



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 64 OF 2017**

PATRICK MADANJI.....1<sup>ST</sup> CLAIMANT  
ELIZABETH OCHIENG.....2<sup>ND</sup> CLAIMANT  
BONFACE OMONDI.....3<sup>RD</sup> CLAIMANT  
MARGARET KASEJE.....4<sup>TH</sup> CLAIMANT  
OCHOLA ODHIAMBO.....5<sup>TH</sup> CLAIMANT  
CHARLES WAFULA.....6<sup>TH</sup> CLAIMANT  
FRANK KIRWA.....7<sup>TH</sup> CLAIMANT  
PAUL ONYANGO.....8<sup>TH</sup> CLAIMANT  
HENRY OKINDA.....9<sup>TH</sup> CLAIMANT

**VERSUS**

VICE CHANCELLOR, GREAT LAKES UNIVERSITY OF KISUMU....1<sup>ST</sup> RESPONDENT  
GREAT LAKES UNIVERSITY OF KISUMU.....2<sup>ND</sup> RESPONDENT

**JUDGMENT**

**Introduction**

1. In a Memorandum of Claim dated 15<sup>th</sup> February, 2017 and filed before court on 22<sup>nd</sup> February, 2017, the Claimants lodged this claim, seeking compensation for unlawful termination, service pay, pay in lieu of notice, unpaid salaries, unpaid allowances and pension, amongst other prayers.
2. The Respondents filed a response to the Claimant's claim dated 5<sup>th</sup> August, 2018 and filed on 18<sup>th</sup> September, 2019, wholly denying the Claimants' claim.
3. The matter was fixed for hearing severally but did not take off. On the 30<sup>th</sup> September, 2021, the matter was mentioned and a hearing date given of 17<sup>th</sup> November, 2021.
4. On the hearing date, both the Respondents and their Counsel were absent, and the matter proceeded to hearing in their absence as evidence of service was presented to the court.
5. Eight of the Claimants were also absent and so was their counsel. The 7<sup>th</sup> Claimant proceeded to testify in support of his case. The Judgment herein therefore, only relates to the claim by the 7<sup>th</sup> Claimant. The rest of the Claimants are deemed to have abandoned their claim.

## **The 7<sup>th</sup> Claimant's Case**

6. The 7<sup>th</sup> Claimant adopted his witness statement dated 15<sup>th</sup> February, 2015. He further produced his bundles of documents and which were marked as Claimant's exhibit 1-7 and 10-17.
7. It is the Claimant's case that he was employed by the Respondents on 22<sup>nd</sup> August, 2008 as an Assistant Accountant. He states that his contract was renewed and confirmed into the Respondent permanent and pensionable service on 6<sup>th</sup> September, 2011.
8. The Claimant states that during his time with the Respondents, he held various positions, including that of an Acting Finance Officer and a Marketing Officer.
9. It is his case that on 9<sup>th</sup> January, 2017, without prior notice, he received a letter from the 1<sup>st</sup> Respondent, altering his terms of employment to that of a part time lecturer and further instructing him to only report to work as and when needed.
10. The Claimant's case is that he was reinstated back to his position vide the Respondents' letter dated 31<sup>st</sup> January, 2017, but that the reinstatement was short lived as he, together with his Co-Claimants were soon thereafter locked out of their place of work without explanation.
11. It is the Claimant's assertions that the Respondents proceeded to recruit new staff to take over their positions.
12. The Claimant states that the actions of the Respondents are unlawful and unfair. He further states that the process of his termination is irregular and unprocedural.
13. The 7<sup>th</sup> Claimant prays that this court awards him 12 months compensation for unfair termination, service pay, payment in lieu of notice, unpaid salaries and allowances and pension entitlement.

## **The Respondents' Case**

14. The Respondents' case is that the Claimants were its employees who served in various capacities and on diverse dates. The Respondents further states that they took measures to reduce the operational costs of the Respondents, which measures included adjusting the terms of service of the Claimants.
15. It is the Respondents' case that they paid the Claimants' one-month salary in lieu of notice as required by law.
16. It is their further case that the memo drafted on 3<sup>rd</sup> February, 2017, was true in substance, made in good faith and protected by qualified privilege. It is their case that locking out the Claimants was intended to prevent a breach of the peace, as they had immense influence amongst other staff and students of the 2<sup>nd</sup> Respondent.
17. It is their case that the Claimants' case does not disclose a cause of action in law and lacks merit.

## **Analysis and Determination**

18. The issues for determination in this matter are as follows: -
  - i. Whether the alteration and/or variation of the 7<sup>th</sup> Claimant's terms of service was lawful and fair
  - ii. Whether the 7<sup>th</sup> Claimant is entitled to the reliefs sought
  - iii. Who bears the costs of the suit.

## **Whether the alteration and/or variation of the 7<sup>th</sup> Claimant's terms of service was lawful and fair**

19. The Claimant's case is that he was issued with a letter varying his terms of employment and that although these terms were briefly reinstated, he was locked out of his place of work without notice and without reason.
20. The Respondents in their response to the Claimants' claim admitted adjusting the Claimant's terms of service owing to low students' numbers and a bloated wage bill. No notice was issued to the Claimant when the reinstatement of his terms was again withdrawn, and he only got to learn about it when he could not access his place of work.
21. Section 10(5) of the Employment Act, 2007, guides parties to an employment contract on the process of variation of terms of service. It states as follows:

***“(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.”***

22. The general rule is that an employer is prohibited from unilaterally varying the terms and conditions of employment to the detriment of an employee without direct consultation with the affected employee(s). Changing terms and conditions of employment require an employer to balance between the business interest and the rights of the employees.

23. The Respondents Human Resource Policy provides as follows in respect of change of terms:

***“Any change of terms in the contract requires communication in writing to the employee concerned. The change should be authorized by the Vice-Chancellor and a copy filed in the employee file.”***

24. The Employment Act provides in mandatory terms that consultation with the affected employee is a paramount. Communicating the decision made without consultation per this provision is unlawful.

25. Where an employer varies the terms of an employee’s contract without consultation, such changes amount to repudiation of the contract and may be construed to amount to constructive termination/dismissal.

26. In the circumstances of the 7<sup>th</sup> Claimant, his terms of employment were varied unilaterally, then shortly reinstated to the old terms and before long, he was locked out of his place of work without being told what informed these drastic decisions. The Claimant was without a doubt constructively terminated. (See **Potter v. New Brunswick Legal Aid Services Commission 2015 SCC 10**)

27. Secondly the decision by the 1<sup>st</sup> Respondent to unilaterally vary the terms of the Claimant’s contract, is a violation of the Claimant’s right to fair labour practices per Article 41 of the Constitution, as it was made without consulting the persons who were to be affected by the decision. (See **James Ang’awa Atanda & 10 Others v Judicial Service Commission (2017) eKLR**).

28. I find and hold that the alteration and /or variation of the 7<sup>th</sup> Claimant’s terms of service amounted to constructive termination hence unlawful and unfair.

#### **Whether the 7<sup>th</sup> Claimant is entitled to the reliefs sought**

29. The 7<sup>th</sup> Claimant herein seeks orders for payment of 12 months’ salary as compensation for unfair termination, service pay, payment in lieu of notice, unpaid salaries and allowances and pension entitlement.

#### **Compensation for unfair Termination**

30. In making an award of compensation, the court is guided by the statutory capping spelt out under Section 49 of the Employment Act, 2007. The Claimant was in the service of the Respondents for close to 9 years. His termination has been declared unfair for the reasons spelt out herein. Further there is no evidence that the Claimant contributed to his termination and owing to his long service and guided by the holding in the case **Alfred Muthomi & 2 Others v National Bank of Kenya Limited [2018] eKLR**, where the Court held that in granting 12 months of salary compensation for unfair termination, it considered the Claimants long service, I award the 7<sup>th</sup> Claimant 12 months’ salary in compensation for unfair termination.

#### **Payment in lieu of notice**

31. The Claimant’s claim is for 3 months’ salary in lieu of notice. The Claimant was evidently not issued with notice prior to termination and although the Respondents in their response to the claim stated that the Claimants were paid in lieu of such notice, nothing has been placed before this court to prove this payment.

32. The Respondents’ Human Resources Policy provides a notice period of 30 days for non-management staff and 90 days for management staff. It is not clear from the evidence before this court, where the 7<sup>th</sup> Claimant falls in the Respondents’ hierarchy of seniority. For this reason, I award him one-month salary in lieu of notice.

#### **Unpaid salaries and allowances**

33. The Claimant did not prove to this court that he was not paid salaries and allowances, and how many months he is owed. The claim is not proved. It fails and is dismissed.

#### **Pension**

34. The Respondents’ Human Resource Policy provides that employees are entitled to pension according to the Respondents’ local pension scheme. The policy further provides that both the employer and the employees shall contribute 12.5% each to the scheme.

35. The 7<sup>th</sup> Claimant’s pay slip for the month of December, 2016, bears deductions in respect of pension. I find that the 7<sup>th</sup> Claimant is entitled to pension payable by the 2<sup>nd</sup> Respondent pension scheme, in accordance with Retirement Benefit Act.

#### **Service Pay**

36. An employee who is a member of a contributory pension scheme does not at the same time qualify for service pay. Pension and Service

pay serve the same purpose, and to grant service pay together with pension, will amount to unjustly enriching the Claimant. The claim for service pay fails and is dismissed.

37. In conclusion, Judgment is entered for the 7<sup>th</sup> Claimant against the Respondents as follows: -

- a. 12 months' salary as compensations for unfair termination at Kshs.756,000/=
- b. One month's salary in lieu of notice at Kshs. 63,000/=
- c. Pension per the RBA
- d. Costs of the suit and interest until payment in full

38. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 27<sup>TH</sup> DAY OF JANUARY, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

**APPEARANCE:**

**N/A FOR THE CLAIMANT**

**N/A FOR THE RESPONDENT**

**CHRISTINE OMOLLO- C/A**