



REPUBLIC OF KENYA



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**Magambo v Meru University of Science & Technology (Cause E009 of 2022)
[2024] KEELRC 2191 (KLR) (12 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2191 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
CAUSE E009 OF 2022
ON MAKAU, J
SEPTEMBER 12, 2024**

BETWEEN

PROF JAPHET KITHINJI MAGAMBO CLAIMANT

AND

MERU UNIVERSITY OF SCIENCE & TECHNOLOGY RESPONDENT

JUDGMENT

1. By the amended Statement of Claim dated 19th June 2023, the claimant sued the respondent seeking the following reliefs:
 - a. A declaration that the Respondent be ordered to forthwith pay the claimant his sabbatical leave days for nine (9) months as per the salary scale of Kshs.1,244,503 x 9=11,200,527/- as per the Vice-Chancellor rates.
 - b. An order compelling Respondent to forthwith pay the claimant his Gratuity benefits of Kshs.168,751.88.
 - c. An order compelling the Respondent to stop deducting the gratuity so far paid to the claimant henceforth.
 - d. An order compelling the Respondent to pay the claimant's unpaid Annual leave of Kshs.3,650.542.
 - e. Cost of the claim and interest at court's rates.
2. The respondent denied liability and averred that it paid the claimant all his dues as its vice chancellor and even exceeded by Kshs.831,704.



Factual background

3. The claimant was appointed as a Principal of Meru University College for five years from 29th March, 2010 but vide another letter dated 14th August 2014 he was appointed Vice Chancellor of the respondent for the five years with effect from 21st June 2013. His contract as the Vice Chancellor were governed by the Terms and conditions of service for a Vice Chancellor. Some of the terms his contract included a sabbatical leave at the end of the contract, annual leave and payment of gratuity for at the rate of 31% of basic salary every two completed years less what the employer would have contributed towards his pension scheme.
4. The claimant served the whole contract term and exited as the Vice Chancellor but was employed by the respondent as a Professor. He then proceeded on Sabbatical leave for nine months but he was paid the salary of a Professor being a basic salary of Kshs.248,898 and house allowance of Kshs.73,715 totalling to Kshs.322,613. The said amount was contrary to the said terms and condition for Vice Chancellor which entitled the claimant to the same benefits he enjoyed during his tenure of duty as Vice Chancellor.
5. A dispute arose and the respondent was advised by the Attorney General that the pay for the claimant during the sabbatical leave was the amount he was earning as Vice Chancellor. The respondent regularised the payment in August 2022 using the correct salary of Kshs.1,244, 503 and added a further Kshs.831,704 as gratuity during the period of sabbatical leave.
6. On 15th May 2022, the claimant received a letter informing him that the respondent would be recovering Kshs.831,704 for being an erroneous payment of gratuity during the sabbatical leave. The said payment was approved by respondent through an internal memo dated 15th December 2020. He was then deducted a total of Kshs.168,751.88 between May-July, 2022. The claimant brought this suit and obtained orders to stop the said recovery pending the determination of the suit.

Evidence

7. The claimant testified as CW1 and adopted his written statement and bundle of 14 documents as his evidence in chief. He reiterated the above facts in his testimony and clarified that Clause 9.8 of the Terms and conditions of service of a Vice Chancellor, entitled him to nine months sabbatical leave with the salary and benefits of a Vice Chancellor. He contended that his salary as Vice Chancellor was Kshs.1,244,503 per month and therefore his total salary for the nine months he was on sabbatical leave was Kshs.11,200,527.
8. He further stated that under clause 9.3 of the said terms and conditions of service, he was entitled to 40 days annual leave and he had been authorised by the chairman of the University Council to accumulate some 88 leave days as at the end of his contract. He produced letters to that effect which bears an endorsement by the chairman.
9. He also testified that clause 12 of the said terms and conditions of service entitled him to gratuity of 31% of his basic salary every two years. He admitted receipt of Kshs.831,704 as gratuity for the period he was on sabbatical leave out of which Kshs.168,758 was recovered as erroneous payment. He produced his pay slips for May, June and July 2022 as evidence. He contended that the respondent has not filed any counter claim against him.
10. On cross examination, he admitted receipt of a gross pay of Kshs.11,393,293 in August 2019, which after statutory deductions, the net was about Kshs.7,000,000. He sought clarification from the respondent but got none. He contended that sabbatical leave was part of his contract as Vice Chancellor



and therefore he was entitled to gratuity and sabbatical leave based on the salary he was getting as vice chancellor being Kshs.1,244,503. He further contended that he was entitled to 88 leave days since the chairman of the council had approved the accumulation of the leave.

11. The respondent's Vice Chancellor, Professor Romanus Odhiambo Otieno, testified as RW1. He adopted his written statement dated 29th June 2023 and 15 documents as his evidence. He then clarified that the claimant was paid all his gross salary of Kshs.11,393,292 for the nine months sabbatical leave as per his pay slip for August 2019. The said amount was subjected to statutory deductions leaving a net pay of Kshs.7.4 million. He further stated that the sabbatical leave was not part of the five years term of the vice chancellor. He contended that the sabbatical leave was just a benefit to allow the vice chancellor to rest. He contended that the gratuity provided under clause 12 (3) of the terms and conditions of service did not extend to the period of sabbatical leave.
12. He stated that the respondent erroneously paid the claimant gratuity for the period of sabbatical leave but the Auditors directed that the erroneous payment be recovered. The Attorney General also advised that the money be recovered from the claimant, hence the deductions from his salary.
13. As regards the claim for leave, he maintained that claimant was not allowed to accumulate leave without approval from the chairman of the council. He contended that the claim for 88 leave days should be declined because the claimant did not get approval from the chairman to carry forward the same.
14. On cross-examination, he maintained that the payment of gratuity during sabbatical leave was erroneous because he was no longer the vice chancellor. Besides his pension was being remitted for him as a Professor at the rate of 10% as employer's contribution. He however admitted that there was written consent by the claimant authorising deductions of his salary to recover the erroneous payment. He admitted that a total of Kshs.168,751 was recovered from the claimant through salary deductions. He contended that there was no need to file a counter claim because as soon as the court order is lifted, recovery process will resume as a natural cause.
15. He further admitted that the claimant was entitled to salary of vice chancellor during his sabbatical leave and it was paid as arrears in August 2019 after receiving advise from the Attorney General.
16. He admitted also that the claimant had 88 leave days outstanding. He confirmed that the claimant requested to carry forward the 88 days vide letter (Exhibit 10) and it was approved by the chairman of the council. He further confirmed that he was not present when the chairman signed the leave form. He confirmed further that the chairman had made similar approval before but without affixing any stamp on it.

Submissions

17. It was submitted for the claimant that the payment of Kshs.11,393,293 was an underpayment of Kshs.129,847 because it included salary for August 2019. It was submitted that when you deduct the Basic salary of Kshs.248,898 and house allowance of Kshs.73,715 from the total Kshs.11,393,293 you remain with Kshs.11,070,680 instead of the correct sum of Kshs.11,200,527 made up of monthly salary of Kshs.1,244,503 x 9 months.
18. As regards gratuity for the nine months sabbatical leave, it was argued that the sum of Kshs.831,704 was not erroneous pay as alleged by the respondent. Reliance was placed on clause 9.8 of the terms and conditions of service to urge that the claimant was entitled to gratuity during the nine months sabbatical leave because it was part of his contract as Vice Chancellor. Consequently, the recovery of Kshs.168,757.88 from salary ought to be reimbursed and the respondent barred from further deductions from the claimant's salary.



19. As regards the claim for leave, it was submitted that the claimant adduced evidence to prove that the accumulation of the 88 leave days not taken was approved by the chairman of the respondent's council. Therefore, it was argued that the claimant is entitled to Kshs.3,650,542.13 for 88 days leave based on his salary of Kshs.1,244,503.
20. On the other hand, the respondent submitted that the alleged arrears of Kshs.129,847 was not pleaded and as such it is in attempt to sneak in a new prayer. It urged that the same ought to be disregarded since parties are bound by their pleadings.
21. As regards the claim for gratuity during the sabbatical leave, it was argued that the said period did not form part of the contract period of five years for the Vice chancellor. Consequently, clause 12 of the terms and conditions of service did not apply to the period of sabbatical leave which was taken after the lapse of the contract.
22. Finally, the claim for 88 annual leave days was denied and the respondent reiterated that all the days not utilized or carried forward with the approval of the chairman was forfeited. It was further argued that the 40 leave days for 2018 were utilised when the claimant took 15 days leave from 5th February 2018 and 25 days from 7th March 2018. Consequently, the court was urged to dismiss the suit with costs.

Analysis and determination

23. The issues for determination are: -
 - a. Whether the claimant is entitled to the claim for Kshs.11,200,527 being salary during sabbatical leave of 9 months.
 - b. Whether the claimant is entitled to reimbursement of Kshs.168,751.88 and protection from further recovery of gratuity paid to him.
 - c. Whether claimant is entitled to payment of Kshs.3,650,542 for 88 leave days.
 - d. Who should pay costs of the suit?

Salary during sabbatical leave

24. The claimant prayed for Kshs.11,200,527 calculated using Kshs.1,244,503 per month for 9 months. During the hearing, he admitted receipt of Kshs.11,393,293 in August 2019 which included the salary for that month. The salary for August 2019 was Kshs.248,898 plus house allowance of Kshs.73,715 totaling to Kshs.322,613 hence the payment toward salary during sabbatical leave was Kshs.11,070,680. The correct salary during sabbatical leave was Kshs.1,244,503 X 9 months =Kshs.11,200,527 less Kshs.11,070,680 paid =Kshs.129,847 outstanding.
25. The respondent submitted that the said outstanding salary arrears of Kshs.129,847 cannot be granted because it was not pleaded. However, the court finds that the Kshs.129,847 was part of the Kshs.11,200,527 pleaded in the claimants Amended statement of claim and therefore I award the same to him.



Gratuity during sabbatical leave

26. The claim for gratuity during sabbatical leave is based on the believe by the claimant that, it was a benefit attached to the expired contract as a vice chancellor. Clause 12 (a) states as follows: -

“The Vice Chancellor shall be paid 31% of basic salary every two completed years, less what the employer would have contributed towards his/her pension scheme.”

27. The respondent is of a different view, that paying the said gratuity would amount to extending the contract by nine months. I can't agree more with the respondent. The benefit of gratuity to the claimant was limited to the contract period of five years.

28. Clause 12 (a) of the Terms and Conditions of Service for a Vice Chancellor does not apply to the period when the retired Vice Chancellor proceed on sabbatical leave at the end of his contract. Doing so would be extending the contract period beyond five years. Consequently, the court cannot protect the claimant from the recovery of Kshs.831,704 erroneously paid to him as gratuity for the nine months sabbatical leave. Doing so would be rewriting the terms of the contract for the parties of which the court does not have jurisdiction.

Annual leave

29. The bone of contention is 88 leave days which accrued during claimant's tenure as vice chancellor. Clause 9.3 of the Terms and Conditions of Service bars a vice chancellor from accumulating leave except with written approval of the chairman of the council. If the leave is not taken and no approval for accumulation was given, the leave not taken stood forfeited.

30. In this case, there is evidence that the approval to accumulate leave was granted by the chairman of the council. By a letter dated 6th May 2016, the claimant sought to carry forward 107 leave days and it was approved by the chairman the same day. By another letter dated 10th February 2017, the claimant sought to carry forward 143 leave days and it was approved by the chairman on 17th February 2017.

31. By a leave application dated 6th March 2018, he applied for 73 leave days and left 88 days to be carried forward and the chairman approved the same. On the said 6th March 2018, the chairman of the council wrote to him informing him that his contract would not be renewed and that he was required to proceed on his terminal and annual leave. Obviously, the remaining days of his contract were fewer than the accumulated leave. Consequently, I find that the claimant is entitled to 88 leave days which was accumulated with the permission of the chairman of the respondent's council.

32. The leave is based on the claimant's basic salary as vice chancellor being Kshs.683,292. Hence $Kshs.683,292 \times 88/30 = Kshs.2,004,323.20$.

Conclusion

33. I have found that the claimant is entitled to salary arrears for the period he was on sabbatical leave plus 88 leave days accumulated with the approval of the chairman of the respondent's council. Consequently, I enter judgment for him against the respondent as follows: -

- i. Salary arrears.....Kshs.129,847.00
 - ii. Accrued leave..... Kshs.2,004,323.20
- Kshs.2,134,170.20



- iii. Costs of the suit plus interest at court rate from the date of filing the suit.
- iv. The award of damages is subject to statutory deductions.

DATED, SIGNED AND DELIVERED AT NYERI THIS 12TH DAY OF SEPTEMBER, 2024.

ONESMUS N MAKAU

JUDGE

ORDER

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

