



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 899 OF 2010

**UNIVERSITIES NON TEACHING STAFF UNION
....CLAIMANT**

VERSUS

UNIVERSITY OF NAIROBI.....RESPONDENT

Mr Moliyasi for Claimant

M/s Oyombe for Respondent

JUDGMENT

1. The grievant was an employee of the University of Nairobi vide a letter of appointment dated 17th April 2000 in the position of Account assistant Grade A/B in the Finance Department with effect from 4th November 1999. The appointment was on permanent terms with entry point of K£ 4,368 per annum. The grievant worked continuously until 13th October 2006 when his employment was terminated on grounds of misconduct.
2. By a letter dated 13th June 2006, the grievant had been suspended pending investigations on charges of misappropriation of University funds. The suspension was without pay. At the time of suspension the grievant earned a gross monthly salary of Kshs 25,683.35.
3. The letter of termination outlined four (4) charges to wit;
 - i. Misappropriation of Kshs 14,150
 - ii. Non banking of Kshs 48,136
 - iii. Receiving accommodation fee in cash contrary to rules and regulations governing management of finances
 - iv. Failure to co-operate with auditors by refusing to open cash box for inspection by internal auditors
4. The Committee heard representation of the Claimant and found that the grievant's conduct was scandalous or disgraceful and rendered the grievant unfit to hold office. The grievant was given normal termination upon considering mitigating factors.
5. The grievant was also surcharged Kshs 62,280 to be deducted from his final dues. Letter inviting the grievant to a disciplinary hearing was dated 4th August 2005. He was to appear before the staff disciplinary committee on 18th August 2005.
6. It is the Claimant's case that, the Union was not allowed to represent the grievant at the staff disciplinary committee contrary to clause 5 (f) of the Collective Bargaining Agreement (CBA) No

- witnesses were called at the hearing. The Internal Auditor who unearthed the shortage also sat in the disciplinary committee instead of being called as a witness. The grievant denies all the allegations of misappropriation of cash stating his work was to issue receipts against deposit slips brought by students for accommodation and cashiers from various kitchens /cafeterias in Lower Kabete.
7. That one Mr Peter Mbugua, used the grievant's name in banking cash collected. The grievant had complained to the Respondent about the matter and no action was taken against the said Peter Mbugua. That the disciplinary committee wrongly found the grievant guilty of carrying out his duties in an inefficient manner and the finding did not correspond to the preferred charges. The termination was therefore for charges the grievant was not charged with.
 8. Clause 5(L) provided for suspension with half (½) pay for 30 days only and no more. The suspension was therefore contrary to the CBA with the Union. The Union appealed the decision to terminate the employment of the grievant and sought the grievant to be reinstated without loss of benefits but the Union's plea was ignored. The Respondent never responded to the Union's appeal which is a violation of the grievant's right.
 9. The dispute was reported to the Minister of Labour. A conciliator was appointed. The investigator made a report in which reinstatement of the grievant was recommended. The Respondent wrote to the Conciliator on 9th March 2010 declining to review the termination. A certificate of unresolved dispute was issued accordingly.
 10. The Claimant prays for the following reliefs;
 - i. Unconditional reinstatement of the grievant
 - ii. In the alternative, full compensation to the grievant for unlawful and wrongful termination of the employment with all entitled benefits upto his retirement age.

Statement of Response

11. The Respondent filed a Memorandum of Defence dated 23rd March 2011. The Respondent admits it has a Recognition Agreement with the Claimant. The Respondent admits that the grievant Mr James N. O. Mwambi was employed by the Respondent on 7th August 1990 as an accounts Clerk grade III. That he was later promoted to Accounts Assistant grade A/B. On 4th August 2005 the grievant was charged with accounting anomalies/financial mismanagement as specifically set out herein before.
12. The grievant was subsequently invited to a disciplinary hearing on 6th June 2006 to explain the case against him. The notice is marked annex '5'. The Respondent avers that the grievant admitted to a Manager and the Internal Auditor that receipts and banking slips were missing in the accounts department. The grievant could not explain why he had not detected the anomalies before the auditor raised the alarm of the shortage yet he was the main cashier and was in charge of the receipt books.
13. That the grievant's explanation that under banking of Kshs 48,136 was cleared by banking of kshs 77,050 and Kshs 25,336 on 19th and 30th November 2004 by E. M. Kitali respectively was found to be false. The grievant presented fake banking-in-slip and the bank statement did not reflect the payments.
14. That the grievant admitted collecting cash from the kitchen sales and the student's accommodation in contravention of the Respondent's rules and regulations.
15. That the grievant barred auditors from checking his books and cash box because he had forgotten the keys to the cashbox at home. That the explanation was not satisfactory since there were receipts indicating that he had received money from students on the material day yet he claimed that the receipt book was locked in the cash box. A copy of disciplinary proceedings was attached to the response and marked 'App 6'. Furthermore the grievant had a false entry of receipt of stationery worth Kshs 6,000. The Respondent prays that the Claim be dismissed with costs.

Oral Testimony

16. The grievant testified under oath in support of the averments in the statement of claim and

confirmed that at the material time, he was stationed at Kabete Structural Management Unit (SMU) Students Welfare Authority (SWA). The grievant testified that on 6th June 2006 when he appeared before the Staff disciplinary Committee comprising of the Director (SWA) Mr Lugwe; Deputy Finance Officer Mr Okemwe; from University representatives; Auditor, Rachael Kairu (the author of the charge) from SWA headquarters; Unit Manager and Senior Accountant Income Mr Kiteli from headquarters, the manager said the grievant had no case to answer and that any issue concerning receipt books should be raised with Mr Kamulu.

17. The Unit Manager, the grievant and the accountant were then transferred. The grievant was taken to lower state house unit and the Accountant to the University Cafe. The grievant insisted that Rachael falsely accused him and was the one questioning him at the hearing. The Director then suspended him after the hearing on 13th June 2006 without pay and terminated his employment thereafter. The grievant asked the court to follow the recommendation by the Conciliator to have him reinstated and / or compensated as prayed.

Defence

18. RW1 was Rachael Kairu, Senior Internal Auditor with the Respondent based at Central Administration main campus. She had worked for the University for 19 years. She is presently an Internal Auditor. Her duties included to ensure internal controls set by management were followed and to safeguard University Assets.

19. RW1 investigated the matter in question and detected the listed anomalies. This led to the charges and disciplinary hearing against the grievant. RW1 concluded that the grievant was responsible for the irregularities and losses incurred by SWA even though he blamed other people, especially Mr Peter Kairu his Assistant and his boss Mr Mureithi the Accountant. That the grievant had accepted to repay the lost money provided the loss was shared with the other two.

20. That the grievant was unco-operative and refused to assist the auditors. That he had even refused to open the cash box and he was quoted to have said “hata Vice Chancellor Makokha akija sita fungua cashbox”. RW1 attended the disciplinary. RW1 agreed no witnesses were called stating that Mr Kairu had already left the University by that time, Mr Kairu however wrote a letter explaining himself on the matter. RW1 said no criminal charges were preferred against the grievant.

21. RW1 had interviewed Mr Kairu, Mr Mureithi and the grievant. RW1 denied that she wanted to finish the grievant. She also denied that she was being used by the grievant’s fellow Kikuyus to finish the Claimant. RW1 concluded that the claimant was guilty of the charges preferred against him and prays that the claimant’s case be dismissed with costs.

22. Determination

Issue (i)

Whether the grievants’ employment was terminated for a valid reason

Issue (ii)

Whether the termination was done in terms of a fair procedure

Issue (iii)

What remedies if any are available to the grievant

23. Issue (i)

A careful analysis of the evidence adduced by the claimant vis a vis that by the Respondent leads me to the following conclusion of fact;

i. The grievant as a cashier was responsible to receiving cash from the kitchen sales, banking them

- in Respondents designated bank accounts and was the custodian of the receipt books for kitchen sales in the campus. The grievant was also responsible for issuing receipts based on bank deposit slips.
- ii. The audit conducted in July 2005 revealed several anomalies including;
 - a. Under banking of Kshs 14,150 between the 17th November 2004 and 3rd March 2005
 - b. Collection of Kshs 48,136 which was not reflected in the Respondents bank statement

24. From the totality of the evidence the Claimant has successfully demonstrated that he had shared responsibility with his supervisor the Accountant and his subordinate, Assistant Cashier. That the Respondent was unable to demonstrate on a balance of probability that the under banking of Kshs 14,150 and non banking of Kshs 48,136 was attributable to the grievant to the exclusion of his supervisor and the assistant. Indeed, it cannot be said that the grievant was responsible for the anomalies at all given the circumstances of the case narrated by the grievant.
25. The court has also established that there was a level of animosity between the grievant and RW1 as to cast doubt on the credibility of the findings by RW1 which findings were solely the basis of the charges leveled by the Respondent leading to the grievant's suspension without pay and termination from employment. It is also the court's finding that the grievant was surcharged Kshs 62,286 representing the alleged under banking of Kshs 14,150 and banking that was not reflected in the sum of Kshs 48,136 without sound basis.
26. The subsequent termination amounted to double jeopardy on the part of the grievant especially because there was sufficient evidence that a colleague was irregularly doing banking in the grievant's name without authority and efforts by the grievant to get the Respondent to stop the irregular practice were not heeded by the Respondent. Furthermore, the allegations of non-cooperation by the grievant in facilitating the internal auditors in the conduct of their investigations is not without blemish. The grievant successfully cast doubt on the bonafides of RW1 and alluded to possible bias in apportioning blame in the matter as between the grievant and other colleagues. It is therefore difficult for the court to believe that the grievant blatantly refused to open the cash box saying that even the Vice Chancellor would not make him heed the directive as alleged by RW 1.
27. The grievant did not come across in court as a person given to such misconduct. The grievant had no previous record of misconduct and had served the Respondent diligently from 4th November 1999 upto the time of termination on 6th June 2006, a period of about seven (7) years. It is the court's considered view that the Respondent did not meet the threshold cast on it in terms of Section 43(1) and 47 (5) of the Employment Act, 2007. Accordingly, the Respondent has not demonstrated that it had a valid reason to terminate the employment of the grievant.
28. The termination was therefore in violation of section 45 (1) as read with section 45 (2) of the Employment Act, in that the termination was not for a valid reason. Even though the Respondent afforded the grievant opportunity to be heard, the grievant was denied opportunity to attend the hearing with a fellow employee of choice or a union representative in terms of the CBA and Section 41 of the Employment Act 2007. The suspension without pay for a long period was also in violation of the CBA, which provided for suspension on half (½) pay. The procedure followed by the Respondent was therefore deficient in violation of both the CBA and Section 41 of the Act, which requires an employer to terminate the employment in terms of a fair procedure.
29. The Respondent did not produce the calculation of the terminal dues owed to the grievant as directed by the court to enable the court implement the alternative prayers for compensation and payment of terminal benefits in the event the court does not order reinstatement of the Claimant.

30. Issue iii Remedies

It is not in dispute that the grievant was a Union member and his terms and conditions of service were governed by the CBA which came into force on 18th August 2006 before the termination of the employment of the grievant on 13th October 2006. The conciliator in her report of 8th July 2010 recommended reinstatement of the grievant. The suit was filed before the present Employment and Labour Relations Act, 2011 came to effect.

31. The Act prohibits reinstatement of an employee after expiry of three (3) years from the date the employee's employment was terminated. It is now eleven (11) years since the termination. A lot of time has passed and the structure of the Respondent may have changed in many respects as to make it not easy for the Respondent to absorb the grievant. The grievant worked in a position of utmost trust, of a cashier responsible for collecting, receipting and banking funds.
32. The level of trust between the Grievant and the Respondent has diminished a great deal even though the court finds there is insufficient evidence to find the grievant liable of the allegations made against him. Notwithstanding the wish of the grievant to be reinstated, the court finds that the circumstances of this case militate against granting of the order for reinstatement. The grievant is however entitled to compensation in terms of Section 49 (1) (c) as read with Section 49 (4) of the Employment Act. The grievant was in permanent and pensionable employment which was prematurely curtailed very early in his career.
33. The grievant lost means of livelihood in a sector which highly frown on past records of misconduct by employees. The prospects of re-employment were diminished greatly. Furthermore, the grievant was not paid terminal benefits upon termination of employment and was kept in suspension without pay even before the termination. The grievant suffered loss and damage and the court is inclined to grant him maximum compensation of 12 months' salary for wrongful and unfair termination of his employment. At the time of termination, per the payslip of May 2006, the grievant earned a gross salary of Kshs 25,693.35. The total compensation is Kshs 308,320.

34. Terminal Benefits

The Court having found that the termination of the employment of the grievant was wrongful and unlawful, the Grievant is entitled to terminal benefits including;

- i. One month salary in lieu of notice in the sum of Kshs 25,693.35
- ii. Arrear salary for the period of suspension between 13th June 2006 to 27th November 2006 in the sum of Kshs 139,600.535 (5 months and 13 days x 25,693.5)
- iii. Refund of surcharged amount in the sum of Kshs 62,288

35. Total Award by the court is as follows;

- i. Compensation Kshs 308, 320
- ii. One month salary in lieu of notice Kshs 25,693.35
- iii. Salary arrears Kshs 139,600.50
- iv. Wrongful surcharge Kshs 62,288.00

Total Award 535,901.88

36. The Award is payable with interest at court rates from the date of filing this suit till payment in full. The Respondent is also to pay the costs of the suit.

Dated and delivered at Nairobi this 20th day of November, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE