



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 224 OF 2013

KENNETH L. KORES.....1ST CLAIMANT

REMPEYIAN MURASIMI.....2ND CLAIMANT

WILBERFORCE K. SEREM.....3RD CLAIMANT

MATAY O. CHEMEY.....4TH CLAIMANT

-VERSUS-

MAASAI MARA UNIVERSITY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 14th March, 2014)

JUDGMENT

The claimants filed the memorandum of claims on 19.07.2013 through Oumo & Company Advocates and prayed for judgment against the respondent for:

- 1. A declaration that the termination of employment was discriminative, unlawful and a violation of the fundamental rights of the claimants.**
- 2. Reinstatement of the claimants to their positions without loss of benefits and in alternative compensation for loss of prospective future earnings till retirement.**
- 3. General damages for unlawful and malicious termination and violation of fundamental rights and freedoms as per the bill of rights.**
- 4. A maximum compensation for wrongful dismissal as per section 49(c) of the Employment Act.**
- 5. A certificate of service as per section 51 of the employment Act.**
- 6. Costs and interest.**
- 7. Any other relief the honourable court may deem fit to grant.**

The respondent filed the memorandum of response on 09.09.2013 through Nchoe, Jaoko & Company Advocates and prayed that the claimants' claims be dismissed with costs.

The case was fixed for hearing on 27.11.2013. By consent, the parties opted not to call witnesses but to

rely on the pleadings and documents on record.

The claimants were employed by the respondent in various capacities with effect from diverse dates. The 1st claimant was employed effective 1.07.2010 as a marketing assistant at gross monthly pay of Kshs.12,390.00. The 2nd claimant was employed effective 1.07.2010 as an Account Assistant I grade 6 at a gross monthly salary of Kshs.15,874.00. The 3rd claimant was employed effective 25.04.2012 as an Account Assistant I at a gross salary of Kshs.30,160.00 per month. The 4th respondent was employed effective 25.04.2012 as an Account Assistant II grade 10 at a gross monthly salary of Kshs.30,160.00. The claimants' last gross salaries were Kshs.40,034.00, Kshs.45,996.00, Kshs.78,235.00 and Kshs.51,832.00 respectively.

Each of the claimant's employment was terminated by the respondent on account of the disciplinary committee finding each of the claimants guilty of conspiracy to defraud and violating section 8 of the Public Officer Ethics Act. Each of the claimants appealed against the termination, the appeals were considered by the respondent's staff disciplinary committee and each of the claimants received a letter determining the respective appeal stating as follows:

"I refer to your appeal against your termination from the services of Narok University College dated 28th February, 2012.

This matter has been re-looked into and deliberated upon. The decision of the Staff Disciplinary Committee has been vacated and you are hereby re-instated to your employment. Your reinstatement takes effect immediately. Your letter of confirmation to Permanent and Pensionable terms will be given to you on your reporting back.

As you report back, you are reminded to always adhere to and observe the conditions and terms of service of your engagement.

Yours faithfully,

Signed

PROF. DAVID K. SEREM

PRINCIPAL"

After the reinstatement, the claimants reported back to work. However, the resumption was short lived. Each of the claimants received a letter dated 15.07.2013 conveying that the employment had been terminated effective 15.07.2013 on account of grounds substantially similar to the grounds of the proceedings concluding in the earlier reinstatement, namely, conspiracy intended to defraud the respondent whereby 393 tons of building sand was to be supplied but only 228 tons of sand could be accounted for as delivered. The claimants were to be paid one month salary in lieu of termination notice and any other dues that they may have been entitled to. The claimants were dissatisfied with the termination and filed the suit. They also filed an urgent application and the court made an interim order for stay of implementation of the respective termination decisions and by consent of the parties, the *status quo* was maintained throughout the pendency of the suit.

The parties also agreed upon the following issues for determination:

- 1. Whether the 1st termination of the claimants' employment by respondent and reasons given for the same were justified.**
- 2. Whether due process was followed before the 1st termination.**
- 3. Whether there was an appeal and decision from the 1st termination.**
- 4. Whether the decision made by the respondent in the appeal is binding on the respondent.**
- 5. Whether the 2nd termination on the same allegations was valid.**

6. What remedies are available to the claimants and the respondent?

The parties filed written submissions to urge their respective cases.

The court has considered the pleadings, the documents on record and the submissions and makes the following findings.

The court has merged issues 1, 2, 3 and 4 and finds that the respondent's decision reinstating the claimants was conclusive finding on the conspiracy allegations levelled against the claimants. The claimants were dissatisfied with the initial termination, they appealed and the respondent determined the appeal in favour of the respondents by reinstating the claimants to their respective employment. The court finds that there being a reinstatement by the respondent, the fairness or otherwise propriety of the 1st termination was thereby conclusively resolved by the respondent.

The 5th issue for determination is whether the 2nd termination on the same allegations was valid. For the respondent, it was submitted that the appeal decision was subject to the final decision by the University Council. That the decision by the Council superseded any other decision made by any other authority in the respondent University.

The court has considered the respondent's submission and finds that the decisions of the staff disciplinary committee were never expressed to be subject to ratification or variation by the respondent's council. The court further finds that it was not established that there existed such statutory or agreed arrangements for the ratification or variation of decisions of the respondent's disciplinary committee by the respondent's council. The court holds that an employer's power to impose a punishment including dismissal is a power exercisable from time to time as circumstances warrant it but exhaustible once exercised with respect to a given alleged misconduct or poor performance. Thus, once given allegations have been levelled against an employee and the employer finds that employee has exculpated oneself or the employer having found the employee is culpable, nevertheless opts to retain the employee in employment or not to impose any punishment, the employer's jurisdiction in that regard is thereby exhausted subject only to the statutory or agreed appeal or review procedure as may be in place.

In the present case, the court holds that once the claimants were reinstated by the respondent's disciplinary committee, the respondent's employer's administrative jurisdiction to revisit the case and to punish on the same or substantially similar grounds had thereby been exhausted.

The court has carefully considered the disciplinary proceedings in the case and finds that in absence of agreed or statutory administrative revision or review jurisdiction, the respondent could not unilaterally revisit the case as was purportedly done. The court further finds that where there are internal layers of disciplinary process with option to appeal, the appeal procedure can only be available to the employee and not the employer's disciplinary authority at any of the layers because a decision maker cannot appeal against its own decision. In the considered opinion of the court, the lower authority in the administrative disciplinary process essentially exercises delegated or imposed authority of the ultimate decision maker in the administrative disciplinary process and in absence of statutory or agreed revision or review arrangements by the ultimate decision maker, once the lower layer has exercised the disciplinary powers as imposed or delegated, the employer's jurisdiction in the case is thereby exhausted.

Accordingly, to answer the 5th issue for determination, the court finds that the purported 2nd termination of the claimants' employment by the respondent on the same allegations was not valid as it was pretended exercise of a power to punish that had already been exhausted once the respondent's disciplinary committee reinstated the claimants in the appeal decision.

The 6th issue for determination is whether the parties are entitled to the remedies as prayed for. The court has found that the ultimate termination was unfair for want of a valid power or administrative jurisdiction on the part of the respondent. In such circumstances, the court holds that such termination was not only unfair procedurally and in substance, but it was also null and void.

The court has considered that the respondent is a public body, the claimants are public officers, the claimants are willing to continue in employment and the claimants have a legitimate expectation to continue in employment unless lawfully terminated or until retirement age. The respondent has not urged any compelling reason why the claimants should not continue in public employment.

In the circumstances of the case, the court finds that an order for reinstatement will serve the ends of justice.

In conclusion, judgment is entered for the claimants against the respondent for:

1. **A declaration that the purported termination of the claimants' employment by the respondent was unfair, null and void.**
2. **Each claimant is reinstated in the employment of the respondent in the respective office held before the termination and without loss of the benefits attached to the respective office, and to continue in employment unless lawfully terminated.**
3. **The respondent to pay costs of the suit.**

Signed, dated and delivered in court at Nakuru this Friday, 14th March, 2014.

BYRAM ONGAYA

JUDGE