



**Mbuba v Aga Khan University (Cause 895 of 2017)  
[2025] KEELRC 1964 (KLR) (27 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1964 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 895 OF 2017  
NJ ABUODHA, J  
JUNE 27, 2025**

**BETWEEN**

**DR CAROLINE KATHOMI MBUBA ..... CLAIMANT**

**AND**

**AGA KHAN UNIVERSITY ..... RESPONDENT**

**JUDGMENT**

1. By a lengthy and prolix statement of claim dated 10<sup>th</sup> November, 2023 the claimant pleaded inter alia:-
  - a. The claimant avers that Scholarship is her chosen career and her area of specialization is Public Health Social Scientist She is a holder of a Bachelor of Home Economics degree from Kenyatta University Kenya (1996-2000), a Master of Public Health degree from the University of Alabama at Birmingham in the United States of America (2002-2004), and a Doctor of Philosophy degree in Public Health and Epidemiology from the University of Basel (Swiss Tropical & Public Health Institute) Switzerland (2008-2011). In October, 2007, and August, 2008, the Claimant undertook courses on qualitative research methods and scientific writing at Oxford University in the United Kingdom. In May, 2009 the Claimant studied medical anthropology as a tool for public health with emphasize on qualitative. Research at University Hospital Heidelberg, Germany. Between 2005 and 2012 the Claimant was an employee of KEMRI-Wellcome Trust where she conducted research using both qualitative and quantitative methodologies. Between September, 2013 and May, 2016, the claimant served as a lecturer, School of Medicine and Health Sciences at Kenya Methodist University.
  - b. The claimant further avers that the Respondent is a university deemed to be established under the Universities Act, 2012, which replaced the Universities Act - Chapter 210 B of the laws of Kenya. By virtue of section 14 of the said Act, and the section which replaced it in the former, it is a legal person with the capacity to sue and be sued under the said Universities Act, 2012. At all material times, the Respondent was a holder of a letter of interim authority to establish a new



university issued by the Commission for Higher Education on 11<sup>th</sup> July, 2002. It's address of service for the purposes of this suit is the Aga Khan University Nairobi, 3<sup>rd</sup> Parklands Avenue, P.O Box 30270-00100 Nairobi. Service of summons will be effected through the Claimant's advocates offices.

- c. The Claimant avers that the Respondent is the local chapter of the Aga Khan University which has been established by the Aga Khan University Order, 1983 of the Republic of Pakistan. The purposes of the University both in the Republic of Pakistan, Kenya and other countries in Africa where similar universities have been established are:
- i) the promotion, dissemination of knowledge and technology, instruction, training, research, demonstration and service in health sciences and such other branches of learning in Pakistan and abroad as the university shall determine;
  - ii) pursue research, to hold conferences, seminars and workshops and to publish and disseminate through print, electronic means its research and academic work including the establishment of websites on the internet;
  - iii) establish and support hospitals, clinics and other facilities for education, training and research;
  - iv) affiliate or associate with other universities and institutions and to establish institutes, faculties, centers, programs, facilities, and other academic units in Pakistan or abroad for the better discharge of its functions and responsibilities;
  - v) to use the financial and other resources allocated to it for executing of its functions.
- d. The Claimant avers that clause 5 of the Aga Khan University, 1983 and the Universities Act, 2012 confer on the Respondent the capacity to enter into contracts including those of employment with its employees.
- e. The Claimant further avers that in December, 2015, the Respondent advertised the post which was awarded to her on 2<sup>nd</sup> June, 2016. The advertisement read as follows:
- Aga Khan University  
Social Scientist
- As a junior faculty member, the individual will develop an academic career in applied health sciences with a specific role to:
- i) To provide social sciences support for a recently funded four-year multi country program on improving access to and quality of maternal newborn and child health services; and
  - ii) To teach qualitative methods and provide qualitative methods support to research projects conducted by students in the faculty of health sciences.
- f. The Claimant avers that there was an inaccuracy in the said advertisement which, together with the Respondents' forgetfulness of the fact that its offer of employment dated 19<sup>th</sup> April, 2016 contained terms which were materially different from those contained in the contract which the parties made on 2<sup>nd</sup> June, 2016. As pleaded above the offer dated 19<sup>th</sup> April, 2016 made the Claimant's appointment subject to confirmation after a review of her performance after the first six months. She was to serve a probationary period. Under the new contract of 2<sup>nd</sup> June, 2016, the Claimant was not to serve any term of her service under probation.



- g. The Claimant further avers that the misrepresentation of facts by the Respondent and the misunderstanding by the Respondent of its obligations under the employment contract and the variation of the terms of the said contract have resulted in a breach of the contract by the Respondent. The inaccuracy in the advertisement is that the Respondent /donors have not funded the qualitative part of the project. As stated above, the truth of the matter is that the qualitative part is and was not funded but the baseline survey component of that program is funded. The consequence is that, if as it happened with the Claimant, the job was awarded to her, she would only do the only component known as baseline survey and this is what she has done since June, 2016. The Claimant accepted the varied contract and has since 2<sup>nd</sup> June, 20x6 performed her part of it on the basis that the qualitative research would be undertaken by her if at all the Respondent receives funding.
- h. The Claimant further avers that she has performed the following tasks since her contract of employment was made on 2<sup>nd</sup> June 2016:
- a) Supervision of three residents
  - b) Developed research proposal guidelines
  - c) Reviewed 5 proposals for research committee
  - d) Taught qualitative research course
  - e) Participated in writing 7 proposals
  - f) Research clinics with 11 residents and 15 faculty
  - g) Development of household survey data collection tools
  - h) Development of household survey manuals (4 countries)
  - i) Report writing (Kenya, Mali and Mozambique)
  - j) Conducted 8 in-depth interviews/field observations
  - k) Developed qualitative research areas
  - l) Developed policy briefs (Kisii/Kilifi)
  - m) Written a teaching story for publication on AKU website
  - n) Supervised two interns
  - o) Abstract review and Judge in annual research day
  - p) Development of communication plan for CoEWCH
  - q) Shortlisting and interviewing M/E officer and data manager
  - r) Designing enumerator certificates
  - s) Attending and contributing to workshops and meetings
  - t) A trainee in the Instructional Skills Workshop
  - u) Excellent attendance in Faculty Academic Rounds



- i. The Claimant avers the two factors pleaded in paragraph 7 above have led to the Respondent's hostility towards the Claimant and making of arbitrary and capricious directives as to how she is to perform her contractual obligations as two illustrations show. First, the Respondent has since 5<sup>th</sup> December, 2016 embarked on a purported review of her performance following completion of six months under probation despite the fact that no probation period exists. Professor Marleen Temmerman of the Respondent who is in charge of the Center of Excellence, in Women and Child Health has purported to evaluate the performance of the Claimant for the purported purpose of determining whether or not the Claimant's contract is to be confirmed after serving a non-existent probationary service. As pleaded above her contract of service does not provide for a probationary service of six months. Without appreciating the fact that the Respondent has no funding for a component of a programme the claimant was to be involved in and that consequently the parties varied the said terms of employment, she has purported to give a negative evaluation designed to be for a basis for termination of the Claimant's contract of employment. She is basing her decision on the content of the advertisement of the claimant's job and not her contract of service which followed that advertisement. In part her negative, illegal and unfair verdict of the Claimant reads as follows;

During earlier performance appraisal, several issues were discussed with Caroline including no motivation and engagement in MERL, reluctance to take on responsibilities and tasks, inappropriate behavior in terms of absence in terms of meetings, late appearance and often without sending apologies... that leadership has been minimal or lacking. Most prominently deficient areas are: interest in MERL; leadership; self-motivation; and self-drive engagement and team play in service.

- j. The purported evaluation of the Claimant, by Professor Marleen Temmerman is unsigned and not dated. It was forwarded to Professor Robert Armstrong, the Dean of the Faculty of Health Sciences to facilitate the termination by the Respondent of the Claimant's contract of service. Following the forwarding to the Dean of the Faculty of Health Science, Professor Marleen Temmerman arranged for the termination by the said Dean in early April, 2017 of her contract of employment, In anticipation of the planned termination of the Claimant's employment, Professor Marleen Temmerman has recruited Dr. Violet Naanyu to replace the Claimant in her job and made her overseer pending the planned termination. In April, 2017 when the Claimant was carrying on field research in Kisii she procured the Dean, to give the Claimant an appointment for the termination of her services, A date for the termination meeting was given for 16<sup>th</sup> May, 2017. Being impatient with the process of the planned termination of the Claimant's employment, Professor Marleen Temmerman procured the Dean to summon the Claimant who was doing field research in Kilifi to come to Nairobi on 24<sup>th</sup> April, 2017 to have her employment terminated. On 25<sup>th</sup> April, 2017 the said Dean met the Claimant in his office and informed her that he had bad news namely the purported planned termination of her services on the grounds of the purported negative, illegal and unfair evaluation of the Claimant by Professor Marleen Temmerman.
- k. At that meeting the Claimant requested that she be supplied by the Dean<sup>v</sup> with the evaluation being relied on. The Dean, who did not have any single piece of paper or file touching the Claimant, informed her that he did not have any evaluation of her.
- l. The Claimant further avers that according to her terms of service, fifty percent of her work fell under the Faculty of Health Sciences where she reported to Professor William Macharia. That department is involved in teaching and research. The Claimant further avers that on 7th



February, 2017 Professor Marleen Temmerman and Professor William Macharia who were under misapprehension that under her contract the Claimant was to serve a probationary of a six months period held a meeting with her and purported to evaluate her. They however, did not disclose to her their evaluation or require her to answer any aspects of her career they might have been dissatisfied with. They did not issue the Claimant any document which would give the Claimant a chance to defend herself against any untrue statements.

- m. The Claimant avers that under Article 35 (2) of the Constitution, the Claimant has a right to the correction or deletion or any untrue information that affects that person. She contends that, if which is denied, the Respondent had a right to evaluate her on the basis that she was serving a probationary period, she was either at that meeting or soon thereafter entitled to be provided with a written statement of her own evaluation by the Respondent so that she might correct any untrue information. The Claimant further contends that by not supplying her with a written evaluation, the Respondent contravened her said right under the Constitution and she is entitled to damages to vindicate her said right.
- n. The Claimant further avers that after the meeting held on 7<sup>th</sup> February, 2017 Professor William Macharia purported in breach of the Claimant's contract of employment to request Professor Marleen Temmerman to extend the said no existent probation.
- o. As pleaded above, since 5<sup>th</sup> December, 2016 the Respondent despite express terms of the written contract of employment made on 2<sup>nd</sup> June, 2016 which does not provide for service on a probationary period has vexed the Claimant with arrangements for purported evaluation. The next meeting for discussion of the purported evaluation will be scheduled after the Dean, who is out of the country returns on 15<sup>th</sup> May, 2017.
- p. The Claimant avers that on 21<sup>st</sup> February, 2017 Professor William Macharia referred the issue on the non-existent evaluation to the Dean, Faculty of Health Sciences. The said Dean set up a meeting with the claimant on 13<sup>th</sup> March, 2017 to discuss the purported evaluation of her performance during the non-existent probationary period.
- q. The Claimant avers that at the meeting, she informed the Dean that of the two departmental heads namely Professor Marleen Temmerman and Professor William Macharia only the former had purported to undertake an evaluation and further she had done so on the false assumption that despite the fact that qualitative research of the Respondent was not funded the claimant has allegedly failed to discharge her duties. The claimant informed the Dean the terms of her contract of service and he under took to look into the matter.
- r. The Claimant avers that after that meeting held on 13<sup>th</sup> March, 2017, she supplied to the Dean the following documents which evidenced part of her performance of the terms of her contract of employment with the Respondent;
  - i. a list of the activities she had been involved with the Respondent since she joined it, on 2<sup>nd</sup> June, 2016.
  - ii. priority research areas for the Access to Quality Care through Extending and Strengthening Health Systems (AQCESS)
  - iii. concept proposal under development on post natal care;
  - iv. an email from Jerim Obure who is the Monitoring, Evaluation, Research and Learning (MERL) Manager). The email was sent to Professor Marleen Temmerman on 13<sup>th</sup> July, 2016 informing her that the qualitative research was not funded.



- s. The Claimant further avers that the Dean of the Respondent promised to study the documents sent to him and consult Professor Macharia who had not undertaken his purported evaluation of the Claimants evaluation of the non-existent probationary period.
  - t. The claimant further avers that on 7th April, 2017 when the Claimant was working in Kisii, doing field research, the Dean's secretary contacted her and a meeting was set up for the two for 16<sup>th</sup> May, 2017.
  - u. The Claimant further avers that after she returned from Kisii she travelled to Kilifi to do further field research. As stated above, Professor Marleen Temmerman who had identified Dr. Violet Naanyu as a replacement for the Claimant procured the Dean's office to bring forward the Claimants meeting at which according to her recommendation, the Claimant's services would be terminated. The Claimant had to abandon her field work and meet the Dean on 25<sup>th</sup> April, 2017 as pleaded above.
  - v. The Claimant avers that since 5<sup>th</sup> December, 2016 the Respondent has been engaged in a process of unlawfully and constructively terminating her employment by making the work environment so hostile that she would have to resign.
  - w. The Claimant avers that from 5<sup>th</sup> December, 2016 she has been a persecuted woman. Her persecutors are the Respondents which does not understand the contract which it entered into with the Claimant on 2<sup>nd</sup> June, 2016.
  - x. The Claimant avers that the said persecution by her has caused the Claimant mental torture and stress. She started suffering such severe headaches she had to seek medical care. Between 6<sup>th</sup> February, 2017 and 2<sup>nd</sup> March, 2017 the Claimant sought and obtained treatment from the Respondent Hospital. On 2<sup>nd</sup> March, 2017 a Magnetic Resonance Imaging (MRI) was performed on the Claimant. The said MRI resulted in a finding that the headache was associated with migraines. The Claimant was put on treatment for one month.
  - y. The Claimant avers that on 19<sup>th</sup> April, 2016 following her successful interview the Claimant was offered a job as a social scientist whose monthly emoluments were Kshs. 350,000/=The other terms of the offer included a term that she was to serve a six (6) months' probation period, during this period, employment can be terminated by either party giving one (1) month written or one (1) months<sup>9</sup> salary in lieu of notice. The Claimant further avers that she and the Respondent negotiated the terms other contract of employment beginning with the said letter dated 19<sup>th</sup> April, 2016.
  - z. The Claimant further avers that following the negotiation pleaded in paragraph 28 above, terms and conditions of service are vastly different from those contained in the Respondent offer dated 19<sup>th</sup> April, 2016, which were agreed upon, reduced into writing and the Claimant accepted the new offer. The major differences were three. First, the monthly salary was to be Kshs. 425,000. Secondly, there was to be no probation period. Thirdly, either party could terminate the contract by giving a three months' notice or J payment of three months' notice in lieu of the salary.
2. The Claimant therefore prayed for orders among others that:
- (a) A declaration that the respondents' actions since 5<sup>th</sup> December, 2016 amount to the phenomenon of attempted, constructive, unlawful dismissal of the claimant



- (b) A declaration that the respondent has contravened the claimant's rights under articles 28, 29, 30, 41, and 47 of *the Constitution*.
  - (c) A permanent injunction restraining the respondent from breaching its contract of employment with claimant dated 2<sup>nd</sup> June, 2016.
  - d. A permanent injunction to stop the respondent from terminating the claimant's services, or victimizing her in any way, for filing this suit.
  - e. A permanent injunction restraining the respondent from advertising the claimant's job and/or in any way replacing her with another employee.
  - (f) An order that the respondent pays the claimant general damages
  - (g) Any other or timber relief that his Honorable Court may deem fit to grant.
3. The Respondent filed its Statement of Response dated 16<sup>th</sup> November, 2022 and averred inter alia:
- i. The Respondent avers that the Memorandum of Claim before this Honourable Court is bad as it is not restricted to setting out die main facts upon which relief is sought but the Claimant has inappropriately included evidence as well as self-serving inferences as well as legal arguments. It is also excessive in length, difficult to comprehend and not as logically ordered as it should have been.
  - ii. In December 2015, the Respondent advertised the position of Social Scientist The advertisement was explicit that that position had two specific roles- (i) to provide social sciences support for a recently-funded 4-year multi-country programme on improving access co and quality of maternal, new born and child health services and (ii) teach qualitative methods and provide qualitative methods support to research projects conducted by students in the Faculty of Health Sciences as well as other additional key areas of responsibility set out therein. The Advertisement did not contain any misrepresentation.
  - iii. By her letter dated 18<sup>th</sup> December 2015, the Claimant applied for that position. She described herself as a public health professional with extensive experience in qualitative and quantitative research and stated her academic qualifications as a Doctorate in Public Health from University of Basel, Switzerland, a Masters in Public Health from University of Alabama at Birmingham USA, an Undergraduate in Food Nutrition and Dietetics from Kenyatta University. She also stated that "for addition "she had postgraduate training in qualitative research methods from University of Oxford, United Kingdom and University Hospital Hieledbetg, Germany without disclosing that these were for non-examinable short courses that do not entitle a trainee to certification as a social scientist
  - iv. Following her interview on 19<sup>d</sup> April 2016, the Respondent sent the Claimant a Letter of Intent offering a position as Social Scientist- AQCESS Grant on the terms and conditions set out therein which were accepted by the Claimant.
  - v. Subsequently, by a letter dated 2<sup>nd</sup> June 2016, which was also accepted by her, the Claimant's employment with the Respondent was extended to apply to the Faculty of Health Sciences as an Assistant Professor in conformity with the advertised position. The terms and conditions of this offer included;
    - a. It was for a fixed term with effect from 2<sup>nd</sup> June 2016 to 1<sup>st</sup> June 2020.



- b. The Claimant’s responsibilities and time commitment would be split 50% between the Center of Excellence in Women and Child Health where she would be accountable to Professor Marleen Temmerman or her designate as her supervisor and 50% towards providing methodology support, teaching and research within the Faculty of Health Sciences. The Claimant’s primary relationship for her methodology, teaching and research role was to be with Professor Macharia. She was required to submit a record of work activities and time spent in the respective roles in accordance with the university and granting agency requirements.
  - c. The letter also severally incorporated the Respondent’s terms and conditions of employment, including the Statement of Main Terms and Conditions of Employment and appraisals etc.
  - d. These main terms and conditions include a Probation Period “The probationary period is six months, The probationary period may be extended based on your performance during this period. The end of the probation period will be confirmed in writing.”
- vi. It is denied that die Respondent sought to revise the Claimant’s terms of employment either in respect to probation and/or her responsibilities and reporting lines whether as alleged in the Memorandum of Claim or at all.
  - vii. In conformity with the terms and conditions of her employment, separate and independent appraisals conducted in the AQCESS programme, found her performance deficient in several respects including her attitude, development of new proposals, interest in MERE, leadership, self-motivation, self-driven engagement and team play in service. The Respondent received complaints in respect of die Claimant’s performance in these areas from other MERL staff. As far as teaching was concerned, she had performed well but that constituted 50% of her work.
  - viii. Contrary to the averments in the Claimant’s averments, the MERE unit and the tasks of the staff have always been clearly defined and funding, though limited, was always available to the extent of fulfilling the aims and objectives of the MERL staff. These objectives are inter alia to work in a multi-disciplinary well-funded platform, take advantage of baseline surveys and come up with new ideas, proposals and raise funds for research projects.
  - ix. There was no intention or attempt on the part of the Respondent to constructively dismiss the Claimant whether by unilaterally revising the terms of contract of employment either as alleged in the Memorandum of Claim or at all.
  - x. It is denied that the Respondent has contravened die Claimant’s rights under Articles 2, 28, 29, 41, and 47 of tire Constitution.
4. In upshot the respondent prayed for the claimant’s suit to be dismissed with costs.

### **Evidence**

- 5. At the hearing the claimant stated that she was relying on her witness statement and bundle of documents filed with the claim. In cross-examination she stated that her contract did not have a clause on probation and that the evaluation based on probation violated the contract. It was a unilateral amendment of the contract. She signed the letter of appointment at page 86 of her bundle of documents and that the letter stated that her appointment was as a Social Scientist and that it stated



- that she would serve on probation. It was further her evidence that the letter set out her role and that she was accountable to Prof. Temmerman or her designate. She accepted the terms of the letter.
6. It was the claimant's further evidence that Prof. Marleen asked her to meet for evaluation and was given a checklist for evaluation. She stated that she submitted her self-evaluation to Prof. Macharia and that he did not object to the evaluation. It was part of her contract. She stated that evaluation was required before being issued with a confirmation letter. It was the claimant's testimony that the reason for not objecting to the evaluation was contained in her witness statement and that there was a lot email exchange on the issue.
  7. At page 92 of her bundle of documents were notes she prepared for her meeting with Prof. Marleen on the issue of extension of her probation period. At this point there was no talk about termination. She complained about not being given her evaluation outcome. According to her, the meeting was about hearing her side of the story. When she was asked to meet the Dean, she was in Kisii and scheduled to travel to Kilifi. According to her, the flights were already booked.
  8. Concerning her performance, it was her evidence that everyone accepted that she was an outstanding supervisor. She however admitted that she was not doing well on Research and Access Projects. She was moved to Population Studies and her supervisor changed. It was her testimony that her work environment did not allow her time to make scholarly contributions.
  9. Regarding relationships at work, it was her testimony that her evaluation returned that she needed improvement and that her work improved in 2019. It was her evidence that there was controversy over parking and that Prof. Macharia denied her a parking saying the parking she wanted was for visitors yet visitors already had a parking.
  10. In re-examination she stated that the situation in ACCESS was that she was supposed to support research but there was no funding however the respondent insisted on evaluating her on it. According to her, the respondent should have focused on her actual deliverables. According to the claimant, she was a super-scholar yet she was being accused of underperforming. She was not evaluated in 2016/2018 but it was done in 2019 because HR wanted them for purposes of her getting benefits. Concerning notice, it was her evidence that the final letter of appointment she signed provided for three months' notice.
  11. The respondents witness Prof. Marleen informed the court that she was the Director of Excellence in Women and Child Health and that she was adopting her witness statement dated 16<sup>th</sup> November, 2022 as her evidence in chief. She also relied on the bundle of documents filed with the response. In cross-examination she stated that she participated in the claimant's confirmation as a member of the Faculty. This was in February 2019 and at page 824 of her documents was the contract addendum. According to her, ACCESS was a project and not a department. The letter moved the claimant from ACCESS to Population Department and that ACCESS did not have funding for qualitative research. It was her evidence that Prof. Armstrong was not in her department and that she did not know for how long the claimant worked there. By the time the claimant left her department she had no contract with her.
  12. Regarding evaluation, it was her evidence that all staff were evaluated and that it was a standard practice. On 14<sup>th</sup> February, 2017 they were to meet with the claimant and that she never asked to meet the claimant. It was Prof. Macharia who asked the claimant to see her. She denied asking the claimant to see Prof. Armstrong for discipline. She did not ask the claimant to see the Dean and that it was the PA to the Dean that did so. It was her evidence that Prof. Macharia and herself did not have problems with the claimant but they had issues with her research and tried to help her to improve.



13. Concerning evaluation, it was her evidence that the claimant was evaluated every year since 2016 and that the probationary evaluation form was not signed. It was to be signed by Macharia, Armstrong and herself.
14. In re-examination she stated that they could not continue with the evaluation because there was a court order.

### **Determination**

15. As observed earlier, the pleadings by the parties to this suit especially by the claimant proved quite difficult for the Court to follow the flow. Whereas the basic rules of pleadings require that they be concise and to the point without pleading law or evidence, the court must confess that the statement of claim as filed was prolix and convoluted. It therefore forced the court to painstakingly wade through the pleadings, witness statements and submissions to figure out what the real cause of action was and the defence to it by the respondent. The Court has also considered submission by both Counsel in the matter.
16. From the claimant's submissions the Court notes that the suit was commenced by way of a memorandum of claim dated 12<sup>th</sup> May, 2017 in which the claimant sought among others a declaration that the respondent contravened her rights under articles 28, 29,30,40 and 47 of *the Constitution*. Counsel for the claimant further noted that on 12<sup>th</sup> May, 2022, Lady Justice Monica Mbaru delivered a ruling declining to grant the claimant leave to amend the memorandum of claim. Counsel acknowledged that the effect of the dismissal of the application for leave to amend, left intact the claim for damages for contravention of fundamental rights only because the claim based on the contract was settled by accord and compromise and discharged the parties of their respective obligations under the contract dated 2<sup>nd</sup> June, 2016.
17. The gist of the claimant's complaint as understood by the Court was that, despite the fact that there was a written four year contract between herself and the respondent, the latter has acted as though the contract was not in force. The contract in question commenced from 2<sup>nd</sup> June, 2016 and was to run until 1<sup>st</sup> June, 2020. According to the claimant, the respondent since December, 2016 set in motion acts designed to result in a constructive unlawful dismissal or unlawful termination of her contract. Her working environment became so damaged that she was suffering headaches since February, 2017. The actions by the respondent included requiring the claimant to submit herself for evaluation so that her contract could be confirmed after probation. According to the claimant, her contract did not provide for probationary period. The claimant however submitted herself to the appraisal but contended that the process was not fair since it did not take into account the fact that in the discharge of her obligations under the contract, she did not do qualitative research as that aspect of the project was not funded and further that she was not given an opportunity to demonstrate the actual work she had done. Further, the appraisal was subjective and demeaning to her professionalism and was carried out with the sole purpose of giving her position to one Violet Naayu.
18. The respondent refuted these allegations by the claimant and stated among others that it advertised for the position of Social Scientist in December, 2015 and that the position had specific roles. That is; to provide social science support for recently funded 4 year multi-country programme on improving access to and quality of maternal, newborn and child health services. Second, learning qualitative methods and providing qualitative support in the Faculty of Health Sciences as well as other additional key areas of responsibility set out therein.



19. According to the respondent, the claimant who described herself as a public health professional with extensive experience in qualitative and baseline research applied and was offered the job on 19<sup>th</sup> April, 2016 and that there was no new negotiation for better terms as alleged. The respondent further stated that the claimant's conduct as per the appraisal showed that her performance deficient in several respects and that the appraisals were shared with the claimant.
20. On 7<sup>th</sup> November, 2023 when the parties appeared before me, I asked them to give an opening address to the Court in order to put in focus their respective positions considering the voluminous documents filed. Dr. Kuria on his part informed the Court that his client's claim was about breach of contract of employment. The claimant was employed as a lecturer but was subjected to unlawful constructive dismissal. This was however stopped and the claimant served the full term of her 4 year contract. The issue therefore was over contravention of the claimant's rights and fundamental freedoms in the course of the discharge of her contract. According to counsel, the contract never provided for probation and review hence no review could be legally undertaken. Counsel contended that the job as advertised was different from the performance terms.
21. Mr. Amoko on his part informed the court that the claimant's contract was explicit on the issue of probation and its possible extension. Further that the claimant was supposed to teach 50% and do research 50%. The teaching function was satisfactory but the research function was wanting. According to Counsel, the claimant took the evaluation negatively and developed a negative attitude towards her work.
22. As correctly observed by Dr. Kuria, when Justice Mbaru declined the claimant's application for amendment of claim, the claim for trial reverted to the one originally filed and dated 12<sup>th</sup> May, 2017. The Court has looked at the prayers sought in that statement of claim against the fact that the claimant served fully, her 4 year contract and is of the view that the only prayer for consideration on merit by the Court is a declaration that the respondent contravened the claimant's rights under articles 28, 29, 30, 41 and 47 of *the constitution*.
23. The question therefore is whether the claimant has demonstrated and met the criteria for elevating her complaints to constitutional questions to merit compensation under article 23 of *the Constitution*.
24. The gist of the claimant's complaint as understood by the Court is that the claimant denied that her contract with the respondent had a probationary clause and that her confirmation would be subject to appraisal at the conclusion of the probationary period. The claimant, although submitted to the appraisal, she considered the same as humiliating and intended to terminate her contract in favour of one Violet Naayu who she claims was brought from Moi University to replace her.
25. The Court has noted that the letter dated 2<sup>nd</sup> June, 2016 found at page 86 of the Claimant's bundle of documents is the appointment letter and it made reference to six months' probation. The claimant admits to signing the letter hence it is not correct as contended by the claimant that her contract did not provide for probation. Regarding evaluation, the court has noted that the claimant testified that she did not object to the evaluation and that it was a requirement before one gets confirmation. Lady Justice Wasilwa in her earlier Ruling in the matter delivered on 13<sup>th</sup> December, 2017 held that the respondents were free to evaluate the claimant but in accordance with laid down procedures and processes.
26. The Court has carefully considered the averments in the statement of claim and noted that they revolve around alleged breaches of the terms of the claimant's contract and that such violations amounted to violations of the claimant's constitutional rights. It is common ground that the parties amicably resolved these complaints and the claimant after all, served her contract to conclusion. In that regard, the basis upon which violations of the constitutional rights can be made have been significantly



compromised. The court has not come across any stand-alone complaint that could amount to breach of the claimant's constitutional rights. It would therefore not be just that on one hand the claimant and respondent compromised on her concerns and she served fully her contract while on the other hand sustain a claim for violation of constitutional rights based on selfsame facts.

27. It has been held in several cases that a claim based on violation of constitutional rights ought to clearly show which rights have been or are threatened with violation, the article of *the constitution* violated or threatened with violation and the manner in which it is violated. The Courts have further stated that not all violations meet the constitutional threshold and that if the breach complained of is adequately addressed by a statute then *the constitution* should not be invoked. In the case of *Anarita Karimi Njeri v AG* [1979] KLR 154 the Court stated thus:

“...we would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed

28. Further in the case of *Sports and Recreation Commission v Sagittarius Wrestling Club and Anor* [2022] KEHC 13633 (KLR) per Ibrahim JA (as he then was) stated

“...Courts will not normally consider as a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights..”

29. The principle of constitutional avoidance holds that where there is in existence a statute that provides for adjudication of certain kinds of disputes, resort ought to be made to the statute and not *the constitution*. I have considered the claim herein and its circumstances as outlined above and become of the view that this was an ordinary employment dispute. The emotions and disappointments may have been abound going by the voluminous documents presented in attempt to justify claims for violation of constitutional rights but these alone were not sufficient to elevate the dispute to a constitutional question. The Court therefore rejects the claim that the respondent violated the claimant's constitutional rights.

30. This being the only question that the Court was left to determine, the suit, for the foregoing reasons is found without merit and is hereby dismissed with costs.

31. It is so ordered.

**DATED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JUNE 2025**

**DELIVERED VIRTUALLY THIS 27<sup>TH</sup> DAY OF JUNE 2025**

**ABUODHA NELSON JORUM**

**PRESIDING JUDGE-APPEALS DIVISION**

