REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

PETITION NO. 9 OF 2017

BETWEEN

KENYA UNION OF DOMESTIC, HOTELS, EDUCATION

INSTITUTIONS AND HOSPITALWORKERS....................PETITIONER

VERSUS

TECHNICAL UNIVERSITY OF MOMBASA............1ST RESPONDENT

AND

THE UNIVERSITY COUNCIL OF TECHNICAL

UNIVERSITY OF MOMBASA...................................2ND RESPONDENT

AND

THE VICE CHANCELLOR TECHNICAL

UNIVERSITY OF MOMBASA..................................3RD RESPONDENT

JUDGMENT

Introduction

1. The Petitioner brought the petition herein dated 15.9.2017 seeking the following orders:

a. A declaration that the stoppage, withholding and refusal to pay the petitioner’s members their rightful salaries and allowances for 12 years and failure to employ the petitioner’s members is unconstitutional and in violation of the petitioner’s members is rights under Article 10, 22, 28, 41(1), (2) and (5) of the constitution of Kenya, sections 37 as read with section 35(1) (c) of the employment Act, 2007 and Section 59 of the Labour Relations Act of 2007.

b. A mandatory injunction to compel the Respondent to employ the petitioner’s members and pay them their rightful salaries and allowances including increments and leave allowance accumulated from 1st July, 2013 to date.

c. Costs and interest be provided for.

d. Any other relief which this Honourable Court deems fit and just to grant.

2. The Respondents opposed the petition through the Replying affidavit sworn by Serah E. Okumu on 26.7.2017 and a further affidavit sown on 15.8.2017.

3. The facts of the case herein is that the petitioner's members (grievants) have been employed by the respondents as casual or contract workers continuously for many years which according to the petitioner is contrary to the Employment Act and the Collective Bargaining Agreement (CBA) between the petitioner and the respondents through the inter-Public Universities Council Consultative Forum (IPUCCF).

The respondents have however contended that both the law and the CBA provides for employment of workers on contract basis and therefore deny the alleged breach of the CBA, law or constitution.

4. The petition was disposed of by written submissions and the main issue for determination herein is whether the respondents have violated the constitutional rights of the grievants.

Petitioner's Case

5. The petitioner alleges that the grievants have worked for the respondent continuously for about 12 years on casual basis until January 2017 when they were given one year contract each. She further states that the grievants are employed under a collective Bargaining Agreement (CBA) negotiated between her and the IPUCCF. She contended that the respondents have breached clause 10 of the CBA which provides that all casual and temporary employees shall be confirmed to permanent status after serving for a period of one year effective 1.1.2017, in line with section 37 of the Employment Act.

6. In addition, the petitioner alleges that the respondents are in breach of clause 4.1.2(a) & (b) of the CBA between herself and the respondents, which require that all temporary and contract appointments are only tenable for such periods and on such terms as specified in the letters of appointment.

7. It is the petitioner's view that, because the respondents have breached the CBA, constitution and the law, the Court she grant the orders sought and convert the grievants casual or temporary employment to permanent and pensionable service in consideration of their long service. She relied on 3 decisions of this Court to support her case.

Respondents' Case

8. The respondents admit that the grievants have worked for them on casual basis until 12.1.2017 when they were issued with one year written contract upto 11.1.2018. They have however denied that they have breached the constitutional rights of the grievants. They contended that section 9 of the Employment Act, allows them to employ workers on contract basis. They urged the Court to find that the contracts were signed voluntarily and the parties there to are bound. In addition, they contend that clause 4.1 of the CBA recongnizes that employment can either be permanent and pensionable, or temporary or contract.

9. As regard the alleged failure to convert the grievants to permanent and pensionable staff, the respondents have denied that the grievants have worked for them for 12 years. In addition, they have submitted clause 4.2.2 of the CBA did not provide for an automatic conversion of the grievants from their temporary employment to permanent service but it provided that they were eligible for consideration as candidates if vacancies arose. They have further submitted that, clause 10 of the CBA by IPUCCF does not apply to the grievants herein because they are contract employees as opposed to casual and temporary employees.

10. In conclusion, the respondents have denied the alleged refusal to employ the grievants and pay their salary and allowances. According to them, they have issued the grievants contracts and they are being paid salaries and Allowances and as all the reliefs sought should fail. In addition, the respondents have submitted that the petition herein does not raise any constitutional question that qualifies to be determined by way of constitutional petition. In their view, the dispute involved herein is an ordinary employment dispute, which should have been initiated by a normal claim and not a constitutional petition. Finally, the respondent submitted that the petition herein was filed prematurely before the one year contracts lapsed and the respondents decided on the fate of the grievants, which decision is subject to approval by the parent ministry and Salaries and Remuneration Commission (SRC).

Analysis and Determination

11. There is no dispute that the grievants have worked for the respondents for a couple of years starting as causal employees' up to 12.1.2017 when they were engaged under one year contract up to 11.1.2018. There is also no dispute that the parties herein have concluded a CBA which govern the terms and conditions of service for the grievants who are members of the petitioner. The issues for determination are:

> (a)Whether the respondents' have employed the grievants in a manner that violates their constitutional rights as employees;
>
> (b) Whether the reliefs sought should be granted.

Violation Constitutional Rights

12. The petitioner has mainly submitted on how the employer has breached the CBA by continuing to employ the grievants on temporary basis instead of converting them to permanent and pensionable basis the respondents have on the other hand submitted that the CBAs and the law allowed for employment on casual or contract basis and denied that the violated the grievants' rights by the continued temporary engagement.

13. I have carefully considered the CBAs cited by the petitioner. Clause

> 4.1.2 of the CBA between the parties herein provided that:
>
> *"(b) temporary and contract employees who continue in employment for over six(6) continuous months shall be considered for permanent employment subject to availability ofa vacancy."*

14. The foregoing clause clearly confirms that the petitioner and the employer had agreed that the grievants could be employed on temporary basis provided that after serving for 6 months, they shall be eligible for appointment on permanent basis if the vacancies are available. The question arises is whether there were no vacancies to justify contract engagements. In my view, the reason why the grievants have not been appointed on permanent basis is not lack of vacancies. In my view all, the positions being served by the grievants are not temporary. They have served in the said positions for many years. They are crucial jobs without which the University would not operate effectively including accommodation, cleaning, catering, library, finance, mail office, Human Resource to name just a few.

15. Under 4.1.2 of the CBA, all the grievants qualify for appointment on permanent basis. They should therefore not be engaged on temporary basis anymore. They should not even be taken through any competitive recruitment because they have all along been doing the job to the satisfaction of the employer while sewing on casual basis of would be unfair labour practice to terminate them after suing to demand better terms of employment.

16. Section 37 of the Act states that:

> *"(1) Notwithstanding any provision of this Act, where a casual employee:-*
>
> > *(a) Works for a period or a number of continuous working days which amount in the aggregate to equivalent of not less than one month; or*
> >
> > *(b) Performs work which cannot reasonably be expected to be completed within a period, or number of days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1) (c) shall apply to that contract of service.*
>
> *(3) An employee whose contract has been converted in accordance with subsection (1), and who work continuously for two months or more from the date of employment as a casual employee, shall be entitled to such terms and conditions of service as he would have been entitled to under*

this Act had he not initially been employed as casual employee.”

17. It is obvious from the foregoing provision that all the grievants are already entitled to conversion to permanent employees in order to enjoy the full benefits and protection of their employment as provided by the Act and CBA. The continuation of their employment of the grievants on temporary basis amounts to violation of the grievants’ rights to fair labour practices and right to fair terms and conditions of services as enshrined under Article 41 of the constitution. The respondents have contended that the decision to appoint the grievants on permanent terms is subject to interagency collaboration between them and the parent Ministry, National Treasury and SRC. However, no good reason was cited as to why the said collaborations have not been done for such a long time.

18. In view of my finding herein above that all the grievants have qualified for conversion from temporary appointment to permanent employment under section 37 of the Employment Act, I proceed to make declaration that the continued employment of the grievants on temporary basis is unconstitutional and it is a violation to their right to fair labour practices and fair terms and conditions of service as enshrined under Article 41 (1) and (2) (a) of the constitution of Kenya. Consequently, I direct the respondents to stop the said violation by appointing all the grievants on permanent basis effective the date when the fixed term contracts given in 2017 lapses. Any other orders sought and not specifically granted are dismissed.

Each party shall bear her own costs.

Signed and dated and at Nairobi this 11th day of May, 2018.

ONESMUS N. MAKAU

JUDGE

Delivered at Mombasa this 28th day of May, 2018.

LINNET NDOLO

JUDGE