



Trusted Society of Human Rights Alliance v Mathews & 6 others (Employment and Labour Relations Petition E024 of 2024) [2024] KEELRC 2502 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2502 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E024 OF 2024
AN MWAURE, J
OCTOBER 11, 2024**

BETWEEN

TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE PETITIONER

AND

BULITIA GODRICK MATHEWS 1ST RESPONDENT

MAASAI MARA UNIVERSITY 2ND RESPONDENT

COUNCIL OF MAASAI MARA UNIVERSITY 3RD RESPONDENT

CABINENT SECRETARY, MINISTRY OF EDUCATION 4TH RESPONDENT

PUBLIC SERVICE COMMISSION 5TH RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION 6TH RESPONDENT

THE COMMISSION FOR UNIVERSITY EDUCATION 7TH RESPONDENT

JUDGMENT

Introduction

1. The Petitioner filed a Petition dated 27th February 2024.

Petitioner's Case

2. The Petitioner avers that the Maasai Mara University Charter, 2013 under Section 15 (1) provides that the Council shall appoint two or more Deputy Vice Chancellors through competitive process who shall under the general authority of the Vice-Chancellor exercise such powers and perform such duties as may be provided for by the statutes.



3. The Petitioner avers that the 1st Respondent had been appointed under a 5 year contract in the office of Deputy Vice-Chancellor (Academics and Students Affairs), his term was due to end on Wednesday 31/1/2024 and the same was communicated vide a letter dated 21/12/2023.
4. The Petitioner avers that vide a letter dated 11/1/2024, the Ag. Vice Chancellor on her motion unilaterally and without any reasons wrote to the 4th Respondent requesting for permission to hold a special council meeting whose main objective was to discuss the re-appointment of the 1st Respondent.
5. The Petitioner avers that the 3rd Respondent through its chairperson sought the 4th Respondent's authorization notwithstanding the 4th and 5th Respondents directive that the position of Deputy Vice-Chancellor (Academics and Students Affairs) be advertised due to the change in law of recruitment of Vice Chancellors and Deputy Vice Chancellors in public universities.
6. It is the Petitioner's case that the 2nd and 3rd Respondents acted arbitrarily and in contravention of section 35(1)(a)(v) of the Universities Act, 2012 as amended through Miscellaneous Amendment Act No. 18 of 2018 which transferred the recruitment power of Vice Chancellors and Deputy Vice Chancellors to the 5th Respondent and it no longer vests on the 3rd Respondent.
7. The Petitioner avers that the 1st Respondent is unqualified as he had not met the prerequisite qualifications for acquisition of Associate Professorship title that he used to ascend to the Office of DVC (Academic & Student Affairs).
8. The Petitioner avers that the recruitment process did not follow due process as the 1st Respondent was hired by his former crony Prof. Mary Walingo who worked with him in Muranga University.
9. The Petitioner avers that the 1st Respondent's rehiring was illegal as request to conduct the recruitment process of the DVCs offices has been sent to the 5th Respondent vide a letter dated 21/12/2023 for advertising as required by law. However, the University Council unilaterally called for a special meeting and renewed the 1st Respondent's contract without conducting competitive recruitment while the office of DVC (Administration, Finance and Strategy) was advertised and went through competitive recruitment process.
10. The Petitioner avers that the 1st Respondent faked his curriculum vitae as he claimed he was a lecturer at Maseno University, University of Nairobi and Technical University of Kenya whereas he was merely a part-time lecturer. Further, it listed Prof. Mary Walingo as one of his referees which was conflict of interest as she went ahead to employ him.
11. The Petitioner avers that the 1st Respondent's contract was illegally inflated to include payment of gratuity on a monthly basis instead of at the end of the year as the law requires.
12. The Petitioner avers that the 1st Respondent has never held any substantive teaching position in any university before he was appointed as Associate professor yet he was sharply promoted from position of Registrar, Administration and Planning to Associate Professor without meeting the minimum requirements of teaching and supervising Masters or PhD level students.
13. As a new PhD graduate, the highest position the 1st Respondent should have been hired to by any public university in Kenya should have been lecturer. The fact that he never went through these steps has eroded confidence in him by many PhD holders and professors working under him.
14. The Petitioner avers that 1st Respondent faked his salary scale from the current substantive employer, Muranga University to bargain exorbitant salary at the Maasai Mara University which was fraudulent and unlawful enrichment of a public officer from public coffers in the course of their employment.



1st Respondents' Case

15. In opposition to the Petition, the 1st Respondent filed a replying affidavit dated 13th March 2024.
16. The 1st Respondent avers that there was nothing arbitrary or unilateral in the special meeting convened by the 2nd Respondent to discuss his employment.
17. The 1st Respondent avers that he is qualified to hold the position having gone through the process of recruitment by applying for the same, attending interviews and finally emerged successful. His appointment was merit based on his qualifications and experience.
18. It is the Respondents' case that his contract was lawfully and legally crafted with valid terms of engagement that were duly approved for the sector by the relevant body with authority.

The 1st, 2nd and 3rd Respondents Case

19. The Respondents aver that the petition is misconceived, frivolous, vexatious, bad in law and incurably defective as it raises no reasonable cause of action as against the Respondents, is an abuse of the court process. Further, the existence of the various legislations and constitutional provisions quoted are acknowledged but their relevance and applicability in this matter cannot be vouched for by the Respondents.
20. The Respondents aver that the 1st Respondent's engagement was a reappointment and not a recruitment and the same was done as per the terms of his appointment contractual terms.
21. The Respondents aver that 1st Respondent was rightfully and procedurally employed and has been in office for more than 5 years now and nobody had questioned his first appointment. Further, everything as regards the 1st Respondent's appointment was publicly handled and as per the law.
22. The Respondents aver that 1st Respondents earnings are legal and it is illogical and without basis to require that he makes a refund of the same and that the 1st Respondent's academic progression through the ranks has been as per established and known procedures in academic circles.
23. The Respondents aver that the petition does not qualify as a constitutional petition as the Petitioner has not been able to establish the constitutional provisions allegedly contravened.
24. The Respondents aver that the orders and declarations sought by the Petitioner are not supported by evidence capable of persuading the court to grant the same.

Petitioner's Submissions

25. The Petitioner submitted that the 1st Respondents recruitment as DVC was based on favouritism, cronyism and breach of national values and principles of good governance as guaranteed under Article 10 and Chapter 6 of *the Constitution* of Kenya. It is mind boggling how an unqualified individual can be appointed to the high ranking position against robust legal provisions on such qualifications.
26. It is the Petitioner's submission that 1st Respondent could not have held an administrative position at Muranga University and served at the same time as a lecturer and senior lecturer concurrently. No evidence has been presented before this court how he procedurally qualified as an associate professor and so he did not qualify to be appointed as DVC in February 2019.
27. The Petitioner submitted that it was not possible to acquire 3 years' experience required for one to become a lecturer and another 3 years teaching experience at the university to acquire senior lecturer status before becoming an associate professor between 2014 and 2017 alone. Therefore, the



1st Respondent was not qualified for appointment as DC (Academic & Student Affairs) Maasai Mara University in 2019.

28. The Petitioner submitted that the Commission for University Education Harmonized Criteria and Guidelines for Appointment and Promotion of Academic Staff in Universities in Kenya ('the Guidelines') were not adhered to in the appointment of the 1st Respondent and to that extent his appointment was irregular.
29. It is the Petitioner's submission that Chapter 6 of *the Constitution* specifically Article 73 declares that authority assigned to a person by the public is public trust that ought to be exercised in a manner that demonstrates respect for the people and brings honour and dignity to the office and promotes public confidence in the integrity of the office. It further requires public officers should be objective and impartial in decision making and ensure that decisions are not influenced by nepotism, favouritism and other improper motives or corrupt practices.
30. The Petitioner submitted that Prof. Mary Walingo, the then Vice Chancellor of the 2nd Respondent who sat through the interview leading to his appointment as DVC was one of his referees, therefore, impartiality, conflict of interest and bias have never been so conspicuous.
31. The Petitioner submitted that there was a reasonable expectation that the process leading to the 1st Respondent's appointment would be carried out in a free and transparent manner, but this was not the case, there was an apparent conflict of interest in the recruitment process.

Respondents' Submissions

32. The Respondents submitted that the 1st Respondent was appointed as DVC for a 5-year term which was eligible for reappointment for a further 5 years. His first appointment was done through a competitive process where he was successful and thus appointed. No complaint was raised in respect to his first appointment. On expiry of his first term and in tandem with the express provision for reappointment, the 1st Respondent applied for renewal of his contract which the 3rd Respondent has power to recommend to the 4th Respondent for reappointment.
33. The Respondents submitted that the petition is based on speculation and not backed by evidence and has not set with certainty the constitutional rights allegedly violated by the Respondents. Hence the petition is misconceived, frivolous, bad in law and defective as it raises no reasonable cause.
34. It is the Respondents submission that the applicable law supports the 1st Respondent's reappointment for a further term, it does not state that the same should be conducted through a competitive process. Therefore, the 1st Respondent's reappointment did not offend the constitutional provisions cited as his initial appointment was competitively done and the constitutional requirements met.
35. The Respondents submitted that the 1st Respondent's first appointment was legal and never challenged therefore it is naïve for the Petitioner to demand that he refunds emoluments paid to him in the first term. Further, no ground has been established through evidence to qualify the grant of orders sought.

Analysis and Determination

36. The main issue for this court's determination is whether the appointment of the 1st Respondent to the office of DVC (Academic and Student Affairs) was procedurally flawed, ultra vires and tainted with irregularities, bias and impropriety.



37. The Petitioner submitted that the 1st Respondent's appointment was expected to be carried out in a free and transparent manner, but this was not the case, there was an apparent conflict of interest in the recruitment process.
38. On the other hand, it is the Respondents' case that the 1st Respondent was reappointed upon expiry of his first term and in tandem with the express provision in his contract which stated the same was renewable.
39. In due consideration that his first appointment was done through a competitive process where he was successful and thus appointed and no complaint was raised in respect to his first appointment. The 1st Respondent applied for renewal of his contract which the 3rd Respondent has power to recommend to the 4th Respondent for reappointment.
40. In *Netah Njoki Kamau & another v Eliud Mburu Mwaniki* [2021] eKLR, the court held as follows in respect to standard and burden of proof:-
- “The standard and burden of proof provided by the *Evidence Act* ought to be discharged; he who alleges must prove. Section 107 of the *Evidence Act* places the burden of proof on the party that alleges. In *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 3 Others* (2014) eKLR the Supreme Court held inter alia:
- The person who makes such allegations must lead evidence to prove the fact. She or he bears the initial legal burden of proof, which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence of a fact in issue.”
41. The Petitioner herein has failed to prove that the reappointment of the 1st Respondent was laced in biasness and conflict of interest and indeed apart from a few memos from unnamed stakeholders there is no other concrete evidence to support the allegation that this 1st Respondent does not deserve to hold this position.
42. It is not in dispute that the 1st Respondent served his first term till the end of the 5-year term contract and none of the allegations tabled in this petition were ever brought against him. He was appointed as Deputy Vice-Chancellor Academic, and Students Affairs of the 2nd Respondent on 15th January 2019 for a period of five (5) years.
43. Therefore, it was only right and in accordance with the terms of the first contract to renew his term for a further 5 years. Unless there were other extraneous circumstances to justify the rejection of the renewal. His was not a new appointment but a renewal of contract based on his performance during the first term hence no need to undergo a competitive process. This court is satisfied the Respondents followed the right procedure to renew the 1st Respondents contract.
44. Therefore having considered the Petitioner's case and submissions and the Respondent's case as well as their submissions the court is satisfied the Petitioner did not prove sufficient grounds to grant the prayers and declarations vide the petition dated 27th February 2024. The same is dismissed accordingly.
45. Each party will meet their respective costs of the petition.

Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

