



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 402 OF 2016

SAMUEL K. CHEPKUTO

CLAIMANT

v

EGERTON UNIVERSITY INVESTMENT

COMPANY LTD

RESPONDENT

JUDGMENT

1. Samuel K. Chepkuto (Claimant) a Farm Manager, was suspended by Egerton University Investment Co. Ltd (Respondent) through a letter dated 1 July 2016.
2. Because the suspension letter did not give any particulars of the allegations leading to the suspension, the Claimant wrote to the Respondent on 4 July 2016 seeking the particulars.
3. On 6 July 2016, the Respondent issued a show cause letter to the Claimant outlining some 3 allegations to which his response was requested before 15 July 2016.
4. The Claimant responded to the allegations through a letter dated 11 July 2016 in which he made reference to his letter of 27 June 2016.
5. A disciplinary hearing was subsequently held on 26 July 2016 culminating in the Claimant's dismissal through a letter dated 28 July 2016.
6. The Claimant appealed against the dismissal through a letter dated 9 August 2016, and on 12 October 2016 he instituted legal proceedings through the firm of *Odhiambo & Odhiambo, Advocates* alleging that the termination of employment was unfair (Claimant changed Advocates after close of hearing).
7. The Respondent filed a Memorandum of Appearance through the Federation of Kenya Employers on 23 November 2016, but no Response was filed.
8. On 13 March 2017, the Court scheduled hearing for 17 October 2017, and the Claimant was directed to serve a hearing notice.
9. The Claimant filed a *List of Issues* on 31 March 2017.
10. According to an affidavit of service sworn by Morris Ajwang Akuku, the *Federation of Kenya Employers* was served and acknowledged the hearing notice on 5 April 2017.
11. When the Cause was called out for hearing on 17 October 2017, the Respondent through Ms.

Chepngetich sought an adjournment on the ground that Mr. Masese who had conduct of the case was attending a meeting.

12. The Court declined to grant an adjournment because having failed to file a Response, the Respondent had not demonstrated diligence or intention to defend the Cause.

13. The Court also notes that no application, even oral was made to seek leave to file a Response out of time.

14. When the Cause was reached at 1140 am, Ms. Chepngetich was not present.

15. The Claimant gave sworn testimony and filed submissions on 29 November 2017, when a Notice of Change of Advocates was also filed.

16. The Court will evaluate the Claimant's case in terms of the framed Issues (although 9 *Issues* were framed, the same can be condensed into 3, *whether there was unfair termination of employment, whether there was breach of contract and appropriate remedies/orders*).

Whether there was unfair termination of employment

Procedural fairness

17. The Claimant was issued with a show cause dated 6 July 2016 outlining the allegations to confront. He was requested to make written representations before 15 July 2016.

18. In response to the show cause, the Claimant made written representations through a letter dated 11 July 2016 after which an oral hearing was held on 26 July 2017.

19. Despite the aforesaid, the Claimant contended that he was not afforded an opportunity to be heard and was not furnished with copies of witness statements. He also contended that no investigations were carried out, and if any were conducted, the same were shoddy.

20. Section 41 of the Employment Act, 2007 sets out the minimum protections an employer should comply with when it contemplates terminating an employment contract.

21. The Claimant herein was informed of the allegations to confront and he was given both written and oral chance to defend himself.

22. Although witness statements may not have been furnished to the Claimant, a disciplinary hearing ought not to be turned into a mini-court with the strictures of a criminal trial, as not many employers would be equipped for such an exercise.

23. In the view of the Court, the Respondent was in substantial compliance with the statutory requirements of a hearing.

Substantive fairness

24. In terms of sections 43 and 45 of the Employment Act, 2007 an employer is under a statutory obligation not only to prove the reasons for dismissing an employee, but that the reasons were valid and fair.

25. Three allegations were outlined against the Claimant and according to the dismissal letter, two of the allegations (*conversion of a power saw Husqvarna 272XP and changing its engine number, and taking a safe belonging to Egerton University for personal use*).

26. In his written explanations, the Claimant explained that though a carpenter went with the power saw

to his farm, it was never used nor did he change its engine number, and regarding the safe, he stated that his brother had died and he was going to use it for purposes of collections towards funeral expenses, and it was eventually returned.

27. The Respondent did not file a Response or attend Court to discharge the burden placed upon it as an employer and on that score the Court has only the case of the Claimant.

28. The Court can therefore find that the reasons for dismissal of the Claimant were not proved in terms of sections 43 and 45 of the Employment Act, 2007.

29. Despite that, if indeed the Claimant converted the power saw and the safe, and there is no suggestion that the same were not returned in good condition, the sanction of dismissal was too severe. There was no evidence of previous infractions by the Claimant

30. In the view of the Court, the dismissal of the Claimant under the circumstances narrated in Court was not in accord with justice and equity in terms of section 45(4)(b) and (5) of the Employment Act, 2007.

Breach of contract/statutory entitlements

Accrued leave days

31. The Claimant pleaded that he had 129 leave days accrued over 6 years of employment for which he sought Kshs 885,000/-.

32. But during testimony, he stated that it is only 2015/2016 that he did not go on leave (the pay slip for January 2016 indicate leave allowance of Kshs 9,000/- was paid).

33. The contract of employment provided that leave could only be carried forward with the written approval of the Respondent's Managing Director.

34. Section 28 of the Employment Act, 2007 provides for leave on full pay, and without evidence from the Claimant that he sought leave and was denied or that there was an arrangement for commutation of untaken leave, the Court finds this head of claim legally untenable.

Salary arrears

35. The Claimant pleaded that he was not paid remuneration for 2 months, but in testimony he asserted that he was not paid his remuneration for the months of May, June and July 2016 before the dismissal.

36. In view of the inconsistency which was not explained, the Court will go by the pleadings.

37. The Claimant disclosed that by time of separation he was earning a gross salary of Kshs 198,000/-.

House allowance

38. The copies of the Claimant's pay slips indicate that he was earning a house allowance, and the Court finds no merit in the claim for house allowance.

Lost future income

39. No evidential or legal basis for remuneration up to end of contract was provided and the Court finds the claim not merited.

Gratuity

40. Because of the conclusion that the dismissal of the Claimant was unfair, he is entitled to gratuity for

the period served.

Pay in lieu of notice

41. Having concluded that the dismissal was unfair, the Court holds that the Claimant is entitled to 3 months' pay in lieu of notice based on basic salary.

Compensation

42. Considering that the Claimant served the Respondent for about 6 years and the allegations and circumstances of dismissal, the Court is of the view that the equivalent of 5 months gross remuneration would be appropriate and fair.

Certificate of Service

43. A certificate of service is a statutory right and the Respondent should issue one to the Claimant within 14 days.

Conclusion and Orders

44. The Court finds and holds that the dismissal of the Claimant was not in accord with justice and equity and thus unfair, and awards him and orders the Respondent to pay him

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|---------------------------|-------------------------|
| (i) Pay in lieu of notice | Kshs 504,000/- |
| (ii) Unpaid salaries | Kshs 396,000/- |
| (iii) Compensation | Kshs 990,000/- |
| TOTAL | Kshs 1,890,000/- |

45. Claimant to have costs on half scale as Cause was not defended.

Delivered, dated and signed in Nakuru on this 4th day of December 2017.

Radido Stephen

Judge

Appearances

For Claimant Wachira Wanjiru & Co. Advocates

For Respondent Federation of Kenya Employers

Court Assistants Nixon/Martin