



Universities Academic Staff Union (Pwani University Chapter) v Pwani University; Universities Academic Staff Union (UASU) (Interested Party) (Petition E004 of 2023) [2023] KEELRC 2377 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2377 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
PETITION E004 OF 2023
M MBARŪ, J
SEPTEMBER 28, 2023**

BETWEEN

UNIVERSITIES ACADEMIC STAFF UNION (PWANI UNIVERSITY CHAPTER) PETITIONER

AND

PWANI UNIVERSITY RESPONDENT

AND

UNIVERSITIES ACADEMIC STAFF UNION (UASU) INTERESTED PARTY

JUDGMENT

1. The petitioner filed the petition herein together with application under Certificate of Urgency dated 12 June 2023. Parties attended and agreed to address the petition and the application together by way of written submissions.

The petitioner in the petition is seeking the following orders;

- a. That any purported retirement notices) by the respondent setting the retirement age of the petitioner’s members as 60 years or 70 years or any other year that is not 75 years contrary to the Collective Bargaining Agreement dated 10th May 2017 are null and void and be and are hereby quashed and further the respondent be and is hereby ordered to continue paying the petitioner’s/applicant’s members their full salary, allowances and other benefits until the retirement age of 75 years.
- b. A declaration that the action of the respondent to promote some members of the petitioner to Assistant Lecturer while failing to promote others who perform the duties of Assistant lecturer



without commensurate pay and promotion to that position is discriminatory and contrary to the CBA and fair labour practices.

- c. An order that the three members of the petitioner namely Diana Mlango Bade, Ndirangu Moses and Jorry Ominde Olang'o who have met the criteria for promotion be promoted to the position of Assistant Lecturer and be backdated to the dates they earned the requisite qualifications of Master's degree.
 - d. A declaration be issued that the act of denying the petitioner's members promotion, incremental credits, setting of the retirement age based on the whims of the respondent is contrary to the CBA amounts to acts of discrimination contrary to Article 27 of [the Constitution](#) of Kenya and Section 5 of the [Employment Act](#), 2007.
 - e. Costs of the petition.
2. The petition is filed on behalf of five (5) members of the petitioner;
- a. Dr. Robert Maneno;
 - b. Dr. Anthony Wasike Pepela;
 - c. Jorry Ominde Olang'o;
 - d. Diana Mlango Bade; and
 - e. Moses Ndirangu.
3. The petition is that the parties have a Collective Bargaining Agreement (CBA) dated 10 May 2017 but the respondent has been unwilling to have it registered until November 2022 when it wrote to the Salaries and Remuneration Commission (SRC) seeking approval for its registration. The SRC replied and gave the respondent approval for registration which is pending in Nairobi ELRC CBA No. E088 of 2023 – University Academic Staff Union v Pwani University.
4. Under the CBA signed and dated 10 May 2017, parties agreed that the retirement age for petitioner's members is 75 years. The CBA also stipulates the manner in which promotions are to be carried out.
5. Despite signing the CBA and pending registration, the respondent has reneged on its terms and proceeded to arbitrarily change the retirement age of the petitioner's members. The respondent has gone ahead to discriminate against the petitioner's members by issuing retirement notices to retire at 60 years, others 74 years and these notices taken effect from 30 June 2023.
6. The unilateral change to the CBA terms is contrary to Section 10(5) of the [Employment Act](#), 2007 (the Act) and Article 41(1) of [the Constitution](#). The respondent has issued arbitrary notices asking petitioner's members to retire at 60 years while aged 62 and others to retire at 70 years while aged 75 years;
- a. Diana Mlango Bade and Jorry Ominde Olang'o were issued with retirement notices to retire at 60 years yet they are aged 62 years in contravention of the CBA retirement age of 75 years at the time.
 - b. Dr. Robert Maneno was promoted but the same indicated his retirement age was 70 years yet he was aged 74 years at the time.
 - c. Dr Anthony Wekesa Pepela was promoted but the same unilaterally varied the retirement age to 70 years.



7. The respondent has discriminated against some members of the petitioner by failing to promote them despite them meeting the promotion criteria, instead, the respondent is issuing promotions based on its whims contrary to the CBA. Despite pleas from the petitioner to abide the CBA provisions and fair labour practices, the respondent has ignored effectively discriminating against Diana Mlango Bade, Ndirangu Moses and Jorry Ominde Olang'o. The three were not promoted to the position of Assistant Lecturer despite having similar qualifications with Humphrey Mwanjola who was promoted.
8. The respondent has caused some members of the petitioner to perform duties of a higher job grade without commensurate pay for that grade and without a promotion. Diana Mlango Bade, Ndirangu Moses and Jorry Ominde Olang'o are performing the duties of an Assistant Lecturer without the pay or promotion for such role. The response that the position of Assistant lecturer grade II was abolished by Commission for University Education is without proof. There exists the Harmonised Criteria for Appointment of Academic Staff in Universities in Kenya dated 2 October 2014 and which had abolished such position but this was held to be null and void by the court in *Universities Academic Staff Union v Machakos University & another* [2019] eKLR.
9. The petition is supported by the Affidavit and Further Affidavit of Chris Kipngetch Ngeny the secretary general of the petitioner
10. In reply, the respondent filed the Replying Affidavit of the acting Vice-Chancellor, Professor James Kahindi
11. The petitioner submitted that the retirement age under the CBA is 75 years under the CBA covering the period of 2013 to 2017 years. The respondent's case is that the subject CBA between the parties is not registered as held in *Royal Ngao Holdings Limited v N.K. Brothers Limited* [2020] eKLR but such non-registration cannot bar the implementation under the general principle and law governing enforceability of common law agreement as held in *Said Ndege v Steel Makers Ltd* [2014] eKLR.
12. The CBA for the period 2010-2013 that the respondent has relied upon under clause 30 provides for one year and thereafter to remain in force until revised by the parties. The respondent signed the CBA dated 17 May 2017 and hence revised the earlier CBA. The reliance on the Public Service Commission (PSC) circular dated 19 November 2020 which provide that the retirement age for academic staff of public universities and research scientists shall be guided by the relevant legislation and guidelines does not apply to the petitioner's members since in the circular dated 28 January 2020 the PSC allow institutions to agree on the retirement age.
13. Even where the respondent was to apply the PSC regulations, it has gone ahead to apply it indiscriminately to some members and not others. Some have been retired at 60 years, others 70 years and others 74 years which is an act in discrimination as held in *Republic v Kenya Revenue Authority ex parte Cooper K-Brands Limited* [2016] eKLR that the petitioner's members have a legitimate expectation that they would be treated fairly and allowed to retire at 75 years in accordance with the CBA terms as held in *Republic v Judicial Service Commission & 2 others ex parte Erastus M. Githinji* [2019] eKLR.
14. For the discriminatory treatment of the petitioner's members, such a violation apparent based on the retirement notices issued, this being contrary to Section 5(3) of the *Employment Act* and Article 27 of *the Constitution*, the petition should be allowed as prayed.
15. The respondent submitted that under Section 59(5) of the *Labour Relations Act*, 2007 (the LRA), a CBA only becomes enforceable upon registration with the court. The CBA dated 10 May 2017 is yet to be registered to become valid for enforcement/ clause 33.0 of the CBA on the implementation date



is upon signing but without registration, it cannot be enforced as held in *Kenafric Industries Limited v Bakery Confectionary Food manufacturing and Allied Workers Union* [2014] eKLR.

16. The petitioner has alleged discriminatory treatment of its members without prove. The retirement notices issued over a year ago in June 2022 and the fact that the 5 members were aged between 60 to 70 years is not sufficient proof of discriminatory treatment. Teaching staff grades are from Grade 11 and non-teaching staff are up to grade 10.
17. Dr. Robert Maneno and Dr. Anthony Wekesa Pepela had their mandatory retirement age set at 70 years due to the positions they hold as teaching staff and this is addressed in the appointment letters.
18. Mr. Jorry Ominde Olang'o and Mrs Diana Mlango Bade and Moses Ndirangu all had mandatory retirement ages 60 years as non-teaching staff by virtue of their grades E, F, and 10 respectively and this is outlined in their letters of appointment.
27. The alleged discrimination is without the petitioner setting out other employees with similar terms of employment and in similar grades treated differently. The allegations are not supported in law or fact and Section 10(5) of the Act has been adhered to. In the case of *Inter Public Universities Councils Consultative Forum of the Federation of Kenya Employers v KUDHEIHA, UASU & KUSU* [2020] eKLR where the court applied the public policy on the retirement age. The argument by the petitioner that its members should retire at 75 years since the interested party is without any merit since the CBA intended to regulate relations between the parties herein is not registered.
19. With regard to alleged discrimination and failure to promote petitioner's members, Mr Humphrey Mwajoha was not promoted to the position of Assistant lecturer due to the fact that there is ongoing recruitment for the position of senior Administrative Assistant, which he had applied for, it is misleading that one member of staff was offered the position of Assistant lecturer, when he was not. The same communication issued to 3 others, Jorry Ominde, Diana Bade and Moses Ndirangu indicating that there was no longer a post of Assistant lecturer within the respondent and could apply for the position of Tutorial Fellow Grade 11 when such vacancies arose.
20. The respondent has always advised the petitioner of any available vacancies to share with its members.
21. The allegations that the petitioner members have been carrying out duties of higher job groups is without proof and the inclusion of other persons in the petition (Alex Kinyonda, Bakari Mwakileo and Boniface Wachira Muarage) is misleading since they are not members of the petitioner and the orders sought should not issue and the petition be dismissed with costs.
22. The interested party submitted that the purported retirement notices by the respondent setting the retirement age of the petitioner's members at 60 years or 70 years or any other year that is not 75 are null and void and contrary to the CBA dated 10 May 2017 and such notices should be quashed. The retirement notices issued are contrary to fair labour practices. The action of promoting some members of the petitioner to Assistant lecturer while failing to promote others who perform similar duties without commensurate pay is discriminatory and contrary to fair labour practices.
23. The registration of the CBA was taken over by the petitioner and it pending in Nairobi ELRC CBA No. E088 of 2023 – *University Academic Staff Union v Pwani University*. The CBA establishes the retirement age for petitioner members at 75 years and also specifies how promotions are to be done which the respondent has failed to address and has acted contrary to Section 10(5) of the Act. In the case of *Universities Academic Staff Union v Machakos University & Another* [2019] eKLR the court declared that the Harmonised Criteria and Guidelines for Appointment and Promotion of Academic Staff in Universities in Kenya dated 2 October 2014 which abolished the post of Assistant Lecturer were invalid, null and void. In a letter dated 2 October 2020 by the Commission for University Education



to the respondent, an internal memo issued dated 31st January 2020 in this regard. The invitation to apply for contractual positions despite the petitioner's members being on permanent employment is an effort to modify their employment terms.

24. The interested party submitted that the respondent is in violation of constitutional rights of the petitioner's members in terms of Article 47 for lack of fair administrative action, Article 50 with regard to fair hearing and Article 41 of *the Constitution* with regard to fair labour practices all which compound the discriminatory treatment prohibited under Article 27 of *the Constitution* read together with Section 5(3) of the Act.
25. The parties are governed under the CBA dated 10 May 2017 as held in CBA 103 of 2018 – Social Service League, M.P. Shah Hospital v Kenya Union of Domestic, Hotels, Educational Institutions and Allied Workers that a CBA is a contractual agreement like any other left to the parties' autonomy and apart from an illegality, the normal legal principles in setting aside the contract would apply including fraud or misrepresentation. The subject CBA herein was voluntarily executed by the parties on 10 May 2017 and bind the parties. The retirement age is 75 years and the respondent should not be allowed to indiscriminately promote its employees as such amounts to discriminatory treatment and the orders sought in the petition should issue.

Determination

26. From the pleadings, the response and written submissions, the issues which emerge for determination are whether the retirement notices issued to petitioner's members violate the CBA dated 10 May 2017; whether there is discrimination by the respondent against petitioner's member in promotions, and whether the remedies sought should issue.
27. The petitioner's case is given emphasis by the Secretary General, Chris Kipngetich Ngeny in his Supporting Affidavit and Further Supporting Affidavit dated 6 September 2023 at paragraph 4(e) he avers that;

The CBA that is enforceable is the one dated 10th May 2017 covering the 2013 to 2017 period. The CBA for the period 2010 to 2013 referred to by the respondent is not applicable and enforceable because it provided at clause 30 that the CBA for 2010 to 2013 period would only remain in force for one year and thereafter only remain in force until revised jointly by both parties.

28. The petitioner is a legal entity registered pursuant to the LRA. It has capacity to sue and be sued separate and different from the interested party.
29. The instant petition is filed in that capacity. The petitioner being its own person in law with standing to sue and be sued.
30. As outlined above, the petitioner asserts that the CBA giving the assertion that the retirement age for the petitioner's members is 75 years and none other, this is the CBA executed by the parties on 10 May 2017.
31. A CBA only becomes enforceable upon registration by the Court in terms of Section 59 (5) of the LRA.
32. Despite the approval by the SRC with regard to the CBA dated 10 May 2017, the petitioner has acknowledged that the same is pending registration under Nairobi ELRC CBA No. E088 of 2023 – University Academic Staff Union v Pwani University.



33. The Subject CBA shall only take the force of law, upon its registration by the court. Section 59(5) of the LRA is couched in mandatory terms and not left to the discretion of the parties or the court;

A collective agreement becomes enforceable and shall be implemented upon registration by the Court and shall be effective from the date agreed upon by the parties.

This section has two parts.

34. The first part is that, a CBA only becomes enforceable upon registration by the Court.

35. The second part is that, upon registration, a CBA is effective from the date agreed upon by the parties.

36. The Nairobi ELRC CBA No. E088 of 2023 – University Academic Staff Union v Pwani University is therefore the process towards addressing the first part of Section 59(5) of the LRA while parties have executed the CBA giving it the date from which it shall take effect.

37. The date of effect cannot apply until and unless the CBA is registered with the Court and given approval.

38. Even though the SRC has given response of ‘no objection’ to the CBA dated 10 May 2017, the CBA cannot be enforced on its terms and conditions until Nairobi ELRC CBA No. E088 of 2023 – University Academic Staff Union v Pwani University is addressed to finality.

39. The petitioner’s members are bound by existing terms and conditions of employment with regard to the retirement age and promotions and cannot enforce the CBA dated 10 May 2017 until its registration. The knowledge that there exists Nairobi ELRC CBA No. E088 of 2023 – University Academic Staff Union v Pwani University is sufficient evidence that the petitioner is aware of the provisions of Section 59(5) of the LRA.

40. The petitioner moved the court under Certificate of Urgency on 12 June 2023 and interim orders issued stopping the retirement of its members before 75 years and to be maintained on the medical cover. Notice to retire issued way back in June 2022 and since the interim orders issued to allow the court hear the parties on the merit, such members have continued to enjoy such terms.

41. The petition analysed, the petitioner cannot justify assertion of any right to have its members to retire in terms of a CBA that is not enforceable. Such benefit does not accrue requiring the respondent to allow service until 75 years.

42. The retirement notices issued to Diana Mlango Bade, Jorry Ominde Olang’o to retire at 60 years and retirement notices issued to Dr. Robert Maneno and Dr. Anthony Pepela to retire at 70 years are procedural and issued in accordance with their letters of appointment.

43. On whether there is discriminatory treatment upon petitioner’s members by the respondent, indeed Article 27 of *the Constitution* and Section 5(3) of the Act prohibit discrimination at the workplace. However, citing that there is discriminatory treatment is not sufficient. A petitioner in this regard must demonstrate that there is differential treatment; a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.

44. The Court of Appeal in the case of Haki Na Sheria Initiative v Inspector General of Police & 3 others [2020] eKLR has aptly captured the matter of discrimination as follows;

... mere differentiation or unequal treatment does not per se amount to discrimination prohibited under Article 27 of *the Constitution*.



45. The petition is that Jorry Olango, Diana Bade and Moses Ndirangu Kamau have been denied promotions to Assistant Lecturer Grade II for years running with their qualifications of Master's degree and yet have workload and job descriptions equivalent to the position as per Clause 13 CBA of 2013 to 2017. All had been promoted to lower and different grades as follows; Diana Bade Grade F, Jorry Olango Grade E and Moses Ndirangu Kamau Grade C yet they possess the same qualifications.
46. Despite having a CBA covering the years 2013 to 2017, in employment and labour relations, an employment promotion is not automatic. The employer is allowed the prerogative to determine a promotion based on its policy, procedures and practice. the petitioner has well addressed the facts that, to be promoted, one had to make an application as Diana Bade, Jorry Olango and Moses Kamau were advised to apply following an online advertisement. The averments by Chris Kipngetich Ngeny in his Supplementary Affidavit at paragraph 15 that this implied that they were meant to resign from their P&P positions and then apply for the open Tutorial Fellow position which were not guarantee that they were to be taken. this advice was misleading ...
47. However, an adviser to an employee to apply for a higher position is not similar to an advice to resign from their ongoing employment. whether, upon such application one secures the position, is a different matter. To fail to apply for a higher position for fear that one would lose the permanent and pension terms of his employment cannot infer discriminatory treatment.
48. To apply the discrimination definition under Article 27 of *the Constitution* and Section 5(3) of the Act in the noted circumstances is not correct.
49. For a promotion to take effect, the policy of the respondent as the employer must apply. the procedures and practice in place must be gone into and unless these can be demonstrated that upon application, there is selection or differentiation that is unreasonable or arbitrary and created for an illegitimate or surreptitious purpose, a claim that there is discrimination against the employee cannot hold. Even where there is noted differentiation, which is not the case here, the petitioner must demonstrate that there is a violation of *the Constitution* and the law by creating a differentiation that is not for a legitimate purpose or that it is unfair. more fundamentally, the ultimate question is whether the different treatment is justifiable as held in Mohammed Abduba Dida vs Debate Media Limited & another [2018] eKLR.
50. The petitioner has made general assertions without giving any particulars with regard to the alleged discriminatory treatment of its members with regard to promotions. The orders sought cannot issue in this regard.
51. As outlined above, since filing the petition, the petitioner has enjoyed interim orders. The benefits accrued to its members' subject to this petition is with regard to time served beyond the retirement notices issued in June 2022 and for labours offered to the respondent. Such benefits shall conclude with this judgment without victimisation in terms of Section 46(h) of the Act.
52. Accordingly, the petition herein and the Notice of Motion dated 12 June 2023 are without merit and are dismissed in their entirety. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 28TH DAY OF SEPTEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine



..... and

