



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 397 of 2015**

**(As consolidated with Kisumu Cause Nos. 344/16, 106/15 and 307/15)**

***(Before Hon. Justice Mathews N. Nduma)***

**1. KENYA UNIVERSITY STAFF UNION .....1<sup>ST</sup> CLAIMANT**

**2. ALEXANDER S. M. MATE .....2<sup>ND</sup> CLAIMANT**

**VERSUS**

**MASINDE MULIRO UNIVERSITY OF SCIENCE & TECHNOLOGY.....RESPONDENT**

**J U D G M E N T**

1. Kenya University Staff Union filed collective cause no. 397 of 2015 against Masinde Muliro University of Science and Technology on 9<sup>th</sup> November, 2015.

2. The Claimant Union prays for:-

- a) An order of injunction restraining the Respondent from retiring claimants, members at age 60 years.
- b) An order of prohibition prohibiting the Respondent from retiring the Claimant's members until they attain the age of 65 years.
- c) A declaration that retiring the Claimant's members at 60 years of age is unlawful and an order compelling the Respondent to execute the 2012/2013 CBA with the retirement age at 65 years so retained.
- d) Costs of the suit.

**Cause of Action**

3. The Claimant states that it is a non-teaching staff union at the Respondent University and represents the interest of all non-teaching staff of the defendant.

4. That the terms of service of the member employees are contained in the Collective Bargaining Agreement (CBA) between the Claimant and the Respondent.

5. That under paragraph 28.0(i), the CBA sets the compulsory retirement age of non-teaching staff at 65 years.

6. That the Respondent has breached the terms of the CBA by writing letters notifying the following persons that they would retire upon attaining the age of 60 years namely:-

(i) Richard W. Lusweti – Letter dated 22/12/2014

(ii) Leah A. Mbira – Letter dated 22/12/2014

(iii) Richard M. Busum – Letter dated 22/12/2014

(iv) Joash W. S. Mabonga – Letter dated 22/12/2014

(v) Ernest Tuiga – Letter dated 5/1/2015

(vi) Angellah Kasyami – Letter dated 5/1/2015

(vii) Patrick W. Masinde – Letter dated 7/7/2015

(viii) Alexander Mate – Letter dated 7/7/2015

(ix) Augustine B. Matala – Letter dated 7/7/2015 and

(x) Richard S. Wepukulu – Letter dated 7/7/2015.

7. The Claimant avers more staff would soon be affected by the impugned action by the Respondent.

8. That there is a dispute between the parties regarding the correct age of retirement of non-teaching staff. The Claimant contends that the correct compulsory age of retirement is 65 years as per the Collective Bargaining Agreement and in terms of Section 26(2) of the Employment Act, 2007 which reads –

*“where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any Collective Agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the industrial court are more favorable to an employee than the terms provided in this part and part iv, then such favorable terms and conditions of service shall apply.”*

9. The Claimant further relies on the doctrine of legitimate expectation, that the non-teaching staff, lawfully expect that they would be retired upon attaining the age of 65 years in terms of the Collective Bargaining Agreement, and any violation of this contractual obligation is unlawful and unfair.

10. The Claimants pray that the suit be allowed.

### **Response**

11. The Respondent filed a memorandum of response on 21<sup>st</sup> November, 2016 and the nub of the defence is that, the Respondent is a public university whose budget is provided for by Treasury and the expenditure must be approved by Government. That the staff of the University are Public Officers and subject to official Government Policy as contained in circulars made by the Government from time to time.

12. That a circular ref. OP/CAB.2/7A dated 14<sup>th</sup> February, 2014, was circulated to all public institutions including the Respondent giving notice that the retirement age of all public officers was 60 years in terms of an earlier circular dated 20<sup>th</sup> March, 2009. That the parties have a Collective Agreement for the period 1<sup>st</sup> July, 2010 to 30<sup>th</sup> June 2012 which provides for a compulsory retirement age at 65 years.

13. That the grievants were being retired by the Respondent relying upon of the Government Circular dated 14<sup>th</sup> February, 2014 since the CBA had expired and the Government circular had the effect of altering the term of employment in the Collective Bargaining Agreement.

14. The Respondent avers that its action is lawful and proper and the suit be dismissed with costs.

### **Other suits**

15. The retired officers named in causes no. 106/2015, 307/2015 and 344 of 2016, proceeded to file individual suits without seeking to be removed from this cause instead of seeking amendments to take care of their specific claims for compensation which by and large distinguish the individual suits from the present one.

16. The issue for determination is the same otherwise in all the suits and the determination in this matter will resolve the rest of the suits and would apply Mutatis Mutandis to each one of them on the issue of liability.

### **Determination**

17. The issues for determination are –

(i) Whether it was lawful to retire the non-teaching staff of the Respondent in terms of a Government Circular dated 4<sup>th</sup> February, 2014 at 60 years in disregard of clause 28.0 (i) of the Collective Bargaining Agreement between the parties which provided for compulsory retirement age at 65 years.

(ii) What relief is available to the Claimant and all affected non-teaching staff.

## **Issue 1**

18. Section 59 of the Labour Relations Act, titled 'Effect of Collective Agreements' reads –

*“(1) A collective agreement binds for the period of agreement –*

*(a) Parties to the agreement*

*(b) All unionisable employees employed by the employer, group of employers or members of the employers organization party to the agreement.*

*(3) The terms of the Collective Agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.”*

19. Clause 37.0 of the CBA between the parties titled “Duration and Effective date” reads –

*“The duration of this agreement shall be two (2) years. The effective date of this agreement shall be 1<sup>st</sup> July, 2010 up to 30<sup>th</sup> June, 2012. Thereafter, the agreement shall remain in force until revised jointly by both parties. The Deputy Vice Chancellor (Administration & Finance) shall communicate such amendments to members of staff through circulars.”*

20. It is without a doubt that the Collective Bargaining Agreement was in place as at the time the circular was received and implemented by the Respondent against the grievants.

21. Section 26 of the Employment Act, elevates any contractual term and condition of employment above the statutory conditions.

22. A Government circular is inferior to a statute and definitely more inferior to a term and condition of service contained in a Collective Bargaining Agreement and a contract of employment. A term in the CBA becomes automatically, a term incorporated in each individual employee's contract of service.

23. Therefore, clause 28.0 (i) of the CBA on retirement which provides compulsory retirement to be 65 years precedes the circular of Government until the CBA is renegotiated and the terms in the circular adopted therein, the retirement age of non-teaching staff of the Respondent remains 65 years and the court so finds.

## **Issue ii**

24. What remedies are available to the grievants in cause number 106/15, 307/2015 and 344 of 2015?

25. The Claimant union sought an injunction to restrain the Respondent from retiring non-teaching staff at age 60 and that the employer be prohibited from doing so. The Claimant also sought a declaration that provided, the CBA is in place and has not been amended, it is unlawful and violation of contractual obligation to retire the grievants and any other non-teaching staff at age 60.

26. The court grants all the three prayers.

27. The Respondent did not seek any damages in this suit.

28. As stated earlier instead of amending the claim, the individual grievants filed separate individual claims in which they seek special and general damages for the early retirement and violation of the contract of employment. The causes were consolidated with cause No. 397 of 2015. The court however notes that it was erroneous to file separate suits on a matter which was already before court and had incorporated all the grievants therein. All that was needed was for the grievants to have the Claimant Union incorporate their special and general damages claims in the existing suit to avoid duplicity and abuse of the court process.

29. The said cases are Kisumu E & LRC No. 106 of 2015, Kisumu E & LRC No. 307 of 2015 and Kisumu E & LRC No. 344 of 2016.

30. The court will proceed to consider the individual claim based on the finding on liability in cause no. 397 of 2015 as follows:-

### **Cause No. 106/2015**

31. The Claimant Richard Mark Busuru was employed as a Senior Architect Grade XIV in the Project Development Unit on 13<sup>th</sup> October, 2008. He worked continuously until he was retired by the Respondent on 22<sup>nd</sup> December, 2014. At that time the Claimant earned a gross monthly salary of Kshs.227,193.

32. The Claimant was offered further employment on short contract on 16<sup>th</sup> February, 2015. The Claimant made a claim for compensation for unlawful termination on 21<sup>st</sup> March, 2015.

33. The claimant served the Respondent in permanent and pensionable status for 38 years. He claims to have been deducted NSSF of Kshs.8,381.22 monthly and NHIF of Kshs.320 but was not remitted.

34. The Claimant was retired at age 62 instead of age 65 and claims special damages of Kshs.9,542,106 being the actual anticipated loss covering the unserved term of 3 ½ years to retirement.

35. Kshs.90,877.20 being unpaid salary for the period 1<sup>st</sup> January, 2015 to 12<sup>th</sup> January, 2015 when the Claimant was on leave. Kshs.627,052.70 being compensation for leave days earned but not taken, Kshs.18,400 being unpaid gratuity for the period before the start of permanent and pensionable employment and in the alternative. 681,579 being 3 months salary in lieu of notice, Kshs.318,486.30 being unremitted NSSF and Kshs.12,160 being unremitted NHIF.

### **Defence**

36. Respondent filed a memorandum of response to this claim on 1<sup>st</sup> July, 2015 in which it admits the particulars of employment and denies allegations of breach of contract and the claims made.

37. It is not in dispute that the Claimant was retired at age 62 instead of 65. It is not in dispute the Claimant was subsequently offered employment on short term contract but he declined.

38. The Respondent submits that no salary is payable for days not served. That at most, the Claimant would be entitled to claim maximum compensation of 12 months salary for unlawful termination of employment. The claim for leave days not taken during the unserved period is also denied. Respondent admits the claimant had accrued 50 leave days at the time of his retirement and is entitled to Kshs.300,824.90 in respect thereof.

39. The Respondent denies the claim for gratuity for the period before the start of permanent and pensionable employment. Respondent avers that the Claimant was paid gratuity for the period between 13<sup>th</sup> October, 2008 to 12<sup>th</sup> October, 2011 amounting to Kshs.749,926. The Respondent denies having deducted and not remitted NSSF and NHIF dues and puts the Claimant to strict proof thereof.

40. The Claimant did not testify in this matter. The onus of proving special and general damages on a balance of probabilities is on the Claimant.

41. The Claimant did not adduce any evidence to discharge this onus. However, the Respondent has admitted that it owes the Claimant Kshs.300,824.90 in respect of 50 days accrued leave and the court awards the Claimant accordingly.

### **Compensation**

42. The court has also found that the Claimant was unlawfully retired at age 62 instead of age 65. He was left with 3 ½ years to serve. The forced retirement was not for a valid reason and did not give the claimant opportunity to state why he ought not to be retired prematurely, in violation of section 41, 43 & 45 of the Employment Act. The Claimant is entitled to compensation in terms of section 49(1)(c) as read with section 49(4) of the Act.

43. The Claimant was denied 3 ½ years of legitimate service. He suffered immense loss of income unlawfully as a result. The claimant did not contribute to this premature termination. The claimant was not offered any compensation for the lost years. The Claimant did not mitigate his loss by refusing further employment on a six months contract. The court awards the Claimant ten (10) months' salary in compensation for the unlawful and unfair termination in the sum of Kshs.(227,193 x 10) 2,271,930.

44. In the final analysis judgment is entered in favour of Richard Mark Busuru as follows –

(a) Kshs.300,824.90 in lieu of leave

(b) Kshs.2,271,930 being 10 months compensation

Total award Kshs.2,572,754.90.

(c) Interest is payable at court rates from date of judgment till payment in full.

### **Cause No. 307/2015**

45. Richard Lusweti Wepukhula was employed by the Respondent on 1<sup>st</sup> March, 2010 as a center co-ordinator/administrative officer. The Claimant was retired at age 60 on 30<sup>th</sup> June, 2015.

46. The court has found that the retirement was in violation of clause 28.0(1) of the Collective Bargaining Agreement. The Claimant prays that the Respondent be compelled to retain him up to the retirement age of 65 years and in the alternative pay compensation for the unlawful and unfair termination of employment.

47. The Claimant had served for about five (5) years and had expectation to continue serving the Respondent until the date of retirement at 65 years. The employment was unlawful and unfairly terminated. The Claimant did not contribute to this loss of job.

48. The Claimant suffered loss and damage and is entitled to compensation in terms of section 49(1)(c) as read with sub-section 49(4). The Claimant was not paid compensation for the sudden loss of employment and loss of legitimate expectations. The court awards the Claimant

the equivalent of five (5) months' salary as compensation in the sum of Kshs.(75,837 x 5) Kshs.379,185. The amount be paid with interest at court rates from date of judgment till payment in full and costs.

**Cause No. 344 of 2016**

49. The Claimant Alexander S. M. Mate was employed by the Respondent in October 2003 as a Senior Clinical Officer Grade (XII) by the then Western University College of Science & Technology which is now the Respondent. The Claimant was retired on 7<sup>th</sup> July, 2015 at age 60. The Claimants proper retirement age in terms of the findings of the court in this matter is 65 years. The early retirement was unlawful and in violation of sections 41, 43, and 45 of the Employment Act, 2007 in that there was no valid reason to forcefully retire the claimant prematurely and he was not given opportunity to explain why he ought not to be retired early despite clear Collective Bargaining Agreement provisions that amended his retirement age to 65 years. The Claimant prays for a declaration that the retirement was unlawful and the Respondent be unjoined and prohibited from terminating the employment of the Claimant.

50. The Claimant did not seek an order for compensation. The Claimant has not yet attained the age of 65 years and the court directs the Respondent to re-engage the Claimant with effect from the date of this judgment until he attains the retirement age of 65 years.

51. The Claimant is unable to determine whether or not the other grievants are entitled to specific reliefs in the absence of pleadings to that effect.

52. In the final analysis, the court enters judgment in favour of the Claimant and the named grievants as follows:-

- a. An order of injunction is issued restraining the Respondent from retiring Claimants, members at age 60 years, unless the CBA is varied accordingly.
- b. An order of prohibition is granted prohibiting the Respondent from retiring the Claimants members until they attain the age of 65 years.
- c. The court declares, that retiring the Claimant's members at 60 years of age is unlawful.
- d. Judgment is entered in favour of Richard Mark Busuru in the sum of Kshs.2,572,754.90.
- e. Judgment is entered in favour of Richard Lusweti Waphukula in the sum of Kshs.379,185.
- f. 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.
- g. The awards are payable with interest at court rates from date of judgment till payment in full.
- h. Costs to abide the outcome.

**Judgment Dated, Signed and delivered this 12<sup>th</sup> day of April ,2018**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Odeny for Claimant

Mr. Ouma for Respondents

Chrispo – Court Clerk