



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. 292 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**ALMOND KIBIWOTT KUTTO.....CLAIMANT**

**- Versus -**

**MASINDE MULIRO UNIVERSITY OF SCIENCE**

**AND TECHNOLOGY.....RESPONDENT**

**JUDGMENT**

The Claimant filed this suit alleging unlawful and unfair dismissal by the Respondent. He prays for the following remedies-

- (a) An order of reinstatement and payment of Kshs.570,661/- to the Claimant.
- (b) **ALTERNATIVELY** the payment of Kshs.864,662.25/- damages for unfair termination of employment.
- (c) Costs and interest.

The Respondent filed a Memorandum of Defence denying the allegations of the Claimant and prayed that the Claim be dismissed with costs

At the hearing of the case both parties called witnesses and thereafter filed and exchanged written submissions.

**Claimant's Case**

The Claimant testified that he was employed by Western University College of Science and Technology, the Respondent's predecessor, on 16th December 2003 as store keeper Grade III. In 2012 he was promoted by the Respondent to the position of Stores Clerk. On 31st January 2014 he was issued with a show cause letter requiring him to account for stores valued at Kshs.6,029.30 being milk valued at Kshs.2,235.00 and bar soap valued at Kshs.3,794.30. The Claimant responded by letter dated 6th February 2014 in which he explained that the milk was destroyed by rodents and he had reported to the invasion of the rodents to the procurement officer and the public Health officer. He attached a copy of a memo to the Catering Officer dated 29th October 2013 requesting for strong wire meshes to cover perforated wall/air bricks to deny rats access into the stores and metallic food shelves to avoid food items

being placed on/near the ground levels. The letter states that this will go a long way in prevention of hazards due to menace caused by rodents and alleviation of damages particularly to rice and milk under storage. On the loss of bar soap he responded that he issued the same to user departments against requests. He further explained that the cateress sometimes took custody of the bar soap due to unavailability of space in the store. The Claimant further explained that the keys to the stores were previously handled by two people.

The Claimant testified that he was issued with a suspension letter dated 18th February 2014. He was on suspension for a while until 5th June 2014 when he received another show cause letter which he responded to on 17th June 2014. After that he was invited to attend a disciplinary hearing which he attended on 28th and 29th August 2014. The recommendations of the disciplinary committee were that he be reinstated and given a warning and surcharge of Kshs. 20,000.00. The Claimant testified that he waited until 17th June 2015 when he was summarily dismissed.

It is the Claimant's contention that the dismissal was unfair as the disciplinary committee recommended his reinstatement. He further states that he was on suspension for a full year although the collective agreement that he is subject to provides for 21 days. The Claimant further contends that he was discriminated as the other employees who were involved in the same case; Kennedy Ochieng, Arthur Kuria and Mabel Wambani, were all reinstated.

The Claimant prayed for reinstatement and payment of Kshs.570,661 or in the alternative payment of Kshs. 864,662 being damages for unfair dismissal.

Under cross examination the Claimant stated that his duties as store keeper was receiving and issuing items in the store, that in the first suspension letter he was accused of non-accounting for goods in the store while in the second letter of suspension he was accused of neglecting his duties. He stated that there was no loss as he had only not updated the records since the documents had been taken away by the Vice Chancellor, but he accepted to be surcharged as recommended by the disciplinary committee. He stated that he did not appeal against the dismissal as he had lost his wife and his children were suffering.

### **Respondent's Case**

RW1 Bernard Ooko, an administrator in the Administration Department of the respondent testified on its behalf. He testified that the Claimant was one of the stores Clerks of the Respondent whose duties entailed receiving goods from suppliers, entering them in the records and issuing them for use to the Catering Department. Around December 2013 it was discovered that there were goods which had been received but not entered in the records. This prompted the suspension of the Claimant to allow for investigations. The investigations revealed some gaps in the records which had not been updated. The Claimant was issued with a notice to show cause and he responded, denying all the charges. A disciplinary committee was constituted and he was called for a disciplinary hearing on 28th August, 2014 and was heard on 29th August 2014. The charges against him were negligence of duty, that on 10th December 2013 he received 23 pails of Tilly cooking fat but recorded only 20, thus failing to account for 3 pails worth Kshs. 10,200. The second charge was that on 12th November 2013 he received 20 bags of sugar but failed to account for 2 bags worth Kshs. 10,400.

RW1 explained that there were 2 storekeepers and a cleaner in the store. At the material time the other store keeper was on sick leave and the Claimant was in charge. He explained that the cleaner does not undertake store keeping tasks. He stated that at the hearing the Claimant stated that there was pressure of work and he had lost his wife which could have caused the gaps in the records. He testified that at the hearing the Claimant stated that he had received 23 pails of Tilly cooking fat but 3 were rejected while for the sugar he explained that they had not updated the records.

RW1 testified that when the disciplinary Committee was making its recommendations it observed that the Claimant had admitted failing to update records and that there was no supervision. The Committee recommended that the Claimant be issued with a warning letter for failing to keep records and be surcharged for the unaccounted for items. That the Claimant was also to lose his half salary withheld

during suspension. RW 1 testified that the recommendation of the Committee is not final, that the Vice Chancellor considered the recommendation too lenient. He testified that the Council is the governing body and all Committees have delegated authority, that the Council retains all decision making powers including discipline and a person dissatisfied has room to appeal as provided in Statute 31(9) and (10). He testified that the Claimant did not appeal against the decision. He testified that the reason why the Claimant's suspension went beyond the 21 days provided for in Clause 12 of the CBA was that it was not possible to conclude investigations in time due to the large volume of documents in the catering stores where the Claimant was working. He testified that after investigations it was a while before the case was fixed for hearing because the Committee is chaired by the Deputy Vice Chancellor who was not usually available.

Under cross examination RW1 stated that the period of suspension was 21 days but the Claimant was on suspension from February 2014 to July 2015, a period of more than a year. He denied that the Deputy Vice Chancellor is incompetent. He stated that the Claimant was suspended with the cateress Mabel Wambani and the cleaner Kennedy Ochieng who worked in the stores with him but the other two were reinstated. He testified that the committee recommended that all of them be reinstated and surcharged and that the cateress was reinstated and surcharged but the Claimant was dismissed. He testified that the Claimant was not found guilty of the loss of bar soap. He stated that the Claimant did not have a chance to appear before the Vice Chancellor. He denied that the Claimant was discriminated.

RW 1 stated that under Statute No. 10 the appeal is against the decision of the disciplinary Committee which recommended that the Claimant be reinstated and that the statute does not provide for appeal against the decision of the Vice Chancellor. Under re-examination RW1 stated that the Committee recommended that Ochieng be dismissed but he was reinstated.

## **Determination**

I have carefully considered the pleadings and evidence as well as the written submissions filed by the parties. The issues for determination are whether both the suspension and dismissal of the Claimant were fair, whether the Claimant was discriminated and whether he is entitled to the remedies sought.

## **Suspension**

Suspension is provided for in the CBA between the Respondent and Universities Non-Teaching Staff Union (UNTESU) which the Claimant was subject to 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.*

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

The Claimant was suspended from duty by letter dated 18th February 2014. He was on suspension until 17th June 2015, a period of 16 months, well beyond the 21 days provided for in the CBA.

Clause 12.2(iv) provides that if suspension exceeds 21 days the employee shall be reinstated unless an agreement has been reached between the union and management to extend the period of suspension to allow more time for investigations or for a court case to be concluded. The CBA is thus self acting. In this case there was no agreement to extend the period of suspension, although RW1 alluded to more time being required to complete investigations and the non-availability of the Vice Chancellor who was to chair of the Disciplinary Committee.

The Claimant in his submissions states that the disciplinary process was marred with irregularities. He relied on this court's decision in **Kisumu ELRC Cause 295 of 2015 Gregory Otieno Owuoth v Mumias Sugar Company** in which the Court stated as follows:

*"...The Respondent cannot put an employee on indefinite suspension against the provisions of its own regulations. If the Respondent was not ready to conclude the process within the prescribed period of 21 days it should have carried out its investigations and finalised them before sending the Claimant on suspension. Although it was not a formal punishment, an employee on suspension is saddled with the uncertainty of not knowing his fate. His self esteem is punctured and his right to work is interfered with. Any disciplinary action must take the shortest time possible, otherwise it turns into punishment."*

The Claimant also relied on the case of **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University Of Agriculture and Technology [2014]eKLR** in which it was held that the court will intervene in disciplinary process marred with irregularities or is stage managed towards their dismissal.

In this case the Respondent clearly breached its own disciplinary procedure by failing to reinstate the Claimant or obtaining the Claimant's union's consent to extend the suspension beyond 21 days.

From the foregoing the suspension of the Claimant was unlawful from the moment the 21 days allowed in the CBA lapsed as there was no agreement for extension.

I therefore find and hold that the suspension of the Claimant for 16 months was in breach of the CBA and therefore unlawful.

## **Dismissal**

The Claimant has contested his summary dismissal on two scores. First, that it was against the recommendation of the Disciplinary Committee and secondly, that it was discriminatory. The Claimant submits that after the Disciplinary Committee recommended reinstatement the Vice Chancellor had no authority to enhance it to summary dismissal. It is further contended that the Vice Chancellor did not give the Claimant a hearing before enhancing the recommendation of the Committee. The Respondent on the other hand submits that there was an agreement between the union and the Respondent to extend the Claimant's suspension and that is why the union did not raise the issue at the Claimant's disciplinary

hearing. This is however not supported by any evidence of such agreement. Indeed in the minutes of the Disciplinary Committee under the title Communication from the Union, the first item reads: ***"Some of the staff appearing for disciplinary hearing have been on suspension for more than five (5) months contrary to the provisions of Clause 12.2 of the UNTESUCBA."***

The argument by the Respondent to the effect that recommendations of the staff disciplinary committee had to be ratified by the senate is also not supported by any evidence. In any event ratification is not the same as amendment of the decision as was done in this case. There is further no evidence that the Vice Chancellor submitted the decision of the Disciplinary Committee to the Council and that the Council changed the decision of the Committee in respect of the Claimant. No minutes of the Council were produced to support the contention. The fact that the Claimant did not appeal against the decision to dismiss him is further not evidence that he accepted the decision as he is in court to challenge the same.

The statutes referred to provide as follows-

There shall be two staff Disciplinary Committees as follows -

- (a) A committee chaired by the Deputy Vice Chancellor for the time being responsible for Administration which shall handle disciplinary matters for staff in grades 1 to 10.
- (b) A Committee of the Council, which shall handle disciplinary matters of staff in grades 11 to 18.
- (c) The committees under this section shall handle the disciplinary cases of members of staff as appropriate in accordance with the Terms and Conditions of Service and the provisions of any law related to employment.

Subject to the provisions of any law related to employment matters, a member of staff may appeal against a decision of the Disciplinary Committee as follows –

- (a) Staff in grades 11 to 18, to the Council; and
- (b) Staff in grades 1 to 10, to the Vice Chancellor and thereafter to the Council.

There is no provision in the Statutes for review of the recommendation of the Disciplinary Committee by the Council. The mandate of the Council under the Statutes in relation to discipline is only to hear appeals. For this reason the Vice Chancellor acted ultra vires when he reviewed the decision of the Committee whose findings and recommendations in respect of the Claimant was as follows:

**Findings:** That the staff admitted that he failed to update the records.

That there was no clear supervision. Whereas the staff served catering stores, he was answerable to the procurement department.

The staff suffered loss of wife and has small children to take care of which affected his performance of duty.

**Recommendations/**

**Determination:** Reinstate the staff and issue a warning for not keeping proper records.

To surcharge that staff for the un-accounted for goods as follows;

Sugar - Kshs.10,400/-

Cooking fat -Kshs.10,200/-

**Total-Kshs.20,600/-**

To lose all the half pay for the period under suspension.

Having acted without authority in contravention of the University Statutes, the decision of the Vice Chancellor to dismiss the Claimant is null and void.

### **Discrimination**

Having found that the decision of the Vice Chancellor to dismiss the Claimant was ultra vires the prayer on discrimination must also succeed. This is because the Respondent although acting on the recommendation of the Disciplinary Committee in respect to the Cateress as was expected, acted without authority in respect of the Claimant thus giving him differential treatment to his detriment.

### **Remedies**

The Claimant prayed for either reinstatement with payment of half salary from date when his suspension should have ceased under Clause 12.2 of the CBA or payment of notice, half pay and compensation in respect of unfair termination.

As I have already found above the decision of the Vice Chancellor was ultra vires and therefore null and void. I have further found that the suspension of the Claimant was unlawful and in contravention of the CBA. For these reasons I make the following orders:

1. The suspension of the Claimant is lifted with effect from 12th March 2014 when 21 days suspension should have ended with the result that he is entitled to full salary and benefits from 12th March 2013 to date.
2. The decision of the Vice Chancellor to dismiss the Claimant is hereby declared null and void and is substituted with the decision of the Disciplinary Committee as amended by 1 above.
3. Having found the suspension of the Claimant in contravention of the CBA and reinstated his salary with effect from 12th March 2014 the recommendation of the Disciplinary Committee to the effect that the Claimant loses half salary withheld during suspension is applicable only to the salary withheld during the 21 days of valid suspension from 18th February to 11th March 2014.
4. The Respondent shall bear the Claimant's costs of this suit.

**Dated, Signed and Delivered this 22<sup>nd</sup> day of September, 2017**

**MAUREEN ONYANGO**

**JUDGE**