



**Olima v Jaramogi Oginga Odinga University of Science and Technology  
(Cause 19 of 2019) [2022] KEELRC 1503 (KLR) (15 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1503 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 19 OF 2019  
S RADIDO, J  
JUNE 15, 2022**

**BETWEEN**

**WASHINGTON H.A. OLIMA ..... CLAIMANT**

**AND**

**JARAMOGI OGINGA ODINGA UNIVERSITY OF SCIENCE AND  
TECHNOLOGY ..... RESPONDENT**

**JUDGMENT**

1. The Cause was heard on 9 October 2019, 25 January 2022, and 4 April 2022.
2. Prof Washington H.A. Olima (the Claimant), a former Chair of Council and Registrar with Jaramogi Oginga Odinga University of Science and Technology (the University), testified.
3. The Claimant filed his submissions on 5 May 2022 and the University on 7 June 2022.
4. The Claimant outlined the Issues in dispute as:
  - (i) Exit package as per clause 32 of the Terms of Service Contract.
  - (ii) Terminal benefits as per the Terms of Service Contract.
  - (iii) Compensation for unfair (constructive) termination of employment.
  - (iv) Compensation for the remainder (unserved) period of the contract.
  - (v) Who pays the costs of the suit with interest?
5. The University, on its part, identified the Issues for adjudication as:
  - (i) Whether the Claimant is entitled to compensation for unfair/constructive termination of employment?



- (ii) Whether the Claimant is entitled to payment in lieu of notice of termination of employment?
  - (iii) Whether the Claimant is entitled to compensation for the remainder/unserved period of the contract?
  - (iv) Whether the Claimant is entitled to payment under clause 32 of the Terms of Service Contract (exit clause)?
  - (v) Who ought to pay the costs of this suit?
6. The Court has considered the pleadings, evidence, and submissions and will adopt the Issues as outlined in the parties submissions.

### **Constructive dismissal**

7. The Claimant pleaded constructive dismissal in paragraph 16 of the Statement of Claim. The contention had also been made in the demand letter dated 16 October 2018.
8. Constructive dismissal is not provided for in a statute in Kenya, but it has been accepted by the Courts in the jurisdiction.
9. The English Court of Appeal set the tempo for what constitutes constructive dismissal in *Western Excavating (CC) Ltd v Sharp* (1978) ICR 221, where it stated:
- If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct.
10. Locally, 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.....
11. The Court then set out some 9 ingredients which should be examined to conclude that there was constructive dismissal.
12. The Claimant asserted that his case was one of constructive dismissal because the University had not given a proper reason for failing to renew the contract, the University had confirmed his re-appointment through the Memo dated 11 July 2018 from the Registrar but later revoked the same, and that the letter dated 10 July 2018 from the Chair of the Council conveying the decision not to renew the contract was not preceded with a fair hearing and this violated his rights to fair labour practices and fair administrative action.
13. In the Court's view, the mere failure to renew a contract of employment or revocation of a decision to renew does not satisfy the test for constructive dismissal since it is usually the discretion of the employer to renew or not renew a contract.



14. In the Claimant's case, he was appraised and was informed that he had not met the performance threshold for the renewal of the contract.
15. The Claimant did not prove that the University had created a hostile work environment or was in repudiation of a fundamental term of the contract by refusing to renew the contract.
16. This was not a case of constructive dismissal.
17. If the Court were wrong on that conclusion, it would now examine whether the Claimant's case was one of unfair termination of the contract on the grounds set out in section 41 of the [Employment Act, 2007](#) (misconduct, poor performance or physical incapacity).

### **Unfair termination of employment**

18. The Claimant was on a fixed-term contract which the University did not renew. The Claimant argued that the University had renewed the contract through an Internal Memo dated 11 July 2018 from the Registrar, Planning and Administration.
19. The Registrar explained the Memo as an error. The Registrar was a junior officer to the Claimant. The Claimant did not place before the Court any practice or tradition by the University where a junior officer would inform his senior of the renewal of the contract.
20. The Chair of the Council had, in a letter dated 10 July 2018, notified the Claimant that his contract would not be renewed. The decision was preceded by an evaluation of the Claimant's performance on 13 April 2018 by an Ad Hoc Committee of the Council.
21. The Claimant contended that the Memo from the Registrar dated 11 July 2018 had psychologically prepared him that his contract would be renewed.
22. The question, therefore, becomes whether the Memo created a legitimate expectation on the Claimant's part.
23. The Court of Appeal addressed the nexus between the legitimate expectation of renewal of fixed-term contract upon effluxion by operation of time in [Registered Trustees of the Presbyterian Church of East Africa & Ar v Ruth Gathoni Ngotho – Kariuki](#) (2017) eKLR thus:

fixed-term contracts carry no rights, obligations, or expectations beyond the date of expiry.....This is in relation to the salary for the months of April up to 5<sup>th</sup> May 2010. Similarly, since the respondent's contract came to an end by effluxion of time, any claim for wrongful termination could not be maintained.
24. The Court finds that the Memo dated 11 July 2018 did not create any legitimate expectation for the renewal of the contract. Its substance was to inform the Claimant that his terminal dues would be processed.
25. Further, in the chain of leadership at the University, it was not the function of a Registrar to inform the Claimant of the renewal of the contract (the Registrar withdrew the Memo). The duty was reposed on the Council, and the Chair of the Council had written to the Claimant a day earlier informing him of the non-renewal of the contract.
26. The non-renewal of the Claimant's contract did not amount to unfair termination of employment.
27. Compensation and pay in lieu of notice do not, therefore, become implicated.



### **Whether clause 32 of the Terms of service applied to the Claimant**

28. The Claimant started his career journey with the University as Deputy Principal, Planning, Administration and Finance in July 2011. On or around 8 August 2013, he was appointed for a 5-year renewal term as Deputy Vice-Chancellor, Planning, Administration and Finance.

29. The contract was subject to the Terms of Service for Senior Management Staff on Grades XVI – XVIII.

30. Clause 32 of the Terms provided:

On exit from the University, an employee on these terms shall be retained on the following emoluments personal to themselves:

- (i) Basic salary.
- (ii) House allowance.
- (iii) All other allowances payable monthly.
- (iv) Membership of a club of choice.
- (v) An office with a Secretary and Research Assistant.
- (vi) A utility vehicle and driver.
- (vii) Sabbatical leave at the rate of 9 months for every five years.
- (viii) One (1) local and one (1) international conference fully paid by the University.
- (ix) Any other benefit as may be approved by the Council.

The exit package will be applicable as long as the officer remains in the service of public universities.

31. On 14 May 2015, the Head of the Public Service issued a Circular Ref OP/SCAC.1/12(11) on the subject: Terms and conditions of service for retired chief executive officers of state corporations who revert to serve in the same institutions in other capacities.

32. The University brought the Circular to the Claimant's attention through an Internal Memo dated 2 June 2015.

33. The Memo expressly informed the Claimant that clause 32 stood withdrawn by virtue of the Circular and advised him that it would be taken that he accepted the withdrawal if he did not object within 14 days.

34. The Claimant did not place any evidence before the Court that he objected to the proposed alteration or variation of the terms of the contract or that he responded to the invitation. He continued to serve.

35. On 23 February 2018, the Claimant applied for the renewal of the contract. The Chair of the Council wrote to him on 10 July 2018, informing him that the request was unsuccessful and that he should hand over the office he was occupying.

36. The employment relationship practically ended, and the Claimant, who had been on a leave of absence from the University of Nairobi, then reported back to the University of Nairobi on 16 July 2018.



37. The Claimant, after that, wrote to the University on 13 July 2018, requesting it to abide by the terms of the Exit Package as set out in clause 32 of the Terms and Conditions of Service (he sent a reminder on 5 September 2018).
38. The University responded on 18 September 2018, asserting that the benefits set out in clause 32 would only apply if the Claimant had remained an employee of the University and that his contract had ended on 12 July 2018.
39. In its Response, the University contended that the Claimant was not entitled to the benefits set out in clause 32 because of the Circular by the Head of Public Service.
40. The Head of Public Service had instructed in the Circular No. OP/SCA.1/12(II) on 14 May 2015 that retired Chief Executive Officers of State Corporations who revert to serve in the same institution in other capacities would be entitled only to the benefits accruing to the substantive position and not former positions.
41. The University also asserted that the clause offended public policy because the Salaries and Remuneration Commission had not approved it.
42. The Claimant urged in his submissions that the Court had disallowed/suspended the Circular in a previous judgment.
43. Section 10(5) of the *Employment Act*, 2007 allows an employer to alter a term of an employment contract in consultation with the employee.
44. The University informed the Claimant of the Circular from the Head of the Public Service through an Internal Memo dated 2 June 2015. The Memo informed the Claimant that because of the Circular, clause 32 of the Terms of Service would be withdrawn, and he was requested to raise any objections within 14 days.
45. The Claimant did not raise any objection to the proposed withdrawal, and the Court finds that by the time of separation, clause 32 was no longer part of the contract.
46. The Claimant is therefore not entitled to or eligible for the Exit Package set in clause 32 of the Terms and Conditions of Service for Senior Management Staff on Grades XVI – XVIII.

#### **Lost income and allowances compensation**

47. The Claimant made a pitch for Kshs 50,248,500/- which he asserted was for the remainder of the contract had he served for the 5-years of the renewed contract.
48. The Claimant's contract was not renewed, so he did not serve for the 5-years.
49. The Court can do no better than citing with approval the holding by the Supreme Court of Uganda in *Bank of Uganda v Tinkamanyire* (2008) UGSC 221 that:

The contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law. Similarly, claims of holidays, leave, lunch allowances and the like which the unlawfully dismissed employee would have enjoyed had the dismissal not occurred are merely speculative and cannot be justified in law.



### **Certificate of Service**

50. A Certificate of Service is a statutory entitlement, and if the University did not issue one to the Claimant, it should issue it within 21-days.

### **Conclusion and Orders**

51. From the above, save for a Certificate of Service, which the Respondent should issue within 21-days, the Court finds no merit in the Cause. It is dismissed with costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 15<sup>TH</sup> DAY OF JUNE 2022.**

**Radido Stephen, MCI Arb**

**Judge**

Appearances

For Claimant Ashiruma & Co. Advocates

For Respondent Olel, Onyango, Ingutiah & Co. Advocates

Court Assistant Chrispo Aura

