Universities Academic Staff Union, Egerton University Charter v Egerton University & 2 others (Petition E023 of 2021) [2022] KEELRC 1162 (KLR) (24 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 1162 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION E023 OF 2021

HS WASILWA, J

MAY 24, 2022

BETWEEN

UNIVERSITIES ACADEMIC STAFF UNION, EGERTON UNIVERSITY CHARTER ..... PETITIONER

AND

EGERTON UNIVERSITY ..... 1ST RESPONDENT

EGERTON UNIVERSITY COUNCIL ..... 2ND RESPONDENT

VICE-CHANCELLOR, EGERTON UNIVERSITY ..... 3RD RESPONDENT

JUDGMENT

1. The Petitioner is a branch of the Universities Academic Staff Union, registered under section 14 of the *Labour Relations Act*, while the petitioner was registered under section 25 of the *Labour Relations Act*. It is stated that this suit was brought on behalf of the petitioner's members who are staff members of the Egerton University, the 1st Respondent herein.

2. The basis upon which this petition was filed was that the Petitioner and the 1st Respondent entered into a Collective Bargaining Agreement (CBA) sometime in October, 2012, which CBA agreed on various term of employment of its members. One of the terms under clause 24.13 dictates that the workload was determined by FTSE formula. FTSE of 1.0 to be the maximum load which is 6 CF'S per semester and 18 CF'S per year. Anything over and above the said CF'S were to be considered as part time teaching and the same was to be paid separately.

3. These terms of the CBA was implemented immediately the CBA was executed in 2012 and the same formed part of the petitioner's member's terms of contract of employment.

4. Furthermore, clause 21 of the CBA provided that members of staff, their spouses and children age 25 and below shall be entitled to tuition waivers as follows; Staff 100% waiver for regular programs,

while under SSP Programme the male was entitled to 70% waiver while their female counterparts were entitled to 75% waiver. The children of the staff were entitled to 50% waiver.

5. About seven years later, the 1st Respondent developed a staff workload policy in the year 2019 without seeking any views from the Petitioner and or its members. The effect of the developed work policy reviewed the workload from the agreed ones of 18 CF'S in a year to 24 CF'S in a year translating to 4 teaching courses in a semester as opposed to the agreed 3 courses per semester.

6. It is contended that the Respondent developed the said policy contrary to the provisions of section 5(1) of the *Fair Administrative Act*, as the Petitioner members were not notified of the changes of their contracts. These changes were then implemented in March 2021.

7. When the said work load policy was implemented its effect were felt by the petitioner's members forcing the petition to take action and engage the Respondents over the matter however that none of the talks between the parties bore any fruits.

8. Vide a Notice of 25th August, 2021, the 1st Respondent once again unilaterally changed the terms of the CBA and withdrawn tuition waiver which were enjoyed by the Respondent's members, their spouses and children as provided by clause 21 of the CBA.

9. The Petitioner contends that its members constitutional rights were infringed more particularly Article 10 (1)(c) of *the Constitution* when the Respondent failed to consult them and or invite their views before implementation of the Work Policy 2019. Further that their rights under Article 41 of *the Constitution* of Fair labour practices were violated when the Respondents varied the terms of the CBA unilaterally.

10. Additionally, that their member's rights under Article 47 of *the Constitution* on *fair administrative Action* and Article 232 particularly the values and principles of accountability, for administrative acts and involvement of the people in process of policy making.

11. The Petitioner therefore sought for the following reliefs; -

    1) A declaration that the Respondent failed to observe and uphold the national values and principles of governance as required by Article 10 of *the constitution*, particularly the values and principles of; good governance, participation of the people, human rights, transparency and accountability, in making and implementing the 'Egerton University staff workload Policy, 2019; and in its decision lifting the waiver on tuition fee on staff with effect from 1 of July 2021. In addition, that the Respondents also failed to observe the values and principles of public service enshrined in Article 232 of *the Constitution* particularly the values and principles of: accountability for administrative acts, and involvement of the people in the process of policy making, in its development and implementation of the said Workload Policy and lifting the waiver of tuition fee for staff.

    2) A declaration that the Respondents' process of developing and implementing the Egerton University, Staff Workload Policy 2019; and their decision lifting the waiver on tuition fee on staff with effect from 1st of July, 2021, infringed and continue to the infringe, the petitioner's fundamental rights and freedoms and those of its members: to fair administrative action and fair labour practices as enshrined in Articles 41 and 47 of *the Constitution*.

    3) A temporarily and permanent order of injunction restraining the Respondents from further implementing the Egerton University, Staff Workload Policy ,2019, and their decision lifting the waiver of tuition fee for the staff.

4) An order for compensation to petitioner and its members for infringement of their rights by the Respondents, and the compensation to be by way of damages; and the salary of petitioner's members for work done pursuant to the new Staff Workload Policy, 2019, and which was not, in accordance to clause 24.13 of the collective bargaining agreement dated October, 2012, regarded as the part-time teaching; and therefore not paid separately, In this regard and for this purpose, the petitioner to file with the Court, a liquidated account and claim for its members in this respect within 30 days of judgment.

5) That the costs of this petition and of all other proceedings associated thereto be borne by the Respondents.

12. In response to the Petition, the Respondents filed a replying Affidavit deposed upon on the 26th October, 2021 by the Prof. Isaac O. Kibwage, the 3rd Respondent on his behalf and on behalf of the 1st and 2nd Respondent. The Respondents opposition was as follows;-

a) That the 1st Respondent was established by a charter dated 1st March, 2013 under section 13(1) of the *Universities Act* and empowered under section 35 of the *Universities Act* to establish organs of governance such as Council, senate and the management Board.

b) He stated that, the Universities Council or the senate is empowered under section 23 of the *Universities Act* to make statues and regulations to regulate the running of the university. Pursuant to those powers the 1st Respondent made the Egerton University statutes 2013 which repealed the Egerton University statute of 1998 and 2008.

c) He stated that, the University Council is empowered under section 47 of Egerton university statutes 2013 to determine all terms and conditions of service for all staff and academic administrative and other staff as described in the terms and conditions of service provided at first schedule to the statues. The 1st Respondent is further empowered to review the said terms as per section 47(4) of the said Charter.

d) Section 28(1)(f) of the charter further empowers the University council to make statutes generally for governances, control and administration of the University and particularly for setting the terms and conditions of service and schemes of service including appointment, dismissal and recommendation of retiring benefits of members of staff of the University.

e) The Affiant avers that, the Petitioner preferred an appeal against the work load policy and before the same was determined the Petitioner filed this Petitioner which the Respondent contends that the same was filed prematurely.

f) It is then contended that the Petition does not meet the threshold for the Petition to be determined as a constitutional petition and in that basis the Injunctive Orders sought to be declined.

g) It is the Respondent case that the Policy which the Petitioner now seeks to injunct its operation has been in force since March, 2021 and the Petitioner members have been working in compliance with.

h) It is averred that there is a subsequent CBA between the 1st Respondent and UASU Egerton university charter entered in June, 2016 which does not specify the CFs to be worked by a staff per year but leaves it open to be determined by FTSE formula. It was then contended that the amendments to the 2012 CBA were already made by the coming into force of the 2016 CBA

signed by the parties herein therefore the allegation that the Egerton staff work Load Policy, 2019 amended the 2012 CBA is without basis.

i) The Deponent agrees that CBAs have an effect of binding parties to the terms therein as provided for under section 59 of the *Labour Relations Act*, 2007 and no party is allowed to renege such an agreement.

j) With regard to the tuition waiver the Respondent's affiant avers that the same was to take effect to new students joining the university and the students who were already enjoying the waivers were allowed to continue. He added that the changes was for austerity measures which took effect from 1st July, 2021 and the same communicated to the 1st Respondent staff vide a notice dated 25th August, 2021.

k) He stated that the increased work load and reduced expense was a measure used by the Respondent to curb its operating deficit which had ballooned to 1,310,675,495 as at the end of financial year 2020/2021 which ended in June, 2021. Furthermore, that the said measures are less drastic as compared to retrenchment which if implemented, the Petitioner's members are likely to lose their source of income.

13. In response to the Replying affidavit, the Petitioner filed a further affidavit dated 12th November, 2021 reiterating its supporting affidavit and in addition stated that the CBA 2016 made amendment on allowances such as commuter, dental and leave allowance and the issue of work load was never mentioned, discussed or amended. Additionally, that there was further negotiation to have the teaching staff retirement age raised to 70 which matter was approved by salaries and remuneration commission and that during that time the issue of work load was not raised either.

14. The Petitioner then maintained that the new changes were made by the Respondents unilaterally therefore the same ought to be stopped.

15. This Petition was canvassed by way of written submissions with the petitioner filing on the 17th February, 2022 and the Respondents filed theirs on the 20th April, 2022.

Petitioner's Submissions.

16. The Petitioner submitted that the Respondents failed to carry out public participation before formulating and implementing the Egerton university staff workload Policy, 2019, which had effect of increasing workload from 18CFs to 24 CFs per year translating to 4 courses instead of the agreed 3 courses per semester. That the policy affects the terms of the Respondents employees which were imposed upon them without consultation or Notice contrary to the provisions of *the constitution* in Articles, 47(2), 10(2) and 232. In this they cited the case of *ABE Semi B v The County government of Tana River and others* [2021] eklr, where the Court held that;

> " The above article envisages public participation as one of the national values and principles of good governance that bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets *the constitution*, enacts, applies any law or makes or implements public policy decisions... What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case"

17. The Petitioner also relied on the case of *Mui Coal Basin Community and 15 others V Permanent secretary of Energy and 17 others* [2015] eklr, where the Court when faces with the issue of public participation held that;-

> "As our case law has now established, public participation is a national value that is an expression of the sovereignty of the people as articulated under Article 1 of *the Constitution*. Article 10 makes public participation a national value as a form of expression of that sovereignty. Hence, public participation is an established right in Kenya; a justiciable one – indeed one of the corner stones of our new democracy. Our jurisprudence has firmly established that Courts will firmly strike down any laws or public acts or projects that do not meet the public participation threshold. Indeed, it is correct to say that our Constitution, in imagining a new beginning for our country in 2010, treats secrecy on matters of public interest as anathema to our democracy."

18. It was further submitted that section 10(5) of the *Employment Act* makes it mandatory for the employer to consult the employee when there are intention to vary their employment terms. In support of its argument the petitioner relied on the case of *Universities Academic Staff Union V Machakos University and another* [2019] eklr. He also argued that failure by the Respondent to involve the Petitioner amounted to violation of the petitioner members rights to fair labour practice and their right to engage in collective bargainings. The Petitioner relied on the case of *Universities Academic staff Union tum Chapter V Technical University of Mombasa* [2019] eklr where the Court held that;-

> "The Respondent further contends that the University Council is mandated to alter the terms of the teaching service, including the number of units to be taught per semester. That may well be true. However, the question before the Court is whether the Respondent could lawfully alter the said terms of employment without consultation with the affected academic staff. 48. I do not think so. Section 10(5) of the *Employment Act* outlaws alteration of the terms of employment, without consultation with the affected employee. In James Ang'awa Atanda & 10 others v judicial Service Commission [2017] eKLR my brother Radido J, with whom I fully agree, held that unilateral variation of terms of employment is an unfair labour practice within the meaning of Article 41(1) of *the Constitution* of Kenya, 2010.49. But the Respondent maintains that the Petitioner was in fact consulted, although its views were not taken. In pursuing this line, the Respondent's Counsel relied on the decision in Universities Academic Staff Union (UASU) v Salaries and Remuneration Commission & another [2019] eKLR where my sister, Onyango J held that consultation does not mean adoption of the proposals or demands made by the people consulted. The Respondent however conveniently omitted the follow up sentence by my sister Judge where she stated: "It [consultation] requires that the input of the people consulted is taken into account before the final decision is reached."50. Meaningful consultation must therefore involve a demonstrable consideration of the views and opinions gathered at the consultation. This is in line with the decision in Amos Kiumo & 19 others v Cabinet Secretary, Ministry of Interior & Coordination of National Government & 8 others[2014] eKLR where it was held that although views expressed by stakeholders are not binding, public involvement cannot be meaningful if there is no willingness to consider those views.51. From the evidence on record, the Respondent ignored the written views of the Petitioner at every turn and went ahead to implement the new Academic Policy, whose effect was to alter the terms of employment of the Petitioner's members, to their detriment and without consultation... have already reached a finding that the impugned Academic Policy was brought on board

without consultation of the Petitioner. I have further found that implementation of the said policy amounts to unilateral and detrimental alteration of the terms of employment of the Petitioner's members.

19. Accordingly, the petitioner submitted that it has made out a case against the Respondent and prayed for the petition to be allowed as prayed and suggested General damages of Kshs 5,000,000 as compensation for the violations of its members rights.

Respondent's Submissions.

20. The Respondent submitted from the onset that the petition does not meet the threshold of a constitutional matter to warrant it being determined as a petition and therefore that the Orders sought are not grantable in the circumstances. He added that the petition failed to demonstrate any of the limbs set out in *Anarita Karimi Njeru V The Republic* [1976-1980] KLR 1272 as it does not state with precision the Articles of *the constitution* violated and how the same were violated by the Respondents.

21. He cited the case of *Mumo Matemu V Trusted society of Human Rights Alliance and 5 other* [2013] eklr where the Court held that;-

> " Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle... The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of *the Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements."

22. Similarly, the Respondents submitted that the petitioner merely reproduced Articles 10(1c), (2a) ,22,23,41, 47 and 232 of *the Constitution* without any particulars as to the allegations or the manner in which the said Articles were infringed.

23. It was further argued that the issue at hand are with regard to workload and tuition waivers, which fall back to alleged breach of employees contract which issue ought to be addressed in reliance to the *employment Act* under a normal Employment cause and not a constitutional Petition. In support of this the Respondent relied on the case of *Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another* [2018] eKLR where the Court held that;-

> " It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a Court of law in the manner allowed by that particular statute or in an ordinary suit as provided for by procedure. It is not every failure to act in accordance with a statutory provision or where an action is taken in breach of a statutory provision that should give rise to a constitutional petition. A party should only file a constitutional petition for redress of a breach of *the Constitution* or denial, violation or infringement of, or threat to a rights or fundamental freedom. Any other claim should be filed in the appropriate forum and in the manner allowed by the applicable law and procedure.
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> 66. In that regard, it is worth remembering the warning sounded by Lord Diplock in the case of Harrikissoon V Atttorney General of Trinidad and Tobago

[1980]AC 265 where he decried the tendency of people rushing to institute constitutional petitions alleging violation of fundamental freedoms where there was none stating;

"The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by...*the constitution* is fallacious. The right to apply to the High Court... for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action... the mere allegation that a human right of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court...if it is apparent that the allegation is frivolous, vexatious or abuse of the process of Court as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom." (emphasis)"

24. The Respondent then submitted that *the Constitution* requires parliament to enact legislation to give effect to the constitutional rights guaranteed in *the constitution* and when such Acts are enacted, it will be impermissible for a litigant to found a cause of action directly on *the constitution* without alleging the statute in question is deficient in the remedies it provides.

25. Accordingly the Respondents submitted that the Court ought to be guided by the doctrine of avoidance explained in the supreme Court decision of *Communication Commission of Kenya and others V Royal Media services Limited& 5 others* [2014] eklr and decline to decide this suit as it was instituted as a constitutional petition when the same ought to have been filed as an Ordinary Employment Cause.

26. It then submitted that having been filed as a constitutional petition instead of an ordinary claim this Court lack jurisdiction to hear and determine the Petition. In support of this argument the Respondent cited the Court of Appeal case of *Sumayan Athmani Hassan V Paul Masinde Simidi and another* [2019] eklr.

27. On whether the Respondents are empowered to determine the terms of service of their employees, it was argued that the Respondent is empowered under clause 47(1) of the Egerton University Statutes 2013 and Section 27 of the *Employment Act* to determine the terms of service of its employees.

28. It was then submitted that the basis of the Petition is a non-existent CBA of 2012 which was replaced by the 2016 CBA. . That the workload clause that was allegedly changed by the Respondent was in fact left open as per the CBA of 2016 and that the same was to be determined by FTSE formula which was merely clarified in the Egerton University Staff Workload Policy 2019. In addition, that the amendments do not in any way increase the working hours over the normal 8 working hours. It was submitted further that 1 CF is equivalent of 15 hours and the maximum 24 CFs indicated in the policy translates to 360 hours in a year which is less than 1720 a full time employee would work in a year.

29. The Respondent further submitted that the agreement between it and the Petitioner is clearly stipulated under the 2016 CBA which repealed the 2012 CBA. Further that this Court cannot rewrite the contract agreed by the parties as was held in the Court of Appeal case of *National Bank of Kenya V Pipeplastic Samkolit (K) Limited*, Civil Appeal no. 95 of 1999.

30. The Respondent then submitted that the measures put in place to increase work load was for austerity measure in wake of waning Revenue streams. It was argued also that the measure to abolish the tuition fees was for the benefit of both the Respondent and its employees who might have been rendered jobless if the wage bill continued to rise, in any case that the Respondent's employee were informed of the said change vide the letter of 25th August, 2021. In this the Respondent relied on the case of *Kenya Tea Growers Association V Kenya Plantation and Agricultural Workers Union* [2018] eklr.

31. With regard to the public participation issue, the Respondent submitted that the same do not apply since CBA are negotiated between the Union and themselves and not the employees directly as envisaged under section 57(1) of the *Labour Relations Act*. Also that the petitioner participated in the negotiations and signing of the 2016 and 2020 CBA which determined the workload for the employees. According, it submitted that the reference to the public participation was misplaced, inapplicable and unnecessary legal lexicon.

32. I have examined the evidence and submissions of the parties herein. The gist of this petition by the petitioner is that the Respondents unilaterally altered their terms of employment and withdrew their benefits without any consultation. The Respondents argued that the dispute herein is strictly based on employment and should be enforced under the *Employment Act* 2007.

33. The Respondents also argue that they are empowered to determine the terms of service of their employees under the *Universities Act* of the Egerton University Statute 2013. Indeed under the Egerton University Statutes 2013, the Respondent has the mandate to determine the terms and conditions of service of all the academic administrative and other staff and can also review the said terms and conditions of appointment and service of any staff category.

34. It is also true that Section 27 of the *Employment Act* 2007 provides as follows;

    27. "Hours of work

        (1) An employer shall regulate the working hours of each employee in accordance with the provisions of this Act and any other written law.

        (2) Notwithstanding subsection (1), an employee shall be entitled to at least one rest day in every period of seven days".

35. Egerton University staff workload policy 2019 is indeed a means of regulating the hours of work of staff members.

36. That notwithstanding, the issue of workload and other benefits to staff of Egerton University upon implementation became part and parcel of the terms & conditions of service of the employees herein. Section 10 (5) of the *Employment Act* 2007 states as follows;-

    (5) "Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing".

37. These terms and conditions of service would only have been revised upon consultation and upon notification of the employees of the change in writing.

38. Paragraph 28 (1) (a) & (b) of 2012 CBA provides that:

    "(1) This agreement shall become effective on 1st July 2012.

(2) Thereafter this agreement shall continue to be in force until mutually amended or when the parties herein shall negotiate and bring to force another agreement."

39. The 2012 CBA is the one that introduced the benefit of school fees reduction for staff raised the issue of calculation of the workload.

40. This CBA was replaced by the 2016 CBA and later by the 2016 CBA and later by the 2020 CBA. In the CBA of 2012 the formula of calculating teaching workload was set therein.

41. In the CBA of 2016 clause 24.15 indicated that:-

" The only approved rates as defined in the new policy on SSP payments apply".

42. The effect of this clause in my view set aside the previous formula for calculating teaching workload previously in the 2012 CBA.

43. The benefit for staff and their family concerning tuition waiver was retained in the 2016 CBA.

44. In the 2020 CBA again the issue of tuition was also retained. This 2020 CBA is still in force to date.

45. However as submitted by the petitioners, the Respondents have gone ahead to alter this provision and without any agreement or consultation with the petitioners.

46. This is a clear breach of the CBAs from 2012 to date on tuition waivers.

47. The workload policy, was purportedly settled through a policy document which has no correlation with the CBA and for which this Court cannot interfere with given that the Respondent have the mandate to determine working hours as provided for under Section 27 of the *Employment Act* (Supra). I will therefore not interfere with this policy document.

48. However as concerns the notice to staff issued by the Respondent lifting the waiver on tuition fees on staff with effect from July 2021, I find the same in contravention of existing CBA between the parties and is therefore illegal, null and void.

49. I therefore find that the petition partially succeeds and partially fails as indicated in this Judgment and I therefore order each party to bear its own costs.

RULING DELIVERED VIRTUALLY THIS 24TH DAY OF MAY, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Muriithi Wairimu for the Petitioner – present

Kisaka for Respondent – present

Court Assistant - Fred