



**Kimathi v Meru University of Science & Technology (Employment and Labour Relations Cause E013 of 2024) [2025] KEELRC 1113 (KLR) (4 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1113 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E013 OF 2024**

**ON MAKAU, J**

**APRIL 4, 2025**

**BETWEEN**

**ANNE NKIROTE KIMATHI ..... CLAIMANT**

**AND**

**MERU UNIVERSITY OF SCIENCE & TECHNOLOGY ..... RESPONDENT**

**JUDGMENT**

1. The claimant was employed by the respondent as Director, Income Generating Unit (IGU) vide a letter dated 18<sup>th</sup> October 2019 for a term of two (2) years. The contract was renewed upon her request for a further two (2) years vide a letter dated 29<sup>th</sup> October 2021.
2. In the course of the second term, the respondent deployed her from her position as Director IGU to a Coordinator in the Directorate of Research Innovation, Commercialization and Extension (RICE) vide a letter dated 17<sup>th</sup> May 2023. As a coordinator RICE, she was no longer answerable to the Vice Chancellor but the Director RICE.
3. The second term ended on 22<sup>nd</sup> October 2023 but it was not renewed despite her application for renewal dated 8<sup>th</sup> September 2023. By a letter dated 25<sup>th</sup> October 2023, she was told that her request was under consideration by the Respondent's Council. Despite vigorous follow up she was kept in darkness until she received two letters dated 29<sup>th</sup> February 2024, one discharging her from services, and the other computing her final dues which were majorly her salary for October 2023.
4. The claimant was aggrieved and brought this suit alleging that the respondent violated her Human Rights during her term of office. She further alleged that the decision of the respondent to discharge her from service was malicious, illegal, irregular and unlawful. Therefore, she prayed for the following reliefs: -
  - a. A declaration that the Respondent's action to deploy the claimant from the position of Director Income Generating Unit to Coordinator in the Directorate of Research, Innovation,



Commercialization and Extension was unfair, unprocedural, unlawful and amounted to a demotion without justification;

- b. A declaration that the Respondent's decision not to renew the claimant's contract and subsequently discharge her from service without justification was malicious, unfair, irregular and unlawful, and the same was a cover up for the irregular deployment and demotion of the claimant from Director IGU to Coordinator Commercialization;
- c. An order directed to the Respondent to renew the claimant's contract as the Director, Income Generating Unit at the Deputy Vice-Chancellor's pay package and allowances;
- d. An order for payment of 2 years' salary as a Director Income Generating Unit, for the 2 years omitted in the claimant's previous 2 contracts, or in the alternative, she be allowed to complete the said 2 years.
- e. An order for payment of gratuity for the 2 contract terms served, calculated at the rate of the Deputy Vice-Chancellor pursuant to Statute 35, with interest from the date they fell due until payment in full.
- f. All allowances unlawfully withheld to be calculated at the rate of the Deputy Vice-Chancellor pursuant to Statute 35, with interest from the date they fell due until payment in full.
- g. The Respondent do pay the claimant the unpaid salary as a result of underemployment for all the years served, being the difference between the Deputy Vice-Chancellor's salary and the actual salary she was paid.

In the alternative to prayer (c) above, this Honorable court be pleased to issue an Order that: -

- h. The Respondent do pay the claimant 12 months' salary at the rate of Kshs.771,458/- per month for unlawful dismissal;
  - i. The Respondent do pay the claimant compensation Kshs.334,298.50 for 13 unutilized leave days;
  - j. The Respondent do pay the claimant 3 months' pay in lieu of notice;
  - k. The Respondent do pay the claimant commission on net revenue generated from the Income Generating Unit since her employment;
  - l. The Respondent do pay the claimant terminal benefits equal to those paid to the Deputy Vice-Chancellor;
  - m. The Respondent do pay the claimant damages for unlawfully withholding her October, 2023 salary and allowances without just cause;
  - n. Exemplary damages;
  - o. Aggravated damages for discrimination and unfair treatment of the claimant;
  - p. Cost of this suit plus interest thereon.
5. The Respondent admitted that it employed the claimant as Director IGU and that her contract was governed by the appointment letter dated 18<sup>th</sup> October 2019, the terms of service, and the staff code of Conduct and Ethics. It further averred that the claimant's contract expired on the due date and as such she suffered no emotional or financial injury. It denied the alleged breach of Constitution and



illegal or irregular termination of the claimant's services. Therefore, it urged the court to dismiss the suit with costs.

### **Claimant's case**

6. The claimant testified as CW1 and basically adopted her written statement dated 22<sup>nd</sup> April 2024 and produced 39 documents, in the list dated even date. In brief, her case was that she was employed by the respondent as the inaugural Director, IGU vide a letter of Appointment dated 18<sup>th</sup> October 2019 on a two-year contract. Her entry monthly salary was Kshs.127,259 exclusive of commission and allowances.
7. The appointment letter expressly stated that University Terms and Conditions of Service document plus the appointment letter would constitute her contract of employment. The letter also stated that the University reserved the right to assign to her any other duties.
8. She served with diligence in structuring and operationalizing the IGU department. She drafted the IGU policy, IGU strategic plan, Annual Work plans, budget, and cash flow forecasts which were important tools for steering the department towards its objectives. Her efforts bore fruits as she succeeded in putting in place several income generating projects including farm, hospital lab and cafeteria among others. As a result, she was honored with appointment to numerous high-profile committees in line with her role and expertise.
9. It was further claimant's case that under statute 35 of the respondent, the Director of IGU should be compensated at a level equivalent to that of a Deputy Vice-chancellor but the respondent disregarded that express statute and arbitrarily paid her an amount that was less than one-fifth of the recommended pay.
10. It was her case that she faced discrimination in the University since she was the only employee without gratuity and annual salary increments which are standard for all the staff. Despite being promised that she would get gratuity at 31% of her basic pay, the same was never paid to her on allegation that she was on a retainer salary. She was also the only employee who was not assigned a specific job grade for purposes of computing pay and allowances. Consequently, she was never paid any allowances like her colleagues even in the various committees she served in.
11. In the year 2022, she was orally informed to start working in the Directorate of RICE because the respondent wanted to wind down the Directorate of IGU for lack of budget. On 17<sup>th</sup> May 2023, she received a letter from the Deputy Vice-chancellor (AFP) deploying her to the Directorate of RICE as a Coordinator.
12. She contended that the deployment amounted to demotion since she was to answer to a fellow Director as opposed to the Vice Chancellor. It also amounted to constructive dismissal since the position to which she was deployed, did not exist in the respondent's job establishment. She further described the deployment as not only illegal and unlawful but also a scheme to end her employment in disregard of fair labour practices.
13. When the contract lapsed her application for renewal was not granted even after being kept waiting. She was also not paid her salary for October 2023 plus service gratuity. On 30<sup>th</sup> January 2024, her work email was deactivated after demanding for her October salary plus gratuity.
14. On 1<sup>st</sup> February 2024, she received a letter from the vice chancellor informing her that she was not entitled to gratuity since she was on a retainer salary. Due to financial hardship, she did clearance on 7<sup>th</sup> February 2024 in order to receive salary for October 2023. On 29<sup>th</sup> February 2024 she received two letters from the vice chancellor, one discharging her from service and the other computing her final



- dues. However, she was not informed why her contract was not renewed, and why the October salary was not paid until May 2024.
15. It was the claimant's case that appointing her under two-year contracts was contrary to statute 35 which provided for three-year contracts. Further that the failure to renew her contract in the absence of any adverse report amounted to unlawful dismissal.
  16. She further testified that she was never paid commission despite generating a net income of Kshs.9,475,799 as at 2021. (See Document 30). After that time, she continued to establish other revenue generating projects and all the generated revenue went to the University account.
  17. She testified that as IGU Director her performance was appraised and she scored outstanding, above the requirement of satisfactory performance under Statute 35 (3). She was therefore at a loss as to why her contract was not renewed, and prayed for the reliefs sought in the claim.
  18. On cross examination, she admitted that her appointment letter provided for a retainer salary of Kshs.127,259 and referred to terms of service without specifying the terms. She further admitted that she signed a document titled Terms and conditions of service for staff in the Senior Administrative, catering, clerical, hospital, library and technical grades 5-15. She contended that the said document was the wrong Terms and conditions of service because she was not graded.
  19. She further contended that she was supposed to sign the terms and conditions for Deputy vice chancellor since she was reporting to the vice chancellor. She became aware of the same in the course of her contract and started seeing for grading of her position. Under Article 35 of the University statutes (page 147 of the Respondents bundle) Director IGU is in the same level as Deputy Vice chancellor and as such their salary ought to be the same. She admitted that she was not a Deputy Vice Chancellor.
  20. She received letter dated 22<sup>nd</sup> October 2021 (page 64 of claimant's bundle) indicating that she would be paid gratuity in accordance with the terms of service for Grade 5-15 (non-teaching staff) calculated at the rate of 31% of her basic pay of Kshs.127,259. The said letter was never revoked or cancelled. She admitted that paragraph 5.2.1 of the Terms of Service she signed provided for payment of gratuity for staff employed for one year and above at the rate of 31% of the basic salary.
  21. She contended that retainer salary under her appointment letter was just a salary. She maintained that she was employed like the other employees, reporting at 8.00am, receiving monthly salary and signed general Terms and conditions of service. She denied that her employment was unique. However, she confirmed that Tax deduction card did not show any tax deductions. She further admitted that her appointment letter provided for payment of commission.
  22. She confirmed that her first contract was renewed at a higher salary of Kshs.134,995 but averred that she was never consulted before her salary was fixed. She further admitted that she applied for the post of Director IGU after seeing the advert.
  23. She confirmed that the post in the advert was not graded but after appointment she raised the issue of grading and that is when she was informed by the HR Director that the post was in the level of Deputy vice chancellor. She contended that grading is crucial because it determines the salary but she was being paid without grading. She contended that as at 2021 she generated a net revenue of Kshs.6,206,816 but she was not aware how much revenue she generated thereafter. She was also never paid any commission as the appointment letter did not indicate the percentage of the generated revenue payable to her.
  24. She contended that she was never paid the right salary. Her appointment letter also never provided for salary increment. She admitted that after deployment to the Directorate of RICE, as coordinator, her benefits remained the same as in IGU.



She further admitted that she wrote a letter dated 3<sup>rd</sup> May 2023 seeking for appointment as Coordinator RICE on permanent and pensionable terms. Again, on 8<sup>th</sup> May 2023 she wrote a letter to the vice chancellor asking for renewal of her contract as Coordinator RICE. She admitted that Article 35 (3) of the University Statutes provided that extension and renewal of a contract was at the discretion of the Council.

25. In re-examination, she contended that the income generating ventures she started are still operational and generating income up to now. She contended that the accounts were run by the University and she was being appraised based on the income generated.
26. She referred to minutes of the Council meeting held on 13<sup>th</sup> January 2023 (page 185 of Respondent's bundle) to prove that an Audit Report was tabled where the Auditor recommended for review of the Director's terms to match the University's terms of service including payment of gratuity. She reiterated that she was discriminated against with respect to her terms of service.
27. She maintained that her deployment as Coordinator RICE was a demotion because she was reporting to the Director RICE who then reported to the Vice chancellor. She clarified that she applied for renewal as Coordinator RICE after the deployment in September 2023.
28. She reiterated that she was never told the rate of the commission payable to her, and she was never told that payment of retainer salary excluded her from payment of allowances. She reiterated that she received a letter informing her that she was entitled to gratuity and the letter was never recalled.

#### **\*Respondent's case**

29. The respondent's Vice Chancellor, Professor Romanus Odhiambo Otieno testified as RW1. He adopted his written statement dated 7<sup>th</sup> June 2024 as his evidence and produced 31 documents as exhibits. He then stated that the position applied for by the claimant did not have a job grade. He stated that page 30 of respondents' bundle indicates that job grades are to be specified in the appointment letter.
30. He further stated that clause 3.2 of the Terms and Conditions of service for grade 5-15 provides that the council has the right to create special positions under special conditions for special interest of the University. He stated that claimant's services were special, created by the council with special terms and conditions of service. He contended that vide Minutes dated 28<sup>th</sup> October 2019, the council awarded the Director IGU a consolidated salary of Kshs.127,000 plus commissions of one percent (1%) of the profits generated from the IGU. No other employee was earning a commission except the claimant.
31. He further stated that both the initial letter of appointment and the letter of renewal provided for payment of a retainer salary plus commission payable at the end of her tenure of duty as per the IGU policy. Her pay slip only indicated the retainer salary only and no allowances or tax deductions. However, he contended that he instructed the HR Registrar to split claimants pay to fit in the entry level of job grade 11.
32. He testified that the Council, vide minutes dated 13<sup>th</sup> January 2023, (page 185 respondent's bundle) recommended for a consolidated salary equivalent to grade 11. He contended that the special position with special terms of service does not amount to discrimination. He confirmed that staff employed for over one year are entitled to gratuity at 31% of basic salary. However, he stated that since the claimant was on retainer salary, she was not entitled to gratuity or annual salary increment.
33. He testified that the claimant's letter of appointment provided that she could be assigned other duties as it happened when she was deployed to the Directorate of RICE as Coordinator. He clarified that the



- claimant did not lose any benefits after the deployment. He contended that the Directorate of RICE deals with research for commercial purposes and the claimant was best suited to do the job because it is income generating activity.
34. He further testified that an Audit report from IGU (in page 185 of respondent's bundle) was tabled to the council on 13<sup>th</sup> January 2023 recommending on alignment of claimant's terms with the University terms of service and in page 186, the audit report was adopted to rationalize the Director IGU within RICE.
  35. He further testified that a request was made for transfer of the claimant to RICE and she was deployed (page 188-190 of the respondent's bundle). He contended that after the deployment, the claimant requested to be absorbed into permanent and pensionable terms (page 191), and shortly thereafter, she applied for renewal of her contract as Coordinator of commercialization in RICE (page 193).
  36. On cross-examination, he reiterated that the claimant's position as Director IGU was special one created by the council on 28<sup>th</sup> October 2019 under minute 9 (page 101 of respondent's bundle). He reiterated that he instructed the HR Registrar to split claimant's retainer salary into months to fit job grade 11 and the commission be paid at the end of the contract.
  37. He admitted that statute 35 required that the claimant be employed under 3 years but she was employed under two-year contracts which she accepted. He further admitted that the minutes on page 101 of the respondent's bundle indicated a commission of 1% of the profits and the claimant was made aware of the said rate by the letter of appointment. He also admitted that the claimant wrote to him, the letter dated 26<sup>th</sup> October 2021 (page 179) stating that her commission rate had not been set.
  38. He admitted that the council employs staff of grade 14 and above and that the claimant was interviewed by the full Council. However, he clarified that the Council has the power to employ any officer. He further admitted that he approved the claimant's application for renewal of her first contract but in 2023, he tabled the application to the Council which resolved not to renew the contract due to lack of budget. However, he did not produce the Council minutes to substantiate that allegation.
  39. He reiterated that the claimant did not fit within the general salary schedule because she was on retainer salary. He admitted that the Council minutes (page 185 of Respondent's bundle) mentioned gratuity payable to the claimant but that was not a resolution but a background discussion.
  40. He admitted that assigning of duties in the claimant's contract did not mean fundamental changes but only meant enhancement. He confirmed that RICE was made in 2023 but IGU was always there. He further admitted that Director IGU was reporting to the Vice Chancellor while after deployment to RICE she was reporting to Director RICE. He contended that he verbally informed the claimant that IGU and RICE Directorates were being merged.
  41. He admitted that the claimant was appraised annually and she scored high but there was no income. He admitted that he approved ventures imitated by the claimant and that all the money generated went to the University account since there was no separate account for IGU. He contended that since all the monies go to the same, one cannot trace how much he/she brings to the account. He challenged the claimant to trace her revenue instead of coming to court.
  42. He admitted that the claimant's salary for October 2023 was withheld for eight (8) months because she failed to clear with the university. He confirmed that stature 35 states that Director IGU is in the level of Deputy Vice Chancellor. He contended that the position of Deputy vice chancellor is in Job Grade 11. He confirmed that the claimant exited as Director IGU and he gave her a certificate of service.



43. He admitted that the claimant requested to be absorbed on permanent and pensionable terms and the HR Manager endorsed thereon that the officer was erroneously left out, but when the request was tabled before the council, it was rejected.
44. He contended that the reason for not renewing the claimant's contract was because her performance did not generate any revenue. However, he admitted that during her annual performance appraisal, the revenue generated was considered. He confirmed that she scored 82% and 83% in 2022 and 2023 respectively.
45. He confirmed that page 85 of claimant's bundle is a bundle of income generated but averred that the same was not audited.
46. He denied that the deployment of the claimant to RICE to report to Director RICE amounted to demotion because her salary went up.
47. In re-examination, he contended that statute 35 did not state that Director IGU will have equal remuneration with Deputy Vice Chancellor. He stated that in the University Organogram (page 85) a Director of a Directorate is below the Deputy Vice chancellor. He clarified that under the Meru University Charter, a Director is not a member of the University Senate as a Deputy Vice Chancellor.
48. He further clarified that the claimant's request for absorption on permanent and pensionable terms was discussed by council (page 191). He further stated that the claimant's contract lapsed automatically and renewal was at the discretion of the University. He contended that salary in lieu of notice was not payable since the contract lapsed.
49. He reiterated that the revenue of Kshs.6,000,000 generated by the claimant was never audited. She also never presented the report on page 67 of her bundle and instead she filed it in court.

### **Submissions**

50. It was submitted for the claimant that the respondent under-employed her contrary to the provisions of statute 35 of the University. Specifically, the respondent was faulted for engaging her for a contract term of two years as opposed to the required three years and also for paying her below the required salary. It was submitted that statute 35 placed the position of Director IGU in the same level as Deputy Vice-chancellor and therefore she was entitled to the same benefits including a salary scale of Kshs.308,990 -432,257 plus allowances and gratuity under clause 5.2.3 of the Terms of service.
51. It was further submitted that claimant was subjected to unfair treatment and discrimination in many instances including being ungraded for no good cause, difficulties in processing of per diems, hired under two-year terms instead of three-year terms, being denied gratuity and commission for the two terms served, withholding of salary for October 2023 for eight (8) months before payment, and unilateral alteration of her contract by being deployed from IGU to the Directorate of RICE.
52. It was submitted that the respondent's council in its minutes dated 13<sup>th</sup> January 2023 acknowledged that the claimant's terms of service were not matching the respondent's terms of service. It was further submitted that when the contract expired the claimant's request for a renewal was declined.
53. It was observed that the respondent caused the claimant to sign the terms and conditions of service for Job Grade 5-15 but then insisted that the claimant was ungraded and further that she was not entitled to the benefits contained in the aforementioned terms of service. It was submitted that the claimant was interviewed and hired by the council and therefore under statute 35, she was in Job grade 14 and above and not job grade 11 as purported by the respondent's council in its minutes dated 13<sup>th</sup> January 2023.



54. As regards the deployment of the claimant to the Directorate of RICE, it was submitted that the same was arbitrary and unlawful since it was a demotion in status and fundamentally altered her contract contrary to section 10 (5) of *Employment Act*. For emphasis reliance was placed on *Njuguna v Entrepplat Insurance Brokers Ltd [2024] KEELRC 139 (KLR)*. It further was argued that, the purported rationalization of IGU into RICE Directorate was flawed irregular and unlawful because there was no prior amendment to statute 35 as required under statute 63 (a).
55. It was further submitted that the claimant has proved a case of discrimination and unfair treatment and therefore she is entitled to aggravated damages of Kshs.5,000,000.
56. It was further submitted that, the claimant's contract of employment was unfairly terminated by dint of statute 35 which provided that the council was to appoint Director IGU for a renewable term of three (3) year based on proof of satisfactory performance in the previous terms. It was argued that the claimant exhibited satisfactory performance and therefore she had a legitimate expectation that her contract would be renewed.
57. It was argued also that the claimant was not under a fixed term contract but rather a periodic contract with option for renewal pursuant to statute 35. It further submitted that the claimant was entitled to three months' notice on salary in lieu of notice. For emphasis, reliance was placed on *Osoti v Trees of the Future INC (2024) KEELRC 962 (KLR)* where the court held that continuous renewal of previous contracts created legitimate expectation of further renewal and as such employer has an obligation to serve notice of non-renewal before the expiry date.
58. It was submitted that the delay to pay her salary for October 2023 to May 2024 was arbitrary, unfair and unlawful because it was her right to be compensated for services she rendered. It was submitted that the said delay violated section 17 (1) & (10) and 18)2) of the *Employment Act*. Accordingly, the court was urged to award the claimant Kshs.1,000,000 for the unlawful withholding of her salary. Reliance was placed on *Kiboko v Osteria Group (Kenya) Limited (2023) KEELRC 2700 (KLR)*.
59. Finally, the court was urged to award compensation for the unutilized leave of Ksh.334,298.50.
60. On the other hand, it was submitted for the respondent that, the claimant has failed to substantiate the alleged under-employment and as such, she cannot be compensated for work not done. It was further submitted that the claimant was employed upon the terms set out in her letter of appointment and the Terms and Conditions of service specified in her letter of appointment.
61. It was further submitted that Clause 5.1 of the said Terms of service provided that Temporary and all contract of appointments are for the period specified in the letter of appointment. Consequently, it was submitted that the allegation that statute 35 provided for three-year contract term cannot hold because the statutes did not constitute her employment contract and the appointment letter never made reference to the University statute.
62. It was submitted that parties herein are bound by the terms of the contract they voluntarily signed and the court cannot rewrite the contract for them. For emphasis reliance was placed on *Grain Pro Kenya Inc Ltd v Andrew Waithaka Kiragu (2019) KECA 563 (KLR)*, *Centurion Engineers & Builders Ltd v Kenya Bureau of Standards (2023) KECA 1289 (KLR)*.
63. As regards the alleged underpayment, it was submitted that the claimant has not substantiated the same. It was argued that placing the Director IGU in level of Deputy Vice chancellor did not equate the hierarchical status, functions, powers, or responsibilities of the two roles. It further argued that the Deputy Vice chancellor hold for greater legal authority, legal recognition, functions, powers responsibilities and status than the Director IGU. It was further submitted that there is no provision



in the statutes that the remuneration or benefits of the Director IGU are similar to those of a Deputy Vice-Chancellor.

64. It was submitted that holding that the claimant gets the same pay as the Deputy Vice-Chancellor would be an act or re-writing the contract for the parties. It would also be a mockery to the academic qualifications by senior employees. Consequently, the court was urged to find that the claimant is bound by the terms in the letter of appointment which she accepted and executed. Further that, the claimant should not benefit from the terms and conditions of service for a Deputy Vice-Chancellor because she admitted during cross-examination that she never signed the same.
65. As regards the claim for payment of commission, it was submitted that the council resolved that the claimant would be entitled to a commission of 1% of the net revenue generated by the IGU. However, it was submitted that the claimant has not proved that she generated any net revenue. It was further submitted that due to failure by the IGU to perform well, the claimant was deployed to the RICE Directorate and the IGU rationalized within the RICE Directorate.
66. As regards the claim for gratuity, it was submitted that the claimant was not entitled to the same under clause 5.2.1 of the Terms and conditions of service because she was on a retainer salary with no basic salary. The court was urged to find that the gratuity is not payable to the claimant because her letter of appointment did not expressly provide for the same. For emphasis, reliance was placed on *Bamburi Cement Ltd v William Kilonzi* (2016) eKLR and *H.Young & Company EA Ltd v Javan Were Mbango* (2016) eKLR where the Court of Appeal held that for gratuity to be paid, the same should be provided in the contract of service.
67. It was further submitted that the alleged discrimination was not substantiated because the claimant did not demonstrate unequal treatment in comparison to colleagues in similar circumstances, without reasonable distinction. For emphasis, reliance was placed on the decision of the Supreme Court in *Gichuru v Package Insurance Brokers Ltd* (2021) KESC 12 (KLR).
68. In this case, it was submitted that the claimant's contract did not provide for payment of gratuity. She was also not entitled to salary increment like the permanent staff under clause 16 of the Terms and conditions of service. In any event, she also confirmed that her salary was increased from 127,259 to Kshs.134,995 per month upon renewal of the contract.
69. It was further argued that the claimant's position of Director IGU was not graded like the other staff because the position was a unique and specialized role. The respondent's decision to keep the position ungraded does not amount to discrimination. The position allegedly advertised with any grading and the claimant applied for the same and accepted the appointment without the grading. She also never raised any queries as indicted in the letter of appointment.
70. In view of the foregoing, it was submitted that there was no discrimination by denying the claimant gratuity, annual salary increment, and grading of her position.
71. As regards the deployment to the RICE Directorate, it was submitted that there was no malice and it did not amount to constructive dismissal. Besides, the claimant welcomed the deployment and she even applied to be given a full-time appointment as Coordinator RICE. She never resigned but worked in the Directorate of RICE until her contract lapsed on 22<sup>nd</sup> October 2023.
72. It was further submitted that the claimant's contract was not unlawfully terminated by the respondent but it expired automatically. For emphasis, reliance was placed on *National Water Conservation & Pipeline Corporation v Mwanza* (2017) KECA 797 (KLR) among other authorities.



73. Finally, it was submitted that the claimant is not entitled to the reliefs sought and the suit should be dismissed with costs.

### **Issues for determination**

74. I have carefully considered the pleadings, evidence and submissions. It is a fact that the claimant was employed by the respondent as the Director IGU from October 2019 until October 2023. The issues for determination are:
- a. What terms applied to the claimant's contract of employment.
  - b. Whether the respondent discriminated and unfairly treated her.
  - c. Whether she is entitled to the reliefs sought.

### **Terms of service**

75. The claimant was employed vide the appointment letter dated 18<sup>th</sup> October 2019 which stated as follows:

“RE: Appointment as a Director Income Generating Unit

On behalf of Meru University of Science & Technology (MUST), I am pleased to offer you an appointment as a Director Income generating Unit in the service of this University with effect from the date you report on duty. Your appointment is on two-year (2) contract renewable on mutual consent.

Please note that if you accept this offer, you will be required signify acceptance within a month and report for duty not later than three months from the date of this letter.

You will be paid a retainer salary of Kshs. 127,230/= per month and a commission on what is generated from the IGU activities.

In addition to this retainer salary, you will be paid the following allowances:

Bus fare allowance : Kshs8,000/= (However, if you use your vehicle to work, you will be paid Kshs. 14,000). Passage and Baggage: non-Accountable: Kshs. 5,570/=(paid once)

Upon acceptance of offer, you will be expected to go through the Terms of Service document which together with this letter shall constitute the contract of employment between yourself and Meru University of Science & Technology Council.

In the performance of your duties you will be answerable to the vice Chancellor or any other Officer authorized by him/her on behalf of the Vice Chancellor. Your performance will be subject to periodic assessment by the vice Chancellor and other University Organs.

However, the university reserves the right to assign you any any other duties it will deem appropriate. Enquiries regarding the terms of service should be addressed to the Vice Chancellor.

As an employee of must you shall undertake to act in all respect according to lawful instructions given through the duly authorized Officers of the University such as the Vice Chancellor and in accordance with the [Universities Act, 2012](#) and Statutes as amended from time to time.

You are expected to be loyal to Meru University of Science & Technology at all times for the duration of your employment with the university.



If you accept the appointment on these terms, please sign in the space provided and return two copies of this letter to the undersigned as soon as possible.

Your sincerely,

Prof. Romanus Odhiambo, PHD

Vice Chancellor

Acceptance

I accept this appointment as.....in the service of MUST on the terms and conditions set out in this letter and the Terms of Service.

Name ..... signature.....

Date..... ID Number ....."

76. The above letter is clear that the terms of service in it plus further terms and conditions of service contained in a separate document constituted her contract of employment. The claimant admitted that she signed the Terms and Conditions of Service for Staff in the Senior Administrative, Catering, Clerical, Hospital, Library and Technical Grades 5-15. She also admitted that she never signed the Terms and conditions of service for a Deputy Vice Chancellor. However, she maintained that the latter terms applied to her because under statute 35, the Director IGU was in the same level with Deputy Vice chancellor.
77. The respondent averred that the position of Director IGU was an ungraded special position created by the council under Clause 3.2 of the Terms and Conditions of Service for Staff in the Senior Administrative, Catering, Clerical, Hospital, Library and Technical Grades 5-15, with special terms and conditions of service that was unique from all the other graded positions. It further averred that the claimant was the only employee with ungraded position, and being paid a retainer salary and commission. It contended that Statute 35 did not state that the Director IGU was entitled to equal remuneration/benefits with Deputy Vice Chancellor. It further argued that neither the letter of appointment nor the Terms and conditions of service made reference to the university statutes.
78. Statute XXXV of the respondent of 2017 provides as follows:
1. There shall be an Income Generation Unit in the University headed by a director which will be responsible for the following:
    - (a) ...
  2. The Director, income Generating Unit shall be appointed by the Council at the level of a Deputy Vice Chancellor for a contractual term of three years.
  3. Upon expiry of the contractual term, the director may request for a renewal of the contract for a further term(s) and such renewal shall be at the discretion of the University and based on proof of satisfactory performance in previous terms.
  4. The Director, Income Generation Unit shall be answerable to the Vice Chancellor in performance of duties and exercise of powers.”



79. Statute XXV provides that:

1. In accordance with section 40 of the Act and section 13 (u) of the Charter, the Council shall appoint and promote such academic and administrative staff as it may deem necessary for the efficient functioning of the University with duties and upon such terms and conditions as the council may prescribe from time to time.
2. The Council shall determine the terms and conditions of appointment and promotion of all staff of the University.
3. ...”

80. The respondent formulated Terms and Conditions of service for Staff in the Senior Administrative, Catering, Clerical, Hospital, Library and Technical Grades 5-15 in October 2014 and Terms and conditions of service for a Deputy Vice Chancellor. Clause 3.2 of the Terms and Conditions of Service for Staff in the Senior Administrative, Catering, Clerical, Hospital, Library and Technical Grades 5-15 provides that:

- “ 3.1 Appointment under these terms include Staff in the Senior Administrative, Catering, Clerical, Hospital, Library and Technical Grades 5NT-NT15 to be specified in the Letter of Appointment.
- 3.2 The Council reserves the right to create, outside of these Terms, special positions under special conditions in accordance with its conception of the interests and efficiency of the University.”

81. Clause 5 of the above terms and conditions further provides as follows:

- “ 5.0 Appointment may be for any period to be specified in the Letter of Appointment.
- 5.1 Temporary appointment and all contract appointments are tenable for such periods and such terms as are specified in their letters of appointment.
- 5.2 Gratuity
- 5.2.1 Staff employed on a contract for a period of one (1) year and above will be paid gratuity at the rate of 31% of their monthly basic salary. Such gratuity shall be payable only on completion of their contract.
- 5.2.2 ...”

82. The claimant was offered the job upon the terms set by the Council and she voluntarily signed the appointment letter to accept the terms of employment. She never made any enquiries or sought clarification over anything contained or mentioned in the appointment letter. She also served the whole contract term and applied for a renewal, and it was granted vide the letter dated 29<sup>th</sup> October 2021. Save for the increase of the retainer salary to Kshs.134,995 per month, all the terms of service remained the same and the claimant accepted by voluntarily signing the contract renewal letter.

83. The claimant admitted in evidence that she learned about the ideal entry level and the remuneration of Director IGU after serving for a while and she started agitating for the same. This is evidence that she applied and took up the job without adequate information about the same. It is an acknowledgement



that she made a bad bargain due to lack of information and she now wants the court to rectify that bad bargain. However, the court does not have the power to interfere with the terms of a contract executed through mutual agreement unless there is evidence of a factor that can vitiate a contract.

84. I gather support from the case of *Grain Pro Kenya Inc Ltd v Andrew Waithaka Kiragu* (2019) KECA 563 (KLR), where the Court of Appeal observed that:

“We hold the primary document of the contract here was the letter of appointment ...”

85. Again, in *Centurion Engineers & Builders Ltd v Kenya Bureau of Standards* (2023) KECA 1289 (KLR) the Court of Appeal held that:

“As this Court has severally stated, and now a longstanding principle of law, that parties to a contract are bound by the terms and conditions thereof, and that it is not the business of courts to rewrite such contracts. In *National Bank of Kenya Limited v pipe plastic Samkolit (K) Ltd* [2002] 2 EA 503, [2011] eKLR at 507, this court stated:

“A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved.”

86. In this case, the claimant has not pleaded and proved any of the aforesaid vitiating factors and consequently, I find that the terms of employment for the claimant were those contained in the appointment letter, renewal letter, and the Terms and Conditions of service for Staff in the Senior Administrative, Catering, Clerical, Hospital, Library and Technical Grades 5-15 of October 2014 which she voluntarily signed.

### **Discrimination and unfairly treated of the claimant**

87. The claimant averred that she was unfairly treated and discriminated from the other staff in many instances including being ungraded, being paid less than a Deputy Vice Chancellor, not being given annual salary increment, being denied gratuity, not being paid commission, demotion and deployment to work as Coordinator RICE, and delay of her salary for October 2023 for eight months.

88. I have carefully considered the evidence and the submissions before the court and I agree with the claimant that she was not treated fairly and in fact she was treated differently in some instances. To begin with, she was entitled to a monthly salary plus commission which was not specified in her letter of appointment and she was never made aware of. Rw1 produced minutes of the Council indicating a resolution to pay the claimant a commission of 1% of the income generated by the IGU but there is no evidence that the claimant ever got to know and agree on the same. Besides, the claimant was never paid any commission at all yet she scored outstanding performance in all her annual appraisal based on the income generated by the IGU.

89. The claimant was also deployed to serve as Coordinator RICE reporting to the Director RICE without prior consultations. As Director IGU she was reporting to the Vice Chancellor in line with Statute 35, which means that she was demoted from Head of a Directorate to junior position reporting to another Head of a Directorate as opposed to the Vice Chancellor. This action of the respondent contradicts the allegation that the claimant’s contract could not be altered in the middle of the term. In *Godfrey Odipo Tom v Tabasamu Sacco Limited* [2022] eKLR where it held as follows:

“While making that finding, the Court holds that a demotion means the emplacement of an employee by the employer to a position or grade or rank to which is attached a lower salary or allowance or both than the salary and allowance attached to the position held



prior to such emplacement. The Court also considers that a demotion in another sense, may entail imposition upon an employee by the employer a position with diminishing scope of control, authority or lower reporting level than previously held, even if, there is no accompanying variation in salary and allowances. In the instant case the responsibility allowance was withdrawn and the claimant was emplaced at a lower level of Senior Credit Officer reporting to the Credit Manager which was a position at par with that of Finance Manager previously held by the claimant. The Court finds that the same amounted to a super classical demotion where both remuneration and authority were diminished.”

90. Rw1 admitted the claimant’s salary for October 2023 was not paid until may 2024 for the reason that she had not done clearance after the end of her contract. The said action was not grounded on any law or the claimant’s contract of employment and therefore, there was no justification for withholding her salary when all the other employees were paid. This action amounted to discrimination and inhuman treatment.
91. The decision by the respondent to deny the claimant gratuity was also contrary to her contract of employment as contained in the letter of appointment and Terms and conditions of service for Grade NT5 – NT15. As noted above, Clause 5 of the said terms of service provided for payment of gratuity to any contract employee at the rate of 31% of his/her monthly basic salary if the employee serves for a period of one year and above. The respondent cannot, therefore appropiate and reprobate with respect to the application of the said terms of service on the claimant.
92. The allegation that the claimant was underemployed or was given shorter contract terms, and given less pay than what Statute 35 provides for is among the terms of service which were accepted by the claimant without full knowledge of the job. It is therefore an afterthought or an attempt to correct a bad bargain after learning knew information down the road. Had the claimant done her background check properly before signing the contract, she could have made a better bargain. Consequently, I do not blame the respondent for the failure to give the claimant three-years contracts.
93. As regards the failure by the respondent to renew the claimant’s contract, I am satisfied that the renewal was at the discretion of the respondent subject to performance. The respondent contended that the IGU directorate did not perform as expected necessitating a rationalization of the same in RICE directorate. The claimant maintained that she Scored higher than the target of satisfactory performance and therefore, she contended that the non-renewal amounted to unfair termination of her employment. Having carefully considered the evidence on record, I am satisfied that the claimant’s contract expired automatically on the due date and the employer had no obligation to renew it. Therefore, I find that the alleged unfair termination was neither here nor there.
94. In *Transparency International – Kenya v Omondi* [2023] KECA 174 (KLR) the Court of Appeal held that:

“Indeed, the doctrine of legitimate expectation does not arise in the renewal of a fixed-term contract and its non-renewal cannot constitute unfair termination or dismissal. Having noted that the respondent was in employment under a fixed-term contract and that the contract came to an end at the appointed time, we are of the view that any relief sought by the respondent on the basis of her assertion that her employment was unfairly terminated was automatically not available to her.”
95. The foregoing point notwithstanding, I am satisfied that the claimant has laid before this court, sufficient evidence to prove that the respondent treated her unfairly and subjected her to both direct



and indirect discrimination as the Director IGU. In *Gichuru v Package Insurance Brokers Ltd* [2021] KESC 12 (KLR) the Supreme Court defined discrimination as follows:

“Direct discrimination involved treating someone less favorably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances. Indirect or subtle discrimination involved setting a condition or requirement which a smaller proportion of those with the attribute were able to comply with, without a reasonable justification.”

### Reliefs sought

96. The claimant prayed for an order directing the respondent to renew her contract as the Director IGU at the Deputy Vice Chancellor’s pay package and allowances. However, no basis has been laid before this court upon which such order for renewal can be granted. The contract was for a fixed term which lapsed automatically on the due date and the respondent exercised its mandate of not renewing the same. For the same reason that the contract expired automatically on the due date, as opposed to unfair termination, the claim for three months’ salary in lieu of notice and 12 months’ salary compensation for unfair termination must fail.
97. In view of the finding that the claimant was demoted through the impugned deployment to the Directorate of RICE, I hold that he is entitled to declaration that the said deployment was unfair, unlawful and amounted to a demotion without justification.
98. The claim for salary for the two years excluded from the three years set under Statute 35 is not merited because as noted above, the claimant voluntarily accepted the terms of her employment by signing the letter of appointment and the renewal letter. She cannot turn around after the lapse of the contract to agitate for matters which she ought to have raised at the time of signing the contract or at least during the subsistence of the contract. However, the court has observed that the failure to employ her in accordance with the University Statute 35 amounted to a violation of the said statute which also amounted to violation of values and principles of public service under Article 232 of *the Constitution*.
99. The claimant prayed for payment of gratuity for the two contract terms calculated at the rate of a Deputy Vice Chancellor’s pay package. No proper particulars of the terminal benefits were pleaded. However, the issue of payment of gratuity was placed before the court for determination at the rate of 31% of her monthly basic salary. I have already made a finding of fact that the terms and conditions of service for Grade NT5 – NT15 applied to the claimant. Consequently, she was entitled payment of gratuity pursuant to Clause 5.2.1 of the said terms of service based on the last basic salary of Kshs.134,995 x 4x12 x31% = Kshs.2,008,740.48.
100. The claim for 13 leave days has not been challenged save for the amount payable. Therefore, I award the same based on the salary of Kshs.134,995 x13/30= Kshs.58,497.88.
101. Finally, the claimant prayed for exemplary and aggravated damages for unfair treatment and discrimination in the manner highlighted above. I have already made a finding of fact that she was indeed a victim of the employer’s unfair treatment and discrimination contrary to Article 27 and 28 of *the Constitution*. The said actions also amounted to violation of her right to fair labour practices and unfair administrative action contrary to Article 41, 47 and 236 of *the constitution*. The respondent also violated the values and principles of public service under Article 232 of *the constitution*. Considering the foregoing violations, I award the claimant Kshs. 2,000,000 as general damages for the said violation of her rights under *the Constitution*, terms and conditions of service and the respondent’s University Statutes by the respondent itself.



## Conclusion

102. I have found that the claimant's terms of employment were contained in her letter of appointment, renewal letter and the Terms and Conditions of service for Staff in the Senior Administrative, Catering, Clerical, Hospital, Library and Technical Grades 5-15 of October 2014 which she voluntarily accepted and signed. I have further found the respondent subjected the claimant to unfair treatment and discrimination contrary to *the Constitution*, the said terms of service, and the University Statutes of 2017. Finally, I have found that the claimant is entitled to terminal benefits and general damages. Consequently, I enter judgment for the claimant against the respondent for payment of the following:

- a. Leave Kshs.58,497.88
  - b. Gratuity Kshs.2,008,740.48
  - c. General damages Kshs.2,000,000.00
- Total Kshs.4,067,238.36

The award is subject to statutory deductions and the claimant is awarded costs of the suit plus interest at court rates from the date of this Judgment.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 4TH DAY OF APRIL, 2025.**

**ONESMUS N MAKAU**

**JUDGE**

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N MAKAU**

**JUDGE**

