



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: NAMBUYE, OKWENGU & MUSINGA, JJ. A.)**

**CIVIL APPEAL NO. 62 OF 2019**

**BETWEEN**

**PANDYA MEMORIAL HOSPITAL.....APPELLANT**

**AND**

**GEETA JOSHI.....RESPONDENT**

(Being an appeal from the decision of the Employment and Labour Relations Court of Kenya at Mombasa (L. Ndolo, J.) delivered on 11th January 2019 in *E.L.R.C Cause No. 190 of 2016.*)

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**JUDGMENT OF THE COURT**

1. This appeal arises from the judgment of *L. Ndolo, J.* delivered on 31st January 2019 in favour of the respondent where the learned judge awarded the respondent: -

**“a. 12 months’ salary in compensation..... Kshs. 521,400**

**b. Damages for discrimination.....Kshs.5,000,000**

**c. Allowance for lab superintendence duties in 2014.....Kshs. 40,000**

**d. Final dues as tabulated by the Respondent.....Kshs.354,037**

**Kshs. 5,915,437.00”**

2. In her claim that she filed in the Employment and Labour Relations Court (ELRC) on 14th March 2016 and amended on 27th June 2017, the respondent stated that she was employed by the appellant as a Laboratory Technologist on 26th March 1990; that on 14th August 2013 she was appointed to the position of Laboratory Superintendent for a period of one year but her responsibility allowances amounting to Kshs.240,000 were not paid; that on 25th March 2015 she received a letter from the appellant’s Chief Administrator notifying her that she would retire at the age of 55 years since it was the appellant’s policy to retire women staff at that age, which to her amounted to discrimination and violated the provisions of **Articles 27** and **41** of the **Constitution** and **section 5** of the **Employment Act**. The respondent prayed for damages for discrimination and unfair labour practice amounting to Kshs.6,000,000.

3. The respondent also prayed for Kshs.960,000 being unpaid allowances for extra duties at Kshs.40,000 per month for 24 months; loss of earnings for the period of 5 years that she would have been in employment but for the premature retirement being Kshs.43,450 per month x 12 x 5 making a sum of Kshs.2,607,000; unpaid royalties for the registration of the appellant’s laboratory using her documents – Kshs.480,000; and service pay ex-gratia payment of one month salary for each completed year of service at Kshs.43,450 x 25 years - Kshs.562,500.

4. In response, the appellant admitted that the respondent was its employee since 26th March 1990, earning a basic salary of Kshs.43,450 per month, but otherwise denied all the respondent’s demands. In particular, the appellant stated that it was its policy to retire all employees upon attainment of the age of 55 years and therefore asserted that there was no discrimination against the respondent as alleged.

5. On 4th May 2017, a date that had been fixed for the hearing of the matter in the presence of counsel for the two parties, **Miss Mutune**,

who held brief for **Mr. Khagram** for the appellant, sought an adjournment of the hearing for the reason that Mr. Khagram had travelled abroad. The application for adjournment was opposed. The Court declined the application and the hearing commenced. The respondent testified and was cross examined by Miss Mutune. Thereafter the respondent closed her case. The appellant's counsel sought another adjournment because the appellant's witnesses had not attended court. The defence case was adjourned to 29th June 2017.

6. In view of an application that was made for amendment of the claim and re-opening of the respondent's case, the hearing did not resume until 29th May 2018. On that day, **Mr. Anjarwalla** for the appellant sought an adjournment but the same was opposed. The Court declined the application and the respondent testified again and closed her case, this time for good. When the defence case came up for hearing on 4th October 2018, Miss Mutune sought an adjournment, saying that Mr. Anjarwalla was attending to some urgent personal issues which were not disclosed to the trial judge. The appellant's witnesses were also not in attendance, although counsel indicated that they had been duly notified of the hearing date.

7. The application for adjournment was firmly resisted. **Miss Chala** for the respondent said that the date had been taken by consent; that the personal issues that Mr. Anjarwalla was attending to had not been disclosed; that there had been no prior communication that an adjournment would be sought; and that no reason had been advanced for the absence of the appellant's witnesses.

8. The Court rejected the application for adjournment, after which Miss Mutune stated: **"I do not have any witness in Court."** The learned judge then directed as follows: -

**"In the circumstances the respondent's case is declared closed. Claimant to file and serve written submissions within 7 days. Respondent to file and serve submissions within 14 days of service. Mention on 5/11/2018."**

9. On 19th October 2018, the appellant filed an application seeking to re-open the matter so that its case could be heard. The Court declined the application, saying, *inter alia*, that the reason for absence of the appellant's counsel and witnesses on 4th October had still not been explained. The Court directed parties to file submissions, which they did.

10. In the impugned judgment, the learned judge identified three issues for determination: -

- a. Whether the Claimant has made out a case of unlawful termination of employment.
- b. Whether the Claimant has made out a case of discrimination;
- c. Whether the Claimant is entitled to the remedies sought."

11. On the first issue, the learned judge held that the retirement notice sent to the respondent on 25th March 2015 expressly stated that the retirement age of 55 years was applicable to female staff, which meant that male staff had a different retirement age; that although retirement generally is a valid ground for termination of employment, the respondent's retirement was not undertaken within the law and therefore she was entitled to compensation.

12. On the second issue, the learned judge held that the premature retirement of the respondent at the age of 55 years on ground of gender was discriminatory and violated **Article 27** of the **Constitution** and **section 5(2) and (3)** of the **Employment Act, 2007**.

13. Turning to the remedies, the learned judge awarded 12 months' salary in compensation for unlawful and unfair termination. The Court took into account the respondent's long service as well as the appellant's conduct in the retirement process.

14. In awarding damages for discrimination, the learned judge stated:

**"In assessing quantum under this head, the Court has considered that the Claimant's career in a high skill technical area was cut short by the Respondent's decision to retire her early. She was unable to find alternative employment and at the conclusion of the hearing, she had been jobless for three (3) years. Moreover, the Respondent had not paid her terminal dues. Taking these factors into account, I award the Claimant Kshs.5,000,000 (read Five Million Kenya Shillings) as damages for discrimination."**

15. Lastly, in respect of the other claims, the learned judge remarked:

**"30. By its letter dated 27th January 2014, the Respondent undertook to pay to the Claimant the sum of Kshs.40,000 for laboratory superintendence duties during the year starting from 1st January to 31st December 2014. This amount is therefore due and payable to the Claimant. The Claimant is further entitled to her final dues as tabulated by the Respondent on 27th January 2016.**

**31. No basis was laid for the claims for lost earnings and unpaid royalties which therefore fail and are dismissed.**

**32. Finally, I enter judgment in favour of the Claimant as follows:**

- a. 12 months' salary in compensation.....Kshs. 521,400

**b. Damages for discrimination.....Kshs.5,000,000**

**c. Allowance for lab superintendence duties in 2014....Kshs. 40,000**

**d. Final dues as tabulated by the Respondent.....Kshs.354,037**

**Total.....Kshs. 5,915,437.00”**

16. Being aggrieved by that decision, the appellant preferred an appeal to this Court on grounds that the learned judge; erred in law in closing the appellant’s case on the material day when its counsel was denied an adjournment to have the file placed aside to enable arrangements to be made for the appellant’s witness to present himself in court to testify; denied the appellant its constitutional right to a fair trial; failed to dispense substantial justice; erred in law in: awarding final dues when the same was neither pleaded nor prayed for; in finding that the respondent’s termination was discriminatory and unfair; in awarding damages that are too high; by failing to appreciate that substantial triable issues were raised in the pleadings for the Court’s consideration and determination; and awarding both damages for discrimination and compensation of 12 month’s salary, thereby awarding the respondent double compensation.

17. On those grounds, the appellant urged us to allow the appeal, set aside the impugned judgment and order that the case be placed before another judge to hear and determine it on its merit.

18. When the appeal came up for hearing, **Mr. Khagram** appeared for the appellant and **Miss Chala** for the respondent. Both relied on their written submissions and orally highlighted parts thereof.

As per the appellant’s submissions, grounds 1, 2 and 3 of the appeal relate to the right to be heard. The appellant faulted the learned judge for dismissing its formal application for setting aside the earlier order declining an adjournment of its case when both its advocate and witnesses failed to attend court. Counsel argued that the learned judge ought to have considered the appellant’s constitutional rights to a fair trial; and that the discretion as to whether or not to grant an adjournment ought to be exercised in a judicial and reasonable manner. This Court’s decision in **Peter M. Kariuki v Attorney General [2014] eKLR** was cited to buttress that submission.

19. On ground 4 of the appeal, the appellant’s counsel submitted that parties are bound by their pleadings, and evidence cannot be led on issues that have not been pleaded. In that regard, the learned judge erred in law in awarding final dues to the respondent when the same were not pleaded and prayed for, counsel submitted, and cited this Court’s decision in **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR**.

20. Turning to the issues of unfair termination and discrimination raised in the fifth ground of appeal, the appellant faulted the learned judge for finding that the respondent was unfairly and unlawfully terminated at the age of 55 years; and that by retiring the respondent at that age amounted to discrimination on the ground of gender. Counsel submitted that had the appellant been given an opportunity to call its witnesses it would have made a case against the respondent’s allegations on the said issues.

21. Lastly, the appellant’s counsel submitted that the learned judge exercised her discretion in an arbitrary manner by awarding the respondent Kshs.5,000,000 for discrimination together with 12 months’ compensation for unfair termination of employment, without giving any explanation or justification for the awards; that awarding both damages for discrimination and compensation of 12 months’ salary amounted to double compensation, to the detriment and prejudice of the appellant. Various authorities were cited in support of that submission, including **NEC Corporation v Samuel Gitau Njenga [2018] eKLR** and **D.K. Njagi Marete v Teachers Service Commission [2013] eKLR**.

22. We were urged to set aside the two awards and only award Kshs.521,400 in compensation as 12 months’ salary in the event that we are satisfied that the termination of the respondent’s employment was unfair.

23. In response, the respondent’s counsel submitted that regarding the appellant’s right to be heard, the appellant squandered several opportunities that it had to offer its defence; that no good reason was advanced for seeking an adjournment, and that the appellant’s counsel’s assertion that the learned judge was requested to place the Court’s file aside for one hour to enable the appellant’s witness to come to court was neither correct nor was it borne out by the record.

24. Regarding the ground of unfair termination and discrimination, counsel discounted the appellant’s contention that the trial court awarded the claims merely because the appellant’s witnesses were not called to testify, saying that the awards were driven by evidence; that the respondent testified that men employees continued working beyond the age of 55 years, and the notice of retirement issued to the respondent expressly stated that **“the retirement age of female staff is 55 years.”**

25. On grounds 6 and 8 that allege the award of Kshs.5,000,000 for discrimination and 12 months’ salary for unfair termination of employment amounted to double compensation, the respondent’s counsel submitted that the issue was never raised by the appellant before the trial court and cannot therefore be brought up. That notwithstanding, each of those awards was merited, the first one being on account of a constitutional violation, and the second one on account of violation of a statutory right. Reliance was placed on this Court’s decision in **Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2EA 212** and **South African Airways (PTY) Ltd v G.J.J.V.V. & Another [2014] 35 ILJ 2774 (LAC)**, a decision by the South Africa Labour Appeals Court.

26. Regarding ground 4 of the appeal where it is alleged that the learned judge erred in awarding final dues when the same was neither pleaded nor prayed for, the respondent’s counsel submitted that the argument had been overtaken by events because the appellant agreed to pay the amount of Kshs.354,037 and had already paid it to the respondent. Consequently, the Court cannot therefore be called upon to snatch

it away from the respondent. The case of *G.M.V. v Bank of Africa Kenya Limited [2013] eKLR* was cited for that proposition.

27. On those, submissions, the respondent urged us to dismiss the appeal in its entirety.

28. We have carefully perused the record of appeal and considered all the submissions made before us. We begin with the issue of the right to be heard. All parties to a legal dispute before a court of law have a constitutional right to be heard before any determination in the dispute is made. There cannot be a fair trial if that right is deliberately denied to a party.

29. The appellant's counsel submitted that the rejection of the application for adjournment to call the appellant's witnesses to testify and produce its defence material was a denial of the appellant's constitutional right to a fair trial. We do not think so. The right to be heard (*audi alteram partem*) is not absolute, it can be waived by a party. The waiver may be express or by conduct.

30. Where parties fix a hearing date by consent, as was the case herein, and both the appellant and its advocate fail to attend court for undisclosed reasons, the appellant must be deemed to have waived its right to be heard. In such circumstances, it cannot be said that the trial court has denied the appellant the right to be heard. A constitutional right can be waived by a party.

31. Did the learned judge in refusing to grant the appellant's application for adjournment exercise her discretion in an injudicious manner to warrant this Court's interference? In *Edward Sargent v Chotabha Jhaverbhat Patel [1947] 16 EACA 63*, it was held that an appeal does not lie to an appellate court against an order made in the exercise of judicial discretion; but an appellate court will interfere only if it is shown that the discretion was exercised injudiciously. See also *Mbogo & Another v Shah [1968] E.A. 93*.

32. The granting or refusal of an application for adjournment is a matter of discretion by a court, but the discretion must be exercised judicially. The elements to be taken into consideration in such an application include:

- a. The adequacy of reasons for the application for adjournment.
- b. The degree of prejudice likely to be occasioned to the parties by the grant or refusal of the adjournment.
- c. Whether the other party or parties can suitably be compensated by an award of costs.
- d. The conduct of the parties and/or their representatives.

See *Teleposta Pension Scheme Registered Trustees v Said Hemed & 3 Others [2020] eKLR*.

33. The record shows that Miss Mutune advocate, who was in the same law firm as Mr. Khagram and Mr. Anjarwala, was the one who held brief for Mr. Khagram for the appellant on 4th May 2017 when the respondent's case commenced. That date had been fixed by consent. Miss Mutune sought an adjournment for the reason that Mr. Khagram had travelled abroad. The trial court was not told why counsel had travelled and why no arrangements had been made for another counsel to attend court to conduct the hearing.

34. The application for adjournment was declined and the respondent testified and closed her case. Thereafter Miss Mutune cross-examined the respondent, after which she sought an adjournment to call the appellant's witness sometime in July 2017. No reason was given for the absence of the appellant's witness. The court granted the application for adjournment but ordered the appellant to pay court adjournment fees.

35. When the matter came up for hearing on 29th July 2017, Miss Mutune again was in attendance holding brief for Mr. Khagram for the appellant. The respondent's counsel told the Court that she had filed an application to amend her claim, effectively to re-open her case and testify on the issue of discrimination. Since the application had been served upon Miss Mutune that very morning, understandably she sought time to consider it, which was granted. The Court ordered that the application be mentioned on 17th July 2017 for directions. Come that day, the Court directed that the application be disposed of by way of written submissions.

36. The application for amendment of the respondent's case was allowed. On 6th March 2018 when the matter was mentioned for further directions, Miss Mutune again held brief for Mr. Khagram for the appellant. Miss Chala for the respondent indicated that she wished to recall the respondent to testify on the issue of discrimination, and Miss Mutune said she had no objection. The learned judge then fixed the case for further hearing on 29th May 2018.

37. On that day, Mr. Anjarwalla was on record as holding brief for Mr. Odengo for the appellant. Mr. Anjarwalla sought an adjournment, saying that he was not prepared to proceed with the hearing as he was not aware of the directions that had been given by the Court. He did not tell the Court why he was not aware of the Court's directions, or why Miss Mutune, who had all along attended court, was not available.

38. The application for adjournment was opposed. Rejecting the application, the Court remarked that the appellant had been accorded sufficient time to prepare its case and ordered that the hearing proceeds. The respondent testified again and Mr. Anjarwalla cross-examined her. After her re-examination the respondent closed her case and the defence hearing was fixed on 4th October 2018.

39. On that day Miss Mutune re-appeared, but this time she said she was holding brief for Mr. Anjarwalla. This is what she told the trial court: -

**“Mr. Anjarwalla is not ready to proceed as he had to go to attend to some urgent issues. He had contacted the respondent**

witness (sic) who was available, but counsel was not available. This is the first time the respondent is seeking an adjournment. This is the first-time matter is coming up for defence hearing. (sic) This is in the interest of justice that the respondent's case is heard. I apologise for the inconvenience. I pray for another date."

40. The learned judge rightly held that the reason for the absence of Mr. Anjarwalla had not been disclosed. Miss Mutune did not also tell the Court why the appellant's witness was not in court since he had been notified of the hearing date. The appellant's counsel stated in her submissions that Miss Mutune did not also

"indicate to the court what efforts she had put in trying to get the witness, taking judicial notice that Pandya Hospital is within town just about 5 minutes' drive from the court."

41. From what we have summarised hereabove, it is preposterous to accuse the learned judge of having "*denied the appellant its constitutional right to a fair trial and to be heard in a court of justice.*" The appellant and its counsel were entirely at fault and can only blame themselves for the turn of events. The appellant had multiple chances to testify but failed to do so.

42. Applications for adjournment must be grounded on clear, logical compelling and legally convincing reasons. Grant of an unmerited application for adjournment on flimsy and baseless grounds amounts to abuse of judicial discretion and contributes to backlog of cases. A diligent judge will not adjourn a hearing on such flimsy reasons, irrespective of whether or not it is the first time the matter is coming up for hearing. The hearing date had been fixed by consent well in advance, and if indeed Mr. Anjarwalla had urgent personal matters to attend to, he ought to have made arrangements for another counsel to proceed with the defence case. Miss Mutune, who was in the same law firm as Mr. Anjarwalla and was well familiar with the case could have held brief for him, as she had done severally. Again, no reason was advanced for the absence of the appellant's witness. It is an indubitable fact that Pandya Hospital is just a few minutes' walk from Mombasa Law Courts. Since the witness was said to have been available, there was no reason why Miss Mutune did not telephone him/her to attend court. As we said earlier, the appellant waved its right to be heard and the blame cannot be shifted to the learned judge. We therefore reject grounds 1, 2 and 3 of the appeal.

43. We now turn to consider whether the termination of the respondent's employment was unfair and discriminatory. The retirement notification that was sent to the respondent by the appellant expressly stated that: "***According to the hospital policy, the retirement age for female staff is 55 years.***" The respondent's employment was therefore terminated by way of retirement on 31st December 2015. The respondent argued that the retirement was selective and discriminatory, and the trial court agreed with her.

44. The learned judge held, and rightly so, in our view, that the appellant having stated that its policy required female staff to retire at 55 years, the corollary was that male staff had a different retirement age, which was unfair and discriminatory.

45. Section 5 of the **Employment Act, 2017** states as follows: -

**"5. Discrimination in Employment**

**(1) It shall be the duty of the Minister, labour officers and the Industrial Court-**

- a. to promote equality of opportunity in employment in order to eliminate discrimination in employment; and**
- b. to promote and guarantee equality of opportunity for a person who is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya.**

**2. An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.**

**3. No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee-**

- a. on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status.**
- b. in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.**

**4. It is not discrimination to-**

- a. take affirmative action measures consistent with the promotion of equality or the elimination of discrimination in the workplace.**
- b. distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.**
- c. employ a citizen in accordance with the national employment policy; or**

d. restrict access to limited categories of employment where it is necessary in the interest of State security.

5. An employer shall pay his employees equal remuneration for work of equal value.

6. An employer who contravenes the provision of the section commits an offence.

7. In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.”

46. Article 27(3) of the Constitution provides that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres, while *Sub Article (5)* prohibits discrimination, directly or indirectly on various grounds as stated in the Article.

The appellant did not disprove the respondent’s allegations. We therefore dismiss ground 5 of the appeal.

47. We now turn to consider whether the learned judge erred in awarding both damages for discrimination and compensation for unfair termination of employment, and whether the awards made were excessive. We have affirmed the trial court’s finding that the termination of the respondent’s employment was discriminatory and unfair.

48. Whichever way one looks at it, either as breach of a constitutional or statutory right, the net effect was the same. We respectfully endorse Justice Rika’s holding in *G.M.V v Bank of Africa Limited* (supra): -

**“This Court does not encourage employees to claim multiple remedies arising from the same wrongdoing on the part of the employer, whether these violations are claimed to infringe the Constitution, the Statute or the Contract.”**

At the same time, where there is a serious constitutional violation that leads to an unfair loss of employment, which claim may also be statutory in nature, compensatory damages may be awarded outside the realm of *section 49* of the *Employment Act, 2017*.

49. In *Ol Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR*, the trial court (Rika, J.) had awarded the respondent 12 months’ gross pay in compensation for unfair termination of employment, amounting to Kshs.3,489,484, and Kshs.18,256,947 in cumulative pay disparity on account of discrimination on the basis of his colour. This Court, having affirmed the constitutional breach on account of discrimination, set aside the trial court’s award and substituted therefor a sum of Kshs.7,500,000. The Court also reduced the sum awarded for unfair termination of employment to 6 months’ salary amounting to Kshs.1,744,542. We must however point out that the sum of Kshs.7,500,000 was “*compensation for racial discrimination in terms of salary at his workstation.*”

50. It cannot therefore be said that there was double compensation for the same violation of a constitutional and statutory right. The sum of Kshs.7,500,000 was to compensate the respondent for the discriminatory underpayments made to him over the years he was in the appellant’s employment. In the matter before us the respondent demonstrated that if she had worked for the remaining 5 years before she was retired like the appellant’s male employees, she would have earned a total of Kshs.2,607,000, yet the Court awarded her for discrimination at Kshs.5,000,000 and a further sum of Kshs.562,500 being 12 months’ salary for unfair termination of employment.

51. On our part, we are satisfied that this amounted to double compensation for the same breach. We therefore set aside the sum of Kshs.562,500 in its entirety.

52. Turning to the amount awarded on account of discrimination, this was an exercise of judicial discretion. It is trite law that an appellate court will not disturb an award of damages by a trial court unless it is shown that the award is inordinately low or high, or where the Court took into account irrelevant factors or failed to consider relevant factors and thereby arrived at an erroneous estimate of damages.

53. In *G.M.V v Bank of Africa Kenya Limited* (supra), the appellant’s employment was terminated on ground of pregnancy, which the trial court found discriminatory and unfair. She was awarded Kshs.3,000,000 but her claim of 12 months’ salary as compensation for wrongful termination of employment (Kshs.2,184,000) was declined.

54. In this appeal, if the appellant was not discriminatory in its retirement policy, the respondent would have worked for a maximum of 5 years before attaining the age of 60 years. If her monthly salary was Kshs.43,450, over a period of 5 years she would have earned Kshs.2,607,000.

Had the learned judge taken that into consideration, we think she would have reduced the award on account of discrimination. In our view, the judge failed to take into account an important consideration and thereby arrived at a figure which we think was excessive in the circumstances. We hereby set aside the award of Kshs.5,000,000 and substitute therefor an award of Kshs.3,000,000 for discrimination and unfair labour practice.

55. The last issue is whether the learned judge erred in awarding dues that were neither pleaded nor prayed for. In the impugned judgment the learned judge’s award included “*Final dues as tabulated by the Respondent...Kshs.354,037.*”

The respondent’s counsel admitted that there was no such prayer in the statement of claim. His only response to that ground of appeal was that “this argument has been overtaken by events because the appellant agreed to pay this amount which they have already paid.”

56. It is trite law that parties are bound by their pleadings, and a court cannot award what has neither been pleaded nor proved; and more so if it is a special damage claim. A perusal of the record of appeal in an attempt to understand where the learned judge got that figure from led us to one of the appellant's documents that were never produced since the appellant's witness did not attend court. It is a letter dated 27th January 2016 by the appellant to the respondent forwarding to her a cheque No.760215 for Kshs.248,036 in respect of payment of gratuity up to May 2011. To the said cheque was attached an Indemnity Form which shows the breakdown of the payment as follows: -

**“Salary as of 2011**

**Kshs.29,500**

**Final dues 15 days x 12 years**

**Kshs.309,750**

**Leave days owing**

**Kshs.44,287**

**Gross**

**Kshs.354 037**

**Less PAYE**

**Kshs.106,000**

**Net Pay**

**Kshs.248,036”**

57. The respondent neither prayed for such an award nor testified about it at all. As there was no basis for awarding the sum of Kshs.354,037 and the appellant was aggrieved by it, we must therefore set aside the award.

58. In conclusion, we partially allow this appeal, having set aside the award of Kshs.521,400 as compensation for unfair termination of employment; reduced the award of damages for discrimination from Ksh.5,000,000 to Kshs.3,000,000, and set aside the award of Kshs.354,037 as final dues. We shall not interfere with the award of Kshs.40,000 as allowance for Laboratory Superintendent, although paragraph 30 of the judgment seems to point to a much higher sum. In the absence of a cross appeal, we cannot interfere with the amount.

59. The amounts awarded shall attract interest at court rates from the date of the trial court's judgment until payment in full. Each party shall bear its own costs of the appeal.

**Dated and delivered at Mombasa this 18<sup>th</sup> day of December, 2020.**

**R.N. NAMBUYE**

.....

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**D. K. MUSINGA**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**