REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

(Before Hon. Lady Justice Maureen Onyango)

CAUSE NO. 884 OF 2015

PETER WANYAMA OJIAMBO.....CLAIMANT

VERSUS

THE TECHNICAL UNIVERSITY OF KENYA.....1ST RESPONDENT

PROF. F. W. O. ADUOL.....2ND RESPONDENT

PROF. JOSEPH KIPLANG'AT.....3RD RESPONDENT

CONSOLIDATED WITH CAUSE NO. 943 OF 2015

ALBERT PETER WERE ACHOKA.....CLAIMANT

VERSUS

THE TECHNICAL UNIVERSITY OF KENYA.....1ST RESPONDENT

PROF. F. W. O. ADUOL.....2ND RESPONDENT

PROF. JOSEPH KIPLANG'AT.....3RD RESPONDENT

JUDGEMENT

The Claimants, Peter Wanyama Ojiambo and Albert Peter Were Achoka individually filed suits against the Respondents on 22nd and 29th May 2015 respectively for constructive dismissal against the Respondents, The Technical University of Kenya, Prof. F. W. O. Aduol and Prof. Joseph Kiplang'at. They both subsequently amended their Memorandum of Claims on 3rd June 2019 and filed the same on 12th June 2019 specifically with regard to the amounts sought as compensation.

The Claimants aver that they were employees of the 1st Respondent having been employed as part time lecturers on contractual basis on or about 1st January 2007, with the 1st Respondent by then operating as Kenya Polytechnic. That between January 2007 and February 2014, the 1st Respondent renewed their contracts through annual appointment letters and they offered their services to the 1st Respondent without any interruption or break. As per the various appointment letters, they were to be paid Kshs.600 per student contact hour under specific terms and conditions which included:

(a) Preparation of Course outlines and distribution of the same to students.

(b) Attending lessons and ensuring completion of the curriculum.

(c) Assessing students and providing continuous assessment feedback.

(d) Preparation of examination items for ordinary student university examination.

(e) Marking exam scripts and submitting completed marking sheets.

They aver that on 17th February 2014, the 1st Respondent through the 3rd Respondent, offered each of them an appointment as Senior Technician on Grade VIII/IX/X in the Department of Printing and Media Technology for one semester with a remuneration of Kshs.64,703 which encompassed a basic salary of Kshs.30,681 House Allowance of Kshs.29,822 and House to Office allowance of Kshs.4,200. On 17th June 2014, they were each offered appointments as Senior Technician on similar grades for the semester with a remuneration of Kshs.68,234, which they both accepted. That on 12th November 2014, they were each offered an ambiguous appointment as part time lecturers (Grade IX/X) without explicitly being informed of the commensurate package accompanying the said appointments and that the terms in the letters dated 12th November 2014 partly stated as follows:

"Your compensation shall be based on the actual teaching load, details which shall be provided to you in the aforesaid letter from the Executive Dean, Faculty of Science and Technology"

"Please note that you will be paid on a monthly basis through the payroll for the actual teaching load. No other benefits are attached to this appointment."

That on several occasions, they both verbally and in writing requested the Respondent to reconsider and revise their appointment letters dated 12th November 2014 in view of their earlier appointment letters dated 17th February 2014 and 17th June 2014. That all the while, they continued faithfully performing their assigned tasks and duties including offering lectures, setting examinations, invigilating and marking exam scripts until April 2015 when the Respondents refused to allocate them further duties.

The Claimants aver that on 26th January 2015, they further requested the Respondents to facilitate their payments owing to the hardships they encountered in travelling to and from work and meeting basic economic means. That the 3rd Respondent on 18th February 2015 in an internal memorandum to the executive dean, indicated they would not be paid for the work done unless they compromised their positions and signed their appointment letters dated 12th November 2014 which were still pending review. That the Respondent continues to withhold their salaries for the months of September 2014 to April 2015 which they had worked for and also failed to assign them any duties since the month of May 2015.

The Claimants aver that the Respondents failed to provide any written reasons for the failure to reconsider and revise the appointment letters dated 14th November 2014. That the Respondents have thus constructively terminated the Claimants' engagement without any just or lawful cause by failing to assign them further duties and/or engaging them, despite having provided their services to the 1st Respondent for an uninterrupted period of 8 years.

That they have since discovered that the Respondents grossly underpaid them for their services performed as Lecturers and/or Senior Technicians/Technologists between the years 2007 and 2015, contrary to the clear ***Terms of Service for Teaching, Senior Technical and Senior Library Regulations of the 1st Respondent.*** That they have issued demand and Notice of intention to sue to the Respondents who have failed to address the Claimants' grievances.

They pray for judgment against the Respondents as follows:

(a) A Declaration that the Respondents have unlawfully withheld the claimants' salary from September 2014 to April 2015.

(b) A Declaration that the claimants are/were deemed to be still in employment for the period of May 2015 until the completion of the academic year with commensurate salary and in the alternative the Respondents are liable for unlawful constructive dismissal.

(c) A declaration that the Claimants are entitled to gratuity as Lecturers for a period of 8 years.

(d) Unpaid salary or salary arrears:

Peter: *September 2014 - April 2015*

Kshs.68,234 x 8 months = Kshs 545,872

Albert: *September 2014 - April 2015*

Kshs.68,234 x 8 months = Kshs.545,872

(e) Underpayment as Lecturer/Senior Technologist:

Peter: *January 2007 - January 2014*

Scale of Kshs.87,112 Less paid (Kshs.28,000)

Kshs.59,112 x 85 months = 5,201,856

February 2014 – April 2015

Salary Scale of Kshs.108,593 Less paid (Kshs.33,410)

Kshs.75,183 x 12 months = Kshs.902,196

Plus allowances (Kshs.54,216 + 4,200) x 12 = Kshs.817,824

Albert *January 2007 – December 2011*

Scale of Kshs.87,112 Less paid (Kshs.38,400)

Kshs.48,712 x 60 months = 2,922,720

January 2012 – April 2012

Scale of Kshs.87,112 Less paid (Kshs.24,000)

Kshs.63,112 x 4 months = 252,448

May 2012 - April 2014

Scale of Kshs.87,112 Less paid (Kshs.28,800)

Kshs.58,312 x 24 months = 1,399,488

May 2014 - April 2015

Scale of Kshs.87,112 Less paid (Kshs.33,410)

Kshs.53,702 x 12 months = Kshs.644,724

Plus allowances (Kshs.54, 216 + 4,200) x 12 = Kshs.817,824

(f) Gratuity for 7 years as per the terms of Service

Peter *Kshs.87,112 x 12 months x 7 years x 15% = Kshs.1,097,611*

Albert *Kshs.87,112 x 12 months x 7 years x 15% = Kshs.1,097,611*

(g) Damages of 12 months as per section 49 of the Employment Act.

(h) Interest on withheld salary and remuneration at commercial rates from September 2014 or in the alternative from date of filing suit.

(i) Certificates of service

(j) Costs of the suit.

The Respondents filed a Statement of Defence dated 21st June 2019 admitting to have employed the Claimants and adding that the Claimants were employed as part time lecturers on contractual basis, with their appointment letters being very specific as to the duration and nature of engagement. They contend that the standard format of appointment letters was introduced by the 1st Respondent due to malpractices that had been pointed out to it by the Ministry of Education in relation to the recruitment and payment of part-time, sessional and Adjunct Professors. That after introduction of the new appointment letter, it was imperative for any person wishing to continue doing contractual work for the 1st Respondent as a part-time lecturer, sessional lecturer and or as an Adjunct Professor, to sign the same after completing their then existing contracts. The Respondents further contend that the appointment letter was designed to be a framework document whose minute details would be filled in by the relevant Dean as otherwise it would become cumbersome manual.

They aver that the Claimants having not signed the new appointment letters dated 12th November 2014, they were no longer legally engaged with the 1st Respondent who further stopped allocating duties to them. That the 1st Respondent was not bound to give reasons for not revising the Claimants' appointment letters since it was a decision arrived at after various consultations at top management level. They aver that the Claimants needed to have signed their individual appointment letters as earlier issued so as to enable the relevant offices process their payments but since they never signed the same, they failed to renew the contracts between them and the 1st Respondent. That any legal engagements with the 1st Respondent were terminated and no payments could arise from the 1st Respondent. The Respondents pray for dismissal of the Claimants' case with costs.

The Respondents also filed a Witness Statement made by the Legal Officer of the 1st Respondent, RUTH KIRWA who states that the 3rd Respondent did not communicate that payment would not be made but pointed out that the Claimants were non-entities at the time as there was no policy or guidelines that such payments could be pegged on. That other lecturers who were offered similar appointments at the same time during the transition to the new regime signed the new appointment letters, accepted the terms therein without any reservations and continued with their duties. That since the employment contract is a contract like any other dependent on the will and intentions of both parties, the 1st Respondent exercised its right to disengage with the Claimants as they had not complied with the laid down regulations.

She states that part-timers are excluded from the conflict of interest rule set out at **Clause 5 of the Terms of Service relating to Teaching, Senior, Technical, Senior Library and Senior Administrative Staff** since they have the opportunity to engage in any other activities outside the institution. She contends that if the Claimants continued to teach without the knowledge of the management of the institution, they cannot claim back payment for a time they were illegally conducting teaching activities and were not recognizable by the system. That it is unknown whether the Claimants taught any classes at all and that the 1st Respondent being a public institution, no one is barred from being on its premises. She contends that the CBA annexed by the Claimants was signed 13th March 2017 way after both Claimants had left employment and that they cannot purport to enjoy the benefits therein when they were paid all their dues.

Claimants' Submissions

The Claimants submit that the 1st Claimant, Peter Wanyama tendered both testimonial and documentary evidence demonstrating that they continued working from 1st September 2014 when the new semester began until end of April 2015 when the 1st Respondent subsequently failed to allocate them any duties. That no sufficient rebuttal or cogent evidence has been offered by the Respondents to counter the Claimants' evidence apart from claiming their service was irregular. That the reason given by the Respondents for the non-payment being the Claimants not having signed the new appointment letters was information only communicated to the Executive Dean by the 3rd Respondent on 18th February 2015. Further, the new offer letters were only availed to them more than two months after they had resumed duties with expectation of receiving terms equal to the previous terms of service or even better.

They submit that non-payment of salary pending any resolution of a dispute would amount to an infringement of **Section 18 of the Employment Act 2007** which provides that wages and salaries are deemed to be due in the case of an employee employed for a period exceeding one month, at the end of each month or part thereof. They cite the case of **Titus Wamalwa Khaemba v Transport Workers Union [2014]** eKLR where it was held that even in a case where there is provision in the respondent's rules or constitution sanctioning that a salary can be withheld for any reason, the same is subject to applicable law as under section 18 of the Employment Act.

The Claimants also rely on the **Collective Bargaining Agreement, 2013 to 2017** *(page 77 of bundle)*, which provides at **paragraph 2.2** that: *"No employee already in service shall receive terms and conditions of service subsequent to the signing of the agreement less favourable than the terms and conditions of his/her service as at that time."* That the Respondents are estopped from taking any other position as regards the terms of remuneration of the claimants considering that they continued engaging them. That **Section 120 of the Evidence Act (Cap 65) Laws of Kenya** provides that when one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

The Claimants further contend that the general principal on change of salary demands that an employee be given justifiable reasons for a reduction in salary as the same would constitute a variation of the terms of agreement between the two parties. They rely on the case of **Fredrick Ouma v Spectre International Ltd [2013] eKLR** where the court held that to reduce an employees pay without any discussion or warning would disorganize the employee and may render the employee incapable of meeting his obligations and especially prearranged obligations including payment of rent and bills. The Claimants urge this Court to thus uphold the claim for unpaid salaries as proved and consequently award each of them the same as pleaded.

The Claimants submit that RW1 admitted in cross-examination that the Claimants' terms of employment were governed by the **Terms of Service for Teaching, Senior Technical Senior Library and Senior Administrative Staff dated 1st July 2009** *(Page 69 of bundle)* and that as per **Clauses 8.10** and **20.1**, the Claimants were entitled to *House to Office Allowance* and *Housing Allowance*. They submit that the two allowances were only reflected in their earlier appointment letters dated 17th February 2014, 17th June 2014 and 23rd June 2014 and that they were therefore underpaid. They urge the court to award the sums pleaded, calculated using the difference between the actual pay and the amount provided for under both the terms of service and the CBAs. That the court should further adopt the sum of Kshs.14,666 (**Schedule 1 of the 2013 -2017 CBA**) as the correct amount for House to Office Allowances.

On gratuity, the Claimants submit that **Clause 10.2 of the Terms of Service** provided that where an employee is appointed on contract terms for a continuous period of two or more years and does not join the University College Pension Scheme, he or she shall be eligible for payment of a gratuity at the rate of 15% of his or her basic salary. That the issue in contention is the interpretation of the words '*contract Terms of Service for a continuous period of two or more years*' and the Respondents have not offered any evidence showing there is a category of employees that were on contract terms beyond two years and to whom the said clause referred to. They rely on the case of **Kenya Plantation & Agricultural Workers Union v Keen Kleeners Limited [2014] eKLR** where the claimants had similarly been on short term contracts and the court held as follows:-

> "*The majority of the Grievants worked continuously, albeit under these periodic arrangements from 2007 to 2011. They cumulatively served for continuous working days of not less than 1 month. They served for years, between 2007 and 2011. They were paid monthly and the Respondent would therefore be incorrect to treat the Grievants as Casual Employees. Section 37 of the Employment Act 2007, demands the Grievants are treated as regular Employees, enjoying the full benefits and protections afforded under that Act."*

It is submitted by the Claimants that they were never consulted and neither did the Respondents discuss the new terms with them prior to their introduction and further, they were not informed of the purported directive by the Ministry of Education. That signing the new

appointment letters before their grievances had been addressed would have compromised their position and they refer to **Section 10(5) of the Employment Act** which provides that: *'Where any matter stipulated in subsection (1) changes, the employer, shall in* consultation with the employee, *revise the contract to reflect the change and notify the employee of the change in writing.'* That it is clear the Respondents breached the law and did not act in a fair administrative manner in addressing their grievances considering the delay in communicating to them. That the Respondents have further not provided this court with the purported letter from the Ministry of Education to enable the court assess whether their actions were reasonable. The Respondents further seek for Certificates of Service as under **Clause 14 of the Terms of Service.**

Respondents' Submissions

The Respondents submit that the 1st Respondent adhered to the requirement of **Section 9(2) of the Employment Act** through its offer of employment dated 12th November 2014 but since the Claimants never consented to the offer by signing the same, an employer-employee relationship was never created. They submit that Courts have severally upheld the principle that fixed-term contracts carry no expectancy of renewal as was similarly held in **Industrial Court Cause No. 1541 of 2010, Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Company Limited and Others**. They further cite the Court of Appeal case of **Registered Trustees of the Presbyterian Church of East Africa and Another v Ruth Gathoni Ngotho- Kariuki [2017] eKLR** where the court in determining whether an employee who continued to work after the expiry of her contract was entitled to salary for that period worked held that:

> *"We respectfully disagree that the failure to do so amounted to an automatic renewal. Why do we say so? It is clear from the wording of the above clauses as well the hospital's human resource manual that the renewal was subject to the mutual consent of the respondent as the employee and the appellants' as the employer. To hold otherwise would be tantamount to holding at servitude a party who wishes to exercise his/her right of termination in terms of the contract as observed by this Court in* ***Minnie Mbue v Jamii Bora Bank Limited [2017] eKLR.*** *Further, this Court in its own words in* ***Kenneth Karisa Kasemo v Kenya Bureau of Standards [2013] eKLR*** *held:*
>
> *"We have carefully considered the law and the facts surrounding this case, suffice to say that the law on employment does not normally envisage a situation where an employee is "forced* upon an employer (and vice versa) and case law is rife on this subject and indeed this Court has time without number honoured the contract existing between the parties."*
>
> *Bearing the foregoing in mind, we note that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the respondent's contract ought not to have been maintained. This is in relation to the salary for the months of April up to 5th 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."*

They submit that RW1 who was acquainted with the internal mechanism within the 1st Respondent institution, questioned the authenticity of the *result sheet* annexed by both Claimants showing that they marked exams and taught the same students the same course being diploma in technology in printing. That at ***page 40 of the 2nd Claimant's memorandum of claim*** is an annexure with results but has no unit indicated and neither is it signed by both the lecturer and head of department. That the result sheet annexed by the 1st Claimant has been signed by him but lacks the signature of the head of department to signify he was duly contracted by the 1st Respondent. The Respondents contend that the Claimants simply want to hoodwink the court that they worked in the 1st Respondent institution despite not having a contract. They urge this court to find that the contract between them and the Claimants lapsed on 15th August 2014 by effluxion of time and that consequently the claim for salary for September 2014 to April 2015 should not be granted.

It is submitted by the Respondents that the **CBA dated 13th March 2017** which is being relied upon by the Claimants, guides members of University Academic Staff Union (UASU) and the respective universities. That the said CBA acknowledges lecturers who are in grade (12A) and not the Claimants who were in grades viii/ix/x before they accepted letters of offer which gave them the job description as senior technicians. That the Claimants did not produce before this court any document to prove they were members of UASU to entitle them to benefit under the CBA dated 13th March 2017 and further, that the Claimants did not lead evidence to this court on any contravention of their rights that would enable the court conclude they were discriminated against. They cite the Court of Appeal case of **Trocaire v Catherine Wambui Karuno [2018] eKLR** where it was held that it is trite that the function of a court is to enforce a contract as agreed by the parties and that the court should not make additions to such a contract by implying a term merely because it deems it would be reasonable to do so.

The Respondents submit that this Court should resonate with the decision of Chemmuttut J. in the case of **Kenya Union of Commercial, Food & Allied Workers v Hebatulla Brothers Ltd [2002] eKLR,** that for a contract of service to be continuous then the contract should not be a break in continuity of service and if an employee is re-employed then that would suffice to be a break in his service. They contend that the Claimants herein were re-employed severally since their contracts were fixed term and would lapse due to effluxion of time. That once a fixed term contract is at an end, the employer has no obligation to justify termination on other grounds beyond the lapse of the fixed period as was held by the court in **Oshwal Academy (Nairobi) & Another v Indu Vishwanath [2015] eKLR** which quoted with approval Rika, J. sentiment in **Bernard Wanjohi Muriuki v Kirinvaga Water And Sanitation Company Limited** *&* ***another [2012] eKLR:-***

> *"In the view of the Court, there is no obligation on the part of an employer to give reasons to an employee why a fixed-term contract of employment should not be renewed. To require an employer to give reasons why the contract should not be renewed is the same thing as demanding from an employer to give reasons why a potential employee should not be employed. The only reason that should be given is that the term has come to an end, and no more. ... Reasons, beyond effluxion of time, are not necessary in termination of fixed-term contracts, unless there is a clause in the contract, calling for additional justification for the termination."*

That it is their submission that the contract between the Claimants and the 1st Respondent which lapsed on 15th August 2014 did not contain any clause that would have given the Claimants any legitimate expectation for renewal. Further, that they were not expected to serve any termination notice on the Claimants since the Claimants' contracts were for a fixed term and terminated by effluxion of time and that

damages should hence not be awarded under section 49 of the Employment Act. The Respondents agree to issue the Claimants with a certificate of service as will be directed by this court.

Analysis and Determination

The first issue for determination is whether the Claimants were unlawfully constructively dismissed by the Respondents. The second issue for determination is whether the Respondents unlawfully withheld the Claimants' salary from September 2014 to April 2015. The third issue for determination is whether the Claimants are entitled to the reliefs sought.

The **Black's Law Dictionary, 8th Edition** refers to constructive dismissal as constructive discharge and defines it as "***a termination of employment brought about by making the employee's working conditions so intolerable that the employee feels compelled to leave".*** Constructive dismissal was also defined in **Pretoria Society for the care of the Retarded v Loots (1997) 6. ELLR** as a situation in the workplace which has been created by the employer and which renders the continuation of the employment relationship intolerable for the employee to such extent that the employee has no other action available but to resign.

In the case of **Kenneth Kimani Mburu & Another v Kibe Muigai Holdings Limited, Nairobi ELRC Cause No. 339 of 2011** at page 10, Rika, J. further defined constructive dismissal as follows:

> *"…constructive dismissal occurs when an employee is forced to leave his job against his will, because of his employer's conduct. Although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed. The basic ingredients in constructive dismissal are:-*
>
> *a. The employer must be in breach of the contract of employment;*
>
> *b. The breach must be fundamental as to be considered a repudiatory breach;*
>
> *c. The employee must resign in response to that breach; and*
>
> *d. The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived."*

In the case of **Premier Construction Limited v Josephat Bwire Lukala & 5 others [2017] eKLR**, the Court of Appeal stated that constructive termination or dismissal will be imputed only where the employer is in breach of some fundamental terms of the contract of employment that makes it untenable for the employee to remain in such employment and resigning in response to that breach.

CW1 testified that between January 2007 and April 2015, he was a lecturer at Technical university (RUC) of Kenya. His duties were teaching, setting exams, moderating, marketing, submission of marks and invigilation.

The claimants have exhibited letters appointing both of them as lecturers. The appointments between 2009 were from the academic 2009/2010. The appointment letters specified the subjects to be taught and the number of hours per week. Payment was specified to be Kshs.600 per student contract hour.

They appointments from January 2012 and 2013 were per semester (January – April 2012, May – August 2012 and September – December 2012). The appointment letters specified the subjects, the hours per week, the rate per hour (Kshs.600) and the rate of pay per week based on the number of hours stated in the contract.

In 2014 the claimants were issued with contracts stating the start and end day, which were per semester. For example, Mr. Ojiambo was issued with a contract dated 17th February 2014 to cover the period 6th January to 18th April 2014, a letter of appointment dated 17th June 2014 to cover the period 5th May to 15th August 2014.

The appointments for the period January to August 2014 had specific provisions for monthly salary, house allowance and house to office allowance.The remuneration for the period January to April 2014 for both claimants was salary of Kshs.30,681, house allowance of Kshs.29,822 and house to office allowance of Kshs.4,200 per month.

The remuneration for the period May to August 2014 was salary of Kshs.33,410, house allowance of Kshs.30,624 and house to office allowance of Kshs.4,200 per month.

However, the appointments dated 12th November 2014 which was issued to both claimants, did not state the remuneration or even the rate per hour to enable the claimants to ascertain their remuneration. The letter states–

> *"12th November 2014*
>
> *RE: TUK/FSST/PTL/SCAT/PMT/2014-15*
>
> *Mr. Albert P. W. Achoka*
>
> *P. O. Box 52428 – 00200*

NAIROBI

Mobile No: 0727 965641, 0727 859714

Dear Mr. Achoka,

RE: APPOINTMENT AS PART-TIME LECTURER (GRADE 1X/X)

On behalf of the Management, I am pleased to offer you appointment as a Part-time Lecturer (Grade IX/X) in the Department of Printing and Media Technology for the Academic Year 2014/2015. You will be reporting to the Chairman, Department of Printing and Media Technology under the general direction of the Executive Dean, Faculty of Social Sciences and Technology and the Director, School of Creative Arts and Technologies.

Your detailed responsibilities shall be specified to you by the Executive Dean, Faculty of Social Sciences and Technology under a separate cover.

You will be expected to:

- *Work under the general direction of the Executive Dean, Faculty of Social Sciences and Technology and the Director, School of Creative Arts arid Technologies, under the direct supervision of the Chairman, Department of Printing and Media Technology;*

- *Teach diligently and cover the syllabus, as specified, for courses assigned to you;*

- *Assess the students and provide continuous assessment feedback, and supervise examinations for courses assigned to you;*

- *Mark your students' examination scripts and submit completed mark sheets to the Chairman, Department of Printing and Media Technology;*

- *Submit a handing over report advising on the general performance in the delivery of courses assigned and possible solutions; and*

- *Perform any other duties of teaching as may be assigned to you by the Chairman, Department of Printing and Media Technology from time-to-time.*

Your compensation shall be based on the actual teaching load, details of which will be provided you in the aforesaid letter from the Executive Dean, Faculty of Social Sciences and Technology.

Your performance will be appraised and evaluated from time to time.

Please note that you will be paid on a monthly basis through the payroll for the actual teaching load. No other benefits are attached to this appointment.

If you accept the appointment on these terms, please sign two copies of this letter and return them to the undersigned.

Yours sincerely,

SIGNED

PROF. JOSEPH KIPLANG'AT, PhD

DEPUTY VICE-CHANCELLOR

ADMINISTRATION, PLANNING AND INFRASTRUCTURE"

[Emphasis]

The letter from Peter Wanyama Were, the 1st claimant, was identical. This is the letter of appointment that the claimants did not sign. As is evident from the date of the letters which were for the academic year 2014/2015, they were issued well into the semester when the claimants had already been assigned duties by the Executive Dean of their department whom they reported to.

The claimants wrote to the respondent over both non-payment of their salaries and review of the terms but there was no favourable response, the respondent insisting that they must sign the contracts before their payments could be processed.

As submitted by the claimants, the terms of the contract they were issued with did not meet the statutory requirements as set out in Section

10 of the Employment Act which requires remuneration to be clearly set out in the contract of employment. Section 10(2) sets out particulars to be contained in a contract

of service at 10(2)(h), (i) and (j) that –

(2) A written contract of service shall state—

(a) the name, age, permanent address and sex of the employee;

(b) the name of the employer;

(c) the job description of the employment;

(d) the date of commencement of the employment;

(e) the form and duration of the contract;

(f) the place of work;

(g) the hours of work;

(h) the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;

(i) the intervals at which remuneration is paid; and

(j) the date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and

(k) any other prescribed matter.

Further as submitted by the claimants, Section 10(5) of the Act requires that any changes in the terms of employment especially those that adversely affect an employee must be made in consultation with the employee as follows –

Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

Section 10(3)(a) of the Act further requires the following particulars to be specified in the contract.

(a) any terms and conditions relating to any of the following—

(i) entitlement to annual leave, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated);

(ii) incapacity to work due to sickness or injury, including any provision for sick pay; and

All these particulars were not contained in the contract issued to the claimants by the appointment letter dated 12th November 2014.

In the case of **Fredrick Ouma v Spectre International Ltd [2013] eKLR**, Cause No. 4 of 2012, the court while commenting on reduction of salary of an employee stated –

"*Fair remuneration in my view means remuneration that is*

adequate and commensurate to the services rendered. It certainly includes a measure of certainty. This is why it is imperative that the remuneration payable to an employee is discussed and agreed upon before services are rendered. The certainty here is important to allow the employer prepare and budget for his pay. Such preparation may include taking a loan in anticipation of the salary that is payable.

To reduce an employee's pay without any discussion or warning would therefore disorganize the employee in question and may render the employee incapable of meeting his obligations and especially pre-arranged obligations including payments of rent and bills. When the respondent herein reduced the claimant's salary without any reasons, they were indeed infringing on his right to be fairly remunerated as enshrined in our Constitution.

Remuneration is defined under ILO Convection 100. Equal Remuneration Conviction, 1957 to include:

"ordinarily, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly whether in cash or in kind by the employer to the worker and arising out of the worker's employment"

This definition in itself envisages that this remuneration cannot

be reduced or valued negatively to the detriment of the worker hence the use of the words basic or minimum. This remuneration can only be improved and never reduced unless there is a special understanding between the employer and the employee and after discussion and agreement by the employee.

The action of the respondent in reducing the claimant's salary in the period under scrutiny was unfair and unjustified given his legitimate expectation to continue receiving the salary he was anticipating."

From the foregoing, I find that the appointment letter dated 14th November 2014 was unlawful as it did not meet the minimum statutory requirements under the Employment Act. Section 3(6) of the Act provides that –

(6) Subject to the provisions of this Act, the terms and conditions of employment set out in this Act shall constitute minimum terms and conditions of employment of an employee and any agreement to relinquish, vary or amend the terms herein set shall be null and void.

The terms of the letter are thus null and void as provided in the Act.

Section 16 gives power to this court to determine the applicable terms of employment where an employee files a complaint in relation to a stalement under Sections 10, 12 or 13 of the Act as follows –

(2) Where as a result of a complaint arising out of section 10, 12, 13 or 20 the Industrial Court determines particulars which ought to have been included or referred to in a statement given under these sections, the employer shall be deemed to have given to the employee a statement in which those particulars were included or referred to as specified in the decision of the Industrial Court.

(3) Where under subsection (1) the Industrial Court has to determine whether the statement given complies with a statement under section 10, 13 or 20 the Industrial Court may—

(a) confirm the particulars as included or referred to in the statement given by the employer;

(b) amend those particulars; or

(c) substitute other particulars for them as the Industrial Court may determine to be appropriate, and the statement shall be deemed to have been given by the employer to the employee in accordance with the court's decision.

CW1 testified that the Executive Dean had requested for their contracts to be extended under similar terms as the previous contract which had just lapsed and on that basis scheduled the claimants in the teaching timetables as demonstrated at ages 33 to 41 of the claimant's list and bundle of documents dated 12th February 2020.

In view of the fact that by 12th November 2014 when the impugned appointments letters were issued, the claimants were already working for the respondent based on the request of the Dean that their contracts be renewed under the terms of the last contract, and that they only received the letters on 20th November 2014, further, having found that the appointment letter of 12th November 2014 was null and void for non-compliance with mandatory provisions of the Act, I find that the claimant's contracts were renewed on the terms of their immediate past contracts.

They are therefore entitled to payment at the rate of Kshs.33,410 for basic salary, Kshs.30,624 house allowance and Kshs.4,200 house to office allowance all totalling to Kshs.68,234 per month. Having been engaged from September 2014 to April 2015, each claimant is entitled to **Kshs.545,872** which I award them.

The claimants further allege that they were underpaid, relying on the Terms of Service for Teaching, Senior Technical, Senior Library and Senior Administrative Staff of the Kenya Polytechnic University College dated 1st July 2009. They submit that they were engaged by the respondent from 1st January 2007 up to the time of ceasing employment in April 2015, first on regular contracts and later on periodical contracts from 23rd June 2009. That this fact is admitted by the respondent at paragraphs 4 and 5 of the Statement of Defence and also by RW1. That RW1 further admitted that under the Terms of Contract the claimants were entitled to house allowance and house to office allowance. They submit that these allowances were not paid to them until February 2014. They therefore pray for the underpayments for the period January 2007 to January 2014 at Kshs.5,201,586.

The claimants further pray for the difference of remuneration paid to them from February 2014 to April 2015 and those provided for in the terms of service.

The respondent submits that the claimants were appointed in the position of Senor Technician Grade VII/IX/X and not Grade XIIA which they have used to tabulate the arrears. Further, that the CBA dated 13th March 2017 which the claimants relied upon was for University Academic Staff Union (UASU) and the respective Universities. That the claimants did not prove they were members of UASU to entitle

them to benefit for the terms of the CBA.

I agree with the respondent that the claimants have not demonstrated that they were entitled to the benefits under the Terms of Service or the CBA in respect of remuneration. Their contracts were specific about their remuneration. They did not at any time during their engagement question the remuneration as set out in their contracts, other than the last one dated 12th November 2014.

Even if they were entitled to the same which they are not, claims from 2007 to 2012 would be time barred as they relate to a period more than three years to the date of filing suit.

I find that the claimants have not proved their claims under that head and the same are for dismissal which I hereby do.

The claimants further claimed for gratuity. They rely on the provisions of Clause 10.2 of their Terms of Service which provided that:-

> *"10.2 Where an employee is appointed on contract Terms of Service for a continuous period of two or more years and does not join the University College Pension Scheme, he or she shall be eligible for payment of a gratuity at the rate of fifteen percent (15%) of his or her basic salary."*

It is not in dispute that the terms of engagement between the claimants and the Respondent were "*contract terms*". RW1 admitted that the claimants were on contract terms and were therefore entitled to gratuity as they were engaged under Grades XI and XII as Technologist or Senor Technologist.

The Terms of Service (TOS) at Clause 9 provided that Appointments under the TOS shall be on temporary, contract or permanent terms as may be determined by the council and indicated in the letter of appointment. The claimant's letters indicated that they were on contract and/or temporary terms. Clause 10.2 of the TOS provided for payment of gratuity as follows –

> *"Where an employee is appointed on contract Terms of Service for a continuous period of two or more years and does not join the University College Pension Scheme, he or she shall be eligible for payment of a gratuity at the rate of fifteen percent (15%) of his or her basic salary."*

The respondent's submissions that the claimants were appointed on fixed term contracts of four months and not two years would go contrary to the Clause 10.2 of the TOS which does not state that the contract must be limited to a term. In any event the claimants stated that their original engagement was continuous until the respondent started issuing to them 4 months' contracts in June 2009. The only qualifications under Clause 10.2 are that the employee has worked for a continuous period of 2 years or more and is not a member of the University Pension Scheme. The entitlement is in the mandatory sense that such employee "*shall*" be entitled to gratuity.

I therefore find that the claimants, having worked for the respondent for more than 2 years on continuous basis, and having not been members of the Respondent's Staff Pension Scheme, are entitled to gratuity at the rate of 15% of basic salary. In view of the fact that the respondent did not dispute the tabulation by the claimants, I award them the amounts as claimed but based on basic salary of Kshs.33,410. This would amount to (33,410 x) = 5,011.50 x 12 x 7 = **Kshs.420,966** as gratuity.

The claimants further prayed for compensation for unfair termination of employment. RW1 admitted that the respondent changed the terms of engagement of the claimants. No notice was given to the claimants about the change. All the respondent did was prepare new contracts with new terms, albeit, inferior to the terms that the claimants had been engaged on. When the claimants refused to sign the contacts, they were assigned no further work. They were further not paid for work done during the semester when the terms were unilaterally changed by the respondents.

Change of terms to the detriment of an employee amounts to fundamental breach of contract and is sufficient for repudiation of the contract. This amounts to unfair termination. Taking into account all the circumstances of this case, the facts set out in Section 49(4) of the Act especially the cumulative length of service, the manner in which their employment ended and the compensation awarded, I award each of the claimant's 5 months' salary as compensation in the sum of **Kshs.341,170**.

In the final analysis I enter judgment for each of the claimants

against the respondents as follows –

1... Unpaid Salary..... Kshs.545,872

2... Gratuity..... Kshs.420,966

3... Compensation..... Kshs.341,170

The total award for each claimant is..... Kshs.1,308,008

The respondent shall pay claimant's costs for the suit and the decretal sum shall accrue interest from the date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JULY 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 15th March 2020 and subsequent directions of 21st 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, the 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 the 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