



Universities Academic Staff Union (UASU) Masinde Muliro University of Science & Technology (MMUST) Chapter v Masinde Muliro University of Science & Technology (MMUST) (Cause E018 of 2024) [2025] KEELRC 297 (KLR) (6 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 297 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
CAUSE E018 OF 2024
DN NDERITU, J
FEBRUARY 6, 2025**

BETWEEN

**UNIVERSITIES ACADEMIC STAFF UNION (UASU) MASINDE
MULIRO UNIVERSITY OF SCIENCE & TECHNOLOGY (MMUST)
CHAPTER CLAIMANT**

AND

**MASINDE MULIRO UNIVERSITY OF SCIENCE & TECHNOLOGY
(MMUST) RESPONDENT**

JUDGMENT

I. Introduction

1. Through M. Kiveu Advocates the claimant, a trade union representing workers in the academia working for the respondent, commenced this cause by way of a memorandum of claim dated 23rd May, 2024 seeking for the following reliefs –
 - a. An order of injunction restraining the respondent from retiring the claimant’s members at age 70 until they attain age 74, declaration to issue in effect that the retirement age of academic staff is 74 years.
 - b. An order of prohibition prohibiting the respondent from retiring the claimant’s members until they attain the age of 74 years.
 - c. A declaration to issue in effect that the retirement age is 74 years.
 - d. Costs of the claim.
 - e. Interest on (c) above from date of filing the suit till the day of full payment.



2. As it is the procedure, the statement of claim was accompanied with a verifying affidavit sworn by Robinson Oduma, the secretary general of the claimant, a witness statement by the same deponent, a list of documents, and copies of the listed documents.
3. Alongside the statement of claim was filed a notice of motion of even date seeking for injunctive interim orders pending the hearing and determination of the cause. In a ruling delivered on 27th June, 2024 (Keli J) the court restrained and prohibited the respondent from retiring or threatening to retire the affected members of the claimant before attaining the age of 74yrs pending the hearing and determination of this cause.
4. The respondent entered appearance through the Attorney General and filed a statement of response dated 25th July, 2024 seeking for the dismissal of the claim with costs for lack of merits.
5. On 18th September, 2024 counsel for both parties agreed and the court so directed that the cause be heard and canvassed by way of written submissions. This consent order was based on the understanding that the facts as pleaded by both sides were not in dispute.
6. Mr. Mulokwe for the claimant filed his written submissions dated 16th October, 2024 and Mr. Tarus for the respondent filed written submissions dated 29th October, 2024.

II. The Claimant's Case

7. The claimant's case is expressed in the statement of claim, the witness statement by Robinson Oduma, the documents filed, and the written submissions by its counsel.
8. In the statement of claim it is pleaded that the parties herein entered into a collective bargaining agreement (CBA) that was to remain in force for the period from 1st July, 2013 to 30th June, 2017. It is further pleaded that according to the said CBA that was executed on 15th January, 2020 the compulsory age of retirement for the members of the respondent was set and agreed at 74yrs.
9. It is further pleaded that this cause was prompted by the respondent issuing notices of retirement to members of the claimant who had not attained the above mandatory age of retirement.
10. It is pleaded that despite demand made for the respondent to revoke and withdraw the said notices the respondent had failed, refused, and or neglected to act rendering the cause necessary to enforce the rights of the said affected members.
11. The names of the affected members are as per the retirement notices filed in court addressed to them on various dates in 2023 and 2024 as follows –
 - a. Dr. Mary Gorretti Kariaga's letters of 18th January 2023 & 7th May 2024
 - b. Dr. Selline A. Ooko's letter of 14th February 2024
 - c. Mr. George Alubokho Sowayi's letter of 14th February 2024
 - d. Prof. James a. Oloo's letter of 19th January 2023
 - e. Prof. John Shiundu's letter of 11th May 2023
 - f. Prof. Aggrey Simiyu's letter of 14th February 2024
12. It is pleaded and pointed out that the above notices violated and were in contravention of Clause 30.0(ii) of the CBA alluded to above. A copy the said CBA was filed alongside the statement of claim together with the other documents mentioned above.



13. It is on the basis of the foregoing circumstances and facts that the court is urged to allow the claim and grant the reliefs as sought. The submissions by the claimant’s counsel shall be considered alongside those by counsel for the respondent in a succeeding part of this judgment.

III. The Respondent’s Case

14. The respondent’s case is contained in the statement of response/defence to the claim and the written submissions by its counsel.
15. In the said response it is admitted that the parties entered into the CBA alluded to in the foregoing paragraphs of this judgment as pleaded by the claimant.
16. Further, it is admitted that the respondent issued the notices of retirement to the affected members. However, it is pleaded that the said notices were properly, fairly, and lawfully issued to the affected employees who are all above 70yrs of age and in accordance with Statute 39(9) of the respondent’s statutes, 2022.
17. It is further pleaded that the above statute was passed in accord with *the Constitution* of Kenya, the *Universities Act*, the Masinde Muliro University of Science & Technology Act, the *Public Finance Management Act*, & the *Employment Act*. It is pleaded that the above laws are not and cannot be subservient to the CBA alluded to above. It is pleaded that the CBA was drafted and executed in contravention of the above laws and the same is termed illegal, null, and void as far the age of retirement of the academic staff of the respondent is concerned.
18. It is on the basis of the foregoing evidence and circumstances that the respondent prays that the claimant’s cause be dismissed with costs.

IV. Submissions

19. On the one hand, counsel for the claimant identified one main issue for determination by the court – Whether it was lawful for the respondent to retire academic staff before the age of 74 in view of the negotiated CBA.
20. It is submitted that Section 59 of the *Labour Relations Act* joins and binds parties that are signatory to a CBA. It is further submitted that clauses 45.0 & 2.6 of the impugned CBA provided as follows respectively –
 45. “The duration of this agreement shall be two (4) years. The effective date of this agreement shall be 1st July, 2010 up to 30th June, 2017. Thereafter, the agreement shall remain in force until revised jointly by both parties. The Deputy Vice Chancellor (Administration & Finance) shall communicate such amendments to members of staff through circulars.”
 - 2.6 “The provisions of this agreement or any part thereof, shall take precedence over any practices, policies or procedures which are inconsistent with its terms. Such inconsistent policies shall be null and void to that extent and subject to relevant labor laws.”
21. Counsel submitted that Section 26 of the *Employment Act* should guide the court to the effect that the provisions in the Act are bare minimums and where the parties agree on better or more favourable terms the better terms should apply. It is further submitted that the respondent’s statutes passed in 2022 cannot override the terms of the negotiated, agreed, and executed CBA. It is submitted that the CBA has the force of a contract and the same cannot be subjected to a unilateral local statute passed by the respondent.



22. It is submitted that the statute by the respondent that purported to lower the age of retirement from 74yrs to 70yrs is not only unfair but also illegal, null, and void as it did not amend the terms of the contracts of the affected employees and, in any event, the said members of the academic staff were neither consulted nor did they consent to such change or variation of their terms of service. It is submitted that this conduct on the part of the respondent violated Section 10(5) of the Employment Act that provides 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”.
23. On the other hand, counsel for the respondent identified the following issue for determination – Whether the claimant’s members should retire as per the collective bargaining agreement or as per the University Statute, 2022.
24. It is submitted that the retirement age for the academic staff of the respondent is governed by Section 39(9) of the respondent’s Statute, 2022 which provides as follows –
- “Staff of University shall retire from employment as for Academic staff, retirement age shall be seventy (70) years for Assistant Lecturers/Tutorial fellows, Lecturers and Senior Professors or such other age as may be determined by the government from time to time.”
25. It is further submitted that the above provision supersedes the CBA. It is submitted that the Masinde Muliro University of Science & Technology Statutes, 2022 were passed in accord with the Constitution, the Universities Act, the respondents Charter, the Public Finance Management Act, and the Employment Act. The court is urged to be persuaded by the holding in Kenya University Staff Union V Council of Jomo Kenyatta University of Agriculture & Technology & Another (2023) eKLR wherein it was held that the contents of a CBA cannot supersede the provisions of a statute.

V. Issues For Determination

26. The court has carefully and dutifully gone through the pleadings filed, documentary evidence tendered from both sides, and the written submissions by counsel for both parties. The following issues commend themselves to the court for determination –
- a. Whether the cause by the claimant has merits as to entitle the claimant to the reliefs sought; and,
 - b. Who should bear the costs of the cause?

VI. Merits Of The Cause

27. The dispute between the parties is rather straightforward and that is why they consented to having the matter heard in a summary manner by way of written submissions. The claimant, a trade union representing the academic staff in employment of the respondent, negotiated, bargained, and executed a CBA with the respondent covering the period from 1st July, 2013 to 30th June, 2017. The CBA was executed on 15th January, 2020 and subsequently registered as per the law.
28. Clause 30.0(ii) of the said CBA provided for the compulsory age of retirement for academic staff at 74yrs. Both parties agree that the CBA was to remain in force unless and or until it is repealed, revised, revoked, amended, or replaced with another mutually negotiated, agreed, and duly executed and registered CBA. The parties are in harmony that no subsequent CBA was negotiated, agreed, and



- or executed and as such the above CBA was in force as at the time the respondent issued the retirement notices alluded to in the foregoing part of this judgment.
29. However, in 2022 the respondent passed Statute XXXIX (39) that provided as reproduced in a proceeding part of this judgment.
 30. The dispute between the parties, therefore, is whether the respondent's statute of 2022 amended and or overrides the CBA executed by the parties on 15th January, 2020. This is so because the notices of retirement to the affected members of the claimant were so issued by the respondent based on the said statute.
 31. It is important for the court to draw some basic distinctions for a better and deeper understanding of the dispute herein and the decision that the court shall arrive at. Firstly, the "statutes" made and pronounced by universities under their constitutive laws should not be confused with statutes passed by the Parliament. The statutes made by the Parliament or Acts of Parliament have the force of law across the country in accordance with *the Constitution*. However, the "statutes" by the universities are internal administrative tools or instruments intended for the better and effective management and operations of the concerned university.
 32. For further clarity and for avoidance of doubts, the "statutes" by the universities are passed by the governing council of the university in accordance with the statute passed by the Parliament to constitute the university. For example, Section 25 of the Masinde Muliro University of Science and Technology Act gives the governing Council of the respondent the powers to pass statutes for the governance, control and administration of the University, and for the better carrying into effect of the purposes of that Act.
 33. Secondly, whereas a CBA is a mutually negotiated agreement and settlement of the terms of service between a union, on behalf of its members, and an employer, as it happened between the claimant and the respondent herein in regard to the CBA signed on 15th January, 2020, the 2022 Statute by the respondent is a unilateral tool of management.
 34. Thirdly, while a CBA forms part and parcel of the contract of employment between the members of the union and the employer, a statute is not such a part of the contract of employment but a managerial tool or instrument as alluded to above in regard to the respondent's *Statute 39 of 2022*.
 35. It is thus so evidently clear that the binding CBA between the parties herein remained binding as part and parcel of the contracts of service of the affected employees even as and at the time of the issuance of the impugned notices of retirement by the respondent. Moreover, the statute passed by the respondent in 2022 should not have applied retroactively as to affect the notified members of the claimant in the manner proposed and propounded by the respondent.
 36. By purporting to apply the said statute in retrospect the respondent was in violation of the rules of natural justice by condemning the affected members of the claimant unheard as they were neither consulted nor engaged in the enactment of the same. Further, the said statute was neither bargained nor negotiated nor agreed by and between the parties herein. As stated above, while the respondent has the legal right to pass such statutes for the better management of its internal administrative operations, the same must be aligned with the constitutional values of respect for the rule of law, individual and collective rights and freedoms of those to be affected, and public participation of those to be affected.
 37. In as far as the respondent intended to defeat the terms and conditions agreed in the CBA, the said statute violated the rights of the affected employees as guaranteed under Article 41 of *the Constitution*. This is so because if the said statute was deemed to override the CBA and to effectively amend the CBA the affected members shall be working on terms and conditions to which they did not consent. That



in effect violates the labour rights of the employees as stated above denying them even the basic right of representation by a trade union of their choice as the claimant was not a party in the processing of the said statute.

38. Section 59 of the *Labour Relations Act* provides that once a CBA is executed and registered it binds the parties thereto and becomes part and parcel of the terms and conditions of the contracts of the union members. Ordinarily, a CBA remains in force unless and until it is mutually repealed, revised, revoked, or amended by the parties thereto.
39. Clause 45.0 of the impugned CBA provided that “The duration of this agreement shall be four (4) years. The effective date of this agreement shall be 1st July, 2013 up to 30th June, 2017. Thereafter, the agreement shall remain in force until revised jointly by both parties. The Deputy Vice Chancellor (Administration & Finance) shall communicate such amendments to members of the staff through circulars.”
40. No evidence has been availed by the respondent that the impugned CBA was at any point mutually repealed, revised, revoked, amended, or replaced. Such a binding instrument, with the legal force of a contract, cannot be wished away or purported to have been repealed through a unilateral statute by the Council of the respondent. If the intention of the statute alluded to above was to amend or repeal the CBA, such a move was illegal, null, and void ab initio.
41. It is important for the court to point out that the *Employment Act* provides for the bare minimums in regard to the terms and conditions of employment. The parties should therefore always agree on the said bare minimums or other such terms that are better than those minimums. This is the essence of Section 26 of the Act to the effect that the court should always adopt the terms and conditions that are more favourable to an employee over and above the minimums provided for in the law.
42. Further, Section 10(5) of the *Employment Act* prohibits an employer from unilaterally changing the terms and conditions of employment of an employee without consultation. No evidence was availed that the claimant or the affected members of the claimant were consulted or engaged in the formulation and drafting of the said statute which was clearly aimed at unilaterally and unlawfully changing the terms and conditions of their service by lowering the mandatory age of retirement.
43. The court has read the ruling by Keli J delivered on 27th June, 2024 in this cause. Though the ruling was on an interlocutory application, I concur with her findings and this judgment confirms the position that the Judge arrived at. The respondent should not retire any of the affected members of the claimant unless and until they reach the agreed mandatory age of retirement being 74yrs. However, for those who may have reached that age they must retire in accordance with their respective contracts on the terms and conditions agreed therein.
44. The court has said enough in demonstrating that this cause has merits.

X.Orders

- a. This cause is allowed as follows –
 - i. A declaratory order be and is hereby issued that the agreed age of retirement of the affected members of the claimant is 74yrs.
 - ii. The respondent be and is hereby prohibited and restrained from retiring the affected members of the claimant before reaching the agreed retirement age of 74yrs.
- b. Costs of the cause to the claimant.



**DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 6TH DAY OF
FEBRUARY, 2025.**

DAVID NDERITU

JUDGE

