



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 68 OF 2015

RACHEL CAROL ATAMBA.....CLAIMANT

VERSUS

MASINDE MULIRO UNIVERSITY OF SCIENCE & TECHNOLOGY....RESPONDENT

J U D G E M E N T

The Claimant is the Registrar (Administration) of the Respondent, a Public University established under the Universities Act, 2012.

The Claimant was employed by the Respondent, then known as Western University College of Science & Technology on 1st December, 2003 as Deputy Registrar. On 11th January, 2007 she was appointed to the position of Registrar (Administration) in acting capacity until 5th May, 2008 when she was confirmed to the position. The Claimant's position was permanent and pensionable.

According to the Respondent's Revised Terms of Service which the Claimant is subject to, her compulsory retirement age is seventy years while the voluntary retirement age is fifty five (55) years. At the time of filing this suit the Claimant was fifty seven (57) years old.

On 30th January, 2015 the Respondent advertised several positions including the position of Registrar (Administration and Finance). The vacancies were also posted on the Respondent's website. The qualifications for the position was inter alia , A PhD in a relevant field in addition to a Masters Degree. The Claimant was not a holder of a Ph.D. decree but had enrolled for the same at Jomo Kenyatta University of Agriculture and Technology Nakuru campus in 2011 and concluded course work but had deferred her studies in 2012.

On 10th February, 2015 the Respondent appointed a Dr. Peter Bukhala as Acting Registrar, Administration effective 1st March, 2015. By email communication dated 4th March, 2015 the Vice Chancellor directed the Claimant together with two other Registrars to take all their accumulated annual leave immediately. The letter further directed them to vacate their current stations "for use by the newly appointed acting officers." The letter informed them that they will be assigned new stations/duties upon resuming duty.

The Claimant who had 96 days accumulated leave complied and applied for all the leave on 4th March, 2015. The Vice Chancellor approved the leave on 10th March, 2015.

In the Memorandum of Claim filed together with a notice of motion seeking stay of the Respondent's decision to advertise her position the Claimant alleges that the Respondent's act of advertising a vacancy in the position of Registrar, Administration and of appointing an Acting Registrar amounts to unfair and unlawful termination of her services contrary to Section 41 and 43 of the Employment Act.

She states that the change of qualifications for the position of Registrar, Administration to include PhD qualifications which the Claimant as a holder of the said office does not have amounts to re-organization or restructuring resulting in redundancy on the part of the Claimant in breach of Section 40 of the Employment Act . She avers that the conduct of the Respondent in effecting new qualifications for the position of the Registrar without consultation with the Claimant and without giving her sufficient time and opportunity to acquire a PhD amounts to unfair labour practices contrary to Article 41 of the Constitution and to cruel, inhuman and degrading treatment contrary to Articles 29 (f) of the Constitution.

The Claimant avers that the action of the Respondent is a violation of the Rules of National Justice as she has been condemned unheard.

She seeks the following reliefs:-

- a) *A declaration that the intended or purported termination of employment of the Claimant is illegal, unlawful, unfair and ultra vires the powers of the Respondent.*
- b) *An order of injunction restraining the Respondent from terminating the employment of the Claimant as Registrar, Administration or demoting her to a junior position.*
- c) *In the alternative, the Claimant be reinstated to her position as the Registrar, Administration, of the Respondent.*
- d) *A declaration that the conduct of the Respondent is in violation of the rights of the Claimant under Articles 28, 29 and 41 of the Constitution.*
- e) *General damages for the violation and or breach of the Claimant's rights under prayer (d) above.*

The Respondent denies the averments in the Memorandum of Claim and in the Replying Affidavit of Professor Joseph Rotich who is the Respondent's Deputy Vice Chancellor (Administration and Finance) avers that the Respondent herein is in the process of restructuring its operations, which process begun in October 2013 when the Respondent decided to benchmark with other Universities on the mode of appointment of Registrar, Dean of Students, Finance Officer, Chief Medical Officers and other grades and that all along, the Claimant was present in the Respondent's Human Resource Committee meetings where the issue of restructuring the University was discussed. During the Human Resource committee meeting held on 19th November, 2014, a proposal to advertise the positions of Registrars, Finance Officer, Dean of Students, University Librarian and Deans of Faculty was approved.

The Respondent's University Council at its 20th meeting held on 4th December 2014, where the Claimant was present, approved the proposal to advertise the positions of Registrar, Finance Officer, Dean of Students, University Librarian and Deans of Faculty.

The Respondent avers that , the position of Registrar (Administration and Finance) would in addition to their duties as Registrar be simultaneously appointed to a position in the teaching department of their respective field of specialization. Consequently, they are required to be qualified to be appointed as such as per the Commission for University Education's regulation and statutes.

The Respondent submitted that the successful applicant for the position will be engaged on a five year contract which is renewable once for a further period of five years subject to satisfactory performance. By inviting for applications to the various positions during the restructuring, the Respondent was only sourcing for employees through a competitive process and its motive was not to illegally remove the Claimant from employment. The appointment of Dr. Peter Bukhala did not mean that the Claimant's employment was going to be illegally terminated as the Claimant is still in employment and continues to earn her salary as the restructuring is ongoing. She thus has no basis to allege unfair and unlawful termination of services.

The Respondent argues that it is contradictory for the Claimant to allege that the Respondent intends to unlawfully terminate her services while at the same time alleging that she has received no communication from the Respondent. It avers that if at all the Respondent wanted to specifically remove the Claimant from officer (which is not its intention) the restructuring and advertisement would have been restricted to the Claimant's position. The Respondent states that the ongoing restructuring exercise affects not only the Claimant's position but also numerous positions in the Respondent University. The effect of the Claimant's suit is that the Respondent will be prevented from continuing with the restructuring process without any justification.

The Respondent argues that it has the managerial prerogative to organize its operations to suit its interests and the orders sought by the Claimant would stifle the Respondent's managerial prerogative since the process has not been completed. The Respondent further avers that it would be unfair to the Respondent to halt an on-going restructuring process based on the Claimant's misplaced apprehension that her services will be unlawfully terminated. It submits that the lawfulness or otherwise of a termination of employment can only be determined after it occurs and not before.

It is the Respondent's position that the Claimant's suit is pre-emptive and without basis since her services have not been terminated and neither has she been demoted to a junior position at a lower salary; that the Claimant's expectation to serve the Respondent until attainment of 70 years of age is unreasonable since her terms of service and the law provide for other means of termination of services; that the government through circular Ref:OP/CAB.2/7A dated 14th February, 2014 from the Executive Office of the President - Chief of Staff and Head of Public Service addressed to among others the Vice chancellors of Public Universities reviewed the retirement age of public servants from 55 years to 60 years; that in paragraph 26 of her supporting affidavit, the Claimant acknowledges that her services can be terminated upon following the due process of law; that the Claimant is solely responsible for the advancement of her academic qualifications and it is unreasonable for her to accuse the Respondent of failing to give her sufficient time to acquire new academic qualification.

Together with the Memorandum of Claim the Claimant had filed a motion seeking interim order restraining the Respondent from terminating her employment as Registrar, Administration, replacing or demoting her pending determination of her claim.

When the application came up for hearing it was agreed that the application be heard together with the main claim as arguments, evidence and prayers in respect of the application were the same as for the main claim. The parties also agreed to maintain status quo obtaining at the time pending hearing and determination of the suit.

At the hearing the Claimant testified on her behalf while the Respondent called the Vice Chancellor Professor Fred Otieno. The parties thereafter filed and exchanged written submissions.

Determination

I have considered the pleadings and evidence adduced in court. I have also considered the written submissions and authorities quoted.

In my considered opinion the issues for determination are the following-

1. Whether or not the Claimant has been unlawfully terminated or declared redundant
2. Whether the Respondent has violated the Claimant's rights under Article 28, 29, and 41
3. Whether the Claimant is entitled to the prayers sought.

Whether the Claimant has been unfairly terminated or declared redundant.

The Claimant's Counsel has submitted that the Claimant has not resigned or reached retirement age, that the advertisement of her job and the letter from the Vice Chancellor requiring her to take all her accumulated leave are a clear indication that her employment has been terminated and that the removal of

the Claimant from the home page of the Respondents' website and her replacement by Dr. Peter Bukhala was further proof of the termination of her employment by the Respondent.

The Claimant urges the court to find that her employment as registrar has been terminated.

The Respondent on the other hand submits that in the Claimant's letter of appointment the Respondent reserves the right to assign her any other duties it may deem appropriate and that the letter sending the Claimant on leave clearly stated that she will be assigned other duties on her return from leave. That an employer has a right to move, relocate and redeploy an employee. It is submitted that the Respondent has embarked on a restructuring process and has deemed it appropriate to reassign the Claimant other duties. It is submitted that the University Statutes and other rules and regulations made by the University Council provide that

"The duties and responsibilities of the staff appointed under these terms of service shall be prescribed to them by their respective divisional heads on behalf of the Vice Chancellor or in accordance with the provisions of the Act, its statutes and regulations as well as any other rules and regulations by the University Council."

It is submitted that the Claimant conceded as much at paragraph 17 of the Memorandum of Claim. The Respondent submits that the case of James Mwathi Nguri v Egerton University, Sylvester Oduor Oyile vs Prime Fuels Kenya Limited and Severine Luyai v Ministry of Foreign Affairs & International Trade & 3 others (2014) eKLR relied upon by the Claimant are all distinguishable from this case.

Both termination and redundancy result in severing employment relationship. There is no evidence of termination of employment of the Claimant. In the present case the employment relationship still subsists, the Claimant is on the payroll and at the time of hearing of this case was on earned annual leave of 96 days that she had accumulated over the years.

I therefore do not agree with and dismiss the Claimant's contention that she has been dismissed and/or declared redundant.

Whether the Respondent has violated Claimant's rights under Article 28,29 and 41 of the Constitution

Article 28 provides for respect of every person's human dignity and Article 29 provides for freedom and security of the person including the right not to be—

- (a) deprived of freedom arbitrarily or without just cause;
- (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;
- (c) subjected to any form of violence from either public or private sources;
- (d) subjected to torture in any manner, whether physical or psychological;
- (e) subjected to corporal punishment; or
- (f) treated or punished in a cruel, inhuman or degrading manner.

Article 41 provides for fair labour practices, fair remuneration and fair working conditions, freedom to associate in trade union activities and to engage in collective bargaining.

It is submitted for the Claimant that the advertisement of her position without official communication of her fate and sending her on leave without telling her where she will report to after the leave has caused the Claimant anxiety, stress, uncertainty and untold suffering.

It is further submitted that the removal from the position of Registrar is a violation of the Claimants rights under Article 236(b) which provides that a public officer shall not be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of the law. It is further submitted that her removal is a violation of Section 10 (5) of the Employment Act which provides that :

"Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing."

It is further submitted for the Claimant that the Respondent infringed her rights under Article 47(1) which provides for fair administrative action.

The Respondent submits that the Claimant was informed of the restructuring on 15th October, 2014 and was present at the meeting of 4th December, 2014 when the decision to advertise her position was made. The Respondent submits that the Claimant having been aware of both the restructuring and the advertisement of her position, was not treated unfairly, as alleged as she was all along aware of the changes.

It is not in dispute that the Claimant did not receive any official communication of her removal from office of Registrar Administration and that by the time she filed suit and even by the time of hearing, she had not been informed of her new position. To this extent I agree with the Claimant that she was unfairly treated by the Respondent. Any changes in her terms, including the change of designation, are material changes that should have been communicated to her well before her position was advertised as provided in Section 10(5) of the Employment Act. Failure to do so was unfair. An employee should not be subjected to a situation of uncertainty and anxiety as was done to the Claimant.

I find that the Claimant's rights under Article 28 and 41 were infringed by the Respondent's failure to officially inform her of changes to her position before it was advertised.

Prayers

The Claimant has prayed for a declaration that the intended or purported termination of her employment is illegal, unlawful, unfair and ultra vires of the powers of the Respondent. I have already stated that the Claimant's employment has not been terminated. I also do not find any threat of termination of the Claimants services.

On these grounds the claimants prayer under this head must fail.

The Claimant also prayed for an order of injunction to restrain the Respondent from terminating the employment of the Claimant as Registrar, Administration or demoting her to a junior position.

The Respondent has demonstrated that the changes in the qualifications for the position of Registrar has been provided for in the Charter. The Claimant is one of 3 Registrars in the employment of the Respondent. All of them have been treated equally.

The court cannot stop an employer from making management or administrative changes especially when in compliance with the law as in the Claimant's case where the requirement of her position changed by operation of the law. Change is inevitable. Life is constantly changing and we must all anticipate and embrace change. Any change, even if it is for the better, is always accompanied by apprehension. That does not mean that we should not change. It is however important to manage change so that it inflicts least discomfort. It is this management of change that the Respondent failed to do.

Change has already taken place and the position of Registrar (Administration) has now become out of the reach of the Claimant as she does not possess the qualifications for the job. The Respondent cannot reverse the situation. The Respondent is however guilty of managing the situation in a manner that has inflict pain and discomfort to the Claimant that could have been avoided.

The Respondent should have identified and communicated to the Claimant the position so that there is a smooth transition.

Since the Respondent was implementing provisions of the Law whose validity the Claimant has not challenged I decline to order reinstatement of the Claimant to the position of Registrar Administration I however direct the Respondent to immediately redeploy the Claimant to the position of head of department without reduction of rank remuneration or allowances.

I also find that the Claimant's right to human dignity was infringed and that she suffered psychological torture by the irresponsible manner in which the Respondent managed the transition from the position of Registrar (administration) and I award her general damages in the sum of Ksh.500,000/=.

The Respondent shall also pay Claimant's costs of this suit. Orders accordingly.

Dated signed and delivered this 17th day of December, 2015

MAUREEN ONYANGO

JUDGE.