MAASAI MARA UNIVERSITY.....1ST RESPONDENT

THE VICE CHANCELLOR MAASAI MARA UNIVERSITY.....2ND RESPONDENT

RULING

1. The claimant, Samson Omwongo by his application and Notice of Motion dated 17th November, 2016 and filed on 22nd November, 2016 is seeking orders that;

1. Spent.

2. Spent.

3. The court do issue an order that the Claimant do receive his full salary pending the hearing of determination of this application.

4. The court do issue an order lifting the suspension pending the hearing and determination of this application

5. Costs of this application be in the cause.

2. The application is supported the Claimant in his affidavit and on the grounds that the Claimant was illegally suspended from work on 31st May, 2016 and put on half salary to date and such suspension has not been lifted or taken any steps as required under the Supplementary Bargaining Collective Agreement [supplementary collective bargaining agreement?] (SCBA). The Claimant has suffered and continue to suffer loss and damage as he has been denied his right to work and now unable to meet his financial obligations and has a family that depends on him.

3. In the affidavit, the Claimant avers that he is an associate professor of history at the Respondent university since 2012 and later in March, 2014 he was appointed Dean School of Arts and Social Sciences until May, 2016 when he was replaced unprocedurally by the 2nd respondent. The Claimant was suspended from work on 31st May, 2016 and put on half salary for alleged absenteeism which was termed as frequent. The Claimant responded to the memos issued to this effect and explained the reasons for the absence and that he had sought permission from the 2nd respondent.

4. Upon the suspension, the Respondents were to resolve the dispute within 90 days in accordance with

the SCBA. The Claimant has sent several letters to the 2nd Respondent requesting that the dispute leading to his suspension be resolved without heeding. The Respondents have left him in the dark. The suspension has left the Claimant suffering for being unable to meet his financial obligations to self and family.

5. In reply, the Respondents filed the Replying Affidavit of **Alfred Abochwa** the Legal Officer of the 1st Respondent and avers that the application by the Claimant is premature as internal dispute resolution mechanisms and procedures have not been exhausted.

6. The Claimant as an employee of the 1st Respondent was on 31st May, 2016 suspended pending investigations and disciplinary action. He was issued with a notice to show cause. On 6th June, 2016 the Claimant wrote a patronising, libellous and insulting letter to the 2nd Respondent clearly demonstrating that he had no respect to the person of 2nd Respondent and members of the 1st Respondent staff. The Claimant circulated the letter to all and sundry within the 1st Respondent in a bid to incite dissent against the staff.

7. Giving regard to the principles of natural justice and progressive discipline within the 1st Respondent, suspension pending further investigations and disciplinary action against the Claimant was merited.

8. On 22nd March, 2017 both parties attended court when the court directed that noting applications dated 16th February, 2017 filed by the Claimant and another filed by the Respondent and dated 7th March, 2017 the court directed parties to file written submissions on the first application dated 16th November, 2016.

9. No party has filed written submissions to date.

10. The application by the Claimant is premised on the facts that he was suspended on 31st May, 2016 on half and the Respondents have not taken any steps to address the same based on the SCBA and as such he stands to suffer loss and damage. The Claimant attached the SCBA to his affidavit as annexure "SM4" from its pages one (1) to 12. The SCBA is not complete. The last pages and maybe the clauses that show the dates of effect for the CBA as signed for by the parties is not included.

11. This is a document the Claimant is relying upon. Without the full document, I take the action of the Respondent against the Respondent is premised on the employer prerogative to address any misconduct of an employee while at work.

12. The Respondent too does not attach any material upon which they relied upon with regard to work place misconduct. There is no policy or rules and regulations of employee.

13. Section 10 read together with section 12 of the Employment Act requires an employer while issuing the letter of employment to specify the disciplinary rules applicable to the employee or to refer the employee to the provisions of a document which is reasonably accessible to the employee which specifies the rules applicable in disciplinary matters. Such a policy or rules should be in place for all employers who employ more than 50 employees. I take it, the 1st Respondent as a university and having the Claimant as one of its employees has sufficient numbers of employee to require that there is a statement on disciplinary rules.

14. Where there is a dispute filed with the court, the employer has a duty to supply the court with all work records and policies upon which the dispute is premised upon. The attachment and or submission of the work place policy in the light of the SCBA now submitted by the Claimant in full, if at all such a document is registered with the court as a lawful document to apply between the parties, the duty is vested on the Respondent to submit the same or other document that is applicable.

15. Without any material on disciplinary procedures applicable between the parties, I will deal with the merits of the application.

16. As stated above, the employer has the prerogative to discipline its employees. However, a prolonged suspension of an employee that is not addressed within a reasonable time only results in anxiety and is bound to raise concern. In **Victor Sammy Mutiso versus TSC [2016] eKLR** the court held that a reasonable time period for an interdiction should be within 3 months and if not possible, soon thereafter and a period of over a year is definitely long and not reasonable. In any event, an interdiction or a suspension like in this case should only be interim to allow for investigations and should not take long as held in **Peter Gaitho Ng'ang'a versus Board of Management Banita School and another [2015] eKLR**

Interdiction is a preliminary step in the disciplinary process. The petitioner may as well be vindicated by the investigations and that could be the end of the matter. Any pecuniary loss he may have suffered during the interdiction can be restored as provided for in the regulations.

17. On this basis, the Claimant having been sent on suspension by the employer on the grounds that;

SUSPENSION FROM DUTY

Reference is made to your letter of 18th May, 2016 addressed to the Vice-Chancellor. Whatever the justification (if any), the language used in your letter is abusive, libellous and insulting to the person and office of the Vice-Chancellor. It violates every rule of decorum and respect to authority. It is clear manifestation of gross misconduct which could attract criminal prosecution and civil litigation.

As a consequence, it has been decided to order your suspension from duty with immediate effect pending further investigation to your conduct ... before taking the contemplated disciplinary action against you, you are hereby given seven (7) days from the date of this letter to show cause why you think the intended disciplinary action should not be taken against you.

18. As such, the Claimant was suspended and issued with a show cause notice of 7 days. To this the Claimant responded vide letter 6th June, 2016 and he misses the crux of the matter, that is, to show cause as to why disciplinary action should not be taken against him for using ... *abusive, libellous and insulting to the person and office of the Vice-Chancellor*, which was found to violate the rule of decorum and respect to authority.

19. The tempo, texture, character of the reply by the claimant, as noted by the Respondent in reply is patronising. I equally find the same condescending, demeaning of the office of the Vice-Chancellor and person of the 2nd Respondent and to a large extent such can be defined in employment and labour relations as insubordination. I state so noting the following statements of the claimant;

Your letter ... dated 31st May, 2016 refers.

I am perturbed, though not surprised, at the turn of events. ... Instead of addressing and unremedying the raised concerns, your letter of 31st May 2016 wades of and turns to the language of my letter which you term as "abusive, libellous and insulting" to you and your office, and consequently you have meted me a suspension from duty. ... what I have questioned, and find irreconcilable, is the actions and decisions you made and given the level of your office. ...

The reason we have a dispute is because we are not in concord on the events leading to my termination as Dean SASS. Madam VC, you have now compounded the problem by suspending me from duty. I am not sure Madam VC, if you really want to lose a scholar of my calibre on a simple account of one and half day's absenteeism. If indeed you don't [do not] mind, then you are largely serving your self interests [self-interests] and not those of the university. [Emphasis added].

20. Was this a reply to the show cause or an attack of the office and person of the 2nd respondent? He show cause was directed at the Claimant for him to reply and state why he should not be disciplined due

to the alleged conduct. For him to turn round to give unsolicited advice to the office and person of the 2nd respondent is what in my view I find to be condescending. The holder of the office of the 2nd respondent being the person required to supervise the Claimant has authority to give lawful instructions. To go contrary to such where there is no basis, such is regulated in law under section 44(4) of the Employment Act.

21. Even where the Claimant holds personal views of and on the person of the 2nd Respondent, where the officer responsible gives lawful instructions, such must be obeyed such personal views notwithstanding. To air such personal views and then proceed on to share to all and sundry only exacerbates an already dire situation where the Claimant was required to show cause why he should not be disciplined; he failed to do so; and continued to attack the person and holder of the 2nd Respondent office. The sharing of official communications to the Respondents to third parties does not reflect well on the Claimant and the office he holds with the 1st Respondent. That I find to be gross misconduct that cannot find justification or be sanctioned by this court whether the Claimant is the applicant or a respondent to court proceedings.

22. Work relations in employment must be regulated. Employees on the shop floor must be managed and as a result the employer has manager, supervisors and shop stewards or a work council to ensure production and or work is done as required. An employee cannot circumvent lawful and appropriate directions or instructions of a supervisor on the basis that the employee hold strong view of his supervisor or feels more justified to act to the contrary. Where work go unregulated, such would only result into chaos and stoppage of the production chain.

23. The Claimant in his reply admits that;

I am not sure Madam VC, if you really want to lose a scholar of my calibre on a simple account of one and half day's absenteeism.

24. Without going into the merits of the case, I find this admission on its simple and logical meaning a case of serious misconduct and categorised under section 44(4) as a case that warrant summary dismissal. The Claimant does not stop at this admission and goes further;

... If indeed you don't [do not] mind, then you are largely serving your self interests [self-interests] and not those of the university. Is it possible to revoke my suspension and normalize our working relations. ... what has exacerbated the issue is that none of us is ready to accept our wrongdoing, if any.

25. Where the Claimant was issued with a suspension notice and a show cause, he became accountable to the employer as directed. The Claimant as the one facing allegations against him cannot turn round and start making demands upon his supervisor and office of the 2nd Respondent or upon who he terms as *Madam VC*. To do so is to miss the issue and turn his response to serve his self-interests. Upon admission by the a Claimant that he was not at work for one and a half (1 ½) days, he cannot then turn around and demand that his suspension be revoked on the grounds that each party is at fault and or wronged, himself included.

26. In any event, the suspension and notice to show cause is a very lenient manner of dealing with the Claimant noting the alleged misconduct. I take it the Respondent has put into account all else in arriving at suspending the Claimant who now has the golden chance to show cause why he should not be disciplined. The Claimant should not waste such a rare opportunity.

27. As noted above, at this stage and without going into the merits of the main claim, the materials present in court with regard to the claimant's application dated 16th November, 2016 I find the suspension of the Claimant by the Respondent has good basis, there is a reasonable cause as to why the Claimant was put on suspension and issued with notice to show cause, such has not been addressed by the Respondent within a reasonable time and as such, that process should be allowed to proceed and end without the court interfering with the same.

28. The Claimant moved the Court and obtained interim orders reinstating his due salaries. Such shall revert as directed vide letter notice of 31st May, 2016.

Accordingly, application dated 16th November, 2016 is hereby declined save that time stopped running from 22nd November, 2016 with the filing of the application; the Respondent has the next 30 days to address the Claimant's case with regard to his suspension and notice to show cause; the Claimant shall remain on suspension and on terms as set out in the letter of 31st May, 2016; and the Claimant shall unconditionally submit himself as required of him by his employer and the Respondent for purposes of the matter herein being addressed through the internal mechanism/rules/policy or work regulations of the Respondents.

As the Claimant has been served with a show cause notice, when invited for hearing, the Respondent shall ensure procedures under section 41 of the Employment Act are appropriately applied.

Before conclusion, I invite the Respondent while dealing with the claimant's disciplinary case to refer to the provisions of section 46(h) of the Employment Act.

Cost in the Cause.

Dated, signed and read in open court at Nairobi this 15th day of June, 2017.

**M.
JUDGE**

MBARU

In the presence of:

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