



REPUBLIC OF KENYA



**KENYA LAW**  
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**Okeyo v Great Lakes University of Kisumu (Employment and Labour Relations Cause E077 of 2021) [2023] KEELRC 405 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 405 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**EMPLOYMENT AND LABOUR RELATIONS CAUSE E077 OF 2021**  
**CN BAARI, J**  
**FEBRUARY 16, 2023**

**BETWEEN**

**FRIDAH ADHIAMBO OKEYO ..... CLAIMANT**

**AND**

**GREAT LAKES UNIVERSITY OF KISUMU ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant's Statement of Claim is dated October 1, 2021, and filed on November 10, 2021. The Claimant seeks an order that her removal from the Respondent's teaching time table violates the provisions of the *Employment Act*, payment of salaries for the months of August, September, October, November, and December, 2019, all amounting to Kshs 376, 500/-, payment of salaries from May, 2020 to October, 2021 amounting to Kshs 1, 387,120/-, an order for the Claimant's confirmation into the Respondent's permanent and pensionable service, general damages and interest from the date of filing suit.
2. The Respondent entered appearance through the Firm of Owiti, Otieno & Ragot Advocates, and subsequently filed a Response to the Memorandum of Claim dated November 26, 2021.
3. The Claimant's case was heard on July 6, 2022, when the Claimant testified in support of her case. She adopted her witness statement and produced a bundle of documents filed in support of her case.
4. The Respondent's case was heard on November 9, 2022. The Respondent presented Ms MaryAnne Atieno, her Human Resource Officer to testify on its behalf. Ms Atieno adopted her statement, and produced a bundle of documents filed in support of the Respondent's case.
5. Both parties filed submissions in the matter.



### **The Claimant's Case**

6. The Claimant states that she was appointed in the Respondent University as a Graduate Assistant in September, 2017, where she dutifully performed her tasks. It is her case that as a result of her hard work and dedication, she was promoted to the position of tutorial fellow in September, 2018.
7. The Claimant states that through a letter dated December 13, 2019, her salary was harmonized to reflect her status, and that she continued to serve in that position for two years, when she was promoted yet again to the position of Research Coordinator and lecturer on November 1, 2020; a position she contends that she holds to date.
8. The Claimant states that she has continued to render her services in the same position diligently and religiously, leading to the renewal of her contract by the Respondent University to run until September, 2021.
9. It is the Claimant's case that in January, 2021, contrary to the employment contract between herself and the Respondent, the Respondent University removed her from its teaching time table without any explanation or communication.
10. It is her further case that she was removed from the teaching timetable without prior notice on why the Respondent University had taken the decision. It is her case that despite being removed from the teaching timetable, she has continued to supervise Master students.
11. The Claimant states that to date, she is yet to receive any communication from the Respondent University in relation to her job status upon being removed from the teaching timetable. She further states that the Respondent has deliberately ignored to respond to her inquiries concerning her employment status.
12. The Claimant further states that the above acts by the Respondent have thrown her into a state of disarray since the status of her employment is unclear to her.
13. The Claimant states that the Respondent has neglected/failed to pay her salaries for the months of August, September, October, November and December, 2019, being Kshs 75,300.00 (Seventy-Five Thousand, Three Hundred only) per month, and from May, 2020 to date at the current salary of Kshs 86,695.00 (Eighty-Six Thousand, Six Hundred and Ninety-Five only) per month.
14. The Claimant states that she has yet to receive any explanation on the withholding of her salaries, contrary to the *Employment Act* and the status of the appointment contract guiding her relationship with the Respondent.
15. The Claimant states that the Respondent has refused to respond to her inquiries and demands despite sending various demand letters.

### **The Respondent's Case**

16. The Respondent's case is that the Claimant was never in their employment, and neither does it have any records indicating that the Claimant was/is employed by it.
17. The Respondent further states that if the Claimant was indeed employed by it, then the alleged employment of the Claimant by an appointment letter dated September 26, 2017, was irregularly made, under the leadership of a person who was under suspension, but who refused to vacate office.



18. The Respondent states that the Claimant's alleged salary increments as pleaded, were also irregular for having been made by a person who was not authorized to do so, and that the Claimant was fully aware of this fact.
19. The Respondent states that a careful perusal of the Claimants documents in support of her claim, does not show any letter or proof that her name was removed from the teaching timetable. The Respondent states that the Claimant, instead, absented herself from work without a trace from November, 2020, and to date, efforts to trace her have proved futile.
20. It is the Respondent's case that before an employee is promoted or their salary increased, she has to submit a performance appraisal to help in the analysis of her achievements on job responsibilities, competencies as well as meeting the university's objectives. The Respondent further states that the Claimant never submitted her performance appraisals to warrant the increase in salary, hence, salary harmonization vide the letter dated December 13, 2019 is an anomaly.
21. The Respondent states that though their policy supports salary increment, the increments are based on budgetary allocation and market conditions, and that at the time the Claimant alleges her salary was increased, the university was under severe distress and financial constraints owing to the dispute surrounding the termination of the previous Vice Chancellor.
22. The Respondent further states that it is not logical that the University Management Board would approve increment in salaries with the predicament that the university was facing.
23. The Respondent states that the Claimant's assertion that her current salary is Kshs 86,695.00 per month is untrue, as she has not provided any pay slips or bank statement to prove that she was earning this amount.
24. The Respondent states that the statement by the Claimant that she has not received any communication in relation to her job status with the Respondent or any explanation for withholding her salary is false, as efforts to trace her physically, by email or by phone call, has proved futile.
25. The Respondent states that the Claimant's claim for outstanding salary is misconceived. The Respondent further states that Claimant was paid her salary, and that the university does not owe her any arrears.
26. The Respondent states that if at all the Claimant was employed by her, she has never cleared with the university, nor has any proof been produced of any such clearance. The Respondent states that the Claimant has not handed over her institutional ID card, or prepared a detailed handing over note as well as an inventory of the Respondent property entrusted to her.

### **The Claimant's Submissions**

27. The Claimant submits that she was employed by the Respondent from September 26, 2017, which contract was subsequently renewed until September 30, 2021. It is her submission that at all times material to this suit, the Claimant was an employee of the Respondent.
28. The Claimant further submits that she was removed from the Teaching Timetable in January, 2021, and which fact was uncontroverted by the Respondent.
29. It is the Claimant's further submission that the Respondent did not pay her over the period August through December, 2019, and the period May to September, 2021, when her contract was expected to expire.



30. The Claimant submits that it is the Respondent's obligation to have their internal records despite changes in administration, and the fact that the Respondent does not have records on her employees, leaves the Claimant's position uncontroverted.
31. The Claimant submits that she has established existence of an employment relationship between herself and the Respondent and as such, she is entitled to damages for breach of contract.
32. It is the Claimant's submission that the actions of the Respondent are unlawful for failing to adhere to the provisions of the *Employment Act*.

### **The Respondent's Submissions**

33. It is submitted for the Respondent that the Claimant is not entitled to the prayers in her statement of claim for reason that she did not table any proof before this Court to show that her name was removed from the teaching time table.
34. The Respondent further submits that the Claimant admitted during cross examination that she has no proof that her name was removed from the timetable, and which time table, was not filed as prove that her name was removed.
35. It is the Respondent's submission that the Claimant has failed before Court to prove that she was earning a salary of Kshs 86,695.00. It is submitted that the Claimant did not avail to this court any pays lips or bank statement to prove her earnings, and she admitted this during cross examination.
36. The Respondent states that the Claimant having produced before court evidence of tax deduction for the year 2019 and 2020, as proof of earnings, only goes to confirm that the Respondent could not have paid taxes unless the Claimant's salary was also paid.
37. The Respondent submits that the Claimant is not entitled to payment of salary arrears for 16 months from May, 2020 to date, as she had been paid by the University as evidenced from the Income Tax deduction forms she produced for the years 2019 and 2020.
38. It is the Respondent's further submission that the Claimant absented herself from work without a trace from November, 2020, and efforts to trace her proved futile.
39. It is submitted for the Respondent that the Claimant is not entitled to confirmation to the Respondent's permanent service, as she has failed to prove that her name was removed from the University teaching time table.
40. The Respondent submits that the Claimant is not entitled to general damages, as she has failed to prove her case on a balance of probabilities.

### **Analysis and Determination**

41. Having considered the pleadings herein, the witnesses' testimonies and the Parties' written submissions, the issues for determination are:
  - i. Whether the Claimant was an employee of the Respondent
  - ii. Whether the Claimant was unfairly terminated
  - iii. Whether the Claimant is entitled to the reliefs sought



### **Whether the Claimant was an employee of the Respondent**

42. The Claimant's case is that she is an employee of the Respondent, while the Respondent contends that the Claimant is not her employee, and if she is/was, then she was recruited by a person without authority to do so, having been appointed at a time the university's Vice Chancellor was under suspension.
43. The Respondent does not strongly deny that the Claimant was her employee. RW1 told the court that the Respondent does not have documents relating to the Claimant's employment.
44. The university Vice Chancellor blamed for the chaos at the administration of the Respondent, was taken through disciplinary action to the point of dismissal back in the year 2017. This in my view, is sufficient time for the Respondent to have constructed their records. It is not a defense that as an institution, the Respondent cannot tell who their employees are, and who are not.
45. The Respondent told the court that the Claimant absconded duty and that their effort to trace her whereabouts were futile. Although no evidence was led to show that the Respondent made effort to trace the Claimant, the Respondent's assertion in this regard, is confirmation that the Claimant was an employee of the Respondent. The Respondent would have no business trying to trace persons whom they have no relationship with.
46. The Claimant has produced in evidence letters appointing her to various position in the employ of the Respondent. The letters were signed by various people including an Acting Vice Chancellor, a Human Resource Manager and a Dean of Research and Postgraduate Studies amongst others. Further, the Respondent's witness confirmed to the court in her testimony that the persons who signed the Claimant's letters are known to her and were employed by the university.
47. Informed by the foregoing, the court is convinced that the Claimant was an employee of the Respondent and I so hold.

### **Whether the Claimant was unfairly terminated.**

48. A termination from service is deemed to be fair where the employer meets a just cause standard by prioritizing fair treatment of an employee through adherence to the procedural fairness test, and the substantive justification test prior to termination.
49. The Claimant herein asserts that she is to date an employee of the Respondent, by reason only that she has not been issued with a letter terminating her services. It is also not disputed that she was not issued a show cause letter nor taken through a disciplinary procedure of any sort.
50. The Respondent's letter appointing the Claimant to the position of Research Coordinator, dated October 19, 2020, states in its last paragraph that other than the job description that is well spelt out therein, the other terms of the contract were to remain the same as those in the previous contracts.
51. The previous contracts carried a contract term of one year, it thus in my view follows that the Claimant's last contract was to end in October, 2021.
52. The Claimant contends that she was instructed to hand-over her course outline, and was thereafter removed from the teaching time table. It is her position that she was not paid salary from January, 2021 to date.
53. In my view, that the Claimant was not given a letter of termination but was nonetheless removed from the Respondent's teaching timetable and was not paid her salary even when she continued supervising



master's students, are sufficient ground to arrive at the conclusion that the Claimant was constructively dismissed.

54. In the case of *Potter v New Brunswick Legal Aid Services Commission 2015 SCC 10* the Court described constructive dismissal thus: -

' In light of the indefinite duration of his suspension, of the fact that the Commission failed to act in good faith in so far as it withheld reasons from him, and of the Commission's concealed intention to have him terminated, the suspension was not authorized by his employment contract. Nor did the Commission have the authority, whether express or implied, to suspend P indefinitely with pay and that suspension was a substantial change to the contract, which amounted to constructive dismissal.'

55. Without a doubt, these were definite changes to the Claimant's contract and which were made unilaterally by the Respondent and which constitute a breach of contract. In *Potter v New Brunswick Legal Aid Services Commission* (Supra) the Court held: -

' A finding of constructive dismissal does not require a formal termination, but a unilateral act by the employer to substantially change the contract of employment.'

56. The Respondent not having issued the Claimant with a formal termination, but proceeded to remove her from the teaching roster and additionally stopped her salary, is for all intents and purposes, a constructive dismissal. I hold that the Claimant was constructively dismissed.

#### **Whether the Claimant is entitled to the reliefs sought**

57. The Claimant's claim is for an order that her removal from the Respondent's teaching time table violates the provisions of the *Employment Act*, payment of salaries for the months of August, September, October, November, and December, 2019, all amounting to Kshs 376, 500/-, payment of salaries from May, 2020 to October, 2021 amounting to Kshs 1, 387,120/-, an order for the Claimant's confirmation into the Respondent's permanent and pensionable service, general damages and interest from the date of filing suit.

#### **An order that her removal from the Respondent's teaching time table violates the provisions of the *Employment Act***

58. In arriving at the finding that the Claimant was constructively dismissed, is confirmation that the Respondent violated the provisions of the *Employment Act*, on both procedure and in respect of the substantive justification for the dismissal.
59. The Claimant is thus entitled to compensation for the constructive dismissal. In *Alphonse Magbanga Mwachanya v Operation 680 Limited [2013] eKLR* the Court held that in determining whether to make an award of compensation the court is to consider the 13 factors set out under section 49 (4) of the *Employment Act*.
60. Further, in *Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR* where the Court cited the case of *DK Marete v Teachers Service Commission Cause No 379 of 2009* it was held that remedies are not aimed at facilitating the unjust enrichment of aggrieved employees but are meant to redress economic injuries in a proportionate way



61. Persuaded by the courts decision in the case cited herein, and considering the Claimant's contract was terminated nine months before the time it was due to lapse, I deem an award of nine months' salary sufficient to compensate the Claimant for the constructive dismissal, and is hereby awarded.
62. On the question of what the Claimant's monthly salary was, the last letter that indicates harmonization of the Claimant's salary provides the basic salary as Kshs 56,925, a house allowance of 40% of the basic salary and a commuter allowance of Kshs 7000. The total monthly gross salary per this letter amounts to Kshs 86,695.

**Payment of salaries for the months of August, September, October, November, and December, 2019**

63. The Claimant was still in the service of the Respondent in the period of this claim. Further, the Claimant has produced in evidence a P9 form indicating tax deductions for salaries paid to the Claimant in the years 2019 and 2020. As submitted by the Respondent, it would not be possible for the Respondent to deduct tax on the Claimant's salary without paying salary to the Claimant.
64. In my view, the P9 form is evidence that the Claimant was paid salary for the years 2019 and 2020. Moreover, the Claimant has not produced her Bank Statement to show that the salary was not remitted to her account. The claims fails and are dismissed.

**Payment of salaries from May, 2020 to October, 2021 amounting to Kshs 1, 387,120**

65. The year 2020 has already been dealt with under the previous claim. Further, the year 2021 has also been remedied vide the award of compensation earlier, which took into consideration the remaining term of the Claimant's Contract. In this regard, this claim also fails and is dismissed.
66. On the prayer to be confirmed into the Respondent's permanent and pensionable service, the Claimant is no longer in the service of the Respondent, the Court having found that she was constructively dismissed. In the premise, there is no service to be confirmed to. One can only be confirmed to a position that she/he already holds as at the time of confirmation.
67. Further, an order for confirmation, is an order for specific performance and which the Court only grants on very exceptional circumstance. (See *Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR*)
68. The claim for confirmation into the employment of the Respondent thus fails and is dismissed.
69. In whole, Judgment is entered for the Claimant as against the Respondent as follows: -
  - a. A declaration that the Claimant was constructively dismissed.
  - b. Payment of nine (9) months' salary as compensation for constructive dismissal at Kshs 780,255/-
  - c. The Costs of the suit and interest until payment in full.
70. It is so ordered.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**CHRISTINE N. BAARI**

**JUDGE**

Appearance:



Mr. Bunde present for the Claimant

Ms. Anuro present for the Respondent

Christine Omollo- C/A

