



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 598 OF 2013**

**PROF. SAMUEL MBUGUA KANG'ETHE.....CLAIMANT**

**VERSUS**

**THE UNIVERSITY COUNCIL**

**INOORERO UNIVERSITY.....RESPONDENT**

**JUDGMENT**

1. By a memorandum of claim filed on 29<sup>th</sup> April, 2013 the claimant averred that he was appointed by the respondent to the position of Deputy Vice Chancellor Academic, Research and Student Affairs on 1<sup>st</sup> November, 2009 on a five year renewable contract. He worked as such until 15<sup>th</sup> October, 2012 when he resigned.
2. The claimant claimed that the resignation was not voluntary but was procured by threats, gross acts of intimidation and falsehood.
3. According to the claimant his resignation was due to serious financial constraints which led the respondent on a mission to reduce staff remuneration burden and cut down running costs.
4. The claimant further averred that the respondent in a bid to create grounds for his removal prepared a plethora of fabricated lies and accusations against him which included:-
  - a. The respondent falsely alleged that the claimant at a certain meeting in the University, the respondent had allegedly instructed the claimant that since the matter of LL.B students was sensitive, it should be handled at the claimant's level. The respondent knew that there had been no such meeting or directive given to the claimant.
  - b. That the claimant had been directed to engage with LL.B students and their guardians which action the claimant allegedly disobeyed. This was also a fabrication peddled by the respondent as there had been no such directive.
  - c. That as direct result of the alleged non-performance by the claimant as above, the Deputy Chair of the Department of Law had tendered his resignation due to frustration allegedly inflicted on him by the claimant. This allegation was also completely false and a fabrication on part of the respondent.

d. That as a direct result of the above alleged misdeeds, false in all material particulars, the claimant caused Diploma in Law Students to abandon their studies and leave the University. Indeed the claimant did nothing of the sort and this was a malicious and false accusation also.

5. The claimant therefore sought judgment against the respondent for six months salary in lieu of notice, terminal benefits for three years, unpaid leave for 66 days among others.

6. The respondent denied the claimants claim and averred that he was not performing his duties as stipulated under part 5 of his letter of appointment. In particular the claimant failed to effectively deal with the sensitive issue of effecting the transfer of Bachelor of laws students from the university. About the resignation, the respondent averred that this was of claimant's own volition and not as a result of any coercion or intimidation by the respondent.

7. The respondent admitted that the claimant was entitled to terminal benefits and was not opposed to paying them however such benefits only accrued upon completion of the contractual period which was November 1, 2013.

8. In his testimony in Court, the claimant repeated the averments in his memorandum of claim. He stated further that law students were to be transferred to Mt. Kenya University because there was a problem between the respondent and the Commission for Higher Education. The transfer according to claimant was to be coordinated by the Dean Faculty of Law.

9. According to him he was terminated because he failed to facilitate the transfer of students. It was his evidence that this was not true because the reason for failure was beyond his control and that the issue was used to frame him and show he was a failure. According to him the respondent was in dire straits and wanted the wage bill reduced. He offered to give 6 months' notice but the vice chancellor wanted him to leave immediately. The respondent did not call any witness and opted to file submissions based on the memorandum of response and supporting documents.

10. Mr. Gathaara in his final submissions stated that the documents marked SMK demonstrated the tremendous effort put by the claimant in executing the transfer of LLB Students. The exercise according to Counsel was hampered by logistics such as unavailability of transfer forms. The accusations by the Vice Chancellor that the claimant failed to execute the transfer was therefore according to counsel, untrue. According to counsel, having decided to lay off the claimant, the respondent went further and prevailed upon him to write a resignation letter. The chronology of events leading to claimant's resignation were according to counsel predetermined hence amounted to constructive dismissal.

11. Mr. Mogere for the respondent on the other hand submitted that the respondent did not in any way at all breach its contract of employment with the claimant in tasking him to provide a progress report of a duty that fell within his docket as the Deputy Vice Chancellor, Academic Research and Student Affairs. Counsel submitted that the burden of proving that the respondent constructively dismissed the claimant lies with him which burden he has not discharged. According to counsel the claimant has not demonstrated how the respondent was in breach of employment contract or how it created intolerable working conditions. In this regard counsel relied on the case of **Turner v. Anheusel - Busch**.

12. Concerning entitlement to six months salary in lieu of notice counsel submitted that the claimant voluntarily resigned mid-stream of a sensitive project and that the claimant sought waiver of the notice period provided in his letter of appointment which request the respondent accepted.

13. The main pillar of the claimant's claim is grounded on his assertion that he was constructively dismissed by the respondent. The Supreme Court of Canada in the case of **David Potter v. New Brunswick Legal Aid Commission** has stated as follows concerning constructive dismissal.

**“Constructive dismissal consists of conduct that when viewed in the light of all the circumstances would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract.”**

14. Further the case of **Turner v. Anheuser – Busch** relied on by the respondent stated that in order to establish constructive discharge, an employee must plead and prove that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that any reasonable person in the employees position would be compelled to resign.

15. What the two decisions imply is that first, the burden of proof of constructive dismissal rests with the employee and second the conditions must be so intolerable or aggravated that no reasonable person placed in the employee's position would not consider resigning or repudiating the contract. Circumstances creating the intolerable working conditions must be more than once and consistently remain intolerable or worse. Every work environment presents its own challenges and every employee will invariably be confronted with situations or colleagues that would cause stress. The Court must therefore proceed cautiously against allegations by overly sensitive employees since there is no guarantee that workplace would be free of stress.

16. The claimant's letter of appointment dated 19<sup>th</sup> October, 2009 flagged some of his key responsibilities as:-

- a. Provide leadership in the registrar's function to ensure proper student records management.
- b. Coordinate the Admission Office to ensure the recruitment of qualified students.
- c. Provide proactive leadership in the development and implementation of policies, regulations and procedures for efficient and effective delivery of service.
- d. Ensure development and controls of budgets in the departments.
- e. Provide academic leadership and ensure effective management of the academic programmes.
- f. Play key liaison position between students and administration for effective communication.
- g. Facilitate recruitment of qualified staff.
- h. Coordinate the establishment of linkages between the University and other Institutions in business and education development.
- i. Coordinate the planning and development of curriculum and research programmes in the university.
- j. Provide leadership in the University's strategic planning process.
- k. Perform any other duties that may be assigned from time to time.

17. The task assigned to the claimant can therefore be reasonably said to fall within his key responsibilities areas outlined above. In fact the claimant has not denied this fact.

18. On 11<sup>th</sup> October, 2012 at 3.35 p.m., the Vice Chancellor Prof. Henry Thairu wrote to the claimant seeking to know the progress on the status of Law Degree students. He wanted to know if the transfer process had been managed.

19. At 5.55 p.m. on the same day the said Vice Chancellor wrote to the claimant as follows:-

Dear Prof.

We agreed yesterday that this matter of LLB is a sensitive matter which should be handled at your level including engaging with students and their guardians. You have actually NOT done this. As a result the deputy Chair of Department had resigned due to the frustration he is receiving from you. As a result some diploma students have started leaving also. This scenario is not acceptable.

Where the matters have reached, I feel you should reconsider your position as the DVC-ARS immediately and set down.

You cannot continue NOT abiding with the decisions agreed upon.

By this mail, I am informing the Chancellor, the Chairman of Council and the Vice Chairman of Council.

20. The claimant responded on October, 12 (next day) at 8.12 a.m. denying the accusations by the Vice Chancellor and requesting for the matter to be discussed with the Vice Chancellor since constraints could not allow the process to be completed the previous day. There is no clear communication of what transpired thereafter. The next document on the issue is the letter dated 15<sup>th</sup> October, 2012 from the vice Chancellor acknowledging receipt of the claimant's letter of 12<sup>th</sup> October, 2012 and accepting his resignation and further informing him that his request for waiver of notice period was accepted. The letter advised him to clear with the University prior to receiving his final dues. The claimants resignation letter was neither attached nor produced as evidence to enable the Court appreciate its tenor and import.

21. If the communication between the claimant and the respondent's Vice Chancellor is anything to go by, it would seem the issue of the transfer of LLB student must have gone seriously wrong that the Vice Chancellor asked claimant to reconsider his position as the DVC – ARS immediately and step down. There is no evidence or document of what transpired thereafter that the Court would consider in order to appreciate if such situations or conditions were so intolerable that the claimant was left with no option but to resign. The claimant averred that the respondent was facing financial strain and a plan had been hatched to reduce staff hence he was targeted for such removal. He however did not produce any such evidence or demonstrate the connection between the respondent's alleged financial woes and his resignation. As pointed out earlier the onus of proof in claims for constructive dismissal lies with the claimant. For that reason the Court is not satisfied that the claimant has made out a case sufficient enough to warrant a finding that he was constructively dismissed.

22. The Court on the other hand is of the view that the failure by the claimant to properly execute the transfer of the LLB students must to the respondent have been a serious breach of responsibility that could have earned him dismissal but instead chose to ask the claimant to reconsider his position as DVC-ARS and step aside which he did. There was no evidence of coercion or threat as alleged besides the position and level of the claimant's education makes the allegation least plausible. Nothing prevented him from refusing to resign, be dismissed and sue as he has done.

23. In conclusion, whilst the Court declines to make a finding that the claimant was constructively dismissed, he will be paid his terminal dues as admitted by the respondent for the three complete years he served the respondent. That is to say the respondent will pay the claimant the sum of Kshs.202,500/= being 15% gratuity for each complete year of service.

24. The claimant being partially successful each party shall bear their own costs.

25. It is so ordered.

Dated at Nairobi this 1<sup>st</sup> day of April.....2016

Abuodha J. N.

Judge

Delivered this 1<sup>st</sup> day of April.....2016

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge