



**University Academic Staff Union (Maseno Chapter) v Maseno University (Petition  
E015 of 2021) [2022] KEELRC 13280 (KLR) (23 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13280 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E015 OF 2021**

**S RADIDO, J**

**NOVEMBER 23, 2022**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 25, 27, 28, 41, 48, 50,  
52, 159, 160, 161, 162, 165, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA,  
2010 AND SECTION 7(1) OF SCHEDULE 6 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF VIOLATION AND THREATENED VIOLATION OF  
ARTICLES 1, 2, 6(3), 10, 19, 20, 21, 23, 24, 25, 27, 28, 40, 41, 43, 48, 49, 50(1), 159,  
160, 161, 162, 165, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTIONS 3, 4 AND 15 OF THE MASENO UNIVERSITY ACT**

**AND**

**IN THE MATTER OF SECTION 5 OF THE UNIVERSITIES ACT, 2012**

**AND**

**IN THE MATTER OF SECTION 8(1) OF THE COMMISSION  
FOR UNIVERSITY EDUCATION GUIDELINES**

**AND**

**IN THE MATTER OF SECTIONS 4 AND 5 OF THE  
FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF A DETERMINATION ON THE TEACHING  
LOAD/WORKLOAD AND WORKING HOURS FOR THE  
TEACHING STAFF/LECTURERS OF THE MASENO UNIVERSITY**

**BETWEEN**

**UNIVERSITY ACADEMIC STAFF UNION (MASENO  
CHAPTER) ..... PETITIONER**



**AND**

**MASENO UNIVERSITY ..... RESPONDENT**

**JUDGMENT**

1. The University Academic Staff Union (UASU) has a recognition agreement with the Inter-Public University Councils Consultative Forum of the Federation of Kenya Employers, of which Maseno University (the university) is a member.
2. On 16 February 2022, UASU moved to the court alleging that:
  11. The respondent has acted unilaterally, did not involve the petitioner, did not consult with the Commission for Universities Education, and did not involve any stakeholders in the education sector in purporting to increase the teaching load/workload from that set by the CUE at 40 hours per week, three (3) courses per semester to 52.5 hours per week and five (5) course units per week.
  12. The actions/omissions and or commissions by the respondent are in breach of the constitutional rights of members of the Petitioner.
3. The University filed a response and a replying affidavit on 16 March 2021, and on March 18, 2021, the court directed the parties to appear for conciliation before the County Labour Officer.
4. On April 27, 2021, UASU filed a further affidavit, and the University filed a further replying affidavit on May 21, 2021.
5. The County Labour Officer filed a report on May 31, 2021.
6. On the same day, the University proposed that the petition proceeds to a hearing on the merit upon filing and exchange of submissions.
7. The court gave the parties timelines for the filing and exchanging of submissions ahead of the delivery of judgment on November 24, 2021.
8. The judgment could not be delivered as the University filed myriads of applications which had to be dealt with first.
9. The university later disowned the directions given on March 18, 2021 and filed a review application on the ground that the advocate who made the proposal had no such instructions.
10. The court heard the application and delivered a ruling on February 3, 2022. The university filed a notice of appeal against the ruling on February 10, 2022.
11. On March 23, 2022, the court indicated that it would deliver judgment on 9 June 2022.
12. The university was not happy with the directions, and it again applied for review.
13. The court declined the application, prompting the university to file a recusal application. The judge recused herself, and on September 29, 2022, this court took brief oral submissions from the parties and, then indicated it would deliver judgment today.
14. UASU filed its submissions on July 23, 2021, and the university on 2 October 7, 2022.
15. UASU identified the issues for determination as:



- i. Is the change of the workload a matter touching on the terms and conditions of employment?
  - ii. Was the increase by the respondent of the teaching workload from three (3) unit courses to five (5) unit courses per semester made after an objective consultation with the petitioner?
  - iii. If the answer to 2 above is in the negative, what is the way forward?
  - iv. Who bears the costs of this petition?
16. The university on its part set out the issues for the courts attention as:
- i. Whether the petition raises any constitutional issues?
  - ii. Whether there was public participation/doctrine of estoppel?
  - iii. Whether the increased teaching load required negotiation with the Petitioner?
  - iv. Whether the petitioner is guilty of *laches*?

#### **UASU's case**

17. The case advanced on behalf of UASU is straightforward.
18. According to UASU, working hours was a term and condition of service which was subject to negotiations as part of collective bargaining in terms of section 10(5) of the *Employment Act*.
19. UASU, therefore, asserted that the decision of the university to alter or review the working hours/teaching load could not stand legal scrutiny because it was not involved in the meetings preceding the decision to increase the teaching load/workload from 3-course units per semester to 5-course units per semester or the work week from 40 hours to 52.5 hours.
20. In this regard, UASU urged the court to consider what constitutes consultations as set out in *Doctors for Life International v Speaker of the National Assembly & Ors* (2006) ZACC 11, *Kenya Airways Ltd v Allied Workers Union Kenya & 3 Ors* [2014] eKLR and *Justina Mutitu Nyaga v Kenya Civil Aviation Authority* [2017] eKLR.

#### **The University's Take**

21. The university first took an objection to the competency of the petition on the ground that it did not meet the standard set in *Anarita Karima Njeru v R* [1979] eKLR.
22. On the merits, the university contended that its senate was responsible for the content and academic standards, that the senate was predominantly composed of academic staff including co-opted members from UASU, and that the senate approved the increase in the teaching load after a report from an *ad hoc* committee on restructuring/deans committee.
23. On consultations, the university asserted that the Chairperson of UASU participated in the senate meetings held on August 13, 2019 and September 7, 2020, where the increase in teaching load was approved.
24. The university denied that the working week had been increased from 40 hours to 52.5 hours.
25. The court has considered all the material placed before it and isolated the questions for evaluation as discussed hereunder.



### **Prematurity**

26. Pursuant to part VIII of the *Labour Relations Act*, a trade dispute should be resolved through conciliation at the first instance (the recognition agreement between UASU and the university also provides for conciliation before a trade dispute is cascaded).
27. UASU did not attempt to have the dispute herein resolved through conciliation, and on that behalf, the court would have declined jurisdiction.
28. However, because the court sent the parties to conciliation before the County Labour Officer in the course of these proceedings and a report was filed in court, the court will assume jurisdiction.

### **No Constitutional Issues Raised**

29. The standard expected of a constitutional petition is settled. The *Constitution, 2010* now allows parties to approach the court informally (epistolary jurisdiction) and courts should exercise caution before rejecting a genuine dispute presented before it.
30. In any case where the court finds that the constitutional route was not appropriate, it can award costs to the other party.

### **Delay**

31. The university urged the court not to look with favour upon the case advanced by UASU because it had been moved more than 7 months after the decision under challenge.
32. In the view of the university, the petition was not only an afterthought but an abuse of the court process.
33. Laches or delay affecting a case adversely is determined based on the circumstances of each case. In the case at hand, the university did not raise the question of delay in its Response or affidavits.
34. Since the university brought the issue only in the submissions, the court declines to find the delay of 7 months was unreasonable or occasioned it any injustice as far as defending itself was concerned.

### **Locus Standi**

35. The university objected to the *locus standi* of UASU to commence the proceedings.
36. Considering the enlarged *locus standi* created by article 22 of the *Constitution* as read with article 258 and the definition of person in article 260, the court finds the *locus standi* objection without merit.

### **UASU Participation**

37. The University placed before the court minutes of meetings held by the Senate to approve the teaching loads. The Chairperson of the local chapter of UASU sent apologies for one meeting and attended the other. He must have been aware of the agenda for the meetings.
38. The minutes do not show that the Chairperson raised any objection at all to the proposal to increase the teaching load.
39. Nevertheless, the court is of the view that (a) representative(s) of UASU should have been made members of the ad hoc committee which prepared the report proposing the increase in teaching load for meaningful consultation and Participation.



40. The presence of UASU's representative during the approval seating of the senate could not have been the participation or consultations contemplated by the Constitution or section 10(5) of the Employment Act, 2007.
41. In the circumstances of this case, the court is satisfied that UASU was not part of the process leading to the approval of the increase in teaching load by the senate in any meaningful way as it was not consulted by the *ad hoc* committee.

### **Conclusion and Orders**

42. Flowing from the above, the court issues the following orders:
- i. A declaration is hereby issued that the respondent's decision to increase the teaching/workload from the recommended 3-course units per semester to 5-course units per semester was invalid for failure to consult the union.
  - ii. An order is hereby issued directing the respondent to consult with the union to resolve the issue of teaching/workload and incorporate such agreement in the next collective bargaining agreement.
43. Due to the social partnership between the parties, no order on costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 23<sup>RD</sup> DAY OF NOVEMBER 2022.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

### **Appearances**

For petitioner Onsongo & Co Advocates

For respondent Joy Akinyi, Legal Department, Maseno University

Court Assistant Chrispo Aura

