REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 84 OF 2013

MARTIN MITO ANYANGO.....1ST CLAIMANT

JUSTUS KIRWA KOECH.....2ND CLAIMANT

FRANCISCO ZEVERIO MACHIRA.....3RD CLAIMANT

- VERSUS -

LAIKIPIA UNIVERSITY COLLEGE.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 4th April, 2014)

JUDGMENT

The claimants filed the memorandum of claim on 12.04.2013 through Gordon Ogola & Associates. The respondent filed the memorandum of defence on 10.06.2013 through the Federation of Kenya Employers. The claimants filed the response to the defence on 20.06.2013 and the respondent's supplementary memorandum of reply was filed on 24.07.2013. The claimants' supplementary statement of claim in response to the respondent's supplementary memorandum was filed on 23.08.2013.

The claimants were employees of the respondent effective diverse dates and until each received the termination letter dated 19.2.2011.

The 1st claimant was a permanent employee working as office assistant grade III attached to the medical department. He was also the shop steward for the union recognised by the respondent. At termination, he earned Kshs.12,713.00 being basic pay and Kshs.9,436.00 being the house allowance per month. Gross pay was Kshs.27,099.00.

The 2nd claimant was a clinical officer earning Kshs.40,492.00 being basic pay and Kshs.30,960.00 house allowance per month. Gross pay was Kshs.81,002.00

The 3rd claimant was a painter earning basic pay of Kshs.16,375.00 and Kshs.10,325.00 being house allowance per month.

The case was heard on 27.02.2014 when the 1st claimant testified to support the claimants' case and the respondent's Senior Registrar for Human Resource Mugo Mureithi **(RW)** testified to support the respondent's case.

The facts of the case are as follows:

1st claimant

He was employed by letter dated 11.5.1995 and deployed to Laikipia Campus by the letter dated 21.05.2004. He was confirmed in appointment by the letter dated 21.9.2007. He was terminated from appointment by the letter dated 19.12.2011. The letter stated that he had appeared before the college disciplinary committee on account of a charge of fraudulent medical claims. The letter conveyed that the 1st claimant had been found guilty as charged and further found guilty of spearheading production of false receipts. The letter further stated that it had been decided that the claimant's services be terminated pursuant to clause 5(d) of the collective agreement and with effect from 15.12.2011. The letter required the claimant to submit the relevant clearance form to enable the respondent to pay the terminal benefits.

2nd claimant

The 2nd claimant was employed by the letter dated 9.8.1995 and confirmed in appointment by letter dated 10.06.1998. The letter of termination is dated19.12.2011 and the letter stated that he had appeared before the disciplinary committee on 15.12.2011 charged with the offence of fraudulent medical claims. The letter further stated that the 2nd claimant was found guilty as charged and further found guilty of facilitating un-procedural referrals. His employment was therefore terminated pursuant to clause 5 (b) III of the collective agreement with effect from 15.12.2011. Subject to submitting the clearance form, he was eligible to terminal benefits and other dues as stipulated under the collective agreement. The 1st claimant testified that the 2nd claimant received the termination letter on 9.01.2012.

3rd claimant

The 3rd claimant was employed by letter dated 14.9.1998 and absorbed in employment by letter dated 26.5.1993. He was upgraded by the letter dated 6.3.1995. The 3rd claimant received from his head of department the termination letter dated 19.12.2011. The letter stated that the 3rd claimant appeared before the disciplinary committee on 15.12.2011 charged with the offence of being drunk on duty on 18.02.2011. The letter stated that he was found guilty and terminated under clause 5(d) of the collective agreement and with effect from 15.12.2011. He would be paid terminal dues upon clearance. The 1st claimant testified that there was no evidence at the disciplinary hearing showing that the 3rd claimant had been seen drunk on the material date. It was the claimants' case that the 3rd claimant's intoxication was due to the alcohol he used to mix the paint and it was involuntary and an occupational risk that the respondent was supposed to take into account. Prior to termination, the 3rd claimant had been suspended per letter dated 4.3.2011 and had been on suspension beyond the 4 months stipulated in the collective agreement. The 3rd claimant was not paid throughout the period of suspension.

The 1st claimant testified that he submitted his appeal on 20.12.2011 but was not considered because it was said to be time barred. He submitted a second appeal but received no response. He stated that he had appealed within 14 days as per clause 10 of collective agreement because he was terminated on 19.12.2011 and he appealed on 22.12.2011. The 3rd claimant had appealed on 3.1.2012 within the 14 days but his appeal was not considered because it was said to be time barred. The 2nd claimant's appeal was on 13.1. 2012 but was rejected as time barred.

The 1st claimant also testified that after termination, a new collective agreement was concluded whose effect was to increase the claimants' pay for part of the period they had been in service and as prayed for in the supplementary memorandum of claim.

The 1st claimant also testified that the charges of fraudulent medical claims involved 27 members of staff and only the 1st and 2nd claimants were terminated as the 25 others were retained in employment so that the termination was discriminatory.

RW's testimony was as follows:

1. The respondent was not liable to 1st claimant for the period he served on fixed term contract renewable every 3 months from 1995 to 2004 when he was placed on permanent terms.

2. The 1st claimant was dismissed for presenting forged medical claims as found by the audit report as alleged medical facilities were found not to exist. 27 employees were involved, 1 found innocent, 1st and 2nd claimants terminated and 24 others found guilty and surcharged.

3. 1st and 2nd claimants were terminated because in the cause of disciplinary proceedings, they were found to bear higher responsibility. The 1st claimant was a shop steward and therefore required of high integrity standards than other employees and had participated in preparing fraudulent receipts. He had been shown the receipts and had not denied. He apologised to the committee and pleaded to be forgiven. The 2nd claimant was the clinical officer who had referred 20 employees in the fraudulent medical claims to external health facilities.

4. The 2nd claimant referred 9 employees to Sunshine clinic that did not exist and the 9 employees had filed fraudulent medical claims.

5. The 3rd claimant had been on suspension beyond the agreed months and he was entitled to be paid for all months beyond the agreed period. RW admitted that the 3rd claimant's defence that he was intoxicated by the paint he used at work had not been investigated.

6. 1st claimant was paid gratuity but used to offset Sacco loans. The 3rd claimant would be paid upon clearance. Payments were computed per clause 7(b) of the collective agreement. The 3rd claimant had not been paid final dues because he had not cleared. The 3rd claimant's vacancy was still there as painters had been engaged through out-sourcing.

7. The matters that aggravated the 1st and 2nd claimants' cases had not been notified to them.

The claimants have prayed for reinstatement and in alternative, payment as set out in the memorandum and supplementary memorandum of claim.

The court has considered the pleadings, the evidence, and the submissions and makes the following findings:

1. The 1st claimant was terminated on account of fraudulent medical claims and further on account of a charge that was not notified of spearheading production of false receipts. The court finds that the first charge of fraudulent medical claims was similar to that of the other 24 employees who were retained in the respondent's employment. The court finds that a termination on that ground was not proportionate and was discriminatory in view of the claimant's position of shop steward and which RW testified aggravated the punishment. The court finds that it was not open for the respondent to treat the 1st claimant differently by imposing higher integrity standards than was expected of the 24 other employees in the case and as was testified by RW to have been the consideration in dismissing the 1st claimant from employment. Under section 5(1) and (2) of the Employment Act 2007, the respondent was bound to strive to eliminate discriminatory employment policies and practices. The court finds that the respondent has failed to show that the discrimination of the 1st claimant did not take place during the imposition of punishment against the affected employees. As provided for in section 5(6) of the Act, the court finds that the respondent has failed to exculpate from claims of discrimination as advanced for the 1st claimant. The court finds that being a shop steward and the consequential imposition of higher integrity standards was not a fair reason to aggravate the punishment against the 1st claimant as such was not a valid reason under section 46 (c), (d) and (e) of the Act. It was testified by RW that the claimant had been terminated because he had spearheaded the preparation of the receipts in the fraudulent medical claims. The court finds that as per the testimony by RW and as verified in the

termination letter, the 1st claimant was not notified and given a chance to defend himself with respect to the allegations forming the 2nd limb of termination. The court has noted that the 1st claimant's appeal had been within time but without any valid basis found to have been time barred. Accordingly, the court finds that the 1st claimant was unfairly terminated. The evidence on record shows that the 1st claimant was keen to continue in his public employment, he had not secured alternative employment since the dismissal and he had many years to serve prior to reaching the mandatory retirement age of 60 years applicable to public officers generally. The court finds that the 1st claimant is entitled to reinstatement with effect from 19.12.2011 with full salary, allowances and benefits as per the prevailing provisions of the collective agreement.

2. The 3rd claimant was terminated on account of being drunk while on duty. The evidence that the claimant's defence was that the drunkenness was due to the effects of the paint that affected the 3rd claimant as a painter and that the allegations were not investigated is not in doubt. RW testified that the 3rd claimant's position was still vacant and further that the respondent had instituted drug rehabilitation measures to assist affected staff. In the circumstances the court finds that the reason for the termination of the 3rd claimant was not valid as envisaged in section 43 of the Act and the claimant is entitled to reinstatement as prayed for. In the circumstances, the court finds that the 3rd claimant is entitled to reinstatement with effect from 19.12.2011 with full salary, allowances and benefits as per the prevailing provisions of the collective agreement. The 3rd claimant is also entitled to full pay throughout the period he was on suspension.

3. The 2nd claimant was terminated on account of fraudulent medical claims and as the clinical officer, RW testified that he referred 9 employees to medical facilities that did not exist. The court has considered the evidence and finds that the respondent's evidence has not been rebutted and on that ground, the respondent was entitled to terminate the 2nd respondent's employment. The court finds that the 2nd claimant acted dishonestly and inconsistent with the high trust expected of a clinical officer and the employment relationship. In the circumstances, the court finds that the 2nd claimant is entitled to be paid only as per the respondent's staff pension scheme.

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

a. A declaration that the termination of the employment of the 1st and 3rd claimants was unfair.

b. A declaration that the termination of the employment of the 2nd claimant was fair.

c. The 1st and 3rd claimants are reinstated in employment with effect from 19.12.2011 with full salary, allowances and benefits as per the prevailing provisions of the collective agreement and the 3rd claimant is also entitled to full pay throughout the period he was on suspension.

d. The 2nd claimant to be paid terminal dues being only as per the respondent's staff pension scheme.

e. The respondent to pay the amounts in (c) and (d) by 1.5.2014, failing, interest at court rates to be payable from the date of the suit (12.04.2013) till full payment.

f. The claimants to calculate and file in court the computation and serve the respondent in 7 days the amounts in (c) and (d) for recording the figures on a date convenient to the parties and the court.

g. The respondent to pay costs of the suit.

h. The 1st and 3rd claimants to report on duty at the respondent's vice–chancellor's office and to be assigned duties as per their respective positions with effect from 7.4.2014 and to continue in employment as reinstated until their respective retirement dates or unless otherwise lawfully terminated.

Signed, dated and **delivered** in court at **Nakuru** this **Friday, 4th April, 2014.**

BYRAM ONGAYA

JUDGE