



**Egerton University v Universities, Academic Staff Union & another (Employment and Labour Relations Petition E012 of 2022) [2023] KEELRC 619 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 619 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS PETITION E012 OF 2022**

**HS WASILWA, J  
MARCH 16, 2023**

**BETWEEN**

**EGERTON UNIVERSITY ..... PETITIONER**

**AND**

**UNIVERSITIES, ACADEMIC STAFF UNION ..... 1<sup>ST</sup> RESPONDENT**

**UNIVERSITIES, ACADEMIC STAFF UNION EGERTON BRANCH .... 2<sup>ND</sup>  
RESPONDENT**

**RULING**

1. By a petition dated October 17, 2022, the Petitioner sued the Respondents seeking for an array of reliefs. When the matter was mentioned before Court the parties requested for the matter to be referred for conciliation, which the Court agreed. The parties met and submitted before a conciliator in Nakuru Labour officers and subsequently, the Conciliator prepared the report dated February 16, 2023 and filed in Court on the February 17, 2023. The issues for determination were reduced to Six (6) as listed below; -
  1. Non-remittance of third party deductions especially to banks, Sacco's, insurance companies, banks recovering loans from members' salary accounts, property and asset recoveries by creditors, evictions by landlords and general inability to meet and sustain livelihood needs.
  2. Withdrawal of unilateral and arbitral notice of variation of Employer pension contribution.
  3. Structured procedure of academic staff Reviews and promotions.
  4. Reinstatement of Annual salary increment for all members of Academic staff.
  5. Unfair and targeted disciplinary actions against Union officials specifically the secretary (Dr. Grace Wanjiru Kibue) and the chairman (Professor Mwaniki Silas Ngari)



6. Salaries being; withheld payment of salaries, withheld salaries for December, 2021 and Deferred salaries.
2. After analyzing the petitioner and the Respondent's submissions, the conciliator came up with the following finding with regard to the issues identified above, which are as follows;
    - i. That the Claimant and Respondent have a signed collective Bargaining Agreement that is registered with the ELRC.
    - ii. That most of the issues in dispute are monetary based and are captured in the parties CBA and it is the duty of the Respondent to act on the same. This is a fact that should be implemented.
    - iii. That the University is a Public Institution funded by the Government of Kenya.
    - iv. That the Respondent and the Claimant have taken different stands as regards the issues being consolidated is a fact and lack of good faith was seen during the conciliation meeting.
    - v. There is no labour legislations acknowledging arbitral variation of salaries and that goes against the protection of wages as enshrined in section 17 and 18 of the [Employment Act 2007](#), Laws of Kenya.
    - vi. It is the duty of the government of Kenya to fully fund the operations of the University both current and recurrent expenditures.
    - vii. The Respondents in this matter, apart from being Administrators at the University are also members of UASU.
    - viii. That the submissions on structured procedure of academic staff reviews and promotions given by the Respondent seems comprehensive and the Claimant should adapt it and include it in the parties CBA.
    - ix. That issue(s) in dispute in this matter that are before the ELRC should be left for it to determine/give a ruling.
    - x. The strike at Egerton University was occasioned by failure by the Respondent to honour/ comply with the parties CBA.
    - xi. That the Egerton University Management unilaterally varied salaries from 100% to 60% in a circular letter dated May 13, 2020 with prior engagement or consultation with the Claimant (UASU) is a fact.
    - xii. Without the Government of Kenya involvement in this dispute by funding the University then it will go on in perpetuity.
    - xiii. The Respondent should benchmark on other Public Universities in Kenya where UASU has membership as to how they manage their labour force without a standoff between the parties.
    - xiv. Failure to implement clauses in the CBA is a violation of the fundamental rights of an employee at work i.e. freedom of association and the right to collective bargaining and goes against the ILO conventions ratified by the Kenyan government.
    - xv. This an Economic dispute that needs to be sorted in order to alleviate the suffering of the Claimant's membership.
  3. The conciliator then made the following recommendations; - Having perused the Respondents and Claimant's submissions coupled with the findings, I recommend that the Respondent should come



out with the timelines as to how he is going to effect payments as demanded by the Claimant in this matter as the issues raised have merit and should be dispensed with as soon as possible.

4. Following that report by the conciliator, the parties were directed to make submission on the finding and recommendation made by the conciliator for the Court to give its verdict.

#### **Petitioners submissions.**

5. The Petitioner submitted from the onset that it is seeking to stop the strike that the Respondent called for because, it has not received funding from the Government and since its Public University, it is fully funded by the Government of Kenya for both its current and recurrent expenditure. It argued that as much as it is willing to pay the Respondents Members' dues, the same is not possible as they are awaiting for funding from the Government and thus any commitment on payment can only be done once the Government remits the funds to the University. On that basis, the Petitioner challenged the recommendation by the Conciliator that sought to have the Petitioner give timeline of effecting payment.
6. On the directive by the conciliator for the Petitioner to pay full salary as directed by the Court in ELRC Case number 16 of 2022, the Petitioner submitted that, these sums of money that is being demanded by the Respondent are deferred pay and third party deductions which accrued from 2017 that the University was unable to pay due to strains in funding from the Government and subsequent effects of Covid -19. He argued that the said Orders of Court were stayed by the Court of Appeal on the April 30, 2022 in Appeal case number E102 of 2023, E155 of 2023 and E002 of 2023. Therefore, that they are waiting for the determination of their application and further direction from the Court of Appeal, thus the payment is not tenable at this stage.
7. On the allegation that the university unilaterally reduced the members' contribution, the Petitioner submitted that the the Union was involved when the decision of reducing the member's contribution was reached. The purpose of the reduction was to save the scheme which was in the verge of collapsing. That all these was captured in the letter of September 23, 2022. The Petitioner thus took issue with the fact that this issue was not captured in the conciliator's report, despite it being among the issue the parties submitted on.
8. The Petitioner submitted that it has on several occasions, sought funding from the Government, which Government promised to remit the funding but has not acted on the promise to date. They however submitted that they are optimistic of funding from the current Government going Forward and once the funding is released, the issue of the parties, that largely revolve around funding, will be sorted out once and for all.
9. On the issue of promotions of UASU staff, the Petitioner submitted that the promotion of the said staff will have monetary impact, which the University is not at a position to consider at the moment because it is still struggling financially. In any case that there are no vacancies at the moment, therefore the recommendations by the Conciliator for promotion of the said staff is not viable at the moment. Further that the petitioner has abandoned the disciplinary action in compliance with the orders of this court.
10. In conclusion, the Petitioner urged this Court to give it time to source and follow up on the funding from the Government and once they receive funding, they resolved the other issues as they all revolve around funding. He added that failure to stop the illegal strike will affect the right of students whose studies have been interrupted time and again by the numerous strikes called for in the past.



## Respondents' Submissions.

11. The Respondent, as per the submission made, agrees with the Conciliator's Report on the issues for determination and went ahead to submit on each of the issues identified therein.
12. On the first issue on non-remittance of 3<sup>rd</sup> Party deductions especially to banks, Sacco's, insurance companies among others, the Respondent submitted that even though the petitioner is alleging that it is unable to meet the payment of 50% every month of the deferred monthly deduction, the same petitioner had earlier indicated that it has been remitting the deductions to the employees' pension scheme since July, 2021 and the other deductions to statutory bodies from December, 2021, however upon investigation, the Respondent discovered none of these deductions were remitted as required under section 19(a),(f)(g) &(h) of the *Employment Act*, which action is in violation of Article 41 of the *Constitution*. The Respondent submitted in agreement with the conciliator's report that the Petitioner ought to be compelled to stick to the law and CBA and remit the statutory deduction as and when they are due. In this they relied on the case of *Kenya Union of Nurses v Murang'a County Public Service Board and another* [2021] eKLR where the Court held that;-

“In as much, the situation here is different. The Respondents stopped deduction of union dues on the premises of a circular from the Chair, Council of Governors. This was despite prompting by the Claimant and also the presence of subsisting Collective Bargaining Agreement which bound the parties to their duties under the contract. The Respondent's refusal and neglect to make union dues deductions amounts to breach of contract and wanton impunity. Non deduction of union dues has always been used as a weapon to constrain union membership and activities. It is clearly a perverted labour relations exercise which must be discouraged for the sake of the work place. Viable industrial relations is a necessary tool for productivity and economic progress in any society. This inaction by the Respondents must therefore be curbed by ensuring that employers who indulge in these malpractices are forced to bear the loss from their kitty. No silences of the law would force an otherwise situation. I therefore find that the Claimant is entitled to the relief sought. This answers the 1st and 2nd issues for determination. I am therefore inclined to allow the claim.”
13. On the second issue on unilateral variation of the employer pension contributions, the Respondent submitted that as much as the Petitioner communicated the variation to them, they were not given opportunity to make comments on the same but merely informed that the percentages have been changed from 20% to 1% which reduction was illogical and drastic and done without following due process. The Respondent further submitted that the issue of reduction of contribution was raised with Retirement Benefits Authority vide a letter of October 10, 2022 which response is yet to be received by the Union. Nevertheless, that they intend to pursue this issue with the Retirement Benefits Authority Tribunal as was held by the Court in *Sarah Mangoli v Kenya Medical Research Institute & Another* [2020] eKLR.
14. The Respondent submitted with regard to the issues of promotions of UASU staff and reinstatement of annual salary increment, that the Petitioner should be compelled to adhere to the provisions of the CBA 2013-2017 and CBA 2017-2021 respectively because the said CBAs were agreed upon by the parties and have been implemented in other universities. It was argued that the Petitioner has no right to vary the remuneration due to the Respondent's members and stated that the Petitioner is still using CBA for the year 2013-2017 in paying its staff when a recent CBA of the year 2017-2021 has been signed by the parties and yet to be implemented. To support this argument the Respondent relied on



the case of *Kenya Union of Commercial Food and Allied workers v Tuskers Mattresses Limited* [2020] eKLR where the Court held that;

“The Court returns that in the circumstances of the present case the Respondent has effected the pay cut upon the salaries or wages of the unionisable staff without consultation or renegotiation with the Claimant and contrary to the cited statutory provisions and provisions in the recognition agreement on negotiation and the terms set in the CBA. It is clear that under section 59 (3) of the *Labour Relations Act*, 2007, the terms and conditions of service as agreed upon by the parties are automatically incorporated into the contract of employment of every employee covered by the CBA. Thus the statutory provisions as cited and applying to variation of the salaries or wages apply. Consultation and negotiation between the parties was mandatory by statute and by contract per recognition agreement.”

15. To reinforce their argument, the Respondent relied on the case of *Geoffrey Mworira V Water Resources Management Authority and 2 others* [2015] eKLR where the Court held that; -

“The principles are clear. The Court will very sparingly interfere in the employer’s entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer’s internal process.”

16. The Respondent submitted that, the disciplinary action taken by the Petitioner was occasioned by the strike that took place on the October 18, 2022, that arose from the non-payment of salaries and non-remittance of statutory deductions. He submitted further that the disciplinary action undertaken by the petitioner is punitive in nature and vindictive especially when the disciplinary action was only undertaken against the representatives of the Union.
17. In conclusion, the Respondent submitted that the conciliatory report indicate clearly that the petitioner is aware that it is violating the law by its actions and omissions. It was argued that since the Petitioner admitted to almost all the issues in the conciliatory report, they ought to be compelled to abide by the law and the CBA and pay its staff when the pay is due to avert unnecessary strikes in future. He submitted further that the Petitioner should be compelled to stop any further disciplinary action against its members for participating in a strike that was done in accordance with the law at section 76 of the *Labour Relations Act* as read with Article 41 of the *Constitution* and to stop any victimization of its Representatives in the Petitioner Employ.
18. I have examined all the averments and submissions of the parties herein.
19. The application herein was filed by the Petitioner applicant seeking to forestall a strike action that had been commenced by the Respondents.
20. In an attempt to help the parties reach a solution to the issues surrounding the union and the Petitioner, this Court referred this matter to a conciliator.
21. The conciliator has since met both parties and written a report which report show that the parties have a subsisting CBA and that the disputes between the parties herein are monetary in nature captured in the parties CBA which the Respondent should act on.



22. The conciliator however noted that the Petitioner is a public institution funded by the Government of Kenya in both its current and recurrent expenditure.
23. The conciliator noted that if the Government of Kenya does not fund the university on priority basis, then these issues will remain unresolved in perpetuity.
24. The conciliator also noted that the Petitioner indeed varied the salaries of the Petitioner members which is against the protection of wages as enshrined in Section 17 & 18 of the [Employment Act 2007](#) Laws of Kenya.
25. On this issue, the Petitioner had submitted that the variation was due to hard financial status of the university and financial status of the university and failure of the Government to remit the funding required to the university.
26. That notwithstanding, it is indeed a violation of an employees labour rights to vary their wages as provided for under Section 10 (5) of the [Employment Act 2007](#) which states as follows;-

“(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”.
27. Indeed I find it a violation of employee’s rights to have the employee vary their terms of engagement without consultation.
28. The employer – the Petitioner herein has also been faulted for unilaterally failing to submit deductions made and especially to banks, SACCOs, Insurance Companies, banks recovering loans e.t.c. and asset recoveries by creditors.
29. This is indeed acknowledged by the Petitioner but indicate that the failure on their part is due to lack of funding by the government.
30. Section 19 (4) (5) & (6) of the [Employment Act 2007](#) states as follows;

“(4) An employer who deducts an amount from an employee’s remuneration in accordance with subsection (1)(a), (f), (g) and (h) shall pay the amount so deducted in accordance with the time period and other requirements specified in the law, agreement Court order or arbitration as the case may be.

(5) An employer who fails to comply with the provisions of subsection (4) commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.

(6) Where proceedings are brought under subsection (5) in respect of failure by the employer to remit deductions from an employees remuneration, the Court may, in addition to fining the employer order the employer to refund to the employee the amount deducted from the employees wages, and pay the intended beneficiary on behalf of the employee with the employer’s own funds”.
31. Indeed having admitted to making the deductions from the Respondents members and having failed to remit as expected is an offence which is even punishable by law. The Petitioner’s explanation notwithstanding, the Petitioners are duly bond to obey the law and the CBA.
32. The Petitioner submitted that the orders compelling them to pay full salaries as directed in ELRC No. 16 of 2022 was stayed by the Court of Appeal in E102 of 2023, E155 of 2023 & E002 of 2023.



33. I will not pronounce myself on the orders of E16 of 2022 as stayed by the Court of Appeal as this matter is not pending before me.
34. However this Court notes that there are actions which the Petitioner is expected to fulfil but which they have not fulfilled.
35. It is against this back drop that the union called for a strike which has been suspended by this Court.
36. That notwithstanding, it is indeed the right of the union to go on strike as provided under Article 41 of the constitution which states as follows:-

“41. Labour relations

- (1) Every person has the right to fair labour practices.
  - (2) Every worker has the right—
    - (a) to fair remuneration;
    - (b) to reasonable working conditions;
    - (c) to form, join or participate in the activities and programmes of a trade union; and
    - (d) to go on strike.
  - (3) Every employer has the right—
    - (a) to form and join an employers organisation; and
    - (b) to participate in the activities and programmes of an employers organisation.
  - (4) Every trade union and every employers’ organisation has the right—
    - (a) to determine its own administration, programmes and activities;
    - (b) to organise; and
    - (c) to form and join a federation.
  - (5) Every trade union, employers’ organisation and employer has the right to engage in collective bargaining”.
37. This right should however be balanced with the rights of an employer with the limitation under Article 24 of the *Constitution*.
  38. In balancing this right to go on strike and the explanation given by the Petitioner, I am of the considered view that the Petitioner cannot hold back strike action forever.
  39. The Petitioner must be willing to cede ground and meet the union and demonstrate they are working towards resolving the issues explained herein.
  40. The Petitioner should actually demonstrate when they are willing to pay dues complained or withheld by showing that the money have been factored in the budgeted cycle and is expected to be released in the near future.



41. The other alternative for the Petitioner will be to initiate a redundancy process if they cannot meet their financial obligations.
42. In the circumstances, I find that the application filed by the Petitioner seeking a raft of orders cannot stand. I will exercise my discretion and direct that the Petitioner should within 120 days being the end and beginning of the budget cycle demonstrate how they are implementing what is in the CBA between them and the Union and in default the Respondent union is free to initiate a fresh strike action after giving the requisite notices as the case may be.
43. Costs in the cause.

**RULING DELIVERED VIRTUALLY THIS 16<sup>TH</sup> DAY OF MARCH, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

**Oteyo for Petitioner – present**

**Respondents – no appearance**

**Court Assistant – Fred**

