Kenya Private Universities Workers Union v United States International University – Africa (Cause E594 of 2020) [2025] KEELRC 2157 (KLR) (23 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2157 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E594 OF 2020

B ONGAYA, J

JULY 23, 2025

BETWEEN

KENYA PRIVATE UNIVERSITIES WORKERS UNION ..... CLAIMANT

AND

UNITED STATES INTERNATIONAL UNIVERSITY – AFRICA RESPONDENT

JUDGMENT

1. The claimant filed the amended statement of claim dated 21.11.2023 through Peter Emisembe Owiti. They prayed for judgment against the respondent for the orders:

    i. That an order of mandatory injunction compelling the respondent to immediately refund all pay cut on their wages and salaries in respect of their unionisable employees.

    ii. That the respondent to adapt the tabulation presented by the claimant herein as correct dues to our members.

    iii. That let the respondent refund all salaries pay cut up to time of unfair redundancy thus to violation of Section 5 of the *Employment Act*, 2007 among other consents signed by parties.

    iv. That the respondent be cited for contempt for having violated a consent signed on 21.02.2022, MOU signed on 30.04.2020 plus other prevailing laws and be tasked to refund all unlawfully deducted dues to our members as above.

    v. Cost of the suit be awarded to the claimant as quantified by the Court as it deems fit and just.

    vi. An order that in default, execution to ensure to recover the said unpaid dues and cost of the suit.

2. The claimant's case was as follows:

a. The issue in dispute is the unlawful redundancy of: Eric Chege Gichane, Yvonne Nkatha Kiogara, Robert Omondi Muga, Dr. Tasneem Yamani, Silas Kwemboi Masal, Collins Secrete Matenga, James Karinga Aluvanza, and others (hereinafter "the grievants").

b. The claimant filed an application on 02.10.2020 seeking to be consolidated in Cause No. 525/2020, *Prof. Maina Mudara & 53 others v United States International University – Africa*, as both matters had similar parties, common issues of facts and law, and sought similar rights and reliefs.

c. The claimant and other parties had several conciliation meetings at FKE and at the respondent's premises, where it was concluded that it was not the right time to carry out any pay cut, suspending employment tuition waiver, among other issues, and that the University had enough funds to run it fully.

d. Other issues in dispute had been settled through a court consent signed on 21.02.2022 for academic staff, but which discriminated, intimidated and victimized non-academic staff, hence terminating the employment of non-academic staff under unfair, unprocedural and unlawful redundancy, and the remedies to that effect.

e. The respondent had an agreement with one of the grievants, Mr. Eric Chege Gichane, to use his professional papers or certificate to run the university clinic/dispensary for a fee of Kshs. 50,000/- per month, which was paid but later stopped. The claimant union thus demands payment of Kshs. 3,430,000/- being the fee for 69 months.

f. The claimant and the respondent are parties awaiting the signing of the recognition agreement then enter into a CBA, but the respondent has derailed granting access and deducting full union dues as per check-off forms sent to it, because the matter is pending in this Court under Cause Nos. 1087/2017 and E878/2021.

g. The respondent has a duty to engage with the claimant on matters pertaining to the terms and conditions of service and welfare of the unionisable members, as per the MOU signed and filed in this Honourable Court on 30.04.2020.

h. The parties herein entered a consent that was adopted by the Court on 21.02.2022, but which the respondent has breached.

i. The respondent is enjoined under the Constitution to observe, respect and promote the rights of their unionisable employees to fair labour practices, fair remuneration and reasonable working conditions.

j. Despite the consent signed on 21.02.2022, the respondent sent away workers on unfair, unprocedural and unlawful redundancy, having deducted their salaries or allowances as the remedy was to refund.

k. The provisions in the MOU, consent signed and the *Constitution of Kenya* are binding upon the respondent at all times without exception, discrimination and victimization.

l. The respondent neither effected any pay cut nor sent away any academic or faculty staff on redundancy as they are still in employment at the respondent to date.

m. The respondent carried out a redundancy of about 66 workers of non-academic staff and later recalled about 35 workers who are back working at the respondent on unclear terms

of employment, including the Chapter representative, Mr. James Karinga Aluvanze, among others.

n. The redundancy process carried out by the respondent had no particular formula and did not involve the claimant as was the norm, and it unilaterally proceeded to outsource the following services: catering, cleaning, security, health services-clinic, among others. Despite two consents signed by both parties, the respondent made a unilateral decision on an unfair process of redundancy in violation of Sections 5 and 40 of the *Employment Act*, 2007, as no selection was done at all and the claimant was not issued with a proper notice to that effect.

o. The tripartite social partners signed the agreement dated 30.04.2020 to mitigate the impact of the COVID-19 pandemic, which agreement did not provide for unpaid leave. If the unpaid leave of the respondent's unionisable employees is left to proceed, the said employees will face hardship and inconvenience to their well-being, and it is further untenable in a democratic society.

p. The respondent neither involved the claimant nor sought its input in preparing the circulars that affected the remuneration of the union members, contrary to the principles of fair labour practices and as per the MOU signed by the tripartite parties.

q. The claimant wrote to the respondent requesting a meeting to discuss the issues of violation of the court consent signed between the parties on 21.02.2022, and the MOU signed by the tripartite, but the respondent refused to have that discussion.

r. The respondent's decision to send workers on unpaid leave with no basic pay but with an inadequate house allowance of between Kshs. 7,000/= to 10,000/=, when it has been in operation for the last 50 years, paying a consolidated salary and reducing salaries by 15% to create house allowance, is a breach of the terms of the MOU and an affront to the rights of the said unionisable employees.

s. The respondent declared redundant all unionisable employees working in clinic, catering, cleaning and transport departments, on 01.03.2021, and outsourced the said services to Karen Hospital and other private organizations in operation at the respondent.

t. Any purported termination, retirement, redundancy and unpaid leave with no payment of basic salaries and house allowance between Kshs. 7,000/= to 10,000/=, that is inadequate to what the respondent pays, ought to be a mutual discussion and agreement and not unilaterally imposed on the employees without notice and especially bypassing the employees' union.

3. The respondent's response to statement of claim dated 19.03.2024 was filed through Nyachae & Ashitiva Advocates. The respondent prayed that the claimant's claim be dismissed and/or struck out in its entirety with costs to the respondent. Its case was as hereunder:

a. The claimant has no locus to bring and/or sustain the court proceedings because there has never been any recognition and collective bargaining agreement between the claimant and the respondent. Furthermore, no employee of the respondent is a member of the claimant union.

b. The proceedings are further defective, and bad in law and procedure for, inter alia, the claimant's failure to produce an appropriate Authority to represent the parties it purports to represent.

c. The claimant is estopped from bringing a claim on behalf of Tasneem Yamani because of a Settlement Agreement between the said employee and the respondent.

d. ELRC Cause No. 525/2020 (*supra*) did not have similar parties, issues of facts and law, and/or similar rights and reliefs as those in the instant cause. The alleged application for consolidation of this suit with the said cause was never heard or prosecuted before any court of competent jurisdiction, and the claimant was never joined as a party in ELRC Cause No. 525/2020.

e. The respondent never entered into any agreement with one Eric Chege Gichane as alleged, and does not owe the said person any dues. In any event, the claimant has failed to show the nexus between the union and the said Eric Chege Gichane so as to claim the alleged dues on his behalf.

f. No issue is pending in ELRC Cause Nos. 1087/2017 and E878/2021, as the former was marked as settled following a Consent Order dated 21.11.2018, while this Court dismissed the latter for want of prosecution on 28.03.2023.

g. The respondent has fully complied with the Consent Order dated 21.11.2018 and has been affording the claimant access and appropriate facilities to seek recruits among the respondent's unionisable employees. However, the claimanthas no recruits to date.

h. Following the COVID-19 pandemic, the respondent had to close in compliance with Government directives. The closure immediately effected a sharp decline of 7% revenue from its auxiliary services for the rest of the academic year, that is, student housing, cafeteria, laundry, sports fee and health services all came to an end. When the university closed, 10% of the students had not cleared their fee balances for the semester, and student enrolment for the summer semester reduced by 18% headcount and 15% of the total number of students taking full units. This decline resulted in a financial deficit for the university to the tune of Kshs. 63 million for the 2019-2020 academic year.

i. The budget assumptions that had been developed by February 2020 and presented to the respondent's University Council's Finance/ Budget Development Committee had to be redone in consideration of the negative impact of the pandemic. The new projections were later approved on 09.07.2020, and meetings were then held with all budget holders and their constituents.

j. On 05.08.2020, the resultant 2020-2021 budget draft was shared with all employees, including those the claimant purports to represent. Simultaneously, the respondent convened a meeting of all its employees as a follow-up to the consultative meeting held between its Management Board and the stakeholders on the effects of COVID-19 within the education sector.

k. On 28.08.2020, the respondent's University Council approved the budget for the 2020-2021 academic year, and on 31.08.2020, the respondent issued a notice to its employees justifying the measures, including redundancy and, where suitable, unpaid leave.

l. The respondent proceeded with the sustainability measures in line with the applicable statutory provisions and procedures, including issuing redundancy notices to some employees and subsequently paying all their dues. The dues include one month's wages in lieu of notice and redundant severance pay.

m. The respondent consulted widely before taking the sustainability measures, thereby following due procedure in effecting those measures. It also continues to pay full salaries to all its employees from January to April and the summer semesters in 2021, despite the decline in revenue.

n. The balance of convenience at that time tilted in favour of the respondent's sustainability measures to avoid its employees, neighbouring community and the public from suffering irreparably.

4. The parties' respective witnesses testified before the Court and thereafter the parties filed their respective submissions. The Court has considered the material on record and returns as follows:

a. To answer the 1st issue, there is no dispute that the seven grievants were employed by the respondent to serve in the respondent's medical department.

b. To answer the 2nd issue, the Court returns that the grievants' employment was terminated on account of redundancy. The undisputed evidence is that it was during the COVID-19 situation. The respondent's finances became seriously affected and one crucial decision was to downsize or close auxiliary services. The medical department was one of such services that had to close. The grievants were thereby affected as the entire medical department was closed. The Court returns that as at termination by redundancy, the respondent has established that there existed a valid and genuine reason as envisaged in section 43 of the *Employment Act*, 2007 and the reason was fair per section 45 of the Act as it related to the respondent's operational requirements being better economy for enterprise survival in view of the COVID-19 situation. The Court finds that the claimant's case that after redundancy and sometimes thereafter in 2021 the respondent outsourced the medical services rendered the redundancy not genuine is found unjustified. It is that the respondent was entitled to re-organise the enterprise for better economy by abolishing in-house medical services in preference to, the respondent's redesign, more sustainable outsourced services. The Court considers that the employer always enjoys a prerogative to re-organise the enterprise, provided, the re-organisation is factual and not fictitious or pretended as to unfairly disadvantage the workers in a pretended redundancy. In the instant case, the re-design of enterprise is found to have been factual and genuine.

c. To answer the 3rd issue, the Court returns that the respondent adopted a fair procedure in declaring and paying the grievants the final dues. The claimant's witness No. 1 (CW1) was the claimant's General Secretary. He confirmed that the union attended two meetings prior to the redundancy of the grievants and whom the union represented. CW1 also testified thus, "Am aware the 7 I represented were paid upon redundancy and direct notices given but were paid severance. We claim pay for unfair redundancy. Some payments were made." Further, claimant witness No. 2 was one of the grievants one Gichana Eric Chege. He testified that prior to redundancy he attended the meetings the respondent convened. He also alleged in his testimony that he was not given an opportunity to offer alternatives but did not mention in his testimony any of such potential alternative. The Court returns that the respondent duly complied with the need to consult as was held by Maraga JA in *Kenya Airways Limited v Aviation &Allied Workers Union Kenya & 3 others* [2014] eKLR. The respondent's submission is upheld that the procedure for redundancy was duly complied with and as for selection criteria based on seniority and suitability for retention, the issue did not arise because the medical services department was abolished in its entirety rendering all staff therein redundant. The Court finds that the petitioner substantially complied with provisions of section 40 of the Act on redundancy.

d. To answer the 4th issue, the Court returns that the termination by redundancy of the seven grievants was not unfair in procedure or substance. Accordingly, the grievants are not entitled to compensation for unfair redundancy as was claimed and prayed for. In any event the claimant's witnesses confirmed that the grievants were paid their respective final termination

dues. The Court has as well noted the respondent's generosity when the respondent's witness (RW) one Night Nzovu testified that after termination, the grievants continued to enjoy the medical cover provided by the respondent and for those who had served for more than ten years, per respondent's policy, their children upon attaining and joining the respondent for university education, they would enjoy tuition waiver. The Court finds such humane exit consideration s to amount to mitigating factors under section 49 of the Act that would in any event, if compensation were due, to have significantly diminished or all together erased the awardable amounts. The Court has also noted that per RW's testimony, for 1.5 years of COVID-19 situation, the respondent had paid salaries while staff were not at work. Unfortunately, the situation persisted and the cost effective measure was the salary cuts that were agreed upon between the respondent and the claimant union or grievants. In such circumstances, the Court returns that the claim for payment of salary cuts that were agreed upon is unjustified. In any event, it would be oppressive for the respondent to pay in circumstances that the grievants were not working for the claimed period in view of the COVID-19 situation.

e. To answer the 5th issue the Court finds that CW2 is not entitled to payment for use of his pharmaceutical practice licence for years 2016 until termination in 2021. CW2 testified that he was employed and worked for the respondent upon satisfaction that he possessed the practice licence and there was no agreement that he would be paid extra for respondent's use of the licence. As submitted for the respondent, the claim was not pleaded and was not proved as was unjustified.

f. To answer the 6th issue, the Court finds that the claimant was entitled to represent its members, the grievants, upon their individual contracts of service, in the redundancy consultations and then in Court. Thus recognition was not a precondition for the union to validly represent the members being unionisable staff of the respondent. The Court of Appeal (Musinga, Gatembu & Murgor, JJA) considered the issue in *Modern Soap Factory v Kenya Shoe and Leather Workers Union* Civil Appeal NO. 37 OF 2019 [and held thus,

> " 15. Based on the foregoing, there are conflicting positions taken by the ELRC on the question under consideration. In our judgment, we can see no reason why a registered union, whose constitution so empowers, should not have standing to institute a claim on behalf of its members and to represent its members in court.
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> 16. Article 41 of the *Constitution of Kenya* on labour relations protects the right of every person to fair labour practices and the right, among others, to join a trade union, which in turn has the right to determine its activities. Article 258 of the *Constitution* on enforcement of the *Constitution* provides in Article 258(2) (d) that an association acting in the interest of one or more of its members may institute proceedings where the *Constitution* is contravened or threatened with contravention. In the same spirit, Section 22 of the Employment and Labour Relations Act provides that: "In any proceedings before the Court or a subordinate Employment and Labour Relations Court, a party to the proceedings may act in person or be represented by an advocate, an office bearer or official of the party's trade union or employers' organisation and, if the party is a juristic person, by a director or an employee specially authorised for that purpose."

17. We can see no reason therefore to fault the conclusion by the Judge that the respondent has locus standi to institute the claims on behalf of its members. That said, whether an employee is a member of a union is a question of fact. Where there is a contest as to whether an employee is a member of a union, evidence would be required to settle that question. It is not a matter that is amenable for determination on the basis of a preliminary objection. [See *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696.]

18. A recognition agreement is defined under Section 2 of the Labour Relations Act as an agreement in writing made between a trade union and an employer, group of employers or employers' organisation regulating the recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers' organisation. It is a bilateral agreement between a trade union and an employer on the basis of which the trade union engages with the employer regarding the terms and conditions of employment of its members. It is not the basis upon which the trade union represents its members in court. As the learned Judge correctly stated, the two roles are distinct."

g. Again, the Court considered the issue in *Kenya Private Universities Workers Union v Aga Khan University Hospital* ELRC Cause No. 169 OF 2019 at Nairobi (Ruling) (2019) eKLR and held, "The Court has considered the previous cases and the jurisprudence appears to tilt towards the position that recognition is a precondition for concluding a collective agreement whereas the precondition to an employees' representation by a trade union is that employee's membership in the trade union. The Court returns that the preliminary objection will fail."

h. Again, Gakeri J in *Kenya Union of Road Contractors & Civil Engineering Workers v Pride Enterprises Limited* (Cause E078 of 2024) [2025] KEELRC 43 (KLR) (23 January 2025) (Judgment) held, "31. From the foregoing, it is surmisable that other than for purposes of collective bargaining, a trade union does not require recognition by an employer or group of employers or employer's organization to recruit members from the ranks of their unionisable employees and represent them in court as necessary."

5. The Court returns that the suit is liable to dismissal. Parties are in continuing or forming industrial relationship and each to bear own costs of the suit.

In conclusion the suit is hereby dismissed with orders each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 23RD JULY, 2025.

BYRAM ONGAYA,

PRINCIPAL JUDGE