



Ojwang' v African Nazarene University; Council of Legal Education & another (Interested Parties) (Petition E200 of 2022) [2024] KEELRC 13441 (KLR) (16 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13441 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E200 OF 2022**

BOM MANANI, J

DECEMBER 16, 2024

**IN THE MATTER OF ARTICLES 10(2) (B), 22(1), 23, 47(1), 50(1),
162(2) (B), 259(1) & 260 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS
OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 25, 27(1),
(2) & (5), 33(1) (C), 35, 41 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE EMPLOYMENT AND
LABOUR RELATIONS COURT ACT NO 20 OF 2011**

AND

IN THE MATTER OF THE UNIVERSITIES ACT NO 42 OF 2012

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA
(PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS)
PRACTICE AND PROCEDURE RULES UNDER RULES, 2013**

BETWEEN

DUNCAN OBURU OJWANG' PETITIONER

AND

AFRICAN NAZARENE UNIVERSITY RESPONDENT

AND

COUNCIL OF LEGAL EDUCATION INTERESTED PARTY

COMMISSION FOR UNIVERSITY EDUCATION INTERESTED PARTY



JUDGMENT

Introduction

1. The dispute between the Petitioner and Respondent revolves around whether the latter unfairly denied the Petitioner the chance to be promoted from the position of senior lecturer to associate professor. The Petitioner believes that he was qualified for progression to the latter position. However, he believes that the Respondent deprived him of this opportunity by subjecting him to a progression process that was unfair, irregular and discriminatory.
2. On its part, the Respondent contends that the Petitioner did not meet the criteria for progression to the position of associate professor. As such, he was legitimately locked out of the position.

Petitioner's Case

3. At the time of instituting these proceedings, the Petitioner was serving as a senior lecturer at the Respondent's School of Law. In addition, he was undertaking various other administrative functions including serving as Dean of the School of Law and as a representative of the academic staff in the Respondent's Management Board Committee and Senate.
4. The Petitioner contends that around 31st December 2020, the Respondent advertised for faculty progression for its academic staff. It is his case that following the aforesaid advertisement, he applied for progression to the position of associate professor.
5. The Petitioner states that the Respondent shortlisted him for interview for the position. Consequently, it invited him to appear before its Faculty Progression Committee (the Committee) on 15th June 2021.
6. It is the Petitioner's case that when he appeared before the Committee, he noted that it lacked external reviewers contrary to the Respondent's Faculty Progression Policy. Similarly, he observed that it (the Committee) lacked a reviewer with specialization in the field of law who was either at the same or higher level than him.
7. The Petitioner contends that during the Committee's deliberations, it indicated that it lacked evaluation tools for certain areas including community service and integrated learning. As such, it requested that the exercise be adjourned to enable resolution of the aforesaid deficiencies.
8. According to the Petitioner, despite the Committee adjourning as aforesaid, the Vice Chancellor of the Respondent irregularly converted the session into an annual performance review exercise for the Petitioner. He avers that the Vice Chancellor did this notwithstanding that the Respondent had not forewarned him (the Petitioner) that he will be subjected to a performance review.
9. The Petitioner contends that during the irregular performance review session, the Committee interrogated him on various matters that were not related to the business of the day. According to the Petitioner, this latter exercise was encouraged by the Respondent's Vice Chancellor who was motivated by ulterior intent against him. It is the Petitioner's contention that the process subjected him to unnecessary humiliation as he was forced to respond to inquiries about issues which he had not been given an opportunity to reflect on.
10. The Petitioner argues that due to his administrative roles at the Respondent institution, he had crossed paths with some of the Respondent's management and in particular, the institution's Vice Chancellor. He believes that these disagreements informed his tribulations before the Committee.



11. It is the Petitioner's case that notwithstanding that the faculty progression session had been adjourned, the Committee went ahead to collect data from him during the informal interaction and used it to deny him the opportunity to progress to the position of associate professor. Further, he contends that despite the Committee having adjourned for want of the necessary evaluation tools, he was surprised to learn that some of his peers who had been subjected to the same process were promoted whilst his case was ignored.
12. As such, he contends that the Respondent subjected him to discrimination. He avers that he was denied equal protection of the law.
13. The Petitioner argues that the ill treatment which the Respondent subjected him to was motivated by the fact that the Respondent's officials were uncomfortable with the position that he had taken on a number of matters. In his view, the Respondent's reaction to differences in opinion between him and its management on various matters violated his freedom of expression and undermined his academic freedom.
14. The Petitioner argues that his efforts to access information accounting for the Respondent's decision to progress his peers whilst stagnating him have been met with silence from the Respondent's management. He contends that despite his call for this information, the Respondent has declined to divulge it. As such, he contends that the Respondent's conduct has violated his rights to information and fair administrative action.
15. Overall, the Petitioner argues that the Respondent has violated his constitutional rights to: protection from discriminatory treatment; equal protection by the law; dignity; freedom of expression; information; fair labour practice; and fair administrative action. He has set out the various constitutional provisions that he contends that the Respondent violated.

Respondent's Case

16. The Respondent filed a replying affidavit dated 12th April 2023. It admits that the Petitioner was its employee serving as Senior Lecturer and Dean, School of Law.
17. The Respondent contends that sometime in the year 2020, it developed its Faculty Progression Policy and Guidelines and Assessment for Appointment and Promotion of Faculty tool. It contends that it trained its members of teaching staff on the two instruments in the months of November and December 2020.
18. The Respondent avers that on 31st December 2020, it invited members of the teaching staff to apply for progression. It contends that those who were interested were advised to lodge their applications by 31st January 2021.
19. The Respondent contends that on the closing date, it had received thirteen applications. Out of these, three were by staff who wished to be progressed to the position of associate professor. The others were by staff who wished to get promoted to position of senior lecturer.
20. The Respondent contends that in February 2021, it set up the Faculty Progression Committee in accordance with clause 3.4.1 of the Faculty Progression Policy to evaluate the applications. It contends that the Committee comprised of the Vice Chancellor, the Deputy Vice Chancellor, the Registrar, the Dean of Post Graduate Studies and Director of the Institute of Research. It further contends that these officers were supported by the Director of Academic Excellence and the Director of Human Capital.
21. The Respondent contends that the Committee held its inaugural meeting on 25th February 2021 to set its terms of reference and agree on the way forward on the progression exercise. It contends that



the Committee agreed on how to process the following: receipt of applications; categorization of the applications; shortlisting of the applicants; conduct of independent assessment of the applications; invitation of the applicants for assessment; and provision of recommendations and feedback to the applicants. It further contends that the Committee committed to undertake the exercise in accordance with the approved Faculty Progression Policy and further undertook to ensure that the applicants who progressed to the assessment stage were evaluated in the presence of external assessors.

22. The Respondent avers that the Committee held the next meeting on 18th March 2021 when summaries of the applications were shared for purposes of shortlisting. It (the Respondent) contends that the Committee shortlisted four individuals for the position of senior lecturer and three for the position of associate professor. The Respondent further contends that the Committee resolved to bring on board the external assessors at the interview stage.
23. The Respondent contends that on 23rd March 2021, the Committee evaluated the documents for the applicants shortlisted for the position of senior lecturer and progressed the four of them to the interview stage. It contends that this cohort was eventually interviewed on 8th and 11th June 2021.
24. The Respondent contends that on 30th March 2021, the Committee assessed the documents for the three applicants for the position of associate professor. However, none of them was progressed to the interview stage.
25. The Respondent avers that on 14th and 15th June 2021, the Committee had individualized sessions with the applicants who did not make it to the interview stage. It contends that the affected individuals, including the Petitioner, were informed of the fate of their applications.
26. The Respondent denies that the meeting which the Committee had with the Petitioner on 15th June 2021 was for purposes of interviewing him for the position of associate professor. It contends that the meeting was for purposes of giving the Petitioner feedback regarding the fate of his application.
27. The Respondent contends that the Petitioner's application was evaluated in accordance with its Faculty Progression Policy. As such, the process was fair.
28. The Respondent asserts that the Petitioner was encouraged to improve on certain areas and to re-submit his application during the next progression review cycle. However, he failed to do so.
29. The Respondent further contends that besides the Committee's interaction with the Petitioner on 15th June 2021, it wrote to him on 28th June 2021 on the outcome of his application. It contends that it (the Respondent) also wrote to him on the subject on 13th July 2021 after he wrote to challenge the outcome of the process.
30. The Respondent denies that its management had differences with the Petitioner arising from execution of his administrative roles. It further denies that it discriminated against him.
31. The Respondent avers that it wrote to the Petitioner's advocates regarding the information they had asked for. It avers that it informed them that the information was to be supplied in due course. It contends that as it was collating the information required for this purpose, the Petitioner moved to court.
32. The Respondent believes that the Petitioner's suit was actuated by malice. It contends that the Petitioner hoped to use the judicial process to arm twist it into progressing him to the position of associate professor without the appropriate qualifications.



Issues for Determination

33. After evaluating the pleadings and evidence on record, the court is of the view that the issues which fall for determination are the following:-
- a. Whether the Respondent failed to process the Petitioner's application for progression in accordance with its Faculty Progression Policy and the law.
 - b. Whether the Petitioner was prejudiced as a result and whether his constitutional rights, as particularized in the Petition, were violated.
 - c. Whether the Petitioner is entitled to the reliefs that he seeks through this action.

Analysis

34. The parties agree that the Respondent is regulated by the *Universities Act*, Cap 201 Laws of Kenya. Pursuant to this legislation, the Commission for University Education promulgated the "Harmonized Criteria and Guidelines for Appointment and Promotion of Academic Staff in Universities in Kenya".
35. These regulations provide the minimum qualifications and standards for processing appointments and promotion of members of the teaching staff in universities. However and as conceded by the parties, individual universities are at liberty to set higher standards for themselves.
36. In recognition of the foregoing, the Respondent published its Faculty Progression Policy in July 2020. According to the document, the policy was to have come into effect in August 2020. However, the Respondent indicates that this was delayed to December 2020 in order to allow for stakeholder engagement.
37. Clause 3.4 of the policy sets out the criteria for academic progression. Clause 3.4.1 provides that the Respondent shall appoint an appropriately qualified assessment committee to consider and rate applications for progression. Whilst undertaking this task, the committee is required to assess and rate the applicants' contributions and achievements.
38. The clause requires at least one third of the membership of the committee which is set up to evaluate applications for associate professor or full professor positions to be made up of external reviewers in the applicants' relevant academic fields. It is noteworthy that the clause does not suggest that the external reviewers are to be brought on board the committee midstream after it has commenced its work. As such, it is expected that they are to be on-boarded at the point of constitution of the committee.
39. The Respondent contends that after its progression policy came into force in December 2020, it informed members of academic staff to apply for progression in accordance with the policy. As a result, the Petitioner and other interested staff applied.
40. The Respondent contends that it set up an assessment committee comprising of its officers to evaluate the Petitioner's and other applications. The committee comprised the following: the Vice Chancellor; the Deputy Vice Chancellor; the Registrar; the Dean of Post Graduate Studies and Director of the Institute of Research; the Director of Academic Excellence; and the Director of Human Capital.
41. From the foregoing, it is apparent that the Committee had a membership of six individuals in the first instance. If clause 3.4.1 of the policy is to count for anything, at least one third of the members of the Committee, that is to say, two individuals, ought to have comprised of external reviewers with expertise in law which is the Petitioner's academic field.



42. The Petitioner contends that in violation of this requirement, the Committee that was set up by the Respondent comprised not only of its management team but also lacked persons with expertise in his academic field. In response, the Respondent does not deny this assertion. As a matter of fact, the Respondent's witness conceded during cross examination that the Committee neither had an external reviewer nor a law don.
43. The Respondent contends that the initial team did not have external reviewers with expertise in the applicants' relevant fields because this was not a requirement at the initial stages of the process. It contends that the external reviewers were to be brought on board at the stage of interviewing the shortlisted candidates.
44. The position taken by the Respondent in this respect is at cross purposes with clause 3.4.1 of the policy. As indicated above, the policy requires that at least one third of the membership of the assessment committee should comprise of external reviewers with expertise in the academic field of the applicant. It does not give the Respondent the discretion to on-board the eternal reviewers mid-stream.
45. This requirement makes sense. For a qualitative review of applications for academic progression, it is important that those who are qualified in the academic field of the applicant undertake the exercise. It is inconceivable that non-experts in a field can qualitatively undertake such an exercise.
46. Besides the foregoing, there must have been other legitimate reasons for decreeing involvement of external reviewers from inception of the progression process. In the court's view, this was intended to ameliorate the possibility of bias by internal reviewers which the Petitioner has alluded to.
47. Having failed to constitute the Committee which evaluated the Petitioner's application in accordance with clause 3.4.1 of its Faculty Progression Policy, the Respondent opened the process to attack by the Petitioner. The Petitioner was entitled to question the impartiality and quality of the entire exercise.
48. The Petitioner contends that the process violated his right to fair administrative action. In his pleadings and evidence he contends that the assessment Committee invited him for an interview on 25th June 2021. However, the session aborted when the Committee indicated that it did not have the necessary tools to evaluate certain aspects of the qualification matrix.
49. He contends that although he expected to be called for an interview after the Committee had addressed the aforesaid challenge, this did not happen. Instead, he learned that a few of the applicants who had been subjected to the same process had been progressed.
50. The Petitioner says that he wrote to the Respondent seeking information on what had transpired. However, the Respondent failed to provide him with a suitable response. As such, the Respondent failed to comply with its legal obligation to furnish him with the reasons for its decision in violation of his right to fair administrative action.
51. In response, the Respondent denies this contention. It contends that the assessment Committee only engaged the Petitioner on this date to inform him of the results of the preliminary evaluation of his application.
52. A review of the minutes of the session for 25th June 2021 appears to support the position advanced by the Respondent. The minutes show that the parties were speaking to the deficiencies in the application which the Petitioner had lodged. The proceedings suggest that the participants in the session were basically examining the areas of weakness in the application and making recommendations on how they could be redressed.



53. The minutes suggest that the Respondent's Committee explained why the Petitioner's application had failed. They show that the Committee had issues with the application in, inter alia, the following areas:-
- a. Integration and faith learning: It was indicated to the Petitioner that he needed a deeper understanding of this matrix.
 - b. Teaching and learning: the Committee was of the view that the Petitioner could do more in this area particularly with regard to online teaching.
 - c. Research and publications: the Committee felt that the Petitioner's publications were largely in the Law School's Journal. It suggested that he needed to publish more in external Journals.
54. The record shows that this oral conversation was followed with the Respondent's letters to the Petitioner dated 28th June 2021 and 13th July 2021 in response to the latter's email inquiries about the reasons for the Committee's decision. Having regard to these conversations, the court is satisfied that the Respondent gave the Petitioner the reasons for its decision in compliance with article 47 of *the Constitution*. As such, it did not violate the Petitioner's right to be informed of the reasons for the impugned decision.
55. Although the Respondent informed the Petitioner of the reasons for the impugned decision, this did not cure the improper constitution of the assessment Committee. As such, although the reasons for the decision were relayed to the Petitioner, this did not render the said decision legitimate.
56. Under article 47 of *the Constitution*, the Petitioner was entitled to action that was procedurally fair during the evaluation process. In the court's view, the Respondent deprived the Petitioner of this entitlement when it caused his application to be reviewed by an assessment Committee which was improperly constituted. As such, the Petitioner's right to fair administrative action was infringed in this respect.
57. The Petitioner has contended that the Respondent's deprived him of his legitimate expectation that he will be fairly evaluated for purposes of progression. As such, he contends that the impugned actions violated his right to fair labour practices protected under article 41 of *the Constitution*.
58. The right to fair labour practices incorporates various limbs including the right to reasonable working conditions. In the court's view, an employer violates this right if he improperly deprives an employee of the opportunity to make career progression through promotions.
59. By the Respondent subjecting the Petitioner's application for progression to an assessment Committee which was improperly constituted and which lacked external reviewers with expertise in the Petitioner's field, it exposed him to the risk of career stagnation as a result of possible prejudices by its internal reviewers who lacked the requisite competencies. This risk would have been mitigated if the Respondent had acted within its policies when setting up the Committee. This would have ensured that the Committee had external reviewers with expertise in the Petitioner's area in order to ensure a qualitative and unbiased review.
60. By the Respondent allowing the Petitioner's application to be exclusively reviewed by its internal team which had no qualifications in the Petitioner's academic field, it prejudiced his legitimate expectation to progress in his career thus infringing on his right to fair labour practices. As such, I find that the actions by the Respondent jeopardized the Petitioner's right to fair labour practices.
61. The Petitioner has also contended that after the assessment Committee rejected his application, his lawyers wrote to the Respondent requesting to be supplied with specific documents and information with respect to the proceedings. However, the Respondent ignored this request. As such and by



this conduct, the Respondent violated his right to information as protected under article 35 of *the Constitution*.

62. The evidence on record shows that on 5th August 2021, the Petitioner's advocates wrote to the Respondent asking for the following information pertaining to the review process:-
- a. The report of the University's Faculty Progression Selection Committee.
 - b. The minutes of the University's Faculty Progression Selection Committee meetings.
 - c. The interview notes for every interviewer/panelist in the constituted interview panel.
 - d. The individual assessment/marking made by each interviewer/panelist of the constituted interview panel regarding the Petitioner.
 - e. The video-audio recording of the Petitioner's interview conducted on 15th June 2021.
 - f. The academic qualifications and credentials of the faculty progression selection committee: each interviewer or panelist in the constituted interview panel.
 - g. The Respondent's approved faculty progression rubric, criteria, guidelines and score card/line.
 - h. Any memos or communication of the decision to select successful candidates for faculty progression.
 - i. The faculty progression selection committee's minutes of their deliberations and selection report.
 - j. Any other document relevant to the said process.
 - k. Copies of the Petitioner's pay slips for six months preceding the date of the request and an explanation for variations in the Petitioner's salary.
63. The Petitioner's lawyers asked that the information be supplied to them within twenty one days' of the request. The Respondent contends that its lawyers responded to this request and informed the Petitioner's lawyers that the information asked for was being put together and would be supplied in due course. However, before this was done, the Petitioner moved to court.
64. I note that the request for information was done on 5th August 2021. The Respondent's lawyers responded to the request on 27th August 2021. They indicated that they were taking instructions on the matter and would revert at the earliest.
65. The Petition was filed on 22nd November 2021, approximately 109 days after the request for information had been lodged with the Respondent. Apart from the Respondent's lawyer's letter of 27th August 2021 promising to revert to the Petitioner's lawyers after receiving their client's further instructions, there is no evidence that the Respondent took meaningful steps to supply the Petitioner with the information he had sought through his lawyer's letter of 5th August 2021. Neither did it inform the Petitioner why the information could not be supplied.
66. Article 35 (1) (b) of *the Constitution* provides as follows:-
- "Every citizen has a right to access to information held by another person and required for the exercise or protection of any right or fundamental freedom."
67. From the foregoing, it is apparent that the Petitioner was entitled to demand and obtain from the Respondent documents and information on the progression process in order to examine whether the



latter's handling of his application had infringed on his rights. On the other hand, the Respondent was obligated to supply this information without unnecessary delay.

68. The Respondent has not provided cogent justification for withholding the information which the Petitioner's advocates requested for through their letter of 5th August 2021 for the duration it did. I do not agree that the Petitioner's decision to move to court compromised the Respondent's obligation to release the information in question.
69. In their submissions, the Respondent's advocates assert (for the first time) that the information in question was not supplied because the Petitioner filed Petition No. E 794 of 2021 on 16th September 2021 before their client had acted on his request. It is noteworthy that there is no mention of this case either in the Respondent's replying affidavit or in the evidence it tendered in court. Nor were copies of the pleadings presented in evidence. In effect, by speaking to this matter through their submissions, the Respondent's lawyers were attempting to introduce evidence of the alleged case through their submissions, a practice that is generally frowned upon.
70. The Respondent's advocates have also stated in their submissions that the Respondent complied with the duty to supply the Petitioner with information on the impugned process when it gave him feedback in the meeting of 15th June 2021 and through its letters dated 28th June 2021 and 13th July 2021. However and in my view, on these dates, all that the Respondent did was to inform the Petitioner about the reasons for its decision without furnishing him with documents in that regard. There is no evidence that it (the Respondent) furnished him (the Petitioner) with any of the documents and electronic media which his lawyers demanded in their letter of 5th August 2021.
71. The Respondent's advocates have also submitted that some of the documents were, in any event, subsequently shared with the Petitioner, perhaps through these proceedings. As regards the balance of the documents and electronic media, it is contended that they were not supplied either because they were not generated since the process did not get to the interview stage or they were not the subject of the review process.
72. The obligation on the Respondent was to share the documents called for by the Petitioner's lawyers in response to their letter. If any of the documents could not be supplied for the reasons which the Respondent's advocates allude to in their final submissions, this ought to have been communicated to the Petitioner and or his lawyers in response to their letter of 5th August 2021.
73. The Respondent cannot contend that it has redressed the failure to supply the documents called for by the Petitioner's lawyers vide their letter of 5th August 2021 by disclosing some of the documents at the point of filing its response to the instant Petition. As such, I find that the Respondent's conduct violated the Petitioner's right to critical information that was necessary in aiding him to determine how to protect his rights.
74. The Petitioner has moved the court to declare that he met the minimum requirements for progression to the position of associate professor under the Respondent's Faculty Progression Policy. The court notes that although the Petitioner submitted data to the assessment Committee to support his contention that he had satisfied the requirements for progression, the Committee was of the view that he needed to have done more to be progressed. For instance, although the Petitioner contends that he had satisfied the criteria on community engagement, the Committee observed that he needed to do more work on this aspect to demonstrate the impact of the activities in this respect on the local community and the Respondent.
75. The court notes that under clause 2.3 of the Harmonized Criteria and Guidelines for Appointment and Promotion of Academic Staff in Universities in Kenya developed by the Commission for



- University Education, the said Commission left it to individual Universities to develop scoring mechanisms to measure the above rubric. As such, the mechanisms for determining whether an applicant has satisfied the criteria on community engagement are left to the respective Universities.
76. The record shows that the Respondent developed guidelines to measure this rubric. The tools developed for this purpose largely require qualitative rather than quantitative data. As such, only the Respondent is qualified to determine whether the Petitioner met the qualitative aspects of this requirement.
 77. As such and based on this example alone, it becomes apparent that the court has no mechanism by which to measure whether the Petitioner had satisfied the qualitative aspects of the requirements for progression. Having regard to the foregoing, the court declines the Petitioner's prayer in this respect.
 78. The Petitioner has also asserted that the Respondent discriminated against him when it progressed some of the applicants and left him out. He contends that although the assessment Committee expressed its inability to measure some indicators for the progression exercise for the entire of the applicants, it later turned out that some of the applicants were progressed using the flawed process. As such, he posits that he was discriminated.
 79. On the other hand, the Respondent denies that it discriminated against the Petitioner. The Respondent contends that the requirements for progression differed depending on the cohort in which an applicant fell.
 80. The Respondent contends that all the applicants in the cohort for associate professor were not progressed due to their inability to meet the progression requirements. On the other hand, four of the applicants for the position of senior lecturer were progressed to the interview stage. However, the measurement instruments for the two groups were different.
 81. Although the Petitioner contends that the Respondent's assessment Committee adjourned the progression interview on 15th June 2021 due to the absence of tools to measure some of the progression indicators, the minutes of the session speak to something else. A reading of the minutes suggests that the meeting was a feedback rather than an interview session. As such and based on the evidence on record, the court is not able to conclude that the session for 15th June 2021 was for the progression interview and that it was adjourned at some point for want of measurement tools.
 82. The evidence on record suggest that the Respondent's assessment Committee begun the evaluation exercise for the various applicants on 25th February 2021. Although the process was flawed for want of proper constitution of the Committee, it (the process) progressed as evidenced in the subsequent meetings that were held on 18th March 2021 and 15th June 2021.
 83. Throughout these sessions, it appears that all that the Committee did was to evaluate the paperwork that had been presented by the applicants and provide feedback. No interviews happened in the process. It is therefore inaccurate for the Petitioner to contend that the Respondent commenced but adjourned the interviews for the exercise on 15th June 2021 only to later discriminately use the data collected on that day to progress some of the applicants whilst leaving him out.
 84. The Petitioner has argued that the Respondent's Vice Chancellor was out to settle personal scores with him on account of his divergent views on various issues at the workplace. However, he did not present cogent evidence to support this contention.
 85. Although the law on discrimination adopts the reverse burden of proof, it nonetheless requires that the person alleging discrimination first establishes a prima facie case before the person who is accused of discrimination is asked to justify the impugned acts. As was demonstrated in the case of *G M V v*



Bank of Africa Kenya Limited [2013] eKLR, a complainant in an employment discrimination case must provide preliminary evidence to establish the following before the Respondent is called upon to justify the conduct that is complained of:-

- a. Establish that he/she belongs to a protected class.
 - b. Demonstrate that he/she qualified for the opportunity in question.
 - c. Show that he/she suffered adverse employment action, directly as a result of some prohibited attribute. He/She must provide prima facie proof, that other explanations by the employer are pretextual, and the real reason for termination was the prohibited attribute.
 - d. Lastly, the employee must, as a minimum, establish that there is a nexus between the adverse employment decision and the prohibited attribute.
86. As was submitted by the Respondent, it is not sufficient for the complainant to say that the parties were differentiated. He must demonstrate, prima facie, that the differentiation was without justification.
87. Having regard to the evidence on record, I am not satisfied that the Petitioner has provided sufficient preliminary evidence to satisfy the above criteria. There was no cogent evidence to demonstrate that he (the Petitioner) had workplace disagreements with the Respondent's management owing to his divergent views which informed the decision not to progress him. There was no cogent evidence to demonstrate that the differentiation between the two cohorts was motivated by prohibited factors. As such, I am unable to find that the Petitioner was discriminated against.

Determination

88. In the ultimate, I make the following findings and orders:-
- a. I find that the Respondent's Faculty Progression Committee which evaluated the Petitioner's application for progression was improperly constituted.
 - b. As such, I declare that the proceedings by the said Committee violated the Petitioner's rights to fair administrative action and fair labour practices under articles 47 and 41 of the Constitution respectively.
 - c. I declare that the Respondent's failure to supply the Petitioner with the information he requested for through his lawyer's letter of 5th August 2021 violated the Petitioner's right to information under article 35 of the Constitution.
 - d. The Respondent is ordered to pay the Petitioner general damages of Ksh. 2,000,000.00 as compensation for violation of his aforesaid rights. In making this award, I have taken into account the principle that the remedy of damages for violation of a constitutional right is not merely to compensate the victim of violation of the right even though compensation is important. The primary purpose of this remedy is to: reflect public disapproval for violation of the right; emphasize the importance of the right; underscore the gravity of its breach; and deter further breaches. Further, in assessing the quantum of damages to be awarded, I have taken into account the principle that the court must neither trivialize nor blow the infringement out of proportion (*Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR).
 - e. The above amount shall attract interest at court rates from the date of this decision.
 - f. I award the Petitioner costs of the case.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF DECEMBER, 2024



B. O. M. MANANI

JUDGE

In the presence of:

..... for the Petitioner

.....for the Respondent

.....for the Interested Parties

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties 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.

B. O. M MANANI

