



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 249C OF 2013

DANIEL K. CHEBOI

CLAIMANT

v

MAASAI MARA UNIVERSITY

RESPONDENT

JUDGMENT

1. Daniel K. Cheboi (Claimant) was added as a Claimant through an Amended Memorandum of Claim filed in Court on 25 September 2013. The initial Memorandum of Claim had been filed by William Morogo Mutwo, Amos Sasine Kitaika and Peter M. Okemwa jointly against Maasai Mara University (Respondent) on 8 August 2013 alleging unlawful termination of employment.
2. The Respondent filed a Response to the Amended Memorandum of Claim on 11 November 2013.
3. On 11 November 2014, the Court directed that the claims be separated and subfolders be opened for each Claimant. This was to ensure orderly proceedings.
4. This judgment therefore relates to the claim of Daniel K. Cheboi.
5. The Cause was heard on 17 December 2014 and 4 March 2015. The Claimant filed his submissions on 10 April 2015 (the submissions should have been filed before 18 March 2015). Respondent filed its submissions late yesterday, regrettably.
6. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the Claimant was an employee of the Respondent, whether the termination of the Claimant's employment was unfair and appropriate remedies.*

Whether Claimant was an employee of the Respondent

7. Although the Respondent denied in its pleading that the Claimant was its employee, its Acting Registrar in charge of Administration, Samson Kirsokoi testified that the Claimant was an employee of the Respondent as an Accounts Assistant Grade 5.

8. The Court therefore answers the issue in the positive.

Whether the termination of the Claimant's employment was unfair

9. On 30 June 2011, the Respondent issued a show cause letter to the Claimant to explain why he had not

remitted Kshs 106,304/- collected from sales at the cafeteria. The letter warned the Claimant of contemplated disciplinary action.

10. On 22 May 2012, the Respondent suspended the Claimant pending further investigations into allegations of theft of Kshs 51,474/- which came into his possession by virtue of his office.

11. The Claimant appeared before the Respondent's Staff Disciplinary Committee on 28 June 2012 for a hearing.

12. After the hearing, the Respondent informed the Claimant through a letter dated 3 July 2012 that

The Disciplinary Committee found you guilty as charged and as a consequence your employment in the services of Narok University College is hereby terminated with effect from 28/6/2012.

13. The Claimant preferred an appeal through a letter dated 23 July 2012. The appeal was successful and on 17 October 2012, the Respondent reinstated him back to duty and directed him to report within 7 days.

14. After this letter of sanction, the Respondent, through a memo by its Deputy Principal dated 29 October 2012 invited the Claimant to appear before its Audit Committee of Council on 1 November 2012. The purpose of the invitation, according to the Memo was for the Claimant to give further clarifications on the issue of loss of revenue at the cafeteria.

15. On 30 October 2012, the union of which the Claimant was a member, Universities Non-Teaching Staff Union (UNTESU) responded to the Respondent's Deputy Principal memo and informed him that because the issue of loss of revenue had been resolved and the Respondent had not communicated with it (union) pursuant to clause 6.0 and 6.2 of the Terms of Service and recognition agreement, the Claimant (and others) had been instructed not to appear before the Audit Committee.

16. On 6 November 2012, the Respondent summarily dismissed the Claimant through a letter of even date. The reason given in the dismissal letter was that

You will recall that you were instructed to appear before the University College Council Audit Committee on 1 November 2012. You however, declined to obey a lawful order to appear before the Committee.

This act constitutes insubordination of authority which is tantamount to gross misconduct.....

17. The Claimant stated that he appealed against the dismissal to the Chairman of the Respondent's Council.

18. From this narration of the background, it is clear to the Court that the real dispute is the summary dismissal for insubordination by failure to appear before the Audit Committee on 1 November 2012.

Procedural fairness

19. The Respondent's invitation to the Claimant to appear before its Audit Committee on 1 November 2012 was lawful. Any employer reserves the right to summon an employee to offer explanations.

20. The Claimant failed or declined to appear on the advise of a union of which he was a member. That failure could have been a misconduct for which the Claimant would be susceptible to disciplinary action.

21. The Respondent therefore had lawful cause to commence disciplinary action against the Claimant. In this process, the Respondent was under a statutory obligation to comply with the procedural fairness requirements of section 41 of the Employment Act, 2007 and the terms of the contract with the Claimant.

22. The question therefore turns as to whether the Respondent informed the Claimant that he would be

subjected to disciplinary action for failing/declining to appear before the Audit Committee on 1 November 2012; whether he was afforded an opportunity to make representations on the failure to attend before the Audit Committee and whether the representations were considered by the Respondent.

23. The Court was not told of who informed the Claimant of the charges contemplated for his dismissal and who heard him. And in this respect, the Respondent's Terms of Service for Non-Teaching Staff provided for procedures to be followed before terminating an employee's appointment. The processes include warning, suspension and disciplinary hearing.

24. The Respondent did not suggest that a hearing as required under its own Terms of Service was followed.

25. The Respondent has failed to demonstrate that it complied with both the statutory procedural and contractual fairness requirements before taking the decision to dismiss him for insubordination by failing to appear before the Audit Committee.

26. Employers must be put on notice that section 41(2) of the Employment Act, 2007 protects employees from summary dismissal without hearing. However grave the offence and the need for instantaneous decision to dismiss, the Courts will not countenance what for lack of a better phrase, a law school student may refer to as *ex parte dismissal*. The present case was a classic example of *ex parte dismissal*.

27. The Court is satisfied that the summary dismissal of the Claimant did not comply with agreed contractual provisions and statutory provisions and hence was procedurally unfair and also in breach of contract.

28. Because of the conclusion reached, it is not necessary for the Court to consider whether the Respondent has proved the reasons for dismissal (section 43 of the Employment Act, 2007), that the reasons are valid and fair (section 45 of the Employment Act) or that the dismissal was in accord with justice and equity (section 45(4)(b) of the Act).

Appropriate remedies

Reinstatement

29. The Claimant sought reinstatement and stated as much in his testimony. An order of reinstatement is tantamount to the Court making an award of specific performance.

30. Some the factors the Court ought to consider in granting reinstatement are the practicability of ordering reinstatement (has employee been replaced, loss of mutual trust and confidence, personal interface with employer on a day to day basis), the common law principle that there should be no order for specific performance in a contract of service and section 12(3)(vii) of the Employment and Labour Relations Court Act.

31. The Respondent is a big institution. It was not suggested that there had been such loss of mutual trust and confidence or that the Claimant's day to day interactions with the employer would be mutually destructive.

32. The Court is therefore of the view that reinstatement from date of dismissal without loss of benefits would be an appropriate remedy.

Compensation for loss of prospective earnings

33. In the alternative, the Claimant sought compensation for loss of prospective future earnings till retirement age of 65 years.

34. The Claimant cited the authority of *Beatrice Achieng Osir v Board of Trustees Teleposta Pension*

Scheme, Nairobi Cause No. 665 of 2011, where Ongaya J held that *failing re-engagement, it is the court's considered view that the claimant is entitled to be compensated for prospective future earnings.*

35. The case dealt with a specific statutory framework (Persons with Disabilities Act, 2003).

36. My own understanding/interpretation of the holding is that an award of future prospective earnings is available where the Court does not order reinstatement or re-engagement. The two remedies cannot be both granted at the same time.

37. But I must mention that it is debatable whether an award of prospective future earnings is available at all where there is a finding of unfair termination/wrongful dismissal under the Employment Act, 2007.

38. I express the view cognizant of the authority of *Bank of Uganda v Tinkamanyire* (2009) 2 EA 66 where the Supreme Court of Uganda held that

the contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law.

39. But that is a debate for an appropriately prosecuted case where both the common law position and the statutory framework currently obtaining in Kenya would be examined after detailed submissions from parties.

40. This remedy does not lie with the order proposed by the Court to order reinstatement.

Damages for unlawful and malicious termination

41. This is not an appropriate remedy and the Court was not addressed on whether and how it is different from compensation under section 49(1)(c) of the Employment Act, 2007, discussed next.

Compensation

42. This is one of the primary remedies for unfair termination/unlawful dismissal. The Court has reached the conclusion that the Claimant be reinstated without loss of benefits. Compensation in the circumstances of this Cause would lead to unjust enrichment and therefore is not appropriate.

Certificate of Service

43. Because of the discussions above and the order proposed, this remedy is not appropriate.

Conclusion and Orders

44. From the above, the Court finds and holds that the summary dismissal of the Claimant was procedurally unfair and orders

THAT the Claimant be reinstated with effect from 6 November 2012 without loss of any benefits.

45. The Claimant did not file submissions before 18 March 2015 as agreed. The ripple effect is that the Respondent did not file its submissions on time. He is denied costs. Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 8th day of May 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Oumo instructed by Oumo & Co. Advocates

For Respondent Mr. Jaoko instructed by Nchoe, Jaoko & Co. Advocates

Nixon Court Assistant