



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 718 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**PROF. JOSEPH MUNGAI KERIKO.....CLAIMANT**

**VERSUS**

**JOMO KENYATTA UNIVERSITY OF**

**AGRICULTURE AND TECHNOLOGY.....1<sup>ST</sup> RESPONDENT**

**VICE CHANCELLOR, JOMO KENYATTA UNIVERSITY OF**

**AGRICULTURE AND TECHNOLOGY.....2<sup>ND</sup> RESPONDENT**

**UNIVERSITY COUNCIL OF JOMO KENYATTA**

**UNIVERSITY OF AGRICULTURE AND TECHNOLOGY...3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

The claimant is a professor of organic chemistry at Jomo Kenyatta University of Agriculture and Technology (the 1<sup>st</sup> respondent). The 2<sup>nd</sup> respondent is the Vice Chancellor of the 1<sup>st</sup> respondent while the 3<sup>rd</sup> respondent is the Council of the 1<sup>st</sup> respondent.

The claimant was first employed by the respondent in December 1989 and was confirmed as Assistant Lecturer in 1992. He rose through the ranks to his current position of Professor. In February 2009, the claimant was appointed to the position of Principal, Nairobi Westlands Campus of the 1<sup>st</sup> respondent, a position he held until December 2012 when he was appointed Principal, Kirinyaga University, on a 5 year contract. He applied for and the 1<sup>st</sup> respondent granted leave of absence without pay to enable him take up the appointment at Kirinyaga University.

His stint at Kirinyaga University was however short lived. He resigned on 2<sup>nd</sup> May 2013. By a letter dated 3<sup>rd</sup> May 2013, the claimant applied to the 1<sup>st</sup> respondent for resumption of duty as Professor of Chemistry. The application was accepted and he resumed duty in May 2013. The claimant's salary on resumption of duty was a basic salary of Kshs.173,080 commuter allowance of Kshs.13,000 and house allowance of Kshs.69,033 making a gross of Kshs.255,113. The claimant was aggrieved by the remuneration he was offered as his previous salary was as follows –

In February 2009 when he was Principal, Nairobi Westlands Campus, he was earning salary as hereunder:

a. Basic salary	185,541
b. Benefits (water Electricity)	8,214
c. Community allowance	8,040
d. Entertainment	8,928
e. Extraneous Arrears	1,072

f. House Allowance	60,000
g. Responsibility allowance	6,286
h. Telephone Allowance	8,214

This was totalling to Gross salary of Kshs. 286,295

In March 2009, he was receiving a salary as follows:

a. Basic salary	231,120
b. Benefits (water Electricity)	10,000
c. Commuting allowance	8,040
d. Entertainment	10,000
e. House Allowance	60,000
f. Teeth Allowance	48,870
g. Responsibility allowance	7,000
h. Telephone Allowance	10,000

This was totalling to Gross salary of Kshs.385,030

In December 2012 as Principal of Kirinyaga University, he was receiving a salary as hereunder:

a. Basic salary	348,056
b. Benefits (water Electricity)	10,000
c. Car benefit	48,000
d. Entertainment	10,000
e. Extraneous Arrears	6,000
f. House Allowance	69,032
g. Management support	75,000
h. Responsibility allowance	7,000
i. Telephone Allowance	10,000

This was coming to Gross salary of Kshs.584,011

As Principal of Kirinyaga University the claimant's salary and benefits were as hereunder:

Basic salary	Kshs.389,703 per month
House allowance	Kshs.80,547 per month
None use of car	Kshs.13,000 per month
Entertainment allowance	Kshs.15,000 per month
Extraneous duty allowance	Kshs.60,000 per month
Telephone allowance	Kshs.15,000 per month

Water and Electricity	Kshs.15,000 per month
Domestic servants allowance	Kshs.15,000 per month
This was totalling to gross salary of	Kshs. 603,250.

The claimant avers that due to his reduced salary, he defaulted in repaying his loans.

The claimant avers that his right to fair labour practices has been infringed and if the prayers he seeks are not granted he will be driven out of job and would be declared bankrupt. That this would lead him to miss many job opportunities in spite of his qualifications.

It is the claimant's averment that on 16<sup>th</sup> January 2013 the Inter Public Universities Councils Consultative Forum (IPUCCF) agreed that the terms of service for Vice Chancellors, Deputy Vice Chancellors and Principals of constituent colleges in public universities who return to their home universities on exit of tour of duty shall be as follows –

- a. *Current Basic salary – frozen to self.*
- b. *Current house allowance – frozen to self.*
- c. *All other allowances payable on a monthly basis at the time of exit.*
- d. *Membership to a club of choice.*
- e. *An office with a secretary and a research assistant.*
- f. *An official car fuelled and serviced by the university and a driver.*
- g. *Sabbatical leave for 18 months (in case of two terms) and 9 months (in case of one term).*
- h. *One local and one international conference fully paid for by the university per year.*
- i. *Any other benefit as may be approved by council.*

It is the claimant's averment that he was discriminated by the respondents from 2009 when he was denied some allowances paid to senior management totalling to Kshs.1,782,000. He further avers that he was denied full gratuity after serving as Principal, Nairobi Westlands Campus between 2009 and 2012 and is still owed Kshs.380,000.

The claimant avers that the 3<sup>rd</sup> respondent is bound to run the Jomo Kenyatta University of Agriculture and Technology in accordance with the Constitution of Kenya, the Universities Act, No. 42 of 2012 and the Charter of the University. The Claimant further contends that the 3<sup>rd</sup> respondent, by virtue of Section 35 of the Universities Act is charged with the express duty of employing staff, approve the statutes of the University, approve policies of the University, approve the budget, recommend for appointment of the Vice Chancellor, Deputy Vice Chancellor, Principal of the constituent colleges/campuses and other staff of the University.

The Claimant avers that Article 27 of the Constitution guarantees him enjoyment of the right to equality which includes the right not to be subjected to any arbitrary and capricious exercises of power by the Respondents. That Article 28 guarantees the Claimant enjoyment of the right to inherit dignity and the right to have the dignity respected and protected at his place of employment. That Article 41 of the Constitution guarantees the claimant enjoyment of the right to fair labour relations, and right to fair remuneration. He avers that the right to fair labour relations includes the right to have his rights to his contact of employment respected.

The claimant avers that his appeals for adjustment of salary were rejected by the respondents.

In his memorandum of claim dated 28<sup>th</sup> April 2016 and filed on 3<sup>rd</sup> May 2016, the claimant seeks the following orders –

- a) A declaration that the reduction of claimant salary as at April 2013 of Kshs.683,231 Kshs.262,238 as from May 2013 after retuning from tour of duty from Kirinyanga University College was illegal and went against the labour laws and Inter Public University Councils Consultative Forum held on 16th January 2013 which agreed that staffs were retain their salary after exit from tour of duty.
- b) A declaration that the respondents' action of reducing the claimant's salary amounts discrimination and constructive dismissal which is unlawful.
- c) A declaration that the respondents have contravened the claimant's rights under Articles 27, 28, 41 and 47 of the Constitution.
- d) Order that the claimant current monthly gross salary of Kshs.296,642 be vacated and substituted with that of Kshs.731,909.11 which is based on the salary he was receiving as at April 2013 after taking into account the supposed annual increments to date.

- e) Order that the respondents pay the claimant salary arrears as from May 2013 to d; Kshs.15,561,112.24 which was occasioned by illegal reduction of claimant salary from 683,230 to 262,238 and taking into account the annual increment of 4 %.
- f) Pay the claimant the wrongly denied management support and extraneous allowances totalling to Kshs.1,782,000 and gratuity arrears of Kshs.380,000 for serving as Principal of 1<sup>st</sup> respondent Nairobi West Campus.
- g) Costs of the suit together with interest thereon at Court rates.
- h) Interest on (e), (f) and (g) above at Court rates until payment in full.

In the memorandum of reply dated 15<sup>th</sup> July 2016 and filed on 20<sup>th</sup> July 2016, the respondents deny reducing the claimant's salary and state that –

a) *The Claimant on 25<sup>th</sup> May 2011 signed the 1<sup>st</sup> Respondent's TERMS AND CONDITIONS OF SERVICE FOR A COLLEGE/ CAMPUS PRINCIPAL which provided as follows:-*

*Clause 22 RE-APPOINTMENT OF PRINCIPALS AFTER LEAVE OF ABSENCE*

*If prior to his/her appointment as Principal, he/she was a member of staff of JKUAT and his/her term has expired and not renewed, and he/she resumes their substantive appointment in JKUAT, the following shall apply:-*

- i) The Principal will revert to earning the basic salary and house allowance in the substantive position he/she was before being appointed Principal.*
- ii) However, the annual increment for the substantive position will be taken into account in determining the basic salary and house allowance.*
- b) The Claimant applied for leave of absence for a period of 5 years with effect from 27<sup>th</sup> November, 2012 to enable him take over appointment as the Principal, Kirinyaga University, College.*
- c) The Claimant did not serve the full 5 years as Principal, Kirinyaga University College and resigned before expiry of 6 months under unclear circumstances.*
- d) The Claimant did not receive an honourable discharge from the Kirinyaga University College.*
- e) The Claimant re-applied to be engaged by the 1st Respondent as Professor of Organic Chemistry which application the 1<sup>st</sup> Respondent considered and engaged the Claimant on or about 10<sup>th</sup> May 2013.*
- f) The Claimant upon re-admission into the University as Professor of Organic Chemistry settled in office and accepted the terms of service of that office but started making demands of the Principal's salary after expiry of about 8 months of service.*

The respondent prays that the claim be dismissed with costs.

The claimant filed a reply to the respondent's memorandum of reply dated 3<sup>rd</sup> June and filed on 4<sup>th</sup> August 2016. In the reply, the claimant states that his terms upon resumption of duty were guided by Article 5 of IPUCCF document which the respondents implemented discriminately. Further that he did not require to renegotiate and/or renew his engagement with the 1<sup>st</sup> respondent upon resumption of duty.

The claimant further avers that he alerted the 1<sup>st</sup> respondent about reduction of his salary on 3<sup>rd</sup> May 2013 and the 1<sup>st</sup> respondent responded by adjusting his salary in May and June 2013. That upon receipt of the payslips which he received in July 2013, he wrote to the 1<sup>st</sup> respondent on 8<sup>th</sup> August 2013 requesting for the correct adjustment.

The claimant avers that the resolutions reached by the IPUCCF committee on 16<sup>th</sup> January 2013 were quite adequate and did not require other approvals by both the Cabinet Secretary (CS) and the Salary and Remuneration Commission (SRC). That SRC was none existent by that time, and all other items in the Inter Public Universities Councils Consultative Forum (IPUCCF) documents were implemented immediately including Item No 4 (on adjustment of salaries of all senior University managers of all Public Universities including that of 2<sup>nd</sup> Respondent). That the implementation of the IPUCCF resolutions by the 2<sup>nd</sup> Respondent, were done haphazardly and with prejudice to discriminate and deny the Claimant his right for better salary and remuneration.

The claimant avers that the circular dated 14<sup>th</sup> May 2015 was released over 2 years after the Claimant resumed duty and does not state in any way whether it was to be implemented retrospectively. It is unlawful to implement such a document retrospectively on matters touching on individual's earnings. That the circular's contents went against the Constitution Article 41 on individual's right for better labour practices and fair remuneration. The claimant contented that his demands for salary adjustment and payment of arrears were rightful and within the law.

The claimant avers that, as a Full Professor of organic chemistry of 1<sup>st</sup> Respondent, the Claimant was entitled to a minimum basic salary of Kshs.240,950 from May 2010 which grew to Kshs.348,056 in December 2012 with a gross salary of Kshs.584,011 per month.

The Claimant's gross salary increased to Kshs.683,250 (Basic Kshs.389,703) at Kirinyaga University College in January 2013. That in accordance with the IPUCCF document (Pages 20, 21, 22, 23 and 24 especially item No. 5), the Claimant was entitled to a salary of Kshs.683,250 per month on resumption of duty in May 2013.

On 6<sup>th</sup> February 2018, the respondents filed a witness statement of Dr. Joseph Obwogi, the 1<sup>st</sup> respondent's Registrar, Administration in which he reiterated the contents of the respondents' reply.

In view of the facts of this petition were not contested the court directed parties to proceed by way of adoption of pleadings, documents and written submissions.

### **Claimant's Submissions**

The claimant submitted that he has been a Full Professor of Organic Chemistry of the 1<sup>st</sup> respondent from May 2010. That this is the highest grade in the academic category of the university, at Grade 15.

That in March 2009, the claimant's gross salary was Kshs.385,030 based on basic salary of Kshs.231,120. That the claimant's salary continued to increase by 4% annual increment and CBA adjustments and by December 2012, the claimant's gross salary was Kshs.584,011 with a basic salary of 348,056. That this was the claimant's highest basic salary between December 1989 and December 2012.

It is submitted that in a letter dated 28<sup>th</sup> April 2016, the State Corporations Advisory Committee wrote to the Permanent Secretary, Ministry of Education, Science and Technology awarding an allowance "*Council Matter's Allowance*" of Kshs.100,000 for Vice Chancellors and Kshs.80,000 for Principals of constituent colleges to replace sitting allowances during council meetings of public universities where they sit as secretaries.

The claimant further submits that IPUCCF, which brings together Chairs of all public universities Councils Vice Chancellors and Principals of all constituent colleges agreed on guidelines for staff returning to their home universities after a tour of duty at the meeting held on 28<sup>th</sup> January 2013. Among the guidelines was that the staff will retain the basic salary and house allowance (frozen to self) including all other allowances payable monthly to the officer at the time of exit.

It is submitted that upon the claimant seeking adjustment of salary, the 2<sup>nd</sup> respondent in her letters of reply dated 28<sup>th</sup> March and 25<sup>th</sup> September 2014 acknowledged the issue but declined to address the same, only claiming that the IPUCCF resolution had not been approved for use. It is submitted that the same was already implemented as confirmed in the letter dated 18<sup>th</sup> October 2016 by Prof. Romanus O. Odhiambo.

He submitted that the finding in **James Tuitoek v Chief of Public Service & Another [2016] eKLR** was that, after return from tour of duty individual officers should retain basic salary, house allowances and all other allowances payable to him/her on exit of duty as per the IPUCCF guidelines.

He submitted that the Respondent has not disputed the claim and that he relies on the Respondent's documents in support of his claim. He submitted that the refusal to adjust his salary in line with existing labour laws and relevant IPUCCF guidelines was a breach of Articles 27, 28, 41 and 47 of the Constitution.

He submitted that the assertion that he was paid the salary he was earning before he left for Kirinyaga University College taking into account his annual increment is untrue because he earned a gross of Kshs.584,011 and a basic salary of Kshs.348,056 before taking up his appointment at the University College.

He submitted that the letter dated 15<sup>th</sup> July 2016 granting leave without pay did not state that he would earn a basic salary of Kshs.173,080. He avers that the terms of service upon his return were directed by the IPUCCF guidelines and did not require any special conditions. That the Terms and Conditions of Service for a College/Campus Principal are not relevant in this case as they were only applicable when he worked as Campus Principal between February 2009 and December 2012.

He submitted that Circular OP/SCAC.1/12 (II) was quashed by the court and that in any event it was released on 14<sup>th</sup> May 2015, 2 years after his return from "*tour of duty*" and did not provide for retrospective implementation.

He submitted that he was granted leave of absence without pay thus he remained an employee of the University and had the right of return. He urged the Court to grant the prayers sought.

### **Respondents' Submissions**

The Respondents submitted that the cause of action arose in December 2012 when the Claimant's tenure ended and is therefore statutorily barred pursuant to section 90 of the Employment Act as the claim ought to have been filed within 12 months from the date of the cause of action. In support of this it relied on the case of **George Hiram Ndirangu v Equity Limited [2015] eKLR** where the Court defined a continuing injury or damage.

They submitted that the Claimant's letter of offer dated 12<sup>th</sup> February 2009 does not confer him management support and extraneous allowances and is therefore not entitled to these allowances. They further submit that the claim for gratuity is time barred. Further that the Claimant has not met the threshold for constructive dismissal.

They submit that the Claimant is not entitled to salary increments from 2013 as he sought leave of absence for 5 years effective 27<sup>th</sup> November 2012. They submit that the terms and Conditions of service of a college/campus principal executed by the Claimant were effective from 1<sup>st</sup> February 2009 for a period of 5 years and was set to lapse in 2014. They submit that he was re-engaged on 10<sup>th</sup> May 2013 and only raised the issue of salary increments 5 months after taking office.

They submitted that the minutes of IPUCCF meeting proposed harmonisation of terms of senior management in various universities on exit tour of duty and that the same required approval from the SRC. They submit that there is no evidence that the recommendations of the IPUCCF meeting were forwarded to the SRC.

To emphasise on the mandate of the SRC under Article 230(1) of the Constitution, they relied on **Kenya Union of Domestic Hotels Education and Allied Workers v Salaries and Remuneration Commission [2014] eKLR** and **Universities Academic Staff Union (UASU) v Salaries and Remuneration Commission & Another [2019] eKLR**.

### **Determination**

I have carefully considered the pleadings and submissions of the parties. Since the parties do not have a contest on the facts of this case, the only issue for determination is whether the claimant is entitled to the prayers sought in the memorandum of claim. The prayers can be summarised as follows –

1. Whether the reduction of the claimant's salary was illegal and unlawful.
2. Whether the reduction of salary constituted discrimination and constructive dismissal.
3. Whether the claimant is entitled to the arrears of salary arising from the reduction in the sum of Kshs.15,561,112.24.
4. Whether the claimant is entitled to extraneous allowance of Kshs.1,782,00 and gratuity arrears of Kshs.380,000.
5. Costs and interest.

I will dispose of issue no. 4 first, that is, the extraneous allowance and arrears of gratuity. These claims arose while the claimant was the Principal at the 1<sup>st</sup> respondent's Nairobi Westlands Campus from 2009 to 2012. I agree with the respondents that the two claims having been made more than 3 years after the cause of action arose, are time barred under Section 90 of the Employment Act which provides that –

### **90. Limitations**

**Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.**

The claims are not continuing injuries, as they are of a specific nature and are not recurrent. There was a specific period within which the claims were payable. The claims are therefore not valid by reason of limitation.

On the prayer for reduction of salary, the claimant's letter releasing him to Kirinyaga University College reads as follows –

“JKU/0722-4(114)

20<sup>TH</sup> DECEMBER 2012

Prof. Joseph M. Keriko,

C/o Department of Chemistry,

JKUAT

Dear Prof. Keriko

### **RE: LEAVE OF ABSENCE WITHOUT PAY**

*On behalf of the Council of Jomo Kenyatta University of Agriculture and Technology, I am pleased to grant you Leave of Absence without pay (retrospectively) for a period of five (5) years with effect from 27<sup>th</sup> November, 2012 up to and including 26<sup>th</sup> November, 2017 to enable you take up an appointment as a Principal at Kirinyaga University College.*

*During the period of this Leave, you will be required to make arrangements to maintain your pension by remitting both your*

contribution and the employer's portion of the contribution to the Staff Pension Scheme of JKUAT. The contribution should be 10% of your Basic Salary (JKUAT) being your contribution to the pension scheme and 20% of the same being the employer's contribution to the pension scheme. Cheques should be drawn in the name of the Fund Custodian - Standard Chartered Bank of Kenya Limited and sent to the Trust Secretary in JKUAT for onward transmission.

If you accept the Leave of Absence on the Terms of this letter, please sign in the space provided and return two copies of this letter to the Deputy Vice Chancellor (APD).

I take this opportunity to congratulate you on this appointment and wish you well as you carry out this important assignment.

Yours sincerely,

SIGNED

PROF. FRANCIS M. NJERUH, Ph.D.,

DEPUTY VICE CHANCELLOR (APD)"

The terms of employment for the 1<sup>st</sup> respondent provide for leave of absence at paragraph 10.8 as follows –

***"10.8 Leave of Absence***

*Upon request, employees shall be granted unpaid leave of absence when on secondment to public institutions or for personal reasons, on the recommendation of the Head of Department and approval of the Employer."*

The claimant's last salary as Principal of the respondent's Nairobi Campus was Kshs.584,001.00 gross with a basic of Kshs.348,056. His last gross salary as Principal Kirinyaga University was Kshs.603,250 with a basic of Kshs.389,703.

Upon resumption of duty he was paid a gross of Kshs.255,113 with a basic of 173,080, house allowance of Kshs.69,033 and commuter allowance of Kshs.13,000.

When he applied to have his terms handled according to the IPUCCF resolutions the respondent declined to pay on grounds that the same had not been approved by SRC. There is no evidence that the respondents sought any approval from SRC or clarification from IPUCCF.

The respondents have not explained why the claimant's salary upon resumption of duty was reduced below the salary that he earned before taking his leave of absence. Having been granted leave of absence, the claimant's employment did not terminate and therefore he could not resume duty on inferior terms.

The respondent submitted a circular from the Chief of Staff and Head of Public Service dated 14<sup>th</sup> May 2015 which directed that retired CEOs in academia and research who revert to serve the institution should not retain the perks for their former administrative positions. Needless to state the letter came long after the claimant's issue arose in May 2013. The circular however does not support the respondent's position, but rather the claimant's as it states that such officers should "*only enjoy remuneration and privileges that fall within the regular terms and conditions of service commensurate to their substantive appointment and grade.*" The circular does not state that such officers receive inferior terms

Having been in the employment of the respondents and his last basic salary and house allowance having been Kshs.384,056 and 69,032 respectively, the only allowances that the respondents can rightfully withdraw from the claimant are those related to the administrative functions such as water plus electricity, entertainment, extraneous duty allowance, management support, responsibility and telephone allowance.

It would amount to degrading treatment to reduce the basic salary and house allowance of the claimant as these were also factored into his pension scheme contributions which he was required by the respondent to remit as a condition for his release. This therefore remained his pensionable salary as of the date of resumption of duty.

I therefore find that the claimant is entitled to a basic salary of Kshs.348,056, house allowance of Kshs.69,033 and commuter allowance of Kshs.13,000. To this should be factored all the annual increments of 4% per annum and any CBA salary increases, if any to bring him to the salary he would have earned had he not been released on the tour of duty.

The respondents are directed to tabulate the salary payable to the claimant based on the forgoing together with arrears and file in court within 30 days from date of this judgment.

The case will be mentioned on 30<sup>th</sup> July 2020 for purposes of adoption of the tabulation of the respondent as the final award of the court.

The 1<sup>st</sup> respondent shall pay the claimant's costs for this suit. Interest shall accrue at court rates from date of filing suit in view of the nature of the claim being arrears of salary withheld by the respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF JUNE 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**