



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 827 of 2010

JOSEPH OLUOCH OMOLE.....CLAIMANT

VS

THE CATHOLIC UNIVERSITY OF EASTERN AFRICA.....RESPONDENT

AWARD

The Claimant's claim in this case is for unfair termination of employment and failure to pay terminal dues. The matter was heard before Madzayo J (as he then was) between 22nd March and 12th October 2011 . The Claimant and the Respondent's witness, Rev. Prof. Juvenalis Baitiu gave sworn evidence and the Advocates for both parties filed written submissions. The parties appeared before me on 3rd December 2012 and by consent agreed that I proceed to issue an award on the basis of the documents filed in Court and the proceedings as recorded by the former Judge.

According to the Claimant, he was employed by the Respondent on 22nd August 2002 first as an Assistant Lecturer on a one year renewable contract (appointment letter is to be found on page 1 of the Claimant's documents). He was subsequently issued with a 3 year contract commencing on 22nd August 2003 and ending on 22nd August 2006. During the currency of the third contract running from 22nd August 2006, the Claimant was promoted to the position of Lecturer Level 15-1 effective 1st August 2009 (promotion letter is to be found on page 5 of the Claimant's documents).

The Claimant claimed to have been entitled to a gross monthly salary of Kshs. 107,342 gratuity at the rate of 1 month's salary for every completed year of service, paid leave, leave allowance of Kshs. 57,342, medical insurance and annual salary increments. The Claimant submitted his payslip for the month of April 2010 which is to be found on page 16 of the Claimant's documents.

The Claimant went on to state that on 18th May 2010, he received an undated letter from the Respondent summoning him to attend an "urgent disciplinary meeting" to be held on 18th May 2010 at 3 p.m at the Vice Chancellor's Boardroom (letter is to be found on page 9 of the Claimant's documents) . The letter indicated that the meeting had been called to discuss important matters connected with the Claimant's teaching responsibilities but no details thereon were given.

The Claimant attended the meeting whereat he was shown copies of newspaper cuttings containing articles authored by the Claimant and published in local newspapers. Copies of the articles titled "*Religious Leaders are Hypocritical*", "*Catholic Bishops are Shepherds, not Cowards*" and "*Christians Have no Basis for Rejecting Kadhi's Courts*" are to be found on pages 40, 41 and 42 of the Claimant's documents.

According to the Claimant, the Respondent took offence at the articles because the Claimant had expressed an opinion on the Proposed Constitution of Kenya, that was contrary to the official position of the Catholic Church. The Claimant stated that the articles carried his personal opinion and that they had nothing to do with his employment as a Lecturer at the University.

On 20th May 2010, the Respondent wrote to the Claimant notifying him that his contract of employment had been renewed for 3 years effective 22nd August 2009 (then past) This letter which is to be found on page 13 of the Claimant's documents was preceded by an exchange of correspondence between the Claimant and the Respondent (correspondence is to be found on pages 6, 7, 8, 10, 11 and 12 of the Claimant's documents).

On 21st May 2010, the Respondent wrote another letter to the Claimant notifying him that his employment had been terminated with immediate effect (termination letter is to be found on pages 14 and 15 of the Claimant's documents). The termination letter made reference to a consultative meeting with the University representatives on 18th May 2010 and the 46th Ordinary University Council meeting held on 19th/20th May 2010. The Claimant stated that he neither had knowledge nor did he attend any of the aforesaid meetings. The termination letter further gave the reason for termination of the Claimant's employment as "specific and consistent pattern of misconduct".

The Claimant claimed that the Respondent's action in terminating his employment contravened both the Employment Act, 2007 and the Respondent's own Terms and Conditions of Service for Senior, Middle Level and Support Staff which governed the Claimant's employment with the Respondent.

The Claimant's claim was tabulated as follows:

- | | |
|--|---------------|
| a) Salary for the month of May 2010..... | Kshs. 107,342 |
| b) 3 months' salary in lieu of notice..... | 322,026 |
| c) Salary for the unexpired period
of the contract (37 months)..... | 2,734,234 |
| d) Gratuity for the period between
September 2006 and August 2009..... | 322,026 |
| e) Gratuity for the period between
August 2009 and August 2012..... | 322,026 |
| f) Pro-rata leave for the period between
September 2009 and May 2010..... | 58,000 |
| g) Leave allowance for the period between
September 2009 and May 2010..... | 57,000 |
| h) Annual increments lost due to wrongful dismissal..... | 48,000 |
| i) 12 months' salary being reasonable compensation
for unfair dismissal | 1,288,104 |

The Respondent stated that the Claimant was first employed as a tutorial fellow on 5th October 1997 and

worked as such up to 31st August 1999 when his contract was not renewed (letter of appointment and notice of non renewal of contract are to be found on pages 1 and 2 of the Respondent's documents). The Respondent denied that the Claimant was entitled to gratuity, paid leave, leave allowance, medical insurance or annual salary increments as claimed by the Claimant. Specifically, the Respondent stated that the University had abolished payment of gratuity replacing it with a Provident Fund that was governed by the Retirement Benefits Act .

On the Claimant's performance record, the Respondent stated that the Claimant had been issued with verbal warnings with regard to his failure to comply with the Terms and Conditions of Service especially relating to teaching materials. The Respondent added that the purpose of the urgent consultative meeting held between the Claimant and the Respondent's representatives was to discuss the Claimant's teaching responsibilities which had been noted to be contrary to the doctrines of the University.

According to the Respondent, the Claimant, being a Social Justice and Ethics Lecturer was obliged to teach within the doctrines of the Catholic Church and that in writing the articles aforementioned which were contrary to the said doctrines, the Claimant had rendered his continued employment untenable. The Respondent had therefore been left with no option but to summarily dismiss the Claimant on grounds of gross misconduct. The Respondent added that the Claimant had failed to hand over and clear with the University to facilitate release of his terminal dues and Certificate of Service and asked that the Claimant's claim be dismissed with costs.

The main issue for determination before this Court is whether the termination of the Claimant's employment by the Respondent was unfair within the meaning of the Employment Act, 2007.

Section 43(1) of the Employment Act, 2007 provides that:

(1) In any claim arising out of termination of a contract , the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45

Section 45(2) of the Act provides as follows:

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid

(b) that the reason for the termination is a fair reason-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure

Section 41 of the Act sets out the procedure for handling of cases of misconduct, poor performance and physical incapacity as follows:

(1) Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor

performance, and the person, if any, chosen by the employee within subsection (1) make

Moreover, Chapter Three of the Respondent's Staffing Manual (to be found on pages 17-21 of the Claimant's documents and on pages 14-17 of the Respondent's documents) provides elaborate staff disciplinary procedures.

The reason for termination of the Claimant's employment as per the termination letter was misconduct. The procedure set out in Section 41 of the Employment Act, 2007 was therefore mandatory in this case. Even if the charges preferred against the Claimant would have led to summary dismissal, a hearing in the fashion set out in Section 41 was still a requirement. Indeed, the only distinguishing factor for cases of summary dismissal is the issue of notice. The termination must still follow due process as set out in Section 41. No matter how offended an employer may be by the conduct of an employee, the employer must observe due process before taking any disciplinary action against the employee. There is no provision under the law for summary disciplinary procedure.

From the documentary and the viva voce evidence, this procedure was not followed.

Additionally, the Respondent flouted its own Staff Manual. According to the minutes of the consultative meeting held on 18th May 2010 (to be found on pages 6-9 of the Respondent's documents), under minute 04 on *Recommendations* "He (the Claimant) never accepted his mistakes so there was no need to call for a disciplinary committee", Curiously, although the consultative meeting had recommended that the Claimant be given a one month's notice of terminate of his employment, his termination letter required him to "leave immediately." In his viva voce evidence, the Respondent's witness stated that the Claimant had been previously warned verbally about his conduct. It is difficult to understand why the Respondent did not find it necessary to document warnings on such serious matters.

In view of the foregoing, I find that the termination of the Claimant's employment by the Respondent was unfair within the meaning of Section 45(2) of the Employment Act, 2007.

Having dealt with the main issue, I now turn to the issue of the remedies appropriate in this case. In their written submissions, Counsel for the parties referred the Court to a fair amount of case law. Counsel for the Claimant made reference to the Court of Appeal decision in **Gad David Ojuando Vs. Maseno University and 2 Others (Kisumu Civil Appeal No. 336 of 2005)** in which the Court of Appeal ordered payment of salary arrears to the Appellant up to his compulsory retirement age. Counsel therefore asked the Court to allow the Claimant's claim for payment of salary for the unexpired period of the contract, in addition to the other heads of the claim.

Granting a prayer for payment of salary for the unexpired period of a contract of employment effectively amounts to an order for specific performance.

In granting remedies under the Employment Act, the Court is required by Section 49(4)(d) of the Act to take into account:

(d) the common law principle that there should be no order for specific performance in a contract of service except in very exceptional circumstances.

Upon careful consideration of the circumstances of this this case I have come to the conclusion that it does not merit an order for specific performance. I therefore decline to grant the prayer for payment of salary for the unexpired period of the Claimant's contract of service. I however award the Claimant the equivalent of 8 months' salary as compensation for unfair termination of employment. I also award him salary for the month of May 2010 as well as 3 months salary in lieu of notice ((as per Respondent's Terms and Conditions of Service). The Claimant is also entitled to prorata leave and leave allowance for the period between September 2009 and May 2010.

From the Claimant's pay slip for the month of April 2010 (page 16 in the Claimant's documents) it is evident that the Claimant was a contributing member of the Provident Fund. However, no evidence was

rendered to show the actual date of transition from Gratuity to Provident Fund. The Respondent is therefore directed to pay the Claimant all earned gratuity as at the date of this transition. The Respondent is further directed to issue the Claimant with a Certificate of Service. The claim for lost annual increments is speculative and is hereby declined.

The Respondent will bear the cost of this case.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JANUARY 2013

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....**Respondent**