IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, J. MOHAMMED & KANTAI, JJ.A.)

CIVIL APPEAL NO. 256 OF 2018

BETWEEN

MAASAI MARA UNIVERSITY ..... 1ST APPELLANT

THE VICE CHANCELLOR,

MAASAI MARA UNIVERSITY .....2ND APPELLANT

AND

PROF. MISIA MANUGUTI KADENYI ..... RESPONDENT

(An appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Kericho

(D.K. Njagi Marete, J.) dated 31st January, 2018

in

ELRC Petition No. 7 of 2017)

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JUDGMENT OF THE COURT

Professor Misia Manuguti Kadenyi ("the respondent" or "DVC") was employed by Narok University College (this later became Maasai Mara University – **"the 2nd appellant"**) as an Associate Professor vide a letter dated 26h June, 2009 on terms set out in that letter and in other charters and documents of the 2nd appellant.

By a letter dated 16th May, 2013 the respondent was appointed by the 2nd respondent as a Professor in its School of Education, a position that was on permanent and pensionable terms. Some of the terms of service were set out in that letter which also stated:

> ***"All other terms and conditions of service are specified in the Terms of Service Document. The Terms of Service Document together with this letter shall constitute the contract of employment between yourself and the University."***

The respondent's duties and responsibilities in the said appointment were set out in the said letter.

A few months later (28th October, 2013) the **Cabinet Secretary, Ministry of Education, Science and Technology** in exercise of powers conferred on him by the **Universities Act, 2012**, appointed the respondent as **Deputy Vice-Chancellor, Academic Research and Student Affairs** of the 2nd appellant for a period of five years with effect from 29th October, 2013. Terms and conditions of service for the said appointment would be provided in a contract document by the Council of the 2nd appellant and its Charter. That was followed by a formal appointment by the 2nd appellant of the respondent as its DVC through a detailed letter dated 28th November, 2013. Some of the salient features of that contract under the hand of the 2nd appellant's Chairman of Council were the period of appointment (five years from 29th October, 2013); it set out the respondent's duties and responsibilities; the salary was Kshs.333,640 per month in the scale of Kshs.333,640-351,990 x 18,350 – 371,910 – 391,774 with a gratuity at the rate of 31% of basic salary at the end of the contract. This was in lieu of pension, and any membership in a Pension Scheme would be administered privately at no cost to the 2nd appellant. The contract set out various allowances the respondent would be entitled to in addition to a fully maintained official car with a driver or a car allowance of Kshs.125,000 per month; medical benefits; annual leave and air travel.

That, to say the least, was a meteoric rise for the respondent in the short period of about four years and the horizon looked all very bright but, unknown to all, there was a dark cloud hanging as the events that unfolded will show.

Problems began in or about the year 2015, as is evidenced by the correspondence exchanged and which was produced before the Judge when the parties went to litigation.

Professor Mary K. Walingo had since joined the 2nd appellant as its Vice-Chancellor **("VC"** - that office is the 1st appellant in this appeal). By her letter of 11th May, 2015 to the County Commissioner, Narok County, the VC decried the security situation at the 2nd respondent stating, amongst other things, that there was a planned student's strike which was organized by some senior members of staff. The letter, which was copied to various offices, stated that:

> ***"…. Our preliminary investigations point to DVC, AR & SA (Academic Research and Student Affairs as the leader and organizer…."***

The relationship between the respondent and the appellants had since deteriorated so that on 4th September, 2015 the respondent found it necessary to write a **"Protest Letter"** to the Chairman of the 2nd appellant's council. She protested the goings on at the 2nd appellant stating that she was recovering from surgery but the VC was **"…. busy telling Management and Senate about my involvement in students' unrest on 23.3.2015 and how I go to meet students in my house in Eldoret……".** The respondent decried that the VC was tarnishing her name and had done so in the presence of her colleagues and had even alleged that the respondent was giving students money to destabilize operations of the 2nd appellant.

The letter ended with a plea by the respondent to the Chairman of the Council of the 2nd appellant to call a conciliation meeting between her and the VC. The Chairman of the Council acknowledged receipt of the letter and promised to call a meeting to resolve the differences between the VC and DVC, which meeting was called for 31st July, 2015 but aborted as the respondent was taken ill.

By a letter dated 20th November, 2015 the 1st appellant wrote to the respondent the following letter:

> ***"From: Vice-Chancellor***
>
> ***To: Deputy Vice-Chancellor (AR&SA)***
>
> ***RE: EXAMINATION RESULTS***
>
> ***As you are aware, preparations for the third graduation ceremony on 10th December, 2015 are on-going.***
>
> ***I regret to inform you that you have failed to provide guidance in the processing of examination results which is a prerequisite for graduation and relevant Council meetings to take place. You have similarly, always avoided meetings where results are discussed with the full knowledge that this is a major function in your Division.***
>
> ***If you recall, the Senate meeting which was to take place on Wednesday, 18th November, 2015 was rescheduled to 20th November, 2015 at your request because the results were still not yet ready for presentation. You instead opted to attend a graduation ceremony on the same day, while fully aware that the issue of results was still outstanding. I fail to understand how you, as the Deputy Vice-Chancellor (AR&SA), who should be most concerned with the student results behave thus?***
>
> ***I would also like to point out that the issues of graduands certificates for 2013, 2014 and review of curriculum are still pending yet the timelines given by Council for completion are drawing close.***
>
> ***I am disappointed in your inability to perform your duties as expected of you. I regret to inform you that your continued ineptitude is becoming a liability to the University.***
>
> ***The purpose of this memo is to ask you to show cause, within seven (7) days, why disciplinary action should not be taken against you for non-performance of your duties in relation to not only processing of examination results for students but also overseeing of operations in the Academic Division, which is the core function of the University.***
>
> ***PROF. MARY K. WALINGO, PhD, MKNAS, MBA, EBS VICE-CHANCELLOR***
>
> ***cc Chairman of Council***
>
> ***Chairman, Academics, Sealing and Honorary Degrees Committee of Council"***

The respondent responded to that letter through her letter of 27th November, 2015 stating, amongst other things, that all examination results had been discussed in the Deans Committee and presented to the Senate but some results awaited investigations. She denied avoiding Senate meetings and denied delay in preparation of Certificates for graduands. She promised that the Graduands list would be ready for those who met all the requirements to graduate.

Things did not get any better as is evidenced by the respondent's letter of 25th July, 2016 to the Council Chairman of the 2nd appellant. The respondent again decried the bad relationship she was having with the VC and reminded the Chairman that he was to call a conciliation

meeting between the VC and the DVC. The respondent raised many issues in that letter, which letter ended with this plea:

> ***"….. What I am saying, Chairman, is that nothing has changed since that Council meeting of April 1st, 2016. Chairman, I am dehumanized, demoralized and extremely excluded from matters that concern my Division.***
>
> ***How do we work together in the midst of exclusivity, non-dialogue, victimization and all the unfounded rumours of my incitement of students and staff?"***

That letter was copied to the VC and to the Cabinet Secretary, Ministry of Education, Science and Technology. That was followed by yet another letter to the Chairman of the Council dated 7th September, 2006 (copied to the said two offices as in the previous letter) where the respondent raised even more issues that she complained made her work at the 2nd appellant very difficult.

By her letter of 13th September, 2016 to the Cabinet Secretary the respondent decried the fact that her office had been raided by officers of the 2nd appellant and the locks had been changed thus denying her access to the office.

The Chairman of the Council wrote to the respondent on 31st October, 2016 interdicting her from her employment. It was stated in that letter that the said Council had at a meeting held on 31st October, 2016 noted repeated challenges in the Academic, Research and Student Affairs Division and it had been decided to interdict her to allow for further investigations on her performance. Further, that concerns had been noted in curriculum review, progression of students, student admissions, processing of examination results, processing of graduands lists, anomalies in certificates, student unrests, insubordination, student campus transfers and conflict of interest. Specific grounds for interdiction were spelt out as insubordination of University Council – here the respondent was accused of arrogating to herself the power to appoint an acting DVC (AR & SA) while proceeding on leave and she was also accused of receiving a letter meant for the VC without notifying the VC of such receipt.

On Curriculum Review, it was stated that the University Senate had never approved the curricula that had been offered at the University college and the University from 2009 to 2016. The respondent was accused of heading a division that had failed in ensuring that programs were duly approved and in line with the University Charter.

On student progression, it was said that progression of students had not been streamlined in line with the approved undergraduate regulations and that some students had been studying units without observing the academic years when the unit was supposed to be offered, negating the purpose of the existence of the curriculum.

On Admission of Students, the letter stated that some students had not been receiving their letters of admission prior to attending classes, especially in the collaborating colleges and satellite campuses.

On Release of Examination Results, it was stated that the division headed by the respondent had not been releasing examination results to students on time and some students had never received their complete results. The division had also ignored deadlines set on processing of examination results by two or more years.

On Student Campus Transfer, it was said migration of students from one campus to the other had not been properly controlled.

On Processing of Graduation Lists, it was stated that in the years 2013, 2014 and 2015 graduation lists were tampered with and had various anomalies. In 2014 one hundred and seven students did not graduate because their details were not in the University System. In 2015 the graduation list was delayed as a result of some student names being sneaked into the list without prior approval of the Senate.

On Anomalies in Graduand's Certificates, it was said that the University had witnessed repeated errors in printing of graduands certificates particularly in the years 2013 and 2014, disadvantaging concerned students in getting jobs. Further, that the University had incurred extra expenses in reprinting such certificates.

On Student Unrest, the letter accused the respondent of heading a division which had failed to deliver on the mandate of students' affairs, thus exposing the University to a series of students' unrests. Those incidents included the cultural activities week of 2015, town campus grievances of 2016; HELB loan disbursement and University Calendar.

The last issue raised in the letter was on **"Conflict of Interest".** Here, the respondent was accused of attending an interview to consider applicants for various posts where it was said that one of the interviewees was the respondent's relative, thus violating the Human Resource Policies and Procedures Manual for the public service.

For all those accusations and issues, the Chairman of the Council of the 2nd appellant informed the respondent:

> ***"You are required to respond to those allegations within 21 days from the date of this letter. While on interdiction, you will be on half basic salary, full house allowance and medical benefits."***

The respondent's response to that letter is not in the Record of Appeal. What appears to follow is a letter of 16th December, 2016 signed by the Chairman of the Disciplinary Committee of Council of the 2nd appellant. That letter states, *inter alia,* that the Council had formed a Disciplinary Committee to examine the respondent's case and that letter invited the respondent to appear before the Disciplinary Committee of Council on 5th January, 2017, which meeting could extend to the following day. The letter advised the respondent to bring evidence or documents that may assist the committee, and further advised the respondent that she could be accompanied by a representative of her choice.

The respondent replied to that letter through her lawyers on 21st December, 2016. The lawyers brought to the attention of the Committee provisions of the Fair Administrative Actions Act and required to be furnished with the charge and particulars of each of the allegations against the respondent; documents, materials, information and evidence to be relied on; list of names of persons who had been lined up to give evidence against the respondent and statements of each of the witnesses. The letter ended by stating that the respondent would exercise her right to legal representation and would also cross-examine all persons, particularly those who would give adverse evidence against the respondent.

The Disciplinary Committee would have none of that – by a letter dated 4th January, 2017 it was stated emphatically that **"as per the provisions of Section 41 of the Employment Act…."** legal representation would not be allowed at that stage.

The flurry of activities continued. The Chairman of Council who had received a letter from the Ministry of Interior and Coordination of National Government found it necessary by a letter dated 20th January, 2016 to address the respondent informing her that that the Ministry had raised serious charges against her on grounds that she had incited students to protest and disrupt the Graduation ceremony that had been held on 2nd December, 2016. The respondent was also accused of planning, inciting and instigating students of the 2nd appellant from a local community and Alumni to demonstrate against the 2nd appellant. The letter requested the respondent:

> ***"Based on the forestasted new allegations against you you are required to respond to these grievous allegations levelled against you within twenty-one (21) days from the date of this letter stating grounds, if any, on which you rely to exonerate yourself.***
>
> ***Failure to respond within stipulated notice or submit a satisfactory explanation will render you liable to disciplinary action as it will be deemed that you have no defence."***

In response to those allegations the respondent by her letter of 26th January, 2017 requested for a copy of the letter from the Ministry to enable her familiarize herself with the allegations. She further requested for particulars and statements of her accusers to enable her respond appropriately and ended the letter by denying that she had incited students or instigated them in any way.

The respondent was invited to meetings of the Disciplinary Committee of the 2nd appellant in January and February, 2017 but was retired from services of the 2nd appellant by a letter dated 20th February, 2017 under the hand of the Chairman of the Council. The letter stated that the Disciplinary Committee had found her guilty of the accusations that had been made against her and the Council had decided to retire her in the public interest from the services of the 2nd appellant.

That is a summary of the events that unfolded between the parties to this appeal leading to a petition which was filed at the Employment and Labour Relations Court ("ELRC") at Kericho, where all those matters were set out. The respondent maintained that she had served the 2nd appellant diligently and that allegations made against her were false and were unsubstantiated. She further stated in the petition and supporting affidavit that upon allegations being made against her she had requested for documents which had not been availed; that on being invited to attend Disciplinary Committee Meetings her legal representative was denied entry or participation in the meeting; that the appellant's lawyer, **Mr. A.M. Lubulellah** was at the meeting and was the one who read out charges to her; that her request that her niece be allowed in the room to take notes on her behalf was also declined; that the lawyer for the appellants kept assuring her that it was not a disciplinary hearing but a fact finding mission; that she was only allowed to call two witnesses but had not been informed of the right to call witnesses; that on the 2nd day of hearings new accusations of inciting students were made against her which had not been brought to her attention prior to the meeting; that at an adjourned meeting held on 20th January, 2017 she was allowed to call two more witnesses; that at yet another adjourned meeting held on 9th February, 2017, while waiting outside the meeting room she observed a number of people enter and leave the meeting room who testified against her in her absence and that, later, she received the letter retiring her from the 2nd appellant. The respondent prayed for a declaration that the decision of the Council to retire her was a violation of **Articles 41, 47 and 50** of the **Constitution of Kenya** hence null and void; a declaration that the said decision was a gross violation of the provisions of the Employment Act hence illegal. The respondent also prayed for a permanent injunction to restrain the appellants from commencing any process of replacing her as DVC and position of Professor; an order of certiorari to quash the letter retiring her from service; an order to reinstate her as DVC and Professor; in the alternative, that the respondent be paid her remuneration/salary for the remainder of her contract as DVC; an order that the respondent be paid her car allowance from 1st January, 2015; and there was a prayer for compensation by way of damages for violation of rights.

Professor Mary Khakoni Walingo, the VC, in a replying affidavit restated the functions of her office and of the 2nd appellant, stating further, that the appellants or the Council had not breached any law in the manner that the respondent's case had been handled. At paragraphs 15 and 16 of her affidavit Professor Walingo depones:

> ***"15. That the appointment of a Deputy Vice-Chancellor at the Maasai Mara University is a contractual engagement and is not a permanent and or pensionable engagement and was in any event subject to the Charter of the University and University Statutes.***
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> ***16. That the Petitioner's status as a Professor of the University does not obligate her to remain in the employment of the University neither does it prevent the University from taking disciplinary action against her. Professorship is an academic and profession status which is on its own an employment relationship between the University and a Professor. A Professor of the University can work for any other University or organization in the world."***

The VC stated further that the DVC was expected to provide sound, effective, strategic direction and transformative leadership. She denied that the respondent was entitled to both a fully maintained car and a car allowance, stating that the respondent was entitled to one, not both.

Further, that the respondent had been found in fundamental breach of her employment contract and that the respondent should not benefit from that breach. The VC accused the respondent of feigning illness and failing to perform her duties which was inimical to the wider interests of the 2nd appellant. There were also accusations of insubordination and incitement of students, the VC deposing that disciplinary proceedings against the respondent were conducted according to the law. At paragraphs 53 and 54 of the affidavit the VC depones:

"53. That the office of the Vice-Chancellor is critical for university operations, meaning that the delay in the appointment of a Deputy Vice-Chancellor is prejudicial to the sound operation of the university and will affect its programs and it academic calendar. For this reason I believe that the interests of justice shall not be best served by an injunction restraining the university from advertising for and recruiting a replacement Deputy Vice-Chancellor to deal with matters of Research, Innovation and Extension under the reorganized Research, Innovation and Extension Division.

54. That the office of Vice-Chancellor (Academic Research and Student Affairs) has been abolished by the University Council under Minute 1887/11/2016 which also established the Research, Innovation and Extension Division. There is therefore no office under the University's current establishment to which the petitioner can be reinstated and to that extent the Petition and Notice of Motion praying for the petitioners reinstatement have been overtaken by events."

Professor Walingo ends by stating that the respondent had applied for, and had been paid her gratuity for the period from January 2014 to October 2016 in the sum of Kshs.1,403,298 less tax and that the 2nd appellant did not owe the respondent any money due to her as gratuity.

There was a further affidavit by Prof. Walingo who questioned why the respondent had not appealed the decision of the Disciplinary Committee to the Chairman of the Council and stated that the petition and an accompanying motion were meant to circumvent the internal dispute resolution mechanisms of the 2nd appellant which had not been exhausted by the respondent. The VC also questioned why the court had been approached through a petition instead of judicial review proceedings being taken; and it was further deponed that the respondent's retirement was in respect of both positions of DVC and Professor.

In an affidavit in support of the petition, Prof. Samson Omwoyo, the former Dean in the School of Arts and Social Sciences (he held that office from 14th March, 2014 to 31st July, 2016) stated that he had worked closely with the respondent when she was the Chair of the Deans Committee and they had met all the goals set under her leadership and her capabilities had not been put to question. He had, upon request by the respondent, attended the Disciplinary Committee meeting on 22nd February, 2017 where he explained the process which in his view, was under the office of the Registrar (Academics), not the DVC.

There were many Motions filed before the trial Judge which took some time to be dealt with but that is not an issue in this appeal. The hearing proceeded through written submissions and in a judgment delivered on 31st January, 2018 the trial Judge (D.K. Njagi Marete, J.) found that the decision to retire the respondent violated various articles of the Constitution and was null and void *ab initio*; he issued a declaration to the effect that the termination of employment of the respondent was in gross violation of **sections 41, 45 and 47** of the **Employment Act, 2007** and was wrongful, unfair and unlawful; the Judge issued a permanent injunction restraining the appellants from commencing any process towards replacement of, or replacing the respondent in the position of DVC and also as a Professor; he issued an order of certiorari quashing the appellant's letter of retirement of the respondent dated 20th February, 2017; the respondent was reinstated to employment as DVC and also as Professor from the date of judgment; it was ordered that the respondent "….. report back to work tomorrow the 1st February, 2018 at 800 hours …."; the respondent was awarded salary compensation for unlawful termination of employment, Kshs.658,112 x 6 =Kshs.3,948,672 and the respondent was awarded costs of the petition.

Those are the orders that provoked this appeal, premised on a Memorandum of Appeal drawn for the appellants by their lawyers, Lubulellah & Associates Advocates where 9 grounds of appeal are taken. In sum the Judge is faulted for: awarding the respondent six months' salary compensation for unlawful termination of employment on the basis of a salary of Kshs.681,112; granting the remedy of reinstatement without balancing the interests of the parties; ordering that the respondent report back to work immediately "…. In the absence of any pleading or prayer in that regard …."; failing to appreciate that the office of the DVC (Academic, Research and Student Affairs) had since been abolished; that the Judge was influenced by own prejudices in relying on a case where he (the Judge) was the claimant; that the Judge misunderstood the circumstances of the respondent's employment as being on permanent and pensionable terms while, according to the appellants, the employment was on contract; that the judgment was against the weight of evidence. In the penultimate ground the appellants fault the Judge for making a final determination of the case when there was an interlocutory application pending before court and, finally, the appellants say that the Judge exceeded his jurisdiction in awarding special damages and other reliefs which were not specifically pleaded, proved or submitted on by the respondent. For all that we are asked to allow the appeal, set aside the Judgment and award costs to the appellants.

The appeal came up for hearing on 19th November, 2020 and we heard the same by the "Go-to-Meeting" platform due to the prevailing COVID-19 pandemic. Learned counsel Mr. Lubulellah appeared for the appellants while learned counsel Mr. Mukhabani appeared for the respondent. Both counsel had filed written submissions and lists of authorities which they entirely relied on. Mr. Lubulellah pointed out that all the arguments in this appeal were the same as in Civil Appeal No. 255 of 2018 involving the same parties. In a brief highlight, counsel for the appellants submitted that there was no basis for the trial Judge to have based salary compensation at a monthly salary of Ksh.658,000 when there was no evidence to support that finding.

A detailed summary of the facts is given in the appellants' written submissions and we do not need to repeat that here as we have already done so in this Judgment. It is submitted that the respondent was appointed as DVC on 28th October, 2013 for a period of five years which period was to end on 28th October, 2018. Further that the salary attached to that appointment was Ksh.333,640 as pleaded at paragraph 6 of the respondent's petition; that the respondent was entitled to a car allowance of Ksh.125,000 per month or a fully maintained car with a driver. It is also submitted that the respondent's appointment as DVC was as per terms and conditions of service and termination of appointment could be done by either party giving the other six months written notice and that, during her service as DVC, the respondent did not draw a salary in her position of Professor. It is further submitted for the appellants that the respondent was not entitled to permanent and pensionable terms of engagement and that the respondent was not entitled to work until the age of 70, when Professors ordinarily retire. It is submitted that disciplinary proceedings which were undertaken against the respondent were regularly conducted; they were not a criminal trial and due process was followed. On the presence of counsel for the appellants in those disciplinary proceedings it is submitted that:

"….. It is not alleged that such presence was illegal or otherwise in contravention of the law. …."

It is also submitted for the appellants that the respondent after being informed that she had been retired, did not appeal that decision thus she did not exhaust internal dispute resolution mechanisms of the 2nd appellant. Further, that the Council of the 2nd appellant vide Minute 1887/11/2016 had abolished the office of DVC (Academic, Research and Student Affairs) long before the petition was determined.

The other aspect of the submissions deals with whether the trial court had jurisdiction to hear and determine the matter, although the appellants admit that this is not one of the grounds raised in this appeal. We do appreciate that a jurisdictional issue can be raised at any time, even on appeal, although it will always be prudent that it be raised at the earliest opportunity so that the court trying the matter will make a determination which would be considered in the appeal, See **Kenya Ports Authority v Modern Holdings (EA) Limited [2017] eKLR**. It is submitted that the remedy of reinstatement to employment should be awarded with caution, the case of **Kenya Airways Limited v Aviation And Allied Workers Union Kenya and 3 Other [2014] eKLR** being cited in support, it being submitted that there were no exceptional circumstances in the respondent's case to justify an order of reinstatement.

The appellants take issue with the trial Judge's reliance on a case where he was the claimant – **D.K. Njagi Marete v Teachers Service Commission [2013] eKLR,** and complain that the Judge exhibited bias against employers. The appellants further submit that there was a pending interlocutory application and final orders should not have been made in the Judgment and, finally, citing the case of **Hahn v Singh [1985] KLR 716,** it is submitted that special damages were awarded when they had not been specifically pleaded and proved. The appellants were not done – they take issues with the award of costs to the respondent by the trial Judge, submitting that the proceedings before that court were "skewed", and costs should not be awarded to the respondent in any event.

Then it was the respondent's turn to respond. Mr. Mukhabani, learned counsel, relied fully on his written submissions filed in court on 11th April, 2019 where, again, the history of the case is set out. It is submitted that the respondent attended Disciplinary Committee meeting on 5th January, 2017 accompanied by her lawyer but the lawyer was denied entry into the meeting for the reason that the meeting was a "fact finding meeting", not a disciplinary one. Further, that after a series of meetings some of which were held in the respondent's absence, the respondent received the letter of 20th February, 2017 retiring her from service for various reasons. On the challenge by the appellants on the jurisdiction of the ELRC to interpret the Constitution, the respondents challenge the submission by the appellants by citing this Court's judgment in the case of **United States International University v Attorney General [2012] eKLR** where it was held that the ELRC, being a court of concurrent status as the High Court, was competent to deal with constitutional matters falling within its domain.

On the ground of appeal relating to what was the appropriate salary to be awarded, the respondent submits that the Judge was right to use the sum of Ksh.658,112 and refer to page 44 of the record which is part of the letter appointing the respondent as DVC. On reinstatement of the respondent to the position of DVC and Professor, it is submitted that **Section 12** of the **Employment and Labour Relations Act** gave jurisdiction to ELRC to make an order for reinstatement of an employee within three years of dismissal, subject to conditions as the court may think fit to impose. It is further submitted that as the trial court was dealing with a constitutional petition it was empowered by **Article 23** of the **Constitution** to grant the awards that it did.

The respondent supports the trial Judge's finding and order that she reports back to work immediately and cite, in support, the case of **Olive Mwihaki Mugenda & Anor v Okiya Omtata Okoiti & 4 Others [2016] eKLR**

where this Court held that court orders take effect immediately. The respondent responds to the attack on the trial Judge who relied on a case where he was a party (claimant) by stating that a judicial officer is not prohibited from being persuaded by the findings of another Judge if the facts leading to the decision are similar. It is therefore submitted that the trial Judge was not biased at all against employers.

On whether the respondent's employment was on permanent and pensionable terms, it is submitted that appointment as DVC was for five years with eligibility for re-appointment, terminable by either party giving to the other six months' notice. It is further submitted on this ground that the respondent's appointment as Professor was on permanent and pensionable terms, and that the respondent did not relinquish this position when she was appointed DVC.

The respondent challenges the submission by the appellants that there was a pending application, submitting that there was no pending application by the time judgment was delivered. It is prayed that we dismiss the appeal.

We have traveled the long journey through the record of appeal to enable us carry out our role as a first appellate court which is to subject the whole evidence to a fresh and exhaustive scrutiny and make our own conclusions but must remember that we had no opportunity of seeing and hearing witnesses – See **Peters v Sunday Post Limited [1958] EA 424** where **Sir Kenneth O'Conner**, sitting in the predecessor of this Court had this to say of the duty of a first appellate court:

> ***"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness."***

The dispute before the trial Judge related to an employment matter and it is a good starting point that we examine what the various provisions of law provide to enable us apply them to the facts before us – were they complied with or was there a breach of the same in the way the dispute pitting the respondent against the appellants was handled?

Article 47 of the **Constitution** on **"Fair Administrative Action"** donates to every person the right to administrative action that is expeditions, efficient, lawful, reasonable and procedurally fair. If a person's fundamental freedom is likely to be adversely affected by an administrative action the person has the right to be given written reasons for the action.

Article 50 of the **Constitution** gives a right to every person to have any dispute that can be resolved by the application of law to be decided in a fair and public hearing before a court or by an independent and impartial tribunal or body.

Section 41 of the **Employment Act 2007** on termination on grounds of misconduct provides in material part that where termination of

employment is on grounds of misconduct, poor performance or physical incapacity, the employer shall, before terminating employment on any of those grounds, explain to the employee the reason for which the employer is considering termination and the employee shall be entitled to have another employee of his choice present during this explanation. Where summary dismissal is concerned under **Section 44(3) or (4)** of the said **Act,** the employer must hear and consider any representations by the employee, if any, and of the chosen person.

By **Section 43** of the said **Act,** where the claim arises out of termination of a contract, the employer must prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair.

Section 44 of the said **Act** on **"Summary dismissal"** provides:

> ***"(1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.***
>
> ***(2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that the employee is entitled by any statutory provision or contractual term.***
>
> ***(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.***
>
> ***(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—***
>
> ***(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;***
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> ***(b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;***
>
> ***(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;***
>
> ***(d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;***
>
> ***(e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;***
>
> ***(f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or***
>
> ***(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property."***

As we have seen, the Judge granted all the prayers in the petition which included a declaration being made that the decision to retire the respondent was unconstitutional; that the decision was unlawful; a permanent injunction was issued restraining the appellants from commencing any process for replacing the respondent in the position of DVC and also as Professor; the letter of retirement was quashed; the respondent was reinstated to her position as DVC and also as Professor. It was ordered that the respondent reports back to work the next day and she was awarded six months salary as compensation with her monthly salary taken as Ksh.658,112.

THE GROUNDS OF APPEAL

Let us now discuss the grounds set out in the Memorandum of Appeal although not necessarily seriatim as some of the grounds collapse into others.

AWARD OF SIX MONTHS' SALARY COMPENSATION

The appellants take issue with the trial Judge who awarded the respondent six months' salary compensation for unlawful termination on the basis of monthly salary of Ksh.658,112.

There are two aspects in this ground of appeal – salary compensation at six months and the sum used for monthly salary.

The trial Judge found that the disciplinary process employed by the appellants was unfair and awarded the respondent compensation.

We have in this Judgment discussed the correspondence exchanged by the parties to this appeal leading to first, interdiction of the

respondent, followed by retirement.

As we have shown, the Constitution, the Fair Administrative Actions Act and the Employment Act dictate that administrative actions be employed in a manner that is fair.

The interdiction letter dated 31st October, 2016 served on the respondent by the 2nd appellant raised many accusations against her and she was required to, within 21 days from the date of the letter, to respond to the allegations. The respondent's advocate's letter of 21st December, 2016 requested for various documents and information to enable the respondent to respond to the allegations but these were not forwarded. In fact, the Chairman of the 2nd appellant's Disciplinary Committee, stated by his letter of 4th January, 2017 that legal representation would not be allowed. He cited **Section 41** of the **Employment Act** for that position but we are of the respectful opinion that he was wrong in his interpretation of that provision. Then, as we have shown, as disciplinary proceedings were ongoing, new allegations were made against the respondent and when she asked for documents to enable her respond, again these were not provided, they were denied. At the hearing of the disciplinary proceedings the respondent was accompanied by her lawyer but the lawyer was denied entry into the hearing and even a request that her niece be allowed into the room to assist her to take notes was denied without the appellants assigning any reason for such denial. It is alleged, and this is not seriously disputed by the appellants, that the appellant's lawyer was present in the disciplinary committee hearings and that it was he who denied entry for counsel for the respondent or her niece, stating that the proceedings were **"fact finding",** not disciplinary. It is difficult to follow the appellant's submission that the appellants had a right to have their lawyer present in the proceedings while the same right was not available to the adverse party. This is an argument that the law will not countenance as parties have equal rights in such proceedings and the way the proceedings were conducted were, to say the least, procedurally unfair. We agree with the trial Judge that the way the proceedings were conducted was flawed; they did not meet requirements of substantive and procedural fairness or justice.

Where termination of employment is found to be unfair, the Employment Act allows the ELRC to award salary compensation. In the case before the Judge he awarded six months' salary compensation and we are of the respectful opinion that the award was fair in the circumstances of the case. The Judge took her monthly salary at Ksh.658,112 in making the award, a finding which is appealed.

It is stated at paragraph 5 of the petition that upon assuming the position of DVC the respondent retained her position as Professor **"… but did not draw any salary from it ….".** It is further stated that as DVC the respondent's monthly salary was Ksh.333,640. In the letter dated 28th November, 2013 appointing the respondent as DVC the monthly salary is stated to be Ksh.333,640 with various allowances.

We have carefully gone through the Judgment of the trial Judge and there is no indication where the monthly salary of Ksh.658,112 is taken from. There is merit in the submission by the appellants that this figure is unsupported by the evidence on record. The salary in the letter of appointment as DVC was Ksh.333,640. We therefore set aside the learned Judge's finding that the monthly salary was Kshs.658,112 and substitute therefor a monthly salary of Kshs.333,640.

REINSTATEMENT

The trial Judge held that the decision to retire the respondent from the position of DVC and that of Professor was unconstitutional, wrongful, unfair and unlawful. The letter of retirement was quashed and the respondent was reinstated to both positions, to report back immediately.

Section 49(3) (a) of the **Employment Act** provides reinstatement as one of the remedies that the court dealing with an employment dispute can grant. There are various matters that the court should consider which are set out at **Section 49** of that **Act** and the trial Judge has summarized that position fairly well in the Judgment.

The Judge considered the age of the respondent (she was 61 years old); that she was at the apex of her career; her retirement was at 70 years old and:

> ***"….. This termination of employment deals a big blow to her career and lifetime. In this kind of circumstances, premature retirement, she would find (sic) difficult to find alternative employment. I would therefore hold that this case satiates a case for reinstatement. The issue of abolition of her office as alleged by the respondent is a non-issue, a case of settling scores and impunity. It should be entirely disregarded ……"***

The remedy of reinstatement as provided by **Section 49** of the said **Act** is in the nature of an order for specific performance and the jurisprudence from Kenya and elsewhere is to the effect that the order is not to be made except in very exceptional circumstances. It was held in the case of **Kenya Power & Lighting Company Limited v Agrrey Lukorito Wasike [2017] eKLR**; *inter alia*, that:

> ***"…. At the very least a Judge ought to set out the facts that mark out a particular case as possessed of exceptional circumstances before reinstatement can be ordered. This provision, properly understood, ought to render orders of reinstatement rarities, not common place and routine pronouncements as appear to come from certain sections of the Employment and Labour Relations Court….."***

Githinji, JA, expressed himself thus on that issue in **Kenya Airways** (supra) case:

> ***"The remedy of reinstatement is discretionary. However, the Industrial Court is required to be guided by factors stipulated in Section 49(4) of the Employment Act which includes the practicality of reinstatement or re-engagement and the common law principle that specific performance in a contract for employment should not be ordered except in very exceptional circumstances. The Court should also balance the interests of the employee with the interest of the employer …. The Employment Act has enacted the common law principle that the remedy of re-instatement should be given in "very exceptional circumstances."***

a) Position as Professor

The respondent was appointed by the 2nd respondent as an Associate Professor by a letter dated 26th June, 2009 and as Professor by a letter dated 16th May, 2013. Both appointments were on permanent and pensionable terms.

The trial Judge reinstated the respondent to the position of Professor in the employ of the 2nd appellant.

We have considered all the factors enumerated in **Section 49** of the **Employment Act** and relevant case law relating to the remedy of reinstatement. That remedy is to be granted in rare and exceptional circumstances. The trial Judge considered the respondent's age, her position of employment by the 2nd appellant, the unfair manner the termination was arrived at, amongst other factors. It is obvious that the respondent wished to be reinstated to office (she so prays in the petition); she had worked as Professor for the 2nd appellant since 2009; as a Professor she was entitled to serve until retirement at the age of 70 years. It is our view that in the position of Professor that position is detached from the working relationship with the VC and the two offices should not clash while engaging in their different duties. Let the Professor teach. The order for reinstatement as Professor was well deserved and we uphold that order in respect of that position. However, we wish to state that in instances where the court is satisfied that an order of reinstatement is deserved, it is not prudent to direct that a claimant reports back to office within a day from the date of the court's decision. Such a drastic order is likely to present considerable implementation challenges to an employer. In our view, a reasonable period, depending on the circumstances of each case, ought to be given for the reinstatement to be effected.

b) Position of DVC

The respondent was appointed as DVC (Academic Research and Student Affairs) by letter of 28th October, 2013 on terms and conditions set out in the 2nd appellant's letter of 28th November, 2013. The appointment was for five years from 29th October, 2013.

The trial Judge reinstated the respondent to that position in the impugned judgment.

As we have shown, reinstatement as a remedy is to be awarded rarely and in exceptional circumstances.

The positions of the 1st appellant (VC) and that of the respondent (DVC) were very senior positions in the structure of the 2nd appellant and it would have been expected that the two offices would work cordially for the good government of the 2nd appellant and its collaborators. That, as we have seen, was not the case. There was exchange of correspondence that could probably have been avoided if phone calls were made and received or by a casual walk across the corridor to raise and discuss issues affecting the two offices. It is not clear, for instance, whether the VC had raised the issues she forwarded to the County Commissioner, Narok, with the DVC where she stated, amongst other things, that it was the DVC who was inciting students to take illegal actions against the 2nd appellant. But let that trajectory rest. The respondent, not once, but twice, wrote to the Chairman of Council of the 2nd appellant saying: "… I am dehumanized, demoralized, and extremely excluded from matters that concern my Division. How do we work together in the midst of exclusivity, non-dialogue, victimization and all the unfounded rumours of my incitement of students and staff?" The 1st appellant in the replying affidavit stated, *inter alia*, that the office of DVC (Academic Research and Student Affairs) had been abolished by the University Council. That was the position to which the respondent had been appointed by the Minister.

The trial Judge analysed the case and came to the conclusion that the allegations made against the respondent by the appellants were a clear demonstration of a hostile work environment. We therefore allow this ground of appeal.

Considering that the positions of VC and that of DVC were intertwined in that the occupants were senior administrators of the 2nd appellant, and considering the hostile environment that obtained between the 1st appellant and the respondent, and considering the facts to be considered under **Section 49** of the **Employment Act**, and also considering that the position to which the respondent had been appointed had been abolished, we think that it was not an appropriate case to order reinstatement. Balancing the interests of the parties tilted in favour of not ordering reinstatement. We therefore allow this ground of appeal.

REPORT BACK TO WORK

The Judge ordered that the respondent report back to work **"….tomorrow the 1st February, 2018 at 800 hours …."**

It is submitted for the appellants that the petition did not invite the court to make any order to report back to work on any particular day. The respondent in response takes comfort in the decision by this Court in ***Olive Mwihaki Mugenda*** (supra). We agree with the submission by the respondent. Courts do indeed impose timelines for doing certain acts and there was nothing wrong or irregular in the Judge making that order.

Citing the Case of D.K. Njagi Marete v Teachers Service Commission

The Judge indeed, not only cited the case where he had been party but heavily relied on it.

The appellants complain that there were other cases that the Judge should have relied on instead of relying on a case where he had been a party.

The respondent responds to that submission by stating that a Judge is not precluded from relying on a decision of another Judge. On our own assessment of the case, the appellants have not placed before us any material that may show that relying on that case influenced the Judge in the assessment of the case. True, another Judge, many in fact, would shy away from relying on a case where the Judge was a party but that, at most, is a matter of choice and tidiness and we hesitate, in the circumstances, to make a serious pronouncement on that issue.

Permanent and Pensionable

We have found, and we hold, that the respondent was employed on contract terms as DVC but was on employment on permanent and pensionable terms as a Professor.

Pending Application

It is argued for the appellants that the Judge erred in making a final determination of the case when there was a pending application. The appellants, as correctly submitted by the respondent, have not pointed out which application was pending, and the appellants were duty bound to give us material on which we could make such a determination.

As noted earlier in this Judgment there were many applications filed before the Judge. There is no indication in the record that any of those applications awaited determination as Judgment was delivered.

Special damages

It is submitted for the appellants that the Judge awarded special damages without specific pleading or proof.

The reliefs sought in the petition as related damages were –

> "(f) Alternatively, the Petitioner be paid her remuneration/salary for the remainder of her contract as the Deputy Vice Chancellor" – this was not awarded.
>
> "(g) The Petitioner be paid her remuneration/salary for the remainder of her term as Professor" – this was not awarded.
>
> "(h) The Petitioner be paid all her car allowance as Deputy Vice Chancellor (Academic, Research and Student Affairs) due from 1st January, 2015 of the 1st Respondent till payment in full" – this was not awarded.

This ground of appeal has no merit.

Our assessment of the record of appeal is that the appeal partially succeeds. The final orders that we make are therefore the following:

> *i) The award of salary compensation made by the Judge is set aside. We award salary compensation to the respondent for six months on a monthly salary of Ksh.333,640 (Ksh.333,640 x 6= 2,001,840).*
>
> *ii) We uphold the order reinstating the respondent as Professor on permanent and pensionable terms.*
>
> *iii) The order reinstating the respondent to the positon of DVC is set aside.*

Although the appeal has partially succeeded, considering the circumstances of the case let each party meet their costs here and below.

Dated and delivered at Nairobi this 19th day of February, 2021.

D.K. MUSINGA

……..

JUDGE OF APPEAL

J. MOHAMMED

…….

JUDGE OF APPEAL

S. ole KANTAI

……

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR