



**Otieno v Kabarak University (Cause E047 of 2021)
[2024] KEELRC 2253 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2253 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E047 OF 2021
DN NDERITU, J
SEPTEMBER 18, 2024**

BETWEEN
CHRISTOPHER OYUECH OTIENO CLAIMANT
AND
KABARAK UNIVERSITY RESPONDENT

JUDGMENT

I. Introduction

1. The claimant commenced this cause by way of a memorandum of claim dated 30th August, 2021 filed through KO Advocates LLP.
2. Alongside the memorandum of claim the claimant filed a verifying affidavit, a witness statement, a list of documents, and a bundle of copies of the listed documents.
3. Upon service the respondent entered appearance on 27th September, 2021 through Odhiambo & Odhiambo Advocates. A response to the claim was filed on 24th November, 2021 wherein the entire claim was denied and the court urged to dismiss the cause with costs.
4. Alongside the response the respondent filed a list of documents, and a bundle of copies of the listed documents.
5. On 14th January, 2022 the claimant filed an amended memorandum of claim wherein he prays for –
 - a. Unconditional reinstatement of the claimant to his Employment and former position with the Respondent without loss of any benefits.
 - b. Part-time claims to the tune of Kshs820,391/=
 - c. Interest on (b) above at court rate from the date of filing suit until payment in full.



- d. Costs of the claim.
In the alternative
- a. A declaration that the termination of the claimant's employment by the respondent was unlawful, malicious and an infringement of the claimant's constitutional right.
 - b. Maximum compensation for wrongful dismissal.
(119,882/= by 12 months)Ksh.1,438,584/=
 - c. Special damages
 - i. Three months' salary in lieu of notice.....Kshs359,646/=
 - ii. 48 leave daysKshs191,811/=
 - iii. Passage and baggage allowance.....Kshs38,000/=
 - iv. Part time.....Kshs820,391/=
 - d. A mandatory injunction directing the Respondent and/or His agents to return my projector.
 - e. A declaration that the claimant's right against discrimination as guaranteed by the Constitution under Article 27 have been contravened by Respondent.
 - f. General Damages.
 - g. Costs of the claim.
 - h. Certificate of Service.
 - i. Interest of (b), and (c) above at courts rate from the date of filing suit until payment in full.
 - j. Any other and or further relief that this Honourable Court deems fit to grant.
6. Alongside the amended memorandum of claim the claimant filed a supplementary list of documents and a bundle of copies of the listed documents.
 7. The cause came up for hearing in open on 14th March, 2023 when the claimant testified and closed his case. The defence was heard on 22nd May, 2023 when Simon K. Kipchumba (RW1) testified and the respondent's case closed.
 8. Counsel for both parties addressed the court through written submissions. Counsel for the claimant Mr. Oketch filed his submissions on 9th June, 2023 and Mr. Biko for the respondent filed on 31st July, 2023.

II. The Claimant's Case

9. The claimant's case is expressed in the amended memorandum of claim, the oral and documentary evidence by the Claimant (CW1), and the written submissions by his Counsel. The same is summarized as hereunder.
10. In his amended memorandum of claim, the claimant pleaded that he was engaged by the respondent, a duly constituted and registered private university, as a lecturer in computer science as per a letter of appointment dated 10th May, 2017. It is pleaded that the claimant was engaged on permanent and pensionable terms. It is further pleaded that the claimant's terms were enhanced vide a letter dated 6th August, 2019 which provided for, inter alia, the following –



- a. The claimant would be entitled to a salary of Kshs119,882/= per month subject to taxation in accordance with the Kenyan Laws.
 - b. The claimant was also entitled to house and car/commuter allowance.
 - c. The claimant was also eligible to join the Pension Scheme.
 - d. The claimant was also eligible to employment medical cover.
 - e. Termination of contract by either party by giving THREE (3) months' notice.
11. It is pleaded that on 24th October, 2019 the claimant was served with a show-cause letter why disciplinary action should not be taken against him for allegedly holding another job with another university while still in employment of the respondent allegedly contrary to the regulations of the respondent that applied to the claimant.
 12. It is pleaded that the claimant was taken through a disciplinary process and later on dismissed vide a letter dated 19th December, 2019. It is further pleaded that the claimant appealed the termination but he was not heard on the appeal.
 13. It is the claimant's case that the entire disciplinary process culminating in his dismissal was unfair and unlawful for lack of both substantive and procedural propriety.
 14. In his testimony in court the claimant adopted his filed statement dated 30th August, 2021 and a further statement dated 30th December, 2021 as his evidence-in-chief. Further, the claimant relied on his documents filed in two bundles and produced the same as exhibits 1 to 33.
 15. In cross-examination by counsel for the respondent, the claimant stated that he served the respondent for three years before the dismissal. He stated that the reason for the dismissal was that he held another job on contract with Karatina University yet, according to him, nothing in his contract or in the regulations of the respondent prohibited him from holding that other job.
 16. The claimant stated that the disciplinary proceedings against him were not on the issue of him holding the two jobs but about alleged neglect of duty. He stated that the respondent purported to introduce a new handbook prohibiting lecturers from holding two jobs for the sole purpose of terminating him. He stated that there were no such provisions in the code that he had signed on joining the respondent. He stated that his position was advertised on 18th December before he was dismissed on 19th, December, 2019 demonstrating malice on the part of the respondent.
 17. The claimant alleged that he was discriminated on the ground of his ethnicity as many other lecturers held two or more jobs yet no other lecturer was terminated or disciplined on that ground.
 18. It is on the basis of the foregoing that the claimant prays that judgment be entered in his favour as prayed in the amended memorandum of claim. The submissions by his counsel shall be considered in a succeeding part of this judgment.

III. The Respondent's Case

19. The respondent's case is expressed in the response to the claim and the oral and documentary evidence adduced through RW1, the registrar (Administration & Human Resources), and the written submission by its counsel.
20. In his testimony in court RW1 admitted that the claimant was an employee of the respondent as pleaded. He stated that towards the end of 2019 the respondent discovered that the claimant was also an



- employee of Karatina University. He stated that by holding the two jobs the claimant had contravened a rule that came into force on 4th October, 2018 that prohibited all lecturers from holding two jobs. He stated that the claimant failed and or refused to disclose his other employment to the respondent.
21. He stated that the claimant was accorded due process and found guilty of gross misconduct and hence dismissed as per the letter of dismissal dated 19th December, 2019. He stated that the claimant was not paid his terminal dues as he failed and or refused to clear with the respondent as per the established procedures. He stated that the claimant was not discriminated at all as no other lecturer held two jobs simultaneously as the claimant did and failed to disclose the same. He stated that the handbook of October, 2018 that prohibited holding a job with another employer while serving the respondent applied to the claimant.
 22. He stated that the appeal by the claimant was considered by the chair of the respondent's governing council who had the mandate and the same was dismissed. He produced the documents filed by the respondent as exhibits and concluded by saying that the claimant's dismissal was fair and lawful.
 23. On cross-examination RW1 confirmed that the claimant joined the respondent in 2016 and that the claimant signed for the staff handbook on 2nd August, 2016. He admitted that the staff handbook allegedly enacted in 2018 was not availed in court. He also admitted that the claimant's position was advertised one day prior to his dismissal. He stated that the respondent was always ready and willing to pay the terminal dues to the claimant but he did not go through the clearance procedure to collect the same.
 24. It is on the basis of the foregoing that the respondent prays that the cause be dismissed with costs. The submissions by counsel shall be considered in a succeeding part of this judgment.

IV. Submissions By Counsel

25. On the one hand, in summary, counsel for the claimant identified the following four issues for determination by the court –
 - a. Whether the claimant's services were unfairly/unlawfully terminated?
 - b. Whether the Respondent discriminated against the claimant?
 - c. What reliefs if any, is the claimant entitled to?
 - d. Who should bear the costs of the claim?
26. On the first issue, it is submitted that the claimant was dismissed allegedly on the basis of contravening a clause 6.38 of the staff handbook which does not really exist. It is further submitted that the claimant was dismissed for allegedly violating a staff handbook that came into operation on 5th June, 2020 hence not applicable to the claimant. The court is urged to find that the respondent had no valid reasons for dismissing the claimant.
27. On the procedure adopted by the respondent it is submitted that the decision to terminate the claimant was premeditated and predetermined. It is submitted that while the initial charges were about the claimant holding two jobs at the same time, the respondent changed the same to neglect of duty. Further, it is submitted that by advertising the claimant's position on 18th ahead of the claimant's dismissal on 19th December, 2019 the respondent demonstrated an already predetermined outcome.
28. Further, it is submitted that the appeal by the claimant was not heard and he was not informed of the outcome thereof yet the same was to be heard and determined within 14 days as per the staff handbook applicable. It is submitted that while the respondent requested for more time to finalize the hearing



- and determination of the appeal vide an email dated 3rd February, 2020 the respondent subsequently authored a letter dated 29th January, 2020 purporting to have heard and dismissed the appeal.
29. Based on the foregoing the court is urged to follow the reasoning in *Kenfreight (EA) Ltd V Benson Nguti* (2016) eKLR, *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR, & *Pamela Nelima Lutta V Mumias Sugar Co. Ltd* (2017) eKLR, amongst other decisions to find and hold that the dismissal lacked both in substance and procedure and hence the same was wrongful, unfair, and unlawful.
 30. On the second issue, it is submitted that while other lecturers held two or more jobs the respondent singled out the claimant for disciplinary action. It is submitted that in any event no policy or regulation prohibited the claimant from holding two jobs as he did while at the same time serving with the respondent. The court is urged to be persuaded by the reasoning in *Barclays Bank of Kenya LTD & Another V Gladys Muthoni & 20 Others* (2018) eKLR & *Keith Wright V Kentegra Biotechnology (EPZ) Ltd* (2021) eKLR amongst other decisions and find in favour of the claimant.
 31. It is on the basis of the foregoing that counsel for the claimant urged the court to find and hold in favour of the claimant and allow the claim with costs. The submission on the reliefs shall be tackled in a succeeding part of this judgment.
 32. On the other hand, counsel for the respondent identified two issues for determination – Whether the claimant’s termination followed due process; and, Whether the claimant’s termination was discriminatory.
 33. On the first issue it is submitted that the process and procedure adopted and applied by the respondent in dismissing the claimant was in accord with Section 41 of the Act. The court is urged to be persuaded by the decision in *Anthony Mkala Chitavi V Malindi Water & Sewerage Co. Limited* (2013) eKLR.
 34. It is submitted that the claimant was served with a show-cause letter on 16th October, 2019 informing him of his violation of clause 6 of the staff handbook by holding another job while still serving with the respondent. It is submitted that the claimant responded to the show-cause letter and was subsequently invited to a hearing on 31st October, 2019.
 35. It is submitted that instead of defending himself against the specific charges against him the claimant pointed fingers alleging that other employees of the respondent held other jobs including the vice chancellor who was by then a senator. It is submitted that the claimant admitted his misconduct and even apologized for the same. He was subsequently found guilty and dismissed accordingly.
 36. On the issue of advertisement of the position that the claimant held on 18th before the claimant was dismissed on 19th December, 2021 it is submitted that the respondent had already decided to dismiss the claimant by 18th only awaiting to inform the claimant which was done on 19th December, 2021. It is submitted that this did not and does not point towards a predetermined outcome by the respondent. It is submitted that the position needed to be filled as soon as practically possible to avoid a vacuum.
 37. It is submitted that the respondent met both the substantive and procedural thresholds in dismissing the claimant in accordance with the law applicable.
 38. On the alleged discrimination by the claimant it is submitted that the respondent is fully aware and cognizant of the provisions in Article 27 of *the Constitution* and Sections 5 & 45(2) of the Act and applies the same in its recruitment and retention of its human capital. It is submitted that the respondent was aware of the ethnic extraction of the claimant even as at the time of his recruitment and engagement and as such if ethnicity was a factor of consideration then the respondent ought not to have engaged the claimant if his Luo ethnicity was considered undesirable.



39. On the basis of the foregoing the court is urged to dismiss the claim with costs.

V. Issues For Determination

40. Upon careful examination and consideration of the pleadings filed, the oral and documentary evidence tendered from the claimant and the respondent through RW1, and the submissions by counsel for both parties, the court identifies the following issues for determination –
- a. Was the dismissal of the claimant by the respondent unfair and unlawful?
 - b. If (a) above is in the affirmative, is the claimant entitled to the reliefs sought?
 - c. What is the appropriate order on costs?

VI. Termination

41. The terms and conditions of engagement of the claimant by the respondent are not really in contest. The claimant was appointed to the position of a lecturer in computer science by the respondent vide a letter dated 2nd August, 2016 with effect from 1st September, 2016. He was to start on a consolidated monthly salary of Kshs113,000/= to rise to a maximum of Kshs147,439/=. The appointment was subject to confirmation upon review of his performance after six months of service. The claimant was confirmed to the appointment vide a letter dated 10th May, 2017.
42. In a letter dated 6th August, 2019 the claimant's consolidated monthly salary was reviewed upwards to Kshs119,882/= with effect from 1st July, 2019.
43. However, on 16th October, 2019 the respondent addressed a show-cause letter to the claimant worded as follows –

Our ref: KABU/0651

16th October, 2019

Mr. Christopher Oyuech Otieno

School of Science, Engineering & Technology

Thro'

Dean, School of Science, Engineering & Technology

Dear Mr. Otieno,

Re: Show Cause

We have confirmed that you are holding two employment contracts, a full-time employment at Kabarak University and a contract with Karatina University for the position of Tutorial Fellow from 6th July, 2017.

This is a breach of staff rules and regulations clause 6.3.8(ix), holding two or more full time employment at the same time, clause 6.3.9(xx) all other such behaviours not consistent with Christian teaching which hampers smooth running of the University.

You are therefore required to provide a written explanation on the above issues and how cause why disciplinary action should not be taken against you. Your written explanation should reach this office by Friday, 25th October, 2019.



Yours Sincerely,
Dr. Simon K. Kipchumba, Ph.D.
REGISTRAR (ADMINISTRATION & HR)
C.C. Vice Chancellor
Deputy vice Chancellor (A&F) To see in file
SKK

44. In a written response to the above show-cause letter the claimant admitted the charges and even apologized for his alleged misconduct. The said response was availed to court and produced as an exhibit by the claimant.
45. The claimant was invited for a disciplinary hearing vide a letter dated 23rd October, 2019. The said letter of invitation read as follows –

Our ref: KABU/0651
23RD October, 2019
Mr. Christopher Oyuech Otieno
School of Science, Engineering & Technology
Thro'
Dean, School of Science, Engineering & Technology
Dear Mr. Otieno,
RE: Disciplinary Meeting

This is to inform you that you are required to appear before the University Staff Disciplinary Committee on Thursday, 31st October, 2019 at 10.00a.m. in the University Boardroom to answer charges on the confirmation that you are holding two employment contracts, a full-time employment at Kabarak University and a contract with Karatina University for the position of Tutorial Fellow.

This is a breach of staff regulations clause 6.3.8(ii) Negligence of duty; clause 6.3.9 (xx) all other such behaviours not consistent with Christian teaching and which hampers smooth running of the University.

Yours Sincerely,
Dr. Simon K. Kipchumba, Ph.D.
REGISTRAR(ADMINISTRATION & HR)
C } .C. Vice Chancellor
Deputy vice Chancellor (A&F) To see in file



46. Vide a letter dated 19th October, 2019 the claimant was dismissed from employment. The letter of dismissal is worded thus –

Our ref: KABU/0651

19th December, 2019

Mr. Christopher Oyuech Otieno

School of Science, Engineering & Technology

Thro'

The Dean,

School of Science, Engineering & Technology

Dear Oyuech,

RE: Dismissal From The University Service

We refer to your appearance before the University Staff Disciplinary Committee on 31st October, 2019 on the charges indicted below:

- i. It was confirmed that you are holding two employment contracts, fulltime employment at Kabarak University and the other with Karatina University for the position of Tutorial Fellow from 6th July 2017.

This behaviour is a breach of staff regulations clause 6.3.8(ix) holding two or more full time employment at the same time, clause 6.3.9(xx), all other such behaviours not consistent with Christian teaching and which hampers smooth running of the University.

After listening to your evidence and witness and taking into account all the available information, the Committee found you guilty of committing the said offence. Arising from the above, it was decided that you be dismissed from the University services with terminal benefits with effects from 31st December, 2019. Arising from this termination, you will be entitled to the following benefits.

- i. Salary up to and including 31st December 2019.
- ii. Passage and Baggage allowance
- iii. Value of your unutilized leave days (48 days)
- iv. Pension contribution. You will be allowed to transfer your contributions to a scheme of your choice. However, you may also continue your membership in the scheme by continued remittance of contribution.

We wish you all the best in your future endeavours

Yours sincerely,

DR. Simon K. Kipchumba, Ph. D.

Registrar (administration And HR)

CC Vice Chancellor



Deputy Voce Chancellor (A & F) To see in file

47. In a letter dated 10th January, 2020 the claimant appealed the dismissal but the same was upheld by the respondent in a letter dated 29th January, 2020. The said letter of appeal reads as follows –

Christopher Oyuech Otieno

School of Science, Engineering and Technology

Kabarak University.

To the Chairman of the University Governing Council

Through the Vice Chancellor,

Kabarak University

10th January, 2020

Dear Sir

RE: Appeal Against The Decision Of Dimissal From University Service

The purpose of this letter is to appeal against the decision of the disciplinary committee as per the letters attached.

My appeal concerns are as follows:

A. The accusation of double full time employment as referred to by the disciplinary committee is contrary to the terms of contract as provided and the clause referred to “(6.3.8) holding two or more employment at the same time” is not in the staff hand book I signed and has never been brought to my attention and was surprised to see it for the first mentioned in the disciplinary documents.

B. In the referred clause”6.3.9(XIX), all other such behaviours not consistent with Christian teaching and hampers smooth running of the University.” The Disciplinary Committee failed to specify how I injured the Christian teaching and smooth running of the University.

C. The disciplinary process was unfair and provided by the relevant employment laws.

D. The outcome arrived at is too severe as there was no warning letter of any kind.

Sir it’s worth noting that accusation charged against me for disciplinary hearing as attached (Negligence of duty) was dropped during the actual hearing meeting as I was found diligently carrying out my duties.

I am therefore looking forward to you favourable considerations within the recommended period of time – preferably 14 working days.

Yours sincerely,

Christopher Oyuech Otieno.

48. It is the claimant’s position that his dismissal was unfair and unlawful for lack of both substantive and procedural fairness. In terms of substance, it is the claimant’s position that he was charged with alleged and unsubstantiated misconduct that was not provided for in the staff handbook that he signed on recruitment and which was applicable to him. The claimant supplied and exhibited in court two staff handbooks. The first one produced as exhibit 2 is what the claimant stated that he executed upon recruitment. The second one, a human resource manual, came into operation on 5th June, 2020 as



communicated by the Registrar (Administration & Human Resources) in a memo/notice dated 17th July, 2020.

49. It is the claimant's position therefore that the charges against him were bogus, trumped up, and without any formal or legal basis. It is his position that nothing prohibited him from holding the two jobs, one with the respondent and another with Karatina University, and that the apology he offered in his response to the show-cause letter was only intended to pacify the respondent not to dismiss him but the same was not an admission of guilt.
50. Neither of the parties supplied the court with the minutes and record of the disciplinary hearing. However, the court is in possession of adequate evidence to help it in determining the issue of the substance of the charges that faced the claimant as preferred by the respondent.
51. Firstly, the court finds and holds that the staff handbook that was applicable to the claimant is the one that he signed and or was in operation when he was appointed on 2nd August, 2016. The claimant supplied the court with a copy of the same and none other was availed by the respondent in rebuttal. The court has gone through the applicable staff handbook and there is nothing therein that prohibited the claimant from holding a second job while still in employment of the respondent. Further, the clause 6.3.8 (ix) allegedly invoked by the respondent in preferring the charges against the claimant does not exist in the said document.
52. While the respondent alleged that a new staff handbook was introduced and operationalized in 2018 that allegedly prohibited all lecturers, including the claimant, from holding a second job while serving the respondent, no such document was availed in court by the respondent and the allegation went just as far as that, a mere allegation.
53. The other document availed in court is the memo/notice alluded to above which purported to introduce a new manual/staff handbook as from 5th June, 2020, by which time the claimant had been dismissed. Certainly, the same did not and should not apply retroactively to the claimant.
54. The court finds and holds that the allegations and or charges against the claimant were baseless, unfounded, ambiguous, unfair, and unlawful. The allegations alluded to misconduct that did not exist. The claimant was not prohibited from holding the second job while still serving the respondent in accordance with the terms and conditions in the letter of appointment.
55. Further, there is no evidence or substantiation on how the claimant's conduct "all other such behaviours" were "not consistent with the Christian teaching and which hampers smooth running of the university". This is what is stated in the letter of dismissal.
56. The court is persuaded by the claimant's confession that he admitted and apologized to the charges in his response to the show-cause letter either as a result of ignorance or simply to pacify the respondent not to dismiss him.
57. In terms of the procedure adopted, the court notes that a show-cause letter was served upon the claimant who was subsequently invited to a hearing that he attended. As noted above, the record of the proceedings of that hearing were not availed in court. The court is thus disadvantaged in that regard. However, having found that the disciplinary process lacked in substance, the procedure applied, no matter how meticulous, shall not cure the lack of substance.
58. However, the court must comment on the casual and insincere manner in which the respondent dealt with the appeal by the claimant. After the claimant filed an appeal on 10th January, 2020 and upon failing to receive a response within the time stipulated, he wrote several reminders to the respondent asking that he be informed of the outcome of the appeal. Such last reminder is found in an email dated



- 3rd February, 2020 to which the respondent replied on the same day seeking for more time to consider and determine the appeal.
59. Curiously, and in a strange move, the chair of the university council authored a letter dated 29th January, 2020 purporting to have considered and dismissed the appeal. This cannot be an honest and sincere consideration of the appeal in that if the respondent was seeking for more time on 3rd February, 2020 there is no way the appeal could have been heard and concluded by 29th January, 2020. The court takes great exception of this casual and rather dishonest manner in which the respondent treated the claimant's appeal on which, literally, his bread and butter depended.
60. The jurisprudence on what amounts to wrongful, unfair, and unlawful dismissal or termination is now settled – See *Mary Chemweno V Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno V Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro V Teachers Service Commission* (2012) eKLR.
61. The court agrees with counsel for the claimant in his submission that the dismissal of the claimant was wrongful, unfair, and unlawful for lack of both substantive and procedural fairness. It is so held and declared.

VII. Reliefs

62. Having held that the Claimant was wrongfully, unfairly, and unlawfully dismissed for lack of both substantive and procedural fairness, the court shall now consider each of the reliefs sought as hereunder.
63. Prayer (a) is for unconditional reinstatement of the claimant into his position without loss of benefits. This prayer is overtaken by events as three years have expired since the dismissal in 2019. However, even if the matter had been heard within the limited time under Section 90 of the Act the court would still have not allowed reinstatement, which amounts to an order of specific performance, without ensuring the possibility and viability in enforcement of such an order.
64. In view of the above holding, the court shall move to consider the alternative prayers as the claim for part-time pay, costs, and interest are covered in the alternative prayers as well.
65. In the alternative prayers, prayer (a) is for a declaration that the claimant's dismissal was unlawful, malicious, and infringed on the claimant's constitutional rights. The court has found and held that the dismissal was wrongful, unfair, and unlawful and a declaration shall issue to that effect.
66. Prayer (b) is for compensation for the wrongful, unfair, and unlawful dismissal equivalent to 12 months gross salary, being the maximum awardable under Section 49(1)(c) of the Act. It is noted that as at the time of dismissal the claimant held another job with Karatina University. Further, the claimant is highly qualified in a marketable field of computer science and informatics. Certainly, the claimant's services were readily required elsewhere and as stated above he already held another job.
67. The foregoing paragraph is not intended to downplay the fact that the claimant was wrongfully, unfairly, and unlawfully dismissed without substantive and procedural fairness. The court considers compensation equivalent to ten months' gross salary to be fair and adequate compensation in those circumstances. The claimant is thus awarded a sum of Kshs1,198,820/=.
68. Prayer (c) has several items. Item (i) is for three months salary in lieu of notice in the sum of Kshs359,646/= based on the express provisions of the letter of appointment that obviously doubles as the contract of service. This claim is allowed as prayed. Item (ii) is for leave pay in the sum of



- Kshs191,811/= . No records were availed by the respondent as the custodian of the same in rebuttal of this claim and the same is allowed as prayed.
69. Item (iii) is for passage and baggage allowance in the sum of Kshs38,000/= . The court notes that the letter of dismissal clearly stated that the claimant is entitled to payment of this item. Although the amount is not specified and or quantified in the letter of dismissal the respondent did not object to or rebut this amount during the hearing or in the submissions by its counsel. For the foregoing reasons the item is allowed and awarded as prayed.
70. Likewise, the respondent did not provide a rebuttal or an alternative to the sum of Kshs820,391/= claimed in item (iv) for part-time services offered by the claimant on the instructions of the respondent. This sum is awarded as prayed.
71. Prayer (d) is for an order of mandatory injunction directing the respondent to return a projector to the claimant. The court notes that the make, model, label, brand, serialization, and or other details of the alleged projector are not provided. No documentation of ownership or purchase was availed by the claimant during the hearing. In those circumstances, it is untenable for the court to issue an order for return of a property that cannot be identified with certainty. The court shall not issue that order. However, if the respondent, as a responsible employer and an institution based on the Christian faith, is in possession of any property belonging to the claimant it makes good sense to hand over the same to the claimant voluntarily and in good conscience.
72. Prayer (e) is for a declaration that the claimant was discriminated in violation of Article 27 of *the Constitution*. In prayer (f) the claimant prayed for damages for the said violation. In paragraph 15 of the amended memorandum of claim the claimant pleaded as follows in this regard “Manipulation of staff handbook to ONLY the claimant’s detriment because of his ethnicity and/or social origin while not terminating other employees.” During the hearing the claimant insisted and was adamant that the staff handbook applicable to him is the one that he signed in 2016 upon recruitment. The court found and held in his favour in that regard in an earlier part of this judgment. However, no evidence was tendered by the claimant that that handbook was specifically manipulated and targeted to disadvantage the claimant.
73. Violation, breach, or threat to constitutional rights is a serious matter that the court cannot gross over. However, such violations, breaches, or threats must be specifically pleaded and proved – See Anarita Karimi Njeru V Republic (No. 1) (1979) KLR 154 and Mumo Matemu V Trusted Society of Human Rights Alliance (2014) eKLR.
74. The claimant alleges that he was discriminated on the basis of his ethnicity. For a given, ethnicity is an inborn human characteristic that cannot be tampered with along the journey of life. The claimant was a Luo before, during, and even after the employment by the respondent. If the respondent considered the ethnicity of the claimant as undeserving and undesirable for employment, the claimant should not have been engaged in the first place. While the court has found and held that the dismissal was wrongful, unfair, and unlawful and awarded compensation for the same above, the court has not detected discrimination based on ethnicity as alleged by the claimant.
75. In my considered view, the respondent, upon late discovery of a vacuum in its staff handbook and regulations, overreacted to a situation for which it had failed to consider and oversee that its employees could seek and obtain employment with other competing institutions of higher learning. The reaction by the respondent was myopic, selfish, capricious, whimsical, and uncalled for. It is for that reason that the respondent has been ordered to compensate the claimant as above. For the foregoing reasons prayers (e) and (f) are denied.



76. The claimant is awarded costs of the cause as per prayer (g) with interest on the amounts awarded.
77. The respondent is hereby ordered and directed to issue and deliver a certificate of service to the claimant as per prayer (h) in accordance with Section 51 of the Act.

IX. Disposal & Orders

78. In disposal of this cause, the court issues the following orders: -
- a) A declaration be and is hereby issued that the dismissal of the claimant by the respondent was wrongful, unfair, and unlawful.
 - b) The claimant is awarded a total of Kshs2,608,668/= made up as follows –
 - i. Compensation for wrongful, unfair, and unlawful dismissal ...Kshs1,198,820/=
 - ii. Three months' salary in lieu of notice ...Kshs359,646/=
 - iii. Leave payKshs191,811/=
 - iv. Passage & baggage allowanceKshs38,000/=
 - v. Part-time payKshs820,391/=TotalKshs2,608,668/=
- *This award is subject to statutory deductions.
- c. Costs of the cause and interest to the claimant.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 18TH DAY OF...SEPTEMBER, 2024.

.....
DAVID NDERITU
JUDGE

