



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 45 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 9th July, 2020)

JOHN OMOLE OWUOR.....PETITIONER

VERSUS

TECHNICAL UNIVERSITY OF KENYA.....RESPONDENT

JUDGMENT

1. The Petitioner filed an Amended Petition on 5/2/2018. He avers that he was employed by the Teacher's Service Commission (TSC) on 21/3/1996 and was later seconded to Kenya Polytechnic until the Polytechnic was converted to a University College vide the Kenya Polytechnic University College Order 2007.

2. He avers that when the Polytechnic became a constituent college of University of Nairobi, in July 2007, he was working as a seconded teacher holding the office of senior lecturer. He avers that he held that position until 2009. He avers that in 2010, he wrote to the Vice Chancellor University of Nairobi who wrote to the Polytechnic to address the matter but there was no response.

3. He avers that despite the fact that he was an academic staff, the University College refused to absorb/employ him in accordance with the Kenya Polytechnic University College Order 2007.

4. He avers that the Respondent maliciously and in bad faith elected to discriminate him by refusing to absorb him as a Senior Lecturer as it did to other persons. He avers that the Respondent therefore violated his rights under Articles 10, 27, 41 & 47 of the Constitution.

5. He seeks the following prayers:-

a. A declaration do and hereby issue that the Petitioner herein being a public officer is protected by Article 236 (b) of the Constitution of Kenya 2010 and Regulation 16 (1) of the Kenya Polytechnic University College Order 2007 against being dismissed, removed from office, demoted in rank without due process of law.

b. A declaration do issue that the Petitioner's fundamental right to fair administrative action and against discrimination was infringed and/or violated by the Respondent herein contrary to the provisions of Article 27, 41 and 47 of the Constitution of Kenya 2010.

c. A declaration do issue that the Petitioner's fundamental right not to be discriminated against has been infringed and/or violated by the Respondent herein contrary to the provisions of section 82 of the Constitution of Kenya (repealed and replaced by the Constitution of Kenya 2010).

d. A declaration do and hereby issue that the Respondent is constitutionally obligated to act lawfully, fairly and reasonably in the exercise of its Constitutional mandate which principles were violated in the dismissal of the Petitioner.

e. An order of mandamus does issue compelling the Respondent to reinstate the Petitioner in his former capacity as an employee of the Respondent and a declaration do hereby issue that the refusal to employ the Petitioner by the Respondent is unconstitutional thus null and void.

f. That in the alternative to (e) above, this Honourable Court do assess and order that the Petitioner be compensated by way of damages for the monetary loss suffered for the period August 2007 to the attainment of 70 years being the salary and allowances that the Petitioner would have earned since 2007 to 2023 when the Petitioner would have attained 70 years.

g. That the costs of this petition be borne by the Respondent.

h. Any such further orders as this Honourable Court shall deem just and fit to grant.

6. The Petition is supported by the Petitioner's Affidavit of sworn on 11/5/2017 and Further Affidavit sworn on 5/2/2018. He avers that though the Teachers Service Commission chose to retire him in 2018, its decision was too late because as at that time he had already become an employee of the Respondent by virtue of the Kenya Polytechnic University College Order 2007.

Respondent's case

7. The Respondent filed its Response to the Amended Petition on 20/4/2018. It avers that the Petitioner was employed by Teachers Service Commission on 21/3/1996, 13 years before he attained the public service retirement age in 2009. It avers that the recognition of the Petitioner came into force when the Petitioner's employer, the Teachers Service Commission seconded him to it but there was no contract between the Petitioner and the Respondent.

8. It contends that all its employees were subjected to fresh terms of service which were subjected to fresh terms of service which were within the realm of the functions of the Council established by the Kenya Polytechnic University College Order 2007.

9. It further contends that the Petitioner's quest to continue teaching at the Respondent was declined by the Council because he had already attained the compulsory retirement age. It avers that the Council was guided by the letter dated 15/10/2007 sent through the Principal Kenya Polytechnic to the Petitioner.

10. It contends that all other staff who were seconded to the institution were employed by the Council since they had met the threshold of being employed by the Council since they had met the threshold of being employed by the Respondent and were not barred on grounds of age.

11. It avers that the reason why the University of Nairobi could not influence the management of the Respondent was that under Regulation 3 (2) of the Kenya Polytechnic University Order the Respondent's polytechnic was a body corporate with perpetual succession. It is its averment that there exists no legal relationship between it and the Petitioner since what it considered was the letter addressed to it by the Teachers Service Commission.

12. The parties agreed to proceed by way of written submissions.

Petitioner's submissions

13. He submitted that Regulation 16 (1) of the Kenya Polytechnic University College Order 2007 took effect on 27/08/2007 and as at that time, no statutes were in force. He submitted that his employment was complete the moment the Order was gazetted.

14. He submitted that at the time the Order came into effect he was 53 years of which was not the retirement age. He therefore submitted that the Respondent had treated him differently from others hence discrimination under Section 82 of the repealed Constitution. He relied on the case of **Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited [2013] eKLR** where the Court held that where a person is treated differently from others who are similarly situated as him then this amounts to discrimination and should there be a specified ground for discrimination then unfairness is presumed. He further relied on the case of **Janine Buss v Gems Cambridge International School Limited [2016] eKLR** where the Court held that protection against any form of discrimination at the workplace should be taken very seriously.

15. He argued that Courts have awarded litigants damages for discrimination and relied on the case of **Geeta Joshi v Pandya Memorial Hospital [2019] eKLR** where the Court awarded the Claimant Kshs. 5,000,000.

Respondent's submissions

16. The Respondent submitted that the Petitioner remained an employee of the Teachers Service Commission from the time of his secondment until his retirement at the age of 55 years. It submitted that the Regulation 16 (7) of the Kenya Polytechnic University College Order 2007 which provided that a seconded member of staff was to be appointed on terms agreed upon between the Council and the seconding body.

17. It relied on the case of **Rev. John Mugania v Kenya Methodist University & Prof. Mutuma Mugambi [2012] eKLR** where the Court held that a person proceeding on secondment must conclude a valid contract with the other employer and that secondment transaction does not transfer to the employer liabilities for pension of the person on secondment unless expressly stated so prior to the secondment. It further relied on the case of **Nahashon Cheruiyot Ngeno v Strengthening of Mathematics & Science Education Project & another [2015] eKLR**.

18. It submitted that the Petitioner having received a letter from his employer informing of the mandatory retirement age, it had no platform of accommodating him. It relied on the Court of Appeal case of **Kenya Education Staff Institute v Kenya Union of Post Primary Teachers (Kuppet) & 2 Others [2020] eKLR** where it held that the grievants were employees of the appellant as they had been absorbed and discharged duties within the appellant's establishment until they were erroneously released to the Teachers Service Commission.

19. It submitted that the Petitioner did not produce any evidence to show that he was discriminated upon and that his colleagues who were seconded to the Respondent had attained the retirement age. In conclusion, it submitted that the Petitioner is in pursuit of enforcing a non-existent employment contract and urged the Court to dismiss the Petition as it is devoid of merit.

20. I have considered the averments of the Parties herein. From the documents availed to Court, the Claimant was 1st employed by the Teachers Service Commission on 21/3/1996 as a Graduate Teacher as per his Appendix JOO -1.

21. Vide a letter dated 12/5/2004, the Petitioner was promoted to Senior Lecturer/Graduate Teacher Job Group 'M'. He was then teaching at Kenya Polytechnic where he was retained.

22. Vide a letter dated 15/10/2007, the Petitioner was informed that he was born on 1/5/1953 and was due to attain 55 years which was age of compulsory retirement and was therefore to retire on 1/9/2008.

23. In the meantime, the Petitioner had sought to be retained at Kenya Polytechnic on 15/9/2007. By this date, the Petitioner had been given notice of his impending retirement and he thus was not retained at Kenya Polytechnic.

24. The Petitioner contends that he was discriminated against by the Respondent by the Respondent's failure to retain him as their employee when he was retired in 2008.

25. This he avers is contrary to the Kenya Polytechnic University College Order 2007 Gazette Supplementary 82 dated 27/8/2007 Legal Notice No.159 page 1425 which stated as follows:-

".....Order 16(1).....the staff of the Kenya Polytechnic existing prior to the commencement order including all those on secondment shall be deemed to be employees of the University College subject to the statute/order....."

26. The Petitioner sought to be reinstated by the Respondent vide his letter dated 14/5/2015 but the Respondents informed him that his request was not granted because he had already retired from the Teachers Service Commission by the time Teacher Service Commission staff at Kenya Polytechnic were converting to employees of Kenya Polytechnic University College.

27. From the Petitioner's evidence he was retired on 31/8/2008. The Kenya Polytechnic University College Order however commenced on 27/8/2007 when the Petitioner had not yet retired from the Teachers Service Commission.

28. The contention that he had retired at the time the Kenya Polytechnic College was created is therefore not true. This implies that the Petitioner should have been absorbed by the Respondent as per the provision of Order 16(1) above (supra).

29. Whereas I agree that the Petitioner should have been absorbed by the Respondent as per the provisions of Order 16(1) above, failure by the Respondent was discriminatory.

30. It is however not clear what held the Petitioner from pursuing his rights under the Constitution since 2007 for him to file this Petition in May 2017 10 years later.

31. In **Joan Akinyi Kabasellah and 2 Others vs the Attorney General Petition No. 41 of 2014** Hon. J. Lenaola (as he then was) stated as follows:-

"there is great danger that parties are abusing the constitutional protection of rights to bring claims before the Court whose sole aim is enrichment rather than vindication of rights. A delay of 10 years or more before one comes to Court to allege violation of rights is clearly not justifiable. As Nyamu J observed in Abraham Kaisha Kanzika and Another vs Central Bank of Kenya (supra): "every where there is no specified period of limitation, it is proper for the Court to consider the period of delay since the accrual of the claim and the reasons for the delay"

32. Indeed the Petitioner seeking redress after 14 years for what he considers as infringement is a big delay which this Court frowns upon. However from the correspondence between the Petitioner and Respondent, he was following up on his retirement as late as 2015 when the Respondent finally informed him that they were unwilling to reinstate him to work.

33. The Petitioner avers that he was discriminated against by not being absorbed in the employment of the Respondent after the Respondent was created in 2007.

34. The Respondents have not been able to explain why they chose not to reinstate him as others were being absorbed into the Respondent's employment.

35. I agree that the Petitioner was indeed discriminated against in breach of Section 82 of the Constitution of Kenya (repealed) which outlawed any form of discrimination.

36. Under Section 84 of the said Constitution any person whose rights were infringed or threatened had a right to apply to the High Court for redress.

37. The Petitioner having chosen to seek redress, I find that indeed he has a claim against the Respondent's for infringing on his rights under the repealed Constitution by discriminating against him.

38. I find for the Petitioner and award him damages for discrimination.

39. I have considered how the Respondents cut short the Petitioner's career path at the University by not absorbing him into employment as provided by law. This definitely has impacted against the Petitioner negatively and he cannot recover this path.

40. I find Kshs.5 million adequate in the circumstances to compensate him for the infringement.

41. The Respondents will pay costs of this Petition.

Dated and delivered in Chambers via zoom this 9th day of July, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kuloba for Petitioner – Present

No appearance for Respondent