



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

CAUSE NO. 397 OF 2015

KENYA UNIVERSITIES STAFF UNION.....CLAIMANT

v

MASINDE MULIRO UNIVERSITY
OF SCIENCE AND TECHNOLOGY.....RESPONDENT

CONSOLIDATED WITH

KISUMU CAUSE NO. 307 OF 2015

RICHARD LUSWETI WEPUKHULU.....CLAIMANT

v

MASINDE MULIRO UNIVERSITY
OF SCIENCE AND TECHNOLOGY.....RESPONDENT

AND

KISUMU CAUSE NO. 344 OF 2016

ALEXANDER S.M. MATE.....CLAIMANT

v

MASINDE MULIRO UNIVERSITY
OF SCIENCE AND TECHNOLOGYRESPONDENT

AND

KISUMU CAUSE NO. 106 OF 2015

RICHARD MARK BUSURUCLAIMANT

v

MASINDE MULIRO UNIVERSITY
OF SCIENCE AND TECHNOLOGY.....RESPONDENT

RULING

1. In a judgment delivered on 12 April 2018, the Court entered judgment for the Claimants and issued the following orders:

- i. An order of injunction is issued restraining the Respondent from retiring the Claimants' members at age 60 years unless the CBA is varied accordingly.
- ii. An order of prohibition is granted prohibiting the Respondent from retiring the Claimants' members until they attain the age of 65 years.
- iii. The Court declares that retiring the Claimants members at 60 years of age is unlawful.
- iv. Judgment is entered in favour of Richard Mark Busuru in the sum of Kshs 2,572,754/90.
- v. Judgment is entered in favour of Richard Lusweti Wepukhulu in the sum of Kshs 379,185/-.
- vi. Judgment is entered in favour of Alexander J.M. Mate for re-engagement without loss of income until he attains 65 years within 30 days of this judgment.
- vii. The awards are payable with interest at court rates from the date of judgment till payment in full.
- viii. Costs to abide the outcome.

2. On 5 February 2021, the Kenya Universities Staff Union (the applicant) lodged a Motion with the Court seeking orders:

- i. ...
- ii. ...
- iii. ...
- iv. An order of committal to be made against the one Prof. Solomon Shibairo, who is the Respondent's acting Vice-Chancellor for such period as this Honourable Court may deem fit and just.
- v. An order that costs of and occasioned by this Motion be paid by the Respondent.

3. The Respondent caused its Vice-Chancellor to file a replying affidavit in opposition to the Motion on 17 February 2021, and this prompted the applicant's Masinde Muliro University of Science and Technology branch chairman to file a supplementary affidavit on 8 March 2021.

4. Pursuant to Court directions given on 9 March 2021, the applicant filed its submissions on 7 June 2021 (should have been filed and served before 9 April 2021) while the Respondent's submissions on which should have been filed by 9 May 2021, were not on record by this morning.

The applicant's case on the Motion

5. In seeking the committal order against the Respondent's Vice-Chancellor, the applicant contended that the Court had on 12 April 2018 prohibited the Respondent from retiring its members until they attained the age of 65 years; the orders had been served upon the Respondent, and that despite service and knowledge of the orders, the Respondent had on 3 February 2021 decided to retire the applicant's members, Moses Mukhangula, Beatrice Barasa, R.C. Atamba, Odhiambo Onyango and Milka Aswa who had not attained 65 years.

6. In its submissions, the applicant argued that the judgment in Nairobi ELRC CBA 1 of 2020, *Inter Public Universities Council Consultative Forum of the Federation of Kenya Employers v Kenya Union of Domestic, Hotels, Education Institutions & Hospital Workers* consolidated with ELRC CBA No. 2 of 2020, *Inter Public Universities Council Consultative Forum of the Federation of Kenya Employers v Universities Academic Staff Union* and ELRC CBA No. 3 of 2020, *Inter Public Universities Council Consultative Forum of the Federation of Kenya Employers v Kenya Universities Staff Union* sought to be relied on by the Respondent as a basis for retiring its members upon attainment of 60 years was irrelevant to the matter at hand because there was a distinct collective bargaining agreement between the applicant and the Respondent at the local level addressing the retirement age.

7. In the applicant's view, the judgment from the Court in Nairobi had held that the retirement age in the public sector would apply in the case of its members and consequently the clause 28 on the retirement age of 65 years in the local collective bargaining agreement for 2012 to 2017 between it and the Respondent was preserved.

8. The decision of the Respondent to prematurely retire its members, the applicant asserted, was unfair and inhuman and breached the text and spirit of Articles 47 and 50(1) of the Constitution.

Respondent's position

9. The Respondent admitted that it had sent retirement notices to the applicant's members on 3 February 2021, and it explained that its decision was founded on a collective bargaining agreement between the *Inter-Public Universities Council Consultative Forum* and the applicant registered on 3 July 2020 and the judgment (supra) delivered by this Court (differently constituted) on 15 January 2021.

10. The Court has considered the Motion, affidavits and submissions on record.

11. It is correct that the applicant and the Respondent had a local collective bargaining agreement signed on 19 May 2012, providing for a retirement age of 65 years.

12. It is equally true that the applicant was a party to the dispute, which led to the judgment delivered in Nairobi on 15 January 2021.

13. In the judgment, the Court rendered itself thus on the retirement age:

Retirement in the public sector is governed by government policy. The last circular on retirement in the public sector is dated 20 March 2009 and reviewed the mandatory 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 SRC guidelines, which this Court is enjoined to consider while dealing with matters that fall under the purview of SRC, provide that among the parameters to be considered in negotiations are Government policies and Guidelines. The SRC guidelines provide –

8 Government Policies and Guidelines: Collective Bargaining Negotiations should adhere to existing policies and guidelines such as the minimum wage guidelines, Public Service Commission Human Resources Policies and Procedures Manual, State Corporation guidelines and various SRC advisories.

Parties can therefore not negotiate outside public policy and guidelines.

For these reasons, the proposals for amendment of the retirement age are expunged from the CBAs.

.....

The CBAs are therefore confirmed as registered on 3 July 2020 as amended by this judgment.

14. The retirement age which had been proposed by the applicant was 65 years.

15. The Nairobi Court found that age to be outside public policy and held that the retirement age in the public sector would apply to the applicant's members.

16. Whilst the applicant's and Respondent's interpretation of the retirement part of the judgment may be different, it is the view of this Court, and the Court finds that there was no wilful disobedience on the part of the Respondent when it relied on the aforesaid judgment to retire the applicant's members who had attained 60 years.

17. In this respect, the applicant should have approached the Court, which delivered the judgment in Nairobi for clarification instead of moving for contempt.

THE MOTION DATED 4 FEBRUARY 2021 IS DISMISSED WITH COSTS. DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 1ST DAY OF JULY 2021.

RADIDO STEPHEN,

MCIARB JUDGE

Appearances

For applicant Mr Odeny instructed by Bruce Odeny & Co. Advocates

For Respondent Mr Ouma, Senior Legal Officer instructed by the Federation of Kenya Employers

Court Assistant Chrispo Aura