



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 387 OF 2018**

**PROF STEPHEN OKEYO.....CLAIMANT**

**VERSUS**

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

**JUDGMENT**

1. On or about 5 May 2018, the Registrar Administration with the Great Lakes University of Kisumu (the Respondent) issued a notice of retirement to Prof Stephen Okeyo (the Claimant) on the ground that he had attained the minimum retirement age.
2. The Claimant believed the retirement was unlawful/in breach of contract, and on 14 December 2018, he filed these proceedings wherein he stated the Issue in Dispute as:  
  
Unfair and unlawful termination and/or retirement of the Claimant.
3. Simultaneously, the Claimant filed a Motion under a certificate of urgency seeking an order reinstating him to employment.
4. When served, the Respondent filed a replying affidavit and also raised a Preliminary Objection, contending that it was not a corporate body capable of being sued.
5. The Preliminary Objection was withdrawn on 19 March 2019 on condition that the Claimant files an Amended Memorandum of Claim.
6. The same was filed on 14 May 2019, and the Respondent filed a Response to the Amended Memorandum of Claim on 16 July 2019.
7. On 26 February 2020, when the Cause came up for hearing, the Respondent secured an adjournment on the ground that the hearing date had been taken *ex-parte*, and further, it had only become aware of the hearing the previous day.
8. The Court rescheduled the hearing to 6 October 2020.
9. Due to COVID19, the hearing did not proceed on 6 October 2020 (the Respondent was not represented), and the Deputy Registrar fixed the hearing for 21 January 2021. The Claimant was instructed to serve a hearing notice.
10. According to an affidavit of service filed in Court on 19 January 2021, the Respondent's advocate was served with the hearing notice on 12 January 2021.
11. On the same day, 19 January 2021, the Respondent's advocate on record filed an application seeking leave to cease from acting.
12. When the Cause was called out for hearing on 20 January 2021, Mr Kago for the Respondent informed the Court of his application to cease from acting, and after hearing brief oral submissions, the Court declined to grant leave and directed that the hearing proceeds.
13. However, when the file was reached for hearing after the cause list call over, Mr Kago had left the virtual platform.
14. The Court allowed the Claimant to present his evidence (the conduct of Mr Kago of not participating in the hearing when his application for leave to cease from acting could not have been in good faith as he did not inform the Court he was leaving the virtual hearing. It was required of him as a matter of courtesy to counsel and the Court).

15. The Claimant testified and closed his case, and in the absence of the Respondent or its counsel, the Court was constrained to close its case. The Court directed the Claimant to file his submissions. The submissions were filed on 22 February 2021.

16. The Claimant identified the following Issues in his submissions:

- i. Whether an employment relationship existed between the Claimant and the Respondent?
- ii. Whether the Claimant's termination of employment was lawful?
- iii. Whether the Respondent adhered to the procedure in law whilst terminating and/or retiring the Claimant?
- iv. Whether the Claimant is entitled to the reliefs sought?

### **Employment relationship**

17. The Respondent admitted in paragraph 3 of the Response to the Amended Memorandum of Claim that the Claimant was its employee at all material times, and therefore this was not an Issue for adjudication by the Court.

### **Unlawful termination/retirement**

18. The Respondent's Human Resource Manual for Staff provides that the retirement age for non-academic staff is 60 years, and for academic staff, the age is set at 70 years. The Manual gives an option for early retirement subject to agreement by the Vice-Chancellor.

19. Schedule VI of the Respondent's Statutes on Termination of Appointments set the retirement age at 65 for administrative and support staff and 70 years for academic staff employed on permanent and pensionable terms.

20. Under the Respondent's Statutes, academic staff is defined as:

all employees of the University who are primarily engaged in teaching and research, or hold an appointment of an academic status as established in the Charter and shall consist of the Vice-Chancellor, the Deputy Vice-Chancellors, the Principals of Colleges, the Deans of Faculties, the Librarian, the Registrars, the professors, Heads of Departments, the lecturers and all members of staff who are engaged in teaching, research and partnership practice.

21. The first issue is, therefore, whether the Claimant was academic staff or non-academic staff.

22. On 27 June 2011, the Respondent renewed the Claimant's contract as an Associate Professor on permanent and pensionable terms.

23. The Claimant went on a sabbatical, and when he resumed, he was confirmed to serve as Dean, Faculty of Health Sciences for 2 years from 2 January 2016.

24. The Claimant also served as an acting Deputy Vice-Chancellor in charge of Planning and Administration, Academic Affairs and Research.

25. The Claimant produced copies of Timetables for the First Trimester 2018 showing that he was teaching General Pathology, Human Physiology, and Reproductive Health, among other courses.

26. The Court is satisfied that the Claimant was part of the academic staff and that he was on permanent and pensionable terms.

27. The question which follows is, what was the Claimant's age at the time of retirement was.

28. According to the Claimant's national identity card filed in Court, he was born on 25 February 1957. He was therefore 61 years old at the time of retirement.

29. In light of the evidence produced by the Claimant, the Court is satisfied that the retirement of the Claimant was premature.

30. The Court also finds that the decision was unilateral and in breach of contract, and therefore unlawful.

### **Compensation or reinstatement?**

31. Although the Claimant pleaded reinstatement as one of the remedies, he did not advert to the same in testimony. He rather stated that he wanted maximum compensation.

32. Without an evidential foundation to the suitability of reinstatement, the Court will not order it.

33. The Claimant served the Respondent and its predecessor for over 12 years, and in consideration of the length of service, the Court is of the view that the equivalent of 10-months gross wages as compensation would be appropriate (monthly salary was Kshs 174,320/-).

## **Breach of contract**

34. The Claimant asserted that he had not been paid his entitlements during sabbatical leave, being half-salary; salaries for July 2016, August 2016, December 2016, January to April 2017 and January to August 2018; and emoluments for part-time tuition, and reimbursements on expenses incurred in the course of work.

35. The Claimant also sought gratuity.

36. The Respondent's pleaded defence to the claims was that if such dues were pending, they had not been paid because the Claimant had refused to go through the clearance process.

37. Nevertheless, the Respondent did not interrogate the Claimant's evidence, nor did it file any pay records to controvert the assertions by the Claimant.

38. In light of the un rebutted evidence and section 10(3) & (7) of the Employment Act, 2007 and the general rules of evidence, the Court will allow these heads of the claim(s).

## **Conclusion and Orders**

39. The Court finds and declares that the retirement of the Claimant was unlawful and further that the Respondent was in breach of contract.

40. The Claimant is awarded:

i. Compensation	Kshs 1,743,200/-
ii. Unpaid salaries	Kshs 3,872,913/-
iii. Unpaid emoluments	Kshs 660,000/-
iv. Reimbursements	Kshs 3,510,099/-
v. Gratuity	Kshs 4,157,400/-
<b>TOTAL</b>	<b>Kshs 13,943,612/-</b>

41. The decretal sum to attract interest at court rates from the date of judgment.

42. The Claimant to have costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 14<sup>TH</sup> DAY OF APRIL 2021**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

### **Appearances**

For Claimant Mr Washika instructed by Wafula, Washika & Associates Advocates

For Respondent Mr Kago instructed by Antony Kago & Co. Advocates

Court Assistant Chrispo Aura