



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

PETITION NO. E026 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

**IN THE MATTER OF ARTICLES 27, 41(1) & (5) 159(1) & (2), 162(2),
165, 230(4) & (5) AND 237 OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF THE LABOUR RELATIONS ACT (2007)

BETWEEN

FRANCIS CHENG'OLI.....1ST PETITIONER

MARK OTUNDO.....2ND PETITIONER

ANN KAARIA.....3RD PETITIONER

AND

KENYA UNIVERSITIES STAFF UNION.....RESPONDENT

JUDGMENT

1. Vide their petition dated 2nd February and filed on 23rd February 2021, the Petitioners seek the following remedies from this Court –

(1) A declaration be made that the Petitioners' fundamental

rights and freedoms under Articles 27 and 41 of the Constitution have been contravened and or likely to be contravened and violated by the Respondent herein.

(2) A declaration that the Kenya University Staff Union constitution registered on the 15th July 2020 by the Registrar of Trade Unions is a nullity and unconstitutional.

(3) A declaration that the Kenya University Kenya University Staff Union constitution registered on the 3rd April 2013 by the Registrar of Trade Unions is hereby reinstated.

(4) A declaration be made that the Petitioners and in deed the members of the Union have a right to participate in the affairs of the Union including vying for elective seats of the Union.

(5) An order of Certiorari does issue removing to the High Court for purposes of being quashed the decision to bar the Petitioners and other members of the Union from vying.

(6) Conservatory and interim orders of stay of all nominations, proceedings and intended elections on the 25th February 2021 or whichever date the Respondents

set.

(7) Expunging of all the discriminatory, illegal and offensive clauses hereinabove stated from the KUSU Constitution.

(8) Formation of an independent and impartial vetting nomination committee to organize, coordinate and oversight the elections in collaboration with the appointed Labour Officer.

(9) Order for the restart of fresh nominations and elections conducted in a free, fair and verifiable manner within the tenets of the Labour Laws and the Constitution of Kenya 2010.

(10) Circulation of the certified members/voters registers to potential members/voters for verification, at least two weeks before any elections.

(11) Costs of this petition

(12) Any other orders, writs and directions the Court considers appropriate and just to grant for purposes of the Petitioner's constitutional rights

2. The Petitioners are members of Kenya Universities Staff Union, a trade union registered under the Labour Relations Act, who is the Respondent in the petition.

3. It is the averment of the Petitioners that the Respondent illegally, and without justification, amended the constitution introducing draconian clauses that bar members from participating in the affairs of the trade union including vying for elective posts in the union. The amended clauses of the constitution include the following –

i) Clause 7.1.2 (ii). Increase of the cost of convening an SGM/SDM by members to Kenya Shillings I wo (2) Million from live Hundred Thousand (500,000/=), this is too exorbitant meant to deny members an opportunity to intervene or exercise their sovereign will, when there is mismanagement of the Union.

ii) Clause 16.2 (b), (d) & (e) vests the organisation, coordination and oversight of elections, both National & Branch, in the National Executive/Branch Executive Committees, composed of current officials, who are also contestants. Hence conflict of interest & lack of fairness or impartiality.

iii) Clause 16.3(d) Only such members who have served as Branch Officers for at least one term of five (5) years shall be eligible for election to NEC/NGC.

CLAUSE 16.3(g) Nomination fees for the National Officers position shall be as follows:

a) Secretary General, Kenya shillings thirty thousand

(Kshs.30,000)

b) National Chairperson and National Treasurer Kenya Shillings twenty-five thousand (25,000)

c) Deputy Secretary General National Organizing Secretary, National Vice Chairperson, Deputy National Treasurer, National Women Representative; Kenya Shillings twenty thousand (20,000)

d) Branch Representatives and National Trustees Kenya Shillings fifteen thousand (15,000)

4. The Petitioners aver that these provisions were draconian and are aimed at barring other people from contesting with high fees up from the Kenya Shillings Ten Thousand for national elective seats and Kenya Shillings five thousand (5,000) and two thousand five hundred (2,500) for Branch officials.

i) Clause 16.3(j) In addition to the provisions of this constitution, an applicant shall hold at least a post -secondary three (3) years KNEC or equivalent diploma certificate in a professional field from a recognized institution.

Clause 16.4(e) and (f) General provisions for Branch Officers. In addition to the provisions of this constitution, an applicant shall hold at least a post -secondary' three (3) years KNEC or equivalent diploma certificate in a professional field from a recognized institution and shall have been a KUSU member for at least five (5) years Notwithstanding the provisions of Clause 16.4(g) serving officers during inception of this constitution may be exempted qualifications.

5. The Petitioners aver that these clauses bar members of the Union from vying for seats, discriminating on their social status and educational backgrounds while granting the ones in office a leeway to still hold office without the same mandatory qualifications.

i) Clause 16.4(d) only such members not in arrears with their union dues shall be eligible for election as branch officers of the union provided that one has neither been involved in anti-union activities nor faced disciplinary action by the union.

ii) Clause 16.3(f) requires that nomination forms for national positions are collected and submitted to the secretariat for vetting and yet the secretariat is comprised of current national officials who are also contestants hence conflict of interest and lack of fairness or impartiality.

iii) Clause 16.4(h) requires that nomination forms for branch positions are collected and submitted to the secretariat for vetting and yet the secretariat is composed of current branch officials who are also contestants. Hence conflict of interest and lack of fairness or impartiality.

iv) Clause 16.4(i) on the escalation of branch nomination fees

v) Branch secretary Kenya shillings fifteen thousand (15,000), Branch chairperson and branch treasurer Kenya shillings twelve thousand five hundred (12,500). Other branch positions (deputy branch secretary, branch organising secretary, branch vice chairperson, deputy branch treasurer, branch trustee, branch women representative) Kenya shillings ten thousand (10,000).

6. The Petitioners aver that these clauses are draconian, aimed at barring other people from contesting with high fees up from between Kenya shillings five thousand (5,000) and Kenya shillings two thousand, five hundred shillings (2,500) for branch officials.

7. They further aver that the Respondents have used these illegally inserted clauses to bar members applying for these clauses despite the same not being in the legitimately viable constitutional order of 3rd of April 2013. That this is draconian and goes against Article 41(4) of the Constitution.

8. The Petitioners further aver that the officials of the Respondent currently in office did not follow the guidelines set out in Article 21 of the Union's constitution which stipulates that:

a) Alterations to these rules shall only be made by resolution upon by secret ballot or any other mode agreed upon and passed at an Annual General Delegates Conference at a Special Delegates Conference. All proposals for amendments shall be submitted to the Secretary General not later than three weeks before the date of such annual or Special Delegates Conference

9. They aver that no such resolutions were ever made nor ratification of the said alterations ever made prior to the registration of the illegal constitution registered by the Registrar of Trade Unions on the 15th July 2020. They also aver that there was no Annual Delegates Conference held in the year 2020 owing to the now global Covid 19 pandemic.

10. The Petitioners aver that there was no public sensitisation and participation in order to effect the changes in the constitution.

11. The Petitioners aver that they have been barred from the nominations that were held on the 10th of February 2021 and will be locked out of the Union elections to be held on the 23rd February 2021 owing to the illegally registered constitution that has set out draconian laws different from the ones set out in the constitution registered in April 2013. They aver that the Respondent's officials who have barred the Petitioners from vying for the elective posts through these illegal draconian laws were the same people overseeing the nominations and organising the elections. That they are acting as judge, jury and executioner.

12. They aver that the Petitioners have now been deprived of the right to participate in the affairs of the union as enshrined in Article 41 of the Constitution, most notably to vie and have a say in the organisational structure of the union.

13. The petition is anchored on Articles 10(2)(1) and (b), 27 and 41 of the Constitution of Kenya.

14. The Petitioners submit that the introduction of draconian financial obligations before a member can be considered as eligible for elections is a hindrance to the Petitioners and other members eligibility to vie for the elective posts.

15. They rely on Article 2 of the Constitution on Supremacy which states that:

(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

(2) No person may claim or exercise State authority except as authorised under this Constitution.

(3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.

(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

16. They submit that though introduction of educational qualifications does not necessarily constitute unfair discrimination but including a proviso that prevents the application of the same clause on persons currently in office makes it unfairly discriminative and should be declared unconstitutional. They submit that the officials of the Respondent used this clause to prevent other members from contesting in the Branch Elections making the incumbents vie unopposed. That this move, coupled with the exorbitant fees imposed to convene a special general meeting have made it virtually impossible for other members to contest the impugned clauses in the constitution.

17. They submit that Article 41 as read with Article 27 of the Constitution guarantees every person a right to fair labour practice which

include joining and participating in the activities of a trade union free from discrimination based on social origin.

18. The Petitioners relied on the decision in **Musili Wambua v Attorney General & 2 others [2015] eKLR** where the Court quoted **Nyarangi & 3 Others v Attorney General [20081 KLR 688** and observed:

"The Black's Law Dictionary defines discrimination as follows:

"The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."

19. The Petitioners also relied on the decision in **Nyarangi & 3 Others v Attorney General [2008] KLR 688**, where the Court held that:

"The Bill of Rights Handbook, Fourth Edition 2001, defines discrimination as follows: -

"A particular form of differentiation on illegitimate ground."...The law does not prohibit discrimination but rather unfair discrimination. The said Handbook defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification."

20. The Petitioners submits that the Respondents have used the illegally registered constitution to bar other members from vying for elective positions ostensibly for disciplinary cases and actions taken against them prior to the registration of the Union Constitution. By dint of Clause 16.4. d; which states that only such members not in arrears with their Union dues shall be eligible for elections as Branch Officers of the Union provided that one has neither been involved in anti-union activities nor faced disciplinary action by the Union.

21. The Petitioners submit that even though they are cognizant of the fact that every Union has the right to formulate its own Constitution that governs the members of that union, the said constitution should conform to the laws of the land which include, that such laws should not be retrogressive and apply to matters that happened prior to the formation of that law or indeed constitution.

22. The Petitioners rely on the decision in **Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others, [2012] eKLR** where the Court was held that:

"As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication it appears that this was the intention of the legislature".

23. The Petitioners submit that the use of a retrogressive law to unfairly and unlawfully discriminate against members of the union while covering the political class should not be entertained by the Court.

24. In the Petitioners' further affidavit sworn by FRANCIS CHENG'OLI on 30th August 2021, he deposes that the Petitioners are not delegates and were not part of the National Delegates Conference held in Bungoma on 30th August 2019. That there were no branch minutes to endorse the amendments and that the amendments were never discussed at Branch level.

Respondent's Case

25. The Respondent filed a replying affidavit of ERASTUS NJERU, the Chairman of the Respondent union who states that the petition is a waste of precious judicial time, lacks any merit and should be dismissed with costs.

26. That Kenya Universities Staff Union Constitution registered in the year 2013 was amended and replaced with the new constitution revised and dated August 2019. That the Kenya Universities Staff Union Constitution registered in the year 2013 is no longer in force.

27. That the amendment of the Kenya Universities Staff Union Constitution started by the Resolution passed by the National Governing Council in the year 2017. This was followed by Notice to all Branches and Sub- branches dated 15th January 2018, the publication of the Notice about the proposed amendment in national newspapers in circulation dated 28th April, 2018 by the Registrar of Trade Unions and invitation to any member with objections to raise the same.

28. That thereafter, a resolution was passed at the National Delegates Conference Meeting at Bungoma on 30th August, 2019 and finally, gazette in the Kenya Gazette dated 8th May, 2020, vide Gazette Notice No. 3423 at page 1867.

29. That the Notice about the convening of the National Delegates Conference Meeting at Bungoma on 30th August, 2019 was duly issued dated 2nd August, 2019 and served accordingly.

30. That the notice concerning the amendment of the constitution and rules was duly served upon the Ministry of Labour Social Security and Services on 20th January, 2020. The same was acknowledged by the Registrar of Trade Unions on 16th July 2020.

31. That the amendment of the Kenya Universities Staff Union Constitution was discussed in the various meetings held by the Union, held on diverse dates of 16th March, 2019, 5th to 6th April, 2019, 13th July, 2019, and 20th to 21st September, 2019 respectively and got finalized at the National Delegates Conference Meeting at Bungoma on 30th August, 2019.
32. That the power to amend the said 2013 Constitution of the Kenya Universities Staff Union, which was duly amended in the year 2019 was expressly provided for under that old/replaced Constitution under Article 21. The said power was duly and legally exercised.
33. The Affiant deposes that the amendment of the Kenya Universities Staff Union Constitution followed the due process. That the Petitioners kept quiet and never raised any issues about the proposed amendments, despite that the proposed amendments; were published in the national newspaper in circulation.
34. That notices were issued to all members of Kenya Universities Staff Union about the proposed amendment of the constitution. That the revised Constitution was initially subjected to the participation of all Union members, discussed in open forums as relevant as possible and finally passed by the supreme organ of the Union. That the Petitioners were mostly present in the meetings that discussed the proposed amendments to the constitution and contributed positively.
35. The Affiant deposes that the entire constitution as revised in 2019 reflects the true intentions of all the persons who subscribe to the Kenya Universities Staff Union. That the Petitioners have only challenged the same document they voted for out of selfishness.
36. That the entire constitution as revised in 2019 has not introduced any draconian Clauses but contains a true reflection of the intentions of the people who subscribe to the Kenya Universities Staff Union and reflect the true intentions of how they want the Union to be Governed.
37. The Affiant states that the prayers sought by the Petitioners are in bad faith and meant to paralyze the Union for their own selfish interests.
38. That save for the omnibus allegations of violation of the Kenya Constitution 2010, the Petitioners have not clearly and sufficiently demonstrated how the Constitution has been violated.
39. The Affiant states that the Petitioners are trying to ask the Court to get involved in the day to day running of the affairs of the Union, so that the Court supervises the day to days' operations of the Union and deny the membership of the Union an opportunity to regulate itself. That such action would create a bad precedent which is very dangerous for the existence of the Trade Union.
40. That the petition was a mere afterthought and was not meant to safeguard any meaningful interest of the Union or its members.
41. The Respondent prayed that the petition be dismissed with costs.
42. In the submissions the Respondent states that the Petitioners have not met the minimum threshold to prove discrimination requirements or that they were discriminated. That the Petitioners failed to demonstrate how the amended Union Constitution differentiated and discriminated between Petitioners and other members with similar interests and qualifications or that there exists a differentiation which is discriminatory. The Respondent submits that discrimination means treating differently, without any objective and reasonable justification, persons in similar situations which has not been proved in this case.
43. The Respondent submits and relies on the definition of discrimination as was defined by a three Judge bench of the High Court in **Peter K. Waweru v Republic [2006] eKLR** as follows; -

“Blacks Law Dictionary 11th Edition defines "discrimination" as under: "Discrimination is in constitutional law the effect of a statute or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between them and those not favoured no reasonable distinction can be found.

Unfair treatment or denial of normal privileges to persons because of their race, age, sex, nationality or religion. A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

44. The Respondent submits that the Petitioners have failed the specificity test established by the authority of **ANARITA KARIMI NJERU**. The test established by the Court was that; *if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.*

45. The Respondent submits and further relies on the test established in the case of **David Mathu Kimingi v SMEC International Pty Limited [2021] eKLR** where the Court held thus;

*“The main issue for determination in the application before me is whether the petition raises any issues on violation of the Constitution to meet the threshold of a constitutional petition. In the Petition while the Petitioner has cited Article 41(1) of the Constitution as having been allegedly contravened, he has failed to specify the said provision and further give particulars of the said contravention within the body of the Petition. The Petitioner further alleges violation of his constitutional right under Article 23(3) in the Orders he seeks in the Petition yet the same is not averred with specificity and particulars given on how the Respondent violated the said right. It is my considered opinion that the Petitioner has failed to satisfy the threshold of specificity as espoused in the celebrated cases of **Anarita Karimi Njeru v Republic (No. 1) (1979) 1KLR154** and **Mumo Matemu v Trusted Society of***

46. The Respondent submits that it was within the mandate of the National Delegates Conference, (the Supreme Organ) of the Union to amend the Constitution as deemed necessary or expedient for the proper conduct and management of the Union. That the powers vested in the National Delegates Conference, (the Supreme Organ) of the Union to amend the Constitution is not in dispute. That the National Delegates Conference was properly constituted and represented the interests of the Union as opposed to the three Petitioners who are hell bent on stagnating the Union.

47. The Respondent submits that there was no violation of the Petitioners' rights. That any member of the Union who was to be affected by the amendment of the Constitution was given, right from the year 2017, to raise any objection they may have had. The Petitioners did not raise any objection until the Constitution was registered in the year 2019.

48. The Respondent submits that the Petitioners' petition was trivial, frivolous, vexatious and made in bad faith and should be dismissed.

49. The Respondent submits that the Petitioners and all other members of the Union were all given a reasonable opportunity to know about the issues in the intended amendment of the constitution, about 2 years, and had an adequate say. That the Petitioners squandered that chance and were now trying to blow hot and cold.

50. The Respondent submits that the petition was a mere afterthought and it was not meant to safe guard any meaningful interest of the Union or its members and prays that the petition be dismissed with costs.

Analysis and Determination

51. I have considered the petition, the pleadings and documents filed with the same, the reply, the submissions and authorities cited by both parties.

52. The issues for consideration are whether the amendments of the constitution of the Respondent as revised in August 2019 and registered on 20th July 2020 by the Registrar of Trade Unions was in compliance with the law and the registered constitution of the Respondent and whether the Petitioners are entitled to the orders sought.

53. Under Section 14(1)(b) of the Labour Relations Act every trade union is required to adopt a constitution that complies with the requirements of the Act and the requirements set out in the First Schedule to the Act which include the following –

MATTERS FOR WHICH PROVISION MUST BE MADE IN THE CONSTITUTION OF TRADE UNION OR EMPLOYERS' ORGANISATION

1. The name of the trade union or employers' organisation and the place of meeting for the business of the trade union or employers' organisation.

2. The whole of the objects for which the trade union is to be established, the purposes for which the funds thereof shall be applicable, the conditions under which any member thereof may become entitled to any benefit assured thereby, and the fines and forfeitures to be imposed on any member thereof.

3. The manner of making, altering, amending and rescinding the constitution.

4. The appointment or election and removal of an executive, and of trustees, secretaries, treasurers and other officers of the trade union or employers' organisation.

5. The custody and investment of the funds of the trade union or employers' organisation, the designation of the officer or officers responsible therefor, and the annual or periodical audit of its accounts.

6. The inspection of the books and names of members of the trade union or employers' organisation by any person having an interest in the funds of the trade union.

7. The manner of dissolution of the trade union or employers' organisation and the disposal of the funds thereof available at the time of the dissolution.

8. The taking of all decisions in respect of the election of officials, the amendment of the constitution, strikes, lock-outs, dissolution and any other matters affecting members of the trade union or employers' organisation generally, by secret ballot.

9. The right of any member to reasonable opportunity to vote.

10. The amount of subscription and fees payable by members, and the discrimination of a member from voting on any matter concerning the union and from receiving benefits if the members' subscription is in arrears.

11. The conditions under which a person may become an honorary member.

12. That the secretary and treasurer of the trade union or employers' organisation shall be persons sufficiently literate in the English or Swahili language to be able adequately to perform the duties of such office.

54. Section 27 of the Labour Relations Act provides for change of name or constitution of a trade union as follows –

27. Change of name or constitution of trade union, employers' organisation or federation

(1) A trade union, employers' organisation or federation may resolve to—

(a) change or replace its constitution; or

(b) change its name.

(2) A registered trade union, employers' organisation or federation may apply to the Registrar to approve a change of name or an amendment to its constitution and rules by submitting to the Registrar—

(a) a notice in Form I or Form J as the case may be set out in the Second Schedule duly completed and signed by the secretary;

(b) a copy of the resolution containing details of the change; and

(c) a certificate signed by the secretary stating that the resolution was passed in accordance with the constitution and rules.

(3) Notice of the change specified in subsection (2) shall be submitted to the Registrar within fourteen days of any resolution to change the

name or constitution.

(4) Upon receipt of the notice of change of name or constitution, the Registrar shall give a notice of at least twenty-one days in the Gazette and in three daily newspapers of national circulation inviting any objections to the proposed change of name or constitution by members of the trade union and where any such objection is raised, the Registrar shall investigate the complaint and the grounds relied upon and may—

(a) refer the matter to the Industrial Court;

(b) refuse to accept the proposed amendments; or

(c) make any orders that he may deem fit in

the circumstances.

(5) The Registrar may approve a change of name or to the constitution if the applicable requirements of registration of a trade union, employer's organisation or federation are met.

(6) The Registrar shall issue a certificate of change

of name or change of the constitution in Form K or Form L, as the case may be.

(7) Any change of name or change to the constitution and rules of a registered trade union, organisation or federation shall take effect when the Registrar approves the change under this section.

(8) A change in the name of a trade union, employers' organisation or federation does not—

(a) affect any right or obligation of that trade union, employers' organisation or federation;

(b) render defective any legal proceedings by or against it and any proceeding instituted under the former name may be continued or commenced by or against it under the new name.

(9) Where the Registrar refuses to approve a change under this section, the Registrar shall give written notice of that decision and the reasons for the refusal.

55. The Respondent's constitution of 2013 provides for amendments and alterations of the constitution at Article 21 as follows –

ARTICLE 21

AMENDMENTS AND ALTERATIONS OF THIS CONSTITUTION

a) Alterations to these Rules shall only be made by resolution voted upon by secret ballot or any other mode agreed upon and passed at an Annual Delegates Conference or a Special, Delegates Conference. All proposals for amendments shall be submitted to the Secretary General not later than three weeks before the date, of such Annual or Special Delegates Conferences.

b) No alteration of these Rules shall take effect until the date of registration thereof by the Registrar of Trade Unions

unless some later date is specified in the Rules.

c) copy of the Constitution and Rules of the Union shall be supplied to any member on application to the Secretary General and upon payment of expenses incurred for photocopying.

56. According to the replying affidavit and the documents attached thereto, the amendments to the Respondent's constitution were not shared with the members. The members were only asked to submit their proposals for amendment but no one shared with them the proposed amendments to enable them confirm if they agreed with the same or opposed the amendments.

57. The notices in the newspapers, apart from being so small that they are barely legible, did not state the nature of the amendments.

58. Further, the notices are by the Registrar of Trade Unions and were posted after the amendments had been made by the National Delegates Conference. The averments of the Petitioners that their input on the amendments was never sought has thus not been rebutted.

59. I have further considered the specific amendments, especially the amendments to Article 7.2 increasing the fees for requisition of Special Delegates Conference from Kshs.500,000/- to Kshs.1,000,000/- (one million) and Article 18 on fees payable by aspirants for both national and branch elections as well as the team to organise elections.

60. These are matters that should have been discussed with members at branch level before being proposed at the National or Special Delegates Conference as the delegates are required to vote and the amendments in line with the resolutions at branch level.

61. All amendments must also be in compliance with the law. Section 34(2) of the Labour Relations Act specifically provides that –

(2) The constitution of a trade union, employers' organisation or federation shall—

(a) not contain a provision that discriminates unfairly between incumbents and other candidates in elections; and

(b) provide for the election, by secret ballot, of all officials of a trade union at least once every five years.

62. The amendments at Article 16.3(b) to the effect that only members who had served for not less than eight years are eligible to vie for elections in national office is discriminatory and therefore in conflict with Section 34(2)(a) of the Labour Relations Act.

63. The amendment of Article 16.4(f) to the effect the serving officers are exempted from professional qualifications is also discriminatory and in violation of Section 34(2)(a) of the Labour Relations Act.

64. Both provisions also violate Article 27 of the Constitution of Kenya 2010 which provides for equality and freedom from discrimination.

65. Article 41 further provides for freedom to form, join or participate in the activities and programs of a trade union which includes the right to participate in union elections by all members.

66. For the foregoing reasons, I find that the Petitioners have proved on a balance of probabilities that the Respondent did not give them an opportunity or participate in the amendment of the constitution of the Respondent nor were they consulted before the amendments were effected.

67. I further find that the amendments are discriminatory and violate Section 34(2)(a) of the Labour Relations Act, and Articles 27 and 41 of the Constitution.

68. I therefore make the following orders –

(i) A declaration be and is hereby issued that the Petitioners' fundamental rights and freedoms under Articles 27 and 41 of the Constitution have been contravened and violated by the Respondent herein.

(ii) A declaration be and is hereby issued that the Kenya University Staff Union constitution registered on the 15th July 2020 by the Registrar of Trade Unions is a nullity and unconstitutional.

(iii) A declaration be and is hereby issued that the Kenya University Kenya University Staff Union constitution registered on the 3rd April 2013 by the Registrar of Trade Unions is hereby reinstated.

(iv) A declaration be and is hereby issued that the Petitioners and in deed the members of the Union have a right to participate in the affairs of the Union including vying for elective seats of the Union.

(v) A declaration be and is hereby issued expunging of all the discriminatory, illegal and offensive clauses hereinabove stated from the KUSU Constitution.

69. Prayers 5, 6, 8, 9 and 10 are declined as they have been overtaken by events as the elections were carried out and the new officers registered and no prayers were made for revocation of their registration.

70. The Respondent shall pay the Petitioner's costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF MARCH 2022

MAUREEN ONYANGO

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 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.

MAUREEN ONYANGO

JUDGE