



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1705 OF 2011

DICKSON OTIENO CLAIMANT

VERSUS

UNIVERSITY OF NAIROBI RESPONDENT

JUDGEMENT

1. The issues in dispute herein are the unlawful/unfair termination of employment and the failure to pay compensation and terminal dues to the claimant.

2. The claim herein was filed on 6th October 2011 and the defence filed on 17th September 2012 where the Respondent admitted having employed the Claimant but he was lawfully terminated from his employment on the grounds contravening of the Code of Conduct and Ethics for Public Universities and the Terms of Service. Both parties were heard in evidence where the Claimant supported his claim and the Respondent opted to rely on filed documents. On 2nd March 2015, both parties agreed to file their written submissions and a mention date fixed for 23rd March 2015 to confirm and the Court to allocate a date for judgment. However on 23rd March 2015, the Respondent sought to have 7 more days to file their written submissions and a new mention date fixed for 30th March 2015. The Court further mentioned the matter on 7th April 2015 but the Respondent had not filed anything while the Claimant filed their submissions on 4th March 2015.

Claimant's case

In the claim, the Claimant avers that he was employed by the Respondent in 1987 and his retirement age set at 60 years of age. He was terminated while aged 54 years for no apparent reason on 2nd August 2011 through summary dismissal on the grounds that he had committed acts of misconduct. The details of the misconduct were never outlined and this was wrongful as there was no basis for such termination and due process was not applied. The summary action thus taken was arbitrary, inhumane noting the long service of 24 years the Claimant had given to the Respondent and being a family man he had school going children who depended on his earnings and his continued employment with the respondent.

The Claimant is seeking a reinstatement back into employment unconditionally and without loss of salary and benefits and in the alternative, payment in lieu of notice at 3 months; damages for unfair and unlawful termination; payment of 25 years of long service at kshs.130,000.00 and payment of full pension dues. The Claimant is further seeking for the issuance of his Certificate of Service and costs of the suit.

In evidence, the Claimant testified that he was employed by the Respondent in March 1987 until 2nd August 2011. He was employed as a Procurement officer at Chiromo Campus as his last station. On 2nd

August 2011 while on duty, security officers brought a letter and told him to clear and handover all Respondent property and to get out of the office. The letter he got was 'termination of appointment contract of employment' which was contrary to his terms and conditions of service as he was permanent and pensionable and not on contract. This was summary action that had not been preceded by any notice, show cause or a hearing. The reason for the termination was that the Claimant had committed acts of misconduct but these acts were not specified. The Claimant thus appealed to the Vice-Chancellor but there was no response.

The Claimant also stated that there was a disciplinary committee hearing where two (2) union officials were present and the hearing was with regard to items that were supposed to be purchased by the ICT department and the allegations were that procurement procedures had not been followed. Upon the committee hearing, they made a finding that Respondent ICT did not give proper specifications of the items to be sourced and thus the Claimant was not responsible and there was no improper conduct. That the Claimant was not guilty and no further action should be taken against the claimant. This decision was signed by the Principal of Chiromo Campus and approved by Prof. Mbithi the Deputy Vice Chancellor Academic and Finance on 2nd June 2011. However on 2nd August 2011, Prof. Mbithi signed the letter of termination. There was no new case after the initial hearing that had found the Claimant not responsible. There was also no follow up recommendations that may have resulted in the termination,

There was a CBA that set the modalities for disciplinary action, notice was required and any termination had to be based on good cause. This had to be preceded by a suspension and where there was good cause a hearing was to follow.

The Claimant also gave evidence that as a result of his termination, the manner it was carried out, he lost face with his fellow workmates. The reason for termination touched on his integrity and has therefore detrimental to his career and has since not been able to get new employment. He was due to retire in 2016 and thus his chances of servicing for the remainder of his term were not possible due to the termination. His appeal was never addressed which was an unfair procedure used on him.

The Claimant is seeking that the Court should quash his termination and be reinstated and in the alternative he should be paid notice pay of 3 months as per the applicable CBA; damages for unfair termination; service pay for 23 years; payment of pension as per the Respondent scheme. Had the Claimant retired, under the pension scheme he would have earned a lump sum and a monthly pension paid by the pension scheme and this is thus due in this case.

Based on the defence filed, the Claimant testified that he was never engaged in any corruption activities as the Respondent called Majadel Enterprises. Lilian Enterprises and found no case of fraud. There were mere suspicions that had no basis. As a Procurement officer, the Claimant dealt with many service providers and there was no good cause for summary action as he should have been given a hearing.

In cross-examination the Claimant confirmed that in 2006 he had received a warning letter and there was a disciplinary hearing on the grounds of desertion of duty. This was not related to corruption. As a Procurement officer he dealt with Litlab and Lilian enterprises but could not tell they were one and the same company. That he was not negligent in awarding a company a tender yet they had not tendered. That it was not possible to know the proprietors of the companies even though his work involved due diligence which he did on these two companies. Vouchers were issued; Local Purchase Orders (LPO) was done by Accounts department who called the companies for payment. The Claimant only advised on the procurement as the secretary to the committee. The Claimant was not aware that a colleague was a supplier or that one of his juniors supplied goods to the Respondent under a company name. He dealt with many companies and it was not possible to check on all of them. His was a case of summary dismissal and not a termination due to the manner in which it was effected. He was not given a chance to be heard.

Respondent's case

In defence, the respondents averred that on 5th March 1987 they employed the Claimant as an Assistant Storekeeper grade AB in the Department of Dental Surgery. At the time to termination he was an

Assistant procurement Officer grade CD at the College of Biological and Physical Sciences. In June 2011, the Respondent received reports about alleged corruption at the claimant's department noting that the Claimant was working in collaboration with other employees on the Respondent who was supplying goods to the Respondent contrary to the Public officer Ethics Act. The Respondent carried out an internal investigation which revealed that Paul Litunya, an employee of the Respondent was the proprietor of two businesses which had sent quotations to the respondent's procurement office with respect to the purchase of materials for repair of leaking drainage pipes. The investigations also revealed that 3 companies that had sent quotations and approval were given to one entity, Majadel Enterprises on 12th November 2011. However, the goods were not ordered for unknown reasons and quotations were again received from 3 other companies in May 2011. One company, Lilam Enterprises, was registered in the name of Paul Litunya and was awarded an order on 7th June 2011 despite prior approval being given to Majadel Enterprises.

The Respondent also stated that in October 2010 quotations were received for the purchase of materials and approval was given to Gramons Holding on 12th November 2010 but there was no purchase until May 2011 which was awarded to Lilam Enterprises. Investigations revealed that in both Litlam Enterprises and Lilam Enterprises, the respondent's junior Technician Paul Litunya had substantial interests.

It was thus recommended that disciplinary action be taken against the Claimant in his capacity as the Procurement Officer and on 2nd August 2011 his services were terminated for committing acts of misconduct in contravention of the provisions of section 10 of the Code of Conduct and Ethics for Public universities (Legal Notice No. 170) as well as section 24(1) of the Public Officer Ethics Act and the terms and conditions of his employment.

The Respondent also stated that the Claimant had a poor work history. On 1st April 2005 the Claimant got a warning for deserting duty; on 26th January 2006 a warning was issued for ordering materials without following procurement procedures and without prior authorisation. In this case the Claimant was found to have misconducted himself in carrying out his duties and was summarily dismissed under the provisions of section 44(4) (g) of the Employment Act. The Respondent was however lenient and instead issued a letter of termination where the Claimant was paid in lieu of notice. That there was good basis for the termination as investigations conducted revealed that Paul Litunya was working with the Claimant to corruptly get deals for supplying goods to the Respondent which contravened the Public Officer Ethics Act and the Code of Conduct and Ethics for Public Universities. The Claimant cannot thus be reinstated or compensated as the termination was lawful.

The Respondent did not offer any supporting evidence not make any submissions at the close of the case.

The Claimant in his written submissions stated that the letter of termination issued to the Claimant was erroneous as it referred to termination of his contract of appointment whereas he was a permanent and pensionable employees and the summary action taken against the Claimant was in essence summary dismissal. Despite the Claimant being unionised and the Respondent having policy manuals on how to carry out disciplinary action these were not followed and the decision to terminate the claimant's employment was thus malicious and inhumane. There was no valid reason or justification for the action taken by the respondent.

Determination

The basis of the claim is that the Claimant was unfairly terminated from his employment and that he was never paid his terminal dues. Upon employment, the Claimant was issued with his letter of appointment which had his terms and conditions of employment and being unionised, he enjoyed the collective agreement between his union ((Universities Non-Teaching Staff Union) and the Respondent that further defined the terms and conditions of engagement. The Respondent also had its *terms of service for staff in the senior clerical, administrative and technical grades* where the Claimant fell as an Assistant Procurement Officer.

The above documents are therefore relevant in determining the issues herein – the letter of appointment, the Collective Agreement with the Union, the Respondent’s terms of service and the applicable law. The termination letter is equally important to refer as from it various issues arise as to **whether this was a normal termination or a summary dismissal; whether there are/were valid reasons for termination or summary dismissal; and whether the Claimant is entitled to hi sprayers.**

In the letter of termination dated 2nd august 2011, the Respondent states

...

TERMINATION OF APPOINTMENT CONTRACT OF EMPLOYMENT

It has been reported that you committed acts of misconduct, which were in contravention of the provisions of the Code of Conduct for Public universities and the Terms of Service under which you are serving, while carrying out your duties as a procurement Officer in the College of Biological and Physical Sciences.

It has therefore been decided that your services are no longer required with immediate effect. You will be paid three months’ salary in lieu of notice, as soon as you complete the clearance process on exit of the university service.

...

The letter of termination thus brings out various issues that,

There were reports against the Claimant committing acts of misconduct;

The acts committed contravened the Code of Conduct and the law;

There was a decision that the claimant’s services were no longer needed; and

There was a decision to immediately terminate the claimant.

the alleged reports against the Claimant that he had committed acts of misconduct can only be deduced from the statement of defence where the Respondent states that they carried out internal investigations whereby it was revealed that the Claimant was working with another employee of the Respondent who was supplying goods to the Respondent contrary to the Public officer Ethics Act. This report is attached as annexure 3 to the Statement of Defence. With regard to the claimant, the report makes a **conclusion** that;

Mr. Dickson otieno – procurement Officer – CBPS

- i. Information in this report confirm that the allegations of corruption in procurement office*
- ii. Disciplinary action should be taken against Mr. D. Otieno, Procurement Officer, and CBPS.*

Upon his conclusion, the report also made a recommendation that disciplinary action should be taken against Paul Litunya, Junior Technician. There is no recommendation with regard to the Claimant apart from the conclusion made in the investigation report. It is however not clear as to whether this investigation report was ever brought to the attention of the claimant, his union or whether there was a hearing giving him a chance to defend himself. The report dated 27th July 2011 seem to have been immediately implemented as on 2nd august 2011, barely seven (7) days later, the Claimant was issued with his termination letter. There is equally no evidence that the union where the Claimant was a member was informed, invited or issued with this report.

The basis of the collective agreement between the claimant’s union and the Respondent was that removal

from office on good cause was regulated by clause 19. The Respondent was allowed to suspend such an employee pending investigations then refer the case to a disciplinary committee and based on the committee recommendations to Council of the respondent, take appropriate action. The most fundamental provision under this clause was that the affected employee is to be allowed his right to appeal the committee decision.

In this case, other than the summary action of termination with immediate effect, I do not find no due process with regard to the applicable CBA on notice being brought to the attention of the Claimant upon the findings in the internal investigations report nor are there evidence that upon the claimant's appeal, this has been addressed and a response given. Whatever recommendations that were made in the internal investigations report, the collective agreement allowed that this was to be subjected to a committee hearing and based on such hearing, a decision taken and the Council to act on the committee decision.

Apart from the provisions in the collective agreement, the Respondent has the terms of service for staff at clause 6(b) allow the Respondent to terminate any employee of good cause or without notice from gross inefficiency, incapacity, scandalous conduct, commits a felony or has contravened the Code of Conduct and Ethics for Public Universities. To thus arrive at such good cause for removal, the Respondent must first establish evidence of existence of such grounds as set out under this clause, otherwise the summary action even where there is payment in lieu of notice becomes invalid.

In this case, the internal investigation report was issued on 27th July 2011. The report made a conclusion against the Claimant without inviting him for a hearing to give his defence. His appeal has never been heard. prior to the internal investigations report, on 27th May 2011 the Respondent held a disciplinary committee meeting on the disciplinary case against the Claimant on the charge that he had fixed quotations so as to award specific bidder, Media Mall Ltd. The meeting reached a recommendation that the Claimant was not guilty. This was signed by the principal, CBPS on 20th June 2011 and the Deputy Vice Chancellor on 6th July 2011. The Claimant was thus absolved. The next audit report is dated 27th July 2011. This I find was not subjected to the same process as the one convened on 27th May 2011.

In this regard therefore, section 43 and 47 of the Employment Act become relevant.

43. (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

Thus the reason for termination must be *proved* and where the employer fails to do so, the resulting termination becomes unfair. To arrive at such *prove*, the employee subject of any misconduct must be subjected to a hearing and based on the rules of natural justice; he must be given a chance to defend himself. The Court must be satisfied that the reason for termination is proved as held in **Ruth Murage versus The Standard Group Ltd, Cause No. 1267 of 2011**. Having failed to prove the reason for the termination, the Court finds that the termination was unfair under Subsection 43(1) of the Employment Act. Further, in such circumstances, the provisions of Section 41 apply and the Court finds that this not having been a proper case for summary dismissal, the Claimant would be entitled to a notification and hearing on the alleged grounds of misconduct which, as the case turns out to be, the termination was invariably unfair.

Where the Respondent found serious and outright breach of the terms of employment based on the conduct of the claimant, nothing prevented the Respondent from taking summary action of summary dismissal. This was at the disposal of the respondent. But the option of termination was taken which then called and demanded that the Claimant be accorded rights that flow with termination unlike the case of a summary dismissal. Even in a case of summary dismissal section 47(1) of the Employment Act apply thus;

47. (1) where an employee has been summarily dismissed or his employer has unfairly terminated his employment without justification, the employee may, within three months of the date of

dismissal, present a complaint to a labour officer and the complaint shall be dealt with as a complaint lodged under section 87.

The allegations levelled against the Claimant were serious and warranted appropriate action by the Respondent but to casually treat the same and alleged that the Respondent was acting in a humane manner and thus reduced the otherwise summary dismissal into a normal termination is contrary to laid down procedural requirements and an outright illegality. Where there was sufficient evidence and good cause to have the Claimant subjected to investigations, then the Respondent should have completed the process by allowing the Claimant to have a hearing and a chance to be heard before taking sections taken against him. Nothing prevented the Respondent from doing what was right. In the minimum, the Claimant should have been heard.

I therefore find the termination of the claimant's employment was at the instance of the Respondent who failed to apply the reasonableness standard in arriving at the decision to terminate his services. See **Sidumo and Another versus Rustenburg Platinum Mines Limited and Others [2007] 28 ILJ 2405**. I find this to have been an unfair termination. Damages thereto will therefore be assessed.

Remedies

The Claimant is seeking a reinstatement. Based on the facts of the case, to return the Claimant to the same work place would be a hostile environment. Labour relations require the Court to consider the work relations between the parties before ordering specific performance. This I find not an appropriate order to make. Further, it has been over three years since; the Respondent must have filled the position and only fair to allow each party to go their way.

In the alternative to the Court not ordering for a reinstatement, the Claimant is seeking compensation for the unfair termination. On the finding that indeed this was a case of unfair termination, noting the number of years the Claimant had served at the time of his termination and the fact that he was due to retire in 2016, this Court shall award the Claimant six (6) months' salary compensation based on the last salary earned being kshs.54,154.00.

In a case of unfair termination, notice pay is due and based on the collective agreement applicable at the time, three months' pay in lieu of notice is due. The Claimant is thus awarded kshs.162, 426.00.

The Claimant is seeking payment for long service of 25 years. The Claimant in his memorandum of claim stated that he had served for 24 years, he was aged 45 at the time of termination but in his evidence he asserted that he had served for 23 years. The claim for long service payment through outlined in the prayers of the Claimant is not justified in evidence or in any other manner. My reading of the collective agreement, the terms of service and the law, I find no valid claim herein. This is thus declined.

The Claimant is seeking his pension dues. On the finding that there was unfair termination, the Claimant should be treated as having lawfully retired from his position for purposes of accessing and benefiting from his pension entitlements as per the rules and provisions of the University of Nairobi Pension Scheme and any other pension scheme where the Claimant was lawfully entitled to benefit from as a result of his retirement.

Conclusion

Judgment is therefore entered for the Claimant against the Respondent for:

- a. a declaration that the termination of employment of the Claimant was unfair;
- b. the Respondent to pay the Claimant Ksh.324,924.00 being six months in compensation;
- c. 3 months' notice pay of 3 months' salary at kshs.162,462.00;
- d. The Claimant is hereby treated as having retired from employment for purposes of his pension entitlements as per the rules and provisions of the University of Nairobi Pension Scheme and any other pension scheme where the Claimant is lawfully entitled to benefit from as a result of his

- retirement.
- e. Respondent to pay costs of the cause.
 - f. Payments herein are subject of the provisions of section 49(2) of the Employment Act.

Delivered in open Court dated and signed in Nairobi on this 25th day of May 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant