



Agong v Jaramogi Oginga Odinga University of Science & Technology (JOUST) & 3 others (Cause E074 of 2023) [2024] KEELRC 1209 (KLR) (22 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1209 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E074 OF 2023**

**S RADIDO, J
MAY 22, 2024**

BETWEEN

STEPHEN GAYA AGONG CLAIMANT

AND

JARAMOGI OGINGA ODINGA UNIVERSITY OF SCIENCE & TECHNOLOGY (JOUST) 1ST RESPONDENT

VICE CHANCELLOR (JOUST) 2ND RESPONDENT

THE JOUST UNIVERSITY COUNCIL 3RD RESPONDENT

THE CHIEF FINANCE OFFICER JOUST 4TH RESPONDENT

JUDGMENT

1. Prof Stephen Gaya Agong (the Claimant) was appointed on or around 20 June 2013 as the Vice-Chancellor of the Jaramogi Oginga Odinga University of Science & Technology (the University).
2. When the contract expired, the University Council extended another contract to the Claimant through a letter dated 30 November 2018. The Claimant signed the contract on 4 December 2018.
3. The appointment was subject to Terms and Conditions which included clause 32 in the following terms:

Post-Contract Period Engagement at the University

On exit from the University as Vice Chancellor, an employee shall be retained on the following emoluments: personal to themselves as Professor of the University:

- (a) Last basic salary earned as the Vice Chancellor personal to himself at the rate indicated in his last payslip.



- (b) House allowance personal to himself at the rate indicated in his last payslip, or the house allowance of a university Professor, whichever is higher.
- (c) All other allowances payable on a monthly basis at a professorial level.
- (d) Subscription to a club of choice.
- (e) An office with a Secretary and a Research Assistant.
- (f) A utility vehicle and a driver.
- (g) A sabbatical leave for (two) 2 years at the end of tour of duty.
- (h) One (1) local and one (1) international conference fully paid by the university.
- (i) Comprehensive medical cover for the officer and spouse.
- (j) Any other benefit that may be approved by the Council.

The exit package will be applicable as long as the employee remains in the service of JOUST as a Professor of the University.

4. For unexplained reasons, on 18 June 2020, the University Council notified the Claimant that he was being offered the position of Full Professor Grade 15 upon the expiry of his contract as Vice-Chancellor and that he would retain the basic salary and house allowance among other benefits upon leaving the office of Vice-Chancellor.
5. The Claimant's contract was set to lapse on 19 June 2023 and on 8 June 2023, the University Council met and approved the Claimant's exit package as set out in the Terms and Conditions.
6. On 11 June 2023, the University Council appointed the Claimant as Director of the Blue Economy Research Institute and the appointment assured the Claimant that he would retain the basic salary and house allowance and other benefits he was enjoying as Vice-Chancellor. The Claimant accepted the appointment on 13 June 2023.
7. On 11 July 2023, the acting Vice-Chancellor wrote to the Claimant informing him that he would be retained as a Professor in the School of Agricultural and Food Sciences on the terms set out in the contract signed on 4 December 2018 (the exit package).
8. Before the lapse of the contract, the Claimant inquired about the exit package. Upon receipt of the letter, the Chief Finance Officer sent a Memo dated 20 June 2023 to the acting Vice-Chancellor seeking clarification on the Claimant's exit package.
9. On 17 July 2023, the acting Vice-Chancellor wrote to the State Corporations Advisory Committee seeking clarification on the Claimant's exit package.
10. On 20 July 2023, the Registrar, Planning and Administration responded to the Chief Finance Officer's inquiry and instructed that the Claimant be remunerated as a Professor Grade 15 until the issue of the exit package was clarified.
11. On his part, the Secretary of the State Corporations Advisory Committee responded to the inquiry about the Claimant's exit package through a letter dated 8 August 2023. The response indicated that in terms of Circular OP/SCAC.1/12(11) of 14 May 2015 from the Head of the Public Service, the exit package was irregular and could not be implemented.



12. Consequently, the Claimant's exit package was not fully implemented and this prompted the Claimant to sue Jaramogi University of Science and Technology, Vice Chancellor, the University Council and the Chief Finance Officer (the Respondents) on 27 September 2023, and he stated the Issues in Dispute as:
 - i. Whether or not it is fair labour practice for the Claimant to extend an offer and enter into an employment contract whose remuneration terms now stand unilaterally deducted and gravely breached?
 - ii. Whether the Claimant was issued with any notice, accorded fair hearing or explanation prior to the unfair and un-contractual salary deduction?
 - iii. Whether the Claimant's right to fair administrative action has been violated by the Respondents move to retain his services whose current wages are not in accordance to the terms and conditions of the employment contract presently in force?
13. The Respondents filed a Response on 13 October 2023, and this prompted the Claimant to file a Reply to the Response on 12 November 2023.
14. The Cause was heard on 7 December 2023, 5 February 2024 and 18 April 2024. The Claimant, a retired Chair of the Council and the Chief Finance Officer of the University testified.
15. The Claimant filed his submissions on 9 May 2024, and the Respondent on 13 May 2024.
16. The Claimant identified 4 Issues for determination:
 - i. Whether there is a legally and procedurally concluded employment contract between the Claimant and the 3rd Respondent?
 - ii. Whether the unilateral review of the Claimant's remuneration despite the subsistence of a duly executed employment contract amounts to unfair, irregular and unconstitutional labour practice on the part of the Respondents?
 - iii. Whether the gratuity payments previously made to the Claimant were procedural?
 - iv. Whether the recovery of the Claimant's gratuity for the June 2023 salary by the 1st Respondent amounts to unfair, illegal and unconstitutional labour practice on the part of the Respondent?
 - v. Who shall be condemned to bear the costs of this suit?
17. The Respondents on the other hand saw the Issues in contention as:
 - i. Whether the Claimant is entitled to the exit package as contained in his contract?
 - ii. Whether the Circular was declared unconstitutional?
18. The Court has considered the pleadings, evidence and submissions.

Lawfulness of the Exit Package

19. The Claimant took the view that the exit package was part of a valid employment contract and that the Respondents unilaterally altered the contract by failing to implement the package after his term as Vice-Chancellor came to an end.
20. Citing *Jackline Wakesho v Aroma Cafe* (2014) eKLR and *Maxwell Miyawa & 7 Ors v JSC* (2017) eKLR, the Claimant urged that the unilateral variation of the contract was unlawful and constituted an unfair labour practice as well as violated the right to equal treatment before the law.



21. According to the Claimant, the failure to implement the exit package violated sections 10(5) and 26(2) of the [Employment Act](#), 2007 because he was not consulted.
22. Further, the Claimant urged that the Circular of 14 May 2015 was declared invalid in [Egerton University v Prof James Tuitoek & Chief of Staff and Head of the Public Service](#) (2021) eKLR.
23. The Claimant also asserted that his right to fair administrative action was breached because the Respondents did not give him any reasons for the variation nor afford him an opportunity to make representations.
24. The Claimant cited the decision in [R v Chief of Staff & Head of the Public Service & 2 Ors ex-parte George A. O. Magoha](#) (2018) eKLR to assert that he should have been given an audience before the withdrawal of the exit package.
25. On the same tangent, the Claimant urged that the benefits in the exit package had accrued and could not be withdrawn on the basis of the Circular from the Head of the Public Service or on the basis of a Circular from the Salaries and Remuneration Commission in 2023.
26. The Respondents resisted the claim on the exit package by contending that on 14 May 2015 during the Claimant's first term as Vice-Chancellor, the Head of the Public Service issued a Circular instructing that Vice-Chancellors whose term had ended or would end would revert to the terms and conditions of service obtaining before service as a Vice-Chancellor.
27. The Respondents asserted that the Claimant was aware of the Circular because he brought to the attention of 2 of his deputies when their terms ended and they reverted to their teaching responsibilities.
28. The Respondents, therefore, found it strange that the exit package found its way to the Claimant's contract executed in 2018.
29. Nevertheless, the Respondents told the Court that they consulted the State Corporations Advisory Committee and it maintained that the exit package could not be implemented.
30. According to the Respondents, the exit package was contrary to a policy guideline from the Head of the Public Service and was therefore null and void.
31. The Respondents urged the Court to apply the maxim *ex dolo malo, non oritur actio* endorsed in [Holman v Johnson](#) (1775 – 1802) All ER 98 to find that the exit package was founded on illegality and could not be enforced.
32. In the Respondents view, a legitimate expectation could not arise from an illegality.
33. Responding to the Claimant's assertions with respect to the James Tuitoek judgment, the Respondents contended that the Court of Appeal did not disturb the finding by the Court that invalidating the Circular would have been overbroad.
34. With respect to claims of unfair labour practices, the Respondents took the view that the rights were not violated because the Claimant had been aware since 2015 of the Circular from the Head of the Public Service, unlike the situation which obtained in the James Tuitoek case, which revolved around events 3 months to end of the term of Prof Tuitoek.
35. The legality of the exit package clause has been the subject of attention by the Courts before.
36. In [R v Chief of Staff & Head of the Public Service & 2 Ors ex-parte George A.O. Magoha](#) (2018) eKLR, the Court upheld the exit package on the grounds that the contract in contention had been executed



- on 2 September 2009, before the Circular of 14 May 2015, and that the Circular was issued as a directive giving no room for negotiations or consultations as required by Article 47 of the Constitution as read with sections 10(5) and 26(2) of the Employment Act, 2007. The Court was of the view that the Circular amounted to a unilateral variation of an employment contract.
37. In Mabel Imbuga v Jomo Kenyatta University of Agriculture and Technology (2020) eKLR, this Court (differently constituted) found that the exit package agreed between the parties in 2014 was unenforceable because it did not have the imprimatur of the Salaries and Remuneration Commission. The Court, however, upheld the validity and enforceability of the 2003 exit package which had crystallised before the Constitution, 2010.
 38. The Claimant as the Chief Executive Officer of the University was aware of the Circular from the Head of the Public Service dated 14 May 2015, on exit package.
 39. This can be discerned from the fact that the Claimant brought the Circular to the attention of some of his deputies in advising them that they would not enjoy the exit package on 2 June 2015 and 2 January 2019. This fact distinguishes this case from the James Tuitoek decision.
 40. The inference can therefore be drawn that when the Claimant was negotiating the renewal of his contract and terms in 2018, he was acutely aware that as a matter of public policy, the exit package should not have been part of the new contract.
 41. It is not clear whether the Claimant brought the Circular to the attention of the University Council. If the Claimant did not bring the Circular to the attention of the University Council, and there is nothing on record to suggest he did, he was negotiating with the Council with an ace hidden in his pocket. In other words, he a public officer, did not enter the negotiations with clean hands.
 42. The Claimant ended his tour of duty as a Vice-Chancellor on 19 June 2023, and he reverted to his duties as a professor but he maintains that he should have carried on with the terms and conditions he enjoyed as a Vice-Chancellor.
 43. Although the parties did not address the issue, it is doubtful whether such a state of affairs would have run counter to the constitutional norm of remuneration outlined in Article 41(2)(a) of the Constitution and contextualized in section 5(5) of the Employment Act, 2007.
 44. Be that as it may, the Claimant failed to bring to the attention of the University Council material and relevant information concerning his terms and conditions of service (invalidation of exit package) to enable the Council to make an informed decision and negotiate with him on equal terms.
 45. The Court, therefore, concludes that the exit package was/is unenforceable in the case of the Claimant.

Gratuity

46. As a permanent and pensionable employee, the Claimant and the University contributed to a pension scheme at the rate of 10% and 20% respectively but when the Claimant was appointed on contract as a Vice-Chancellor, the contract provided for the payment of gratuity every two years at the rate of 31% of the basic salary.
47. When the Claimant's term as Vice-Chancellor came to an end, the University deducted Kshs 329,150/- said to be an excess payment.
48. The Claimant asserts that the deduction was not contractual and had no lawful basis.
49. The University, however, contended that the deduction was premised on clause 19 of a Policy dated October 2018 which provides that:



gratuity shall be payable at the rate determined by the Council from time to time currently at the rate of 31% of the basic salary, such gratuity shall be payable at intervals of two years in arrears provided that upon termination for appointment takes place (sic) where pension is paid by the employer the gratuity will be net of the pension.

50. Regrettably, the Respondents did not place a copy of the Policy before the Court (an extract of the Terms and Conditions of Service for Senior Management Staff did not include the clause).
51. The Court, in the circumstances finds that the deduction was unlawful and not supported by the contract in place.

Conclusion and Orders

52. In conclusion, the Court finds that:
- i. The exit package was/is unenforceable in the case of the Claimant.
 - ii. The deduction of Kshs 329,150/- from the Claimant's dues was unlawful and the same should be reimbursed.
53. The Claimant has succeeded partly. Each party to bear own costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 22ND DAY OF MAY 2024.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Claimant Ms Mongare instructed by E. Valerie Advocates

For Respondents Ms Masaka, Senior Principal State Counsel, Office of the Hon Attorney General

Court Assistant Chemwolo

