



**Chelagat v Kabarak University (Cause 28 of 2020)  
[2023] KEELRC 642 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 642 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 28 OF 2020  
DN NDERITU, J  
MARCH 16, 2023**

**BETWEEN**

**REBECCA JEBICHII CHELAGAT ..... CLAIMANT**

**AND**

**KABARAK UNIVERSITY ..... RESPONDENT**

**JUDGMENT**

**I. Introduction**

1. In a Statement of Claim dated 3<sup>rd</sup> August, 2020 filed in court on 6<sup>th</sup> August, 2020 through Raydon Mwangi & Associates Advocates the Claimant prays for: -
  - A. Reinstatement
    - i. That the Claimant be reinstated back to her position.
    - ii. That the Claimant be paid her salaries upto date among other allowances which she was entitled to by virtue of her letter of engagement.
  - or
  - B. Payment For Terminal Dues
    - i. That the Claimant be paid three(3) months gross salary in lieu of notice as stipulated in her letter of appointment.
    - ii. That the Claimant be paid her salary for August, 2017 which she had worked for.
    - iii. That the Claimant be paid her salary for 7 days for September, 2017 which she had worked for.



- iv. That the Claimant be paid twelve (12) months gross salary for compensation based on Section 49(1) C of Employment Act.
- v. That the Honourable Court be pleased to award any other relief it deems fit to award.
- vi. The Claimant be issued with certificate of service based on Section 51 of the Employment Act.
- vii. That the Respondent to meet the costs of the suit.

Claims Arrangement

1. Three(3) months' salary in lieu of notice .....Kshs.393,633.00
2. Salary for August, 2017.....Kshs.131,211.00
3. Salary for y days for the Month of September, 2017.....Kshs. 30,615.90
4. Twelve(12) months' salary for compensations for unfair termination based on Section 49(1) C of the Employment Act .....Kshs.154,532.00

Totals Kshs.2,129,991.90

2. Together with the statement of claim was filed a statement by the Claimant and a bundle of documents in support of the claim.
3. On 9<sup>th</sup> September, 2020 the Respondent through Kiplenge & Kurgat Advocates entered appearance and filed a memorandum of response to the claim on 29<sup>th</sup> September, 2020. In their memorandum of response, the Respondent prays that the Claimant's cause be dismissed with costs for want of merits.
4. Along with the statement in response to the claim the Respondent filed a list with several documents attached. A further list was filed dated 3<sup>rd</sup> March, 2021 with two documents attached.
5. This cause came up in court for hearing on 16<sup>th</sup> March, 2022 when the Claimant (CW1) testified and closed her case.
6. The defence was heard on 7<sup>th</sup> June, 2022 when PROF RONALD K. CHEPKILOT (RW1) testified and the Respondent's case was closed.
7. Counsel for the parties addressed and summed up their respective client's case by way of written submissions. Counsel for the Claimant, Mr. Ndichu, filed his submissions on 13<sup>th</sup> July, 2022 while Counsel for the Respondent, Mr. Koome, filed on 19<sup>th</sup> July, 2022.

**II. Claimant's Case**

8. The Claimant's case is expressed in the statement of claim, the oral and documentary evidence of the Claimant (CW1), and the written submissions by her Counsel, and the same is summed up as hereunder.
9. The Claimant adopted her filed witness statement on record and stated that she was employed by the Respondent on 15<sup>th</sup> April, 2005 as an assistant lecturer and the terms and conditions were reduced into writing as per a contract of service of even date. She started off at a basic salary of Kshs.43,800/= plus Kshs.29,200/= in house allowance making a gross monthly salary of Kshs.73,000/=.



10. On 1<sup>st</sup> August, 2005 the Claimant was re-designated as an assistant student counsellor but the other terms of employment remained the same. The contract and the letter of re-designation were produced as exhibits.
11. The Claimant's terms of employment were reviewed and improved from time to time and by the time of her dismissal vide a letter dated 7<sup>th</sup> September, 2017 she was on a basic salary of Kshs.77,526/= plus house allowance of Kshs.51,684.40 and airtime allowance of Kshs.2,000/= making a total gross monthly salary of Kshs.131,211/=.
12. The Claimant testified that in her capacity as student counsellor she was in-charge of a student exchange programme which among many other programmes gave students a chance to visit the United States (the US) as volunteer missionaries at ALACCA Bible Camp Conference Centre in Idaho State.
13. To enable students to obtain Visa for travel to the US the travelling students had to present themselves at the American Embassy in Nairobi and among the documentation needed was a letter of introduction from the Respondent confirming that the visa applicant was a student and that the student had permission to travel as such.
14. The Claimant testified that while escorting a group of students to the Embassy on 13<sup>th</sup> July, 2013 she was arrested and detained at Gigiri Police Station on allegations of forging the letters of introduction for the students purporting the same to be genuine letters authored and signed by the Dean of Students, Dr Moses Alela. She was subsequently charged with forgery and uttering of false documents in Chief Magistrate's Court at Kibera in Criminal Case No. 1851 of 2017 (the criminal case). After the trial the Claimant was acquitted of the charges on 17<sup>th</sup> January, 2020.
15. However, following the arrest of the Claimant on 13<sup>th</sup> July, 2013 and while pending trial the Respondent issued the Claimant with an undated show-cause letter in the following terms –

Office of The Registrar (Administration & Human Resources)  
 Private bag – 20157 .....Tel:254-51-343234/5  
 Kabarak, Kenya .....Fax: 254-51-343012  
 Email:registrar@kabarak.ac.ke .....www.kabarak.ac.ke  
 REF: KABU/0152  
 Ms. Rebecca Jebichii Chelagat  
 Student Affairs Department  
 Thro'  
 The Dean of Students  
 Dear Ms. Chalagat,  
 RE: Show Cause Letter

It has been reported that you were involved in illegal practice of issuing letters of introduction to nine (9) applicants purporting to be Kabarak University students to the United States Embassy in Nairobi for the purpose of securing VISA to travel to United States of America to participate as Volunteer Missionary at ALACCA Bible Camp Conference Centre, 101 China Garden Tad-Harster, ID 83552, Idaho. It is further reported that you presented yourself to the Embassy as the Team Leader to the group with introduction letters using letterhead and forged signature of Dean of Students, Dr. Moses



Alela. The forged introductory letters for visa application to US Embassy dated 19<sup>th</sup> May, 2017 were issued to the following:

1. Joel Jebiwot Kiplimo - ED/M/1066/09/14
2. Sarah Chebet Rotich - ENVIS/M/0893/09/14
3. Allan Kipruto Cheruiyot - BMIT/M/0911/09/15
4. Anne Jeppkorir Kipchawii - ED/M/0834/05/15
5. Clinton Kipngetich Rono - CM/M/0586/05/14
6. Immaculate Chepchirchir Tallam - LAW/M/0537/09/14
7. Janet Chesang Sumukwo - INTE/M/0958/05/14
8. Faing Njambi Kimaku - CM/M/0570/01/15
9. Charlex Jim Otieno - CM/N/0599/05/15

It has been established that these are not Bonafide students of Kabarak University.

This is Professional and Gross Misconduct, a breach of staff regulations clause 1.8(vi); falsification of information, 1.9(vii); corrupt practices 1.9(xi); Deceit, 1.9(xix); behaviours not consistent with Christian teaching and which hampers the smooth running of the University. You are therefore required to provide a written explanation on the above issues and show cause why disciplinary action should not be taken against you. Your written explanation should reach this office by Friday, 4<sup>th</sup> August, 2017.

Thank you.

Yours Sincerely

Signed

Prof. Ronald K. Chepkilot

Registrar (ADMN. & HR)

C.C. Ag. Vice Chancellor – To see in file

RKC/ccb

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Kabarak University Moral Code

members of Kabarak University family, we purpose at all times and in all places, to set apart in one's heart, Jesus as Lord: 1 Peter 3:15.

16. On 3<sup>rd</sup> August, 2017 the Claimant responded to the said show-cause letter in the following terms –

The Registrar (Admins & HR)

Kabarak University

Private BA-20157

Kabarak, Kenya

(Your Ref: KABU/0152)



3<sup>rd</sup> August, 2017

Dear Sir,

RE: Show Cause Letter

I refer to your undated letter on the above captioned matter which letter I wish to reply thereto as hereunder;

That I have gone through the contents of the said letter and wish to state that the same are allegations towards me which allegations I kindly request to be supplied with documents in support of the same before I fully comment on all the allegations leveled against me as I remain puzzled of the same.

Yours faithfully,

Signed

Rebecca Chelagat

17. It is the Claimant's testimony that she was not supplied with the further and better particulars as requested in her response to the show-cause letter but instead she was issued with a letter dated 23<sup>rd</sup> August, 2017 inviting her for a disciplinary hearing. The said notice of hearing is reproduced hereunder for ease of reference –

Office of The Registrar (Administration & Human Resources)

Private bag – 20157 .....Tel:254-51-343234/5

Kabarak, Kenya .....Fax: 254-51-343012

Email:registrar@kabarak.ac.ke .....www.kabarak.ac.ke

REF: KABU/0152

23<sup>rd</sup> August, 2017

Ms. Rebecca Jebichii Chelagat

Student Affairs Department

Thro'

The Dean of Students

Dear Ms. Chalagat,

RE: Disciplinary Meeting

-----  
This is to inform you that you are required to appear before the University Staff Disciplinary Committee on Thursday, 7<sup>th</sup> September, 2017 at 10.00a.m. in the University Boardroom to answer charges on the following:

It has been reported that you were involved in illegal practice of issuing letters of introduction to nine (9) applicants purporting to be Kabarak University students to the United States Embassy in Nairobi for the purpose of securing VISA to travel to United States of America to participate as Volunteer Missionary at ALACCA Bible Camp Conference Centre, 101 China Garden Tad-Harster, ID 83552, Idaho. That you presented yourself to the Embassy as the Team Leader to the group with introduction letters



using letterhead and forged signature of Dean of Students Dr. Moses Alela. The forged introductory letters for Visa application to US Embassy dated 19<sup>th</sup> May, 2017 were issued to the following:

1. Joel Jebiwot Kiplimo - ED/M/1066/09/14
2. Sarah Chebet Rotich - ENVS/M/0893/09/14
3. Allan Kipruto Cheruiyot - BMIT/M/0911/09/15
4. Anne Jeppkorir Kipchawii - ED/M/0834/05/15
5. Clinton Kipngetich Rono - CM/M/0586/05/14
6. Immaculate Chepchirchir Tallam - LAW/M/0537/09/14
7. Janet Chesang Sumukwo - INTE/M/0958/05/14
8. Faing Njambi Kimaku - CM/M/0570/01/15
9. Charlex Jim Otieno - CM/N/0599/05/15

It was established that these are not Bonafide students of Kabarak University.

The above conducts are contrary to clause 1.8(vi); falsification of information 1.9(vii); corrupt practices 1.9(xi); Deceit, 1.9(xix); behaviours not consistent with Christian teaching and which hampers the smooth running of the University of Staff handbook. Please note that in presenting your case during disciplinary meeting you may bring witness relevant to the case.

Yours Sincerely,

Signed

F Prof. Ronald K. Chepkilot

Registrar (ADMN. & HR)

C.C. Ag. Vice Chancellor – To see in file

RKC/ccb

Kabarak University Moral Code

As members of Kabarak University family, we purpose at all times and in all places, to set apart in one's heart, Jesus as Lord: 1 Peter 3:15

18. Again, on 4<sup>th</sup> September, 2017 the Claimant wrote to the Respondent reminding the registrar in-charge of administration and human resources of her letter dated 3<sup>rd</sup> August, 2017 wherein the Claimant had sought for further and better particulars in regard to the show-cause letter. This letter of 4<sup>th</sup> September, 2017 was addressed in the following words –

Your Ref: KABU/0152

The Registrar (ADMINS & HR)

Kabarak University

Private BA-20157

Kabarak, Kenya



(Your Ref: KABU/0152)

4<sup>th</sup> September, 2017

Thro'

The Dean Of Students

Dear Sir,

RE: Disciplinary Meeting

Your letter dated 23<sup>rd</sup> August, 2017 whose contents I have taken note of refers.

Kindly take note that I had earlier on received a letter from the Registrar, which letter I replied to on 3<sup>rd</sup> August, 2017. I request the same documents for me to be able to prepare for the Disciplinary Committee as all the allegations are a surprise to me.

I enclose (i) a copy of the Show Cause letter from the Registrar (Admin & HR) (ii) my reply dated 3<sup>rd</sup> August, 2017 to the same requesting for the documents.

Kindly but urgently supply me with material documents relating to the allegations against me for me to be able to prepare myself before the Disciplinary Committee on 7<sup>th</sup> September, 2017.

Yours faithfully,

Signed

Rebecca Chalagat

19. It is the Claimant's testimony that her two requests for further and better details of the charges were ignored by the Respondent and not responded to and as such she attended the hearing without the benefit of knowing the extent, nature, details, and particulars of the charges that she was to face in the disciplinary hearing.
20. The Claimant testified that she attended the disciplinary hearing on 7<sup>th</sup> September, 2017 as invited and raised two issues that were never addressed. One, she complained that her supervisor, Dr Alela, was a member of the panel yet they had a long-standing toxic relationship after the Claimant turned down love overtures from him, and two, that she had not been supplied with the details and particulars of the charges and documents as requested in her response to the show-cause and the letter of 4<sup>th</sup> September, 2017, both reproduced above. Further, she testified that she was not allowed to defend herself during the hearing after the charges were read to her but was simply sent away and told to go and wait for the verdict.
21. Vide a letter dated 7<sup>th</sup> September, 2017, the same day that the disciplinary hearing was conducted, the Claimant was dismissed by the Respondent in the following terms –

Office of The Registrar (Administration & Human Resources)

Private bag – 20157 .....Tel:254-51-343234/5

Kabarak, Kenya..... Fax: 254-51-343012

Email:registrar@kabarak.ac.ke..... www.kabarak.ac.ke

REF: KABU/0152

7<sup>th</sup> September, 2017



Ms. Rebecca Jebichii Chelagat

Student Affairs Department

Thro'

The Dean of Students

Dear Ms. Chalagat,

RE: Dismissal From The University Service

-----  
We refer to your appearance before the University Staff Disciplinary Committee on Thursday 7<sup>th</sup> September, 2017 on the charges indicated below:

As you recall, you were involved in illegal practice of issuing letters of introduction to nine (11) applicants purporting to be Kabarak University students to the United States Embassy in Nairobi for the purpose of securing VISA to travel to United States of America to participate as Volunteer Missionary at ALACCA Bible Camp Conference Centre, 101 China Garden Tad-Harster, ID 83552, Idaho. That you presented yourself to the Embassy as the Team Leader to the group with introduction letters using letterhead and forged signature of Dean of Students. The forged introductory letters for Visa application to US Embassy dated 19<sup>th</sup> May, 2017 were issued to the following:

1. Joel Jebiwot Kiplimo - ED/M/1066/09/14
2. Sarah Chebet Rotich - ENV/S/M/0893/09/14
3. Allan Kipruto Cheruiyot - BMIT/M/0911/09/15
4. Anne Jeppkorir Kipchawii - ED/M/0834/05/15
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6. Immaculate Chepchirchir Tallam - LAW/M/0537/09/14
7. Janet Chesang Sumukwo - INTE/M/0958/05/14
8. Faing Njambi Kimaku - CM/M/0570/01/15
9. Charlex Jim Otieno - CM/N/0599/05/15

It was observed that there were two other people included and the number is eleven(11). It was established that these were not Bonafide students of Kabarak University.

The above conducts are contrary to clause 1.8(vi); falsification of information 1.9(vii); corrupt practices 1.9(xi); Deceit, 1.9(xix); behaviours not consistent with Christian teaching and which hampers the smooth running of the University of Staff handbook.

After taking into account all the available information, the Committee found you guilty of communicating the said offences. The Committee noted that this was a serious gross misconduct. Arising from the above, it was decided that you be dismissed from the University services with terminal benefits with effect from 7<sup>th</sup> September, 2017.

Kindly arrange to have the clearance certificate duly completed by the relevant sections of the University. Please arrange to handover all the University property that may be in your



possession to the Dean of Students as soon as possible. You have also been given up to 22<sup>nd</sup> September, 2017 to vacate the university House.

Yours Sincerely

Signed

Prof. Ronald K. Chepkilot

Registrar (ADMN. & HR)

C.C. Ag. Vice Chancellor – To see in file

RKC/ccb

22. On 19<sup>th</sup> February, 2020 the Claimant appealed against the dismissal bringing to the attention of the Respondent the fact that she had been acquitted in the criminal case and as such pleaded that she be reinstated to the service of the Respondent. Her appeal was not successful as the Respondent communicated the dismissal of the appeal through a letter by the Vice Chancellor dated 23<sup>rd</sup> February, 2020.
23. The Claimant produced a certified copy of the judgment in the criminal case to confirm that she was indeed acquitted under Section 215 of the Criminal Procedure Code.
24. It is on the basis of the foregoing that the Claimant prays that judgment be entered against the Respondent as prayed in the memorandum of claim. The submission by her counsel shall be considered in a latter part of this judgment.

### **III. Respondent's Case**

25. The Respondent's case is contained in the response to the claim, the oral and documentary evidence adduced through RW1, the Deputy Vice Chancellor – Administration and Finance, and the written submissions by Counsel, as summarized hereunder.
26. The witness adopted his filed witness statement on record and produced the two bundles of 15 documents filed by the Respondent. All the documents except the handwritten one at page 21 of the bundle were admitted in evidence as Respondent's exhibits 1 to 14.
27. RW1 stated that the Respondent had a student exchange programme whereby students used to travel to the US on missionary work. He stated that on 21<sup>st</sup> July, 2017 the Directorate of Criminal Investigations (DCI) wrote to the Respondent inquiring if a group of alleged students who were seeking travel visas from the American Embassy were actually students at the University. The Respondent responded to the DCI vide a letter dated 27<sup>th</sup> July, 2017 to the effect that the letters presented by the visa applicants were not genuine and they were a forgery by the Claimant. It is on the basis of the foregoing that the Claimant was arrested and charged as alluded to in the preceding part of this judgment.
28. He testified that of all the visa applicants only two were former students of the university, and even those two had completed their studies in 2015. The others were civilians and according to him the Claimant had acted dishonestly and fraudulently as the Dean of Students, Dr Alela, had disowned the said letters of introduction as forgery.
29. He testified that it is on the basis of the alleged misconduct that the Claimant was taken through disciplinary process alluded to in the preceding part of this judgment culminating in her dismissal. He



stated that the Claimant was given a fair hearing and that her dismissal was lawful both in substance and procedure. He also claimed that the Claimant was paid all her terminal dues upon dismissal.

30. It is important to note that the minutes of the disciplinary hearing allegedly held on 7<sup>th</sup> September, 2017 were not produced as an exhibit in this matter.
31. It is on the basis of the foregoing that the Respondent is seeking that the Claimant's cause be dismissed with costs.
32. The submissions by Counsel for the Respondent shall be considered alongside those of counsel for the Claimant in the subsequent part of this judgment.

#### **IV. Issues for Determination**

33. This court has carefully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, the written submissions by counsel for both parties, and the court identifies the following issues for determination –
  - a. Was the dismissal of the Claimant by the Respondent wrongful and unlawful?
  - b. If (a) above is in the affirmative, is the Claimant entitled to the reliefs sought in the claim?
  - c. Who meets the costs in this cause?

#### **V. The Dismissal**

34. The terms and conditions of employment of the Claimant by the Respondent are not really in dispute. The Claimant was engaged by the Respondent as an assistant lecturer as from 15<sup>th</sup> April, 2005 as per the contract of employment and letter of offer dated 4<sup>th</sup> April, 2015. The Claimant started on a monthly basic salary of Kshs.43,800/= plus house allowance of Kshs.29,200/=.
35. Vide a letter dated 1<sup>st</sup> August, 2005 the Claimant was re-designated as assistant lecturer, Biblical Studies, on the same terms as above. The Claimant's salary was reviewed upwards from time to time and as at the time of her dismissal on 7<sup>th</sup> September, 2017 she was on a basic salary of Kshs.77,526.60, Kshs.51,684.40 in house allowance, and airtime allowance of Kshs.2,000/= making a total of Kshs.131,211/=.
36. The chronology of the events and circumstances leading to the dismissal of the Claimant have been enumerated in the foregoing paragraphs and to a large extent the parties agree on the facts pertaining thereto. The Claimant was dismissed on allegations that she had forged letters of introduction to enable some persons, civilians and students, to obtain visas from the American Embassy to enable them travel to the US on a students' exchange programme.
37. The Claimant was arrested and charged in a criminal court but she was acquitted of the forgery charges and she insisted her innocence even during the hearing of this cause alleging that the alleged letters of introduction were authored and issued by the Dean of students, Dr Moses Alela, now deceased. The Claimant insisted that the deceased instigated her charging in the criminal case and even dismissal because she had allegedly turned down an overture from the deceased to have a love relationship with him.
38. The Claimant insisted that she was denied both substantive and procedural fairness before, during, and after the disciplinary hearing culminating in wrongful, unfair, and unlawful dismissal.
39. The law and jurisprudence on what constitute fair and lawful dismissal or termination is to a large extent settled. The twin tests of substantive and procedural fairness go hand in hand – See Mary



Chemweno v Kenya Pipeline Company Limited (2017) eKLR, Loice Otieno v Kenya Commercial Bank Limited (2013) eKLR, and Walter Ogal Anuro v Teachers Service Commission (2012) eKLR.

40. In terms of substance, an employer is required to demonstrate and prove that there was a good lawful reason that informed the disciplinary action leading to dismissal. Section 43 of the Employment Act (the Act) provides as follows –
- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
  - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
41. Going by the provision of Section 43(2) of the Act cited above, it is clear that the reason(s) for termination (or dismissal) “are matters that the employer at the time of termination of contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”. This is clearly a subjective test which an employer can pass if it is demonstrated that the employer genuinely believed that such matters as to constitute lawful reason for dismissal existed. Of course, for the employer to hold such believe it must be founded on reasonable evaluation and consideration of the matters and circumstances obtaining.
42. As at the time that the Respondent decided to take disciplinary action against the Claimant there were serious allegations of criminal conduct on the part of the Claimant who was arrested and accused of charges of forgery and uttering false documents. Section 44(4)(g) of the Act provides that it amounts to gross misconduct where -
- (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer’s property.
43. Under Article 157 of the Constitution as read along with the provisions of the Office of the Director of Public Prosecutions Act the power to prosecute any person on any criminal charges is vested in the Director of Public Prosecutions (DPP) following investigations by various agencies such as the Directorate of Criminal Investigations (DCI), National Police Service, the Ethics and Anti-corruption Commission (EACC), Kenya Revenue Authority (KRA), among others. While the DCI investigated the alleged criminal conduct by the Claimant following a complaint from the Respondent or even from the American Embassy, it is the DPP who made the ultimate decision to charge the Claimant in the criminal case. It is the DPP who, after due consideration and evaluation of the evidence and facts availed, decided that there was a prima facie case against the Claimant worth a trial in a criminal court. In making the decision to charge the DPP was certainly not privy or bound by the bad blood between the Claimant and the deceased Dean of Students.
44. It is the considered view of this court that upon the Claimant’s arrest and charging in the criminal court the Respondent had genuine and reasonable ground(s) upon which to found disciplinary proceedings. The Respondent genuinely held the believe that the Claimant had committed a criminal offence against the Respondent or its property or to the detriment of the Respondent.
45. The matters and circumstances that prevailed as at the time the Respondent decided to take disciplinary action against the Claimant, is that the Claimant had been arrested and charged in a criminal court as alluded to above. In those circumstances, it is in the view of this court that the Respondent did not have to wait for the conclusion of the criminal case to decide on whether or not to



take disciplinary action against the Claimant. In any event, the standard of proof in the criminal case is higher than what the Respondent was required to demonstrate under Section 43 of the Act alluded to above.

46. Although Counsel for the Claimant has not addressed this issue directly, he appears to suggest that since the Claimant was acquitted of the criminal charges the Respondent acted unlawfully by dismissing the Claimant based on the allegations of forgery and uttering false documents. That is not the right interpretation of Section 43 of the Act as expressed above. On the other hand, counsel for the Respondent has made a strong submission on this issue and relied on the decisions in *Galgalo Jarso Jillo V Agricultural Finance Corporation of Kenya* (2021) eKLR and *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 Others* (2019) eKLR among several other decisions.
47. Flowing from the foregoing, on the issue of whether the Respondent had a substantive lawful reason in taking disciplinary action against the Claimant, this court holds in the affirmative that in the circumstances that prevailed at the material time the Respondent genuinely and reasonably believed that there existed matters that demanded that disciplinary action be taken against the Claimant.
48. However, substantive fairness must go hand in hand with procedural fairness. They are fraternal twins. Procedural fairness is more in line with the rules of natural justice. Article 47 of the Constitution and the various provisions in the Fair Administrative Action Act provide a good scope of what fair administrative action should entail. Some of the components of fair administrative action include fair hearing, right to lawful process, and a right to appeal or review against a decision made. Administrative action is defined to include-
  - i. the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
  - ii. any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;
49. In the context of employment matters Sections 35, 36, 38, 40 (redundancy), 41, 44, 45, 46, and 47 of the Act have provisions relating to procedural fairness. In a simplified fashion, the following are some of the ingredients of procedural fairness –
  - I. The employer must inform the employee in writing, in a language that the employee understands, of the intention to take disciplinary action and the possible outcomes of such disciplinary proceedings.
  - II. The employer must inform the employee in writing, in a language that the employee understands, of the charges or allegations of misconduct with particulars and precision that the employee shall understand without ambiguity or obscurity.
  - III. The employer must inform the employee of the right to call witnesses and seek any particulars and or documents that the employee may need to prepare the defence against the charges.
  - IV. The employer shall give the employee reasonable and adequate time to prepare the defence and or to respond to any notices, correspondences, or allegations, or charges made against the employee.
  - V. The employee must be informed of the right to appear at the hearing with a union representative, if the employee is a member of a union, and a co-employee.
  - VI. The employer shall not make it difficult for the employee to prepare and attend a hearing, if a physical one is to be held, and hence the employer shall put into consideration the costs to be incurred by the employee, the witnesses, and representatives in attending such a hearing. It



is desirable that the physical hearing be held at a location or venue that is as close as possible to the place of work to ameliorate the costs to the employee. If necessary the employer should facilitate the employee and his witnesses and or representatives in attending such hearing.

- VII. During the hearing the employer shall produce and present all evidence against the employee and afford the employee the right and opportunity to interrogate that evidence by way of questions or cross-examination, and also allow the employee to avail and present all the evidence in defence.
  - VIII. The employer shall inform the employee of the right to appeal or apply for review of the decision made after the hearing and the procedure in making such appeal or review.
  - IX. The employer shall inform the employee of the outcome of the hearing without delay and remind the employee of the right of appeal or review and the timelines and procedure in lodging such appeal or review.
  - X. The employer shall give due consideration to the appeal lodged or request for review and inform the employee of the outcome thereof without delay.
50. This court has taken time in outlining the above ingredients with a clear conscience that a disciplinary hearing is not a court trial and hence an employer is not bound by the strict technical rules of procedure and adduction of evidence that apply in court trials. However, an employer is bound by the basic rules of natural justice and more so the cardinal rule that no one shall be condemned unheard.
51. Applying the above tests to the disciplinary process that the Claimant was subjected to it is clear that the procedure adopted by the Respondent fell short of the minimum standards outlined above. Firstly, the Claimant pleaded to be supplied with the particulars of the charges against her and the evidence that the Respondent was relying on in founding the charges, yet no such particulars and evidence was supplied to her even after she wrote two letters requesting for the said particulars and evidence as alluded to in an earlier part of this judgment.
52. Secondly, the Claimant testified that she demanded for the particulars and evidence against her before the hearing commenced but none were given. She stated that she protested the participation of Dr Alela as a panelist during the hearing but her plea was either ignored or dismissed. For whatever reason, and none was given during the hearing of this cause, the Respondent did not avail the minutes of the disciplinary hearing which should have otherwise shed light on how the hearing was conducted and if indeed the foregoing issues were raised by the Claimant at the hearing.
53. This court takes the view and holds that the Respondent approached the disciplinary process with a predetermined mind of dismissing the Claimant for what it considered serious misconduct. I say so because the Respondent dismissed the Claimant on the same date that the disciplinary hearing was held on 7<sup>th</sup> September, 2017 and a dismissal letter was addressed to the Claimant on the same date. Inasmuch as RW1 praised the efficiency of the disciplinary panel in his testimony in court, this court takes the view that the alleged “efficiency” by the panel was only geared towards a quick and swift dismissal of the Claimant without due consideration of the evidence and circumstances of the matter. In any event, the Respondent did not avail the minutes of the said hearing during the hearing of the cause in court.
54. This court finds and holds that the Claimant was denied procedural fairness as envisaged in the applicable constitutional and statutory provisions cited in an earlier part of this judgment.
55. The Claimant’s counsel has cited Janeth Chepkemoi Machira & Another V Laikipia University (2021) eKLR and Walter Ogal Anuro V Teachers Service Commission (Supra) in buttressing the argument



that the Claimant was not accorded procedural fairness and this court agrees with that submission and the persuasive authorities cited.

56. For the foregoing reasons the dismissal of the Claimant by the Respondent is hereby declared wrongful, unfair, and unlawful for lack of procedural fairness.

## VI. Reliefs

57. Having held that the Respondent wrongfully and unlawfully dismissed the Claimant and failed to accord her procedural fairness this court shall now consider each of the reliefs sought as set out at the introductory part of this judgment.
58. Prayer (A) is for an order of reinstatement. Section 12(3)(vii) of the Employment and Labour Relations Court Act provides that this court may “order for reinstatement of any employee within three years of dismissal, subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law”. The Claimant was dismissed on 17<sup>th</sup> September, 2017 and three years lapsed sometimes in September, 2020 and hence this court cannot lawfully order for reinstatement. However, the parties can still agree on such reinstatement even after expiry of three years only that the court cannot lawfully make such an order in its judgment but can do so in a consent order, even this late.
59. For good measure, and in the alternative, the Claimant included prayer (B) seeking various items in terminal dues. Prayer (i) thereof is for three months salary in lieu of notice based on the initial contract of employment which provided that either party may terminate the contract by giving the other party three months’ notice or making payment in lieu thereof. Although the original contract was indicated to last for three years the parties proceeded on the same terms for the entire period of over 11 years that the Claimant worked for the Respondent. In the circumstances, this court shall not experience any difficulties in awarding to the Claimant three months gross salary in the sum of Kshs.393,633/=.
60. Prayer (ii) is for salary for August, 2017 and prayer (iii) is for salary for seven days worked in September, 2017. There is evidence that the Claimant was paid salary for August, 2017 and a pay-slip has been availed by the Respondent to that effect. In regard to salary for seven days worked in September, 2017 the same was paid but there was miscalculation as submitted by counsel for the Claimant in that the gross salary was erroneously understated. This court awards a sum of Kshs.9,242.20 being the unpaid portion of salary for days worked in September, 2017.
61. Prayer (iv) is for compensation in the maximum of 12 months gross salary. This court has evaluated the entire circumstances of this cause and weighed the same against the factors provided for in Section 49(4) of the Act. The Respondent failed to give due process and fairness to the Claimant. Once the Claimant was acquitted of the criminal charges in 2020 the Respondent took no action to engage the Claimant in resolving this matter by way of reinstatement or compensation. The Respondent has all along acted with a single mind of keeping the Claimant away, yet the Claimant served the Respondent for over 11 years. The Claimant testified that since the dismissal she has not found another job due to the impression created by the Respondent that she is unethical and unprofessional and of criminal conduct.
62. The Claimant was acquitted of the criminal charges and as such this court cannot attribute any misconduct on her part in the circumstances.
63. This court takes the view and holds that this is an appropriate cause for award of the maximum compensation of 12 months gross salary as submitted by Counsel for the Claimant in the sum of Kshs.1,574,532/= and the same is so awarded.



64. Prayer (vi) is for a certificate of service. The Respondent exhibited a certificate of employment dated 10<sup>th</sup> February, 2021 in the name of the Claimant. The court orders that the same be delivered to the Claimant within 30 days of this judgment.

#### **IV. Costs**

65. Costs follow the event and the claimant is awarded costs of this cause.

#### **V. Disposal**

66. In final disposal of this cause, this court issues the following orders:

- a) A declaration be and is hereby issued that the dismissal of the Claimant by the Respondent was wrongful and unlawful.
  - b) The Claimant is awarded a total of Kshs.2,132,736/= together with interest thereon from the date of this judgment less statutory deductions. The said sum is made of-
    - i. Balance of salary for the month of September, 2017.....Kshs.164,571/=
    - ii. Three months gross wage in lieu of notice.....Kshs.393,633/=
    - iii. Compensation for wrongful and unlawful dismissal equivalent to 12 months gross salary.....Kshs.1,574,532/=Total.....Kshs.2,132,736/=
- This amount is subject to statutory deductions.
- c) All the other claims are denied.
  - d) The Claimant is awarded costs of this cause.
  - e) The Respondent is ordered to issue and deliver to the Claimant a certificate of service within 30 days of this judgment.

**DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 16<sup>TH</sup> DAY OF MARCH, 2023.**

**DAVID NDERITU**

**JUDGE**

