



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**PETITION NO.31 OF 2016**

**IN THE MATTER OF ALLEGED VIOLATIONS OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 28,  
41 43 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ILO CONVENTIONS 100 AND 111**

**BETWEEN**

**JAMES GERISHOM ILATSYA ..... PETITIONER**

**VERSUS**

**MOI UNIVERSITY ..... 1<sup>ST</sup> RESPONDENT**

**UNIVERSITY OF ELDORET ..... 2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. The petitioner is a Lecturer and has lectured at different universities in the Republic of Kenya and the respondents are institutions of higher learning established under an Act of parliament.

2. The petitioner is seeking the following orders;

- a) Underpayment = kshs.6,715,940/=
- b) Medical claims 23/07/2010 Kshs.96,977/=
- c) Gratuity/pension benefits to be quantified
- d) Annual leave days to be quantified
- e) Annual leave allowance to be quantified
- f) compensation for unfair/wrongful termination in September 2013 to be quantified
- g) Notice pay to be quantified
- h) General damages for discrimination

**Petition**

3. The petition is that the petitioner was a Maintenance Engineer with Hayer Bishan Singh, Kisumu attached to become a lecturer and was offered part-time appointment by the 1<sup>st</sup> respondent on 2<sup>nd</sup> February, 1998 at the respondent's main campus in Eldoret. The petitioner lectured in TED 100 MET.211, MET.212. MET.311, MET.462, Introduction to metals technology and Practice I – IV for two lecture hours and 5 workshop practical hours per week.

4. While the petitioner was teaching at the 1<sup>st</sup> respondent university, he got a chance to apply as a regular lecturer when the same was created and advertised internally in 1999.
5. The petitioner was highly recommended for position of regular lecturer by three full time lecturers of the 1<sup>st</sup> respondent. The petitioner was also recommended for appointment as a regular lecturer when the vacancy arose in 2001.
6. The petitioner was assigned lecture units by the 1<sup>st</sup> respondent alongside the regular lecturers. In meetings for the department it was agreed that the petitioner be given allowances instead of external lecturer.
7. While the petitioner was awaiting promises for appointment to full-time lecturer by the 1<sup>st</sup> respondent, he started the same lecture units at the Chepkoilel University College, a constituent of the 1<sup>st</sup> respondent.
8. In January, 2005, the Head of Technology Education department confirmed to the Vice-Chancellor of the 1<sup>st</sup> respondent that the petitioner was entitled to double payment as it was the practice for lecturers who taught the integrated class of government sponsored students and the private sponsored students
9. On 18<sup>th</sup> October, 2005 the head of technology Education department made a spirited follow-up of the due payments for the petitioner to the Dean School of Education. The Dean produced minutes of the Faculty Board of 20<sup>th</sup> May, 2004 that approved double payments to lecturers including the teaching of the two groups of students at the same time.
10. It was also agreed that to avoid discrimination against the external lecturers they would continue to be paid double as the internal lecturers for teaching the private sponsored students programme combined with the government sponsored students.
11. The 1<sup>st</sup> respondent issued the petitioner with a tax certificate for January to December, 2005, 2006 and 2007.
12. On 28<sup>th</sup> August, 2006 the petitioner wrote to the 1<sup>st</sup> respondent Vice Chancellor requesting for the release of kshs.81,000.00 per semester as payment over and above the lecturer entitlements for teaching integrated class of privately sponsored students programme and government sponsored students which had been approved and remained unpaid.
13. On 2<sup>nd</sup> May, 2007 the 1<sup>st</sup> respondent's senior administrative officer wrote to the petitioner making enquiries about the claim for double payment entitlements of Kshs.81,000.00 for 2003 and 2004. In reply, the petitioner on 14<sup>th</sup> September, 2008 asked why his cheques for the payment had been cancelled. The petitioner had also been issued with tax certificates for January to December, 2008, 2009 and 2010.
14. The petitioner had his services with the respondent renewed by letter dated 5<sup>th</sup> March, 2010 in which the rate of pay per hour was revised from Kshs.450.00 per hour to Kshs.1000.00 per hour and accommodation raised from Kshs.10,000.00 to Kshs.15,000.00 and Kshs.1,000.00 per paper for setting examinations. The petitioner was also moved by the 1<sup>st</sup> respondent to teach the same units at the constituent college, Chepkoilel Campus.
15. On 20<sup>th</sup> August, 2010 vide Kenya Gazette Notice No.125 of 2015 Chepkoilel University College was established from the 1<sup>st</sup> respondent Chepkoilel constituent college. From the Order, Chepkoilel University College became autonomous with an academic board, Chancellor, Council and a management board. The university also became the successor of the 1<sup>st</sup> respondent Chepkoilel campus.
16. On 16<sup>th</sup> October, 2011 the Chepkoilel University College formerly absorbed the petitioner as part-time lecturer in the same department of technology education to teach the same unit MET.462 on similar terms as those that existed with the Chepkoilel University campus of Moi University. The same teaching timetable was also adopted to allow the petitioner continue with his course.
17. In February, 2013 the President awarded University Charter to Chepkoilel University College and renamed University of Eldoret, the 2<sup>nd</sup> respondent.
18. The petitioner was absorbed by the 2<sup>nd</sup> respondent as part-time lecturer by letter dated 3<sup>rd</sup> July, 2014 and confirmed his units of teaching. The petitioner was still pursuing his right to appointment as regular lecturer with the 1<sup>st</sup> respondent and despite the transfer to the 2<sup>nd</sup> respondent.
19. On 11<sup>th</sup> February 2013 the petitioner started teaching for the 2<sup>nd</sup> respondent at the Eldoret main campus for the regular students and the privately sponsored students. At the end of the 1<sup>st</sup> semester in May, 2013 the petitioner was asked to teach the PSSP students during the school holidays for April, August, and December, 2013.
20. The petitioner was not given classes for regular students in the 1<sup>st</sup> respondent semester of 2013 being September to December, 2013 and no reasons were given for that despite being slotted in the teaching time-table.

#### **Constitutional violations**

21. It is the petition that the petitioner's rights under articles 23, 27, 28, 30, 31 and 43 of the constitution were violated by the respondents. His rights under the Employment Act, 2007 on protection of wages were violated.

22. Despite the petitioner being qualified and highly recommended for regular employment by the respondents, without being given reasons and after applying for the position and being interviewed he was left in limbo. The petitioner continued to be remunerated on casual terms as he was paid on hourly basis though he devoted the all his energies to teach at the respondents' campuses. As a result of being remunerated on casual terms from 1998 to August, 2010 the petitioner suffered discrimination contrary to article 27 of the constitution, ILO Convention 100 and provisions of section 5 of the Employment Act, 2007 since his contract of service exclude commensurate level remuneration that was enjoyed by full time lecturers and in addition was denied house allowance, medical cover, pension, annual leave, leave allowance, annual increments.

23. As a result of the prolonged placement as a casual lecturer by the respondents the petitioner suffered from being remunerated on inferior terms contrary to article 20 of the constitution, the ILO principles of Convention 11 regarding equal pay for equal work of equal value and provisions of section 50 of the Employment Act, 2008 [2007].

24. The petition is supported by the petitioner's **Affidavit** and **Statement** who avers that while working with Hayer Bishan Singh, Kisumu he was offered part-time appointment by the 1<sup>st</sup> respondent on 2<sup>nd</sup> February, 1998. He was paid at an hourly rate of Kshs.450.00 entitled to daily meals allowance of Kshs.150.00 and accommodation of kshs.820.00. The petition had a provision for travel expenses subject to a maximum of Kshs.10,000.00 per month.

25. The petitioner also avers that on 10<sup>th</sup> December, 1999 the 1<sup>st</sup> respondent invited applications through internal advertisement for full time lecturers in the department of technology education with a minimum of 3 years teaching experience which he applied for upon recommendations in his department.

26. The advertised positions would be remunerated at Kshs.17,220.00 per month increasing annually by kshs.465.00 per month to kshs.21,405.00 per month which would rise in the 3<sup>rd</sup> year by Kshs.555.00 per month being Kshs.23,625.00 per month. In addition the person would be entitled to membership of the Pension Scheme, house allowance, medical scheme and leave benefits.

27. The petitioner applied for the position in terms of the advertisement made.

The 1<sup>st</sup> respondent did not disclose the outcome of the application. He continued teaching alongside other regular lecturers despite recommendation for appointment as a regular lecturer of the 1<sup>st</sup> respondent when the vacancy arose in the year 2001.

28. The petitioner also avers in his affidavit that his terms of service were renewed by the 1<sup>st</sup> respondent vide letter dated 5<sup>th</sup> March, 2010 increasing the rate of pay per hour.

29. When the 2<sup>nd</sup> respondent was constituted as a full university, the petitioner was appointed as part-time lecturer in a letter dated 3<sup>rd</sup> July, 2014. The 1<sup>st</sup> respondent then failed to give the petitioner classes from May, 2013 thus ending his career with them. The 2<sup>nd</sup> respondent also stopped allocation of classes and the petitioner was constructively dismissed without notice and reasons.

30. The failure for appointment as a regular lecturer has denied the petitioner benefits and terms of service similar to other lecturers of the respondents enjoying the same for equal work of equal value and contrary to the constitution, the law and the ILO conventions.

### **1<sup>st</sup> respondent**

31. In response, the 1<sup>st</sup> respondent's case is that the petition is in abuse of court process as the petitioner has failed to attach the specific advertisement notice to show that there was a vacancy at the 1<sup>st</sup> respondent and the petition fails to meet the constitutional threshold for a petition as it does not disclose the specific breaches of the constitution.

32. The petition against the 1<sup>st</sup> respondent is time barred by virtue of section 90 of the Employment.

33. The position that the petitioner was entitled to be employed on permanent and pensionable terms is not justified. The petitioner has not demonstrated that he was qualified for any such position and has not attached any application that show he applied for the alleged position. As a public body the 1<sup>st</sup> respondent must advertise all positions and interview shortlisted persons. The management reserves the right to put in place processes that are effective and competitive and in accordance with the law.

34. The 2<sup>nd</sup> respondent is a legal entity and successor of Chepkoilel University College and liable on its own accord.

35. This court has no jurisdiction.

36. The 1<sup>st</sup> respondent also filed the witness statement of Eric Liyala, the legal officer of the respondent.

### **2<sup>nd</sup> respondent**

37. The 2<sup>nd</sup> respondent in response states that the petition is bad in law and should be dismissed. The petition has failed to meet the constitutional threshold for a petition as no specific constitutional breaches have been disclosed. The claimant had a contractual relationship with the respondent and has no constitutional breach and thus offends the provisions of section 90 of the Employment Act as cause of action arose more than 3 years ago.

38. The 2<sup>nd</sup> respondent was established on 11<sup>th</sup> February, 2013 vide charter of equal date and cannot be held liable over claims before such date. Any such claims should be directed to the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent is subject to the dictates of the Commission for University Education which provides policy guidelines to be followed during appointments and promotions of academic staff the last such policy being published on 27<sup>th</sup> October, 2014.

39. All candidates to be appointed on permanent and pensionable terms must have a PhD in their respective areas and can only be promoted to the next area upon attainment of the relevant qualifications. The petitioner has failed to demonstrate which rights have been violated and thus discloses no reasonable cause of action.

40. The respondent employs part-time lecturers but this does not create a right for employment on permanent basis. The petition should therefore be dismissed with costs.

### Submissions

41. On 18<sup>th</sup> July, 2018 the parties agreed to file written submissions to address the petition. The petitioner and 1<sup>st</sup> respondents filed their respective written submissions. The 2<sup>nd</sup> respondent did not file any written submissions.

42. The petitioner submissions are that he was appointed lecturer by the 1<sup>st</sup> respondent on 2<sup>nd</sup> February, 1998 and posted to Chepkoilel Eldoret Campus on hourly rates and including daily meal allowances, accommodation, travel expenses. He was not entitled to other benefits and rates commensurate to regular lecturers. The petitioner remained in the service of the 1<sup>st</sup> respondent until 11<sup>th</sup> February, 2013 when his services were transitioned to the 2<sup>nd</sup> respondent.

43. While the petitioner was serving as part-time lecturer of the 1<sup>st</sup> respondent he was recommended to the position of regular lecturer when vacancies were advertised for application for full-time lecturers in the department of technology education through an internal memo advertisement and in which department the petitioner had been serving. The advertisement required that applicants should have PhD or a good master's degree in technology education of equivalent and should have teaching experience of not less than 3 years and at least one of which must be in a university level and the petitioner was qualified. Despite the petitioner being highly qualified he was kept in limbo and no feedback has been given.

44. The 2<sup>nd</sup> respondent was granted a charter into a university status and on 6<sup>th</sup> October, 2011 the petitioner was transferred on appointed on part-time on similar terms as those subsisting with the 1<sup>st</sup> respondent. By letter dated 8<sup>th</sup> November, 2012 the terms applicable were set out. By letter dated 3<sup>rd</sup> July, 2013 the petitioner was offered external part-time appointment by the 2<sup>nd</sup> respondent. The petitioner was on the time-table schedule 2013/14 but he was not allocated any classes to teach and no reasons were given for the end of his contract as lecturer.

45. The petitioner submits that with regard to application of section 90 of the Employment Act, the issues herein relates to underpayments of the petitioner by the 1<sup>st</sup> respondent from 1998 to 2010 when his services were transferred to the 2<sup>nd</sup> respondent and such issues arose in 2017 when the petitioner discovered his remuneration was inferior to the remuneration of the regular lecturers in the employment of the respondents. The issues raised in the petition relate to fundamental rights which cannot be defeated by time limitation as held in **peter Kariuki versus Attorney General [2014] eKLR** and referred in the case of **OI Pejeta Ranching Limited versus Daniel Wanjau Mukoro**.

46. The petitioner also submits that in the case of **Mary Kitsao Ngowa & 36 others versus Krystalline Limited [2015] eKLR** the court held that discrimination with regard to equal pay for work of equal value is unlawful.

47. The petition has merit and the petitioner had qualified to be appointed as a full time lecturer and the dues owing for the period in the service of the respondents should be remunerated and paid to him as petitioned.

48. The 1<sup>st</sup> respondent submissions are a contradiction. On the one part they relate to the 2<sup>nd</sup> respondent and on the other the 1<sup>st</sup> respondent. The court shall rely on the pleadings.

### Determination

Whether the petition is time barred;

Whether there is a case of discrimination against the petitioner;

Whether the remedies sought are available.

49. The issue of the petition and claims made being time barred is the main defence and response by the respondents. Where such a matter arise, the court must first address it as to fail to do so and make findings only to have them as time barred would be to ignore a statutory provisions and jurisdiction to address matters outside the law.

50. The petitioner's case is that his constitutional rights have been violated by the respondents and has cited the provisions of articles 27, 28, 41, 43 of the constitution, 2010 and conventions 100 and 111 of the ILO. That his rights to non-discrimination were violated by the respondent when they failed to appoint him as full time lecturer, his right to enjoy similar terms at work were violated when he was paid a part time remuneration instead of similar remuneration like other lecturers on full time having undertaken work of equal value. That this is contrary to his rights to fair labour practices and property.

51. The petition is also premised on facts that the petitioner was appointed by the 1<sup>st</sup> respondent as part-time lecturer in 1998 until 6<sup>th</sup> October, 2011 when he was transferred to the 2<sup>nd</sup> respondent which had been elevated to a full university.

52. By letter dated 3<sup>rd</sup> July, 2013 the petitioner was offered letter of external part-time appointment by the 2<sup>nd</sup> respondent on similar terms as those he held with the 1<sup>st</sup> respondent. The petitioner was to lecturer in various modules at an agreed rate. He was not allocated such classes. Despite back and forth efforts to engage the respondents on appointment as full time basis, the respondents did not oblige.

53. The petition was filed on 23<sup>rd</sup> August, 2016.

54. The petitioner had not been in the service of the respondent since the letter of 2<sup>nd</sup> respondent dated 3<sup>rd</sup> July, 2013 and the letter of transfer from the 1<sup>st</sup> respondent dated 6<sup>th</sup> October, 2011.

55. The petitioner is seeking dues with regard to;

*Underpayments; Medical claims; Gratuity payments;*

*Annual leave days; Annual leave allowances; One month notice pay;*

*Compensation for unfair/wrongful termination; and General damages for discrimination.*

56. The time period within which any claim(s) or constitutional breaches or violations with regard to the petitioner's service(s) to the respondent arose though commencing in 1998 to 2013 arose in the context of the Employment Act, 2007. Even where the employment relationship commenced within the context of the Employment Act Cap 226, now repealed or the Constitution (repealed) the petitioner's relationship for part-time services(s) with the respondent subsisted and remained in force to the time period and application of the Employment Act, 2007 and Constitution, 2010.

57. Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 allow parties before this court to commence suit through Memorandum of Claim, Petition and Judicial review. However, Rule 7(3) provides that;

*(3) Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court*

58. Inherently therefore not all matters citing constitutional violations require to commence by way of a constitutional petition. The employment and labour relations Court Rules allow parties to approach the court through Memorandum of Claim and by stating in precise language what they are seeking from the court against the employer or the employee or as the case may be. See **Chelimo A Esther & others versus Hon. Prof. John Lonyangapuo & others Petition No.2 of 2018 (Eldoret)**.

59. in the case of **Annarita Karimi Njeru versus Attorney General [1979] KLR**, a person alleging a contravention or threat of contravention of a constitutional right, he must set out the right infringed and the particulars of such infringement or threat. The High Court in addressing the question of what constitutes a petition, made reference to the case cited above and held in the case of **Trusted Society of Human Rights Alliance versus AG & others [2012] eKLR** that;

*We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable*

*controversies. However we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.*

*The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case. [underline added].*

60. In this petition and as set out above, the matters the petitioner has set out as being in issue against the respondents relates to his rights against non-discrimination in appointment as full time lecturer and the benefits thereto which are matters addressed under article 27 of the Constitution, 2010 read together with section 5 of the Employment Act, 2007 the substantive statute with regard to an employee and employer rights at work. The petitioner is also seeking to address matters with regard to underpayments, medical claims, gratuity, annual leave; annual leave allowances, one month notice pay and payment of compensation for unfair/wrongful termination of employment. Such are rights at work and in employment covered and articulated as rights under the Employment Act, 2007.

61. The claims and alleged constitutional violations alleged by the petitioner cannot be separated outside the employer and employee relationship between the parties herein. Claims not to be discriminated against at work during recruitment, during interviews, promotion, terms and conditions of employment, termination of employment or various matters arising between an employer and employee in the context of employment and labour relations are addressed comprehensively under section 5 of the Employment Act, 2007. Where there is discrimination on any ground(s), such a claim is subject to the provisions of this statute, the Employment Act, 2007.

62. Section 5 (3)(b) of the Employment Act, 2007 provides as follows;

*(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—*

*(a)*

*(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment*

63. Any such claim must be filed with the court within the provisions of section 90 of the Employment Act, 2007. Any claim(s) outside the statutory period is time barred and the court has no jurisdiction to extend time as held by the Court of Appeal in **Beatrice Kahai Adagala versus Postal Corporation of Kenya [2015] eKLR;**

*Section 90 of the Employment Act 2007 which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract of employment must be filed within 3 years. As this Court stated in the case of Divecon Limited -vs- Samani [1995-1998] 1 EA P.48, .... in Josephat Ndirangu - vs = Henkel Chemicals (EA) Limited, [2013] eKLR, the limitation period is never extended in matters based on contract.*

64. In this case therefore, without jurisdiction noting the time period he respondent terminated the petitioner's service(s) with them and being over the period contemplated under section 90 of the Employment Act, 2007 the court has no jurisdiction. To continue with other matters and issues set out above will be academic.

65. The petitioner has urged the court that since the respondents declined to include him in allocation of classes despite his lessons and lecturers being on the same-table he has engaged them, but such engagement in demands and counter-demands is not admission of liability or a matter of continuing injury under the meaning of section 90 of the Employment Act, 2007 to justify filing of the petition outside the limitation period. Such petition and the orders sought relate to rights at work, the nature of which are founded within the meaning of rights articulated under the Employment Act, 2007 and despite being called a *Petition* such cannot revive the claim(s) for the court to have the requisite jurisdiction.

**Accordingly, the petition must fail. The same is filed outside time. Each party to bear own costs.**

**Dated and delivered in open court at Nakuru this 18<sup>th</sup> day of October, 2018.**

**M. MBARU**

**JUDGE**

In the presence of:.....