



REPUBLIC OF KENYA



**Kenya Universities Staff Union v Kisii University (Petition
E007 of 2023) [2023] KEELRC 1127 (KLR) (10 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1127 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E007 OF 2023**

S RADIDO, J

MAY 10, 2023

**IN THE MATTER OF ARTICLES 2, 3(1), 10, 27, 41, 47
AND 232 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION
OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF SECTION 34 OF THE PUBLIC SERVICE COMMISSION ACT OF 2017

AND

**IN THE MATTER OF SECTION 10 OF THE PUBLIC
SERVICE (VALUES AND PRINCIPLES) ACT, 2015**

AND

**IN THE MATTER OF SECTION 29 OF THE HUMAN
RESOURCE MANAGEMENT PROFESSIONALS ACT**

AND

IN THE MATTER OF THE UNIVERSITIES ACT

AND

IN THE MATTER OF SECTION 5 OF THE EMPLOYMENT ACT, 2007

AND

**IN THE MATTER OF CONTRAVENTION AND
VIOLATION OF KISII UNIVERSITY STATUTES, 2020**

AND

**IN THE MATTER OF CONTRAVENTION AND VIOLATION OF KISII
UNIVERSITY CAREER GUIDELINES (SCHEMES OF SERVICE, 2014)**



BETWEEN
KENYA UNIVERSITIES STAFF UNION PETITIONER
AND
KISII UNIVERSITY RESPONDENT

JUDGMENT

1. The Kenya Universities Staff Union (the Union) sued Kisii University (the University) on 9 March 2023, alleging that the recruitment process commenced by the University for the positions of Registrar (Administration, Human Resource & Central Services), Registrar (Academic Affairs), Registrar (Research, Extension, Innovation & Resource Mobilisation), Chief Planning Officer and Human Resource Manager violated the Kisii University Career Progression Guidelines (Scheme of Service), 2014, section 29 of the [Human Resource Management Professionals Act](#), section 34 of the [Public Service Commission Act](#), section 10 of the [Public Service \(Values and Principles\) Act](#), 2015, the Statute XI of the Kisii University Statutes, 2020 as well as several provisions of [the Constitution](#).
2. The Union further contended that without a substantive Chair of the University Council, the recruitments could not lawfully proceed.
3. The remedies sought in the Petition were:
 - i. A declaration be and is hereby made that the Respondents have violated the provisions of Articles 2, 3(1), 10, 27, 41, 4, 72(3)(b) and 232 of [the Constitution](#) of Kenya, 2010.
 - ii. A declaration be and is hereby made that the proposed recommendations by the Kisii University Human Resource and Appointments Committee of Council to have the acting Registrar (Administration, Human Resource & Central Services), acting Registrar (Academic Affairs), acting Registrar (Research, Extension, Innovation & Resource Mobilisation) and acting Human Resource Manager confirmed as substantive office holders without due procedures is null and void.
 - iii. A declaration be and hereby issued that the Respondent is bound to apply the provisions of [the Constitution](#) in particular Articles 2, 3(1), 10, 27, 41, 47, 72(3)(b) and 232 in the recruitment of all office holders of the advertised vacancies and any other subsequent vacancies that shall arise within the University.
 - iv. An order of certiorari be and is hereby issued quashing the recruitment process through the advertisement on the Respondents website and local dailies on or about the 17th February 2023 for being unconstitutional and failing to comply by the Kisii University Career Progression Guidelines (Scheme of Service) 2014 hence null and void ab initio.
 - v. An order of mandamus be and is hereby issued against the Respondent compelling them forthwith advertises (sic) all positions having persons serving in acting capacities beyond six months.
 - vi. An order of prohibition be and is hereby issued restraining the Respondent from making any further advertisement until the University gets a duly gazette and appointed chairperson of Council.



- vii. Consequently, an order compelling the Respondent to forthwith restart the recruitment process for all vacant positions in a competitive, transparent, fair and open manner with due compliance to all constitutional, statutory and legal provisions.
 - viii. This Honourable Court issues any other order it may deem fit to grant.
 - ix. Costs of the Petition be borne by the Respondent.
4. The University filed a Response and affidavit in reply to the Petition and authorities on 21 March 2023.
 5. Pursuant to Court directions, the Union filed its submissions and a further affidavit on 4 April 2023.
 6. The Union identified the Issues in dispute as:
 - i. Whether the exhaustion doctrine applies to the Petitioner's Petition?
 - ii. Whether the Petitioner is entitled to the orders/reliefs sought for?
 - iii. Who should bear the costs of the application and Petition?
 7. The University filed its submissions on 25 April 2023 wherein it set out the Issues for adjudication as:
 - i. Whether the Petition as presented to this Honourable Court is legally sound?
 - ii. Whether the advertisement for the five (5) advertised vacancies placed by the University in local dailies and on its website is proper in law?
 - iii. Whether the reliefs sought by the Petitioner ought to be granted?
 - iv. Who should bear the costs of the Petition?
 8. The Court has given due consideration to the Petition, affidavits and submissions.

Legal soundness of the Petition

Exhaustion of alternative dispute resolution mechanisms

9. The University took objection to the competency of the Petition on the ground that the parties had a valid recognition agreement which provides at clause 3 as follows:

3. Negotiation Procedure

For the purpose of settling issue (sic) arising out of any breach of this Agreement, real or alleged or any other matter concerning employees in relation to the terms of their employment, the following procedure shall apply:

A. Individual Grievances

This shall mean any dispute(s) or grievances arising from an alleged breach of the existing Terms and Conditions of Service affecting employee(s) or group of employees of the University College covered by this agreement.

B. Collective Grievances

This shall mean any claim(s) affecting all or a section of employees and or alterations to the Terms and Conditions of Service regarding matters specified in clause 2(a) of this Agreement or any other matter(s) that may affect all or a section of employees of Kisii University College who are represented by the Union:



10. Clause 2(a) referred to above provides:
 2. Recognition
 - (a) The employer accords full recognition to the Union as a properly constituted and representative body and the sole labor organisation representing the interests of its members who are in the employment of Kisi University College in grades 5 up to and including grade 15 in all negotiable matters concerning rates of pay, overtime hours of work, method of remuneration and salary payment, paid leave, medical benefits, principles of promotion, staff training and development, staff discipline , terms of employment and all other negotiable conditions of employment for all employees who are members of the Union as defined from time to time by employer, Federation of Kenya Employers, and the Union and as contained in the International Labor Organisation Charter. Such recognition shall take into consideration the principles of the Industrial Trade Unionism.
11. The University in objecting to the legal soundness of the Petition asserted that the dispute revolved around collective grievances as contemplated by the recognition agreement.
12. The cause of action advanced by the Union concerned to recruitment.
13. It is not in dispute that the parties herein have a recognition agreement and under the recognition agreement and the Labour Relations Act, collective grievances, and or any trade dispute should be channelled in the manner contemplated by agreement and the Act.
14. However, the dispute presented by the Union transcends what constitutes a trade dispute as defined under the Act.
15. The recruitment was also open to persons who were not members of the Union (it was not an internal recruitment), so it was not strictly in respect to matter(s) concerning employees in relation to the terms of their employment as contemplated under clauses 2 and 3, either as an individual or collective grievance(s).
16. In this context, it cannot be lost to the Court that the University is a public institution, and it is obligated to observe the tenets imbuing recruitment within the public service as envisaged under the Constitution.
17. Consequently, in the Court's view, the instant dispute would be an exception under and to the doctrine of exhaustion of alternative dispute resolution as set out by the Court in William Odhiambo Ramogi & 3 Ors v Attorney General & 4 Ors; Muslims for Human Rights & 2 Ors (Interested Parties) (2020) eKLR.

Petition does not disclose constitutional issues

18. As part of its defence, the University contended that the Petition did not disclose any constitutional issues warranting approaching the Court through a constitutional Petition instead of the normal route availed by the Employment and Labour Relations Court (Procedure) Rules, 2016.
19. The Court is minded to agree with the University. The gravamen of the action presented by the Union revolves around an interpretation and application of the Career Progression Guidelines (Scheme of Service), 2014.
20. The Court will, however, not decline to consider the Petition on the basis that it does not disclose constitutional issues.



21. Instead, the Court is of the view that an appropriate costs order would suffice, depending on the outcome of a determination of the Petition on the merits.

Merits of the Petition

Promotions and confirmations of acting appointments

22. The University started a process to promote and/or confirm certain employees who had acted for long in the offices the subject of this Petition.
23. The material on record suggests (and the Union did not demonstrate otherwise), that upon the Union raising objections to the promotions/confirmations process itself and through its advocates, the University stopped the process and opted to advertise the positions.
24. The Court is, therefore, of the view that the dispute over the promotions and/or confirmations had been overtaken by circumstances before the filing of the Petition.
25. Consequently, it does not behove the Court to address the same as it is moot.
Absence of substantive Chair of Council: lawfulness of the advertisement
26. One of the challenges by the Union to the recruitment process was that the University did not have a substantive Chair of Council to superintend or give policy directions on the recruitment process.
27. The Union argued that the *Universities Act* did not have a provision delegating or allowing members of the Council to appoint an acting chairperson of Council and that in any case, the mandate was reserved to the Cabinet Secretary, Education.
28. The University on the other hand took the position that it was open to the Council to appoint one of them to serve as chair in the absence of a substantive chair (solace was found in Statute XX paragraph 6).
29. In the Court's view, the argument cannot be determinative of the Petition herein.
30. So long as the Council was quorate, it was open to it to appoint an acting Chairperson for any particular meeting as need be but not an acting chairperson at large by dint of Statute XX paragraph 6.

Career Progression Guidelines (Scheme of Service)

31. The University has a Career Progression Guidelines (Scheme of Service), 2014 which sets out general as well as specific qualifications to various positions within the University.
32. Part of the Preamble/Introduction to the Scheme of Service states that:

The Vice-Chancellor in consultation with the University Council will administer the Scheme. In administering the Scheme, the Vice-Chancellor will ensure that their provisions are strictly observed for fair and equitable treatment of officers.
33. The University advanced an argument that because the Scheme had not been revised since 2014 (there was a provision for revision every 2 years), the Council could revert to its powers under the establishing statute to promulgate new and specific terms and conditions of service to suit the emerging needs of the University.
34. The Court finds the proposition unattractive. It cannot be disputed that the Council had codified the eligibility criteria or requirements for certain offices in the Scheme of Service.



35. Upon codification, the Scheme of Service became an official embodiment of the requirements for all the positions established therein and also served as a notice to all and sundry who would express interest in working with the University on the qualifications and requirements.
36. It is also illogical for the University to assert that since the Scheme of Service had not been revised every 2 years as provided for, it could go outside its confines.
37. The responsibility to revise the Scheme lies squarely on the shoulders of the Council, and it cannot seek to benefit from an abrogation of its responsibility by appearing to tailor make qualifications and requirements for employment whimsically and on an ad hoc basis.
38. To alter and or vary the requirements and qualifications, the Council ought to have amended the Scheme of Service in a manner available to the public.

Lawfulness of the advertisement: requirements/qualifications for appointments

Registrar (Academic Affairs)

39. The Scheme of Service outlines the qualifications an applicant for the position of Registrar (Academic Affairs) should hold.
40. These include PhD degree and rank of Associate Professor and above and chairmanship or deanship/director in a University.
41. In the declaration of vacancies, the University set out some of the requirements for the office of Registrar (Academic Affairs) as holder of PhD degree of at least 3 years and extensive experience in administration of at least 3 years at level of Deputy Registrar or equivalent position and chairmanship or deanship/directorship.
42. The requirement for candidates to have served as an Associate Professor or above was omitted.

Registrar (Research, Extension, Innovation and Resource Mobilisation)

43. For the position of Registrar (Research and Extension), the Career guidelines required the holder of the office to have amongst other primary qualifications, a PhD degree and rank of Associate Professorship and above, and chairmanship or deanship/director in a University.
44. The vacancy call, however, omitted the qualification of the applicants having held the position of Associate Professorship and above.

Registrar (Administration, Human Resource and Central Services)

45. In the call for applications for Registrar (Administration, Human Resources and Central Services), the University indicated that applicants should primarily have a PhD in a relevant field with 3 years' experience or a holder of a master's degree with 5 years' experience.
46. The Union asserted that the Scheme of Service required the holder of the office to have a Bachelors and Master's degree in Business Administration or equivalent as well as CPS(K) certification.
47. The Court has perused the Scheme of Service. It does not have specific requirements/qualifications for holders of the office of Registrar (Administration, Human Resource and Central Services).
48. Nevertheless, the Scheme of Service generally requires that for a person to hold the office of a Registrar, they should have a PhD in a relevant field with 3 years' experience together with a CPS(K) or a master's degree in a relevant field with 5 years' experience amongst other qualifications.



49. In the impugned vacancy announcement, the qualifications were stated as PhD in a relevant field with 3 years' experience or holder of a master's degree in a relevant field with 5 years' experience.
50. The qualification of CPS(K) was not included.
51. The *Human Resource Management Professionals Act*, 2012 has now intervened to regulate the human resource function. It requires persons interested in practising as a human resource management professional to register and take out a practising certificate.
52. Being a law of general application, the University was obliged to ensure that its head of the human capital function met the criteria set by the Act. The advertisement fell short of the requirements of the Act.

Chief Planning Officer

53. For this position, the applicants were informed that they needed to hold a master's degree in statistics, planning, strategic management or related field together with 5 years' work experience, be a member of relevant professional body with a valid practicing certificate amongst others.
54. The Scheme of Service makes it a requirement that a holder of the position of Chief Planning Officer needs primarily a PhD in planning or other related field, be a member of a relevant professional body and be registered with the Physical Planners Registration Board of Kenya or a master's degree with 5 years' experience.
55. In the advertisement, the requirement for PhD and registration with the Physical Planners Registration Board was omitted.
56. The Court, however, notes that the duties and responsibilities envisaged under the advertisement are remarkably different from those contemplated in the Scheme of Service.
57. The advertisement called for a planner with regard to strategic planning and not limited to what would be expected of a physical planner registered by the Physical Planners Registration Board.
58. The Court, therefore, does not find a departure from the Scheme of Service, as the position to be filled is markedly distinct from what was provided for in the Scheme of Service and more without any evidence that the position was not lawfully established by the University.

Human Resource Manager

59. The University's Scheme of Service does not have provision for a Human Resources Manager.
60. In the vacancy announcement, the University indicated that applicants should have a master's degree in Human Resource Management or its equivalent together with at least 5 years' experience, be registered with the Institute of Human Resource Management and hold a valid practising certificate among other qualifications.
61. The Court cannot fault the University for setting such qualifications where the Scheme of Service is silent.

Conclusion and Orders

62. Considering the above, the Petition succeeds to the extent that the Court grants the following orders:
 - i. A declaration be and is hereby issued that the recruitment process through the advertisement on the Respondent's website and local dailies on or about the 17th February 2023 for the



positions of Registrar (Administration, Human Resource & Central Services), Registrar (Academic Affairs) and Registrar (Research, Extension, Innovation & Resource Mobilisation) failed to comply with the Kisii University Career Progression Guidelines (Scheme of Service) 2014 hence null and void ab initio.

- ii. An order of certiorari be and is hereby issued quashing the recruitment process through the advertisement on the Respondent's website and local dailies on or about the 17th February 2023 for failing to comply with the Kisii University Career Progression Guidelines (Scheme of Service) 2014 hence null and void ab initio.
 - iii. An order be and is hereby issued compelling the Respondent to forthwith restart the recruitment process for the 3 positions in (ii) above in a competitive, transparent, fair and open manner with due compliance to all constitutional, statutory and legal provisions.
63. The Petition did not raise any issues which required an interpretation and or application of *the Constitution* to determine.
64. The Union is denied costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 10TH DAY OF MAY 2023.

RADIDO STEPHEN, MCIARB

JUDGE

APPEARANCES

For Petitioner Onyony & Co. Advocates

For Respondent Nyamurongi & Co. Advocates

Court Assistant Chrispo Aura

