



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 43 OF 2019

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 41, 47
AND 232 OF THE CONSTITUTION OF KENYA, 2010**

UNIVERSITIES ACADEMIC STAFF UNION.....PETITIONER

VERSUS

MACHAKOS UNIVERSITY.....1st RESPONDENT

COMMISSION FOR UNIVERSITY EDUCATION.....2nd RESPONDENT

JUDGMENT

1. The Commission for University Education (the Commission) is established under section 4 of the Universities Act, No. 42 of 2012 and among its functions under section 5(c) is to promote, set standards and assure relevance in the quality of university education.
2. Under section 70 of the Universities Act, the Cabinet Secretary responsible for university education is authorised to prescribe *Regulations* for the better carrying of the objectives and purposes of the Act.
3. Consequently, the Cabinet Secretary enacted the *Universities Regulations, 2014* vide Legal Notice No. 76 of 2014.
4. Regulation 87(1) of the *Universities Regulations 2014* empower the Commission to prepare and publish a set of standards to be referred to as *Universities Standards and Guidelines* to govern the performance, operations and general conduct of all universities authorised to operate under the Regulations.
5. The Standards and Guidelines are envisaged to outline minimum standards, and the Commission is granted the authority to amend the Standards and Guidelines.
6. A Schedule to the *Universities Act, 2012* set out the initial Standards and Guidelines.
7. Under the initial Standards and Guidelines, each University was free to set its own grading, appointment and promotion criteria for academic staff.
8. The Commission felt that there was a need for uniform criteria to guide the grading, appointment and promotion of academic staff in all Universities in Kenya.
9. On 16 June 2014, the Commission's Chief Executive Officer/Commission Secretary invited all Vice-Chancellors of Universities and Principals of University Colleges to attend a stakeholder meeting on *Harmonisation of Appointment and Promotion Criteria for Academic Staff members*.
10. The stakeholders met at Kenyatta International Convention Centre on 11 July 2014 and agreed to the formation of a Select Committee to scrutinise the proposals raised during the meeting.
11. The Select Committee presented its report to the stakeholders on 27 October 2014, and the meeting of stakeholders adopted the *Report on Harmonised Criteria for Appointment and Promotion of Academic Staff in Universities in Kenya* (dated April 2015), which report was

transmitted to the Cabinet Secretary, Ministry of Education on 7 May 2015.

12. The Cabinet Secretary, Ministry of Education appended his signature to the Report on 7 July 2015 and on 14 October 2015, the Commission wrote to all Universities notifying them that the *Harmonised Criteria for Appointment and Promotion of University Academic Staff* would become operational with effect from 14 November 2014 (backdated).

13. On 22 August 2017, the Universities Academic Staff Union, the Petitioner (UASU) raised its misgivings with the *Harmonised Criteria for Appointment and Promotion of University Academic Staff* and requested the Commission to call a stakeholder forum to discuss its concerns.

14. In its response dated 6 September 2017, the Commission informed UASU that the *Harmonised Criteria for Appointment and Promotion of University Academic Staff* had been subjected to stakeholder engagement and further that the *Universities Regulations 2014* were undergoing amendments with a view to the amendment and harmonisation of the Standards and Guidelines.

15. The Commission assured UASU that all stakeholders would be notified to participate in the deliberations.

16. On 29 January 2018, UASU wrote again to the Commission expressing regret that the revision of the *Universities Standards and Guidelines 2014* and *Harmonised Criteria for Appointment and Promotion of University Academic Staff* were undergoing revision without it (UASU) being afforded an opportunity to participate as a stakeholder.

17. The Commission responded on 14 February 2018 indicating that all stakeholders would be involved at an opportune time.

18. On 6 February 2019, the Registrar, Machakos University (the University) issued a *Memo* to all Assistant Lecturers and Tutorial Fellows informing them that pursuant to new Guidelines from the Commission, the positions of Assistant Lecturers and Tutorial Fellows had been scrapped, and that they should update the Registrar on progress made towards attaining Ph.Ds in terms of the *Harmonised Criteria for Appointment and Promotion of University Academic Staff*.

19. The *Memo* reminded the Assistant Lecturers that they were expected to have attained their Ph.Ds by October 2019.

20. Alarmed, on 13 February 2019 UASU moved the Court contending that the Respondents did not involve it nor seek its input in the preparation of the *Harmonised Criteria for Appointment and Promotion of University Academic Staff* despite it being a necessary stakeholder and despite the existence of a *recognition agreement* and *collective bargaining agreement* with the Inter Public Universities Councils Consultative Forum (a federation of employers).

21. At the same time, UASU filed a motion under a certificate of urgency seeking an interim interdict against the implementation of the *Harmonised Criteria for Appointment and Promotion of University Academic Staff*.

22. The University filed a replying affidavit and Response to the Petition on 20 February 2019.

23. The Commission filed its replying affidavit on 12 March 2019 and a *Response to the Petition* and further replying affidavit to UASU's further affidavit on 27 March 2019.

24. On 14 March 2019, the *Kenya Private Universities Workers Union* filed an application to be joined to the proceedings as an Interested Party, but it did not attend court to prosecute the application.

25. The Commission filed submissions in respect to the motion on 8 July 2019.

26. On 16 September 2019, the Court directed that the application and the Petition would be urged together in order to save on judicial time. The parties were directed to exchange submissions.

27. UASU filed its submissions on 18 September 2019, the University filed its submissions on 8 October 2019 and the Commission filed its submissions and List of Authorities on 9 October 2019.

UASU's submissions

28. UASU asserted that it is a trade union representing academic staff and that it had a *recognition agreement*, and a *collective bargaining agreement* with the *Inter Public Universities Councils Consultative Forum*, a federation of employers of which the University is a member.

29. UASU, therefore, contended that it was a relevant stakeholder whenever the terms and conditions of service of its members were up for discussion and/or review, and therefore its exclusion from the consultations leading to the *Harmonised Criteria for Appointment and Promotion of University Academic Staff* was inconsistent with the provisions of Articles 41(5), 232(1)(d),(e) and (f) of the Constitution, the Labour Relations Act, Employment Act and international labour norms.

30. According to UASU, the *Harmonised Criteria for Appointment and Promotion of University Academic Staff* had adversely affected its members as some of the standards/guidelines set out included a requirement that all Assistant Lecturers obtain Ph.Ds by October 2019, a timeline which was impossible and that promotions would be based on a weighted points system.

31. UASU also urged that the *Harmonised Criteria for Appointment and Promotion of University Academic Staff* had varied the *terms and*

conditions of service agreed in previous *collective bargaining agreement*, by abolishing existing grading systems and also undermining the right to collective bargaining.

32. In the view of UASU, the process leading to the adoption of the *Harmonised Criteria for Appointment and Promotion of University Academic Staff* was not consultative as contemplated by the value of participation enshrined in Article 10 of the Constitution.

33. In the view of UASU, the process leading to the adoption of the *Harmonised Criteria for Appointment and Promotion of University Academic Staff* violated the public service values set out in Article 232 which require the involvement of people in policymaking.

34. Further, UASU contended that the Vice-Chancellors and Principals could not validly represent the interests of its members/employees.

35. UASU identified 3 broad Issues as arising for the Court's determination, to wit,

- (i) whether the Petition met the threshold for a constitutional Petition
- (ii) whether the Respondents had breached Articles 10, 41, 47 and 132 of the Constitution
- (iii) Appropriate relief.

The University's take

36. The University denied the contention by UASU that the *Harmonised Criteria and Guidelines for the Appointment and Promotion of Academic Staff in Universities* sought to reform the terms and conditions of service of lecturers (appointment, remuneration and or grading of lecturers) in public universities.

37. But in the same breathe, the University contended that members of UASU did not meet the criteria set by the Commission for appointment and promotion

38. According to the University, UASU was involved in the process leading to the adoption of the *Harmonised Criteria and Guidelines for the Appointment and Promotion of Academic Staff in Universities*.

39. The University took the view in the submissions that UASU had not demonstrated that it had violated the provisions of Articles 10, 41, 47 and 232 of the Constitution and therefore was not entitled to any of the orders sought.

40. In its submissions, the University identified some 2 Issues arising for determination being

- (i) Whether the Petitioner's rights and freedom were violated
- (ii) Appropriate relief.

Commission's assertions and contentions

41. The Commission asserted that the process leading to the adoption of the *Harmonised Criteria and Guidelines for the Appointment and Promotion of Academic Staff in Universities* was in full compliance with the legal framework in place, and was only after extensive consultations with stakeholders.

42. Countering the primary complaint by UASU that it was a key stakeholder but was not involved in the process, the Commission maintained that consultations were held from and at the departmental units, by Dean of Students (which are staffed by UASU members), up to the Senate of all Universities.

43. To convince the Court that the process met the legal threshold for public participation, the Commission drew the attention of the Court to a passage in *R v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 Ors ex parte Council of Governors & Ar* (2017) eKLR it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the lawmaker and taken in formulating the final regulations. Accordingly, the law is that the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.

44. The Commission identified only 1 question as arising for the Courts determination and it was whether the process leading to the making of the *Harmonised Criteria and Guidelines for the Appointment and Promotion of Academic Staff in Universities* was vitiated by lack of participation and consultation on the part of the Petitioner as to render the Guidelines unconstitutional or unlawful.

Evaluation

45. The Court agrees that there is only one principal Issue in dispute as set out by the Commission but will also address certain peripheral legal questions.

Constitutional threshold

46. The Commission and University contended the Petition did not meet the requisite threshold as set out in the case of *Anarita Karimi Njeru v R* (1979) eKLR.

47. The Court is of the view that the alleged violations of constitutional norms and how the norms were violated were outlined with sufficient clarity in the Petition.

Stakeholder participation *Labour Relations Act*

48. Prior to the adoption of the *Harmonised Criteria and Guidelines for Appointment and Promotion of Academic Staff in Universities in Kenya*, Universities in Kenya had entered into contracts of employment with UASU members.

49. The Court has examined the *Harmonised Criteria and Guidelines for Appointment and Promotion of Academic Staff in Universities in Kenya*.

50. The *Harmonised Criteria and Guidelines for Appointment and Promotion of Academic Staff in Universities in Kenya* purported to create new job designations (descriptions).

51. The Criteria and Guidelines not only designate the grading nomenclature for lecturers but also sets out the minimum criteria academic staff (person) need to satisfy to be appointed or promoted.

52. It cannot be gainsaid that these Criteria and Guidelines fall squarely within *terms and conditions of service* and which *terms and conditions of service* form the embodiment of a *collective agreement* and an *employment matter* as defined in section 2 of the Labour Relations Act as read with section 57 of the Act.

53. Section 2 of the Labour Relations Act defines a collective agreement as a written agreement concerning any terms and conditions of employment made between a trade union and an employer, group of employers or organisation of employers.

54. The University is a member of a federation of employers which has a *recognition agreement* with UASU predating 2014.

55. On that ground alone, the Respondents should have involved UASU directly as a legally registered association of lecturers for the content of the *Harmonised Criteria and Guidelines for Appointment and Promotion of Academic Staff in Universities in Kenya* has set out matters which directly impact *terms and conditions of service* of academic staff as contemplated by the Labour Relations Act.

Employment Act, 2007

56. Further, section 10(5) of the Employment Act, 2007 makes it a requirement that the employer consults with the employee where changes are to be made to certain employment particulars. Section 13 of the Act is also to similar effect.

57. The question, therefore, arises whether the Respondents consulted or involved UASU or the employees within the prescriptions of the Employment Act, 2007.

58. The Commission sent out invitation letters to Vice-Chancellors of Universities and Principals of University Colleges.

59. The Commission did not deny that it did not invite UASU to (any) consultation(s). Its contention was that by the nature of a university set-up, the employees were involved in their departments.

60. However, none of the Respondents produced any evidence that lecturers discussed or were involved in the process leading to the adoption of the *Harmonised Criteria and Guidelines for Appointment and Promotion of Academic Staff in Universities in Kenya* in/or through their departments. No minutes or notes of such consultations or meetings were placed before the Court.

Constitutional norms

61. Consultations within the employment arena and where there is organised labour is not just a statutory imperative but part of the Constitutional values and norms in terms of Articles 10(2)(a) & (c) and 232(1) (d) & (f) of the Constitution.

62. The importance of public participation was underscored very recently by the Court of Appeal in *Law Society of Kenya v Attorney General & 2 others* (2019) eKLR when it observed while overturning a High Court decision that

It was an error for the learned judge to require the appellant to prove the negative, for once it states there was no public participation, the burden shifted to the respondents to show that there was. Much weight has been placed on public participation because it is the only way to ensure that the Legislature will make laws that are beneficial to the *mwananchi*, not those that adversely affect them.

63. The Commission and the University did not discharge the burden of demonstrating that it consulted with UASU, a representative of lecturers in Universities.

64. Further, by not involving UASU, the Respondents were assaulting the rights of every worker to fair labour practices and the rights of UASU to organise and engage in collective bargaining.

65. The Court is therefore of the view and finds that UASU as a primary stakeholder was not afforded reasonable opportunity to participate in the process within the understanding of the legal principle set out in *R v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 Ors ex parte Council of Governors & Ar* (2017) eKLR.

Statutory Instruments Act

66. Although the parties did not address the Court as to whether the *Statutory Instruments Act* was applicable, under the Act, a regulatory making authority is under an obligation to consult with persons likely to be affected by the statutory instrument.

67. It is beyond debate that the *Harmonised Criteria and Guidelines for Appointment and Promotion of Academic Staff in Universities in Kenya* affected lecturers, and that UASU is a duly registered organisation representing the lecturers in Universities in Kenya.

68. The contention also arose whether Vice-Chancellors and Principals could represent employees where *terms and conditions of service* are being discussed.

69. In the humble opinion of this Court, Vice-Chancellors and Principals of University Colleges, within a university context are the very epitome of the employer. Their interests cannot be those of the employees, or a trade union representing employees.

Conclusion and Orders

70. UASU sought 3 substantive orders

(a) A declaration that the 2nd Respondent's Report on Harmonised Criteria and Guidelines for Appointment and Promotion of Academic Staff in Universities in Kenya dated 27th October 2014 as unconstitutional, null and void in relation to Articles 10, 41, 47 and 232 of the Constitution, the Universities Act No. 42 of 2012 and the Employment Act, 2007.

(b) A declaration that the Respondents have infringed on the Petitioner's Constitutional rights under Articles 10, 41, 47 and 232 of the Constitution, 2010.

(c) A permanent injunction be issued against the Respondents whether by themselves, their servants and/or agents or whomsoever is acting on their behalf from implementing the *Harmonised Criteria and Guidelines for Appointment and Promotion of Academic Staff in Universities in Kenya dated 27th October 2014 in all public universities in Kenya without the inclusion of the Petitioners input.*

71. UASU has succeeded on account that it was not involved in the process leading to the adoption of the *Harmonised Criteria and Guidelines for Appointment and Promotion of Academic Staff in Universities in Kenya*, and not because the Criteria and Guidelines are/were inherently unconstitutional.

72. In the view of the Court, the most efficacious order then would be, and the Court hereby orders that

(a) A declaration be and is hereby issued that the *Harmonised Criteria and Guidelines for Appointment and Promotion of Academic Staff in Universities in Kenya dated 27 October 2014* are invalid, null and void for having been made in breach of Articles 10(2)(a), (c), 41(1),(2)(c), (4)(b) & 5 and 232(1)(d),(f) and sections 10(5) and 13 of the Employment Act, 2007.

73. Each party to bear own costs.

Delivered, dated and signed in Nairobi on this 6th day of December 2019.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Koceyo instructed by Koceyo & Co. Advocates

For 1st Respondent Ms. Maina instructed by Ann M. Kiusya & Co. Advocates

For 2nd Respondent Mr. Maina instructed by Karanja-Njenga Advocates

