Chiuri v Laikipia University & 3 others (Employment and Labour Relations Cause E012 of 2021) [2023] KEELRC 612 (KLR) (6 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 612 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

EMPLOYMENT AND LABOUR RELATIONS CAUSE E012 OF 2021

HS WASILWA, J

MARCH 6, 2023

BETWEEN

LOIS WANJIKU CHIURI ..... APPLICANT

AND

LAIKIPIA UNIVERSITY ..... 1ST RESPONDENT

VICE CHANCELOR, LAIKIPIA UNIVERISTY ..... 2ND RESPONDENT

CHAIRPERSON OF THE COUNCIL, LAIKIPIA UNIVERSITY .... 3RD RESPONDENT

COUNCIL LAIKIPIA UNIVERSITY ..... 4TH RESPONDENT

JUDGMENT

Introduction.

1. The Claimant instituted this claim vide memorandum of claim dated 19th March, 2021, alleging to have been unfairly terminated and seeking compensation for the Unfair termination. She sought for the following reliefs; -

    1. A declaration that the Claimant's termination of employment was unjustified, unlawful, wrongful and illegal.

    2. A declaration that the Claimant attended to all her duties assigned to her by the Respondents.

    3. That the Claimant be reinstated as an associate professor in Laikipia University.

    4. The Claimant be paid her salary and accompanying benefits from the month of December, 2020.

5. The Claimant be paid her gratuity dues of her position as the deputy vice chancellor, Academic and Research for the year ending 2020 at the rate of 31% of the annual basic salary; her salary as the deputy Vice Chancellor, Academic and Research Being 525,346.

6. Payment in lieu of notice of 3 months as stipulated in the letter of engagement as Deputy Vice chancellor contract at 525,346*3= Kshs 1,576,038

7. The Claimant's corporate email and all other support systems be reactivated to enable her perform her duties as an associate professor.

8. Damages for malicious termination that has dented the Claimant's credentials and reputation being a scholar, consultant, and an associate professor at the rate of 24 months' salary that is calculated as follows; 525,346 X 24 months= 12,608,304/=

9. In the alternative; The Claimant be paid salary in full until she attains the age of 70 years being the retirement age of a university professor. The Claimant being 63 years of age thus she has 7 years before her official retirement as a professor. The Claimant's monthly salary being Kshs. 250,668 the Claimants salary for the remaining years at the rate; 250,668*12*7 years= Kshs. 21,056,112 10.

10. Payment in lieu of notice of 6 months as stipulated in Collective Bargaining Agreement at the rate of Kshs. 250,668*6= Kshs. 1,504,008

11. The costs of this suit.

12. Any other order that the Honorable Court may deem fit to grant in the circumstances.

Claimant's case.

2. The Claimant avers that she was initially employed by the Respondent as a faculty teaching staff in Egerton-Laikipia University since 1997.

3. On 23rd November, 2015 she was appointed as the deputy Vice Chancellor, Academic and Research, following a successful interview conducted by the University council and the subsequent appointment by the cabinet secretary ministry of Education and Technology. She served in this position for a period of 5 years as per the employment contract reference number; MOHEST/CONF/2/1/3/ (35) which provided for renewal of the contract upon application at least 6 months before the expiry of the contract.

4. It is stated that she served the university well and during her tenure the university expressed tremendous results. Consequently, on 22nd January, 2018, she was appointed as the Associate Professor Grade 14 of Environmental Science in the department of Public Administration and Environmental Science, which is currently in the department of Earth science, School science and applied Technology of Laikipia University. She served in this position until the untimely termination.

5. It is her case that from February, 2018 she doubled up as the Deputy vice chancellor, Academic Research and Student Affairs and an Associate professor.

6. On 24th November, 2020, the Claimant's contract as the deputy vice chancellor, Academic, Research and Student Affairs responsibility, expired and upon applying for renewal of the contract was asked by the Chairperson, Human Resource Committee to provide 33 pieces of evidence of her performance target and prepare a presentation of her vision of the Academic Division of the University to table during the interview.

7. She prepared as instructed but on the day of the interview, the presentation was disregarded and the interviewers dwelt on the ills that bedevil the education sector. She stated that the interview was unstructured and very hostile. After the interview she received communication through the letter dated 26th October, 2020 that she was not successful in the interview and therefore her contract would not be renewed.

8. A month later on the 25th November, 2020, the Claimant's staff email was disabled. She then handed over the office of the Deputy vice chancellor on 30th November, 2020. She then wrote to the registrar Administration and Human Capital informing them that she had handed over the office but was still working as an associate professor.

9. The Claimant stated that she was not paid her December, 2020 salary despite working as an associate professor, she was also not paid her gratuity for the position of Vice chancellor that she had served for 5 years. On 6th January, 2021, she requested for her pay but was informed by a letter dated 11th January, 2021 that the Vice chancellor was waiting for communication from the University council.

10. She continued pressing for her pay and on 14th January, 2021, she wrote a reminder letter to the chairperson of the University Council, asking for her pay as an associate professor and the said chairperson wrote back on 29th January, 2021, informing the Claimant that her position as an associate professor was nullified.

11. The reason given for nullification was because the Claimant was appointed to a permanent and pensionable position while still serving as the Deputy vice chancellor on contract and full time basis. Also that the Claimant did not report to the department within 3 months for assignment of duties, therefore that the employment as an associate professor lapsed after three months.

12. She stated that the reasons given by the chairperson of the council are untenable because, the Claimant reported to work and fully participated in her program from the date of appointment. In that period, she was allocated classes, taught, administered exams, marked and submitted results. Infact that at the time of termination, she was actively supervising PHD students. Also that she participated in several departmental activities such as curriculum review, organization and managing resource persons for her course and field trips for the students.

13. It is her case that the 4th Respondent was the one that interviewed her for the position of Deputy Vice chancellor, indicating her diligence in her work. Moreover, that it was practice in all universities that the position of the Vice Chancellor and Deputy Vice –Chancellor were picked from the members of academia. Also that several members of staff take up two active contracts and thus the move by the 4th Respondent to terminate her services for talking up two roles was discriminatory.

14. She contends that her termination was unfair because the Council that terminated her services was the same one that interviewed her for the position of Associate professor, knowing very well that she was the Deputy Vice chancellor. That she was terminated without notice or hearing as required under the law. Further that there is no law or regulation under the University HR Manual that bars her from holding two roles at a time.

15. She believed that her termination was pre-determined because she was frustrated by the Respondent while undertaking her interview for renewal of contract as the Deputy Vice Chancellor.

16. During hearing the Claimant testified as CW-1 and adopted her witness statement of 19.3.2021 and produced the list of documents as her exhibits. Upon cross examination she testified that she started working for the Respondent in 2015 but previously she was employed by Egerton University in 1997. She testified that she served as the Deputy Vice Chancellor for 5 years, which renewal of contract was

not automatic. That she appealed the non-renewal of her contract but the appeal was not considered by the Respondents.

17. With regard to the position of an associate professor, the Claimant testified that she had earlier on applied to be a full professor but since she did not have the three years teaching experience her application was unsuccessful. She then resorted to seeking for a position as an associate professor which she did vide the letter dated 26th July, 2017. Since there was no advertisement for the position, the Dean requested the Human Resource office to advertise for the same and a public Advertisement was made on 10th October, 2017. That she applied and became successful. She then served as the Deputy Vice chancellor and an associate professor but was not paid for teaching in the department. she testified that she wrote to the Chairman of the University Council asking to be paid for the services rendered as an associate professor, after the expiry of her contract as DVC because her employment as DVC was not renewed.

18. She clarified that she worked for Egerton University from 1997 to 2013 when she took leave of absence before resuming duties as Laikipia University and that by then Laikipia University was a campus of Egerton. She testified that while she was an Associate professor she taught one unit, being Environmental Impact Assessment and Audit and taught for 45 hours unlike full professor that taught for 90 hours. She also stated that part-time lectures are permitted to teach, administer exams, mark etc. she also reiterated that she was not aware that she was a part time lecture until a document giving such guidelines was unveiled. She maintained that she is a member of Academia by dint of her appointment as DVC.

19. On re-examination, the Claimant reiterated that she was a lecturer before she became the DVC and after the contract of being DVC expired she ought to have reverted back to her ordinary job of lecturing. She maintained that she was unfairly terminated when her appointment as associate professor was nullified and sought for the reliefs for the termination.

20. The 2nd Claimant witness was Prof. Francis Kibuba Lelo, the professor of Environmental Studies at Egerton University. He adopted his witness statement of 4.8.2021 and upon cross examination, he testified that it is university policy that a staff member can hold 2 positions but that such employee cannot be paid two salaries. He also clarified that leave of absence is only taken by employees and maintained that the Claimant was the Respondent's Employee.

21. On re-examination, he cited the Teaching policy at the Claimant's list of documents at page 216 and reiterated that it allows for an employee to take up both administrative and teaching positions.

Respondents' case.

22. The Respondents entered appearance on the 23rd April, 2021 and filed a defence to claim on even date denying all the contents of the claim and in particular stated that the Claimant was duly appointed as Deputy Vice chancellor on a contract for 5 years which expired. On the appointment as an associate professor, the Respondent stated that the process of appointment was improper as it was guided by the self-interest of Claimant and the nullification was justified as it was used to remedy the irregularity.

23. It is averred that while the Claimant was serving as the deputy vice chancellor, she applied for appointment as a full professor in the Environment and Science Department sometimes in 2017 which application was unsuccessful because the Claimant was not qualified for the reasons inter alia that she had not met the Three (3) years teaching experience required by Commission for University Education.

24. Since she did not qualify for the position of Full professor, she wrote to the Chairperson Department of Public Affairs and Environmental Studies (PAES) through the dean of the Development studies on

26th July, 2017, requesting to be considered for the position of Associate professor. It averred that since the Claimant was senior than the officer appointing the associate professor, she was appointed for the said position by the letter dated 22nd January, 2018.

25. In the letter of appointment, the Claimant was required to report to the faculty dean for allocation of duties within 3 months of appointment which period could only be extended with permission of the Vice Chancellor. It was stated that the Claimant never reported to duty, nor did she seek leave to report out of time.

26. The Respondent denied the allegation that the Claimant was free to carry both duties of being an Associate professor and being the Deputy vice chancellor, because both responsibilities were full time and it was not possible for one person to take up both of such roles.

27. The Respondent also denied the allegation that the interview for renewal of vice chancellor's position was stage managed and hostile and stated that the interview was fairly done.

28. The Respondent admitted to deactivating the Claimant's account upon lapse of the contract and non-renewal, because the Claimant was holding a senior position which got access to sensitive and confidential information of the University and since she was no longer an employee, she could not be allowed to access the University's database.

29. The Respondent also stated that the Claimant never took up any roles as an associate professor as such was not entitled to any pay for the said position. He qualified the statement that any teaching roles undertaken by the Claimant was part-time, which she used to further her scheme to attain the requisite years in teaching experience. Additionally, that the Claimant did not take full teaching load of an associate professor but took only one course to help her gain experience.

30. It was averred that although vice chancellors and deputy vice chancellor are commonly appointed from academia, she was not a members of academia at the time of appointment because she was appointed directly from outside. The Respondent also denied allegation that there are other members of who take up two positions in the university. Further that the activities undertaken such as curriculum development was done in her capacity as a deputy vice chancellor.

31. The Respondent maintained that the Claimant could not have handled two roles at the same time because both roles were demanding and conflicting. Therefore, that the nullification of the process of appointment was justified and the Claimant is not entitled to the reliefs sought.

32. During hearing the Respondent called its Registrar of Administration and Human Capital, Hezron Nyagaka as RW-1. He adopted his witness statement of 27.5.2022 and stated that the teaching policy exhibited by the Claimant indeed contemplate a situation where an academic staff can take two position but that when such staff is appointed to an administrative position, they ought to take leave of absence for the teaching position, but in this case the Claimant did not take such leave. He testified that the Claimant was not a members of the academic staff and that she never took up the role of an associate professor because she was a DVC and they are not tasked with teaching. Also that she did not report to the department as required under the teaching policy, which requires an academic staff to report in writing to the dean for allocation of duties and lessons.

33. On cross examination, the witness testified that he was employed by the Respondent on 2nd November, 2020 and was handed over documents for all staff in the university. He stated that the Claimant was not given an opportunity to respond to the allegation against her. He also admitted that there was nothing in Court to show the staff in the department of environment science and affirm that the Claimant did not report. He also admitted that in the meeting held on 20.2.2018 the Claimant who present as the

DVC and the members of Art Science and Allocation and in the termination letter she was referred to as a part timer but that no contract was exhibited to show she was a part timer. He admitted that in December, 2020, the Claimant was paid for lecturing before her employment was nullified on 18th December, 2020. He told this Court that the Claimant was a manager but that nothing in the policy stopped the managers such as DVC from teaching. He maintained that he was not aware that the Claimant conducted any lecture or supervised student in their Examination as pleaded.

34. On re-examination, he testified that the Claimant's position of associate professor was nullified because there was no such position in existence. He also testified that the Claimant was the DVC and a part time lecturer but did not take full teaching load like other lecturers. He added that since the Claimant did not report on alleged appointment and take leave of absence the said position was not taken up and thus the Claimant remained the DVC only.

Claimant's Submissions.

35. The Claimant submitted on three issues; whether the termination was wrongful and unfair, whether the Claimant is entitled to the reliefs sought and who should bear costs of the suit.

36. On the first issue, the Claimant submitted that the reason for nullification of her appointment as an associate professor was on the reason that she took up the position of associate professor while serving as the Deputy Vice chancellor, a position that was full time and also that the Claimant did not report to the department to be allocated duties as an associate professor to operationalize the position applied within 3 months as required under the teaching policy.

37. To rebut these allegations, the Claimant submitted that she was appointed as an associate professor by the letter of appointment dated 22nd January, 2018 and the nullification of such contract can only be done under the law based on reasons interalia of mistake, fraud misrepresentation, coercion among others, which was not the basis of nullification in this case.

38. It was submitted that before the Claimant was appointed, a vacancy had arisen in the department of environmental science that wanted an associate professor. The position was advertised in the daily nation of 10th October, 2017 and since the Claimant was qualified, she applied for the said position vide her application letter of 19th October, 2017, clearly indicating that she was the deputy vice chancellor in charge of Academic and Research in Laikipia University. An interview was scheduled for 17th January, 2018 where she scored 90.5 % and subsequently offered the job. On that basis, the Claimant submitted that due process was followed in the application of the said job and the Respondent ought to have followed proper procedure such as issuing notice and giving the Claimant audience before terminating the said contract. To support this argument, she relied on the case of Mukulu v County Government of Machakos & Another [2022] KEELRC1151 (KLR) Where the Court held that;-

> "In terminating the Claimant's employment, the 1st Respondent apparently relied on a letter dated 23rd December 2011, by which the 2nd Respondent had ostensibly nullified the recruitment of lower cadre staff in the Municipal Council of Machakos. From the evidence on record, it is evident that the Claimant's employment was preceded by ministerial authority to fill vacant positions after which the Claimant was duly interviewed and subsequently issued with a letter of appointment and was thereafter confirmed in her position..In its Response to the Claimant's claim the 1st Respondent alluded to some unspecified irregularities regarding the Claimant's employment. It is apparent that the Claimant was not made aware of any such irregularities prior to the termination of her employment. At any rate, it was not her responsibility to check and assure the efficacy of

the recruitment process.....In this case, the Claimant was issued with a letter of appointment after going through an interview. She had no reason to doubt the recruitment process nor was she expected to interrogate it. If there were any irregularities in the recruitment process, the Claimant could not be blamed for them as she was not in pari delicto with the Respondents and their officers. That said, I find and hold that the Respondents have failed to establish a valid reason for terminating the Claimant's employment as required under Section 43 of the *Employment Act*."

39. The Claimant submitted further that she was not granted an opportunity to be heard contrary to the dictates of Article 47 of *the Constitution* as read with Section 4 of the Fair Administrative Actions Act. Furthermore, that Clause 7.1.1 & 7.1.3 the University Human Resource Management Policies and Procedure Manual gives an elaborate procedure under which all employees are to be subjected before their services are terminated. It was argued that the allegation by the Respondent that she did not report to duty within three months' amount to desertion of duty which is also covered under the CBA at page 11 entered into by the University with her Union. In summation, it was argued that the law and the Respondent's HR Manual together with the CBA makes it mandatory for an employee to be subjected to disciplinary process before termination and the failure by the Respondent to follow such procedure made the termination unfair. To support this the Claimant relied on the case of Belinda Kanana Muriuki v University of Nairobi[2021] eklr where the Court relied in the Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR Court of Appeal addressed itself on Article 47 of *the Constitution* and held that: -

> " Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

40. She also relied on the case of Samuel Mayenda Openda V National Land Commission & Another [2019] eklr where it was held that;-

> " . In the present Petition, the Petitioner's complaint is that he was not given notice and neither was he afforded an opportunity to be heard. There is no evidence that indeed the Petitioner was given any notice and/or served with any particulars of the allegations which were leveled against him... I am satisfied that any decision that the 1st Respondent would have made was likely to affect his rights and interest in the property adversely. He therefore under Article 47(2) of *the Constitution* and Section 4(4) of the *Fair Administrative Action Act* ought to have been given notice and afforded the opportunity to be heard before the decision revoking his title was made."

41. The Claimant submitted that the way in which her services were terminated was pre-determined and accentuated by malice and bad faith because the said nullification was done three years after the appointed and soon after she was subjected to a hostile interview for the renewal of her services as Deputy Vice chancellor and indication that the Respondents were doing all under their power to remove her from employment, despite the Claimant taking up her role as an associate professor and

attending several meetings including departmental meeting held on 20th February, 2018, curriculum workshop held in Nakuru campus on 18th to 20th February, 2019 and exam moderation meeting held on 3rd October, 2019. Also that she was assigned classes to teach as indicted in the timetables for the year 2018/2019 and submitted exams for processing on 15th January, 2021, affirming that the Claimant was a member of the teaching fraternity.

42. The Claimant submitted that even if the position by the Respondent is to be believed, that she failed to report for allocation of duties within the first three months, the Respondent ought to have raised such concern on the earliest possible time as intimated by Section 42 of the *Employment Act*. Additionally, that the allegation that the Claimant taught as a part-timer was not backed up by any credible evidence because the documents exhibited as evidence that the Claimant worked on part time from 2018 were signed by an Acting COD who was appointed as such from 14th to 16th December, 2020, demonstrating that the evidence produced are not credible and a fabrication to aid the defence case.

43. On the allegation of conflict of interest, the Claimant submitted that the Teaching Policy dated September, 2019 at page 216- 234 intimate a situation where an employee holding an administrative position can still teach the full load of 3CF, discrediting the allegation by the Respondent that an administrative officer cannot undertake class lectures. In any case that the fact that the Respondent admitted to having the Claimant work as a part time lecturer is a true testament of the fact that an officer holding administrative position was allowed to double up as a lecturer. From the foregoing, the Claimant submitted that the Respondents have not justified the termination of the Claimant's services as required under section 45 and 47(5) of the *Employment Act*. In this she relied on the case of National Bank of Kenya V Samuel Nguru Mutonya[2019] eklr where the Court cited the case of In Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR, the Court summarized those procedures required, before an employee is terminated, as follows:-

> "Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity. The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee. Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and

to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer."

44. She also cited the case of Galgalo Jarso Jillo V Agricultural Finance Corporation [2021] eklr where the Court held that;-

> "Section 47(5) of the *Employment Act* sometimes presents a challenge regarding how to navigate the aspect of the burden of proof in addressing disputes arising from terminations. It does suggest two burdens: the employee has the burden of proving the unlawfulness of the termination; and the employer has the burden of justifying the termination. The interpretation given to the section by Courts is that all the employee needs to do in order to discharge the burden of proof on him/her is to place before the Court prima facie evidence suggesting that a termination has occurred and that the said termination lacks a substantive justification and or is procedurally flawed. Once the employee makes a prima facie case, the burden of proof shifts onto the employer to justify the termination. In Josephine M. Ndungu & others v Plan International Inc [2019] eKLR, the Court said this of the foregoing: ''Under section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the four corners of the legal threshold set out by section 45 of the Act.''

45. From the foregoing, the Claimant submitted that she has proved her case to the required standard and urged this Court to find in her favour and grant the reliefs sought together with costs and interest.

Respondent's Submissions.

46. The Respondent submitted on three issues; whether the Claimant was unfairly terminated from the position of Deputy Vice chancellor, whether she was unfairly terminated from the position of Associate professor and whether she is entitled to the reliefs sought.

47. On the first issue, it was submitted that the Claimant was appointed as the Deputy Vice Chancellor Academic Research and Student affairs for a fixed term of 5 years which could not be automatically renewed. He submitted that fixed term contract carry no expectation of renewal as a general principle and in this cited the case of Eunice Achieng Ochola and 2 others V Coast Clay Works Limited [2020] eklr where the Court held that;-

> "The basic principle regarding fixed term contracts is that they are self- executing and carry no automatic right of renewal. In this regard, I concur with holding my brother Rika J in Margaret A. Ochieng v National Water Conservation and Pipeline Corporation [2014 eKLR that to expect automatic renewal of fixed term contracts would defeat the very purpose of this category of contracts and stifle the employer's prerogative to regulate employment terms."

48. He relied on the case of Margaret A Ochieng V National Water Conservation and Pipeline Corporation[2014] eklr where the Court held that;

> "The fixed-term contract had its own in-built termination notice, in that the date of termination was advised to the Claimant on execution of the three year contract in December 2008. She knew termination would be upon the lapse of the three years in

2011. The Respondent has no obligation to pay her notice pay as there was no premature termination of the fixed- term contract."

49. It was submitted that the Respondent did not create legitimate expectation of renewal of the Claimant's contract to warrant the reliefs sought. In this they relied on the case of United Nations Appeal Tribunal case no. 2010-125 between Frenchon V The Secretary General of the United Nations. Furthermore, that the allegation by the Claimant that the Respondents were driven by ill-motive in failing to renew the contract was not supported by any evidence. In any case that the Respondent had no obligation to give any explanation for failing to renew the Claimant's contract. In this they relied on the case of Bernard Wanjohi Muriuki V Kirinyaga Water and Sanitation Company Limited and Tana Services Board[2012] eKLR where the Court held that;-

> " In the view of the Court, there is no obligation on the part of an employer to give reasons to an employee why a fixed- term contract of employment should not be renewed. To require an employer to give reasons why the contract should not be renewed, is the same thing as demanding from an employer to give reasons why, a potential employee should not be employed. The only reason that should be given is that the term has come to an end, and no more. The contract required the Claimant to express his interest to renew six months before the expiry. He did this in December 2009. This clause did not create any obligation on the 1st respondent to renew; it merely directed the Claimant on the procedure of seeking renewal. Reasons, beyond effluxion of time, are not necessary in termination of fixed-term contracts, unless there is a clause in the contract, calling for additional justification for the termination."

50. On the second issue, the Respondents submitted that the nullification of the Claimant's position as associate professor was justified because the Claimant; was found guilty of conflict of interest, failed to report to work within the expected timelines as stipulated in the offer letter of 22nd January, 2018 and for failing to participate in the departments activities in the capacity as it would have been expected of an associate professor.

51. It was argued that the Claimant obtained the position of associate professor using unorthodox means because she requested to be considered for the position of Associate professor, which request was place before the table of her junior officer in the department of PAES, who was forced to advertise for a vacancy in the department of environmental science. That the advertisement, curiously, did not attract any other applicant save for the Claimant, as such was offered the position without any competition. The Respondents thus maintained that the Claimant influenced her appointment and in any case that the holding of both position being full time roles created a conflict of interest because her position as DVC entailed directing, organizing and administering learning and research and supervising other lectures, therefore that the fact that she took up teaching role would mean that she would not be supervised or questioned because she is the one in charge.

52. The Respondent further justified the nullification of the Claimant's role as Associate Professor and stated that it was justified in the circumstances because the appointment from the start was shrouded with impropriety and guided by self-interest.

53. Notwithstanding the submissions made above, the Respondent submitted that the Claimant failed to report within 3 months to the Dean for allocation of lessons upon being appointed as an Associate professor and failed to participate in the departments activities. By failing to execute the duties required of her being an associate professor, the university did not recognize her as a lecturer as such the appointment was merely being nullified not her services being terminated. Further that there is no file,

held by the Respondent with any details of the Claimant being an Associate Professor, neither was she in any payroll for the said position.

54. It was also submitted that the Claimant joined the Respondent's employ from outside in 2015 pursuant to her appointment as the Deputy Vice chancellor and was never a member of Academia in Laikipia University. It was argued that the teaching policy allowed for administrative officers to take up teaching role but capped their teaching units to a minimum of 3CF and maximum of 6 CF Courses per semester but the Claimant admitted on cross examination to teaching only one unit which fell short of the requirement of a lectures. He reiterated that Vice Chancellors and their deans were not allowed to teach because of the apparent conflict of interest that would occur. In this they relied on the case of Felix Kiprono Mategei V Attorney General & 3 others [2016] eklr where the Court reinforced the need for public officer to avoid taking two roles to avoid conflicts which is not in the spirit of *the constitution* or public service.

55. The Respondent submitted that the only reason the Claimant took up teaching role without requiring any payments was to be able to meet the requirement for appointment as a full professor, for her own personal growth. It was therefore submitted that the nullification of the position created is justified and in this they relied on the case of Galgalo Jarso Jillo(Supra) where the Court held that;

> " 5. In terms of section 43 of the *Employment Act*, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken. In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must in fact be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists even if it later turns out that it, in fact, did not. In my view, what the law is concerned with here is whether the circumstances surrounding the decision to terminate would justify a reasonable man on the street, standing in the same position as the employer, to reach a similar decision as him/her regarding the termination."

56. On the reliefs sought, the Respondents submitted that the nullification of the Claimant's letter of offer for the position of Associate professor was justified as such not unfair in the circumstance.

57. On the prayer for reinstatement, the Respondents relied on the case of Kenya Power and Lighting Company Limited V Aggrey Lukorito Wasike 2017] eklr where the Court held that; -

> " At the very least a Judge ought to set out the factors that mark out a particular case as possessed of exceptional circumstances before reinstatement can be ordered. This provision, properly understood, ought to render orders of reinstatement rarities, not common place and routine pronouncements as appear to come from certain sections of the Employment and Labour Relations Court. This calls for a strict adherence to the law as carefully and mandatorily set out in the controlling statute."

58. Accordingly, it was submitted that there are no exceptional circumstances placed before this Court to warrant the award of this relief. Moreover, that the Claimant was not properly appointed as an associate professor, neither did she take up her role even after obtaining an offer letter.

59. On the claim for gratuity pay, the Respondent conceded to the prayer but argued that the reason for the non-payment of the same was because the Claimant had not cleared with the university a fact which she admitted on cross examination.

60. On the claim for three months' notice for the position of DVC, the Respondent submitted that the Claimant during cross examination abandon that prayer and stated that the claim pending before Court relate to her position as an Associate professor not Deputy Vice Chancellor.

61. With regard to damages for malicious Termination and payment till retirement, the Respondent submitted that no evidence was placed before this Court to suggest that the Respondent dented the Claimant's reputation in any way. Furthermore, that the figure of Kshs. 525, 346 claimed as salary for associate professor was what the Claimant was paid as DVC not as Associate professor. The Respondent reiterated that the claim for damages is not justified and should be disallowed by this Court.

62. On costs, the Respondents submitted that costs follow event and in the event the Court finds in favour of the Claimant to order for each party to bear its own costs because the Claimant influenced her appointment and abused her powers in getting the appointment then failed to execute the roles that come with the position as required under the Teaching policy.

63. In conclusion, the Respondents reiterated that no person can hold and serve effectively two full times roles as suggested by the Claimant and the one unit taught by the Claimant was to further her scheme of attaining full professorship by attaining requisite years of teaching. They thus prayed for the claim to be dismissed with costs.

64. I have examined all the evidence and submissions of the parties herein. The issues for this Court's determination are as follows;-

    1. In what capacity the Claimant was employed by the respondent.

    2. Whether the Claimant was unlawfully and unfairly terminated for the position she had been appointed to.

    3. What remedies if any the Claimant is entitled to.

Issue No. 1

65. The Claimant submitted that she was appointed by the 4th respondent on a 5 year contract renewable as VC Academic Research and Student Affairs. Indeed this 5 year term lapsed and was not renewed. The respondent admitted that indeed upon the lapse of this 5 year contract, it was not renewed.

66. The Claimant has also indicated that she was also appointed an Associate professor Grade 14 of Environmental Science in the Department of Public Administration on 22nd January 2018.

67. To prove this position, the Claimant produced a newspaper excerpt for advertisement by Laikipia University for the position of an Associate Professor. Vide a letter dated 19/10/2017, the Claimant applied for this position as an Associate Professor.

68. On 22/1/2018 the Claimant received her offer of appointment as Associate Professor Grade 14 in the Department of Public Affairs & Environmental Studies of Laikipia University following an interview held on 17/1/2018.

69. The letter indicated that she would be on probation for 6 months and subsequently be on permanent and pensionable terms upon successful completion of her probationary period.

70. This letter was signed by Prof. Isaac S. Kosgei PhD for Deputy Vice Chancellor (AF & D) for the Vice Chancellor. The Claimant accepted this offer and signed it on 24/1/2018.

71. There is evidence submitted by the Claimant that following this appointment, she participated in various departmental activities including departmental meeting of 12/10/2018 curriculum review meeting held at HDS boardroom on 20/2/2018 curriculum review workshop held in Nakuru Campus on 18th to 20th February 2018 for directorate of quality Assurance and standards and exam moderation held at Business Boardroom on 3/10/2019.

72. Other than this, the Claimant gave proof that she participated in Departmental Oral Defence of PhD Proposals from the School of Science and Applied Technology, Department of Earth Science, dated 9/3/2020.

73. RW1 testified that the Claimant's appointment as Associate Professor was irregular. RW1 also indicated that after the appointment, the Claimant was to report for allocation of duties within 3 months but she didn't.

74. He also denied the allegation that the Claimant was free to carry out both duties of Assistant Professor of Deputy Vice Chancellor.

75. As indicated above, the averment that the Claimant didn't report for allocation of duty is not supported by evidence.

76. It is evident that the Claimant reported and was able to participate in various departmental activities as per the list of documents produced in Court being documents No. 3, 4, 5, 6, 7, 8, 9 and 11 in the bundle filed on 8/6/2022.

77. RW1 further admitted in cross examination that the teaching policy exhibited by the Claimant indeed contemplated a situation where an academic staff could take 2 positions but that they take leave of absence from the teaching position when appointed in an administrative position.

78. In cross examination RW1 stated that there was nothing before Court to show that the Claimant didn't report. He also admitted that the Claimant was present in the meeting held on 20/2/2018.

79. He also admitted that there was nothing in the policy of 4th respondent that stopped managers such as Deputy Vice Chancellor from teaching.

80. Having analyzed as above, it is my finding that indeed the Claimant served the respondent as both Deputy Vice Chancellor and Associate Professor.

Issue No. 2

81. On this issue, the Claimant had submitted that she was unlawfully terminated from the position of Deputy Vice Chancellor and Associate professor. On the issue of Deputy Vice Chancellor, the Claimant had been appointed to this position on a 5 year renewable contract. In CA No. 81 of 2018 Transparency International Kenya VS Teresa Carlo Omondi the learned JJA held as follows;-

> " 24. ....indeed the doctrine of legitimate expectation does not arise in the renewal of a fixed term contract and its non-renewal cannot constitute unfair termination or dismissal.
>
> Having noted that the respondent was in employment under a fixed-term contract and that the contract came to an end at the appointed time, we are of

the view that any relief sought by the respondent on basis of her assertion that her employment was unfairly terminated was not available to her.

The Court of Appeal decision in Registered Trustees of the Presbyterian Church of East Africa and Another Vs Ruth Gathoni Ngotho (2017) eKLR lends credence to our holding, where the Court pronounced itself, thus;-

"29. Bearing the foregoing in mind, we note that fixed term contract carries no rights, obligations or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the respondent's contract ought not to have been maintained. This is in relation to the salary of the months 5th of April up to May 2010. Similarly since the respondent's contract came to an end by affluxion of time, any claim for wrongful termination could not be maintained".

82. Indeed this is the law and any claim based on failure by respondent to renew an expired fixed-term contract of the Claimant cannot stand and is rejected.

83. As concerns the issue of termination of the appointment of the Claimant as an Associate Professor, the respondents averred that the Claimant failed to report for this assignment and that she also didn't participate in departmental activities.

84. In my analysis above, I have found that this assertion is not correct. The Claimant indeed reported to the department and she has demonstrated by evidence that she participated in departmental activities, attended meetings and even supervised PhD students.

85. The Claimant was indeed appointed as Associate Professor Grade 14 in the department of Public Affairs and Environmental Studies of Laikipia University as per the letter dated 22nd January, 2018. The letter stated as follows;

"Re: Offer Of Appointment

Following your application for the post of Associate Professor Grade 14 in the Department of Public affairs and Environmental Studies of Laikipia University and the subsequent interview held on 17th January, 2018, I am pleased to inform you that you have been offered the post of Associate Professor Grade 14 in the Department of Public Affairs and Environmental Studies with effect from the date that you report for duty.

This appointment is on probation of six (6) months. On confirmation, your terms of service will be permanent and pensionable in accordance with the Collective Bargaining Agreement for staff in Grades XI and above, a copy of which can be obtained from the Registrar (Administration) for perusal once you report for duty. These terms, together with this letter, constitute a contract between yourself and Laikipia University.

Your incremental date will be 1st January of every year if you report for duty by 30th June and 1st July of every year if you report for duty from 1st July. Under the terms of this letter, your retirement age will be seventy (70) years.

The salary attached to this post is Kshs.203,605/= per month in the salary scale of kshs.145,441 – 203,605 per month. Your other allowances will be as follows;-

Housing :House allowance of kshs.66,344/= per month shall be paid in accordance with the university regulations.

Medical allowance :Out patient medical allowance of kshs.3,900/= per month shall be paid. In-patient treatment shall be provided in accordance with University regulations.

Commuting allowance :Will be paid at the rate of kshs.16,000/= per month

Professorial Allowance :Kshs.5,000/= per month

Hardship Allowance :A hardship allowance of kshs.38,100/= per month will be paid, being the rate applicable to Civil Service.

Leave Entitlement :Will be at the rate of thirty six (36) days per calendar year.

Your day to day duties will be specified on behalf of the Vice-Chancellor, by your Head of Department. Please note, however, that the University Management reserves the right to re-deploy you to any other section or area where your services may be required.

If you accept this appointment, please sign in the space provided below and return to the undersigned one copy of this letter. You are also required to personally present the enclosed medical examination form to a Government Doctor to examine you. This form should be forwarded directly to the University Medical Officer – Laikipia University under confidential cover as soon as possible. Your final appointment is subject to a satisfactory medical report.

You are required to report for duty within (3) months from the date of this letter. This period can only be extended with prior written permission from the Vice-Chancellor, Laikipia University.

Any queries or clarifications regarding this offer should be directed to the undersigned.

Yours sincerely,"

86. In the letter above it is evident that the Claimant was appointed on 22/1/2018 on terms indicated which she accepted on 24/1/2018.

87. Upon her termination of duties as Deputy Vice Chancellor she indicated in her letter of 30/11/2020 that she had now handed over the office of Deputy Vice Chancellor and has actually continued to take up her responsibilities as an Associate professor.

88. In a turn of events, the Claimant was dismissed from service vide a letter dated 29/1/2021.

89. There is no evidence that the Claimant was given an opportunity to be heard over this decision made. The respondents breached the law especially Section 41 of the *Employment Act* 2007 which states as follows;-

"41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee

may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make".

90. Whether the respondent had valid reasons or not to terminate the services of the Claimant has also not been determined and this breaches the provision of Section 43 of the *Employment Act* 2007 which states as follows;-

"43. Proof of reason for termination

(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."

91. In view of the fact that the Claimant was terminated without valid reasons and without any fair hearing I find the termination of the Claimant as Associate Professor unfair and unjustified as provided for under Section 45 (2) of *Employment Act* which states as follows;-

" 45.

(1) .....

(2) A termination of employment is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure".

Issue No. 3

92. Having found as above, I find for the Claimant and order as follows;-

1. I declare the Claimant's termination of employment as Associate Professor was unjustified, unlawful, wrongful and illegal.

2. The Claimant be reinstated as an Associate Professor in Laikipia University without loss of her salaries and all benefits from the month of December 2020.

3. The Claimant be paid her gratuity dues from her position as Deputy Vice Chancellor Academic and Research for the year ending 2020 at the rate of 31% of the annual basic salary = 31/100 x 525,346 x 12 = 1,954,287.12/=

4. In view of the unlawful and illegal action against the Claimant terminating her services in a manner detrimental to her reputation, I award her 10 months salary as compensation for the

unlawful termination = 10 x 250,668 (as pleaded) = 2,506,680/= TOTAL = 4,460,967.12/= Less statutory deductions

5. The respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 6TH DAY OF MARCH, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Aoko holding brief for Kisila for Respondent – present

Kabiru for Claimant – present

Court Assistant – Fred