



**Mathooko v Machakos University (Cause E946 of 2021)
[2020] KEELRC 1937 (KLR) (19 June 2020) (Judgment)**

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**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E946 OF 2021
K OCHARO, J
JUNE 19, 2020**

BETWEEN
PROFESSOR FRANCIS MATHOOKO CLAIMANT
AND
MACHAKOS UNIVERSITY RESPONDENT

JUDGMENT

Introduction

1. This matter arises from a dispute between the Claimant, Professor Francis Mathooko, and the Respondent, Machakos University, concerning an alleged unilateral reduction of the Claimant's salary and benefits following his transition from an administrative role as Acting Vice-Chancellor to a teaching position as a Full Professor. The Claimant alleges that the Respondent's actions constitute a breach of contract, a violation of procedural fairness, and a denial of his legitimate expectations under the terms of his employment. The Respondent, on the other hand, contends that the reduction was in compliance with government circulars and internal audit findings, and that the Claimant's appointment as a Full Professor was irregular.
2. The Claimant seeks declaratory relief, reinstatement of his salary and benefits, compensation for damages, and costs of the suit. The Respondent maintains that its actions were lawful and justified, and that the Claimant is not entitled to the reliefs sought. This case raises significant questions regarding the enforceability of employment contracts, the applicability of government circulars, and the principles of procedural fairness in administrative actions.
3. At the hearing, the Claimant and the Respondent's witness adopted their witness statements herein filed, and tendered in evidence, the documents filed herein and their documentary evidence.



The Claimant's case.

4. Professor Francis Mathooko, asserts that he is a distinguished academician with over a decade of experience as a Full Professor at various Kenyan universities. Prior to joining Machakos University, he served as a Full Professor at the South Eastern Kenya University (SEKU) for six and a half years and at Jomo Kenyatta University of Agriculture and Technology (JKUAT) for four years. In December 2013, he was appointed as the Principal of Machakos University College, a constituent college of Kenyatta University at the time.
5. During his tenure as Principal, he played a pivotal role in the development and growth of Machakos University College. His leadership was instrumental in the institution's upgrade to a fully-fledged university in October 2016. Following this upgrade, he was appointed as the Acting Vice-Chancellor of Machakos University, a position he held until February 2018. His appointment as Acting Vice-Chancellor was initially for a period of six months, but it was subsequently renewed twice.
6. In May 2017, while still serving as Acting Vice-Chancellor, and at the instance of the Respondent, the Claimant applied for the position of Full Professor at Machakos University. His application was approved, and he was appointed as a Full Professor in the School of Agricultural Sciences. The terms of his appointment, as outlined in his letter of appointment, included the retention of his basic salary and house allowance upon exiting his administrative role. This was approved by the University Council at its meeting on May 29, 2017. This arrangement was in line with the exit benefits package approved by the Inter-Public Universities Councils Consultative Forum (IPUCCF).
7. The Claimant's transition from an administrative role to a teaching position was accompanied by assurances from the university council that he would retain his previous salary and benefits. These assurances were critical in his decision to accept the appointment as a Full Professor, as they provided financial security and stability following his tenure as Acting Vice-Chancellor.
8. Upon his exit from the Vice-Chancellor position in February 2018, he expected the university to honour its commitments. However, in March 2018, shortly after he returned to his teaching position, the Respondent unilaterally reduced his basic monthly salary from KShs. 534,259 to KShs. 170,681, his house allowance from KShs. 82,704 to KShs. 73,715, and his medical insurance cover from KShs. 7 million to KShs. 2 million. This reduction was implemented without prior consultation or agreement, contrary to the terms outlined in his appointment letter, which explicitly stated that he would retain his previous salary and benefits upon exiting his administrative role. This constituted a material breach of contract by the university and resulted in significant financial losses on his part.
9. The Claimant appealed this decision, and in April 2018, the university council revoked the reduction, reinstating his previous salary and benefits. However, in April 2021, the Respondent once again reduced his salary and benefits, this time citing an internal audit and government circulars as justification. The Respondent argued that the Claimant was only entitled to the salary and benefits of a Full Professor, not those of a Vice-Chancellor, and that the previous council's decision to allow him to retain his higher salary was in violation of government circulars.
10. He further argued that the decision to reduce his salary and benefits was made arbitrarily, without consultation, and without affording him the right to a fair hearing. The Respondent's action was an affront on his right to fair administrative action, and statutory law which dictate that an employer must engage an employee before making such fundamental changes to their employment terms.
11. The Respondent unfairly singled him out for salary and allowance reduction, whereas other senior administrators in Kenyan public universities had retained their salaries upon returning to teaching.



He pointed out that IPUCCF-approved exit package benefit had been granted to numerous other Vice-Chancellors, Deputy Vice-Chancellors, and Principals of constituent colleges who returned to academia after completing their executive terms. He cited the case of Dr. Esther Gicheru, a former Acting Principal of the Cooperative University College of Kenya, whose exit benefit remained intact, even though she had only served briefly.

12. He further questioned why the payroll audit that triggered his salary reduction did not raise concerns about other university officials who had received similar benefits. He accuses the Respondent's internal audit committee of selectively targeting him, calling it a malicious and retaliatory move.
13. This, in his view, amounted to discrimination and violated the stipulations of Article 27 of *the Constitution* of Kenya, which guarantees equality and freedom from discrimination.
14. Based on the University Council's assurances, he made long-term financial commitments with the expectation that his salary and benefits would remain unchanged. After the Council reaffirmed his salary retention in April 2018, he took on financial obligations, including loans, insurance, and investments, relying on that decision. He contends that it was grossly unfair for the Respondent to later revoke its commitment in 2021, leaving him financially vulnerable and facing potential bankruptcy.
15. Institutions of higher learning must be held accountable for the commitments they make to their employees and that the Respondent's sudden reversal violated the principles of fair labour practices and ethical governance.
16. The Claimant further argues that the Respondent's actions have caused him immense financial and emotional distress. The salary deductions, along with unilateral recovery of allowances, significantly impacted his ability to meet financial obligations. The situation was not only unfair but punitive. The university proceeded with salary recoveries without offering a structured repayment plan or negotiations, worsening his financial struggles.
17. Moreover, he states that the uncertainty, frustration, and public humiliation caused by this dispute have taken a serious toll on his mental health and professional reputation. He accuses the university of acting recklessly and callously, failing to consider the human impact of its decisions.
18. The Respondent's reliance on the circular letter reference No. OP/CAB.9/21/2A of August ,19th ,2015, from the Chief of Staff and Head of Public Service, to the Cabinet Secretary, Ministry of Education, clarifying on the applicability of Circular No. OP/SCAC1/12[ii] of 14th May, 2015 lacked legal foundation, as the circular has since been held by a Court of law without a legal basis.
19. Further, the Respondent misinterpreted the Circular Letter No. OP/CAB. of August 19, 2015. The Circular explicitly provided that its provisions should not be applied retrospectively. Further, acknowledged that the retired CEOs may retain their previous terms and constrictions.
20. Cross examined by Mr. Wena, Counsel for the Respondent, the Claimant testified that he was appointed to the position of Full professor on or about May, 30 2017 in the School of Agriculture and Natural Resources. The School was subsequently merged with others. They currently are under the School of Agriculture, Environment and Health Sciences.
21. Against the decision to reduce his salary and allowances, he filed two appeals. The 1st one on April, 27,2017. The second, was under the letter dated 7th May 2021. The letter was on the letter head of School of Agricultural Sciences, where he currently serves. The name changed from the one he mentioned earlier, due to further re-organization of the departments.



22. The internal memo dated 12th November 2013 was by South Eastern Kenya University and addressed to him, concerning his exit package. The university was committing to pay him the salary and allowances that he was earning while serving at the management level. This letter was relevant to the employment relationship between him and the Respondent. It is this package that he transferred to the Respondent university. His letter of appointment is a testament to it.
23. He was appointed as an Acting Vice-Chancellor though the letter indicates that he was to become a Vice-Chancellor. He was appointed to the position on September, 20 2016. The Circular No. OB/SCSC/1/12[ii] dated May, 14 2015, therefore, predated his appointment to the position of Acting Vice Chancellor. However, the Circular No. OB/CAB.9/21/2A, was issued after his appointment.
24. Under agenda 5 of the Minutes of the Inter University Councils Consultative forum, of 16th March 2013, the terms of exit for senior management- Vice Chancellors, Deputy Vice Chancellors, Principals of University Colleges, were discussed. The phrase ‘return to home university’ under the clause, didn’t limit the applicability to one’s previous employer, university. For purposes of this matter, home university, meant the Respondent university.
25. He was on leave of absence from South East University of Kenya. He remained its employee up to May, 29 2017. Upon appointment by the Respondent university, he transferred his accrued benefits there.
26. Through his email dated May, 23 2017, addressed to Professor Douglas Shitanda, who was then the Deputy Chancellor, Administration, Planning, and Finance, he instructed that some matters including interviews had to be concluded before the new Council was installed. In the letter he gave directions on how the interviews were to be conducted, and indicated that he had talked to the Chairman of the Council. The issue of interviews had dragged for a long time, it was the Chairman’s desire that it be conclusively dealt with before he exited.
27. The Claimant further testified that he first he first applied for the position of full professor on February, 18 2014, but consideration of the application was deferred. He applied again on May, 23 2017, following verbal instructions by the Chairman. The Chairman instructed all managers who qualified to apply.
28. He attended the 6th Special meeting held on May, 29 2017 as an ex-officio member. Under Agenda 5[b], the HR Committee recommended for the issue to be discussed before a Special Committee to be held on Monday 29, 2017, before the interviews and absorption. The Committee resolved in favour of his appointment.

The full Council meeting didn’t discuss the two circulars.

Respondents case

29. The Claimant was first appointed as the Principal of the then Machakos University College, a Constituent College of Kenyatta University, on 30th December 2014 for a period of five (5) years. Machakos University College is the predecessor in title of Machakos University.
30. Upon the Respondent attaining full university status on 7th October 2016, the Claimant was appointed as its Acting Vice Chancellor via a letter dated 20th September 2016 for a period of six (6) months. This appointment was subsequently renewed twice, a position he held until 20th February 2018.
31. The Claimant’s initial appointment was in an acting capacity. Therefore, Clause C.13 of the Public Service Commission Human Resource Procedure Manual was applicable.



32. On 23rd May 2017, while still Acting as Vice Chancellor, the Claimant sent an email to Professor Shitanda instructing him to table a summary of staff transition and absorption of top management and other applicants for Grade 14 and 15 in the Human Resource Appointment Committee of the University Council, which was scheduled to meet on 29th May 2017.
33. On the same day, 23rd May 2017, the Claimant applied to the Chairman of the University Council for the post of Full Professor in the School of Agriculture and Natural Resource Management at the University.
34. On the same date, Professor Shitanda, who was the Deputy Vice Chancellor of Administration, Planning, and Finance, commented on the Claimant's application letter, instructing the Registrar of Administration and Planning to include the Claimant in the shortlist for interviews.
35. On 29th May 2017, the University Council held its 6th Special Meeting and discussed a proposal for the absorption of top management staff on contract terms as academic staff of Machakos University. The issue was discussed under MIN 4/65P/MKSU/17 and resolved as follows: a) The four top management staff who applied for absorption as academic staff of the University at the same grades they held at their respective universities would be interviewed by the Appointment and Promotion Committee since the positions already existed. b) Any member of the top management who applied for absorption at a higher grade would be interviewed for transfer of service and subsequently for promotion. c) The monthly basic and housing allowance for top management staff whose terms were transferred upon interview would remain as applicable at the time of exit from university top management personnel until the monthly basic salary and house allowance of an Associate Professor reached that level.
36. The Claimant participated in the full council meeting that deliberated on the absorption of top university management into academic staff while also being one of the applicants for such absorption. This constituted a clear conflict of interest, which he did not declare.
37. The Claimant's email to Professor Shitanda on 23rd May 2017 indicates that personal conversations had occurred between Professor Shitanda and the Chairman of the University Council regarding the absorption of university top management into academic staff. The email also suggests that the list needed to be presented before the Chairman of the University Council resigned, as agreed. This indicates that the Claimant's appointment to Full Professor in the School of Agriculture and Natural Resource Management was not conducted transparently.
38. The University Appointment Committee of the Council met on 29th May 2017 to consider the Claimant's transfer of service from South Eastern Kenya University to Machakos University. The Committee resolved to appoint the Claimant as a Full Professor in the School of Agriculture and Natural Resource Management and to transfer his services to Machakos University.
39. The Claimant was appointed to the position of Full Professor in the School of Agriculture and Natural Resource Management on 30th May 2017, an appointment he accepted on 31st May 2017, signing the terms of service for Academic/Senior Library and Administrative Staff.
40. The Claimant reverted to his position as Full Professor in the School of Agriculture and Natural Resource Management upon the conclusion of his tenure as Acting Vice Chancellor.
41. Public Service Circulars Reference No. OP/SCAC.1/12(11) dated 14th May 2014 and Reference No. OP/CAB.9/21/2a dated 19th August 2015, issued by the Head of Public Service and binding on the University, stipulated that staff employed by State Corporations only receive remuneration and privileges within the regular terms and conditions of service applicable to their substantive



- appointments and grades. Specifically, staff in research institutions and public universities who retire as Chief Executive Officers but revert to research/teaching positions must adopt the salaries and allowances assigned to their new lower-grade roles.
42. In compliance with the Circulars, upon the Claimant's completion of duty as Principal of Machakos University College and Acting Vice Chancellor of the University, his earnings were limited to the basic salary and house allowance applicable to his substantive position as a Full Professor.
 43. The University Council's resolution on 29th May 2017, which allowed top management staff to retain the salaries and allowances earned in their management positions even after reverting to academic positions, contravened the Public Service Circulars and was therefore illegal, null, and void.
 44. The provision in the Claimant's appointment letter of 30th May 2017, allowing him to retain his Vice Chancellor's salary and house allowance upon reverting to Full Professor, was similarly illegal, null, and void for violating the same Circulars.
 45. The exit terms of service for Vice Chancellors, Deputy Vice Chancellors, and Principals of Constituent Colleges in Public Universities, as approved by the Inter Public University Councils Consultative Forum (IPUCCF), did not apply to the Claimant since he did not return to his home university, South Eastern Kenya University. His appointment as Full Professor in the School of Agriculture and Natural Resource Management at Machakos University meant that he could only revert to another role within Machakos University after his tenure as Acting Vice Chancellor.
 46. Consequently, the Claimant was not entitled to retain the salary, house allowance, and benefits he received as Acting Vice Chancellor after his exit from the position on 20th February 2018. The University Council's decision on 29th March 2018 to adjust his salary and allowances to that of a Full Professor was lawful.
 47. The decision to reduce the Claimant's medical insurance cover from Kshs. 7,000,000 to Kshs. 2,000,000 for inpatient care and from Kshs. 7,000,000 to Kshs. 3,000,000 for outpatient care was in compliance with the regulations requiring him to receive only the medical insurance applicable to his position as a Full Professor.
 48. The University Full Council's resolution of 12th April 2018, communicated on 16th April 2018, stating that the Claimant would retain his salary and house allowance from his substantive principal position until the Professor's salary exceeded that amount, was in contravention of the Public Service Circulars.
 49. The decision of the Full University Council Meeting held on 15th April 2021, communicated to the Claimant on 29th April 2021, to pay him only the salary and house allowance applicable to a Full Professor was in accordance with Public Service Regulations and Circulars.
 50. The Claimant appealed this decision via a letter to the Chairman of the University Council dated 7th May 2021.
 51. An Ad Hoc Committee deliberated on the Claimant's appeal, and after considering his arguments, the Full Council upheld the decision of 18th April 2021, as communicated to him on 29th April 2021.
 52. The Claimant's appointment to Full Professor on 30th May 2017 disregarded the requirement for an approved staff establishment in the relevant school or department, as neither the School of Agriculture and Natural Resources Management nor the Department of Food and Science Technology existed at that time. The Staff Establishment was only approved on 12th November 2021, with the school renamed as the School of Agriculture, Environment, and Health Sciences.



53. The Respondent's witness [Sarah Mumbi] cross examined by the Claimant's Counsel, Ms. Guserwa, testified that the University Council is the top most decision-making organ of the Respondent. The Audit Committee cannot reverse the Council's decision. Only the Council can reverse its decision[s].
54. When the Council approves the employment of an employee, the employee is engaged on specific terms and conditions. The terms and conditions can only be varied after hearing the affected employee.
55. The audit report that raise the issue of the Claimant's salary and allowances being what they weren't supposed to be, was not presented to Court, she confirmed.
56. She asserted that the Claimant was in the Council meeting of 29th May 2017, where the issue of his salary as Full professor was discussed. He attended as the Vice Chancellor/ Secretary. However, it isn't possible to tell whether or not he contributed to the deliberations on the salary.
57. Upon advice from the Audit Committee, the Respondent's Council, decided to change his terms of engagement. The Claimant was engaged before the variation of his salary and allowances as required by section 10[5] of the *Employment Act*. However, the Respondent didn't lodge any document before this Court from where this can be discerned.
58. The money that was recovered from him was which that had been paid to him erroneously under a Collective Bargaining Agreement, not any salary and allowances that had been paid over and above the newly set salary and allowances.

Analysis and Determination

59. I have carefully considered the pleadings by the parties herein, their evidence and Counsel's submissions, and the following issues emerge for determination:
 - I. Whether the Respondent's reduction of the Claimant's salary and benefits constitutes a breach of the terms of his employment contract.
 - II. Whether the government circulars cited by the Respondent could be applied justifiably to reduce the Claimant's salary and benefits.
 - III. Whether the Respondent's actions were in violation of the constitutional guarantee to fair administrative action.
 - IV. Whether the Respondent's actions were violative of the Claimant's right not to be discriminated against.
 - V. Whether the Claimant is entitled to the reliefs sought.

Whether the Respondent's reduction of the Claimant's salary and benefits constitutes a breach of the terms of his employment contract.

60. There is no dispute that the Claimant was appointed as the Principal of the Respondent University College effective from 30th December, 2013 for a period of five [5] years. Clearly, before the lapse of this contractual period, the institution morphed into a fully-fledged University on 7th October, 2016. Upon this, he was appointed as the Acting Vice-Chancellor of the University, a position which he served for one year and four and half months up to 20th February 2018.
61. Further, it is undeniable that before exiting the forestated position, he had applied for, and been appointed as a Full Professor in the Respondent's School of Agriculture on 30th of May, 2017. The



terms of service under the contract of employment, following the appointment are the subject matter of the instant matter.

62. The foundation for the absorption of top Management Staff on contract terms as Academic Staff of the Respondent University was in detail laid out in the MIN4/6SP/MKsU/17 of the 6th Special Meeting of the Respondent's Council held on 29th May, 2017. I have carefully, considered the details of the minute, the justification for the absorption, the fact that good practice was borrowed from other universities locally and internationally where a similar model had been applied, and the manner the process was to be carried out, and take a clear view, the minute is reflective, of a Council that was alive of, and that intended to act per, the stipulations of Article 232 of *the Constitution* of Kenya- Values and principles of public service, and Article 73[2], Guiding principles of leadership and integrity.

63. On 29th May, 2017, after meeting to consider the transfer of service for the Claimant from South Eastern Kenya University to the Respondent University, the Appointment Committee of Council, resolved that he be appointed as a Full -Professor in the School of Agriculture and Natural Resources Management and his services transferred to the Respondent University. It is imperative to point out, that the modalities of carrying out his interview, embodied, consideration of transfer of service at the same grade he was currently holding in his respective university, and the usage of the developed score card with the pass mark of 70 points out of a maximum of 100 points.

64. It was a term inter alia of his appointment to the position of Full Professor, as was expressed in his letter of appointment dated 30th May 2017, that;

“Your monthly basic salary and house allowance shall be that applicable at the time of exit from the University Management personal to yourself and until the monthly basic salary and house allowance of a Full Professor reach that level.”

65. I am of the view, that this term was informed by the justification for the absorption of the top Management Staff to Academic Staff, as was elaborately brought out in the detailed minute of the Council hereinabove referred to, and the need to retain and maintain a workforce that could enable it efficiently, effectively, and competitively discharge its mandate, under the Act establishing it and its Charter.

66. I am of a further view, that the fact that the Claimant had an exit package at the time of leaving the South Eastern Kenya University for his tour of duty, under the letter dated 12th November, 2013, which read in part;

“ ... I wish to inform you that the University Council at its meeting held on 8th November, 2013 resolved that you retain your current basic salary and house allowance frozen to self until when basic salary and house allowance of a Professor of South Eastern Kenya University will exceed your current basic salary and house allowance.”

67. Relevantly, the internal Memo issued by the Office of the Vice- Chancellor, South Eastern University with the subject “Payment of Salary for Prof. Francis Mathooko” read:

“The University Council during its meeting held on 8th November, 2013 approved that Prof. Francis Mathooko retains his basic salary and house allowance frozen self until such a time when the salary of a professor at SEKU exceeds his basic salary and house allowance.

Kindly arrange to pay Prof. Mathooko with effect from 22nd October, 2013 as follows;

I. Basic Salary- KShs. 340,339 per month



II. House Allowance- KShs. 74,920 per month

Sub-total - KShs. 415, 259 per month

In addition, the following allowances payable to professors of SEKU should be paid:

III. Professional responsibility- KShs. 5,000 per month

IV. Professional telephone - KShs. 1,000 per month

V. Hardship allowance - KShs. 5,000 per month

Subtotal- KShs. 11,000 per month

Total Kshs. 426, 259.00

68. Was a factor that was in the negotiations for the terms of service for a Full Professor position for the Claimant in the Respondent University, and that influenced the contentious term hereinabove referred to. It wasn't irrelevant, unworthy and peripheral, as Counsel for the Respondent submits.
69. Undeniably, the Claimant had vested contractual rights which were born out of negotiations and consideration of numerous factors, when he accepted the Respondent's offer to serve as a Full-Professor. The vested rights and more specifically those that concerned salary, house allowance, and other allowances were clarified and reinforced through the Respondent's Council's meeting of 12th April, 2018, under the resolution embodied under Min37/9CNL/MksU/18- Retention of Principals Basic Salary and House Allowance Personal to Self and other Allowances, and the ensuing letter dated 16th April 2018.
70. Undeniably, through its letter 29th April, 2021, without any prior notice to, or consultation, or engagement, with the Claimant in any manner whatsoever, the Respondent's Council 'revoked' the forestated letter of 16th April 2016.
71. The employer has no implied right unilaterally to vary the contract terms. However, nearly all the terms of the contract of employment may be varied at any time by agreement between the individual parties, as in the case of any contract. This Principle is reflected in section 10[5] of the *Employment Act*, 2007, in my view with valuable purpose, protection of an employee[s] against misuse of the imbalanced bargaining power in an employee-employer relationship.
72. The provision forestated in my view, provides for a non-derogable right, through a non-contractual 'statutory imposition' in favour of employees. The Respondent's action, of varying the contractual terms, without consultation of the Claimant, was violative of the statutory imposition, the principle of sanctity of contract, and thus a breach of contract between it and the Claimant.
73. The principle of sanctity of contract is well-established in Kenyan law. In the case of National Bank of Kenya v. Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR, the Court of Appeal held that parties are bound by the terms of their contract, and any variation of those terms must be agreed upon by both parties.
74. The *Fair Administrative Action Act*, 2015, is a cornerstone of administrative law in Kenya. It gives effect to the constitutional right to a fair administrative action under Article 47 of *the Constitution* of Kenya, 2010. In my view, any action by a party that is violative of the constitutional guarantee under the Article and the statutory provisions of the *Fair Administrative Action Act*, is null and void. It is not lost of this Court, that the decision to negatively vary the terms of the Claimant's employment, came in almost



four years of the date of the contract, this coupled with the fact that it was not demonstrated that the Council was destitute of knowledge of the existence of the circulars and extent of their applicability, the holding hereinabove that the action was violative of section 10[5] of the *Employment Act*, and the non-rebutted evidence of the Claimant that following his appointment under the terms he was, he got into various commitments, and forwent getting back to SEKU under his exit package, it isn't difficult to conclude in that the Respondent's administrative action was not expeditious, reasonable, efficient, and lawful.

75. Article 47, and the postulations of the Fair Administrative Action, specifically section 4 thereof, require that before any administrative action or decision is undertaken or reached against a person, procedural fairness must be present. Presence of procedural fairness will entail, the person to be adversely affected by the action or decision being notified and heard before the action or decision is undertaken or reached. In this matter, it isn't in dispute that the decision to vary the Claimant's salary and allowances, was reached without first notifying and hearing him.
76. With great respect, the Respondent simplistically looked at the effect of section 10[5] of the *Employment Act*, 2007, the stipulations of the *Fair Administrative Action Act*, and Article 47 of *the Constitution*. Simply arguing that no amount of hearing or consultation could have validated an unlawful, null and void action by the Council that appointed the Claimant to the position of Full Professor. I am not persuaded that it was within the authority of the successor Council to declare as unlawful, null and void decision[s] by the predecessor Council, which affected the individuals' social-economic, and constitutional rights, without first, legally challenging those actions, and or engaging those individuals.
77. If indeed the Respondent had the conviction that the Claimant was improperly employed in the position of Full Professor, and that the contractual salary and allowances that were accorded to him under the contract were without consideration of the circulars, the only reasonable and legal option they had was to seek from Court a declaration to that effect, among other remedies. A reasonable employer with such a conviction could have filed a Counterclaim in this matter for interrogation. To allow the position taken by the Respondent, will be in ignorance, and rendering nonsense of the statutory protection and rights that an employee[s] is supposed to enjoy both under the *Employment Act*, the *Fair Administrative Action Act*, and the Constitutional provisions regarding, Fair labour practices [Article 41], Fair administrative action [Article 47], and Fair hearing [Article 50].
78. I agree with the Court in the decision in the case of Republic v Chief of Staff & Head of the Public Service & 2 others Ex-parte George A.O. Maghoa, where it was held:
- “My understanding of the above provision is that where an administrative action would affect an individual, that individual should be given an opportunity to be heard. The Applicant was however never heard on an administrative action that adversely affected him.”
79. The importance of procedural fairness was further emphasized in the case of Republic v. Public Procurement Administrative Review Board & Another Ex-parte Selex Sistemi Integrati [2018] eKLR, where the court held that administrative decisions must be made in a manner that respects the rights of the affected parties. The court further stated that failure to adhere to procedural fairness renders the decision null and void.
80. In the upshot, I find that the Respondent's action was in violation of the dictates of the *Fair Administrative Action Act*, and the constitutional guarantee to Fair administrative action, for the Claimant, and therefore null and void.



Whether the government circulars cited by the Respondent could be applied justifiably to reduce the Claimant's salary and benefits.

81. The Respondent contended that its decision to reduce the Claimant's salary and benefits in 2021 was based on government circulars hereinabove mentioned. This court has rendered itself the legality of the circulars in the cases of George A.O Maghoa [Supra], Nakuru ELRC JR No. 1/2016-Professor James Tuitoek v Chief of Staff and Head of Public Service and Egerton University and R v Head of Public Service and others [2018] eKLR, and found them to be legally inapplicable in the circumstances similar to the ones in the instant case.
82. It is important to point out that in the last case [Professor Francis Muhiru Njeru], the court issued an order for certiorari, removing into the Court and quashing the Circular Letter, Reference No. OP/SCA.1/12[11]. The decision was not appealed against, it still stands. The Court's decision was made on 15th October, 2018. The decision to vary the Claimant's salary and allowances, was made in April 2021. As such, a circular which had been quashed could not legally and justifiably be applied to vary the Claimant's salary in the manner it was.

Whether the Respondent's actions were violative of the Claimant's right not to be discriminated against.

83. The Claimant alleges that the Respondent's actions were discriminatory and in violation of his constitutional right under Article 27 of *the Constitution*. I have carefully considered the material placed before this Court, and on the basis thereof, I am unable to find in favour of the assertion. In a bid to demonstrate that he was discriminated against, the Claimant contended that Dr. Esther Gichuru one of the Principals of a Constituent University College was availed the IPUCCF-approved exit benefits package in perpetuity. Besides, baldly asserting in this manner, he placed forth no evidence to show that indeed this happened.

Whether the Claimant is entitled to the reliefs sought.

84. The Claimant sought inter alia an order directing the Respondent to refund all deductions effected on his basic salary [including 2017-2021 CBA arrears], house allowance and all other allowances as set out in paragraph 18 of the amended statement of claim. The Respondent's witness in answer to this claim asserted that there weren't deductions made on the Claimant's remuneration regarding basic salary and allowances, but only in respect of payments that had been erroneously paid to him under a Collective Bargaining Agreement. In my view, in light of the admission by the Respondent, more was required of them, to tender evidence to show why they deemed the payments under the CBA unlawful.
85. The Respondent as the keeper of employee records needed to demonstrate by way of production of records, that the amounts as specifically pleaded in the Claimant's amended statement of claim, were not deducted from the Claimant's monthly remuneration, during the period alleged. In the absence of such, I hold, the Claimant's claim under this head wasn't discounted.
86. The Claimant further sought for payment of all allowances excluding Administrative/Management allowances and benefits effective February 2018 as per Schedule 2 to the statement of claim. I have carefully considered the particulars of special loss and damages as at October 2021. They appear duplicated under schedule 2. As such, granting the relief sought under this head shall tantamount to double awarding the Claimant.
87. Having found that the Claimant didn't prove that he was discriminated against, I decline to award the damages sought forth alleged violation of his constitutional right under Article 27 of *the Constitution*.



88. In my understanding of *the Constitution*, there isn't a right provided therein called "right to lawful expectation". The Claimant sought damages for violation of his constitutional right to lawful expectation. This Court cannot grant the remedy sought on the premise of a non-existent constitutional right.
89. Lastly, the Claimant asked this Court to direct the Respondent to pay him pecuniary damages. This is a relief sought ambiguously, and whose legal and factual basis was not established.
90. In the upshot, Judgment is hereby entered for the Claimant in the following terms:
- I. A declaration that the Respondent's decision and action of varying the Claimant's salary and allowances was unlawful and unfair.
 - II. A declaration that the Claimant was at all material times was and is entitled to earn salary and allowances as set out in his letter of appointment and clarified in the Respondent's letter dated 16th April 2018.
 - III. The Respondent to tabulate within 30 days of this Judgment:
 - a. All the salary and house allowances that have not been paid to date, to the Claimant following the Respondent's decision to vary the salary and house allowance, contrary to his letter of appointment and the Respondent's letter dated 16th April 2018.
 - b. Il annual and monthly professorial allowances applicable to professors of the Respondent University, that have not been paid to the Claimant with effect from 20th February, 2018, as per the Respondent's letter dated 16th February 2018.
 - c. The deductions made from the Claimant's remuneration by the Respondent on the alleged basis that the sums had been paid to him erroneously, under a Collective Bargaining agreement.
 - d. Any amounts that were deducted from the Claimant's remuneration, on account that they were basic salary, house allowance, and other allowances and or benefits, that were paid to him contrary to the Ministerial circulars.
 - IV. The tabulation be filed in court and served on the Claimant within the foretated period [30 days].
 - V. This matter shall be mentioned on 6th of May 2025, for purposes of checking on compliance, adoption of the tabulation by the Respondent as the final award of this Court, and or for further orders and or directions.
 - VI. Interest on the sum to be paid by the Respondent shall be at court rates from the date of the decision to vary the Claimant's salary and house allowance till full payment.
 - VII. Costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2020.

OCHARO KEBIRA

JUDGE

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