



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

PETITION NO 6 OF 2019

THE UNIVERSITIES ACADEMIC STAFF UNION (UASU) TUM

CHAPTER..... PETITIONER/APPLICANT

VS

TECHNICAL UNIVERSITY OF MOMBASA.....RESPONDENT

RULING

1. The Petitioner/Applicant is a chapter of a registered trade union representing teaching staff working for the Respondent. In January 2019, the Respondent effected a new Academic Policy whose Clause 8.5 increased the number of regular units to be taught by each lecturer per semester, from three (3) to four (4).

2. Being dissatisfied with the new Policy, the Petitioner filed a Petition and a Notice of Motion on 10th September 2019. This ruling relates to the Notice of Motion by which the Petitioner seeks an order of injunction restraining the Respondent by itself, its employees, servants or agents from implementing the new Academic Policy requiring the staff (lecturers) to teach 4 units per semester instead of the conventional 3 units per semester.

3. The application, which is supported by the affidavit of the Petitioner's Chairman, Joseph Raphael Ngare is based on the following grounds:

- a. The Petitioner was not consulted at all regarding the implementation of the new Academic Policy requiring the lecturers to teach 4 units instead of 3 units per semester;
- b. The new Policy is being imposed, bulldozed, forced an/or dictated on the teaching staff;
- c. The Petitioner was not invited to give its views, consent and/or opinion on the new Academic Policy;
- d. The Petitioner did not participate in the implementation of the new Academic Policy as agreed in the running 2010-2013 Collective Bargaining Agreement (CBA);
- e. The forced Academic Policy is draconian, unprocedurally implemented hence unconstitutional;
- f. The teaching staff stand to suffer financial loss and low morale damage if the Policy is implemented;
- g. The new Policy amounts to exploitation of the teaching staff as the 4th unit will not be paid for at all;
- h. The new Academic Policy has been implemented in bad faith;
- i. The Policy violates the principles of natural justice.

4. In his affidavit in support of the application, the Petitioner's Chairman, Joseph Raphael Ngare depones that the new Academic Policy runs counter to the employment terms and conditions of the affected lecturers. Ngare further depones that the Policy was implemented in an unprocedural manner. He states that the resultant change was radical and required full participation of all stakeholders.

5. The Respondent's response is contained in a replying affidavit sworn by its Legal Officer, Sarah E. Okumu on 27th September 2019.

6. Okumu depones that on 18th October 2018, the Council of Technical University of Mombasa met and resolved to apply a raft of cost cutting measures, one of them being review of the workload of lecturers from 3 units to 4 units per semester. The cost cutting measures were communicated to all Heads of Department by the Vice Chancellor in a circular dated 11th January 2019.

7. Okumu further depones that the very first step taken by the Respondent was to inform and invite the Petitioner and other union officials to a consultative meeting so that their views could be taken before implementation of the review of teaching units. The consultative meeting took place on 21st September 2018.

8. Thereafter, an adhoccommittee was formed to spearhead the review process. The ad hoccommittee presented a report to the Senate which did not agree with the proposed changes but instead forwarded the matter to the Council for consideration. The Council discussed and approved the proposed changes to the Academic Policy. The said changes were implemented effective September 2019.

9. Okumu states that the review of the Academic Policy was informed by the need to cut costs. She presented the following budget trend analysis for the last 4 years:

YEAR	APPROVED BUDGET (KSHS)
2016/2017	1,731,490,000
2017/2018	1,914,094,035
2018/2019	1,709,100,383
2019/2020	1,876,260,215

10. Okumu points out that in the financial year 2018/2019, the budget was revised downwards by Kshs. 204,993,652 to Kshs. 1,709,100,383 despite an increase in operational costs. The approved budget for the current financial year 2019/2020 increased from the previous financial by Kshs. 167,159,832 to stand at Kshs. 1,876,260,215.

11. Okumu goes on to state that despite the increase in budget, the University was underfunded in comparison to the financial year 2017/2018 when it had an approved budget of Kshs. 1,914,094,035. As a result, the University had been unable to settle the bulk of pending bills, among them being part time payments, which were in arrears by two semesters.

12. Additionally, the National Treasury had directed that the budget for the current year be subjected to a quarter of the budget for the year 2018/2019, thus subjecting the University to further financial constraints.

13. Okumu concludes that it had become necessary for the University to come up with various cost cutting measures in order to meet its most urgent operational costs. Noting that part time expenses continued to increase and academic staff continued to take more part time units in and out of the University, the area had been highlighted as a way in which the University could cut costs, through increase in teaching units.

14. Regarding the procedural framework within which the policy review was undertaken, Okumu depones that Statute XXX1(1) of the University Statutes gives the University Council the mandate to determine the terms and conditions of appointment and promotion of all staff of the University, including the number of units taught in a semester/academic year.

15. Statute XXX(6) provides that the terms and conditions of employment of staff shall be read together with the Labour Laws, Government Guidelines, University Policies and concluded Collective Bargaining Agreements (CBAs). Clause 5.0 of the CBA provides that workload shall be determined by the Academic Policy of the University. The CBA does not make provision for the number of units lecturers are to teach in a semester/academic year.

16. Okumu further makes reference to Clause 19 of the Respondent's Charter which mandates the Council to develop and implement policies such as the subject Academic Policy.

17. In response to the specific issues taken by the Petitioner on the review of the Academic Policy, Okumu states that the Petitioner's officials were consulted prior to implementation of the new Policy. She refers to a consultative meeting held on 21st September 2018 at which the Petitioner was represented by its Chairman-Joseph Ngare, Treasurer-Darius Oloo and Wambua J.I-Vice-Chairman.

18. Okumu depones that the Petitioner's officials present at the consultative meeting gave consent to the proposed changes and agreed to communicate the changes to UASU members, whom the officials represented at the meeting.

19. Having received consent of the proposed review of the Academic Policy from union officials, the Respondent proceeded with the review process. In its meeting held on 18th November 2018, the Council directed that the Academic Policy be reviewed.

20. This led to the formation of an ad hoc committee to spearhead the review process. Some of the members of the ad hoc committee were Deans (elected by their respective faculties) and/or their representatives who are themselves members of UASU. The ad hoc committee

presented its report which endorsed the proposed review of the Academic Policy to increase the number of teaching units per semester from 3 to 4.

21. At a subsequent meeting of the Senate held on 24th January 2019, there was no unanimity on the proposed policy review. The matter was therefore submitted to the Council for deliberation.

22. The Council held a retreat on 1st and 2nd April 2019. Okumu states that due to the sensitive nature of the matter at hand, the Council invited some non-members to attend the retreat.

23. At the retreat, the proposed policy review was agreed upon and at a full Council meeting held on 15th April 2019, the report of the retreat was adopted, giving way to approval of the increase in teaching units from 3 to 4 per semester. The new policy became effective in September 2019.

24. Okumu acknowledges that UASU made written representations on the proposed changes to the Vice Chancellor on 16th January 2019. She however points out that consultation or public participation does not mean concurrence. The Respondent was therefore not bound to adopt the proposals by UASU.

25. According to Okumu, all the Respondent was required to do was to give UASU members a reasonable opportunity to express their views, which they were given.

26. It is the Respondent's position that since UASU took part in a consultative meeting, held its own meetings to discuss the proposed changes, presented a memorandum thereon and had its members as part of the meetings in which the changes were discussed, UASU cannot now turn around and plead that it was not consulted or given a chance to participate in the review process.

27. Okumu states that the views of UASU were considered by the Respondent but were deemed untenable because of the prevailing financial status of the University, the need to make sound financial decisions and to operate optimally with the available funds.

28. Okumu further states that the Petitioner's averment that its members will suffer loss of income and earnings because the University will not pay for the extra one unit has no basis. She points out that UASU members, who are employees of the Respondent, have terms and conditions of employment contained in their respective letters of appointment.

29. The letters of appointment indicate that the terms of employment are contained in the *University Terms of Service for Academic Staff*. Okumu makes reference to Clause 1.0 which provides that the terms of service shall not be altered except with the approval of the Council. She adds that under Clause 5.2(i) Chairpersons/Heads of Departments may determine the number of courses, lectures or tutorials that an academic staff is to teach.

30. Okumu concedes that the salaries of the lecturers cannot be altered to their disadvantage but adds that the University can alter the number of units taught. According to her, payments for part time units do not form part of the salary or benefits of the lecturers. Moreover, under the new Academic Policy, the lecturers can still take up to 3 part time units per semester.

31. Okumu accuses the lecturers of undertaking private business in a manner that is inconsistent with their employment as full time employees of the Respondent.

32. The issue for determination in this application is whether the Petitioner has made out a case for suspension of the revised Academic Policy implemented by the Respondent effective September 2019, increasing the number of units taught by the Petitioner's members from 3 to 4 per semester.

33. The Petitioner's complaint is that the revised Academic Policy, which affects their members was effected without consultation.

34. The Respondent's response is twofold; first that the Respondent's organs were mandated by the University statutes to revise the Academic Policy and second, that the Petitioner's officials were consulted prior to implementation of the new Academic Policy.

35. The Respondent goes further to state that the Petitioner's officials gave their consent for implementation of the new Policy. To support this assertion, the Respondent filed minutes of a consultative meeting held on 21st September 2018 attended by the Petitioner's Chairman, Vice-Chairman and Treasurer.

36. A reading of these minutes reveals the subject as consultation on cost cutting measures in light of budget reduction in the year 2018/2019. The relevant minute is MIN.CM/21/9/2018/2 (xiii) on part time payments. It reads:

“The University should revisit and raise the breakeven numbers per class for part time payments. Classes for Government sponsored students that had previously been split will be combined. Lecturer's workload will be revised to 4 units per semester instead of the regular 3 units.”

37. I find it necessary to reproduce the following points of agreement as recorded in the minutes:

i. The union officials gave consent to the proposals and agreed to pass the message to staff members they represent for their views and comments on the cost cutting measures for consideration by management.

- ii. They also promised to work collectively in helping the University keeping (sic) afloat by offering proposals on (sic) the university could generate more money. The proposals would be given in two weeks' time.
- iii. Before implementing the compulsory benevolent fund, it should be restructured, contributions standardized and proper management put in place.
- iv. Counter check if there were not people who were earning both Management allowance and responsibility allowance.
- v. The university guided by Management, Senate and Deans Committee to work on its systematic weakness.
- vi. To consider installation of solar panels like in classes where less power is needed.

38. From the foregoing record, it seems to me that the union officials gave their consent in principle, for the proposed cost cutting measures to be discussed by their members, whose views would be considered by management. This would explain why the Petitioner held a Special General Meeting on 16th January 2019 at which meeting the proposal to increase regular semester units from 3 to 4 was rejected.

39. The Court did not find any specific consent to the proposal to increase the teaching units by the Petitioner's officials. In fact, the agreements recorded in the minutes of the consultative meeting of 21st September 2018 suggest that the Petitioner's officials could not give such a consent without consulting the Petitioner's members.

40. After the Petitioner's Special General Meeting of 16th January 2019, its officials petitioned the Respondent's Vice-Chancellor by written memorandum of the same date, asking that the proposal to increase the teaching units be shelved. The Court did not see any response by the Vice-Chancellor in this regard.

41. On 19th June 2019, the Petitioner penned another petition on the same subject matter to the Chairman of the Respondent's Council. Apart from taking issue with the proposed review of the Academic Policy, the Petitioner offered suggestions on how the University could improve its financial health.

42. In his response by email dated 2nd September 2019, the Chairman of Council stated *inter alia*:

“Thank you for the various suggestions aimed at the improvement of critical facets of TUM operations. This is a continuing dialogue and the presentations will be considered along with others. May I also suggest that you continue interrogating some points with regard to CUE and the International Labour Organisation (ILO) guidelines especially on emoluments and number of students per lecture session.”

43. My understanding of the substance of the Petitioner's grievance is that by increasing the number of teaching units from 3 to 4, while maintaining the obtaining monthly salary, the Respondent has in effect altered the terms and conditions of employment of the Petitioner's members to their detriment.

44. In prosecuting the application before the Court, Counsel for the Petitioner relied on Article 232(d) of the Constitution of Kenya, 2010 which lists '*involvement of the people in the process of policy making*' as a value and principle of public service.

45. The back office information in this dispute, which is confirmed by the parties in their pleadings, is that under the old Academic Policy, the 4th unit was available as part time work for which the Petitioner's members could earn extra income.

46. The Respondent contends that the terms and conditions of employment of the Petitioner's members are contained in respective letters of appointment as read together with the *University Terms of Service for Academic Staff*.

47. The Respondent further contends that the University Council is mandated to alter the terms of the teaching service, including the number of units to be taught per semester. That may well be true. However, the question before the Court is whether the Respondent could lawfully alter the said terms of employment without consultation with the affected academic staff.

48. I do not think so. Section 10(5) of the Employment Act outlaws alteration of the terms of employment, without consultation with the affected employee. In ***James Ang'awa Atanda & 10 others v judicial Service Commission [2017] eKLR*** my brother **Radido J**, with whom I fully agree, held that unilateral variation of terms of employment is an unfair labour practice within the meaning of Article 41(1) of the Constitution of Kenya, 2010.

49. But the Respondent maintains that the Petitioner was in fact consulted, although its views were not taken. In pursuing this line, the Respondent's Counsel relied on the decision in ***Universities Academic Staff Union (UASU) v Salaries and Remuneration Commission & another [2019] eKLR*** where my sister, **Onyango J** held that consultation does not mean adoption of the proposals or demands made by the people consulted. The Respondent however conveniently omitted the follow up sentence by my sister Judge where she stated:

“It [consultation] requires that the input of the people consulted is taken into account before the final decision is reached.”

50. Meaningful consultation must therefore involve a demonstrable consideration of the views and opinions gathered at the consultation. This is in line with the decision in ***Amos Kiumo & 19 others v Cabinet Secretary, Ministry of Interior & Coordination of National Government & 8 others [2014] eKLR*** where it was held that although views expressed by stakeholders are not binding, public involvement cannot be

meaningful if there is no willingness to consider those views.

51. From the evidence on record, the Respondent ignored the written views of the Petitioner at every turn and went ahead to implement the new Academic Policy, whose effect was to alter the terms of employment of the Petitioner's members, to their detriment and without consultation.

52. The Court was invited to make a finding on whether the Petitioner had established a *prima facie* case to warrant grant of the conservatory orders sought. In *Kevin K. Mwiti & others v Kenya School of Law & others [2015] eKLR Odunga J* stated the following:

“A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues.....It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition.”

53. I have already reached a finding that the impugned Academic Policy was brought on board without consultation of the Petitioner. I have further found that implementation of the said policy amounts to unilateral and detrimental alteration of the terms of employment of the Petitioner's members. I must therefore find that the Petitioner has established a *prima facie* case.

54. The Court is also persuaded that if the orders sought are not granted, the Petitioner's members will suffer irreparable harm. In making this particular finding, the Court takes judicial notice that the Petitioner's members are employees who plan their economic and social lives based on their regular income. This would include part time payments on account of the 4th unit and to take away this income without consultation has potential to occasion financial ruin on the Petitioner's members.

55. Overall, I find and hold that the Petitioner has made out a case meriting intervention by the Court at this interlocutory stage.

56. Consequently, the Respondent's new Academic Policy requiring the Petitioner's members to teach 4 units instead of 3 units per semester is suspended pending further orders of the Court.

57. The Respondent will meet the costs of this application.

58. These are the orders of the Court.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF OCTOBER 2019

LINNET NDOLO

JUDGE

Appearance:

Mr. Makasembo for the Petitioner/Applicant

Mr. Oluga for the Respondent