



**Rapemo & another v Maseno University (Cause 205 of 2018)  
[2023] KEELRC 2114 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2114 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 205 OF 2018  
S RADIDO, J  
SEPTEMBER 20, 2023**

**BETWEEN**

**ELIZABETH OPITO AWITI RAPEMO ..... 1<sup>ST</sup> CLAIMANT**

**FLORENCE AKEYO AWINO ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**MASENO UNIVERSITY ..... RESPONDENT**

**JUDGMENT**

1. Carey Francis Onyango (deceased) sued Maseno University (the University) on 4 June 2018 alleging constructive dismissal and breach of contract.
2. The University filed a Response on 6 July 2018 and because the deceased passed away, Elizabeth Opito Awiti Rapemo and Florence Akeyo Owino successfully petitioned the Court to be substituted as the Claimants.
3. As a result, the Claimants filed an Amended Statement of Claim on 21 April 2021.
4. The Cause was heard on 13 June 2023. The 2<sup>nd</sup> Claimant and a Human Resource Officer with the University testified.
5. The Claimants' submissions were not on record by agreed timeline while the University filed its submissions on 30 August 2023.
6. The Court has considered the pleadings, evidence and submissions.



## **Constructive dismissal**

7. The Court of Appeal addressed the question of constructive dismissal in *Coca Cola East & Central Africa Limited v Maria Kagai Lugaga* (2015) eKLR wherein it stated:

The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behaviour towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constitutes a repudiatory breach of the contract of employment- this is the contractual test.....

8. The Claimants' pleaded case was that the deceased was constructively dismissed because the University failed to pay him salary increments and allowances agreed in a collective bargaining agreement for the period 2013 – 2017, failed to pay salaries after January 2017 and making it practically impossible to attend work and fulfil his contractual obligations.
9. The said particulars were set out in the deceased's resignation letter.
10. The University resisted the constructive dismissal claims by asserting that information reached it on 31 October 2016 that the deceased, its full time lecturer on permanent and pensionable terms had secured gainful employment with the Centre for Multiparty Democracy as the Executive Director.
11. It further asserted that it, therefore, issued a show-cause letter to the deceased on 5 December 2016, and that on 9 February 2017, the deceased apologised for his actions and asked for leave of absence, which was not approved.
12. It is common cause from the record that the deceased joined the Centre for Multiparty Democracy in June 2016 as the Executive Director without informing the University.
13. By that time, he had not raised the question of any fundamental breach of the contract on the part of the University entitling him to quit on the ground of constructive dismissal.
14. The assertion that the resignation of the deceased was prompted by the Respondent's failure to implement the terms of the collective bargaining agreement 2013 – 2017 could not have been genuine, as the agreement was only registered by the Court on 5 November 2018.
15. Under the *Labour Relations Act*, the agreement could only be implemented after registration by the Court.
16. The Court finds that the case of the deceased was not one of constructive dismissal.

## **Breach of contract**

17. The Claimants also claimed breach of contract in that the University failed to implement the terms of the 2013 – 2017 collective bargaining agreement on salaries and allowances amounting to Kshs 1,092,690/-.
18. Further, the Claimants made a pitch for Kshs 2,734,138/- on account of earnings from January 2017 to December 2017, 1-month salary in lieu of notice and unutilised leave days.
19. The deceased was not dismissed unfairly and, therefore, the question of salary in lieu of notice does not arise.



20. With respect to the claim for salary arrears and allowances for the period 2013 to 2017, the Court notes that clause 1.0 of the collective bargaining agreement excluded and reserved the question of salary increments and allowances to further negotiations.
21. If any agreement was reached after the contemplated negotiations, no evidence of such agreement was placed before the Court.
22. The deceased ceased working with the University from June 2016. Since he did not provide any services or fulfil his contractual obligations to the University, it would be unconscionable and against public policy to award him any earnings as claimed from January 2017.
23. Lastly, the Claimants sought Kshs 248,567/- on account of 36 accumulated leave days in 2017.
24. The leave records for the deceased were not put before the Court nor requested for by the Claimants to enable the Court determine whether the deceased had any accumulated leave by time of separation (leave allowance was however being paid with the January payroll).
25. Since a foundation for this particular head of the claim was not laid, it is rejected.

### **Conclusion and Orders**

26. Flowing from the above, the Court finds no merit in the Cause and it is dismissed.
27. The Claimants only came on board the proceedings because the person who was in a contractual relationship with the University is deceased.
28. The Court will not burden them with costs.
29. Each party to bear own costs.

**DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

Appearances

For Claimants Oregu & Odhiambo Co. Advocates

For Respondent Owiti, Otieno & Ragot Advocates

Court Assistant Chrispo

