



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & MUSINGA, J.J.A)

CIVIL APPEAL NO. 108 OF 2018

BETWEEN

TECHNICAL UNIVERSITY OF MOMBASA.....1ST APPELLANT

THE UNIVERSITY COUNCIL OF

TECHNICAL UNIVERSITY OF MOMBASA.....2ND APPELLANT

THE VICE CHANCELLOR

TECHNICAL UNIVERSITY OF MOMBASA.....3RD APPELLANT

AND

KENYA UNION OF DOMESTIC HOTELS,

EDUCATIONAL INSTITUTIONS AND

HOSPITAL WORKERS.....RESPONDENT

(An appeal from the Judgment of the Employment and Labour Relations Court at Mombasa (Makau, J.) dated 11th May, 2018

in

Petition No. 9 of 2017.)

JUDGMENT OF THE COURT

1. By an amended petition filed in the Employment and Labour Relations Court (ELRC), the respondent, acting on behalf of some of its members, who happened to be 1st appellant's employees, sought several orders against the appellants. Basically, the respondent's claim stemmed from what it believed was breach of its members' constitutional right to fair labour practices by the appellants.
2. It was the respondent's position that the 1st appellant had engaged its members on casual basis or on back to back contracts, as it put it, for a continuous period of over 12 years. The 1st appellant's conduct was not only contrary to the **Constitution** and the **Employment Act** but also the Collective Bargaining Agreement (CBA) dated 17th March, 2015 between itself and the 1st appellant.
3. It is on that basis that the respondent prayed for declaration that the appellants refusal to employ its members on permanent and pensionable basis; and/or withholding of their rightful salaries and allowances was in violation of **Articles 10,22,28, 41(1)(2) & (5)** of the **Constitution**, **Section 37** of the **Employment Act** and **Section 59** of the **Labour Relations Act**. It also sought a mandatory injunction compelling the appellants to employ its members and pay them their rightful salaries and allowances from 1st July, 2013.
4. Resisting the petition, the appellants were steadfast that the employment of the respondent's members was in accordance with the **Employment Act** as well as the CBA, both of which recognized employment on contractual basis. They denied that the respondent's

members were ever engaged on casual basis. According to them, the petition was premature and frivolous since the respondent's members were still serving their one year term contract which commenced on 11th January, 2017 and was scheduled to end on 10th January, 2018. The employees in question were bound by the terms of the said contracts which they voluntarily executed. In any event, Clause 4.1.2 (b) did not stipulate that the conversion of the employees' terms of employment from contractual to permanent basis was automatic. It was subject to the availability of vacancies as well as other factors. They also denied withholding any salaries and allowances that were due to the respondent's members.

5. The petition was disposed by way of affidavit evidence and written submissions. Upon considering the evidence placed before it, the trial court (**Makau, J.**) in a judgment dated 11th May, 2018 expressed:

“In view of my finding herein above that all the grievants have qualified for conversion from temporary appointment to permanent employment under section 37 of the Employment Act, I proceed to make declaration that the continued employment of the grievants on temporary basis is unconstitutional and it is a violation to their right to fair labour practices and fair terms and conditions of service as enshrined under Article 41 (1) and (2) (a) of the Constitution of Kenya. Consequently, I direct the respondents to stop the said violation by appointing all the grievants on permanent basis effective the date when the fixed term contracts given in 2017 lapses. Any other orders sought and not specifically granted are dismissed.”

6. The appellants were not happy with that decision hence the appeal before us predicated on 8 grounds which can be aptly summarized as:

The learned Judge erred in law and fact by:

a) Misconstruing the nature of the respondent's members' employment with the appellants.

b) Granting orders that were not sought.

c) Failing to find that the petition was filed prematurely.

7. Prosecuting the appeal, Mr. Oluga, learned counsel for the appellants, took issue with the learned Judge's finding that the respondent's members were engaged on temporary/casual basis. To him, this finding was at variance with the pleadings and unsubstantiated by evidence. He asserted that the respondent, in its amended petition, clearly indicated that its members were engaged on 'back to back contracts.' It followed therefore that the respondent's members were retained on fixed term contracts. Moreover, contrary to the learned Judge's sentiments, the appellant never admitted, at any point in time, that the respondent's members were employed on casual basis. In counsel's view, the trajectory taken by the learned Judge depicted that he did not appreciate the dispute before him.

8. Due to that misapprehension, the learned Judge went on to invoke **Section 37** of the **Employment Act**, which was not applicable, as the basis of converting the employees terms of employment from what he perceived was casual basis to permanent and pensionable terms. Mr. Oluga argued that under clause 4.1.2 of the CBA the conversion of a temporary employee to a permanent and pensionable employee was not automatic, as the learned Judge thought. Rather it was subject to the availability of a vacancy and competitive recruitment process.

9. Additionally, the availability of vacancies was subject to availability of funds, prevailing government policies, recommendation by the Salaries and Remuneration Commission amongst other factors. In point of fact, the appellants had produced a circular from the National Treasury which barred the recruitment of more staff by the appellants. To him, the conversion of the respondent's members' terms of employment would be tantamount to the recruitment which had been halted by the National Treasury.

10. The learned Judge was also criticized for failing to give regard to the doctrine of privity of contract by directing the appellants to engage the employees in question on a permanent and pensionable basis. Nonetheless, Mr. Oluga contended that the respondent had not sought such a prayer in the petition. As far as counsel was concerned, the petition was filed prematurely since at the time, the respondent's members were still serving their respective contractual terms. All in All, the petition did not raise any constitutional issue.

11. Supporting the learned Judge's decision, Mr. Onwong'a, the respondent's representative, reiterated that the decision was in line with the CBA dated 17th March, 2015 and **Section 37** of the **Employment Act**. He added that the national level CBA dated 15th March, 2017 between the Inter-Public Universities Councils Consultative Forum and the respondent also required the conversion of the terms of employees engaged on casual basis to permanent and pensionable terms. In that regard, he made reference to Clause 10 of the said national CBA which states:

“With reference to Employment Act, 2007 section 37, all casuals and temporary employees in all Public Universities shall be eligible to confirmation and to permanent and pensionable service within a period of one year into various job grading according to their qualifications effective 1st January, 2017 progressively and according to their years of service to take care of succession management.”

In his view, there was no reason for us to interfere with said decision.

12. We have considered the record, submissions made on behalf of the respective parties and the law. In doing so, we are mindful of our mandate as the first appellate Court under **Rule 29 (1) (a)** of the **Court of Appeal Rules** is to re-appraise the evidence and draw our own inferences of fact. We are also conscious that the decision of the trial court is entitled to some measure of deference unless the conclusions made on the evidential material on record are perverse or the decision as a whole is bad in law.

13. From the onset, it is important to note that contrary to the learned Judge's finding, we have not come across any evidence on record to the

effect that the respondent's members were engaged on casual basis. **Section 2** of the **Employment Act** defines a casual employee in the following manner:

“casual employee” means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time;...”

14. All that there is on record are copies of one year contracts in favour of the respondent's members. Equally, in contrast to the learned Judge's sentiments the appellants never admitted that the respondent's members were engaged on casual basis as evidenced in the replying affidavits sworn on their behalf. The onus was on the respondent to prove that indeed its members were engaged on casual basis which they failed to do. Having observed as we have, it goes without saying that **Section 37** of the **Employment Act** which was invoked by the learned Judge was not applicable. This is because the said provision exclusively deals with the conversion of casual employment. The section provides:

“37. Conversion of causal employment to term contract

i. Notwithstanding any provisions of this Act, where a casual employee—

a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more,

the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.”

15. Be that as it may, there is still the question of whether the appellants conduct was in violation of the CBA between the 1st appellant and the respondent and the national CBA. As this Court noted in **Kenya Tea Growers Association vs. Kenya Plantation & Agricultural Workers Union [2018] eKLR**, the essence of a CBA is that the terms and conditions therein are voluntarily agreed upon between the employer and the union representing the employees, such as the respondent in this case. These terms govern the employment relationship between the employer and the employee and are contractual in nature. Therefore, the determination of whether the appellants violated the CBAs calls for the interpretation of the terms thereunder.

16. It is trite that parties to an agreement are the masters of the parameters that govern their relationship. It is precisely for this reason that whenever a court is called upon to determine the terms of a contract its objective is to give effect to the intention of the parties. See **Filipo Fedrini vs. Ibrahim Mohamed Omar [2018] eKLR**.

17. To begin with Clause 10 of the national level CBA, which we have set out herein above, clearly indicates that it is in respect of casual employees thus it is not applicable to the respondent's members. As for the CBA dated 17th March, 2015, the respondent claimed that the appellants' conduct was in breach of Clause 4.1.2 (b) therein which stipulated that:

“Temporary and contract employees who continue in employment for over six (6) continuous months shall be considered for permanent employment subject to availability of a vacancy.”

18. As per the learned Judge, the import of the aforementioned clause was as follows:

“I have carefully considered the CBAs cited by the petitioner. Clause 4.1.2 of the CBA between the parties herein provided that...

The foregoing clause clearly confirms that the petitioner and the employer had agreed that the grievants could be employed on temporary basis provided that after serving for 6 months, they shall be eligible for appointment on permanent basis if the vacancies are available. The question arises is whether there were no vacancies to justify contract engagements. In my view, the reason why the grievants have not been appointed on permanent basis is not lack of vacancies. In my view all, the positions being served by the grievants are not temporary. They have served in the said positions for many years. They are crucial jobs without which the University would not operate effectively including accommodation, cleaning, catering, library, finance, mail office, Human Resource to name just a few.

Under 4.1.2 of the CBA, all the grievants qualify for appointment on permanent basis. They should therefore not be engaged on temporary basis anymore. They should not even be taken through any competitive recruitment because they have all along been doing the job to the satisfaction of the employer while sewing (sic) on casual basis ... [Emphasis added]

19. In our view, we do not agree with the learned Judge's interpretation. This is because looking at the words employed in the clause in question, we find that firstly, the conversion of contractual terms to permanent and pensionable terms is dependent on availability of vacancies. The availability of vacancies, in our minds, could not be inferred, as the learned Judge did, simply on the basis that the employees in question were undertaking jobs/ duties which he deemed as integral to the 1st appellant. There ought to have been evidence of such vacancies in the form of advertisements or notices of the same as per Clause 4.1.1(d) of the said CBA which read:

“New vacant positions will be advertised internally and externally and all eligible candidates from within and outside the University will be allowed to apply.”[Emphasis added.]

20. Secondly, the use of the word that ‘considered’ for permanent employment coupled with Clause 4.1.1(d) connotes that even where such vacancies arise the respondent’s members were not entitled to automatic engagement on permanent and pensionable terms. They were to be subjected to competitive recruitment process like other applicants. Our position is fortified by the sentiments of this Court in **Sun Sand Dunes Limited vs. Raiya Construction Limited [2018] eKLR**:

“The object of construction of terms of a contract is to ascertain its meaning or in other words, the common intention of the parties thereto. Such construction must be objective, that is, the question is not what one or the other parties meant or understood by the words used. Rather, what a reasonable person in the position of the parties would have understood the words to mean.”

21. Accordingly, we find that the learned Judge had no basis for finding that the respondent’s members were entitled to automatic engagement on permanent and pensionable terms. What is more, the respondent did not tender any evidence to show that such vacancies had arisen and that the appellants had side-lined its members.

22. As such, we are satisfied that the respondent’s members were engaged on fixed term contracts and there is no evidence that such engagement was contrary to the CBAs, **Employment Act** or the **Constitution**. In point of fact, Clause 4.1.2 (a) of the CBA recognized such term contracts:

“All temporary and contract appointments are tenable for such periods and on such terms as are specified in the letters of appointment.”

23. In the end, we find that the issues raised herein did not amount to violation of the respondent’s members’ rights under the **Constitution**. They were issues of a contractual nature and should have been dealt with as such. To that extent, we agree and adopt the words of **Lenaola, J.** (as he then was) in **Bernard Murage vs. Fineserve Africa Limited & 3 others [2015] eKLR**

“I am bound to follow that principle of law since it flows from the other important principle that not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first. In that regard the words of the Court in Harrikinson v Attorney General of Trinidad and Tobago [1980] AC 265, hold true today as they did then;...”

24. Accordingly, we find that the appeal herein has merit and is hereby allowed. We set aside the judgment dated 11th May, 2018 in its entirety and substitute the same with an order dismissing the respondent’s petition. This being an employment matter we make no order as to costs both in this appeal and the ELRC.

Dated and delivered at Mombasa this 14th day of March, 2019.

ALNASHIR VISRAM

JUDGE OF APPEAL

W. KARANJA

JUDGE OF APPEAL

D. K. MUSINGA

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR