



**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)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E022 OF 2023**

SC RUTTO, J

JUNE 29, 2023

**IN THE MATTER OF ARTICLES 1, 2, 3(1), 10, 19, 20, 21, 22, 23, 27(1), (2), (4),
(5), 35, 37, 41, 48, 50, 165 & 258 (1) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF RULES 4, 10, 11, 13, 20, 23, OF THE CONSTITUTION OF KENYA
(SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS OF INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2013**

AND

IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 215

AND

**IN THE MATTER OF ALLEGED CONTRAVENTIONS
OF THE LABOUR RELATIONS ACT, 2007**

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2002

BETWEEN

KENYA UNIVERSITIES STAFF UNION PETITIONER

AND

**THE COUNCIL OF JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND
TECHNOLOGY 1ST RESPONDENT**



JUDGMENT

1. The Petitioner herein filed the instant Petition dated 3rd February, 2023 through which it seeks the following prayers: -
 - i. A declaration that the retirement of the Petitioners employment by the Respondent is wrongful, unfair and unlawful.
 - ii. A declaration that the Respondent is in violation of the Collective Bargaining Agreement provisions with respect to the retirement clause.
 - iii. A declaration that the action and or inaction by the Respondents is discriminatory among select members of the Petitioner.
 - iv. An order to issue quashing the Respondent's discriminatory letters on retirement on age grounds.
 - v. An order to issue quashing the implementation of the impugned and discriminatory letters of Retirement on age groups.
 - vi. An order to issue to the Respondents to recall all discriminatory letters of retirement on age grounds issued to the petitioners.
 - vii. An order to issue directing the Respondents to unconditionally adhere to the terms of the Collective Bargaining Agreement with respect to retirement on age grounds.
 - viii. Costs be in the cause.
 - ix. Any other relief the court may deem fit and just to grant in the circumstance
2. The Petition is supported by the sworn affidavit of Nickson Chege, who describes himself as the Branch Secretary of the Petitioner. Briefly he avers that: -
 - a. The Respondents have discriminated against some of the Petitioner's members which discrimination is detrimental to these members and in absolute contravention of the laid out laws that expressly prohibit discrimination of persons.
 - b. Such discrimination is not only unlawful and unfair but not in the interest of justice and neither in conformity with legal provisions and principles of natural justice and the rule of law which demands equality of all persons.
 - c. The Parties to this matter are bound by provisions of a Collective Bargaining Agreement (CBA) entered into on 11/4/2017: which govern their engagement with respect to terms and conditions of the Petitioner's members' employment.
 - d. The CBA provides the effective date and duration of the agreement under clause 27: that the agreement shall cover the period of 1st July 2013 up to 30th June 2017 and that thereafter the agreement shall continue to be in force until



mutually amended or when the Parties negotiate and bring to force another agreement.

- e. The terms of the CBA are still in place and in force to date as no other agreement has been negotiated between the parties; no notification for resolution nor any amendment thereof entered with respect to the CBA.
 - f. The CBA provides for retirement of the Petitioner's members under clause 19.1 whereas a member of staff who reaches the retirement age shall be required to cease duty on the next 30th June of the following year.
 - g. Notwithstanding the foregoing, the Respondents have willfully knowingly discriminated in a totally unfair and unjust manner, some of the Petitioner's members by subjecting select members to an early retirement that is contrary to the provisions of the Collective Bargaining Agreement.
 - h. The discrimination and unfair labour practices were subjected specifically to the members of the Petitioner's union who were born between 1st January and 30th June who were unreasonably denied the enjoyment of provisions of the retirement clause of the CBA.
 - i. Those born between 1st July and 31st December, enjoyed the provisions of the CBA clause to the letter.
 - j. No substantial reason has been brought forth by the Respondents to justify their unilateral discriminative actions notwithstanding the provisions of the [Employment Act](#) which mandates an employer to promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.
 - k. He has written to the Respondents on several occasions drawing attention to retirement notice letters issued to the Petitioner's members who were discriminated against.
 - l. Vide letters dated 9th March 2022, follow up letter dated 1st April 2022 and 22nd April 2022 the Petitioner sought to address and settle this grievance with the Respondents amicably. However, these letters elicited no response from the Respondent despite their receipt of acknowledgement.
 - m. The Petitioner has exhausted all avenues and internal mechanisms for the resolution of the dispute regarding the correct implementation of the CBA terms; have been futile as the Respondents have knowingly remained unresponsive.
3. The Petition has been opposed by the Respondents through a Replying Affidavit sworn on 26th April, 2023 by Dr. Rose Muthoni Githu, the Acting Registrar of the 2nd Respondent. Briefly, she avers that:
- a. On or about the 20th day of March, 2006, the 2nd Respondent and the Universities Non-Teaching Staff Union (UNTESU) entered into an agreement relative to recognition and negotiation procedure between the said parties;



- b. Subsequently, on the 11th day of April 2017, the Petitioner and the 2nd Respondent entered into a Collective Bargaining Agreement (CBA) for the period between the 1st day of July, 2013 to the 30th day of June, 2017. The CBA was to continue in force until it was mutually amended or when the parties therein had negotiated and agreed on another agreement.
- c. Under the CBA, any dispute in respect to the obtaining of a mutual agreement on the amendment of the CBA was to be referred to arbitration in accordance with the *Labour Relations Act*, 2007.
- d. Vide a letter dated the 14th day of October, 2019, the Salaries and Remuneration Commission wrote to all the Vice Chancellors of Public University directing, inter alia, that all Collective Bargaining Negotiations shall comply with the legal requirements provided by *the Constitution* of Kenya, labour laws and other statutes governing employment relationships and public finance management in Kenya and that Collective Bargaining Negotiations should adhere to existing policies and guidance such as the Minimum wage Guidelines, Public Service Commission Human Resource Policies and Procedures Manual, State Corporation guidelines and various SRC advisories.
- e. Vide a letter dated the 19th day of November, 2020, the Public Service Commission issued a directive to all public officers that in accordance with Section 80(1)(a) of the *Public Service Commission Act*, the Commission or any other appointing authority shall not extend the service of such retired public officer beyond the mandatory retirement age. That with effect from the 1st day of January, 2021, it would not approve any extension of service for officers retiring from service upon the attainment of the mandatory retirement age of 60 years and 65 years for persons with disability.
- f. In line with the foregoing circulars and guidelines, the 2nd Respondent wrote retirement notice letters to the Petitioner's members who were about to attain the mandatory retirement age of sixty (60) years requiring them to retire from service in accordance with the provisions of the CBA and the law.
- g. Issuance of the retirement notices upon the Petitioner's members who had attained the mandatory retirement age was lawful.
- h. The Petitioner has not sought to challenge the subject circulars on the mandatory retirement age of public servants.
- i. The Petitioner's proposals on the application of Clause 19.1 (d) in the CBA seek to unlawfully extend the mandatory retirement age of its members in contravention of the law.
- j. Being a public entity with the mandate of upholding the law, it would be a challenge and a deviation from the law from the Respondent to implement the Petitioner's proposals on the retirement clause in the CBA in respect of its members.



- k. The mandatory retirement age cannot be extended by the ingenuity of CBA negotiations. Indeed, parties cannot negotiate outside legislation, public policy and guidelines.
 - l. The Petitioner has failed furnish this Court with evidence to demonstrate that the Respondents have discriminated its members in an unfair and unjust manner by subjecting them to early retirement in contravention of the law as alleged.
 - m. The Petitioner has failed to demonstrate the fundamental rights and freedoms that it alleges to have been violated by the respondents as against its members.
 - n. The petitioner has failed to exhaust the mechanisms provided in law with respect to this matter.
4. Contemporaneous with filing the Petition, the Petitioner moved the Court vide a Motion Application dated 3rd February, 2023, seeking to stay and or set aside by way of a conservatory order; the implementation of the impugned letters of retirement on age grounds. When the matter came up for hearing on 27th February, 2023, the Court directed the parties to maintain status quo. The parties further agreed to canvass the Petition through written submissions.

The Submissions

- 5. The Petitioner submitted that by virtue of being signatories to the CBA having been duly signed on 11th April, 2017, the same is binding and shall remain in force until another agreement is signed. That since no other agreement has been signed, the CBA registered is still binding. In support of this argument, the Petitioner placed reliance on Section 59 of the *Labour Relations Act* and the case of Kenya Union of Commercial and Allied Workers vs London Distillers (K) Limited (2021) eKLR.
- 6. It was the Petitioner's further submission that its members are entitled to equal treatment in line with the law and the CBA. That no reasons have been brought forth by the Respondents to justify why it would subject some of its members to differentiated treatment. That the same is unfair and contrary to the rule of law on equality.
- 7. The Petitioner further urged that a CBA is a binding product of good faith negotiations and is a fair and reasonable agreement and urged the Court to uphold the provisions thereof and grant its members the reliefs sought.
- 8. On the part of the Respondents, it was submitted that the Petitioner has failed to meet the established threshold for grant of conservatory orders in that it has failed to demonstrate that the instant matter discloses arguable constitutional issues touching on the fundamental rights and freedoms of its members in accordance with Chapter 4 of *the Constitution*. On this score, the Respondents argued that it is evident that there is no pleading or allegation of any denial, violation, infringement and/or threat of the Petitioner's members' rights or fundamental freedoms in the bill of rights.
- 9. The Respondents further submitted that public bodies are bound to apply statutory instruments pertaining to the retirement age of public servants in accordance with Section 2 of the *Statutory Instruments Act*. Therefore, the retirement notice letters written by the 2nd Respondent and addressed to the members of the Petitioner who attained the mandatory age of retirement, were in accordance with the provisions of the law and government policy and regulations. That indeed, the Respondents have no liberty to extend the date of retirement of the Petitioner's members.



10. The Respondents maintained that contrary to the Petitioner's averments, the application of the mandatory retirement age in relation to its members does not amount to unfair discrimination and is therefore not in violation of their rights and freedoms.
11. It was further argued that the Petitioner is attempting to negotiate the terms of the CBA outside the scope of the law and public policy guidelines by seeking to get some of its members to stay in service past their retirement age. The Respondents further submitted that this Court is obliged not to register, recognize and/or enforce any CBA terms and agreements that do not conform to the law and government policies and directives.

Analysis and determination

12. I have considered the Petition, the Response thereto, the opposing submissions as well as the authorities cited and two issues stand out for determination in this Petition, thus:
 - i. Whether there is a case of constitutional violation; and
 - ii. Whether the Court should grant the orders sought in the Petition.

Constitutional violation?

13. The Petitioner has cited the Respondents for discrimination and unfair labour practices. Specific mention was made to the Petitioners' members who were born between 1st January, and 30th June. In this regard, the Petitioner has argued that the said members have been subjected to early retirement contrary to the provisions of the CBA.
14. Central to this dispute is Clause 19.1 of the Collective Bargaining Agreement (CBA). I will highlight the portions relevant to this dispute, thus: -
 - 19.1 Retirement
 - a. The retirement age shall be sixty (60) years.
 - b.
 - c.
 - d. A member of staff who reaches the retirement age shall be required to cease duty on the next 30th June of the following year.
 - e. Prior to retirement the employer shall issue a retiring employee a written notice at least twelve (12) months before his/her effective retirement date.
15. In support of its case, the Petitioner exhibited copies of notices of retirement issued to some of its members. I have carefully considered all the said notices of retirement and from my analysis, none of the members of the Petitioner was required to exit service prior to attaining the retirement age of 60. Further, all the members of the Petitioner were issued with retirement notices which notably, were longer than the stipulated 12 months.
16. I must say that my analysis has not revealed any act or omission on the part of the Respondents that can be termed as discriminatory. In the event there are some members of the Petitioner who served longer past their retirement age, then the same is an anomaly and as a matter of fact, was contrary to the law. By all means, this cannot be termed as amounting to unfair discrimination.



17. What's more, it is notable that Section 80 (1) (a) and (b) of the *Public Service Commission Act* provides as follows: -
- (1) Where a public officer has attained the mandatory retirement age as may be prescribed in regulations—
 - a. the public officer shall retire from the service with effect from the date of attaining the mandatory retirement age; and
 - b. the Commission or other appointing authority shall not extend the service of such retired public officer beyond the mandatory retirement age.
18. Therefore, the members of the Petitioner being public officers, are bound by the provisions of the aforementioned statute and were to retire upon attaining the mandatory age of retirement in the public service being 60 years.
19. 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.
20. The upshot of the foregoing is that the Petition as a whole, does not disclose the alleged violation of the constitutional rights of the Petitioner's members by the Respondents.
21. What I really find to be in dispute herein is the interpretation of the terms of the of the CBA executed by the parties on 11th April, 2017. Be that as it may, such an issue cannot be subject to a Constitutional Petition as the one herein. Any alleged breach of the terms of the CBA ought to have been brought by way of a normal Claim.

Orders

22. It is against this background, that I dismiss the Petition dated 3rd February, 2023 in its entirety with an order that each party bears its own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of June, 2023.

STELLA RUTTO

JUDGE

Appearance:

Ms. Matina for the Petitioner

Mr. Macharia by the Respondents

Court Assistant Abdimalik Hussein

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 had 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 *Civil 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.

STELLA RUTTO

JUDGE

