



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE NO. 95 OF 2019

PROFESSOR MABEL IMBUGA.....CLAIMANT

VERSUS

JOMO KENYATTA UNIVERSITY OF

AGRICULTURE AND TECHNOLOGY.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent in 1997 as a Lecturer. In 2008 she was appointed Vice-Chancellor under a fixed term contract until 11.7.2013 when she was reappointed vice-Chancellor for another term until 31.7.2018. The contract of service for the claimant as a Vice-Chancellor contained an exit package clause which entitled the claimant to retain certain benefits which she enjoyed during tour of duty as Vice-Chancellor.

2. After the expiry of her contract term as the Vice Chancellor, the claimant reverted to her service as a lecturer in the respondent university but her benefits guaranteed under the exit package clause of her said contract were denied by the respondent. She has therefore brought this suit seeking the following reliefs:-

- a) A declaration that the Respondents withholding of her Exist package is unlawful and unfair.**
- b) An Order for the payment of all lawful Exist benefits accruing to her as set out at paragraph 8 and hereafter as long as the Claimant remains in the Respondent's employment.**
- c) An order directed to the Respondent to pay the her damages for unlawful and discriminatory treatment.**
- d) Costs of this suit with interest thereon.**

3. The respondent has filed defence admitting that she employed the claimant as a Lecturer in 1997 and as a Vice Chancellor from 2008 to 31.7.2018 when she reverted to the position of a lecturer. However, she has denied the alleged refusal or failure to complete Clause 11 of the claimant's contract as Vice Chancellor which provided for an exit package and averred that she is prevented from implementing the exit package clause by directives and circulars from the State Corporations Advisory Committee (SCAC) and the Public Service Commission (PSC) dated 14.5.2015, 19.8.2015 and 25.10.2016 respectively. She further avers that the said circulars prohibits payment of the said packages to Vice Chancellors upon exit from tour of duty.

4. In the alternative and without prejudice to the foregoing, the respondent averred that she has already paid substantial amounts to the claimant with respect to the exit package dues but due to limited capitation from the government and reduced funding she is unable to meet the claimant's exit package. She further averred that the dues quantified by the claimant are not payable as a lump sum figure but monthly and reflected in the claimant's payslip as she continues with her employment in the university.

5. In response however, the claimant contends that the failure to pay her exit package is discriminatory compared to other former university Vice Chancellors like Professor George Magoha, Professor Tuitoek and Professor Esther Kahangi. She further averred that the said circulars do not affect her because they were issued after she had executed her contract of service and the terms thereof crystallized.

6. On 24.9.2019, the counsel for the two parties agreed to dispose of the suit by written submissions on the basis of the court record.

Claimant's submissions

7. The claimant submitted that after retiring from the position of Vice Chancellor of the respondent, the employer refused to implement the exit package clause of her contract of service. She contends that the failure to implement the exit clause amounts to breach of her contract of service which she signed with the respondents through the Chairman of the University Council on 17.10.2014.

8. The claimant submitted further that the failure to implement the said exit package clause on the basis of circulars from third parties amounts to a unilateral amendment to the terms and conditions of her employment which is against the provisions of section 10(5) of the Employment Act, Article 47 (1) and (2) of the Constitution of Kenya and section 4 of the Fair Administrative Action Act. She relied on **Prof. James Toitok v Chief of Staff and Head of Public Service and Egerton University [2016]eKLR** where Radido J held that a circular that took away rights which had accrued to the applicant and without consultation or giving him an opportunity to be heard was procedurally unfair.

9. On the other hand the claimant submitted that the parties herein had already signed the contract of employment and bound themselves to the terms thereunder before the circulars cited by the respondent were published. She maintained that the failure to implement the exit package clause of the contract amounts to both breach of contract and violation of her constitutional right to lawful expectation. She therefore, prayed for the reliefs particularized in her claim or alternatively there be an order directing the respondent to implement and pay the claimant all her accrued benefits under the exit package terms in the Terms and Conditions of Service for Vice Chancellors dated 17.10.2014.

10. For emphasis she relied on **Republic vs Chief of Staff and Head of Public Service & 2 others ex parte Prof. George A.O. Magoha [2018]eKLR and Prof. James Tuitoek v Chief of Staff and Head of Public Service and Egerton University [2016]eKLR** where the court granted order of mandamus compelling the universities to accord the said retired Vice Chancellors their benefits under the exit package clause of their contracts.

Respondent's submissions

11. The respondent submitted that she is a public university established under the Universities Act No. 42 of 2012 and as such her budget and expenditure is subject to the Government approval. She further contended that she is subject to official government policy as contained in circular No. OP/SCAC1/12/ (ii) dated 14th May 2015, circular No. OP/CAB.9/21/2A dated 19.8.2015 and Circular No. PSC/ADM/14/V9 (107) dated 25.10.2016.

12. She further submitted that the Executive Office of the President, Chief of Staff and Head of Public Service held a committee meeting on 16.10.2014 to consider the terms and conditions of service of retired Chief Executive Officers (CEOs) of State Corporations and observed that, whereas retaining services of retired CEOs in research institutes and public universities was globally accepted, retaining the retired CEOs would create unnecessary power games, lead to inordinate and unsustainable expenses to the institutions.

13. The respondent urged that she is bound by the said circulars by dint of her being a State Corporation. Consequently relied on the said circulars to contend that the exit package clause of the claimant's contract of service is not enforceable.

Issues for determination

14. There is no dispute that the claimant was employed by the respondent as Vice Chancellor from 2008 to 31.7.2018. The issues for determination are:

- (a) Whether Clause 11 of respondents Terms and Conditions of service 2014 constitutes a valid and binding contract between the parties herein.
- (b) Whether the claimant is entitled to the remedy sought.
- (c) Which orders should be issued

Clause 11 of the Terms and Conditions of Service

15. The claimant served under two contracts. From 2000 and 2013 her contract was governed by the respondent's Terms and Conditions of Service for Vice Chancellor. Clause 10 of the said Terms and Conditions of Service provided that:

"EXIT PACKAGE

At the end or on termination of the contract the Vice-Chancellor will have an exit packaged that will comprise of [sic] the following:-

- (i) The provisions of one secretary and other secretarial support as long as one is in the service of the university.***
- (ii) Telephone and utility expense for as long as one is in the service of the university.***
- (iii) The provision of utility vehicle so long as one is in the service of the university.***

(iv) Facility of house servant, gardener and watchman for a period of five years provided one is in the service of the university.

(v) Pension contribution for Senior Management Team should be pegged on actual salary.

(vi) Should continue with the basic salary and house allowance which are personal to them, by the university they exit to.

16. The above exit package clause remained in force as at the time when the claimant started her new contract in July 2013. However on 17.10.2014, the respondent published new Terms and Conditions of Service for Vice Chancellors which enhanced the exit package. Clause 11 of the said terms and conditions of service provided as follows:-

“EXIT PACKAGE

At the end or on termination of the contract the Vice Chancellor will have an exit package that will comprise of [sic] the following:-

(a) The provision of one secretary, research assistant, and other secretarial support as long as one is in the service of the university.

(b) Telephone and utility expense for as long as one is in the service of the university.

(c) The provision of utility vehicle and driver fueled and serviced by the university as long as one is in the service of the university.

(d) Facility of house servant, gardener and watchman for a period of five (5) years provided one is in the service of the university.

(e) Payment of water and electricity as long as one is in the service of the university.

(f) Pension contributions for Senior Management Team should be pegged on actual salary.

(g) To retain the basic salary and house allowance which are personal to themselves, when they exit the position as long as one is in the service of the university.

(h) Membership to a club of choice as long as one is in the service.

(i) The local and one international conference fully paid by the university per year.

(j) Sabbatical leave computed on the basis of two (2) months for each year completed in service taken at the end of the tour.

(k) All other allowances paid on a monthly basis at the time of exit.”

17. The foregoing Terms and Conditions of Service is the basis of this suit because whereas the claimant claims that the respondent is bound to implement the same, the respondent contends that the said exit package cannot be implemented because of circulars by the SCAC and PSC which were written after the said Terms and Conditions were published and made part of the claimant's contract of service.

18. The SCASC wrote through the Chief of Staff and Head of Public Service the circular Ref. No. OP/SCAC/1/12/12 dated 14.5.2015 stating as follows:-

“ . . .The Committee meeting of 16th October 2014 considered the matter of terms and conditions of service for retired Chief Executive Officers (CEOs) of State Corporations who revert to serve in the same institutions in other capacities. The committee observed that:

(a) The practice of retired CEOs reverting to serve the same institution in other capacity is most common in research institutions and public universities.

(b) Retaining retired CEOs in academia and research is a healthy global practice that enriches the body of knowledge in the institutions. However, in some instances, CEOs who revert retain the perks of their former administrative positions thereby creating unnecessary power games and competition with their successors.

(c) Retaining the perks attached to the position of CEOs in the above circumstances would be inordinately expensive and unsustainable to the affected institutions.

It is required that all State Corporations should ensure the staff in their employment only enjoy remuneration and privileges that fall within the regular terms and conditions of service commensurate to their substantive appointments and grade more

specifically, staff in research institutions and public universities who retire as Chief Executive Officers but got to revert to research/teaching roles when their tour of duty as CEOs lapses should be required to adopt the perks attached to the newly assigned lower grade.”

19. The Chief of Staff and Head of Service wrote to the Cabinet Secretary Ministry of Education, the letter dated 19.8.2015 to clarify that the foregoing circular did not operate retrospectively. The letter stated that:

“This is a rule of general application effective from the date of the circular and should therefore not be applied in retrospect. It is acknowledged that there are instances, where the Government or specific institutions have allowed retired CEOs to retain their terms and conditions of service from a component of their employment contract at the new lower grade. Requirement for retrospective adoption of terms and conditions of service for the lower grade would therefore amount to breach of contract with cost to the Government.

The purpose of this letter is to clarify that the circular is effective from 14th May, 2015 and should not be applied retrospectively. . . .”

20. The foregoing clarification notwithstanding the Secretary of PSC wrote the letter dated 25.10.2016 to the Chief of Staff and Head of Public Service advising that the 2014 exit package was flawed and recommended that:

“(i) The review and determination of terms and conditions for University Staff is the mandate of the Ministry/State Department and the State Corporations Advisory Committee.

(ii) The advisory role of SRC should in this case be sought.

(iii) Any terms and conditions of service determined by IPUCCF are null and void to the extent of the law; and

(iv) The State Corporations Advisory Committee is required to review the existing guidelines for terms and conditions of service for State Corporations to be in line with the Constitution and create the necessary controls. The role of the Policy Service Commission and Salaries and Remuneration Commission should be taken into account. . . .”

21. The foregoing letter was forwarded to all the CEOs of State Corporations by the letter dated 24.7.2017 by the Secretary SCAC M/s. Jane Mugambi. The letter stated that:

“ . . .

RE: REVIEW OF TERMS AND CONDITIONS OF SERVICE FOR PUBLIC UNIVERSITIES.

Please find attached a self-explanatory letter Ref. NO PSC/14V9(107) of the 25th October, 2016 (Copy attached) addressed to the Chief of Staff and Head of the Public Service by the Secretary/Chief Executive Officer of the Public Service Commission regarding the above.

It is required that you note the concern of the Public Service Commission and comply with the directions thereof..”

22. After careful consideration of the above correspondences I find that the 2014 Exit Package Clause ran into problems. In my view, the foregoing letter by SCAC Secretary had the effect of implementing the recommendation by PSC that the impugned Exit Package Clause of 2014 was null and void for want of advisory from the SRC, after it was drafted by the IPUCCF, which draws its membership from the universities management. Article 230 (4) & (5) of the Constitution provides that the SRC has the power to advise the National and County Governments on the remunerations and benefits of all public officers and in so doing it shall consider the sustainability of the wage bill and also ensure inter alia the public services are able to retain the skills required to execute their functions.

23. In view of the failure by the respondent to comply with the foregoing constitution provision, I agree with the respondent that the said exit package clause of 2014 is unenforceable. As correctly indicated by the PSC in the letter dated 25.10.2016, the said clause is null and void, in my view, until it is approved or advised by the SRC.

24. However, the claimant is entitled to the exit packages under the 2003 Terms and Conditions of Service because they were made before the 2010 Constitution. The said terms and conditions of service forms the irreducible minimum after the nullification of the 2014 terms and conditions of service. The 2003 said terms and conditions of service did not require the advisory from the SRC because they crystalized before 27.8.2010 when the new constitution was promulgated and also before the SRC was operationalized.

Reliefs

25. There is no dispute that the respondent has not paid the claimant all her benefits under the 2014 exit package clause of her contract of service. The defence counsel stated from the bar that the respondent has paid some money to the claimant but no figure was stated. I therefore, make a declaration, as prayed, that withholding of the claimants exit package is unlawful and unfair subject to my holding above.

26. In addition I order the respondent to calculate and pay and/or accord the claimant all her lawful benefits exit package under the Clause 10 of the respondent’s 2003 Terms and Conditions of Service for Vice Chancellor which I have set out herein above, until the 2014 Exit

Package is approved by SRC.

27. The respondent is given 21 days to calculate and detail the claimant's entitlements under the said 2003 terms and conditions of service and in default the court will make a determination.

28. Finally, I dismiss the claim for damages for discriminatory treatment because, the offending circular and directives from the government agencies have not been challenged and they have not been found to be unlawful. In fact the court never quashed them in the two precedents cited by the claimant.

Conclusion and disposition

29. I have found that the exit package clause in the respondents 2014 Terms and Conditions of Service were unenforceable for want of approval by the SRC. I have further found that the invalidation of the said clause did not take away everything from the claimant because she reverted to the 2003 exit package clause which had crystalized before the 2010 Constitution came into force and SRC established. Consequently, I have ordered the respondent to calculate pay, and/or accord the claimant her exit package within 21 days and in default the court will quantify the package payable and/or to be accorded to the claimant. The costs of the suit are granted to the claimant plus interest at court rates from date of filing the suit. The suit will be mentioned on 18th February, 2020.

Dated, signed and delivered in open court at Nairobi this 24th day of January, 2010.

ONESMUS MAKAU

JUDGE