



**Wekesa v Mount Kenya University (Petition 138 of 2016)
[2024] KEELRC 538 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 538 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 138 OF 2016**

J RIKA, J

MARCH 8, 2024

BETWEEN

MONI WEKESA PETITIONER

AND

MOUNT KENYA UNIVERSITY RESPONDENT

Procedure to be followed where an employee’s position had become redundant or was due for retrenchment

The petitioner’s case was that his contract of employment was terminated unfairly and unlawfully. The court highlighted the proper procedure to be followed where an employee’s position had become redundant or was due for retrenchment. The court held that the petitioner ought to have been consulted before the termination. The court further found that the law did not allow the respondent to terminate the petitioner’s contract at will.

Reported by Kakai Toili

Labour Law – employment – termination of contract of employment – redundancy – what was the proper procedure to be followed where an employee’s position had become redundant or was due for retrenchment - Employment Act (cap 226), section 40.

Labour Law – employment – termination of contract of employment - termination of contract of employment by an employer at will - whether it was mandatory for an employer to consult an employee where the employer sought to terminate the employee’s contract prematurely - Employment Act (cap 226), sections 40, 43 and 45.

Statutes – retrospective application of statutes - retrospective application of the guidelines by the Council for University Education on promotions - whether the guidelines could be applied retrospectively to promotions pre-dating the guidelines.

Constitutional Law - constitutional reliefs – constitutional reliefs in employment disputes - whether an employee could claim constitutional violations and remedies, in addition to contractual and statutory violations in employment disputes.

Constitutional Law – fundamental rights and freedoms - concept of human dignity - what was the nature of the concept of human dignity - Universal Declaration of Human Rights, article 1.



Brief facts

The petitioner stated that he was employed by the respondent as a professor, and acting dean at the respondent's school of law, on a 1-year contract dated June 10, 2010. The petitioner stated that he served diligently in his various roles, until January 25, 2016, when the respondent, abruptly terminated his contract unfairly and unlawfully. He was advised that he had been retrenched. The petitioner stated that the termination violated a raft of his constitutional rights, including; right to fair labour practices; right to dignity; and the right not to be discriminated against.

The petitioner submitted that the Constitution guaranteed substantive and procedural fairness on termination of employment. He further submitted that the respondent was required to engage him in consultations, before retrenchment. He stated that he was not consulted; he was not paid severance, and other dues were underpaid. He further claimed that he was denied his right to dignity. He was exposed to pecuniary embarrassment.

The petitioner stated that it was difficult to explain to colleagues and students why he, a professor of international repute, was dropped by the respondent from teaching law, without valid reason. The petitioner thus prayed for among other orders; a declaration that the retrenchment was unfair and unlawful; reinstatement; and compensation equivalent of 12 months' salary for unfair and unlawful termination.

Issues

- i. What was the proper procedure to be followed where an employee's position had become redundant or was due for retrenchment.
- ii. Whether it was mandatory for an employer to consult an employee where the employer sought to terminate the employee's contract prematurely.
- iii. Whether an employer could terminate an employee's contract at will.
- iv. Whether the guidelines by the Council for University Education on promotions could be applied retrospectively to promotions pre-dating the guidelines.
- v. Whether an employee could claim constitutional violations and remedies, in addition to contractual and statutory violations in employment disputes.
- vi. What was the nature of the concept of human dignity?

Held

1. From the petitioner's biography and other evidence on record, the petitioner came out across as a complete, thoroughbred, intellectual and legal professional, with an added expertise in sports medicine, whose credentials could not be doubted. His biography provided an open book, for any enquirer, including the respondent to interrogate, before making any decision relating to the petitioner. The biography was available in 2016 when the respondent terminated his contract.
2. The petitioner was on leave. He was not involved in any form of consultations or hearing, regarding any of the proffered reasons in justifying termination. He was not notified that termination was contemplated and given any opportunity to say anything regarding the reasons for the intended termination. He had left the workplace on annual and research leave, only to be slammed with a letter of termination, when he was ready to resume duty.
3. Whatever the reasons the respondent had, whether prompted by regulatory requirements, or any shortcomings on the part of the petitioner, did not obviate the need to avail procedural fairness to the petitioner. He needed be told in advance that the respondent intended to terminate his contract prematurely, for specific reasons. He ought to have been consulted.
4. If the respondent considered that the petitioner's position had become redundant, or that he was due for retrenchment for operational reasons, then proper procedure under section 40 of the Employment Act ought to have been followed. That procedure required that the affected employee, if not a member of a trade union, was to be notified directly of the employer's intention to declare his position redundant. Where he was a member of a trade union, the employer must notify his trade union. The local labour office must in either case, be notified. Notice must disclose the reasons for, and the extent



- of, the intended redundancy, not less than a month, prior to the intended date of termination on account of redundancy.
5. Section 40 of the Employment Act employed the term ‘intended redundancy’ and ‘intended date of termination on account of redundancy.’ The use of those terms was deliberate. Fair redundancy procedure must have notices of intended redundancy, and intended termination. Those notices issued, before there was a decision to terminate on account of redundancy. The notices paved way for consultations. There was no notice issued to the petitioner by the respondent, advising him that the respondent intended to declare any position redundant or that it intended to terminate his contract on account of redundancy. Such notices ought to have issued at least a month, before the intended date of termination.
 6. Consultations were integral to fulfilment of the procedural rights under section 40(1)(c) to (g) of the Employment Act. It was only through consultations that the selection criteria; the obligations under the CBA or individual contract; leave entitlement; notice; and severance pay could be agreed upon. Consultations were important because fairness of procedure and substance, was premised on the employer complying with all the conditions prescribed by the law, under section 40(1) of the Employment Act.
 7. The respondent did not appear to have been sure footed in explaining procedure. It alternatively held that it followed redundancy procedure and submitted that it followed the termination clause in the contract executed between the parties. Either way, the law did not allow the respondent to terminate the petitioner’s contract at will, as the respondent did on January 25, 2016.
 8. The termination was not procedurally fair under the Employment Act, the Fair Administrative Action Act and the Constitution of Kenya. The grounds stated by the respondent in justifying termination, swayed like a column in an earthquake. Section 43 of the Employment Act required an employer to give clear valid reason or reasons justifying termination. Vacillation could only lead to a conclusion that an employer did not have valid reason or reasons to justify termination.
 9. Redundancy was mainly on the ground that the regulators, Council for Legal Education (CLE) and Council for University Education (CUE), had in place regulatory standards which the petitioner did not meet.
 10. Abrupt termination of the petitioner’s contract was a strange decision, more so, because the allegation that the petitioner was a professor of sports medicine, and not law, had been discounted.
 11. The guidelines from the CUE, which came into operation in 2015, could not affect the petitioner’s promotions, which preceded the guidelines. The petitioner became an associate professor and a full professor, before the guidelines. The CLE, did not have guidelines of its own that were shown by the respondent to bar the petitioner’s law professorship and deanship.
 12. Termination could not be justified solely on the basis of the termination clause. Nearly every other contract had a clause on termination, whose fulfilment, by either party, did not satisfy the requirement of substantive justification of termination, imposed by section 43 and 45 of the Employment Act. Termination clauses could hold sway prior to enactment of the Employment Act 2007, when the concept of employment at will of the employer, was an accepted principle of Kenya’s employment law. Under the Employment Act, a valid reason or reasons must be established by an employer in justifying termination, even where the contract, as most contracts did, had a clause on termination notice.
 13. The respondent told the court that it had a moratorium of six months from the CLE, to put its house in order at its faculty of law. The letter granting moratorium was dated January 20, 2016. Six months would lapse in June 2016. The respondent ought to have utilized the moratorium to constructively engage the petitioner, as well as both regulators, and taken proper remedial action. Declaring that the petitioner’s position had become redundant was a very unorthodox way, of dealing with any regulatory apprehensions.



14. The respondent did not establish a valid reason or reasons, to justify termination of the petitioner's contract as required under sections 43, 45 and 47(5) of the Employment Act. The purported redundancy was a colourable exercise.
15. The petitioner's right to claim constitutional violations and remedies, in addition to contractual and statutory violations could not be doubted. The petitioner's right not to be discriminated against, under article 27 of the Constitution, as legislated in section 5 of the Employment Act was violated; his right of fair administrative action under article 47, as legislated in section 4 of the Fair Administrative Action Act, and sections 40, 41, 43, 45 and 47(5) of the Employment Act was violated; and his article 41 right, under the Constitution, read with the same provisions of the Employment Act above, was violated.
16. The Constitution was similar to a wireframe that needed to be fixed with other materials; or a skeleton, that needed organs and muscles, for it to function. For every statutory or contractual breach, there was always an implicated constitutional violation. The petitioner's right to human dignity, under article 28 of the Constitution was infringed. The respondent acted in a manner that did not respect, and protect the petitioner's human dignity. The evidence strongly pointed to violation of the petitioner's right to human dignity.
17. The concept of human dignity was a belief, that all people hold a special value that was tied solely to their humanity. It was not about high status, the petitioner's towering frame in the academia, but something he was born with. It was rooted in article 1 of the Universal Declaration of Human Rights, which stated that all human beings were born free and equal in dignity and rights. The right was restated in the International Covenant on Civil and Political Rights, 1966, whose preamble states that, those rights derived from the inherent dignity of the human person. Recognizing a right to dignity was an acknowledgement of the intrinsic worth of human beings; and autonomy and control over one's personal circumstances, was a fundamental aspect of human dignity. The respondent violated the petitioner's internationally and constitutionally recognized right to human dignity.
18. Remedies in employment law were not designed to be disproportionate to the nature of the violations suffered by the employee. The remedies were not aimed at unjust enrichment. Constitutional remedies could only supplement statutory and contractual remedies, where the statute or the contract, did not offer adequate redress.
19. The ceiling for compensation for unfair and unlawful termination of employment had been set through legislation at equivalent of 12 months' gross salary. Such compensation may not suffice, where violations went beyond the confines of the statute or contract, such as where different forms of discrimination, were shown to have informed termination decision. 12 months' salary would not suffice, where violation against the right not to be discriminated against, and where the right to human dignity, were shown to have openly been violated.
20. The court was mandated to grant fair, balanced, and effective remedies, guided by section 49 of the Employment Act, section 12(3) of the Employment and Labour Relations Court Act, and article 23 of the Constitution.

Petition partly allowed.

Orders

- i. *It was declared that termination of the petitioner's contract by the respondent was unfair and unlawful.*
- ii. *It was declared that the respondent violated the petitioner's constitutional right to fair labour practices, the right to fair administrative action, the right to human dignity and the right not to be discriminated against.*
- iii. *The respondent shall pay to the petitioner: balance of severance at Kshs. 709,442; balance of notice at Kshs. 45,645; balance of January 2016 salary at Kshs. 40,083; equivalent of 9 months' salary in compensation for unfair termination at Kshs. 3,060,000; and coalesced damages for constitutional violations, at Kshs. 3,000,000 – total Kshs. 6,855,170.*
- iv. *Costs to the petitioner.*



v. *Interest granted at court rate, from the date of judgment, till payment was made in full.*

Citations

Cases

Kenya

1. *German School Society & another v Ohany & another* Civil Appeal 325 & 342 of 2018 (Consolidated); [2023] KECA 894 (KLR) — (Explained)
2. *GMV v Bank of Africa Limited* Cause 1227 of 2011; [2013] e-KLR — (Explained)
3. *JOO (also known as JM) v Attorney General & 6 others* Petition 5 of 2014; [2018] KEHC 7540 (KLR) — (Explained)
4. *Kariuki, Peter M v Attorney General* (Civil Appeal 79 of 2012; [2014] KECA 713 (KLR)) — (Distinguished)
5. *Kenfreight (EA) Limited v Nguti* (Petition 37 of 2018; [2019] KESC 79 (KLR)) — (Explained)
6. *Kenya Airways Limited v Aviation & Allied Workers Union & 3 others* (Civil Appeal 46 of 2013; [2014] e-KLR) — (Explained)
7. *Kenya Union of Commercial, Food and Allied Workers & another v Choppies Enterprises Kenya Limited & 3 others* Commercial Civil Case 408 & Kisumu CMELRC 408 of 2019 [2020] KEELRC 190 (KLR) — (Explained)
8. *Kibe, Elizabeth Wakanyi v Telkom Kenya Limited* Civil Appeal 25A of 2013; [2014] — (Explained)
9. *Marete, D K Njagi v Teachers Service Commission* (Civil Appeal 316 of 2013; [2020] KECA 840 (KLR)) — (Explained)
10. *Muhura, Peter Muchai v Teachers Service Commission* Cause 53 of 2014; [2015] KEELRC 717 (KLR) — (Explained)
11. *Mutuku Ndambuki Matingi v Rafiki Microfinance Bank Limited* Constitutional Petition 10 of 2021; [2021] KEHC 9059 (KLR)- (Explained)
12. *Ndirangu, Titus Muriuki v Beverly School of Kenya Limited* (Cause E009 of 2021; [2022] KEELRC 827 (KLR) — (Explained)

Tanzania

Dutambala Cr Appeal No 37 of 1991 — (Explained)

South Africa

S v Makwanyame & another [1995] ZACC 3) — (Explained)

International Instruments

1. International Covenant on Civil and Political Rights (ICCPR), 1966
2. Termination of Employment Convention (ILO Convention No 158), 1982

Statutes

Kenya

1. Constitution of Kenya articles 23, 27, 28, 41; Chapter 4 — (Interpreted)
2. Employment Act (cap 226) sections 5, 40, 41(1)(d); 43; 45; 47; 49 — (Interpreted)
3. Employment and Labour Relations Court Act (cap 8E) section 12(3) — (Interpreted)
4. Fair Administrative Action Act (cap 7L) section 4(3) — (Interpreted)
5. National Cohesion and Integration Act (cap 7N) section 7(4) — (Interpreted)

Advocates

Moni Wekesa & Company Advocates for the petitioner.

Adera & Kenyatta, Advocates for the respondent.



JUDGMENT

1. Prof Dr Moni Wekesa, the petitioner herein, filed his Petition dated November 7, 2016, on November 11, 2016.
2. The Petition is supported by a verifying affidavit, sworn on November 1, 2016; a witness statement made by the petitioner dated October 31, 2016; and a bundle of documents on record.
3. The petitioner states that he was employed by the respondent as an Associate Professor, and acting Dean at the respondent's School of Law, on a 1-year contract dated June 10, 2010.
4. The contract was renewed for 3 years effective June 15, 2011, through a letter dated May 6, 2011.
5. On June 30, 2012, the respondent appointed the petitioner a member of the respondent's International Conference Organizing Committee.
6. On May 24, 2012, he was appointed as the Board Chairman at a PhD Thesis Oral [Defence] meeting.
7. He was appointed as a Masters [Med. EPMA] Project Supervisor, on July 27, 2012.
8. On July 12, 2013, he was appointed as an External Examiner of Thesis/ Project
9. On March 3, 2014, he was appointed as a PhD Research Proposal Reviewer, and in an undated letter, was later appointed to serve as 3rd Internal Examiner [Supervisor].
10. His contract was renewed for 5 years, effective July 15, 2014, through a letter dated August 5, 2014.
11. On December 17, 2014, he was appointed as the substantive Dean, School of Law with effect from January 1, 2015.
12. Through a letter dated December 18, 2014, he was promoted to Professor, Department of Public Law, with effect from January 1, 2015.
13. He served diligently in his various roles, until January 25, 2016, when the respondent, abruptly terminated his contract unfairly and unlawfully. He was advised that he had been retrenched.
14. He was paid upon termination: -
 - a. Salary for days worked up to January 25, 2016[though not correctly calculated].
 - b. Accrued leave days up to January 25, 2016.
 - c. 1-month salary in lieu of notice [though not correctly calculated]
 - d. Gratuity up to January 25, 2016.
15. His membership of the respondent's Medical Scheme was terminated alongside his contract.
16. The petitioner states that termination violated a raft of his constitutional rights, including: -
 - a. Article 41, right to fair labour practices.
 - b. Article 28, right to dignity.
 - c. Article 27, right not to be discriminated against.
 - d. Right to enjoy all other rights provided for under Chapter 4 of the [Constitution](#)



17. Prof Dr Moni Wekesa, the petitioner herein, submits that the Constitution guarantees substantive and procedural fairness on termination of employment, under article 41.
18. He submits that the respondent was required to engage him in consultations, before retrenchment. He was not consulted.
19. He was not paid severance, and other dues were underpaid.
20. He was denied his right to dignity. He was humiliated and degraded. He was exposed to pecuniary embarrassment. It was difficult to explain to colleagues and students why the petitioner, a Professor of international repute, was dropped by the respondent from teaching law, without valid reason. He was made to feel useless and unwanted.
21. He was discriminated against, and lost his source on income. Income is the foundation for actualization of many fundamental rights. Fundamental rights cannot be left to undefined premises and uncertain application. He merits aggravated damages, that serve to redress injuries not compensable by ordinary damages.
22. The petitioner legitimately expected to serve out his 5-year contract to the end.
23. He prays for: -
 - A.
 - a. Declaration that retrenchment was unfair and unlawful.
 - b. Declaration that retrenchment violated the petitioner's right to fair labour practices.
 - c. Declaration that retrenchment violated the petitioner's right to human dignity.
 - d. Declaration that retrenchment violated the petitioner's right not to be discriminated against.
 - e. Declaration that retrenchment denied the petitioner the right to enjoy all other rights under Chapter 4 of the Constitution.
 - B.
 - a. Reinstatement.
 - b. Compensation equivalent of 12 months' salary for unfair and unlawful termination at Kshs 340,000 x 12 = Kshs 4,080,000.
 - c. Severance pay at 30 days' salary for each year from 15th June 2010, at Kshs 2,007,500.
 - d. Underpayment of 1-month salary in lieu of notice at Kshs 340,000 -294,355 = Kshs 45,645.
 - e. Underpayment of salary for days worked at Kshs 340,000 -242,250 = Kshs 41,083.
 - f. Salary for 35 months and 5 days, left in the contractual period at Kshs 11,956,667.
 - g. Aggravated damages at Kshs 30,000,000,
 - h. Punitive damages at Kshs 10,000,000
 - Total... Kshs 58,130,895
 - i. Costs and interest.



24. In his submissions dated October 28, 2021, the petitioner has revised the above prayers. He relinquishes the prayer for reinstatement, acknowledging that the remedy is time-barred. He also relinquishes his prayer for anticipatory salary for the remainder of the contractual period, submitting that he secured employment elsewhere.
25. The remaining prayers are calculated at a total sum of Kshs 46,172,728.
26. The respondent answers the Petition, through the replying affidavit of Prof. Evans Kerosi, respondent's Deputy Vice-Chancellor, Administration, Planning and Institutional Advancement, sworn on June 16, 2017, and a further affidavit of respondent's Deputy Director of Human Resource Department, Lucy W Maina, sworn on July 29, 2020.
27. Prof. Evans Kerosi concedes that the petitioner was employed by the respondent as petitioned. It is conceded that the respondent terminated the petitioner's contract, on January 25, 2016.
28. Termination was in strict compliance with the contract of employment executed between the Parties. The respondent followed the clause on termination, in the contract. The petitioner was not bound to work in perpetuity.
29. The petitioner was never retrenched. His contract was lawfully terminated, for proper and adequate reasons. He was aware at the time of engagement, that his contract could be terminated through notice.
30. He was paid all his terminal dues. He received the same without protest. He was paid accrued annual leave for the year 2016, at Kshs. 63,281. He did not have additional leave claims. He never applied for annual leave for the period 2010-2015. An Employee who fails to utilize his annual leave, forfeits it. The petitioner forfeited his leave for the period 2010-2015 because he did not apply for it.
31. He was paid gratuity at Kshs 452,919 calculated from June 15, 2011 to January 25, 2016. There was no policy on payment of gratuity, prior to June 2011.
32. He was paid notice of 1 month at Kshs 242,250 and salary for days worked in January 2016, at Kshs. 294,355.
33. In total, the petitioner was paid terminal benefits at Kshs 614,775, through a cheque dated August 6, 2016.
34. He belonged to a medical insurance scheme procured by the respondent. The scheme run for 1 year. It lapsed at the end of 1 year, regardless of the Employee's employment status. The respondent did not cancel his medical cover; it ended at the end of the 1 year contracted between the respondent and the insurer.
35. Termination was not arbitrary, unreasonable, unfair and unjust as claimed. It did not offend the Constitution or Statute. It was fair and lawful. There was no legitimate expectation for the petitioner to work to the end of his contract. There was no breach of the petitioner's right to human dignity. The petitioner has misapprehended the right to human dignity. Termination did not in any way discriminate against the petitioner.
36. The petitioner has not justified his prayer for any form of damages. He cannot be returned to the position of Dean of School of Law. The position was substantively filled, and the regulator had raised questions about the suitability of the petitioner.
37. Deputy Director of Human Resource, Lucy Maina, adds through her further affidavit that, the Council of Legal Education conducted an audit on May 5, 2015 at the respondent. The audit report



from the Council indicated that the petitioner was a Professor of Sports Medicine, and not an Associate Professor, or Professor of Law.

38. Consequently, the Council encouraged the respondent to ensure the Dean is an Associate Professor of Law.
39. The petitioner wrote to the Deputy Vice-Chancellor on August 10, 2015, seeking annual leave from September 1, 2015, as well as a break from teaching from October to December 2015.
40. He applied for annual leave on August 26, 2015, and handed over the Office of Dean, School of Law, on August 31, 2015.
41. He proceeded on annual leave, from September 1, 2015 to end on September 26, 2015.
42. He was advised by the Director, Human Resource, through a memo dated October 27, 2015, that he would not be paid deanship allowance for the period he was away.
43. He was advised by the Director, Human Resource in a letter dated January 4, 2016, to continue with his leave until further communication.
44. The Council for Legal Education, in a letter dated January 20, 2016, approved the request by the respondent, for a 6 months' moratorium, to undertake remedial action, on reducing the number of students for admission for the Bachelor of Law Programme. There was suspension of further admission. The respondent undertook regularization of its staffing.
45. Based on the audit of the Council for Legal Education, the respondent opted to terminate the petitioner's contract, through a letter of termination, dated January 25, 2016. It indicated the predicament it was faced with, upon review of its operational requirements.
46. Termination of the petitioner's contract through redundancy, was therefore based on the observation of the Council of Legal Education, that the petitioner holds a PhD in Sports Medicine, and was not qualified to be the Dean, School of Law.
47. This information from the Council of Legal Education was relayed to the petitioner, who opted to take annual leave as he awaited the decision of the respondent.
48. The decision by the respondent was not easy. It was discussed with the petitioner. Parties agreed to have the petitioner's contract terminated.
49. The petitioner accepted the decision, cleared with the respondent, and was paid terminal dues in the sum of Kshs. 614,775. He accepted termination and terminal benefits, and his Petition is an afterthought.
50. Ms. Maina joins Prof. Kerosi in urging the Court to find that termination was fair and lawful, and did not violate the petitioner's rights, under the Constitution or Statute.
51. The respondent urges the court to dismiss the Petition with costs.

Hearing

52. The petitioner testified on June 9, 2022, and October 14, 2022 when he closed his Petition. Human Resource Officer Janet Kajwang' testified for the respondent on December 8, 2022 and July 27, 2023, when the hearing closed. The Petition was last mentioned on October 6, 2023, when the Parties confirmed filing and exchange of their Closing Submissions.

Petitioner's Evidence



53. The petitioner adopted as his evidence –in-chief, the contents of his Petition, verifying affidavit, documents and replying affidavits on record.
54. He told the court that he holds the following Degrees - Bachelor of Education; Master of Education; PhD in Sports Medicine; Bachelor of Law; Master of Law; and PhD in Law.
55. At the time of giving evidence, he was teaching Law, at the Daystar University, Nairobi. He was employed at Daystar in November 2016. Before this he worked at Kenyatta University [1982-1985]; University of Nairobi [1996-1997]; University of Namibia in 1998; Catholic University Nairobi in 2010; and, at the respondent from June 2010 to January 2016.
56. He restated that he was appointed to various roles by the respondent, from June 2010. He was acting Dean, School of Law from June 2010. His contract was renewed for 3 years from June 15, 2011. He was appointed an Associate Professor, on this date. He was appointed to honorary positions, attending thesis examination, supervising Master’s Degree students, and reviewing external PhD candidates.
57. After his 3-year contract expired, it was renewed for 5 years, from June 15, 2014 in the position of Associate Professor. He was appointed Dean, effective January 1, 2015. He became Professor through a letter issued by the respondent, dated December 15, 2014. The effective date of appointment as Professor, Department of Public Law, School of Law, was January 1, 2015.
58. He never went on annual leave. There was a lot of administrative work to be done.
59. He applied for annual leave on September 1, 2015 to September 30, 2015.
60. Thereafter, he applied for research leave from October 1, 2015 to December 31, 2015.
61. The petitioner took the break, to write a book titled ‘Research Methods for Lawyers & Other Professionals,’ a copy which was availed to the Court.
62. His leave ended on December 31, 2015. He wrote to the respondent’s Management, stating that he was ready to resume duty.
63. He was advised by the Chief Human Resource Director, that he continues with his leave, until further communication.
64. He received another letter, dated January 25, 2016, terminating his contract. He was told that the respondent was implementing institutional reforms and rationalization of human capital. Positions had been abolished, and departments merged.
65. The position of Dean, School of Law is integral to the Faculty of Law. The petitioner asked for a list of academic staff affected by rationalization. He was not availed any list. He did not know if Law Departments were merged.
66. He was not invited to discuss restructuring of reorganization. He was not shown any minutes of a meeting on restructuring.
67. The Council of Legal Education did not have the mandate of setting standards of legal education at the respondent. The respondent furnished the petitioner with a document from the Council of Legal Education, which he saw for the first time in July 2020.
68. The body responsible for regulation of education at the respondent was the Commission for University Education [CUE]. It dealt with promotions. It issued guidelines on promotions, which came into effect in 2015, long after the petitioner was promoted.



69. His document 'MW 39' Page 29, shows that he became Associate Professor in 2011.
70. Before his promotion, each University had its own guidelines, based on its statutes, on promotions. Private Universities applied their Charters. From 2010 to 2015, the petitioner never saw a complaint from the Commission for University Education, about his appointment, qualifications and promotions.
71. Staff who were retained by the respondent did not have superior qualifications to the petitioner. He had no disciplinary complaints against him. He felt discriminated against. His dignity was impaired. He could not keep the company he was used to. He was exposed to vagaries of health. His right of employment was violated. His last contract was due to expire in 2020.
72. He told the Court he did not wish to pursue the remedy of reinstatement. He secured alternative job. He seeks compensation equivalent of 9 months' salary, the period he remained unemployed. He seeks severance pay at the rate of 30 days, for each complete year of service. Notice was underpaid. Salary for days worked was underpaid. He seeks aggravated damages at Kshs. 30 million, and punitive damages at Kshs. 10 million. He prays for costs and interest.
73. Cross-examined, the petitioner told the Court that he was first employed on June 10, 2010. He was acting Dean, School of Law. He signed the contract and accepted the terms and conditions. Either Party could terminate the contract through written notice of pay in lieu of notice.
74. On appointment, the petitioner had Bachelor of Laws and Master's Degree in Sports Law. He did not have a PhD. He got PhD 6 months later, in December 2010.
75. He was appointed Associate Professor, after he acquired PhD. The Commission for University Education has guidelines, on appointment of academic staff. They are dated 2014, but were signed by the relevant Cabinet Secretary, in 2015. The guidelines were issued to harmonize standards. Before then, Universities were guided by individual standards.
76. The guidelines state that an Associate Professor, must have a PhD or its equivalent. The petitioner had a PhD and years of teaching experience. By 2014, he had been teaching for 30 years. He had been teaching since 1982. He had taught Law for more than 3 years, beginning at Catholic University in January 2010.
77. The guidelines require that an Associate Professor should have a minimum of 48 publications. This did not apply to the petitioner. He was not persuaded that it could apply retrospectively to him. He did not meet this standard.
78. The petitioner was aware of audit, carried out by Council of Legal Education. The audit was carried out, during the petitioner's deanship. The report is signed by the Council's Chief Executive Officer, Prof. Kulundu Bitonye.
79. It highlighted that Faculty student-staff ratio was too low, and more staff should be recruited. It observed that the Dean was not an Associate Professor of Law. The petitioner did not recall if the report raised the issue concerning minimum number of publications.
80. The petitioner requested for research leave, to go and publish. He was not actuated by the audit report, which questioned his qualifications. He was not privy to the audit. He would be away for 4 months. He intended to complete his research on the book he was writing. This is after the audit of the Council. He had been teaching since 2010. He nominated an acting Dean for the period of his leave. The period was too short to complete a minimum of 48 publications. Eventually, his journals were published. He did not take leave, to acquire qualifications.



81. He was advised by the respondent to continue with his leave at the end of the scheduled period. It was not indicated in the letter asking him to extend leave, if this was to allow him acquire the necessary qualifications of an Associate Professor.
82. He was aware that the Council for Legal Education, through Prof. Kulundu Bitonye, gave the respondent a moratorium for remedial action involving staff qualifications. He was not aware that all staff, included him.
83. The respondent wrote to the petitioner a letter of termination. It referred to institutional reforms. It stated that the situation had been aggravated, by instructions from the Council to suspend the LL.B. programme. He was not privy to these instructions. He was not aware of Board meetings held by the respondent on the subject. He asked for details. None was supplied.
84. He cleared with the respondent. He was paid terminal dues indicated by the respondent. Clearance form shows the computation of dues. It indicates a total figure of Kshs. 871,840. The sum did not add up. The petitioner collected a cheque for the sum. He did not object to this amount, because there was no opportunity to object.
85. Redirected, the petitioner told the court that the Commission guidelines, came into effect, on July 7, 2015. He was already an Associate Professor. The guidelines could not apply to him in retrospect. The Council for Legal Education had no guidelines on who becomes a Law Lecturer. This role is discharged by the Commission for University Education. The guidelines could not apply retrospectively. The Commission audit report was not shared with the petitioner. He saw it for the first time in Court. He did not take annual and research leave, as a result of the audit. He was entitled to leave. The respondent states in its replying affidavit, that the petitioner was not retrenched, that his contract was terminated in accordance with the terms of the contract. The letter of termination specifically refers to retrenchment.

Respondent's Evidence.

86. Janet Kajwang affirmed the contents of the affidavits sworn by Prof Kerosi and Lucy Maina, in her evidence-in-chief. She exhibited documents filed by the respondent. She confirmed that the petitioner was employed by the respondent, and held the various ranks, pleaded in his Petition.
87. Part of his role was to ensure that the respondent complied with statutory regulations. He was to ensure that the respondent complied with the regulations issued by the Commission for University Education, and the Commission for Legal Education.
88. The contract contained a termination clause. Either Party could terminate the contract through a written notice of 30 days, or pay equivalent of 30 days' salary in lieu thereof. The petitioner accepted the terms and signed the contract.
89. He was to serve as an Associate Professor and Dean, School of Law effective June 15, 2011. Associate Professor, was in addition to his role as Dean.
90. His contract as Associate Professor was renewed for 5 years. The terms and conditions remained as stipulated, in the contract of 2011.
91. He was to work based on the University legal framework. Initially his appointment as Dean, was not regularized.
92. The Council for Legal Education carried out an audit and made a report. The Council regulates teaching and research, and carries out regular inspection.



93. The Council audit found out that the Dean, was a Professor of Sports Medicine, not a Professor of Law. The Council advised that the respondent ensures the Dean, is an Associate Professor of Law, not Sports Medicine. The Council advised that the respondent, addressed all issues, ready for the next inspection.
94. The Commission for University Education had mandatory requirements for the position of Associate Professor. The petitioner did not meet these requirements. He did not have a minimum of 48 publications. He asked for annual and research leave, 2 months after this was raised.
95. He sought leave to complete writing a book and journal articles. He asked for 4 months' leave cumulatively. It was in order for him, to address the concerns raised by the regulators.
96. He was granted leave as sought. At the end of the period, he was advised by the respondent to continue with his leave, until further notice. As of this date, he had not appraised the respondent about his research and publications. The Council had given the respondent moratorium of 6 months, to be compliant.
97. In the end the respondent decided that the petitioner's services were no longer required, on account of regulatory requirements. He was offered full terminal benefits. He cleared with the respondent. The reason for termination was stated. He was paid the sum stated in his evidence.
98. The respondent did not write to the petitioner expressly, pointing out that he was unqualified. This was to protect him, and his students. His rights were not violated. He signed payment voucher in August, 2016.
99. Cross-examined, Kajwang' told the court that the respondent appointed the petitioner an Associate Professor, in 2011. The respondent had criteria for appointing Associate Professors. He held 2 positions- Associate Professor, and Dean, School of Law. One can be an Associate Professor, but not a Dean.
100. He was promoted on December 18, 2014. There was approval of the University Council. The University Council approves appointments. There was an interview, recommendation, approval and then appointment.
101. The Commission for University Education guidelines, were signed on June 17, 2015 by the Cabinet Secretary.
102. The Council for Legal Education has its own guidelines on employment of academic staff. Kajwang' did not have a copy of these guidelines in court. Student-Lecturer ratio, was said to be unsustainable. There was need to increase staff members. Most desirable qualification to teach at the University is at least, a PhD.
103. There were no complaints, concerning the petitioner's discharge of duties and responsibilities.
104. The audit report exhibited by Lucy Maina, as LMW 1, is dated June 17, 2015. It did not relate to poor performance. The petitioner was told by the respondent that restructuring had taken place, and his services would no longer be required.
105. The petitioner was not issued a notice of redundancy. He was invited for a redundancy meeting verbally. There were no minutes recording the meeting. The positions of Professor and Dean, were not abolished. There was no merger of departments.
106. The petitioner's contract had not expired. Kajwang' was not aware of the redundancy principle of first in last out [FILO], or last in first out [LIFO].



107. The respondent was not aware if the petitioner published his book, as intended. The respondent acknowledged that the book was probably published. The respondent had granted the petitioner time off, to publish. Kajwang' was not aware if the Council report was copied to the petitioner. The report stated that the petitioner was a Professor of Sports Medicine, not Law. There are no minutes to show that the respondent held a meeting with the petitioner, where the audit report was discussed. The petitioner's handover report states that he handed over the Council report.
108. The report states that more staff, not less, were required. Appointment of the petitioner was not based on the Commission for University Education guidelines, which came into force much later. Kajwang' was not certain when the guidelines came into force. She testified that she believed the guidelines were in force in 2014. The document is shown to have been signed by the Cabinet Secretary on July 7, 2015. The Council report is dated June 17, 2016.
109. The Council for Legal Education monitors and evaluates legal education. The highest qualification needed to teach Law is PhD.
110. The petitioner had this qualification, as of January 2016, Kajwang told the court.
111. The witness was not able to confirm from the petitioner's pay slips, if he was paid the correct notice and salary for days worked in January 2016. She could not tell if departments were merged.
112. Redirected, Kajwang' reiterated that the petitioner's contract had a clause on termination through 1-month notice, or salary of 1-month in lieu thereof. He was paid notice and did not protest.
113. The Council for Legal Education licences institutions involved in legal education. These institutions have to comply with Council standards. The petitioner was the Dean, and charged with implementation of regulations. The regulator found that he was a Professor of Sports Medicine, not Law, and the respondent was bound by the finding. The petitioner sought time to qualify. The respondent was given timelines to address the anomaly, in readiness for the next inspection. The Council's position was that the Dean, must be an Associate Professor of Law.
114. The audit report was signed on July 7, 2016. The guiding document was the Commission for University Education. The guidelines required that an Associate Professor should have a PhD, 3-years' teaching experience, and 48 publications, 32 of them from refereed scholarly journals. The petitioner did not meet these requirements. He was aware about the Council recommendations as shown in his handover report. He was the respondent's main link with the Council. Termination was fair and lawful.

Submissions

115. The petitioner filed closing submissions dated October 28, 2021, and October 2, 2023. The respondent filed closing submissions dated September 28, 2023. An order for closure of proceedings had issued on October 14, 2021, with directions that the Petition is disposed of through written submissions. The petitioner therefore filed the first set of his submissions dated October 28, 2021. The respondent successfully moved the Court for oral hearing, which opened on June 9, 2022, which explains the wide gap, on the dates appearing in the parties' respective Submissions.
116. The petitioner submits that the issues in dispute are: whether he was qualified to hold the position of Professor and Dean, School of Law; whether his contract was unfairly and unlawfully terminated; whether his rights were violated; and whether he is entitled to the remedies sought.
117. He rehashes his evidence, in his answer to the above issues, in his closing submissions.



118. On the law, he submits that section 40 of the *Employment Act* regulates termination of employment, on account of redundancy. The law recognizes the right of an Employer to organize its business. However, an Employer must observe procedural and substantive fairness, in exercising this right.
119. An Employer must show evidence of poor business performance warranting redundancy; the affected Employee must be consulted; criteria applied in selecting the affected Employee must be established; and notice must issue to the Employee, his Union where applicable, and the Labour Office.
120. Section 43 of the *Employment Act* calls for valid reason or reasons, in justifying termination.
121. The petitioner invokes the frequently cited decision of the Court of Appeal on redundancy, in *Kenya Airways Limited v Aviation & Allied Workers Union & 3 others* [2014] e-KLR, on procedural and substantive requirements on redundancy, under Section 40 of the Employment Act.
122. He submits that the respondent retrenched him, but did not justify its decision, by availing to the court evidence of economic downturn. The positions held by him were not abolished. There were no departments that were merged. He was not consulted by the respondent.
123. The petitioner restates that he is eminently qualified, a holder of LL.B. LL.M and PhD in Law, among other degrees.
124. Retrenchment was stated as a reason to justify termination, in afterthought.
125. He submits that in her affidavit, Lucy Maina alleges, that the Parties consulted and agreed on termination by way redundancy, by “mutual consent.” No evidence of this consent was supplied to the Court.
126. He submits that the principle of LIFO [last in, first out], was disregarded by the respondent. He points to his exhibit ‘MW40,’ a timetable for January – April 2016, showing 23 Law Lecturers were retained by the respondent, even as the petitioner was being retrenched. All 23 held LL.B. and LL.M degrees. Others had BA as a first degree.
127. By contrast the petitioner was just one of two PhD holders at the respondent. It was the evidence of the respondent, and is common knowledge, that the most desirable qualification for teaching at the University, is a PhD.
128. Again citing the Kenya Airways decision, the petitioner submits that there was no notice issued to him and to the Labour Office. He first learnt of retrenchment on January 25, 2016, when he received the letter of termination.
129. On constitutional violations, he cites a South African decision, *S v Makwanyame & another* [CCT3/94] [1995] ZACC 3, a decision cited with approval by the Kenyan High Court, in *JOO [a.k.a. JM] v Attorney-General & 6 others* [2018] e-KLR, holding that recognizing a right to human dignity, is an acknowledgment of the intrinsic worth of human beings. The right is a foundation of many constitutional rights. He relies on the case of soldier *Peter M. Kariuki v Attorney-General*, 2014 e-KLR, which arose from a court-martial dispute, after Kariuki, Commander of the Kenyan Airforce, was implicated in a coup de tat attempt against the Moi regime in 1982. The petitioner submits that the Court of Appeal granted Kariuki Kshs. 15 million in enhanced damages for violation of various constitutional rights and loss of employment.
130. The petitioner invokes article 27 of the *Constitution*; section 5 of the *Employment Act*; and section 7[4] of the *National Cohesion and Integration Act*, in submitting that the respondent discriminated against him, by dismissing him on the stated grounds.



131. He extends the constitutional argument to article 41, submitting that the respondent denied him his right to fair labour practices. The petitioner's additional Submissions dated October 2, 2023, reiterate the earlier Submissions, underscoring that aggravated and punitive damages are merited, in order to send a clear message to Employers who are minded to infringe Employees' rights, on the consequences of infringement.
132. The respondent highlights its evidence, in its closing submissions. It is submitted that the petitioner had the responsibility of implementing regulatory standards at the Faculty of Law; the Council for Legal Education audit concluded that the petitioner was a Professor of Sports Medicine, instead of the required Associate Professor of Law; the petitioner did not meet the mandatory requirements of associate professorship, set by the Commission for University guidelines; he conceded he did not meet the requirements; and the petitioner sought 4 months' leave, to enable him meet the standards. At the end of the 4 months, he had only managed to write one book, known as 'Research Methods for Lawyers and Other Professionals.'
133. There is an unfortunate gap in the respondent's closing submissions dated September 28, 2023. Between page 3 and 9 of the Submissions, the respondent supplied the Court with blank pages. From paragraph 18, the Submissions proceed to paragraph 31.
134. Page 9 begins with the submission that constitutional remedies such as sought by the petitioner, are reserved for serious violations, as held in the Tanzanian decision in *Dutambala Cr. Appeal No. 37 of 1991*. The grievance by Prof. Dr. Dr. Moni Wekesa, the petitioner herein, is not so serious to attract constitutional sanctions.
135. The respondent submits that the petitioner was fully aware about the Council audit, and knew that he was not an Associate Professor. On January 20, 2016, the Council gave the respondent a moratorium of 6 months, to address the issues raised in the audit report, including the requirement that the Dean of School of Law, should be at least an Associate Professor of Law.
136. The audit report compelled the respondent to restructure. The petitioner was paid all his dues. There was no Recognition Agreement applicable to the Parties, and the issue of section 40 [1] [d] of the *Employment Act* did not arise. The respondent submits that it procedurally and substantively complied with the Employment Act and the terms and condition of service, in terminating the petitioner's contract.
137. In event the court is convinced that the respondent did not observe section 40 of the *Employment Act*, it is submitted that 1-month salary to the petitioner, would be a sufficient remedy.
138. Severance pay was availed to the petitioner in the name of gratuity. The court in *Kenya Union of Commercial, Food and Allied Workers & another v Choppies Enterprises Kenya Limited & 3 others* [2020] e-KLR, held that, the employer had met the requirement for payment of severance on redundancy, although the payment was characterized as gratuity. The petitioner confirmed receipt of severance pay, in the form of gratuity.
139. The Supreme Court of Kenya, in *Kenfreight [EA] Limited v Benson K Nguti* [2019] e-KLR, held that the Employment Act limits the award the court can make on award of damages for unfair and unlawful termination, to 12 months' salary. This was the same holding by the E&LRC, in *Titus Muriuki Ndirangu v Beverly School of Kenya Limited* [2022] e-KLR. The prayers for anticipated salary for the remainder of the contractual period, punitive and aggravated damages are all misplaced. The respondent urges the court to decline the Petition.
140. The issues as identified by the Parties are, whether: -



- a. termination of the petitioner's contract was procedurally fair;
- b. termination was substantively fair;
- c. the respondent violated the petitioner's constitutional rights; and,
- d. the petitioner merits statutory and constitutional remedies as pleaded.

The Court Finds: -

141. A lot of time was spent by the Parties, on the academic qualifications of the petitioner, at the time of termination of his contract, in the year 2016.
142. According to the respondent, the petitioner did not qualify to be the Dean, Faculty of Law, because he was not a Professor of Law, but a Professor of Sports Medicine.
143. On cross-examination, Janet Kajwang' from the respondent's Human Resource Office, told the Court that Commission for Legal Education monitors and evaluates legal education. The highest qualification required of Law Lecturers is a PhD in Law. Kajwang' told the Court that as of January 2016, the month the respondent terminated the petitioner's contract, "the petitioner had this qualification."
144. The petitioner's biography in his book 'Research Methods for Lawyers & other Professionals,' a copy which was availed to the Court, confirms that as of 2016, indeed the petitioner was a holder of PhD in law.
145. For clarity on his credentials, it is important for the Court to highlight that biography from the outset, so that moving forward in this Judgment, this issue becomes well-settled. The biography reads, inter alia: -

" Prof. Dr. Dr. Moni Wekesa...joined the University of Nairobi, where he obtained a Bachelor of Education [Science] First Class Honours in Mathematics and Physical Education. He obtained Masters and PhD in Sports Medicine, from the Deutsche Sporthochschule – Cologne, a European Centre of Excellence. He also obtained Bachelor of Laws, Master of Laws and PhD in Law, from the University of Nairobi. He has taught at Kenyatta University, University of Botswana, University of Namibia, Catholic University of Eastern Africa, and Mt. Kenya University..."
146. The respondent did not cross-examine the petitioner on the information contained in his biography. This information is part of the evidence on record. It is unchallenged. On June 9, 2022, the petitioner told the Court, in the presence of Learned Counsel for the respondent, Mr. Kenyatta, " Thereafter, I applied for research leave from October 1, 2015 to December 31, 2015. I took the opportunity to write a book. I exhibit the book."
147. The petitioner's professional achievements from the biography, include: he worked as Regional Manager for Africa with Special Olympics; Sports Medicine Instructor for the Federation Internationale de Football [FIFA] and the Confederation of African Football [CAF]; served as Secretary General of Kenya Football Federation; was a Visiting Professor for post-graduate studies in Law at the Universite' Libre de Kigali; was on the Roll of Senior Scholars at the Lusaka Law School; has over 100 publications in the fields of Law and Sports Medicine; has supervised many post-graduate Law Students; and presented over 80 papers at learned conferences and workshops all over the world.
148. From this biography, and other evidence on record, the petitioner comes out across as a complete, thoroughbred, Intellectual and Legal Professional, with an added expertise in Sports Medicine, whose credentials could not be doubted. His biography provided an open book, for any enquirer, including



the respondent to interrogate, before making any decision relating to the petitioner. The biography was available in 2016, when the respondent terminated his contract. It is confirmed by the respondent's witness, Janet Kajwang' that the petitioner held PhD in Law, as of January 2016.

149. Is it likely that a Law Professor states on oath before the Court, and in his public records, that he holds a PhD in Law, while he does not, or did not in 2016, when he was dismissed on the ground *inter alia*, that he was not a qualified Professor of Law?
150. Having laid to rest the recurring question, on the academic and professional qualifications of the petitioner, the Court turns to the specific issues in dispute, as identified at paragraph 140 of this Judgment,

Procedure

151. The respondent clearly got it all wrong, on procedural fairness, from the word go.
152. It is not contested that the petitioner took his annual leave from September 1, 2015 to September 30, 2015.
153. He applied for and was granted research leave from October 1, 2015 to December 31, 2015.
154. He was to return to work, in January 2016. He notified the respondent, that he was ready to resume duty.
155. The respondent wrote to the petitioner on January 4, 2016, advising him to continue with his extended leave.
156. Fast on the heels of the letter dated January 4, 2016 came the letter dated January 25, 2016, advising the petitioner that his services would no longer be required, with effect from January 25, 2016.
157. The respondent advanced various reasons for its decision, which will be shortly examined, in analysing substantive justification.
158. The petitioner was advised that: -
 - a. Arising from the demands of the environment in which the University is operating, the Board of Trustees and the University Council has undertaken a number of institutional reforms which have resulted to new University structures, review of academic programmes and rationalization of human capital requirements.
 - b. The situation has been aggravated by the demand by the regulator for legal education, for the University to suspend further admission for the Bachelor of Law Programme.
 - c. As a consequence, several positions have been abolished, departments merged, and a number of staff whose contracts expired, have not been offered new contracts.
 - d. In view of the above, and after reviewing the University operational requirements, we regret to inform you that your services will no longer be required, with effect from January 25, 2016.
159. The petitioner was on leave. He was not involved in any form of consultations or hearing, regarding any of the proffered reasons in justifying termination. He was not notified that termination was contemplated, and given any opportunity to say anything, regarding the reasons for the intended termination. He had left the workplace on annual and research leave, only to be slammed with a letter of termination, when he was ready to resume duty.



160. Whatever the reasons the respondent had, whether prompted by regulatory requirements, or any shortcomings on the part of the petitioner, did not obviate the need to avail procedural fairness to the petitioner. He needed be told in advance that the respondent intended to terminate his contract prematurely, for specific reasons. He ought to have been consulted.
161. If the respondent considered that the petitioner's position had become redundant, or that he was due for retrenchment for operational reasons, then proper procedure under section 40 of the Employment Act ought to have been followed.
162. That procedure is commonly familiar to Employers and Employees, as elaborated in the widely dispersed decision of the Court of Appeal in *Kenya Airways Limited v Aviation & Allied Workers Union [Kenya] & 3 others* [2014] e-KLR, cited by both Parties.
163. That procedure requires that the affected Employee, if not a member of a trade union, is notified directly, of the Employer's intention to declare his position redundant. Where he is a member of a trade union, the Employer must notify his trade union. The local labour office must in either case, be notified. Notice must disclose the reasons for, and the extent of, the intended redundancy, not less than a month, prior to the intended date of termination on account of redundancy.
164. Section 40 employs the term 'intended redundancy' and 'intended date of termination on account of redundancy.' The use of these terms is deliberate.
165. Fair redundancy procedure must therefore have notices of intended redundancy, and intended termination. These notices issue, before there is a decision to terminate on account of redundancy. The notices, pave way for consultations.
166. There was no notice issued to the petitioner by the respondent, advising him that the respondent intended to declare any position redundant or that it intended to terminate his contract on account of redundancy. Such notices ought to have issued at least a month, before the intended date of termination.
167. Consultations are integral to fulfilment of the procedural rights under section 40 [1] [c] to [g] of the *Employment Act*. It is only through consultations that the selection criteria; the obligations under the CBA or individual contract; leave entitlement; notice; and severance pay can be agreed upon. Consultations are important because fairness of procedure and substance, is premised on the Employer complying with all the conditions prescribed by the law, under section 40 [1] of the *Employment Act*.
168. The centrality of consultations in redundancy process has been affirmed by the Court of Appeal of Kenya, in *The German School Society v Helga Ohany* [2023]e-KLR, where it was held that consultations give an opportunity for other avenues to be considered, to avert or minimize the adverse effect of redundancy; consultations are an imperative under the Kenyan Law; they have to be a reality and not cosmetic or a charade; stakeholders must genuinely consult, and do so with open minds; and only after consultations will a decision be made, on redundancy.
169. The German School Society decision, not only affirmed the need for consultations on redundancy as implicit in the Employment Act; it held that section 4[3] of the *Fair Administrative Action Act*, and article 47 of the *Constitution* of Kenya, require Parties to consult before a redundancy decision is made.
170. Furthermore, the Court of Appeal has now endorsed the application of *ILO Convention 158 – Termination of Employment Convention*, 1982 which requires Parties to consult, where termination of employment is contemplated for economic, technological, structural or similar reasons.



171. In the Kenya Airways Appeal, the Court was not united on the need for consultations, or the application of *ILO Convention 158*. It was Maraga JA alone, who laid stress on the application of *ILO Convention 158* and the need for consultations. A consensus on consultations has since emerged from the Court of Appeal, with the Fair Administrative Action Act and article 47 of the *Constitution* giving greater anchorage, for the need for consultations before termination on account of redundancy.
172. The letter of termination issued upon the petitioner told the petitioner that several positions had been abolished and departments merged. He was not given notice of the reasons for, and extent of redundancy. He was just told through the letter of termination that several unspecified positions had been abolished, and departments merged. He was not told which positions and departments. He was not notified or consulted. He asked the respondent to supply him, with a list of Employees whose positions were affected by redundancy. Not a single name was supplied. He was just slammed with a letter of termination while he was on extended research and annual leave.
173. The respondent does not appear to have been sure footed in explaining procedure. It alternatively held that it followed redundancy procedure, and submitted that it followed the termination clause in the contract executed between the Parties. Either way, the law did not allow the respondent to terminate the claimant's contract at will, as the respondent did, on January 25, 2016.
174. Termination was not procedurally fair, under the *Employment Act*, the *Fair Administrative Action Act*, and the *Constitution* of Kenya.

Substance

175. The court has intimated in discussing procedure, that termination was flawed in substance as well.
176. This flows from the reasons given to the petitioner, in justifying termination. The respondent alternated between justifying termination on the ground of redundancy, and under the termination clause.
177. The grounds stated by the respondent in justifying termination, swayed like a column in an earthquake. Prof. Kerosi, in his replying affidavit states that the petitioner was never retrenched. Lucy Maina states in her further affidavit, that the petitioner's contract was terminated on account of redundancy. She in her evidence before the court, alleged that Parties agreed to have the petitioner's contract terminated. She was not able to exhibit any document recording this agreement. When all these grounds appeared too wobbly to stand, the respondent took refuge in the termination clause.
178. Section 43 of the *Employment Act* requires an Employer to give clear, valid reason, or reasons, justifying termination. Vacillation can only lead to a conclusion that an Employer did not valid reason or reasons, to justify termination.
179. Redundancy was mainly on the ground that the regulators, Council for Legal Education and Council for University Education, had in place regulatory standards, which the petitioner did not meet.
180. The respondent alleged that it responded to Council audit report, by restructuring, abolishing some offices, and merging departments. There was no evidence placed on record, of positions that were abolished, or departments which were merged. The position of Dean, School of Law, and Associate Professor were not abolished.
181. The petitioner has demonstrated that he was the only one affected, yet he was one, of only two Lecturers, out of a total of 25 Law Lecturers, with a PhD.



182. Lucy Maina told the court that the Council audit, established that the student-lecturer ratio, was not ideal. More Lecturers were needed. Yet, the respondent terminated the contract of its top Law Lecturer.
183. Even assuming he did not qualify to continue holding the position of Dean, School of Law, what disqualified him from continuing to teach Law at the respondent?
184. On cross-examination, Kajwang' conceded that the position of Dean, was separate from that of Professor, and that one could be a Professor and not a Dean.
185. If the petitioner was not qualified to be the Dean, why was he also disqualified from his teaching role?
186. How was it that this man, who has taught law in an out of Kenya, who has supervised PhD Students including at the respondent, a man who is widely published, was deemed unqualified to continue lecturing at the respondent University?
187. Abrupt termination of his contract was a strange decision, more so, because the allegation that the petitioner was a Professor of Sports Medicine, and not Law, has clearly been discounted both in his own evidence, and that of the respondent's witness, Janet Kajwang'.
188. The Court does not think that the guidelines from the Council for University Education, which came into operation in 2015, could affect the petitioner's promotions, which preceded the guidelines. The petitioner became an Associate Professor and a full Professor, before the guidelines. The Council for Legal Education, did not have guidelines of its own, that were shown by the respondent, to bar the petitioner's Law Professorship and Deanship.
189. He was appointed acting Dean, with effect from June 15, 2010, with the approval of the Chairman, Board of Trustees of the respondent, and in accordance with the respondent's own statutes.
190. He was appointed Associate Professor, with the approval of the respondent's Board of Management, on May 6, 2011.
191. He held other positions, based on his qualifications as a seasoned Law Professor. With effect from January 1, 2015, a year before termination, the respondent appointed him as its substantive Dean, School of Law.
192. With effect from the same date, January 1, 2015, on the authority of the respondent University's Council, the petitioner was promoted to the position of a Professor, Department of Public Law, School of Law.
 - a. His academic certificates were exhibited as 'MW -35 to MW -37[c]'. None of these certificates was challenged by the respondent, in his cross-examination. He taught at the University level for almost 30 years, dating back to 1982.
193. It was a strange decision for the respondent to undo all these appointments and promotions, which happened from June 15, 2010, through a stroke of the pen, in its letter dated January 25, 2016.
194. Termination could also not be justified solely on the basis of the termination clause. Nearly every other contract has a clause on termination, whose fulfilment, by either Party, does not satisfy the requirement of substantive justification of termination, imposed by section 43 and 45 of the Employment Act.
195. Termination clauses could hold sway prior to enactment of the Employment Act 2007, when the concept of employment at will of the Employer, was an accepted principle of our employment law.
196. Under the Employment Act, valid reason or reasons must be established by an Employer in justifying termination, even where the contract, as most contracts do, has a clause on termination notice.



197. The respondent told the Court that in any event, it had a moratorium of 6 months from the Council, to put its house in order at its Faculty of Law. The letter granting moratorium is dated January 20, 2016. 6 months would lapse in June 2016. Why did the respondent terminate the petitioner's contract, just 6 days, after it was granted moratorium by Council of Legal Education, to remedy all the deficiencies highlighted in the audit report? It ought to have utilized this moratorium to constructively engage the petitioner, as well as both regulators, and taken proper remedial action. Declaring that the petitioner's position had become redundant was a very unorthodox way, of dealing with any regulatory apprehensions.
198. The Court is satisfied that the respondent did not establish valid reason or reasons, to justify termination of the petitioner's contract, as required under sections 43, 45 and 47[5] of the Employment Act.
199. The purported redundancy was a colourable exercise.

Constitutional Rights

200. There was a challenge mounted from the inception of the Petition, on whether the petitioner has properly invoked the constitutional jurisdiction, and whether he is entitled to claim constitutional reliefs.
201. This was answered in a Ruling of the Court on record, dated May 11, 2018. The Court [Ongaya J] using rather forceful language stated: -

"Rules 7[2] and [3] [E&LRC] are carefully designed to emancipate litigants from burdensome procedural slavery, and the same are in line with article 159[2] of the Constitution...the Court holds that a litigant does not have to file an ordinary action and at the same time a Petition with respect to the same facts and transaction."
202. The Ruling went on to say that every person has the right to institute court proceedings, claiming that a right or fundamental freedom has been violated. Rights and fundamental freedoms in the Bill of Rights, do not exclude other rights and fundamental freedoms outside the Bill of Rights. Citing his own opinion in *Peter Muchai Mubura v Teachers Service Commission* [2015] e-KLR, the Learned Judge concluded that the Constitution of Kenya has opened avenues for access to justice and all stipulated remedies.
203. The Learned Judge upheld the petitioner's procedural right to present a Petition, as well as pursue statutory, contractual and constitutional reliefs.
204. The petitioner's right to claim constitutional violations and remedies, in addition to contractual and statutory violations cannot therefore be doubted.
205. His right not to be discriminated against, under article 27, as legislated in section 5 of the *Employment Act* was violated; his right of fair administrative action under article 47, as legislated in section 4 of the *Fair Administrative Action Act*, and sections 40, 41, 43, 45 and 47[5] of the Employment Act was violated; and his article 41 right, under the Constitution, read with the same provisions of the Employment Act above, was violated.
206. Courts have held that the Constitution is similar to a wireframe that needs to be fixed with other materials; or a skeleton, that needs organs and muscles, for it to function. For every statutory or contractual breach, there is always an implicated constitutional violation.



207. It is also clear in the mind of the Court that the petitioner’s right to human dignity, under article 28 of the *Constitution* was infringed. The respondent acted in a manner that did not respect, and protect the petitioner’s human dignity.
208. He told the court that his peers and students, who straddle the globe, were left wandering about the reasons he left the respondent. His professional and academic credentials were questioned. He states that he felt exposed to pecuniary embarrassment; it was not easy to explain to his colleagues and students what had happened; it was difficult for any person to understand why an internationally acclaimed Professor of Law, was dropped from the respondent’s Faculty of Law abruptly; it became difficult for the petitioner to maintain his usual social and academic circles; and he was made to feel useless and unwanted. This evidence strongly pointed to violation of the petitioner’s right to human dignity.
209. The concept of human dignity is a belief, that all people hold a special value, that is tied solely to their humanity. It is not about high status, the petitioner’s towering frame in the academia, but something he was born with. It is rooted in article 1 of the Universal Declaration of Human Rights, which states that all human beings are born free and equal in dignity and rights.
210. The right is restated in the *International Covenant on Civil and Political Rights, 1966*, whose preamble states that, “these rights derive from the inherent dignity of the human person.”
211. The courts in Kenya and South Africa, have echoed this definition of human dignity, as an intrinsic value in human beings. The petitioner cites the *South African decision, S v Makwanyane & another* [CCT3/94] [1995] ZACC 3; and the Kenyan cases, *JOO [aka JM] v the Attorney-General* [2014] e-KLR, and *Mutuku Ndambuki Matingi v Rafiki Microfinance Bank Limited* [2021] e-KLR.
212. The jurisprudential thread, running through these decisions, is that recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings; and autonomy and control over one’s personal circumstances, is a fundamental aspect of human dignity.
213. The respondent violated the petitioner’s internationally and constitutionally recognized right to human dignity.

Remedies

214. The E&LRC in *GMV v Bank of Africa Limited* [2013] e-KLR; and the Court of Appeal in *Elizabeth Wakanyi Kibe v Telkom Kenya Limited* [2014] e-KLR; and *DK Njagi Marete v Teachers Service Commission* [2020] e-KLR, cautioned that remedies in employment law, are not designed to be disproportionate to the nature of the violations suffered by the Employee. The remedies are not aimed at unjust enrichment. Constitutional remedies can only supplement statutory and contractual remedies, where the statute or the contract, does not offer adequate redress. The ceiling for compensation for unfair and unlawful termination of employment has been set through legislation at equivalent of 12 months’ gross salary.
215. It is recognized however that such compensation may not suffice, where violations go beyond the confines of the statute or contract, such as where different forms of discrimination, are shown to have informed termination decision. 12 months’ salary would not suffice, where violation against the right not to be discriminated against, and where the right to human dignity, are shown to have openly been violated.



216. The courtis mandated to grant fair, balanced, and effective remedies, guided by section 49 of the *Employment Act*, section 12[3] of the *Employment and Labour Relations Court Act*, and article 23 of the Constitution.
217. It is declared that termination of the petitioner’s contract by the respondent, was unfair and unlawful.
218. It is declared that termination violated the petitioner’s constitutional right to fair labour practices, right to human dignity and right not to be discriminated against.
219. The petitioner’s letter of appointment did not have a clause on payment of gratuity at the end of employment.
220. The letter of termination however, offered the petitioner gratuity up to January 25, 2016. He conceded in his evidence that he collected a cheque for terminal dues, which included an amount of Kshs 271,354, described in the clearance form, as gratuity.
221. The courtis ready to accept that the respondent mistermmed the item as gratuity, instead of severance pay. There was no gratuity benefit under the contract. Communication on payment of gratuity was through a letter of redundancy. It would logically lead any reasonable person to deduce, that gratuity, which was based on years of service, was intended to be severance pay, on redundancy.
222. The courtis however not satisfied that based on a monthly gross salary of Kshs 340,000, and a service period of 5 years, severance pay under section 40 of the *Employment Act* was properly computed. Section 40 requires severance is paid on a minimum of 15 days’ salary for each complete year of service.
223. 15 days’ salary based on a maximum of 26 working days in a month, would yield a sum of Kshs 196,153. In a period of 5 complete years of service, from June 2010 to January 2016, this would yield Kshs $196,153 \times 5 =$ Kshs 980,796 as severance pay.
224. The petitioner computes severance on the basis of 30 days’ salary for each complete year of service. He has not pointed to any human resource instrument, any law, or contractual clause, which set payment of severance, based on 30 days’ salary for each complete year of service.
225. There is similarly no foundation to the respondent’s submission, that if the courtis persuaded, that the respondent did not adhere to section 40 of the *Employment Act*, payment of 1-month salary would be sufficient compensation to the petitioner.
226. The petitioner is granted the balance of severance pay at Kshs 709,442.
227. The respondent paid notice equivalent of the petitioner’s 1-month salary, at Kshs 294,355. His monthly gross salary was Kshs. 340,000, and there was no explanation why, the respondent deducted from the petitioner’s full notice pay. He is allowed the prayer for the deficit of notice at Kshs. 45,645.
228. The same applies for days worked, in January 2016. The contract was terminated on January 26, 2016. The petitioner was entitled to his salary for January 2016, but was paid Kshs 242,250 without justification. He is granted the shortfall of Kshs. 40,083.
229. Lucy Maina was not able to justify the deductions, in her evidence.
230. Although there was evidence adduced on the petitioner’s annual leave entitlement, the courtwas not able to identify a prayer in the Petition, relating to annual leave.



231. The prayers for reinstatement and anticipated salary have well-advisedly, been withdrawn.
232. Aggravated damages and punitive damages claimed separately, at Kshs. 30 million and Kshs 10 million [total Kshs. 40 million] are not merited.
233. Aggravated damages are considered appropriate when the conduct of the defendant, or the surrounding circumstances increase the injury to the claimant, by subjecting him to humiliation, or embarrassment particularly in tortious claims such as assault, false imprisonment and defamation.
234. Punitive damages, also called exemplary damages, are intended to punish a defendant for negligence. They are also aimed at specific deterrence. They are normally paid in addition to compensatory damages.
235. The petitioner's violated rights, under the Constitution and the relevant statutes, may theoretically well justify aggravated and punitive damages, but following the principles enunciated by the Courts in decisions such as those cited at paragraph 208 of this Judgment, employment remedies are not aimed purposely at punishing Employers, or making examples of wrongdoing Employers; they are aimed at affording the aggrieved Employee reasonable compensation. In the Court of Appeal decision Elizabeth Wakanyi Kibe, cited above, the Court upheld principle that unfair termination protections under the Kenyan Law, exist to ensure that a 'fair go all round' is extended to both Employees and Employers. The employer-employee relationship, is not intended to be punitive, to any of the Parties.
236. Violation of the right of human dignity, like violation of other rights pleaded by the petitioner, may well have involved humiliation and embarrassment of the petitioner. The violations and remedies must however not be replicated through Pleadings, and must not distort the idea of fair dealing, in the employer-employee relationship.
237. The decision cited by the petitioner in *Peter M Kariuki v Attorney-General* [2014] e-KLR, in urging the court to pay damages which the Court considers inordinately high, is distinguishable from the petitioner's dispute.
238. The decision involved remedying of historical injustices, revolving around the coup attempt in 1982, when the Moi regime took drastic actions against the alleged coup schemers, which historically has been viewed by courts as the darkest hour in Kenya's human rights law, warranting corrective action, most of which has been taken by the courts retrospectively, and resulted in questionably generous monetary awards.
239. It was not in short, a decision rooted simply in a contract of employment; it revolved around historical injustices, and the courts' feeling that they have an obligation to bend backwards, and generously, correct past injustices.
240. The petitioner herein definitely suffered multiple violations, but all arising from the same facts. He is wrong in applying for a multiplicity of damages, which ends up appearing like a craving for unjust enrichment. The courts must be cautious not to turn unfair termination claims, into a cash-grab industry, through grant of multiple damages, such as those claimed by the petitioner, in the form of aggravated and punitive damages, claimed at Kshs 40 million.
241. The petitioner was able to mitigate loss of his employment, by securing alternative jobs.
242. He is granted equivalent of 9 months' gross salary at Kshs 3,060,000 in compensation for unfair termination, under the Employment Act.
243. He is granted coalesced damages at Kshs 3,000,000 for violation of his constitutional rights.



244. The respondent shall pay him costs, and interest at court rate from the date of Judgment till payment is made in full.

In Sum it is Ordered: -

- a. It is declared that termination of the petitioner's contract by the respondent, was unfair and unlawful.
- b. It is declared that the respondent violated the petitioner's constitutional right to fair labour practices, the right to fair administrative action, the right to human dignity, and the right not to be discriminated against.
- c. The respondent shall pay to the petitioner: balance of severance at Kshs. 709,442; balance of notice at Kshs. 45,645; balance of January 2016 salary at Kshs. 40,083; equivalent of 9 months' salary in compensation for unfair termination at Kshs. 3,060,000; and coalesced damages for constitutional violations, at Kshs. 3,000,000 – total Kshs. 6,855,170.
- d. Costs to the petitioner.
- e. Interest granted at court rate, from the date of Judgment, till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS 2020, THIS 8TH DAY OF MARCH 2024.

James Rika

Judge

