

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAIROBI
CAUSE NUMBER 169 OF 2019**

BETWEEN

KENYA PRIVATE UNIVERSITIES WORKERS UNION.....CLAIMANT

VERSUS

AGA KHAN UNIVERSITY
HOSPITALRESPONDENT

JUDGMENT

1. The Claimant filed its Statement of Claim on 14th March 2019.
2. The Claim is brought of behalf of Claimant's member, a former Employee of the Respondent, Dianah Nyanga Owino [Grievant].
3. The Grievant was employed by the Respondent on 1st October 2014, as an ultra-sonographer.
4. She served probation of 6 months, before she was confirmed as permanent and pensionable, on 1st April 2015, and placed on a monthly salary of Kshs. 112,860.
5. The Claimant states, that the Grievant's contract was unfairly terminated by the Respondent, on 22nd June 2018. Her salary at the time was Kshs. 132,860.

6. She was deployed to the Respondent's Kitengela outreach clinic, in October 2014. She worked diligently, to the satisfaction of the Respondent's radiology department, under which she was placed.
7. She is physically disabled, and is a mother, but rendered her service diligently and faithfully. She is qualified as an ultra-sonographer, and her competence and professionalism were never in doubt.
8. She went on maternity leave in April 2017. She returned in August 2017. She found a new radiologist, who was supposed to validate her ultrasound reports. The radiologist did not validate half of all the Grievant's reports, that she had prepared before she went on maternity leave.
9. She was informed that the new radiologist in-charge, was not happy with her work. The Grievant responded expressing her regret that the new radiologist was unhappy.
10. It was resolved that the Grievant goes for retraining at the main hospital in Nairobi, twice a week, for 2 weeks. She was retrained and went back to her station at Kitengela.
11. In February/March 2018, she was again summoned to the main hospital. She met the radiology manager and sonographer-in-charge. She was informed that she had made many mistakes in her work. As an Employee living with disability, she felt unfairly treated.

12. She was given a form by the radiology manager, required to sign it, and take it to Kitengela. She declined to sign, because it was not explained to her, what were the contents in the form. The radiologist retrieved the form and advised her to go back to Kitengela.
13. She was called by the human resource manager on 15th May 2018, and told to collect a letter. She was not told what the letter was about.
14. The Grievant proceeded to the Human Resource Office at Nairobi, where she was issued a letter of suspension, on the ground that she was incompetent.
15. On 28th May 2018, she was issued a letter to show cause, for poor performance.
16. On 31st May 2018, it dawned on her that there was a conspiracy to dismiss her. She resigned. The Respondent declined resignation, on the ground that it had already scheduled disciplinary hearing.
17. She appeared before the disciplinary committee on 6th June 2018, charged with poor performance.
18. She was dismissed on 22nd June 2018. She unsuccessfully appealed against the decision.

19. The Claimant reported the existence of a trade dispute to the Ministry of Labour. The Respondent declined to attend conciliation meetings.
20. The Claimant states that the Grievant was denied house allowance.
21. The Claimant prays on behalf of the Grievant for: -
 - a. Declaration that termination was irregular, unprocedural, and unlawful.
 - b. Declaration that termination violated the Grievant's fundamental right to employment.
 - c. Reinstatement without loss of salary and benefits, and compensation equivalent of 12 months' salary for unfair termination.
 - d. Compensation for unfair termination equivalent of 12 months' salary [repetitious].

Alternatively

- e. Notice of 3 months at Kshs. 449, 367.
- f. House allowance at Kshs. 757,302.
- g. Service at 15 days' salary for each complete year of service at Kshs.259,250.
- h. 12 months' salary in compensation for unfair termination at Kshs. 1,797,468 [again repetitious]

- i. Special damages for violation of the Grievant's fundamental right to employment, at Kshs. 5,000,000.
 - j. General damages.
 - k. Interest.
 - l. Costs.
22. The Respondent filed its Statement of Response dated 28th February 2025. It is not contested that the Grievant was employed by the Respondent.
23. Her contract did not provide for 3 months' notice of termination.
24. Her salary was consolidated. Her claim for house allowance in arrears is misplaced.
25. She was subscribed to N.S.S.F and is not entitled to service pay.
26. She was fairly and lawfully dismissed, and does not merit reinstatement or compensation.
27. The prayer for special damages is unfounded in law and fact.
28. Her role demanded high skill and specialization. Complaints were raised in 2017 about her performance by her supervisor. Her ultra-sound images were poor. Poor work was a risk to patient-safety.

29. The Grievant was offered 3 -weeks' remedial training. She completed training, but continued to be lackadaisical in her ultra-sonography work.
30. She was suspended and issued a letter to show cause, dated 6th May 2018. She was invited for disciplinary hearing on 25th May 2018. The date was changed to 6th June 2018.
31. She was advised afterwards, that a decision had been taken, to dismiss her, with effect from 22nd June 2018.
32. She appealed on 10th July 2018. The appeal was heard on 16th August 2018. It was rejected and the decision communicated to the Grievant on 28th August 2018.
33. The Respondent states that while the Grievant was qualified on paper, she failed to meet the required professional standards.
34. Her gross monthly salary on termination, was Kshs. 132,860.
35. The Respondent did not attend conciliation meetings, as the Grievant had already been dismissed, and could only be reinstated through a order of the Court.
36. The Respondent urges the Court to dismiss the Claim with costs.
37. The Claimant filed a Reply to the Statement of Response, dated 5th May 2025. The Reply does not raise any fresh issues, but reiterates the

contents of the Statement of Claim, and does not appear to the Court to have been a necessary pleading.

38. The Grievant, and the Respondent's human resource manager Doreen Omollo, gave evidence on 2nd February 2026 during the Nairobi Court's service week, closing the hearing.
39. The Grievant restated that her problems with the Respondent started after she came back from maternity leave. There was no complaint against her, before she went on maternity leave. No patient ever complained. She had gone through probation and was confirmed. She was on her 4th year in employment. Remedial training was like another interview. She was reassessed at Nairobi by radiology manager and scored poorly. She felt victimized. She had been working for the past 3 years without any complaints against her. She therefore declined to sign the assessment forms at the main hospital. She thought she was being discriminated against, on account of her disability.
40. She was issued a letter to show cause. She responded. She was invited for disciplinary hearing. She was accompanied by a doctor who worked with her at Kitengela. He reaffirmed that he did not have any complaint against her.
41. Cross-examined, she told the Court that she reported to a radiologist at Kitengela. She carried out ultrasound tests and prepared reports. The doctor would advise patients about the diagnosis. If reports were

inaccurate, it would expose the Respondent to claims of medical negligence.

42. The assertion that she performed below competency level, was a falsehood. 3 doctors had complained that she was not competent.
43. She was issued a letter to show cause. She answered. She was invited for disciplinary hearing. She was allowed the company of a colleague at the hearing. She chose to resign on 31st May 2018, but the Respondent declined her resignation. She did not raise issue about her disability at the disciplinary hearing.
44. Poor imaging was a system issue, which the Grievant had flagged. She did not have the documents showing that she flagged the issue. She completed probation and was well-oriented. She was willing to initiate termination of the contract, before the Respondent declined termination.
45. The notice period under the contract was 1 month. The salary was indicated to be consolidated. She was subscribed to the N.S.S.F.
46. Redirected, she told the Court that she was employed in 2014. There was no complaint until 2017. For about 4 years, her doctor at Kitengela did not complain. The Respondent complained about gaps in her work. She was not advised what these gaps were.

47. Human resource manager Doreen Omollo adopted her witness statement and documents filed by the Respondent [1-12], in her evidence-in-chief.
48. Cross-examined, she stated that probation is a period of assessment, before confirmation. Confirmation signifies that the Employer, is satisfied with the suitability of the Employee, to the given position.
49. The Grievant was confirmed and worked for about 3 years. She was okay over this period. She provided the Respondent with a certificate of disability. Retraining depended on the needs of the Employee, and technical advice of the radiologist.
50. After her maternity leave, she worked for about 8 months. The Respondent found gaps in her performance and took her for remedial training. It did not gamble with the safety of its patients for the period it employed the Grievant.
51. Her duties did not change after maternity leave. It is possible for performance to dip, even after confirmation. The patients would not know about the quality of sonography images. Omollo was not sure how long the Grievant worked with the doctors who assessed her poorly. Her disability was reasonably accommodated. Omollo did not recall if there was an imaging machine that was faulty. She did not know why the Grievant offered to resign. There was no opening at the main hospital, where she could work under close supervision of the doctors at the institution. Her salary was consolidated.

52. Redirected, Omollo told the Court that disability and maternity, were never in issue at the disciplinary hearing. Certificate of disability issued in 2025. She did not raise any issue about a faulty machine.
53. The issues are whether: termination was procedurally fair [Sections 41 and 45 of the Employment Act]; whether it was based on valid ground [Section 43 and 45 of the Employment Act]; and whether the remedies sought are merited.

The Court Finds: -

Uncontested.

54. Parties agree that the Grievant was employed by the Respondent as an ultra-sonographer, on 1st October 2014. She successfully completed 6 months' probationary period. She was employed on permanent and pensionable terms, on 7th July 2015.
55. It is common evidence that the Respondent terminated her contract on 22nd June 2018, on the grounds of poor performance. The letter of termination further states that the Grievant was habitually negligent, in performance of her duties.
56. Her last gross monthly salary at the time of termination, was Kshs. 132,860.

57. She was on maternity leave, from April 2017 to August 2017.
58. She is certified to be a person with a physical disability.
59. She was deployed at the Respondent's Kitengela outreach clinic.

Unlikely remedies.

60. Whatever are the findings of the Court on the issues in dispute, there are some remedies pleaded by the Claimant, which are repetitious, or outright misplaced.
61. Although a little bit unorthodox, the Court would propose to deal with these remedies from the outset.
62. The prayer for compensation for unfair termination, is pleaded thrice: under paragraph 48 [iii]; paragraph 48 [iv]; and paragraph 48 [v] [d].
63. The prayers for compensation under paragraphs 48 [iii] and 48 [v][d] are struck out, with the only prayer for compensation left to be considered under paragraph 48 [iv].
64. Prayer 48 [ii] urges the Court to declare that the Respondent violated the Grievant's fundamental right to employment. There is no Article in the Constitution of Kenya that is pleaded by the Claimant, establishing a fundamental right to employment. It is not pleaded and established that

such a fundamental right, was impaired by the Respondent. Prayer 48 [ii] is unfounded.

65. Prayer 48 [v] [e] seeks special damages quantified at Kshs.5,000,000. It is the single highest monetary prayer. It is not supported in the pleadings and evidence placed before the Court. It is safe to conclude from the outset, that the prayer has not specifically been proved, and is declined.

66. **The prayers** to be considered at the end of the Judgment are: -

- a. Declaration that termination was unfair and unlawful.
- b. Notice.
- c. House allowance.
- d. Service pay.
- e. Reinstatement.
- f. Compensation.
- g. Costs.
- h. Interest.

67. **Procedure**. The Grievant was issued a letter to show cause, dated 16th May 2018. She was informed through this letter by the human resource coordinator Diana Langat, that reports from the radiology department, indicated her performance was below the minimum competency levels.

68. She was advised that she had been availed remedial training at the main hospital, but there was no improvement.

69. The letter required the Grievant to show cause why disciplinary action should not be taken against her, not later than 22nd May 2018.
70. The letter also informed the Grievant that she was expected to attend disciplinary hearing, in the company of a colleague of her choice, on 25th May 2018.
71. She resigned through her letter dated 31st May 2018. She expressed her readiness to issue a month's notice of resignation.
72. Her resignation should have ended the relationship between her and the Respondent, and there would probably have been no further dispute between the Parties.
73. But the Respondent declined her resignation, which is legally a wrong response. Resignation is an Employee's right in terminating the contract of employment, which is only subject to the notice period or forfeiture of salary in lieu of notice.
74. Either party could, under the contract and the law, initiate termination. The decision to terminate does not need the acceptance of the other party. It is only subject to the law and the contract governing the parties. There was nothing in law or in the contract, requiring acceptance of a notice of termination by the other party, for the notice to become effective.

75. The letter dated 31st May 2018 by the Grievant was a valid notice of termination. Since the Respondent declined it, it can only be interpreted as having resulted in the unilateral reinstatement of the Grievant by the Respondent, validating the subsequent disciplinary hearing and decision.
76. Although the hearing date was deferred, the communication of the disciplinary hearing, in a letter to show cause, was a significant infringement, of the Grievant's procedural rights.
77. She was not given a fair chance, to redeem herself, through her response to the letter to show cause. The Respondent had already determined that she would face disciplinary action, so what was meant to be served by the letter to show cause?
78. At the time an Employer issues a letter to show cause to an Employee, there is no decision to take an Employee through a disciplinary hearing. The Employee must be given a fair chance to rebut the allegations and give an explanation, without prejudgement.
79. Where the letter to show cause is merged with the invitation to attend disciplinary hearing, it makes any response to the letter to show cause superfluous. There is bias, or semblance of bias, in the disciplinary process, right from the beginning, when the letter to show cause becomes an invitation to attend a disciplinary hearing.
80. The Grievant responded to the letter to show cause at length. Her response is undated.

81. The disciplinary hearing took place on 6th June 2018. She was accompanied to the hearing by Dr. Dave Kihara, described in the minutes as her witness.
82. The Grievant was granted the opportunity to make her representations.
83. The committee recommended that her contract is terminated.
84. The Grievant lodged an appeal dated 10th July 2018, addressed to the human resource director.
85. The Grievant was heard on appeal, on 16th August 2018.
86. She was informed through a letter from the Respondent's chief executive officer, that her appeal was found not to have raised any new evidence, and was therefore unsustainable.
87. The Claimant Union sought to consult the Respondent on the dispute after termination, through a letter dated 10th September 2018. The Respondent disregarded the invitation for consultation.
88. On 20th September 2018, the Claimant reported the existence of a trade dispute to the Ministry of Labour.
89. The Conciliator scheduled a meeting between the Parties at Nyayo House, on 12th October 2018.

90. Conciliation did not yield settlement, and the Conciliator issued a certificate of unresolved dispute, opening the way for presentation of the Claim before the Court.
91. This procedure, except for the misstep noted at the show cause letter stage, cannot be faulted.
92. Procedure was largely in conformity with the minimum statutory standards of fairness under Sections 41 and 45 of the Employment Act, 2007.
93. **Validity of Reason.** The reasons as stated in the letter of termination, justifying termination, were twofold: negligence; and performance below the competency levels.
94. The Grievant alluded to disability discrimination, but offered no evidence to support her allusion.
95. She exhibited her certificate of physical disability. The certificate however issued in the year 2025, long after the dispute arose. It did not feature in the disciplinary process. She did not raise any issue of disability at the disciplinary process. It would seem that the certificate of disability was only exhibited before the Court, to add weight to the Claimant's belated claim for disability discrimination.

96. Did she not have disability in 2014 to 2017 when she served the Respondent without any problems? It does not appear likely that the Respondent discriminated against her on account of her disability in 2017-2018, while she was allowed to work uninterruptedly.
97. She went on maternity leave in April 2017. She returned in August 2017 after her 3 months statutory maternity leave.
98. Up to this time, there was no complaint from her colleagues at Kitengela and Nairobi, about her work as an ultra-sonographer. There was no complaint from her patients.
99. She had been placed on 6 months' probation which she successfully completed, way back in 2014.
100. There were no adverse reports about her work, before she went of maternity leave, in April 2017.
101. To the contrary, the Respondent wrote to her on 27th April 2017, raising her monthly salary based on her performance appraisal rating.
102. She was told that," following your recently concluded performance appraisal exercise for the year 2016,we are pleased to inform you that effective 1st January 2017, you have been awarded annual salary increase, based on your performance appraisal rating, which was good... we appreciate your contributions and look forward to a continued mutually beneficial association."

103. So what changed 3 months later, after the Grievant came from maternity leave?
104. Her good performance was indeed emphasized by Enoch Onchong'a, a supervisor, in her report on remedial training.
105. The report, shared by Onchong'a with the Respondent's management on 5th December 2017, made the following observations: -
- a. She [the Grievant] is a very hardworking lady, and can work under minimal supervision.
 - b. She regularly consulted with colleagues and could do well the examinations below, on her own: obstetric scans; abdominal scan; pelvic scans; other regional scans; doppler, except few like the lower limb venous doppler; and she did always arrive on time, and informed colleagues when late because she lived far away from town.
 - c. Recently, the consultant had complained that her images [sonography] were not of good quality. Onchong'a confirmed that the images were poor.
 - d. The Grievant was called for remedial training, where she always consulted with colleagues.

- e. She did her remedial training very well.
 - f. She was very appreciative of her training.
 - g. After she went back to Kitengela, report was received from her radiologist that her performance was poor.
106. Her past service, and the report by Onchong'a were surprisingly at variance with the findings of the disciplinary committee, that: the Grievant was negligent; she did not communicate promptly; she lacks basic knowledge on procedures; and her overall performance was very poor.
107. These findings were not justifiable. The Respondent had assessed the Grievant highly before she went on maternity leave.
108. She had barely worked after maternity leave, for the Respondent to conduct a fair appraisal, to conclude that her performance was very poor, and that she did not understand basic procedure.
109. What happened during maternity leave, so that upon resumption of duty, she forgot everything she had been doing perfectly over the past 4 years?

110. She alluded to pregnancy discrimination. It may well be that there was indirect pregnancy discrimination, which altered the Respondent's perception of the Grievant after she resumed. The Claimant did not however, plead and establish pregnancy discrimination, and the Court would be wrong, in concluding that termination was as a result of indirect pregnancy discrimination.
111. It was for the Respondent in all circumstances, to establish valid reason, justifying termination.
112. Having taken the Grievant through probation, confirmed her based on her competency, and having raised her salary at the time she left on maternity leave, based on good performance, it is not persuasive to shortly thereafter dismiss her on allegations of poor performance and lack of knowledge in basic procedures. How would a qualified ultrasonographer, who had worked flawlessly without complaint from patients and colleagues for 4 years, change so suddenly after maternity leave, and plunge to below competency levels?
113. She graduated way back on 3rd December 2009 with a diploma in medical imaging sciences from Kenya Medical Training College Nairobi, and obtained a higher diploma in medical imaging [ultrasound], from the same reputable institution, on 1st December 2011. So why would the radiologists who interacted with her after her maternity leave, place her below competency level, and allege that she did not know the basic procedures?

114. Onchong'a was emphatic that the Grievant was hardworking, able to perform most procedures, and consulted her colleagues widely.
115. It was not unlikely that there were problems between the Grievant and the new radiologist at Kitengela, that created discordance. It may also have been that the sonography machine was defective, generating poor images. These were explanations by the Grievant, that were not beyond belief, and that were not fully discounted by the Respondent.
116. The Court is persuaded termination was not based on valid reason.
117. **Remedies**. The Grievant's letter of appointment described her monthly salary to be consolidated. It was inclusive of the housing element. The prayer of housing allowance in arrears is declined.
118. Her correct monthly gross salary was Kshs. 132,860.
119. She was subscribed to N.S.S.F. Service is not payable under Section 35[6] of the Employment Act.
120. The clause on termination in the contract, provided for 1 month notice, or payment of 1 month salary in lieu of notice, during the 6 months of probation.
121. After confirmation, the period was stated to be 3 months, or payment of 3 months' salary in lieu of notice. The Grievant's prayer for **3 months' salary in lieu of notice is merited, and allowed at Kshs. 398,580.**

122. The prayer for reinstatement is not practicable, reasonable or lawful. She was dismissed 8 years ago. The remedy is statutory-barred under Section 12[3][vii] of the Employment & Labour Relations Court Act. The Grievant also expressed her wish not to continue working for the Respondent, when she tendered her resignation. The prayer for reinstatement is declined.
123. She merits compensation for unfair termination. She did not cause or contribute to the circumstances leading to termination. She was on permanent and pensionable terms, and expected to work until retirement. She did not disclose to the Court what she is currently doing for a living, but told the Court that she is a trained ultra-sonographer. She appears to have moved on, in her rarefied field of ultra-sonography. It is recognized that although she was not discriminated against on account of her disability, she is a person living with disability and was momentarily, placed by the Respondent in a position where she was no longer having a monthly income.
124. **She is granted equivalent of 12 months' salary in compensation for unfair termination, at Kshs. 1,594,320.**
125. **Costs to the Claimant.**
126. **Interest granted at court rate from the date of Judgment, till payment is made in full.**

IN SUM, IT IS ORDERED: -

- a. It is declared that termination was unfair.***
- b. The Respondent shall pay to the Grievant through the Claimant, 3 months' salary in lieu of notice at Kshs. 398,580; and equivalent of 12 months' salary in compensation for unfair termination at Kshs. 1,594,320 -total Kshs. 1,992,900.***
- c. Costs to the Claimant.***
- d. Interest granted at the court rate, from the date of Judgment, till payment is made in full.***

Dated, signed and delivered electronically at Nairobi, under Rule 68[5] of the E&LRC [Procedure] Rules, 2024, this 30th day of April 2026.

James Rika
Judge

