

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 361 OF 2022

SIMON KUNIA WANYOIKE..... CLAIMANT

-VERSUS-

AGAKHAN UNIVERSITY KENYA..... RESPONDENT

JUDGMENT

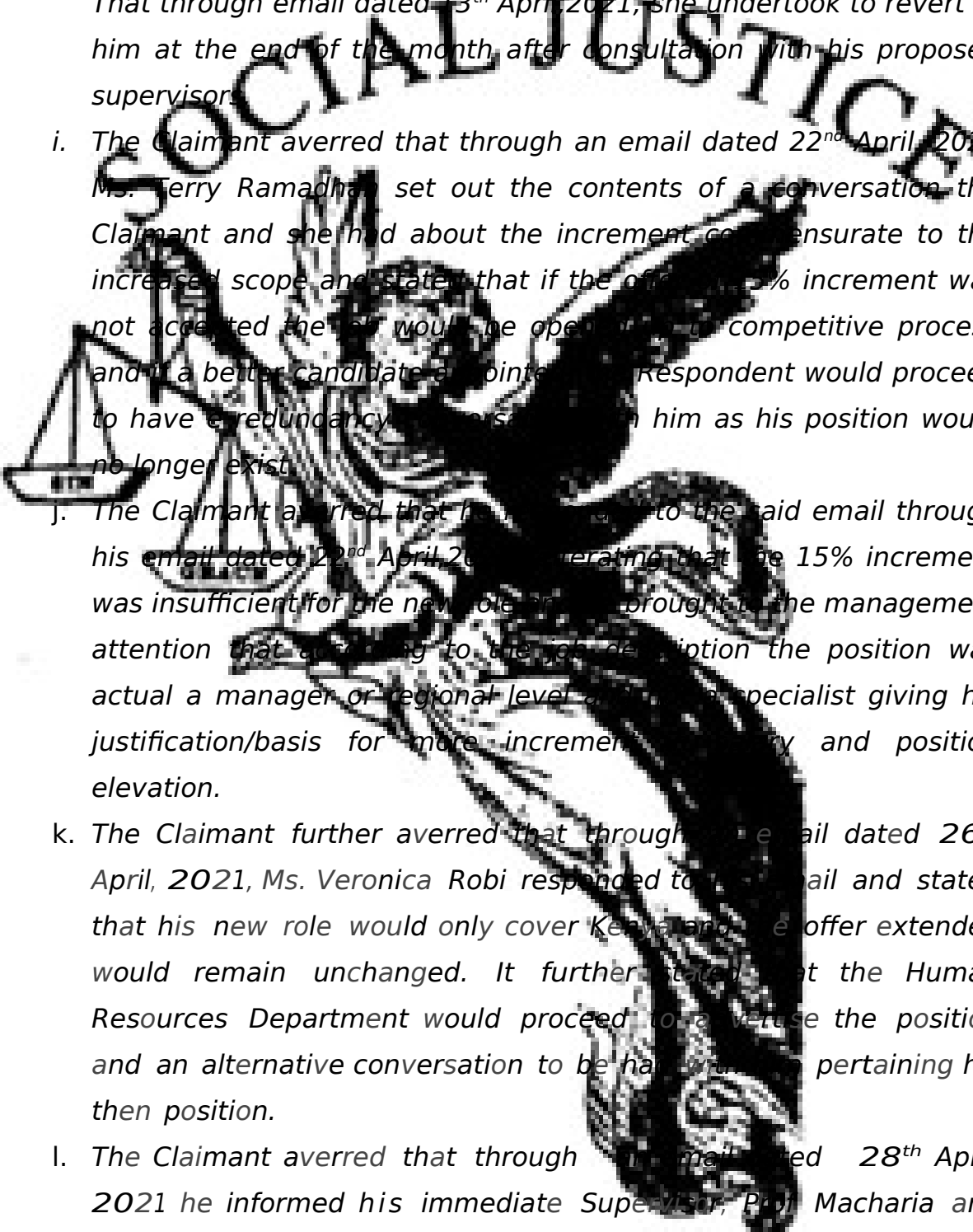
1. The Claimant through a Memorandum of Claim dated 27th May, 2022 pleaded inter alia as follows: -

- a. The Claimant averred that he joined the Respondent on 17th November, 2008 in the position of project Accountant for the Heart and Cancer Centre in the Department of Facilities Management up to March 2012 where he was reported to the Project Manager and Project Director. That in March 2012 he joined the Respondent's Budgeting and Planning section, Finance Department as a Grants Officer whose sole responsibility of grants management pre-award, post award/ implementation and grants closure and reported to the Budgeting and Planning Manager and later to the Finance manager who was promoted to Finance Director.
- b. The Claimant averred that in 2012 his roles were added to budgeting and planning doing annual budget for the Medical College Kenya, School of Nursing and Midwifery, Monthly financial performance and newsletter. That in March 2017 he joined the Research Office to serve researchers in the Position of Team Leader-Grants and Contract and reporting to Associate Dean, Research.
- c. The Claimant averred that through a letter dated 13th February, 2017 he was promoted to Team Leader Grants and Contracts of the Respondent with effect from 1st March, 2017. He was assigned to the

Research Office, Kenya which was headed by Prof William Macharia and had Four staff members: Research Manager, Team Leader Grants and contract (Claimant) and two Administrative Assistants.

- d. The Claimant averred that he accepted the offer on 8th March, 2017 which became a binding contract and the employer was forbidden from so altering the terms of service unilaterally as to compel the employee to resign and further that where the employer unilaterally alters the terms of service the employee is entitled to resign and bring against it an action for unlawful or wrongful termination of employment.
- e. The Claimant averred that through a letter dated 22nd March, 2021 the Respondent redesigned the position to Specialists, Grants and Contracts, Grant Support in the post office of the Respondent with a salary increment of 15% effective 1st April, 2021.
- f. The Claimant averred that together with transfer letter was attached a job description for the new position which outlined the position of Grants, Contracts and Compliance. That upon review of the transfer letter and the job description he realised that the 15% increment was not commensurate with the increase in his work in terms of geographical cover as the Respondent covered the East African Countries and the new Role required him to provide support in the three countries, increased scope of work covering all of the whole grants lifecycle and the increased scope and responsibilities clearly demonstrated the position was at managerial level at regional level but the job grading was done in a biased way to discriminate and oppress him as a jobholder.
- g. The Claimant averred that he raised his concerns through a letter dated 8th and 17th March 2021 and the former Resource Director Ms. Terry Ramadhan, requested a meeting and presented the offer letter for the Claimant to sign as it was.
- h. The Claimant averred that after the meeting he sent an email dated 25th March, 2021 to negotiate for an increment commensurate with

the increased scope. That Ms. Terry Ramadhan acknowledged receipt of the email and undertook to revert after consultations. That through email dated 13th April, 2021, she undertook to revert to him at the end of the month after consultation with his proposed supervisor.

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- i. The Claimant averred that through an email dated 22nd April, 2021 Ms. Terry Ramadhan set out the contents of a conversation the Claimant and she had about the increment commensurate to the increased scope and stated that if the offer of 15% increment was not accepted the offer would be open to a competitive process and if a better candidate appointed, the Respondent would proceed to have a redundancy process with him as his position would no longer exist.
 - j. The Claimant averred that he responded to the said email through his email dated 22nd April 2021, stating that the 15% increment was insufficient for the new role brought to the management attention that according to the job description the position was actual a manager or regional level of a specialist giving his justification/basis for more increment, salary and position elevation.
 - k. The Claimant further averred that through an email dated 26th April, 2021, Ms. Veronica Robi responded to the said email and stated that his new role would only cover Keeyaa and the offer extended would remain unchanged. It further stated that the Human Resources Department would proceed to advertise the position and an alternative conversation to be had with him pertaining his then position.
 - l. The Claimant averred that through an email dated 28th April, 2021 he informed his immediate Supervisor, Prof. Macharia and copied the said email to the Human Resources Director in Charge of Medical College, Mr. Sammy Chepkowny and requested his

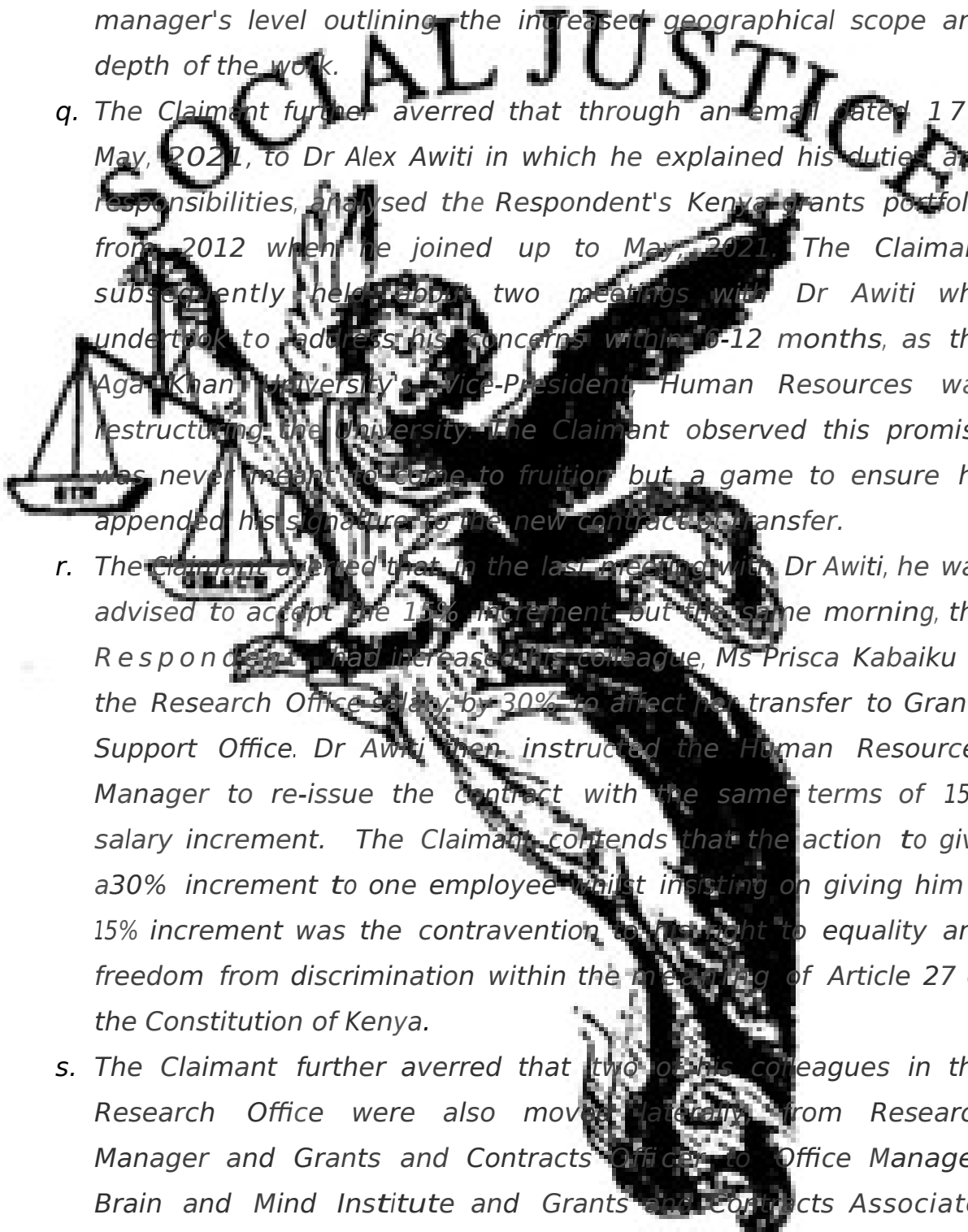
intervention in the issue so that the threats of redundancy or termination would stop.

m. The Claimant further averred that on a Zoom meeting held on 11th May, 2021, in which the Human Resources Director - Ms. Terry Ramadhan, the Director Grants and Awards - Ms. Veronica Rebi and him where Ms. Terry Ramadhan told the Claimant that he had three options i.e. accept the offer as it is, resign or face disciplinary action. The Claimant contended that the communication of these three options amounted to intimidation and harassment contrary to the definition of harassment within the meaning of the Respondent's policy as outlined in clause 3.5.13 of the HR Handbook.

n. The Claimant averred that after that meeting, he reported that harassment to his immediate Supervisor Prof. Macharia through an email dated 11th May, 2021, and informed him that after the meeting, the Claimant was informed to hand over to Prof Macharia by 17th May, 2021 and accept the offer or resign or face disciplinary action. There was no negotiation or discussion on the salary increment. The Claimant immediate Supervisor, Prof Macharia wrote back on 11th May, 2021 and asked him which option he had chosen, instead of offering a shield of protection.

o. The Claimant further averred that through an email dated 13th May, 2021, to Prof Macharia and copied to Mr. Sammy Chepkwony, he outlined the dissatisfactory approach taken by the Human Resources Department and his proposed Supervisor in respect of his proposed transfer and the duress and undue influence he was under to make a decision and threats of termination and redundancy.

p. The Claimant averred that Vice Provost, Dr Alex Awiti invited him for a meeting on 13th May, 2021, wanting to know the reasons he had not accepted the transfer. The Claimant made a



presentation and provided justification for a higher increment in the compensation and requesting the position to be elevated to manager's level outlining the increased geographical scope and depth of the work.

- q. The Claimant further averred that through an email dated 17th May, 2021, to Dr Alex Awiti in which he explained his duties and responsibilities, analysed the Respondent's Kenya grants portfolio from 2012 when he joined up to May, 2021. The Claimant subsequently held about two meetings with Dr Awiti who undertook to address his concerns within 6-12 months, as the Aga Khan University's Vice-President Human Resources was restructuring the University. The Claimant observed this promise was never meant to come to fruition but a game to ensure he appended his signature to the new contract of transfer.*
- r. The Claimant averred that in the last meeting with Dr Awiti, he was advised to accept the 15% increment but the same morning, the Respondent had increased his colleague, Ms Prisca Kabaiku in the Research Office salary by 30% to affect her transfer to Grants Support Office. Dr Awiti then instructed the Human Resources Manager to re-issue the contract with the same terms of 15% salary increment. The Claimant contends that the action to give a 30% increment to one employee whilst insisting on giving him a 15% increment was the contravention to his right to equality and freedom from discrimination within the meaning of Article 27 of the Constitution of Kenya.*
- s. The Claimant further averred that two of his colleagues in the Research Office were also moved laterally from Research Manager and Grants and Contracts Officer to Office Manager, Brain and Mind Institute and Grants and Contracts Associate, Grants Support Office respectively and the two were given salary increments of 65% and 30% respectively. The Claimant further contended that this action of granting other employees higher*

salary increments whilst not granting him similar terms was discriminatory within the meaning of Article 27 of the Constitution and against the Respondent's Policy on Recruitment and Selection, Policy No. HR/RC-01 and Faculty and Staff Handbook of Human Resource Policies and Procedures.

- t. The Claimant averred that through an email dated 19th July, 2021, Dr. Alex Awiti stated that the Respondent would proceed to finalise his transition to the Grants Office and the Human Resources Department would take over the issuance of the contract and there will be a re-organisation of both the budget and rationalise the staffing over the next 12 months.
- u. The Claimant further averred that after the meetings with Dr Awiti, the Human Resources Academic Office, Ms. Vickie Adiedo took over the matter and instead of re-issuing the transfer letter, she decided that there be a review of the job description.
- v. The Claimant averred that through an email dated 22nd July, 2021, he forwarded to the Human Resources Manager Ms. Vickie Adiedo, the job description which was prepared and shared with his proposed Supervisor, Ms. Veronica Robi for evaluation, and offered to meet briefly to discuss the same. However, Ms. Vickie Adiedo was not available but subsequently; a physical meeting set down for 25th August, 2021 where both the Claimant's version and Ms. Veronica Robi's respective job descriptions would be discussed.
- w. The Claimant further averred that following the meeting, it was clarified that the role was regional and therefore implied that the scope was larger than the Claimant previously handled. Through an email dated 25th August, 2021, Ms. Vickie Adiedo forwarded the job description with the necessary amended clauses for the Claimant to further review and provided his comments on the same.
- x. The Claimant averred that after the negotiations, through emails exchanged on 31st August, 2021, between the Claimant and

Vickie Adiedo, the revised job description was agreed upon and was to be sent to the job evaluation team in Karachi and thereafter, for the offer to be sent out and signed.

y. The Claimant further averred that after that meeting, it was concluded that the Human Resources Manager was to increase the Claimant's salary increment to 30% to align with his other colleague from the Research Office but upon involvement of the Global Human Resources Director, Ms. Saima Ali, it was decided that the Claimant's transfer did not merit any increment despite the increased workload and the 15% increment was also removed. The Claimant contended that the refusal to grant a higher increment and eventually removal of his salary increment was contrary to clause 2.2 of the Respondent's Transfer Policy, Policy No. HR PLAD-1039 on lateral transfers.

z. The Claimant averred that whilst the negotiations and discussions pertaining to his proposed transfer continued between March and September 2021, he continued working as an employee of the Research Office.

aa. The Claimant further averred that on 12th October, 2021, through a letter dated 7th October, 2021, he was served with a transfer letter and a job description with increased scope from Ms. Saima Ali transferring him from the Research Office to Grants Support Office (GSO) and withdrawing the 15% increment and whose effective date was 1st November, 2021.

bb. The Claimant further averred that when his 15% salary increment was arbitrarily withdrawn through the letter dated 7th October, 2021 from Ms. Saima Ali, he appealed to the Vice-President Human Resources, Ms. Wasan Mithoranza to intervene and sort the issues he had raised out in an email dated 15th October 2021. Unfortunately, his email was not responded to nor acted upon.

cc. The Claimant averred that through an email dated 29th October, 2021 addressed to the Human Resource through Prof William Macharia, the Claimant's immediate supervisor, and copied to Ms. Vickie Adiedo, Ms. Veronica Robi, Saima Ali and Ms. Wasan Miglioranza, stating that in accordance with the Respondent's Transfer Policy, he declined the offer and stated the reasons for that decline.

dd. The Claimant further averred that he received a phone call from Ms. Dorothy Akayo on 10th November, 2021, requesting for a physical meeting and when they met, she was inquiring as to where the Claimant had been between 1st and 10th November, 2021 and to whom he had been reporting to.

ee. The Claimant averred that through a letter dated 12th November, 2021, he responded to those inquiries and pointing out that he had raised his concerns through an email dated 29th October, 2021, to Prof. Macharia and the same had remain unaddressed and further, that his new offer had withdrawn the 15% increment of salary which was a matter under negotiation. He also pointed out that there must be a commensurate compensation with the increase of scope and particularly, if the Respondent was not considering paying an extra person for the increased workload.

ff. The Claimant further averred that through a letter dated 17th November, 2021, Ms. Lubnah Alam, Director Human Resources Shared Services stated that what was being effected was a lateral move and his remuneration will **not** be changed.

gg. The Claimant averred that in response to that letter, he wrote a letter dated 17th November, 2021, to Ms. Lubnah ALam, Director of Human Resources Shared Services, pointing out that his concerns had not been addressed.

hh. The Claimant further averred that he received a letter dated 22nd November, 2021 from Ms. Saima Ali, Global Director Human

Resources Academic of the Respondent pertaining to the said transfer and told him he was required to report to his new role effective Monday 29th November 2021 and failure to report to the said re-designated role shall be construed as persistent discharged/disobedience of rule on his part warranting disciplinary action.

ii. The Claimant averred that he responded to the same through a letter dated 26th November, 2021 pointing out that his concerns were not being addressed and he was willing to move to the new office once the issues he had raised were addressed.

jj. The Claimant further averred that through a Notice to Show Cause letter dated 3rd December, 2021, Ms. Dorothy Obiayo, Senior Manager Employee Relations to the Claimant, he was alleged to have been persistently insubordinate and that was considered gross misconduct as he refused and/or neglected to move to the Grants Support Office. The Claimant was invited to show cause why severe disciplinary action should not be taken against him and stated that he was required to give a written response by 7th December, 2021.

kk. The Claimant averred that through a letter dated 16th December, 2021, he stated the history of the conflict and his interactions with various staff including the Human Resource Department and his immediate Supervisor and proposed Supervisor and the Vice Provost.

ll. The Claimant further averred that through an email dated 16th December, 2021, he was notified of a disciplinary hearing on 20th December, 2021 advising of the venue, his right to have another staff member for support and the consequences of non-attendance of the same.

mm. The Claimant averred that on 20th December, 2021, he attended the said disciplinary hearing and the composition of the Disciplinary Committee included two of whom were from the Human Resource

Department i.e. Ms. Dorothy Obiayo, Ms. Vickie Adiedo and who had previously heard his complaints and failed to address them. The other members of the Disciplinary Committee were Ms. Veronica Robi (who also had handled the matter instead of sorting them, she referred the same to Human Resources), Ms. Sammy, Ms. Vivian (both Junior HR Officers, who might not be the independent from their HR Superiors when voting), Mr. Henry Ndirangu-Independent Manager and he was accompanied by Dr Ferdinand Okwira Social Scientist and Dr Shahid Sayed-reknown Senior Scientist.

nn. The Claimant further averred that during that hearing, he was not asked on insubordination/gross misconduct.

oo. The Claimant averred that he attempted to apply for his leave in November and December 2021, through the online platform and his request was sent to Prof Macharia, his Immediate Supervisor, but he declined to approve it and referred it to Ms. Obiayo and Ms. Veronica Robi. Ms. Obiayo informed the Claimant that Ms. Robi was his Supervisor for the purposes of approving his leave. This was despite the fact that the transfer had not taken place and according to the online platform, Prof Macharia was his immediate Supervisor. In December, 2021, Mr. Sammy Chepkwony, the HR Director, advised staff to comply with Annual leave Policy stating that no staff or recruit can carry 2021 leave days to 2022 unless an approval from the Departmental Head in writing.

pp. The Claimant further averred that he then applied again for his leave in compliance with the Respondent's policy and the HR directive and the online platform was sent to Prof Macharia and the Claimant sent a reminder but he neither approved his leave nor responded to his email.

qq. The Claimant avers that through an email dated 21st January, 2022 to Ms. Dorothy Obiayo, who chaired the proceedings

of the Disciplinary Committee hearing, he sought a copy of the minutes of the Disciplinary Committee hearing held on 20th December, 2021. Ms Obiayo, instead of supplying the said minutes, responded and asked the Claimant to wait until past 6pm on that day and sent a meeting request for 11 am on Monday 24th January, 2022 and the agenda was the outcome of disciplinary action against the Claimant.

rr. The Claimant further averred that through a letter dated 24th January, 2022, it was communicated that the outcome was that the Claimant was given a stern warning and was required to proceed to report to the Grant Supports Office with immediate effect and failure to which, he would suffer further and harsher disciplinary action. Claimant's 7 days of appeal were not accorded to the him, contrary the Respondent's Policy on Disciplinary action which guarantees a window of 7 days for appeal and hence his right to appeal the decision was not communicated in the warning letter and hence it was denied, violating his rights to appeal. In addition, the warning letter stated that the Claimant was to shift to the new department with immediate effect, implying the appeal was rendered useless and exercise in futility.

ss. The Claimant averred that Ms. Dorothy Obiayo then informed Ms. Veronia Robi to give the Claimant an appointment letter and job description which was the same appointment letter and job description issued on 7th October, 2021 by Ms. Saima Ali and which the Claimant had disputed.

tt. The Claimant further averred that Ms. Veronia Robi was then instructed to write to Vice Provost - Dr Alex Awiti and inform him that the Claimant had refused to sign the offer letter and the job description and further that informed the Claimant that he should only get work from the proposed Supervisor and operate from 7th Floor of the University Center.

uu. The Claimant averred that he then requested Ms. Dorothy Obiayo again for the minutes of the disciplinary proceedings and he was informed that they had not been ratified and once they are approved he would receive a copy. The said minutes of the disciplinary hearing were never given to the Claimant. The Claimant contended that the failure to provide him with the minutes of the Disciplinary Committee was a contravention of his right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair under Article 47 of the Constitution of Kenya, 2010.

vv. The Claimant further averred that through a letter dated 25th January, 2022, to Ms. Lubnan Alam, his advocates informed the Respondent of his decision to resign from his employment with it for constructive discharge.

ww. The Claimant averred that he took a copy of the said letter dated 25th January, 2022 to his immediate Supervisor, Prof Macharia, who received it in person on the same day and on 26th January, 2022, Prof. Macharia advised the researchers and staff that the Claimant would no longer be available to support in grant management with immediate effect. The Claimant contended that the said email was a confirmation that the Claimant was still working in the Research Office and had not been formally transferred to the Grants Support Office. The Respondent's resignation Policy stated that an employee resigning, the resignation letter should be channeled through employee's immediate supervisor, who then submits the resignation letter to Human Resources. The claimant observed the policy to the letter.

xx. The Claimant further averred that the said resignation letter was then taken to Ms. Dorothy Obiayo and received by her assistant, Ms. Stefanie Kuria in her absence and further, the said letter was emailed by the Claimant to Ms. Dorothy Obiayo and Ms. Vickie Adiedo on the same day. The Claimant averred that on

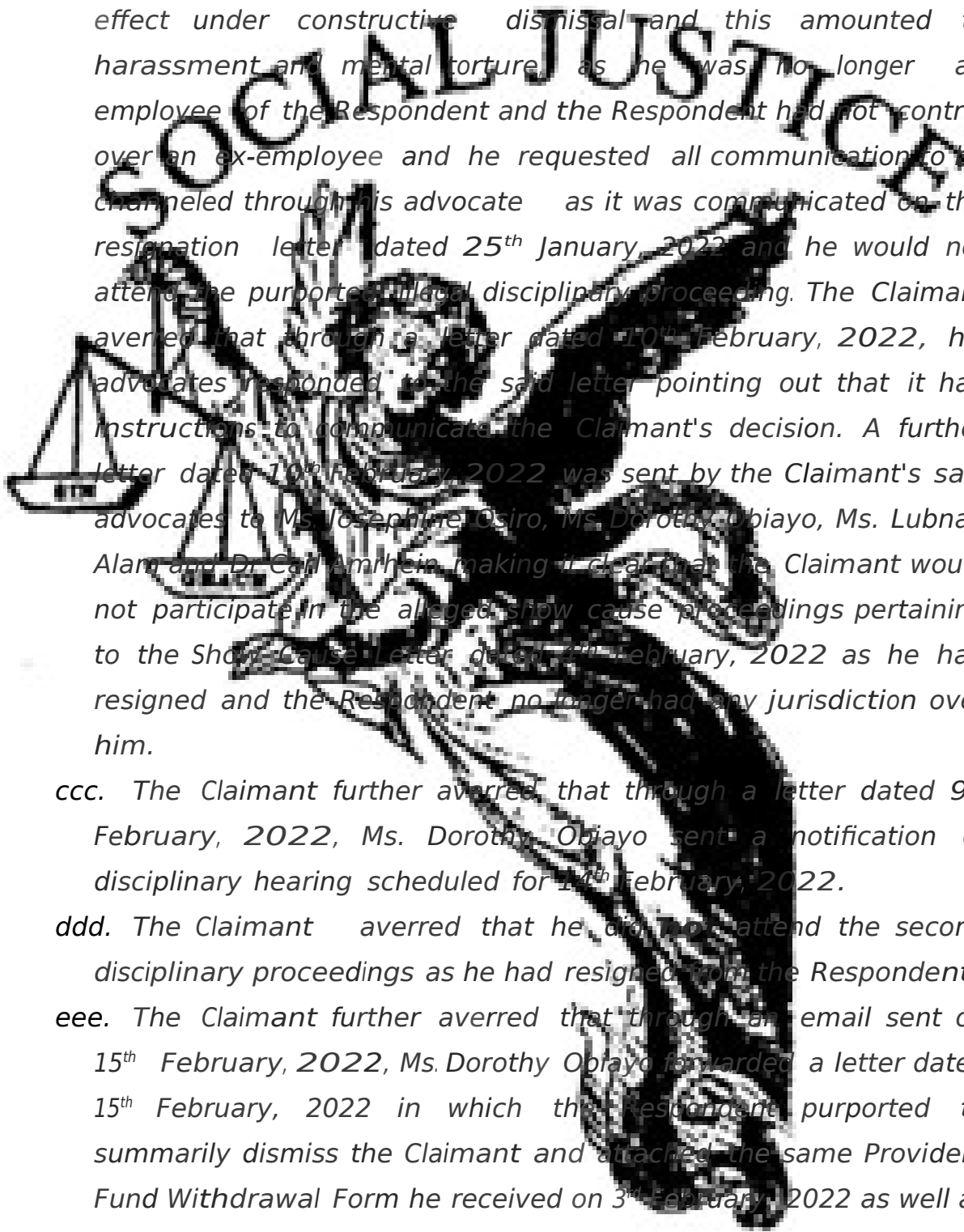
2nd February, 2022, he wrote to Jubilee Insurance wanting to withdraw his accumulated provident fund and he received a withdrawal form which is required for the Respondent's Provident Trustees to sign off.

yy. The Claimant further averred that upon filing the said Jubilee Insurance Provident withdrawal form to the Respondent's Provident Fund Secretary, Ms. Vickie Adiedo and another trustee Ms. Dorothy Abayo on 3rd February, 2022, they refused, declined and/or neglected to sign the said form stating that the Claimant had not resigned and he was required to appeal the Disciplinary Committee decision. The Claimant contended that the letter communicating the decision of the Disciplinary Committee did not have a provision for him to exercise a right to appeal against it which is contrary to a fair administrative action under Article 47 of the Constitution of Kenya 2010.

zz. The Claimant averred that through an email dated 4th February, 2022, Ms. Dorothy Abayo forwarded another Show Cause Letter for alleged unauthorized absence and insubordination which amounted to gross misconduct and the Claimant was supposed to report back to the office on receipt of the letter. The said letter gave the Claimant up to 9th February, 2022 to give a written response to the said Show Cause letter.

aaa. The Claimant further averred that through a letter dated 9th February, 2022, addressed to the Claimant's advocates, the Legal Officer of the Respondent alleged that the Claimant had not resigned as the Respondent had neither terminated his employment nor had they received a resignation letter from the Claimant.

bbb. The Claimant averred that on receipt of the invitation to attend the 2nd disciplinary proceeding sent on 9th February 2022 and the hearing set on 14th February, 2022 on his private email from Ms. Dorothy, he replied her on the 9th February 2022



copying Ms. Lubnah Alam, Dr Alex Awiti, Dr Carl, Ms. Wasan and stating that he resigned on 25th January 2022 with immediate effect under constructive dismissal and this amounted to harassment and mental torture, as he was no longer an employee of the Respondent and the Respondent had no control over an ex-employee and he requested all communication to be channeled through his advocate as it was communicated on the resignation letter dated 25th January, 2022 and he would not attend the purported illegal disciplinary proceeding. The Claimant averred that through a letter dated 10th February, 2022, his advocates responded to the said letter pointing out that it had instructions to communicate the Claimant's decision. A further letter dated 10th February 2022 was sent by the Claimant's said advocates to Ms Josephine Osiro, Ms Dorothy Obiayo, Ms. Lubnah Alam and Dr Carl Amrhein making it clear that the Claimant would not participate in the alleged show cause proceedings pertaining to the Show Cause letter dated 4th February, 2022 as he had resigned and the Respondent no longer had any jurisdiction over him.

ccc. The Claimant further averred that through a letter dated 9th February, 2022, Ms. Dorothy Obiayo sent a notification of disciplinary hearing scheduled for 14th February, 2022.

ddd. The Claimant averred that he did not attend the second disciplinary proceedings as he had resigned from the Respondent.

eee. The Claimant further averred that through an email sent on 15th February, 2022, Ms. Dorothy Obiayo forwarded a letter dated 15th February, 2022 in which the Respondent purported to summarily dismiss the Claimant and attached the same Provident Fund Withdrawal Form he received on 3rd February, 2022 as well as a Certificate of Service.

fff. The Claimant averred that in the said Certificate of Service, it wrongly states that he had been serving the Research Office

between 1st March, 2017 to 21st January, 2022 and thereafter as Specialist, Grants and Contracts from 24th January, 2022 to 15th February, 2022 despite the fact that Prof. Macharia stopped the assignment of work to him on 26th January, 2022 and he resigned officially from the Respondent on 25th January, 2022.

ggg. The Claimant averred that the Respondent advertised for the position of Research Grants Manager on 29th April 2022, to carry-out the roles and responsibilities that the Claimant was doing before his resignation, but elevating the position to the manager level as the Claimant had requested to the Respondent during the negotiations but fell on deaf ears, this is a clear sign of discrimination and oppression that the Respondent perpetrated towards the Claimant.

hhh. The Claimant averred that his contract of employment is, and at all material times was governed by Articles 27,28,29,30, 41 and 47 of the Constitution, the Employment Act and the Respondent's Human Resources Policy and accompanying documentation.

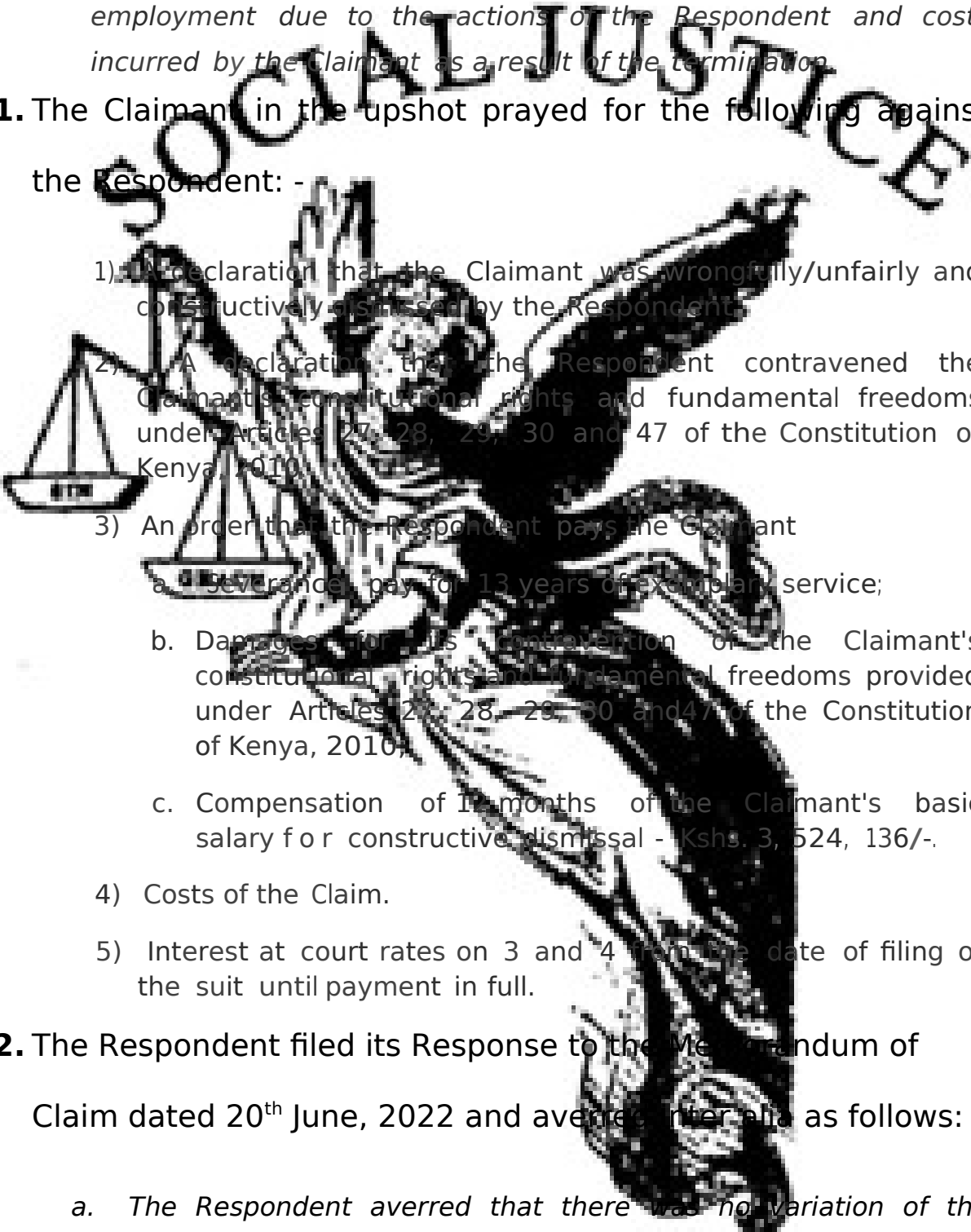
iii. The Claimant contended that the Respondent breached the provisions of the Employment Act and his constitutional rights and fundamental freedoms under Articles 27, 28, 29(d) and (f), 30, 41 and 47. The Claimant also contended that the Respondent has a duty to honour the terms of his contract of employment and as such is liable to pay to him damages payable under common law.

jjj. The Claimant further contended that he was constructively and unfairly dismissed from his contract of employment and the Respondent is, therefore, liable to pay damages to him for wrongful/unfair dismissal.

kkk. The Claimant also contended that the Respondent is liable to pay him damages as compensation for the contravention of his constitutional rights and fundamental freedoms provided under Articles 27, 28, 29, 30, and 47 of the Constitution as outlined

above. He also contended that the Respondent is liable to pay damages for the Claimant's loss of income and suitable employment due to the actions of the Respondent and costs incurred by the Claimant as a result of the termination.

1. The Claimant in the upshot prayed for the following against the Respondent: -

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- 1) A declaration that the Claimant was wrongfully/unfairly and constructively dismissed by the Respondent.
 - 2) A declaration that the Respondent contravened the Claimant's constitutional rights and fundamental freedoms under Articles 27, 28, 29, 30 and 47 of the Constitution of Kenya, 2010.
 - 3) An order that the Respondent pays the Claimant
 - a. Severance pay for 13 years of exemplary service;
 - b. Damages for its contravention of the Claimant's constitutional rights and fundamental freedoms provided under Articles 27, 28, 29, 30 and 47 of the Constitution of Kenya, 2010;
 - c. Compensation of 12 months of the Claimant's basic salary for constructive dismissal - Kshs. 3, 524, 136/-.
 - 4) Costs of the Claim.
 - 5) Interest at court rates on 3 and 4 from the date of filing of the suit until payment in full.

2. The Respondent filed its Response to the Memorandum of Claim dated 20th June, 2022 and averred inter alia as follows:

- a. *The Respondent averred that there was no variation of the Claimant's terms of service either unilaterally or otherwise compelling the employee to resign as alleged. That the Claimant never resigned from employment as alluded to by the Claimant.*

The Respondent carried out a restructure of various roles including that of the Claimant, necessitating a re-designation of his role as further particularized below and as will be further expounded in witness statements. In summary, a decision was made for all roles relating to grants to fall under a newly formed, Grants & Contracts Support department, as opposed to falling different under departments. This was to ensure efficiency and the streamlining of grants. The Claimant's role however remained essentially the same it was simply a lateral move.

b. The Respondent averred that there was no increased scope of work in the proposed new job description and as such the Claimant's allegation of promotion was not supported.

c. The Respondent averred that discussions were held with the Claimant to explain to him the requirements and the needs of the organization. The Claimant was informed that the demand for a higher increment was not used in the organization given that the old and proposed roles were essentially at the same level. He was to remain a Specialist in the new role as he was in his original role. The Claimant refused to listen to his superiors and also refused to move departments in contempt and insubordination of his supervisors.

d. The Respondent explained to the Claimant that there was no expanded role or responsibilities but the Claimant refused to agree with the Supervisor making it difficult to run the affairs of the Department. The position was not at managerial or regional level as alleged by the Claimant or at all. Alleged threats of redundancy and termination were false.

e. The Respondent averred that there were meetings held jointly by the parties in a bid to grant the Claimant an opportunity for consultation and provide clarity on the issues he raised but the Claimant continued frustrating the transition and jeopardized the functions of the department he was re-assigned to. The allegations

of intimidation and harassment are unfounded and false. It is not correct that the Claimant was given options of resigning or threatening to subject him to a disciplinary action taken against him.

f. The Respondent averred there were various follow-up communications between the parties and the Respondent had exhausted negotiation mechanisms at this point and a decision needed to be made to avoid continued paralyzing operations of the Respondent in the department in question. The Claimant refused to cooperate in the midst of the restructuring and was using the opportunity to make unreasonable demands that the Employer could not accommodate or be justified. A decision was thus made and communicated to the Claimant that there were no additional funds and the initial offer of a 15% increment remained as given.

g. The Respondent averred that:

i. The Employer had offered a 15% increment which was rejected by the Claimant who resorted instead to making unreasonable demands and paralyzing the employer's operations. The Claimant was all bent on arm twisting the Employer to yield to his unreasonable demands and when that did not happen, the Claimant then claimed he was being harassed and threatened.

ii. It is not true that there were no negotiations or discussions as alleged by the Claimant. There were several discussions including redrafting and review of the job description which job description was agreed upon by both parties as admitted by the Claimant but the outcome was that there was no justification for the higher salary increment demanded by the Claimant. Needless to say, the Employer had been careful in the course of restructuring to ensure there was no job loss affecting the Claimant or a downgrade of his role but

actually an increase in the course of a lateral move. It is noteworthy that the restructure started just before the COVID-19 pandemic and the Respondent would have easily declared the Claimant position redundant given the economic effects that were caused by the pandemic which affected not only the Respondent but many entities locally and internationally as is judicially noticeable.

iii. The Claimant blatantly refused to cooperate and it reached a point where he was outright disobedient by failing to follow a lawful and proper command issued by the employer as allowed by the law. There was certainly no duress and undue influence as alleged.

iv. The Claimant could not take a hard stand on his demands and did not budge after the intervention of the Vice Provost, Mr. Awang. According to the Claimant, he had already redesigned his position as 'Manager' and nothing would hinder or change his perspective which he had contrary to the Employer's perspective. Anything short of that in the course of negotiations and discussions did not go down well with him and was taken as harassment or intimidation, which could not have been the case.

v. Despite the Vice Provost trying to reason with the Claimant and even requesting him to understand that the institution was facing financial constraints due to its other business in the wake of the COVID-19 pandemic and proposing with the Claimant that he could start by accepting the 15% increment offered and there be further discussions as the portfolio is built and the workload on a regional scope increases, it is evident the Claimant had been a fixated mind and intention as he speculates the same to be a promise that would never come. This clearly shows he was negotiating in bad faith.

vi. The allegations of discrimination in paragraph 23 of the Claim have no basis. The issue of the Claimant's colleague who was initially offered 15% and increased to 30% was based on the fact that the particular colleague was at the lower spectrum of the salary band unlike the Claimant who was in fact over and beyond the higher spectrum of the salary band following job evaluations.

vii. Claims of discrimination against other employees are not justified. The colleague who the Claimant alleges received a 60% increase, this was a wholly different case as the colleague in question subsequently applied for a new and different position that was competitively recruited in a different Institute of the University that was being set up (Brain and Mind Institute). The colleague was subjected to the necessary video interviews and issued with a new contract based on new terms and conditions tied to the position. To the avoidance of doubt, the said staff actually shifted from an open-ended contract term commonly referred to as Permanent and then to a fixed term contract.

viii. There were numerous attempts to resolve the matter which entailed a further review of the job description and re-evaluation of the Claimant's job and the results came out the same that the Claimant was actually being remunerated outside of the pay band for the roles that he was playing. There was further evaluation of the job description by the job evaluation team and it was clear that there was no expanded scope warranting the increase that the Claimant was demanding. The evaluation of the role was thus undertaken twice, which demonstrates that the Respondent went over and above what it would have ordinarily done to consider the issues raised by the Claimant. Both evaluations

revealed that the new role fell at the same level as the original role.

- ix. After the job evaluation, it emerged that there are no regional roles at the Respondent as claimed by the claimant. The Respondent however two campuses in Tanzania and Uganda and occasionally a job description may necessitate carrying out some functions that cut across the aforementioned campuses but this was the minimal and not alter the substratum of the role. This role was to be based in a new office that was being set up (Grants & Contracts Support) with a portfolio of few grants in Kenya and no grants in Tanzania and Uganda at the moment. The insistence by the Claimant that the role was regional was thus unfounded and his demand for a higher salary would
- x. The revised job description was sent to the job evaluation team. This was merely informational and not an agreement as indicated by the Claimant in paragraphs 28 and 29 of his claim. There was no agreement for his increment from 15% to 30% as alleged by the Claimant at all.
- xi. As indicated above, the revised job description was sent to the job evaluation team for a second evaluation and there was no assurance of the 30% increment as alleged by the Claimant.
- xii. Upon the re-evaluation, it was confirmed that the Claimant was already over and above the salary band for the job description hence did not merit an increment. For this reason, a decision was made to withdraw the 15% that had initially been offered and more so because the offer had not yet been accepted by the Claimant and had in fact been rejected.

h. The Respondent averred that the Claimant did not continue working as an employee of the Research office whilst the

negotiations on his transfer continued as alleged. On the contrary, the Claimant refused to report as per the proposed structure, took advantage of the fact that he used to sit in a different site from both his previous and new supervisor and because he knew this would make it difficult to track his physical presence, formed a habit of continuously absenting himself without permission while outright undermining everyone's authority more particularly that of the proposed supervisor.

- i. The Respondent further averred as follows:
 - i. The Claimant was once again offered with a transfer letter with the re-evaluated job description with the 15% withdrawn for reasons that the results of the job evaluation showed that his pay was well above the pay band.
 - ii. The 15% was not actually withdrawn as claimed by the Claimant. The offer had not yet been accepted by the Claimant and further, a job evaluation conducted did not warrant the same.
 - iii. The Claimant confirms in his affidavits that he declined to accept the employer's offer with the increment of 15% and cannot be heard to claim that it was withdrawn.
 - iv. During this time of crisis, the Claimant took advantage of the fact that he used to sit in a different site from both his previous and new supervisor. The Claimant absented himself from work without authority and this prompted his supervisor to write to him asking him to account for his whereabouts.
 - v. Despite two evaluations of the new role having been conducted and the outcome being that there was no justification for a pay increase, the Claimant continued to blatantly frustrate the process and introduced outrageous demands including insisting that additional staff should

undertake what he had wrongly concluded were expanded responsibilities in the new role.

j. The Respondent averred that the Claimant rejected the offer given by the employer and refused to cooperate with the Employer by failing to report to his new work station. He had undermined authority resulting in paralyzing the Employer's operations in the department in question. The Claimant had crafted a job title and determined a salary range for himself and expected the Employer to toe the line as per his demands yet these demands were not met. The Claimant was determined to continue holding the employer ransom until the employer yielded to his unreasonable demands and the employer had to take the necessary steps.

k. The Respondent averred that all the concerns raised by the Claimant were addressed and responses were provided to the Claimant. The employer intended to position and its expectations of the Claimant. The Claimant completely failed to take the lawful instructions to relocate to his new work station. The Claimant was being mischievous and deliberate by refusing and/or failing to follow a lawful command at the same time paralyzing Employer operations.

l. The Claimant's behavior at this stage amounted to insubordination hence the reason for initiating disciplinary proceedings which followed the due process of the law. The Claimant was given an opportunity to be heard and in the first disciplinary hearing was given a stern warning to ensure that he reported to his work station. He failed to honour the warning and continued to take the employer in a state of paralyse the employer's operations which prompted a second disciplinary process.

m. The Respondent averred that the Claimant did not raise any issue concerning the composition of the disciplinary committee of 20th

December 2021, despite having the chance to do so. Raising the complaint now is an afterthought. It is not correct that the Claimant's complaints had not been addressed by Ms Dorothy Abiayo and Vickie Adedo as alleged at paragraph 43 of the Claim. His complaints had been dealt with and a decision taken and communicated to him as noted above, namely that there was no justification for his demands. Despite the prompt handling of his complaints, the Claimant continued with insubordination and failed to take lawful instruction from the employer, thereby paralyzing the employer's operations.

- n. The Respondent averred that the Claimant had refused to move to his new work station thus paralyzing the operations of the Respondent. Further, the Claimant's refusal to change work stations brought confusion because his former supervisor could not approve the Claimant's leave following the work restructure. His former Supervisor could not approve the leave and therefore re-routed the leave request back to the Human Resource department for it to be sent to the new supervisor. It is clear that the Claimant had so much contention with his new supervisor and could not send his leave application to him.
- o. The Respondent averred that there are minutes of the disciplinary hearing and the same will be produced here. The disciplinary hearing was conducted on 20th December 2021, right about the time when most people were taking leave for the Christmas holidays and the disciplinary hearing minutes needed to be completed and signed by the Committee members before circulation. The minutes are available and will be produced herein.
- p. The Respondent averred that the Claimant was advised of the outcome of the disciplinary hearing and was given a stern warning although the Claimant's actions amounted to gross misconduct warranting summary dismissal. The Employer was lenient and decided to give the Claimant another chance and only issued a

warning. It was not true that the Claimant was threatened with a harsher disciplinary action if he failed to comply as alleged. It was not true that the Claimant was denied a right of appeal. The right of appeal exists in the Respondent's Policy on Disciplinary action and nothing stopped him from appealing but he was also duly notified of the right, contrary to the Claimant's assertions.

q. The Respondent averred that there was no employer-employee relationship between the alleged advocate who allegedly resigned on behalf of the Claimant. There can not be constructive dismissal without the resignation of the employee. The fact that the letter of 26th January 2022 was signed by the Claimant's officers did not legitimize the same and give life to a non-existent resignation. The Respondent did not receive any resignation letter from the Claimant and the plea of constructive dismissal is denied.

r. The Respondent averred that Mr. Anshu Goyal is not a trustee of the Provident Fund. The proper trustee could not sign the form because the Claimant had not put forth any reasons for his departure and ultimate withdrawal of his name. The Claimant had indicated in this form that he had resigned whereas no resignation was received from him.

s. The Respondent averred that it issued a notice to show cause in February 2022 following the continued insubordination by the Claimant and unauthorized absence from the office. The Respondent had not received any resignation from the Claimant as at that time and he remained the Respondent's employee.

t. The Respondent averred that it did not infringe the Claimant's rights in any way as alleged or otherwise and is not liable to pay the Claimant any damages as sought by the Claimant. The claimant is to blame for his own predicaments.

u. The Respondent averred that it had justified reasons to summarily dismiss the Claimant and that the due process of the law was

followed. It denied that there was constructive dismissal of the Claimant who at any one time did not resign from employment. The Claimant was summarily dismissed for fair and valid reasons and the due process of the law was followed. The Claimant has not satisfied the legal requirements of constructive dismissal upon which the substratum of the whole claim lies. The entire claim thus discloses no reasonable cause of action against the Respondent and it should fail.

v. The Respondent averred that the Claimant's dues were ready for collection as soon as the Claimant completes the clearance process with the Respondent. The Claimant's employment was terminated fairly following the provisions as set out in the Employment Act, 2007 and the Respondent's internal policies. The Claimant was fundamentally in breach of his employment contract and was found culpable of gross misconduct.

w. The Respondent averred that the termination of the Claimant's employment met the requirements of the law, and particularly sections 41, 43 and 45 of the Employment Act, 2007. That Section 43 of the Employment Act, 2007 requires that the employer proves the reason for the termination. The reasons must be the matters that the employer at the time of termination genuinely believed to exist and which caused the employer to terminate the contract of the employee. The Respondent had valid reasons it genuinely believed to exist and which caused it to terminate the services of the Claimant at the time of termination.

EVIDENCE

3. The Claimant's case was heard on 17th June, 2025 where the claimant testified and adopted his statement and documents filed on 27th May, 2022. He further testified that as per the

promotion letter his job description was a team leader with the new job reviewing his previous job description by removing the post-award role. That the job description was reviewed by the HR director and he accepted by signing.

4. CW1 testified that he was offered a new job which was a re-designation to grant support office with the new title of Specialist Grants and Contract; grant support office and Provost. He was to report to the Provost for Grants and Awards, Provost. That his new salary would be Kshs 321,647/= effective date 1st April, 2021.

5. CW1 testified that he was offered the new job description which he was required to sign but he did not sign. That the Job description was different from the initial one. It added grant management in East Africa and project implementation, monitoring and reporting.

6. CW1 testified that he gave his view of the new role through an email and tried to make the Respondent understand the scope of the Job description. That he emailed the HR Director requesting for a pay rise due to the expanded Job Description. That he also explained why he had not reported and signed the new role.

7. CW1 testified that he also did an email to his immediate boss appealing over re-designation and he brought to his attention the transfer policy. That the Respondent responded to him on his concerns of the transfer that his issues were addressed which was not true and he responded to the letter. That this was the third transfer in 8 months.

8. CW1 testified that he felt his new job addressed his issues of transfer and the new job description never changed from the one issued in March. He refused to sign the contract. That he responded to the notice to show cause over the charges of insubordination.

9. CW1 testified that he was given notice of the disciplinary hearing where the outcome of the disciplinary hearing was that he should report to the new department. Immediately he further testified that he did a demand letter and resignation on account of constructive dismissal. That he got the communication that he would no longer be available to provide grant support with immediate effect. That he was wrongly and unfairly dismissed and he sought compensation for violation of his constitutional rights among others.

10. In cross-examination CW1 confirmed that the initial contract provided for other general terms in accordance with the prevailing hospital policies. That he was interviewed prior to transfer to Grants office. He confirmed that there was no change in salary in lateral transfer unless the job was larger since it was on same grade as per transfer policy. That he received 15% salary increase upon the lateral transfer. He further confirmed that his salary was to be Kshs 321,647/= upon the re-designation to the support office. That he proposed a salary of Kshs 321,647/= because his role was expanded to East Africa. That he was informed via email that his role would only remain in Kenya.

11. CW1 further stated that training and building was part of his role and the tasks were not the same. That he wrote an email to Macharia for his intervention. That there were interactions on the issue between him and the Respondent.

12. CW1 confirmed that he did not do the work to see if his role was expanded. That he never moved to the new department. That he responded to the show cause letter. That he was involved in the discussions leading to the transfer.

13. CW1 confirmed that he was invited to the disciplinary hearing, received outcomes of the hearing and the notice of appeal when he had already signed. That he was issued with a certificate of service.

14. In re-examination CW1 clarified that the email from Veronica his immediate supervisor on re-designation to cover only Kenya was not contained in the Job Description. That evaluation was done on extra work workload would need extra staff. He clarified that a letter stating the terms of contract would remain unchanged and did not contain the 15% increment. That he did not move to the new department as he did not sign any contract requiring him to move. That he did not sign because the scope of work was not defined.

15. CW1 clarified that when he got the email from Veronica negotiations were ongoing and he had not signed the November contract for he felt the position he was moving to was expanded. That by the time he was given a summary dismissal letter he had already left the Respondent after resigning on 25th January, 2022.

16. The Respondent's case on the other hand was heard on 23rd September, 2025 and Vicky Adiedo (RW1) testified as the

Respondent HRM. She adopted her witness statement sworn on 25th July, 2023 and the Respondent's bundle of documents filed as her evidence in chief. She stated that the contracts provided for general terms to be in accordance with Respondent's policy and an employee was expected to abide by them. That on lateral transfer there was no increase in compensation unless the job was higher and an employee was to remain in the same grade as per the policy clause 2.2.2.

17. RW1 testified that the lateral transfer was to be done by mutual agreement but the Respondent never had the discretion to transfer. The letter of transfer from Planning & Budget to AKU Finance Department was a lateral transfer with no change in compensation.

18. RW1 testified that the re-designation to support office had scope outside Kenya but there was no reference in the Job description. That there was summary discussions between the Claimant and the Respondent about the clarifications of the transfer which the Claimant declined the offer.

19. RW1 testified that from the exchange of emails between her and the Claimant, the Claimant said that he was okay with the

job description. That the re-designation letter did not have change in salary. That the Respondent responded to concerns raised by the Claimant on the transfer and that the Respondent re-emphasized the transfer and attached the job description.

20. RW1 confirmed that there were email exchanges between the Claimant who had had not moved to the new position 8 months later hence the Respondent initiated the disciplinary action.

21. In cross-examination RW1 stated that he joined the Respondent in 2012 and the Claimant joined before her around 2008. That she was transferred to AKU as HRM in 2017. RW1 confirmed that the job titles for her Grants and Contracts was different from Grants Contracts and Compliance Specialist. That the job purpose was also different as well as difference in skills and knowledge. That there was no significant difference and that a Master's degree was a requirement for the job.

22. RW1 confirmed that on salary review there was no response because they had protracted conversation with the Claimant and the Respondent re-evaluated the Job description. That the

Job description was not amended for it was fine. She further stated that the transfer was lateral as per policy and the Claimant was not coerced in to signing any letter. That the email from Veronica was an opinion shared by a supervisor not a coercion. That the Claimant's allegation of coercion could not be acted upon unless a formal communication was made by the claimant.

23. RW1 confirmed that the Claimant went through disciplinary hearing where she sat as a member of HR and that she was not a member of the committee. She further stated that there was a process of constituting the committee which was with the Director. That she was not aware the Claimant was furnished with minutes of the disciplinary hearing. That the Respondent had harassment policy document and the Claimant never formally reported any harassment to the HR. That there was an email from the Claimant reporting claims of harassment.

24. In re-examination RW1 clarified that the Claimant was not an HR expert to justify the salary increase and that the job purpose, project implementation and job description were similar. The same offered the minimum experience with

anything above being okay. She clarified that the re-designation offered a salary increment which the Claimant rejected. That the Respondent portrayed good will to the Claimant to resolve the matter amicably but the Claimant was not happy that the Respondent had shown the good will.

25. RW1 confirmed that she sat in the disciplinary committee hearing as a witness in her role as the Chair. The Committee resolved that the Claimant be warned of poor coordination and he was informed of his right of appeal 14 days. That the Claimant did not appeal.

26. The Second Respondent's witness (RW20) was Dorothy Obiayo the Manager HR of the Respondent. She adopted her witness statement of 25th July, 2023 as evidence in chief and further stated that the effective date of resignation to be mutually agreed was not later than November 2021. That the Claimant raised issues with over expansion of role and salary increment. That the Respondent responded stating that the re-designation was a lateral move and it did not attract salary increment.

27. RW2 testified that the Claimant was given up to November to report to the new position and he responded that there was

no binding resolution of his case which was why he did not transition. That the Claimant did not report despite the fact that the Job description had been attached to the re-designation letter.

28. RW2 further testified that the show cause letter was on persistent insubordination and that by December the Claimant had not reported to the new station. That the Claimant responded on 6/12/2022 which was her email inviting him for disciplinary hearing. That the notice to show cause was on unauthorized absence and insubordination. That after the demand letter confirming resignation they proceeded with disciplinary hearing to void the Claimant's contract.

29. In cross-examination RW2 confirmed that the Claimant's letter to her stated that he had no issue with the transfer but complained on increase of role. That the letter was addressed to her and she sat with him and reviewed the transfer letter and the Job description.

30. RW2 confirmed that they responded to concerns raised by the Claimant but he refused the salary increment. That the disciplinary action was triggered by the Claimant's refusal to

take up the new position. She further stated that she was not aware of the Claimant's resignation by the time she wrote the email.

31. In re-examination RW2 clarified that the letter dated 25/1/2022 was not addressed to HR. That under clause 4.0 transfers could be done at the discretion of the Respondent in certain cases and there need not be mutual agreement. That the Claimant did not follow the resignation procedure as per the Handbook on resignation.

32. The Claimant's Advocates, Kariuki Kuria & Company Advocates filed written submissions dated 10 October, 2025 and submitted in the main that the Claimant's case in sum was that he was employed by the Respondent under a valid contract of service whose terms were unilaterally and fundamentally altered during a restructuring exercise, resulting in an expanded workload, downgraded designation, and discriminatory treatment without corresponding adjustment of remuneration or consent.

33. Counsel submitted that the Claimant diligently and faithfully discharged his duties as an employee of the Respondent, consistently meeting and exceeding performance expectations within the scope of his assigned responsibilities. That the Constitution of Kenya 2010 came to transform the lives of citizens and their society. That the Claimant wishes for the transformative promise to be realized in his claim while relying on the supreme court case **Speaker of the Senate vs the Speaker of the National Assembly** on the said transformative promise which affirming his declarations and orders for compensation for curtailment of his constitutional rights.

34. Counsel submitted that the court while interpreting Article 41 of the Constitution has to bear in mind the relevant jurisprudence touching the contract of employment in nations like the Republic of Ireland which has discussed the constitutional protection of the contract of employment and held that the right to fair labour practices and presentable working conditions include and implied right to basic fairness of procedures like evaluation where it obtains and implied right to a good name of the employee. Counsel relied on

Redmond on Dismissal law, 3rd Edition. That the Claimant was seeking compensation for contravention of Article 47 of the Constitution on fair administrative action.

35. Counsel submitted that upon a holistic consideration of the facts, the statutory framework, and the guiding jurisprudence, the Claimant's circumstances amount to constructive dismissal in both fact and law. The Respondent's unilateral alteration of the Claimant's designation, withdrawal of the agreed salary increment, and institution of procedurally flawed disciplinary proceedings constituted a fundamental breach of the employment contract contrary to sections 10(5) and 13 of the Employment Act, 2002.

36. Counsel submitted that the Respondent's actions eroded the mutual trust and confidence essential to the employment relationship and violated the Claimant's rights to equality, dignity, fair labour practices and fair administrative action as guaranteed under Article 27, 28 and 47 of the Constitution.

37. On the law counsel submitted that the Claimant's case rested on three interrelated pillars that is the employment contract, the constitutional guarantees under the Bill of rights

and the legal framework governing constructive dismissal remedies for breach. That the Respondent's conduct of unilateral alteration of contractual terms, denial of fair treatment and creation of an intolerable work environment amounted to constructive dismissal. That the Claimant invoked the protection of his fundamental rights to equality and fair labour practices guaranteed under Articles 27 and 41 of the Constitution.

38. Counsel submitted that from the Respondent's conduct constituted a fundamental breach of employment relationship. That despite the issuance of a letter of offer and accompanying job Description in March 2020 and subsequent revisions in October and November 2020, the Claimant's formal justification for salary review and position upgrade dated 22nd April 2021 submitted in accordance with the Respondent's own Human Resource Policy Manual, was never addressed or acted upon to his satisfaction. Instead, the Respondent withdrew the previously proposed 15% salary increment, re-designated the Claimant to a lower grade position without consultation and subjected him to a procedurally flawed disciplinary process. That those

cumulative actions demonstrated disregard for contractual and procedural fairness, eroded mutual trust and confidence and rendered the Claimant's continued employment intolerable thereby meeting the threshold of constructive dismissal.

39. Counsel relied on the case of **Coca-Cola (Kenya) Ltd v Maria Kagai Ligaga (2013) eKLR** to submit that the Respondent's conduct amounted to immediate breach of the employment contract, satisfying the contractual test for constructive dismissal. The Respondent's actions were an unreasonable and inconsistent with fair labour practice that the Claimant could not reasonably be expected to continue in employment.

40. Counsel relied on Section 10 (5) of the Employment Act to submit that any change in terms of employment must be consulted upon and consented to by the employee, and the employer was required to notify the employee of such changes in writing. Counsel further relied on Section 13 of the Employment Act and among other cases, the case of **Muchiri v Beiersdorf East Africa Limited (Cause 096 of 2022) [2025] KEELRC 502 (KLR)** to submit that any variation or alteration of an employment contract shall have no legal

effect unless it is mutually agreed upon. Any unilateral alteration of an employee's terms of service constitutes to a repudiation of the employment contract. Where such repudiation renders continued employment untenable, the resulting termination is deemed to amount to constructive dismissal under the law.

41. Counsel secondly relied on the case of *Bank of Credit and Commerce International (S.A.) v. Ali (Compulsory Liquidation) Munawar Ali, Sultana Rumi and Others (2001) UKHL*

to submit that when disputes arise involving the interpretation of contracts, the court's function is to ascertain the intention of the parties as it can be gathered from the language which the parties have used.

42. Counsel submitted that the Claimant's claim is based on a contravention of fundamental rights as are Articles 27, 28, 29(d), 30, 41 and 47 of the constitution. Counsel relied on the case of *Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019) [2021] KESU 12 (PLR)* to submit that an employee is entitled to, claim damages for breach of contract and for the contravention of fundamental rights.

43. Counsel relied on Article 10 of the constitution and the case of **Okiya Omtata Okoiti v Commissioner General, KRA & Others, Petition 532 of 2017** to submit that the Respondent's response stems from a blatant and arrogant refusal to uphold the national values which obligate it to comply with the constitution and to observe fundamental principles such as adherence to the rule of law and respect for individual rights.

44. Counsel relied on among other cases, the case of **Rose Wangui Mumbo and 2 Others v Limuru Country Club and 17 others [2014] 1 KLR** to submit that the Bill of rights applies to both public and private institutions and that the Respondent in addition to committing breaches of contract contravened the Claimant's rights under the Bill of Rights, and therefore the Claimant was entitled to constitutional remedies.

45. Counsel submitted that the unilateral termination of the Claimant's contract contravened his rights protected by article 41 of the Constitution on right to fair labour practices and right to fair working conditions among others under the said article while relying on the case of **Olga Anyango**

Okello v Registered Trustees of the Sisters of Mercy(Kenya) t/a the Mater Hospital(2021) eKLR. That article 24 prohibited limitation of any right under the Bill of rights unless by law or where the limitation is reasonable and justifiable.

46. Counsel relied on the case of **Menginyo v Jim Murgani v Kenya Revenue Authority HC No. 1139 of 2002** to submit that failure to secure a job or loss of one has a direct relationship with a person's dignity and place in the society. That in view of the fact that the Respondent contravened these fundamental rights the Claimant was entitled, on the authority of the Supreme Court decision of Kshs.10,000,000 for contravention of those rights.

47. Counsel submitted that although the Claimant did not sign the proposed letters of offer, the Respondent's subsequent withdrawal of the initially proposed 15% salary increment contained in the first letter of offer violated his right to equality and freedom from discrimination under article 27 of the constitution and was not done in good faith by the Respondent. Notably, the Respondent retained the same job summary while rescinding the increment and at the

same time granted higher salary adjustments of 30% and 65% to colleagues with lighter workloads.

48. Counsel relied on the case of **Reuben Njuguna Gachukia & another v Inspector General of the National Police Service & 4 others [2019] eKLR** to submit that the Respondent's actions of disregarding the Claimant's complaints and excluding his department from the review of terms and conditions of employment was selective and prejudicial treatment which amounted to direct discrimination contrary to article 27(4) and (5) of the Constitution.

49. Counsel submitted that the Respondent gravely infringed upon the Claimant's dignity by failing to honour the terms of his employment contract and subjecting him to persistent harassment, intimidation and unfair treatment contrary to article 28 of the Constitution. That those actions caused the Claimant profound psychological torture, that the prolonged humiliation and mental anguish inflicted upon the Claimant violated his right to human dignity which extended beyond protection from physical harm to safeguarding the emotional and psychological wellbeing of every person. Counsel relied

on the case of **MWK v Another V Attorney General & 3 Others (2017) eKLR** on article 28 of the Constitution.

50. Counsel submitted that the Respondent's conduct further violated the Claimant's right to freedom and security of the person under article 29 of the Constitution. Through persistent intimidation, coercion and harassment, including repeated threats of disciplinary action, denial of leave and unreasonable work demands without commensurate compensation, the Respondent subjected the Claimant to severe psychological distress and mental anguish.

51. Counsel submitted that the Respondent's conduct equally offended the constitutional guarantee under article 30, which protected every person from being held in slavery or servitude.

52. Counsel submitted that the right to fair labor practices was equally disregarded. The Respondent unilaterally altered the Claimant's terms of service, subjected him to intimidation and harassment and conducted a biased disciplinary hearing presided over by his complainant in contravention of article 47. It further denied him access to the disciplinary minutes,

withheld his provident fund and failed to accord him the right of appeal.

53. Counsel submitted that procedural fairness and administrative justice were also absent. The Respondent disregarded its own Human Resource Manual and constituted a disciplinary committee composed of persons directly involved in the dispute. Such actions were arbitrary, unreasonable, and unlawful direct violation of the constitutional requirement of fair administrative action as contained in article 47 of the constitution.

54. Counsel submitted that the cumulative effect of the Respondent's actions constituted a breach of his rights to equality, dignity, security of the person, fair labour practices and fair administrative action entitling him to appropriate declaratory reliefs and compensatory damages.

RESPONDENT'S SUBMISSIONS

55. The Respondent's Advocates Mnyadzi Mubvumba & Kashindi Advocates filed its submissions dated 19th November, 2025 and on the issue of whether the Claimant was a constructively dismissed counsel submitted on the Respondent's managerial prerogative to transfer the Claimant and that the transfer was

issued as the Respondent's prerogative as employer and as allowed by the terms of the Claimant's employment accepted by him and in the transfer policy. Counsel relied on among another the case of **Raphael Kihara Ruthuku v Kenya Revenue Authority (2019) eKLR** on this assertion of employer's prerogative to transfer employee.

56. On the extensive consultation with the Claimant, counsel submitted that the Respondent in compliance with section 10(5) of the Employment Act and pursuant to the transfer policy issued the transfer letter which offered the Claimant 15% increase in salary and he was requested to countersign to signal his acceptance. That what followed was several months of the Claimant rejecting the salary increase and persistently refusing to take up the new post as directed by the Respondent.

57. Counsel submitted that the legal requirement is consultation not necessarily consent as contemplated by section 10(5) of the act as read together with section 10(2) (h). Counsel relied on among another case the case of **Wachanga v Revere Technologies Limited (2024) KEELRC 2135(KLR)** on this assertion.

58. Counsel further submitted that both the Employment Act and the Respondent's transfer policy recognized the need for consultations before variation in terms of employment but do not require consent of the Claimant. That this was because they both recognize the Respondent's prerogative as employer to organize its operations in accordance with its unique needs. That clause 4.10 of the Respondent's transfer policy which allowed for transfer with consultation reserved the discretion to the Respondent.

59. Counsel relied on the case of **Republic v Public Procurement Regulatory Authority & Another: (Exparte) (2024) KEELRC 13494** that the employers must be allowed to adapt to ever evolving business needs by arranging employees (through transfer) in a manner consistent with prevailing needs. That this is better than dismissal due to restructuring. That the Claimant's assertions that he needed to consent to the changes in his satisfaction are not supported by law. That the cases quoted by the Claimant in his submissions are not applicable because variation of terms of employment was unilateral by the employer without any consultations.

60. Counsel further submitted that in this case there were extensive consultations initiated by the Respondent with the Claimant regarding the lateral transfer in accordance with section 10(1) of the Act and as per the holding by Justice Nzioki wa Makau in **Ondieki v Nyamosongo Cooperative Society Ltd (Appeal E002 of 2022) (2025) KEELRC 3152(KLR)** that an employers' prerogative to transfer an employee does not have to be subject to consent by the employee.

61. Counsel further submitted that there was no material change in job description of the Claimant's new assignment as Specialist, Grants and Contracts, Support Office as designated in the transfer letter as against the old job description in the role of Team leader Grants and Contracts. That the Claimant argued that the new job description provided an expanded role including work outside Kenya and relied on this as the basis for his persistence that he required an increase of salary more than the 15% offered by the Respondent.

62. Counsel submitted that the Respondent's Transfer Policy provided that a lateral transfer could be undertaken without

an increase in salary and such an increase was therefore not mandatory as provided for under clause 2.2.2 of the Transfer Policy. That there was no material change between the two job descriptions. The new one incorporated the old role by simply expanding it while the old role was generalized. That in any event, the Claimant was offered a 15% salary increase set out in the transfer letter which the Claimant rejected.

63. Counsel further submitted that during cross-examination the Claimant confirmed that he never carried out the new role to ascertain if it was expanded from his old role or as confirmed by his supervisor that his role would be restricted to Kenya.

64. Counsel submitted that the allegations that the Claimant's submissions were untrue because he had produced any evidence in support of the two other employees receiving salary increments of 30% to 65% as alleged, no evidence that his workload was more than the employees. That the employees the Claimant referred to were competitively recruited by a different entity whose contract terms were negotiated. That salaries of the Respondent's employees were based on salary bands and any adjustment was to take in to

account those bands. That the 15% salary increase was withdrawn after an independent review of the new role concluded that the Claimant was already on the higher end for specialist within the Respondent. The Claimant in any event rejected the increase in salary hence not binding.

65. Counsel submitted that the Claimant lodged a complaint with the HR Department regarding the re-designation which was duly considered and further discussions held with the Claimant. That by a letter dated 17th November, 2021 the Respondent HR responded to the Claimant's complaint and upheld the decision to transfer the Claimant. The Claimant despite the accommodation by the Respondent refused to adhere with the directives to report to the new position.

66. Counsel submitted that the Claimant's designated line manager wrote to the Claimant on 30th November, 2021 requiring him to report to the new position since the sector was understaffed and the Claimant responded indicating the reasons for his refusal to comply with the directives had been given. Counsel relied on the case of **Nugi Kanga v Access Kenya Group Limited (2022) eKLR** where the court

considered the refusal of employee to sign performance improvement plan form to amount to insubordination.

67. Counsel submitted that due to the acts of the Claimant which amounted to insubordination the Claimant was taken over the first disciplinary process where he was issued with a show cause letter dated 3rd December, 2021. He responded on 6th December, 2021. Finding his response unsatisfactory the Respondent invited the Claimant vide email of 16th December, 2021 to a disciplinary hearing scheduled for 20th December, 2021.

68. Counsel submitted that the Claimant attended the hearing with his chosen representative. At the hearing he confirmed that he had indeed been involved in the discussions relating to the transfer letter and the resignation letter. That the conduct of the Claimant as that of an employee was clearly insubordination and any reasonable employer would have taken action to dismiss the Claimant in accordance with section 43 and 44(1) (e) where insubordination is ground for summary dismissal. Counsel relied on the case of **Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2**

Others (2019) KECA 300(KLR) on reasonableness test of an employer.

69. Counsel submitted that despite the Respondent having all the reasons to dismiss the Claimant on his persistent insubordination which was a valid and reasonable ground it took a decision to issue a final warning to the Claimant by the letter dated 24th January 2022 calling on him against further insubordination and requiring him to report to the redesignated role.

70. Counsel submitted that the Claimant did not lodge an appeal against the warning or report on his new role. Instead by a letter dated 25th January, 2022 from the Claimant's advocates to the Respondent's provost the Claimant's lawyers purported that the Claimant had resigned with immediate effect on account of alleged constructive dismissal. That it was not clear why the communication was issued to provost despite the Claimant being in constant communication with HR department as required by the Respondent's HR policy.

71. Counsel submitted that the Respondent did not receive any resignation letter from the Claimant. That employment relationship is a relationship *in personam* and cannot be

assigned to third parties or representatives as per as formation and termination is concerned. That the letter from the Claimant's lawyers was therefore not a valid resignation. That the email from Prof Macharia as argued by the Claimant was not an acknowledgement of the resignation as he was not in the HR department. That his email was to the effect that the Claimant would not be available to support with grants.

72. Counsel submitted that the Claimant sent the letter from his advocates on 9th February, 2022 in response to the invite to the disciplinary hearing. Counsel relied on the case of **Chege v Timsales Limited (Civil Appeal 29 of 2020) 92025) KECA 1660(KLR)** that resignation by an employee with immediate effect intended to avoid a disciplinary process is not a valid resignation.

73. Counsel submitted that the Claimant was taken through a second disciplinary process by being issued with a show cause letter on 4th February, 2022 for the continued proskonding of duties and continued insubordination. That the Claimant's advocates responded to the show cause letter by the letter dated 10th February, 2022 indicating that the Claimant stands by his purported resignation letter sent by the advocates.

74. Counsel submitted that the Claimant was invited for disciplinary hearing on 14th February 2022. That the Claimant did not attend the disciplinary hearing as scheduled and the Respondent took a decision to dismiss the Claimant for insubordination and absconding of duty. That the conduct of the Claimant consisted of serious and persistent insubordination and absconding of duty which are both valid grounds for dismissal from employment under section 44(4) of the Employment Act and with the aid of reasonableness test set out by the above case of **Kenya Revenue Authority vs Reuwel (supra)**.

75. On the issue of whether there was constructive dismissal, Counsel submitted that there can be no constructive dismissal without a valid resignation. That the Claimant's employment ended with a valid dismissal which has not been challenged in the proceedings and not on constructive dismissal. That if the court upholds the resignation the claim shall fail because the Claimant did not discharge the burden of proof in constructive dismissal that it is the conduct of the Respondent which led to the resignation while relying on the case of **Coca Cola East & Central Africa Limited case.**

76. Counsel relied on the case of **Stella Muraguri vs Edward Kamau Muriu & 4 Others (2022) eKLR** that an employee cannot claim constructive dismissal simply because they are faced with a situation that they do not agree with. That the Claimant refused to comply with the Respondent's directives and after the final warning letter anticipated that action may be taken against him, he therefore absconded from duty and purported to resign through his lawyers. That this action was taken to avoid his contractual obligations under the contract and rules of employment hence the Claimant was estopped from claiming constructive dismissal.

77. On the issue of whether the Claimant's fundamental rights were violated as alleged counsel submitted that there was no contravention of Constitutional rights. That the Respondent was accommodating the Claimant at every turn who turned to be unreasonable and high-handed insisting on dictating the terms of transfer which could not stand in employment relationship. That the exercise of Respondent's managerial prerogative could not be said to be a violation of Claimant's constitutional rights while relying on the case of **Karanu v**

Director of Public Prosecutions & Another; Mutonga & Another (Interested Parties) (2023) KEHC 23055(KLR).

78. Counsel submitted that the Respondent observed Article 41 of Constitution by ensuring that they were long and protracted discussions on the transfer. That apart from just alleging the violations the Claimant did not provide evidence in proof of the said violations which leaning on the case of **Willian Ochiambo Mutunga & 4 Others V Attorney General & 4 Others: Musisi for Human Rights & 2 Others (Interested Parties) (2020) eKLR**. Counsel also relied to this court's decision in the case of **Ndinda V Ethics and Anti-Corruption Commission Application E209 of 2021(2025) KLR** on the court not looking at an ordinary termination of employment from a constitutional lens. That the breach of Constitutional rights needs to be proven.

79. On the issue of whether the Claimant was entitled to reliefs sought counsel submitted that the Claimant was not entitled to the reliefs sought. That the Claimant failed to prove his claim and the same should be dismissed with costs to the Respondent.

DETERMINATION

80. The Court having analysed the pleadings, evidence and submissions by counsel, has become of the view that what requires to be decided in this matter is whether the respondent had justifiable reasons to terminate the claimant's service and on the other hand whether the respondent created an intolerable working conditions that left the claimant with no choice but to resign hence constituting constructive dismissal. If the Court agrees with the claimant that he was constructively dismissed, then the issue would be what heads of compensation are allowable to him.

81. However, there is the issue whether terminating the claimants service, the respondent violated his constitutional rights. This issue has been delved into in several cases. In the case of **Anarita Karimi Njeri v AG** [1971] 1 LR 154 the **Court stated as follows:**

"...we would, however, again stress that if a person is seeking redress from the High Court on a matter which involves reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed".

This was also the position in **Kamlesh Pattni v The AG [2001] KLR 264** and **Mumo Matem -vs- Trusted Society of Human Right & 5 others [2013] eKLR**.

82. In this particular case, the claimant was transferred to a different department which he considered different from his job description and entailed more responsibilities. He therefore considered it an elevated position yet the respondent considered it as a lateral transfer and no additional compensation in terms of salary was required. The claimant after several exchanges with the respondent did not take up the transfer and instead attempted to resign which was not accepted by the respondent. As a result, the respondent commenced disciplinary proceedings against the claimant on account of insubordination and absconding duties. At the conclusion of the disciplinary hearing, the respondent took the decision to terminate the claimant's service. He did not appeal the termination. It is noteworthy that the claimant participated in the disciplinary process including response to the show cause letter.

83. From the foregoing it can be reasonably concluded that nothing extraordinary happened to the claimant outside the

contemplation of his contractual relationship with the respondent encapsulated in his employment contract and employment law generally that would justify invoking provisions in the constitution regarding violation of constitutional rights. The claimant has therefore not satisfied the **Anzira Karimi** test of setting out a reasonable degree of precision that of which he complains, the provisions of the constitution he alleges to have been infringed, and the manner in which they are alleged to have been infringed by the respondent.

84. Further, the Supreme Court in the case of **Communication Commission of Zimbabwe & 5 Others v Royal Media Services Ltd & 5 others** at paragraph 256 that *the principle of avoidance meant that the Court will not determine a constitutional issue when a matter may properly be decided on another basis.* Additionally, in the Zimbabwean case of **Sports and Recreation Commission v Sagittarius Wrestling Club and Another** was stated that:

“...Courts will not normally consider as a constitutional question unless the existence of a remedy depends upon it, if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights..”

85. From the foregoing, the Court is not satisfied that the claimant has demonstrated any violation of his constitutional rights to warrant the elevation of what on the face of it is a simple employment dispute to a constitutional question. The complaints raised if successful, are adequately catered for by his employment contract and the Employment Act.

86. On the question whether the claimant was unfairly terminated, the Court has considered the pleadings, evidence and submission by both parties and noted that the claimant refused to take up the transfer despite several requests by the respondent claiming that the transfer was a promotion as it entailed additional responsibilities for which the respondent refused to pay him additional salary as demanded by him. The respondent however maintained that the transfer was lateral and was not a promotion and in any event, had offered the claimant a salary increment of 15% which he rejected and never took up the transfer.

87. Counsel for the respondent is right in submitting that the claimant did not have the right to dictate to the respondent managerial decisions. In any event the claimant never took up

the assignment in order to see if it entailed additional responsibilities as alleged but denied by the respondent. He instead chose to resign which the respondent considered was ineffective since it was done through a third party and in contemplation of disciplinary proceedings against him. The Court is therefore not persuaded that on a preponderance of evidence there was an fair termination of the claimant's service and that the termination was carried on valid grounds of insubordination and absconding duty. Further, the court is persuaded from the evidence that the termination was carried out through a fair procedure.

88. In conclusion the court finds the claimant without merit and the same is hereby dismissed with costs.

89. It is so ordered.

Dated at Nairobi this 30th day of January, 2026

Delivered virtually this 30th day of January 2026

Abuodha Nelson Jorum

Presiding Judge-Appeals Division