Waweru v Ackerman & another (Employment and Labour Relations Petition 51 of 2022) [2023] KEELRC 3031 (KLR) (16 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 3031 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS PETITION 51 OF 2022

K OCHARO, J

NOVEMBER 16, 2023

BETWEEN

FAITH WAWERU ..... PETITIONER

AND

ANDRE ACKERMAN ..... 1ST RESPONDENT

AVENUE HEALTHCARE LIMITED ..... 2ND RESPONDENT

JUDGMENT

1. The Petitioner approached this Court through a petition dated the 20th of August 2021, charging that; the termination of her employment was unlawful and unfair; while in the said employment she had been discriminated against and her constitutional rights violated, and thus sought against the Respondents jointly and severally the reliefs and Orders for:

    a. A declaration and finding that the termination of the Petitioner's employment with the Respondent was unfair.

    b. A declaration that the 2nd Respondent maintaining a system of pay inequality and discrimination is unfair and illegal.

    c. A declaration that the 1st Respondent's Racial Abuse and intimidation against the Petitioner was unlawful and unfair.

    d. A declaration for special damages for pay inequality in terms of difference in salary of Ksh.180, 000 per month for three years be entitled to the petitioner.

    e. That the said special damages being paid inequalities be computed in favour of the petitioner and assessed at Ksh. 180,000 X 12 X 3 totalling Ksh.6,480,000.

    f. Special damages of Ksh.14, 155,000, the amount as pleaded in paragraph 17 above.

g. An order directing the Respondent to reinstate the petitioner to her employment without loss of position, status or benefits. Damages to emotional and mental distress in favour of the petitioner.

h. Damages for pay inequalities and discrimination in favour of the petitioner.

i. Costs.

j. Interest on (c), (d) and (e) above at the court rates from the date of filing this Claim until payment in full.

k. Certificate of Service.

l. Any other relief this honourable court may deem fit to grant in the interest of justice.

2. The Petition was supported by the Affidavit sworn by the Petitioner on the 20th of August 2021.

3. The Petition was resisted by the Respondents through the Replying affidavit sworn by Andre Ackerman on the 18th March 2022, Supplementary affidavit sworn by Jay Michoma on 26th March 2022 and further supplementary affidavit sworn by Jay Michoma sworn on 13th April 2022.

The Petitioner's Case.

4. The Petitioner stated that on or about 1st February 2012, she was offered employment by the 2nd Respondent as a Project Manager at Avenue Hospital Parklands Branch.

5. The Petitioner asserted that she was so employed on permanent and pensionable staff terms with all the attendant benefits inclusive of a starting monthly gross salary of Ksh.350, 000. Subsequently, on the 1st of August 2017, she was promoted to the position of Hospital Administrator. Resultantly her terms of employment were revised, with her monthly gross salary being reviewed upward to KShs. 700,000. The salary was inclusive of the house allowance.

6. The petitioner stated that the 1st Respondent was a South African male who at the material time was the 2nd Respondent's Chief Executive Officer. Further, throughout the pendency of the employment relationship between her and the 2nd Respondent, the 1st Respondent as its Chief Executive Officer did not at all promote equal opportunity in employment nor strive to eliminate discrimination in employment policies and practices.

7. It was contended that the Human Resource Department of the 2nd Respondent managed by the 1st Respondent would interview prospective, and hire employees and then assign them to direct line Managers for supervision. The employees hired as such could be given a higher salary than their Supervisors. A typical example was Dr. Nyawira who was appointed as Medical Services Manager directly reporting to the petitioner in the hierarchy of command but was assigned a higher salary, Ksh.980, 000 compared to the petitioner's salary of Ksh.700, 000 in an opaque manner and that would breed ground for contempt against the Supervisors from their Supervisees.

8. The petitioner asserted that she was contacted by the Chief Operating Officer on the 21st March 2021 who requested her to step in for him during his period of absence as he was to be away on medical grounds. The email to her in this regard was copied to the Human Resource Manager.

9. The Petitioner averred that pursuant to the 1st Respondent's emails dated the 30th November 2020 and in concurrence by the Chief Operating Officer as expressed in his dated 3rd December 2020, all nursing and Laboratory aspects were removed from her docket and assigned to the Manager-Nursing Services.

10. It was the Petitioner's case that on the 22nd March 2021, she was summoned to the 2nd Respondent's headquarters where she was served with letters purportedly drawn by the then Chief Operating Officer, Dr. Andrew Kekovole. The letters were served on her by an external Consultant, one Laban in the presence of the Human Resource Manager and Chief Quality Standards Officer. One of the letters required her to give a detailed explanation of some three events within 48 hours of the date of the letter. The other placed her under immediate suspension from her official duties. Upon inquiry, whether the Chief Operating Officer was aware of the said letter and the action being taken, she was answered in affirmative by the Chief Quality Standards Officer which prompted her to contact the alleged author of the said letter who denied knowledge and authorship of the letters and requested to be sent copies.

11. The Petitioner stated that she was later informed by the Chief Operating Officer that the said letters were forgeries and that he had lodged a complaint with Gigiri Police Station. The complaint was that a false document had been made and uttered in his name. Notwithstanding, out of an abundance of caution she responded to the show cause by way of a response dated the 24th March 2021 within the time frame set.

12. The Petitioner asserted that on the 15th of April 2021, she received communication from the head of Human Resources to appear for a further disciplinary hearing for purposes of "further clarification" on her response to the Show Cause dated the 24th of March 2021. She dutifully attended. The disciplinary process was flawed as the panel consisted of external parties in the absence of her supervisor.

13. The Petitioner stated that she was invited to a disciplinary meeting scheduled for the 29th of April 2021. To her dismay, the invitation letter set forth different issues from those the panel had sought clarification on the 24th of March 2021. The notice for the meeting was too short to enable her to get her witnesses. Nonetheless, she showed up for the hearing without a witness.

14. The petitioner contended that during the disciplinary proceedings, the 2nd Respondent's Human Resource Policy was also flouted as the Respondent invited a legal representative from their Dubai office, a foreign board member and an external Human Resource Consultant. Her request to, be allowed legal representation during the hearing and, for the Human Resource Manager to follow the principles of natural justice and allow her more time, attracted harassment and intimidation against her from the panel. When she complained of emotional stress, the hearing was rescheduled to 3rd May 2021.

15. The Petitioner stated that during her rescheduled disciplinary proceeding, she responded to all the issues in the purported letter. Despite her complaint that the process was flawed, the issue was not given any attention. In the hearing, she was asked to answer questions regarding policies, training and implementation, and quality of services, aspects within the nursing, medical and laboratory realms which were not part of her direct job description.

16. Flowing from the proceedings, the 2nd Respondent decided to terminate her employment. The decision was communicated through a letter dated the 24th June 2021.

17. The Petitioner maintained that the termination was mal fides, and in breach of the Respondent's statutory obligations. Her written inquiry as to who exactly authored the notice to show went unanswered. In her view, she was castigated for performing her civic duty under the law to prevent the commission of a felony. She was not accorded a fair hearing as contemplated under section 41 of the *Employment Act*, as she was not allowed the right to accompaniment with a colleague during the hearing.

18. She contended that the 1st Respondent racially discriminated against her and other members of the staff more particularly women to whom he held great disdain. Further, the 1st Respondent lived under a misguided view that Kenyan women executives are grossly overpaid, had no place in his current style of management and had to be replaced.

19. The Petitioner asserted that the 1st Respondent was known to meet with some women employees in the comfort of clubs/hotels to intimidate and threaten their livelihoods if they "did not get into the bus."

20. It was further stated that immediately prior to her dismissal, there were only two women in the senior management position at the 2nd Respondent's Avenue Hospital Parklands, namely Dr Nyawira and her. At the time of filing the petition herein, both of them had been dismissed from employment.

21. Further, at the time the two were suspended, their positions were awarded to male figures who were also directly sentinels of the events for which the petitioner and the Medical Services Manager were being punished. They took over the positions not through any competitive process or consultation with the group's senior management team.

22. It was further stated the issue of abuse and other welfare concerns were at one point raised by a whistle-blower employee to the Chairman of the 2nd Respondent's Board. Consequently, a virtual meeting was convened. In the meeting, the issues of; racial abuse by the 1st Respondent, harassment and intimidation; lack of facilitation to others to perform official duties; and the emergence of a practice of illegal and unlawful instructions being made to doctors to contravene medical policy by referring patients to admission who did not fit medical criteria; and the illegal demotion of staff without proper procedure, were raised. Surprisingly, the foreign Managers did not attend the meeting, yet it concerned them on how to relate to Kenyan employees.

23. It is averred that the 1st Respondent racially abused the African members of staff referring to them as "monkeys" and "gorillas" and further intimating that the Japanese were the epitome of intelligence above all the other races.

24. The petitioner stated that the 1st Respondent verbally insulted and punished any employee who spoke out against the unhealthy working environment in the institution and frequently used offensive language against any Manager for questioning the Respondent's actions. The hired expatriates could intimidate, harass and abuse staff under the guise of managing employee relationships. They cared not that there was a fully functional Human Resource department and a board that was led by a highly qualified Human Resource Practitioner.

25. The Respondents could selectively take disciplinary actions against certain members of staff more specifically those who dared become vocal in the exercise of their legal and constitutional rights. Structures could be arbitrarily changed to victimize the vocal employees. The approval by the Board of the structure that rendered the position of the Chief Operation Officer redundant is a notable example.

26. The Petitioner maintains that the process leading to her termination was not only pre-ordained but a camouflaged process that was aimed sanitization process by the Respondents' selective elimination of employees who were held not aligned to the institution's non-justifiable preferences.

27. The petitioner further contended that the Respondent deliberately failed to consider issues that were within her scope of work under the 2nd Respondent's Human Resources and proceeded to dismiss her from employment on matters which were not within her job description. There had never been any formal appraisal of her performance or revelation regarding her alleged performance shortcomings, by her line Manager or a performance improvement plan put in place.

28. Lastly, the Petitioner asserted that at all material times, she served the 2nd Respondent with dedication and diligence and as a result, she received recommendations and promotion. She didn't have any disciplinary issues against her for the ten years she was in service. As a result of the termination of her employment, she suffers from anxiety and panic attacks, and she is currently under medical supervision to mitigate the effects.

The 1st & 2nd Respondent's case.

29. The 1st and 2nd Respondents filed a replying affidavit sworn by Andre Ackerman on 18th March 2022 in opposition to the Petitioner's Petition. The Affiant averred that it was true that the Petitioner was appointed on the 20th of January 2012 as a Project Manager earning Ksh.350,000 per month. Thereafter by a promotion letter dated the 1st of August 2017, the terms of employment were revised and she was promoted to the position of a Hospital Administrator at a consolidated monthly remuneration of Ksh.700, 000. The said promotion was effective from 1st August 2017.

30. It is contended that by a letter dated 22nd March 2021, the Petitioner was issued with a show cause letter enumerating various allegations against her which included;

    i. failing to ensure that the resuscitation equipment in Radiology was accessible whenever required,

    ii. failure to ensure that proper handover and communication system, vertical and lateral between the nurses, doctors and lab personnel was put in place,

    iii. failure to ensure that there was critical result reporting for outsourced labs,

    iv. the failure to ensure that there were dedicated shift leaders, and

    v. not ensuring that there was adequate nurse-to-patient ratio.

31. It was further stated that the Petitioner was required to show cause why disciplinary action could not be taken against her for failing to perform her duties satisfactorily. On the same day, she was suspended from duty with immediate effect pending further investigation into the matter.

32. The Respondents further stated that Petitioner submitted her written response to the show cause letter on 24 March 2021, stating;

    a. Outpatient case of 27 February 2021: There was no policy specifying acceptable locations for resuscitation trollies, a function which should be performed by the Medical Quality Department.

    b. COVID-19 case: The incident was a result of gross negligence on the part of particular nurses who had a direct reporting channel to the Nursing Services Manager, against whom disciplinary action had been taken.

    c. Patient Fall Case: The fault was on the member of staff who failed to escalate the incident in good time and therefore it was beyond her control as training on events reporting had been done.

33. It was the Respondents' case that Petitioner's response was duly considered. It was however found to be unsatisfactory prompting the invitation of the Petitioner for a clarification meeting on the 16th of April 2021 wherein:

a. Concerning allegations on the COVID-19 case; the Petitioner was faulted for not putting in place a proper handover and communication system.

b. Concerning allegations on the Patient Fall case; the Petitioner was faulted for lack of adequate escalation of the incident.

34. Subsequently, the Petitioner was called for a disciplinary hearing before the disciplinary committee on the 3rd of May 2021 accompanied by a representative of her choice, a member of staff by the name of Solomon Mathenge. After considering the Petitioner's representation on various grounds, the Staff Disciplinary Committee found that;

a. The Petitioner failed to ensure that her direct reports, the Nursing Services Manager and Medical Service Manager implemented the tool.

b. The Petitioner failed to ensure that non-negotiable standards which include critical results reporting under IPSG2 were implemented.

c. The Petitioner failed to implement the Laboratory Critical Values Reporting Policy that was uploaded on the 25th of January 2021.

35. Upon the foregoing premise, the Petitioner's employment was terminated through a letter dated 24th June 2021. The termination was based on valid reasons and fair procedure was employed in the process leading to the termination, as she; was served with a show cause letter, was given an opportunity to provide a written explanation in response, was able to submit her response within the stipulated time, was notified of a disciplinary hearing and appeared at the same accompanied by a representative/ witness, and the Disciplinary committee was duly constituted as per Clause 6.3 of the staff Handbook and finally she was given the reasons of her dismissal vide the letter dated 24th June 2021.

36. The Respondents stated that considering the Petitioner's job description, all the matters that she was accused of and that formed the subject matter of the disciplinary proceedings and the termination that flowed therefrom fell within the scope of her duties.

37. The 1st Respondent categorically denied the Petitioner's allegation that he racially discriminated against her, harassed or racially abused her and other employees. He has never believed or made a statement that African members are "monkeys". At all times he observed principles that promoted fair treatment of persons and fostered mutual respect, transparency and accountability with colleagues.

38. It was contended that the Petitioner has not presented sufficient evidence to demonstrate that the 2nd Respondent violated the principle, of equal pay for equal work or work for equal value.

The Respondents' supplementary affidavit.

39. The Respondents filed a Supplementary affidavit sworn on the 26th March 2022 by Jay Michoma, the Human Resource Manager of the 2nd Respondent. In it, it was contended that the differential pays between the petitioner and Dr. Nyawira Kinyua was justified by the fact that they had different levels of expertise, experience and skills. Comparing the two, it was stated;

I. The petitioner holds a Diploma in Mass Communication.

II. The petitioner worked at Excloosive Limited from the year 2008 to 2011.

III. Her experience at the Respondent Hospital spanned a period of 9 years. She started her employment there as a Project Manager/Personal Assistant on 20th January 2012 at a monthly salary of KShs. 120,000.

IV. The petitioner was promoted to the position of Hospital Administrator for Avenue Hospital at Parklands by a letter dated 4th September 2017, earning a salary of KShs. 700,000.

V. Conversely, Dr Kinyua is a medical officer by training being a holder of a Bachelor of Medicine and Bachelor of Surgery degree amongst other professional qualifications earned in 1992.

VI. Dr. Kinyua has 30 years of experience in healthcare and had previously worked at the Ministry of Health from the year 1991 to 1999, MP Shah & Aga Khan Hospitals from the year 1995 to 1999, AAR, Hospital from the year 1999- 2003 and at Avenue Hospital from the year 2003 to 2021.

VII. By a letter dated 30th November 2011, - Dr. Kinyua was promoted to the position of Inpatient Manager effective 1st December 2011 and her salary was increased to KShs. 500,000.

VIII. On 7th August 2014, Dr. Kinyua was awarded a merit increment and as a result, her monthly salary was increased to KShs. 720,000 effective 1st July 2014.

IX. By a letter dated the 15th of May 2017, Dr. Kinyua's monthly salary was adjusted to KShs. 904,847 effective 1st June 2017 again based on merit.

40. Therefore, the salary difference between them was not upon the premise of discrimination or impermissible or unlawful grounds.

41. The Respondents maintained that the Petitioner was paid her terminal dues including the unpaid leave days upon her termination.

Respondents' Further Supplementary Affidavit.

42. The 2nd Respondent filed a further supplementary affidavit sworn by Jay Michoma on 13th April 2022. In the affidavit, it was contended that the notice to show cause letter was signed by Dr. Paul Wangai for Dr. Kekovole. The latter who was supposed to sign and issue the same to the Petitioner, had taken emergency leave.

The Petitioner's Submissions.

43. The Petitioner identified three issues for determination and made submissions thereon. Thus,

i. Whether the petitioner was unlawfully, unprocedurally and unfairly terminated from employment by the 2nd Respondent.

ii. Whether the Petitioner's constitutional rights protected under *the Constitution* of Kenya were violated by the Respondents.

iii. Whether the Petitioner is entitled to the reliefs sought in the instant petition.

44. The Petitioner submitted that Article 47 of *the Constitution* safeguards every Citizen's right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The constitutional right to a fair hearing is replicated under sections 41 and 45 of the *Employment Act*. The procedure to be followed by any employee contemplating termination of an employee's employment is statutory and mandatory. To support this submission, reliance was placed on the decision in the case of Kenya Union of Commercial Food & Allied Workers Union vs Meru North Farmers Sacco Limited (2013) eKLR.

45. Counsel for the Petitioner further submitted that Sections 43 and 45 of the *Employment Act* place a mandatory duty on the employer to prove that the reason[s] for termination of an employee's employment and that the reason[s] was valid and fair. To buttress this legal position, the holding in the case of Mary Chemweno Kiptanui vs Kenya Pipeline Company Limited (2014) eKLR was cited, thus:

> " Under subsection 43 (2) of the *Employment Act*, 2007, the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee. However, these reason or reasons must be addressed before the termination notice is issued and subjected to a hearing to establish if the employee has a defence that is worth consideration. The reasons should never be given after the termination has taken effect. This would be an outright negation of the purpose, intent and validity of any reason or reasons an employer may have against the affected employee."

46. The 2nd Respondent failed to demonstrate that its action against the Petitioner was informed by valid and genuine reasons. The 2nd Respondent affronted the dictates of procedural fairness when it failed to accord her an opportunity to substantively respond to the evidence that was tendered against her. It failed to provide her with sufficient materials and reports necessary to enable her to respond substantively and or refute the allegations of failure to perform her duties.

47. It was the petitioner's position that mere allegations without credible investigations could not be used as justification for her termination. The 2nd Respondent was duty-bound to undertake administrative investigations to verify the alleged misconduct before arriving at the decision to terminate her employment. In support of these submissions, Counsel relied on the case of John Munyao Musiku vs Athi River Mining Limited (2018) eKLR which was cited in the case of Nicholas Muasya Kyula vs Farmchem Ltd 2011; (2012) LLR.

48. It is interesting to note that the show cause letter and the one placing the petition under investigative suspension were issued on the same date. Ordinarily, investigations are supposed to precede the issuance of a show cause letter. Investigative suspensions are meant to give the employer a chance in the absence of the subject employee to interrogate and establish if there are grounds that warrant a show cause letter against the employee to warrant a response. Reliance was placed on the case of Amrick Consales versus Mara Ison Technologies Kenya Limited, Cause No. 2538 of 2012 where the Court stated;

> " Ordinarily in work relations, where an employee commits acts of misconduct, such an employee may be suspended to allow the employer to carry out investigations. Such investigations are meant to give the employer a chance in the absence of the subject employee to interrogate and establish if there are grounds that warrant a show cause notice against the employee that warrants a response. Until such a process is concluded, the employee remains without a concluded case against him that warrants a defence. Once the investigation is complete, the employee must be recalled from the suspension to answer any allegations leading to the process of hearing where the employee is to give his defence. Once the Further hearing is concluded, a sanction follows."

49. Further reliance was placed on the case of James Mulinge v Freight Wings Limited [2016] eKLR, where it was held inter alia;

> " 68. To therefore proceed and circumvent due process, issuing a show cause letter before investigations is a process that I find was set up with a single purpose to

frustrate the Claimant; keep him out of the workplace; and eventually lead to the wrongful dismissal."

50. The petitioner submitted that no evidence was provided during the disciplinary hearing or during proceedings proving that the petitioner had failed to perform her duties ascribed to her. For a termination reason to be deemed valid, it must be supported by evidence. It is not enough for the employer to cite allegations of poor performance or misconduct. To bolster this submission, reliance was placed on the case of Naima Khamis vs Oxford University Press (E.A) Ltd (2017) eKLR where the court held that:

> " It is necessary to point out that reasons for termination of a contract are matters that an employer at the time of termination of contract can genuinely support by evidence and which impact on the relationship of both the employer and employee in regard to the terms and conditions of work set out in a contract."

51. The petitioner further submitted that where an employer terminates an employee's employment on account of poor performance or performance-based reasons it becomes incumbent upon him or her to prove that he or she had put in place adequate measurement tools to assess performance and measures to address any poor performance by the employee. The petitioner relied on the case of National Bank of Kenya vs Samuel Nguru Mutonya (2019) eKLR in which the case of Jane Samba Mukala vs Ol Tukai Lodge Limited (2010 was cited with approval.

52. The petitioner submitted, that the reasons that were given as a basis for the termination of her employment cannot be traced to the matters that were captured in the show cause letter and the disciplinary hearing. This makes the termination unfair. To support the submission, reliance was placed on the case of Veronica Oteri vs Barclays Bank of Kenya (2018) eKLR where it was held:

> " It is contrary to the *Employment Act* and rules of natural justice to terminate an employee's services for reasons different from the ones such employee was subjected to at a disciplinary hearing and in respect of which such employee never tendered his or her defence. As is evidently clear here the respondent in its termination letter used more serious allegations to terminate the claimant's services without granting her a chance to defend herself against the accusations."

53. On the second issue, the petitioner submitted that her evidence on intimidation and harassment in the workplace by the 1st Respondent was corroborated by the evidence of the petitioner's witness Dr. Andrew Kekovole who was the Chief Operating Officer [COO] in the 2nd Respondent Organization and also the Petitioner's line Manager at all material times.

54. The Petitioner's Counsel further submitted that Article 41 (2) (a) and (b) of *the Constitution* of Kenya guarantees every worker the right to fair remuneration and reasonable working conditions. Section 5 [2] of the *Employment Act*, 2007 commands the employer to ensure equal opportunity and eliminate all forms of discrimination in the workplace. Section 5[3] prohibits an employer from discriminating against any employee on the basis of race, gender, or ethnicity. Further, sub-section 5 provides for equal remuneration for work of equal value.

55. The petitioner went on to submit that where a contravention of the provisions of the statutory provisions above is alleged, as is in the present case, the burden lies on the employer to prove that discrimination did not take place as alleged and that the discriminatory act or omission was not based on any of the grounds specified in the section. Reliance was placed on the case of Reuben Wamukota

Sikulu vs Director of the Human Resource Management, Ministry of Devolution & Planning & 2 others (2020) eKLR where it was held:

> "What the employee is required to do is establish a prima facie case, through direct evidence or statistical proof, that he or she was discriminated against on any of the grounds set out in Article 27(4) of *the constitution*, which include; race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. To establish a prima facie case, the appellant had a duty to demonstrate he qualified for the position he was denied; show that he suffered an adverse employment action as a result of the discrimination; must provide prima facie proof that other explanations by the employer are not contrived or without basis; that the real reason for denial of promotion was discriminatory and the reasons must bear unreasonableness or other types of malpractices which must be linked to the suffering endured by the employee. Once the employee establishes a prima facie case, the burden shifts to the employer, to show a legitimate explanation for refusing to grant the promotion. Where the employee has demonstrated a prima facie case, a presumption that the employer discriminated against the employee is raised. The employer must then articulate a clear, specific, and non-discriminatory reason for denying the promotion."

56. It was submitted that the Respondents did not provide any evidence whatsoever justifying the inequitable wage increment in favour of Dr. Nyawira who was of a lower rank.

57. For the third issue it was submitted that the petitioner was entitled to the reliefs sought and specifically reinstatement or compensation whose measure was proportionate to the unpaid or withheld salary throughout that period of unlawful or unfair termination. The counsel relied on the holding in the case of Kenya Union of Printing, Publishing paper Manufacturing & Allied Workers vs Timber Treatment International Limited (2013) eKLR.

58. The petitioner further relied on the case of Beatrice Achieng Osir vs Board of Trustees Teleposta Pension scheme and further the holding in Ol Pejeta Ranching Ltd vs David Manjau Muhoro (2017) eKLR.

The Respondent's Submissions.

59. The Respondents filed their submissions distilling the following issues for determination:

    i. Whether there were fair and valid reasons for the petitioner's termination.

    ii. Whether the petitioner's termination was procedurally fair.

    iii. Whether the 1st Respondent discriminated against the petitioner.

    iv. Whether the 1st Respondent racially abused the petitioner.

    v. Whether paragraphs 31 and 33 of the petitioner's supporting affidavit sworn on the 20th of August 2021 ought to be struck out.

    vi. Whether the witness statement by Dr. Andrew Kekovole dated 25th March 2022 should be struck out.

    vii. Whether the petitioner is entitled to the remedies sought.

60. On the first issue the Respondent submitted that the petitioner was not diligent in the performance of her responsibilities and therefore the reasons for her dismissal were valid and justified in accordance

with sections 43 and 45(1) & (2) of the *Employment Act*. To fortify their submission, the Respondent relied on the case of CFC Stanbic Bank Limited vs Danson Mwashako Mwakuwoma (2015) eKLR where it was held:

> " ...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair."

61. Similarly, the counsel relied on the case of Kenya Revenue Authority vs Reuwel Waithaka Gitahi & 2 others (2019) eKLR. Where it was held:

> " The employer was able to show that it genuinely believed that there were reasonable grounds and sufficient grounds to suspect that the respondents had committed gross misconduct in their employment and had done acts which were substantially detrimental to KRA. It is not for the court to substitute its own 'reasonable grounds' for those of the employer. See CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona [2015] eKLR. It is our finding on the 1st issue that the dismissal of the respondents was substantively justified and the trial court was in error in finding otherwise."

62. On the second issue it was submitted that the Respondent followed the right procedure prior to the termination. The Respondent relied on the case of Risper Otieno Mtula vs Mumias Sugar Co Ltd (2015) eKLR where it was held:

> " Counsel for the applicant submitted that if the letter was a show cause only or a suspension only, then the applicant would have had no reason to complain. He further submitted that by being suspended the applicant was being punished without a hearing. My understanding of the notice of suspension/show cause is that it required the applicant to stay away from office while at the same time requiring her to respond to the charges against her. She indeed responded to the same and sought further information in her letter dated 22nd December 2014.
>
> Suspension in my understanding is resorted to during investigations where it would be inappropriate or inconvenient to carry out the investigations in the presence of the employee or where the employee is likely to interfere with investigations. If the employee is vindicated by the investigations, the employee is allowed to go back to work and does not suffer in any other way."

63. On the Claimant's assertion that the letters were forged, the Respondents submitted that the petitioner failed to meet the threshold laid in cases where forgery is alleged. Counsel relied on the case of Joseph Mukuha Kimani vs Republic (1984) eKLR as well as the case of Caroline Wanjiku Ngugi vs Republic (2015) eKLR.

64. It was the Respondents' submission that the duration given to respond to the show cause letter did not violate the law and the petitioner had not demonstrated why the two days period was unfair, unlawful, and a violation, of policy or her employment contract. Reliance was placed on the case of Timothy Stephen Mbogho vs Kenya Safari Lodges and Hotels Limited (2018) eKLR where it was held:

> " On 16th June 2016, the Claimant was issued with a show cause letter and was required to respond within two days. The letter further also notified the Claimant that he had been suspended pending a disciplinary hearing. The Claimant responded to the show cause letter on 20th June 2016 and on 6th August 2016 he was invited to a disciplinary hearing scheduled for 11th August 2016.
>
> ... It is also on record that the Claimant was taken through a disciplinary process. The Claimant contends that he was not given adequate time to prepare his defence and that he was not accompanied at the disciplinary hearing. There was however no evidence that he asked for more time to either prepare his defence or to find someone to accompany him at the hearing. The Claimant held a very senior position and the Court was unconvinced that he would be intimidated to the level where he would be unable to ask for a fair hearing."

65. It was the Respondent's submissions that that the procedure leading to the petitioner's termination was per sections 41 and 45 (2) (c) of the Act The petitioner was given a notice to show cause letter and subsequently given a fair hearing. Reliance was placed on the case of Hosea Akunga Ombwori vs Bidco Oil Refineries Ltd (2017) eKLR and the case of Alphonse Maghanga Mwachaya vs Operation 680 Limited (2013) eKLR.

66. For the third issue the Respondent submitted that the petitioner was never discriminated against as alleged. It was submitted that the burden of proving unfair discrimination rested entirely on the employee. The Respondent relied on the case of Samson Gwer & 5 others vs Kenya Medical Research Institute & 3 others (2020) eKLR.

67. The Respondent further submitted that the threshold for proving discrimination is that an employee must first demonstrate a differentiation in treatment and, secondly must demonstrate that the differentiation was unfair. The Respondent relied on the case of Mohamed Abduba Diba vs Debate Media Limited & Another (2018) eKLR where the court held:

> " Mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislation has in view."

68. The Respondents further relied on the case of Ol Pejeta Ranching Limited vs David Wanjau Muhoro (2017) eKLR where the court held;

> " Further, fairness requires that people doing similar work should receive equal pay. The principle has however extended to an analogous situation requiring that work of equal value should also receive equal pay as is claimed in the present appeal. The principle of equal pay for equal work, or work of equal value was succinctly explained in by the South African Labour Court in Louw v Golden Arrow Bus Services (Pty) Ltd [1999] ZALC 166 as follows;

'.....it is not an unfair Labour practice to pay different wages for equal work or for work of equal value. It is however an unfair Labour practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing, is direct or indirect discrimination on arbitrary grounds or the listed grounds e.g., race or ethnic origin.'

In claims of this nature, where the claimant invokes the principle of equal pay for equal work the claimant must establish that the unequal pay is caused by the employer discriminating on unlawful grounds. It was observed in Louw v Golden Arrow Bus Services (Pty) Ltd (supra) that discrimination on a particular 'ground' means that the ground is the reason for the unequal treatment complained of by the claimant. As discussed by the writer, Adolph A. Landman in his article The Anatomy of Disputes about Equal Pay for Equal Work,

"The mere existence of disparate treatment of people of, for example, different races is not discrimination on the ground of race, unless the difference in race is the reason for the disparate treatment. Put differently, it must be shown that the difference in salaries is because of sex, gender, race, and so on."

69. On the fourth issue the Respondents submitted that the petitioner did not adduce an iota of evidence, whether in writing or audio recording to demonstrate that she was racially abused and that the witness statement filed by Dr Andrew Kekovole was defective and filed in bad faith as the witness or the maker would not be cross-examined to its authenticity. The Respondent relied on the case of Kenneth Litswa vs Martin Shivere & 2 others (2020) eKLR where the court held:

" Section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya) provides that:

107.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

There is the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence this was held in the case of Isca Adhiambo Okayo vs Kenya Women's Finance Trust KSM CA Civil Appeal No. 19 of 2015 (2016) eKLR. This is found in sections 109 and 112 of the Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

70. On the fifth issue it was submitted that the supporting affidavit sworn by the petitioner was defective and inadmissible for want of compliance with the law as it did not disclose the deponent's source of knowledge or her basing of belief regarding the matter as specifically paragraphs 31 and 33 of the said supporting affidavit and thus should be struck out. Reliance was placed on the case of Premchand Rainchand & Another Ltd vs Quarry Services & others (1969) E.A 514 and the case of AN Phakey vs World-Wide Agencies Ltd (1948) 15 EACA.

71. On the sixth issue the Petitioner submitted that the Witness statement of Dr. Andrew Kekovole should be struck out for two reasons; first, it seeks to introduce new facts that were not pleaded in the petition

and the supporting affidavit and second, it was improperly on record. To buttress this the Respondent relied on the case Jael A. Omolo vs South Nyanza sugar Co Ltd (2019) eKLR and the case Daniel Otieno Migore vs South Nyanza Sugar Company Limited (2018) eKLR.

72. On the last issue the Counsel submits that the Petitioner is not entitled to any of the reliefs sought. For the relief of reinstatement, it was submitted that the petitioner was lawfully terminated and that this prayer should fall. The Respondent relied on the case of Kenya Broadcasting Corporation vs Geoffrey Wakio (2019) eKLR where it was held:

> "We agree with this reasoning as practicability is one of the factors to be considered when determining whether or not to order reinstatement. (See Kenya Airways Ltd vs. Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR). From the record, the respondent's efforts to be reinstated were frustrated for a long time. It was not until judgment was entered in his favour that the appellant decided to reinstate the respondent. By then, the relationship was beyond repair."

73. The Respondent further submitted that reinstatement is a special remedy and should be allowed cautiously and in rare circumstances. The Respondent relied on the case of Parliamentary Service Commission vs Christine Mwambua (2018) eKLR.

74. On the relief for the alleged discrimination, the Respondent submitted that the Petitioner had not proved that she was discriminated against and urged the court to find that the Petitioner is not entitled to any compensation sought for the alleged discrimination.

75. Lastly on the relief of special damages, KShs.14,155,000/=, it was submitted that the claim under this head lacks basis in law. Further, the sum was sought as special damages, the law requires the same to be specifically proved. It wasn't. The same cannot be availed to the Claimant.

76. In conclusion it was submitted that the Petitioner's petition dated the 20th August 2021 should be dismissed with costs.

Analysis and determination.

77. Having carefully analysed the petition, the Respondents' response and the submissions presented before me by the parties, I distil the following issues for determination:

    i. Whether the termination of the petitioner's employment was procedurally and substantively fair.

    ii. Whether the Petitioner's constitutional rights as enshrined under Articles 27, 41 and 47 of *the Constitution* have been infringed or violated.

    iii. Whether the witness statement by Dr. Andrew Kekovole should be struck out.

    iv. Whether paragraphs 31 and 33 of the petitioner's supporting affidavit should be struck out.

    v. Whether the Petitioner is entitled to the reliefs sought.

    vi. Who should shoulder the costs of this petition?

Whether the termination was fair and procedural?

78. The *Employment Act* 2007 puts forth two elements that must be considered by the Court whenever called upon to interrogate whether the termination of an employee's employment was fair, procedural and substantive fairness.

79. In the case of Walter Anuro vs Teachers Service Commission (2013) eKLR it was held:

> "For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness."

80. Section 41 of the *Employment Act* provides the structure for procedural fairness. It provides;

> "(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
>
> (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."

81. It is trite that procedural fairness entails three components. First, the notification component, the employer must notify the employee unambiguously, of the intention to terminate his or her employment and the grounds stirring the intention. Second, in the hearing component, the employer should allow the employee adequate opportunity to prepare and defend himself or herself against the grounds. Conjoined with this is the statutory right of accompaniment. The employer must allow the employee to be accompanied by a colleague of his choice or a trade union representative [where the employee is a member of a trade union] during the hearing. Third, Consideration component, before taking a decision, the employer must consider the representations made by the employee and or the person who accompanied her/him.

82. The Respondent contended that it took the Petitioner through a process that was full of the three components and that therefore the termination of her employment was in adherence with the statutory canons of procedural fairness. There is no doubt that the petitioner was issued with a show cause letter contemporaneously with a suspension letter all dated the 22nd March 2021. The show cause letter did put forth the accusations that were being levelled against her. Through her letter dated the 24th March 2021, she responded to the Respondent's. Subsequently, a Clarification meeting was held on the 16th April 2021. A disciplinary hearing was held on the 3rd May 2021, the petitioner was accompanied a colleague. After the hearing, the Petitioner's employment was terminated.

83. Superficially looking at the foregoing premises one can easily arrive at an incorrect conclusion that procedural fairness was wholly present in the process that led to the decision to terminate the Petitioner's employment. At this point, it becomes imperative therefore to state that there were events and or actions which when taken into consideration deprive the process of the apparent fairness.

84. Again, and again this Court has stated that an employment relationship must be characterized by good faith, candidness, forthrightness, trust and confidence. Where these miss in any event occurring or action taken in the course of the relationship, such an event or action will definitely be affected adversely. There is no doubt that the process leading to the termination of the Claimant's employment was set off through the notice to show letter dated 22nd March 2021 and the suspension letter of even date.

85. The two letters are purported to have been authored by the then Chief Operations Officer, Dr. A. Kekovole, though apparently, they were signed on his behalf. It is not in controversy that during the material time, the alleged author was on leave. In my view, where a letter is shown to be authored under the name of a person but signed on his behalf, such a person must have, instructed the writing of the letter, or, had it written with his knowledge. Further, for a letter to be signed on behalf of another person, that other person must have known that it was to be so signed and consented to the same. Otherwise, the letter shall become a forged document or one uttered falsely.

86. From the onset, the Petitioner in her petition categorically [see paragraphs 13-15] stated, and expressed that the Chief Operations Officer was not aware of the letters. He didn't author the same. The Court notes that despite the raising of this grave issue by the Claimant, the Respondent didn't specifically or in any manner deny the allegation of forgery in the first answering affidavit of Andre Ackerman. Further, the deponent of the supplementary affidavit sworn on 26th March 2022, Jay Michoma didn't find it imperative to respond to the issue.

87. The Court notes that Dr Andrew Kekovole, the Chief Operations Manager did a witness statement, dated 25th March 2022, elaborately setting out; how it got to his attention that some letters written under his name had been issued to the Petitioner; denying the authorship, instructions for the writing of the same, knowledge that the same was to be written and consent for the same signed on his behalf; the action that he took upon realising the same, making a report to the police and protesting to the Respondent; and what befell him as a result-victimization.

88. It is after the witness statement that the Respondent through a further supplementary affidavit, of Jay Michoma attempted to explain how the letters were authored and signed. In my view, the affidavit was an afterthought and I take it as such. Further, I have carefully considered the affidavit and note that therein it has not been asserted that the letters were written with the knowledge and or under the instructions of Dr Kekovole. Additionally, the affidavit does not express that he gave instructions or consented to the person who purportedly signed the letters on his behalf, to so do. The person himself chose not to swear an affidavit explaining the circumstances under which the contested letters were written and whether he had the authority to sign the same on behalf of Dr Kokevole.

89. By reason of the foregoing premises, I come to an inevitable conclusion that the process leading the termination of the Petitioner's employment was cosmetic as much as it apparently appeared compliant with the statutory edicts of procedural fairness. It was one which was undertaken with a predetermined position, termination of her employment.

90. Sections 43, and 45[2] speak to substantive fairness. The two sections place upon the employer a twin legal burden to discharge in a dispute emanating from the termination of an employee. Under section 43, the employer bears the burden to prove the reasons for the termination. Section 45[2] imposes a further duty on the employer to demonstrate that the reason or reasons were valid and fair. A failure to discharge the burden renders the termination unfair. See Court of Appeal decision in the case of Pius Isundu Machafu vs. Lavington Security Limited.

91. The separation of the Petitioner and the Respondents stemmed from the termination letter dated the 24th June 2021 as paraphrased;

> "Upon reviewing all the facts of the case and giving you a fair hearing, the Disciplinary Committee establishes that you failed to perform your duties as the Hospital Manager;
>
> i. You failed to ensure that your direct reports, the Nursing Services Manager and Medical Services Manager implemented the handover tool.

ii. You failed to ensure that non-negotiable standards which includes critical results reporting under IPSG 2 were implemented.

iii. You failed to implement the Laboratory Critical Values Reporting Policy that was uploaded on the 25th January 2021

In view of the above your employment is being terminated with effect from the 24th June 2021 for loss of confidence."

92. The Court notes that the position taken from the onset by the petitioner was that her employment was terminated for matters that fell outside the scope of her duties. She asserted that through emails of 30th November 2020 and with the concurrence of the Chief Operating Officer, all aspects of Nursing, and the Laboratory were removed from her docket and assigned to the Manager-Nursing. I have carefully scanned through the replying affidavit by the 1st Respondent and note that it does not specifically or in any manner deny that Nursing and Laboratory matters were at his initiation removed from under the docket of the Petitioner. Consequently, I hold that the Petitioner's evidence that she was dismissed on matters that were outside her docket was not rebutted. Her assertion is deemed admitted.

93. The Court notes further that during the disciplinary hearing, the Petitioner stated that there was a directive from the CEO for indirect reporting of the NSM to the CEO from 1st December 2020 which made it difficult for her to supervise the NSM. She asserted that the email by the CEO through which the instructions were given would be retrieved from the COO. The respondent does not state whether or not the same was retrieved. At the disciplinary hearing, this evidence was not rebutted or discounted in any manner.

94. The Court hasn't lost sight of the fact that indeed the accusations that were levelled against the petitioner were undeniably regarding laboratory and nursing matters.

95. The tone of the Respondent's replying affidavit was that at all material times, the Petitioner denied the alleged faults that were being attributed to her, and blamed the same on some specific departments/ units and or individuals. For instance, on the accusation that she failed to put in place a proper handover and communications system, she asserted that the Medical Quality Department had the overall function of creating controlled documents to be used across the group facilities once they audit quality gap areas in the organization. The Department failed to prepare the document. Faced with a response like this, that was from the Petitioner, a reasonable employer could give details of the functions of the unit blamed, and show how wrong the assertion by the petitioner was. The Respondent opted not to place forth any material from which a basis to discount the Petitioner's evidence can be derived.

96. I have carefully considered the contents of the minutes of the disciplinary hearing and more specifically the explanations that the Petitioner gave on the issue of the handover and communications system. She explained that that was a function that fell under the space of the forestated department and that the Department failed to discharge its function regarding the system. Noting the failure, she and Dr. Misiani prepared a document which was at the material time being used across all hospitals. She elaborately explained how she ensured the implementation of the same. I note that during the disciplinary hearing, no document was put to her to suggest that she was not being truthful in her explanation nor evidence tendered to contradict hers. I find considerable difficulty in understanding the basis for the disciplinary committee's decision that the petitioner didn't sufficiently explain herself, off the accusation.

97. I have carefully reviewed the explanations that were given by the petitioner in respect of the other charges that had been levelled against her, in my view, the are plausible. This conclusion is fortified by

the fact that this Court notes that during the disciplinary hearing, the employer [read the Respondent] didn't place forth any material or evidence that could contradict the Petitioner's evidence on her innocence. In this matter too, the Respondent did not place before the Court any such evidence.

98. It is my firm view that it is not enough for the employer to just assert in conclusion that the employee didn't give sufficient explanations concerning the charges. The assertion and conclusion must be seen to flow from the material and evidence that was placed before the disciplinary panel. The conclusion must therefore be a product of a conscious consideration of the material before it. With great respect, the conclusion[s] made by the Disciplinary Panel lacked this character.

99. In the CFC Stanbic Bank Limited v Danson Mwashako Mwakuwoma [2015], eKLR, cited by Counsel for the Respondent the Court of Appeal held;

> " ..... In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach [the range of reasonable responses test] is that in many case there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair, but if the dismissal falls outside the band, it is unfair.....".

100. This Court is cognizant of the above quoted legal principle and has given it due regard. In my view, no reasonable employer will dismiss an employee who has given plausible explanations concerning the accusations against him or her, like the Petitioner in this matter did, in the absence of evidence and material contradicting and or rebutting the explanations, as was in the instant matter.

101. In the upshot, I hold that the dismissal of the Petitioner from her employment was without a substantive justification and therefore substantively unfair.

Whether the Petitioner's constitutional and statutory rights against discrimination under Article 27 of *the Constitution* and Section 5 of the *Employment Act* were violated.

102. The *Employment Act* 2007 prohibits unfair discrimination in the workplace. Alleging that she was discriminated against by the Respondent, the Claimant anchored her case on the provisions of section [5] [5] of the Act. In essence, she argued that pay discrimination was visited on her in the course of working for the 2nd Respondent. In my view, the provisions of section 5[7] of the Act do not in any manner take away the responsibility of the employee asserting discrimination to first establish prima facie that there was discrimination before the burden shifts to the employer to prove that the discrimination didn't occur as alleged. Therefore, it won't suffice for the employee to just assert that he or she was discriminated against, without going further.

103. In my view, where an employee alleges pay discrimination a comparator is required. I think, having this in mind the Petitioner picked DR. Nyawira Kinyanjui for this purpose. Geared to discharge its legal burden under the above stated subsection, the 2nd Respondent did put forth detailed explanations in the supplementary affidavit of Jay Michoma. The explanations, which were not rebutted at all by the Petitioner, clearly show that the two were; not performing similar tasks; trained in different professions; and that Dr. Nyawira was more qualified than the petitioner.

104. Further, it is my finding that the Petitioner failed to demonstrate that the pay difference between her and Dr. Nyawira, was engineered by arbitrary grounds or those prohibited grounds set forth in section 5 of the *Employment Act* or Article 27 of *the Constitution* of Kenya.

105. In the case of Mohammed Abduba Dida vs Debate Media Ltd & Another (2018) eKLR the court held:

> " Mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislation has in view."

106. In the case of Ol Pejeta Ranching Limited vs David Wanjau Muhoro (2017) eKLR the court held;

> " Further, fairness requires that people doing similar work should receive equal pay. The principle has however extended to an analogous situation requiring that work of equal value should also receive equal pay as is claimed in the present appeal. The principle of equal pay for equal work, or work of equal value was succinctly explained in by the South African Labour Court in Louw v Golden Arrow Bus Services (Pty) Ltd [1999] ZALC 166 as follows;
>
> '.....it is not an unfair Labour practice to pay different wages for equal work or for work of equal value. It is however an unfair Labour practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing, is direct or indirect discrimination on arbitrary grounds or the listed grounds e.g., race or ethnic origin.'
>
> In claims of this nature, where the claimant invokes the principle of equal pay for equal work the claimant must establish that the unequal pay is caused by the employer discriminating on unlawful grounds. It was observed in Louw v Golden Arrow Bus Services (Pty) Ltd (supra) that discrimination on a particular 'ground' means that the ground is the reason for the unequal treatment complained of by the claimant. As discussed by the writer, Adolph A. Landman in his article The Anatomy of Disputes about Equal Pay for Equal Work,
>
> "The mere existence of disparate treatment of people of, for example, different races is not discrimination on the ground of race, unless the difference in race is the reason for the disparate treatment. Put differently, it must be shown that the difference in salaries is because of sex, gender, race, and so on."

107. I am persuaded by the Respondent that the Petitioner remarkably failed to prove her case on pay discrimination or discrimination generally.

Whether the Petitioner's Constitutional rights under Article 41 have been infringed

108. Article 41 of *the Constitution* of Kenya 2010 states that 'everyone has the right to fair labour practices. No doubt, *the Constitution* has not defined the phrase or defined what the right entails. Suffice it to state that the right is incapable of precise definition. What is 'fair' will depend on the circumstances of each case. An infringement on the right to fair practice certainly amounts to unfair labour practice. A 'fair 'practice in general, means one that was not capricious, arbitrary or inconsistent. Imperative to state that 'practice' should be interpreted to include not only habitual conduct but also a single act or omission.

109. I have carefully considered the circumstances of this case, and hesitate not that in many respects the actions by the Respondents were arbitrary and capricious, therefore an infringement of the Petitioner's right encapsulated in Article 41. To anchor a disciplinary process on forged or falsely uttered foundational documents; to dismiss an employee in respect of infractions not committed by herself in absence of a logical connection between her job description and the infraction by the other employee yet there is no dispute that disciplinary action was taken against the other for the infraction at the initiation of her; and to dismiss an employee on matters outside her control when it was known or ought to have been known by the employer that the matters were removed from under her docket by the employer's CEO, meets no better description than being capricious and arbitrary.

110. In my view, considering the conduct of the Respondents, this is a matter where general damages for the breach of the petitioner's fair labour practices should be right to fair should be awarded. She is hereby awarded Kshs. 500, 000.

111. It is apparent on record that Dr. Kinyua Nyawira despite being a subordinate to the Petitioner herein, she had other attributable expertise and skills. The Respondents had justified reasons in paying Dr. Nyawira Kinyua and the Court cannot pock-nose in the employer's preference in the said pay arrangement.

112. The mere allegation that a human right or fundamental freedom has been or likely to be contravened is not of itself sufficient to entitle an Applicant to invoke the jurisdiction of the Court especially if it made for the purpose of avoiding applying the normal judicial remedy. The Courts abhor the practice of converting every issue into a constitutional question and filing suits disguised as constitutional Petitions where in fact they do not fall anywhere close to violation of the Constitutional rights.

113. By the premise of the following, it is my considered view that the Petitioner has not cogently demonstrated any breach of her constitutional rights as alleged and particularized in her Petition. No damages or Constitutional Declarations can be awarded in vacuum. The Court declines to make any declaration for violation of the Petitioner's rights and the damages thereto for want of prove and substantiation.

Whether Paragraphs 31 and 33 of the Petitioner's Supporting Affidavit should be struck out.

114. Through an application dated 28th March 2022, the Respondents sought that the above-mentioned paragraphs be expunged as the affront the rules of procedure on affidavits. To attain an expeditious disposal of this petition, I directed that the issue be shelved for determination under this judgment.

115. Order 19 (3) (1) of the *Civil Procedure Act* 2010 provides:

> "Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted, provided that the grounds thereof are stated."

116. Further in the case of Premchand Rainchand & Another Limited vs Quarry Services & Others (1969) eKLR the court reiterated the position that affidavits based on information must disclose the source of information.

117. I have considered keenly the Petitioner's supporting affidavit and more particularly paragraphs 31 and 33. I note that the matters deposed to in the stated paragraphs are those that one cannot conclude were within her knowledge. There is no disclosure of the source of the information. No doubt, the paragraphs offend the procedural rules on affidavits. Consequently, paragraphs 31 and 33 of the Petitioner's supporting affidavit are hereby expunged.

Whether the written Witness Statement by Dr. Andrew Kekovole should be Expunged

118. I find considerable difficulty in understanding the basis for the Respondents' craving to have the witness statement expunged. When this Court gave directions on how the petition herein was to be proceeded with, it was contemplated that this Court renders itself on the petition on the basis of the material put forth by the parties. Therefore, the statement by Dr Andrew Kekovole, inclusive. Further, the parties waived their right to have viva voce evidence taken from them and their witnesses. In essence, the right to cross-examine the parties and or their witnesses was waived. With great respect, it is illogical for the Respondents to turn around and start alleging that if this Court were to consider the witness statement, they shall be prejudiced as the consideration shall be on evidence that hasn't been subjected to scrutiny under cross examination.

119. The Respondents argue that the statement departs from what is contained in the petition. In my view, if the assertion were to be true, this Court can only find the evidence presented through the witness statement as irrelevant and unhelpful to the Petitioner's case, but not strike it out. In the case of Daniel Otieno Migore vs South Nyanza Sugar Co Ltd (2018) eKLR the court held:

> "....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded....."

120. In the case of Josephine Mwende vs University of Nairobi (2017) eKLR, this court stated:

> " Before I delve further into this issue, it is imperative to state from the onset that the issue of the government circular and the contract of employment being or becoming irregular and illegal as a consequence of the directive therein, was a matter that was not pleaded by Respondent. It is here that I must comment on the importance of pleadings and the implication of a party venturing out of what he or she has not pleaded.
>
> 31. No doubt, numerous judicial attentions have been given on the importance of pleadings and the implication on a party's dwelling on matters not pleaded or that cannot be ascertained from its pleadings. In Adetoun Oladeji [NIG] Ltd vs Nigeria Breweries PLC S.C 91/2002, Judge Pius Aderemi J.S.C expressed himself;
>
> ".....It is now a very trite principle of law that parties are bound by their pleadings ant that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded,"
>
> 32. Sir Jack Jacob in his Article entitled "The Present Importance of pleadings" cited with approval by the learned Judges of the Malawi Supreme Court in Malawi Railways Ltd v- Nyasulu [1998] MWSC, aptly captures it thus....."

121. The Witness statement by Dr. Andrew Kekovole in my view speaks to matters raised in the Petition. The contents thereof go to support the same. I am not persuaded that the statement needs to be struck out. I decline the Respondents' invitation to strike it out.

Whether the Claimant is entitled to the reliefs sought

a. Pay inequality for the three years.

122. Having found that the Petitioner has failed to prove pay discrimination, there cannot be any justification to make an award in her favour under this head.

b. An Order of Reinstatement.

123. The Petitioner urged this Court to issue an order directing the Respondent to reinstate her to her employment without loss of position, status and benefits together with damages to mental and emotional distress. Section 49 (3) (a) of the *Employment Act* 2007 provides for reinstatement as one of the remedies available to an employee who has successfully challenged his or her employer's decision to terminate his or her employment. However, before the Court settles on reinstatement as an appropriate remedy for the employee, it must consider those factors set under section 49 (4).

124. In the case of Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR, Maraga J (as he then was) stated:

> " As I have said, in Kenya, reinstatement is one of the remedies provided for in Section 49(3) as read with Section 50 of the *Employment Act* and Section 12(3) (vii) of the Industrial Court Act that the court can grant. Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance, the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them. That will engender friction, which is not healthy for businesses, unless the employment relationship is capable of withstanding friction like where the employer is a large organization in which personal contact between the affected employee and the officer who took action against him will be minimal.
>
> Under the Kenyan *Employment Act*, the factors to be considered when considering reinstatement are enumerated in Section 49(4) of the *Employment Act*. Those relevant to this appeal include the wishes and expectations of the employee; the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances; the practicability of reinstatement; any compensation paid by the employer; and chances of the employee securing alternative employment. I would like, in particular, say something about the practicability factor."

125. Considering the industry in which the Respondent 2nd operates, the vastness of the Respondent's business, limited may be to a few hospitals and the animosity between the Respondents and the Petitioner, I conclude that it is impracticable to order the Petitioner back to the 2nd Respondent's employment.

Damages for unlawful termination.

126. Section 49[1][c] of the *Employment Act*, provides a grant of a compensatory relief in favour of an employee who has successfully assailed her or his employer's decision to terminate his or her employment. However, the award is not automatic. It is discretionary. The award depends on the circumstances of each case. I have considered the fact that; as noted hereinbefore the termination of the Petitioner's employment was infested by a lack of good faith, candidness, forthrightness, and a breach of the implied duty of mutual trust and confidence by the Respondent; without justification, the Respondent veered off adhering to legal cannons for a fair termination; the length of the period of service by the Petitioner to the Respondent and; in my view, the petitioner did not contribute to the

dismissal, and conclude that she is entitled to the compensatory award contemplated in the provision and to an extent of eight (8) months' gross salary, thus Ksh.5,600,000 which I hereby award.

c. Unpaid leave of Ksh.675,000

127. The Petitioner sought compensation for earned but unutilized leave days. She contended that she is entitled to Ksh.675, 000. The Respondent didn't place before this Court any material from whence it can be discerned either that at termination of her employment she did not have unutilized leave days or that if she had, she was duly compensated for the same. The evidence by the Petitioner was therefore unrebutted. It was not enough for the 2nd Respondent to just assert that she was duly paid. By reason of the premises the Petitioner is hereby awarded Ksh.675, 000 as compensation for the earned but unutilised leave days.

Who should bear the Cost of the Suit?

128. The Cost of this suit to be borne by the Respondents herein.

129. In the upshot, judgment is hereby entered for the Petitioner against the 2nd Respondent in the following terms:

a. A declaration that the termination of the Petitioner's employment was both procedurally and substantively unfair.

b. Eight months' gross salary as compensation for unfair dismissal pursuant to the provisions of section 49[1][c] of the *Employment Act*. ..... Ksh.5,600,000.

c. Compensation for earned but unpaid leave days..... Ksh.675,000.

d. General damages for the breach of the Petitioner's right to fair labour practices, ...Kshs. 500,000.

e. Interest on the awarded sums at court rates from the date of this judgement till full payment.

f. Cost of the Suit & Interest

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF NOVEMBER, 2023.

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Kihang'a for Petitioner

Ms. Koech for Saina for Respondent

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of

Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

OCHARO KEBIRA

JUDGE