



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 11 & 12 OF 2020**

**1. PROF. GERALD KANYAGO MATHAKIA**

**2. PROF. MOSES GACHARI KAROKI.....PETITIONERS**

**VERSUS**

**DEDAN KIMATHI UNIVERSITY OF TECHNOLOGY....RESPONDENT**

**JUDGMENT**

1. The Petitioners herein sued the Respondent in Petitions No. 11 and 12 of 2020. The causes revolved around similar facts and were consolidated merely for purposes of hearing and penning this Judgment. The Petitioners challenge the decisions of the Respondent which to alter the Petitioners' terms of service on exit of duty as communicated vide the Respondent's letters to the Petitioners. In Petition No. 11 of 2020 – Prof. Gerald K. Mathakia v Dedan Kimathi University of Technology, the Claimant averred that his terms upon exit of the position of Deputy Vice Chancellor, he was entitled to *inter alia* retain his basic salary and house allowance on exit. He averred that his tenure as a Deputy Vice-Chancellor lapsed on 28<sup>th</sup> July 2018. He asserts that prior, by letter dated 19<sup>th</sup> June 2018, the Respondent had notified him that the it's Council had resolved that upon expiry of the Petitioner's contract as a Deputy Vice-Chancellor Academic Affairs for a term of 5 years with effect from 29<sup>th</sup> July 2013, the Petitioner could assume his academic position as a Professor at the Chemistry Department on terms that the Petitioner retains the basic salary and house allowance as per the terms of Clause 24 of the Contract dated 25<sup>th</sup> February 2014. The Petitioner asserts that by letter dated 1<sup>st</sup> November 2017, he was notified of the Respondent's Council approval of the appointment of the Petitioner as Professor, Grade 15 in the Chemistry Department with effect from 9<sup>th</sup> October 2017. The Petitioner was further notified that the professorial salary and house allowance payable to him after expiry of his contract as Deputy Vice-Chancellor, Academic Affairs would be determined by the Respondent's Council and communicated to the Petitioner. The Petitioner averred that by letter dated 19<sup>th</sup> June 2018, the decision of the Respondent's Council was communicated to him and in the letter, he was notified that upon lapse of his contract, he could assume an academic position in the Chemistry Department, School of Science on terms that the Petitioner would;

- a) Retain his basic salary on exit
- b) Retain the rate of house allowance on exit
- c) Be entitled to nine months sabbatical leave on completion of his contract
- d) Be entitled to one local and one international conference per year

The Petitioner asserts that the said terms as set out in the letter were in line with the contents of Clause 24 of the employment contract dated 25<sup>th</sup> February 2014 which provided that upon expiry of the Petitioner's contract as a Deputy Vice-Chancellor, he would retain his basic salary and the rate of house allowance. The Petitioner asserts that his contract as a Deputy Vice-Chancellor, Academic Affairs lapsed on 28<sup>th</sup> July 2018 and upon the said lapse, he reverted to an academic position in accordance with Respondent's letters dated 1<sup>st</sup> November 2017 and 19<sup>th</sup> June 2018. The Petitioner maintains that from August 2018 to May 2020, the Respondent has at all material times paid him a basic salary and the rate of house allowance that he was earning as a Deputy Vice-Chancellor which was in compliance with the provisions of Clause 24 of the employment contract dated 25<sup>th</sup> February 2014 and the letter of 19<sup>th</sup> June 2018. The Petitioner stated that on 27<sup>th</sup> May 2020, he was informed by the Respondent's Vice-Chancellor via telephone conversation that the Petitioner's terms and conditions of service have been varied pursuant to a directive from the Public Service Commission. The Petitioner was further informed that formal communication would be sent to him as regards the aforesaid variation. On the same day, 27<sup>th</sup> May 2020, the Petitioner received a letter dated 26<sup>th</sup> May 2020 via email from the Respondent notifying him that the Respondent's Council had resolved to "replace" his terms of service on exit of duty as communicated in the Respondent's letter dated 19<sup>th</sup> June 2018 with the terms and conditions of service of a Full Professor. The Petitioner was notified that resolution of the Respondent's Council was based on a directive from the Public Service Commission through the Ministry of Education. The Petitioner asserts the alleged directive was not availed to him. The Petitioner asserts he was not accorded an opportunity to

be heard prior to the making of the decision contained in the letter of 26<sup>th</sup> May 2020 contrary to expectation. The Petitioner argues that the letter dated 26<sup>th</sup> May 2020 is illegal for non-compliance with the constitutional provisions and the provisions of the Fair Administrative Action Act, 2015 and the Employment Act, 2007.

2. The 2<sup>nd</sup> Petitioner Prof. Moses Gachari Karoki asserts that by a letter dated 5<sup>th</sup> August 2013, he was appointed as the Respondent's Deputy Vice-Chancellor, Administration & Finance and the appointment was effective from 29<sup>th</sup> July 2013 for a period of five years. Prior to the appointment, the Petitioner held the position of Deputy Principal (Administration and Finance) at Kimathi University College of Technology (KUCT) which is the predecessor of the Respondent. The Petitioner asserts that the terms and conditions of service as a Deputy Vice-Chancellor, Administration & Finance were enumerated in the letter dated 25<sup>th</sup> February 2014 which constitutes a binding contract between the Petitioner and the Respondent. He asserts that Clause 24 of the contract provides for the terms of service on exit from duty and states that upon completion of the Contract the Petitioner "would retain the basic salary and the house allowance." The Petitioner's tenure as a Deputy Vice-Chancellor, Administration & Finance lapsed on 28<sup>th</sup> July

2018. Prior, thereto by letter dated 19<sup>th</sup> June 2018, the Respondent had notified the Petitioner that the Respondent's Council had resolved that upon expiry of the Petitioner's contract as a Deputy Vice-Chancellor, the Petitioner could assume his academic position at the Institute of Geomatics (GIS) and Remote Sensing (IGGRES) on terms that the Petitioner would retain his basic salary on exit, retain the rate of house allowance on exit, be entitled to nine months sabbatical leave on completion of his contract, be entitled to one local and one international conference per year. The Petitioner asserts that the basic salary and house allowance are as per the terms of Clause 24 of the Contract dated 25<sup>th</sup> February 2014. It was asserted that upon the lapse of the Petitioner's tenure as a Deputy Vice-Chancellor, Administration & Finance he reverted to an academic position at the Respondent on terms set out in the contract dated 25<sup>th</sup> February 2014 and the letter of 19<sup>th</sup> June 2018. Averment was made that as from August 2018 to May 2020, the Petitioner has been earning a basic salary and house allowance in accordance with the employment contract and the Respondent's letter dated 19<sup>th</sup> June 2018. It is averred that on 27<sup>th</sup> May 2020, the Petitioner received a letter dated 26<sup>th</sup> May 2020 from the Respondent informing him that his terms and conditions of service as set out in the Respondent's letter dated 19<sup>th</sup> June 2018 had been "replaced" with the terms and conditions of service of a Full Professor. The Petitioner asserts the replacement amounts to a substantial reduction of his basic salary from a sum of Kshs. 432,256/- to Kshs. 248,890/-. The Petitioner asserts that prior to the decision contained in the letter of 26<sup>th</sup> May 2020 being made, he was 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 Action Act. Like his colleague, he asserts his constitutional rights were violated by the decision of the Council to be directed by the Ministry of Education.

3. In response to the Petitions the Respondent filed a replying affidavit sworn by Prof. Paul Ndirangu Kioni the Vice-Chancellor of the Respondent. In the affidavit in reply, he asserts that the suits by the Petitioners are misconceived, incompetent, bad in law and devoid of any merit. He asserts that the contract of employment provided that the Petitioner would retain the basic salary in line with the public service. The Respondent asserts through its Vice-Chancellor that on 5<sup>th</sup> May 2020 it received a letter dated 4<sup>th</sup> May 2020 from the Cabinet Secretary, Ministry of Education directing the University Council to realign the terms and conditions of Vice-Chancellor and Deputy Vice-Chancellor to the Public Service (Government Guideline). He asserts that the Circular directs the University Council to conform with Public Service Commission (PSC) Advisory on the same as contained its advisory dated 25<sup>th</sup> October 2016. He asserts that in addition to the directive contained in a letter dated 11<sup>th</sup> 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 appointment and grade. The deposed stated that based on the above and the letter dated 4<sup>th</sup> May 2020, the Respondent wrote to, the Petitioners the letters dated 26<sup>th</sup> May 2020 in line with Clause 24 (i) which provides the contracts be in line with Public Service. He stated that it is imperative that the Petitioner are not discharging any duty of a Deputy Vice-Chancellor but those of a professor. He stated that the Petitioners mutually agreed to Clause 24(i) of the letter of appointment to be bound an exit salary in line with the Public Service. He deposed that the letter dated 26<sup>th</sup> May 2020 is merely implementing the Public Service guideline, as contained in the aforesaid letters as set out in Clause 24(i) of the letters of appointment dated 25<sup>th</sup> February 2014 and 5<sup>th</sup> August 2013. He asserted that no constitutional, statutory or contractual rights of the Petitioners have been violated and that they are bound by Clause 24(i) of the letters of appointment. He asserts that these Petitions lack merit and should be dismissed with costs to the Respondent.

4. Brief oral submissions were entertained by the Court on 28<sup>th</sup> September 2020 when the case was due for hearing. Mr. Fred Ngatia SC and Mr. Wahome Gikonyo appearing for the Petitioners and Respondent, respectively, submitted that there was no contestation of the facts as presented by both parties and that the only point of divergence was on the exit salary as contained in the rival positions taken by the parties. Mr. Ngatia for the Petitioners argued that the parties were cognizant of what would happen after the terms of the Petitioners as Deputy Vice-Chancellors. It was argued that they were assured through the contract Clause 24 on exit salary that they would retain the exit salary and exit house allowance. Counsel for the Petitioners submitted that the letter most proximate to the case for Prof. Muthakia is dated 19<sup>th</sup> June 2018 and being most proximate to his exit stated that the University Council of the Respondent had met and through the letter the Vice Chancellor conveys the resolution of the Council to the effect that the Petitioner in this case was to resume the duties under the faculty of Chemistry and was to retain the basic salary and house allowance on exit. He asserts that in respect of the 1<sup>st</sup> Petitioner, that is exactly what happened as eh enjoyed and continues to enjoy the salary he enjoyed hitherto until the issue now in contest arose when a letter dated 26<sup>th</sup> May 2020 almost 2 years later was issued purporting to review the Petitioner's salary. Mr. Ngatia argued that this meant the Petitioner was going to earn a much lower salary than what he is entitled to which letter was for quashing through certiorari. He submitted that bar a few minor details the case for Prof. Muthakia mirrored that of Prof. Karoki almost to a letter as they were on identical facts. He cited the cases of **Republic v Chief Staff & Head of the Public Service & 2 Others ex parte George A. O. Magoha [2018] eKLR** and argued that the Petitioners were entitled to the orders sought. The Petitioners had presented a comprehensive digest of cases but whose tenor I need not rehash here other than cite a case or two that a highlight would suffice.

5. The Respondent was opposed and through its Counsel Mr. Wahome Gkonyo argued that the question to be asked and determined is what the import of Clause 24 of the letters of appointment in so far as it says the exit is subject to the public service. He submitted that the Petitioners were to retain the exit salary in line with the public service and that to understand public service there was need to look at Article 260 on the definition of a public officer. He argued that the payment made to the Petitioners is from the consolidated fund out of public money and the Respondent being funded by the public purse has to protect the revenue since the money is channeled to the Ministry of Education for disbursement to public universities. Mr. Gikonyo argued that the Petitioners were well aware of the provisions of Clause 24

when they signed the contracts and that their exit was pegged upon or in line with the public service. He argued this distinguishes them from all the cases cited by Mr. Ngatia as determined by other courts. He submitted that it was imperative that this court determines what is meant in the clause on exit in line with the public service. He urged the court to distinguish these two Petitions from preceding cases. He asked the court to determine whether a clause in a contract of service amounted to an administrative action. He submitted that the Petitioners signed the contracts while aware that public service is fluid and the terms and conditions of service keep changing depending on the circumstances. He argued that presently were are in very uncertain times and he posed the question – does the non-application of the circular in 2018 mean the failure to implement in 2015 is retrospective application? He asked whether that means that one cannot correct a mistake made yet the clause is in the contract. He submitted that the Petitioners had suggested that the Respondent had surrendered itself to outside forces but he urged the Court to marry that submission with clause 24(i). He cited the case of **St. Mary's Boys Secondary School v Julius D. M. Baini [2017] eKLR** and he argued that the Court should find as the court in that case did that the implementation of a clause in a contract did not amount to unfair labour practice or unfair administrative action.

6. The question that this Court is required to answer is not what posed by Mr. Wahome Gikonyo for the Respondent. As enticing as the prospect is of determining what the phrases “subject to the public service” and its contrast “to retain the exit salary in line with the public service” would be an academic exercise. In the case before me, the issue is whether the Respondent is permitted in law or otherwise to do what it did vide the impugned letter of 26<sup>th</sup> May 2020. It is apparent that the Petitioners served the Respondent in higher positions in the University structure and by virtue of those positions enjoyed favourable terms parts of which they assert were to be retained upon exit. The Respondent in its opposition to the Petitions asserts the terms were to be retained in accordance with the terms in the public service and cite for this authority a directive from the Ministry of Education curtailing the practice of retaining previous allowances on resumption of duties in the faculty post. The letter dated 4<sup>th</sup> May 2020 from the Cabinet Secretary Ministry of Education Prof. George A. O. Magoha, CBS in material part provides as follows:-

*As mentioned in the correspondences above, terms and conditions enjoyed by the Vice Chancellors and Deputy Vice Chancellors based on the IPUCCF communication (attached) should conform with the Public Service Commission Advisory. In this regard kindly ensure you update this office on the progress made on compliance of the Government Guidelines on contracts of Vice Chancellors and Deputy Vice Chancellors within two weeks of this communication.*

7. The Public Service Commission advisory dated 25<sup>th</sup> October 2016 on the salaries for Vice Chancellors and Deputy Vice Chancellors is seemingly awaiting review of the State Corporations Advisory Committee as it provides as follows:-

*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 Public Service Commission and Salaries and Remuneration Commission should be taken into account.*

8. The Petitioners terms in my considered view are insured against any such letter as their contracts predate the circular. The circular by the Minister for Education cannot have retroactive effect meaning it cannot alter contracts that had been entered into before the directive. The terms the Petitioners enjoyed were preserved in their contracts and as negotiated by the Inter Public Universities Council's Consultative Forum. The terms of the Petitioners are subject to the determinations by the University Council and not the Cabinet Secretary or the Ministry and as such the letter in as far as the Petitioners are concerned is null, void and of no legal effect. In the final analysis I grant the two Petitioners reliefs in the following terms:-

a. A declaration be and is hereby issued that the purported variation of the Petitioners terms and conditions of service as set out in the Respondent's letter dated 26<sup>th</sup> May 2020 is illegal, unlawful, null and void in so far as the Petitioners are concerned.

b. An Order of *Certiorari* do issue to bring into this Honourable Court for the purposes of being quashed in its entirety the letter dated 26<sup>th</sup> May 2020 issued by the Respondent to the Petitioner purporting to replace the Petitioners terms of service on exit of duty as communicated in the Respondent's letters to the Petitioners with the terms and conditions of service of a Full Professor.

c. An Order of Prohibition do issue against the Respondent prohibiting the Respondent from amending, varying, vacating or in any way interfering with the Petitioners terms and conditions of service as set out in Clause 24 of the Contract dated 25<sup>th</sup> February 2014 and the Respondent's letters dated 19<sup>th</sup> June 2018 and 2<sup>nd</sup> July 2018 in the manner set out in the Respondent's letter dated 26<sup>th</sup> May 2020 or at all.

d. An Order of Mandamus do issue to compel the Respondent to at all material times adhere to the provisions of Clause 24 of the Petitioners Contracts as well as the Respondent's letters dated 19<sup>th</sup> June 2018 and 2<sup>nd</sup> July 2018 in respect to the Petitioners terms and conditions of service as set out therein without any variation or amendment thereof.

e. The Petitioners be entitled to costs on the 2 Petitions.

It is so ordered.

**Dated and delivered at Nyeri this 10<sup>th</sup> day of November 2020**

**Nzioki wa Makau**

**JUDGE**