



**Malaya v Masinde Muliro University of Science and Technology (Petition
5 of 2023) [2023] KEELRC 3005 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3005 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
PETITION 5 OF 2023
JW KELI, J
NOVEMBER 23, 2023**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 2,3(1), 10, 19, 20,
21(1), 22,23,25(B), 27, 28, 30(1), 41(1) & (2) (A) 47 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE EMPLOYMENT ACT, 2007
AND THE PUBLIC SERVICE COMMISSION ACT, 2017**

BETWEEN

VINCENT CHIBINI MALAYA CLAIMANT

AND

**MASINDE MULIRO UNIVERSITY OF SCIENCE AND
TECHNOLOGY RESPONDENT**

Engaging an employee in an acting capacity for 7 years violates the employee’s right to fair labour practice

The petitioner held the position of acting university librarian with the respondent, a position allegedly held for over 7 years. The petitioner alleged that he was grossly underpaid. The court held that the change of the requirements for the position of the university librarian reset any expectation that the petitioner had based on the previous qualifications for the position. The court further held that keeping the petitioner in an acting capacity for 7 years violated his right to fair labour practice.

Reported by Kakai Toili

Constitutional Law – fundamental rights and freedoms – enforcement of fundamental rights and freedoms – right to fair labour practices - whether engaging an employee in an acting capacity for 7 years violated that employee’s right to fair labour practice - whether the omission to fill a position in which an employee worked in an acting capacity for over 6 six years violated the right to fair labour practices and fair remuneration – Constitution of Kenya, 2010, article 41.



Constitutional Law – doctrine of legitimate expectation – legitimate expectation that a person acting in a position would be appointed to that position - whether the change of requirements for a position reset any expectation that a person acting in that position had based on previous qualifications for the position.

Labour Law – employment – employment policies in the public service - whether a public entity could formulate its human resource policies below the provisions of the terms of the Human Resource Policies and Procedures Manual for Public Service, 2015.

Brief facts

The petitioner held the position of acting university librarian for over 7 years. The respondent made an external advertisement for the position of the university librarian which the petitioner contended violated his right to fair labour practices, as he legitimately expected that he could be confirmed into the substantive position. The petitioner further contended that the requirements to fill the new position were significantly changed in contrast to those held by the previous office holder and as contained in the respondent's Scheme of Service for Non-Teaching staff.

The petitioner claimed that having acted in the acting capacity for the past 7 years, he was grossly underpaid for undertaking the work of the substantive holder. The petitioner sought for among other orders; a declaration that keeping the petitioner in an acting capacity for over 7 years was unlawful and violated the petitioner's right to fair labour practice, right to equal remuneration for equal work, or work of equal value.

Issues

- i. Whether engaging an employee in an acting capacity for 7 years violated that employee's right to fair labour practice.
- ii. Whether the omission to fill a position in which an employee worked in an acting capacity for over 6 six years violated the right to fair labour practices and fair remuneration.
- iii. Whether the change of requirements for a position reset any expectation that a person acting in that position had based on previous qualifications for the position.
- iv. Whether a public entity could formulate its human resource policies below the provisions of the terms of the Human Resource Policies and Procedures Manual for Public Service, 2015.

Held

1. The Public Service Commission developed human resources policies from time to time to guide its operations. The public universities through their council under section 35 of the Universities Act also had a right and duty to develop its policies to guide recruitment of employees. The respondent's Human Resource Policy and Procedures Manual of 2022(the Policy) was not in place at the time of the petitioner's appointment to the acting capacity as of November 23, 2015, and no other policy was provided to indicate the timelines or terms of the acting period, the provisions of section 34(3) of the Public Service Commission Act and the 2015 human resources policies and manual for public service should apply in the instant case considering that the respondent was a public body whose employees were public officers and their conduct regulated in the public service.
2. In the absence of its own human resources policy as at time of appointment of the petitioner to acting, the Public Service Commission Regulations of 2015 applied upto time of the respondent's policy of November 23, 2022. The change of the requirements for the position of the university librarian reset any expectation that the petitioner had based on the previous qualifications for the position of a university librarian. The petitioner did not at the point when the respondent advertised for the position object to the advertisement based on the new qualifications but remained mum. If at all any expectation by the petitioner existed, the same was extinguished by the respondent's advertisement of the position of university librarian, and no objection was raised by the petitioner.
3. Although the position of university librarian was not filled after the advertisement, the petitioner did not question why the position was not filled and he could have received a response from the respondent why the position was not filled. The petitioner continued to occupy the office in an acting



- capacity because no candidate was appointed after the advertisement. If a candidate was chosen then, the petitioner would have vacated the acting post.
4. The petitioner's appointment letter by the respondent to the acting capacity of November 30, 2015, indicated that the petitioner's engagement would be based on the term of his substantive engagement and the petitioner continued to receive his salary on his substantive position with the additional allowances on the acting capacity.
 5. The meaning of clause 4 of the respondent's Scheme of Service for Non-Teaching Staff, 2012, was that the respondent could also in addition to the minimum requirements required for any position provide for additional requirements in recruitment procedures apart from the minimum provisions set out in the scheme of service and any appointment was subject to the approval of the Council. An employee was entitled to be considered for either appointment or on the other hand promotion to the next grade. The use of the word "or" was disjunctive, meaning it separated things. That was to say that one could either be appointed to a position or promoted to the next grade.
 6. Under clause 22.11 of the Scheme of Service, an employee could advance to the position of the university librarian through appointment and not promotion to the next grade.
 7. For legitimate expectation to arise, there must have been a clear and ambiguous intention on the part of the public authority, the respondent, to confirm the petitioner to the position. That intention was not manifested by the Registrar of Administration that the petitioner was to be confirmed to the position of university librarian, but rather, he directed that the position be filled as the same was vacant and not occupied by the petitioner.
 8. From a close look at the internal advertisement, the respondent had not advertised for the position of the university librarian which fell on grade XV. The respondent had not advertised for any position internally that fell within grade XV which as per its Human Resource Manual Clause 2.14.4 was to be advertised externally. The petitioner could not have been shortlisted or promoted to a position that had not been advertised. The petitioner had if at all he applied for the position of university librarian done so based on his own volition without any call for the filing of the post.
 9. The petitioner did not raise any objection to his further appointment to the acting capacity. The new appointment letter from the respondent contained a contract term of six months. The petitioner accepted to act as so and there was no express conduct from the respondent that the petitioner was to be confirmed to the new position.
 10. There was no legitimate expectation that the petitioner was to be confirmed by the respondent into the substantive position. The performance evaluations and performance appraisals conducted by the respondent or externally were carried out as part of the respondent's normal operations and there was no indication that the performance appraisals were geared towards confirming the petitioner to the position of university librarian. No legitimate expectation had crystalized that the petitioner was to be confirmed to the position of university librarian which expressly required competitive recruitment under the respondent's Scheme of Service for Non-teaching Staff.
 11. There was no evidence of existence of a human resource policy by the respondent covering the period of 2015 to October 2022, the provisions of section 34(3) Public Service Commission Act that an officer may be appointed in an acting capacity for a period of at least thirty days but not exceeding a period of six months, applied.
 12. The period from when the petitioner was engaged in an acting capacity was from November 23, 2015 to April 25, 2022 and from May 1, 2022 to October 31, 2022 culminating in 6 years 11 months. That was beyond the six months contemplated by the Public Service Commission Act. There was no provision for what would happen in that case. Due to the respondent's omission to fill the position of the university librarian for a period of 6 years and 11 months, the petitioner's right to fair labour practices and fair remuneration was violated.



13. The petitioner did not produce evidence that any of his colleagues at the same level as him were promoted or confirmed to any position in a higher position. He however claimed that he had applied for a promotion and was denied. There was no proof that he had applied for any promotion nor any evidence that he was treated differently from any other employee.
14. The position of university librarian grade XV of the respondent was vacant. The last acting appointment contract of the petitioner of May 2022 had expired as demonstrated in his letter for renewal of November 2, 2022 which there was no evidence of having been received by the respondent. It was envisaged under section 34(5) of the Public Service Commission Act that recruitment of a substantive holder of the office would be done in any acting position and that the acting would not curtail the recruitment.
15. Clause 2.14.3 of the respondent's Human Resources Policies and Procedure Manual required for advertisements for senior posts job grade fifteen (15) and above be done externally in open, competitive fair and merit based process which led to the impugned advert for the university librarian (grade XV)(SS2). The competitive recruitment of the university librarian was consistent with the provisions of article 10(2) of the Constitution which provided for the national values and principles of good governance to wit good governance, integrity, transparency and accountability; and section 34(5) of the Public Service Commission Act that acting position would not curtail the expeditious appointment or deployment of a competent person to the public office concerned. The respondent had the mandate to recruit the substantive holder of the position and the petitioner also applied to be considered. The recruitment process was lawful. There was no evidence of discrimination.
16. The acting period was before the respondent's Human Resource Policy and Procedure Manual, 2022. The Human Resource Policies and Procedures Manual for Public Service, 2015 (Public Service HR Manual) formulated by the Public Service Commission provided in part in its preamble that it provided guidelines in the management and development of human resource capacity towards the achievement of various national goals and objectives. The Public Service Human Resources Manual incorporated provisions of the Constitution, labour laws and other legislation that governed various aspects of industrial relations in the public service.
17. The Public Service HR Manual was to be used as the source of the minimum terms where a public entity wished to formulate its own human resource manual. A public entity must formulate its human resource policies either at par with the Public Service HR Manual or on higher terms, but an entity could not go below the provisions of the terms in the Public Service HR Manual.
18. The provisions of the Public Service HR Manual were only a minimum requirement in formulating human resource policies by different public bodies, the minimum was that the acting allowance should be at 20% of an employee's substantive salary and it could be higher than 20%, but it could not be lower. Other allowances payable to the employee in an acting capacity were then to be formulated by a specific entity as the case may be.
19. The respondent did not have a job group "Q" on its part and it only meant that each public body must tailor the Public Service HR Manual to fit its working environment with the Public Service HR Manual as a guiding manual. Where a public body had formulated its human resource policies and procedures, the procedures were applicable in place of the Public Service HR Manual as long the minimum provisions of the Public Service HR Manual were met.
20. At the time of the appointment of the petitioner to the acting capacity the Public Service HR Manual was in place and the applicable acting allowance was 20%. The respondent's basis for payment of the acting allowance at 15% was on the annexure SS-3 titled in hand "MMUST HR Policies and procedure" which set out the acting allowance at 15% of one's salary. The acting allowance at 15% had been paid to the petitioner and what was in issue was that from December 2015 to December 2020, the acting allowance paid was at 15% instead of the rate of 20% as per the Public Service HR Manual which set the minimum guidelines.



Petition allowed.

Orders

- i. *A declaration was issued that keeping the petitioner in an acting capacity as the respondent's university librarian for 7 years violated the petitioner's right to fair labour practice under article 41 of the Constitution.*
- ii. *The court awarded compensation for the sum of Kshs. 500,000 for the unfair labour practice.*
- iii. *The court awarded the balance of 5% acting allowance for the period December 2015 to December 2020. The parties to file in court concurrently the tabulation of 5% basic salary of the university librarian position over that period within 21 days with a view recording the payable amount in court at the next mention date of January 23, 2024.*
- iv. *The payments as ordered in the judgment to be effected by the respondent within 90 days in default interest to be payable thereon at court rates from the date of the judgment till full payment.*
- v. *The respondent to pay cost of the petition to the petitioner.*

Citations

Cases

Kenya

1. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 13 (KLR) - (Explained)
2. *Kenya County Government Workers' Union v County Government of Nyeri & another* Petition 10 of 2015; [2015] KEELRC 100 (KLR) - (Mentioned)
3. *Maiywa, Edah Cherono v University of Nairobi Enterprises and Services Limited* Cause 273 of 2019; [2020] KEELRC 447 (KLR) - (Explained)
4. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Mentioned)
5. *Mbutura, Silas Kaumbuthu v Meru Central Dairy Co-Operative Union Limited* Cause 24 of 2015; [2015] KEELRC 603 (KLR) - (Explained)
6. *Njeru v Republic* Miscellaneous Criminal Application 4 of 1979; [1979] KEHC 30 (KLR); (1979) KLR 154 - (Mentioned)
7. *Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); (1979) KLR 1283 - (Mentioned)
8. *Nyaga, Justina Mutitu v Kenya Civil Aviation Authority* Cause 2229 of 2014; [2017] KEELRC 405 (KLR) - (Explained)
9. *Oyatsi v Judicial Service Commission* Petition E111 of 2021; [2022] KEELRC 3 (KLR) - (Explained)
10. *Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte)* Judicial Review Application E023 of 2021; [2022] KEHC 5 (KLR) - (Explained)
11. *Transparency International - Kenya v Omondi* Civil Appeal 81 of 2018; [2023] KECA 174 (KLR) - (Mentioned)

South Africa

National Director of Public Prosecutions v Philips [2004] ZASCA 111; [2005] 1 All SA 635 (SCA); 2005 (5) SA 265 (SCA); 2005 (1) SACR 360 - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 10, 27(1)(2); 28, 30(1)(m); 41(1) (2)(a); 47; 155(3)(a); 158(3); 234(2) (a)(3); 252(1) - (Interpreted)
2. Employment Act (cap 226) section 5(2)(3)(5)- (Interpreted)
3. Kenya Defence Forces Act (cap 199) section 28- (Interpreted)
4. Labour Relations Act (cap 233) In general - (Cited)



5. Public Officer Ethics Act (cap 185B) section 2 - (Interpreted)
6. Public Service Commission Act (cap 185) sections 2, 3, 34(3)(5) - (Interpreted)
7. Public Service Commission regulations, 2020 (cap 185 Sub Leg) regulation 3 - (Interpreted)
8. Universities Act (cap 210) sections 3, 35(1)(a)(i) - (Interpreted)

Advocates

Wambui h/b for *Kanjama* Senior Counsel, for the petitioner

Nyambura h/b for *Ochola* for the respondent

JUDGMENT

1. The petitioner held the position of Acting University Librarian with the respondent, a position allegedly held for over seven years. The respondent made an external advertisement for the position of the University Librarian in the *Daily Nation* newspaper on November 25, 2022, which the petitioner contends violated his right to fair labour practices, as he legitimately expected that he could be confirmed into the substantive position; that the requirements to fill the new position were significantly changed in contrast to those held by the previous office holder and as contained in the respondent's Scheme of Service for Non-Teaching staff; and alleges that having acted in the acting capacity for the last seven years, he was grossly underpaid for undertaking the work of the substantive holder and filed the instant petition dated December 28, 2022 seeking the following reliefs: -
 - I. A declaration that keeping the petitioner in an acting capacity for over 7 years was unlawful and violated the petitioner's right to fair labour practice, right to equal remuneration for equal work, or work of equal value.
 - II. A declaration that the refusal by the respondent to pay the petitioner the full remuneration for University Librarian (Job Grade XV), not promoting him when he was due and promoting his colleagues instead and advertisement of the position of the University Librarian in two occasions amounted to a violation of the petitioner's rights including violation of his right to freedom from discrimination, servitude and right to human dignity and self-worth.
 - III. A declaration that causing the petitioner to serve in the office of University Librarian beyond the lawful acting period amounted to constructive confirmation of the petitioner as a substantive holder of that office and that the petitioner is deemed to have been lawfully appointed to the position of University Librarian of the respondent upon expiry of six months from the date of appointment in acting capacity on 2 November 3, 2015.
 - IV. Declaration that the respondent violated the petitioner's rights under articles 27,28, 30,41, and 47 of the *Constitution of Kenya, 2010* as set out in this petition.
 - V. An order of certiorari to bring into this court and quash the decision to externally advertise for the position of the University Librarian in the *Daily Nation* Newspaper of November 25, 2022 and as found on the respondent's website.
 - VI. An order for compensation of special damages amounting to Kshs. 12,375,877.76/-as at the date of filing the petition as more particularized under paragraph 40 above which sum shall keep increasing until full payment.
 - VII. An order for general and aggravated damages for discrimination, violation of the petitioner's right to human dignity and self-worth, violation of the petitioner's right to access information, fair labour practices, fair administrative action, and freedom from servitude.



- VIII. Conservatory order do issue restraining the respondent from taking any action against the petitioner, victimizing him on account of filing this petition, or interfering with the position of University Librarian in an unlawful manner.
 - IX. Conservatory order do issue staying and or stopping the respondent's recruitment exercise for the position of the University Librarian. In particular, the respondent, its agents, and or servants BE Restrained from conducting interviews and or appointing anybody else other than the applicant as a substantive holder of the said position.
 - X. That costs of this petition be borne by the respondent.
 - XI. Interest at court rates on the backdated underpayments from the date they fell due to the date of payment in full.
 - XII. Any other or further relief that this honourable court may deem appropriate to meet the ends of justice.
2. The petitioner filed his supporting affidavit sworn on December 28, 2022 together with annexures accompanying the petition. The petitioner filed a further affidavit sworn on 9th February 2023 by himself and received in court on February 16, 2023 in support of the petition.(All these were refiled on December 29, 2022).
 3. The petition was opposed. The respondent filed a replying affidavit sworn by Prof. Solomon Shibairo on the 18th of January 2023 and received in court on an even date accompanied by its annexures.

Written Submissions

4. The court directed that the petition be canvassed by way of written submissions. The petitioner's written submissions drawn by Muma and Kanjama Advocates were dated July 24, 2023 and received in court on the October 2, 2023. The petitioner filed supplementary submissions dated October 9, 2023 and received in court on the October 11, 2023. The petitioner filed authorities relied on together with the submissions. The respondent's written submissions drawn by G & A Advocates LLP were dated August 21, 2023 and received in court on September 19, 2023.

Petitioner's Case In Summary

(The case as per supporting affidavit of the petitioner dated December 28, 2022 and the further affidavit sworn on February 9, 2023)

5. The petitioner was employed by the respondent as a Deputy Librarian vide a letter of appointment dated September 9, 2015 with terms of salary and benefits stated therein(pg. 1-2 of VCM-1).
6. That vide letter dated November 30, 2015, he was appointed in an acting capacity as the University Librarian effective from November 23, 2015(VCM-1 Pg.5) following the demise of the previous office holder Mr. George G. Shibanda. (Pg.133 to 134 of VCM-1) which position he says fell vacant seven years ago.
7. In the acting capacity, he was entitled to a responsibility allowance(Kshs 30,000.00); Telephone allowance(Kshs 10,000.00), and Entertainment Allowance(Kshs 20,000.00).
8. The petitioner contends that he was eligible, yet not paid an acting allowance at the rate of twenty percent of his substantive salary as contemplated under section C.14 of the 2015 Human Resource Policies Procedures Manual for the Public Service (VCM -1 Pg 6-132).



9. The petitioner asserts that he possesses over twenty years of experience as a librarian in the university set-up having worked from 2012 to 2015 as a Deputy Librarian at Strathmore University and has completed his course work for the Programme of Doctor of Philosophy Library and information studies(The petitioner's CV on Pg 135-138 of VCM-1).
10. The petitioner asserts that the qualifications to hold the position of a University Librarian and has amassed a wealth of experience which has helped him excel in his performance. (Certificates on Pg 139 -178 of VCM-1). He states that he has in his acting capacity been appointed to various committees by the respondent due to his exemplary performance(PG-179 to 205 of VCM-1).
11. The petitioner states that he has performed his duties under the respondent diligently which is evident from the staff performance appraisals of 2016 to 2020 where he scored 94% and his performance was acknowledged by his supervisor, the Deputy Vice-Chancellor (Pg 206 to 212 of VCM-1). In the 2020/2021 performance Evaluation Report, he was the only senior-level staff above Level 11(the Senior binder) whose department scored 100% in Enhanced Library Resources in an external appraisal(Evaluation report on pg 213 to 216 and Staff Establishment(2019-2024) Pg.
12. The petitioner states that since 23rd November 2015, he has served in the acting capacity of the University Librarian performing all functions of the said office, and has never been promoted formally or confirmed as the substantive holder of the said office.
13. The petitioner states that the respondent in December 2019 externally advertised[(Advert(AD/02/12/19) on pg.219-224 of VCM-1)(This was wrongly marked and appeared on Pg 221 to 225) for the position of the University Librarian(Job Grade XV 1) outlining different requirements unlike those held by the previous holder and contrary to the respondent's scheme of Service of Non-Teaching staff(Pg-225-232 of VCM-1 at Pg.64-65)(This was wrongly marked and appeared on Pg 226 to 233). He states that applications were to be submitted by December 30, 2019 but the position was never filled.
14. That for the entire period he has worked in the acting capacity he has earned less remuneration than what an occupant of the said position could have earned in salary and allowance amounting to Kshs. 31,846,806.96 as of May 23, 2016 to date and as outlined in Table 1.0 (showing a tabulation of the salary that was payable to a University Librarian)and in line with the Salary scales by the Salaries and Remuneration Commission(Pg-234-256 of VCM-1).
15. The petitioner states that as from November 2015 to July 2020 he earned a gross salary of Kshs 10,714,660/=and Kshs 9,210 180.00/-from July 2020 to December 2022 and claims all total to Kshs 19,924,840.00/= and claims for the difference between what he could have earned and what he earned in Kshs 11,921,966.96/-.
16. The petitioner states that in June 2020, he realized he was being underpaid the telephone allowance which ought to have been Kshs.15,000/- but he was being paid Kshs 10,000/= contrary to the Revised Terms of Service of Senior Administrative Grades (pg.257-276 of VCM-1)and states that the Registrar (Admn) *vide* a Memorandum of 12th May 2020(Pg 277-278 of VCM-1) confirmed that the Acting capacity should have ceased after 6 months of appointment in 2016.
17. The petitioner states that in November 2020, an internal advertisement(Pg. 279-280 of VCM-1) was made by the respondent which was to lead to promotions with applications' deadline on November 25, 2020. He states that he made an application for the position of University Librarian, but he states that he was not shortlisted yet all library staff that he mentors were promoted to a higher grade. That he however received a Letter of Appointment dated April 25, 2022 as the Acting Librarian a position he was already serving which outlined that his term of service would be for six months from May 1, 2022 to



- October 31, 2022, subject to the appointment of the substantive office holder; and he would be entitled to acting allowance at 20% of his basic salary and allowances per month at Responsibility Allowance- Kshs 30,000.00/=; Entertainment Allowance-20,000.00/=; Telephone Allowance: Kshs 15,000.00/- (Appointment letter dated April 25, 2022 pg 281 to 282 of VCM-1).
18. The petitioner states that at the end of October 2022, he received a call from the Human Resource office informing him to apply to the Vice Chancellor for the extension of the Acting position of University Librarian if he desired to receive the acting allowances and to that end, he on November 2, 2022 wrote a letter requesting the renewal of his acting capacity (Pg. 283-285 of VCM-1). He states that all acting allowances ceased apart from the car allowance of Ksh 12,500/- since October 2022.
 19. The petitioner states that the respondent vide an external advertisement in the *Daily Nation* Newspaper of November 25, 2022 (pg.286-293 of VCM-1) advertised the position of University Librarian with the application's deadline of December 16, 2022. He applied for the position. (Pg 294 of VCM-1). The requirements of the said position are significantly different from those of the previous office holder and as per the respondent's Scheme of Service for Non-Teaching staff.
 20. The petitioner states that despite having worked in the acting capacity as University Librarian for seven years, the respondent continued to pay him the salary of a Deputy University Librarian instead of that of the University Librarian as evidenced by his pay slips (Pg 3-4 of VCM-1), which actions by the respondent, he states failed to protect his fundamental rights and freedoms under chapter 4 of the Constitution in particular articles 27(1)& 2, article 28, article 30(1) and article 41, section 34(3) of the Public Service Commission Act, 2017, section 5(2) & 3; and 5(5) of the Employment Act, 2007.
 21. The petitioner states that his rights were violated by the respondent, by engaging him in the acting position for over seven years without confirming him to the substantive position; failing to pay him the acting allowance and other allowances; advertising the position of University Librarian when he ought to have been deemed to have been appointed as such; setting the requirements of the Position of the University Librarian different from those of the previous office holder and as per the respondent's Scheme of Service for Non-Teaching staff and failing to promote him while promoting juniors.
 22. The petitioner states that the respondent has never informed him of any shortcomings in his performance that he could have rectified and states that despite the imposed acting status he performed the duties of the substantive office holder of a University librarian and he is entitled to the benefits of the said office six months after he started acting to his last day in the said office.
 23. The petitioner states that the respondent has advertised for the position of the University Librarian with the applications' deadline on December 16, 2022 and interviews slated to commence after December 8, 2022 or on January 3, 2023, the said recruitment exercise, he claims is *ultra vires* as it is illegal, unlawful, irrational and fraught with Wednesbury's unreasonableness.
 24. The recruitment process is unconstitutional as the office is already occupied, considering that under section 34(3) of the PSC Act, an acting capacity can only be occupied for Six months, and beyond that the Acting capacity can only be of a substantive holder.
 25. That section C14(1) and (7) of the Public Service Commission Human Resource Policies and Procedures Manual of the Public Service, 2015, an officer eligible for appointment to a higher post who is called to act in an acting capacity pending advertisement of the post is eligible to 20% of his substantive basic salary as acting allowance and the acting allowance is not payable to an officer beyond six months.
 26. The petitioner states that the respondent appointed him in the substantive office on November 23, 2015 and after the expiry of the six months, the respondent ought to have either confirmed him or sent



him back to his previous post, but the respondent has nevertheless kept him in the said position for over seven years without reasons which he states continue to violate his right.

27. The petitioner states that at the time of his appointment as Acting University Librarian he possessed the qualifications for the said office as per the respondent's Scheme of Service for Non-Teaching staff and has in the span of seven years he has occupied the said office been subjected to performance appraisal and evaluations which have indicated this exemplary performance and he has received many commendations.
28. Petitioner asserts that the current recruitment advertisement is unconstitutional, an abuse of power and office, and above the powers of the respondent, as there was a first advertisement in 2019 that did not result in any appointment and that the respondent is keen on removing him from the position of University Librarian and unlawfully demote him and appoint a new person other than him.

Further affidavit by petitioner

29. The petitioner states that as a public officer, under section 2 of the [Public Officer Ethics Act](#) No 3 of 2003 by virtue of being an employee of a Public University, the provisions of the [PSC Act](#) relating to disciplinary control apply to his employment.
30. The petitioner adds that he was at all times after 31st October 2022 recognized as the substantive office holder of University Librarian as evidenced by his attendance and reference in the agendas and minutes of the respondent's Senate Meetings of November 1, 2022, November 15, 2022, November 22, 2022; January 16, 2023; 16th, 18th and January 20, 2023(pg. 1-37 of VCM-2).

Respondent's Case In Summary

(The case as per the replying affidavit of Prof. Solomon Shibairo (the Vice Chancellor of MMUST) sworn on January 18, 2023)

31. It is the respondent's case that the petitioner's employment is governed by the [Universities Act](#), the MMUST Statutes, the respondent's Human Resource Policy and Procedures Manual, and the respondent's Scheme of Service for Non-Academic staff.
32. The respondent is a chartered Public university established by the [Universities Act](#), No 42 of 2012, and a successor to the Western University College of Science and Technology established by the revoked Western University College of Science and Technology order,2002.
33. That under section 3 of the [Universities Act](#), there is established a University Council which is mandated with the responsibility of approving statutes and policies to be used alongside the Act to employ staff.
34. The respondent exercised its mandate under section 35(1)(a)(i) of the [Universities Act](#) in the employment of the petitioner which is independent from the [Public Service Commission Act](#).
35. The respondent states that the petitioner's employment is regulated through the [Universities Act](#), the University Statute, the respondent's Human Resource Policy and Procedures Manual, and the respondent's Scheme of Service for Non-Academic staff("hereinafter Governing documents") and raises an objection to the petitioner's reliance on the provisions of the [Public Service Commission Act](#).
36. The respondent states that in exercise of its power under the aforementioned governing documents, it appointed the petitioner in an acting capacity as University Librarian *vide* a letter dated November 30, 2015(SS-1) and the petitioner would be entitled to a responsibility allowance, telephone allowance and



- entertainment allowance; which allowances were provided under Clause 4.5 of the Human Resource Policy and procedures Manual which enumerated that acting allowance was payable to a staff member who was appointed to perform duties of a higher position falling within his/her next grade and which he met the minimum requirements for its appointment(SS-2).
37. The respondent states that under its Human Resource Manual, Responsibility Allowance(SS-3) is payable to various members of staff who perform additional responsibilities in addition to their normal duties being Vice-chancellor, Deputy Vice-chancellor, Principal, Deputy Principals, Campus Coordinators, Deans, Directors, University Librarian, Registrars, Finance Officers, and Departmental Heads and Equivalentents.
 38. The respondent states that further to its Revised Terms of Service for Senior Administrative Grades(SS-4), the members of staff become entitled to Responsibility allowance, Entertainment allowance, car/mileage/commuting allowance, Telephone allowance; subsistence allowance, day/trip allowance and book allowance subject to review by the Council from time to time.
 39. It is the respondent's position that the petitioner vide a memo dated June 2, 2022 complained of underpayment or non-payment of allowances since his appointment in the acting capacity as University Librarian and the respondent states that according to the University Statute and the Human Resource Manual, the respondent had responded to the petitioner's complaint on January 25, 2021; that Responsibility allowance was not payable to the petitioner since acting and responsibility allowance address the same purpose; that the telephone allowance was Kshs. 15,000/- per month; that the acting allowance would be 15% of the basic salary from 23rd November 2015 up to November 1, 2020 and that the petitioner would draw all other allowances as per the revised Terms of Service for Senior Administrative Grades, except the Responsibility allowance.
 40. The respondent states that the Finance officer was advised through the letter dated 20th January 2021 to pay the petitioner all allowances as per the revised Term of Service for Senior Administrative Grades except responsibility allowance(SS-5).
 41. The respondent states that on or about November 20, 2022 it called for qualified persons to fill the vacant position of University Librarian setting out the minimum qualification as a holder having a PhD in Library and Information Sciences, or its equivalent with at least 2 years working experience, three (3) of which as Deputy Librarian Grade 14 in an accredited university or its equivalent; registered with a professional body and possessing proficiency in Library computer (SS-6).
 42. The respondent states that the qualifications for the position of the University Librarian were revised and approved by the University's Council in 2022 which are revised from time to time in line with the University Statutes(SS-7).
 43. The respondent submits that its advertisement complied with Clause 2.14.3 of the respondent's Human Resource Policy and Procedure Manual which requires advertisement for Senior posts, Job Grade Fifteen (15) and above, and that the same be externally advertised, in an open, competitive, fair and merit-based process.
 44. The respondent further states that the respondent's statutes require the competitive recruitment and appointment of a University Librarian who is to hold office on terms determined by the respondent's Council.
 45. The respondent states that at the time of its advertisement of the position of the University Librarian, there was no substantive holder of the said officer as the petitioner's contract had expired on October 31, 2022 and the petitioner failed to apply for a request for a renewal of the acting position. The respondent states that the petitioner's petition is an afterthought meant to stifle the respondent's



operations considering the time that lapsed after the expiry of the acting contract and the time of filing the present petition.

46. The respondent states that nothing is preventing the petitioner from applying to be considered for the substantive position of University Librarian and that indeed the petitioner did tender his application for the said position(SS-8).
47. The respondent states that it acted within the provisions of its statutes and has not prevented any person from submitting their application for consideration in the open, transparent, and competitive recruitment.
48. The respondent states that the petition is bad in law, incompetent, misconceived and merely intended to stifle the respondent's right to competitively recruit a University Librarian who is a crucial University officer to enhance the effectiveness of the respondent.
49. The respondent states that the petitioner has not demonstrated a prima facie case with a high chance of success nor has he demonstrated a prima facie case with a high chance of success nor has he demonstrated the irreparable loss or injury he is likely to suffer in the event the court declines to grant the order sought.
50. The respondent states that in the interests of justice, fairness, and equity, the Petition is to be dismissed with costs.

Determination

Issues for Determination.

51. The petitioner addressed the following issues in his two sets of written submissions:-
 - i. Whether the petitioner's constitutional rights including the right to fair labour practices have been violated.
 - ii. Whether the law, policies, and procedures as well as the petitioner's rights enshrined thereto have been violated.
 - iii. Whether the petitioner's right to legitimate expectation have been violated.
 - iv. Whether the *Universities Act* is the only applicable law with regards to the recruitment of the respondent's staff.
 - v. Whether there was violation of the petitioner's constitutional rights.
52. The respondent in its submissions addressed the following issues:-
 - a. Whether the respondent's recruitment Process was lawful and proper.
 - b. Whether a legitimate expectation had crystallized.
 - c. Whether there was violation of the petitioner's constitutional rights.
 - d. Whether the petitioner is entitled to the reliefs sought.
53. The court discerned that the issues placed before it by the parties for determination under the petition are as follows:-



1. Whether the provisions of section 34(3) of the [Public Service Commission Act](#) and the Public Service Commission Human Resource Policies and Procedures Manual of the Public Service, 2015 apply to the respondent's employees
2. Whether legitimate expectation had crystallized by engaging the petitioner in an acting position beyond six months for more than 7 years .
3. Whether failing to confirm the petitioner who was employed in an acting capacity for a period of 7 years and receiving the salary of his substantive position of Deputy Librarian and other allowances of the Substantive position of University Librarian violated the petitioner's right to freedom from discrimination, right to human dignity, right to Fair labour practices and right to fair administrative action.
4. Whether the respondent's recruitment process was lawful and proper
5. Whether the petitioner is entitled to the reliefs sought.

Issue 1. Whether the provisions of section 34(3) of the [Public Service Commission Act](#) and the Public Service Commission Human Resource Policies and Procedures Manual of the Public Service, 2015 apply to the respondent's employees

petitioner's case

54. The petitioner submits that [Universities Act](#) is not the only applicable law with regards to recruitment of staff of the respondent, that other laws governing the ambit of recruitment of the respondent is the [Employment Act](#) and the [Public Service Commission Act](#) contrary to assertion by the respondent that only the [Universities Act](#), MMUST statutes , the respondent's Human Resources Policies and Procedures Manual and the respondent's Scheme of service of non- academic staff. That section 3 of the [Public Service Commission Act](#) applies to all public bodies and persons holding office in the public service, that regulations 3 of the [Public Service Commission regulations](#) 2020 define public body to include a public university.

The Respondent's Case

55. The respondent submits that the petitioner's reliance on the [Public Service Commission Act](#) which provides for an officer appointed on acting basis not to exceed 6 months was a misapprehension of the law. That the principle policy that guides the recruitment of the respondent's staff is the [Universities Act](#), MMUST statutes , the respondent's Human Resources Policies and Procedures Manual and the respondent's scheme of service of non- academic staff. That the [Universities Act](#) No 42 of 2012 and in particular section 35(1)(a)(i) establishes the university council that is mandated to employ staff. The council is also to formulate policies and did so for the respondent's Human Resources Policies and Procedures Manual in discharge of its mandate under sections 35(1)(a) of the [Universities Act](#). That the said manual finds its anchor in the [Constitution](#), [Employment Act](#) and [Labour Relations act](#).

Decision on issue 1

56. The respondent takes the position that the [PSC Act](#) and the Human resources thereunder are not applicable to them as they are under the [Universities Act](#) and their own policy documents and schemes of service. They rely on section 35 of the [Universities Act](#) of 2012 to wit:- "Governing organs of a university (1) In addition to the provisions of its Charter, a university shall establish the following organs of governance or their equivalent— (a) a Council, which shall— (i) employ staff; (ii) approve



the statutes of the University and cause them to be published in the Kenya Gazette; (iii) approve the policies of the University. “

57. It is not in dispute that the respondent is a public university.
58. Section 3 of the [Public Service Commission Act](#) provides for the Scope and application of the Act to be:- Subject to articles 155(3)(a)(nomination of Principal Secretaries), article 158(3)(Removal and resignation of the Director of Public Prosecutions), article 234(2)(a)(defines mandate of the Public Service Commission), article 234(3) (offices excluded from ambit of the Public Service Commission by State officers, diplomatic missions and related staff, Parliamentary Service Commission, Judicial Service Commission, Teachers Service Commission, National Police Service Commission and County Government offices save for appeals from the County public service)and article 252(1) (Reporting of commissions and independent offices)ofthe Constitution and section 28 of the [Kenya Defence Forces Act](#) (No 25 of 2012), this Act shall apply to all public bodies and persons holding office in the public service.” It is apparent from section 3 of the Act that public universities are not excluded from the ambit of the [Public Service Commission Act](#).
59. Section 2 defines a public body for the purposes of the Act as follows:- “a public body” includes— (a) any corporation, council, board, committee or other body which has power to act under and for purposes of any written law relating to the undertakings of a public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; (b) a corporation, the whole or a controlling majority of shares which are owned by a person or entity that is a public body by virtue of any of paragraph (a) of this definition; (c) statutory public bodies; or (d) any public body brought under the jurisdiction of the Commission by an Act of Parliament for a specified function to the extent of that function;”
60. The court then find and determines the [Public Service Commission Act](#) is applicable to the respondent a public body envisaged under the scope of the Act. The determination does not undermine in the provisions of section 35 of the [Universities Act](#) and the management prerogative of the respondent to determine terms and conditions of service of its employees.
61. On the regulations. The court notes that the Public Service Commission develops human resources policies from time to time to guide its operations. The Public Universities through their council under the [Universities Act](#) section 35 also have a right and duty to develop its policies to guide recruitment of employees.
62. The respondent referred to its Human Resource Policy and Procedures Manual(“the Policy”, which conspicuously on Page 1 indicates that the same was issued in November 2022. As to which Human Resource Policy was available at the time of appointment of the Petitioner in the acting capacity, no document was availed by either party covering that period.
63. Bearing in mind that the respondent’s policy of 2022 was not in place at the time of the petitioner’s appointment to the Acting capacity as of November 23, 2015, and no other policy was provided to indicate the timelines or terms of the Acting period, the provisions of section 34(3) of the [PSC Act](#) and the 2015 human resources policies and manual for public service should apply in this case considering that the respondent is a public body whose employees are public officers and their conduct regulated in the public service.
64. The court further finds in absence of its own Human Resources policy as at time of appointment of the petitioner to acting the [PSC regulations](#) of 2015 applied upto time of the respondent’s policy of November 23, 2022.



Issue 2 :- Whether legitimate expectation had crystallized by engaging the petitioner in an acting position beyond six months for more than 7 years .

The Petitioner 's Case and Submissions.

65. The petitioner alleges that under section 34(3) of the *PSC Act*, he has served in the position of respondent's University Librarian for seven years and has never been promoted or formally confirmed as a substantive holder of the office. He stated that having held the position of Acting University librarian for Seven years, the acting was unlawful and that the respondent violated his right to fair labour practice.
66. The petitioner argued that he had all the requirements for the substantive position and through the various internal and external performance evaluations and appraisals by the respondent, he had performed exemplary in the acting position to entitle him to be confirmed to the substantive position having held the same for seven years.
67. He states that the respondent's own Human resource policy provides that appointment to an acting position was to a person who qualified to be appointed to the substantive office and by the respondent's continued renewal of his appointment severally, he had a legitimate expectation to be confirmed as the substantive office holder. He relied on the case of *Communications Commission of Kenya & 5 others v Royal Media Services limited & 5 others* [2014]eKLR where the Supreme Court stated that Legitimate expectation could only arise on (a) an express, clear, and unambiguous promise given by a public authority; the expectation itself must be reasonable; the representation must be one which it was competent and lawful for the decision -maker to make and there cannot be a legitimate expectation against clear provisions of the law or the Constitution.
68. The petitioner contends that the failure by the respondent to confirm him to the position he held for 7 years and to which he qualifies; and has demonstrated excellent performance then Legitimate expectations crystallized.

Respondent's Case and Submissions

69. The respondent submitted that contrary to the petitioner's assertion that the respondent had aroused the petitioner's expectations through the renewal of his acting appointment and that he was fit to take over the mantle of the University Librarian, The respondent on its part submits that the petitioner's Letter of Appointment to the Acting capacity clearly stated that "the other terms and conditions remain as per your letter of appointment" to denote that the petitioner's terms of acting were of a fixed nature and no legitimate expectation could arise in a fixed -term contract. To buttress this point, the respondent relied on the decision in the Court Appeal Decision in *Transparency International Kenya v Teresa Carlo Omondi*[2023].
70. The respondent went further to state that based on the Supreme Court's finding in *Communications Commission of Kenya & 5 others v Royal Media Services limited & 5 others* (2014)eKLR; Legitimate expectation could only arise on (a) an express, clear, and unambiguous promise given by a public authority; the expectation itself must be reasonable; the representation must be one which it was competent and lawful for the decision -maker to make and there cannot be a legitimate expectation against clear provisions of the law or the Constitution.
71. The respondent submitted that the renewal of the petitioner's acting appointment severally could not amount to a legitimate expectation as the petitioner would have been required to comply with the requirement on qualifications of the substantive position as set out but the University Council



and in any event for legitimate expectation to crystallize the person who relies on that doctrine must satisfy that he or she relied on the decision maker's representation to his or her detriment, which the respondent states has not been shown through evidence by the petitioner. It relied on the case of *Anarita Karimi Njeru v Republic* [1978] eKLR.

72. The respondent submitted that the respondent's HR Policy clause 2.14.3 provided that senior posts of grade 15 and above should be advertised externally in an open, competitive, fair, and merit-based process(SS-7), and thus where there is a change in a policy any expectation founded on the earlier policy is extinguished. To buttress this point the respondent relied on the decision in *Republic v Kenya Revenue Authority ex parte proto Energy Limited* (Judicial Review Application E023 of 2021) [2022] KEHC 5 (KLR) (24 January 2022) (Judgment).

Decision on issue 2

73. The petitioner was employed by the respondent vide letter dated September 9, 2015 and as Deputy Librarian Grade XIV in the university library.
74. Shortly thereafter the substantive holder of the office died and the petitioner was appointed to the Acting Capacity on November 30, 2015, effective from November 23, 2015. The Letter of Appointment of November 30, 2015 stated that....." this is to inform you that you have been appointed as Acting University Librarian with effect from November 23, 2015. You will be entitled to the following allowances.....the other terms and conditions remain as per your letter of appointment"
75. On December 30, 2019, the respondent advertised for the Position of University Librarian (pg.219 to 224 of VCM-1) seeking persons possessing a doctorate in Library and Information sciences or its equivalent from a recognized university; with at least ten years working experience in a university Library; six years' experience as a Deputy Librarian or its equivalent in a university or an equivalent institution; is a member of recognized professional association for Librarians(KLA, LA, ALA); must have attained at least fifteen peer-reviewed publications; and provide evidence of scholarship or research in their area of specialization.
76. The petitioner stated that the said requirements were different from those in the respondent's Scheme of Service for Non-Teaching which required a University Librarian to possess a Ph.D. in Library and Information Science or its equivalent with 12 years working experience of which as Deputy Librarian Scale 14 or its equivalent or A master's degree in Library and Information Sciences or its equivalent with 15 years working experience of which as Deputy Librarian Scale 14 or its equivalent; Registered with Relevant professional body and ICT competent.
77. When the December 30, 2019 advertisement was issued the petitioner never raised an issue as to why the respondent had changed the qualifications of the position of the University Librarian. The petitioner did not raise any issue about why the qualifications of the position he hoped to be confirmed to were changed. As rightly quoted by the respondent, Justice John M Mativo in *Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte)* (Judicial Review Application E023 of 2021) [2022] KEHC 5 (KLR) (24 January 2022) (Judgment) quoted:-

"Discussing legitimate expectation, HWR Wade & CF Forsyth states thus:-

It is not enough that an expectation should exist; it must in addition be legitimate....First of all, for an expectation to be legitimate, it must be founded upon a promise or practice by the public authority that is said to be bound to fulfill the expectation..... Second, clear statutory



words, of course, override an expectation howsoever founded..... Third, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy...."

78. The change of the requirements for the position of the University Librarian reset any expectation that the petitioner had based on the previous qualifications for the position of a university Librarian. The petitioner did not at the point when the respondent advertised for the said position object to the advertisement based on the new qualifications but remained mum. If at all any expectation by the petitioner existed, the same was extinguished by the respondent's advertisement of the position of University Librarian, and no objection was raised by the Petitioner.
79. Although the position was not filled after the said advertisement, the petitioner did not question why the position was not filled and he could have received a response from the respondent why the position was not filled. The petitioner continued to occupy the office in an acting capacity because no candidate was appointed after the advertisement. If a candidate was chosen then, the petitioner would have vacated the acting post.
80. In *Republic v Kenya Revenue Authority; Proto Energy Limited (supra)*, the court held "...The requirements for the existence of such an expectation were restated in *National Director of Public Prosecutions v Philips*. These include:- (i) that there must be a representation which is "clear, unambiguous and devoid of relevant qualification," (ii) that the expectation must be reasonable in the sense that a reasonable person would act upon it, (iii) that the expectation must have been induced by the decision-maker and (iv) that it must have been lawful for the decision-maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it. If the court finds that a legitimate expectation did exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner."
81. The petitioner's appointment letter by the respondent to the acting capacity of November 30, 2015 indicated that the petitioner's engagement would be based on the term of his substantive engagement and the petitioner continued to receive his salary on his substantive position with the additional allowances on the acting capacity.
82. The respondent's Scheme of Service for Non-Teaching Staff, 2012 under clause 4 provided that "the scheme sets out the minimum qualification and or/experience required for advancement from one grade to another. It is emphasized, however, that these are the minimum requirements the fulfillment of which entitles an officer for consideration for appointment or promotion to the next grade. In addition, advancement from one grade to another will depend on (i) the existence of a vacancy in the authorized establishment; (ii) merit and ability as reflected in work performance and results; and (iii) the approval of the council."
83. The meaning of the above clause is that the respondent could also in addition to the minimum requirements required for any position provide for additional requirements in recruitment procedures apart from the minimum provisions set out in the scheme of service and any appointment was subject to the approval of the council.
84. It should be distinguished that the scheme under clause 4 outlined that "...It is emphasized, however, that these are the minimum requirements the fulfillment of which entitles an officer for consideration for appointment or promotion to the next grade..."
85. This meant that an employee was entitled to be considered for either appointment or on the other hand promotion to the next grade. The use of the word "or" is disjunctive, meaning it separates things. That is to say that one can either be appointed to a position or promoted to the next grade.



86. For the position of the University Librarian in the scheme of service, under Clause 22.11 of the scheme of Service(Pg 230 of VCM-1), an employee could advance to this position through appointment and not promotion to the next grade. The petitioner contends that having worked in the said position he ought to have been promoted to the next grade or rather he had by conduct been confirmed to the said position.
87. The petitioner in his supporting affidavit confirmed that the Registrar Administration had through the letter of May 12, 2020(Pg.277-278 of VCM-1) confirmed that the Acting capacity should have ended after six months.
88. A look at the contents of the said letter(pg 278), the respondent's Registrar Administration pointed out that the petitioner and other staff had acted for more than the stipulated period and recommended that the position should be filled.
89. For Legitimate expectation to arise, there must have been a clear and ambiguous intention on the part of the public authority, the respondent herein, to confirm the petitioner to the said position. This intention was not manifested by the Registrar of Administration that the petitioner was to be confirmed to the position of University Librarian, but rather, he directed that the position be filled as the same was vacant and not occupied by the petitioner as he alleges.
90. The petitioner alleges that in November 2020, the respondent made an internal advertisement (pg 279-280 of VCM-1) that was to lead to promotions and while his juniors were shortlisted and promoted a grade higher, he states that he made his application for the Position of University Librarian(XV) and yet he was not shortlisted and that he appealed and is yet to receive feedback. There was proof of an application made by the Petitioner or any appeal addressed to the respondent.
91. A close look at the said internal advertisement, the respondent had not advertised for the position of the University Librarian which falls on Grade XV as rightly quoted by the petitioner. The respondent had not advertised for any position internally that falls within Grade XV which as per its Human Resource Manual Clause 2.14.4 is to be advertised externally. The petitioner could not have been shortlisted or promoted to a position that had not been advertised. The petitioner had if at all he applied for the position of University Librarian done so based on his own volition without any call for the filing of the said post.
92. When the petitioner received the letter of April 25, 2022(pg. 281-282 of VCM-1) to act in an Acting Capacity for a period of six months from May 1, 2022 to 31st October 2022, subject to the appointment of a substantive office holder, the letter stipulated that if the petitioner had any issues, he could seek for assistance. The petitioner did not raise any objection to his further appointment to the acting capacity. The New appointment letter from the respondent contained a contract term of six months. The petitioner accepted to act as so and there was no express conduct from the respondent that the petitioner was to be confirmed to the new position.
93. At this juncture, there was no legitimate expectation that the petitioner was to be confirmed by the respondent into the substantive position. The performance evaluations and performance appraisals conducted by the respondent or externally were carried out as part of the respondent's normal operations and there was no indication that the performance appraisals were geared towards confirming the petitioner to the position of University Librarian. The recognition by the respondent that the petitioner performed well in his work did not in itself show that the petitioner had been confirmed as the university Librarian but rather that he performed his work well. The performance appraisals were conducted on all employees of the respondent and it could not be said that only the petitioner was appraised to confirm him to the substantive position of the University Librarian.



94. From the onset, the respondent's appointment of the petitioner was on an acting basis and all other terms of the petitioner were to remain those of his substantive position of Deputy Librarian.
95. When the contract period of the acting appointment expired on October 31, 2022; the petitioner himself stated that he applied for Renewal of "Acting Appointment" through his letter of November 2, 2022(pg 283 of VCM-1). The respondent indicates that he never received the said letter. The petitioner did not provide proof that the respondent received the said letter. it is clear from the request for renewal letter from the petitioner that he was aware that he was in an acting capacity throughout the said engagement.
96. In the upshot, the court holds that no legitimate expectation had crystalized that the petitioner was to be confirmed to the position of University Librarian which expressly requires competitive recruitment under the respondent's Scheme of service for non-teaching staff.

Issue(3) Whether failing to confirm the petitioner who was employed in an acting capacity for a period of 7 years and receiving the salary of his substantive position of Deputy Librarian and other allowances of the substantive position of University Librarian violated the petitioner's right to freedom from discrimination, right to human dignity, right to Fair labour practices and right to fair administrative action.

97. The petitioner argues that the respondent having engaged him in an acting capacity for a period of seven years; was entitled to the salary payable to the University Librarian. The petitioner argues that the respondent violated his right to fair labour practices by failing to upgrade his remuneration to make it commensurate with the functions, risks, and responsibilities attendant to the office of the University Librarian. That to date the respondent continues to pay the petitioner the salary for his position of Deputy Librarian.
98. The petitioner argues that the respondent has failed to uphold the values of good governance under article 10, by failing to pay the petitioner his acting allowance and other allowances for the acting position and by changing the requirements for the position of the University Librarian and failing to promote him when his juniors were promoted, the respondent has under article 27 discriminated him.
99. The petitioner alleges that the respondent had discriminated against him by failing to pay him the benefits enjoyed by his colleagues in the level of group 15 and to some extent those who were promoted from the lower job ranks.
100. He argues that by failing to pay him the salary of the university Librarian, the petitioner's right to inherent dignity was violated as it denied him a dignified life. The petitioner argues that by failing to appoint the petitioner to the substantive office of the University Librarian after the lapse of Six months, the respondent enjoyed free labour from the petitioner on a low salary and this violated the petitioner's right to fair labour relations, a right to equal remuneration for work of equal value as per section 5(5) of the *Employment Act*. The petitioner to buttress his claim to be confirmed has relied on the decision in *Oyatsi V Judicial Service Commission* (Petition E011 of 2021)(2022)KEELRC(KLR)(10 March 2022) (Judgement) and *Silas Kaumbuthu Mbutura v Meru Central Dairy Co-operative Union Limited*;
101. The petitioner stated that the respondent discriminated against him by failing to promote him even after he applied for the job when other junior staff were promoted.
102. The petitioner states that by changing the requirements for the position of University Librarian they have discriminated against him as the change was geared to lock him out of the appointment and relied on the finding in *Justina Mutitu Nyaga v Kenya Civil Aviation Authority*[2017]eKLR.



103. The respondent states that the right to fair labour practices under article 41 encompasses constitutional, statutory, and workplace conventions and usages to give effect to fairness at work and relied on *Kenya County Government Workers' Union V County Government of Nyeri & another* [2015] eKLR.
104. The respondent submits that the acting capacity of the petitioner had lapsed before the petitioner filed the instant petition. That the petitioner was entitled to an acting allowance and the same had been paid to him together with other allowances.
105. The respondent submits that it called for applications to fill the position of the University Librarian as is mandated by its statutes and the petitioner was not prevented from applying for the same position. The respondent argues that the petitioner has not shown how his constitutional rights were violated and relies on the decisions of *Mumo Matemu V Trusted Society Of Human Rights Alliance* Civil Appeal 290 of 2012 [2013] eKLR and *Anarita Karimi Njeru V Attorney General* [1979]KLR 154

Decision on issue 3

106. There was no evidence of existence of Human Resource policy by the respondent covering the period of 2015 to October 2022 and the provisions of the section 34(3) *PSC Act* that “An officer may be appointed in an acting capacity for a period of at least thirty days but not exceeding a period of six months” apply.
107. The period from when the petitioner was engaged in an acting capacity is from November 23, 2015 to April 25, 2022 and from May 1, 2022 to October 31, 2022 culminating in 6 years 11 months. This was beyond the six months contemplated by the PSC Act. There was no provision for what would happen in that case.
108. The respondent first advertised for the substantive position on December 30, 2019, but the position was not filled. There was no indication that the petitioner applied for the position. The position was however never filled and no reason was given as to why, but the petitioner at the time did not raise any issue relating to the advertisement. By conduct, the petitioner continued to occupy the acting capacity which was not filled.
109. The petitioner was on April 25, 2022 (pg. 281-282 of VCM-1) appointed to service a further term in an Acting Capacity for a period of six months from May 1, 2022 to October 31, 2022, subject to the appointment of a substantive office holder. The petitioner did not raise any objection to this further appointment to the acting capacity. The contract term expired and the petitioner alleges that he sought for extension of the acting capacity but the same was never responded to.
110. The parties relied on various authorities relating to the acting beyond the period of six months. It is good to note that in *Susan Khakasa Oyatsi v Judicial Service Commission* [2022] eKLR and *Edah Cheronu Maiywa v University of Nairobi Enterprises and Services Limited* (2020)eKLR; the internal Human Resources Policies of the respondents therein provided for the confirmation of employees engaged on acting capacity after eighteen months from the lapse of the period to act and allowed for the internal appointment of an employee engaged on acting basis beyond the acting period into the substantive position respectively. This is not the case in the instant case, which is based on section 34(3) of the *PSC Act* and which is silent on what was to happen if the six-month lapses. Indeed section 34(5) of the *PSC Act* states: “ An acting appointment under subsection (4) shall— (a) be in favour of a public officer who is duly qualified and competent to perform the duty; and (b) not undermine the expeditious appointment or deployment of a competent person to the public office concerned.”(emphasis given)



111. The petitioner had been employed on September 9, 2015 (pg 1 of VCM-1-2) as a Deputy Librarian and he was to be on probation for a period of six months. He was to report to duty on November 2, 2015. Before he could even complete his probation period as a Deputy Librarian, he was appointed acting to the position of University Librarian, a position he has served for a period of 6 years and 11 months. The only position that the petitioner has served in the respondent's employ is in an Acting Capacity as a University Librarian, he had not performed the duties of his substantive office of a Deputy Librarian for more than a month when he was appointed into the substantive position.
112. There were no reasons that had been provided as to why the substantive office of the University Librarian had not been filled. The petitioner had performed exemplary by the respondent's performance appraisals in a position that he took over when he was newly employed by the respondent.
113. As held by the court in *Susan Khakasa Oyatsi V Judicial Service Commission* [2022] eKLR where the court held: "In *Silas Kaumbuthu Mbutura v Meru Central Dairy Co-operative Union Limited* [2015] eKLR – this court found:-"The court finds that the claimant was subjected to unfair Labour practice by constantly being held on acting capacity in the post of the Production supervisor. The claimant's claim to substantive appointment is valid and for the unfair Labour Practice in contravention of article 41 of the Constitution, the court finds that a compensation of Kshs 300,000.00 under article 21(3)(c) of the *Constitution* will meet the ends of justice. While making that finding, the court finds that for over 18 years of service, the claimant was required by the respondent to serve in an acting capacity for unexplained reasons of failure to be appointed substantively as a production supervisor or any other suitable position in the respondent's establishment. Such conduct on the part of the respondent, in the opinion of the court was a gross violation of the claimant's entitlement to fair labour practices as provided for in article 41 of the Constitution."
124. The aforesaid cases mimic, the predicament the petitioner has been put in by the respondent for a period of more than six years up to the time of filing this suit and the situation appertains to date. The respondent has by its acts of commission and omission grossly violated the petitioner's right to fair labour practices ordained by article 41(1) of the *Constitution* and has exacerbated the situation by denying the petitioner her right to fair remuneration payable to a holder of the position of Director of Finance of the Judiciary and in violation of article 41(2) (a) of the *Constitution* and in violation of its own judiciary establishment for the position of Director Finance, and section B 20 (iii) and (iv) of the Human Resource Policies and Procedures Manual..."
114. Rightly so, in the present case, the petitioner had only worked in his substantive office for a period from November 2, 2015 to November 30, 2015, when he was appointed to act in the position of the University Librarian. He worked in this position performing all duties attendant to the said position, yet his pay remained that of his substantive position.
115. The petitioner performed the duties of the university librarian in satisfaction of the respondent. By the respondent's omission to fill up the position of the University Librarian, the petitioner continued to occupy the said position receiving less remuneration when he was performing the duties of the said office from the word go for a period of six years 11 months until his contract to so act was terminated.
116. I hold that due to the respondent's omission to fill the position of the University Librarian for a period of six years and 11 months, the petitioner's right to fair labour practices and fair remuneration was violated.
117. On the issue of discrimination, the petitioner alleges that in November 2020, the respondent made an internal advertisement (pg 279-280 of VCM-1) that was to lead to promotions and while his juniors



were shortlisted and promoted a grade higher, he states that he made his application for the position of University Librarian(XV) and yet he was not shortlisted and that he appealed and is yet to receive feedback. There was no proof of an application made by the petitioner or any appeal addressed to the respondent. A close look at the said internal advertisement, the respondent had not advertised for the position of the University Librarian which falls on Grade XV as rightly quoted by the petitioner.

118. The respondent had not advertised for any position internally that falls within Grade XV which as per its Human Resource Manual Clause 2.14.4 is to be advertised externally. The petitioner could not have been shortlisted or promoted to a position that had not been advertised. The petitioner had if at all applied for the position of University Librarian done so based on his own volition without any call for the filing of the said post.
119. The petitioner claimed that his junior employees were promoted yet he was left out. The court in [*Edah Cherono Maiywa v University of Nairobi Enterprises and Services Limited*](#) [2020] eKLR held that:-
- “ 47. I agree with the meaning of the word discrimination adopted by the European Court of Human Rights in the case of *Willis v the United Kingdom* 36042/97, ECHR 2002 – IV cited by the respondent, where the court observed that discrimination and unfair labour practice means treating differently, without any objective and reasonable justification, persons in similar situations. In the instant case, I find that the claimant has proved on a balance of probability that she was treated differently from the other colleagues who were appointed in acting capacity and thereafter were given substantive appointment in their respective positions without any delay, based on the same HR instruments approved by the respondent’s Board, SCAC and SRC in 2017 and before.”
120. The petitioner did not produce evidence that any of his colleagues at the same level as him were promoted or confirmed to any position in a higher position. He however claimed that he had applied for a promotion and was denied. There was no proof that he had applied for any promotion nor any evidence that he was treated differently from any other employee.
121. In the upshot the court upholds the decision in [*Silas Kaumbuthu Mbutura v Meru Central Dairy Co-operative Union Limited*](#) [2015] eKLR upheld in [*Susan Khakasa Oyatsi v Judicial Service Commission*](#) [2022] eKLR to find the Petitioner’s right to fair labour practice through over 6 years in acting position was violated to wit:- ‘The court finds that the claimant was subjected to unfair labour practice by constantly being held on acting capacity in the post of the production supervisor. The claimant’s claim to substantive appointment is valid and for the unfair labour practice in contravention of article 41 of the Constitution, the court finds that a compensation of Kshs 300, 000.00 under article 21(3)(e) of the Constitution will meet the ends of justice. While making that finding, the court finds that for over 18 years of service the claimant was required by the respondent to serve in an acting capacity for unexplained reasons of failure to be appointed substantively as a production supervisor or any other suitable position in the respondent’s establishment. Such conduct on the part of the respondent, in the opinion of the court, was a gross violation of the claimant’s entitlement to fair labour practices as provided for in article 41 of the Constitution.’”
122. The petitioner applied for the acting position to participate in the recruitment process.- The petitioner is still in employment holding his substantive post. The petitioner is awarded damages for the unfair labour practice of holding acting position for approximately 7 years for Kshs 500,000/-.



Issue 4. Whether the respondent's recruitment process was lawful and proper

123. It was not in dispute the position of University Librarian Grade XV of the respondent was vacant. It was also not in dispute the last acting appointment contract of the petitioner of May 2022 had expired as demonstrated in his letter for renewal of November 2, 2022 which the court held had no evidence of having been received by the respondent. It is envisaged under section 34 (5) of the Public Service Commission Act that recruitment of a substantive holder of the office would be done in any acting position and that the acting would not curtail the recruitment to wit:- "34(5) An acting appointment under subsection (4) shall— (a) be in favour of a public officer who is duly qualified and competent to perform the duty; and (b) not undermine the expeditious appointment or deployment of a competent person to the public office concerned."
124. Clause 2.14.3 of the respondent's Human Resources Policies and Procedure Manual required for advertisements for senior posts job grade fifteen(15) and above be done externally in open , competitive fair and merit based process which led to the impugned advert for the University Librarian (Grade XV) (SS2).
125. The petitioner's issue with the position as advertised was the change of the requirements from those held by the previous office holder of the position. According to the petitioner, these terms were changed in December 2019 and were different from the respondent's scheme of service for non-teaching staff.
126. The non- teaching scheme of service gave the requirements for appointment of University Librarian as follows:-PhD in library and information sciences or its equivalent with 12 years working experience 3 of which as a deputy librarian scale 14 or its equivalentA masters degree in library and information sciences or its equivalent with 15 years working experience 3 of which as a deputy librarian scale 14 or its equivalentRegistered with relevant professional bodyICT competent. (Page 231 of the petitioner's bundle of documents)
127. The court observed that the advert excluded the Masters qualification. The petitioner had not obtained his PhD but had done his course work.
128. I looked into the respondent's Non-Teaching staff scheme of service highlighted above at page 231 of the petitioner's documents and found that the academic and professional requirements were not in the alternative contrary to what is stated in paragraph 28 of the petition. There is no use of word 'or' in the requirements.
129. The court finds that the competitive recruitment of the University Librarian was consistent with the provisions of article section 10(2) of the Constitution which provides for national values and principles of good governance to wit :-"(c) good governance, integrity, transparency and accountability;" and section 34(5) of the PSC Act that acting position would not curtail the expeditious appointment or deployment of a competent person to the public office concerned. The court further finds that the respondent had the mandate to recruit the substantive holder of the position and the petitioner also applied to be considered.
130. In the upshot and in answer to the issue 4 the court holds the recruitment process was lawful.

Issue 5. Whether the petitioner is entitled to the reliefs sought.

131. The petitioner sought the following reliefs:



- a. A declaration that keeping the petitioner in an acting capacity for over 7 years was unlawful and violated the petitioner's right to fair labour practice, right to equal remuneration for equal work, or work of equal value.
 - b. A declaration that the refusal by the respondent to pay the petitioner the full remuneration for University Librarian (Job Grade XV), not promoting him when he was due and promoting his colleagues instead and advertisement of the position of the University Librarian in two occasions amounted to a violation of the petitioner's rights including violation of his right to freedom from discrimination, servitude and right to human dignity and self-worth.
 - c. A declaration that causing the petitioner to serve in the office of University Librarian beyond the lawful acting period amounted to constructive confirmation of the Petitioner as a substantive holder of that office and that the petitioner is deemed to have been lawfully appointed to the position of University Librarian of the respondent upon expiry of six months from the date of appointment in acting capacity on November 23, 2015.
 - d. Declaration that the respondent violated the petitioner's rights under articles 27,28, 30,41, and 47 of the *Constitution of Kenya*, 2010 as set out in this petition.
 - e. An order of certiorari to bring into this court and quash the decision to externally advertise for the position of the University Librarian in the Daily Nation Newspaper of November 25, 2022 and found on the respondent's website.
 - f. An order for compensation of special damages amounting to Kshs 12,375,877.76/-as at the date of filing the petition as more particularized under paragraph 40 above which sum shall keep increasing until full payment.
 - g. An order for general and aggravated damages for discrimination, violation of the petitioner's right to human dignity and self-worth, violation of the petitioner's right to access information, fair labour practices, fair administrative action, and freedom from servitude.
 - h. Conservatory order do issue restraining the respondent from taking any action against the applicant, victimizing him on account of filing this petition, or interfering with the position of University Librarian in an unlawful manner.
 - i. Conservatory order do issue staying and or stopping the respondent's recruitment exercise for the position of the university librarian. In particular, the respondent, its agents, and or servants BE Restrained from conducting interviews and or appointing anybody else other than the applicant as a substantive holder of the said position.
 - j. That costs of this petition be borne by the respondent.
 - k. Interest at court rates on the backdated underpayments from the date they fell due to the date of payment in full.
 - l. Any other or further relief that this honourable court may deem appropriate to meet the ends of justice.
132. As regards constitutional violations I have already held that the prolonged acting period of November 2015 to October 2022 approximately 7 years by the petitioner in position of the respondent's University Librarian amounted to unfair labour practice and awarded as compensation for the violation Kshs 500,000/-. I did not find evidence of discrimination. I therefore make a declaration that



- keeping the petitioner in an acting capacity of 7 years was unlawful and violated the petitioner's right to fair labour practice under article 41 of the Constitution. I award Kshs. 500,000/- for the violation.
133. I found the recruitment process was lawful.
 134. Having awarded the compensation for the unfair labour practice I proceed to look into the issue of underpayment of acting allowance.
 135. The respondent produced its Human Resource Policy and Procedure Manual 2022. The acting period was before the said document.
 136. The Human Resource Policies and Procedures Manual for Public Service, 2015 (Public Service HR Manual) formulated by the Public Service Commission provides in part in its preamble that “..provides guidelines in the management and development of human resource capacity towards the achievement of various national goals and objectives.”
 137. The court finds that the Public Service Human Resources manual incorporates provisions of the Constitution, Labour Laws, and other legislation that govern various aspects of industrial relations in the Public service. The manual is also anchored on other policies and guidelines governing the management of the Public Service. It provides the basis for human resource policies and regulations in the wider Public service and “.....the regulations should however, be used as the minimum norms and standard for human resource practice in the Public Service...”
 138. The import of the above is that the Public Service HR Manual is to be used as the source of the minimum terms where a Public Entity wishes to formulate its own Human Resource Manual. It means that a public entity must formulate its human resource policies either at par with the Public Service HR Manual or on higher terms, but an entity cannot go below the provisions of the terms in the Public Service HR Manual.

Decision on Acting Allowance

139. Regulation C.14(1) of the Public Service HR Manual provides that “ when an officer is eligible for appointment to a higher post and is called to act in that post a pending advertisement of the post, he is eligible for payment of acting allowance at the rate of twenty percent (20%) of his substantive basic salary. Acting allowance will not be payable to an officer for more than six (6) months”
140. Regulation C 14(7) provides that “an officer who is appointed to act in a higher post shall be eligible for the duration of his acting appointment for the traveling privileges, accommodation allowance, subsistence allowance or an extraneous allowance and entertainment allowance applicable. However, the officer shall not qualify for house allowance or other remunerative allowances applicable to the higher post.”
141. Having seen that the provisions of the Public Service HR Manual are only a minimum requirement in formulating Human Resource policies by different public bodies, the minimum is that the acting allowance should be at 20% of an employee's substantive salary and it can be higher than 20%, but it cannot be lower. Other allowances payable to the employee in an acting capacity are then to be formulated by a specific entity as the case may be.
142. A reading of regulation C 14(4) points to “All recommendations for acting recommendations in Job Group “Q” shall.....” This statement indicates that the Public Service HR Manual applies to employees employed by the Public Service Commission where the said Job Group “Q” is available.



143. The respondent does not have a Job Group “Q” on its part and it only means that each public body must tailor the Public Service HR Manual to fit its working environment with the Public Service HR Manual as a guiding manual.
144. It therefore goes without saying that where a Public body has formulated its Human Resource Policies and Procedures, the said procedures are applicable in place of the Public Service HR Manual as long as the minimum provisions of the Public Service HR Manual are met.
145. The respondent referred to Clause 4.5.2 of its Human Resource Policy and Procedures Manual (“Policy”) which provides that acting allowance is payable at the rate of twenty percent. This is in tandem with the Public Service HR Manual. However the Human Resource Policy and Procedures Manual provided indicated on page 1 that the same was issued in November 2022. As to which Human Resource Policy was available at the time of appointment of the petitioner in the acting capacity, none was availed by either party covering that period. Therefore the court can only fall back to the Public Service HR Manual and the *Public Service Commission Act*.
146. The petitioner in his petition states that he was never paid an acting allowance at the rate of 20% of his substantive salary but he was rather paid a responsibility allowance of Ksh. 30,000; Telephone allowance of Kshs. 10,000 and an entertainment allowance of 20,000.00.
147. The respondent referred to a letter dated January 20, 2021(SS-5) in response to the petitioner’s assertion on non-payment of acting allowance wherein; the respondent was responding to a memo that had allegedly been sent by the Petitioner raising questions on underpayment of telephone allowance and acting allowance(This letter was not availed). The respondent confirmed that the petitioner was entitled to acting allowance and went ahead to state that the same was payable at the rate of 15% from November 23, 2015 up to November 1, 2021 and at the rate of 20% from November 2, 2021. The respondent in the same letter indicated that it had domesticated the Public Service HR Manual which allowed the 20% acting allowance. As to which date the respondent adopted the Public Service HR Manual it was not indicated. But as discussed above, the Human Resource policy of any Public body could not provide for benefits below those under the Public Service HR Manual. The court holds that the 15% acting allowance was an underpayment.
148. At the time of the appointment of the petitioner to the Acting capacity the Public Service HR Manual was in place and the applicable acting allowance was 20%. The respondent’s basis for payment of the acting allowance at 15% was on the annexure SS-3 titled in hand “MMUST HR Policies and procedure” which set out the Acting allowance at 15% of one’s salary.
149. The respondent stated that the responsibility allowance (ss3)was synonymous with the acting allowance and the responsibility allowance was not payable to the petitioner as he was not the substantive holder of the Office of University Librarian and the petitioner could only get the acting allowance. the respondent outlined in the said letter that the acting allowance would be calculated at the rate of 15% which as established above was wrong.
150. The respondent went ahead and tabulated the acting allowance at the rate of 15% from December 2015 to December 2020. The responsibility allowance I agree with the respondent was synonymous with the acting allowance and the respondent replaced it with the acting allowance term. The petitioner was paid the difference of sums underpaid at the rate of 15% and the other sums which were paid at the rate of 15% which were greater than the responsibility allowance were deducted to align to the 15% rate. The acting allowance payable was to be based on the substantive salary payable to the petitioner at the rate of 20% at the point in time and the same should be calculated as such for the period the acting allowance was paid at 15% i.e. December 2015 to December 2020.



151. The other allowances that were payable to the petitioner were acknowledged in the letter SS-5 by the respondent and the respondent who produced an extract of a document (SS-3) titled in hand “MMUST HR Policies and procedure” which set out the allowances payable to the petitioner in the acting Capacity as Entertainment Allowance(20,000); Telephone allowance(30,000); Telephoneoffice-allowance(15,000); Book allowance(10,000) Leave allowance-non-accountable(20,000) and Acting allowance-(15%) of one’s salary.
152. These allowances among others such as Car/Mileage /commuting allowance; Subsistence allowance, Day Trip Allowance, and entitlements) were also provided for in the Revised Terms of Service for Senior Administrative Grades(Pg. 262 -264 of VCM-1).
153. The respondent set out the allowances that were payable to the petitioner and where there was an underpayment or non-payment,(being telephone allowance, annual leave, and book allowance), and the finance officer was advised to pay the petitioner.
154. Conspicuously enough, the petitioner in his further affidavit of February 9, 2023failed to respond to the respondent’s assertion whether or not he had indeed been paid an acting allowance and other allowances payable during the acting period. The petitioner instead alleged that all allowances payable to him had been stopped yet as at the point of October 31, 2022, the letter of appointment of April 25, 2022(pg. 281-282 of VCM-1) for a six-month acting capacity had lapsed and the petitioner could not be entitled to receive the Acting allowances. In his submissions dated July 24, 2023, (para.19) the petitioner alleged that he had discovered in June 2020 that he was being underpaid his acting allowances. He did not state the outcome of the said discovery or whether he had been paid, as it was confirmed by the respondent.
155. I find and hold that the acting allowance at 15% had been paid to the petitioner and what is in issue is that from December 2015 to December 2020, the acting allowance paid was at 15% instead of the rate of 20% as per the Public Service HR Manual which sets the minimum guidelines. This position was also confirmed by the respondent’s Registrar Administration in his letter of 12th May 2020(pg. 277 of VCM-1) that the acting allowance was payable at the rate of 20%.
156. I do award the petitioner the balance of 5% of the acting allowance for the period December 2015 to December 2020 having been paid at rate of 15% as per letter dated January 25, 2021

Conclusion and Disposition

157. I enter judgment for the petitioner against the respondent in the following terms:-
 - a. A declaration that keeping the petitioner in an acting capacity as the respondent’s University Librarian for 7 years violated the petitioner’s right to fair labour practice under article 41 of the Constitution .
 - b. I award compensation for the sum of Kshs. 500,000/- for the unfair labour practice.
 - c. I award the balance of 5% acting allowance for the period December 2015 to December 2020. The parties to file in court concurrently the tabulation of 5% basic salary of the University Librarian position over that period within 21 days with a view recording the payable amount in court at the next mention date of January 23, 2024.
 - d. The payments as ordered in this judgment to be effected by the respondent within 90 days in default interest to be payable thereon at court rates from the date of this judgment till full payment.



e. The respondent to pay cost of the petition to the petitioner.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 23RD DAY OF NOVEMBER 2023

JEMIMAH KELI

JUDGE

In The Presence of:

C/A: Lucy Macheso

For Petitioner: Wambui h/b Kanjama SC

For Respondent: Nyambura h/b Ochola

