



**Kenya Universities Staff Union v Masinde Muliro University of Science
and Technology (Employment and Labour Relations Cause E013 of 2021)
[2022] KEELRC 13247 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13247 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE E013 OF 2021**

**JW KELL, J
NOVEMBER 17, 2022**

BETWEEN
KENYA UNIVERSITIES STAFF UNION CLAIMANT
AND
**MASINDE MULIRO UNIVERSITY OF SCIENCE AND
TECHNOLOGY RESPONDENT**

JUDGMENT

Representation:-

1. The Claimant vide statement of claim dated December 2, 2021 stated that it was a non- teaching staff union of Masinde Muliro University registered under the *Labour Relations Act* seeking the following reliefs:-
 - a. An order of injunction be issued restraining the Respondent from retiring the members of the Claimants at 60 years unless the CBA is varied accordingly.
 - b. A declaration that the notices of retirement issued by the Respondent on March 9, 2021 are unlawful and illegal
 - c. A declaration that the letters of retirement issued to the members of the Claimant by the Respondent retiring them on February 3, 2021 are unlawful and illegal.
 - d. An order directing that the members of the Claimants retired by the Respondent on February 3, 2021 be reinstated and re-engaged by the Respondent without loss of benefits.
 - e. In the alternative , the Respondent do pay the members of the Claimants compensation in the sum of Kshs 150,718,520.70 being salary as well as leave allowance from the date of retirement notice to end of contracts,



- f. Damages for unlawful retirement
 - g. Interest on prayer 5 above from date of filing suit.
 - h. Costs of the claim.
2. The Claimant together with the claim filed witness statement of Meshack Onzere Mulongo dated December 2, 2021, claimant's list of witnesses, claimant's list and bundles of documents.
 3. The claim is opposed. The Respondent filed response dated February 10, 2022 to the claim and received in court on the 1February 2, 2022. The Respondent further filed its list of documents dated June 30, 2022.
 4. The Claimant filed reply to the response dated February 17, 2022 and received in court on the February 18, 2022.

The evidence

5. The Claimant called one witness of fact Meshack Onzere Mulongo, the branch chairman of the Claimant who testified on oath adopting his witness statement of December 2, 2021 as his evidence in chief and was cross- examined by counsel for Respondent. The witness further produced as the Claimant's evidence bundle of documents dated December 2, 2021.
6. The defence did not call any witness and relied on its written submissions.
7. The Claimant filed written submissions dated July 26, 2022.
8. The Respondent filed written submissions dated August 22, 2022.

Claimant's case in summary

9. The Claimant submits that it brings the case on behalf of its affected members. Relies on clause 28.0 of the July 2010 to June 2012 CBA between the parties to effect that the mandatory retirement age was 65 years and members had legitimate expectation of retiring at that age. That the Respondent had breached the terms of CBA by retiring several members listed in the claim at paragraph 10 without attaining mandatory age on February 3, 2021 and had issued notice of retirement notice to other members to retire on the June 30, 2022.
10. The Claimant states that the act of retirement of its members before attainment of 65 years was unlawful as it amounted to unilaterally changing its members terms of service without consulting the Claimant under Section 10 of the *Employment Act* and its members, justifying the actions on a circular as well as a court decision that members of the Claimant were not part of, that the retirement letters were contra section 10(5) of the *Employment Act*, the process breached the provisions of section 3,4 and 6 of the *Fair Administrative Actions Act* No 4 of 2015 and was in total disregard of Articles 10,41, 47 and 236 of the national values and principle as of governance, fair labour practices, fair administrative action and protection of public officers. The Claimant prays for reinstatement or reengagement of its members and in the alternative damages for unlawful termination and compensation for reminder of their contracts.

Respondent's case in summary

11. The Respondent states that clause 28.0 of the alleged CBA signed in the year 2012 is not binding as retirement in the public sector is governed by Government Policy being the circular on retirement in public sector dated March 20, 2009 which stipulates that mandatory age for retirement of



public servants is 60 years. That the said clause is against the SRC guidelines which stipulate that any negotiations in the public service must consider government policies and guidelines, that the requirement that the public servants in the respondent's institution should retire at 65 years of age as contained in their CBA was expunged by the court in Interpublic University Councils Consultative Forum (IPUCCF) V KUDHEIHA ELRC CBA/1/2020 as being against government policies on retirement of public servants and decision upheld in *Kenya Universities Staff union & 3 others v Masinde Muliro university of Science and Technology (2021)eKLR*. The Respondent submits that the instant claim is resjudicata the courts having decided on the retirement age of the claimant's members. The claim is opposed in toto.

Determination

Issues for determination

12. The Claimant in their written submissions addressed the following issues:
 - a. Parties to the suit
 - b. Whether the claim was resjudicata and merits of their claim
13. The respondent in their written submissions addressed the following issues:-
 - a. Whether the claim was resjudicata.
 - b. Whether the deponent of the verifying affidavit had authority to file the claim on behalf of KUSA(Kenya University Staff Union).
 - c. Whether the decision of the respondent to retire the claimant's members at age of 65 years was unlawful.
 - d. Whether the claimant's members are entitled to reliefs sought.
14. The court having considered the pleadings, Claimant's viva voce evidence and the submissions by the respondent is of the considered opinion that the issues placed by the parties for determination of the dispute by the court are as follows:-
 - a. Parties to the suit and whether the verifying affidavit was authorised by the claimant.
 - b. Whether the claim was resjudicata.
 - c. Whether the decision of the respondent to retire the claimant's members at age of 60 years was unlawful.
 - d. Whether the claimant's members are entitled to reliefs sought.

Issue 1 Parties to the suit and whether the verifying affidavit was authorised by the claimant

15. The Claimant in the suit is Kenya Universities Staff Union. The Claimant's witness during cross-examination confirmed he was the branch chairman. The Respondent submits that the suit is incompetent as the deponent described himself as branch chairman and identified himself as such did not have authority to bring the suit on behalf of the claimant and had confirmed the suit was filed by Kakamega branch only.
16. The Claimant submits that the issue is not fatal as the respondent suffered no prejudice as they knew the case they faced and responded and relied on Article 159 (2)(d) of the *Constitution*.



17. The Court finds and determines that the witness statement of Meshack Onzere Mulongo paragraph 1 stated he was the branch chairperson of the claimant and competent to make statement on behalf of the claimant and its affected members. The court while finding no evidence of authority by the national leaders to file the suit, the court finds the respondent did not raise the issue under its response. Parties are bound by their pleadings. The court finds that the suit is properly in court as the witness was able to demonstrate that the members before court fell under his branch.

Issue 2 Whether the claim was resjudicata

18. The Respondent submits that the case is resjudicata relying on the definition under section 7 of the Civil Procedure Act to wit: ‘ no court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties or between parties under whom they are or any claim litigating under the same title , in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.’
19. The Respondent submits that the instant case is resjudicata the decision rendered by court in Interpublic Universities Councils Consultative forum (IPPUCCF) V KUDHEIHA ELRC CBA 1/2020 which decision dealt with the issue of retirement age by members of the claimant and where the court pronounced itself on the issue of retirement age of public servants should be in accordance with the public policy and regulations that govern retirement age in public service. That the claimant in attempt to revive the issue of retirement age filed another suit that is Kenya Universities Staff Union & 3 others v Masinde Muliro University of Science & Technology [2021] eKLR in which they claimed that the respondent had unlawfully and in contempt of court orders retired its members at age of 60 years instead of 65 years , however the court held that the respondent therein were not in disobedience of the court case when they retired the Claimant’s members at 60 years. The claimant submits that the retirement age of claimant’s members has already been dealt with by a court of competent jurisdiction and not appealed against. That it is misleading for the claimant to submit that ELRC Case NO 397 OF 2015 concerned one Alexander S Mate yet they were parties and the said Alexander S Mate only became a party due to the consolidation of suits. That in Interpublic Universities Councils Consultative forum (IPPUCCF) V KUDHEIHA ELRC CBA 1/2020 at page 11 the court held that the issue of retirement age of public servants including employees at the respondent’s university should be guided by provisions that govern retirement age in the public sector and in the case the Respondent submit that the retirement age at the respondent’s institution should be guided by the government policy and regulations that stipulate that public servants must retire at age 60 years.
20. The Respondent further submits that the court should refer to its decision in Nathan Mukwena v Alupe University College (2022)eKLR where it held, , ‘the retirement age of all public servants at the age of 60 years is couched in mandatory terms under the law unless one falls under disability category which retires at age 65 years.’
21. The Respondent further submits that the CBA referred to was signed between the Respondent and Universities Non- Teaching Staff Union (UNTESU) and not the Claimant covering period of 2010 to 2012 hence not applicable to the suit.
22. The Claimant submits that ELRC Cause No 397 of 2015 concerned one Alexander S Mate who is not a party to the proceedings. The Claimant submits that the issue of retirement age was not dealt with in Interpublic Universities Councils Consultative forum (IPPUCCF) V KUDHEIHA Nairobi ELRC CBA 1/2020. That the court in Nairobi expunged the retirement age and ordered current practice as set out in the pension schemes for universities, the policies and guidelines in place and provisions of any law that governs retirement age in the public sector to apply. The Claimant submits



that the court reverted to the position of the retirement age to the time prior to the decision. That the position according to the claimant's witness was as under the 2012 CBA of 65 years following which its members obtained loans from financial institutions with knowledge of employer on legitimate expectation they would retire at 65 years. That employer was aware of 2009 circular on retirement and choose to apply 65 years hence cannot return and rely on the said circular.

Court's decision on whether the claim is *rejudicata* and on the retirement age for claimant's members

23. The Claimant's witness confirmed to the court he was aware that the union went to court concerning retirement in Kisumu ELRC 397 OF 2015 in which the court restrained employer from retiring its members at age 60 years, that he was aware of the union contempt case against the respondent in Kisumu ELRC 397 of 2015 where Justice Radido ruled that the respondent was not in contempt and that he was aware of the Judgment in Nairobi ELRC 3/2020 confirming the court expunged part of CBA retirement age of 65 years and that the union had not appealed against these decisions. The witness admitted he was aware of the government circulars for public servants to retire at 60 years.
24. On re-examination the claimant's witness told the court the decision in ELRC CAUSE 397 OF 2015 the parties are the Claimant and one Alexander Mate and not the persons under paragraph 10 of the claim who had not been terminated from employment at time of that case. The said persons were also not in the contempt case. The witness told the court Nairobi ELRC Cause 3 of 2020 expunged the national CBA and that the internal CBA between the parties had not been expunged.

Findings of the court

25. That the Claimant in the instant suit is Kenya Universities Staff Union and not Universities Non-Teaching Staff Union (UNTESU) whose CBA 2010-2012 was produced by the claimant's witness. The court finds and determines that the said document was irrelevant to the dispute.
26. That in Interpublic Universities Councils Consultative forum (IPPUCCF) V KUDHEIHA ELRC CBA 1/2020 the court adopted the 2020 CBA between the Kenya Universities Staff Union (Claimant) with the Interpublic Universities Councils Consultative Forum (CBA NO 3) which had suggested mandatory retirement age of 65 years. On the retirement age the court stated:- 'retirement in public sector is governed by government policy. The last circular on retirement in public sector dated March 20, 2009 reviewed retirement age for public servants from 55 to 60 years but retained retirement age for public servants whose retirement age was above 60 years.' The court finds in the said circular the exception for universities was academic staff. The court in Interpublic Universities Councils Consultative forum (IPPUCCF) V KUDHEIHA ELRC CBA 1/2020 noted that parties cannot negotiate outside public policy and guidelines and for those reasons expunged the proposals on retirement age of 65 years for the claimant's members from the 2020 CBA. The court stated that 'the current practice set out in the pension schemes for the universities, the policies and guidelines in place and provisions of any law that govern retirement age in the public sector shall apply'.
27. The Court finds that the 2012 CBA was replaced with the 2020 CBA and the mandatory retirement age was per the prevailing public policy as at January 15, 2021 when the court adopted the CBA for 2020. The 2012 CBA was no longer relevant having been replaced by the 2020 CBA registered by the court in Interpublic Universities Councils Consultative forum (IPPUCCF) V KUDHEIHA ELRC CBA 1/2020 with condition on the retirement age to be as per prevailing government policy in the public sector.
28. The Court finds that there is only one valid CBA applicable to the claimant's members being one registered by the court between the claimant and the respondent on January 15, 2021. The branch does not have an independent CBA outside that registered by the court.



29. The Court finds that the public policy on retirement age for the claimant is then as stated in the government policy of 2009 as adopted in the decision of *Radido J in Kenya Universities Staff Union & 3 others v Masinde Muliro University of Science & Technology* [2021] eKLR while rejecting application for contempt of court against the Respondent for retiring claimant's members at 60 year and the Human Resource Policies and Procedures Manual for the Public Service of May, 2016 clause D.21 which provides:- 'All officers shall retire from the service on attaining the mandatory retirement age of 60 years, 65 years for persons with disabilities and/or as may be prescribed by the government from time to time'.
30. Section 80 of the *Public Service Commission Act* provides:-
- (1) where a public officer has attained mandatory retirement age as may be prescribed in regulations.
 - a. The Public officer shall retire from the service with effect from the date of attaining the mandatory retirement age and
 - b. The Commissioner or other appointing Authority shall not extend the service of such a retired public officer beyond the mandatory retirement age.'
31. The Court upholds its decision in *Nathan Mukewa v Alupe University College* [2022] eKLR on the issue of mandatory retirement age of the Claimant's members under the 2020 CBA to be 60 years as registered in Interpublic Universities Councils Consultative forum (IPPUCCF) V KUDHEIHA ELRC CBA 1/2020 and as per the public policy stated in Human Resource Policies and Procedures Manual for the Public Service May, 2016 Clause D.21 and Section 80 of the *Public Service Commission Act*.
32. Consequently, the court holds that the instant suit is resjudicata the claimant having been a party in *Kenya Universities Staff Union & 3 others v Masinde Muliro University of Science & Technology* [2021] eKLR where it sued for contempt for retirement of its members at 60 years and the court dismissed their case based on the decision in Interpublic Universities Councils Consultative forum (IPPUCCF) V KUDHEIHA ELRC CBA 1/2020 which expunged the proposed retirement age of 65 years under the registered 2020 CBA and stated the mandatory retirement age to apply was as per the existing government policy for the public sector which this court found was 60 years which position is consistent with decision of court in *Kenya Universities Staff Union & 3 others v Masinde Muliro University of Science & Technology* [2021] eKLR.
33. The Court wishes to reiterate to the Claimant what justice Radido told it in *Kenya Universities Staff Union & 3 others v Masinde Muliro University of Science & Technology* [2021] eKLR 'In this respect, the applicant should have approached the Court, which delivered the judgment in Nairobi for clarification instead of moving for contempt(paragraph 17).' In this case since the claimant appears to be not satisfied with the decision of the court in registration of the 2020 CBA directing the prevailing public policy of retirement age in the public sector to apply, the wise thing is to move the said court for review or appeal against the decision. The current case as framed was just to seek a second opinion on the retirement age offending the doctrine of resjudicata.

Whether the Claimant is entitled to reliefs sought

34. The Claimant's case having been hinged under the retirement letters issued relying on the Interpublic Universities Councils Consultative forum (IPPUCCF) V KUDHEIHA ELRC CBA 1/2020 and the



2020 CBA and the court having upheld the two decisions of the court to effect that the claimant's members mandatory retirement age is 60 years then the court finds there is nothing else to consider. The issue of mandatory retirement age of claimant's members has been settled by the court to be 60 years and section 80 of the Public Service Commission prohibits extension of the retirement age beyond the 60 years for public servants unless an officer is under the category of disabled persons.

35. Consequently, the claim against the Respondent is dismissed with costs.

36. It is so ordered.

DATED , SIGNED AND DELIVERED IN OPEN COURT THIS 17TH NOVEMBER 2022 AT BUNGOMA.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF

Court Assistant: Brenda Wesonga

For Claimant:

For Respondent:

