



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

PETITION NO. 11 & 12 OF 2020

1. PROF. GERALD KANYAGA MATHAKIA

2. PROF. MOSES GACHARI KAROKI.....CLAIMANT

VERSUS

DEDAN KIMATHI UNIVERSITY OF TECHNOLOGY.....RESPONDENT

RULING

1. The Petitioners herein are both employees of the Respondent and have sought similar orders. The facts that are largely uncontested are that they were employed at different times by the University and in the course of their service enjoyed salaries and perks that are now the subject of this Ruling. They filed 2 different Petitions but for purposes of the applications for interim relief and this Ruling were consolidated solely for the determination of the motions. The Petitioners represented by Mr. Fred Ngatia SC and the Respondent represented by Mr. Wahome Gikonyo articulated their respective cases via the virtual platform now in place for court matters and I am grateful to both of them for the concise and focused submissions. The applications sought in the main for an order to stay the decision of the Respondent purporting to replace the Petitioners' terms of service on exit of duty as communicated vide the Respondent's letters to the Petitioners with the terms and conditions of service of a Full Professor. The Petitioners assert that they were both appointed as Deputy Vice Chancellors Academic (Prof. Muthakia) and Deputy Vice Chancellor Administration & Finance (Prof. Karoki) respectively. Upon appointment to these positions they served and successfully exited the positions as follows:- for Prof. Karoki, upon his tenure lapsing on 18th July 2018, the Respondent's University Council resolved that Prof. Karoki could resume his academic position on terms that he retains the basic salary and house allowance as per the terms of Clause 24 of the contract dated 25th February 2018 while for Prof. Muthakia he too was advised vide the Respondent's letter dated 19th June 2018 that he could resume his academic position on terms that he retains the basic salary and house allowance as per the terms of Clause 24 of the contract dated 25th February 2014.

2. The Petitioners through their counsel argue that the Respondent's letters to them informed them that their terms and conditions of service had been replaced with the terms and conditions of a full professor and that the replacement amounts to a substantial reduction of the Petitioners' salaries from a sum of Kshs. 432,256/- to Kshs. 248,890/-. The Petitioners assert that prior to the decision contained in the letters being made, they were not granted an opportunity to be heard in contravention of the provisions of Article 47 of the Constitution and Section 4 of the Fair Administrative Actions Act. They assert that the Respondent has no power by dint of the provisions of Section 10(5) of the Employment Act to unilaterally vary the Petitioners terms and conditions of service.

3. Mr. Ngatia argued that at the time of the appointments the law provided that the Cabinet Secretary appoints the Deputy Vice Chancellors and the contracts were to be supplied by the University's Council which was the body empowered under Section 35 of the Universities Act to employ. He submitted that the provisions of the contract were that the terms of service on exiting the position was that on exit the employee would get exit salary in line with PSC guidelines and retain club benefits and so on. The Petitioners argued that upon exiting the position their terms of remuneration because of the move from position of DVC to faculty were to be determined by the Council. The Petitioners argued that the Council determined that the salary would be the basic salary to be earned at exit of position of DVC plus the house allowance earned at the time of exit. The Petitioners submitted that the directive from the Respondent was revising their salary from approximately Kshs. 400,000/- to approximately Kshs. 200,000/-. The Petitioners submitted that the question to be determined is whether the University can be allowed to renege from a contractual position. The Petitioners relied on the decision of **Republic v Chief of Staff & Head of the Public Service & 2 Others ex parte George A. O. Magoha [2018] eKLR** which is to the effect that where an administrative action would affect an individual, that individual should be given an opportunity to be heard. The Petitioners argue that the revision of their salaries flies against the provisions of Article 41 on the right to fair practices and closely allied to that Article 47 on fairness. The Petitioners submit that the University should not be allowed to abandon its power under Section 35 of the Universities Act and allow itself to be dictated to by an outsider. The Petitioners relied on the cases of **Elizabeth Kwamboka Khaemba v BOG Cardinal Otunga High School Mosochi & 2 Others [2014] eKLR** and that of **James Ang'awa Atanda & 10 Others v Judicial Service Commission [2017] eKLR** whose *ratio decidendi* was that an employer cannot alter the employment contract without the consent of the employee which shows the interplay between Article 41 and Article 47. The Petitioners also relied on the case of **Maxwell Miyawa & 7 Others v Judicial Service Commission [2017] eKLR** which abhors the unilateral variation of an employment contract. The Petitioners relied on the case of **Keroche Breweries**

Limited & 6 Others v Attorney General & 10 Others [2016] eKLR on their legitimate expectations. The Petitioners relied on the case of **State of U.P. & Ors v Maharaja Dharmender Prasad Singh [1989] AIR 997 1989 SCR (1) 176** and submitted that one cannot surrender their statutory power to another person. They thus urged the grant of the orders sought.

4. The Respondent opposed the notice of motion applications and to that end filed replying affidavits sworn by Prof. Paul Ndirnagu Kioni the Vice Chancellor of the University. He stated that the applications and the Petitions are misconceived, incompetent, bad in law and devoid of merit and should be dismissed. It was deponed in the said affidavit that the basic salary to be retained was per Clause 24(1) which provided that the Petitioners would retain the basic salary in line with public service. He deponed that the Respondent received a letter on 4th May 2020 from the Ministry of Education directing the University Council to realign the terms and conditions of Vice Chancellor and Deputy Vice Chancellors to the Public Service (Government Guidelines). The Vice Chancellor deponed that the Circular directed the University to conform with Public Service Commission (PSC) Advisory dated 25th October 2016. He deponed that in addition a directive contained in a letter dated 14th May 2015 from the Civil Service requires that staff in employment enjoy remuneration and privileges that fall within their regular terms and conditions of service commensurate with their substantive appointments and grade. The Vice Chancellor deponed that it was imperative to note that the Petitioners are not discharging any duties of a Vice Chancellor but those of a professor. He deponed that the letter of 20th May 2020 was merely implementing the Public Service guidelines as per Clause 24(1) of the letter of appointment.

5. The Respondent is one of the leading technology universities and through its counsel Mr. Wahome Gikonyo articulated that the salary the Petitioners were to retain as per paragraph 24 of the letter of appointment was to be in line with the public service. The Respondent asserts that there is no decision relied on by the Petitioners where the clause 'retain exit salary' was used. The Respondents thus urged this Court to find that the cases relied on by the Petitioners are distinguishable from these 2 cases and therefore not applicable. The Respondent invited the Court to make an interpretation of contractual clause. It was asserted that the Respondent was implementing the clause in the contract and did not in any way alter the contracts between the 2 parties. The Respondent posed the question as to whether the Petitioners were prejudiced in any way in having the terms of their contracts implemented. The Respondent argued that the Petitioners read and understood the terms of contract and are bound by it. The Respondent argued that the implementing of the contract does not amount to altering the terms of the contract. The Respondent cited the decision of the Court of Appeal (Waki, Nambuye, Sichale JJA) in the case of **The Registered Trustees De La Salle Christian Brothers t/a St. Mary's Boys Secondary School v Julius D. M. Baini [2017] eKLR**. The Respondent urged the Court to find that the University did not in any way alter the terms of the contract and the Petitioners did not have to be heard as they were aware of the terms of the contract. The Respondent submitted that there is no violation of Article 41 on fair labour practices. It was argued that the Petitioners are not entitled to earn a salary for a position they do not hold. Mr. Gikonyo posed the question whether it is fair for the Respondent to pay salary to employees not holding the office especially at a time of strict budgetary allocations. The Respondent urged the Court to find no constitutional, statutory or contractual rights have been violated in view of Clause 24(1) of the letter of appointment and that the applications should be dismissed with costs.

6. The Petitioners applications challenge the review of their salaries and for the Petitioners it was argued that this was untenable while for the Respondent it was argued that was the implementation of the clause of the contract between the parties. It is not disputed that the Petitioners were issued with letters which were to the following effect (and for the exemplar used we will focus on the one issued to Prof. Moses Karoki):-

De KUT/217

26th May, 2020

Prof. Moses Gachari Karoki

Institute of Geomatics, Geospatial Information Systems and Remote Sensing

DeKUT

Dear Prof Gachari,

RE: REVIEW OF TERMS AND CONDITIONS OF SERVICE

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The exit terms communicated to you on 19th June 2018 were drawn from the terms of service on exit of duty as contained in the letter appointing you as the DeKUT's DVC (A&F) dated 25th February 2014. These terms were implemented by DeKUT following a resolution that was arrived at in an Inter-Public Universities Councils' Consultative Forum (IPUCCF) meeting held on 6th February 2013.

The University has since received a directive from the Public Service Commission through the Ministry of Education dated 4th May 2020 directing the University Council to consider the terms and conditions of service that have been determined by IPUCCF as null and void. The directive also requires State Corporations to ensure that staff in their employment enjoy remuneration and privileges that fall within their regular terms and conditions of service commensurate with their substantive appointment and grade.

The import of the above communication is that the terms and conditions of service of the Petitioners were being reviewed. The reason advanced was that the University had received a directive from the Public Service Commission through the Ministry of Education directing the Respondent to consider the terms and conditions of service that have been determined by the IPUCCF as null and void. The reading of this letter is that the terms and conditions of service determined by IPUCCF are the terms the Council had implemented in their letter of appointment to the Petitioners. In the case of was **Republic v Chief of Staff & Head of the Public Service & 2 Others ex parte George A. O. Magoha** it was held by Wasilwa J. that

...Article 47(1) (2) of the Constitution of Kenya 2010 which provides as follows:-

1. "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action".

42. Pursuant to Article 47(3) of the Constitution, Parliament enacted the Fair Administration Action Act No. 4 of 2015 which provides at Section 4 as follows:-

4(1). Every persons has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

2) Every person has the right to be given written reasons for any administrative action that is taken against him.

3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision:-

a) Prior and adequate notice of the nature and reasons for the proposed administrative action;

b) An opportunity to be heard and to make representations in that regard;

c) Notice of a right to a review or internal appeal against an administrative decision, where applicable;

d) A statement of reasons pursuant to Section 6;

e) Notice of the right to legal representation, where applicable;

f) Notice of the right to cross-examine or where applicable; or

g) Information, materials and evidence to be relied upon in making the decision or taking the administrative action.

4) The administrator shall accord the person against whom administrative action is taken an opportunity to:-

a) attend proceedings, in person or in the company of an expert of his choice;

b) be heard;

c) cross-examine persons who give adverse evidence against him; and

d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

6) Where the administrator is empowered by any written law to follow a procedure which confirms to the principles set out in Article 47 of the constitution, the administrator may act in accordance with that different procedure".

43. My understanding of the above provisions is that where an administrative action would affect an individual, that individual should be given an opportunity to be heard. The Applicant was however never heard of an administrative action that adversely affected him.

44. The circular letter was given in form of a directive and no room for negotiation was left. This amounted to a unilateral amendment to a condition of employment without recourse to negotiation or appeal.

45. Section 26(2) of the Employment Act No. 11 of 2007 provides as follows:-

"(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply".

46. In the Applicant's case, it is clear that the terms of his exit package were underpinned in his employment contract and in that case, such favourable terms and conditions of service shall apply.

47. That notwithstanding, the benefit of the supervisor exit package had already accrued to the Applicant. The Respondent could

not unilaterally take away this benefit from the Applicant.

48. Section 10(5) of Employment Act 2007 provides as follows:-

“(5) 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(5) 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.”

49. Under Section 10(5) of Employment Act, terms of an employment contract can only change after consultation with the employee and the same notified to the employee in writing.

7. It is amply clear from the reading of Article 41 and 47 of the Constitution as well as the Fair Administrative Actions Act and Section 10 of the Employment Act that the review of the Petitioners terms and conditions of service without consulting them entitles them to the interim relief sought. In the premises I will grant the prayer that an order do and is hereby issued to stay the decision of the Respondent purporting to replace the Petitioners' terms of service on exit of duty as communicated vide the Respondent's letters of 26th May 2020. For avoidance of doubt the Petitioners shall continue to earn their basic salaries and house allowances pending hearing and determination of the Petitions herein directions for which shall issue after this Ruling.

It is so ordered.

Dated and delivered at Nyeri this 14th day of July 2020

Nzioki wa Makau

JUDGE