



Case Number:	Cause 1715 of 2011
Date Delivered:	19 May 2014
Case Class:	Civil
Court:	Employment and Labour Relations Court at Nairobi
Case Action:	Judgment
Judge:	Nzioki wa Makau
Citation:	E.D.K v K.U [2014] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Industrial Court
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Claim Allowed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	Kshs. 18,766,344/-.
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REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI
CAUSE NUMBER 1715 OF 2011

E D K.....CLAIMANT

VERSUS

K U.....RESPONDENT

JUDGMENT

1. The Claimant filed suit on 2nd October 2011 against the Respondent seeking various reliefs against the Respondent. These were

a. A Declaration that the Respondent's action in failing, ignoring, neglecting and/or refusing to grant the Claimant promotion in her employ is discriminatory, unconstitutional and contrary to law.

b. A Declaration that Claimant qualified and ought to have been promoted by the Respondent to the position of Lecturer with effect from February, 1996.

c. A Declaration that Claimant qualified and ought to have been promoted by the Respondent to the position of Senior Lecturer with effect from February, 1999.

d. A Declaration that Claimant qualified and ought to have been promoted by the Respondent to the position of Associate Professor with effect from February 2003.

e. A Declaration that Claimant qualified and ought to have been promoted by the Respondent to the position of Professor with effect from February 2008.

f. The Respondent be ordered to promote the Claimant in terms of prayers (b), (c), (d), (e) above

The Claimant also sought in addition that the Respondent be ordered to pay the Claimant Kshs. 18,766,344.00 in accrued dues, Compensation and/or damages, Costs of the suit and any other relief the Court may deem fit to grant.

2. The Claimant was employed on 1st April 1992 by the Respondent as an Assistant Lecturer in the Biochemistry department a position she holds to date. The Claimant averred that she is a Kenyan citizen of Russian extraction and is a holder of a Doctor of Philosophy degree in Biochemistry and a distinguished expert in her field of expertise namely Biochemistry of Alcohol Addiction in Kenyan Populations. The Claimant pleaded that she has been unfairly treated, discriminated against, embarrassed and humiliated during her 22 years of employment with the Respondent in comparison to other staff and is thus aggrieved hence the suit against the Respondent. She testified on 19th March 2013 that she was employed as Assistant Lecturer from 26th March 1992. The qualifications for promotion are academic qualifications. She was informed by the Respondent of the criteria for promotion. She referred to a letter dated 13th June 2003 which set out the qualifications for promotion which were Master Degree, letter of registration for PhD and copies of seminar papers or publication. She also referred to an advertisement in the Standard on 26th September 2007 for various vacancies in the Respondent and the minimum requirements were set out. She had applied many times for the positions. She had made requests to the Deputy Vice Chancellor and the Vice Chancellor for promotion. She even attached the certificate for the PhD thesis. She testified that the list of academic staff of the department had 2 assistant lecturers and there was none with her qualifications. One of the lecturers was even her student and was employed as senior lecturer even without experience. Others held Masters degrees and had been promoted to associate professor. There was a case she had filed against the Respondent when the Respondent withheld an award of degree culminating in orders in her favour. She had sought permission to travel to receive an award by Research Society on Alcoholism but was denied support. She claimed harassment as her pay was often delayed, she is not paid commuter allowance and was also sexually harassed by her former Chairman. She testified that she had applied to be a lecturer but had not applied to the other positions.

3. In cross examination by Mr. Wetangula for the Respondent the Claimant testified that she received her PhD pursuant to a Court order. She testified that she was not aware if any of the two gentlemen she had referred to in her examination in chief had any cases filed against them challenging the award of degree to them. She stated that there is no requirement for teachers not to be surpassed by their students. She testified that a professorship is awarded by the institution. She admitted that she had not applied to be a Professor or an associate professor. She stated that she had not held the position of lecturer, senior lecturer, associate professor or professor. She maintained that the Respondent had discriminated against her. She was not aware that the University had power to revoke any degree awarded. She testified that the Respondent was not obligated to pay for attendance of international conferences. The procedure is to apply to the Dean and the Deputy Vice Chancellor Finance and they either approve or decline. She applied and it was declined twice and to her that amounted to discrimination. In one case the Dean approved it and the DVC declined due to unavailability of funds. On the delay in payment of salary she admitted there was delay in institutions on payment of salary at times. The delays affected other staff too. She had no evidence that the commuter allowance was not paid to her due to her race. She had made an allegation of sexual harassment against the acting chairman of her department. She admitted having complained to higher authorities and written letters to the PS Ministry for Higher Education, she had filed suit seeking to compel the President to appoint another Vice Chancellor. She accused the Vice Chancellor of being corrupt. She testified that she did not remember complaints from students though she was aware of a letter dated 19th August 2009 with no names containing a complaint. She was also aware of the complaint on insubordination to which she had responded satisfactorily and the case closed. She admitted there was a notice of appeal against the award of the degree for PhD. She testified that the ultimate responsibility to promote her lay with the

employer. She was not aware that promotion to a higher office was not automatic.

4. In re-examination by Mr. Odhiambo counsel appearing for the Claimant, the Claimant testified that she had not been served with a memorandum of appeal. She testified that she was not a difficult person to deal with and she was not aware of any other person holding a PhD who was an associate lecturer. She testified that she was a lecturer and the main activity of a lecturer is to teach. She admitted that it was not unusual for a complaint to be made by students after teaching for 18 years. She added that she has been discriminated against and has not been promoted by the Respondent and has been denied the opportunity to use all her skills.

5. The Respondent called Mr. J J N N. He is a senior lecturer at the Respondent and holds a Bachelor and Masters in Veterinary medicine and a PhD in Molecular parasitology. His PhD was obtained from the University of Pretoria South Africa. He admitted that he worked with the Claimant and was at a time the acting chairman of the Department of Biochemistry and Biotechnology. He testified that the Claimant was disrespectful to him and he had written a letter of complaint. He had assigned a unit to the Claimant and she was to teach the unit Protein Metabolism but he received a complaint from a student that no lectures had been delivered to the students by the Claimant on the unit. He wrote a Memo to the Claimant containing the complaint and the Claimant stormed his office and confronted him and wagged a finger at him in the presence of a visitor he was attending to. He found this intimidating and demeaning. He knew that the Claimant had obtained her PhD degree through a court order and he was aware the Respondent was challenging the award of the degree to the Claimant. He testified that one is only paid for the work done. He stated the department of biochemistry had 4 female lecturers and that employment is not based on gender but qualification. The Claimant had not brought any complaint to him on any sexual harassment or racial discrimination during his tenure as chairman of the department.

6. In cross exam by Mr. Odhiambo, the witness testified that his PhD thesis was an examination of the anaplasma organisms. He was undertaking research on trypanosomiasis in both wildlife and domestic animals. He was employed at the level of lecturer. He stated that commuter allowance is given for those who are not housed by the Respondent. He denied having a strong dislike for the Claimant and that his letter of 17th July 2009 was his take on the incident and how she stood and handled the situation. He testified that the Claimant was spoiling for a fight and he sought protection of management as he felt belittled by his junior the Claimant. There was no reason why the Claimant did not respond to the memo he wrote. He stated that it was true that he had said the Claimant had refused to teach a unit and she went to class and taught one or two units. He testified that the handwritten complaint exhibited in the case was written by the two class representatives who had signed the letter. He admitted that the Claimant had taught longer than he had and had therefore taught many many units. He wrote a letter to the Claimant asking her how the students would be examined on a unit they had not been taught. If the Claimant had decided to go and teach that would have been okay as at time lecturers fall sick or delay

but later they catch up. When he noted that she had not taught he felt it was prudent to ask her for an explanation. Her response was timely but not satisfactory. He felt that was an insult to him as she selected a class and he wrote an administrative letter and she attended only once then claimed she was not appointed. He left the matter to the Vice Chancellor. He wrote to another lecturer to teach the unit. He testified that qualifications for senior lecturer one must have been a lecturer for not less than 4 years and produced not less than 2 publications in referenced journals and supervised to completion students taking masters. The qualifications for positions advertised are not cast in stone and change depending on the times. He testified that he had no role to play in the promotion of the Claimant as that was the preserve of the DVC Administration.

7. In re-exam he testified that the complaint he had made on the conduct of the Claimant was to ensure that there was dignity and respect accorded to the office of the chairman of the department. He testified that he sent the letter to the DVC to issue letters of appointment to the lecturers on the units. The normal procedure is for delivery of letters to lecturers through their pigeon-holes or through a delivery book.

8. The Respondent then called the second defence witness Mr. N G the HR Manager of the Respondent. He testified that the Respondent has policies and is against sexual harassment. Sexual harassment is taken very seriously and he was not aware of any specific case by the Claimant on the issue. He referred to the letter by the Claimant to Chairman of the University Council of the Respondent Prof. O M Y. The letter did not raise a specific issue of sexual harassment and the letter did not say who or when the incident took place. He testified that salary is paid at the end of the month and instructions are given to pay at the last week of the month. He admitted there are delays at times and they do not target the Claimant or any specific person. The delay may affect all staff or employees who bank at a particular bank depending on the particular delay. He testified that the refusal to fund the Claimant's trips was for reasons stated on the request for approval. Regarding promotions he testified that the individual may write through head of the department who give recommendation and the letter goes through the dean of the school and to the DVC Administration and finally the letter is passed to the HR department to analyse the profile of the applicant. The appraisal is sent to a promotion and appraisal committee which evaluates the credentials of the applicant and if found to meet the criteria set it is sent to the appointment and promotion committee which calls the employee for an interview. He was aware through the records that the relationship between the Claimant and the heads of department since 1992 have been poor. He testified that the issue of promotion is pending the outcome of the Court of Appeal case. He stated that staff are paid for the work they have done for the Respondent and the Claimant had not discharged duties of a lecturer. She has not held the position of senior lecturer, associate professor or professor.

9. In cross exam he testified that to get to position of lecturer one has to have a PhD. There is also a

promotion criteria such as publications, projects supervised, conduct and performance of duty. On sexual harassment he testified that the Respondent took the issue seriously and the policy on sexual harassment is followed and some people have lost their jobs on that score. First is a report given by a person harassed and if report is investigated and found to have substance the culprits are brought to disciplinary process and if found guilty are punished. The Disciplinary Committee is comprised of University Council members, the Vice Chancellor, Deputy Vice Chancellors, Registrar and members of the relevant department. He was not aware of any specific case brought by the Claimant. It is upon the person alleging harassment to give names and details. He was referred to the letter of 14th December 2004 in which the Claimant alleges harassment. He stated that the letter was not good enough. On promotion he stated that the Respondent follows the policy on promotion and does not discriminate. In his years of service at the Respondent he had not seen any person who has been promoted without following the criteria.

10. In re-examination he testified that one is not entitled to automatic promotion. On sexual harassment he stated that the letter by the Claimant did not state the individual or the date and was silent on the manner of sexual harassment.

11. That marked the end of the case for the Respondent and the Claimant and Respondent agreed to file written submission. The Claimant filed her submission on 17th March 2014 and a list of authorities on the same date.

12. She submitted that she has unique qualification in Biochemistry & Genetics of Alcoholism and that her research was on the Kenyan population and she is the only specialist in this field in the world. She is a member of the global umbrella research society in addiction - International Society for Biomedical Research on Alcoholism (ISBRA) through Research Society on Alcoholism (RSA) and is among the only four members from Africa. The Claimant advances her cause by referring to the criteria for appointment which was published by the Respondents' Office of the Deputy Vice-Chancellor (Administration) in a paid advertisement for recruitment of academic staff in a local daily newspaper on 26th September, 2007 the criteria for Lecturer position was a Masters degree, registration for PhD, University teaching experience of at least 3 years and must have presented at least 3 seminar papers. The Claimant submitted that she had met the qualifications and satisfied the criteria set by the University for promotion from position of Assistant Lecturer to the position of Lecturer from February 1996.

13. The Claimant further submitted that she met the qualifications and satisfied the criteria set by the

Respondent for promotion for the position of Senior Lecturer in February 1999 and that she had met the qualifications and satisfied the criteria set by the Respondent for promotion for the position of Associate Professor in February 2003 and that she also met the qualifications and satisfied the criteria set by University for promotion for the position of Professor in February 2008.

14. The Claimant had testified that the Respondent has continuously ignored, neglected, discriminated and failed to promote her despite several applications and correspondences thereon. Further, the Claimant submits that she has severally applied to the Respondent's Administration for promotion between the period of 1996 to 2010 at least 15 times but has never received any response, except five acknowledgements. The Claimant testified that the Respondent has over the years of her employ promoted persons with inferior experience and qualifications to the position of Senior Lecturer.

15. She relied on the case **Republic v Kenyatta University & 2 Others – Ex Parte Elena D. Korir – Nairobi High Court Miscellaneous. Application No. 1285 of 2007** for the proposition that she had been discriminated against. The Claimant submitted that she did not her PhD through the Court as repeatedly alleged by the Respondent but that the Court simply quashed the letter deleting her name from the graduation list for the degree she had qualified for. The Claimant submits that the Respondent continued to harass her and even went ahead to render the Claimant not creditworthy by writing a letter introducing extraneous information on a court case with the Respondent.

16. The Claimant submitted that on more than two occasions the Respondent had inexcusably refused to offer financial assistance to the Claimant to attend International Conferences where she was scheduled to present her research findings despite the fact the Respondent knew that her presentation of the research findings and professional networking during the conferences are career advancement that the Respondent is under obligation to promote. The Claimant testified that her other colleagues including the Vice Chancellor are at all times always able to travel abroad unhindered for various reasons. The Claimant further submitted that she was in continuance of the discrimination by the Respondent denied an opportunity to attend a conference in Santa Barbara, United States of America to receive the prestigious and once in a lifetime award on alcohol addiction. Regarding the complaint by the acting chairman of her department she relied on the case of **Ridge v Baldwin** for the holding that she was not accorded the protection of the principles of natural justice. She submitted that contrary to the principles of natural justice, she did not get a copy of the letter raising a complaint against her and her right to fair administration and the right to be heard was contravened. She relied on Article 50(1) of the Constitution of Kenya to support her contention that she was not accorded a fair hearing before an impartial or independent tribunal.

17. The Claimant submitted that it was only around 28th July, 2009 that she was officially informed about the complaints of the Chairman of Biochemistry Department, Dr N, through the office of Deputy Vice-Chancellor and in response to the accusations she wrote the letter to Deputy of Vice-Chancellor Administration and explained her part of the story. Consequently, the Claimant was found with no case to answer and the case was closed.

18. The Claimant testified that on 3rd September 2009 she had received a letter from the Chairman of Biochemistry Department accusing her of absconding her duties as a lecturer by failing to teach a unit. The Claimant submitted that the handwritten letter dated 17th August 2009 was allegedly written by two students devoid of the said students' names and/or registration numbers complaining about an "unattended course unit by the Claimant". In the same letter the two students also complained about the Claimant's style of teaching. She submitted that this shows the mischievous efforts of the Chairman of Biochemistry Department, Dr N, who had somewhat already anticipated and perhaps predicted that the said letter was going to be written 1 month in advance and had already reported the case to Vice-Chancellor ahead of the students' complaint on 17th July, 2009. On the promotion she submitted that on the basis of **Associated Provincial Picture Houses Limited v Wednesbury Corporation [1947] 2 All ER 680** the denial of promotion was not reasonable. She submitted that the refusal to promote her has led to adverse financial consequences for her. She submitted that position abridged the Constitution Articles 27 and 41 as well as Section 5(5) of the Employment Act 2007. She placed reliance on cases from South Africa and India on the issues at hand and also quoted **Black's Law Dictionary, 9th Edition** for the definition of discrimination. She thus urged the Court to grant her the prayers sought in her claim as she had failed to earn more income as a result of the discrimination by the Respondent.

19. The Respondent filed submissions on 13th May 2014 as counsel for the Respondent Mr. Wetangula had been indisposed. This position had been presented to the court and the Claimant had not objected to the extension of time to enable the Respondent to file its submissions. The Respondent submits that the Claimant's case covers mixed questions of law being Constitutional law, administrative law and Employment law. The issues the Respondent isolated for determination are

a. Whether the Respondent has subjected the Claimant to individual and systemic discrimination based on her race.

b. Whether there is a rule, practice and custom and tradition of the Respondent for automatic promotion upon attainment of higher qualifications.

c. Whether the University has promoted persons holding less experience than the Claimant and whether the Respondent has neglected to promote the Respondent

- d. Has the Claimant over the years been the target of persistent harassment and overt discrimination by the Respondent
- e. Are the actions of the Respondent unconstitutional and contrary to the legitimate expectations of the Claimant"
- f. Is the Claimant entitled to compensation of a salary for a positions that she is has not worked
- g. Does the court have the power to order the promotion of any employee within an employer employee relationship
- h. Is part of the claim filed by the Claimant time barred and thus not capable of being granted by the court
- i. Is the Claimant entitled to the prayers sought in the statement of Claim"

20. On the issue as to whether the Respondent has subjected the Claimant to individual and systemic discrimination based on her race, the Respondent submitted that discrimination though not defined by the law can be gleaned from **Black's Law Dictionary 9th Edition** and Section 82 of the former Constitution of Kenya which defined discriminatory as affording different treatment to different persons attributable wholly or mainly to their respective description by race, tribe, place of origin or residence, or other local connexion, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restriction which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another description. It was submitted for the Respondent that the Constitution of Kenya under Article 27 does not define discrimination. However the Article provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.

21. It was submitted that the Respondent led evidence to the effect that the Respondent is an equal opportunity employer and it has in place a policy that ensures employment opportunities are availed to all people regardless of their ethnic extraction, race, gender or the like. The Respondent's second witness testified that there are other employees of other nationalities on its payroll and thus the Respondent does not discriminate on basis of race. It was submitted that if it were true that the Respondent discriminates on account of the race, then it would not have employed the Claimant in the first place because when she sought employment and she was not a Kenyan Citizen and it would not have changed her terms of employment upon registration as a Kenyan Citizen, due to the fact despite the registration as a Kenyan citizen she was not an African.

22. It was submitted that the Claimant alleges that she has been discriminated upon due to the denial of promotion by the Respondent but in all the evidence she relies upon there is no letter from the Respondent denying her promotion for the reason of her race and the communication from the Respondent stated that the Claimant had not met the qualification set out and she was notified that she was at liberty to make a further application. The Respondent submitted that all matters related to the award of the PhD degree are subject to an appeal before the Court of Appeal hence cannot form the basis of a determination in this matter. Regarding the letter of introduction to Equity Bank the Respondent submitted that it had an obligation cast upon it to be candid and disclose all facts about its employees and the disclosure could not and did not amount to discrimination.

23. The Respondent submitted that from the evidence presented by its witness Dr. N the Claimant has had a difficult relationship with the people in authority over her. The Claimant's behaviour prompted him as the Chair of the Department where the Claimant was working, to write a complaint letter over her conduct. There is a litany of other letters and complaints regarding her conduct written by the Chairmen of the Department where she worked. It was submitted that it is preposterous to suggest that the Respondent orchestrated members of staff to accuse the Claimant of insulting behavior.

24. I have considered the pleadings, the evidence adduced, the authorities cited, and the law in coming to this decision. I wish to thank both parties for the elaborate conduct of the matter and the research undertaken.

25. The issues that I have to resolve can be collapsed into four broad categories. Firstly whether there was discrimination meted out to the Claimant regarding her employment, secondly whether there was sexual harassment, thirdly whether the Respondent has deliberately failed to promote her, fourthly what remedies lie if the Court finds that there has been discrimination and resultant failure to promote. The Court will also have to determine who bears the costs of this suit.

26. The issue that lends itself to determination first and foremost is whether there was discrimination to the Claimant. Kenya has in place a Constitution passed and promulgated in 2010. Under Article 6 thereof there is provision that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution. Kenya is one of the signatories of various employment treaties under the ILO. ILO Convention 111 is one of the treaties Kenya has ratified. In the treaties including Convention 111 Kenya undertakes not to permit discrimination at the workplace based on gender or race. In her Claim, the Claimant alleges there has been systemic discrimination against her due to her race. She is a

Kenyan but of Russian extraction. Instructively the Respondent tries to demarcate between employees who are both Kenyan and African and those who are not. The Employment Act Section 5(6) places a burden on the employer to prove that discrimination did not take place. The said section provides:

5(6) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act omission is not based on any of the grounds specified in this section.

27. In the submissions filed, the Respondent asserts that it did not discriminate against the Claimant. At paragraph 19 of the submissions the Respondent submits as follows - the submission is reproduced *verbatim*:

19. In any event were it true that the Respondent discriminated on account of the race, then it would not have in the first place employed the Claimant when she sought employment as she was not a Kenyan Citizen and it would not have changed her terms of employment upon registration as a Kenyan Citizen, due to the fact despite the registration as a Kenyan citizen she was not an African.

28. Plainly put, the Respondent submits that it changed the terms of employment of the Claimant upon registration as a Kenyan due to that fact (registration as citizen) despite the fact that she was not an African. It is clear that the Respondent places a distinction between races since Kenyans who are not African are viewed in a different spectrum. To my mind that implies that if she was African and Kenyan then she would have enjoyed this as of right but because she was registered as a Kenyan citizen then her terms were changed in spite of the fact that she was a Kenyan citizen who is not African. That is clearly discriminative. There is no greater right placed upon Kenyans who are African and those whose extraction is from other races. It would bear repeating that this nation has Kenyans whose ethnic or racial background is as diverse as the colours of the rainbow but as Kenyans we are all equal and there should not be any discrimination on account of ethnicity or race. I find it disturbing that in the claim the Respondent did not dispel the notion that it has discriminated against this Kenyan who is of Russian extraction. No lists were availed to prove there are other Kenyans who are not African or staff against whom there has been progress up the ladder as either academia or support staff. The Respondent has adverted to a policy that does not encourage discrimination but nothing of substance was availed to that effect. The Claimant it was submitted has had difficulties with her superiors at work. There is a plethora of correspondence to the effect that there was friction between the Claimant and her co-employees. Who wouldn't if there was discrimination at the workplace" It is clear that the Claimant has been subjected to discrimination in terms of the law. Section 82 of the former Constitution set out the parameters on discrimination unlike the present Constitution which provides that discrimination is outlawed but does not specifically state what discrimination entails. **Blacks' Law Dictionary Ninth Edition** defines discrimination as:-

The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class of race, age, sex, nationality, religion, or disability.

29. The Claimant has stated that she was not promoted due to the discrimination meted out. It is clear that she only applied to be promoted to the position of lecturer. Though she has qualifications that could well place her at position of senior lecturer, associate professor and professor she admits that she has not sought by way of application or through her head of department or dean a promotion to those positions. She admits that she asked to be promoted to the position of lecturer and her Head of Department recommended her promotion. She was not promoted however in spite of the recommendation. To qualify to appointment as a lecturer one requires to have a Masters Degree and be registered for PhD in addition to university teaching experience for at least 3 years and must have presented 3 seminar papers. The Claimant met the criteria and was denied promotion. The decision to deny her the promotion was not based on any proper cause and thus was administratively unfair. The Claimant cited the case of **Associated Provincial Picture Houses Limited v Wednesbury Corporation** (*supra*) which enunciated the reasonableness test. It provided the following on discretion.

"It is true the discretion must be exercised reasonably. Now what does that mean" Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in Short v. Poole Corporation gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

30. The Respondent submitted an authority being **De Smith's Judicial Review** on legitimate expectation. I am persuaded that legitimate expectation of the Claimant was to be appointed to the position of lecturer upon satisfying the criteria for promotion but due to discrimination was not accorded that promotion. The issue of delayed salary payment however, does not comprise discrimination as the Claimant was not targeted for the delay and in any event she was not the only one who suffered delay of salary. In her case it occurred only once. That hardly can constitute discrimination.

31. One of the complaints against the Claimant was that she deliberately refused to take up a class. There is an anonymous letter produced in Court though Dr. N who was a defence witness was aware of the authors of the handwritten letter. In the said letter, the students complained about the Claimant's teaching style and at the same time accused her of diverting to unrelated issues during teaching. It is either she was not taking the classes or she took the classes and was a pathetic lecturer given to diverting to discourses not relevant to the subject she was teaching such as discussing the weather or the last holiday she took. It is improbable that she did not take the classes as well as digress while teaching. The two accusations are mutually exclusive and it is impossible to advance both at the same time. It is curious how Dr. N was aware of the complainants and had adverted, like a prophet, to such prior to the receipt of the complaint. It would seem the letter and his complaint on the conduct of the

Claimant were orchestrated by him. He did not produce the letter or memo assigning the Claimant the class merely stating that he issued a notification to the relevant office and that they must have dispatched the notification to the Claimant through either a recorded delivery or the pigeon-hole assigned to the Claimant.

32. On the issue framed regarding automatic progression, there are cadres in the public service where there are regulations for automatic ascension to the next grade upon successful service for the specified period. In the Claimant's case there is no regulation in place for automatic progression. There must be recourse to the statute which provides a mechanism for the progression of staff. In her Claim and in her evidence she did not at any time show any evidence of having sought the position of senior lecturer, associate professor or professor.

33. On the issue of sexual harassment, Section 5 of the Employment Act is clear. The Respondent has in place a detailed policy on the issue. I heard the HR manager testify that the Respondent is ISO certified and that sexual harassment is taken seriously. I do not doubt that. I agree that in such a case it is the duty of the party who faces this form of harassment to make a report and give sufficient detail. Sexual harassment cannot be *in rem*. An entire institution cannot be accused of it. There should be individuals, a time or place specified. It could be a single incident, it could be repeated. It cannot be raised casually and on this issue there is no basis to accuse the Respondent or the staff of sexual harassment. In the absence of evidence to show there was sexual harassment I would find that the Claimant failed to prove there was any sexual harassment. Let it be known out there that all right thinking Kenyans would be appalled by any conduct that would be construed as sexual harassment. The Respondent is alive to this fact and according to the testimony tendered has even relieved persons investigated and found culpable of their positions. It cannot be faulted for not having had action in respect of the Claimant as the accusation was made casually and without sufficient material to further the enquiry. The inquiry conducted by the Respondent was sufficient and demonstrated there was nothing to pin the allegation on.

34. The third issue flows from the first and as I found that there was discrimination I would hold that there was a deliberate failure to promote the Claimant but say no more on that since the prerogative to promote is the Respondent's alone. The issue of the Doctorate and the attack on the mode and manner of acquisition is neither here nor there as it is not the award of the doctorate that determines the promotion she sought. The doctorate is relevant to other positions but not that position which formed the gravamen of her case. The fact there is an appeal on the award is thus not an issue for determination. It is a right reserved to the Respondent to pursue and from all indications it is a right that is being pursued.

35. On the remedies the Claimant is entitled to, the Court has been asked to grant her Kshs. 18,766,344/- which is the difference between what she earned and what she could have earned. Under the provisions of Section 12 of the Industrial Court Act 2011, the sums the Claimant would be entitled to would be limited to the gamut of reliefs set out in that section.

36. The Section provides as follows:-

12 (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

- (a) disputes relating to or arising out of employment between an employer and an employee;
- (b) disputes between an employer and a trade union;
- (c) disputes between an employers' organisation and a trade unions organisation;
- (d) disputes between trade unions;
- (e) disputes between employer organisations;
- (f) disputes between an employers' organisation and a trade union;
- (g) disputes between a trade union and a member thereof;
- (h) disputes between an employer's organisation or a federation and a member thereof;
- (i) disputes concerning the registration and election of trade union officials; and
- (j) disputes relating to the registration and enforcement of collective agreements.

(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

- (i) interim preservation orders including injunctions in cases of urgency;
- (ii) a prohibitory order;

- (iii) an order for specific performance;
- (iv) a declaratory order;
- (v) an award of compensation in any circumstances contemplated under this Act or any written law;
- (vi) an award of damages in any circumstances contemplated under this Act or any written law;
- (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or
- (viii) any other appropriate relief as the Court may deem fit to grant.

37. The Claimant seeks damages to the tune of Kshs. 18,766,344/-. In the preceding section of law cited, the Claimant would be entitled to compensation for discrimination. The Court would have a discretion as to the amount allowable as damages. I would use the figure as a rough guide and grant the Claimant an award of 18,766,344/- as damages for the discrimination. I cannot interpose between the Claimant and the Respondent on the contract of service and cannot thus order her promotion to the positions she has enumerated. Even if she was qualified the Court would be running afoul of the law if it were to order her appointment.

38. The Claimant will also have costs of the suit as the Claim has substantially succeeded. I would urge the Claimant and Respondent to be conciliatory toward each other as they have subsisted in the employee-employer relationship for a long time, 22 years or so by my reckoning. This battle and the others being waged elsewhere take away from the contribution of the Claimant to the field of study which is quite important for this our land and Nation given the frequent stories of methanol induced deaths by imbibers of alcohol.

Orders accordingly.

Dated and delivered at Nairobi this 19th day of May 2014

Nzioki wa Makau

JUDGE



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