



**Universities Academic Staff Union v Kirinyaga University (Cause 2 of 2022) [2022] KEELRC 13547 (KLR) (15 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13547 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE 2 OF 2022  
ON MAKAU, J  
DECEMBER 15, 2022**

**BETWEEN  
UNIVERSITIES ACADEMIC STAFF UNION ..... CLAIMANT  
AND  
KIRINYAGA UNIVERSITY ..... RESPONDENT**

**JUDGMENT**

1. The claimant is a trade union registered to represent unionisable Academic staff of Public Universities and brings this suit on behalf of eighteen (18) members (herein after called the grievants). The suit is contained in the Amended memorandum of claim dated March 4, 2019 seeking the following reliefs;
  - a. That the claimant's members who were appointed on contract terms: on five years contracts renewable once for a further five years, with some required to have attained higher academic qualifications within their contract period, the contracts for all such staff be renewed for five years on the same terms, effective from the date of expiry of the previous contract.
  - b. Payments for the claimant's members March, 2018 salaries.
  - c. Alternatively, compensation for unfair loss of employment upto maximum of 12 months salary for each of the 18 claimant's members together with damage for discrimination and unfair practices of the 18 claimants at Kshs.5,000,000.00 each.
  - d. Costs of the suit.
  - e. Any other and/or further relief that this court may deem fit and just to grant in the circumstances.
2. The basis of the suit is that upon transition from the Kirinyaga Technical Institute to Kirinyaga University the grievators' right as employees were violated and their employment contract unfairly



terminated. According to the claimant, the unfortunate situation faced by the grievants is attributable to the respondent's breaches and hence the reliefs sought.

3. The respondent is in denial and has filed defence to put the record straight. The respondent's case is that the absorption of the claimant's members was to be subject to appraisal to determine suitability to teach at the university.
4. It is further respondent's case that the Principal of the college issued contracts uphazardly to the grievants without following the criteria for appointment of academic staff in Public Universities and thereby awarded the grievants benefits which were not commensurate with their qualifications.
5. Again the respondent averred that the grievants were engaged under fixed term contracts which expired by effluxion of time and as such the claim for unfair termination and violation of constitutional rights is without merits. Further the respondent averred that the grievants were deployed by their employer, Teachers Service Commission to other institutions after the lapse of their contract on May 31, 2018 and as such the reliefs sought are not tenable. Therefore it prayed for the suit to be dismissed with costs.
6. The suit was disposed of by written submissions on the basis of the pleadings, written witness statements and documentary evidence filed.

### **Evidence**

7. The claimant relied on the written statements of its secretary General Dr. Constantine Wasonga filed on November 15, 2018 and bundle of documents filed on November 15, 2018 and July 12, 2022 as its evidence. In brief, the witness stated that Janet Shikhuyu, Florence Maweu, Benard Njogu, Mercy Munyi, Shaaban Macharia, Philip Wanjohi, Samuel Kimwea Njoka, Mary Maina, Edith Thairu, Symon Kinyua, Nancy Kamaru, Nelius Gate, Gilbert Muchiri, Simon Njoka, Susan Njuguna, Paul Muchai, Lucy Mwithi and Milton Nyaga Kaboi were members of the Teaching Staff of the respondent having transitioned from Kirinyaga Technical Institute after it attained a University College status vide legal Notice No. 108 of 2011- Kirinyaga University College Order, 2011.
8. The witness further stated that under the said legal Notice 108 of 2011, the staff of the defunct institute were to undergo appraisal to determine their suitability for absorption into the university teaching staff, which appraisals were conducted around May 9, 2012 and a recommendation for appointment of the grievants was made. Thereafter the grievants were employed by the respondent under five (5) years contract starting 1<sup>st</sup> December 2012.
9. The witnesses further stated that the contract of service provided for renewal on mutual agreement, provided that the renewal would only be done once if the staff would not have attained further Degrees or advanced. Finally the contract provided for payment of allowances commensurable with the employee's grade plus gratuity at the rate of 20% of their basic pay upon successful completion of the contract.
10. The witnesses also stated that all the grievants advanced in their academic status and notified the respondent before that expiry of their respective contracts but the respondent changed their job grades from Grade 11 to Grade 10 in 2017 and thereby affected their career progression and benefits. Thereafter the respondent arbitrarily renewed the grievants' contracts for only six (6) months despite them qualifying for another five (5) years contract.
11. The witnesses further stated that the grievants were discriminated because while other staff got two (2) years renewal of their contracts, the grievants were given only six (6) months contracts. He further stated that after the termination of the contracts, the respondent advertised the positions held by the grievants and appointed staff of less academic qualifications than the grievants.



12. The witnesses maintained that the termination of the grievants' employment was unfair for lack of prior notice and valid reasons. Therefore, he prayed for the reliefs sought in the suit because the action by the respondent amounted to violation of the right to fair labour practices under section article 41 of *the constitution*.
13. The respondent relied on the written statement by the Head of Human Resource Ms. Joyce Kiragu dated March 27, 2019. From the onset the witness disputed the authenticity of the documents dated 9<sup>th</sup> May 2012 in page 13 of the claimants' bundle of documents, contending that it was strange to the respondent.
14. In addition she stated that the transitioning of the staff of the defunct institute to the university teaching staff was subject to appraisal and took issue with the five (5) years contracts given to the grievants contending that they were not in the interest of the university and they contravened the guidelines and standards for Academic Staff 2014. She contended that the grievants were given job grades above their qualifications and that had occasioned financial loss to the university because they got benefits which were not commensurable with their qualifications.
15. The witness further stated the contract of five (5) years expired automatically on the due date and the grievants applied for renewal. The applications were considered and it was decided that the grievants' contracts be renewed for a period of six (6) months only. Appointment letters for six (6) months were then prepared and grievants accepted the same voluntarily by signing. She denied that the grievants' contracts were terminated by the respondent and maintained that they expired by effluxion of time.
16. The witness stated that the grievants were treated fairly by the respondent during their employment. She also stated that the grievants are not entitled to the reliefs and the suit should be dismissed with costs. Finally, she stated that the grievants have since been deployed to other institutions by the Teachers Service Commission as follows:-
  - a. Florence Maweu – Jeremiah Nyaga- Thika Technical Institute
  - b. Lucy Mwithi - Jeremiah Nyaga- Rwika Technical Institute
  - c. Samuel Kimwea - Jeremiah Nyaga- Rwika Technical Institute
  - d. Simon Njoka - Jeremiah Nyaga- Rwika Technical Institute
  - e. Edith Thairu – Kenya Technical Teachers College
  - f. Symon Kinyua – Mukira Technical Institute (Meru)
  - g. Mercy Munyi – Murang'a Technical Teachers Institute
  - h. Nelius Gate – Mathenge Technical Institute
  - i. Nancy Kimaru – Mathenge Technical Institute
  - j. Mary Maina – Ndia Technical Institute
  - k. Philip Wanjohi – Ndia Technical Institute
  - l. Susan Njuguna – Kagema Technical Institute
  - m. Benard Njogu – Mukurweini Technical Institute
  - n. Milton Nyaga – Nyeri National Technical Institute
  - o. Janet Shikhuyu – Eldoret Poly Technic



p. Gilbert Muchiri – Thika Technical Institute.

### Submissions

17. The claimant submitted that clause No. 16 of the legal notice No. 108 of 2011 was violated by the respondent to the prejudice for the claimants' members. The said clause provided for appraisals to be done on the claimants' members to ascertain suitability for their absorption into the university's teaching staff. According to the claimant the appraisal was conducted on May 9, 2012 and the grievants were appointed by the university on December 1, 2012 under five (5) years contracts. The contracts were renewable upon mutual agreement but for those staff who would not have attained further degrees or advanced, the contracts were renewable only once.
18. It was submitted for the claimant that the grievants fully complied with their contracts by advancing in their studies before the expiry of the five (5) years term and notified the employer about the same. They also applied for renewal of their contracts but the university, arbitrarily renewed the contract for only six (6) months. Thereafter the contracts neither renewed nor converted to permanent and pensionable terms. They submitted that the action by the employer amounted to misrepresentation and has occasioned loss to the grievants.
19. The claimant further submitted that the failure to renew the grievants' contracts dated December 1, 2012 after fulfilling the requirements was without valid reasons and therefore unfair. It submitted that the Guidelines for appointment and promotion of Academic Staff in Public Universities in Kenya 2014 came into force two (2) years into the grievants contract and therefore they would not apply retrospectively against grievants.
20. The claimant further submitted that proper procedure was not followed before terminating the contracts of the grievants. It was contended that prior notice was not served on the grievants and they were not heard as provided by section 41 of the *Employment Act*. They were shocked to receive letters on the last day of their six (6) months contract telling them that the contract would not be renewed. Reliance was placed on *David Wanjohi Muhoro v OL Pajeta Ranching Limited* (2014) eKLR where the court held termination without prior hearing under section 41 of the *Employment Act* was unfair.
21. For the reasons set out in the above submissions. The claimant contended that it is deserving the reliefs sought in the suit as prayed.
22. The respondent reiterated its objection to the documents prepared by "the Board of Governors" of the Kirinyaga Technical Institute dated 9<sup>th</sup> May 2012 (see page 13 of the claimants' bundle). It was submitted that the authenticity of the source of the documents was unknown and therefore it cannot be relied upon by this court in determining the dispute herein. For emphasis the respondent cited *Kenneth Nyaga Mwiige V Austin Kiguta & others* (2015) eKLR where the court discussed the stages that a document passes before it becomes part of evidence for a case.
23. As regards to merit of the case, it was submitted that the Kirinyaga University College order 2011 did not provide that all the staff previously employed by the Kirinyaga Technical Institute were to be automatically and fully transferred to the university college. It was observed that the claimant has even admitted under paragraph 7 of the Amended memo of claim that clause 16 of the Legal Notice No. 108 of 2011 provided for appraisals to be carried out to ascertain suitability of the staff to be absorbed in the respondent's teaching staff.
24. The respondent submitted that there is no contention that the grievants were appraised and given five (5) years contract by the university college. It was further submitted that the contracts provided for a



renewal upon mutual agreement and the claimant has acknowledged that fact under paragraph 9 of its pleadings.

25. The respondent further argued that the claimant has not tendered any evidence to support the allegations that the grievants were required to obtain further degrees in education in order for their tenure to change from contract to permanent and pensionable terms. The respondent maintained that the contracts signed by the grievants were for fixed term and they were entered into through mutual agreement.
26. The respondent reiterated that the contracts lapsed automatically by effluxion of time and as such it did not terminate the same. It was argued that the issue of valid reasons and prior hearing or termination notice does not arise since the nature of the contracts was that they lapsed automatically on their own on the due date. Reliance was placed on the case of *Stephen M. Kitbeka v Kevita International Ltd* (2018) eKLR and *Rajab Barasa and four (4) others v Kenya Meat Commission* (2021) eKLR, where the court held that fixed term contracts terminates automatically on the due date by operation of the law.
27. For the above reasons, the respondent contended that the grievants were not discriminated during the recruitment as alleged. Further it was submitted that no evidence of the alleged discrimination was tendered by the claimant. Finally the court was urged to dismiss the entire suit with costs.

### **Analysis for Determination**

28. There is no dispute that Kirinyaga Technical Institute (“the institute”) was converted to a university college vide the Legal Notice No. 108 of 2011. It is also common ground that the teaching staff of the institute were to transfer to the university college subject to appraisal to ascertain their suitability to be absorbed into the university teaching staff. There is also no dispute that the grievants were employed by the university under five (5) years contract from December 1, 2012.
29. The issue for determination are:-
  - a. Whether the respondent terminated the contracts unfairly or they lapsed automatically.
  - b. Whether the grievants were discriminated during the recruitment by the respondent.
  - c. Whether the reliefs sought are deserving.

### **Unfair termination v Automatic expiry**

30. Section 45 of the *Employment Act* provides that:-

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
  - (a) that the reason for the termination is valid;
  - (b) that the reason for the termination is a fair reason—
    - (i) related to the employees conduct, capacity or compatibility; or
    - (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.”



31. In this case the respondent maintained that the grievants contracts were never terminated by anyone. The claimant has admitted in its pleadings and evidence that the grievants were initially employed by the respondent under five (5) years contract from December 1, 2012 to November 30, 2017. It is further admitted by the claimant that the grievants contracts were then renewed contracts for six (6) months from December 1, 2017 to May 31, 2018 when they lapsed.
32. All the grievants signed their respective contracts and they were fully aware of the terms therein including the contract period. There is evidence on record of the grievants applying for renewal of their respective contracts in which they cited the expiry date.
33. I have also perused clause 16 of the Kirinyaga University College Order, 2011 (Legal Notice No. 108 of 2011) which was allegedly contravened by the respondent during recruitment of the grievants. The clause provided as follows:-

“ 1). The staff of the Kirinyaga Technical Institute existing prior to the commencement of this orders including those on secondment are eligible for employment by the university college subject to appraisal by the council in accordance with statutes.

2) .....

a). All members of staff of the university college shall:-

a). be subject to the general authority of the council and the Principal, and

b). be considered to be employed in accordance with the statutes or as otherwise specifically provided by the statute or by the terms of a particular appointment”.

34. The individual contracts for the grievants issued in December 2012 provided that:-

“ All other terms and conditions of service are as specified in the Terms of Service Documents for Academic Staff Grades AC 11 – 15 which together with this letter shall constitute the contract of employment between yourself and the university college”.

35. The foregoing statement renders irrelevant the document on claimants ‘bundle, (Recommendations for Teaching staff universities from KTI to KUC dated 9<sup>th</sup> May 2012) and which was objected to by the respondent. I will therefore not waste time determining the objection raised since it is clear from the Legal Notice No. 108 of 2011 what constituted the contract of employment.

36. Clause 5 of the Terms of Service for Academic Staff Grade AC 11 – 15 November 2015 provides for tenure of appointment as follows:-

“ Appointment may be made for any period to be specified in the appointment letter.”

5.1 Temporary and contracts appointment.

Temporary appointment (including staff and other supervisory appointments) and all contract appointments are tenable for such



periods and on such terms as are specified in the letters of appointment.”

37. It is clear from the foregoing that the said terms of service provides for appointment of Academic Staff on temporary and contract basis, and the period of the contract is to be specified in the appointment letters.
38. In this case, the grievants were appointed under five (5) years contract which was renewed for six (6) months. They served through their contract terms and their request for renewal after 31<sup>st</sup> May 2018 was declined. The contract were never terminated by the employer. They lapsed automatically by effluxion of time. The employer had the discretion to renew or not to renew just like the grievants. Therefore, I find and hold that the claimant has not proved that the grievants` contracts of service were unfairly terminated by the respondent.
39. I gather Support from the case of *Stephen M. Kitheka v Kevita international Ltd* (2018) eKLR where the court held that:-

“The claimant having been on a fixed term contract with an ascertained date of expiry, is not entitled to notice of termination”

40. I further agree with the decision in *Rajab Barasa & four (4) others v Kenya Meat Commission* (2021) eKLR where the court held that:-

“The law is that the expiry of fixed term contract of employment does not constitute termination of the contract by any of the parties. There is an automatic termination of the contract by the operation of law and not a dismissal or unfair termination of employment as alleged by the claimant”

### **Discrimination**

41. The claimant alleged that the grievants were exposed to discrimination during the recruitment. It was alleged that its members were given short contract terms than other staff. The respondent denied the alleged discrimination and averred that it treated the claimant`s members fairly all through. It also submitted that the claimant has not given details of the staff who were given preferential treatment than its members.
42. I have perused the evidence on record and I agree with the respondent that there is no details given of any staff members who were accorded preferential treatment than the grievants. The foregoing facts in addition to the earlier finding that the respondent did not violate Legal Notice No. 108 of 2011 and the respondent`s terms of service for Academic staff grade 11-15 of 2012, I must reject the claimants` allegations that its members were discriminated by the respondent during the recruitment. They were appraised like any other staff of the defunct institute and were appointed on fixed contracts which they accepted and served to the end.

### **Reliefs**

43. In view of the findings that the grievants`s contracts lapsed automatically and not unfairly terminated by the respondent, I decline the prayer for renewal of their contracts for five (5) years effective 1<sup>st</sup> December 2017 as prayed. For the same reason I decline the alternative prayer for compensation for unfair loss of employment and damages for discrimination and unfair labour practices.



44. Finally, the claim for salary for March 2018 has not been specifically proved and I also decline to award the same. For all the reasons set out above, I dismiss the suit with costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 15<sup>TH</sup> DECEMBER, 2022.**

**ONESMUS N. MAKAU**

**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 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N. MAKAU**

**JUDGE**

