REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1259 OF 2013

DR. SOLOMON MUMMAH.....CLAIMANT

VERSUS

KENYATTA UNIVERSITY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 22nd March, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 06.08.2013 through Okoth & Kiplangat Advocates. The claimant prayed for judgment against the respondent for:

a) A declaration that the respondent's termination of the claimant's contract of employment was unfair, illegal, null, and void ***ab initio***.

b) Damages in the amount of Kshs. 71, 281, 516 being:

i) 12 months' salaries for unlawful termination Kshs. 2, 048, 124.00.

ii) Payment for remainder of intended 33 years of service on fixed and payment contract at Kshs. 170, 677.00 per month Kshs. 67, 588, 092.00.

iii) General damages for discrimination.

iv) Unpaid salaries and allowances under the UASU – CBA Kshs. 1, 500,000.00.

v) Unpaid salary on interdiction Kshs. 233, 772.00.

vi) Unpaid 60 leave days Kshs.75, 000.00.

vii) Unpaid house to office allowance Kshs.48, 440.00.

viii) Passage and baggage allowance Kshs.10, 760.00.

ix) Leave travelling allowance Kshs. 7, 200.00.

x) Unpaid contractual sum for part time teaching Kshs. 71, 400.00.

xi) Electricity, water and security deposit refunds Kshs.7, 500.00.

c) An order for restitution and return of all items confiscated from claimant's premises by the respondent or equivalent compensation of Kshs. 16, 007, 470.00.

d) Certificate of service.

e) Costs of the suit.

f) Interest.

g) Any other or further relief that the Honourable Court may deem fit to grant.

The memorandum of response was filed on 30.10.2013 through Mohammed Muigai Advocates. The amended memorandum of response and counterclaim was filed on 03.11.2014. The respondent prayed for:

a) The claim be dismissed with costs.

b) Judgment against the claimant for the sum of Kshs. 500,000.00.

c) Interest at Court rates.

d) Costs of the counterclaim.

The claimant testified to support his case. The respondent called two witnesses.

There is no dispute that the claimant was employed by the respondent by the letter dated 23.03.2004 as a Tutorial Fellow in the Department of Guidance and Counselling. The letter stated that the appointment to the position was to a training grade post during which the claimant was supposed to do some teaching while at the same time working for a Ph.D degree or its academic equivalent. The letter enclosed two copies of the document on the terms and conditions of service for staff on academic grades which together with the letter constituted the contract between the claimant and the University Council. The claimant accepted the appointment on 29.03.2004.

As at the time of hearing the suit on 13.03.2018, the claimant testified that he was an academic by profession holding a post-doctoral degree in Higher Education Management Leadership; a post-doctoral in Advanced Research and Training; and a post-doctoral in Adolescent Studies. He further holds a doctoral degree in Psychology.

The claimant testified that after the appointment as a Tutorial Fellow, three years later he graduated with a Ph.D. Thus he was promoted and the position he last held with the respondent was that of Lecturer at Kshs. 170, 677.00 per month.

The claimant was suspended from employment by the letter dated 27.12.2011 signed by Professor Paul K. Wainaina, Deputy Vice Chancellor (Administration). The letter stated the grounds for suspension as follows:

a) The claimant's use of rude, abrasive, disrespectful and arrogant language while answering official memos from the Chairperson, Department of Psychology.

b) Several complaints from students in PhD classes the claimant had been allocated to teach since 2009 about the quality and content of the lectures the claimant gave.

c) The claimant's insubordination of the Chairperson, Department of Psychology and the claimant had informed her in writing not to write any other memo to the claimant during her remaining tenure.

The letter stated that the conduct was scandalous and disgraceful contrary to the terms of service and it amounted to gross misconduct under section 44(4) of the Employment Act, 2007. Thus the claimant was suspended pending appearance at the Senior Board of Discipline. He was to handover to his supervisor the Chairperson, Department of Psychology and he was placed on half salary until further notice.

By the letter dated 02.05.2012 the respondent invited the claimant to appear before the Senior Board of Discipline on Friday 04.05.2012 at 1.00pm. The letter stated that the claimant would be given an opportunity to answer the three allegations as levelled in the suspension letter and a further allegation thus, **"(d) Casting aspersions of impropriety on the part of the University Management on matters of appointments and promotions.**" The letter stated that the claimant may submit a written defence (if any) to the Deputy Vice-Chancellor (Administration) before the date of the meeting. The claimant replied by his advocates' letter dated 03.05.2012 raising the issue of impossibility to arrange and attend on a 24 hours' notice, and, requesting the rescheduling by giving at least a 14 days' notice to enable the claimant's advocates to organise the diary so as to attend with the claimant. By the letter dated 16.05.2012 the respondent acknowledged receipt of the advocates' letter and informed the claimant that the Committee had decided that the claimant would be invited to the next Board of Discipline sitting. The claimant's advocates responded by the letter dated 18.05.2012 stating that a 14 days' notice should be allowed and the claimant should only defend himself against the allegations raised in the suspension letter and not any other allegation.

By the letter of 30.05.2012, the respondent invited the claimant to attend the Senior Board of Discipline on 11.06.2012 at 9.00am. The four charges as per earlier invitation were listed and the claimant was notified that he would be accorded an opportunity to defend himself against the charges. He was at liberty to submit a written defence prior to the date of the meeting. The claimant's advocates wrote in reply on 06.06.2012 pointing out that the request for a 14 days' notice to enable the advocates to schedule to attend had been ignored and that Mr. J. Oriema Okoth was the advocate attending to the matter but was due for a compulsory medical review and would be available only after the end of June, 2012. Thus another matter in the Industrial Court (presumably between the parties) had been fixed for July 2012. The letter requested that the meeting be rescheduled allowing 14 days' notice and that matters in the advocates' letters of 03.05.2012 and 18.05.2012 stood as good.

By the letter dated 08.06.2012 the claimant's advocates made the written defence to the allegations as follows:

a) The written defence was being made without prejudice to appear before a properly constituted Senior Board of Discipline.

b) The allegations had been varied to include the allegation not in the suspension letter, namely, casting aspersions of impropriety on the part of the University Management on matters of appointments and promotions. It was not therefore a charge the claimant could answer at the hearing or meeting or in the letter of defence. The Registrar (Administration) could not validly prefer the allegation against the claimant and unilaterally so without involvement of the Senior Board of Discipline.

c) The suspension letter was irregular because it was signed by the Deputy Vice-Chancellor (Administration) without authority as Council had not delegated the power to suspend to the Deputy Vice-Chancellor (Administration) as Council was vested with the authority under section 16 of the Kenyatta University (Amendment) Act, 1991 which defined academic staff to include Deputy Vice Chancellors, The Librarian and all members of staff who are engaged in teaching or research. That clause 2(23) of Statute XIV to the Act vested the power of removal and of disciplinary of academic staff in the Council. Schedule 3 to the Act provided for the members of the Senior Board of Discipline and Clause 9.4 of the terms of service provided that the Senior Board of Discipline is a committee appointed by Council with powers to terminate the services of a member of staff.

d) The Chairperson of the Department of Psychology and the Deputy Vice-Chancellor (Administration) having been directly or indirectly been involved in the case as levelled against the claimant, they could not validly sit in the Senior Board of Discipline to deliberate and decide the case against the claimant.

e) On the allegation of claimant's use of rude, abrasive, disrespectful and arrogant language while answering official memos from the Chairperson, Department of Psychology, the Council never considered the allegation per clause 9.4 of the terms of service and it should not be entertained as it was irregularly levelled. Further the offensive words had not been established at all because the true position was that the claimant had not said that no memo be written to him but he had stated in his memo, "**I will therefore be grateful if the said memo of 8th December 2011 becomes the last of your malicious memos that I ever receive till your tenure comes to a close.**"

f) On the allegation of several complaints from students in PhD classes the claimant had been allocated to teach since 2009 about

the quality and content of the lectures the claimant gave, Council had not considered the allegation per clause 9.4 of the terms of service. As allegation did not originate from Council, the Senior Board of Discipline could not entertain it. Further Article 8 of the prevailing collective bargaining agreement stated thus, "**An employee whose work or conduct is unsatisfactory and/or commits an offence, which does not warrant termination, shall be warned in writing. The unsatisfactory work or conduct shall be stated in writing."** In absence of the written warning since 2009 as alleged, the allegation could not be entertained. The alleged complaints from the students had not been served upon the claimant. Students who may have failed as taught and examined by the claimant should not complain after failing and records showed that the majority of students taught by the claimant passed the examination.

g) On the allegation of the claimant's insubordination of the Chairperson, Department of Psychology and the claimant had informed her in writing not to write any other memo to the claimant during her remaining tenure, the claimant had denied as per the response to the first allegation of insubordination.

The claimant failed to attend the disciplinary hearing on 11.06.2012 and was dismissed from service by the letter dated 11.06.2012 on account of the three grounds as levelled against him in the suspension letter. He was given a right of appeal within 14 days.

The **1st issue** for determination is whether the respondent invoked fair procedure in terminating the claimant's employment. First the claimant submits that the Deputy Vice-Chancellor (Administration) usurped the powers of the Vice-Chancellor in issuing the suspension letter. It is submitted for the claimant that under clause 9.4 (i) of the terms of service for academic staff, it is clearly stated thus, "**When in the opinion of the Vice-Chancellor, there has been good cause as defined below, the Vice-Chancellor shall have power to suspend the appointment of a member of staff, and refer his case to a Committee appointed by Council with powers to terminate with good cause a member of staff's services on these terms. Where applicable, the terms and period of notice shall be as stipulated in Clause 9.1 of these terms.**" It is admitted for the respondent that the provision bound the parties and is further submitted that Statute VIII of the respondent's statutes grants the Deputy Vice-Chancellor (Administration) the Authority to deal with disciplinary matters and the provision being subsidiary legislation overrides clause 9.4. The Court returns that clause 9.4 of the terms of service was the specific agreed contractual term that applied and the general duties of the Deputy Vice-Chancellor (Administration) encompassing disciplinary docket could not be relied upon to defeat the clear powers as were vested in the Vice-Chancellor. The Court returns that the suspension letter and the disciplinary proceedings flowing from the letter amounted to unfair disciplinary process as envisaged in section 45 (2) (c) of the Employment Act, 2007. The suspension letter was without the Vice-Chancellor forming an opinion as envisaged in the clause 9.4 and therefore the Vice-Chancellor cannot have referred the case to the Committee as envisaged in the clause. Instead, it appears from the suspension letter that the Senior Board of Discipline would thereafter handle the case without involvement of the Vice-Chancellor.

Secondly, it is clear that while inviting the claimant to attend the disciplinary hearing, the respondent did not allow him to attend in company of the trade union representative. However, since the claimant never attended the hearing, the Court finds that that procedural requirement under section 41 of the Employment Act, 2007 never accrued and the respondent cannot be faulted in that regard.

Thirdly it was urged that the claimant's supervisor the Chairperson of the Department of Psychology being the complainant and the Deputy Vice-Chancellor (Administration) having signed the suspension letter had thereby been directly or indirectly been involved in the case against the claimant so that they ought not to have sat at the Senior Board of Discipline that deliberated the case. The Court returns that there was no established contractual or statutory provision that the persons previously directly or indirectly involved should not participate and that ground will fail. The Court considers that a disciplinary case is between the employer and employee and there cannot be strict independence of the employer except where the statute or contractual provision specifically prescribes that those handling the disciplinary case should not have been directly or indirectly been involved in the case before, the Court will not impose such levels of independence in handling of disciplinary cases by the employers. All that is imposed by section 41 as read with section 45 (2) (c) of the Employment Act, 2007 is the employer giving the employee due chance to explain himself before the employer imposes punishment such as dismissal. The employer is not expected to be a neutral arbiter in that process of notice and hearing. An employee will have to show clear aspects of manifest procedural injustice such as shortness or unreasonableness of notice or inadequacy of particulars of allegations or such other sufficient lamentation to succeed for unfair procedure under the sections and in absence of statutory or contractual provision, mere demand and anticipation of neutrality of the employer or employer's representatives or authorised persons in handling the disciplinary proceedings will not alone, in the opinion of the Court, render the procedure unfair.

Fourth, it was submitted that the claimant was denied chance to attend the disciplinary hearing with his advocate. The evidence is clear that a chance was allowed to attend with the advocate but the advocate was not available due to medical attention he had to

attend. The evidence was that the respondent did not object to the advocate attending. In that respect, though there was no statutory or contractual provision that the claimant attends or does not attend with the advocate, the respondent never objected to such attendance. The Court, on the issue of legal representation follows its opinion in the judgment in **Republic –Versus- Arnold Karani Njiru, Fund Account Manager, Laikipia East Costituency Fund and 10 Others Ex-parte Amin Mohammed Ali [2015]eKLR,** thus,**"While making that finding, the court holds that in a democratic civilised society, the right to legal representation during administrative decision making is desirable and in absence of any identifiable bar it is a crucial component of fair hearing which cannot be defeated in absence of clear statutory qualification. In the present case, there was no such statutory qualification and the court holds that the applicant was entitled to appear at the hearing together with his advocate especially in view of the gravity and consequence of the allegations that had been levelled against the applicant by the respondents. In this case, the respondents did not advance any ground that would have made legal representation inimical and the court finds that the respondents having allowed and not objected to the applicant attending the hearing with his advocate, the respondents were thereby bound to allow the advocate to effectively participate in the proceedings. It was desirable that the respondents exercised their discretion in favour of allowing the advocate to attend but by resisting the advocate's participation in the proceedings, the court finds that the applicant's legitimate expectation to the legal representation was thereby thwarted and the proceedings, taking into account the other defects stated in this judgment, fell short of the fair hearing the applicant was entitled to."**

The Court has already found that the respondent never denied the claimant the opportunity to appear with his advocate as per the correspondence exchanged between the respondent and the advocate as well as the claimant.

Fifth, having allowed the claimant to believe that he would appear by his advocate, the claimant thereby acquired a legitimate expectation that the advocate's attendance would be facilitated as was requested and the Court returns that the respondent acted unfairly when it then proceeded to decide the case in absence of his advocate and the claimant whereas the advocate had explained his inability to attend. It was unfair procedurally under section 45 (2) (c) of the Employment Act, 2007.

For the cited procedural defects, being, issuing the suspension without authority; and proceeding with deliberations in absence of the advocate and the claimant to determine the case - whereas the advocate had explained the undisputed reason for the absence, the Court returns that the dismissal was procedurally unfair. In any event, RW3 confirmed that the termination letter never referred to consideration of the written defence by the claimant through his advocates and in absence of any other material on the point, the Court returns that the procedure was unfair because the respondent failed even to consider the claimant's written defence which was before it prior to issuing the dismissal letter.

The **2nd issue** for determination is whether as at the time of termination the respondents had valid or genuine reasons for terminating the employment of the claimant as envisaged in sections 43 and 47(5) of the Employment, Act, 2007. It is clear that there had been no written warnings on the poor performance or misconduct relating to alleged complaints by the PhD candidates and as was required under the contractual provisions. The alleged complaints stretching from 2009 were not exhibited and no statements or oral evidence by the students was made available in Court or at the disciplinary proceedings. The Court returns that the respondent has failed to establish that ground.

On allegations of the claimant's insubordination of the Chairperson, Department of Psychology that the claimant had informed her in writing not to write any other memo to the claimant; and the allegation of claimant's use of rude, abrasive, disrespectful and arrogant language while answering official memos from the Chairperson, Department of Psychology, the claimant has established that the allegations were unfounded and the Court returns that the respondent has failed to establish the allegations as at the time of dismissal or before the Court. In particular the claimant has shown that his words in the alleged offensive memo were that the Chairperson would not issue any further malicious memo in her tenure against the claimant and not that no more memos would issue at all. The Court follows the holding by the Court of Appeal in **CMC Aviation Limited –Versus- Mohammed Noor [2015]eKLR**, (Karanja, Musinga & Gatembu JJ.A) that the employer must specify the alleged abusive or insulting words that the employee uttered in discharging the burden of justifying the grounds of the termination of employment or wrongful dismissal as per section 47(5) of the Employment Act, 2007. The respondent failed to satisfy that requirement from the suspension letter, to termination letter and to hearing before the Court. The Court therefore returns that the respondent has failed to show that as at the time of dismissal, the reasons for termination had been established.

The **4th issue** for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

a) The claimant is entitled to a declaration that the respondent's termination of the claimant's contract of employment was unfair, illegal, null, and void ***ab initio***.

b) The claimant prays for 12 months' salaries for unlawful termination Kshs. 2, 048,124.00. The claimant had served from March 2004 to dismissal on 11.06.2012. The Court has considered that long period of service. RW2 testified that the claimant had a cordial relationship at work except for normal brushing at work place. The Court has considered that the claimant wished to continue in employment but also had a bumpy relationship with the respondent such as an earlier suit between the parties which was compromised. Considering the factors, he is awarded 8 months' salaries in compensation for the unfair termination under section 49 of the Act at Kshs. 170, 677.00 per month making **Kshs.1, 365, 416.00**.

c) The claimant prays for payment for remainder of intended 33 years of service on fixed and payment contract at Kshs. 170, 677.00 per month Kshs. 67, 588,092.00. The Court returns that the claimant being a highly qualified intellectual has not established a reason attributable to the respondent that would prevent him from securing alternative gainful venture after the dismissal. Further he has not established any ground attributable to the respondent that has diminished his inherent capacity to get gainfully engaged. The prayer will fail as merely anticipatory or hopeful but which was unjustified.

d) The claimant prayed for general damages for discrimination. There was no submission to justify the prayer or evidence in that regard and the prayer is declined as abandoned. The Court returns that the pleadings failed to set out the particulars of discrimination and the claimant gave no evidence in that regard.

e) The claimant prayed for unpaid salaries and allowances under the UASU – CBA Kshs. 1, 500,000.00. The Court has perused the record. There was no evidence or submissions to justify the claim. The specific provisions of the CBA and why the claim was made or justified were not shown at all. The prayer will fail as unjustified.

f) The Claimant prays for unpaid salary on interdiction Kshs. 233, 772.00. The claimant was never interdicted. He was suspended. It is not clear why the prayer was made and the Court returns that it will fail as no submissions were made to justify the prayer.

g) The claimant prayed for unpaid 60 leave days Kshs.75, 000.00. The Court has revisited the evidence and there was no evidence or submissions to justify the prayer. The Court returns that the same will fail.

h) The claimant prayed for unpaid house to office allowance Kshs.48, 440.00. Particulars of the claim were not pleaded specifically and no evidence was provided in that regard. The prayer will fail.

i) The claimant prayed for passage and baggage allowance Kshs.10, 760.00. The evidence and particulars as well as the basis of the claim were not provided. The same will fail.

j) Leave travelling allowance Kshs. 7, 200.00 was claimed but the evidence of the leave in issue and the basis of the claim was not provided. The same will fail.

k) The Claimant prayed for unpaid contractual sum for part time teaching Kshs. 71, 400.00**.** The Court has revisited the record. The particulars of the part time teaching, the hours taught, and the applicable rate of pay as well as the evidence in that regard was not provided. The contractual basis for part time teaching was not established. The Court returns that the prayer will fail as it was not established.

l) The claimant prayed for electricity, water and security deposit refunds Kshs.7, 500.00. The basis for the claim was not established. There were no submissions to justify the same. The prayer will fail.

m) The claimant prayed for an order for restitution and return of all items confiscated from claimant's premises by the respondent or equivalent compensation of Kshs. 16, 007, 470.00. The claimant testified that he had no evidence of the items in his inventory of the claim. He alleged the receipts were in documents taken away by the respondent but there was no notice to produce. He also had no evidence of the value as claimed. The Court returns that the prayer will fail as not established.

n) The claimant is entitled to a certificate of service under section 51 of the Act.

The **5th issue** for determination is whether the respondent is entitled to the counterclaim. The respondent's case is that in November 2011 and December 2011 several complaints were made against the claimant about his misconduct of not cooperating with the respondent and the students. Thus the claimant was suspended as per the letter of suspension on record in this suit. The claimant thereafter failed to handover. The claimant failed to handover the results for the units he had taught and examined the students. Cause 250 of 2012 was filed to compel the claimant to release the results but he failed to do so. Thus the claimant incurred Kshs. 500,000.00 to enable the affected students to re-sit the examinations. The amount is now counterclaimed. The Counterclaim was filed on 06.11.2014. The injury appears to have been a continuing one ceasing on the date of separation on 11.06.2012 and the Court returns that it was time barred under section 90 of the Act because it was filed long after the lapsing of the 12 months of limitation under the section. Further, with due diligence, the claim should have been pursued in the earlier suit Cause 250 of 2012 but which was not done – so that the claim is ***res judicata***. In any event there was no allegation levelled against the claimant in that regard so that the claim is an afterthought for which no disciplinary action had been initiated against the claimant. Further, no evidence was exhibited to show that indeed the respondent paid out the Kshs. 500, 000.00 now claimed against the claimant. Accordingly the Court returns that the prayer will fail as not established even though, the claimant did not file a response to the counterclaim. Each party will bear own costs of the counterclaim.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1) The declaration that the respondent's termination of the claimant's contract of employment was unfair, illegal, null, and void ***ab initio***.

2) The respondent to pay the claimant a sum of **Kshs.1, 365, 416.00** by 01.06.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.

3) The respondent to deliver to the claimant the certificate of service by 15.04.2019.

4) The respondent to pay claimant's costs of the suit.

5) Each party to bear own costs of the counterclaim.

Signed, dated and **delivered** in court at **Nairobi** this **Friday 22nd March, 2019.**

BYRAM ONGAYA

JUDGE