REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

PETITION NO. 7 OF 2017

(Before D. K. N. Marete)

PROF. MISIA MANUGUTI KADENYI.....PETITIONER

VERSUS

MAASAI MARA UNIVERSITY.....1ST RESPONDENT

THE VICE CHANCELLOR, MAASAI MARA UNIVERSITY.....2ND RESPONDENT

THE CHAIRMAN OF COUNCIL, MAASAI MARA UNIVERSITY...3RD RESPONDENT

THE COUNCIL, MAASAI MARA UNIVERSITY.....4TH RESPONDENT

JUDGEMENT

This matter is originated by way of a Petition dated 5th April, 2017.

The respondents' in a Replying Affidavit to the Petition and Notice of Motion dated 8th May, 2017 denies the petition and prays that the same be dismissed with costs.

The petitioner's case is that she was employed as an Associate Professor by the respondent in 2009. Vide a letter dated 16th March, 2013 she was appointed as a Full Professor on permanent and pensionable terms of service.

The petitioner's further case is that in the same year, 2013, and through a competitive selection process the 1st respondent appointed her to the position of Deputy Vice Chancellor, Academic, Research and Student Affairs. Despite assuming this office, she still retained her position as Full Professor but did not draw any salary from it. Her salary was Kshs.333,640.00, gratuity at 31% of the basic salary at the end of the contract, allowances – entertainment allowance, responsibility allowance, house allowance, extraneous allowance, domestic allowance, telephone/airtime allowance and car allowances. She was however not paid her car allowance amounting to Kshs.125,000.00.

The petitioner's duties, as contained in her letter of appointment were as follows;

- *to be the head of the Academic Division and be in charge of all Academic and Student Affairs*

- *to provide Secretariat to the Senate, and;*

- *to drive the University's research agenda in line with the country's vision.*

She was answerable to the 2nd respondent – The Vice Chancellor, Maasai Mara University.

The petitioner's other case is that she performed her duties diligently until the year 2014 when the 2nd respondent accused her of planning a student demonstration which allegation were never substantiated. Henceforth, the relationship between the petitioner and the 2nd respondent became frosty forcing her to write a protest letter to the 3rd respondent who responded and organized a meeting in which it was agreed that the petitioner and the 2nd respondent should foster dialogue and unity. This did not work and the 2nd respondent began writing memos and letters to the petitioner with copies to the 3rd respondent in a bid to cast her in bad light.

The petitioner further avers that on or about September 2016, she applied for leave which was to run from 6th September, 2016 to 1st November instant and as was custom she wrote to the 2nd respondent recommending one of her counterparts, the Dean of Science to act on her behalf while she was away. The 2nd respondent instead went ahead to appoint the Dean of Business who had not submitted all the examination results for the year to take over from her.

Her other case is as follows;

15. Though the Petitioner expressed her reservation to the 2nd and 3rd Respondents about the person nominated to take over from her, the same was ignored and instead on 9/9/2016 on the Petitioner's last day in office before proceeding on leave, the 1st Respondent's agents and/or servant proceeded to the Petitioner's office late in the evening and well past the working hours, took inventory of what was contained in her office and proceeded to change the locks and lock the door to the Petitioner's office.

16. The Petitioner indeed proceeded on leave on 10/09/2016 which leave to end on 1st November, 2013.

17. However, on the morning of 1st November, 2016 just as the Petitioner was preparing to report for work, she received an interdiction letter dated 31/10/2016 that was delivered by the 1st Respondent's Security Officer.

18. The Petitioner's interdiction was instigated by a report prepared by the 2nd Respondent on the performance of the Petitioner which report had been presented before the Council, Maasai Mara University.

19. The said interdiction dated 31/10/2016, which was a replic of the report prepared by the 2nd Respondent cited the following grounds for interdiction:

i. Insubordination of University Council: the Petitioner was accused of arrogating herself power to appoint an acting DVC (AR &SA) while she proceeded on leave by protesting the appointment made by the Chair of Council and receiving a letter meant for the Vice-Chancellor.

ii. Curricula Review: the Petitioner was accused of failing to ensure that the curriculum was approved by the Senate, Maasai Mara University and offering programmes not approved by the University.

iii. Student Progression: the Petitioner was accused of failing to streamline the progression of students.

iv. Admission of Students: the Petitioner was accused of not ensuring that the students receive their admission letters in time.

v. Release of Examination Results: the petitioner was accused of failing to release examination results on time.

vi. Student Campus Transfers: the Petitioner was accused of failing to control migration of students from one campus to the other.

vii. Processing of Graduation Lists: the Petitioner was accused of tampering with the graduation lists for the year 2013-2015.

viii. Anomalies in Graduation Certificate: the Petitioner was accused of errors in printing of graduands certificates in the years 2013 and 2014.

ix. Student unrest: the Petitioner was accused of failing to deliver on the mandate of student affairs thus exposing the University to a series of student unrest.

x. Conflicts of Interest: the Petitioner was accused of attending an interview to consider applicants for the post of Reproductive Health Nurse, Medical Health Records Officer, Pharmaceutical Technologist, Clinical Officer and Medical Laboratory Technologists on 1st April, 2014 where one of the interviewees, Grace Moraa orina, a relative was successfully appointed.

The letter of interdiction above cited culminated in an invitation to the petitioner to attend disciplinary before the Disciplinary Committee of Council on 5th January, 2017. It also informed her of the liberty to bring evidence of documents at the hearing but on application for documents the 1st respondent wish to rely on but this was rebuffed. Legal representation at this meeting was also declined by the 3rd respondent. Her call to invite her niece to take notes during the proceedings was also resisted and refused forcing her to appear without any representation.

This is further presented as follows;

28. Upon settling down for the meeting which began at 4.45pm despite the Petitioner being at the venue at 9.00am as per the invitation letter, Mr Lubulellah, the Respondent's legal representative assured the Petitioner that the session was not a disciplinary hearing but that the Disciplinary Committee was only on a fact finding mission.

29. It is while the venue that the legal representative of the 1st Respondent indicated to the Petitioner that she could call her witnesses, which information she had not been given prior to the set date.

30. The Petitioner, attempted to call some of the people who would clarify some of the issues raised in the interdiction letter but most of them were not available as the notice was too short and it was also too late in the evening for them to make arrangements to appear.

31. The Petitioner only managed to call the Deputy Vice Chancellor, Administration, Finance and Planning who spoke on the issue of conflict of interest and confirmed that the Petitioner was not present when Grace Moraa Orina was being interviewed.

32. At the close of that day, the Disciplinary Committee dealt with two issues; conflict of interest and student unrest. The meeting was thus adjourned to 6/01/17.

33. On 6/1/2017, the Petitioner made her submissions on the remainder of the issues which mainly touched on academics and called only one witness, Prof Ogolla.

34. At the aforesaid meeting, new allegations of inciting students to protest and disrupt the University's graduation ceremony held on 2/12/2016 were leveled against the Petitioner which allegations had not been brought to her attention prior to the meeting and which were not part of the interdiction letter of 31/10/2016.

35. At the end of the meeting which lasted till 6pm the Petitioner was informed by the 3rd Respondent that they had concluded the meeting but would call her if they needed anything

36. The Petitioner subsequently received a letter dated 10/1/17 inviting her to appear before the Disciplinary Committee on 20/01/2017.

37. On 20/01/2017 the Petitioner appeared before the Disciplinary Committee alone and the 3rd Respondent told her that they had completed her issue unless she had something to tell them.

38. The Petitioner indicated to them that she had come with witnesses as per the invitation letter: Dean of School of Science, Prof. Nathan Oyaro and the former Dean of the School of Arts and Social Science, Prof. Samson Omwoyo.

39. The said witnesses were questioned on all academic issues raised in the interdiction letter.

40. Throughout the process, the 3rd Respondent kept insisting that the proceedings before the Disciplinary Committee was not a trial.

41. Upon concluding the meeting the Petitioner was told that the Disciplinary Committee would communicate to her.

42. The Petitioner later received a letter dated 7/2/17 inviting her to appear again before the Disciplinary Committee on 9/2/17 at 9:am.

43. The Petitioner arrived at the venue at 9.00am but the Chairman told her that if they needed her, they would call her.

44. The Petitioner gave the 3rd Respondent the location where she could be found in case they needed her and left.

45. It was only until 4.30 pm that a driver was sent to pick her up.

46. When the Petitioner arrived, she was told to remain outside and wait to be ushered in.

47. While waiting, she saw persons coming in and out of the meeting room, which person she later learnt were witnesses who had been called to testify in her matter in her absence.

48. The Petitioner was later called into the meeting room where she was told to make her final submissions which she did.

49. To the Petitioner's shock, on 2/3/2017 she received a letter dated 20/2/2017 retiring her from service of the University on grounds that she had been found guilty on issues of delay in curriculum review, unco-ordinated and unstructured admissions of students and student progressions, delay in release of examination results, tampering with graduation list of the years 2013, 2014 and 2015, repeated errors in printing certificates particularly in the year 2013 and 2014, haphazard transfers of students from one campus to another, insubordination and conflict of interest.

50. The said letter did not address the Petitioner's fate in so far as her position is concerned, which position was on permanent and pensionable terms, noting that the charges leading up to the disciplinary action to retire her were for her acts and/or omissions during her tenure as Deputy Vice Chancellor (Academic Research and Student Affairs).

51. The Petitioner is sixty one (61) years of age (having been born on29/12/1955) and as such, the decision to retire her from the University services was premature given that as per the Pension Scheme and Insurance Policy contained in the Human Resource Policy, non-teaching staff were expected to retire at the age of 65. However, since the Petitioner was also a Professor and therefore fell within members of the teaching staff, her retirement age was expected to be 70 years if all her contract as Deputy Vice Chancellor (Academic Research and Student Affairs) was not renewed.

52. It is therefore draconian for the Respondent to terminate the Petitioner's services from the University yet she was Full Professor at Maasai Mara University at the time she was appointed as a Deputy Vice Chancellor.

53. It is therefore the Petitioner' contention that the series of events leading up to her retirement from the 1st Respondent's employment was a well choreographed scheme by the Respondents herein particularly the 2nd Respondent to settle personal scores with the Petitioner at the expense of the University's interest and that of the students and public.

54. The Petitioner is apprehensive that the 1st – 4th Respondents will communicate or have already communicated with the 5th Respondent to recommend the filling of the purported vacancies created by the wrongful retirement of the Petitioner and unless stooped by orders of this court, the Respondents are bound to appoint a replacement to the Petitioner as Deputy Vice Chancellor and Full Professor.

55. The Petitioner further contends that the entire process leading up to her dismissal was completely flawed and unprocedural thus rendering her dismissal unlawful, illegal, wrongful and in total contravention of the Constitution of Kenya, 2010, the Fair Administrative Action Act, 2015, The Universities Act, 2012, the Maasai Mara University Human Resource Manual and the Charter for Maasai Mara University for the reasons that;

- *The Petitioner was the only person subjected to disciplinary action yet the charges leveled against her were for actions and/or inaction by the various department heads who were never called upon to answer to those charges contrary to Article 41(1) of the Constitution of Kenya, 2010.*

- *The Respondent subjected the Petitioner to a disciplinary hearing guised as a "fact finding mission/interview contrary to Article 47 (1) of the Constitution of Kenya, 2010*

- *The Petitioner was not adequately informed of the charges facing her contrary to Article 50 the Constitution of Kenya, 2010, Section 4(3)(a) of the Fair Administrative Action, Act, 2015 and 63(1)(a) of the Universities Act, 2012*

- *The Respondent failed and/or refused to avail and/or supply to the Petitioner documentary evidence that were to be relied upon during the disciplinary proceedings against her contrary to Articles 35 and 50 of the Constitution of Kenya, 2010 and Section 4(3)(g) of the Fair Administrative Act,2015.*

- *The Respondents, in the Petitioner's absence, heard witnesses who testified against the Petitioner hence denying the Petitioner an opportunity to cross-examine and/or question the makers of the documents and/or witnesses who testified against her during the disciplinary proceedings contrary to Article 47 and 50 of the Constitution of Kenya, 2010 and section (4)(c) of the Fair Administrative Action Act.*

- *The Petitioner was deprived of her right to representation, legal or otherwise during the disciplinary hearing despite the 1st Respondent being represented by their Advocate, A. M. Lubulellah throughout the disciplinary proceedings contrary to Article 41(1), 47 and 50 the Constitution of Kenya, 2010 and Section 4(4) (a) of the Fair Administrative Action Act.*

- *The Respondents failed to inform the Petitioner of her right to call witnesses prior to the disciplinary proceedings contrary to Article 47 and 50 of the Constitution of Kenya, 2010.*

- *The Petitioner was not given adequate time to prepare her defence and witnesses contrary to Article 47 of the Constitution and 63(1)(b) of the Universities Act, 2012.*

- *The Petitioner was not informed of the reasons for the administrative action taken to retire*

her contrary to Article 47 of the Constitution and Section 4(2) and 6 of the Fair Administrative Action Act, 2015.

- *In contravention of Article 35 of the Constitution of Kenya, 2010 and Section 6 of the Fair Administrative Action Act, the Petitioner was denied access to the transcript of the proceedings despite the Petitioner requesting the same in her letter dated 4/3/2017.*

- *The Petitioner was deprived of her right to administrative action that is expeditious, efficient, lawful, transparent, open, reasonable and procedurally fair contrary to Article 47 of the Constitution and Article 4(1) of the Fair Administrative Action Act, 2015.*

- *The Petitioner was not provided with an option to review or pursued internal appeal mechanism contrary to Article 47 of the Constitution and Section 4(3)(c) of the Fair Administrative Action Act, 2015.*

- *The Respondent failed to follow due procedure in terminating the Petitioner's employment as contemplated in Article 47 of the Constitution of Kenya, 2010 given that no prior notice of retirement was issued to the Petitioner contrary to the Pension Scheme and Insurance Policy contained in the Human Resource Policy which provides that prior to retirement the employer shall issue a retiring employee a written notice of at least twelve (12) months before their effective date or in the vent that the 1st Respondent does not intend to retain a staff beyond the mandatory retirement age, then the Council will inform the staff by giving the employees three (3) months' prior notice.*

- *The Respondent did not issue the Petitioner with six month's notice to terminate her service as Deputy Vice Chancellor as per her employment letter contrary to Article 47 of the Constitution of Kenya, 2010.*

56. The Petitioner therefore contends that the Respondents action were irregular, unprocedural, null and void.

57. The Petitioner has invested heavily in her career and it would be unjust for it to come to an abrupt halt based on a well choreographed scheme by the Respondents to terminate her services unprocedurally and without prior notice.

58. The Petitioner has been denied her only source of livelihood as she is currently not on salary or allowance and/or benefits she enjoyed in her capacity as Deputy Vice Chancellor yet she is still on treatment.

59. Demand and notice to sue has been issued in vain.

60. That this court has jurisdiction to hear and determine this matter.

She prays thus;

a. A declaration that the decision of the council vide its letter of 20th February, 2017 violated Article 41, 47 and 50 of the Constitution of Kenya hence null and void.

b. A declaration that the termination of the Petitioner is in gross violation of Sections 41, 45 and 47 of the Employment Act hence illegal.

c. A permanent injunction against the Respondents restarting them from commencing any process towards replacement of, or replacing the Petitioner in the positions of Deputy Vice Chancellor, Academic, Research and Student Affairs and Professor.

d. THAT an order of certiorari to issue to quash the letter of retirement dated 20th February, 2017.

e. An order that the Petitioner be reinstated and/or allowed to resume her duties as the Deputy Vice Chancellor (Academic, Research and Student Affairs) and Professor of the 1st Respondent.

f. Alternatively, the Petitioner be paid her remuneration/salary for the remainder of her contract as the Deputy Vice Chancellor.

g. The Petitioner be paid her remuneration/salary for the remainder of her term as a professor.

h. The Petitioner be paid all her car allowance as Deputy Vice Chancellor (Academic, Research and Student Affairs) due from 1st January, 2015 of the 1st Respondent till payment in full.

i. That the Petitioner be compensated by way of damages being not less than 12 months' salary for violation of her rights above.

j. Costs of this Petition.

The respondent's case is presented as follows;

8. That I am familiar with the procedure for the appointment of Deputy Vice-Chancellors of the University as provided in Section 35 (1) (v) of the Universities Act, 2012 and observe that whereas it is the responsibility of Council to employ Staff, in the case of Public Universities, the Cabinet Secretary Ministry of Education Science and Technology appoints the Vice-Chancellor, Deputy Vice-Chancellors and Principals of Colleges of the University on behalf of and on the recommendation of Council. The Council competitively indentifies the candidate suitable for appointment and therefore the Vice-Chancellor and Deputy Vice-Chancellor remain so to speak employees of the University Council.

9. That the Respondents have done nothing that can constitute a valid cause of action against them. The case against members of the University is not therefore in my belief incompetent. This view is based on the legal opinion received from the University's Advocates on record.

10. That on the basis of the advice of the University's Advocates on record, which I believe to be correct, I believe that the Chairman of Council cannot be personally sued or made liable in his personal capacity for any decisions of Council since all decisions of Council are not personal but corporate decisions of all Council Members made by consensus and/or unanimous vote. This belief is also based on my experience as Secretary to the Council and my understanding of the rules governing the operations of the University Council.

11. That the Council of the University was recently reconstituted by the Cabinet Secretary, Education Science and Technology with the consequence that the current chairman of council of the university had absolutely nothing to do with matters complained about by the petitioner.

12. That under Section 66 of the Universities Act, 2012 "No matter or thing done by a Member of a University or any Officer, Employee or Agent of a University shall if the matter or this is done bona fide for executing the functions powers or duties of the University, render the Member, Officer or Agent or any Person acting under the directors personally liable to any action, claim or demand whatsoever".

13. That the Petitioner has sought no substantive Orders against the Cabinet Secretary, Education Science and Technology and his joinder is misconceived and bad in law. I am advised by the University's Advocates on record and believe such advice to be correct that a Cabinet Secretary cannot be personally sued in respect of maters of National Government in Court proceedings against the National Government.

14. That the Petitioner is a full Professor of the Maasai Mara University, appointed as Deputy Vice-Chancellor (Academic Research and Student Affairs) by the Cabinet Secretary Ministry of

Education Science and Technology on 28th October 2013 on the recommendation of Council for a period of 5 years which commenced on 29th October 2013 and was to end on 28th October 2018 if her services had not been terminated by Council. Statute VI of the University Statutes provided that Council may terminate the appointment of a Deputy Vice-Chancellor in accordance with the terms of contract.

15. That the appointment of a Deputy Vice-Chancellor at the Maasai Mara University is a contractual engagement and is not a permanent and or pensionable engagement and was in any event subject to the Charter of the University and University Statutes.

16. That the Petitioner's Status as a professor of the University does not obligate her to remain in the employment of the university neither does it prevent the University from taking disciplinary action against her. Professorship is an academic and professional status which is on its own an employment relationship between the University and a Professor. A Professor of the university can work for any other University or organization in the world.

17. That the Petitioner signed a letter of appointment dated 28th November 2013 accepting the terms and conditions of her employment as Deputy Vice-Chancellor at Maasai Mara University. That letter sets out the duties and responsibilities of the Petitioner as Deputy Vice Chancellor (Academic, Research and Students Affairs) at the University. That letter, the Cabinet Secretary's letter appointing the Petitioner, and the University's terms of service are the only matters of relevance to the Petitioner's employment relationship with the University.

18. That the said letter of 28th November 2013 also charged the Petitioner with the responsibilities, inter alia, of curriculum development, academic research and extension programmes and social and academic programmes for students activities.

19. That as head of the Academic, Research and Students Affairs of the University the Petitioner was expected to provide sound effective, strategic direction and transformative leadership. This requirement placed a professional burden on the Petitioner over and above that of other Academic Staff of the University.

20. That as Vice-Chancellor the Petitioner was entitled to and was paid a salary of Kshs.333,640/= per Month and was further entitled to gratuity of 31% of the basic salary at the end of her contract. The Petitioner was also entitled to allowances which included "a fully maintained Official Car with a driver or a car allowance of Kshs.125,000/= per Month".

21. That throughout her tenure as Vice-Chancellor, the Petitioner enjoyed the services of a fully maintained Official Car with a driver but still entertains the misconceived view that she was also additionally entitled to a Car allowance of Kshs.125,000/= per Month. Under her contract and the University Policy one cannot be entitled to a fully maintained Car with a driver and a simultaneous Car allowance. The University does not owe the Petitioner any money on account of Car allowance as the same is not payable.

22. That although the Petitioner's letter of appointment provided for termination for the appointment by either party giving the other party six (6) Months written Notice that letter was nevertheless subject to the Petitioner's satisfactory performance of her duties and responsibilities under the Universities Act, the University Charter and the University Statutes. The Petitioner was found by Council to be in fundamental breach of her employment contract, and I am advised by the Respondent's Advocates on record, which advice I believe to be correct, that the Petitioner is not in law and equity be allowed to profit from her own breach of Contract.

23. That contrary to the Petitioner's averments, the Petitioner was never diligent or satisfactory in the performance of her duties as Deputy Vice-Chancellor (Academic, Research and Student Affairs). Annexed and marked ***"MKW 1"*** *are letters addressed by me to the Petitioner regarding her perfunctory and mediocre performance as Deputy Vice-Chancellor (Academic, Research and*

Student Affairs). The Petitioner's failures in the Management of the Academic, Research and Students affairs constituted a real threat to the ability of the University to deliver on its core business. This failure or breach could not be countenanced by the University.

24. That while engaged as Deputy Vice-Chancellor (Academic Research and Student's Affairs), the Petitioner indulged in sponsoring and planning Student unrest, in the University, conduct which is inimical to the wider interests of the University and which may be perceived as sabotage to the University. Annexed and marked ***"MKW 2"*** *is a security report detailing the Petitioner's malicious schemes against the University Administration.*

25. That I believe that the Petitioner has a personal grudge against me for an unexplained reasons and has failed to focus on her duties and responsibilities to the University in the misguided belief that her failures would be ascribed to me and portray me as being unworthy of my Office as Vice-Chancellor. She drummed up support from her collaborators in engaging in unethical professional conduct to the detriment of the University's reputation. This is not the kind of conduct that the University could countenance.

26. That the Petitioner had a habit of feigning sickness or disability whenever she wished to attract sympathy as a cover-up for her ineptitude and negative attitude towards work. There are many incidences when the Petitioner has feigned sickness in order to avoid her duties even in preparing for graduations. Again this is not conduct which the University could countenance.

27. That the Petitioner's sum total in performance of her duties was, so to speak, perfunctory and lacking in the requisite erudition and professional quality required of her Office. This is exemplified by my internal Memo dated 20th November 2015 and annexed as ***"MMK 3"*** *to the Petitioner's Affidavit sworn on 5th April 2017. The Petitioner's failures are, in my humble opinion, a fundamental breach of her duty as Deputy Vice-Chancellor (Academic, Research and Student Affairs) and is not excusable.*

28. That a perusal of the Petitioner's annexture ***"MMK 10"*** *is sufficient evidence of the Petitioner's conduct and preoccupation with feigning sickness to cover-up for her abnegation of duty. If the Petitioner was actually sick (as can happened to any Person), the Employer cannot be informed of sick offs after the event and when the Employer was not notified of the sickness timeously as required under Section 30(2) of the Employment Act.*

29. That I also believe on that basis that where a Senior Officer such as the Petitioner is constantly prevented from carrying out her duties as a result of genuine sickness it would be fair for her to seek retirement on medical grounds and not to expose the entire University and its programmes to serious risk and prejudice due to her absence from work. I annex hereto documents marked "MKW3´showing that the Petitioner used her sickness related requests for sick-offs and leave of absence to deny the University of Service for which she continued to receive full remuneration. This is not conduct that can be countenanced by any employer.

30. That I further believe based on the above cited legal provision that any Officer of the University (including myself) must in the event of sickness immediately inform the University authorities so that the business of the University is not interrupted. It is unconscionable for an Officer to keep away from the University and only resume duty whenever she wishes and to throw back-dated doctors' notes at the Employer, as a belated explanation for her absence from work without regard for the prejudice and inconvenience caused to the University.

31. That the Petitioner annexture "MMK 3" confirms that on 19th May 2015 I as the Chief Executive of the University, had no information on the whereabouts of the Petitioner. The Petitioner states that she "instructed Prof. Fredrick Ogala to act for her while she was away". This is one example of the Petitioner's modus operandi in her misconceived belief that the responsibilities of the Deputy Vice-Chancellor (Academic Research, and Student Affairs) are personal to her to delegate as she wishes without reference to the Vice-Chancellor or to Council.

The Deputy Vice-Chancellor is administratively responsible and answerable to the Vice-Chancellor of the University but legally to Council.

32. That another example of the Petitioner's insubordination is evidenced by the annexed memo from the Petitioner to the Vice Chancellor, and dated 23rd August 2016 marked "MKW 4" in which she purported to delegate the functions of her office to Professor Nathan Oyaro without the concurrence of the Vice Chancellor. Again I annex similar Memos marked "MKW 5" by the Petitioner tasking Pro. Thuo to act for her in her absence

33. That in another incident of insolence and rude insubordination in the memo dated 7th September 2016 addressed to the Vice Chancellor annexed and marked "MKW 6" the Petitioner had the audacity of questioning a Council decision. Other similar and relevant Memos are attached and marked "MKW 7" – "MKW 15"

34. That although the Deputy Vice-Chancellor is administratively responsible and answerable to the Vice-Chancellor, it is not correct and is fact contrary to the Petitioner's assertion in paragraph 65 of her Affidavit that the Vice-Chancellor is the supervisor of the Deputy Vice-Chancellor.

35. That the office of Deputy Vice-Chancellor is a professional Office and the holder of that Office is appointed on the basis of academic qualifications, self-proclaimed ability and competence to handle the Office professionally and diligently, subject to University processes, the law and direction of Council. The Deputy Vice-Chancellor cannot expect to be supervised in the same manner as support Staff of the University.

36. That the Petitioner had formed a habit of using me as scapegoat for her inadequacies in the hope that issued about her poor performance would be muddled up and escalated to other Institutions and Officers of the University. The Petitioner resisted efforts to review the curricula with no opponent reasons. There were also failures in guidance on Students progression. I annex marked as "MKW 16" a copy of my report to Council dated 26th October 2016. Curriculum development is a very important function of the University and the Petitioner's under performance could not be countenanced.

37. That after obtaining Council approval to take disciplinary action against the Petitioner, on 31st October 2016 on instructions of Council, I wrote to the Petitioner (Exhibit "MMK 17") interdicting her to allow for further investigations into the Petitioner's performance.

38. That the said letter specified the grounds for the Petitioner's interdiction as insubordination of the University Council; failure to expedite and exercise due diligence in the process of reviewing the curriculum; failure to streamline Students' progression; failure to issue students with admission letters prior to their attendance of classes; failure to release examination results to Students timeously or at all; failure to control the migration of Students from one Campus to another; failure to maintain a proper and accountable system of processing graduation lists; printing of erroneous graduation Certificates for Students; failing to keep proper control of Students affairs and allowing discontent among Students leading to Students' unrests; and acting in conflict of interest in the matter of the appointment of one Grace Moraa Orina.

39. That the Petitioner clearly understood the charges against her as is exemplified by her Advocates letter of 4th March 2017 annexed as "MMK 33" to the Petitioner's Affidavit. The very same grounds of the Petitioner's interdiction constituted charges against her in the disciplinary hearing. The main grounds were as follows;

i. Failure to release the examination results to Students on time or at all;

ii. Failure to rein in and to stop wanton migration of Students;

iii. Persistent tampering of graduation lists and results;

iv. Delays in processing graduation lists and results;

v. Failure to put in place a system to synchronise academic programmes in the University; and

vi. Taking leave whenever results are being processed.

40. That some of the details concerning the Petitioner's under-performance touch on personal details of Students and confidential information of the University such that it may not be in good faith or proper to divulge the same without reference to the concerned parties.

41. That the University Council constituted a Disciplinary Committee to hear and determine the disciplinary complaints against the Petitioner. The Chairman of the Disciplinary Committee vide a letter dated 16th December 2016 invited the Petitioner to appear before the Committee on 5th January 2017 (Annexture "MMK 14"). The said letter was explicit that the Petitioner was permitted to bring all her documentary evidence and to appear in the company of a representative of her choice. Council adhered to due process and rules of natural justice.

42. That it is pretentious for the Petitioner to allege that the proceedings of 5th and 6th January 2017 were an interview when she knew that she had not applied for any vacancy for which she was to be interviewed and further had in her possession a letter inviting her to appear before the Disciplinary Committee of Council, which is not an interview Panel.

43. That the Petitioner voluntarily appeared before the Disciplinary committee of Council on 5th and 6th January 2017 when the hearing was adjourned to 20th January 2017.

44. That new or further charges emerged against the Petitioner of which she was given Notice by the Chairman of Council vide his letter dated 20th January 2017 ("MMK 24"). The Petitioner was informed, inter alia, that she incited Students to protest and disrupt the University Graduation held on 2nd December 2016 in order to pressurize my removal as Vice-Chancellor of the University and to render the University unmanageable.

45. That the Petitioner was again invited to appear before the Disciplinary Committee of Council on 9th February 2017 which took place in the presence of the Petitioner who was permitted to attend the proceedings with a representative of her choice. The Petitioner was permitted to cross examine any witness and to make such observations as she deemed necessary. The Petitioner attended the proceedings with Prof. Nathan Oyaro and Prof. Samson Omwoyo and I belie that the Petitioner was given a fair hearing in an open and transparent process..

46. That at the said hearing the Petitioner received an explanation from the Disciplinary Committee of Council and from the legal consultants and she did confirm that the proceedings were based on her misconduct and poor performance of her duties and that she had to show sufficient cause why her employment would not be terminated. She confirmed that she understood the proceedings and participated in the same without objection.

47. That the Council is entitled to legal and professional consultation and therefore sought and obtained consultation and guidance from the firm of Messrs. Lubulellah & Associates Advocates during the disciplinary proceedings against the Petitioner. These Advocates are service providers to the University in compliance with the Public Procurement and Asset Disposal Act, 2015.

48. That the Disciplinary Committee of Council received representations from the Petitioner and considered the same before reaching its decision. This is confirmed in paragraphs 38 and 40 of the Petitioner's Affidavit. A copy of the Petitioner's response is annexed hereto and marked "MKW 17".

49. That on 20th February 2017 the University Council resolved to retire the Petitioner from service of the University on the grounds that she had been found guilty of delaying in curriculum review, uncoordinated and unstructured admission of students and students progressions, delay in release of examination results, tampering with graduation list for the years 2013, 2014 and 2015, repeated errors in the printing of Certificates particularly in the years 2013, 2014 and 2015, repeated errors in the printing of Certificates particularly in the years 2013 and 2014, haphazard transfers of Students from one Campus to another, insubordination and conflict of interest. The letter dated 20th February 2017 is annexed by the Petitioner as "MMK 27" to her Supporting Affidavit.

50. That the Council's decision to retire the petitioner as signified by the letter dated 20th February 2017 was in every aspect valid, legal and justified as it was a genuine decision arrived at in a process which was above board and legal in every respect.

51. That the balance of convenience does not favour the grant of an order of injunction sought in the Notice of Motion. The university's students and the university programmes would suffer irreparably if the injunction is granted.

52. That having been retired procedurally and validly, the petitioner is not entitled to the remuneration or salary for the remainder of the contract as that would amount to utilizing public funds to pay for the services which will not have been rendered.

53. That the office of the Vice-Chancellor is critical for university operations, meaning that the delay in the appointment of a Deputy Vice-Chancellor is prejudicial to the sound operation of the university and will affect its programs and it academic calendar. For this reason I believe that the interest of justice shall not be best served by an injunction restraining the university form advertising for and recruiting a replacement Deputy Vice-Chancellor to deal with matters of Research, Innovation and Extension under the reorganized Research, Innovation and Extension Division.

54. That the office of Vice-Chancellor (Academic Research and Student Affairs) has been abolished by the University Council under Minute 1887/11/2016 which also established the Research, Innovation and Extension Division. There is therefore no office under the University's current establishment to which the petitioner can be reinstated, and to that extent the Petition and Notice of Motion praying for the petitioner's reinstatement have been overtaken by events.

55. That the petitioner applied for, and was paid her gratuity for period from January 2014 to October 2016 in the sum of Kshs.1,403,298/=. The sum of Kshs 601,414/= had been deducted as tax deducted from the gratutity. Annexed and marked as ***"MKW 18 to 20"*** *are copies of payment vouchers and cheques evidencing the above. The University does not therefore owe the Petitioner any money due to her as gratuity.*

56. That what is stated herein is true to the best of my knowledge, information and belief.

The issues for determination therefore are;

1. Whether the termination/retirement of the petitioner by the respondent was lawful?

2. Whether the petitioner is entitled to the relief sought?

3. Who bears the costs of this petition?

The 1st issue for determination is whether the termination/retirement of the petitioner by the respondent was lawful. It would be prudent to make a jurisprudential analysis of the term termination as employed in its various usages in employment law. On this, I wish to rely and take credence on the authority of **D.K. Njagi Marete vs. Teachers Service Commission [2013] eKLR** where my good friend and brother, Rika, J. very ably interrogated this term and came out as follows;

17. Termination of employment as a general term, means, the coming to an end of the contract of employment. The end may come voluntarily, involuntarily or consensually. It comes voluntarily when for instance, the employee resigns; involuntarily when the employee is dismissed or has his position declared redundant; or consensually when a fixed term employment contract lapses. The overall terminology for the end of the employment contract is termination. The means by which that end comes vary. Any form of termination, as discussed by this Court in the Industrial Court Cause Number 886 of 2010 between ***Julie Topirian Njeru v. Kenya Tourist Board****, should always be on objective and demonstrable ground.*

18. Retirement on public interest is a form of termination of employment, instigated by the employer, and would therefore fit the description of involuntary termination. It is not necessarily the result of a disciplinary process. It may for instance, result from an administrative decision by the employer, taken for the removal of persistent non performers from employer's business. As a decision based on public interest results in termination of employment, it would fall within the requirements of Section 43 of the Employment Act 2007. It is the responsibility of the employer to prove the reason or reasons for the retirement.

19. The Respondent had the onus to show objective and demonstrable grounds warranting the retirement of Marete. When a public employer justifies the premature termination of a contract of employment, on the grounds of public interest, such an employer must show its decision is driven by public policy objective, and that the decision taken is legitimate and justifiable. It is not enough to merely write a letter to the employee and inform him that a decision to retire him on public interest has been made. There must be shown valid reasons amounting to public interest, to justify termination. The employer would be expected to show adherence to fair termination procedure, before arriving at the decision. If the allegation against the employee is on non performance, the employer must at the outset advise, counsel, and assist the public servant to amend his ways. In case there is no change, the employer should call for special appraisal. At the end of these procedural steps, the employer would have material with which to confront the employee, and justify retirement on public interest. If public employers are allowed to merely invoke public interest in retiring employees, without giving elaboration of the circumstances giving rise to the infringement of public interest, the employment protections given under the Employment Act 2007 would be meaningless to public servants.

This analysis clearly shows that in the circumstances that this case, the action of the respondents by their letter of retirement of the petitioner dated 20th February, 2017 amounted to termination of employment. The observations made by the court in this cause therefore apply to this petition and suit.

The petitioner in her written submissions dated 10th November, 2017 submits a case of unlawful termination of employment in that the respondent preferred charges against the petitioner on issues that were the responsibility of specific heads of the respondents institution. She submits thus;

- *The issue of processing examination lies squarely with the Dean of school as provided in the Academic procedure manual and the final authority is the Senate of the 1st Respondent as per Section 4(i) and (j) of the Maasai Mara University Charter and the Maasai Mara University Statues, 2013 (see annexure* ***"MMK 28"*** *running from page 47 to 98 of the annexures to the petition)*
- *On the issue of curriculum development, the Academic Procedure Manual provides that the Senate has the final word in so far as approving the curriculum is concerned as per section 4(d) of the Statute. If the Senate does not approve it then the same is referred back to the relevant school for implementation of the recommendations made and for resubmission. My role only comes into play once the curriculum is presented to the Commission for University Education and if any issue is raised, then I am the one to address them (see page 67 of the annexures to the Petition).*
- *The issue of admission of students is handled by the Registrar (Academic Affairs) as evidenced in the Registrar Academic Affairs Procedure Manual (see annexure* ***"MMK 29"*** *on page 101 – 103 of the annexures to the*

Petition). The Registrar also handles the registration of student (see procedure number 2 of the Manual), inter and intra school transfers (see procedure number 3 of the Manual, administration of examination (see procedure number 4 of the manual), Examination irregularities (see procedure number 5 of the Manual), student clearance (see procedure number 6 of the Manual, graduation of students and processing and issuance of official transcripts and academic certificates (see procedure number 7 of the Manual).

The petitioner further faults the disciplinary proceedings leading to her retirement as follows;

- *The Respondents subjected the Petitioner to a disciplinary hearing guised as a "fact finding mission/interview contrary to Article 47 (1) of the Constitution, 2010 (see the affidavit by Prof. Samson Omwoyo sworn on 11/5/2017 filed on 25/5/2017.*

- *The Petitioner was not adequately informed of the charges facing her given that new charges were brought against her when she appeared before the Disciplinary committee contrary to Article 50 of the Constitution.*

- *The Respondent failed and/or refused to avail and/or supply the Petitioner with documentary evidence that were to be relied upon during the disciplinary proceedings against her contrary to Article 35 and 50 of the Constitution and Section 4 of the Fair Administrative Act, 2015 and Statute XXXIX of the Maasai Mara University Statute, 2013 despite the Petitioner requesting for the same (see letter dated 21/12/2016 on page 36 and 37 of the annexures to the petition)*

- *The Petitioner was deprived of her right to representation by a person of her choice during the disciplinary hearing. The petitioner wrote to the 3rd Respondent indicating that she would be legally represented instead the Disciplinary committee denied the petitioner's advocate access to the venue of the disciplinary hearing. This is despite the 1st Respondent being represented by an Advocate, A.M Lubulellah throughout the disciplinary proceedings contrary to Article 41(1), 47 and 50 of the Constitution of Kenya, 2010, Section 4(5) of the Fair Administrative Action Act, 2015 and Statute XXXIX of the Maasai Mara University Statute, 2013 appearing on page 143 of the Petition). Also see the affidavit sworn by Reece Mukhabani Mwani on 25/5/2017 and filed on an even date and paragraph 47 of the affidavit sworn 10/5/2017 by the 2nd Respondent)* – the defence.

- *The Respondents, in the Petitioner's absence, heard witnesses who testified against her hence denying the Petitioner an opportunity to cross-examine and/or question the makers of the documents and/or witnesses who testified against her during the disciplinary proceedings contrary to Article 47 and 50 of the Constitution of Kenya, 2010 and Section 4(4) of the Fair Administrative Action Act, 2015.*

- *The Respondents failed to inform the Petitioner of her right to call witnesses prior to the disciplinary proceedings contrary to Article 47 and 50 of the Constitution. The Petitioner was only informed of that right when she was already at the venue of the disciplinary. As such the Petitioner was not given adequate time to prepare her defence witnesses for the hearing (see page 3 of the Petition).*

- *The Petitioner was not informed of the reasons for the administrative action taken to retire her from both her position as a Deputy Vice Chancellor and as a professor in contravention of Article 47 of the Constitution and Section 6 of the Fair Administrative Action Act, 2015. This is because the letter of retirement indicated that the petitioner was retired due to public interest which interest the Respondent have not divulged the date despite the Petitioner seeking clarification of the same.*

- *The Petitioner was deprived of her right to administrative action that is expeditious, efficient, lawful, transparent, open, reasonable and procedurally fair contrary to Article 47*

of the Constitution of Kenya, 2010 and the Article 4(1) of the Fair Administrative Action Act, 2015.

She therefore submits a case of unlawful termination/retirement which she argues should be reversed *in toto*.

The petitioner further seeks to buttress her case by relying on the authority of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR** where the court held;

> *Section 41 of Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice.*
>
> *The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets.*

Here, the court was elaborate and emphatic on procedure as follows;

> *34. Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee. It is now established best practice to allow for an appeal to such an employee within the internal disputes resolution mechanism and with due application of the provisions of section 5(7) (c) of the Employment Act. Where this procedure is followed an employer would have addressed the procedural requirements outlined under section 41 and any challenge that an employee may have would be with regard to substantive issues only.*

Further,

> *43. Is this the procedure envisaged as under section 41 of the Employment Act. "Did the respondent as the employer follow this procedure" Far from it. From 17th February 2009 to 29th June 2012, the claimant was still under suspension. The respondent Board of Directors met and made a decision to terminate the claimant on the reason of public interest. It was not pleaded or adduced in evidence as to the process employed by the respondent to arrive at this public interest reason of termination. The respondent has not claimed to have given notice or accorded the claimant the right to be heard before the issuance of the letter dated 29th June 2012. This is absurd as the very purpose of due process, natural justice and fair labour practices now demand that before termination, even in a case where the employer is ready and willing to pay in lieu of notice, a hearing must be conducted where an employee is given a fair chance to defend self in the presence of a union representative and if not unionized, in the presence of a fellow employee of the employees' choice. This is a provision core to fair labour practices that each party to an employment relationship must respect. This right was espoused in detail by this court in the case of Elizabeth Washeke and others versus Airtel (k) Ltd and Another Cause No 1972 of 2012. Section 41 of the Employment Act is mandatory as outlined above.*

The 1st and 2nd respondents in their written submission dated 9th January, 2018 also reiterate their case as presented and pleaded. She submits and forments a case of lawful termination of employment in that the petitioner was non performing, belligerent and was habitually passing the back as a cover up for her failure in the performance of her office.

The respondents further fault the case and submission of the petitioner that the issues of non performance she was accused of were the province of other offices of the respondent as follows;

25. In her submissions the Petitioner alleges that the charges leveled against the Petitioner were to be undertaken by specific heads in the 1st Respondent's institutions. That is further from the truth. The Petitioner's letter of appointment dated the 28th of November, 2013 is explicit on the petitioner's responsibilities and they included curriculum development, academic research and extension programmes and social development and academic programmes for student activities. The Petitioner was appointed as the head of the Academic, Research and Students Affairs of the University and was therefore expected to provide overall sound effective, strategic direction and leadership. Thus requirement placed a professional burden on the Petitioner over and above other Academic Staff of the University.

I agree with this limb of the respondents' submission but add that the petitioner's role and duty was to offer leadership in this structure: *sound effective, strategic direction and leadership* was the emphatic requirement of the petitioner. She was not expected to indulge in the mundane aspects of her roles. Her argument and submission therefore suffices.

The respondents' position and submission is that the petitioner was subjected to a procedural disciplinary process thus justifying her retirement or termination from employment.

In conclusion, the 1st and 2nd respondents vehemently submit a case against reinstatement by relying on the authority of **Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] eKLR** where the Court of Appeal observed thus:

*Reinstatement is provided for under **Section 49(3) (a)** of the Employment Act as one of the remedies that a Court, by virtue of Section 50, shall be guided by. It is couched in mandatory terms and requires the court to take into account any of following matters set out in **Section 49(4) (a)** to **(m)** before it can order reinstatement;*

a. The wishes of the employee;

b. The circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and

c. The practicability of recommending reinstatement or re-engagement;

d. The common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

e. The employee's length of service with the employer;

f. The reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

g. The opportunities available to the employee for securing comparable or suitable employment with another employer;

h. The value of any severance payable by law;

i. The right to press claims or any unpaid wages, expenses or other claims owing to the employee;

j. Any expenses reasonably incurred by the employee as a consequence of the termination;

k. Any conduct of the employee which to any extent caused or contributed to the termination;

- *Any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and Any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee."*

A striking feature of the learned Judge's award of reinstatement is that it is not preceded, accompanied or followed by any indication that the foregoing matters were given serious or any consideration as they were required to be. We consider that to be a serious error of law because, as set out in ***(d),*** *the order of specific performance in a contract for personal services, which an order of reinstatement amounts to, is not to be made* ***except in very exceptional circumstances****. At the very least a Judge ought to set out the factors that mark out a particular case as possessed of exceptional circumstances before reinstatement can be ordered. This provision, properly understood, ought to render orders of reinstatement rarities, not common place and routine pronouncements as appear to come from certain sections of the Employment and Labour Relations Court. This calls for a strict adherence to the law as carefully and mandatorily set out in the controlling statute.*

… In the ***Kenya Airways Ltd case (supra)*** *Githinji, J.A., expressed himself thus;*

"(27) The remedy of reinstatement is discretionary. However, the Industrial Court is required to be guided by factors stipulated in section 49(4) of the EA which includes the practicability of reinstatement or re-engagement and the common law principle that specific performance in a contract for employment should not be offered except in very exceptional circumstances. The court should also balance the interest of the employees with the interest of the employer."

This was echoed in the same case by Maraga JA (now CJ);

"68. As I have said in Kenya, reinstatement is one of the remedies provided for in Section 49(3) as read with Section 50 of the Employment Act and Section 12(3) (vii) of the Industrial Court Act that the court can grant. Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them."

… **New Zealand Education Institute vs. Board of Trustees of Auckland Normal Intermediate School [1994]2 ERNZ 414** CA stated as follows;

"Whether … it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justice of the cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the in the sense of being impracticable to reinstate the employment relationship."

With respect, we agree.

We think that in all respects the learned Judge got it all wrong. Where, as here,

an employer has reasonable cause to take disciplinary action against an employee and does so with scrupulous adherence to due process and fair, equitable treatment of the employee; and even imposes a normal termination with pay in lieu of notice when it could easily have summarily dismissed the employee reasonably suspected of attempted theft with ample evidence thereof availed, it cannot be right that orders such as issued in the instant case be given. Much as courts are right to be solicitous of the interests of the employee, they must remain for a where all, irrespective of status, can be assured of justice. Employers are Kenyans, too, and have rights which courts are duty bound to respect and uphold. As is often stated, justice is a two-way highway.

The elaborate submission against reinstatement by the respondents is agreeable. Reinstatement should be a rarity and not common place or routine. However, I must add that the common law situation on which

our current law is founded did not anticipate situations like are common place in our employment circles and circumstances. It did not anticipate cases of impunity where employers for no reason whatsoever send employees home and proceed to feign and manipulate circumstances and conditions justifying such termination of employment. Courts are therefore duty bound to lift the veil of termination and temperate this with the common law position as espoused in our law to come up with a case of justice for the employee.

We should applaud the revolutionary nature of employment law and practice incepted by the 2007 reforms on the law. The transformative Constitution of Kenya, 2010 is also a pace setter in radicalizing Employment and Labour Relations Law. We should therefore be cautious so as not to appear like we wish to hide behind the law to deny parties their fundamental rights and freedoms enshrined in the Bill of Rights and applicable in contemporary society. This would be a derailment of the gains so far made and unacceptable.

This matter tilts in favour of the petitioner. This is because she has overwhelmingly brought out a case of termination of employment without regard to procedural fairness as provided for by section 41 (1) and (2) of the Employment Act, 2007. This is as follows;

- The petitioner is served with a letter of interdiction on 31st October, 2016. This allows and invites the petitioner to bring *a representative of her choice*.

- She is through letter dated 16th December, 2016 invited to appear before the Disciplinary Committee of Council on 5th January, 2017.

- The petitioner through her advocates calls for documents to be relied on by her accusers during the disciplinary proceedings but this is denied.

- On the eve of the disciplinary proceedings, the 2nd respondent in a letter dated 4th January, 2017 informs the petitioner that legal representation would not be allowed during the disciplinary proceedings.

- At the proceedings on 5th January, 2017, her advocate, Reece Mukhabana is disallowed entry and participation in the disciplinary proceedings.

- The petitioner, not being unionized pleads with the disciplinary panel to allow her niece to come in and assist her in taking notes during the proceedings but this is resisted, denied and declined. She walks it all alone.

- During the proceedings, counsel for the respondent, A.M. Lubullelah is present and announces that this was a fact finding mission and not a disciplinary hearing.

- She is also at this moment informed that she could call witnesses.

- On the second day, 6th January, 2017 new issues touching on inciting of students to protest and disrupt the university graduation ceremony arise. This had not been communicated any earlier.

- The proceedings close with a rider that the petitioner would be called if need arose.

- She is re-invited to appear before the disciplinary committee on 20th January, 2017 where she is informed that the disciplinary committee had completed her issues and any balances would be anything material from her side.

- She requests to call two witnesses a Prof. Nathan Oyaro and Samason Omwoyo who testified on all academic issues touching on the interdiction.

- She received a letter dated 7th February, 2017 inviting her before the disciplinary committee on 9th instant but when she reports, she is turned away and informed that she would be called on need.

- On the same day at about 1630 hours she is picked by the respondents' driver and taken to the venue of the disciplinary proceedings where she is advised to wait outside and wait to be ushered in.

- While outside, she sees strangers entering the meeting room. She later learns that these were witnesses called to testify on the matter in her absence.

- On 2nd March, 2017 the petitioner receives a letter dated 20th February,2017 retiring her from service on grounds that she had been found guilty on issues of delaying in curriculum review, unco-ordinated and unstructured admission of students and students progressions, delay in release of examination results, tampering with graduation list for the years 2013, 2014 and 2015, repeated errors in the printing of certificates particularly in the years 2013 and 2014, haphazard transfers of students from one campus to another, insubordination and conflict of interest.

The respondents dispute some of the claims by the petitioner as above cited. They, however, do not proffer any evidence to controvert the petitioner's case as set out. Particularly, the respondents deny the presence of counsel Lubullelah during the disciplinary proceedings but the matter ends at that. Denial.

It was the foremost duty of the respondents to produce a copy of the disciplinary proceedings in support of their case. This is not only apt practice but evidence of compliance with section 41 of the Employment Act, 2007 and the authority of **Mary Chemweno Kiptui**, supra. This would tell the composition of the disciplinary panel. It would assuage and even shed light on the petitioner's claims on the presence of Mr. Lubullelah at the meeting. This is not availed anywhere in these proceedings.

It is our finding that the disciplinary proceedings conducted by the Disciplinary Committee of Council were flawed. They did not in the least meet the requirement of substantive and procedural fairness as espoused by section 41 of the Employment Act, 2007. The petitioner was not awarded adequate information, time and space to present her case. From the onset, she is denied particulars of her accusations despite request in writing. Secondly, her representative of choice, her counsel is denied entry and participation to the disciplinary committee meeting chambers. When the situation turns desperate on the second day of the proceedings, the petitioner resorts to calling her niece to take notes of the meeting in the absence of any other capable representation. This again is despite the petitioner seeking the disciplinary panels intervention with no avail. This again arises when it was all clear to the panel that the petitioner was not unionisable by virtue of her position and office.

I have scrutinized the annextures in evidence presented by the petitioner in answer to the various issues raised against her by the respondent and her other intervening correspondence. These include;

- A protest letter dated 4th September, 2015 by the petitioner the Chair, University Council reporting a case of bad blood between the petitioner and the 2nd respondent and also seeking interventionary measures by way of a meeting to thrash out the issues in contention. This was not fully and satisfactorily addressed.

- Internal Memo dated 27th November, 2015 from the petitioner to the 2nd respondent in answer to an earlier one to the petitioner by the 2nd respondent dated 20th instant. This comes out as a genuine, sober and satisfactory explanation of the issues raised in the show cause memo.

- A letter dated 25th July, 2016 by the petitioner to the Chair, University Council seeking an immediate meeting over burning issues touching on the petitioner's functions and performance and the reaction of the Vice – Chancellor on the same.

- A letter dated 7th September, 2016 by the petitioner to the Chair, University Council citing escalated hostility to the petitioner by the 2nd respondent (Vice – Chancellor) and accusations of inciting students, masterminding strikes and being a member of Al shabab. These again seeking interventionary measures.

- A letter dated 13th September, 2016 to the Cabinet Secretary for Science and Technology by the petitioner reporting and complaining of her being locked out of her office for unexplained reasons.

- A letter dated 26th January, 2017 by the petitioner to the Chair, University Council in answer to an earlier one dated 20th instant by the Chair to the petitioner on allegations of incitement of students against the University.

All these to me come out clean in favour of the petitioner's cause. They are a clear demonstration of a hostile work environment created by the respondents and which they did not wish to genuinely address.

Rivalry and competition at the work place has existed as long as labour relations would tell. This would not be unusual bearing in mind the theatrics of human nature and relations. What comes into play is the nature of management of these situations. Competition and rivalry should be soberly and maturely addressed so as to forestall hostility at the work place. This is because we all thrive on work and productivity and any threat to work is a threat to our lifeline.

We have fallen short of the glory and wisdom of managing interpersonal relationships at the work place. Many a times rivalry and competition at the work place has been machinated to decimate, injure and hurt careers. This is sad and unfortunate. The work place does not belong to anybody, director, manager or any other employee. It is our collegiate wealth and responsibility. It must be managed without personalty, personality and partiality. These are not matters personal and therefore the explicit provisions of the law to take care of these situations.

Is this an appropriate case for reinstatement of the petitioner? My answer is yes. In as much as we are agreed that reinstatement should be the exception other than the rule, I am of the view that the circumstances of a case should be handy in a determination for or against reinstatement. Like observed variously in this judgement, our practice is replete with situations of outright impunity and disregard of the law in determining cases of termination of employment at the work place. Courts are therefore duty bound to take into account our polarized work place situations and protect the weak – the employee, as and when this arises. The common law as is expressed in section 49 (4) (d) of the Employment Act, 2007 should be a guide and not a fetter to justice.

The petitioner is 61 years old. At her current position, she is at the apex of her career. She is also in the middle of an engagement and profession where retirement age is set at 70 but is customarily lifelong. This termination of employment deals a big blow to her career and lifeline. In this kind of circumstances, premature retirement, she would find difficult to find alternative employment. I would therefore hold that this case satiates the requirements of section 49 (4) of the Employment Act, 2007 and satisfies a case for reinstatement. The issue of abolition of her office as alleged by the respondent is a non-issue, a case of settling scores and impunity. It should be entirely disregarded.

It is our finding that the petitioner's case overwhelms that of the respondents in terms of evidence. Even in the absence of this, it would still take sway on a balance of probabilities. Given this scenario, the petitioner's case sounds the more probable of the two. I therefore find a case of unlawful termination/retirement of the petitioner by the respondent and hold as such. This answers the 1st issue for determination.

The 2nd issue for determination is whether the petitioner is entitled to the relief sought. She is. Having won on a case of unlawful termination of employment she is entitled to the relief sought.

I am therefore inclined to allow the petition and order relief and declare as follows;

i. A declaration be and is hereby issued that the decision of the 1st respondent's Council to retire the petitioner vide a letter of 20th February, 2017 violated Articles 41, 47 and 50 of the Constitution and is therefore null and void *ab initio.*

ii. A declaration be and is hereby issued that the termination of employment of the petitioner is in gross violation of section 41, 45 and 47 of the Employment Act, 2007 and hence wrongful, unfair and unlawful.

iii. A permanent injunction be and is hereby issued restraining the respondents from commencing any process towards replacement of, or replacing the petitioner in the position of Deputy Vice-Chancellor, Academic, Research and Student Affairs and also as professor.

iv. An order of certiorari be and is hereby issued quashing the respondents letter of retirement of the petitioner dated 20th February, 2017.

v. That the petitioner be and is hereby reinstated to employment as Deputy Vice-Chancellor, Academic, Research and Student Affairs and also as professor with effect from the date of this judgement of court.

vi. That the petitioner be and is hereby ordered to report back to work tomorrow, the 1st February, 2018 at 800 hours.

vii. Six months salary as compensation for unlawful termination of employment Kshs.658,112.00 x 6 = **Kshs.3,948,672.00**

viii. The costs of this petition shall be borne by the respondents.

Delivered, dated and signed this 31st day of January 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss Odwa instructed by Nyairo & Company Advocates for the petitioner.

2. Mr. Wabuge instructed by Lubullelah & Associates for the 1st and 2nd respondents.

3. No appearance for the 3rd and 4th respondents.