



**Kisaka v University of Nairobi (Petition 7 of 2019)
[2023] KEELRC 1795 (KLR) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1795 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 7 OF 2019**

JK GAKERI, J

JULY 25, 2023

BETWEEN

ERASTUS SIFUNJO KISAKA PETITIONER

AND

UNIVERSITY OF NAIROBI RESPONDENT

JUDGMENT

1. The Petitioner commenced this suit by way of a Petition filed on 14th January, 2019 under Certificate of Urgency seeking various reliefs including certiorari mandamus, prohibition, reinstatement and damages for defamation and pain and suffering.
2. About three years later and after the court had rendered a ruling in the Notice of Motion, 10th January, 2020 which sought various orders, the court restrained the Respondent from terminating the Claimant's employment and directed the Respondent to proceed with the disciplinary process within 3 months.
3. The Petition is supported by a Supporting Affidavit dated 29th October, 2022 which generally replicates the contents of the petition.
4. In the amended petition, the Petitioner avers that he was employed by the Respondent as an Assistant Lecturer in the Department of Finance and Accounting, Faculty of Business Management on 25th September, 2001. No Letter of Appointment was provided, and served as such until 18th July, 2013 when he was employed as a lecturer.
5. The Petitioner alleges that he was appointed Senior Lecturer on 14th July, 2018. No letter of appointment was provided. That he was suspended from duty vide letter dated 25th September, 2018 and was on suspension for a long time.
6. It is the Claimant's case that he was not provided with any evidence of the allegations made against him.



7. That the Respondent failed to follow its disciplinary code and required him to work three days a week at half salary with no commuter allowance until he was reinstated by the court on 8th May, 2020.
8. That he was invited for a hearing on 21st February, 2020 scheduled for 27th February, 2020 at which meeting he requested for certain documents and formally did so by letter dated 28th February, 2020 (copy of letter was not attached).
9. The Petitioner avers that the Disciplinary Committee failed and/or neglected to consider his strong submissions in defense and he appealed by letter dated 26th May, 2020 which appeal was dismissed vide letter dated 19th June, 2020.
10. It is the Petitioner's case that by letter dated 25th July, 2016, he had applied for promotion to the position of Senior Lecturer and was invited for an interview on 14th March, 2018 vide letter dated 6th March, 2018.
11. That the Respondent failed to effect his promotion after the interview as a consequence of which the Petitioner wrote on 21st August, 2020 on the issue to obviate loss of benefits due to the suspension but the request was declined vide letter dated 18th September, 2020 and 13th November, 2020.
12. That the delayed suspension violated his right to expeditious administrative action.
13. The Petitioner further avers that he was branded a thief and corrupt despite being reinstated as no correction or withdrawal of the alleged defamatory remarks was done and his reputation has been harmed.
14. That his professional growth has been stunted by the delayed promotion to Senior Lecturer without just cause.
15. That the half-salary and benefits unpaid during suspension remain unpaid, reinstatement notwithstanding and his family has suffered immensely, loss, damage, pain, mental anguish, and psychological and emotional stress occasioning constant medical attention.
16. It is the Petitioner's case that the foregoing violated the provisions of Article 2(1), 3(1), 10, 20(1), 21(1), 22(1), 23(1), 28, 41, 47, 50 and 165(3)(b) of the Constitution of Kenya, 2010 as they relate to supremacy of the Constitution, duty to respect, uphold and defend the Constitution, national values and principles, observance of Bill of rights, jurisdiction of the High Court, right to dignity, fair labour practices and fair trial.
17. The Petitioner further alleges that the Respondent violated the provisions of Section 4(c) and 12 of the Fair Administrative Action Act, 2015 and Section 17(1) of the Employment Act, 2007 on wages and the Respondent's Code of Conduct and Ethics on disciplinary procedures.
18. Reliance is also made on violations of the Universal Declaration of Human Rights and the African Charter on Human and Peoples Rights.
19. With regard to the particulars of the alleged violations, the Petitioner avers that the right to fair administrative action was violated by the delayed suspension, fair labour practices by the same delay, fair hearing by non availment of evidence against him, discrimination and defamation and change of effective date of promotion.
20. In his Further Affidavit dated 28th March, 2023, the Petitioner dismisses the Respondent's Replying Affidavit as tainted with contradictions, malice, innuendos, misrepresentations and untruthful and intended to mislead.



21. He denies having attempted to extort money from Charles Mugwanja, a student.
22. That the student was part of a group that had cheated and brought trumped up charges against him.
23. That the cause of action did not delay the appointment of the Disciplinary Committee but admits that his counsel wrote on 16th November, 2018 and 13th December, 2018 and petition was filed on 14th January, 2019.
24. The Respondent did not furnish any evidence nor comply with court directions that the process be completed within 3 months.
25. That the suspension was waived by court order on 20th January, 2020.
26. That the Respondent's decision to issue a strong and final warning letter, being put on strict performance observation and supervision and no salary arrears was contemptuous of the court order which waived the suspension and he performed during suspension.
27. That the suspension was from September 2018 to May 2020.
28. The Petitioner prays for;
 - a. An order to issue restraining the Respondent either by itself, employees, servants and/or agents from suspending or terminating the employment of the Petitioner.
 - b. Reinstatement and/or immediate release of all salary arrears from the date of suspension until reinstatement together with interest.
 - c. Damages for defamation.
 - d. Damages for pain and suffering.
 - e. A declaration that the Respondent's decision to intentionally delay his suspension period and finding of guilt by letter dated 8th May, 2020 and the sanction thereof are unwarranted, choreographed, illegal and unlawful.
 - f. An order compelling the Respondent to issue a correction/retraction to the Petitioner and further withdraw and expunge all defamatory communication and letters authorised by the Respondent that continue to negatively affect his reputation and inherent right to dignity from the Petitioner's records.
 - g. An order compelling the Respondent to pay the Petitioner's monies for the Module 2 teaching.
 - h. A declaration that the arbitrary change of the Petitioner's effective date of promotion to Senior Lecturer by the Respondent is against the legitimate expectation of the Petitioner and therefore unconstitutional, null and void ab initio.
 - i. A declaration that 15th March or thereabout is the effective date to the Petitioner's promotion as Senior Lecturer in the Department of Finance and Accounting and is entitled to salary increments and benefits from the said date.
 - j. An order compelling the Respondent to pay any short fall in salary and benefits that remain unpaid from the effective date of his promotion 15th March, 2018 or thereabout together with interest.
 - k. Costs of this petition.



Respondent's case

29. In its Replying Affidavit dated 7th February, 2023 sworn by Bernard Njuguna, the Respondent deposes that based on investigations, it was established that the Petitioner attempted to extort money from a student and mishandled student's marks.
30. That on or about 10th January, 2019, the Petitioner filed the instant Petition before the disciplinary process was completed for the lifting of the order of suspension which the court directed should proceed within 3 months effective 20th January, 2020 and the Petitioner was invited for a hearing on 27th February, 2020 by letter dated 21st February, 2020 and a decision was made.
31. That court proceedings delayed the process and time started running after the court gave directions on 20th January, 2020.
32. That the remedies sought were untenable since the Petitioner was found guilty by the Committee.
33. That in view of the magnitude of the accusations, the Petitioner's records were forwarded to the Ethics and Anti-Corruption Commission (EACC) for purposes of being charged with appropriate criminal offences under the Leadership and Integrity Act for demanding solicitation of bribe on inducement to perform a public function.
34. That the Petitioner was using the court to sanitize his criminal actions.

Petitioner's submissions

35. Counsel for the Petitioner submitted on the court's jurisdiction to entertain the amended petition, entitlement to reliefs and costs.
36. On the 1st issue, counsel relied on the provisions of Section 12(3) of the Employment and Labour Relations Court Act, 2011, Rule 7 of the Employment and Labour Relations Court (Procedure) Rules 2016 and Articles 10, 20(1), 21(1), 22(1), 23(1), 27(1) and (2), 35(1), 28 and 47 of the Constitution of Kenya, 2010 and Section 12 of the Fair Administrative Action Act to urge that the court had jurisdiction to hear and determine the amended petition.
37. Reliance was also made on the decision in United States International University (USIU) v Attorney General & 2 others (2012) eKLR, Peter Wambugu Kariuki & 16 others v Kenya Agricultural Research Institute (2013) eKLR and Esther Njeri Maina v Kenyatta University on enforcement of rights.

Respondent's submissions

38. The Respondent's counsel isolated no particular issues for determination but highlighted the law applicable generally and in relation to defamation.
39. The sentiments of the Supreme Court in Sammy Kemboi Kipkeu v Bowen David Kangogo & 2 others (2018) eKLR were relied upon to urge that reinstatement of half-salary, commuter allowance and salary arrears were in the nature of equitable remedies and thus governed by the maxims of equity such as clean hands and the Petitioner having been found culpable had unclean hands.
40. The decision in J.M.A v R.G.O (2015) eKLR was also relied upon to reinforce the submission.
41. As regards defamation, counsel relied on the sentiments of the court in Hon. Uhuru Muigai Kenyatta V Baraza Ltd (2011) eKLR on the defence of justification.



42. Counsel urged that since the issues raised were addressed at the Disciplinary hearing and he was found culpable, the claim for defamation was unsustainable.
43. Counsel submitted that the Petitioner could not pursue a legal remedy premised on an illegal action.

Findings and determination

44. From the pleadings by the parties and submissions, the issues for determination are whether;
 - i. The instant suit meets the test of a constitutional petition.
 - ii. The setting aside of the Petitioner's suspension was a consequence of the court order made on 20th January, 2020 or at the instance of the Respondent.
 - iii. The Claimant was defamed by the Respondent.
 - iv. The Claimant is entitled to the reliefs sought.
45. As to whether the suit herein meets the threshold of a constitutional petition, the home port are the allegations made by the Petitioner as they define the scope of the suit and the attendant remedies.
46. The gravamen of the Petitioner's case is that he was suspended from employment by the Respondent from 25th September, 2018 to May 2020 and remained on half salary without allowances, on unfounded allegations by a student, was not given evidence of the allegations, worked during the suspension, was defamed and suffered loss and damage.
47. The inordinately lengthy duration of suspension, financial, psychological distress and defamation are the crux of the case.
48. From the remedial side, it is evident that the remedies are essentially declaration, damages and release of unpaid monies, date of promotion and retraction of defamatory communication. Clearly, none of the remedies implicate the provisions of the Constitution directly and are substantively covered by statutory provisions and case law.
49. The threshold of a Constitutional petition was articulated in Anarita Karimi Njeru v Attorney General (1979) KLR 154 and has been restated in legions of decisions such as Mumo Matemu v Trusted Society of Human Rights Alliance and Josphat Nanok & another v Ethics and Anti-Corruption Commission (2018) eKLR and Kiambu County Tenants Welfare Association v Attorney General & another (2017) eKLR among others.
50. The threshold is;
 - i. A precise statement of constitutional provisions allegedly violated or threatened with violation,
 - ii. Manner of the alleged violation or threat.
 - iii. Nature and extent of the alleged violation or threat.
51. There is sufficient judicial authority from the Supreme Court of Kenya and other Superior Courts that not every suit or petition raises a constitutional issue and even where it does, if the issue is remediable through an Act of Parliament, the same should be remedied via that route as is the case here.



52. In *Josphat Koli Nanok & another v Ethics and Anti-Corruption Commission* (*Supra*) the court expressed itself as follows;

“ . . . I think that it trivializes the Constitution , its values and principles when empty allegations of infringement are made. A Petitioner who cites a violation of the Constitution , must by cogent evidence relate alleged breaches with real, concrete and direct loss, damage or injury arising out of the violation. It does not help to allege violation to fit some artificial textbook arguments of the nature and extent of constitutional principles.”

53. Other than the inordinate suspension, as the court found in its Ruling on 20th January, 2020, the other allegation lack relevant particulars.

54. For instance, how much is the Petitioner claiming as arrears of salary and allowance during suspension or under the alleged promotion or for defamation or pain and suffering or particulars on the alleged date of promotion.

55. In the absence of cogent evidence of these claims and the Constitutional articles allegedly violated and the manner of violation, it is a herculean task to sustain a constitutional petition.

56. For the foregoing reasons, the court is persuaded that the instant petition would have been prosecuted more efficiently as a cause to enable the Claimant adduce oral evidence to exemplify his claims.

57. Be that as it may, the Petition raises issues that call for determination with a view to put the matter to rest.

58. As to whether the setting aside of the Petitioner’s suspension was pursuant to a court order or at the instance of the Respondent, the court proceeds as follows;

59. Curiously, the Petitioner prays for reinstatement and alleges that he was reinstated.

60. In the court’s view, the term reinstatement has no application in this case since the Petitioner though on suspension was still in the employment of the Respondent and even alleges that he worked for 3 days a week while on suspension.

61. According to Black’ Law Dictionary, 10 Edition, to reinstate is defined as;

“ To place again in the former state or position. To restore.”

62. Similarly, a reading of the provisions of Section 12(3)(vii) of the Employment and Labour Relations Court Act, 2011 with Section 49(3)(a) of the Employment Act, 2007 reveals that the two provisions envision reinstatement as a terminal remedy or order.

63. Section 49 of the Employment Act, 2007 is entitled “Remedies for wrongful dismissal and unfair Termination.”

64. In the court’s view, the remedy of reinstatement would not be available prior to the dismissal or termination of employment.

65. The salient issue for determination is how the Petitioner’s suspension came to end.

66. While the Petitioner argues that it was a consequence of the court order, the Respondent’s case is that it lifted the same after the hearing.



67. In its Ruling delivered on 20th January, 2020, the court stated as follows;
- “In the circumstances, for the sake of putting the process back on track, I direct that the Respondent should proceed with the stalled disciplinary process against the applicant within 3 months with effect from the date of this judgement. In default, the suspension would stand waived.”
68. The issue for determination is whether the court meant concluding the process within 3 months or ensuring that the process got back on track which literally means return to the right path or right direction.
69. Key in this determination is the term proceed which would appear to suggest that the process had stalled.
70. According to *Black’s Law Dictionary*, 10th Edition, proceed is defined as;
- “Begin a course of action, go on to do something; carry on or continue or move forward.”
71. In this context, since the Petitioner had already been suspended by letter dated 25th September, 2018 and had been called upon to show cause why disciplinary action should not be taken against him, the disciplinary process had already begun and could only continue or move to the next level.
72. Did the court order envision that the process had to be completed within 3 months or had to be gotten back on track only?
73. The Respondent appear to have construed the direction as one requiring that the process was continued or moved forward whether it was concluded or not i.e action had to be taken within 3 months.
74. The Claimant argues otherwise, that it envisaged conclusion of the process.
75. The Respondent avers that it acted within the 3 month period by inviting the Petitioner for a disciplinary hearing slated for 27th February, 2020, though the minutes are dated 2nd May, 2020 and urges that it acted within the 3 months.
76. In the court’s considered view by using the term proceed, in its directions, the court envisioned the continuation or moving the disciplinary process forward as opposed to concluding it as submitted by the Petitioner.
77. In the circumstances, the court is persuaded that the lifting of the Petitioner’s suspension was at the instance of the Respondent’s letter dated 8th May, 2020 when the Petitioner signed as opposed to the directions of the court dated 20th January, 2020.
78. Although the Petitioner’s counsel submitted that the Petitioner signed the letter of lifting of the suspension under duress and threats and fear of losing employment, he tendered no evidence on how, where and by whom the alleged duress or threats were made. A letter to the Respondent explaining the circumstances in which the letter was signed would have demonstrated the correct state of affairs. Without any cogent or credible evidence of duress, the signature by the Petitioner is binding as acceptance of the contents of the letter.
79. As to whether the Petitioner was defamed by the Respondent, the Petitioner avers at paragraph 26 of the Supporting Affidavit that he “continues to suffer shame being branded a corrupt and a thief” and



the Respondent had not corrected or withdrawn the defamatory remarks, the communication and letters authored by the Respondent.

80. For unexplained reasons, neither the Supporting or Further Affidavit nor the petition particularizes the defamatory remarks, statements or letter.
81. It is unclear to the court whether it is all the letters by the Respondent, which appears unlikely or some of them.
82. The absence of particulars of the alleged defamatory representation or statements and evidence to establish their defamatory nature is fatal to a claim founded on defamation.
83. There is no allegation as to who referred the Petitioner as “corrupt or as a thief.”
84. In *SMW v ZWM* (2015) eKLR, the Court of Appeal stated as follows;

“A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him or her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.”
85. Similarly in *Paramount Bank Ltd v Naqvi Syad Camara & another* (2017) eKLR, the Court of Appeal stated as follows;

“For a statement to qualify as defamatory, it must tend to bring the person named in it into hatred, contempt or ridicule and the words used in the statement tend to lower him in the estimation of right-thinking member of society. Generally see Winfred & Jolowicz on Torts 16th Edition 2002 at page 404.”
86. Finally, the Petitioner has not adduced cogent evidence to establish the elements of defamation namely;
 - i. The alleged defamatory representation or statements and their being made known to others or another person.
 - ii. The representation or statements referred to the Petitioner which would be clear in this case in case of a letter or letters by the Respondent.
 - iii. The statements or representation was falsely made or without any justification.
87. The Petitioner has not demonstrated which of the statements made by the Respondent are false and thus defamatory in the ordinary sense or by innuendo.
88. The Petitioner’s allegations on defamation are too general to be sustained.
89. In view of the foregoing, it is the finding of the court that the Petitioner has failed to prove on a balance of probabilities that he was defamed by the Respondent.
90. On entitlement to the reliefs, the court proceeds as follows;

Order restraining the Respondent from suspending or terminating the Petitioner’s employment.

91. Since the Petitioner has not demonstrated that there is imminent danger of being suspended or terminated from employment, and there are no pending disciplinary proceedings, the order sought cannot issue and is declined.



Since the remedy of reinstatement cannot issue in this case, release of unpaid half salary and commuter allowance deserves consideration

92. The suspension letter dated 25th September, 2015 was unambiguous that the Petitioner would be paid half salary and copies of the Petitioner's payslips for October would appear to confirm as much.
93. By the reinstatement letter dated 8th May, 2020, the Respondent informed the Claimant the outcome of the Disciplinary hearing and the decision including the findings but deciding not to pay him unpaid salary and commuter allowance on the premise that he had committed gross misconduct and the sanction ought to have been dismissal.
94. It is unclear to the court the basis on which the Disciplinary Committee decided to lift the Petitioner's suspension but deny him the unpaid wages. It would appear the Petitioner was being punished by denial of unpaid salary and allowance during suspension which took inordinately long as the court found.
95. Although the Respondent's terms of service for Academic, Senior Library and Administrative Staff May, 2016 provide for the suspension of a member of staff by the Vice-Chancellor and the issue referred to a committee appointed by the Respondent's Council, there are no provisions on the entitlements of staff during suspension.
96. Similarly, none of the parties provided a copy of the Collective Agreement between the Respondent and the Universities Academic Staff Union (UASU).
97. In the circumstances, it is unclear to the court the basis on which the Disciplinary Committee lifted the suspension but denied the Claimant unpaid dues.
98. Having lifted the suspension, the Respondent could not again revisit the Petitioner's transgression to deny him unpaid dues. It suspended him from duty and he abided by the terms of the lengthy suspension attributable to the Respondent.
99. From the evidence on record, it is clear that the Respondent took no action to further the disciplinary process from 25th September, 2018 to 14th January, 2019 when the Petition was filed, a duration of more than 3 months.
100. The court is in agreement with the Petitioner's averment in the Further Affidavit that the Respondent cannot be heard to argue that the Petitioner protracted the suspension by taking no steps to progress the process.
101. For the foregoing reasons, the court is persuaded that the Petitioner is entitled to all his unpaid dues from the date of suspension.

Damages for defamation

102. Having found that the Petitioner failed to prove that he was defamed by the Respondent in any manner, the claim for damages is unsustainable and is declined.

Damages for pain and suffering

103. In his Supporting Affidavit dated 10th January, 2019, the Petitioner made no reference to pain and suffering as a consequence of suspension from employment by the Respondent.
104. Similarly, the Further Affidavit dated 28th March, 2023 did not provide particulars in support of the claim for damages for pain and suffering.



105. In the Supporting Affidavit dated 26th October, 2022, the Petitioner depones that upon his suspension, he suffered a “severe migraine” due to stress and was diagnosed with high blood pressure and hyper glycaemia which led to blindness and his wife suffered stroke and is now paralysed as the suspension was least expected.
106. In support of the averments, the Petitioner filed Annexure 16 which comprises 5 documents;
- i. An unclear unauthenticated report from the Agakhan University Hospital’s Radiology Department under the name Sifunjo Abigael dated 5th September, 2022.
 - ii. Out-Patient Treatment Form from Nairobi Women’s Hospital under the name Sifunjo Abigael Amadadi dated 31st August, 2022. The nature of illness is unclear. The form is unauthenticated by the Hospital.
 - iii. A handwritten Medial Report by a Dr. Kuria of the Nairobi Women’s Hospital dated 31st August, 2022.
The document states that the one Abigael Sifunjo had collapsed at home and had “known hypertensive” and was on medication. The report details the findings of the examination.
 - iv. Letter from Laiser Hill Academy dated 18th August, 2022 on discrimination of the Petitioner’s children schooling owing to unpaid fee balances.
 - v. Payment receipt from Kshs.67,400/= dated 12th September, 2022 to P.C.E.A Kikuyu Hospital.
107. None of the documents on record identify the Petitioner as the patient and all are dated August or September 2022.
108. While the foregoing documents would appear to show that the Petitioner’s wife was indisposed sometime in August and September 2022, they are not proof that the indisposition was occasioned by the Petitioner’s suspension by the Respondent for the Respondent to be held liable for the indisposition.
109. More significantly, none of the Affidavits on record contextualize the documents or demonstrates the nexus between the indisposition of the Petitioner’s wife and her husband’s suspension. The Petitioner was suspended in September 2018. This would require ascertainment of the proximate cause of her indisposition which has not been demonstrated.
110. It is trite that causation is not a chain but a net and many imponderables interpose between the events and the outcome. It is the obligation of the Petitioner to evidentiary prove the nexus between the suspension and his indisposition or his wife.
111. The court is satisfied that the Petitioner has failed to show by a preponderance of the evidence that the proximate cause of the alleged indisposition was his suspension by the Respondent. (See *National Controls Corp v National Semiconductor Corp* 833 F 2d 491, 497 (3rd cir 1987).
112. As a consequence, the prayer for damages for pain and suffering is declined.

On the protracted suspension, although the Respondent took no steps for more than 3 months after the suspension, the Petitioner exacerbated the situation by filing the instant petition. The Respondent could not have convened a disciplinary meeting with a suit in court challenging the suspension.

In the court’s view, the Petitioner aggravated the delay and the declaration sought that it was intentional, is unjustifiable and is declined.



Order to compel the Respondent to issue a correction/retraction or withdraw the defamatory communication

113. Having found that the Petitioner failed to show the manner or extent to which he was defamed by the Respondent, it is unclear to the court as to what is supposed to be corrected or retracted.

The prayer is declined.

Payment for Module 2 teaching

114. This claim lacks the requisite particulars and evidential proof and it is dismissed.

Declaration that the arbitrary change of effective date of promotion

115. Evidence on record reveal as deponed by the Petitioner, that by letter dated 25th July, 2016, the Petitioner applied for the position of Senior Lecturer, Department of Finance and Accounting 7/208/16 pursuant to an advertisement dated 21st July, 2016 and was invited for interview by letter dated 6th March, 2018 and the interview was held on 14th March, 2018.

116. By letter dated 18th August, 2020, the Respondent notified the Petitioner that he had been promoted to the position of Senior Lecturer, Department of Finance and Accounting.

117. Other than the changes in salary and title, other terms and conditions of service remained the same.

118. The letter stated that the effective date of promotion would be the date of acceptance of the position.

119. The Claimant signed the letter on 21st August, 2020 on a without prejudice basis.

120. By letter dated 28th August, 2020, the Petitioner engaged the Respondent on the effective date of promotion. The letter is barely legible and appear to base its argument on the Ruling by Wasilwa J. on 20th January, 2020.

121. The judge held inter alia that;

“... the Respondent’s action of placing the Applicant on a suspension without progressing to a disciplinary hearing is an unfair labour practice which should not be condoned. The court should not however take away the employer’s prerogative at proceeding with their internal disciplinary processes.”

122. By letter dated 18th September, 2020, the Respondent informed the Petitioner that the request to alter the effective date of promotion had been considered and declined because the Petitioner was involved in a disciplinary process.

123. That the University had not offered the appointment by then.

124. By a further letter dated 13th November, 2020, the Respondent informed the Petitioner that the effective date of appointment was when a member of staff assumes duty and a Staff Movement Advice (SMA) raised on the same.

125. The letter was emphatic that the previous letter dated 18th September, 2020 remained valid.

126. The two letters are signed by different officials of the Respondent and for unexplained reasons provide different reasons for the refusal to backdate the Petitioner’s promotion date.



127. The promotion letter dated 18th August, 2020 stated that the effective date was the date of acceptance of the offer in which case 21st August, 2020.
128. Puzzlingly, neither the Replying Affidavit nor the Respondent's submissions addressed the issue of effective date of promotion. According to the Petitioner, the date ought to have been the date of the interview.
129. To resolve this issue, it is necessary to ascertain when the decision to promote the Petitioner to the position of Senior Lecturer was made.
130. In public institutions, when positions fall vacant or new positions are established as by law prescribed and there is manifest need to recruit for the positions, the same are advertised internally or externally or both and eligible individuals are invited to apply for the positions.
131. The applications are sorted out and an ad hoc shortlisting committee does the shortlisting of candidates.
132. In a University setting as is in this case, an Appointment Committee is constituted to interview the candidates and decide their fate and the decision is made by the Committee on the date of the interview and minutes of the meeting clearly show when the decision was made.
133. After the interview, the appointment committee becomes *functus officio*.
134. According to the *University of Nairobi Statute*, 2013, the Chairperson of the Senior Lectureship Appointment Committee is the Deputy Vice-Chancellor (Academic Affairs).
135. The Petitioner was invited for the interview slated for 14th March, 2018 at 8.00 am and presented himself and was interviewed and was successful as evidenced by the Respondent's letter dated 18th August, 2020.
136. Intriguingly, the letter makes no reference to the interview or any other background. Logically, since the interview was conducted on 14th March, 2018, the Appointment Committee made its decision on that day, the date of accepting the promotion notwithstanding. Had the Respondent produced minutes of the meeting, it would have effortlessly demonstrated when the decision was made by the Appointments Committee. For unknown reasons, the Respondent did not avail the minutes or a resolution of the Committee.
137. Equally, it is not uncommon for the effective date of promotion to be backdated to the date of the interview for the simple reason that that is when the decision was made.
138. Granted that the Petitioner was promoted to Senior Lecturer on 14th March, 2018 and was suspended from duty on 25th September, 2018, more than 6 months later and the Respondent had not communicated to him that he was unsuccessful, the Petitioner was a Senior Lecturer by implication. The Respondent cannot rely on internal procedures to argue that the Petitioner was not a Senior Lecturer on 25th September, 2018.
139. In the court's view, the decision ought to have been communicated to him within 3 months.
140. From the Respondent's letters dated 18th August, 2020, 18th September, 2020 and 13th November, 2020, the Respondent has not provided a cogent justification as to why it took over six (6) months to notify the Petitioner that he had been promoted to the position of Senior Lecturer and why the effective date was not 14th March, 2018 when the interview was conducted and a decision made by the Appointment's Committee.



141. For the foregoing reasons, it is the finding of the court that the change by the Respondent of the effective date of the Petitioner's promotion to Senior Lectureship was arbitrary and cannot stand and a declaration to that effect is merited.
142. A declaration is hereby issued that the Petitioner's effective date of promotion ought to have been the date of the interview.
143. As a consequence, it follows that the Petitioner is entitled to the short fall in salary and benefits effective the day of promotion.

Conclusion

144. For the above stated reasons, it is the finding of the court that the Petitioner has proved his case and judgement is entered in favour of the Petitioner against the Respondent in the following terms;
- a. Unpaid salary and commuter allowance from the date of suspension till its lifting.
 - b. Declaration that change of the effective date of promotion to Senior Lectureship was arbitrary and ought to have been the date the decision was made by the Appointments Committee.
 - c. Short fall in salary and allowances from the date of suspension till its lifting.
 - d. Costs of the suit.
 - e. Interest on (a) and (c) from date of judgement till payment in full.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25TH DAY OF JULY 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the *Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

