



**Mburugu v Meru University of Science & Technology (Cause 14 of 2019)
[2022] KEELRC 13158 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13158 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
CAUSE 14 OF 2019
DKN MARETE, J
OCTOBER 31, 2022**

BETWEEN

GITONGA NKANATA MBURUGU CLAIMANT

AND

MERU UNIVERSITY OF SCIENCE & TECHNOLOGY RESPONDENT

JUDGMENT

1. This matter was originated by way of a Memorandum of Claim dated 23rd May, 2019. It does not disclose an issue in dispute on its face.
2. The Respondent in a Respondent's Response to claim dated 14th June, 2019 denies the claim and prays that the same be dismissed with costs.
3. The claimant's case is that *vide* a letter of Appointment dated 12th November, 2010, "MUCST" offered his an appointment to the Office of Deputy Principal Academic Affairs a position which the claimant took up on the terms of the said letter of appointment, which provided *inter alia* that:
 - a. The appointment will be on a five (5) year contract period renewable once subject to performance and competitive interview.
 - b. The salary scale attached to the post was Kshs.254,232/- to Kshs.319,132/- per annum and the salary entry point for the claimant was Kshs.254,232/-.
 - c. The claimant would be entitled to 36 days' annual leave and a medical cover for himself and dependants and also other allowances and benefits as stipulated in the Term of service.
4. The claimant's further case is that MUCST was elevated to a full-fledged university following the Award of a Charter on 1st March, 2013 and hence Meru University of Science and Technology. The claimant was subsequently appointed as the Acting Deputy Vice-Chancellor Academic Affairs of MUST *vide* a letter dated 12th March 2013 prior to the appointment of a substantive Deputy Vice



Chancellor through a competitive interview. The said appointment was done pursuant to section 35(1) (v) of the *Universities Act* vide a letter dated 21st February 2014 by the Cabinet Secretary Ministry of Education Science and Technology.

5. The claimant's further case is that MUST conducted the interview for the office of Deputy Vice Chancellor between 16th & 17th January, 2014 which interviews were conducted by the University's governing body i.e. the University Council. Subsequently, the Respondent's Council in a special meeting held on 14th August 2014 resolved that the claimant was entitled to 3 months Sabbatical leave and a further benefit of Kshs.806,954.90 on account of his tenure as Deputy Principal MUCST: This is illustrated in the minutes of the meeting of the special council as follows;
 - a. Gratuity calculated on *pro rata* basis for period of served as Deputy Principal-Kshs.78,811.90
 - b. Compensation for 38 leave days not taken –Kshs.450,838/-
 - c. Security Allowance –Kshs.277,305/-
 - d. Sabbatical leave-3 months
6. The claimant further avers that he was confirmed to the office of Deputy Vice Chancellor (Academic, Research & Student Affairs) MUST vide a letter of 14th August, 2014 which he shall rely upon at the hearing for its full meaning and tenor and which provided inter alia
 - a. The claimant's Appointment as the Deputy Vice Chancellor (Academic, Research & Student Affairs) of MUST took effect from 21st January, 2014.
 - b. The claimant's said appointment was on a five (5) years performance based contract.
 - c. The claimant would be eligible for re-appointment at the end of the first five-year term for a further one term, subject to satisfactory performance of his duties.
 - d. Upon acceptance of the offer, the Terms and conditions of service for the Deputy Vice Chancellor/ Academic, Research & Student Affairs would apply to the contract.
 - e. The salary scale for the office of Deputy Vice chancellor being Kshs.308,940/- to Kshs.432,257/- per month, the claimant would enter the scale at Kshs.350,078/- per month.
7. The claimant wishes to rely on the terms and conditions of service for a Deputy Vice Chancellor which the claimant shall rely upon at the hearing hereof for their full meaning and tenor provided *inter alia*;
 - a. The contract of employment shall be for a period of five (5) years and the claimant shall be eligible for a re-appointment at the end of the first five-year term for a further one term.
 - b. The appointing authority may terminate the appointment by giving six (6) months' notice in writing or have the University pay six (6) months basic salary in lieu of notice on the recommendation of MUST council.
 - c. There shall be a sabbatical leave of nine (9) months for each term completed in service to be taken at the end of the term.
 - d. A written request for renewal of contract should be made at least six (6) months before the expiry of the contract.
 - e. The University may at least six (6) months before the expiry date of the contract, write to the Deputy Vice Chancellor /(claimant) notifying him/her of the expiry of the contract.



- f. The Deputy Vice chancellor shall be paid 31% of basic salary every two completed years, less what his employer would have contributed towards his/her previous scheme.
 - g. An exit package shall be determined by the University council from time to time.
8. The claimant's other case is that on 15th October 2019, he was appointed as a Professor in the Department of Agriculture, School of Agriculture and Food Science with effect from November 1, 2015. The claimant shall at the hearing hereof rely on the letter appointing him to the service of MUST as a Professor in the Department of Agriculture for its full meaning and tenor thought he said letter instructively provided as follows;
 - a. The appointment to the post of Professor as set out in the letter was in addition to the claimant's administrative duties as the Deputy Vice Chancellor.
 - b. The claimant's terms and conditions of service remained the same (Emphasis added).
9. The claimant has since dutifully served MUST in the office of Deputy Vice chancellor (Academic, Research & Student Affairs) and as a Professor of the University in the Department of Agriculture. In the discharge of his duties, it was at all material times the legitimate expectation of the claimant that MUST would in its dealings with him:
 - a. Respect and uphold the terms of his appointment both as Deputy Principle of MUCST and Deputy Vice chancellor (Academic, Research & Student Affairs) MUST.
 - b. Respect and uphold the terms and provisions of the Terms of Services as Deputy Principal of MUCST and Deputy vice chancellor MUST.
 - c. Honour and uphold his right to the full application of constitution and the Laws of Kenya.
10. The claimant's further case is that on 6th March, 2018, he was issued with a show cause letter requiring that he explains;
 - a. Alleged consistent failure to manage student affairs,
 - b. Alleged inaccuracies in student fees data provided to the council during special council meeting held on 5th March, 2018,
 - c. Alleged communication to students on fees adjustments without following the process including approval of the fee adjustments by council.
11. He dutifully responded to the said show cause letter and exonerated himself from blame. This he did without prejudice to the following salient but pertinent facts:
 - a. In the course of his duties, the claimant's immediate superior and reporting line was the Respondent's Vice-chancellor,
 - b. At no time prior to the said show cause letter, had the Respondent's Vice chancellor raised any concerns regarding the claimant's duties or any failure in the same.
 - c. There was no record of any complaint lodged against him by the Respondent's Vice Chancellor.
12. The Respondent's University Council did not communicate any further on the subject.
13. The claimant's avers that on Tuesday 10th of April 2018 when the Respondent advertised a vacancy in the office of Vice Chancellor, the claimant applied for consideration to the said post and was



shortlisted and invited for interviews *vide* a letter dated 8th June 2018 by the Respondent's University Council, which ultimately forwarded his name among others to the Cabinet Secretary in the Ministry of Education for consideration for appointment to the said office of Vice Chancellor of MUST.

14. The claimant on 22nd August, 2018 filed an application for renewal of his contract. At this time, the Respondent had not written to him to inform him that it would not be renewing his contract. The claimant was therefore dumbfounded when *vide* a letter dated 12th November, 2018, the Respondent purported to inform him that its University Council had agreed not to renew his contract as Deputy Vice Chancellor (Academic, Research and Student Affairs).
15. The claimant avers that the Respondent's decision not to renew his contract as Deputy Vice Chancellor (Academic, Research and Student Affairs) was in breach and violation of his rights for Fair Administrative Action as guaranteed under Article 47 of *the Constitution* of Kenya and the *Fair Administrative Action Act*. This was also unprocedural, unlawful and in breach of the terms set out in his Letter of Appointment as read together with the Terms and Conditions of Service for the office of Deputy Vice Chancellor (Academic, Research and Student Affairs).

Particulars of Breach as pleaded at paragraphs 24 and 25

- a. Failing and/or neglecting to write to the claimant at least six (6) months before the expiry thereof to notify him of the expiry of the contract.
 - b. Failing and/or neglecting to inform the claimant of the nature and reasons for the proposed action not to renew his appointment as Deputy vice Chancellor (Academic, Research and Student Affairs).
 - c. Failing and/or neglecting to accord the claimant an opportunity to be heard and to make representations in regard to the proposed action not to recommend renewal of his appointment as Deputy Vice Chancellor (Academic, Research and Student Affairs).
 - d. Failing and/or neglecting to accord the claimant an opportunity to review or Appeal the decision not to renew his appointment as Deputy Vice Chancellor (Academic, Research and Student Affairs).
 - e. Failing and/or neglecting to provide the claimant with the reasons for the decision not to recommend the renewal of his appointment as Deputy Vice Chancellor (Academic, Research and Student Affairs).
 - f. Failing and/or neglecting to provide the claimant with the materials to be relied upon in making the decision not to recommend renewal of his appointment as Deputy Vice Chancellor (Academic, Research and Student Affairs).
 - g. Failing and/or neglecting to recommend re-appointment of the claimant to the position of Deputy Vice Chancellor (Academic, Research and Student Affairs) for a further one term.
16. The claimant further avers that notwithstanding the breach of the terms of his appointment and terms of service, it was at all material times the claimant's legitimate expectation that the Respondent would honour its obligations regarding his remuneration, benefits and allowances at the end of his term of duty thus;



- a. According to the claimant, the right to proceed on a three (3) month sabbatical leave being the period of sabbatical leave earned for the period of three (3) years served as Deputy Principal MUCST.
- b. According to the claimant, the right to proceed on a nine (9) month sabbatical leave being the period of sabbatical leave earned for the period of five (5) years served as Deputy Vice Chancellor (Academic Research and Students Affairs).
- c. The payment of a disengagement allowance to assist settling at thirty (30) days subsistence allowance as disengagement of duty being the rate of Kshs.12,000/- per day totalling Kshs.360,000/-
- d. The payment of passage and baggage allowance at the rate of Kshs.20,000/- non accountable and an additional Kshs.30,000/- accountable.
- e. Gratuity at the rate of 31% of his basic salary for every two completed years of services and therefore in the case of the five (5) years of service, the sum of such gratuity shall be based on his basic salary which stood at Kshs.408,079/- as at 31st December, 2018.
- f. Setting an exit package for the claimant.
- g. The payment of his salary at the rate of Kshs.877,501.50 made up of his basic pay and allowances as follows;

Basic salary 408,079.00

Allowances

 1. House Allowance 82,704.00
 2. Entertainment All 30,000.00
 3. Responsibility All 30,000.00
 4. Management All 100,000.00
 5. Benefit water& Elec Allowance 15,000.00
 6. Telephone Allowance 15,000.00
 7. Domestic workers All 52,500.00
 8. Car benefit 54,218.00
 9. Security Allowance 30,000.00
 10. Duty House all 60,000.00

Gross pay 877,501.50
- h. The resumption of duty upon completion of his said Sabbatical leave as Professor in the department of Agriculture, School of Agriculture and Food Science.

He prays thus;



1. A declaration that in reaching its decision not to re-appoint the claimant to the post of Deputy Vice Chancellor (Academic, Research and Student Affairs) MUST the Respondent's;
 - a. Breached the claimant's right to Fair Administrative Action as envisaged at Article 47 of *the Constitution* of Kenya and the Fair Administrative Act.
 - b. Breached the terms of the claimant's Appointment and Term of Service.
2. An injunction do issue directed at the Respondent, directing it to re-appoint an reinstate the claimant to the position of Deputy vice chancellor (Academic, Research and Student Affairs) MUST, together with all his attendant salaries and allowances to date.
3. An injunction directed at the Respondent, directing it to pay to the claimant the equivalent of 6 months' salary and allowances in lieu of notice for the failure to notify him at least (6) months prior of the expiry of his contract as Deputy Vice Chancellor (Academic, Research and Student Affairs)
4. An injunction directed at the Respondent directing it to;
 - a. Accord the Claimant the right to proceed on a three (3) month sabbatical leave being the period of sabbatical leave earned for the period of three (3) years served as Deputy Principal MUCST.
 - b. Accord the Claimant the right to proceed on a nine (9) month sabbatical leave being the period of sabbatical leave earned for the period of five (5) years served as Deputy Vice Chancellor (Academic, Research and Student Affairs).
 - c. Pay to the claimant the sum of Kshs.806,954/- as passed by the Respondent's council meeting of 14th August, 2014 as amount of his tenure as Deputy Principal MUCST.
 - d. Pay to the claimant the disengagement allowance to assist him in settling at thirty (30) days subsistence allowance as disengagement of duty being the rate of Kshs.12,000/- per day totalling Kshs.360,000/-
 - e. Pay to the claimant passage and baggage allowance at the rate of Kshs.20,000/- non accountable and an additional Kshs.30,000/- accountable.
 - f. Pay to the claimant gratuity at 31% of his basic salary for every two completed years of service as Deputy Vice Chancellor ((Academic, Research and Student Affairs) MUST based on his basic salary of Kshs.408,079.00 as at 31st December, 2018 and therefore applicable on 21st January, 2019 and five (5) completed years of such service.
 - g. Set an exit package for the claimant in respect of his term of duty as Deputy Vice Chancellor (Academic, Research and Student Affairs).
 - h. Continuous remitting to the claimant his salary at the rate of Kshs.877,501.50 made up of his basic pay and allowance from 21st January, 2019.
 - i. Allow the claimant to resume duty as a Professor of Agriculture School of Agriculture and Food Science upon completion of his sabbatical leave, on



the same terms of service as those he enjoyed as Deputy Vice Chancellor (Academic, Research and Student Affairs).

5. An injunction directed at the Respondent, restraining it whether by itself, its organs, employees and/ or agents from adversely interfering with the claimant's employment as Professor in the Department of Agriculture, School of Agriculture and Food Science.
 6. General Damages.
 7. Aggregated Damages
 8. Exemplary Damages
 9. The Respondent to bear the cost of this action.
 10. Interest on any and all payments and costs awarded above at court rates until payment in full.
 11. Any other Order this court shall deem mete and just.
17. The Respondents case is a denial of the claim.
 18. The Respondents case is that the claimants contract as Deputy Vice Chancellor - Academic, Research and Student Affairs (DVC ARS) was never and has never been terminated but he run his full term which expired and was not renewed. The claim therefore has no foundation and should fail in toto.
 19. It is her further case that the contract of Deputy Vice Chancellor was renewable subject to satisfactory performance of his duties and he cannot arrogate himself with the role of determining and deciding that which is satisfactory or otherwise.
 20. The Respondent other case is that the claimant served as Deputy Principal in the defunct Meru University College of Science and Technology (MUCST) for 2 years, between 1st February, 2011 to 28th February, 2013. Again, when MUCST was awarded a Charter to become a fully-fledged public University in 2013, to wit, Meru University of Science and Technology (MUST) the claimant was appointed by MUST as Acting Deputy Vice-Chancellor Academic Affairs (DVC ARS).
 22. The Respondent other case is that the claimant is concealing from the court the fact that his gratuity as Deputy Principal of the said Meru University College of Science and Technology (MUCST) was paid in full in September, 2013. (See a copy of internal memo dated 06/09/2013, copy of claimant's pay slip for September, 2013 and a calculation of the same filed as Respondent's document No.1).
 23. Again, the claimant ought to have claimed sabbatical leave from the DVCSC defunct and not bring out this in a different establishment. Sabbatical leave cannot be carried forward.
 24. The parties contractual terms were as follows;The claimant served as Acting Vice-Chancellor of MUST for 11 months from 01/03/2013 to 20/01/2014 and was entitled to a gratuity of Kshs.1,068,949/-. The said gratuity was paid to him in full in July, 2017 (see a copy of internal memo dated 07/07/2017 and claimant's payslip of July, 2017 filed as Respondent's document No.2)The claimant was confirmed and served as Deputy Vice chancellor of the Respondent for a five year term from 21.01/2014 to 21/01/2019 vide a contract offer dated 14th August, 2014. Under paragraph 2 of the said contract offer, it was stated in clear terms that, "The appointment offer is on a five (5) year performance based contract. You shall be eligible for reappointment at the end of the first five year term for a further one term subject to satisfactory performance of your duties."The Respondent states that under the terms and conditions of service for a Deputy Vice-chancellor under clause 5 (1.1), it is stated in clear



terms that, “ The contract of employment shall be for a period of five (5) years and shall be eligible for reappointment at the end of the first five-year term, for a further one term.” The plain understanding of the above provisions being that the claimant was appointed to serve for 1 term, and by virtue of his appointment, the claimant would be considered for reappointment by the Respondent if he met the threshold. It is not stated in the above terms and conditions that the claimant was to serve for two terms or that his second term was already secured. In fact, the Appointment offer referred to in paragraph 9 above is clear that reappointment was subject to satisfactory performance of the claimant’s duties. No provision of automatic renewal Under clause 11(b) of the terms and conditions of service of the claimant, the Respondent may notify the claimant of the expiry of his contract at least 6 months’ before the expiry date. This clause is not couched in mandatory terms as compared to clause 11 (a) which requires that the claimant must apply for renewal of his term 6 months before the current term expires. Neither does the said clause 11(b) require the Respondent to notify the claimant of the non-renewal of his contract/term, but simply notify them that their term is nearing expiry as per the existing contract and the claimant should not be allowed to rewrite the terms of that contract.

25. The Respondent’s further case is that the claimant applied for renewal of contract on 22nd August, 2018 less than 6 months to the expiry of his contract. This was declined on assessment of his performance and he was informed of non-renewal.
26. Her other case is that a show cause letter was issued to the claimant for failure to handle students affairs leading to their unrest. This was rampant and impacted on his tenure.
27. The Respondent’s denies that there was separation of professional and Deputy Vice-Chancellor roles as claimed by claimant. Conclusively, no termination of employment occurred but a non-renewal of contract was the issue and events. This was procedural and lawful. She puts it thus;
28. The decision not to renew the claimant’s contract as DVC ARS was most procedural and lawful contrary to the claimant’s assertions. The claimant was given opportunity to apply for renewal, which Application was assessed and measured against his performance in the current term and he failed to meet the threshold. The claimants particulars of breach under paragraph 25 of the Statement of Claim are baseless and constitute misinterpretation and misconstruction of the letter of appointment and the terms and conditions of service.
28. The Respondent’s penultimate case is that the claimant was duly heard through the proceedings of the show cause letter. He has not applied for his nine (9) months leave and this is open to him. Again, pursuant to the claimant’s contract of service, there is no additional exit package save for those expressly indicated.
29. The issues for determination therefore are;
 1. Whether there was a termination of the employment of the claimant by the Respondent.
 2. Whether the termination, if at all, was wrongful, unfair and unlawful.
 3. Whether the claimant is entitled to the relief sought.
 4. Who bears the costs of this cause.
30. The 1st issue for determination is whether there was a termination of the employment of the claimant by the Respondent. The claimant in his written submission dated 21st June, 2021 reiterates his case and submits a case of termination of employment. He elaborately sets out this and asserts that the claimant was never involved or notified of meetings to deliberate on this matter. This is as follows;

Indeed it is incontrovertible that claimant was;



- a. Never notified of such meeting to discuss the matter,
- b. Never invited to make representation on his own behalf,
- c. Never invited to be accompanied by an employee of his choice,
- d. Never informed of the allegations against him,
- e. Never given a chance to answer to any representation made against him,
- f. Never warned of an impending decision adverse to his employment contract

31. This negated the legality of his termination of employment.
32. This is denied by the Respondent. In her written submissions dated 1st November, 2021 she reiterates a case of no termination of employment. It is her case and submission that the claimant's fixed term contract lapsed by effluxion of time and was not renewed on the basis of non-performance on the part of the claimant. At all times, he was informed of this and participated in disciplinary proceedings in regard to his disability to quell or appropriately manage students affairs thereby leading to student unrest.
33. The Respondent's case overwhelms that of the claimant. He has not ably controverted the Respondent's case of no termination of employment. On a balance of probability and preponderance of evidence, the Respondent's case surmounts that of the claimant.
34. Again, the claimant has failed to satiate the requirements of the provisions of section 47 (5) of the [Employment Act, 2007](#) which comes out as follows;
- “For any complaint of unfair employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
35. I therefore find a case of no termination of employment and hold as such.
36. The 2nd issue for determination is whether the termination of employment of the claimant by the Respondent, if at all, was wrongful, unfair and unlawful. It is our finding that no termination of employment occurred in the circumstances. This issue for determination therefore dissipates into nothingness.
37. The 3rd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having failed on a case of termination or any owings by the Respondent, he becomes disentitled to the relief sought.
38. I am therefore inclined to dismiss the claim with orders that each party bears the costs of the same.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF OCTOBER, 2022.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mr. Mbabu instructed by T.K Kariba Mbabu & Company Advocates for the claimant.
2. Mr. Kimaita instructed by Wambugu & Muriuki Advocates for the Respondent.

