



**Munene v United States International University (Cause 105 of 2019)
[2024] KEELRC 1635 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1635 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 105 OF 2019**

**J RIKA, J
JUNE 28, 2024**

BETWEEN
PROFESSOR KAREGA MUNENE CLAIMANT
AND
UNITED STATES INTERNATIONAL UNIVERSITY RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim, dated 19th February 2019.
2. He states that he was employed by the Respondent University on 1st September 2003, as an Associate Professor.
3. He was made a full Professor 4 years later, effective 1st September 2007. He taught / teaches history.
4. His grievance is that although he was promoted to full Professor, the Respondent continued to keep him in the job grade of an Associate Professor. The Respondent continued to refer to him as an Associate Professor, in its communications.
5. He was at the time of filing the Claim, earning the basic monthly salary due to an Associate Professor, at Kshs. 275,500.
6. The starting monthly basic salary of a full Professor was Kshs. 301,300 at the time.
7. He states that from the date he was promoted, on 1st September 2007, his salary has been underpaid. As at December 2018, underpayment stood at Kshs. 11,839,417.
8. The Respondent acknowledged promotion and adjustment of the Claimant's salary, through its letter dated 29th June 2007, but failed to pay the new salary.
9. The Claimant states that he has been treated maliciously and discriminatively, by the Respondent; he had been denied lawful benefits; he has been underpaid; he has been exposed to ridicule and suffering;



he has been exposed to pecuniary embarrassment and economic harassment; he has suffered damage to his professional career, social standing, mental stress, emotional anguish; and. his constitutional right not to be discriminated, violated.

10. He prays for Judgment against the Respondent for: -
 - a. Declaration that the withholding of his salary by the Respondent, is unlawful and unfair.
 - b. Damages for discrimination.
 - c. Terminal dues.
 - d. Compensation for forced resignation.
 - e. Costs.
11. The Respondent filed its Statement of Response dated 10th April 2019. It is not contested that the Claimant was employed by the Respondent as an Associate Professor and promoted to full Professor of history, as pleaded. It is denied that he was kept in the salary scale applicable to an Associate Professor, after promotion. His salary was not underpaid.
12. The Respondent denies that it treated the Claimant maliciously and discriminatively. He has not suffered damage as pleaded. If any damage was sustained, it was self-inflicted.
13. The Claimant's salary was raised upon promotion, to Kshs. 248,323 monthly. He was placed at step 4 grade of a full Professor. His enhanced salary was paid as and when it was due. Change in the terms and conditions of service of an Employee, is the prerogative of an Employer. Salary increment was not automatic. The Claimant acquiesced to the monthly salary that continued to be paid, and is estopped from demanding payment of a different monthly salary.
14. The Respondent states that the Claim is time-barred, and in gross abuse of the process of the Court. The Claimant is asking the Court to rewrite the contract of employment executed between the Parties. It is proposed to have the Claim dismissed with costs.
15. The Claimant filed a Reply to the Statement of Response, dated 2nd May 2019. He basically reiterates the averments in his Statement of Claim, while refuting that his salary was increased upon promotion. He reiterates that he was treated maliciously and discriminatively and suffered damage as pleaded.
16. The Claimant gave evidence on 21st March 2023, and 17th October 2023, when he rested the Claim. Night Nzovu, the Respondent's Director, Administration, gave evidence on 17th October 2023, closing the hearing.
17. On 15th February 2024, it was confirmed by the Parties before the Court, that the Claimant had been paid by the Respondent a sum of Kshs. 3,724,471.95 in part settlement. Details of what the payment represented, were not communicated to the Court.
18. On 19th March 2024, the Parties confirmed filing and exchange of their closing submission, paving the way for preparation of the Judgment.
19. The Claimant relied on his witness statement, documents [page 1-71], supplementary documents [page 1-98] and a 3rd supplementary bundle of documents. Document number 3 in the last bundle, a pay slip of another Employee [Prof. Peter Lewa], was contested and declined, on the ground that the owner of the pay slip, was not a witness before the Court.
20. The Claimant underscored that he was initially appointed as an Associate Professor, and later became a full Professor, the highest academic rank in Kenya.



21. He was advised that his emoluments would be adjusted on promotion. There were no conditions attached. It was not correct as stated by the Respondent's witness Night Nzovu, that the Claimant's salary increment, depended on his submission of appraisal forms for evaluation, which he failed to submit. There were no conditions attached to pay increment, upon promotion.
22. He continued to be paid Kshs 275,500 monthly, the salary due to an Associate Professor. It was the same salary he was paid, at the time of giving evidence-Kshs. 275,500. He was paid Kshs. 35,000 in house allowance, applicable to an Associate Professor.
23. The salary structure has different job grades, 4,3,2,1 [academic]. Full Professor is graded AC 1 with a starting salary of Kshs. 301,300 and a ceiling of Kshs. 445,400. The Claimant was placed far below the starting salary of a full Professor.
24. The Vice-Chancellor made a report on salary evaluation and grading systems. The Claimant did not manufacture the grades. Full Professor was AC 1, Associate Professor AC 2, Assistant Professor AC 3 and a Lecturer AC 4. The report indicated that review was long overdue. It trumpeted employment equity. It clarified the staff ranking in the organogram. The report made in 2016, was implemented, while the Claimant's salary remained static.
25. The Claimant's house allowance was to be adjusted from Kshs. 35,000 monthly, to Kshs. 40,000. It was not.
26. On 6th December 2021, the Respondent's Vice- Chancellor Ms. Freida Brown, made a desperate bid to compromise the Claim, writing to the Claimant and offering him a monthly salary of Kshs. 319,000 from Kshs. 275,500. He was being placed in step 3, of the full professorship. House allowance was to be adjusted from Kshs. 35,000 to Kshs. 40,000. The Claimant declined the compromise. He had worked for over 15 years for the Respondent.
27. He was discriminated against. At page 78 of the Claimant's supplementary documents, the Respondent recognizes him as a full Professor.
28. In its website and computer system, the Respondent continued to describe the Claimant as an Associate Professor, and paid him as such. Page 46 of the Respondent's supplementary documents, is a screenshot of the Respondent's management information system. It places the Claimant in the school of humanities, and refers to him as an Associate Professor. The information was generated in 2022.
29. The Claimant gives a breakdown of the underpayments, at paragraph 10 of the Statement of Claim. They date back to 2007, when he became a full Professor. He explained that he had computed underpayments to the year 2018, when he filed the Claim, but the injustice was continuous. The injury was continuous. Even as he gave evidence, he continued to be paid at the salary scale of an Associate Professor.
30. He also claims underpayment of pension contribution. The Claimant was to contribute 5% of his monthly basic salary, and the Respondent would contribute 10%. House allowance payable to a full Professor was Kshs. 40,000. He was paid Kshs. 35,000. He claims the cumulative difference.
31. On cross-examination, he told the Court that his letter of employment, referred to faculty handbook. To understand the contract fully, one had to read the handbook. He reiterated that he seeks 5 prayers from the Court.
32. He understood terminal benefits, to mean payment made on leaving employment. He was still an Employee of the Respondent. He seeks compensation for forcible resignation. He has not resigned, and the prayer was not applicable at the moment.



33. He became full Professor on 1st September 2007. His monthly basic salary was adjusted from Kshs. 155,949 to Kshs. 248,323. In 2009, it was adjusted to Kshs. 253,289. In 2010, it was again adjusted to Kshs. 270,100. It was subsequently raised to Kshs. 275,000, with a house allowance of Kshs. 35,000.
34. The faculty handbook provided for implementation of salary scale survey, 2007. Column on Professor, notch 4, provided for a monthly salary of Kshs. 248,323. Increment in the survey review of 2007 was implemented. The handbook provided that an Employee had to submit self-evaluation form, failing which he would remain in the old salary scale. The Respondent was concerned that the Claimant failed to submit self-evaluation forms, for 2 consecutive years. He would have to look at the handbook, to confirm if he was in breach of policy.
35. Kshs. 275,500 in monthly salary, fell within the range given to Professors. The Claimant did not have additional responsibilities, and was not acting in any office. He was discriminated against. It is not correct that he was lucky, no disciplinary action was taken against him, for breach of evaluation policy.
36. Redirected, he explained that AC 2 was an Associate Professor. He was placed in AC 2, instead of AC 1, full Professor. He is a full Professor. Placing him in AC 2 was discriminatory. The handbook has been severally revised. He had complied with the requirement for self-evaluation, but never received response from the Respondent, on submitting self-evaluation. He was employed under 2003 handbook. The Respondent referred to a handbook of 2007. He was not subjected to disciplinary proceedings for breach of policy. He instead was awarded certificate of merit. He was promoted to full professorship. The letter of promotion did not mention performance evaluation.
37. The Respondent's Director of Administration, Night Nzovu, relied on her 2 witness statements on record, the averments in the Statement of Response, and 3 lists of documents [1-4] [5-7] and [8], in her evidence-in-chief.
38. The Claimant, was paid within the range of applicable salary scale, from the date he was promoted. His salary was adjusted to Kshs. 275,500 monthly. The report of the Vice-Chancellor shows that his salary was progressively adjusted. The house allowance was pegged on the payable salary. It was between Kshs. 25,000 and Kshs. 40,000. The Claimant was paid Kshs. 35,000 monthly, within the range.
39. The faculty handbook was applicable to the Claimant. He was expected to read it, among other policies. It was clearly indicated that only self-evaluated staff, would get the cost of living adjustment. If one did not self-evaluate for 2 consecutive years, his contract would be terminated.
40. The Claimant did not submit his self-evaluation. He was expected to self-evaluate and then discuss his performance with his supervisor. Evaluation is triggered by the Employee. Kshs. 275,500 paid to the Claimant, matched the salary paid to Professors in the old salary structure. Without evaluation, he remained in the old structure.
41. Nzovu told the Court that the Respondent met and discussed voluntary settlement with the Claimant. It was hoped that the Claimant would comply with the self-evaluation policy. The Respondent reviewed what he would have earned, had he complied with the evaluation policy, and paid to the Claimant the sum of Kshs. 3,374,471.95. This included adjustment on house allowance.
42. Cross-examined, Nzovu told the Court that new job grading system was created. The changes were from 1st September 2007. The Claimant was a full Professor. If he had done self-evaluation, he would technically be in the category of full Professor. There is no separate grading for full Professors.
43. The house allowance payable to a full Professor is from Kshs. 40,000. The Claimant continued to be graded under scale AC2, because he did not submit his self-evaluation. He did not comply, to move up



- with the rest. His pay slip continued to refer to him as an Associate Professor. There was no demotion of the Claimant, from 2007. The pay slip could have been erroneous.
44. The 2008/2009 catalogue described him as a full Professor. He is entitled to benefits applicable to a full Professor, subject to evaluation. He was issued a letter to show cause for noncompliance with evaluation policy. The letter is not exhibited before the Court. The letter to show cause exhibited, refers to his failure to attend symposium. It is not about evaluation. He replied to the letter.
 45. Redirected, Nzovu reiterated that the Claimant was paid within the salary scale applicable to a full Professor. He needed to be evaluated, in accordance with the faculty handbook, to move up with the rest. Although he did not evaluate, his salary was aligned. There was no discrimination.
 46. The Claimant submits that the total underpayments, as of 14th February 2024, when he drew his closing submissions, was basic salary at Kshs. 12,622,407; pension under-contribution at Kshs. 633,354; and house allowance at Kshs. 749,999 – total Kshs. 14,005, 761.
 47. He submits that withholding of his emoluments after promotion, resulted in unfair labour practice, a violation of his fundamental rights, under Article 41 of *the Constitution*.
 48. He has been discriminated against in violation of Section 5 of the *Employment Act*. This is shown through his pay slips, Respondent's web page and official communication. He has continued to be referred to as an Associate Professor, in disregard of his promotion to the rank of full Professor of history, way back in September 2007. Other full Professors are paid according to the salary scale applicable to full Professor, job grade AC1
 49. The Claimant proposes that he is paid general damages for discrimination at Kshs. 7,500 invoking the Court of Appeal decision in Civil Appeal No. 42 of 2015, OI Pajeta Ranching Limited v. David Wanjau Muhoro. He prays for arrears of his rightful remuneration.
 50. The Respondent submits that the Claimant's salary was regularly reviewed upwards, in accordance with his grade as a full Professor. It was increased from Kshs. 122,397 to Kshs. 275, 500 by the time he filed the Claim. It is submitted that increment was subject to performance appraisal. The Claimant failed to submit his evaluation forms. He did not trigger evaluation, and was therefore stuck in the minimum salary payable to a Professor. The Respondent cites E&LRC decision in Stephen K. Kachila v. Bamburi Cement Limited [2015] e-KLR, where it was held that salary increment is discretionary and dependent on performance appraisal.
 51. The Respondent submits that, the Parties are governed by their contract and the law, and the Claimant is asking the Court to look at his general feelings, desires and wishes. Parties are bound by the terms of their contracts and the Court cannot prescribe new terms, as held in E&LRC case, Jonyo v. Kisumu National Polytechnic & 8 Others [2022] e-KLR. The Claimant was paid the salary amounts, which were stated in all the contracts he executed.
 52. The Respondent submits that there was no discrimination against the Claimant. His grievances are self-inflicted, having failed to submit his performance evaluation.
 53. It is submitted for the Respondent, that acting in good faith, the Respondent paid to the Claimant Kshs. 3,724,491 aligning his salary to what would have been paid, if he had complied with the self-evaluation policy. The Claimant has engaged in continuous insubordination by failing to submit his self-evaluation forms, and the Respondent reserves its right of taking appropriate disciplinary action, against the Claimant. The Respondent submits that the Claimant has completely failed to show that he was denied salary increment, and discriminated against. The Respondent calls upon the Court to dismiss the Claim with costs.



54. The issues as submitted by the Parties, and as gathered by the Court from their pleadings and evidence are: whether the Claim is time-barred; whether the Claimant has resigned; whether he has been discriminated against by the Respondent; and whether he merits the prayers sought, which include declaratory orders, damages, terminal dues and compensation.

The Court Finds: -

55. The Claimant was employed by the Respondent as an Associate Professor, around 1st September 2003.
56. He was made full Professor of history by the Respondent, through a letter signed by the Vice-Chancellor Professor Freida A. Brown, dated 29th June 2007.
57. The effective date was 1st September 2007.
58. The letter states that the decision to make the Claimant a full Professor of history, was arrived at following a meeting of the Respondent's Board of Trustees held in the month of June 2007.
59. The Respondent's handbook, clause 4.4. has the criteria for promotion: excellence in teaching; scholarly activity; and service to the Respondent, community, profession, and contribution to student growth. These are the conditions the Claimant fulfilled, warranting his ascension to the highest peak in academic ranking.
60. His claim is that upon promotion, his salary was not raised to the salary scale of a full Professor [AC1]. His salary remained in the scale of an Associate Professor [AC2].
61. Specifically, an Associate Professor earned a basic monthly salary of Kshs. 275,500 as of the time the Claim was filed. The Claimant earned this basic salary. A full Professor was entitled to a monthly basic salary of Kshs. 417,400. The Claimant was underpaid basic monthly salary by Kshs. 141,900.
62. He claims he received housing allowance of Kshs. 35,000 monthly, while he was entitled to Kshs. 40,000, and was therefore underpaid house allowance by Kshs. 5,000. He claims the shortfall in pension contribution of 10% from the Respondent. Based on the difference of Kshs. 141,900 in basic salary, he pleads pension contribution from the Respondent, at Kshs. 14,900.
63. There is no dispute that the Claimant was promoted in September 2007. There is no dispute that his salary was not adjusted to that of a full Professor. The Respondent explains that the Claimant failed to submit performance self-evaluation forms, which was a condition for salary adjustment, imposed by the faculty handbook. He was in consecutive default of 2 years. The Respondent also states that the Claimant's salary was periodically adjusted in his favour, his defiance of the evaluation policy notwithstanding. Further, the Respondent justifies its decision on the ground that it is entirely in the discretion of an Employer, to adjust the salary payable to an Employee, or to adjust other terms and conditions of employment.
64. At paragraph 15 of the Statement of Response, the Respondent states that the Claim is time-barred, and that it would raise a point of preliminary objection to that effect.
65. The Respondent did not pursue its objection preliminarily as indicated. The Court has an obligation nonetheless, to determine if the Claim, which has its roots in a promotion that took place on 1st September 2007, is time-barred.
66. Time-bar: The Claim is based on a continuing act or omission, where the Claimant states he has been denied his rightful remuneration, from September 2007 to-date.



67. A Claim based on a continuing act of discrimination, is not specifically time-barred under Section 90 of the *Employment Act*. It is in the nature of a continuing injury. The time limit for lodging a complaint, is deemed to be the date when the last act of discrimination or other injury, takes place. The cause of action is deemed to arise, when the discriminatory act or continuous injury ceases. The perpetrator of the discriminatory or injurious act, determines when the cause of action arises, by ceasing continuous discrimination or injury. If there is no cessation, the cause of action resets in perpetuity.
68. In other words, the cause of action is renewed, every time the discriminatory or injurious act is repeated. Every month the Claimant is paid less than he merits, if he can show that indeed he has been so paid, has the effect of renewing the cause of action. Each salary cheque received by the Claimant, under the scale of an Associate Professor, is deemed to constitute a discriminatory act.
69. In *David Wanjau Muhoro v. Ol Pejeta Ranching Limited* [2014] e-KLR, relying significantly on the jurisprudence of the dissenting Judgment of the late US Supreme Court Judge, Ruth Bader Ginsberg [*Lilly Ledbetter v. Good year Tyre & Rubber Co.* 550 U.S. 618, 2007], this Court held that pay discrimination often happens in instalments. It is incremental. An Employer who carries forward past pay discrimination, should not be allowed to go scot free, through the application of limitation of time law. The date the cause of action arises, resets, every day an act of discrimination takes place. Each unadjusted monthly salary cheque received by the Claimant, if indeed he received such a cheque, has the effect of resetting the date the cause of action arises.
70. The Claimant also invokes *the Constitution* of Kenya, in submitting that the Respondent repeatedly violated his right to fair labour practices and the right not to be discriminated against. The Respondent does not submit on time-bar with regard to remedies for constitutional violations pleaded by the Claimant.
71. The Respondent's point of preliminary objection on time-bar, which was pleaded but not argued, has no merit and is declined.
72. Resignation: The Claimant prays for terminal benefits. He prays for compensation for forced resignation.
73. These prayers have no support in evidence. He may have contemplated resigning, granted that he harboured a pay disparity grievance for years, but there is no evidence that he did so. He may have contemplated termination of his contract of employment, so as to enable him claim terminal benefits. There is no evidence that he terminated his contract in any way, and his prayers for terminal benefits and compensation for forced resignation, have no foundation.
74. Discrimination: It is common ground that the Claimant was promoted to full Professor, from an Associate Professor, about 17 years ago today, in September 2007.
75. The Respondent however, has continued to refer to the Claimant as an Associate Professor. This is captured in the Respondent's online human resource management system. As late as the year 2022, even while the Claim was pending before the Court, and 15 years after the Claimant became a full Professor, the Respondent continued to circulate information in its world wide web, that the Claimant is an Associate Professor.
76. A full Professor is the highest academic rank, while an Associate Professor is a mid-level rank. A full Professor and an Associate Professor have different levels of experience, research and teaching skills. The faculty handbook, under clause 4.1.1. prescribes the minimum qualifications for full Professors and Assistant Professors. Their job grades and salary scales are different. It is an abomination to place a full Professor in the category of an Associate Professor, and to pay him remuneration due to an



- Associate Professor. It is no less an abomination, for the Respondent, to repeatedly refer to a full Professor as an Associate Professor, in its official communications.
77. There is adequate evidence that the Respondent, has not only continued to broadcast widely, that the Claimant remains an Associate Professor, but also continues to pay him the remuneration due to an Associate Professor. This injustice has been going on, for 17 years today.
 78. There was job evaluation, organization and salary reviews in 2009 and 2016. Every Employee, academic and otherwise, benefited from the reviews, while the Claimant remained static, in the salary scale of an Associate Professor.
 79. The review, approved by the Respondent's Board on 1st November 2016, indicates that full Professors would be on grade AC1. House allowance would range from Kshs. 40,000 monthly, for full Professors.
 80. The Respondent's Human Resource Management Information System [HRMIS] continued to refer to the Claimant as an Associate Professor. The reference as an Associate Professor was not made in typographical error; it was sustained and deliberate. The Respondent continued to deliberately treat the Claimant as an Associate Professor. His pay slip indicates he continued to be paid basic salary and house allowance applicable to an Associate Professor. The HRMIS indicates he continued to receive the salary applicable to an Associate Professor.
 81. The Respondent attempted to redress the continuing discrimination and injury against the Claimant, through a meeting involving the Vice-Chancellor, the Director of Administration and the Claimant, on 21st March 2022. This was after years of correspondence from the Claimant to the Respondent, detailing his grievance, and imploring the Respondent for remedial action. It was indeed some years after this Claim had been lodged before the Court. The Respondent offered to pay the Claimant full house allowance in arrears, applicable to a full Professor. But the offer did not address the elephant in the room: the arrears of basic salary from the date of promotion. The Respondent also did not make an offer on its underpaid pension contribution. Even when the chance to end the continuing discrimination and injury offered itself, the Respondent was less than willing to redress.
 82. When the review of 2016 was taking place, HRMIS indicates that the Respondent took some time, to consider what job title to assign to the Claimant. Against job title, it was indicated 'to be defined.' The Claimant was already a full Professor for 9 years, so what was to be defined? Subsequently, the Respondent retained the job title of Associate Professor, and has persisted to-date, in paying him remuneration due to an Associate Professor.
 83. Before instructing Counsel, the Claimant had repeatedly communicated his grievance to the Respondent, but the Respondent appears to have given him a deaf ear.
 84. He wrote to the Respondent on 19th October 2018 where he narrated his employment history and the grievance in clear details: he was employed by the Respondent as an Associate Professor on 1st September 2003; he was promoted to full professorship, through a letter dated 29th June 2007; and he continued to be referred to as an Associate Professor by the Respondent, and paid monthly remuneration on the scale of an Associate Professor. His monthly salary of Kshs. 275,500, was below the entry point of a full Professor.
 85. The Claimant wrote that the treatment he was accorded by the Respondent was a gross injustice, discriminatory and demoralising.
 86. There was no response from the Respondent, necessitating the writing of a letter of reminder by the Claimant, dated 6th November 2018.



87. The Claimant wrote further on 10th December 2018, where he tabulated his arrears of salary at Kshs. 11,681,693 as of 30th November 2018.
88. He requested the Respondent to redress, to free him from distractions as he focussed on serving the Respondent, the students, the community, and the country.
89. Surprisingly, the Respondent ignored the Claimant's grievance. The Respondent pleads that the Claimant acquiesced to the distorted remuneration that he continued to receive, and is therefore, estopped from seeking redress. How is this so, while he has constantly been communicating his grievance to the Respondent, from its inception in 2007? He wrote to the Respondent on 14th January 2019, complaining about the magnitude of the injustice visited upon him. He notified the Respondent that he was contemplating instructing Counsel. There was no redress, and he instructed Counsel.
90. The rest is history.
91. In David Wanjau Muhoro [supra], as well as G.M.V v. Bank of Africa Limited [2013] e-KLR, it was held that, in discrimination claims, it is first the duty of the Claimant, to establish facts, from which it may be presumed, that there has been direct or indirect discrimination. Once such facts are established, it falls on the Respondent to prove that there has been no violation of the principle of equal treatment. The Respondent can do so, by advancing a legitimate explanation, justifying its different treatment of the Claimant.
92. There is no doubt in the mind of the Court that the Claimant has placed before the Court, facts sufficient to lead the Court, into a presumption that he has endured unequal, unfair and discriminatory treatment by the Respondent. There is adequate evidence, that would require the Respondent to prove that there was no violation, and that the treatment of the Claimant, was based on other legitimate considerations. This principle on burden of proof in discrimination claims is also well discussed in the UK decision, Efobi v. Royal Mail Group Limited, 23rd July 2021 [2021] UKSC 33 SC.
93. The Respondent's explanation of other legitimate reasons, for its unequal treatment of the Claimant, is firstly that the Claimant declined to submit his performance self-evaluation forms, for 2 consecutive years.
94. This is not a legitimate explanation. Failure to self-evaluate would attract disciplinary sanctions. The Claimant was never subjected to a disciplinary hearing. Night Nzovu told the Court that if one was not evaluated for 2 consecutive years, his contract of employment was terminated. The Claimant's contract was not terminated.
95. The Claimant told the Court without much challenge from the Respondent, that evaluation in any event, was incomplete, without the feedback of the evaluator. He had in the past submitted self-evaluation without feedback from the Respondent. Although the Respondent states that evaluation was triggered by self-evaluation of the Employee, evaluation would serve no purpose, without the evaluator's feedback.
96. Nzovu also advanced the argument that the Claimant's salary was adjusted progressively. This was not a legitimate explanation. The adjustment granted to the Claimant was based on the salary scale of an Associate Professor. When the Respondent offered to end discrimination, pursuant to the meeting of 21st March 2022, the basic salary was pegged on the starting salary of a full Professor at Kshs. 301,300. What sort of adjustment was this, the Claimant having served as a full Professor for 14 years at the time? Was the Claimant at the start of full professorship in 2022 when the offer arrived? Nzovu told the Court that only the evaluated staff, were entitled to cost of living adjustment. The Claimant was not asking for cost of living adjustment; he was asking to be paid the correct salary applicable to a full



Professor. Annual increments which are based on cost of living adjustment, did not place the Claimant in the correct grade and salary scale of a full Professor. The explanation that the Claimant's salary was regularly adjusted, is not a legitimate explanation. The Respondent was not ready to correct the yawning historical pay disparity suffered by the Claimant, and avail to him, his fundamental right of equal pay, for work of equal or comparable value.

97. There were other explanations by the Respondent which bordered on the bizarre. The Court was told that salary increment was not automatic, and therefore there was nothing objectionable in continuing to pay the Claimant the salary of an Associate Professor, while he is a full Professor. The witness also alleged that there is no discrimination, because the Claimant's salary was aligned. When asked if disciplinary action was taken against the Claimant for failing to self-evaluate, Nzovu referred to a letter to show cause issued to the Claimant by the Respondent. The letter is on a subject different from self-evaluation. It relates to the Claimant's failure to attend a symposium. She agreed that there is no letter exhibited before the Court by the Respondent, asking the Claimant to show cause why disciplinary action should not be taken against him, on account of his failure to self-evaluate.
98. These explanations are devoid of merit. The letter of promotion dated 29th June 2007, not only changed the Claimant's job title, it changed his remuneration. The Respondent indicates in the letter that the Claimant would be paid in accordance with the new salary scale, to be implemented in September 2007. That scale could only be reference to the scale applicable to a full Professor.
99. The Respondent did not therefore establish legitimate reasons, why the Claimant continues to be treated and remunerated as an Associate Professor, many years after he was promoted in September 2007.
100. It is important to underscore that the burden of proof in discrimination claims, does not entail hearing of evidence and argument in 2 stages. The Court will have heard all the evidence, before proceeding on the 2 stage analysis, to determine if the burden of proof has shifted to the Respondent, and if so, whether the Respondent has discharged that burden. The 2 stage procedure in establishing discrimination claims, is not to be confused with the procedure in criminal trials, where the Court determines first, if the prosecution has established a prima facie case requiring the accused person to defend.
101. In *Reeves v. Sanderson Plumbing Products Inc.* 530 US 138, 141 [12th June 2001], a decision cited with approval in *G.M.V [supra]*, it was held that, "in appropriate circumstances, the trier of facts can reasonably infer from the falsity of the explanation, that the employer is dissembling, to cover up discriminatory purpose... once an employer's justification has been eliminated, discrimination may well be the most alternative explanation, especially because the employer is in the best position to put forth the actual reason for its decision [action]."
102. In the case of David Wanjau Muhoro, the Court adopted the following steps, in establishing proof, in discrimination claims: the Employee must by a preponderance of evidence, establish a prima facie case of discrimination; the Employer must rebut the presumption, by introducing evidence of legitimate, non-discriminatory reasons for its actions; and the Court must in the end, examine if the reasons offered by the Employer are pretextual, and if they are pretextual, discrimination may well be the correct diagnosis.
103. Section 5[7] of the *Employment Act*, states that in any proceedings, where discrimination is alleged to have taken place, the Employer shall bear the burden of proving that the discriminatory act or omission, is not based on any ground specified in the Section. The Employee must primarily, establish the grounds specified in the Section, before the burden shifts on the Employer, to prove legitimate purpose.



104. The reasons given by the Respondent for its longstanding unequal treatment of the Claimant, amount to dissembling by the Respondent, to cover up discriminatory purpose. The reasons were clearly, pretextual.
105. Section 5 [5] of the [Employment Act](#) provides for equal remuneration, for work of equal value. The Claimant ought to have been paid remuneration equivalent of what other full Professors were paid, as soon as he became a full Professor in September 2007.
106. In International Labour Organization [ILO] publication titled “Equal Pay, an Introductory Guide” by Martin Oez, Shauna Olney and Manuel Tomel, ILO Labour Standards Department- Geneva ILO 2013, the concept of equal pay for work of equal value, is characterized as a fundamental right of every worker, to receive equal pay, for same or similar work.
107. The ILO Equal Remuneration Convention [100] of 1951, and the Discrimination [Employment and Occupation] Convention No. 111 of 1958, prohibit distinctions, exclusions or preferences at the workplace, made on various grounds.
108. Article 41 [2] [a] of our Constitution, states that every worker has the right to fair remuneration. This right encompasses equal pay, for work of equal or comparable value. A full Professor of the United States International University, the Respondent herein, must be paid the salary paid to other full Professors at the Respondent.
109. The Claimant has established that he has been subjected to unequal pay. He was discriminated and continues to be discriminated against, even as the Claim proceeded before the Court. The Respondent made half-hearted attempts at abatement of discrimination and continuous injury, by meeting the Claimant and making him an offer on 21st March 2022. The offer fell far short of correcting the full historical injustice and pay disparity, that has continued to be meted out to the Claimant.
110. Remedies: It is declared that the Respondent’s failure to pay the Claimant the remuneration of a full Professor, from September 2007, is unlawful, unfair and discriminatory.
111. The Claimant merits the arrears of his remuneration, including the basic salary, house allowance and pension contribution. He merits general damages for pay discrimination. His constitutional right to equality and freedom from discrimination [Article 27]; his right to equal pay, for work of equal value [Article 41]; and right to fair labour practices [Article 41], have all been severely trampled under, by the Respondent, over a very long period of service.
112. It has not been discounted by the Respondent, that the Claimant was exposed to ridicule, by the persistent reference by the Respondent, particularly in its worldwide web, as an Associate Professor, while the Respondent had long conferred on him the title of a full Professor of history.
113. The Parties did not disclose the details of the amount of Kshs. 3,724,471.95 paid to the Claimant by the Respondent, through a consent presented before the Court, dated 20th July 2022. The amount was only described as partial settlement. It is deductible from any award the Court grants to the Claimant.
114. In another of the ILO publications on pay discrimination, “ An Outline of Recent Developments Concerning Equality Issues in Employment for Labour Court Judges and Assessors” by Jane Hodges-Aeberhard, Equality and Human Rights Coordination Branch, ILO [1997], it is emphasized that Courts must grant effective remedies for pay discrimination. The Respondent submits, quite regrettably, that the Claimant is asking the Court to fulfil his general feelings, wishes and desires, rather than seeking genuine correction of pay disparity.



115. Section 5 [1] of the *Employment Act* places an obligation on the Court, and the social partners, to promote and guarantee equality at the workplace, with a view to eradication of discrimination at the workplace. The law calls for effective remedies.
116. The Court has carefully examined the computation of the arrears of basic salary, pension and house allowance, contained at paragraphs 24-27 of the Claimant's submissions, dated 14th February 2024.
117. The Respondent filed closing submissions after the Claimant, dated 18th March 2024. While the consent filed indicates that the Claimant was paid part settlement at Kshs. 3,724,491.95, there is no alternative computation submitted by the Respondent.
118. The computation by the Claimant is based on the difference paid, between an Associate Professor and a full Professor, dating back to September 2007. It is a persuasive tabulation, and a fair reflection of remuneration that the Claimant has been deprived of cumulatively, dating back 17 years, to September 2007.
119. The Court endorses the computation submitted by the Claimant, and grants him underpayment of basic salary, pension and house allowance at Kshs. 14,005,761.
120. The amount paid under the partial settlement at Kshs. 3,724,491.95 shall be deducted from the sum of Kshs. 14,005,761.
121. The Respondent shall pay to the Claimant arrears of basic salary, pension and house allowance at Kshs. 10,281,270.
122. The violations sustained by the Claimant were undoubtedly, aggravated by their persistence, and the refusal by the Respondent to offer complete redress, and cease discrimination and continuous injury to the Claimant, even when the Parties met on 21st March 2022.
123. In this Court's Petition No. 138 of 2016, Prof. Dr. Dr. Moni Wekesa v. Mt. Kenya University, the Court found Mt. Kenya University to have violated the Claimant's constitutional rights to fair labour practices and the right not to be discriminated against, and awarded general damages at Kshs. 3,000,000. In *G.M.V v. Bank of Africa Limited* [2013] e-KLR, the Court granted the Employee Kshs. 3,000,000 for pregnancy discrimination.
124. The Claimant is granted damages for constitutional violations at Kshs. 3,000,000.
125. The Respondent shall ensure that the Claimant is hence referred to as a full Professor in all its communications, and is paid the remuneration applicable to a full Professor.
126. Costs to the Claimant.
127. Interest granted at court rate, from the date of Judgment, till payment is made in full.

In Sum, It Is Ordered: -

- a. It is declared that failure by the Respondent, to pay the Claimant basic salary, house allowance and make full pension contribution, due to a full Professor, from September 2007 to-date, is unlawful, unfair and unconstitutional.
- b. The Respondent shall pay to the Claimant arrears of basic salary, house allowance and pension contribution, at Kshs. 10,281,270; and damages for constitutional violations at Kshs. 3,000,000 – total Kshs. 13,281,272.



- c. The Respondent shall ensure that the Claimant is hence referred to as a full Professor in all its communications, and is paid remuneration applicable to a full Professor.
- d. Costs to the Claimant.
- e. Interest granted at court rate, from the date of Judgment, till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 28TH DAY OF JUNE 2024.

JAMES RIKA

JUDGE

