



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 705 of 2011**

**ZACHARIAH SAMBAY.....**

**CLAIMANT**

**VERSUS**

**NAROK UNIVERSITY COLLEGE .....**

**RESPONDENT**

*Rika J*  
*CC. Elizabeth Anyango*

*Mr. Lusweti holding brief for Mr. Kigamwa instructed by Wambua Kigamwa and Company Advocates for the Claimant*

*Mr. Lutta instructed by Lutta and Company Advocates for the Respondent*

**ISSUE IN DISPUTE: UNLAWFUL AND UNFAIR TERMINATION**

**AWARD**

1. Zachariah Sambay initiated this Claim by way of a Statement of Claim filed in Court on 9<sup>th</sup> May 2011. The Respondent filed its Statement of Reply on 15<sup>th</sup> June 2011. The Claimant was heard and closed his case on 24<sup>th</sup> September 2012. The Respondent gave evidence through Stephen Githuku Njuguna, the Registrar Administration, on 31<sup>st</sup> October 2012 when proceedings closed. On 27<sup>th</sup> November 2012, the dispute was last mentioned in Court when the Respondent informed the Court the Respondent had filed its closing submissions, but the Claimant had not deemed it necessary to file any. Parties were advised the Award would be read on notice.
2. The Claimant testified he was employed as an Assistant Security Officer by Moi University on 21<sup>st</sup> February 2008. He was deployed to work at the Narok Campus on 22<sup>nd</sup> February 2008. Narok Campus was at the time of Sambay's employment, a Campus of Moi University. The Narok University Order of 2008 made Narok University a body corporate. The Respondent retained the Claimant as its employee. It enrolled him in a Pension Scheme; administered his PAYE tax; and the N.H.I.F contributions. The Respondent assumed full control over the Claimant. He was paid a monthly salary of Kshs. 48,146.
3. On 29<sup>th</sup> October 2009, the Respondent suspended the Claimant alleging he had engaged in gross misconduct. Sambay was placed on half his monthly salary. He was invited for a disciplinary hearing to answer three offences of handling stolen University property; abuse of office; and breaking the University

Code of Conduct and Ethics. He was found by the Staff Disciplinary Committee on 25<sup>th</sup> February 2010, not to be guilty of the specific charges. On 30<sup>th</sup> March 2010 the Narok University wrote to Sambay. It noted that he had not been issued with a letter of appointment by the Respondent; there was no direct evidence against him on the three employment offences; but, his integrity as a Security Officer was found questionable; and the Committee concluded he was guilty of negligence in the loss of the University Occurrence Book. The letter informed Sambay that it had been decided he is warned; and secondly, redeployed to Moi University '*who is your employer,*' with effect from 1<sup>st</sup> April 2010. This letter is the genesis of the dispute.

4. On 16<sup>th</sup> August 2010, the Moi University advised the Claimant that he could not return to Moi on redeployment. The Claimant wrote to the Respondent, telling the Respondent that in view of the Advice from Moi, the Respondent remained his only employer. '*Moi University has no jurisdiction and interest over me,*' Sambay wrote. The Respondent did not change its position. Sambay feels that the Respondent subjected him to a disciplinary sanction characterized as redeployment, which is unknown to the Employment Act 2007. The Claimant approached the Industrial Court seeking:-

- A declaration that the decision by the Respondent to redeploy him to Moi University was unlawful and unfair termination;
- An Order for Reinstatement;
- Full Salary from the date of suspension to-date;
- In the alternative and without prejudice to the foregoing, 12 months' salary in compensation for unfair termination;
- Costs; and interest.

5. On cross-examination, the Claimant admitted he does not hold any letter of employment from the Narok University; he has one given by Moi University. He was seconded by Moi to Narok. He did not understand if Narok was a Constituent College of Moi. He just knew it as a Campus. He was confirmed in position by Moi University in a letter dated 10<sup>th</sup> September 2009. He accepted confirmation as an employee of Moi University. Narok University was founded through the Legal Notice Number 101 of 18<sup>th</sup> July 2008. It conducted interviews for employees after the gazette notice. Sambay was not interviewed. He testified that if he had been found unsuitable by Narok University, it would not have made sense to redeploy him to Moi University. He worked with an Accountant named Mr. Koech. This workmate had come from Moi University and was successfully redeployed. Narok University continued to pay Sambay's salary after the gazette notice. He could not sue Moi University because the instructions to go back to Moi came from Narok. Order Number 16 [1] of the Legal Notice required existing employees of Narok University to be appraised by the University Council, before re-employment. Sambay was not appraised. He was not aware of Order Number 16 [6] [b], which required that employees be appointed subject to the terms and conditions agreed to, between Moi and Narok. He denied that he was involved in any theft at Narok University. Stolen items belonging to the University were recovered from the houses of two employees. They were transported using the University's Pick-Up Vehicle. Sambay was asleep at the time of the incident. It was not his duty to work overnight. Mr. Nakola, the driver of the Pick-Up, alleged at the disciplinary hearing that Sambay requested him to ferry the stolen items. This was not true. Narok University would not have been in a position to dismiss the Claimant. He understood the letter from Moi saying it would not take him back, to mean that Sambay goes back to Narok. Redirected, Sambay testified that he all along worked for Narok University. Narok University paid his salary. He was taken through a disciplinary process by Narok University. He was redeployed by Narok University. If there were any outstanding disciplinary questions, Narok University would not have redeployed him to Moi.

6. The Respondent's position is that Sambay was employed by Moi University and sent to work at Narok. He was charged for the employment offences enunciated in his Claim. The Staff Disciplinary Committee

warned him for his negligent conduct and redeployed him to Moi University. The Respondent could not appoint, dismiss or recommend retirement of the Claimant as he was not its employee, but only seconded from Moi. He was properly redeployed in accordance with the Narok University College Order of 2008. Narok was established on 18<sup>th</sup> July 2008 after the Claimant was employed by Moi. Order 16 [1] provided for the only way existing employees could transit to Narok, after the Legal Notice. The Claimant did not show if he was appointed under this law.

7. The Registrar Administration explained that Sambay was deployed by Moi to Narok on 22<sup>nd</sup> February 2008. He was Assistant Security Officer, deployed to work in a then Campus of the Moi University, Narok Campus. This Campus became Narok University College through the Legal Notice. It was not independent from Moi previously; the two were linked academically. Order 3 states Narok is established as a Constituent College of Moi. 3[2] says the new College would have corporate personality. Sambay remained an employee of Moi. He was confirmed in position after probation by Moi. Narok did not give him any letter of employment. As Security Officer, he reported people who had allegedly stolen the Respondent's items, to the Respondent. The Occurrence Book went missing. It was alleged he was involved in the crime. Disciplinary proceedings ensued against him. It was concluded that his integrity was questionable. He was unsuitable to continue serving as a Security Officer. He was redeployed to Moi. He could not be disciplined by Narok; he could only be redeployed to his point of entry, Moi University. The Respondent communicated officially to Moi that it no longer required Sambay's services. He was returned to where he came from. To be re-employed, deployed employees had to appear before the Committee for Hiring and Employment of the Respondent. Sambay did not do so. Koech the accountant appeared before the Committee; was unsuccessful in the interview; and was redeployed to Moi where he was received back. On cross-examination, the Registrar testified that the Claimant was paid his salary by Narok on deployment. The Order of 2008 commenced on 18<sup>th</sup> July 2008. The Claimant's pay slip shows he drew salaries from Narok University College. It is not true that the new College was paying salaries to a stranger. The two Institutions still share a senate. Narok does not have a Charter. It offers degrees of Moi University. Sambay faced a disciplinary body of the Narok University. There was no direct evidence against him, but his integrity was wanting. He was not appraised and did not go through the Employment Committee. The witness testified that the Respondent did not interview for this position. Sambay had not been appraised by the time of his redeployment. The Respondent urges the Court to find the Claim lacking in merit and dismiss it, with costs to the Respondent.

*The Court Finds and Awards:-*

8. The dispute raises these questions:

- a) Who is an employer?**
- b) Was Sambay an employee of Narok or Moi?**
- c) Was his contract of employment fairly terminated; and**
- d) What remedy is available to him?**

9. Section 2 of both the Employment Act No. 11 of 2007 and the Labour Relations Act No. 14 of 2007, uniformly define an employer to be:

***“any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.”***

Section 2 of the Labour Institutions Act No. 12 of 2007 is worded differently in defining who an employer is. It states:

***“employer means any person, including the government who employs or has employed an employee and where appropriate includes- a) an heir, successor, assignee or transferor of an employer; or b) an***

*agent, director, or any person authorized to represent the employer.”*

Section 4 of the Work Injury Benefits Act No. 13 of 2007 which was declared unconstitutional by the High Court of Kenya defined an employer in much the same language as the Labour Institutions Act stating:

*“an employer means any person who employs an employee and includes a) the legal personal representative of a deceased employer; b) any person controlling the business of an employer; and c) the government.”*

Some critics of the High Court decision argued that Kenya is now without a definition of the term ‘*employer*’ but as can be seen here, the term is defined in various other valid Statutes.

The last of the core Statutes regulating the employment relationship, the last of the laws commonly referred to as the Labour Laws of 2007, is the Occupational Safety and Health Act No. 15 of 2007. This Act provides for safety, health and welfare of workers and all persons lawfully at the workplaces. It is not restricted to the employer and the employee. It does not therefore have an elaborate definition of the term ‘*employer*,’ but instead defines ‘*owner*’ and ‘*occupier*’ of workplaces. An ‘*occupier*’ is deemed to include an ‘*employer*.’

10. The common law lays out four tests in examining if an employment relationship exists. This Court had the opportunity to discuss these tests in the *Industrial Court Cause Number 684 of 2011 between Child Welfare Society of Kenya [Isiolo Children’s Home] v. Margaret Bwire*. These tests are:

- i. Control;
- ii. Ownership of the tools;
- iii. Chance of Profit/ Risk of Loss; and
- iv. Integration/ Organization test.

**The Control test** focuses on whether a person is in a position to order another on what work is to be done, and how that work is to be done. The employer directly or indirectly controls the work methods and assigns tasks. The payer exercises control. The test on **ownership of tools** requires that the employer supplies the employee with the equipment and tools required in performance of work. The employer caters for costs incidental to the use of these tools. Ownership of tools however, is not a test that applies in every situation. Some occupations such as carpentry, mechanical and photography, customarily require the employee to have his own tools of trade. The employer alone assumes the **chance of profit and the risk of loss**. The employer covers the operating costs which include office expenses, employee wages, benefits and insurance premiums. The employee does not assume financial risk and is entitled to full salary, regardless of the financial health of the business. **The integration/organizational test** examines whether the tasks performed by an individual form part of the business. A person must not be merely accessory to the business, for instance, as in the case of independent contractors.

11. The first question framed under paragraph [8] above is adequately answered by the statutory provisions and the common law position discussed above.

12. To answer the second question, one would have to first try to understand the nature of Narok University College; Moi University; and the link between the two of them. Moi University was established through the **Moi University Act, Cap 210 A of 1984**. It was created as a body corporate, with capacity to sue, be sued and contract. Section 5 of this Act stated that the President may, in consultation with the Council:

*“ a) establish any college as a constituent college of the University; b) declare an institution of learning or higher education, or any training established, to be constituent college of the University; or*

***c] establish colleges within the University consisting such faculties, institutes or schools as may be provided by that Order.”***

This Act has now been repealed through section 71 of the **Universities Act No. 42 of 2012**. The new Act requires that every University in Kenya shall be established by Charter, in accordance with the Act. Constituent colleges existing on the date of enactment in 2012, remain as such under the new Act. The Act says under Section 75 that a Campus or Campus College existing before the commencement of the new law is deemed to be established under the new law. Narok University was described as a Campus of Moi University, before the Legal Notice No. 101 of 2008, which transformed it to Narok University College. Sambay was appointed on **21<sup>st</sup> February 2008** before the Legal Notice. He was appointed by Moi University. He was deployed immediately after employment, on **22<sup>nd</sup> February 2008**. He has never worked at the Moi University or as he? The letter deploying him states, “*you have been deployed to Narok Campus with immediate effect, as an Assistant Security Officer.*”

13. What is a Campus? The Court has not been able to get the definition of this term from the different repealed Universities Acts, or from the current consolidated Universities Act No. 42 of 2012. Encyclopedia sources such as Wikipedia define Campus as ***‘land on which college or university and other institutional buildings are situated.’*** A Campus is a collection of buildings belonging to an institution; it is not itself an institution. Sambay in this respect, was deployed to some collection of buildings called Narok Campus, by Moi University. A Constituent College on the other hand, is described in the same encyclopedic source as an ***‘an institution that provides tertiary education, but does not have full or independent university status.’*** Section 2 of the Universities Act simply defines a Constituent College to be ***‘a constituent college of a university established under this Act.’*** At the time Sambay was deployed to Narok Campus, Narok Campus was legally the **Narok Teachers Training College**. The Legal Notice No. 101 of 2008 says that, ***‘the university college shall be the successor to Narok Teachers Training College.’*** Moi University had merely taken the buildings at Narok Teachers Training College, and converted them into a Campus at the time it employed and deployed Sambay.

14. The Narok Campus where the Claimant was sent to work was nothing more than an appendage of Moi University. It was evolving into some identifiable institution, changing into a Constituent College. The understanding of the Court is that in whatever form, Narok remained an academic and business vehicle of Moi University. It was an extension of Moi and it does not make any sense to see the two as distinct employers, who should toss the Claimant about, and eventually terminate his contract of employment under the guise of redeployment. Moi University exercised control over Narok Campus. The Management of Narok Campus remained under the direction of the decision makers at Moi. This did not change much even after the constituent status. The senate remains one, resident at Moi. Sambay worked under the control of Narok University Campus and then College, which were themselves under the direct or indirect control of Moi. His salary was paid by Narok Campus and then College, up to the date of termination. Moi University owned, or had the legal occupation of the Narok Campus infrastructure. In seeking the answer to the second question, regard must be paid to the control exercised by Moi over Narok; other than the control exercised by either institution over Sambay. It should be understood also that the growth of the Narok Institution from a Teachers’ Training College, Campus and Constituent College is progressive. The Legal Notice suggests this to be a gradual activity where the older Institution Moi, assists the younger Narok University to stand on its two feet and eventually blossom into a fully fledged University. Order Number 25 of the Legal Notice states that, ***‘the status of a constituent college is transitional only, and the University [Moi] shall initiate the necessary administrative and legal measures to ensure that the University College [Narok] becomes a fully fledged university.’***

15. It is of little help therefore to dichotomize who employed Sambay and who carries responsibility in his employment claim. Moi and Narok were no more than two components of the same economic and academic enterprise. This Court has stated in its past decisions that employees must not be hampered by the different business and legal permutations adopted by employers, in seeking remedies for employment wrongs. It would be impossible for Sambay to know the exact details of the relationship between Moi and Narok, or even know the different stages of the reincarnation that is Narok University. He was appointed by Moi University and told to report to work at a Campus. As seen above, even the Court had to dig deep to understand what is a Campus. The Campus as a component of the Moi University academic and

economic enterprise, could validly be deemed to be an employer of Sambay on its own. It exercised direct control over him; defined and assigned him duties; paid him a salary; and even disciplined him when he was deemed to have erred. However this control cannot be severed from the control exercised by Moi over Narok in this transitional arrangement. The two Institutions could be deemed joint-employers of Sambay, or separate employers. The bringing in of one of them or both of them to Court, does not affect the validity of the claim. The Acts of Parliament and the common law, explain the term employer broadly, so that employment wrongs do not become irremediable, in this age of fast evolving business formations. Agents, factors, foremen and managers in enterprises can be employers. The Administrators and Managers at Narok at the time Sambay was employed were merely transitional voices. The real decision making power, until Moi University has initiated the necessary legal and administrative measures to ensure the University College is a fully fledged University, remains the Moi University. Narok University however still exercises control over those employees it has recruited and those deployed to it by the Principal. It bears responsibility over such employees. It was not a mistake that Narok paid Sambay's salary, directed him in his work and even disciplined him. Order 16 [1] of the Legal Notice relates to the transitioning of former employees and seconded employees of the Respondent. The Court agrees they were to go through an appraisal. The Respondent was to carry out the appraisal. It did not appraise the Claimant. There were no interviews with regard to his position. The default in failing to appraise was entirely of the employer's. It cannot be visited upon Sambay. The default could not result in the automatic termination of the Claimant's existing contract of employment. If there was such an unintended effect, then there would have been no need to redeploy or discipline Sambay; he would just have exited through non-appraisal. Order 16 [7] [b] required that the terms of seconded employees be agreed upon between the Council and the seconding body. The Respondent appeared to argue that this was not followed. That may well be so, but how could the employee be blamed for another default caused by the employers? The answer to the second question is that Sambay was an employee of both Moi and Narok. Narok however is the employer with the closest connecting factors to the employee, and was properly brought to Court.

16. The third question is much easier for this Court to answer than the second. This is because sections 41, 43 and 45 specify the standards to be observed by employers in any termination of employment. There must be demonstrated valid reason or reasons justifying the decision. The decision must follow a fair procedure. Although arguing that it was not the employer, Narok charged Sambay, heard him and made a decision in an elaborate disciplinary process. He was charged with involvement in the theft of the employer's property. The Staff Disciplinary Committee did not have any direct evidence of his involvement. They came up with other accusations about the missing occurrence book. When all appeared unjustifiable on the part of the Respondent, it resorted to the general labeling of the Claimant as being a man of '*questionable integrity.*' A decision to redeploy to Moi was made. Startlingly, the decision was accompanied by a warning. What purpose was the warning meant to serve a departing employee? He was asked to go back to Moi where he came from. He had never worked at Moi, not even for a single day. The Respondent did not even say under what law it was redeploying a man it had not employed. Redeployment was a colourable exercise, the real intention of Narok University being to rid itself of an employee it did not freely recruit; an employee it had failed to appraise; and an employee it had failed to pin down on any employment offence. The Respondent knew Moi University was not likely to take back Sambay. He had not worked at the Moi University in Eldoret. Narok had already soiled the employability of Sambay through the disciplinary process. The termination had no substantive justification. The Respondent observed procedural fairness partly. The charges and the hearings are well recorded. By imposing a non-existent disciplinary sanction however, the Court agrees entirely with the Claimant that the Respondent violated the minimum statutory disciplinary procedure. The Claimant's contract of employment was unfairly terminated.

17. The fourth question is on the suitable remedy. The Claimant has asked for reinstatement. This would have been a very suitable remedy in the circumstances of this case. The Court is being urged everyday to use this remedy sparingly. The law demands the remedy is used sparingly. This is not to say however that the remedy should not be used. Some employment practices are so outstandingly bad, that no other remedy would suffice. This is why in certain employment jurisdictions reinstatement is a primary remedy, considered ahead of all other remedies. This Court has traditionally exercised a lot of caution in availing reinstatement to employees where other remedies are sufficient, but adopts the approach that in cases of

flagrant employment violations, the Court must not hesitate to grant employees the full benefit of employment protections. The Court has considered that Sambay was suspended on 29<sup>th</sup> October 2009. He has not worked for Narok from this date. His contract was effectively terminated with the redeployment on 30<sup>th</sup> March 2010. More than three years given under Section 12 of the Industrial Court Act No. 20 of 2011 unfortunately, have passed from the date of termination. The Universities are now created and regulated under a new law, the Universities Act No. 42 of 2012. The Narok University College is fast evolving towards full autonomy from Moi. Systems of work and means of production change very fast. It may not be easy for Sambay to fit at the Narok University College, which was a mere collection of buildings at the time he was employed. He may find the present institution an unfamiliar place. The Narok University College and Sambay may not be able to rebuild the values of mutual trust and confidence, the two cornerstones of an employment relationship. Not without some sympathy to Sambay, the Court declines the remedy of reinstatement. The Court agrees that compensation in this case is a suitable remedy. The Claimant earned a gross monthly salary of Kshs. 48,146 at the last date he worked for the Respondent. The Court Awards:-

***[a] The redeployment of the Claimant by the Respondent to Moi University amounted to unfair termination of the contract of employment;***

***[b] The Respondent shall pay to the Claimant 12 months' gross salary amounting to Kshs. 577,752;***

***[c] This amount shall be paid within 30 days of the delivery of this Award; and,***

***[d] No order on the costs.***

Dated and delivered at Nairobi this 3<sup>rd</sup> day of May 2013

**James Rika  
Judge**