



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**  
**PETITION NO. 63 OF 2014**

**PERIS NYAMBURA KIMANI .....PETITIONER**

**VERSUS**

**DALBIT PETROLIUM LIMITED ..... RESPONDENT**

**JUDGEMENT**

**Appearances**

**Onyony Advocate instructed by Onyony & Co. Advocates for the Petitioner**

**Omwanza and Kiarie Advocates instructed by Nchogu Omwanza & Nyasimi Advocates for the Respondent.**

**Introduction**

1. The Petitioner filed the Petition herein together with application seeking for interim orders and based on the grounds that the Respondent had shown contempt to constitutional and employment laws when they purported to issue a termination letter to the Petitioner via email on the 6<sup>th</sup> of October 2014 while the Petitioner was on sick off. The Petitioner served the Respondent with her sick off on 6<sup>th</sup> October 2014 and thus the email sent to her on termination was in ignorance of the applicable constitutional and labour rights. That before the termination there was no hearing or reasons given for the same, which has greatly affected the petitioner. the Petitioner was on sick off due to pregnancy complications, she had sought medical attention soon after arriving from a trip abroad where she had been sent by the Respondent and by thus purporting to terminate her for taking sick off to attend to her pregnancy was an act of discrimination against her contrary to Article 27 and section 5 of the Constitution and the Employment Act respectively. The Petitioner's pregnancy and health status were at stake, and by purporting to terminate her employment, the Respondent was acting contrary to the Constitution and the applicable law. That the Respondent applied discriminatory employment policy and practices in relation to the Petitioner. The summary dismissal should be stopped and the Petitioner allowed continuing with her employment.

2. When the matter came for the hearing of the application on 10<sup>th</sup> October 2014 the Court stayed the dismissal notice dated 6<sup>th</sup> October 2014. On 18<sup>th</sup> November 2014, a ruling by the Court directed the Respondent to reinstate the Petitioner and retain her on the medical scheme pending hearing of the main suit.

3. When the matter came up for hearing on 16<sup>th</sup> December 2014, I granted leave for the Respondent to amend the response to Petition and cross-Petition and the Petitioner was allowed to amend the Petition upon service by the Respondent so that all substantive matters could be dealt with at the main hearing.

4. In the Cross-petition, the Respondent added the Cabinet Secretary, Labour and Social Service and the Attorney General (AG) as the 1<sup>st</sup> and 3<sup>rd</sup> respondents respectively and seeking for orders that the 1<sup>st</sup> Respondent should investigate discriminatory practices within the 2<sup>nd</sup> Respondent Company. The AG entered appearance for the 1<sup>st</sup> and 3<sup>rd</sup> respondents and objected to the joinder. On 2<sup>nd</sup> February 2015, the Court delivered a ruling expunging the 1<sup>st</sup> and 3<sup>rd</sup> Respondent from the record as no cause of action had been established against the two respondents.

### **The Petition**

5. The Petition is based on based on the provisions of Article 22, 23, 26, 27, 41, 50, 159 and 258 of the Constitution and section 5, 9, 10, 17, 18, 19, 20, 35, 37, 43, 44, 45, and 49 of the Employment Act. Apart from the prayers which were introduced at the instance of the application by the petitioner, she seeks the following reliefs in the Petition dated the 10<sup>th</sup> December 2014;

- a. *A declaration be issued that the summary dismissal was a violation of the Petitioner's constitutional rights in particular Article 27(4) and 41(1) of the constitution;*
- b. *A declaration be issued that the Petitioner's enjoyment of her rights and fundamental freedoms secured in the Bill of Rights under Article 41 of the Constitution have been violated by the Respondent by failing, neglecting and refusing to give the Petitioner notice of termination as per the contract of employment;*
- c. *An order be made for payment of general damages for discrimination on the account of pregnancy and future loss of medical benefits to the Petitioner and her baby at Kshs.3,000,000.00;*
- d. *A declaration be issued that the Petitioner's summary dismissal on account of pregnancy amounted to a violation of the Petitioner's rights under section 5(3) of the Employment Act;*
- e. *A mandatory order be issued compelling the Respondent to release the Petitioner's salaries totalling Kshs.72,692.00 for the days worked in October 2014;*
- f. *A mandatory order be issued compelling the Respondent to release the Petitioner's just terminal benefits;*
- g. *An order be issued directed to the Respondent to pay the Petitioner 12 months' salary compensation at Kshs.3,600,000.00;*
- h. *An order be issued directed to the Respondent to pay the Petitioner 3 months' notice of Kshs.900,000.00;*
- i. *A mandatory order be issued directed to the Respondent to pay the Petitioner 23 years' salary for the remainder of her employment contract equivalent to 23 years at kshs.300,000.00 at 12 months all being Kshs.82,000,000.00;*
- j. *A mandatory order be issued directed to the Respondent to pay the Petitioner for the prorated leave days of 21 days equivalent to Kshs.242,307,69.00;*
- k. *A mandatory order be issued compelling the Respondent to negotiate a fair and reasonable exit package;*
- l. *An order be issued compelling the Respondent to pay the Petitioner pension due totalling to 10% of her monthly salary for 3 months of Kshs.30,000.00;*
- m. *An order be issued expunging and cancelling the letter of termination;*
- n. *The Court does issue any other declaration and/or orders that serve the cause of justice;*
- o. *Costs of this Petition be borne by the respondent.*

### **Petitioners' Case**

6. The Petition was heard on the 16<sup>th</sup> December 2014, 25<sup>th</sup> May 2015 and 28<sup>th</sup> May 2015. Ms Kimani testified that she was wrongly, unfairly and illegally dismissed from her employment by the respondent. The Petitioner is an Advocate of the high Court of Kenya who holds a Bachelors of Laws degree and

done postgraduate studies in Human Resource with Kenya Human Resource Managers and holds a Masters in Human Resource from the Jomo Kenyatta University of Agriculture and Technology and has previously worked with various companies where she gained legal and human experiences. Before joining the Respondent she was with Mabati Rolling when the Respondent on 5<sup>th</sup> December 2013 called her and enticed her to take up a job with them, she was called for an interview that was conducted on 27<sup>th</sup> November 2013 and on 28<sup>th</sup> November 2013 she got her letter of appointment. There was no advertisement for the job and she was not required to put in her application. At the interview the Petitioner was not given a job description but the job was confirmed. She requested to serve notice on her employer and commenced work with the Respondent on 6<sup>th</sup> January 2014. The claimant was placed on probation for 6 months.

7. The Petitioner was given the title of Group Relations Manager for the Respondent consortium, based in Kenya with frequent travel to the other countries. She had the best experience with the Respondent as the work was diverse; dealing in petroleum, energy products, food and beverages, wines and the people involved were diverse spread across countries with different laws and cultures.

8. In May 2014, the Petitioner left for Zambia as the Human Resource manager there was having problems. She came back to Kenya on 31<sup>st</sup> May 2014 and went back to Zambia on 6<sup>th</sup> June 2014. The Petitioner was on a temporary visa to Zambia and had to come back on 21<sup>st</sup> August 2014. She left for Zambia again on 14<sup>th</sup> September 2014 and came back on 1<sup>st</sup> of October 2014. On her way back, the flight travel had negative impact on her pregnancy, she was bleeding and had to call her doctor for medical advice. On 2<sup>nd</sup> October when the Petitioner was supposed to report back to the office, she called her boss/supervisor Mr Kimeu Kimeu and indicated that she would be reporting late as she had to see a Doctor. Mr Kimeu insisted that the Petitioner had to report to the office urgently as there was an urgent letter to be sent to Zambia with regard to 2 employees from Philippines who had problems with Zambia immigration. Despite being in a bad medical state, bleeding due to pregnancy, the claimant went to the office and briefed Mr Kimeu and the email communication to Zambia was done. She proceeded to see her doctor and was advised to take total bed rest. She got a sick sheet from Dr Kigen but was only able to send a 3<sup>rd</sup> party to serve on the Respondent on 6<sup>th</sup> October 2014. She called Mr Kimeu and told him that she had 6 days off on medical grounds.

9. On 3<sup>rd</sup> October 2014, the Petitioner got a call from a work colleague and wanted to know why she had resigned from her employment but this was not correct as she had not resigned. She went into shock as. The colleague forwarded an email shared by Mr Kimeu indicating that the Petitioner had left the employment of the respondent.

10. On 2<sup>nd</sup> October 2014, the Petitioner had tried to access her office email account without success and not knowing that Mr Kimeu had already deactivated all her emails. Kimeu had not talked to the Petitioner about the termination despite having met him on the morning of 2<sup>nd</sup> October 2014. There was no warning, notice or any form of communication with the claimant that she had been terminated. The email on the Petitioner's termination was circulated to all the Respondent worldwide networks save for the petitioner.

11. On 6<sup>th</sup> October 2014 at 5pm, the Petitioner received an email with a termination notice dated the same date. This was sent on her private email address. There was no reason given to the Petitioner on why she had been terminated. There was no indication as to what had led to the summary action. The Petitioner had a contract of employment that provided for notice before termination and it made provision that while she was on probation she could be terminated on 30 days' notice and once confirmed, she could be terminated by issuance of 3 months' notice or payment in lieu of notice. There was an obligation to be given reasons for termination. The Respondent had a policy manual that made provision on how a termination was supposed to be undertaken and this was not followed. Termination was effected and shared with others before the Petitioner was notified violating her right to privacy and confidentiality.

12. In the human resource policy, the Respondent state that they are an equal opportunity employer and

have a practice to eliminate discrimination on any ground. The Petitioner felt that she was discriminated against. Where the Respondent was an equal opportunity employer in hiring and retaining employees, the Petitioner was not protected in this regard. She was not subjected to the same procedures on her termination contrary to the very policy held by the respondent. In her case, pregnancy was not a disease but on this basis, she was discriminated against. During her tenure with the respondent, the Petitioner experience was that the Respondent treated its employee equally but when she became pregnant and while on sick leave, she was terminated. Had she not been pregnant and unwell, she would have remained an employee at the Respondent as she had done a good job, received accolades from Human Resource Director especially when she managed to stop a strike in Zambia and from The Chief Executive Officer also commended her good work.

13. The Petitioner was supposed to be confirmed on her position upon completion of probation on 6<sup>th</sup> July 2014. This was the time the Petitioner had to travel to Zambia to address the pending strike. Upon return she had to travel to Tanzania to work on a collective bargaining agreement. By this time the Petitioner had done immense work while on travel, at the office and via emails from wherever she was. She had a legitimate expectation that her position would be confirmed. With the confirmation her salary was to be reviewed upwards from Kshs.270, 000.00 to kshs.300, 000.00. She thus appealed to Kimeu to do the appraisal precedent to confirmation. On 19<sup>th</sup> August 2014 Kimeu wrote to the Petitioner and noted that she would be confirmed upon her appraisal. The Petitioner had set targets from January 2014 that were to be used for her appraisal. There was no appraisal or confirmation.

14. On 6<sup>th</sup> October 2014 the Petitioner was unlawfully issued with letter of termination without any reasons. Such termination was stayed by the Court and 10<sup>th</sup> October 2014 the Respondent was directed to pay the Petitioner and to retain her on the medical scheme and to resume work on 18<sup>th</sup> November 2014. She reported to work at her Kileleshwa office but was kept at the reception all morning, she was later called by Kimeu and issued with a letter dated 19<sup>th</sup> November 2014 directing her to report at Mombasa Road, Industrial Area, in a sister company packaging beverages and noting that she was an embarrassment to management. She was allocated a corner office that had been a store, it had to be cleared of boxes and dust and due to the fact that this was a beverages company, the environment was not conducive noting her pregnancy status. While at the office in Kileleshwa, the Petitioner was made to return the lap top she had and was issued with a new one with her documents being retained in the old computer. Her emails were changed and a new address installed. Her old data was not uploaded. As she left the office, the security guards at the gate subjected her to a search on self and her car. This had not been done before as this had been her office. The security guards told the Petitioner that they had been directed to do their work as they did by Kimeu. She developed a lot of pressure and started bleeding due to her pregnancy and events she was subjected to during the whole day.

15. The Petitioner also testified that on 21<sup>st</sup> November 2012 she did an email to Kimeu seeking information as her safaricom post-paid allowance had been withdrawn which was against her contract of employment. She had not been allocated duties and there were salary arrears. On 25<sup>th</sup> November 2014, Kimeu replied and noted that the Petitioner was still awaiting confirmation and asked her to do a self-appraisal as a reply to her email on 16<sup>th</sup> August 2014 when the Petitioner has asked to be appraised for purposes of her confirmation into employment. The Petitioner was asked to reply by 1<sup>st</sup> December 2014 when the Petition herein was due in Court for hearing. According to the policy manual, performance appraisal is regulated at clause 8 and 9 that require an appraisal to be on a one-on-one meeting with the supervisor, it has to be based on set targets, there was a Court ruling with regard to confirmation into employment and any other appraisal had to be on new set targets. What existed for the Petitioner at the time were the targets set upon her employment, she had not been appraised for confirmation and could not use the set targets then for any other appraisal. It was thus unfair for Kimeu to ask her to use the same targets, 11 months old to do a self-appraisal. That in any event she no longer had her data with the set targets as her lap top had been withdrawn, all the data taken with it and with the change of email address, all earlier communications that she could have extracted the targets were no longer available. This then made it impossible for the Petitioner to comply as directed. Kimeu refused to give her any guidance in the matter.

16. The Petitioner's case is that she is aggrieved by the summary dismissal as the Respondent failed to follow due process and never gave her any reasons for such action and that her rights were violated as under Article 27 of the constitution. The Petitioner resigned from her position on 14<sup>th</sup> May 2015. Based on Court directions, the Petitioner was supposed to have taken her maternity leave that was to start in February 2015 after 90 days she was to resume duty in May 2015. In resigning, the Petitioner put into account that she was working for an employer who was not willing and this has caused her great pain she is keen to look for a job and serve a new employer who appreciates her skills. She is keen to be released so as to get her terminal dues. She is willing to serve the notice period. The matter has had an impact on her career. Any new employer would do a background check with the respondent.

17. In reply to the Respondent's pleadings, the Petitioner testified that the Respondent had a non-discriminatory policy but the same was not applied in her case as she was discriminated against. The policy made provision that each pregnant employee was to take maternity leave but in this case the Petitioner was dismissed and did not take maternity leave. She received bad treatment aggravating her pregnancy and had to seek medical assistance and had to seek sick off. There was a medical cover provided. When the Petitioner joined the Respondent she was already covered by a different provider where she was being attended to by a gynaecologist of her choice and the Respondent cover allowed her to use a private doctor then seek 80% reimbursement of the costs incurred. The Petitioner opted to use her chosen doctor and seek reimbursement. The list of Respondent employees alleged to have taken maternity leave are unknown to the Petitioner for her to compare with her case. While the Petitioner was employed, there were 3 other employees pregnant and have all since left their employment. The case is not that the Respondent denies its employees maternity leave but how the Petitioner was treated while pregnant. When she came back from Zambia, the Petitioner told Kimeu that she needed to see a doctor as she was pregnant and bleeding.

18. The Petitioner is seeking the Court to determine as to how much salary she was entitled to. Her right to confidentiality was violated when her dismissal was published before she was notified. The Respondent did not comply with the law or its own policy. Her job grade required notice of 3 months before such termination. The policy on probation was violated. There were no disciplinary proceedings and all her rights at work were violated as a result.

19. In cross-examination, the Petitioner testified that based on the Court ruling on 18<sup>th</sup> November 2014, she was confirmed in her position but was to remain on her salary of Kshs.270,000.00 and all benefits pending the determination of due salary per the contract at kshs.300,000.00. Since November 2014, the payment of her salary became a tussle as the Respondent failed to remit it as required. Due to her changed emails and data disconnection, she could not communicate with some employees.

20. The Petitioner also testified that she knew her duties well, she was aware of the confidentiality clause in her contract of employment and the obligation of non-disclosure of any confidential information but she was never subjected to any disciplinary proceedings. There were various incidents cited that related to the Petitioner disclosing confidential information – That on 8<sup>th</sup> May 2014 Margaret Mbaka travelled to Zambia as there was a human resource issue involving the Petitioner that needed to be resolved and it was settled; the email sent with regard to Africa Spirits medical cover with APA coming to an end and the information being shared with AON; various emails sent with a note 'your eyes only'; and the Petitioner testified that she did not disclose any confidential information and some email have not been fully disclosed to show the entire line of communication and the context within which her communications were done. Since her emails were changed, she is not able to confirm the details attached in the defence as being her emails. In any case, she was not issued with a warning or subjected to disciplinary hearing.

### **Respondent's case**

21. The Respondent in reply to the Petition relied on the Replying Affidavit of Kimeu filed on 25<sup>th</sup> November 2014 and Cross-Petition, Supplementary Affidavit filed on 25<sup>th</sup> May 2015 and the oral evidence of Kimeu. The Respondent admits that the Petitioner was employed as the Group Employee Relations Manager with effect from 6<sup>th</sup> January 2014 subject to 6 months' probation. The letter of

employment made reference to the application of the Human resource Manual that spelt out the terms and conditions of employment for the petitioner. Before confirmation of employment, an employee must be confirmed. In this case the Petitioner though having served for over 6 months had not been appraised for such confirmation and according to her contract of employment and as required in the Respondent policy.

22. The Respondent also states that the Petitioner had 30 days of sick leave subject to the production of certificate of incapacity. There is procedure before taking sick leave that has to be approved. The Petitioner never brought to the attention of the Respondent about her illness or that she was having a difficult pregnancy and in any case employees on probation who become pregnant are entitled to 90 days maternity leave and there was no discrimination in this case. Where the Petitioner had a doctor's appointment on 2<sup>nd</sup> October 2014, she failed to bring this to the attention of the Respondent despite being in the office on the same date. She unprocedural took leave for 6 days without prior authorisation and only until 6<sup>th</sup> October 2014 did the Respondent get the alleged sick sheet. This was not an emergency as the Petitioner had to postpone the visit to the doctor to attend to her work in the office. Had the issue of being ill been brought to the attention of the respondent, the policy applicable was clear; she would have been given the required approval.

23. The Respondent further states that they took the decision to terminate on 2<sup>nd</sup> October 2014 that was to take effect on 6<sup>th</sup> October 2014. This was before the Petitioner served her medical sheet upon the respondent. This was therefore not a case of discrimination against the petitioner. No damages are due in this regard. There is no demonstration that the Petitioner was treated any different from others so as to alleged discrimination against her.

24. The Respondent also states that, while the Petitioner remained under probation, she could be terminated upon notice of 7 days or payment in lieu of such notice. The Respondent complied with section 42 of the Employment Act and offered to pay the Petitioner for 30 days in lieu of notice due while under probation. This was also an agreed term of her contract of employment.

25. The Respondent also states that, on 2<sup>nd</sup> October 2014, Mr Kimeu met the Petitioner but the two did not discuss her termination. The communication that went out to other employees on the same date with regard to the termination of the Petitioner was meant to exclude her and the fact that she got access to it meant that she was in violation of the terms of her contract on confidentiality. That the Petitioner was in breach of her contract of employment and was lawfully terminated. The Petition should be dismissed with costs.

26. In cross-petition, the Respondent states that upon the employment of the petitioner, she was placed under probation for 6 months and was to be confirmed upon successful appraisal. Before such confirmation, her salary was Kshs.270, 000.00 per month. Termination during probation period was upon notice of 30 days or payment in lieu of such notice which was done in this case. that under the Bill of Rights in the constitution, each party is protected and fair labour relations entails that the Court should respect contracts between parties and not cause a new interpretation of the terms agreed by consent. In this case the Respondent is entitled to the protections under Article 27 on equal treatment and non-discrimination and the parties herein are bound by the terms of the employment contract which gave terms of probation and termination. That the Petitioner was to remain under probation until her appraisal and confirmation and section 42 of the Employment Act canto be used to change such terms or should be read to give the agreed terms meaning. Under Article 50 of the constitution, the Respondent has a right to a fair hearing before the Court can direct a reinstatement.

27. The Respondent thus in cross-Petitioner is seeking that the orders of the Court reinstating the Petitioner violated the right to fair hearing and are contrary to Article 27 of the constitution; the Court ruling on 18<sup>th</sup> November r2014 violate Article 41 of the Constitution on fair labour relations and the cross-Petition should be allowed with costs.

28. The gist of the amended cross-Petition was to amend and included parties that has since been expunged.

29. In evidence, Mr Kimeu testified that he is the Group Human Resource Manager of the Respondent managing all the employees. The Petitioner was hired and placed under 6 months' probation period and confirmation was at the discretion of the Respondent following an appraisal. The appraisal was never done and hence she remained on her probationary terms. The management has to originate the appraisal proves and he wrote to the Petitioner noting this. That the Petitioner was never discriminated against as the Respondent has had other pregnant employees before and all have been treated equally. Termination was not based on the Petitioner's health status or her pregnancy. The Petitioner told him that she had complications with her pregnancy and had been given time off to attend at a doctor's clinic as the Respondent had provided a medical cover.

30. Kimeu also testified that when the Court reinstated the petitioner, the Respondent had to start from where her termination had taken effect and she was asked to self-appraise. This was the applicable procedure where an employee could only be confirmed upon appraisal. In the case of the petitioner, her termination arose due to breach of confidentiality. This issue was severally raised with her. On 8<sup>th</sup> May 2014 an email with confidential information was sent to the Petitioner where she decided to send the same email to the person subject of discussion on a matter that required confidentiality. In regard to such breach, he escalated the matter to his boss noting that the subject matter in the email related to human resource and required to be kept within the copied staff before disclosure to the subject employee or before a decision had been taken. Mr Kimeu gave the case of Mr Mbewa who had a problem with parking; he wrote his complaint and copied to his boss Margaret Mbaka and to the Petitioner as the Employees Relations Manager. At this point it was not necessary to copy Mr Mbewa yet but the Petitioner sent this email to him in outright disregard to confidentiality. This was wrong as a decision had not been made. Another case was when the Petitioner was asked to get a medical cover for African Spirits, part of the Respondent group of companies. She had a duty to get the best medical cover. She received quotations from APA and AON insurance companies. The Petitioner forwarded the APA quotation to AON who were a competitor which was an unfair practice to share materials of one supplier with the other in violation of tendering and procurement of services policy. When the Petitioner was asked as to why she did that, she failed to give a good account for her actions. Another case related to the contract of Mr Gubi that was to expire and the Respondent needed to decide as to what terms a renewal contract of the same would take or whether his manager would take over his duties. This was a junior employee but the Petitioner forwarded these emails exchanges with the subject employee. To do this before a decision was taken was in essence to tarnish the reputation of the managers discussing the matter. Another case was with regard to an employee who was at a construction site while drunk. This was a breach of safety and security operations at the site and for the employee. The site manager told the drunken employee to leave as he was posing a risk. In an email, Mr Joseph Musyoka was explaining what had happened in this case and thus copied the Petitioner and the Safety Manager. The Petitioner copied this email to the subject employee in utter disregard to procedure, confidentiality and the fact that management was still discussing the matter.

31. These acts led to the serious breach of trust between the Petitioner and her colleagues. The witness wanted the employees to work as a team but he noted that every communication sent to the Petitioner was forwarded to other employees not copied to the same or not part of the subject matter. This created serious breach of trust, confidence and an atmosphere of mistrust. Such loss of confidence in the Petitioner was noted in a case from the Respondent's DRC manager where he was seeking assistance from an external lawyer on debt recovery. The Petitioner was copied to this email with the request in her official capacity for her advice but proceeded to copy to other employees advising them 'for your eyes only'. This created an impression that the Petitioner was not working in a team.

32. Mr Kimeu also testified that on 2<sup>nd</sup> October 2014 when he called the Petitioner to his office, it was on a background that other manager had started protesting on the conduct of the Petitioner on breaching confidentiality. Information was being circulated to persons not supposed to access such information. The human resource office asked the witness to address the matter as the Petitioner in her position was supposed to be a responsible person and was supposed to maintain confidentiality but she kept on forwarding emails and information to different people in clear breach. She made directors so uncomfortable to work with her. As the human resource manager it was not good conduct and had to be addressed.

Kimeu also testified that when he called the Petitioner on 2<sup>nd</sup> October 2014, he asked her to resign as she was still young and the sector begin small she needed good credentials. It was agreed between then that the Petitioner would tender her resignation. She did not resign. On 3<sup>rd</sup> October 2014, the witness learnt that the Petitioner was circulating information to other employees that she was going to sue the Respondent for terminating her. He took the decision to share to all staff that the Petitioner had resigned her position. The meeting they had held was not a disciplinary hearing. It was meant to give the Petitioner a chance to resign. As friends and work colleagues, he felt he had an obligation to give her a chance. The Petitioner asked to be given time to meet with the director on 5<sup>th</sup> October 2014 but she never turned up for the meeting.

33. Mr Kimeu also testified that the Petition should be dismissed with costs. It lacks basis. The Respondent gave the Petitioner a chance to walk out with her head held up high and to keep her dignity but she declined to resign. The Respondent complied with the Court orders and reinstated the Petitioner who could work from anywhere. Her emails were changed for the reasons that the Respondent needed to protect its data as all emails were the property of the respondent. To avoid further circulation and breach of confidentiality, all emails were detained. Her email identity was changed but the Petitioner's name was kept to avoid further harm to the respondent. He also confirmed that upon resumption of duty and reinstatement, he did not allocate the Petitioner any duties. She was also given a different office near her home to save her time going to the office. Her lap top was changed to protect data and avoid further circulation of information. The Petitioner was thus not able to communicate as before. On 6<sup>th</sup> October 2014, he sent the termination letter after getting the sick sheet but doubted the same as it was not from a doctor in the panel the Respondent was using. His practice was to talk an employee before termination but in this case, he already knew the matter was heading to court. A notice had already been sent by the advocate. Soon after the termination, he was served with Court papers.

## Submissions

34. In submissions, the Petitioner relied on her documents and evidence on the grounds that she was not given an enabling environment to continue to work legitimately as her termination of employment was directly and indirectly related to her pregnancy. Sickness and health status which goes against principles lay out under CEDAW. The Petitioner was thus placed under conditions that hinder the growth and development of the petitioner. Her rights under Article 10, 22, 23(3), 26, 27, 28, 41, 47, 50, 159, and 258 were violated. The Petitioner also relies on the provisions of sections 5, 9, 10, 17, 18, 19, 20, 30, 37, 43, 44, 45, and 49 of the Employment Act. In the policy of the respondent, they failed to adhered to the provisions as regards confirmation into employment; appraisal system; equal opportunity; sick off provisions; legitimate expectations in the years of service of employment and employment after being head hunted from Mabati Rollings Ltd.

35. The Petitioner also submitted that in her meeting with Kimeu on 2<sup>nd</sup> October 2014, her termination was not discussed but on 3<sup>rd</sup> October 2014 he sent out an email that she had been terminated which was cruel and inhuman and hence forcing her out of employment. No reasons for termination were given. The Petitioner is young, highly qualified and the sector she is placed is small and chances of getting new employment with a bad record of termination not possible. The Petitioner had done her work diligently without any warnings, or notice of misconduct until her termination. Nothing existed to justify the actions of the respondent.

36. The Petitioner also submitted that upon the reinstatement of the petitioner, there was non-compliance as effectively, the Respondent made it impossible to have her work. Her lap top was withdrawn, her emails and data were erased, email address was changed, relocated to a sister company, appropriate salary was not paid, and the refusal to allocate the Petitioner work caused her anxiety and irreparable harm. The Petitioner relied on several cases in support of their submissions; **Elizabeth Washeke and 62 others versus Airtel networks (K) Ltd [2013] eKLR; G.M. versus Bank of Africa Kenya Limited [2013] eKLR; and Whitehead versus Woolworths (Pty) Ltd (199) 8 BLLR 862 (LC).**

37. In submissions, the Respondent stated that the Respondent terminated the Petitioner on 6<sup>th</sup> October

2014 but this process was not completed as she was reinstated by the court. As held in **Fredrick Odongo Owegi versus CFC Life Assurance Limited [2014] eKLR**, the Court held that where there is reinstatement, compensation is not payable and a reinstatement is only made where it is not impractical to so direct. The employer was thus directed to pay compensation in a case where a reinstatement was not practical. In this case, the Petitioner has a new job and the question of reinstatement does not arise.

38. The Respondent also submitted that the Petitioner was not unfairly terminated as she remained under probation and the provisions of section 41 of the Employment Act do not apply in her case. she was governed under section 42 of the Act that make provision for termination upon 7 days' notice as held in **Elijah Ochieng Achoch versus national Police Service Commission & 2 Others [2013] eKLR**. The Petitioner herein was terminated for failing to heed to her fiduciary duties and the interests of the employer. The Petitioner was not honest in her duties following her actions to share email correspondences discussed at the executive level to the persons discussed in the said emails.

39. The Respondent also submitted that the Petitioner breached confidentiality contrary to the terms of her contract. She held a high position that required establishing good relations between employees and the management but failed in this regard by sharing information and email communications leading to mistrust and poor work relations. The actions of the Petitioner were detrimental to the Respondent and the only option was to terminate her employment. Mutual trust had been lost as held in **Leland I Salano versus Intercontinental Hotel [2013] eKLR**. The treatment of the information that came into the hands of the Petitioner was to be held in trust and not divulged to others in ways that were inconsistent with the understanding of the original disclosure. The Petitioner was bound by her contract of employment which she breached. Under section 43 of the Employment Act, the Respondent had a right to terminate the Petitioner as there were genuine concerns and reasons following the breach of contract.

40. This is not a case of discrimination against the petitioner. The Respondent has a policy on non-discrimination and equal opportunity employment. There was no *prima facie* case of discrimination on the basis of pregnancy or illness. Such claims were too vague to infer discrimination. Where pleaded, the Petitioner had the duty to prove her case and noting that the Respondent had other employees who became pregnant and were not discriminated against, there exists no evidence to show that she was differently treated. The orders sought cannot issue as there was no discrimination; this was not a case where section 41 of the Employment act was to apply; she breached her own contract and no compensation is due as the Petitioner remained on probation; and leave is not due as employment was not confirmed.

### ***Issues for Determination***

I have framed the key issues for determination as follows;

- a. Whether the dismissal of the Petitioner was in breach of her rights under the Constitution or other relevant laws
- b. The extent of the right of unfair labour practice under **Article 41** and the right to non-discrimination under **Article 27** of the constitution.
- c. The status of the Petitioner's employment

41. Before delving into the above issues, it is relevant to highlight the following. On diverse dates the Court allowed both parties to amend their pleadings. Only the Respondent filed their Cross-Petition and amended the same. Despite the ruling of the Court on 18<sup>th</sup> November 2014, noting the reinstatement of the petitioner, noting the grounds upon which the Petitioner was based upon and the issue of discrimination forming the core of the petition, her Petition was never amended. Up and until the close of the Petitioner's case, the Petition was based on the facts that the Petitioner had been unfairly dismissed from employment on the basis of her pregnancy which was discriminatory. With the Court reinstating the petitioner, the ground of dismissal became mute. This is crucial to note as the case mutated to new issues upon the reinstatement of the petitioner. The circumstances of the Petitioner once she resumed work changed. The Petitioner's place of work was changed, her working tools especially her lap top was changed; her emails address and data were withdrawn and most crucial, she was not allocated any work.

This she stated in evidence led to her resignation vide notice dated 14<sup>th</sup> May 2015. While the Petitioner was under such circumstances, she had her child, she never applied for maternity leave and the question of pregnancy that was stated to have led to her termination, and the progress and impact of it were matters that the Court was never apprised until the close of her case. Where the initial claim changed due to the orders of the Court on 18<sup>th</sup> November 2014, it was the duty of the Petitioner to amend her pleadings. This is an opportunity granted, but was not utilised.

42. The question of dismissal was therefore left bare. The Court is however not left without crucial issues for determination.

43. On the question as to the status of the Petitioner's employment, the ruling of the Court on 18<sup>th</sup> December 2014 addressed the matter of probation of the Petitioner and the status of her employment. This being a matter already addressed it shall not be gone into save that the application of section 42 of the Employment Act overtaken by events and the salary payable to the Petitioner was to be addressed at the hearing. Upon the Petitioner's lawful completion of probation as held by the Court in the referenced ruling herein, the Petitioner effectively became a full time employee as on 6<sup>th</sup> July 2014 by operation of the law. The contractual salary due in this regard is payable. Though contested by the respondent, the Court has already made an analysis herein and a ruling delivered on 18<sup>th</sup> November 2014, the matter thus addressed, I find no legal basis why the due salary of Kshs.300, 000.00 should not be remitted to the petitioner. Where the Petitioner continued to receive the sum of Kshs.270, 000.00 even after the probation period had lapsed; the balance payable for each month worked is due. In evidence the Petitioner confirmed that she has received all due salaries of Kshs.270, 000.00 albeit with delays. The Petitioner has since resigned from her job out of being frustrated by the Respondent and from the feeling that she was in an unwanted environment. Notice due in this regard is 3 months and she was willing to serve her notice period. 16 days later, no acknowledgement had been received. From July 2014, the salary owed to the Petitioner is Kshs.300, 000.00 and not Kshs.270, 000.00. The balance unpaid from 300,000.00 for the period served and notice period is due and owing and shall be paid with interest as this was legally due in salary and not paid.

44. Section 12 of the Industrial Court Act give the Court jurisdiction to make orders of reinstatement subject to conditions as the Court deems fit to impose under circumstances contemplated under written law. The Court also has discretion to grant any other appropriate relief deemed fit based on the circumstances of each case. In this case what is sought is an order that the Petitioner was discriminated against and entitled to damages and payment of her contract salary as a confirmed employee. The powers thus granted in law to the Court require that each case be assessed thus noting the claim, the orders sought and the evidence. Reinstatement, compensation, damages are all lawful orders that can be granted. Such are orders the Court ordinarily makes upon hearing all the facts, evidence and analysis of the case at the final stage in a judgement. But this is not exclusive, such orders can be made in the interim based on the facts of each case and where the Court finds the same appropriate upon application and a show of good cause. See **Isaac Mukonyi versus Nairobi City County, Cause No.677 of 2015**. Such mandate therefore when exercised is not outside the Constitution or written law, it finds firm basis lawfully as held in **COTU & Another versus Cabinet Secretary of Labour, Social Security and Services & Another, Cause No.2013 of 2014**;

*Consequently, this wide mandate is to include what is set out under the Constitution at Article 162(2), the Industrial Court Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations on matters as outlined under section 12 of the Industrial Court Act and including matters as outlined for adjudication by the Court under any other written law.*

45. Once the Petitioner was thus reinstated, her position with the Respondent was secured. She resumed work without loss of benefits, allowances or any other right that was due to her by virtue of her position. For the same to be frustrated and treated as having no consequence was in essence to revert to the position that the Respondent had taken that of termination as of 6<sup>th</sup> October 2014. This is confirmed by the Respondent's witness, Mr Kimeu. No work was allocated to the claimant, she could not be trusted with

company information and for all intents and purposes, the Petitioner did not do any work. The orders thus made on 10<sup>th</sup> November and 18<sup>th</sup> November 2014 were not enforced. This is not a matter to be taken lightly by the court. Frustration of Court orders even on a matter that a party strongly feels against is not part of the rule of law that the Court should ensure. To insist on a wrong position even where Court has given clear directions is utter contempt.

46. The Petitioner applied for contempt proceedings, this were left in abeyance to enable parties address the substantive issues herein. Such application now gets meaning within the context that the Respondent did not comply with orders made on 10<sup>th</sup> and 18<sup>th</sup> November 2014. Even where the Petitioner failed to amend her pleading as appropriate, it is apparent she was keen to enforce the orders issued to her. By admission of the Respondent that their position on the termination remained constant, the termination of the Petitioner thus remained effective. To pay the salary due is not a cure to the termination. Constructively, the employment relationship remained terminated. This I find was an unfair labour practice.

47. On the question of the right under Article 41 and 27 of the Constitution that relate to unfair labour practice and non-discrimination, it is important to set out the conceptual framework for each and then both. The preamble and the provisions on national values and principles contained in **Article 19** lays emphasis on dignity, human rights and social justice for all persons. In giving effect to the provisions of the Constitution and the Bill of Rights, the place of employees is given special detail under Article 41 of the constitution. Employees in this regard are to be treated fairly, without discrimination and in dignity. Article 27 outlines the right to non-discrimination while Article **28** protects the right of any person to be treated with dignity.

48. The Constitution also provides a window for enforcement and enrichment of the rights of employees under all the international conventions that are ratified from the international Labour Organization (ILO). This is through the provisions of **Article 2(5)** and **(6)**. Thus in the preamble of the ILO Constitution it is recognized that;

*... And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; ...*

49. When the ILO passed Convention No. 111 on non-discrimination, the contest of it was the protection of employees against any injustice, hardship and privation while at work for purpose of ensuring industrial peace and harmony. The application of Article 41 of the Constitution must be seen in the backdrop of the ILO convention and the protection of the right to fair labour practices that should be free from discrimination of whatever kind as outlined under Article 27 of the constitution. Both rights mutually coexist. There should be distinction, exclusion or restriction on any status of an employee which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of sick off due to pregnancy as outlined under section 5 of the Employment Act.

50. Article 27 of the Constitution forbids discrimination on any of the grounds including pregnancy. Article 27(4) states;

*(4) The State shall not discriminate directly or indirectly against Any person on any ground, including race, sex, **pregnancy**, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. [emphasis added].*

51. Private persons and entities are also forbidden from discriminating against any person. In this regard therefore, where discrimination is cited in an employment scenario, the Court must stop and address the circumstances leading to such a matter.

52. In this case, the Petitioner gave evidence that her termination was due to her pregnancy, illness or by

virtue to taking sick off. It is however not clear at what point the matter of pregnancy of the Petitioner came to the notice of the respondent. What is clear though is that, on 2<sup>nd</sup> October 2014, she sought time to see a doctor and on 6<sup>th</sup> October she forwarded her sick off sheet to the respondent. By this time, the Respondent had on 2<sup>nd</sup> of October 2014 made a decision to terminate the petitioner. No reason was given for such termination. Communication over the termination was only done to the Petitioner on 6<sup>th</sup> October 2014. Can this then be inferred to mean the termination of the Petitioner's employment was based on her pregnancy, illness or application for sick off?

53. Section 5 of the Employment Act forbids direct or indirect discrimination on the basis of pregnancy. This is reaffirmed by Article 27 of the Constitution that prohibit discrimination on any grounds, whether direct or indirect. However the circumstances outlined by the Petitioner in her case does not build a case of knowledge of her pregnancy to the Respondent or its officer Mr Kimeu by 2<sup>nd</sup> of October 2014 until her Petitioner was filed on 10<sup>th</sup> October 2014. The sick off sheet does not also talk of the illness the Petitioner had. Annexure "PNK4" to the Petitioner's application filed on 10<sup>th</sup> October 2014 is the *Ben-Ammi Medical Centre* seeks off sheet giving the Petitioner 6 days of and a recommendation to have light duties. This sheet is dated 2<sup>nd</sup> October 2014. This is the document presented to the Respondent on 6<sup>th</sup> October 2014. It is not until one reads annexure "PNK3" dated 9<sup>th</sup> October 2014 that one gets to know the exact condition and illness that the Petitioner had as this is the medical document issued by Dr. Kigen Bartilol. I take it then, this medical certification of the nature of illness and condition of the Petitioner only came to the notice of the Respondent after 10<sup>th</sup> October 2014 when they were served with her application filed on 10<sup>th</sup> October 2014. I find a remote link to the Petitioner's termination with her condition of pregnancy, illness or sick off. This is apparent noting that the condition, illness were unknown to the Respondent save for the sick off sheet as of 2<sup>nd</sup> October 2014 or 6<sup>th</sup> October 2014 when the termination decision and termination was made respectively. To infer direct or indirect discrimination in circumstances such as these ones would be to go against the very principles and requirements an employee should articulate under section 5 of the Employment Act or Article 27 of the Constitution. However mention is made that where the Respondent is undertaking such practices, even on the finding that this is not the case here, it is wrong and amounts to an unfair labour practice and should be addressed as other than labour claims, it attracts criminal sanctions.

54. At Paragraph 13(m) of the Supporting Affidavit sworn by Mr Kimeu and dated 25<sup>th</sup> May 2015 he states;

*It is further worthy of note from annexure marked "PNK6" in the Petitioner that the Respondent made the decision to terminate on 2<sup>nd</sup> October 2014 which took effect on 6<sup>th</sup> October 2014 well before the said medical report was issued. This demonstrates that the sick sheet was an afterthought on the Petitioner's part with a view of building a case for unlawful termination in that the said sick sheet was received by the Respondent a day after she purportedly learnt of communication to the effect that she had left the Respondent Company.*

55. This is an affirmation that indeed, the Petitioner had been terminated way before the 6<sup>th</sup> October 2014.

56. The Petitioner also claim that her right to privacy was violated. Such a right is protected under the Constitution and thus where violated she is entitled to damages. In this regard I find the Respondent's evidence implicating. third parties became aware of the fact save for the petitioner. This is contrary to fair labour relations and contrary to Article 41 of the constitution, it is a serious violation of confidentiality clearly outlined in the Human Resource Manual and policy of the Respondent and beyond this, it goes contrary to the Bill of Rights at Article 31 of the Constitution as it defeats the essence to the right to privacy thus;

**31. Every person has the right to privacy, which includes the right not to have—**

**(a) their person, home or property searched;**

(b) *their possessions seized;*

(c) *information relating to their family or private affairs unnecessarily required or revealed; or*

***(d) the privacy of their communications infringed.***

***[emphasis added].***

57. The right to privacy is non-derogable. It cannot be limited for any purpose and more so for an employee as defined under section 2 of the Employment Act. The rights due to an employee at the workplace include the respect to their right to privacy. Where this is violated, the impact of it is that the inherent dignity of the employee is left naked. Such a fundamental violation is contrary to Article 28 of the constitution. Where done by any party against another and this is brought to the attention of the Court such as the case here, and there is no justification to the same, such an employee, where an unfair practice is proved is awarded damages. On the other hand, where there is a constitutional violation such as under Article 28, 31 or any other provision of the Constitution other than unfair labour practice, the Court under the powers granted in section 12 of the Industrial Court Act is to award damages to such an employee.

58. By his own admission, Kimeu states at paragraph 24 of his Replying Affidavit filed on 25<sup>th</sup> May 2015 that;

*In response to paragraph 21[20][1] referred email communication was only meant for the recipients to which it was addressed and to the exclusion of other staff. In any event the annexure marked "PNK11" of the Petitioner's List of Documents which contains information of which the Petitioner was not a recipient is a clear demonstration that the Petitioner is in breach of clause 13 of her letter of appointment which outlawed unauthorised disclosure of information.*

59. The violation of the right to privacy cannot find justification in an alleged violation of the right of confidentiality. Though both mutually coexist, where the Respondent alleges that the Petitioner violated the right to confidentiality with regard to information she held and should not have disclosed to third parties, this cannot be cured by the Respondent by violating the Petitioner's right to her privacy and confidentiality as well. Where the Petitioner was in violation of her terms of contract that required confidentiality, there is a legal mechanism as to how the Respondent should have addressed such gross misconduct. The Respondent as the employer retained the right, power and mandate to discipline the Petitioner in accordance with the law. To thus wait for the Petitioner to move the Court for the protection of her right and then claim confidentiality was violated lacks basis.

60. What Kimeu has averred in his affidavit only demonstrates that a decision to terminate the Petitioner was taken without due process that is without hearing, she was not made aware of the impending termination and before this was communicated to her, third parties to the employment relationship were notified in exclusion of the petitioner. For the Petitioner to find out that she had been terminated or a decision for her termination had been arrived at and communicated to the entire staff in her exclusion is a matter degrading, psychologically distressful and should not happen to any employee. Such communication to third parties only removes the dignity of the person, dehumanises the subject employee and does not serve any useful purpose in industrial peace. Where the Respondent found merit, good grounds and reasons to terminate the petitioner, there exist a legal mechanism under section 41 of the Employment Act to follow. To thus inform third parties before such due process is an outright illegality. This I find to be inhuman, degrading and punishment most perverse, pertinacious, and contrary to any known norm of good labour relations.

61. The above put into account, termination of employment is now regulated by section 35, 41, 43 and 44 of the Employment Act. These provisions should not be read singly. They should all be read together and seen as a whole as to read them separately is to lose the gist and impact of the law and by reading them in whole one gets the context, procedures and rationale of their operation. The import of these provisions with regard to this case is that no employee should be dismissed without being accorded an opportunity for hearing. Whatever misconduct that is alleged to have been committed, even in extreme cases that

require summary action. The law now makes it mandatory for such an employee to be given a hearing as a fundamental rule that finds firm basis not only under the Employment Act as section 43 but affirmation under Article 47 on the principles outlined for fair administrative action and what is envisaged in the rules of natural justice. Section 41(2) of the Employment Act provides;

*(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.*

62. No private contract, treaty of agreement of employment should be made contrary to the law. Any contract of employment should only go beyond the minimum. Therefore, even in a case where the termination period is agreed as under section 35, the legal minimum is 30 days' notice; where termination is due to misconduct or gross misconduct or as the case maybe, the provisions of section 41 should be adhered to even in a serious case at to warrant the operations of section 44(4). Hearing before such termination is regulated in law. It is no longer the case that an employer once fed up by an employees' conduct can decide to terminate *suo moto*. To the contrary, section 41(1) has now made it mandatory that such an employee must be given a hearing. at such a hearing, the employee is given the opportunity to tell their story, state their case, give their defence or state their case in mitigation. This is the shift now created by Article 41 of the Constitution as regards fair labour relations and which embraces what constitutes the rules of natural justice. An employee must be heard before termination.

63. What is clear is that despite the reinstatement of the petitioner, this was of no effect to the respondent. As confirmed by Kimeu, the Petitioner was not allocated any work, her emails and addresses were changed so as to protect data and restrict communications with others and her work station was changed and was placed at a sister company. Though there is no claim of constructive dismissal that eventuality led to the resignation of the petitioner, the circumstances confirmed by Kimeu are an unfair labour practice that should not received sanction by the court. Going back to the cross-petition, the same is not addressing any particular misconduct committed by the petitioner. It does not outline the reasons sated by Kimeu in his evidence. Where indeed the Petitioner was in serious breach of her contract of employment, there are legal procedures to address such a scenario. The prayers sought in the cross-Petitioner do not speak to any such misconduct. They seek to challenge the reinstatement. To thus know of good reasons that may lead to the termination of an employee yet fail to address such and instead ask such an employee to resign and when the employee fails to resign she is forced out is a violation of due process and in labour relations, becomes an unfair labour practice. The Petitioner remained under pay since her termination on 6<sup>th</sup> October 2014 until her resignation taking effect on 14<sup>th</sup> July 2015. The resignation was during the pendency of her case. It was necessitated by prudence when the Petitioner found herself in a situation where she felt unwanted by her employer. Indeed the continued employment of the Petitioner by the Respondent is not viable. It is a hostile environment. The Respondent were adamant in not respecting the orders of the Court yet they did nothing to lawfully and procedurally to correct any alleged misconduct on the part of the Petitioner and where they had evidence that implicates the petitioner. As she remained their employee, nothing prevented the Respondent from initiating disciplinary proceedings with regard to any misconduct. What Kimeu stated is clear. The Respondent knew where the matter was heading. Court.

64. The salaries paid to the Petitioner while in the employment of the Respondent cannot be equated to any compensation. She was available for work but such work was not allocated. Where the Respondent forced her out of employment, such is an unfair labour practice. However, the Petitioner does not aid her case; she failed to amend her pleadings so as to claim as appropriate. This is not a matter that was not at her disposal so as to seek the aid of the court. Failure to plead and apply as appropriate is a duty of a party so seeking. The Court shall therefore not award such compensation under section 49 of the Employment Act.

65. There is however a breach to the petitioners constitutional right to privacy and confidentiality, the tight to dignity and inhuman treatment that is degrading. Damages are due under section 12 of the Industrial Court Act.

66. The cross-Petition must fail. It failed to address any of its substantive grounds. It is not framed in terms of any rights violation. The same is hereby dismissed.

## **Remedies**

67. By operation of the law the probation period of the Petitioner ended on 6<sup>th</sup> July 2014. She is entitled to the contract salary of Kshs.300, 000.00 from such date until her last date at work vide the resignation notice of 14<sup>th</sup> May 2015 being 15<sup>th</sup> August 2015. Such salary is due and owing for the period served and shall be so payable until the last day of employment.

68. On the finding that there were constitutional violations, noting the Petitioner received her salaries and shall continue to receive the same until her last day so service and based on the orders made on 18<sup>th</sup> November 2014 the resultant benefits of the reinstatement, payment of damages due shall put into account such payments made so far. The sum of Kshs.3, 600,000.00 in damages is hereby found appropriate and is awarded.

69. Notice pay is not due noting the orders of 18<sup>th</sup> November 2014. The Petitioner has remained under the pay roll of the Respondent since and factoring the payment of damages for constitutional violations, this shall not be awarded.

70. The claim for salaries due until retirement were not specifically gone into by the petitioner. She has since resigned from her employment. With the reinstatement that was frustrated by the respondent, the Petitioner failed to apply for constructive dismissal. This shall not be awarded.

71. The pension claimed is not articulated as to how it arose. The Petitioner was under a contract of employment that spelt out her terms and conditions of employment. Where her statutory deductions were made under section 35(6) of the Employment Act, and without an outline as to how the claim for 10% pension, the same should not be awarded. However this shall not defeat any claim of pension or gratuity due to the Petitioner by virtue of her employment and confirmation by operation of the law.

72. Costs shall be awarded noting that the current suit could have been avoided save for the unfair labour practices the respondent went into and remained adamant in their position. The defiance of the court orders forced the Petitioner into resignation. Costs are thus due.

## **Conclusion**

**In view of the foregoing, I make the following orders:**

- a. **The cross-Petitioner by the Respondent is dismissed with no order as to costs.**
- b. **The Petitioner is awarded unpaid salary arrears from the 6<sup>th</sup> July 2014 to date based on a due salary of Kshs.300,000.00 and subsequent payments until 15<sup>th</sup> August 2015 shall be based on a monthly salary of Kshs.300,000.00;**
- c. **Where gratuity and pension are due, I direct the Respondent do ensure that the same is calculated and paid within 60 days from the date hereof. Parties shall take a mention date to confirm compliance;**
- d. **The Petitioner shall be paid Kshs.3, 600,000.00 in damages by the respondent.**
- e. **Salaries arrears under (b) above and due to date, shall be paid with interest; and**
- f. **The petitioners' costs of the suit shall be borne by the respondent.**

**Delivered, dated and signed in open Court at Nairobi this 9<sup>th</sup> July 2015.**

**M. Mbaru**

**JUDGE**

In the presence of:

Lilian Njenga: Court Assistant

.....

.....

---

[\[1\]](#) 20. THAT on 3<sup>rd</sup> October 2014, I had now learnt that Mr Kimeu Kimeu had clandestinely and secretly sent out an email informing the Respondent and the Group of companies that I had left the Group as Group Employee Relations Manager and that all the employees relations issues were to be diverted to him for immediate response.