



REPUBLIC OF KENYA



KENYA LAW
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**Oyatsi v Judicial Service Commission (Petition E111 of 2021)
[2022] KEELRC 3 (KLR) (10 March 2022) (Judgment)**

Susan Khakasa Oyatsi v Judicial Service Commission [2022] eKLR

Neutral citation: [2022] KEELRC 3 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E111 OF 2021

MN NDUMA, J

MARCH 10, 2022

**IN THE MATTER ALLEGED CONTRAVENTION OF ARTICLES 3, 10, 20,
21(1), 22, 23, 25(B), 27, 28, 30, 35, 41, 47, 162(2), 172(1) (B) (II), (C) & (2) (A) &
(B), 232 AND 258(1) AND 2(C) OF THE CONSTITUTION OF KENYA, 2010**

AND

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

BETWEEN

SUSAN KHAKASA OYATSI PETITIONER

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

Human resource policies and manuals formed part of one's employment contract.

Reported by Ribia John

***Employment Law** – employment contract – elements – human resource policies and manuals - whether human resource policies and manuals formed part of one's employment contract – whether the Judiciary Human Resource Policies and Procedures Manual was an employment policy or labour practice - Employment Act, 2007, section 5(7)(c).*

***Employment Law** – employment contracts – human resource polices and manuals – conflict between human resource policies and an Act of Parliament that guided the labour practices of a public institution – judiciary – where an employee was employed in acting capacity for more than six months in contravention of the Judiciary Human Resource Policies and Procedures Manual – where the law allowed for employees to work in acting capacity – legitimate expectation to be confirmed - whether an employee employed in an acting capacity for a long period, against the provisions of the employer's human resource policy, had a legitimate expectation to be confirmed for the position they were acting in - whether by not confirming the petitioner to the position of director finance*



upon acting for a period of twelve 12 months according to the provisions of the Judiciary Human Resource Policies and Procedures Manual was ultra vires to the provisions of paragraph 9(2) of part III of the Third Schedule to the Judicial Service Act which allowed for the continued employment of a public officer on temporary terms – Judicial Service Act, Third Schedule, Part iii, paragraph 9(2); Constitution of Kenya, 2010, articles 172(1)(ii) and (2)(a) and (b); Judiciary Human Resource Policies and Manuals, section B20 (iii) and (iv).

Constitutional Law – *fundamental rights and freedoms - freedom from discrimination, right to human dignity, right to fair labour practices, right to fair administrative action, and right to access to information – where an employee was employed in an acting capacity for a period of six years without being given reasons - whether failing to confirm an employee who was employed in acting capacity for a period of six years and receiving half pay while the employee’s colleagues were being confirmed was a violation of the employee’s freedom from discrimination, right to human dignity, fair labour practices and the right to fair administrative action - whether the act of an employer to keep an employee in acting capacity for a period of six years without according the employee reasons as to why they had not been appointed substantively was a violation of the employee’s right to access of information – Constitution of Kenya, 2010, articles 27, 28, 35, 41 and 47.*

Brief facts

In 2015, the petitioner was appointed as Director of Finance in an acting capacity pending the filling of the position with a substantive office holder. The position of Director of Finance fell vacant in 2013 and had never been formally filled with a substantive holder. The petitioner deposed that the delay in filling the position was unlawful, and had pre-disposed the respondent to unfair labour practices and unfair administrative actions and a violation of the Judiciary Human Resource Policies and Manuals. The petitioner contended that on two occasions in the years 2015 and 2019, the respondent interviewed candidates with a view to fill up the position of Director of Finance and the petitioner was one of the candidates interviewed to fill the substantive position on both occasions. The petitioner further contended that she had asked many times for information relating to her performance, scores, and rankings during the interviews, but the respondent had failed and/or neglected to provide the same to the petitioner.

Aggrieved by being employed in an acting capacity while being denied the full pay of her position, the petitioner filed the instant petition in which she sought for a declaration that keeping the petitioner in an acting capacity for over 6 years was unlawful and violated the petitioner’s right to fair labour practices and an order for compensation of special damages amounting to Kshs 22,862,848.00 to remedy the underpayment she incurred in acting capacity amongst others.

The respondent contended that the Judicial Service Act allowed for the judiciary to hire employees in an acting capacity and as such sought for the petition to be dismissed.

Issues

- i. Whether human resource policies and manuals formed part of one’s employment contract.
- ii. Whether the Judiciary Human Resource Policies and Procedures Manual was an employment policy or labour practice recognized under section 5(7)(c) of the Employment Act, 2007.
- iii. Whether an employee employed in an acting capacity for a long period, against the provisions of the employer’s human resource policy, had a legitimate expectation to be confirmed for the position they were acting in.
- iv. Whether confirming the petitioner to the position of Director Finance upon acting for a period of twelve 12 months according to the provisions of the Judiciary Human Resource Policies and Procedures Manual was *ultra vires* to the provisions of paragraph 9(2) of part III of the Third Schedule to the Judicial Service Act which allowed for the continued employment of a public officer on temporary terms.
- v. Whether failing to confirm an employee who was employed in an acting capacity for a period of six years and receiving half pay while the employee’s colleagues were being confirmed was a violation of



- the employee's freedom from discrimination, right to human dignity, right to fair labour practices and the right to fair administrative action.
- vi. Whether the act of an employer of having an employee serve in an acting capacity for a period of six years without according reasons to the employee as to why they had not been appointed substantively was a violation of the employee's right to access to information.

Held

1. The disadvantage that the petitioner suffered by being placed by the respondent in an acting capacity while actually performing the substantive job was the difference between the salary attributable to the position of director finance, in the sum of Kshs 733,100 per month and the salary of assistant director finance, which the petitioner had received for a period of six years and four months as at the time the suit was filed in the sum of Kshs 297,110 per month. The petitioner had received an annual overall allowance of Kshs 23,000 instead of that attributable to the substantive post of director in the sum of Kshs 30,000 which amount is less by Kshs 7,000 per year.
2. The provisions of section B 20(ii) and (iii) of the Judiciary Human Resource Policies and Procedures Manual were couched in mandatory terms by using the word must. The Judiciary Human Resource Policies and Procedures Manual was an employment policy or labour practice recognized under section 5(7)(c) of the Employment Act, 2007. The manual was an internal mandatory guide, with statutory underpinnings and was a kingpin of good corporate governance in any organization worth its salt. The respondent was bound by its own human resource policies and procedures manual, the same way, the employees were bound to abide by its terms in their daily work disposition and behavior. Employees of the judiciary who fell foul of the provisions of the human resource policies and procedure manuals would be subjected to disciplinary action in terms of the manual. The respondent could not be heard to say that they were at liberty to cherry-pick what to adhere to and what not to respect in the manual. The provisions of the Judiciary Human Resource Policies and Procedures Manual were impliedly incorporated in the contractual terms and conditions of service of all judiciary staff, including the petitioner.
3. The development of the Judiciary Human Resource Policies and Procedures Manual as the primary document to guide the recruitment, retention and career development of Judiciary staff was done by the respondent in the discharge of its mandate under article 172(1)(ii) and (2)(a) and (b) of . The human resource manual found its anchor in the Employment Act, but was also well-founded in the Constitution and was an authoritative policy and procedure document for proper management of human resource in the Judiciary.
4. Implementation of section B 20 (iii) and (iv) of the Judiciary Human Resource Policies and Procedures Manual to confirm the petitioner to the position of director of finance upon acting for a period of twelve (12) months and an extension for a further maxim period of six (6) months would not be *ultra vires* the Judicial Service Commission Act.
5. By dint of section B20(iii) and (iv) of the Judiciary Human Resource Policies and Procedures Manual, the petitioner had a legitimate expectation that she would be confirmed to the position of director of finance, upon expiry of 18 months from the date of the acting appointment. The respondent failed to honour that legitimate expectation of the petitioner.
6. Paragraph 9(2) of part III of the Third Schedule to the which allowed for the continued employment of a public officer on temporary terms supported the contention by the petitioner that a vacancy need not be advertised where the Commission was satisfied that the vacancy should be filled by the appointment or re-appointment of a public officer. To disregard that part of paragraph 9(2) and rely on it to temporarily employ the petitioner as Director of Finance, while denying her remuneration duly earned, amounted to an unfair labour practice. The petitioner fit the bill perfectly in that the Commission had chosen for a period of more than six (6) years to appoint and re-appoint the petitioner as director of finance in an acting capacity.



7. The respondent's appraisal and evaluation of the performance of the petitioner confirmed that she was duly qualified and competent to hold that position for that long time and her performance from the respondent's own documents had been exemplary. The respondent having enjoyed the exemplary service from the petitioner discharging the full mandate of director finance was bound to pay commensurate remuneration provided the petitioner continued to hold and serve the judiciary in that position. The respondent had by its acts of commission and omission grossly violated the petitioner's right to fair labour practices ordained by article 41(1) of and had 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 and in violation of its own judiciary establishment for the position of Director Finance, and section B20(iii) and (iv) of the Judiciary Human Resource Policies and Procedures Manual.
8. The respondent had within the period it had kept the petitioner in the capacity of acting director finance, confirmed to substantive positions male colleagues of the petitioner who were horizontally of equal status as the petitioner but had acted for shorter periods than the petitioner in the position of director planning and organizational performance and director of audit and risk management and the two upon confirmation started earning the commensurate full salary of a director in the judiciary while the petitioner while undertaking the full role of a director continued to earn less than half remuneration for equivalent responsibility and duties.
9. The omission by the respondent for an inordinate period of more than six (6) years not only perpetrated a violation of the petitioner's right to fair labour practices and the right to fair remuneration under article 41 of the Constitution. That conduct also violated the petitioner's right to equal protection and equal benefits of the law protected under article 27(1) of and that omission constituted direct discrimination against the petitioner as against her male peers for failure to pay her equal remuneration for work of equal value mandated by section 5(5) of the , 2007 in violation of article 27(2), (3) and 4 of .
10. Whereas the court considered that it was not prudent to publish to the public the individual scores of all the candidates interviewed by the respondent on both occasions in 2015 and 2019, the petitioner was entitled to receive reasons for non-appointment privately especially because she was already an officer in the establishment of the judiciary with genuine concerns about the conditions of service she was being subjected to by the respondent. Denial of that information impaired the petitioner's right to exercise and/or protect her rights the court had determined were violated by the respondent for a very prolonged period of time. Article 41(2)(b) of spoke to the situation by guaranteeing every person the right to reasonable working conditions.
11. By continuing to hold the petitioner in the position of director of finance, for a period of more than six (6) years, while refusing to appoint her substantively to the position, the petitioner had a right to be given reasons why she could not be appointed and remunerated correctly. The denial of the information violated the petitioner's right under article 35(1)(b) and also subjected the petitioner for an inordinately long period, to unreasonable working conditions in violation of article 41(2) (c) of the Constitution.
12. The cumulative effects of the acts of commission and omission by the respondent towards the petitioner degraded the human dignity of the petitioner in violation of article 28 of by being subjected to undignified work conditions as compared to her peers and a false narrative being sent out impliedly that she was incompetent and not deserving of the position, she so diligently, ably and graciously served for over a period of six years. She suffered and endured less remuneration as her counterparts which in itself was a humiliating and aggravating factor.
13. The failure by the respondent to timeously provide written reasons to the petitioner as to why she was not confirmed to the position of director of finance and why she was deemed unsuccessful twice in 2015 and 2019 despite demand for information, also violated article 47(1) and (2) of read with section



(6) of No. 4 of 2015. The petitioner was denied reasonable and fair conditions of employment as a consequence.

Petition allowed.

Orders

- i. *Declaration that the respondent violated the petitioner's rights under articles 27, 28, 35, 41 and 47 of of Kenya.*
- ii. *Declaration that the petitioner was deemed to have been lawfully appointed to the position of Director Finance of the Judiciary upon expiry of eighteen months from the date of appointment in acting capacity on December 2, 2016.*
- iii. *The respondent was directed to pay the petitioner a total underpayment calculated at Kshs 3,572,320 per year from May 2, 2018 to the date of the instant judgment.*
- iv. *The payment of special damages from May 2, 2018 to the date of the instant judgment was considered sufficient compensation for the violations committed by the respondent against the petitioner.*
- v. *An order of certiorari was issued to quash the decision contained in an advertisement for the position of director finance found in the respondent's website and in the local daily Newspapers that was, the Standard Newspaper dated June 29, 2021.*
- vi. *The respondent was to compute the special damages under (iii) above, serve the petitioner and file with court for confirmation within sixty (60) days of the instant judgment.*
- vii. *Interest at Court rates on (iii) above from the date of the instant judgment till payment in full.*
- viii. *Costs awarded to the petitioner against the respondent.*

Citations

Cases

East Africa;

1. *Anarita Karimi Njeru v Republic (No 1)* [1979] KLR 154 — (Applied)
2. *Chase International Investment Corporation & another v Laxman Keshra & 3 others* [1978] KLR 907 — (Explained)
3. *Communication Commission of Kenya & 5 others v Royal Media Services & 5 others* [2014] eKLR — (Explained)
4. *Edah Cheronu Maiywa v University of Nairobi Enterprises and Services Limited* Cause 273 of 2019; [2020] eKLR — (Explained)
5. *Heritage Insurance Company Limited v Christopher Onyango & 23 others* Civil Appeal 114 of 2016; [2018] eKLR — (Explained)
6. *Kenya Shoe & Leather Workers Union v Slapper Shoe Industries* Cause 289 of 2013; [2015] eKLR — (Followed)
7. *Shollei v Judicial Service Commission* Petition 34 of 2014; [2014] eKLR — (Explained)
8. *Silas Kaumbuthu Mbutura v Meru Central Dairy Co-operative Union Limited* [2015] eKLR — (Explained)

Statutes

East Africa;

1. Access to Information Act, 2016 (Act No 31 of 2016) section 4 (1)(b); 35 — (Interpreted)
2. Constitution of Kenya, 2010 articles 2, 3, 4(1)(2)(a)(b); 21 (3)(c)(b); 27(1)(2); 28; 30; 35(2); 41; 47; 172 (c); 232(1)(2) — (Interpreted)
3. Employment Act, 2007 (Act No 11 of 2007) sections 5 (2)(3)(5)(7)(c) — (Interpreted)
4. Fair Administrative Action, 2015 (Act No 4 of 2015) section 6 — (Interpreted)
5. Judicial Service Act, 2011 (Act No 1 of 2011) In general — (Cited)

Advocates

1. Sharply Barret & Co Advocates for the petitioner



JUDGMENT

1. Introduction

The doctrine of unfair labour practice was introduced in Kenya under article 41 of *the Constitution* of Kenya, 2010 (hereinafter *the Constitution*) which provides as follows:-

“Labour Relations

41(1) Every person has the right to fair labour practices.

(2) Every worker has the right:-

(a) to fair remunerations;

(b) to reasonable working conditions;

.....

2. In the same charter the concept of fair administration action, hitherto anchored in common law received Constitutional mandate under article 47 of *the Constitution* as follows:-

“Fair administrative action

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(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

3. The Kenya Charter was a culmination of blood and sweat of the Second Liberation to halt once and for all the injustices of the past regimes on Kenyans and to uphold the rights and freedoms of Kenyans and all those who desire to live and earn a decent living in this nation, Kenya.

4. And so the Kenyans decreed under article 3(1):-

“Every person has an obligation to respect, uphold and defend this Constitution.”

And under article 2(4) Kenyans provided:-

“Any law including customary law, that is inconsistent with *the Constitution* is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid. (emphasis is mine)

Petition

5. The petitioner, Susan Khakasa Oyatsi, filed the petition dated 8th July, 2021 praying for judgment to be entered in favour of the petitioner against the Judicial Service Commission (hereinafter JSC), the respondent in the following terms:-



- (a) A declaration that keeping the petitioner in an acting capacity for over 6 years was unlawful and violated the petitioner's right to fair labour practice.
- (b) A declaration that the refusal by the respondent to pay the petitioner the full remuneration for Director of Finance (Job Group JSG1) amounted to a violation of the Petitioner's right to equal remuneration for equal work or work of equal value, violation of her right to freedom from servitude and right to human dignity and self-worth.
- (c) A declaration that the confirmation and appointment of the two male colleagues of the petitioner as Directors while refusing to confirm the petitioner amounted to discrimination of the petitioner and to unequal treatment of the petitioner before the law.
- (d) A declaration that from the date of her appointment to act, the petitioner performed equal work as a substantive Director would and is therefore entitled to equal remuneration payable to a substantive Director backdated from the date of her appointment to act until her last day in the position.
- (e) A declaration that causing the petitioner to serve in the office of Director of Finance beyond the lawful acting period amounted to Constructive confirmation of the petitioner as a substantive holder of that office.
- (f) A declaration that the recruitment process conducted by the respondent in 2015 and 2019 lacked transparency hence was unconstitutional since no reason or explanation was given for not filling that position with a substantive Director after the close of the interviews contrary to the provisions of article 172(c) which requires competitiveness and transparent process of appointment.
- (g) A declaration that the refusal by the respondent to provide the petitioner with information relating to her performance at the interview violated the petitioner's right to access to information as protected under article 35 of the Constitution.
- (h) A declaration that the respondent has violated the petitioner's right to legitimate expectation by not confirming or appointing her as Director of Finance.
- (i) An order for compensation of special damages amounting to Kshs 22,862,848.00 as at the date of filing the petition as more particularized under paragraph 43 above which sum shall keep increasing until full payment.
- (j) An order for general damages for discrimination, violation of the petitioner's right to human dignity and self-worth, violation of the petitioner's right of access to information, fair labour practices, fair administrative action and freedom from servitude.
- (k) A permanent injunction restraining the respondent from taking the petitioner back to a position which is lower than her current position of Director finance (job group JSG 1) or victimizing or treating the petitioner unfairly on account of instituting this petition.
- (l) An order of Judicial Review in the form of *certiorari* to bring into this Court and quash the decision contained in an advertisement for the position of Director Finance found in the respondent's website and in the local daily Newspapers, that is, the Standard Newspaper dated 29th June, 2021.
- (m) Costs of the Petition.



- (n) Any other or further relief that this honourable court may deem appropriate to meet the ends of justice.
- (o) Interest at court rates on the backdated underpayment from the date they fell due to the date of payment in full.

Facts of the Petition

6. The petitioner has set out the facts of her case under paragraphs 3 to 12 of the petition, the gravamen of which is that the petitioner was employed by the respondent on 13th July, 2013 as Regional Assistant Director, Finance on permanent and pensionable terms.
7. That on 19th February, 2015, the petitioner was appointed as Director of Finance in an acting capacity pending the filling of the said position with a substantive office holder.
8. That the position of Director Finance fell vacant eight (8) years ago in 2013 and to date has never been formally filled with a substantive holder.
9. The petitioner deposes that the delay in filling the position is unlawful, and has pre-disposed the respondent to unfair labour practices and unfair administrative actions as the petitioner persuades the Court to find.
10. The petitioner deposes further that from 19th February, 2015, to date, the petitioner has continued to serve in the position of the Director Finance performing all the substantive functions and responsibilities of that position but has never been formally confirmed as a substantive holder of the office. The petitioner has continued to act in that position for over six (6) years. The petitioner deposes the purported acting capacity is unlawful and unfair and the Court should find so.
11. The petitioner deposes further that on two occasions in the years 2015 and 2019, the respondent interviewed candidates with a view to fill up the position of Director Finance and the petitioner was one of the candidates interviewed to fill the substantive position on both occasions.
12. That the petitioner has asked many times for information relating to her performance, scores and rankings at the interviews, but the respondent has failed and/or neglected to provide the same to the petitioner.
13. The petitioner asserts that for the entire period she has been serving as the Director Finance, in the purported acting capacity, the respondent has been remunerating her with earnings less than what an occupant of the office is entitled to earn.
14. That two of the petitioner's male colleagues who were appointed to act, one as Director Audit and Risk Management and the other, Director Planning and Organizational Performance, were promptly confirmed officially as substantive office holders notwithstanding the fact that the two were appointed to act long after the petitioner had been appointed to act.
15. The petitioner deposes that as the Director of Finance, in acting capacity, she has served with dedication, passion and competence. That the petitioner's achievements, competences, skills, passion, integrity and excellence in performance were aptly captured by the Chairperson of the Judicial Service Commission, the then Hon. Chief Justice, of the Republic of Kenya, Justice Maraga, in his commendation letter to the petitioner dated 9th December, 2020 in these words:-

“I take this opportunity to recognize and commend your outstanding efforts as the person who conceptualized the Enterprise Resource Planning (ERP) idea and became the Chairperson of the project implementation Team of Judiciary Financial Management



Information System (JFMIS). Your passion and drive in aiding the E-filing and case Tracking System have enabled the integration of a payment gateway and JFMIS. This judiciary home grown Finance Management System which comprises of Expenditure, Deposit, Budget, and Revenue Modules has brought to the Judiciary a lot of efficiency. Above all, you have demonstrated integrity, quintessential excellence and performance of your duties as Ag. Director of Finance.

Thank you so much for that exemplary leadership and commitment to service.”

Violation of the petitioner’s Constitutional Rights and Violations of the Law, Policies and Procedures of the Judiciary

16. The petitioner has set out in detail the various violations of her Constitutional rights and violation of laws and Policies by the respondent to her loss and detriment under paragraph 13 to 32 of the petition.
17. The petitioner has in this respect detailed violations of article 25(b); 27(1) and (2); 28; 30; 35(2) 4(1) and (2) (a) & (b); 47 and 232(1) and (2) of the Constitution by the respondent by acts of commission and omission.
18. Firstly, the petitioner states section B 20 of the respondent’s own *Human Resource Policies and Procedure Manual* provides as follows:-
 - (i) An acting appointment shall apply where a judicial officer/staff is called upon to perform duties that are distinct and in a higher position than his/her day to day responsibilities. The position shall be in his/her line of duty.
 - (ii) For a person to qualify for appointment to an acting position, he/she must meet the minimum requirements for the position.
 - (iii) An acting appointment shall be limited to twelve (12) months at any given time for substantively vacant positions. However, when an officer/staff has been appointed to act in a post for up to 12 months and is not confirmed to the substantive post, a decision must (emphasis added) be added to either confirm the employee or take him/her back to her former post.
 - (iv) If the substantive position is not filled, the acting may be renewed for a further maximum period of six (6) months.
19. The petitioner deposed that to the extent that the respondent has caused the petitioner to remain in the purported acting position without official confirmation or appointment for over six (6) years, contrary to section B 20 (iii) & (iv) cited above, the respondent violated and has continued to violate the petitioner’s right to fair labour practices guaranteed under article 41(1) of the Constitution.
20. The petitioner added, the omission by the respondent not only denied the petitioner fair remuneration, guaranteed under article 41(2) (a), but also the conduct by the respondent violated article 41(2)(b) of the Constitution which guarantees every worker the right to reasonable working conditions by ensuring that a substantive position in the Judiciary establishment held by any person is remunerated at the correct salary attributed to that position which has not happened in the case of the petitioner for a period of more than six (6) years of service. Furthermore, the respondent discriminated against the petitioner in violation of article 27(1) and (2) of the Constitution read with Section 5 of the Employment Act, 2007 for treating her differently from the way it treated her fellow, male Directors who acted for short periods of time and were timeously confirmed to their substantive positions which action ensured that they were remunerated at the correct, higher salaries commensurate to the establishment of Director Cadre in the Judiciary.



21. In this respect, article 27(1) of the Constitution provides:-

- “(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality, includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment including the right to equal opportunity in political, economic, and cultural and social spheres.
- (4) The state shall not discriminate directly or indirectly against any person on any ground.....”

22. In this respect, section 5 of the Employment Act, is relied upon by the petitioner as it provides that:-

(1)

“(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

23. Subsection 5(3) of the Act augments prohibition against any form of discrimination at the workplace as follows:-

- “(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee –
 - (a) on grounds of sex.....”
 - (b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.”

24. The petitioner further evokes the provision of sub-section 5(5) which provides:-

“(5) An employer shall pay his employees equal remuneration for work of equal value.”

25. The petitioner deposes that to the extent that the petitioner is not enjoying the same benefits as are being enjoyed by her male colleagues who are doing work of equal value at the same horizontal directorate level and to the extent that those two male colleagues were promptly confirmed and were appointed to act much later after the petitioner had acted for a longer period, the respondents have violated the rights of the petitioner aforesaid.

26. The petitioner asserts that she has all the qualification requirements, experience and skills for the job of Director of Finance as provided under section B 20 (ii) of the respondent’s own Human Resource Policy and Procedure Manual and therefore it cannot be gainsaid that is the reason she was appointed to act in that position in the first place.

27. The petitioner further adds that since the year 2015, the petitioner has been subjected to annual performance appraisals in relations to the position of the Director Finance, the same way a person holding substantive appointment is subjected to and the results of all the appraisals have been good to excellent.



28. The petitioner deposes that the impression given by the respondent that the petitioner was not successful in her two interviews created a false narrative that the petitioner was not competent and qualified enough to be substantive holder of the position of Director of Finance and in the same vein continue to hold her in purported acting position in blatant violation of section B 20 (ii) (iii) and (iv) of the Human Resource Manual.
29. The petitioner further deposes that the denial by the respondent of the requisite remuneration commensurate with the office she held of Director Finance, has denied the petitioner respectful and dignified life, hence violating the petitioner's right to human dignity and self-worth as protected under article 28 of the Constitution which provides:-

“Human dignity.

“Every person has inherent dignity and the right to have that dignity respected and protected.”

30. The petitioner states that for the respondent to create a false narrative of her incompetence and at the same time refuse to provide the results to her of the interviews conducted in 2015 and 2019 despite her request to be provided with the information is a perpetration of violation of her right to human dignity and this has been achieved by the respondent by a further violation of the petitioner's right of access to information protected under article 35 of the Constitution read with Access to Information Act, No 31 of 2016.

31. The article 35 provides:-

“(1) Every citizen has the right of access to:-

(a)

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.”

32. Section 4(1)(b) of the Access to Information Act, 2016 reiterates the aforesaid Constitutional provision.

33. By a letter dated 15th October, 2020, the Petitioner through her advocates demanded to be provided with reasons why the respondent stated that the petitioner was unsuccessful in her interview. The petitioner invoked section 5(i) (a) (iii) of the Act, to demand information which include “the procedure followed in decision making process” by the respondent in the interviews of 2015 and 2019.

34. The petitioner deposes that the unlawful withholding of the results of the 2015 and 2019 interviews while continuing to subject the petitioner to unfair terms of remuneration for the position she has ably and successfully held for over six (6) years was an aggravation of the violation of the Constitutional rights of the petitioner aforesaid by the respondent.

Violation of Petitioner's Right to Legitimate Expectation

35. The petitioner argued that she had legitimate expectation of being confirmed or appointed as the substantive Director of Finance since the Respondent itself created in the petitioner this expectation in the following ways:-

(a) By appointing her to act as the Director Finance. It is a mandatory requirement under the Respondent's Human Resource Policies and Procedure Manual that an acting appointment is only to be made to a person who qualifies to hold the substantive office.



- (b) By allowing her to act for more than the maximum period provided for under the Human Resource Policies and Procedure Manual.
 - (c) By shortlisting the petitioner twice and interviewing her twice for the said position when she was already acting the same position.
 - (d) By appraising the petitioner's performance annually and finding that her performance was always very good.
 - (e) By recognizing and appreciating her achievements while occupying that office.
 - (f) From the outset, the petitioner had all the academic and professions qualifications for the job.
36. The petitioner has set out under paragraph 43, the numerical disadvantage in terms of remuneration being a culmination and real effect, the violation of the rights of the petitioner and the law have had on her bottom line. The petitioner therefore prays that the Court remedies the situation by making the following orders:-
- (a) That the respondent pays the difference between the gross salary of Kshs 435,990 inclusive of a purported acting allowance of Kshs 20,000 and annual leave allowance of Kshs 23,000 she now enjoys with the commensurate remuneration of Director Finance at job Group JSG 1 which attracts a gross monthly salary of 733,100 plus Kshs 30,000 annual leave allowance which reflects a monthly underpayment of 297,110, therefore annual underpayment of Kshs 3,565,320.00. Add the Kshs 7,000 annual leave underpayment to make total Annual underpayment of Kshs 3,572,320.00
37. The petitioner therefore prays for payment of total underpayment from February, 2015 until July, 2021 which is Kshs 3,572,320.00 x 6.4 years which brings the total claim as at the filing of the suit to Kshs 22,862,848.00.
38. The petitioner deposes that the respondent has further gone ahead to advertise the position of Director Finance by a decision dated 29th June, 2021. The petitioner deposes this action by the respondent is a perpetuation of violation of her rights aforesaid and that the said decision is unlawful, ultra vires and was made in excess of jurisdiction.
39. The petitioner deposes further that the conduct to advertise the position in view of the facts before court is irrational, illegal and unprocedural and that an order of certiorari do issue from the Court to quash the said decision.
40. The petitioner further claims compensation by way of general damages for the violation of her rights aforesaid. The petitioner further seeks permanent orders to restrain the respondent from continuing to violate the petitioner's rights set out herein before.
41. The petitioner adds that notice of intention to sue was duly served on the respondent but the demands herein were not met by the respondent.
42. The petition is supported by an affidavit of the petitioner and all relevant documents attached thereto. The petitioner prays that she be awarded as prayed

Response

Replying Affidavit

43. The respondent filed a replying affidavit sworn to by Anne Amadi, the Chef Registrar of the Judiciary (hereinafter CRJ) who deposes inter alia that the position of Director of Finance in the judiciary



- fell vacant on or about 12th November, 2013 and the Hon. Chief Justice (Rtd). Dr. Willy Mutunga appointed Ms Beatrice Kamau (the current Deputy Director of Finance of the Judiciary) as the acting Director of Finance, a position she held until her resignation in February, 2015.
44. The petitioner was appointed to the post of Director Finance in acting capacity on 19th February, 2015.
 45. That Judicial Service Commission in the meantime advertised and invited applications for the newly vacant position of Director of Finance in the Judiciary on 23rd December, 2014. The shortlisted candidates among them the petitioner were interviewed on 17th September, 2015.
 46. That at the conclusion of interviews, Judicial Service Commission deliberated and took into consideration such factors as promotion on merit, suitability for the vacancy and regional, ethics and gender balance and rationalized the interview results.
 47. That among the issues considered post-interview was confidential information received from various persons regarding all the shortlisted candidates. With respect to the petitioner herein, there emerged concerns of conflict in the department of finance on account of the petitioner's failure to embrace teamwork, and this was communicated to her. In addition, the Judicial Service Commission equally considered the shortlisted candidates (including the petitioner) qualifications, competences and performance.
 48. The deponent attached to the reply four letters the first, dated 9th January, 2015 written to the petitioner in the capacity of Assistant Director of Finance by the Secretary Human Resource Management Advisory Committee regarding a misunderstanding between the petitioner and her staff, named Rahab Mwaura, serving as Accountant II. The Committee advised the petitioner to embrace teamwork to avoid conflicts in the department. The committee found that the conflict between the two officers was a result of lack of clarity on roles pertaining to both old and new officers.
 49. The second letter dated 2nd March, 2016 was written by Chief Registrar to the petitioner on 2nd March, 2016 in which Chief Registrar of the Judiciary encouraged the petitioner to embrace a more collaborative approach of work within the directorate. This arose from a letter written to the Department by Director of Finance, M/s Beatrice Kamau dated 23rd February, 2016 by the petitioner.
 50. Chief Registrar deposes that on 17th February, 2016, Judicial Service Commission noted and concluded that the recruitment process to fill the position of Director of Finance was non-responsive since it failed to generate suitable candidate. That Judicial Service Commission resolved to re-advertise the said position to allow for competitive recruitment.
 51. It is also noteworthy that the third letter dated 2nd June, 2016, was a revocation of the acting position of the petitioner by Hon Chief Justice Dr Willy Mutunga, and her replacement with one Mr Philip Kakai as the Acting Director of Finance.
 52. However, Chief Registrar produced a fourth letter dated 2nd December, 2016 in which the incoming Chief Justice, Hon David Maraga re-appointed the petitioner to the position of Acting Director of Finance and in terms thereof, the petitioner had to be paid acting allowance at the rate of 15% of her substantive basic salary from the period of her service as Acting Director.
 53. Chief Registrar deposes further that Judicial Service Commission re-advertised the position of Director of Finance in the Judiciary and again invited applicants for the vacant position of Director, Finance in the Judiciary on 29/6/2019. Judicial Service Commission again shortlisted several candidates including the petitioner and interviewed them on 5th December, 2019.



54. That Judicial Service Commission, again took into account all the relevant factors stated herein before and on 9th June, 2020, Judicial Service Commission noted and concluded that the recruitment process was non-responsive since it yet again failed to generate a suitable candidate. Judicial Service Commission resolved again to re-advertise the said position to allow for competitive recruitment. That Judicial Service Commission's position was communicated to all the candidates who were interviewed by virtue of paragraph 9(2) part III, Third schedule of the *Judicial Service Act*.
55. That Judicial Service Commission thus re-advertised for the third time the position of Director of Finance in the judiciary and commenced the shortlisting process until the same was halted by the Conservatory Orders restraining Judicial Service Commission from completing the recruitment exercise issued on 13th July, 2021 by Hon Justice Nzioki wa Makau.
56. Chief Registrar deposes that the recruitment processes were transparent, competitive and fair for the reasons that the position was publicly advertised in both leading local dailies and the judiciary website inviting all qualified candidates to apply and applications were received in 2015 and 2019. That all the qualified candidates were shortlisted using the criteria developed by the Judicial Service Commission and the unqualified ones were duly notified by way of letters of regret.
57. That all the shortlisted candidates including the petitioner were subjected to the interviews by the Judicial Service Commission and given a score by each panelist in accordance with a scoring criteria developed and agreed upon by the Judicial Service Commission.
58. That background checks including those from various government institutions were conducted on all the shortlisted candidates and considered by the Judicial Service Commission. That in addition, Judicial Service Commission sought for and considered confidential reports from current and previous employers of the candidates.
59. That all the shortlisted candidates who appeared for the interviews on both occasions were treated fairly during the interviews and at the conclusion thereof, they were notified of the outcome.
60. Chief Registrar of the Judiciary deposes that she is aware upon unsuccessful attempts at the interviews, the petitioner resolved to use of political channels to coerce the Judicial Service Commission into confirming her to the position of Director, Finance. That the petitioner further escalated the matter to Parliament whereupon the National Assembly has on several occasions summoned the Judicial Service Commission to appear before it to shed light on the issue. Chief Registrar of the Judiciary deposes that the conduct by the petitioner amounts to canvassing and basic interference with a constitutionally sanctioned process under Article 172 of *the Constitution* and is contrary to the doctrine of separation of powers and as such should be condemned in the strongest terms possible.
61. That there is no malice demonstrated on the part of Judicial Service Commission in conducting the interviews in terms of the relevant laws and procedures. That these processes have thus been transparent, competitive and fair to all candidates involved.
62. Chief Registrar of the Judiciary deposes further that it is indeed true that Section B 20(iii) of the Human Resource Policies and Procedure Manual (HRPPM) 'speaks of the duration of Acting Appointment.' However this provision must be read together with paragraph 9(2), part III third Schedule of the *Judicial Service Act* aforementioned which allows for the continued 'employment of a public officer on temporary terms.'
63. That in the hierarchy of laws, an Act of Parliament takes precedence over organization's Human Resource Manual and therefore the action of keeping the petitioner in acting capacity for a period



longer than that prescribed in the Human Resource Policies and Procedure Manual is lawful by dint of section 9(2) part III, third schedule of the *Judicial Service Act*.

64. That the petition has not been pleaded with reasonable precision demanded in *Annerita Karimi Njeru v Republic (No 1)* (1979) eKLR.
65. Therefore the petition does not disclose any violation of the rights of the petitioner protected under articles 27, 28, 30, 35, 41 and 47 of *the Constitution*.
66. Furthermore, Judicial Service Commission rightfully weighed the petitioner's request to publish reasons for determining the interviews conducted in 2015 and 2019 were non-responsive and decided that the release of such information as to the scores of the candidates including the petitioner and why a particular candidate did not qualify for appointment was highly likely to breach the right to privacy of the interviewed candidates. Chief Registrar of the Judiciary therefore denies that Judicial Service Commission violated article 35 of *the Constitution* with regard to access to information necessary to defend the petitioner's rights.
67. That the petitioner in the entire period she has acted in that position of Finance Director has been paid acting allowance equivalent to 15% of her substantive basic salary and has thus been duly remunerated in accordance with the governing regulations being section H4 (i) and (ii) of the Human Resource Policies and Procedure Manual.
68. That in addition, the petitioner receives other benefits including, an official government car, Kshs 30,000 fuel allowance and enhanced airtime allowance of Kshs 10,000. That the petitioner on her own accord wrote to the Directorate of Human Resource in the Judiciary requesting for payment of an acting allowance and enhanced airtime allowance commensurate to the position. The petitioner is therefore estopped from suing the Judicial Service Commission on terms granted to her at her own request. The letters from the petitioner dated 1st February, 2017 and 5th January, 2017 are annexed to the replying affidavit for ease of reference. In the letter of 1st February, 2017, the petitioner notified the Director of Human Resource Management and Administration that in terms of her email dated 5th January, 2017, she had not yet received acting allowance as stipulated in the Human Resource Manual, section H4(i) and (ii) and requested to be paid accordingly.
69. That being an acting Director does not entitle the petitioner to be remunerated as a substantive holder of the position and her claim is unjustified, unlawful and an attempt at unjust enrichment.
70. That the petitioner's assertion that she was subjected to servitude is far from the truth in that her acting capacity cannot be equaled to servitude since she is well remunerated.
71. That with regard to the allegation of discrimination and or being treated differently, Chief Registrar of the Judiciary states that this is far from the truth since all the vacant positions in the judiciary including the position of Director Audit and Risk Management, Director Planning and Organizational Management and Director of ICT all which had respective persons serving in acting capacities were competitively advertised and filled in the year 2019.
72. That it is not true that the two Directors in Audit and Risk Management and Planning and Organisational Management were fast-tracked to confirmation to the exclusion of the petitioner. That the two were fully qualified for appointment pursuant to competitive recruitment process unlike the case of the Finance Director.
73. That Confirmation of the petitioner to the position of Director Finance without following a competitive process would be a blatant violation of the law which requires competitive, fair and transparent recruitment of public and state officers.



74. The respondent further states that the Supreme Court laid down the Principles that govern a successful invocation of the doctrine of Legitimate Expectation in the case of *Communication Commission of Kenya and 5 Others v Royal Media Services Limited and 5 Others* [2014] eKLR including that:-

“there must be an express, clear and unambiguous promise given by a public authority, this 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*.”

75. The respondent states therefore that no Legitimate expectation was created on the petitioner since no promise was made to her either expressly or impliedly that she would be appointed as Director of Finance. That an appointment into an acting capacity cannot rouse legitimate expectation as claimed by the petitioner or at all.

76. That the petition is devoid of merit and it be dismissed with costs.

Supplementary and Further Affidavits by the Petitioner

78. The petitioner states that the respondent is by dint of section 5(7)(c) of the *Employment Act*, 2007 bound by its employment policy or practice and therefore is bound by its own Human Resource Policy and Procedure Manual before court with regard to its own policy on acting appointments set out herein before in this judgment.

79. The petitioner further refers to section 9(2), part III of the Third Schedule of the *Judicial Service Act* which reads as follows:

“A vacancy need not be advertised where the commission is satisfied that the vacancy should be filled by the appointment or re-appointment of a public officer held against the establishment of the judicial service of by the continued employment of a public officer on temporary terms.”

80. The petitioner asserts that this clause cannot be a justification to perpetrate an unfair labour practice which violates the respondent’s own Human Resource, Policy and Procedure Manual.

81. The petitioner further states that the respondent failed to respect its own performance evaluation reports which show that the petitioner was qualified and competent to hold the position of Director Finance since she started acting in that capacity from the year 2015 to date.

82. That the respondent further ignored the commendation of the Honourable Chief Justice Maraga; who was its substantive chairperson as at the time of the second interview.

83. Furthermore, Chief Registrar of the Judiciary had personally recommended the appointment of the petitioner to the substantive position of Director Finance as follows:-

“Susan is a diligent and hardworking officer. Has demonstrated eagerness to ensure accountability and prudent use of funds in the judiciary. Recommended.”

84. The petitioner states that the Chief Registrar of the Judiciary cannot now be heard to state otherwise in the replying affidavit, since she is the accounting officer of the judiciary who annually enters into performance management and measurement understanding with the petitioner in her capacity as the Chief Registrar of the Judiciary and the petitioner being the Director of Finance.



85. The petitioner referred to the Performance Management Contracts between her and Chief Registrar for the period 1st July, 2015 to 30th June, 2016; 1st June, 2016 to 30th June, 2017, 1st July, 2017 to 20th June, 2017 to 30th June, 2018 and 1st July, 2018 to 30th June, 2019 all before Court.
86. The petitioner exhibited the scores for the period 2015 and 2016 at 76.46% which was rated good; 1st July, 2016 to 30th June, 2017, she was rated outstanding to a minimum of good 2018 to 2019, she was rated outstanding in all items and the evaluation of the petitioner for the period 2019 to 2020 is set out in the further affidavit which evaluation was released on 16th September, 2021 and the petitioner was graded out of the 34 units of measure as follows:-
- 21 units - Outstanding
 - 6 units – Excellent
 - and
 - 2 units - Very good.
87. The petitioner states that this is her best rating since she was first rated as a Director Finance for the period 2015 to 2016.
88. The petitioner states that the aforesaid evaluation reports confirm her excellent performance as evidenced by the glowing commendation by the Retired Hon Chief Justice Maraga.
89. That there is no justifiable reasons to deny the petitioner confirmation to the substantive position she has held for more than six (6) years.
90. That the petition be allowed with costs.

Determination

91. The parties filed written submissions in which the positions stated in their depositions are reiterated and the attention of the court drawn to the relevant authorities for consideration.
92. The issues for determination are as follows:-
- (a) Whether the petitioner has proved violation of her rights set out in the petition.
 - (b) Whether the respondent is bound by its own Human Resource Policies and Procedures Manual.
 - (c) Whether the petitioner is entitled to the reliefs sought.
93. The particulars of employment of the petitioner by the respondent are not in dispute.
94. The petitioner was employed by the respondent on 13th June, 2013 as Regional Assistant Director, Finance on permanent and pensionable terms.
95. On 19th February, 2015, the petitioner was appointed to serve as Director of Finance in acting capacity pending the filling of the said position with a substantive office holder. Until the filing of this suit in the year 2021, the petitioner has continued to serve as the Director of Finance of the Judiciary in an acting capacity. It is not in dispute that during the period the petitioner has served in acting capacity, she has continued to receive the salary of Assistant Director, Finance in the sum of Kshs 435,990 per month. The petitioner has been paid acting allowance of Kshs 20,000 per month and Kshs 23,000 annual leave allowance.



96. It is also common cause that remuneration payable to a holder of the substantive position of Director Finance, which is pecked at Job group JSG1 in the Judiciary establishment is gross monthly salary of Kshs 733,100 plus Kshs 30,000 annual leave allowance.
97. It follows that the disadvantage, the petitioner suffers by being placed by the respondent in an acting capacity while actually performing the substantive job is the difference between the salary attributable to the position of Director Finance, in the sum of Kshs 733,100 per month and the salary of Assistant Director Finance, which the petitioner has received for a period of six years and 4 months as at the time this suit was filed in the sum of Kshs 297,110 per month.
98. The petitioner has by that fact received annual overall allowance of Kshs 23,000 instead of that attributable to the substantive post of Director in the sum of Kshs 30,000 which amount is less by Kshs 7,000 per year.
99. The petitioner adduced evidence that she had on two occasions applied to be appointed substantive holder of the position of Director Finance in 2015 and 2019 but the respondent has declined to appoint her on unclear grounds while sending out a false narrative that the petitioner is not qualified to hold the position of Finance Director, Judiciary. It is the petitioner's case that despite request for reasons why the respondent has refused to confirm her to the position of Director Finance, she has been unlawfully denied the reasons.
100. It is the petitioner's case that the respondent has violated its own Human Resource Policies and Procedures Manual and in particular section B 20 cited herein before, which mandates under section B 20(ii) that:-

“for a person to qualify for appointment to an acting position he/she must meet the minimum requirements for the position”.
101. It is the petitioner's case, that, by this fact alone, she is prima facie qualified to hold the substantive position of Director Finance and has in fact held that substantive position for over six years without proper recognition and requisite remuneration by the respondent.
102. It is also the petitioner's case that by dint of section B 20(iii) of the respondent's own Human Resource Manual, the petitioner could only remain acting Director Finance for a period of 12 months. That, upon expiry of 12 months, the respondent had no choice but to confirm the petitioner to the position of Finance Director or take the petitioner back to the former post of Assistant Director. It is not in dispute that the respondent did not take either of the mandatory options under section B 20 (ii) of its own Human Resource Policies and Procedures Manual
103. The provisions of section B 20(ii) and (iii) are couched in mandatory terms by using the word must.
104. The petitioner has provided undisputed and very compelling evidence that from the year 2015 up to the year 2021, her performance has been appraised by the respondent in the position of Finance Director. That her rating since then has moved from good, to very good and lately to excellent performance. The petitioner has also adduced evidence that the head of the Judiciary, and the Chairman of the respondent commended her competent service as Director of Finance in most compelling language but that notwithstanding, the respondent has failed and/or neglected to recognize her excellent performance as the Director Finance of the Judiciary.



105. It is the court’s finding that the Human Resource Policies and Procedures Manual of the Judiciary is an employment policy or Labour practice recognized under section 5(7) (c) of the [Employment Act, 2007](#); which provides that:-
- “an employment policy or practice includes any policy or practice relating to recruitment procedures, advertising and selection criteria, appointment, and the appointment process, job classification and grading, remuneration, employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, termination of employment and disciplinary measures.”
106. The manual therefore is an internal mandatory guide, with statutory underpinnings and is in the court’s judgment a kingpin of good corporate governance in any organization worth its salt. The court finds without any hesitation that the respondent is bound by its own Human Resource Policies and Procedures Manual, the same way, the employees are bound to abide by its terms in their daily work disposition and behavior. Indeed, employees of the Judiciary who fall foul of the provisions of the Human Resource Policies and Procedure Manuals would be subjected to disciplinary action in terms of the manual. Equally, the respondent cannot be heard to say that they are at liberty to cherry pick what to adhere to and what not to respect in the manual.
107. In Cause No 273 of 2019 [Edab Cherono Maiywa versus University of Nairobi Enterprises & Services Limited](#), Onesmus Makau J had the following to say as regards employer policy document:-
- “The above provision of the Human Resource Policy and Procedures manual cannot be wished away as it is founded on the law and it is incorporated into the contract of service of every employee of the respondent. Cw2, RW1 and Rw2 confirmed in their testimonies that the claimant was an efficient HR professional who had no performance issues in the HR docket. She had acted for fairly long period as the SHRAO and as such, nothing prevented the employer from conducting internal recruitment under Clause 2.6 (iv) of the HR Policy and Procedures Manual as she did to RW2.”
108. In Civil Appeal No 114 of 2016 - [Heritage Insurance Company Limited -vs- Christopher Onyango & 23 Others](#) [2018] eKLR, the Court of Appeal observed that:-
- “..... It is axiomatic that companies as employers do from time to time come up with new Staff Handbooks or Staff Manuals to reflect new regulations in the area of employment of their own staff. In practice, employment contracts do make reference to staff manuals or staff Handbooks as forming part of the terms of employment.
109. It cannot be gainsaid therefore, that the provisions of the Judiciary Human Resource Policies and Procedures Manual are impliedly incorporated in the contractual terms and conditions of service of all Judiciary staff, including the petitioner.
110. The respondent has submitted that it was bound to appoint a Director of Finance upon a competitive recruitment process in terms of the mandate given to it under article 172 of [the Constitution](#) and that confirming the Director, Finance to a substantive position would violate this mandate.
111. Article 172 of [the Constitution](#) provides:-
- (1) The Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall:-



- (a)
 - (b) review and make recommendations on the conditions of service of
 - (i)
 - (ii) the staff of the judiciary; and
- (2) In performance of its functions, the Commission shall be guided by the following:-
- (a) Competitiveness and transparent processes of appointment of Judicial officers and other staff of the Judiciary; and
 - (b) The promotion of gender equality.”
112. It is the court’s considered finding that the development of the Judiciary Human Resource Policies and Procedures Manual as the primary document to guide the recruitment, retention and career development of Judiciary staff was done by the respondent in the discharge of its mandate under article 172(1) (ii) and (2) (a) and (b) of *the Constitution*.
113. That indeed the Human Resource Manual does not only find its anchor in the *Employment Act*, but it is also well founded in *the Constitution* and thus it is an authoritative policy and procedure documents for proper management of Human Resource in the Judiciary.
114. The argument by the respondent that implementation of section B 20 (iii) and (iv) to confirm the petitioner to the position of Director Finance upon acting for a period of twelve (12) months and an extension for a further maxim period of six (6) months would be ultra vires the Judicial Service Commission Act holds no water.
115. Indeed, that would be in keeping with the mandate given to the respondent under article 172 of *the Constitution* as read with section B 20 (iii) and (iv) of the Judiciary Human Resource and Policies Manual.
116. By dint of section B 20(iii) and (iv) of the Judiciary Human Resource Policies and Procedures Manual, the petitioner had Legitimate expectation that she would be confirmed to the position of Director Finance, upon expiry of 18 months from the date of acting appointment. The respondent failed to honour this Legitimate expectation of the petitioner. The court so finds.
117. The respondent has further argued that it was lawful and proper to continue retaining the petitioner in an acting capacity of Director Finance for a period of over six (6) years by dint of paragraph 9(2), part (III), Third Schedule of the *Judicial Service Act*, 2011 which allows for the continued employment of a public officer on temporary terms. Indeed the respondent wholly relies on this provision as the legitimate basis of its resolution to allow the petitioner to continue acting as Director Finance for a period of more than five (5) years.
118. We have considered the provisions of paragraph 9(2), part III of the Third Schedule to the *Judicial Service Act*. If anything the provision supports the contention by the petitioner that:-
- “A vacancy need not be advertised where the Commission is satisfied that the vacancy should be filled by the appointment or re-appointment of a public officer held against the establishment of the judicial service.....” (emphasis mine)
119. To disregard this part of paragraph 9(2) and rely on it to temporarily employ the petitioner as Director Finance, while denying her remuneration duly earned, amounts to unfair Labour Practice.



120. The petitioner fits this bill perfectly in that the commission has chosen for a period of more than six (6) years to appoint and re-appoint the petitioner as Director Finance in an acting capacity.
121. The respondent's own appraisal and evaluation of the performance of the petitioner confirms that she is duly qualified and competent to hold this position for that long time and her performance from the respondent's own documents has been exemplary. The respondent having enjoyed the exemplary service from the petitioner discharging the full mandate of Director, Finance is bound to pay commensurate remuneration provided the petitioner continues to hold and serve the judiciary in that position.
122. In *Kenya Shoe and Leather Workers Union v Slapper Shoe Industries* [2015] eKLR, the erstwhile Industrial Court found:-
“ the court agrees with the Conciliator by using the Grievants for prolonged period of time in acting capacity while paying them acting allowances, the respondent engaged in unfair Labour Practices. It affected the upward mobility of the Grievants' careers and it is little wonder that some have since left employment.”
123. 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.
124. 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.
125. There is compelling and credible evidence before court, which the court accepts that the respondent had within the period it has kept the petitioner in the capacity of acting Director Finance, it had confirmed to substantive positions male colleagues of the petitioner who were horizontally of equal status as the petitioner but had acted for shorter periods than the petitioner in the position of Director Planning and Organizational Performance by the name Mr Ronald Wanyama and Director of Audit and Risk Management by the name Mr Jeremiah Nthusi and the two upon confirmation started earning the commensurate full salary of a Director in the Judiciary pegged in job JSJG1, while the



petitioner while undertaking the full role of a Director continued to earn less than half remuneration for equivalent responsibility and duties.

126. It is the court's considered finding that the omission by the respondent for an inordinate period of more than six (6) years not only perpetrated violation of the petitioners right to fair Labour practices and the right to fair remuneration under article 41, this conduct also violated the petitioner's right to equal protection and equal benefits of the law protected under article 27(1) of *the Constitution* and that omission constituted direct discrimination against the petitioner as against her male peers for failure to pay her equal remuneration for work of equal value mandated by section 5(5) of the *Employment Act*, 2007 in violation of Article 27(2), (3) and 4 of *the Constitution*.
127. The petitioner requested the respondent to provide her with the results including individual scores of the panelists for the two interviews for the position of Director Finance, which she attended in the year 2015 and 2019. It is not in dispute that the respondent did not consider the request reasonable for the reasons advanced in the replying affidavit and submissions by the respondent that this would be intrusive and a violation of the right to privacy of the candidates.
128. The petitioner has submitted that the respondent put out there a picture that the petitioner was not qualified and or competent to perform the duties of Director Finance. It is the petitioner's case that the respondent's own evaluation and rating of her performance for over six years is in stark contrast to the image the respondent portrayed to the public by refusing to appoint her to the substantive position of Director Finance, while continuing to benefit from her full service in that capacity.
129. It is the petitioner's case that the denial of the results of the two interviews by the respondent violated her right to access information held by another person which she required for the exercise or protection of her right to be appointed Director Finance and be paid commensurate remuneration for the petitioner in violation of article 35(1 (b) of *the Constitution* as read with sections 4(1) (2) and 5(1) (iii) of the *Access to Information Act* No 31 of 2016.
130. Section 4(2) of the Act, provides:
- “ Subject to this Act, every citizen's right to access information is not affected by—
- (a) any reason the person gives for seeking access; or
- (b) the public entity's belief as to what are the person's reasons for seeking access.
- (3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.
- (4) This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6. (5) Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information.
131. In Petition 34 of 2014 *Shollei v Judicial Service Commission*, [2022] KESC 5 KLR, the Supreme Court held that:-
- “ if a right or fundamental freedom of a person had been or was likely to be adversely affected by administrative action, the person had the right to be given written reasons for the action.”
132. Whereas the court considers that it was not prudent to publish to the public the individual scores of all the candidates interviewed by the respondent on both occasions in 2015 and 2019, it is the



court's considered finding that the petitioner was entitled to receive reasons for non-appointment privately especially because she was already an officer in the establishment of the Judiciary with genuine concerns about the conditions of service she was being subjected to by the respondent. Denial of that information impaired the petitioner's right to exercise and/or protect her rights the Court has determined were violated by the respondent for a very prolonged period of time.

133. Article 41(2)(b) of *the Constitution* speaks to this situation by guaranteeing every person the right to:-
- “(b) reasonable working conditions.”
134. . It is the court's conclusion and finding that by continuing to hold the petitioner in the position of Director Finance, for a period of more than six (6) years, while refusing to appoint her substantively to the position, the petitioner had a right to be given reasons why she could not be appointed and remunerated correctly.
135. This denial of information violated the petitioner's right under article 35(1) (b) and also subjected the petitioner for an inordinately long period, to unreasonable working conditions in violation of article 41(2)(c) of *the Constitution*.
136. It is pertinent to find that the cumulative effects of the acts of commission and omission by the respondent towards the petitioner set out in this judgment, degraded the human dignity of the petitioner in violation of article 28 of *the Constitution* by fact of being subjected to undignified work conditions as compared to her peers and a false narrative being sent out impliedly that she was incompetent and not deserving of the position, she so diligently, ably and graciously served for over a period of six years. She suffered and endured less remuneration as her counterparts which in itself is a humiliating and aggravating factor in this case.
137. The failure by the respondent to timeously provide written reasons to the petitioner as to why she was not confirmed to the position of Director and why she was deemed unsuccessful twice in 2015 and 2019 despite demand also violated article 47(1) and (2) of *the Constitution* read with Section (6) of *Fair Administrative Action Act* No. 4 of 2015. The petitioner was denied reasonable and fair conditions of employment as a consequence thereof.
138. In the final analysis, upon a careful weighing of the depositions, documentary evidence and submissions by the parties and in line with the law and relevant authorizes placed before Court, the Court finds that the petitioner has proved her case on a balance of probabilities and the petition succeeds accordingly.

Remedies

139. Having found that the petitioner has served diligently, effectively and efficiently in the position of Director Finance, for a period of more than six years, and guided by the provisions of section B 20(i) (ii) (iii) and (iv) of the Judiciary Human Resource, Policies and Procedures Manual and further guided by the equitable principle espoused by the Court of Appeal in *Chase International Investment Corporation and another v Laxman Keshra and others* [1978] KLR 907, that:-

“If the circumstances are such as to raise an equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed.”,

the Court deems the petitioner to be the substantive holder of the position of Director Finance of the Judiciary with effect from 2nd May, 2018 being 18 months from the date of appointment in acting capacity by Hon Chief Justice, Mr. David K. Maraga on 2nd December, 2016.



141. Accordingly, the petitioner is entitled and shall be paid by the respondent total underpayment plus remuneration from 2nd May, 2018 at the rate of Kshs 3,572,320 per year to-date.
142. In the final analysis, judgment is entered in favour of the petitioner as against the respondent and orders made as follows:-
- (a) A declaration that the respondent violated the petitioner's rights under Articles 27, 28, 35, 41 and 47 of the Constitution of Kenya, 2010 as set out in this judgment.
 - (b) A declaration that the petitioner is deemed to have been lawfully appointed to the position of Director Finance of the Judiciary upon expiry of eighteen months from the date of appointment in acting capacity on 2nd December, 2016.
 - (c) The respondent is directed to pay the petitioner total underpayment calculated at Kshs 3,572,320 per year from 2nd May, 2018 to-date.
 - (c) That the payment of special damages from 2nd May, 2018 to-date is considered sufficient compensation for the violations committed by the respondent against the petitioner.
 - (d) An order of Judicial Review in the form of *certiorari* is issued to bring into this court and quash the decision contained in an advertisement for the position of Director Finance found in the Respondent's website and in the local daily Newspapers that is, the Standard Newspaper dated 29th June, 2021.
 - (e) The respondent to compute the special damages under Clause (c) above, serve the petitioner and file with court for confirmation within sixty (60) days of this judgment.
 - (f) Interest at court rates on (c) above from date of judgment till payment in full.
 - (g) Costs of the suit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 10TH DAY OF MARCH, 2022

MATHEWS N. NDUMA

JUDGE

Appearances

Sharply Barret & Co. Advocates for the petitioner

Mr. Fred Ngatia Advocate, Leading,

Muma & Kanjama Advocates for Respondent

Mr. Kanjama Leading

Ekale – Court Assistant

