



**Universities Academic Staff Union (UASU) Masinde Muliro University of Science and Technology (MMUST) Chapter v Masinde Muliro University of Science and Technology (MMUST) (Cause E018 of 2024) [2024] KEELRC 1690 (KLR) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1690 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
CAUSE E018 OF 2024**

**JW KELL, J  
JUNE 27, 2024**

**BETWEEN**

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

**AND**

**MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY  
(MMUST) ..... RESPONDENT**

**RULING**

1. The ruling is on application by way of a Notice of Motion application by the Claimant/Applicant (herein “Applicant”) dated 22<sup>nd</sup> May 2024 and filed on 27<sup>th</sup> May 2024 brought under the provisions of Articles 10 and 159 (2) (d) of *the Constitution*, Sections 1A, 1B and 3A of *Civil Procedure Act*, seeking the orders: -
  - a. Spent.
  - b. A temporary injunction be issued restraining the respondent from retiring members of the claimant who have attained the age of 70 years pending the hearing and determination of this application inter partes.
  - c. The said order do subsist pending the hearing and determination of this claim.
  - d. The costs of this application be provided for.
2. The Notice of Motion was premised on the grounds on the face of the application and the grounds in the supporting affidavit sworn by Mr. Robinson Oduma (UASU Secretary General-MMUST Chapter) on 22<sup>nd</sup> May 2024 as follows: -



- i. The respondent has issued various retirement notices to the Applicant's members who have attained the age of 70 years namely: -
    - a. Dr. Mary Goretti Kariaga's letters of 18<sup>th</sup> January 2023 & 7<sup>th</sup> May 2024
    - b. Dr. Selline A. Ooko's letter of 14<sup>th</sup> February 2024
    - c. Mr. George Alubokho Sowayi's letter of 14<sup>th</sup> February 2024
    - d. Prof. James A. Oloo's letter of 19<sup>th</sup> January 2023
    - e. Prof John Shiundu's letter of 11<sup>th</sup> May 2023
    - f. Prof. Aggrey Simiyu's letter of 14<sup>th</sup> February 2024 (R-O-1(a-i)).
  - ii. That the said notices are contrary to the Collective Bargaining Agreement (CBA) for the period 1<sup>st</sup> July 2013 to 30<sup>th</sup> June 2017 signed on 15<sup>th</sup> January 2020, that is still in force, and particularly clause 30.0(ii) that provides that the mandatory retirement age for Academic Staff is 74 years and not 70 years (R-O-2).
  - iii. that despite the claimant's responses, to the said notices, the respondent has failed to address the issue(R-O-3).
  - iv. that through a demand letter dated 27<sup>th</sup> March 2023(R-O-4), the claimant sought the respondent's response to no avail, and they are apprehensive that the respondent will implement the notices thus defeating the substance of their claim.
  - v. That the CBA is superior to the University's Human Resource Policies and Procedures Manual (HRP & PM 2017) or any statutes, as it is a negotiated document that binds the claimant and the respondent.
  - vi. That the claimant thus has a *prima facie* case with a high possibility of success and damages will not be an appropriate remedy in the circumstance.
  - vii. That the staff are still in employment and the balance of convenience tilts in their favour.
3. The Application was opposed by the respondent through the Relying affidavit sworn by Benard Ooko (Assistant Registrar of MMUST) on 11<sup>th</sup> June 2024 on the grounds that: -
- i. The MMUST Statutes 2022 provides on retirement; at Statute 39(9) that: 'staff of the University shall retire from employment as -for Academic staff, retirement age shall be seventy (70) years for Assistant Lecturers/Tutorial fellows, lecturers, and Senior Lecturers; and Seventy-Four (74) years for Associate Professors, Professors and Senior Professors or such other age as may be determined by government from time to time.'
  - ii. That the MMUST statute was passed in line with the Constitution of Kenya, the University Act,2012, the MMUST Charter,2013, the Public Finance Management Act, 2012, and the Employment Act.
  - iii. the MMUST Statute 2022 on retirement age cannot be subservient to the Collective Bargaining Agreement being relied on by the Claimant and parties to a CBA cannot negotiate outside public policy and guidelines. The CBA should adhere to existing policies and guidelines such as minimum wage guidelines, public service commission, human resource policies and procedures manual, state corporation guidelines, and various SRC advisories.
  - iv. That as relates to the grievants issued with notices; -



- a. Dr. Mary Goretti Kariaga is a senior lecturer and not an associate professor and above and she should retire at age 70 years.
- b. Mr. George Alubokho Sowayi is a Senior Lecturer and should retire at 70 years.
- c. Prof. James A. Oloo was born in 1948 and thus 76 years and past the retirement age.
- d. Prof John Shiundu was born in 1950 and thus retired in June 2023 and is currently serving a post-retirement contract.
- e. Prof. Aggrey Simiyu was born in 1951 and is due to retire on 30<sup>th</sup> June 2024.
- v. That to allow the grievants to serve beyond their retirement age is outside the law and against public policy.
- vi. That the applicant has not satisfied the conditions for the grant of temporary orders of injunctions and the applicant should be dismissed with costs.

### **Written Submissions**

4. The court directed that the application be canvassed by way of written submissions. The parties complied. The Applicant's written submissions dated 14<sup>th</sup> June 2024 were filed by M. Kiveu Advocates. The Respondent's written submissions dated 15<sup>th</sup> June 2024 were filed by State Counsel Gilbert C. Tarus of the Office of the Attorney General.

### **Determination**

#### **Issues for determination.**

5. The Applicant addressed one issue in their submissions being: -
  - a. Is the Claimant entitled to orders sought.
6. The Respondent addressed the following issue in its written submissions: -
  - a. Whether the provisions of the CBA on retirement age supersedes the retirement notices issued to the Claimant's members.
7. The court having perused the pleadings by the parties and their submissions was of the considered opinion that the issue placed before the court by the parties for determination of the application to be:
  - Whether the application was merited.

#### **Whether the application was merited**

8. The Applicant union alleges that the Respondent has issued Retirement notices to its members which they assert are contrary to the Collective Bargaining Agreement (CBA) for the period 1<sup>st</sup> July 2013 to 30<sup>th</sup> June 2017 signed on 15<sup>th</sup> January 2020, and that is still in force, and particularly clause 30.0(ii) that provides that the mandatory retirement age for Academic Staff is 74 years and not 70 years (R-O-2). The Applicant relied on Justice Nduma's decision in *Kenya University Staff Union & another v Masinde Muliro University of Science and Technology* (2018) eKLR.
9. The Respondent on its part states that the MMUST Statutes 2022 provide on retirement; at Statute 39(9) that: 'staff of the University shall retire from employment as -for Academic staff, retirement age shall be seventy (70) years for Assistant Lecturers/Tutorial fellows, lecturers, and Senior Lecturers; and



- Seventy-Four (74) years for Associate Professors, Professors, and Senior Professors or such other age as may be determined by government from time to time.”
10. The Respondent states that the MMUST statute was passed in line with the Constitution of Kenya, the University Act, of 2012, the MMUST Charter, of 2013, the Public Finance Management Act, of 2012, and the Employment Act.
  11. The Respondent states that the MMUST Statute 2022 on retirement age cannot be subservient to the Collective Bargaining Agreement being relied on by the Claimant and parties to CBA cannot negotiate outside public policy and guidelines. They relied on the decision by My Sister Judge Rutto in Kenya Universities Staff Union v Council of Jomo Kenyatta University of Agriculture and Technology & another (Petition E022 of 2023 [2023] KEELRC 1754 (KLR) (29 June 2023) (Judgment) Neutral citation: [2023] KEELRC 1754 (KLR) where she held that:- ‘As to the import of Clause 19.1 (d) of the CBA, the same cannot supersede the provisions of a statute. The CBA ought to be interpreted in line with the existing relevant statutes and where there is inconsistency, the CBA must give way. As was rightfully held by the Court of Appeal in its decision in Ben Chikamai and another vs Machithi and Another, Civil Appeal No 313 of 2018; [2020]eKLR, a Press Statement, a policy paper or letter cannot override clear provisions of the law. The same case applies to CBAs.”
  12. The Respondent asserts that the CBA should adhere to existing policies and guidelines such as minimum wage guidelines, public service commission, human resource policies and procedures manual, state corporation guidelines, and various SRC advisories.
  13. The Applicant union has contended that the parties indeed signed a Collective Bargaining Agreement on 15<sup>th</sup> January 2020, which the Respondent does not dispute. The Respondent’s position is that its Statute of 2022 cannot be seen to be inferior to the CBA and the terms in the said statute of 2022 supersede the CBA. The said statute was passed by the University Council according to the provisions of section 25 of the Masinde Muliro University of Science and Technology University Act CAP. 210F[Rev. 2012] to wit:- ‘25. Statutes (1) In the performance of its functions under this Act, the Council shall subject to this Act, make statutes generally for the governance, control and administration of the University and for the better carrying into effect of the purposes of this Act, and in particular for— (a) the establishment of faculties, institutes, centres, parks and schools of the University; (b) the description of degrees; (c) the description of diplomas, certificates and other academic awards; (d) the requirements for the award of degrees, diplomas, certificates and other academic awards; (e) the conduct of examinations; (f) determination and collection of fees and other charges; 1] (g) the settlement of the terms and conditions of service, including the appointment, discipline, dismissal, remuneration and retirement benefits, of the members of the staff of the University; (h) the constitution and procedure of meetings of the Council, and the establishment, composition and terms of reference of committees thereof; (i) prescribing the rules and statutes of the students’ organization; (j) making statutes that govern intellectual property rights of the University; (k) providing for or prescribing anything which under this Act, may be provided for or prescribed by the statutes. (2) Notwithstanding subsection (1), the Council shall not make, amend or revoke, any statutes relating to the functions or privileges of the Chancellor, the Vice-Chancellor or the Senate without first ascertaining the opinion of the Senate. (3) Statutes shall only be made by a resolution passed at a meeting of the Council supported by a majority of not less than three-fourths of the members present and voting being not less than half of the total membership of the Council. (4) Statutes made by the Council under this Act shall be published in the Kenya Gazette but sections 27, 31(e) and 34 of the Interpretation and General Provisions Act (Cap. 2) shall not apply to such statutes.”It was apparent to the Court that the Statute of 2022 by the University Council, amended the retirement terms negotiated by the parties under the registered CBA of 2020. In my opinion, the said University Council Statute



of the university cannot supersede the CBA negotiated and registered in court earlier. The university statute does not enjoy the status of an Act of Parliament.

14. The CBA relied on by the Applicants was negotiated between the Applicant union and the Respondent and after negotiations only then was the CBA signed and subsequently registered by the Court. The CBA in place was negotiated before the Respondent enacted its MMUST Statute, 2022, as it is evident that the CBA was signed on 15<sup>th</sup> January 2020, two years prior to the MMUST statute of 2022.
15. The Court holds that the CBA was already binding on the employer-employee relationship hence forming part of terms of the employment of the employees. The university council by the act of changing the retirement terms unilaterally amended the terms of the employment of the academic staff without any consultation and outside the existing government public service retirement policy upheld during the registration of the said CBA in *Inter Public Universities Councils Consultative Forum of the Federation of Kenya Employers v Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (KUDHEIHA) & 2 others; Ministry of Education & 3 others (Interested Parties)* [2021] eKLR as follows:- ‘Retirement in the public sector is governed by government policy. The last circular on retirement in the public sector is dated 20<sup>th</sup> March 2009 and reviewed mandatory retirement age for public servants from 55 to 60 years but retained retirement age for public servants whose retirement age was above 60 years.

The circular states: -

“Review of The Mandatory Retirement age for Public Servants

The current policy on retirement of Public Servants provides for a mandatory retirement age of 55 years. This is with the exception of Judges, Academic staff in Public Universities, Research Scientists and Public Servants with disabilities whose retirement ranges from 60 years to 74 years.”

16. The Respondent on their part asserted that parties to a CBA cannot negotiate outside public policy and guidelines. The Respondent relied on the decisions of the court in *Kenya Universities Staff Union v Masinde Muliro University of Science and Technology (Employment and Labour Relations Cause E013 of 2021)* [2022] KEELRC 13247 (KLR) (17 November 2022) (Judgment); and *Kenya University Staff Union vs Council of Jomo Kenyatta University of Agriculture and Technology and another (Petition No. E022 OF 2023)* (2023) KEELRC 17554 (KLR) 29<sup>th</sup> June 2023 (Judgement). The Court finds that the said decisions are correct and consistent with the government’s public policy on retirement as the cases related to university non-academic staff.
17. Justice Wendoh in *County Government of Migori v Hope Self Help Group* [2020] eKLR held that: -

“The Court of Appeal in Nairobi Civil Appeal 155 of 1992 Kukal Properties Development Ltd v Tafazzal H. Maloo & 3 others [1993] eKLR had occasion to consider the effect of variation of contract both prior to reducing to writing and after. It observed;

‘Evidence of negotiations is never admissible to vary the terms of the written contract. However, where there is a latent ambiguity, extrinsic evidence may be given of surrounding facts to explain the ambiguity. But certainly, no evidence or correspondence on prior negotiations may be admissible. It is assumed that the intentions of the parties to a written contract are embodied in a written contract itself. I have used the phrase “priority negotiations” because subsequent correspondence may affect the written contract where it is clear from the wording that the parties intended such subsequent correspondence to affect



the written contract. For instance, subsequent correspondence may vary the terms of the written contract if it is clear from the correspondence that the parties intended to vary the contract.” (underline mine) Where there is a CBA in place the same ought to be amended by the parties for the variation of the negotiated terms to be bidding.

18. By dint of section 26(1) of the *Employment Act*, the Collective Bargaining Agreement signed by the parties herein on 15<sup>th</sup> January 2020 provides more favorable terms to employees of the Respondent and to that extent supersede the application of the terms and conditions set out in the MMUST Statute as relates to Retirement age.
19. The Collective bargaining agreement unless changed by a subsequent CBA between the parties remains binding on the parties, where it provides for more favourable terms. The court already held the CBA conformed with the exiting public policy on retirement.
20. It is undoubtedly clear that the object of the MMUST Statutes was to amend the Collective Bargaining Agreement as relates to the Retirement Age which in itself was amending the contracts of all the Academic staff contrary to the public policy on retirement age.
21. Section 10 (5) of the *Employment Act* provides that “(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”.
22. The Respondent has not shown there were any engagements with the Applicants to change the CBA terms to terms that are less favourable.
23. The respondent stated, that where a CBA is inconsistent with a statute, the latter takes precedence. However, the application of the terms of a CBA is also within the provisions of section 59 of the *Labour Relations Act* which states that, “(1) A collective agreement binds for the period of the agreement-
  - a. the parties to the agreement;
  - b. all unionisable employees employed by the employer, group of employers, or members of the employers’ organisation party to the agreement; or
  - c. the employers who are or become members of an employers’ organisation party to the agreement, to the extent that the agreement relates to their employees.(2) A collective agreement shall continue to be binding on an employer or employees who were parties to the agreement at the time of its commencement and includes members who have resigned from that trade union or employer association.  
(3) The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.”
24. The respondent relies on this court’s decision in *Kenya Universities Staff Union v Masinde Muliro University of Science and Technology* (Employment and Labour Relations Cause E013 of 2021) [2022] KEELRC 13247 (KLR) (17 November 2022) (Judgment); where the court found that:-

“The issue of mandatory retirement age of claimant’s members has been settled by the court to be 60 years and section 80 of the Public Service Commission prohibits extension of the retirement age beyond the 60 years for public servants unless an officer is under the category of disabled person”



25. The Respondent and the Applicant negotiated the 1<sup>st</sup> July 2013 to 30<sup>th</sup> June 2017 CBA which they signed on 15<sup>th</sup> January 2020. The Retirement age bracket under the CBA was capped at 74 years which age the Court holds was in line with the government policy on retirement as re-stated in *Inter Public Universities Councils Consultative Forum of the Federation of Kenya Employers v Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (KUDHEIHA) & 2 others; Ministry of Education & 3 others (Interested Parties)* [2021] e KLR (*supra* Para. 15).
26. The CBA terms form part of the Contract of employees and their variation can only be after consultation with the employee and amendment of the CBA. The CBA was in place before the MMUST statute was passed by the University Council and for the Respondent to have changed the terms presently in the CBA to what is contained in the MMUST Statute was unlawful.
27. The terms of the CBA supersede the terms of the MMUST Statute, 2022 passed by the Council pursuant to section 25 of the Respondent's University Act (*supra*) as there was no evidence that the variation contained in the said statute was undertaken in consultation with the employees to change the existing CBA retirement age of 74 years.

#### **On the issue of working beyond retirement age**

28. The Respondent contended in the replying affidavit of Bernard Ooko on 11<sup>th</sup> June 2024 that Prof. James A. Oloo PF NO. 1414 was born in 1948 and thus 76 years past the retirement age; Prof John Shiundu PF 0080 was born in 1950 and thus retired in June 2023 and is currently serving a post-retirement contract and Prof. Aggrey Simiyu PF 002 was born in 1951 and is due to retire on 30<sup>th</sup> June 2024. This was not rebutted.
29. The public policy on retirement (*supra*) by the Government and the CBA clause 30.0 between the Parties provides that the compulsory retirement age of academic staff is 74 years. The Court agreed with the respondent that the continuation of public officers in service beyond the compulsory retirement age is against public policy. The court holds that the Respondent is mandated to ensure compliance with the public policy on the compulsory retirement age as per the CBA which is capped at 74 years for academic staff consistent with the government policy on retirement age in public service.
30. In the upshot, the application is hereby allowed by issuance of interim order which is hereby issued restraining the Respondent, from, retiring or threatening to retire the Applicant's members until they attain the age of 74 years pending the hearing of the claim. The Respondent is at liberty to comply with the enforcement of compulsory retirement age of 74 years of the Claimant's members who have already attained the compulsory retirement age as per the CBA.
31. Considering this matter concerned the interpretation of the instruments of employment between the parties, the court orders each party to bear its costs in the application.
32. The parties are further ordered to comply with Order 11 of the *Civil Procedure Rules*. Pretrial directions in the claim on the 16<sup>th</sup> of July 2024.
33. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 27TH DAY OF JUNE 2024.**

**J.W KELI**

**JUDGE**

**IN THE PRESENCE OF: -**



**Court Assistant: Macheso**

**Claimant /Applicant: - Mondia**

**Respondent: Tarus**

