



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1707 OF 2011

BETWEEN

ROBERT MACHATHA KIHARA..... CLAIMANT

VERSUS

THE UNIVERSITY OF NAIROBI RESPONDENT

Rika J

CC. Leah Muthaka

Mr. Namada Simoni Advocate instructed by Namada & Company Advocates for the Claimant

*Mr. Harrison Okeche Advocate instructed by the Federation of Kenya Employers [F.K.E] appearing
for the Respondent*

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. Robert Machatha Kihara, formerly employed by the University of Nairobi as its Deputy Co-ordinator in the Transport and Garage Section, filed this Claim on 6th October 2011. He claims a total of Kshs. 4,642,556 from the University, which his Advocate submits, to use the Advocate's words, should be paid '*bila maneno*,' [Kiswahili for 'without further ado']. The Respondent filed its Statement of Reply on 4th June 2012. The Claimant gave evidence and closed his case on 21st November 2012. The Respondent testified on 29th May 2013 through its Co-ordinator Transport and Garage Section Dr. Julius Maina Ogola. Hearing closed on 29th May 2013. The dispute was last mentioned in Court on 18th June 2013, when the Claimant confirmed to have filed its submissions, and Parties advised Award would be read on notice.

2. Kihara stated he was initially employed on a 3 year contract, starting 11th August 2008. The contract was renewed for a similar period on 12th July 2011. His basic salary was Kshs. 73,864, house rent allowance at Kshs. 48,375 and commuter allowance of Kshs. 2,250- gross salary Kshs 124,489. Without reason, warning or notice, the Respondent terminated the Claimant's contract on 3rd August 2011. He was advised that his services were no longer required. The Claimant had received the letter renewing his contract only about 2 weeks earlier, on 12th July 2011. Termination was wrong and illegal. It was made

without basis; and the procedure envisaged by the University Rules and Regulations, the Employment Act, and Rules of Natural Justice, was disregarded. He had served the University for 3 years without blemish. The Claimant had planned his life around the renewed contract. He is a family man, and had school-going children who looked up to him for upkeep. He seeks from the Respondent:-

- a. 3 months' salary in lieu of notice at Kshs. 95,935 [net pay] x 3 = 293,935;
- b. Accrued salary from 12th July 2011 to 3rd August 2011 at Kshs. 73,582;
- c. Salary for the period between August and September 2011 at Kshs. 191,954;
- d. Salary for October 2011 to September 2014 [end of renewed contract] at Kshs. 3,274,884;
- e. Gratuity for the first 3 years at 15% of the basic salary at Kshs. 409,336;
- f. Gratuity for the second contract from October 2011 to September 2014 at 15% of the basic salary at Kshs. 398,865.

TOTAL... Kshs. 4,642,556

He also seeks a declaration that termination was unfair and compensation for unfair termination.

3. Kihara testified he was previously employed by the AAA Company of Kenya as a Driver Trainer, and in charge of the fleet maintenance. He trained the Staff of the University of Nairobi while at AAA. He applied to join the University, sat an interview and was recruited. He resigned from his position with AAA. His last contract was renewed, and would lapse on 1st October 2014. It was terminated prematurely and Security Guards called to forcibly remove the Claimant from Office. There was no opportunity accorded to him to clear from Office. He was shocked. He handed over the keys, left and came back after 2 days when he handed over all the documents in his custody. He cleared with all the departments, but was not paid any terminal benefits, including the 3 months' salary in notice pay.

4. There was no disciplinary case against the Claimant for the entire time he served. There were no complaints about his performance. His immediate boss was Dr. Julius Ogola. There was a Memo from Ogola to Kihara dated 9th April 2009, alleging Respondent's Motor Vehicle registration number KAB 251 B Isuzu Trooper was released from Stantech Motors Garage, with defects. Ogola alleged the Claimant failed to adequately inspect the vehicle before receiving it from the Garage. Kihara testified he acted on the recommendations of Dr. Ogola, and the issue was resolved. The Claimant denied knowledge of another Memo issued by the Chief Security Officer Wilfred Wahome on 26th July 2011, which alleged that Respondent's Motor Vehicle registration KAG 804 F, had been through several repairs, before experiencing engine knock and becoming grounded. The complaint was about the Garage which serviced this Vehicle, and was not brought to the Claimant's notice. The Memo was addressed to the Vice-Chancellor not to the Claimant or Dr. Ogola. Similarly, the Internal Memo from Mr. Wahome dated 26th July 2011 complaining about Motor Vehicle registration KAB 251B Isuzu Trooper that was abandoned at the entrance to the Chief Security Office with flat and worn out tyres, was not directed to the Claimant or his boss, but to the Vice-Chancellor. The Claimant testified another complaint related to Motor Vehicle registration KAG 804 F, which was said to have serious brake jam, even after undergoing repairs. There was a Memo from the Security Office dated 4th September 2009, addressed to the Co-ordinator. The Claimant acknowledged receipt of this Memo. He consulted the Garage Foreman who assured him the vehicle was okay at the time it was released from the Garage. The problem was at any rate rectified after the complaint. The other letters attached to the Statement of Response as appendices 8[b], 8[c] and 8[d] related to normal requests for repairs, which involved the procurement process, and were processed through the relevant committee.

5. The Claimant testified the renewal of his contract showed there were no doubts in the mind of the Respondent, about the performance of his duties. The University is ISO certified, and all procedures should be followed. The disciplinary procedure should be followed before dismissal. The Claimant stated he was deeply affected by, and continues to feel the effect of, the loss of his job.

6. Cross-examined, Kihara testified he is a Graduate of the Kenya Polytechnic. He does not hold diploma, but holds general certificates. He has a certificate in administration. His role was to coordinate

transport. It was his role to ensure vehicles were repaired. There were employees who worked under him- mechanics and foremen- all numbering about 5. The Coordinator was Claimant's boss. The Claimant was employed after the Coordinator. The Claimant was not required to express his interest in renewing the contract three months before expiry. He indicated he wished to renew his contract on 27th July 2011. Dr. Ogola was away on education leave. The Acting Coordinator was the Claimant's boss in the interim. Dr. Ogola appraised the Claimant and compiled an appraisal report dated 10th July 2009. At paragraph 4, Ogola stated the Claimant's performance was below expectation and inconsistent. There were more than 250 vehicles and the Claimant could only attend to a number of them at a time. He claims 3 months' salary in lieu of notice. This was offered in the letter of termination. It was untrue that the Deputy Vice-Chancellor head-hunted the Claimant. The Claimant was recruited competitively as a result of his good record. He has since termination received 3 different job offers. He took one under contract. He served as a consultant from September 2011 to March 2012. He is still in the same arrangement, lecturing driving Institutions here and there. He has not become a full time consultant, with a definite flow of income.

7. Kihara explained on redirection that he takes consultancies to make ends meet. He has not been invited by the University for any Terminal Benefits, despite having written demand letter through his Advocates. The Memos revolved around 2 vehicles, whereas the Respondent had a fleet of about 257 vehicles. He joined the Respondent on 1st October 2008, and first appraisal was in 2009. It was not the only appraisal; appraisal was annual. About 3 such appraisals were carried out. The Respondent only brought to the Court 1 appraisal. Dr. Ogola left on education leave in 2010. The Claimant worked under the Acting Coordinator Professor Stephen Mutuli for the whole year ending in 2011. Professor Mutuli strongly endorsed the Claimant's application for renewal commenting that the Claimant had strong managerial capabilities and had worked hard to streamline and improve services. The Professor had known the Claimant well over a year. The Claimant signed acceptance of the 2nd contract on 20th July 2011. There was nothing said to the Claimant on non-performance. No evidence of non-performance was given to the Claimant. He was not in charge of the entire motor vehicle repair process, and delay in delivery of service could be apportioned elsewhere.

8. The Respondent's position is that it employed the Claimant as the Deputy Coordinator Transport and Garage Section, for a period of 3 years, starting 19th August 2008. His salary was Kshs. 51,750 and house rent allowance of Kshs. 45,000 per month. On 9th April 2009, he was cautioned by his supervisor over inadequate inspection of Motor Vehicle registration number KAB 251 B. He was asked to ensure inspection and repair of motor vehicles was properly done. His performance was appraised in 2009, and it was concluded his performance was not satisfactory. The Respondent concedes the Claimant's contract was to expire in September 2011. He applied for renewal on 27th June 2011. On 12th July 2011, the contract was renewed with effect from 2nd October 2011 for another 3 years.

9. On 15th July 2011, the Chief Security Officer wrote a Memo to the Deputy Vice-Chancellor, concerning the poor mechanical work carried out on Motor Vehicle KAG 795 F. The vehicle was returned for use with faulty brakes and failing engine. A private mechanic called in confirmed the brakes and the engine had not been serviced for a long time, resulting in the problems. The Chief Security Officer wrote again on 26th July 2011, complaining about another vehicle KAG 804 F, which suffered constant problems, restricting the security department to use of one motor vehicle for a considerably long time. On the same day, the same Officer wrote complaining about the worn out tyres and lack of spare tyres, for the security standby vehicle. The Claimant received communication from the Respondent on various occasions with regard to his poor performance. On 3rd August 2011, the Respondent rescinded the contract which was due to become effective on 2nd October 2011. The Claimant gave the Respondent no option. Termination was lawful and fair. There was fair reason as provided for under Section 45[2] [b] [i] and [ii] of the Employment Act 2007. He was paid 3 months' salary in lieu of notice. Termination was lawful under Section 35 of the Employment Act. It is not true that he served for 3 years without blemish; there were numerous complaints against his performance. He is not entitled to any of the prayers.

10. Dr. Ogola testified he is a Senior Lecturer in the department of Mechanical Engineering. Kihara worked under him. At the time the Claimant left employment, Dr. Ogola was on sabbatical leave. The

witness saw a copy of the termination letter on resumption of duty. There were complaints relating to quality control, made against the Claimant. There was inadequate inspection and repairs. Complaints continued from users even after Ogola issued the Memo. There were complaints from the Chief Security Officer. The Claimant did not act to minimize the complaints. In the appraisal of the Claimant carried out by Ogola, it was concluded the Claimant's technical training was below higher national diploma, then required for the position of Assistant Transport Officer. He held a position higher than Transport Officer, and would have been expected to hold a Degree. Ogola was not able to say how the Claimant was employed in the position he was not qualified to hold. The Claimant applied for renewal when Ogola was away on sabbatical. His Acting Supervisor gave recommendation for the renewal. This was just a recommendation, and there were other levels of decision-making. Ogola would have looked at the cumulative record if he was to recommend the Claimant's contract renewal. It would have been a difficult decision. Ogola was not surprised that the renewed contract was reversed. He was not aware of the reasons for the reversal, but was not surprised considering the employee's record.

11. Cross-examined, Ogola stated he was a witness for the University. He did not come to Court as the University's representative. He worked with Kihara for one year before he took his sabbatical leave. Ogola sat in the interviewing panel. The Respondent was recruiting for an Assistant to Ogola. The Claimant was the sole candidate and was accepted by the Respondent. No other person applied for the job. Appraisals were carried out annually. The one carried out on 10th July 2009 by Ogola was a special appraisal, not an annual one. The special appraisal was requested for by the Management. It was an opinion appraisal. Other appraisals other than the special one, were not brought before the Court. These were the appraisals for 2009, 2010 and 2011. The Respondent did not deliberately fail to bring these to Court. In annual appraisals, the employer looked at performance, not certificates. Kihara was always found to have met expectations in the appraisals. It was a borderline reporting as the University did not wish to de-motivate its employees.

12. Ogola did not indicate that there was inadequate inspection of Motor Vehicle KAB 251 G. He did not know who collected the vehicle from Stantech Garage. This was a prequalified Garage. He did not know who released the vehicle to its users. Respondent's appendix 8[b] refers to Motor Vehicle KAG 804 F, which was already the subject of an earlier complaint. Kihara did not carry the repairs himself, but was employed as a hands-on-person. He ought to have road-tested the vehicles. Respondent's appendix 8 [a] is dated 4th September 2009. Other complaints documented from appendix 6, all related to 2011. They concerned two vehicles. There were about 200 working vehicles at the University. Professor Mutuli who recommended renewal of Claimant's contract was Senior in terms of academic hierarchy to Dr. Ogola. He was an Associate Professor at the time he made the recommendation. The two Dons were in the Engineering Department. One could not draw a conclusion based on seniority. Ogola accepted that the Claimant accepted renewal of the contract. The decision to reverse the contract was made at the top Management level. Ogola could not say what the justification was. The letter did not give a reason for termination. The University is ISO certified and Ogola participated in the process leading to certification. He stated he is nonetheless not an expert on employment termination, and could not tell if termination was fair. He agreed termination should follow the laid down procedure. Redirected, Dr. Ogola clarified that the complaints against the Transport Department involved more than just the two vehicles. Ogola did not know how Kihara was sourced; he was just invited to sit in the Panel which interviewed him. The Respondent prays the Court to dismiss the Claim.

The Court Finds and Awards:-

13. Several facts in this dispute are not contested. It is agreed the Claimant was employed by the Respondent University as the Deputy Coordinator in the Transport and Garage Section. He was at first employed on 11th August 2008 on a 3 year contract. This was to lapse on 30th September 2011. It is conceded that on 27th June 2011, the Claimant applied for renewal. On 12th July 2011, the Deputy Vice-Chancellor Professor Peter Mbithi, wrote to the Claimant, advising that the Respondent had agreed to renew the Claimant's contract for another period of 3 years, starting 2nd October 2011. The Claimant was offered a basic salary of Kshs. 73,846; house rent allowance of Kshs. 48,375; and commuter allowance of Kshs. 2,250. The Claimant accepted the new contract, and appended his signature on the contract

document on 20th July 2011. These facts are not in dispute. Likewise the Respondent conceded on 3rd August 2011, two weeks after the letter of renewal, the Respondent terminated the Claimant's contract of employment. The letter of termination is dated 3rd August 2011.

14. The Respondent appears to have terminated both the outgoing and incoming contracts of employment in this single letter. The letter states,

“I refer to my letter to you, dated July 12th 2011, in which you were offered an appointment contract of employment as Deputy Coordinator, Transport and Garage Administration.

It has been decided that your services are no longer required by the University of Nairobi, 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.”

In the view of the Court, the Respondent terminated the contract which was to lapse on 30th September 2011 and offered to pay three months' salary in lieu of notice. At the same time, the Respondent terminated the contract which the Claimant had already accepted, and which was to start on 2nd October 2011 to last a period of three years. No notice pay was offered in the second termination.

15. The Respondent did not give reason or reasons for termination in either case. Beyond saying the Claimant's services were no longer required, there were no reasons to explain the premature termination of the two contracts. The Respondent suggested in its evidence that the Claimant:-

- Had his work appraised by his supervisor Dr. Ogola on 10th July 2009, and was found wanting. His work was unsatisfactory and inconsistent, and his technical training below the required higher national diploma.
- Had failed to adequately discharge his role in the inspection and repair of Respondent's motor vehicle.

Although these were not expressed as the reasons for the double termination, the Respondent suggested in its evidence and pleadings that these were the grounds forming substantive justification in the double termination.

16. These were not, in the finding of the Court valid grounds justifying termination. There are various reasons why the Court has reached this conclusion. The appraisal carried out by Dr. Ogola was said to be a special appraisal. It was not explained to the Court what necessitated this special appraisal, and significantly, why the annual appraisals for 2009, 2010 and 2011, were not considered at the time of termination. Dr. Ogola himself had sat in the interview Panel which recruited the Claimant on 11th August 2008. The Claimant was accepted in employment notwithstanding that he did not have a higher diploma. It was unclear why Dr. Ogola raised the issue one year later in a special appraisal. Surprisingly, the Respondent through Professor Mutuli, did on 27th June 2011, strongly endorse the Claimant's continued employment, upon the Claimant's application for renewal of contract. The Professor described the Claimant as dedicated and with strong managerial capabilities. One would not expect such strong endorsement if the special appraisal report of two years back, was considered in any way significant. The decision to renew the Claimant's contract, communicated by Professor Mbithi on 12th July 2011, is itself evidence enough that the two grounds seemingly relied upon by the Respondent in justifying termination had no validity. The records of the special appraisal, and the numerous letters about faulty motor vehicles, were available to the University on the date renewal was made.

17. The Internal Memo dated 9th April 2009 from Dr. Ogola to the Claimant complaining about the repairs on KAB 251 B, seems to have been acted on. There were no complaints the whole of the year 2010. Complaints resurfaced in 2011, the year of renewal or termination of the Claimant's contracts. Some of the complaints related to the same two vehicles, and in total touched on no more than five vehicles over a period of two years, and in a fleet of about 250 vehicles. Some of the outsourced garages such as Stantech against whom complaints were raised, were prequalified by the University in a regular

procurement process. The nature of the complaints appear to the Court to be the normal, day to day, and expected complaints about worn out tyres, faulty brakes, and speeding up of repair works. These were complaints directed at a system, rather than an individual. The Respondent did not consider these complaints to reflect on the Claimant's personal output. There were no allegations of poor performance or disciplinary lapses against the Claimant. None were mentioned in the letter of double termination.

18. In any event the Respondent does not state anywhere in the pleadings or evidence that it formally communicated any charges against the Claimant, and offered him an opportunity to defend himself. An employer does not make and unmake contracts, without communicating any cogent reasons for termination, or inviting the employee to explain himself on any allegations that may be laid out by the employer.

19. The Respondent was not compelled to renew the Claimant's contract; it did so of its own volition, and imposed on itself certain obligations. It had the option of holding on until 30th September 2011 when the Claimant's contract was due to end. The relationship would have ended *bila maneno*. The Respondent would not have needed to justify termination on 30th September 2011, or explain its decision for not renewing the contract. Instead the Respondent offered the Claimant an early renewal of the contract, which it must be emphasized the Claimant accepted. The Respondent, even before the ink had dried on the renewed contract, terminated the old contract prematurely. These decisions changed the legal position in favour of the Claimant, creating legal obligations where none beyond those relating to the end of the first contract, should have been. It offered the Claimant notice pay of three months under the old contract, which the Claimant states he has not been paid to-date. The Respondent has not shown the Court evidence of payment, and it is the finding of the Court this money has not been paid.

20. The Court is satisfied that the Respondent did not have justification in the premature termination of the Claimant's contracts in either case. The Claimant has asked for 3 months' salary in lieu of notice. The Court understood him to be claiming this under the first contract. The Respondent did not give details of payment of this item, although it undertook to pay the Claimant in the termination letter. ***The Claimant is awarded 3 months' salary as notice pay at Kshs. 293,935 as prayed.*** The Court did not quite understand the claim for accrued salary from 12th July 2011 to 3rd August 2011 of Kshs. 73,582. The Claimant seems to suggest that he should be paid the salary for the period between the date the contract was renewed and terminated. This is preposterous. The renewal would only have earned the Claimant a salary from 2nd October 2011. He was still serving under the unexpired contract. He is not entitled to this claim. The claim for payment of salary for the remaining months under the old contract [August and September 2011], appears to the Court unreasonable particularly in view of the grant of notice pay above. It cannot have been the intention of the parties that notice pay is paid on top of salaries for the remaining months in the first contract. This prayer is rejected. The Court has seen no material in evidence to justify the claims for accrued and anticipatory gratuity calculated at 15% of the Claimant's basic salary. There is nothing in the two contracts or the law shown to justify any claim for gratuity. Both prayers for accrued and anticipatory gratuity are rejected. The Court explained in the ***Industrial Court Cause Number 379 of 2009 between D.K. Njagi Marete v.the Teachers Service Commission*** that in redressing breaches such as visited upon the Claimant by the Respondent, regard must be given to the principle of *fair go all round*. The Claimant does not merit salaries for the entire contract beginning October 2011 to 2014. He has not performed any work for the period. It is not his fault that he has failed to do so, but the redress lies in a compensatory award of damages, not in a huge payment of salaries not earned. The law presumes the Claimant has moved on to mitigate his economic injury. The Claimant has asked for compensation for unfair termination. Such compensation should be sufficient to redress the economic injury, and an additional order for payment of anticipatory salaries covering a period of three years, would result in unjust enrichment. The purpose of redressing employment wrongs is to afford an employee economic recompense, not unjustly enrich the employee, or punish the delinquencies of the employer. The claim for anticipatory salaries at Kshs 3,274,884 is rejected. The Court has taken into account that there occurred a double termination without valid reason or reasons, and without fairness of procedure, and ***the Claimant is granted 12 months' salary based on the monthly rate of Kshs. 95,935, totaled at Kshs. 1,151,220 in compensation for unfair termination.*** In sum:-

[a] Termination of the Claimant's contracts of employment was unfair.

[b] The Respondent shall pay to the Claimant 3 months' salary in notice pay at Kshs.293,935 and 12 months' salary in compensation at Kshs. 1,151,220.

[c] The total sum of Kshs.1,445,155 shall be paid by the Respondent to the Claimant within 30 days of the delivery of this Award.

[d] Certificate of service shall be availed by the Respondent to the Claimant forthwith.

[e] No order on the costs.

Dated and delivered at Nairobi this 21st day of January 2014

James Rika

Judge