



**Kinyanjui v ASA International (Kenya) Limited (Petition E073 of 2024)
[2025] KEELRC 359 (KLR) (10 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 359 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E073 OF 2024
HS WASILWA, J
FEBRUARY 10, 2025**

BETWEEN

BERNARD MWATHA KINYANJUI PETITIONER

AND

ASA INTERNATIONAL (KENYA) LIMITED RESPONDENT

JUDGMENT

1. The matter before this court is the petition of Bernard Mwatha Kinyanjui dated 30th April, 2024. The petitioner's case is that he was employed by the Respondent on 1st September 2018 as Manager – HR & Administration. His employment was initially probationary for six months and was subsequently confirmed by conduct. Over time, the Petitioner received salary increments and promotions, including a salary review on 13th February 2019, another increment on 16th September 2019, and a promotion from Job Grade VI to Job Grade V on 22nd February 2022. However, the work environment became hostile, leading the Petitioner to resign on 7th November 2023. This hostility was largely instigated by the employer due to the Petitioner's advocacy for staff welfare and equal treatment.
2. While working for the Respondent, the Petitioner observed discriminatory remuneration practices based on race. Specifically, there were two payrolls: one for Black African employees and another for expatriates of Asian descent, the latter being highly confidential. Employees in similar job grades earned vastly different salaries, with Black African employees receiving lower wages. The Petitioner raised concerns about these disparities and violations of minimum wage laws, but his protests were ignored. As a result, his work environment became increasingly hostile, forcing him to resign, which he contends amounts to constructive dismissal. The Respondent's Human Resources Policies and Procedures Manual explicitly advocated for equal employment opportunities regardless of race, sex, creed, or other protected characteristics.
3. Additionally, there was an approved salary structure defining employee earnings by job grade. However, the Respondent failed to adhere to its own policies, discriminating against Black African



employees. For instance, the Petitioner, in Job Grade V, earned a gross salary of KShs. 219,912.48, while Mr. Sankar Das, an expatriate in the same grade, received a basic salary of KShs. 439,788.60—twice the Petitioner’s gross salary. Moreover, junior expatriates under the Petitioner’s supervision earned significantly higher basic salaries than his gross salary. Expatriates also received additional privileges, benefits, and allowances such as house rent, food, travel costs, and shopping, which were denied to Black African employees of equivalent job grades.

4. The Petitioner contends that the Respondent had a duty to uphold and implement his constitutional rights, including the right to equality before the law and equal protection under Article 27(1) of *the Constitution* of Kenya, 2010. The right to full and equal enjoyment of all rights and freedoms under Article 27(2), and the right of women and men to equal treatment and equal opportunities in political, economic, cultural, and social spheres as per Article 27(3). Additionally, the Petitioner asserts the right not to be discriminated against on the grounds of race, sex, ethnicity, or other protected characteristics under Article 27(5), the right to inherent dignity and its protection under Article 28, the right to fair labor practices under Article 41(1), and the right to social security as provided in Article 43(1)(e).
5. As a result of these violations, the Petitioner has suffered and continues to suffer loss and damage. The specific losses include the loss of income and livelihood due to his constructive dismissal, loss of commensurate remuneration due to discriminatory pay, amounting to a monthly salary difference of KShs. 219,876.12 between the Petitioner and an expatriate in the same job grade since September 2018 to February 2024, and the loss of equivalent privileges, benefits, and allowances. The Respondent is directly and vicariously liable for these constitutional violations and resulting losses. Despite demands and correspondence, the Respondent has neglected, refused, and failed to rectify the Petitioner’s loss and damage. No other legal proceedings are pending between the parties concerning these issues.
6. In view of the foregoing, the Petitioner humbly prays for the following reliefs against the Respondent:
 1. A declaration that the resignation of the Petitioner was a constructive dismissal and therefore an unfair termination.
 2. A declaration that during employment, the Petitioner’s fundamental rights and freedoms were violated.
 3. An order directing the Respondent to pay the Petitioner general damages equivalent to 12 months’ salary for constructive dismissal, amounting to KShs. 2,638,949.76.
 4. An order directing the Respondent to pay the Petitioner special damages equivalent to the salary difference between the Petitioner and expatriates in the same job grade for the duration of employment, amounting to KShs. 14,511,823.92.
 5. General damages for violation of the Petitioner’s constitutional rights and freedoms.
 6. Any such appropriate relief that the Honourable Court may deem fit to grant.
7. The Petitioner swore an affidavit dated 30th April 2024, stating that he was employed by the Respondent on 1st September 2018 as Manager – HR & Administration. His employment was probationary for six months and was subsequently confirmed by conduct. Over time, he was awarded salary increments and promotions, including a salary review on 13th February 2019, an increment on 16th September 2019, and a promotion from Job Grade VI to Job Grade V on 22nd February 2022. The work environment became hostile, forcing him to resign on 20th November 2023, through a letter dated 7th November 2023. This hostility was largely instigated by the Respondent due to his advocacy for staff welfare and equal treatment.



8. During his tenure, the Petitioner observed discriminatory remuneration and treatment based on race, with two separate payrolls: one for Black Africans and another for expatriates of Asian descent, the latter being highly confidential. Employees in similar job grades were paid vastly different salaries, violating minimum wage laws. His protests to address these disparities were ignored, and the Respondent actively undermined him, creating a hostile work environment that forced his resignation, which he contends amounts to constructive dismissal.
9. The Respondent's Human Resources Policies and Procedures Manual expressly promoted equal employment opportunities, committing to provide equal opportunities regardless of race, sex, creed, or other protected characteristics. Additionally, the Respondent had an approved salary structure that defined earnings for various job grades. However, in practice, the Respondent did the opposite, discriminating against Black African employees. For example, in Job Grade V, the Petitioner earned a gross salary of KShs. 219,912.48, whereas Mr. Sankar Das, an expatriate in the same grade, earned a basic salary of KShs. 439,788.60—twice the Petitioner's gross salary. Additionally, junior expatriates under the Petitioner's supervision earned significantly higher basic salaries than his gross salary. Expatriates also received additional privileges, benefits, and allowances, including house rent, food, travel costs, and shopping, which were denied to Black African employees in equivalent job grades.
10. The Petitioner believes the Respondent had an obligation to uphold and implement his constitutional rights, specifically the right to equality before the law and equal protection under Article 27(1) of *the Constitution* of Kenya, 2010, the right to full and equal enjoyment of all rights and freedoms under Article 27(2), and the right to equal treatment and opportunities in political, economic, cultural, and social spheres under Article 27(3). He asserts the right not to be discriminated against on the grounds of race, sex, ethnicity, or other protected characteristics under Article 27(5), the right to inherent dignity and its protection under Article 28, the right to fair labour practices under Article 41(1), and the right to social security as provided in Article 43(1)(e). Due to these violations, the Petitioner suffered enormous loss and damage, including the loss of income and livelihood due to his constructive dismissal, loss of commensurate remuneration where his salary was Kshs. 219,876.12 less than an expatriate in the same job grade from September 2018 to February 2024, and the loss of other commensurate privileges, benefits, and allowances provided to expatriates in the same job grade.
11. The Petitioner avers, based on advice from his advocates, which he conscientiously believes to be sound, that the Respondents are directly and vicariously liable for the infringement of his fundamental rights and freedoms, as well as the loss and damage suffered due to constructive dismissal. Despite demands and correspondence, the Respondent has refused to compensate the Petitioner for his loss and damage. The affidavit is sworn in support of the Petition, urging the Honourable Court to grant the reliefs sought above.

Petitioner's Written Submissions

12. The Petitioner filed written submissions dated 20th November 2024 in support of the Petition dated 30th April 2024 and in opposition to the Respondent's Amended Reply to Petition and Amended Cross-Petition dated 8th July 2024. In response to the Amended Reply to Petition and Amended Cross-Petition, the Petitioner filed a Reply and a Further List of Documents, both dated 30th October 2024. These submissions were filed pursuant to directions given on 28th October 2024, allowing the matter to proceed by way of written submissions. The Petitioner seeks reliefs including a declaration that his resignation amounted to constructive dismissal and unfair termination, a declaration that his fundamental rights and freedoms were violated, general damages equivalent to 12 months' salary amounting to KShs. 2,638,949.76, special damages equivalent to the salary difference between the Petitioner and expatriates in the same job grade for the duration of employment amounting to KShs.



14,511,823.92, general damages for violation of constitutional rights and freedoms, and any other relief deemed appropriate by the court.

13. The Petitioner's case is based on grounds that the Respondent violated his constitutional rights, including the right to equality before the law under Article 27(1) of *the Constitution* of Kenya 2010, the right to full and equal enjoyment of rights under Article 27(2), the right to equal treatment and opportunities under Article 27(3), the right not to be discriminated against on various grounds including race and ethnic origin under Article 27(5), the right to inherent dignity under Article 28, the right to fair labour practices under Article 41(1), and the right to social security under Article 43(1)(e). The facts in support of the Petition include that the Petitioner was employed by the Respondent on 1st September 2018 as Manager – HR & Administration, with a probationary period of six months, after which he was confirmed by conduct. He received salary increments and promotions, including a salary review on 13th February 2019, another increment on 16th September 2019, and a promotion to Assistant Director HR and Administration on 23rd February 2022. However, due to hostility from the employer arising from his advocacy for staff welfare and equal treatment, he was forced to resign on 7th November 2023.
14. The Petitioner observed that the Respondent maintained two payrolls: one for Black African employees and another for expatriates of Asian descent, the latter being highly confidential. Employees in similar job grades received significantly different salaries, in violation of minimum wage laws. His protests regarding discrimination were ignored, and the Respondent actively undermined him, leading to his resignation, which he contends was a case of constructive dismissal. The Respondent's Human Resources Policies and Procedures Manual explicitly advocated for equal employment opportunities and had an approved salary structure defining earnings by job grade, but these policies were not followed. The Petitioner, in Job Grade V, earned a gross salary of KShs. 219,912.48, while Mr. Sankar Das, an expatriate in the same grade, earned a basic salary of KShs. 439,788.60, twice the Petitioner's gross salary. Additionally, junior expatriates under the Petitioner's supervision earned significantly higher basic salaries than his gross salary. Expatriates also received additional privileges and benefits, including house rent, food, travel costs, and shopping allowances, which were denied to Black African employees.
15. The Petitioner further opposed the Respondent's Cross-Petition, arguing that his resignation was not voluntary but forced due to workplace hostility. He denied that he was treated fairly and insisted that his concerns about discrimination were ignored. He argued that Mr. Sankar Das did not have superior academic qualifications or technical expertise compared to him and other employees, and if he did, he should not have been in the same job group as the Petitioner. The Petitioner maintained that the salary information he presented in court was lawfully obtained in his capacity as Human Resource Manager and did not require consent. He also denied sharing any data with bloggers, stating that he was mentioned in the blog as a second person. He argued that confidentiality could not be used to shield constitutional violations and illegality and that his disclosure of Mr. Sankar Das's salary was necessary to prove discrimination. He contended that the Employment and Labour Relations Court had no jurisdiction over data protection matters, which should be handled by the Office of the Data Protection Commissioner.
16. The Respondent, in its Amended Reply to Petition and Amended Cross-Petition, argued that salary determinations were based on multiple factors, including negotiated agreements, academic qualifications, experience, service duration, and responsibilities. It admitted that the Petitioner earned KShs. 219,912.48 while Mr. Sankar Das earned KShs. 439,788.60 but denied that this difference was due to discrimination. It claimed that Mr. Sankar Das was employed by the Respondent's parent company in 1991, deployed to Kenya in 2015, and possessed superior academic qualifications and



- technical expertise. The Respondent further argued that expatriate remuneration was structured to ensure neither losses nor gains from foreign assignments. The Respondent also asserted that the Petitioner was bound by confidentiality obligations and had unlawfully disclosed sensitive information.
17. The issues for determination include whether the Petitioner was constructively dismissed due to his advocacy for staff welfare, whether racial discrimination existed in the Respondent's workplace, whether Asian expatriates in the same job grade had superior qualifications or experience, whether the principle of equal remuneration for work of equal value applied, whether the Petitioner's constitutional rights were violated, whether he suffered loss and damage as a result, whether confidentiality could override constitutional violations, whether disclosure of salary information was legally offensive, whether the Employment and Labour Relations Court had jurisdiction over data protection claims, whether the Petitioner lawfully collected and disclosed salary data, whether he shared information with bloggers, whether the 2nd Cross-Petitioner was lawfully enjoined, whether the 1st and 2nd Cross-Petitioners suffered damage, and whether the reliefs sought should be granted. The Petition was supported by the Petitioner's affidavit dated 30th April 2024, where he reiterated his claims of discriminatory remuneration, workplace hostility, and constructive dismissal. He reaffirmed his belief that the Respondent was obligated to uphold his constitutional rights, including equality before the law, equal treatment, dignity, fair labour practices, and social security. He detailed the losses suffered, including loss of income following his dismissal, discriminatory salary differences amounting to KShs. 219,876.12 per month from September 2018 to February 2024, and loss of privileges and benefits granted to expatriates.
 18. The Respondent, in opposing the Petition, argued that salaries were fairly determined and that expatriates' remuneration was calculated to align with international assignments. It asserted that salary disparities were justified by factors such as academic qualifications, experience, and duration of service. It denied that the Petitioner was constructively dismissed and maintained that he was bound by confidentiality obligations, which he allegedly breached by disclosing salary information. The court must determine whether the Petitioner's resignation amounted to constructive dismissal, whether racial discrimination in remuneration occurred, whether the Respondent's Asian employees in the same job grade had superior qualifications, whether equal remuneration for work of equal value applies within the same organization, whether the Petitioner's constitutional rights were violated, whether he suffered damages due to discrimination, whether confidentiality can shield constitutional violations, whether disclosing salary information was unlawful, whether the Employment and Labour Relations Court has jurisdiction over data protection matters, whether the Petitioner lawfully accessed and used salary data, whether he shared data with bloggers, whether the 2nd Cross-Petitioner was properly enjoined, whether the 1st and 2nd Cross-Petitioners suffered damage, whether their damage supersedes the Petitioner's constitutional violations, and whether the reliefs sought by all parties should be granted.
 19. The Petitioner further submitted that under *the Constitution* of Kenya, 2010, Article 2(5) provides that general rules of international law shall form part of Kenyan law, and Article 2(6) states that any treaty or convention ratified by Kenya shall be part of Kenyan law. Article 27 guarantees the right to equality before the law, equal protection, and equal benefit of the law. It further provides for full and equal enjoyment of all rights and fundamental freedoms and equal opportunities for men and women in political, economic, cultural, and social spheres. Article 27(5) prohibits direct or indirect discrimination on the grounds of race, sex, marital status, ethnicity, or other protected attributes. Article 28 guarantees the right to inherent dignity and its protection. Article 41(1) provides for the right to fair labour practices, and Article 43(1)(e) establishes the right to social security.



20. The *Employment Act*, No. 11 of 2007, under Section 5, mandates employers to promote equal opportunity and eliminate discrimination in employment policies and practices. Section 5(3) prohibits discrimination based on race, colour, sex, language, religion, nationality, or social origin in recruitment, promotion, training, and termination. Section 5(5) requires employers to pay equal remuneration for work of equal value. Section 5(7) places the burden of proof on the employer in any discrimination claim, requiring them to demonstrate that discrimination did not occur. The Petitioner also relied on ILO Convention 111 on Discrimination (Employment and Occupation) ratified by Kenya on 7th May 2001, which defines discrimination as any distinction or preference based on race, colour, sex, religion, political opinion, national extraction, or social origin that impairs equality of opportunity or treatment in employment. The UN Convention on the Elimination of All Forms of Racial Discrimination, ratified by Kenya, obligates states to pursue policies aimed at eliminating racial discrimination and ensuring non-discriminatory practices in public and private institutions.
21. The Petitioner further relied on ASA Limited's Human Resources Policies and Procedures Manual, which he personally drafted and which commits to equal opportunity employment irrespective of sex, race, creed, or religion. The Data Protection Act, Cap. 411C, was also cited, particularly Section 8, which empowers the Office of the Data Protection Commissioner to enforce data protection laws and investigate complaints of rights infringements. Section 28(2)(f) permits indirect collection of data where necessary for law enforcement or the protection of another person's interests. Section 30 outlines lawful data processing grounds, including processing for legal claims or the legitimate interests of a data controller. Section 45 allows processing sensitive personal data where necessary for legal claims or protecting a data subject's interests. The Data Protection (General) Regulations provide that data controllers may process data without consent if necessary under Section 30(1)(b) of the Act and that personal data collection must comply with lawful processing principles.
22. The Petitioner submitted that he was constructively dismissed due to workplace hostility caused by his advocacy for staff welfare and equal treatment. He resigned on 20th November 2023 via a letter dated 7th November 2023 due to this hostility, as confirmed by Exhibit 16, pages 35-36 of his bundle of documents dated 30th April 2024. He argued that racial discrimination was evident at the Respondent's workplace, with separate payrolls for Black African employees and expatriates of Asian descent. The expatriate payroll was highly confidential, but as Assistant Director of HR and Administration, he had lawful access. Payroll records at Exhibit 15, page 34 of the bundle of documents dated 30th April 2024, showed that employees in similar job grades were paid vastly different salaries based on race. The Respondent, in paragraph 15 of its Amended Reply to Petition dated 30th July 2024, admitted to this disparity.
23. The Petitioner questioned whether expatriate employees, particularly Mr. Sankar Das, in the same job grade had superior academic qualifications or experience. The Respondent submitted evidence of Mr. Das's qualifications, which included a provisional certificate in B.A. (Pass) Examination from Dhaka University in Bangladesh. However, the Respondent failed to attach a Certificate of Recognition and Equation of Qualification from the Commission for University Education as required under Section 5(1)(g) of the *Universities Act* No. 42 of 2012, making it impossible to determine whether Bangladeshi qualifications were equivalent to Kenyan standards. Mr. Das had worked for the Respondent's parent company since 1992 and joined the Kenyan office in 2014. His job description included assisting the CEO in implementing policies, supervising regional branches, preparing financial reports, formulating operational plans, and overseeing training and performance tracking.
24. The Petitioner, on the other hand, presented a comprehensive Curriculum Vitae detailing his academic, professional, and experiential qualifications, which led to his appointment as Manager –



HR & Administration and subsequent promotion to Assistant Director HR and Administration. He and Mr. Das both reported to the CEO. The Petitioner provided academic certificates showing he was pursuing a Master of Business Administration in Human Resource Management from St. Paul's University and held a Bachelor of Business and Management from Egerton University. These were submitted as Exhibit 17, pages 3-6 of his Further List of Documents dated 30th October 2024 and Exhibit 18, page 6, and Exhibit 24 of the same list.

25. The Petitioner further questioned why Mr. Das, if indeed more qualified, was in the same job grade as him. The Petitioner argued that the salary differential was not justified by academic or experiential superiority but was purely racial. The Respondent had admitted that the Petitioner's gross salary was KShs. 219,912.48 in Job Grade V, while Mr. Das's basic salary was KShs. 439,788.60—double the Petitioner's earnings. The Petitioner contended that, in addition to the higher salaries, expatriates received extra privileges such as housing, food, travel, and shopping allowances, which were denied to Black African employees.
26. The Petitioner submitted that the Respondent had failed in its obligation under the Employment Act, No. 11 of 2007, to provide equal remuneration for work of equal value. Section 5(5) of the Act mandates employers to ensure equal pay for equal work, and Section 5(7) places the burden of proof on the employer to show that discrimination did not occur. The Petitioner also relied on ILO Convention 111, which prohibits distinctions based on race and social origin that impair equality in employment. The UN Convention on the Elimination of Racial Discrimination further obligates Kenya to eliminate racial distinctions in employment practices.
27. The Petitioner maintained that the evidence presented, including salary records and employment policies, demonstrated clear racial discrimination. He further submitted that confidentiality could not be used to shield illegal discrimination and that disclosure of salary records in legal proceedings was justified under Section 30(1)(b)(vii) of the Data Protection Act, which allows data processing where necessary for legitimate legal interests. The Data Protection (General) Regulations also provide that data controllers must demonstrate a legal basis for processing data, and Rule 6 allows collection of personal data from third-party sources, including employment records.
28. The Petitioner submitted that his claims of discrimination, constructive dismissal, and loss of income were supported by both factual evidence and legal principles. He urged the court to find that the Respondent violated his constitutional rights under Articles 27, 28, 41, and 43 of the Constitution of Kenya, 2010, as well as statutory provisions under the Employment Act, the Data Protection Act, and international conventions ratified by Kenya. He prayed for the reliefs sought, including a declaration that his resignation was a constructive dismissal and an unfair termination, a declaration that his constitutional rights were violated, general damages equivalent to 12 months' salary amounting to KShs. 2,638,949.76, special damages for salary disparities amounting to KShs. 14,511,823.92, and any other relief deemed appropriate by the court.
29. The Petitioner submitted that he possessed professional qualifications, including certificates from the Institute of Human Resource (Exhibit 20, pages 9-12 of the Petitioner's Further List of Documents dated 30th October 2024), a Certificate in Anti-Money Laundering (Exhibit 22, page 13), a Certificate of Strategic HR Management (Exhibit 22, page 14), a Certificate of Labour Training (Exhibit 22, page 15), a Certificate of Organizational Development (Exhibit 25, page 16), a Certificate of Anti-Money Laundering and Anti-Bribery (Exhibit 23, page 17), and a Certificate of Occupational Safety & Health (Exhibit 25, page 20). He also holds a Certified Public Secretary (CPS(K)) certification from KASNEB, obtained between 2003 and 2007. The Petitioner's experiential qualifications were detailed in his Curriculum Vitae, showing a career spanning since 2007, starting as a Finance Officer



and progressing through five organizations in positions of increasing responsibility before being hired by the Respondent in 2018 after an 11-year career.

30. The Petitioner's job responsibilities as Manager, Human Resource and Administration, reporting to the CEO, included consulting with entity management on HR guidance and services, supervising HR staff, policy development and implementation, advising on legal and regulatory compliance, employee relations, recruitment, payroll preparation, contract management, benefits administration, training, office management, vendor relations, procurement, and ensuring operational continuity. He was also responsible for expatriate HR matters, ensuring legal compliance for visas and immigration, and managing HR data systems. The job description, as shown in Exhibit 4, pages 20-21 of the Petitioner's Bundle of Documents dated 30th April 2024, demonstrated that his role was extensive and critical to the Respondent's operations. The Petitioner argued that the comparator's job description was not superior to his, as both reported directly to the CEO and held the same job grade. The Respondent provided no evidence to suggest that the comparator had superior academic qualifications or experience.
31. The Petitioner relied on *Ol Pejeta Ranching Limited v David Wanjau Muhoro* (Civil Appeal 42 of 2015) [2017] eKLR, where the Court of Appeal found that a finance manager's responsibilities, including finance, accounting, and HR, were of equal value to the roles held by expatriate managers and that racial pay disparities were unjustifiable. The court emphasized that job evaluation must be based on objective criteria and not race. The Petitioner argued that his and the comparator's roles were of equal value within the Respondent's organization, as evidenced by Exhibit 6, page 23 of the Petitioner's Bundle of Documents dated 30th April 2024, where both were assigned to act on behalf of the CEO and Deputy CEO. Exhibit 14, page 33 of the same bundle, confirmed that employees within the same job grade were to receive the same salary. However, a separate payroll for expatriates, which was confidential, existed, demonstrating racial discrimination.
32. The Petitioner relied on *Ol Pejeta Ranching Limited v David Wanjau Muhoro* (Civil Appeal 42 of 2015) [2017] eKLR, where the Court of Appeal held that fairness required equal pay for equal work and that the principle extended to jobs of equal value. The court criticized the employer's practice of valuing expatriate managers' work as equal while undervaluing Black managers' work despite them being in the same management cadre. The Petitioner further submitted that his fundamental constitutional rights were violated due to racial discrimination, citing Exhibit 14, page 33 of the Petitioner's Bundle of Documents dated 30th April 2024, which confirmed that his salary should have been equal to that of the comparator. *The Constitution* of Kenya, 2010, under Articles 27, 28, 41, and 43, guarantees the right to equality, dignity, fair labour practices, and social security. The *Employment Act*, No. 11 of 2007, ILO Convention 111 on Discrimination in Employment and Occupation (1958), and the UN Convention on the Elimination of Racial Discrimination prohibit employment discrimination.
33. The Petitioner further relied on *Koki Mubia v Samsung Electronics East Africa Ltd (ELRC Cause No. 1583 of 2013 - Nairobi)* [2015] eKLR, where the court found that an employer's practice of sending incompetent expatriates to supervise highly qualified Kenyan employees constituted racial discrimination. The court held that discrimination, in any form, violated fairness and justice and emphasized that all employees should be guaranteed equal protection and benefit of the law. The Petitioner argued that he suffered loss and damage due to discrimination, amounting to general damages equivalent to 12 months' salary for constructive dismissal, totaling KShs. 2,638,949.76. He also claimed special damages equivalent to the salary difference between him and expatriates in the same job grade for 66 months, amounting to KShs. 14,511,823.92, and general damages for constitutional rights violations.



34. The Petitioner submitted that confidentiality could not be used as a shield for constitutional violations and illegalities. He argued that disclosing the comparator's salary was not legally offensive, relying on *Ol Pejeta Ranching Limited v David Wanjau Muhoro* (Civil Appeal 42 of 2015) [2017] eKLR, where the court held that a valid comparator must exist within the same organization, and salary comparisons could be made for employees performing similar work. The Petitioner argued that the Employment and Labour Relations Court had no jurisdiction to hear claims under the Data Protection Act, as Section 8 of the Act assigns enforcement authority to the Office of the Data Protection Commissioner. If the court found jurisdiction, the Petitioner submitted that his collection and disclosure of salary data in legal proceedings were lawful under Sections 28(2)(f)(ii), (iii), 30(1)(b)(vii), (2) of the Data Protection Act, and Rules 5, 6, and 29 of the Data Protection (General) Regulations.
35. The Petitioner maintained that he was a data subject in the disclosed information and that Section 45 of the Data Protection Act allows processing sensitive personal data where necessary for legal claims or protecting the vital interests of the data subject. He argued that previous cases had shown that employers would not willingly produce incriminating salary data and that petitioners were legally allowed to disclose information within their custody. He relied on *Ol Pejeta Ranching Limited v David Wanjau Muhoro* (Civil Appeal 42 of 2015) [2017] eKLR, where the court held that an employer's failure to disclose salary data despite a court order demonstrated an attempt to conceal discriminatory practices.
36. The Petitioner denied sharing data with bloggers, arguing that the Respondent had failed to prove this allegation. Exhibit 16, page 35 of the Petitioner's Bundle of Documents dated 30th April 2024, contained a blog post that referred to the Petitioner in the third person, indicating that he did not share the data. The Petitioner submitted that the 2nd Cross-Petitioner was unlawfully enjoined in the Cross-Petition, had no locus standi, and should be struck out. The Petitioner further submitted that the 1st and 2nd Cross-Petitioners had suffered no damage, whereas he had suffered racial discrimination and constructive dismissal. He argued that the Cross-Petition should be dismissed with costs.
37. The Petitioner submitted that he was entitled to the reliefs sought, including a declaration that his resignation amounted to constructive dismissal and unfair termination, a declaration that his constitutional rights were violated, general damages equivalent to 12 months' salary, special damages for salary disparities, and any other relief the court deemed fit. He concluded that he had established a clear case of racial discrimination in employment, which violated his fundamental rights. He urged the court to grant the orders sought in the interest of justice and fairness.

Respondent's Case

38. The Respondent filed an affidavit dated 6th June 2024 and an amended reply to the petition dated 8th July 2024, denying all allegations except where expressly admitted. The Respondent admits paragraphs 1 to 4 of the Petition. The allegations in paragraph 6 are denied, and the Petitioner is put to strict proof. The Respondent asserts that the Petitioner was treated fairly, worked in a conducive environment, and was not subjected to discrimination. It is emphasized that the Petitioner voluntarily resigned for personal reasons, confirmed the cordial work environment in his resignation letter, and never raised any complaints of hostility during his employment despite the availability of grievance resolution mechanisms.
39. The Respondent denies paragraphs 7 to 10, reiterating that all employees, including the Petitioner, were treated equitably in matters of remuneration, which was determined based on negotiated terms, qualifications, experience, length of service, and responsibilities. In response to paragraph 8, the Respondent denies racial discrimination, stating that expatriates' salaries are structured to ensure



- financial neutrality in foreign assignments. Paragraphs 11 and 12 are admitted, while paragraph 13 is denied. The salary figures in paragraph 14 are admitted, but the claim that disparities resulted from discrimination is rejected. The Respondent explains that Mr. Sankar Das had longer service, superior qualifications, and was deployed to Kenya before the Petitioner's employment, justifying any pay differences.
40. Paragraphs 16 to 21 are denied, with the Petitioner put to strict proof. The Respondent asserts that it has not violated any constitutional provisions regarding the Petitioner or any employee. Paragraph 22 is admitted. The Respondent argues that the Petitioner is not entitled to the reliefs sought and prays for the dismissal of the Petition with costs. Additionally, the Respondent intends to challenge the court's jurisdiction, contending that the Petitioner failed to exhaust available statutory remedies. Accordingly, the Respondent seeks to have the Petition dismissed.
 41. The Respondent further filed an amended cross-petition dated 6th June 2024, asserting that the 1st Cross-Petitioner, Asa International (Kenya) Limited, is a duly registered company under the [Companies Act](#), while the 2nd Cross-Petitioner, Sankar Das, is a Bangladeshi national lawfully employed by the 1st Cross-Petitioner. The Cross-Petition is brought against the Respondent in the Cross-Petition, who was employed as a Human Resources Manager by the 1st Cross-Petitioner under an appointment letter dated 1st September 2018, with responsibilities that included payroll management, contract administration, and statutory deductions.
 42. It is alleged that the Respondent in the Cross-Petition was bound by a confidentiality clause but nonetheless disclosed confidential salary information concerning the 2nd Cross-Petitioner and other employees without consent. The Respondent in the Cross-Petition included this information in the main Petition and supporting affidavit, particularly at paragraph 14, where salary disparities between himself and the 2nd Cross-Petitioner were mentioned. Additionally, documents labelled serial 14 and 15 in the Petitioner's list of documents allegedly contain unauthorized disclosures, while item 16 on page 35 of the list suggests the information was shared with bloggers.
 43. The Cross-Petitioners argue that these actions contravene Article 31 of [the Constitution](#) of Kenya, 2010, which guarantees the right to privacy, including protection from unnecessary disclosure of private affairs. The Respondent in the Cross-Petition is further accused of violating Sections 3, 25, and 26 of the [Data Protection Act, 2019](#), which safeguard individuals' privacy by requiring lawful data collection, valid explanations for data use, and an opportunity for the data subject to object to its use. The Respondent allegedly obtained and used the information unlawfully, failing to provide a valid explanation or obtain consent from the affected employees.
 44. As a result, the 1st Cross-Petitioner claims reputational damage and exposure to potential lawsuits from affected employees whose information was unlawfully disclosed. The 2nd Cross-Petitioner claims that he has been dragged into a legal dispute without cause, is now facing workplace hostility, and is exposed to security risks.
 45. The Cross-Petitioners seek declarations that the Respondent in the Cross-Petition's actions were unconstitutional and unlawful, damages of Kshs. 5,000,000 each for breach of privacy, an indemnity order holding the Respondent liable for any legal claims arising from the disclosures, dismissal of the main Petition, costs of the suit, and interest on damages and costs from the date of filing until full payment.
 46. The Petitioner in the Cross-Petition filed an affidavit dated 27th September 2024, stating that he is the Operations Manager of the 1st Petitioner and is duly authorized to make the statement on behalf of himself and the 1st Petitioner. He was appointed as County Operations Director by the 1st Petitioner



- through a letter dated 15th December 2015, following a rigorous selection process. His appointment terms provided for a consolidated salary and allowance of USD 1,450 per month, and he was required to report to the Country Director of ASA Limited Kenya. Before this appointment, he worked as a District Manager at ASA in Kishorenganj Sadar District until his deployment to Kenya as a Team Leader via a letter dated 4th April 2015.
47. He had been engaged with ASA Bangladesh since December 1992, serving in various roles, including Community Organizer, Branch Manager, Regional Manager, and District Manager. His extensive experience and expertise enabled him to serve the 1st Petitioner effectively for nearly a decade in different positions. His duties included assisting the CEO in implementing policies, procedures, and internal controls for loan portfolios and operating accounts, ensuring timely production and submission of operational and financial reports, assisting in budget preparation and financial management, and overseeing new programs and investment funds.
 48. Upon his appointment to lead the Kenyan team, he obtained a two-year work and residence permit from immigration, which was renewable. His work permit was approved on 30th March 2015. Due to exceptional performance, he was promoted from SR-OM-VIII to SR-ZM-VII, effective 1st July 2020. As is customary, his change in position and responsibilities resulted in salary increments. In recognition of his work ethics and performance, the Petitioner in the Cross-Petition reassigned him to the role of Operations Manager, effective 2nd June 2021, through a letter dated 28th May 2021.
 49. He swore the affidavit in support of the application, confirming that the information provided to be accurate to the best of his knowledge, information, and belief, except where sources have been disclosed.

Respondent's Response in Cross Petition

50. The Respondent in the Cross-Petition filed a Reply to the Petition and the Cross-Petition dated 24th October 2024, denying all allegations except where expressly admitted. The Respondent maintains that he was forced to resign due to a hostile work environment and denies that his resignation was voluntary. He reiterates that he raised concerns about discrimination and workplace hostility, which were ignored. The claims that he was treated fairly and that the workplace environment was conducive are denied. The Respondent further disputes assertions regarding the superior qualifications and expertise of the 2nd Petitioner in the Cross-Petition, putting the Cross-Petitioners to strict proof. He also questions why Mr. Sankar Das was placed in the same job group as the Respondent if his qualifications were significantly higher.
51. The Respondent denies all allegations in the Cross-Petition regarding breaches of confidentiality and privacy. He asserts that salary information is not private, confidential, or classified as personal data, and therefore, the 2nd Petitioner's consent was not required. He further denies sharing any data with bloggers and puts the Cross-Petitioners to strict proof. As the Human Resources Manager, he had lawful and unrestricted access to salary information and was himself a data subject in the disclosed data. The Respondent disputes claims that the 1st Petitioner suffered reputational damage or that the 2nd Petitioner has been exposed to security risks or adverse working conditions due to the disclosures. He argues that if the 2nd Petitioner truly possessed superior qualifications and expertise as claimed, he would not be at risk unless those claims were untrue.
52. The Respondent in the Cross-Petition contends that the 2nd Petitioner is improperly joined in the proceedings and should be struck out. He further asserts that this Honourable Court lacks jurisdiction to entertain the Cross-Petition as the issues raised fall under the mandate of the Office of the Data Protection Commissioner. A preliminary objection was raised on the jurisdiction of this court. The



Respondent prays that the Cross-Petition be dismissed with costs, that the 2nd Petitioner and his evidence be struck out as he is a stranger to the proceedings, and that the 1st and 2nd Petitioners in the Cross-Petition be ordered to pay the costs of both the Petition and Cross-Petition.

Respondents Submissions

53. The Respondent filed written submissions dated 28th December 2024 in opposition to the petition dated 30th April 2024, relying on the amended reply to the petition and the cross-petition dated 8th July 2024, the supporting affidavit sworn by Sankar Das on 27th September 2024, the supporting affidavit of the Respondent's legal manager Emmanuel Bara dated 6th June 2024, and the annexures therein.
54. The Respondent raised several issues for determination, including whether the Petitioner voluntarily resigned, whether he was estopped from claiming constructive termination, whether he was discriminated against on the grounds of race or color, whether he was entitled to compensation for unfair termination, and whether the cross-petition had merit.
55. The Respondent submitted that the Petitioner voluntarily resigned, as evidenced by his resignation letter contained on page 26 of the Petitioner's List and Bundle of Documents.
56. In the resignation letter, the Petitioner expressed appreciation for his experience with the company and confirmed a cordial working relationship, thus negating any claims of constructive dismissal.
57. The Respondent relied on *Kenya Hotels & Allied Workers Union v Mara Siria t/a Safari Camps (K) Ltd (Cause 388 of 2014) [2016] KEELRC 1269 (KLR)*, where the Court held that resignation is a unilateral act and must be clear and unambiguous.
58. The Respondent further submitted that there was no constructive dismissal as alleged, citing *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] KECA 394 (KLR)*, which set out the principles for determining constructive dismissal, including the requirement for an objective test to establish a fundamental breach of contract by the employer. The Respondent argued that the Petitioner failed to demonstrate that the employer's actions constituted a repudiatory breach and that the resignation was prompted by the employer's conduct.
59. The Respondent further submitted that it upholds the principle of equality and did not discriminate against the Petitioner based on race or color. The Respondent referred to its HR policies and procedures manual, which encourage employees to raise concerns regarding work conditions. The Respondent provided documentary evidence, including salary reviews, to demonstrate that the Petitioner's salary had been increased three times between 2018 and 2023.
60. The Respondent also submitted that Sankar Das was not in the same job category as the Petitioner, as he held the position of Country Operations Manager, a role with different responsibilities from that of Human Resource Manager. The Respondent argued that Sankar Das's higher salary was justified due to his experience and tenure, having worked with the company since 1992 and held multiple managerial positions over 32 years.
61. The Respondent contended that the Petitioner, who had only worked with the company for five years, could not reasonably expect to receive the same remuneration as an employee with three decades of service.
62. The Respondent also submitted that the Petitioner failed to provide evidence of discrimination or any complaints of unequal wage pay during his employment. The Respondent relied on *Waithaka v Sunflag Textiles and Knitwear Mills Limited (Cause 336 of 2018) [2023] KEELRC 1735 (KLR)*,



- where the Court held that an employee must prove that different wages for equal work were based on discrimination rather than job responsibilities and experience.
63. The Respondent also cited *OI Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR, where the Court of Appeal held that different wages for equal work are only discriminatory if they are based on arbitrary grounds such as race or ethnicity.
 64. The Respondent argued that the Petitioner's allegations were an afterthought, as he had never raised any formal complaint of unequal wage pay during his employment, and there was no causal link between his resignation and any alleged discrimination.
 65. The Respondent also contended that the Petitioner had delayed in resigning if he indeed felt aggrieved by discrimination, citing Labour Appeal Case No. 14 of 2020, *Herbert Wafula Waswa v Kenya Wildlife Services* [2020] eKLR, where the Court held that an employee must not delay in resigning after a breach by the employer, as delay may constitute waiver of the breach. The same principle was affirmed in *Kenneth Kimani Mburu & Another v Kibe Mungai Holdings Limited* [2014].
 66. The Respondent submitted that the Petitioner was not entitled to compensation for unfair termination or payment for differential salary, arguing that he voluntarily resigned and was not unlawfully dismissed. The Respondent also urged the Court to find that the claim for discrimination had not been proved and should be dismissed.
 67. The 1st and 2nd Cross-Petitioners, in their submissions, relied on the amended cross-petition dated 8th July 2024, the supporting affidavit of the 1st Cross-Petitioner's legal manager Emmanuel Bara dated 6th June 2024, and the 2nd Petitioner's supporting affidavit dated 27th September 2024.
 68. The Cross-Petitioners argued that the Respondent, in filing the petition, had exposed the 1st Petitioner to unauthorized disclosure of private employee data and that the 2nd Petitioner's private information was also disclosed without permission.
 69. The Cross-Petitioners relied on Section 12 of the *Employment and Labour Relations Court Act*, which empowers the Court to award damages for breaches of the law, including the Data Protection Act. The Cross-Petitioners also cited Article 31(c) and (d) of *the Constitution*, which guarantees the right to privacy and prohibits the unnecessary disclosure of private information.
 70. The Cross-Petitioners contended that the Respondent violated the employer's right to privacy by relying on confidential salary structures of employees, which were illegally obtained and shared with bloggers and the public through social media. The Respondent had no right to retain such documents after leaving employment. The Cross-Petitioners argued that the Petitioners' actions constituted a breach of data privacy and exposed the 1st Petitioner to potential claims from employees for data breaches. The Respondent relied on confidential documents that were illegally obtained, including those in pages 33 and 34 of the List and Bundle of Documents dated 30th April 2024. The Cross-Petitioners contended that the Respondent's actions amounted to a violation of the constitutional right to privacy, and the Court should take judicial notice of these violations.
 71. The Respondent further submitted that the High Court has jurisdiction under Article 165(3) and (6) of *the Constitution* to determine matters related to the enforcement of the Bill of Rights and the interpretation of *the Constitution*, as held in *Mombasa Civil Appeal No. 166 of 2018, Kenya Ports Authority v William Odhiambo Ramogi & 8 Others* [2019] eKLR. The Respondent contended that the Court is not barred from entertaining the cross-petition, even though the Data Protection Act grants powers to the Data Commissioner. The Respondent argued that as a Human Resource and Administration Manager, he was bound by professional confidentiality and was responsible for



safeguarding employee payrolls and salary information. However, in filing his claim, he unnecessarily disclosed private salary information of the 1st Petitioner's employees, violating their right to privacy under Articles 28 and 31 of *the Constitution*. The Respondent's disclosure exposed employees to potential security risks, as sensitive financial data was circulated without lawful justification. The Respondent relied on the case of Irene Donna Shamala v NIC Bank Limited [2021] eKLR, where the Court held that unjustified disclosure of banking information violated an individual's constitutional right to privacy. The Respondent was required to obtain consent or a court order before disclosing such confidential information.

72. The Respondent further submitted that confidentiality clauses barred the disclosure, publication, or circulation of such information beyond authorized parties. By sharing the information on social media and in court documents, the Respondent made the private data public in a manner that was malicious, vengeful, and calculated to harm the Petitioners' reputation. The duty of confidentiality breached was owed by the Respondent to both the 1st and 2nd Petitioners, entitling them to damages. The Respondent relied on *MWK & another v Attorney General & 4 others; Independent Medical Legal Unit (IMLU) (Interested Party); The Redress Trust (Amicus Curiae) (Constitutional Petition 347 of 2015) [2017] KEHC 1496 (KLR)*, where the Court awarded Kshs. 4,000,000/- in general damages for violation of the constitutional rights to privacy and dignity. The Court in that case affirmed that compensation is an appropriate remedy for breaches of fundamental rights and that the quantum of compensation depends on the circumstances of each case. The Court further held that translating emotional harm into monetary compensation is inherently arbitrary but must be fair and reasonable based on judicial precedent.
73. The Respondent also submitted that the 2nd Petitioner was properly joined in the cross-petition, as a cross-petition is a standalone suit, and the law does not bar the inclusion of a necessary party. The Respondent concluded that the Petition lacked merit, as the Petitioner voluntarily resigned, and the claim for discrimination was merely an attempt to obtain unjust enrichment. On the other hand, the cross-petition demonstrated that the Respondent unlawfully disclosed confidential information, violating the Petitioners' right to privacy and causing them loss and damage. As such, the Respondent urged the Court to dismiss the Petition with costs and enter judgment in favor of the Cross-Petitioners.
74. I have examined all evidence and submissions of the parties herein. The issues for this court's determination are as follows:
1. Whether the petitioner was constructively dismissed by the respondent.
 2. Whether the petitioner rights were violated.
 3. Whether the respondent's cross petition is merited.
 4. Whether the petitioner is entitled to the remedies sought.

Issue No 1: Constructive Dismissal

75. From the evidence submitted by the petitioner he was employed as a Manager HR & Administration vide a letter of 31st July 2018 w.e.f 1/9/2018 and his salary was gross kshs 105,000/-. The salary was later reviewed on 13/2/2019 to kshs 124,875 gross and kshs 133,200/- to kshs 181,745.85 on 16/9/2019 and 23/2/2022 respectively. As at 1/1/2022 the petitioner was promoted from Manager grade VI to Assistant Director HR and Administration grade V.



76. Vide a letter of 7/11/2023 the petitioner tendered his 3 months' notice of resignation to the Ag CEO wef 20/2/2024. in the said letter, the petitioner stated as follows:

Bernard Mwatha Kinyanjui

Assistant director HR & administration

ASA International K Ltd

PO Box 20 01001

Kalimoni

To the acting CEO

ASA International Kenya Limited

O Box 2420 00606

Sarit centre Nairobi

RE: Notice of Termination of employment

I trust his letter finds you in good health.

I first want to appreciate your confidence in my potential for entrusting me to head the HR for the last over five years. It has been a time of great learning, empowerment and service. I appreciate the team that we have served together since I joined the company. I also want to appreciate the supervisors and seniors both at the group level and here in Kenya.

Having taken time to consider my current service and the opportunity to continue discharging my duties as the head of HR and administration effectively, I regret to inform you of my decision to resign from my current role at ASA international Kenya ltd. My resignation shall take effect on February 20 2024.

Effectively, I would be happy to be of assistance in facilitating a seamless transition for the position. I hope that the duration of three months is sufficient to allow find a suitable replacement for the position.

Yours faithfully

Bernard Mwatha Kinyanjui

MIHRM CHRP (K) CPS (K), CHRA

77. As per the letter, the petitioner did not seem to assign any negative reasons of resigning to the respondents and he was then released from the respondents' employment on 15/2/2024 and then his dues were calculated which were signed off on 2/3/2024.
78. The petitioner avers that during the subsistence of his employment he was discriminated against on racial grounds. The petitioner avers that there was a parallel pay roll for local staff and that of expatriate staff of the respondents. He has pointed out that he was on same grade as one Sankar Das but the said Sankar was paid double his salary being kshs 439,788.60.
79. In response to the petitioners averment and submissions, the respondent aver that the petitioner's letter of resignation was clear and unambiguous that he resigned voluntarily. They aver that the words and tone in the resignation letter did not show any existing problems between the petitioner and the



respondent. The respondents cited Kenya Hotels and allied workers Union vs Mara Siria t/a Safari Camps (K) Ltd – cause No 388 of 2014 [2016]KEELRC 1269 (KLR) which stated that:

“the court observed thus in a decision from South Africa, Quinn/Singlehurst Hydraulics (SA) Ltd (2005) 6 BALR 673: “the test was stated thus the test for determining whether an employee resigned or not is not that an employee has to either by word or conduct show a clear and unambiguous intention not to go on with his contract of employment or that he has to act in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his part of the contract. “

In Southern vs Franks Charlesly & Co (1981) IRLR278 and Sovereign House Security Services vs Savage (1989) IRLR 115, the Court of Appeal (England) held that words used by an employee when resigning should be unambiguous.

80. I have quoted the petitioner’s resignation letter whose tone and words are clear. The tone shows that the petitioner intended to leave the employment of the respondent voluntarily. He thanked the respondent for the opportunity accorded to him to serve and even offered to help during the transition. There was no indication that he was intending to leave the employment due to an act or omission of the respondent.
81. As set out in Coca Cola East and Central Africa Ltd vs Maria Kagai Ligaga (2015) KECA 394 (KLR) constructive dismissal is established when the conduct of the employer must be a fundamental or significant for each going to the root of the contract of employment which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. There must be a causal link between the employers conduct and the reason for the employee terminating the contract.
82. Upon evaluating the evidence and submission and even the resignation letter, I do not find any substantive reason to believe that the petitioner was pushed to resignation due to the action or omission by the respondent. In the circumstances, I find no evidence of constructive dismissal by the respondent against the petitioner.

Issue No 2: Breaching of Constitutional Rights

83. The petitioner has further submitted that his rights under *the constitution* were breached. He petitioner contends that he was paid less than an expatriate employee who was on the same grade with him. The petitioner exhibited a payroll from the respondents which indicate that there were 2 payroll systems for local staff as compared to expatriate staff. He avers that the expatriate payroll was highly confidential but as Assistant Director of HR and Administration, he had lawful access to it and the petitioner avers that Mr Sankan Das was in the same job grade as the petitioner but that the said Das earned Kshs 439,788.60 whereas the petitioner earned kshs 219,912.48/-. The petitioner aver that this was discrimination and a breach of article 27, 28, 41 and 43 of *the Constitution*.
84. In response to this, the respondents submitted that it is their fundamental principle to ensure equality to all irrespective of among others race and colour.
85. The respondents aver that they did not breach this term by discriminating on race or colour against the petitioner in terms of equal wage pay.
86. The respondents further aver that Mr Das was the Country Operations Manager for AsA Limited Kenya and his duties and responsibilities were not the same as those of the petitioner. He also averred that a Country Operations Manager is not in the same job group as uHuHHuman Resource Manager.



87. The respondents further submitted that Mr Das had been working for the respondent since 1992 in various management levels as a Branch Manager, Regional Manager and District Manager and that he demonstrated loyalty by working for one company for over 32 years. The petitioner on the other hand worked for the respondent for only 5 years.
88. The respondents cited *Waithaka vs Sunflag Textiles and Knitwear Mills Ltd* (Cause No 3369 (2018) (2023) K EELRC 1735 (KLR) 13th July 2023 where Hon. J Nduma stated that the three employees the claimant used to demonstrate discrimination held different and not same or equivalent positions to that held by the claimant.
89. In the current case, the petitioner has averred that he was on the same job grade with one Mr Das. There are no documents produced by the petitioner to show that the petitioner and Mr Das were on the same job group. There is no evidence in terms of duties performed by the two to show that they were performing similar duties. It has also been pointed out that the said Das had served the respondent for over 32 years whereas the petitioner had only worked for the respondent for five (5) years.
90. In *Miguna Miguna vs The AG*, (2012) eKLR a similar issue arose as to whether an employee who accepts terms of employment as per the contractual terms can repudiate the same at a later time alleging discrimination. Section 5 of the *Employment Act* 2007 states as follows:

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

91. Article 27 of *the Constitution* also state as follows:

"Every person is equal before the law and has the right to equal protection and equal benefit of the law.

- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
- (6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
- (7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
- (8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.



92. Section 53 of the *Employment Act* is clear that it is not discrimination to take affirmative action with the promotion of equality or elimination of discrimination at workplace and even to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job as was observed in the Miguna Miguna case.

”The fact that Prof Kibwana is distinguished for his higher pay having been a former minister, is also not discrimination.....”

93. In the current case, Mr Das has served the respondent for over 32 years and has worked as the Country Operations Manager of the respondent is indicative that he was serving on a higher scale and was indeed not performing the same duties as the petitioner who served respondent for only 5 years and therefore the submissions that the petitioner was discriminated against is found without merit and is therefore disregarded.

Issue No 3: the Cross Petition

94. The respondents herein cross petitioned against the petitioner alleging breach of privacy arising from the disclosures made by the petitioner. The petitioner on the other hand denied any wrongdoing on their part. They denied sharing confidential information of the respondents with bloggers.

95. The respondents have not demonstrated that the petitioner shared any confidential information with bloggers and that they have been injured in any way. There is no clear evidence that the petitioner shared any information with anybody and the cross petition therefore fails.

Issue No 4: Remedies

96. In view of my findings above, I find that the petition and cross petition fails and therefore each party shall bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2025.

HELLEN WASILWA

JUDGE

