



**Akama v Kisii University & 2 others (Cause E048 of 2024)
[2025] KEELRC 109 (KLR) (27 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 109 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E048 OF 2024
JK GAKERI, J
JANUARY 27, 2025**

BETWEEN

PROFESSOR JOHN SORANA AKAMA CLAIMANT

AND

KISII UNIVERSITY & 2 OTHERS RESPONDENT

JUDGMENT

1. The Claimant commenced this suit vide a statement of claim dated 30th May, 2024 alleging unlawful and wrongful termination of employment by the Respondents.
2. The Claimant's case is simply that Clause 31 of the contract of employment provided that he would after the Vice-Chancellorship revert to teaching and research as a full Professor at the Kisii University, the 1st respondent, and faults the 2nd and 3rd respondents for frustrating the contract of employment.

The claimant prays for:

- a. A declaration that termination of employment was unfair, unlawful, wrongful and invalid.
- b. Reinstatement to his position as per the contract of employment and/or re-engagement to a similar and comparable position.
- c. Payment of monthly salary and allowances until the date of reinstatement and continue paying until the date of lawful termination.
- d. Aggravated and exemplary damages.
- e. Costs of the suit plus interest at Court rate.



1st and 2nd Respondent's case

3. The 1st and 2nd respondents admitted that the claimant was their employee serving as the 1st respondent's Vice-Chancellor effective 12th June, 2018 for a second term and having served as its Principal since 2008.
4. The 1st and 2nd respondents' case is simply that the claimant was not a Professor of Kisii University before becoming its Vice-Chancellor in June 2013.
5. The 1st and 2nd respondents aver that the claimant was at all material times aware that he had never served as a full Professor of the 1st respondent and the issue of reverting to the position of Full Professor at the end of the contract was incapable of performance and thus unenforceable.
6. That they fulfilled their contractual obligations under the employment contract and the 1st respondent's the Human Resource Manual provided the process of recruitment of professors.
7. The 1st and 2nd respondent allege that they learnt of the letter dated 3rd May, 2023, signed by Dr. Bob Ndubi when it was brought to their attention by the Claimant and deny its authenticity as no resolution was passed by the 73rd Full Council meeting held on 6th February, 2023, the council had no acting chair and Dr. Bob Ndubi had no authority to sign the letter.
8. The 1st and 2nd respondents deny having terminated the claimant's employment and allege that clause 31 of the claimant's contract of employment was impractical and unenforceable.
9. To reinforce their case, the 1st and 2nd respondents aver that the Claimant was an employee of Moi University where he served as a Full Professor in the Department of Tourism and Tour Operations Management in the School of Tourism Hospitality and Events Management and expected to serve till retirement at the age of 70 and was serving the 1st respondent while on leave of absence and went back to Moi University and was thus seeking another full-time position in another state corporation.
10. The 1st and 2nd respondent pray for dismissal of the claimant's case with costs.

3rd respondent's case

11. The 3rd respondent admits that the claimant's contract of employment provided that the claimant would after the Vice-Chancellorship revert to the position of full Professor, but aver that the clause was invalid/ineffectual and void as the claimant was not a Professor of Kisii University, a fact he was aware of.
12. The 3rd respondent's case is that the claimant was an employee of Moi University on leave of absence and had applied to be reinstated to continue serving as a Professor and was reinstated and cannot hold two positions in the public service and could not be appointed a Professor at Kisii University outside the law and policy.
13. The 3rd respondent questions the letter dated 3rd May, 2023 by Dr. Bob Ndubi and avers that the position of Kisii University Coordinator of the KUKHA Project was not vacant and no resolution had been passed in support of the letter by Dr. Bob Ndubi.
14. The 3rd respondent denies having terminated the Claimant's employment illegally or unprocedurally and avers that the contract lapsed on 11th June, 2023 and prays for dismissal of the Claimant's case with costs.



Claimant's Response

15. The response raised no new issue save that the Claimant had neither reported nor received any remuneration from Moi University as the contract with the 1st respondent was still running.

Claimant's evidence

16. On cross-examination, the claimant confirmed that he had a contract of service with Kisii University dated 12th January, 2019, but effective 12th June, 2018, to serve for a period of 5 years as the 1st Vice-Chancellor.
17. The witness admitted that he was not a Professor of Kisii University but was serving in a teaching position at the University as the Vice-Chancellor is a teaching position.
18. It was his testimony that the position of Vice-Chancellor ushered his employment at the Kisii University.
19. CWI, confirmed that the phrase "to revert" meant to go back to as per the Human Resource Manual and Statute 25(i) of Kisii University.
20. According to the claimant, he was appointed to the position full Professor vide letter dated 3rd May, 2023 in the School of Business and Economics which housed the Department of Tourism and Hospitality.
21. The witness expressed surprise that the 73rd Council meeting did not resolve that he be appointed a Professor, School of Business and Economics.
22. He confirmed that the meeting had no substantive chairperson and M/s Caroline Chizupo was the temporary chair and the Claimant as Secretary. The witness testified that the minutes on record were incomplete but were the only copy on record and Dr. Bod Ndubi signed the letter as the Acting Chair and was a Council member. CWI denied that Dr. Bob Ndubi had no authority to sign the letter dated 3rd May, 2023.
23. The witness confirmed that before joining Kisii University, he was a Professor in the Department of Tourism at Moi University and had taken leave of absence and was thus its employee.
24. It was his testimony that although Moi University had informed him of forfeiture of appointment for not reporting back, he sought and was granted reinstatement and sought further leave of absence for one (1) year as he had another running contract with Kisii University as per the contract of employment.
25. The claimant admitted that he sued on account of the letter he received from the Chair of Council, Kisii University.
26. The witness further testified that the 73rd Council meeting discussed Clause 31 of the contract of employment and a decision was made as evidenced by the letter dated 3rd May, 2023.
27. He admitted that the Statutes of the University made no reference to an acting chair of council.
28. The claimant further admitted that he had not rendered services to Kisii University from June, 2023 or received any salary and was seeking reinstatement at Kisii University.



29. On re-examination, CWI testified that recruitment could take various forms including head hunting and his contract of employment was signed the Chairman of Council, Chairman Human Resource and Appointments Committee and the himself.
30. That he attended the 73rd Council meeting and Dr. Bob Ndubi was also in attendance and the letter he signed had not been challenged as forgery nor had Dr. Bob Ndubi disowned it and neither RWI nor RWII attended the meeting.

Respondent's evidence

31. RWI, Professor Nathan Ogechi confirmed, on cross-examination that Vice-Chancellorship was a teaching position as is that of a Principal of a college as reflected in Statute No. 25(i) of Kisii University.
32. The witness admitted that the Claimant had a contract of employment with the 1st Respondent and Clause 31 was part of the contract.
33. RWI equally confirmed that he was a professor of Moi University on leave of absence serving Kisii University and had not seen any letter appointing the claimant a Professor at Kisii University.
34. On re-examination the witness stated that a person who ceases to be a Vice-Chancellor was not deemed to be a member of the teaching staff.
35. The witness denied that Mr. Bob Ndubi was the Acting Chair of Council. He testified that no resolution of reversion to the position of Professor was passed by the 73rd Council meeting.
36. RWII, Dr. Sarah Rutto confirmed that she was not a member of the Kisii University Council on 6th February, 2023 or its chair.
37. According to RWII, the minutes of the 73rd council meeting were confirmed by the 74th Council meeting but were not approved for circulation.
38. That Dr. Bob Ndubi's letter dated 3rd May, 2023 made reference to the Minutes of the 73rd Council meeting and no evidence had been adduced to controvert the contents of the letter.
39. That under the 1st respondent's Human Resource Manual and statutes, Vice-Chancellorship was deemed to be a teaching position.
40. That the letter signed by Dr. Bob Ndubi had a PF No.0002R and thus traceable.
41. The witness admitted that she did not attend the 73rd Council meeting and became the chair of the council on 23rd May, 2023, before which the Council had no substantive chair from late 2022.
42. That the 1st respondent's Council meeting had no position of acting chair and Dr. Bob Ndubi ceased to be a member of Council on 22nd May, 2023.
43. RWII further testified that minutes of the 73rd Council meeting were confirmed on 18th June, 2023 and signed the same and Dr. Bob Ndubi attended the meeting and did not contest or object to the contents.
44. That the claimant communicated with her using her private email address.
45. On re-examination, RWII testified that a few members who attended the 73rd Council meeting attended the 74th council meeting.
46. It was her testimony that recruitment must be competitive and the Vice-Chancellor reverts to where he/she has a contract and the claimant was to go back to Moi University.



Claimant's submissions

47. As to whether there existed a contract of service between the claimant and the 1st respondent, the claimant submits that clause 31 of the employment contract effective 12th June, 2018 and the letter dated 3rd May, 2023 show that there was a contract of service between the parties.
48. Reliance was made on the sentiments of the Court in *Fidelity Commercial Bank V Kenya Orange Vehicle Industries Ltd* [2013] eKLR on ascertainment of intention of the parties to a contract as well as the extrinsic evidence rule.
49. The Claimant submits that parol evidence is inadmissible to contradict, vary or alter the terms of a deed or written document and cited the sentiments of the Court in *Prudential Assurance Co. of Kenya Ltd V Sukhwinda Singh Jutley & Another*. Pushing his argument further, the claimant contends that in the case of ambiguity in a contractual documents the same is construed against the party that drew the document as held in *United Millers Ltd V Nairobi Java House Ltd* [2019] eKLR.
50. On variation or modification of the terms of a contract, reliance was made on the decisions in *Gimalu Estates Ltd & 4 Others V Internationl Finance Corporation & Another* [2006] eKLR and *Kenya Breweries Ltd V Kiambu General Transport Agency Ltd* [200] EA 398 as well as the provisions of Section 2 of the *Employment Act* on the definition of a contract of service to urge that the 2nd respondent's letter made reference to the 73rd Council meeting held on February 6th 2023 and the 3rd respondent illegally and unprocedurally terminated the claimant's contract of service.
51. Concerning reinstatement, the claimant urges that this is an exceptional case as he is 65 years old with less than 5 years to retirement and dedicated his time serving Kisii University.
52. Reliance was made on the decisions in *Kenya National Union of Nurses V Permanent Secretary Ministry of Health & 2 Others* [2020] eKLR.
53. As regards the Professorship of the Claimant, the claimant submits that although the respondent's argue that he was a professor of Moi University, they did not enjoin it in the proceedings as a Third Party and/or Interested Party.
54. In any case the claimant admitted in evidence that he was on leave of absence from Moi University since joining the 1st respondent and Moi University was not paying him.
55. More significantly, the claimant joined the 1st respondent in January 2009 as Principal and transitioned the college to a fully fledged University.
56. Equally, RWI admitted that he was a Professor at Moi University with a running contract with Kisii University.
57. Finally, the claimant took issue with the fact that the respondents did not produce the minutes of the Council meeting held on 9th June, 2023 or call Dr. Bob Ndubi or any other person who attended the 73rd Council meeting where the issue in dispute was discussed and concluded and urges the Court to make and adverse interference on the issue as held in *Kenya Akiba Micro Finance Ltd V Ezekiel Chebii & 14 Other* [2012] eKLR.

The claimant argues that the respondents were hiding the truth.



1st and 2nd Respondent's submissions

58. On construction of clause 31 of the employment contract, counsel for the parties delved into the meaning of the term revert as defined by Oxford Dictionary to urge that since the Claimant did not hold a position at Kisii University or its predecessor, clause 31 of the contract was unhelpful and in any case his contract ended by effluxion of time.
59. Reliance was made on Peter Ochieng Okello V Metal Tin Makers Ltd [2020] eKLR and Josphat Kobia Oyangi V Kenya Education Management Institute [2018] eKLR.
60. Concerning the letter dated 3rd May, 2023 signed by Dr. Bob Ndubi Counsel submits that the respondents were emphatic that the letter did not emanate from them and Dr. Bob Ndubi, though as Council member, the 1st respondent had no position of Acting Chair of Council and the 73rd Council meeting did not make a resolution on the appointment of the claimant as a full Professor of Kisii University or acting chair.
61. Counsel submitted on appointment of staff by Council to reinforce the argument that the letter dated 3rd May, 2023 was not official communication from the University.
62. On the reliefs sought, counsel submits that none is due to the claimant but urges that should the Court find that the claimant has a valid claim, it ought be guided by the sentiments of the Court in Co-operative Bank of Kenya Limited V Banking Insurance and Finance Union cited with approval in Five Forty Aviation Ltd V Erwan Lanoe that the reliefs are discretionary not mandatory and regard must be had on the provisions of Section 49(4) of the Employment Act.
63. Counsel submits that since the claimant was on leave of absence from Moi University, his position was still available and ought to have reported back and any alleged loss of earnings is attributable to his default and does not qualify for the prayers sought.
64. Finally, counsel submits that the respondents never attempted to introduce extrinsic evidence and the issue was irrelevant.
65. Similarly, on the alleged ambiguity of clause 31 of the employment contract, counsel submits that the clause had no demonstrable ambiguity as its language was clear and the contra proferentem rule was inapplicable.
66. That the claimant was a member of the teaching staff qua Vice-Chancellor and the same ended when his terms as Vice-Chancellor ended.

3rd respondent's submissions

67. On the reliefs sought, counsel urges that there was no unfair termination of employment as the claimant's contract of employment lapsed by effluxion of time as held in Registered Trustees of the Presbyterian Church of East Africa & Another V Ruth Gathoni Ngotho [2017] eKLR as well as Transparency International-Kenya V Omondi [2023] KECA 174 (KLR).
68. On Clause 31 of the Claimant's contract of employment counsel submits that the same was ineffectual and null and void as the claimant was never a full Professor of Kisii University and could not revert to a position he never held and could only apply if he was a Professor of Kisii University prior to appointment as the Vice-Chancellor and his request was declined.



69. Counsel further submits that Clause 31 of the contract of employment is unconstitutional as it purports to appoint the claimant as a full Professor of Kisii University without recruitment under Article 232 of *the Constitution* of Kenya which espouses the values of public service.
70. Reliance was made on the decision in *Katiba Institute & Another V Attorney General & Another* [2020] eKLR to further urge that clause 31 is unlawful and could not be sustained and also cites *Simeon Kioko Kitheka & 18 Others V County Government of Machakos & 2 Others* [2018] eKLR on the effect of a statute adjudged as unconstitutional.
71. concerning the letter dated 3rd May, 2023, counsel urges that it is of no consequence as the author had no capacity to do so and the position of acting chair did not exist and the resolution cited did not exist.
72. That the minutes of the 73rd Council meeting could not be confirmed on 9th June, 2023 which was a special Council meeting but confirmed by the 74th council meeting held in June, 2023.
73. Counsel submits that the filing of the suit was an afterthought as the claimant had sought resume duty at Moi University as per his letter dated 3rd April, 2024.
74. On the claimant's age, counsel urges that he is already an employee of Moi University and the argument that he could not secure employment could not arise and had written to the University and his request was granted.

Analysis and determination

75. Having considered the pleadings, evidence on record and submissions by the parties, the issues for determination are:
 - i. Whether clause 31 of the employment contract dated June 2018 and executed on 28th January, 2019 is enforceable.
 - ii. Whether termination of the claimant's employment by the respondent was unfair or the employment contract lapsed by effluxion of time.
 - iii. Whether the claimant is entitled to the reliefs sought.
76. It is common ground that the Claimant joined the 1st respondent as principal of its predecessor in January 2009 and was its founding Vice-Chancellor in 2013, competitively recruited for a term of 5 years which he successful served and was engaged for another 5 year term vide the contract of employment signed on 28th January, 2019 scheduled to lapse on 11th June, 2023.
77. It is equally not in contest that the Claimant was a full Professor of Moi University and took leave of absence to serve as Principal of the Kisii University college and later as Vice-Chancellor of the University and his performance for the two terms was unblemished.
78. Similarly, it is indisputable that Statute 25(i) of the 1st respondent and its Human Resource Manual 2016 constituted the Vice-Chancellor a member of the University's teaching staff and could therefore render the services of a Professor if he so wished having regard to his duties and responsibilities as the Vice-Chancellor.
79. It follows that contrary to the respondent's argument that the Claimant was not competitively appointed as a Professor of Kisii University, he was the moment he was appointed its Vice-Chancellor as the Council of Kisii University recognized his Professorship of Moi University, thus indirectly recognizing him as a Professor at Kisii University.



80. It is common knowledge that most Universities in Kenya, expressly require their Vice-Chancellor to be a Professor in his or her discipline and once an applicant is found suitable to serve as a Vice-Chancellor, his/her Professorship by whatever University it was awarded is recognised as a Professorship of the University engaging him or her as Vice-Chancellor, bearing in mind that the process is competitive and all persons who meet the threshold can apply.
81. The pith and substance of this case is whether clause 31 of the claimant's contract of employment is enforceable. Whereas the respondents argue in unison that the clause is unenforceable, void impracticable and unconstitutional, the claimant maintains that it was a term of the contract of employment and the parties were bound to abide by it.
82. In *Technoserve Ltd V Nokia Corporation & 3 Others* [2021] eKLR Mativo J (as he then was) stated: -
“For starters when a person signs a document, that signature should signify an intent to be bound by the terms and conditions embodied in the signed document”.
83. Similarly, in *Lestrange V Graucobs* [1934] 2KB 394 Scrutton L. J. stated
“When a document containing contractual terms is signed, then in the absence of fraud or, will add, misrepresentation, the party signing it is bound and it is wholly immaterial whether he has read the document or not”
84. Clause 31 of the claimant's contract of employment entitled “expiry of contract” states
“At the end of the contact and on his willingness to serve the University, the Vice-Chancellor shall revert to teaching and undertaking research as a full Professor in the appropriate Faculty/School and shall continue to draw(b) considering (a) the basic salary, house allowance and in terms of Cabinet Secretary Ministry of Education: Ref No. MOE/CONF/4/1 dated on 5th December, 2018 and as stipulated in an earlier circular by the Head of Public Service ref/OP/SCAC 1/12(ii) dated on the 14th May, 2015”
85. It is not in dispute that the parties entered into the contract of employment willingly and understood its contents, more so the 1st respondent which drafted the contract and is thus responsible for it tenor.
86. Strangely, the respondents spent considerable time during the hearing and submissions on what the term “reverting” in clause 31 meant, an exercise, which in the Courts view, was unnecessary and as counsel for the 1st and 2nd respondents submitted, no ambiguity had been demonstrated by the claimant. In any case, the clause is very clear on the intention of the parties and as RWI confirmed when asked by the Court, the clause may have been replicated from other contracts of employment of University Vice-Chancellors, without appreciating its full implications.
87. The claimant played no role in the preparation of the contract. He only signed it to signify acceptance of its terms.
88. Regrettably the 1st Respondent replicated terms of employment from an older university whose Vice-Chancellor was a Professor in the same university and it is only logical that he/she confirm serving after the terms as Vice-Chancellor without domesticating the clause to its unique circumstances as the claimant was not only the founding Vice-Chancellor but from other university.
89. Although review of the draft by counsel would have obviated this suit the respondent has no choice but to own up the oversight and promise itself do better next time.



90. Fortunately, none of the respondents has disowned the clause other than allege that it is impracticable or impossible to implement.
91. In simple legal parlance, a contract is a legally binding agreement made between two or more persons.
92. A contract is concluded when one party's offer is unequivocally accepted by the other, coupled with all other elements of a contract, such as intention consideration, legality and capacity.
93. None of the respondents pleaded or proved that the contract of employment was vitiated by misrepresentation, duress, mistake or undue influence.
94. Contractual obligations are binding and if the respondent's wanted clause 31 of the contract of employment re-negotiated, nothing prevented them from proposing the same to the claimant after all, a contract emanates from an agreement between the parties.
95. Puzzlingly, the respondents are only raising the issue of clause 31 after they have benefited from the services of the claimant which none of them have faulted in any respect.
96. Regrettably, both RWI and RWII testified that the provision on the claimant reverting to the position of Professor at the Kisii University was impracticable because he never held a position in the first place. RWI, specifically stated that the clause had an issue of interpretation but could not explain why the University Council had not sought advice from the office of the Attorney General, if it thought that the clause had construction issues.
97. Contrary to RWII's testimony, on re-examination, that the claimant ought to have reverted to Moi University where he had a contract of employment, Clause 31 was very clear on the intention of the parties to the contract of employment.
98. This evidence, with respect, lacks any probative value as the contract, the subject matter of this case was between the claimant and Kisii University.
99. It is trite that an agreement is complete as a contract as soon as the parties have reached agreement as to what each of its essential terms are or can with certainty be ascertained, for it is an elementary principle of English law of contract "id certum est quod certum veddi potest".
100. In sum, clause 31 of the claimant's contract of contract of employment was part of contract and binding on the claimant and the 1st respondent and all that the claimant was required to do was to express his willingness to serve Kisii University.
101. Contrary to the submission by the 3rd respondent that the clause was unconstitutional, illegal and void, no evidence was adduced by RWII to prove the alleged unconstitutionality, illegality or nullity.
102. Relatedly, the authorities cited relate to the impact of a statute being declared unconstitutional as opposed to a contract or a term of the contract.
103. Equally, contrary to the submission by the 1st and 2nd respondent that the claimant was only part of the academic staff at Kisii University qua Vice-Chancellor. Clause 31 extended the teaching at the end of the Vice-Chancellorship provided the Claimant was willing to serve the University and in any case he was Professor and could have been absorbed in any appropriate Faculty/School.
104. It is also noteworthy that although the 1st and 2nd respondents argue that there was no ambiguity in clause 31 shown by the claimant, they contested the term revert in evidence.



105. As adverted to elsewhere in this judgment both RWI and RWII raised the issue of interpretation of clause 31. In the case of RWII the letter dated 10th July, 2023 is explicit. It is by this letter that the 3rd respondent notified the claimant that his requests had not been approved.
106. As correctly argued by the claimant, an ambiguous clause in a contract is construed against the party that drafted the contract it is interpreted contra proferentes (restrictively against the author) or party that authorized it. This is the contra profentem rule of construction, which is applicable in this case, contrary to the submission by the 1st and 2nd respondents that it was inapplicable.
107. See *Jomo Kenyatta University of Agriculture and Technology V Kwanza Estate Ltd* [2023] KECA 700 (KLR) where the Court of Appeal stated as follows:
- “Regarding the contra proferentem rule, the appellant contends that the ambiguous phrase “or on the sooner determination” should be construed against the drafter of the contract. While this is true, the Court is sitting as a Court of Appeal...”
108. See also *Direct Line Assurance Co. Ltd V Peter Micheni Manguo* [2018] eKLR.
109. Having been the author of clause 31 of the contract of employment, the 1st respondent is bound by its terms and cannot contest the term “revert” to mean anything else other than what the drafter intended.
110. As correctly submitted by the claimant, attempts by the respondents to adduce oral evidence to explain a written contract is untenable in law as oral evidence cannot as a general rule be relied upon to explain or contradict written terms of a contract.
111. See *Prudential Assurance Co. of Kenya Ltd V Sukhwender Singh Jutney & Another* [2005] eKLR.
112. Finally, and more significantly, it is trite law that contractual clauses are interpreted in the context of the entire contract not as distinct and independent aspects of the contract.
113. To the question whether clause 31 of the claimant’s contract of employment was enforceable, the Court returns that it was binding and enforceable and the respondent was obligated to act accordingly as soon as the claimant intimated his willingness to serve Kisii University as the clause required.
114. A pertinent question that arises is whether implementation of clause 31 was subject to approval by Council of the 1st Respondent.
115. This issue arises because of the contested letter by Dr. Bob Ndubi and minutes of the 73rd Council meeting as well as those of the meeting held on 9th June, 2023, which were not filed by the respondent.
116. Clearly, and in the Court’s view, since clause 31 was embodied in a contract of employment between the claimant and the 1st respondent, implementation of the contract did not require approval by Council by way of a resolution.
117. In any case both parties were bound by the terms of the contract and if Council deemed such approval necessary, nothing prevented it from rewording the contents of clause 31 to make the clause subject to approval by Council.
118. In the court’s view, what council needed was to note the claimant’s willingness to serve in appreciation of its contractual obligation.
119. In the absence of any suggestion to show that subsequent approval of Council was required, the Court has no reason to find that such approval was necessary.



120. However, as adverted elsewhere in this judgment, the claimant had to express his willingness to serve in Kisii University albeit in a different capacity and did so vide letter dated 6th December, 2022 more than six (6) months before his term as Vice-Chancellor ended. He also made a further request to be appointed Co-ordinator of the KUKHA Project to establish the Centre for Excellence in excellence in Health Education and Training (CEHET), which Council granted vide Minute 08.06 of the 73rd Council meeting, chaired by Caroline Chizupo as nominated by the meeting.
121. How was he to serve as the Co-ordinator of the KUKHA project if he was not a professor at Kisii University?
122. Although the Agenda of the meeting did not include the claimant's request nor his intimation of willingness to serve Kisii University, the meeting considered it under Minute 7.05 (Remarks from the chair) and resolved that a letter would be written to the SRC on the way forward.
123. Clearly, the 73rd Council meeting did not dismiss clause 31 of the contract nor express an opinion on it save for the letter to the SRC. Implicitly, the meeting appreciated that it was a binding contractual term.
124. Intriguingly, neither RWI nor RWII availed evidence to show that the resolution was indeed implemented or the claimant's letter dated 6th December, 2023 was responded to.
125. In any case even assuming that a letter was done to the SRC Clause 31 of the employment contract was still binding on the parties and the claimant was still in employment.
126. As regards the letter dated 3rd May, 2023 signed by Dr. Bob Ndubi on behalf of the 1st respondent's, Council, although the respondents argued that the 1st respondent had no position of acting chair of Council and the signatory was not the chair of council and thus had no authority to issue the letter, neither RWI nor RWII was a member of the 1st respondent's Council then and both admitted that Dr. Bob Ndubi was a member of the Council.
127. The letter by Dr. Bob Ndubi, Ref P/F 800283 was on Kisii University Office of the Chairperson of the Council letter head, Post Office Box, email address and telephone number and is a response to the claimant's letter dated 6th December, 2023.
128. Similarly, the letter cites the resolutions of the 73rd Council meeting held on 6th February, 2023.
129. Strangely, although the respondents argue that Dr. Bob Ndubi had no authority to sign the letter, they did not deny that they could have ascertained the circumstances in which the letter was written as it had a Refence Number.
130. The respondents adduced no evidence to prove that efforts were made to trace the letter in the respondents mailing system to ascertain when and how it was written and signed.
131. Relatedly, none of the witnesses testified that it was forged or adduce evidence to show that indeed the signatory had no authority to write the letter.
132. Evidence by Dr. Bob Ndubi or any other person who was a member of the council at the time would have effortlessly shown the circumstances in which the letter was written and why Dr. Bob Ndubi signed it.
133. In the court's view, a misdescription, or mis-statement of the designation of a signatory to a letter does not of itself render the letter inauthentic or invalid, the circumstance in which it was written and signed may.



134. As neither RWI Professor Ogechi nor RWII Dr. Sarah Rutto could testify on the circumstances in which the letter was written and signed, they could not evidentiary fault it and efforts to do so could not go far.
135. Significantly, the letter was written after the 73rd meeting of the 1st respondent's Council and before the claimants contract of employment lapsed and almost 5 months later.
136. The unanswered question is where was the substantive chair, if there was one and if not where was Caroline Chizupo to ensure that the minutes were implemented as time was running against the claimant?
137. From the evidence on record, the court is not persuaded that the respondents have proven that Dr. Bob Ndubi had no authority to sign the letter dated 3rd May, 2023, having done so on behalf of the 1st respondent's Council.
138. As to whether the claimant's employment was terminated by the respondent or ended by effluxion of time, parties have adopted opposing positions with the respondents maintaining cooperatively that the employment contract ended by effluxion of time.
139. Whereas it is true that the claimant served the 1st respondent under a fixed term contract slated to end in June 2023. It is not in dispute, and as found elsewhere in this judgment, clause 31 of the employment contract constituted the claimant an employee of the respondent post the Vice-Chancellorship if he was willing continue serving as a Professor of the University in the appropriate Faculty/School.
140. It is trite law as contended by the 3rd respondent that a fixed term contract terminates on the date of expiry and carries no rights, obligations or expectations thereafter as held in the Registered Trustees of the Presbyterian Church of East Africa & Another V Ruth Gathoni Ngotho (Supra) affirmed in other decisions such as Transparency International Kenya V Teresa Carlo Omondi, (supra).
141. See also Amatsi Water Services Co. Ltd V Francis Shire Chachi [2018] eKLR, Registered Trustees De La Salle Christian Brothers T/A St. Marys Boys Secondary School V Julius D. M. Baini [2017] eKLR among others.
142. In Transparency International – Kenya V Omondi (Supra) the Court of Appeal agreed with its earlier decisions in other cases on fixed term contracts such as the Ruth Gatoni Ngotho's case as well as Francis Shire Chahi and Julius D. M. Baina cited above but opined that

“Concomitantly, the scenario would have been different if there was an indication, by act or omission from the appellant to indicate renewal was forthcoming to whet the respondent's appetite that her contract would be renewed and hence rely on the doctrine of legitimate expectation...”
143. In the instant dispute, the contract between the parties was explicit that the claimant would continue serving as Professor of the 1st Respondent in the appropriate Faculty or School.
144. The Claimant had a contractually enforceable promise that his employment would continue at Kisii University as a Professor an obligation the respondent could not escape by citing reasons extraneous to the contract it had voluntarily executed.
145. On termination of employment, it is trite law that for the same to pass as fair, it must be proved that the employer had a valid and fair reason to terminate the employment and did so in accordance with a fair procedure.



146. Put in the alternative there must have been a substantive justification and procedural fairness as held in *Walter Ogal Anuro V Teachers Service Commission* [2013] eKLR and *Naima KHamis V Oxford University Press (EA) Ltd* [2017] eKLR.
147. In the instant case, it is clear that the claimant's employment by the respondent was continuous as at the end of the Vice-Chancellorship, the claimant would revert to the position of full Professor of Kisii University and continue rendering services as such.
148. Notably, the claimant expressed his willingness to abide by the terms of clause 31 as early as December 2022 but the respondent responded in two contradictory letters, an occurrence neither witness could not explain to the court's satisfaction.
149. From the minutes on record, it is discernible that the claimant's expression of willingness to serve Kisii University in consonance with the contract of employment and request to serve as Coordinator of the KUKHA Project were both discussed by the 73rd Council meeting held on 6th February, 2023 and resolutions were made.
150. However, for unexplained reasons the 3rd respondent's unreferenced letter dated 10th July, 2023 intimated that the 74th Council meeting held on 18th June, 2023 considered the two requests and rejected both on various grounds including construction of clause 31.
151. Puzzlingly, the 2nd respondent overturned resolutions of the 73rd meeting by purporting to approve implementation of the claimant's contract of employment and denying him an appointment that it had already accorded him.
152. Having noted that the claimant's employment by the respondent was seamless, at the instance of the parties and the claimant had already expressed his willingness to serve as full Professor at Kisii University, the 3rd respondent's letter dated 10th July, 2023 amounted to a letter of termination of the claimant's employment and as no substantive justification was given and procedural formalities were not complied with, rendering the termination of employment was unfair and unlawful within the meaning of Section 45 of the *Employment Act*.
153. A peripheral issue raised by the respondent's counsel is that since the claimant was an employee of Moi University, he could not lay a claim against the 1st respondent as he would, if he succeeded beholding two public offices contrary to *the Constitution* of Kenya and other laws.
154. All the respondents argue that the Claimant ought to have reported back to Moi University where he had a job.
155. The respondents even sought the assistance of Moi University by way of letters to prove that the claimant was still an employee of Moi University and the University vide letter dated 20th September, 2024 confirmed that the claimant's leave of absence was extended for a further period of one (1) year to enable him attend to personal matters.
156. It is common ground that the claimant was a Professor of Moi University before taking leave of absence to join Kisii University College in 2009 and the leave was extended regularly at his instance until the last extension for one (1) year.
157. It is equally public knowledge that an employee on leave of absence is removed from the employer's pay roll and is only bound the terms of the leave of absence and in particular payment of pension contributions and resumption of duty after the leave lapses.



158. In other words, the employee retains the position only without any benefit and that was the claimant's position.
159. Since the claimant had a contract of employment with Kisii University he had the constitutional right to sue to enforce his rights notwithstanding his dormant position at Moi University. His working at Kisii University, as RWI was doing would not, in the Court's view be tantamount to holding two public offices as incorrectly argued. Leave of absence is akin to a secondment. It does not create a new office as such.
160. The evidence adduced by the respondents to show that the claimant appealed against the forfeiture of appointment at Moi University vide letters dated 25th July, 2018 and 3rd April, 2024 and the subsequent reinstatement in the Department of Tourism and Tour Operations Management in the School of Tourism, Hospitality and Events Management did not affect the claimant's rights to pursue any claim or relief he may have had pursuant to the contract of employment he had with the 1st respondent.
161. In sum, the argument that the claimant would hold two offices after being reinstated by Moi University lacks persuasion.

On reliefs, the court proceeds as follows:

i. Declaration

Having found that termination of the claimant's employment by the 3rd respondent was unfair and unlawful, a declaration to that effect is merited.

ii. Reinstatement

This remedy is provided by Section 12(3)(vii) of the *Employment and Labour Relations Court Act* read with Section 49(3)(a) of the *Employment Act*, but is only available within 3 years after cessation of employment. Although the claimant's case falls within the prescribed 3 years, the Court is not persuaded that it is the most appropriate remedy in the circumstances.

On account that:

- a. Though a Professor, it is true that the claimant was not an employee of Kisii University prior to his appointment as Principal of Kisii University College and later Vice-Chancellor of Kisii University.
- b. The circumstances in which the termination of employment took place render reinstatement not an appropriate remedy as the respondent's Council overruled its earlier decision yet three members of Council attended the 73rd meeting of Council and no objection was recorded.
- c. The foregoing reinforces the challenge of practicability of reinstatement of the claimant.

In *Kenya Airways Ltd V Aviation and Allied Workers Union Kenya and Others* (supra) Murgor JA, while discussing the practicability of directing reinstatement cited the sentiments of the Court in *Newzealand Educational Institute V Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERN2 414(CA) where the New Zealand Court of Appeal stated:

"Whether... it would not be practicable to reinstate (the employee) involves a balancing of the interests of the parties and the justices of their cases with regard not only to the future. It is no uncommon for this court or its predecessor, having found a dismissal



to have been unjustified to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship.

Practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequences”.

In the Kenya Airways Ltd case, (supra) the majority judgment found the remedy of reinstatement impracticable.

In Kenya Ports Authority V Managing Director, Kenya Ports Authority and 5 Others [2019] eKLR where the trial court granted reinstatement, of the 1st and 2nd respondent the Court of Appeal set aside the same on the ground of impracticability.

Contrary to the claimant’s submission that exceptional circumstances have been demonstrated for the order of reinstatement to issue, the court is not persuaded that any unique circumstances has been demonstrated to except the common law principle as regards specific performance in contracts of personal service.

- d. As regards the claimants age and inability to secure employment, the court is in agreement with the respondent’s that the claimant has a job at Moi University and having been granted a one (1) year extension of leave of absence and the employment is readily available by reporting back.
- e. The claimant did not appeal the respondent’s decision.

In the circumstances, the Court is not persuaded that reinstatement is an appropriate remedy in this instance.

iii. Salary till reinstatement and until lawful termination

Although the claimant’s employment had no discontinuity, the claimant adduced no evidence of having reported to the Head or Dean of the School of Business and Economics or having rendered any services to Kisii University before his contract of employment was terminated vide letter dated 10th July, 2023.

Section 17(1) of the [Employment Act](#) provides that

- i. Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly, in the currency of Kenya.

Having not rendered any service to the 1st respondent after serving as Vice-Chancellor and before termination of employment a month later, no wages had been earned or become payable to him.

The claim for salary till reinstatement is declined.

However, having found that termination of the claimant’s employment by the respondent was unfair the claimant is entitled to compensation in accordance with the provisions of Section 49(i)(c) of the [Employment Act](#) as held by the Supreme Court in Kenfreight (EA) Ltd V Benson K. Nguti [2021] eKLR.



Considering that the claimant had already served the last five (5) year contract as Vice-Chancellor of the 1st respondent and the contract of employment was terminated after only one (1) month and having further considered that the claimant expressed his desire to remain in employment by suing for reinstatement and did not contribute to the termination of employment and having further considered that the claimant made efforts to mitigate his losses by seeking reinstatement at Moi University, the Court is satisfied that equivalent of three (3) months gross salary as per Clause 31 of the contract of employment is fair, Kshs.2,109,051 and commuter allowance for 3 months.

iv. Aggravated and exemplary damages

In *Rookes V Benard* [1964] 1 ALLER 367 it was held that exemplary damages may be awarded in two classes or cases; first where there is oppressive, arbitrary or unconstitutional action by the servants of the government, and secondly, where the defendants conduct was calculated to procure him some benefit not necessarily financial at the expense of the plaintiff.

See *Obongo & Another V Municipal Council of Kisumu* [1971] EA. 91

Aggravated damages are by their nature punitive and thus non-compensatory.

The claimant has not demonstrated any legal or factual basis to justify an award of aggravated or exemplary damages.

The claim is accordingly dismissed.

Before concluding this judgment, it is important to state that the fact that the claimant was a Professor of Moi University did not justify the shabby treatment he was forced to endure by the respondents as it was injurious to the exemplary service he rendered to Kisii University College and later the 1st respondent, which neither of the respondents faulted in any respect. Having served the 1st respondent diligently for two (2) terms it behoved the respondent's to treat their former Vice-Chancellor with respect even if they did not wish to honour the terms and conditions of an employment contract they authored and whose ramifications they could not escape. In the Court's view this matter ought to have been settled out of court.

162. In the upshot judgment is entered in favour of the claimant against the 1st respondent in the following terms:
- a. Declaration that termination of employment was unfair.
 - b. Equivalent of 3 months gross salary as per Clause 31 of the employment contract Kshs.2,109,051.00
 - c. Commuter allowance for 3 months.
 - d. Costs of the suit.
 - e. Interest at court rates from the date hereof till payment in full.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 27TH DAY OF JANUARY, 2025.

DR. JACOB GAKERI

JUDGE



ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

