



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 15 OF 2020

**IN THE MATTER OF UNFAIR, ILLEGAL, ARBITRARY AND IRREGULAR
DISMISSAL/TERMINATION OF SEVERAL EMPLOYEES, MEMBERS OF
THE PETITIONER**

AND

**IN THE MATTER OF ARTICLES 20, 21, 22(3), 23, 24, 27, 41, 47, 165, 232 AND 236 OF
THE CONSTITUTION OF KENYA, 2010, CAP 26 LAWS OF KENYA AND THE CIVIL
PROCEDURE ACT, CAP 21 LAWS OF KENYA**

AND

**IN THE MATTER OF DISMISSAL/TERMINATION OF SEVERAL EMPLOYEES OF
KISII UNIVERSITY WHO ARE UNION MEMBERS OF THE PETITIONER**

AND

**IN THE MATTER OF CHARTER FOR KISII UNIVERSITY, LEGAL NOTICE NO.
225 GAZETTED ON 30TH DECEMBER 2013 UNDER LEGISLATIVE SUPPLEMENT
NO. 77 UNDER KENYA GAZETTE SUPPLEMENT NO. 185**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF KISII UNIVERSITY'S HUMAN RESOURCE MANUAL, 2016

AND

IN THE MATTER OF THE UNIVERSITIES ACT NO. 42 OF 2012

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

BETWEEN

KENYA UNIVERSITIES STAFF UNION

JUDGMENT

1. The Kenya Universities Staff Union (the Union) moved the Court on 28 April 2020, alleging that the Kisii University (the University) had unfairly terminated the contracts of several employees who were members of the Union.

2. The Union prayed for the following orders:

(a) A declaration that the Petitioner’s members, employees of the 1st Respondent were/are entitled to fair administrative process and that letters terminating/purporting to terminate /dismiss several employees from their employment commencing 17th March 2020 or thereabouts to date or any other later date is irregular, illegal, null and void.

(b) A permanent order of injunction restraining the Respondents jointly and severally, their agents, functionaries, officers and/or employees from terminating, dismissing, upholding dismissal and/or interfering with the affected employees without the prerequisites of the law.

(c) An order directed at the Respondents ordering for unconditional reinstatement/restoration of the employees irregularly, illegally and unprocedurally terminated into their employment positions and/or contracts status ante.

(d) A declaration that the decision and process leading to the removal of the Petitioners and/or their members from the employment of the 1st Respondent is/was premature, ultra vires, illegal, irregular, null and void, ab initio.

(e) An order directed at the 1st Respondent itself, its agents, officers or employees to cease any dismissal of its employees without the requisites of the law and without notice to the Petitioner, participation of the Petitioner and/or affected parties consent or concurrence of the Petitioner and affected individual employees.

(f) A permanent order or relief to be issued in favour of the Petitioner and the affected workers within the ambit of Article 23(3) of the Constitution of Kenya, 2010.

(g) THAT costs of the Petition be provided for.

3. At the same time, the Union filed a Motion seeking interim injunctive orders.

4. The Court issued an *ex-parte* conservatory order on 29 April 2020 and directed the Union to serve the pleadings.

5. The University caused a replying affidavit to be filed on 7 May 2020, and the Union and the Respondents filed a supplementary affidavit on 9 September 2020.

6. On 7 May 2020, the University filed a Motion seeking an order to stay or discharge the *ex-parte* conservatory order.

7. The Court stayed the *ex-parte* conservatory order and further directed that the Motion by the University be deemed as a response to the Union’s Motion.

8. The Court heard the parties and, in a Ruling delivered on 28 January 2021, found the Union’s application devoid of merit. It was dismissed.

9. When the Petition came up for directions on 28 June 2021, the Court directed the parties to file Agreed Issues and submissions.

10. The Union filed further submissions on 26 July 2021, while the Respondents filed a supplementary affidavit sworn by the Legal Officer and their submissions on 9 September 2020.

11. The Respondents filed their submissions on 7 December 2021 (should have been filed and served before 16 September 2021).

12. The Court has considered the Petition, affidavits and submissions, and come to the view that the Petition is incompetent and also lacks merit for the following reasons.

13. First, the Kenya Universities Staff Union and the University have a recognition agreement, and any disputes between them are subject to the alternative dispute resolution avenues outlined in such a recognition agreement or under Part VIII of the Labour Relations Act.
14. Under the provisions of the Part, the Union should have at the first instance reported a trade dispute to the Cabinet Secretary, Labour, who in turn would have appointed a Conciliator.
15. By virtue of section 73 of the Act, the Union or the University was at liberty to refer the dispute to the Court if the dispute remained unresolved after conciliation level.
16. The Union did not reveal whether it reported a trade dispute to the Cabinet Secretary or whether the dispute remained unresolved after conciliation.
17. Second, the employees on whose behalf the Union purported to move the Court were on fixed-term contracts.
18. The University informed 14 of the employees of the renewal of their contracts through letters dated 9 March 2020.
19. In the same vein, on 13 March 2020, the University notified some 4 of the employees that their contracts would not be renewed upon expiry on 30 April 2020.
20. On 8 April 2020, the University notified some 14 more employees that their contracts would not be renewed upon expiry on or around 8 May 2020.
21. Section 10(2) of the Employment Act, 2007 has recognised contracts of a *definite duration*, and by giving parties the autonomy to agree and set the duration of the contract, unfair termination of the contract does not occur when one of the parties opts not to renew the contract.
22. Consequently, it would be stretching the right to be afforded an opportunity to be heard or fair administrative action to hold that an employee on a contract of *definite duration* is entitled as of right to hearing in cases where the contract is not renewed.
23. In this regard, the Court notes that in exceptional cases, a party may have a legitimate expectation that the contract would be renewed, but in the case at hand, the Union did not prove such legitimate expectation.
24. Third, the employees listed in the Petition were not *casual employees*, as asserted by the Union.
25. There was no evidence that the employees were paid at the end of the day, and the suggestion that section 37(1) of the Employment Act, 2007 applied is misplaced.
26. Before concluding, the Court will address its mind to an objection which was raised on behalf of the Respondents that the Union lacked the *locus standi* to initiate the Petition because it was not a registered trade union as contemplated by the Labour Relations Act.
27. The Constitution at Article 22(2), as read with Article 260 defines a person and has now given the *locus standi* even to unincorporated entities to sue, and the objection is without merit.

Conclusion and Orders

28. Arising from the above, the Petition is dismissed with no order on costs due to social partnership between the parties.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 15TH DAY OF DECEMBER 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Petitioner Bruce Odeny & Co. Advocates

For Respondents Nyamurongi & Co. Advocates

Court Assistant Chrispo Aura