



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**PETITION NUMBER 47 OF 2014**

**NAFTALY RUGARA MUIGA.....CLAIMANT**

**VERSUS**

**JOMO KENYATTA UNIVERSITY OF AGRICULTURE**

**AND TECHNOLOGY (JKUAT).....RESPONDENT**

**JUDGMENT**

1. The petitioner in this matter seeks an order of certiorari to issue for purposes of quashing the respondent's council disciplinary committee proceedings of 13<sup>th</sup> May, 2014 and the committee's decision contained in the letter dated 16<sup>th</sup> May, 2014 in respect of the petitioner. The petitioner further seeks damages for breach of his constitutional rights.
2. The petitioner avers that as a member of the respondent's academic staff he, in exercise of his rights under section 29 (2) of the University Act initiated legal proceedings to determine the constitutionality of appointment of persons and bodies who are under the Universities Act, 2012 charged with the running of affairs of the respondent.
3. By a letter dated 6<sup>th</sup> September, 2013 following a resolution of a full council meeting, the petitioner was suspended from employment as an Assistant Lecturer on grounds of inimical conduct which were neither disclosed nor substantiated. According to the petitioner he was suspended alongside his colleague Mr. Joseph Mutuura Mberia on similar grounds and that the only nexus between them is that the petitioner and Mr. Mberia were Secretary General and Deputy Secretary General respectively of UASU-JKUAT Chapter and that they jointly filed a suit to question the legality and constitutionality of the respondent's governing bodies which did not auger well with the respondents hence the accusation of inimical conduct.
4. On his suspension, the petitioner states his suspension contravened section 63 (3) of the University Act, 2012 which provides that the University Council shall expeditiously dispose of all matters before it and in any event within six months from the date of suspension. The petitioner's suspension lapsed on 5<sup>th</sup> September, 2013 and on 7<sup>th</sup> May, 2014 (eight months after the date of suspension) notified of a disciplinary hearing to take place on 13<sup>th</sup> May, 2014.
5. He stated that the charge sheet he was furnished with contained two counts one of which was allegation of inimical conduct and included events said to have occurred on 8<sup>th</sup> October, 2013, one month after the petitioner's suspension. He argued that the events of 8<sup>th</sup> October, 2013 could

logically not have formed part of the reasons for suspension.

6. In the second count the petitioner was accused to have used confidential documents to support an affidavit he had sworn in respect of court cases an accusation he complained was new and had not been stated in the suspension letter.

7. At the disciplinary hearing, the petitioner stated that he protested that the hearing was time barred but the respondents nonetheless proceeded with the hearing.

8. Concerning confidential documents, the petitioner averred that the documents claimed to be confidential were about the constitutionality of the respondent's council as currently constituted. The petitioner further complains that the respondent's council was in breach of section 63 (4) of the University Act which forbidded persons with an interest over a matter from deciding on the same matter. Further the respondent's council could not exercise impartiality since the petitioner had instituted proceedings that could culminate in the removal of the respondent's council.

9. The petitioner was consequently summarily dismissed from the respondent's service and advised to appeal to the chairman yet the chairman had sat in the full council meeting of 6<sup>th</sup> September, 2013 that resolved to suspend the petitioner. The petitioner further complains that his suspension was contrary to clause 6.7 of the Collective Bargaining Agreement and the approved disciplinary guidelines of the respondent which provided that suspension of the respondent's members of staff should be done by the Vice Chancellor.

10. In their reply to the petition the respondents state that they were justified in suspending the petitioner as his conduct was adverse to the interest of the respondent. The respondent further stated that all the charges preferred against the petitioner were relevant and he was given ample opportunity to respond to the same and that the additional charges did not have to constitute the reason for suspension. Concerning the charges, the respondent stated that the petitioner was properly charged and if there was any delay the petitioner was solely to blame by reason of litigation propelled by himself.

11. The respondent further raised a preliminary objection to the petition to the effect that the petitioner had not complied with Order 53(1) of the Civil Procedure Rules and that the petition was an abuse of the process of the Court since the petitioner had commenced Industrial cause No. 1587 of 2013 which was still pending before the Court.

12. Mr. Muigai for the petitioner in his submissions to the Court stated that the proceedings before the Court were in the nature of a Constitutional reference under article 22 of the Constitution and not Judicial Review Proceedings under Order 53 of the Civil Procedure Rules. According to counsel therefore, the petition was governed by the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. According to Counsel, under article 23(3) of the Constitution, the Court is empowered to make a judicial review order in any proceedings brought under article 22 of the Constitution.

13. Regarding the averment that the petition is an abuse of the Court process since there is a pending Industrial Cause No. 1587 of 2013 commenced by the petitioner, Counsel submitted that the issue is not a preliminary point of law but an issue of fact and to determine whether the process of Court is being abused or not, the Court would have to consider the pleadings and proceedings in the said Industrial Cause. In any event, Counsel submitted that cause number 1587 of 2013 had been overtaken by events when the respondents dismissed the petitioner from employment.

14. The respondents on the other hand, through submissions filed through Mr. Lutta submitted in the main that the dispute before the Court arose under the Employment Act 2007 and the Industrial Court Act, 2011 and need not have been escalated into a constitutional issue. Counsel complained that the use of the petition procedurally denied the respondent an opportunity to

interrogate the claimant's evidence and documents by cross-examination in a proper trial. Mr. Lutta further submitted that both the charge sheet and case summary heavily deponed upon in the petitioner's affidavit does not raise any alleged breach of constitutional rights but merely show alleged breaches of employment/contractual rights.

15. According to counsel, the petition does not raise any breaches of constitutional rights which cannot be effectively determined within the enclaves of Employment Act which is the specific piece of legislation governing contractual relationship between the parties. To support this contention Counsel relied on the case of **Prof. Daniel N. Mugendi v. Kenyatta University and 3 others (2011) eKLR.**

16. Regarding the issue of fair administrative action, Counsel submitted that the petitioner was accorded a fair administrative chance to make representations and defend himself through a disciplinary hearing which was in line with Collective Bargaining Agreement executed between the parties. The petitioner was further accorded the right to appeal to the chairman of the council which instead he opted not to.

17. Regarding delay in disposing of the disciplinary process, counsel submitted that this was occasioned by the petitioner himself by initiating litigation over the same. Concerning the remedies sought, Counsel submitted that the remedy of certiorari may not issue in the circumstances because the dispute concerned a contract of employment between the petitioner and respondent hence governed by private law. According to Mr. Lutta, whereas the Court can under article 23 (3) (f) of the constitution grant a judicial review order, the same is not available to remedy the dismissal of an employee. To support this contention Counsel sought reliance on the case of the **Staff Disciplinary Committee of Maseno University & 2 Others Vs. pro. Ochong' Okello (2012) eKLR.** Concerning damages, Counsel submitted that damages as a remedy for alleged violation of constitutional rights do not issue as of right, they must be specifically pleaded. The petitioner has not shown or demonstrated any loss/damage suffered to warrant the court's discretion in his favour.

18. Having reviewed the facts as set out in the petition herein and response thereto and further having analysed submissions by counsel in support of their respective positions, the following emerge as issues for determination by the Court.

**(a) What were the reasons for the petitioner's suspension and eventual dismissal and as a corollary, was the respondent justified in suspending and eventually dismissing the petitioner for the said reasons?**

**(b) In suspending and eventually dismissing the petitioner, did the respondent violate the University Act, 2012, the operating Collective Bargaining Agreement and its disciplinary guidelines? If so did such violation constitute a violation of the petitioner's constitutional rights or was it a mere breach of his contractual rights under the employment contract? and;**

**(c) If the Court were to find in favour of the petitioner are the remedies sought capable of being granted?**

19. Concerning issue (a), by a letter dated 6<sup>th</sup> September, 2013, the respondent through a letter signed by Prof. Mabel Imbuga, the Vice Chancellor of the respondent, informed the petitioner that at its meeting held on 6<sup>th</sup> September, 2013 the respondent's Council resolved to suspend the petitioner from his employment as an Assistant Lecturer in the Department of Electrical and Electronic Engineering due to inimical conduct on the petitioner's part that had affected the smooth running of the University.

20. The petitioner was informed by the said letter that such conduct amounted to gross misconduct contrary to the provisions of Terms of Service for Academic Staff at clause 6.7 (i),

(ii), (iii), (b).

21. This suspension culminated in summary dismissal which was communicated to the petitioner by a letter dated 16<sup>th</sup> May, 2014. The dismissal letter informed the petitioner that after his appearance before the University Council Disciplinary Committee on 13<sup>th</sup> May, 2014 and after the Committee listened to his submissions on the charges levelled against him, his actions were found wanting of a member of staff of the respondent and a lack of discipline and commitment on his terms of service as an Assistant Lecturer. Consequently the petitioner was dismissed for good cause in accordance with the terms of service for Academic Staff. The petitioner was however reminded of his right of appeal against the dismissal to the chairman of the University Council.

22. The charge sheet attached to the letter dated 7<sup>th</sup> May, 2014 inviting the petitioner to the disciplinary hearing accused the petitioner of involvement in several protracted altercation and incidences of negative publicity. In so doing the petitioner led a spirited dissent which was considered detrimental to the smooth running of the University.

23. The second count on the charge sheet accuses petitioner of breach of confidentiality in that he on several occasions used confidential University documents, without authority, in support of an affidavit sworn by himself in a case against the respondent. These documents, he is accused, were not supposed to be in his possession.

24. For count one the petitioner is accused of contravening section 44(4) (d) of the Employment Act and clause 6.7 part (iii) (b) of Terms of Service for Academic Staff. While for count two, he is accused of having breached Staff Code of Conduct and Ethics, XI on integrity.

25. Whereas the second count does not disclose the details of the confidential documents used by the petitioner and just broadly states the details are within the petitioners knowledge, count one gives a case summary of the events which the respondent considered constituted inimical conduct. Although these events are detailed separately, they appear to be contemporaneous and part of the same transaction. They all took place on 8<sup>th</sup> of October, 2013 and seemed to be an attempt by the petitioner to gain entry into the respondent's premises but meeting a repulsion by the respondent's security apparatus. This attempted forceful entry became the subject of cause number 1587 of 2013 in respect of which the Court issued orders restraining the respondent from interfering with the movement of the petitioner within the University. This order was quite apt because the petitioner was suspended as a member of staff of the respondent but still remained the Secretary General of UASU-JKUAT Chapter hence his entry into the respondent's premises on that account could not without good cause be restricted. The events of the 8<sup>th</sup> October, 2013 constituting the case summary appear to me as one continuous event marred with jostling between the petitioner and the respondent's security personnel in his attempt to gain entry to the respondent premises.

26. Clause 6.7. of Terms of Service for Academic Staff provides:

**6.7 Termination for good cause:**

**(i) When in the opinion of the Employer, there has been good cause as defined below, the vice chancellor shall have power to suspend the appointment of a member of staff, and refer his case to a committee appointed by council with powers to terminate with good cause a member of staff's services..."**

**(ii) "Good cause" means**

**(b) Conduct which the Council shall deem to be such as to constitute failure or inability of the member of staff concerned to continue to perform his duties or to comply with the conditions of appointment.**



days.

30. The petitioner herein was suspended on 6<sup>th</sup> September, 2013 on what was simply described as inimical conduct without disclosing the nature or manner of the conduct which the respondent considered inimical. In his view, the suspension was as a result of he and his colleague questioning the legality and constitutionality of the respondent's governing council as constituted.

31. The petitioner and his colleague remained on suspension until 13<sup>th</sup> May, 2014 when he was invited to a disciplinary hearing by a letter dated 7<sup>th</sup> May, 2014. The latter letter had attached to it the charge sheet in respect of two counts. Regarding the first count the petitioner was accused of engaging in several protracted altercation and incidences of negative publicity. He was further accused of forcing his way into the University and assaulting a security guard at the gate. Whereas the second limb of this first charge discloses some minimal details of what the respondent regarded as inimical conduct, no such minimal details are furnished in respect of accusations of protracted altercation and incidences of negative publicity which took place in August, 2013 and which form the 1<sup>st</sup> limb of this charge.

32. The petitioner was suspended on 6<sup>th</sup> September, 2013 and this must have been for a reason which the respondent deemed inimical yet no details of the so called inimical conduct was disclosed to him even minimally.

33. As observed earlier, according to the respondent's Terms and Conditions of Service for Academic Staff and the operating Collective Bargaining Agreement the disciplinary process save for extreme case of summary dismissal starts with the suspension of the employee pending investigations at the conclusion of which there will be a disciplinary hearing. The suspension letter must therefore endeavor to at least minimally, disclose the reason for suspension. Use of vague terminology or ambiguous words does not amount to such disclosure. This disclosure is important because it enables the employee ample time during the period of suspension, to prepare for his or her defence.

34. This Court has held in the case of Grace Kazungu & Another v. NSSF Cause No. 703 of 2010 that:

**“the fundamental principles of natural justice are that a person affected by a decision will receive notice that his or her case is being considered. Second, they will be provided with the specific aspects of the case that are under consideration so that an explanation or response can be prepared and thirdly, they will be provided with opportunity to make submissions to the case.”**

35. The events of 8<sup>th</sup> October, 2013 were not in contemplation during the time the suspension letter was written and their inclusion in the charge without being part of reason for suspension was contrary to the respondents Terms and Conditions of Service for Academic Staff and the operating Collective Bargaining Agreement. To this extent the Court agrees with the petitioner that his suspension could have been triggered by the litigation he commenced questioning the legality and constitutionality of the appointments to respondent's Council.

36. Regarding the issue of use of confidential documents, the Court has already observed that the respondent neither disclosed to the petitioner nor to the Court, the manner and to what extent the alleged documents were confidential. All the respondent stated was that their confidentiality was within the petitioners knowledge.

37. In concluding the first issue for determination therefore, the Court identifies the reason for suspension and eventual dismissal of the petitioner as his inimical conduct during the month of August, 2013 and use of confidential documents in supporting of a case against the respondent. These reasons as already observed were unclear hence could not justify the petitioners dismissal.

38. On the second issue, that is whether in suspending and eventually dismissing the petitioner the respondent violated the University Act, 2012, the Operating Collective Bargaining Agreement and its disciplinary guidelines and if so did such violation constitute a violation of petitioners constitutional rights or was it a mere breach of his contractual rights, the court has already found that in suspending the petitioner and eventually dismissing him, the respondent had no reason or justifiable reason to do so. This naturally means the respondent violated the University Act, 2012, the operating Collective Bargaining Agreement and its own disciplinary rules and procedures.

39. On the issue whether such violation was a mere breach of contractual rights and not a violation of the petitioners constitutional rights, the Court would like to tread very carefully on this line of argument since there is in most cases a thin or virtually no line of difference between purely contractual rights and constitutional rights.

40. Contracts are entered into to secure rights. The Constitution recognizes rights including contractual rights and creates a pathway for their recognition or enforcement through private or public law remedies. For instance article 41 recognizes the right to fair labour practices and these include the right to fair remuneration, reasonable working conditions, right to form or join or participate in the activities and programmes of a trade union. These rights invariably form the core content of most employment contracts. To this extent it would not be right to argue that they are purely contractual rights and cannot be litigated on the platform of constitutional rights. As to which pathway to use in litigating over these rights should depend on the nature and magnitude of the alleged breach or violation. The Constitution gives a more robust and flexible array of remedies than the Employment Act or related statutes hence there could be cases when it would be more maneuverable to petition the Court via the Constitution.

41. Regarding the remedy of certiorari, in matters of this nature, the Court will concur and in any event is bound by the decision of the Court of Appeal in **The Staff Disciplinary Committee of Maseno University & 2 Others v. Prof. Ochong' Okello (2012)eKLR** where Visram JA observed as follows:-

**“...the above opinion by the trial Judge is an emotive statement which opens a window for lecturers whose services are not statutorily underpinned to obtain orders of judicial review having the effect similar to an order of injunction or specific performance of their contract of employment. However, orders of judicial review are orders used by the Court in its supervisory jurisdiction to review the lawfulness of an act or decision in relation to the exercise of a public act or duty. In this case, the contract of employment between the respondent and Maseno University was a contractual relationship governed by private law. The dispute between the respondent and the appellants arose from the performance of the respondent's contract of employment. While it is true that the public has a general interest in the University being run properly, that interest does not give the public any rights over contractual matters involving the University and other parties....”**

42. Concerning the award of damages for breach of the petitioners constitutional rights the Court will not award this remedy for the reason that this was not canvassed in the petition, and supporting affidavit and submission by Counsel. However, in view of the finding that the petitioner's dismissal was unlawful in terms of reasons and procedure, the Court hereby orders the petitioners reinstatement to service without loss of salary, benefits and seniority.

43. That is to say the claimant's reinstatement shall be reckoned from when he was terminated and evaluated upwards in tandem with other staff which were at the same level as him. He shall further benefit from routine promotions and salary increments that colleagues of his caliber and grade have benefited from time to time since his dismissal.

44. It is so ordered.

**Dated at Nairobi this 20<sup>th</sup> day of February 2015**

**Abuodha J. N.**

**Judge**

**Delivered this 20<sup>th</sup> day of February 2015**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge