



**Nzilu v Inter-Religious Council of Kenya & another (Cause E270 of 2021) [2025] KEELRC 931 (KLR) (19 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 931 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E270 OF 2021  
K OCHARO, J  
MARCH 19, 2025**

**BETWEEN**

**PATRICIA MWENDE NZILU ..... CLAIMANT**

**AND**

**INTER-RELIGIOUS COUNCIL OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**DR. FRANCIS KURIA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. Contending that at all material times she was an employee of the 1<sup>st</sup> Respondent, who, contrary to its own Human Resource policy, it suspended from employment without pay; whose salary it reduced without any legal justification; whose employment it terminated unfairly; and who the 2<sup>nd</sup> Respondent subjected to workplace harassment, the Claimant sued the Respondents jointly and severally, seeking declaratory orders, compensation for unpaid salary, compensation to the extent of the reduced salary, general and aggravated damages, compensation for unfair dismissal, and costs and interest.
2. The Respondents resisted the Claimant's claim through their respective Statements of Response. They denied her cause of action against them jointly or severally, and her entitlement to the reliefs sought.
3. At the hearing, the Claimant and the 2<sup>nd</sup> Respondent, who testified for and on behalf of the 1<sup>st</sup> Respondent and himself, adopted their witness statements herein filed as their respective evidence in chief and tendered the documents filed under various lists of documents as their documentary evidence.
4. After hearing the parties, I directed them to file their written submissions. They obliged. Their submissions are on record.



## The Claimant's Case

5. It was the Claimant's case that she first came into the Employment of the 1<sup>st</sup> Respondent on 8<sup>th</sup> August 2011 in the position of Project Coordinator, Faith for Life [f41] project.
6. Per the contract of employment, she was entitled to a starting gross of KShs. 125,000, and other benefits including house allowance, transport allowance, medical allowance or appropriate medical cover, for herself, spouse and any other family dependents less than twenty [21] years of age, gratuity, hardship allowance, and 24 working days annual leave taken with leave.
7. Due to her exemplary work ethic, she quickly rose through the ranks to become a Programs Manager-Health & Wellbeing as of 24<sup>th</sup> January, 2012. Following the elevation, her salary was adjusted upwards to KShs. 135,000, with the other terms and conditions of service remaining per her letter of appointment.
8. Further, she was entitled to an annual salary increment. Consequently, her salary increased on an annual basis, thus:
  - I. January 2012 increased to KShs. 135,000.
  - II. January 2013 increased to KShs. 150,000.
  - III. January 2014 increased to KShs. 165,000.
9. Despite working dedicatedly, diligently, and faithfully for the 1<sup>st</sup> Respondent, in July 2016, her salary was reduced from KShs. 165,000.00 to KShs. 125,000.000, without any justifiable cause, and contrary to the dictates of the *Employment Act*, 2007.
10. This act by the 1<sup>st</sup> Respondent was violative of the employment contract. As a result, she suffered loss and damage.
11. To her surprise, on or about 20<sup>th</sup> July 2018, by email, the Respondents sent her on compulsory two months' leave, without any prior notice. The action was unjustified.
12. As at the time she was being sent on compulsory leave, she was earning a Gross salary of KShs. 165,000.00.
13. As a consequence of the Respondents' actions, which amounted to a breach of contract, she suffered loss and damage in the following manner:
  - I. Unpaid salary that was unfairly deducted for July 2016 till February 2019;
    - a. July 2016 to December 2016 [KShs. 165,000-110.00 x6] =KShs. 330,000.00
    - b. January 2017 till December 2017[165,000.00-KShs. 110,000] x 12 months=KShs. 480,000.
    - c. January 2018 to December 2018 [KShs. 165,000 -KShs. 133,000]x12 months=KShs 384,000.00.
    - d. January 2019 till February 2019 [KShs. 165,000.00-KShs. 133,000.00]x12months =KShs. 64,000.00Total =KShs. 1,258,000.00
  - II. Unpaid compulsory leave, two months,
    - a. July 2018 = KShs. 165 000.00



b. August 2018=KShs. 165, 000.00

Total =KShs. 330,000.00

14. When she went to hand over her work prior to proceeding on the compulsory leave, the 2<sup>nd</sup> Respondent violently confiscated her working tools, touching her inappropriately and physically chasing her away from the office in the presence of her colleagues. He did all this while verbally abusing her in the presence of her colleagues and informing her that she was no longer needed in the office.
15. The 2<sup>nd</sup> Respondent abused his power as her immediate supervisor by engaging in physical and psychological violence against her, contrary to the provisions of section 6 of the Employment Act. He did this in the course of his employment with the 1<sup>st</sup> Respondent and or in his capacity as the 1<sup>st</sup> Respondent's Director.
16. These odious, perverse and outrageous acts of physical perversity were unwelcome to her, and were wilful, wanton, reckless, intentional, persistent and continuous.
17. For the 2<sup>nd</sup> Respondent's acts, the 1<sup>st</sup> Respondent is liable in that it, through acts of omission, allowed a workplace environment that enabled the 2<sup>nd</sup> Respondent to harass her at the workplace. Among others, the 1<sup>st</sup> Respondent failed to establish a policy against gender, physical, and mental harassment.
18. On 26<sup>th</sup> June, 2018, she wrote to the Chairman of the 1<sup>st</sup> Respondent complaining of the said abuse, but no action was ever taken. Even after she was unfairly dismissed from employment, the 2<sup>nd</sup> Respondent continued to harass and threaten her with unspecified consequences through emails.
19. On or about 1<sup>st</sup> November 2018, after the lapse of the two months' compulsory leave, she wrote to the Respondents, who had gone silent on the matter, enquiring about her resumption to work. However, the enquiry didn't elicit any response from the Respondents.
20. She wrote another letter dated 20<sup>th</sup> January 2019 as a follow-up. Subsequently, the 2<sup>nd</sup> Respondent wrote her an email dated 5<sup>th</sup> July, 2019, asking her to attend the Respondent's offices to pick up a cheque settling her final dues. This was a testament that the 1<sup>st</sup> Respondent had unfairly dismissed her from employment.

She thereafter requested the Respondents to tabulate her final terminal dues. However, the Respondents failed, refused and neglected, to avail the same.

### **The Respondents' Case**

21. The 2<sup>nd</sup> Respondent testified that at all material times during his employment with the 1st Respondent, he was answerable to the Board Members of the 1st Respondent.
22. The Claimant was also employed by the 1st Respondent Organization as a Project Coordinator, Faith for Life, on a one-year renewable contract which was effective on 29th August, 2011.
23. Her role in the 1<sup>st</sup> Respondent organization was to provide technical and programmatic support for project implementation and the planning, organisation, hosting and reporting of the International Faith for Life Conference, amongst many other duties as would be assigned to her by him or any other superior Member of Staff.
24. The Claimant was engaged by the 1st Respondent on the aforementioned annual contract for an all-inclusive monthly salary of Kshs 125,000/= subject to statutory and staff facilities deductions, and annual performance appraisals.



25. On 28th March, 2012, subsequent to renewal of her contract for one year, the Claimant was promoted to the position of Acting Project Manager, Health and Children.
26. Annual performance appraisals were conducted for the Claimant. Based on the appraisals, her contract was renewed for a further period of 12 months.
27. The Claimant, being a senior employee of the 1st Respondent organisation, was fully aware of the Financial and Procurement Management and Administrative Policies and procedures of the 1st Respondent as enshrined in the Manual dated June 2013.
28. The said policies and procedures prohibited any overspending of organizational funds without authority, first had and received.
29. On 30th September, 2015 it came to the 2<sup>nd</sup> Respondent's attention that the Claimant in contravention of organizational policies, recklessly spent the 1<sup>st</sup> Respondent's funds during a training of Health workers at Gracey Hotel, Homabay in August, 2015 without adhering to the internal financial control guidelines of the 1st Respondent which she was aware of at all material times.
30. The said over expenditure without authority was to the tune of Kshs. 171,600/= and it occasioned substantial loss to the 1st Respondent. Consequently, the Claimant was issued with a warning letter.
31. He further stated that between 14th to 19th March, 2016, the Claimant was assigned the 1st Respondent's Motor Vehicle Registration Number KBP 958H for an official trip to Isiolo, which vehicle was in good mechanical condition and had no defects or mechanical problems at all. The Claimant carelessly used and returned the said vehicle when its engine was damaged and not functional, thus occasioning substantial loss to the 1<sup>st</sup> Respondent.
32. The Claimant's work ethic was wanting in that she was unwilling and/or unable to follow instructions from her Supervisors and/or seniors and constantly clashed with the other employees of the 1st Respondent, leading to an uncomfortable and tension-filled work environment.
33. The 1st Respondent entered into an Agreement with AMREF Health Africa, Kenya, regarding the United States Agency for International Development-funded Afya Timiza project in Turkana and Samburu Counties. As a result, on 10th June, 2018, the Claimant was redeployed from her then position to Program Manager, Afya Timiza project, and was required to report to Maralal on 2nd July, 2018.
34. On 25th June, 2018, the Claimant wrote a letter to the 1st Respondent indicating that she was not willing to take up the new position of Program Manager Afya Timiza. This amounted to insubordination, and a basis for disciplinary action and or summary dismissal against her.
35. The 2<sup>nd</sup> Respondent testified further that on 5<sup>th</sup> July, 2018, the Claimant requested for two months' unpaid leave to enable her to "think" about her redeployment to Maralal, Samburu County. The 1st Respondent approved her request to proceed on two months' unpaid leave effective 24th July, 2018.
36. After the said approval, the Claimant cunningly wrote an e-mail correspondence to the 1st Respondent that she had not requested for leave. Further, as and when she needed one, she would apply per the laid down procedure.
37. On 3rd January, 2019, he received a Memo from the Respondent's Personal Assistant indicating that the Claimant's 2 months' unpaid leave had ended on 31<sup>st</sup> October, 2018, however, she was yet to report back to work.
38. The Claimant never reported back to work and was thus deemed to have absconded from duty.



39. Notwithstanding that the Claimant was liable for summary dismissal for insubordination and absconding work, the Claimant's contract of employment came to an end on 31st December, 2018 and was not renewed as it was evident that she was unwilling to undertake her duties at Maralal in Samburu County as the Afya Timiza Program Manager.
40. On 20th January, 2019 the Claimant wrote a letter to the 1st Respondent alleging that there had been no communication from the 1st Respondent with regards to her position as the Program Manager, Health and Wellbeing, a fact she knew to be false as she was only acting in the said office and had already been deployed to the Afya Timiza project.
41. In the letter, the Claimant falsely alleged that he had informed her to go on compulsory leave, forcefully evicted her from the office and violently confiscated her working tools.
42. The 1<sup>st</sup> Respondent runs strictly on religious principles, and as such, violence at the workplace was untenable as the basic requirements of every employee of the said organisation were to observe decency, respect and courtesy to everybody at all times.
43. The Claimant didn't make any complaint regarding the alleged violence and harassment to the 1<sup>st</sup> Respondent's Board.
44. Several employees worked in the 1st Respondent's offices at the material time, and it would have been quite easy for the claimant to produce at least one witness to the alleged violence and mistreatment that was allegedly meted out to her.
45. The Claimant abandoned duty and cannot now claim that she was unfairly terminated when she, on her own volition, opted not to report to work.
46. The 1st Respondent wrote a letter to the Claimant reminding her that she never reported back to the organization after her leave of absence ended on 31st October, 2018 and that due to her absconding from duty, her contract was not renewed.
47. Cross-examined by Counsel for the 2<sup>nd</sup> Respondent, testified that the Claimant remained in the employment of the 1<sup>st</sup> Respondent until 2018, a period of approximately eight years.
48. Throughout the period, the Claimant remained in the service of the 1st Respondent under fixed-term contracts that were renewed annually.
49. He testified further that on 21<sup>st</sup> January 2013, the Claimant was promoted to the position of Programmes Manager. However, the promotion didn't in any way mean that her employment was permanent and pensionable. Promotions within the 1<sup>st</sup> Respondent Organization were often a result of an employee's good performance.
50. Though he accused the Claimant of having mismanaged the 1<sup>st</sup> Respondent's vehicle, at the material time, it was under the control of his [ 2<sup>nd</sup> Respondent's] driver.
51. On 10<sup>th</sup> July 2018, the 1<sup>st</sup> Respondent signed a contract with AMREF Africa, the project required that they deploy staff to the field. That was hired to. They deployed the Claimant as the project team lead. Initially, the witness had deployed Cynthia Cherop to hold forte. However, she wasn't in charge of the project; the Claimant was. Cynthia was recalled to Nairobi, but not to have her occupy the Claimant's position. He did not require her to report to Cynthia.
52. She asked for the two months' leave orally. The practice at the Respondent's was that an employee had to fill out a leave application form.



53. He testified further that in his email dated 20th July 2018, he directed the Claimant not to visit the 1st Respondent's offices during her leave, and indicated that her leave period was to be segmented into two. Paid and unpaid periods. Additionally, he directed her to hand over the 1st Respondent's property to another employee.
54. After the two months, the Claimant didn't report back to work. He didn't bother to contact her.
55. The 1st Respondent admitted that by her email dated 24th July 2018, the Claimant asserted that he had not discussed with her anything to do with her leave and that she hadn't requested for any. If she wanted any leave, she could follow the stipulated procedure. He didn't respond to the email as he found it argumentative.
56. When he didn't respond to the email, the Claimant escalated the matter to the 1st Respondent's Board via email. The subject matter of the email was the confiscation of work tools and the compulsory leave. She further alleged in the email that he [2nd Respondent] had forcefully removed her from office. He stated that he did not do so, contending that he is a respectful person, and as such incapable of manhandling a lady. He only asked her to hand over the laptop to another staff member, a thing she did without any problem.
57. She wrote a letter dated 1st November 2018, expressing her desire to resume work. He never wrote back as he didn't see the letter.
58. Subsequently, the Claimant wrote another letter dated 20th January 2019, with similar content to that of 18th November 2018. He responded to it on 12th February 2019. He informed her that they had marked her absence as desertion of duty.
59. The 1st Respondent's Human Resource Manual sets out a procedure for leave without pay. Leave without pay must be at the employee's initiative. In this case, the claimant didn't apply for leave.
60. He further testified that in his letter dated 12th February 2019, he didn't rebut the Claimant's accusations against him that were contained in her letter dated 20th January 2019. He also didn't write to the Chairman to exonerate himself from the allegations that the Claimant had set out in the letter to the Chairman of the 1st Respondent's Board. The Board never discussed the matter. However, this shouldn't be construed as an admission of the truth of the allegations.
61. When he eventually responded to her email [s], he accused her of absconding from duty. However, he admitted in his testimony that he was aware that the Claimant had consistently asserted that she had not applied for any leave.
62. The 2nd Respondent stated that they did not summarily dismiss the Claimant from her employment. They couldn't dismiss someone who had refused to report to work.
63. He denied ever having verbally or physically abused the Claimant, reiterating that as a religious man, he wouldn't have. Furthermore, such is prohibited within the 1st Respondent Organization. The Claimant could have escalated this to the Board. He, as a person, didn't escalate the matter to the Board as in his view, the allegations were untrue.
64. In his evidence under re-examination, the 2nd Respondent asserted that the contract between AMREF Africa [K] required that the project manager be stationed in Samburu. The 1st Respondent and the Claimant were both involved in the negotiations for the terms and conditions of the contract on behalf of the 1st Respondent.



65. The Claimant did not report back to work after writing the letter dated 24th July 2018. The 1st Respondent didn't successfully conclude the project. The Project Manager, whom they engaged to be in charge of the project, didn't perform satisfactorily. The partner [AMREF] was dissatisfied; resultantly, they terminated the contract.

**Analysis and Determination.**

66. I have carefully considered the pleadings herein by the parties, their respective evidence and submissions, and the following issues emerge for determination;

- a) At the time of separation, what was the nature of the Claimant's contract of service?
- b) How did the separation occur?
- c) Was there workplace harassment against the Claimant, and violation of her right to fair labour practice?
- d) Is the Claimant entitled to the reliefs sought?

**At the time of separation, what was the nature of the Claimant's contract of service?**

67. There is no dispute that the Claimant first came into the employment of the 1st Respondent on 29th August 2011 under a letter of offer for employment dated 8th August 2011. The letter read in part;

“Following our discussions, we are pleased to offer you employment in the Inter-Religious Council of Kenya [hereinafter referred to as 'IRCK' or 'organization'] on a one-year contract, renewable, effective 29th August, 2011, subject to your acceptance and conditions hereunder.”

68. Undeniably, at the lapse of the contract period, the Claimant's employer-employee relationship between the 1st Respondent and the Claimant didn't terminate. She continued to work for the 1st Respondent, as admitted by the 2nd Respondent in his testimony under cross-examination, in various capacities, which were a result of promotions, for a further seven [7] years. Further, no other contract was executed by the parties that expressed that the initial contract, which had lapsed by effluxion of time, was being renewed for another year or on such other terms.

69. By reason of the foregoing premise, I am not persuaded that after the lapse of the contract of employment [fixed term], that came into being through the letter of appointment dated 8th August, 2011, the Claimant continued serving the 1<sup>st</sup> Respondent under contracts of service that could be renewed annually.

70. It is my view that after effluxion of the initial fixed term contract, and in the absence of any other contract expressing renewal of the same, and that the engagement of the Claimant was to be under annually renewable contracts, the Claimant continued to serve the 1st Respondent for the period she did, under a month to month contract of service, that could be terminable by a one month's notice under section 35 [1][c] of the Employment Act. I reject the Respondent's assertion that she was serving under annually renewable fixed-term contracts.

71. As such, she was entitled to the protections, rights and procedures provided for under the Employment Act, sections 41, 43,45, 45[7] and 47[5], among others.



## How did the separation occur?

72 The Respondents didn't want to come out clearly, and indeed didn't, on how the Claimant left her employment with the 1st Respondent. The 2nd Respondent, in his testimony, consistently kept changing goal posts. At one moment, contending that the Claimant absconded from duty and at another that her contract terminated by effluxion of time in December 2018.

73 Having found as I have hereinabove as regards the nature of the Claimant's employment, at the time of separation, the Respondents' assertion that the contract came to an end by lapse of time is unpersuasive, and in the circumstances of this matter, unreasonable.

74 Having said this, I need to answer the question as to whether the termination of the Claimant's employment was at the initiative of the 1st Respondent. In the case of *Rebecca N. Nyangolo v Prashant Raval* [2021] KEELRC 898 [KLR], this Court stated:

“ 54. The common denominator in all forms of dismissal is that all of them are ultimately caused by the employer. Dismissal, by its definition, is not initiated by the employee, nor is it something which merely happens- *Schmahnn v Concept Communications Natal [Pty]Ltd* [1997] 8 BLLR 1092[LC]. In essence, some overt action by the employer must be present to bring the employment to termination.

75 This Court notes that by an email dated 12th February 2019 addressed to the Claimant, the 2nd Respondent wrote;

“ Your letter dated 20th January, 2019, refers.

You were instructed, vide the email below, to go on leave for 2 months on 24th July 2018. The leave of absence ended on 31st October 2018. You never reverted to the undersigned, and we marked your absence as absconding.

Further, in line with your employment and IRCK Human Resource policy, your contract ended on 31st December 2018. Having severally failed to follow directions that I gave, and in view of the above, I am not in a position to give you any further directions.”

76 By its letter dated 5th July 2019, the 1<sup>st</sup> Respondent wrote to the Claimant, thus;

“ RE: Final Dues

Reference to the subject mentioned above. We enclose herewith Payment Cheque No. 5016 dated June 19, 2019, of KES 706,060 [Seven hundred sixty thousand sixty only] to be drawn from NIC bank, as your final dues.

Kindly sign a copy of this letter as an acknowledgement of receiving the same, and that you have no other claim to IRCK.’

77 I consider the email dated 12th February 2019 and the letter dated 5<sup>th</sup> July 2019, overt acts on the part of the 1<sup>st</sup> Respondent, that signified the termination of the Claimant's employment. For the purposes of this matter, the effective termination date is 12<sup>th</sup> February 2019.

78 In conclusion, the Claimant's employment was terminated at the initiative of the 1<sup>st</sup> Respondent, on the alleged account of desertion of duty.



- 79 Having said this, I now turn to consider whether the termination was fair. Tasked to determine whether or not termination of an employee's employment was fair, a Court of law must interrogate the presence or otherwise of two statutory aspects, namely, procedural and substantive fairness. The burden to prove procedural and substantive fairness lies on the employer. See Pius Isindu Machafu v Lavington Security Guards Limited [2017] eKLR.
- 80 Section 45 of the *Employment Act*, 2007 defines an unfair termination of employment as one that lacks both fair procedure and a valid and fair reason[s].
81. Section 41 of the *Employment Act* provides a mandatory procedure that any employer contemplating terminating an employee's employment must adhere to; otherwise, the termination shall be deemed unfair by dint of the stipulations of section 45 of the Act. The Supreme Court of Kenya in the case of Kenfriight [E.A] LTD v Benson K. Nguti[2019]eKLR, held;
- “Had the Appellant complied with the requirements of section 41 of the *Employment Act*, the summary dismissal would have been a fair one. But to the extent that the appellant did not follow the statutory procedure, the dismissal was found to be unfair, which we agree.”
- 82 The procedure provided for under the stated section comprises three ingredients. Thus, the employer must inform the employee of their intention and the grounds spurring the contemplation. second, the employer must accord the employee an adequate opportunity to prepare and make a representation on the grounds. Conjoined with this right to a fair hearing is the employee's right to be accompanied during the hearing by a colleague of their choice or a trade union representative. Lastly, the employer shall consider the employee's representation before making a final decision.
- 83 With no hesitation, I find that the 1st Respondent didn't conform to the mandatory requirements of section 41 of the *Employment Act*. Hence, the termination of the Claimant's employment was unfair by dint of the provisions of section 45 of the *Employment Act*.
- 84 Section 43 of the *Employment Act* places a legal burden on the employer in a dispute regarding termination of an employee's employment to prove the reason for the termination. Section 45[2] places a further duty on the employer to prove that the reason[s] were valid and fair. Therefore, it won't suffice for the employer to just state that they dismissed the employee for this or that reason. They must further move to demonstrate that, in the circumstances of the matter, the reason [s] were legitimate to be a basis for the termination.
- 85 I have carefully considered the Respondent's Counsel's submissions. He has intensively dealt with insubordination as the basis for termination of the Claimant's employment, and how justified the 1st Respondent was in terminating her employment on the account. A careful consideration of the material placed before this Court reveals that insubordination was not the ground that the Respondents expressed as the basis for the termination. They alleged desertion from duty. To that extent, the submissions were irrelevant, and the many authorities cited in support were too.
- 86 No doubt, through his email addressed to the Claimant, the 2<sup>nd</sup> Respondent placed the Claimant on compulsory leave for two months, effective 24<sup>th</sup> July 2018. This Court notes that the email didn't set out the exact date of reporting back. The 1<sup>st</sup> Respondent contended, and he expressed so in his email referred to hereinbefore, that the Claimant absconded from duty. In my view, absconding or desertion of duty entails an employee being out of duty without the authority of the employer, with the intention of not continuing to serve.



87. This Court does not agree with the Respondents' assertion that the Claimant deserted duty. She wrote not once to the Respondents enquiring about a resumption of duty. The first such letter was that dated 1<sup>st</sup> November 2018. Her compulsory leave, as per the evidence of the 2<sup>nd</sup> Respondent, having lapsed on 31<sup>st</sup> October 2018. In my view, her approach wasn't off mark considering the contents of the email that placed her under compulsory leave, including that she had been forced to hand over her working tools before she proceeded on leave and instructed not to visit her place of work during the leave period.
88. That she so wrote was not refuted by the Respondents. In the eyes of a reasonable man, such action, as was the Claimant's, could signify one thing: an employee who was desirous to continue rendering her services.
89. It is now trite, that where the employer asserts that they terminated an employee's employment on account of desertion of duty, that employer must demonstrate that they made efforts to contact the employee to establish why he or she wasn't reporting to work, intimate to him or her the consequences of absence or continued absence from work without authority, and or that they contemplate taking action against him or her for the unauthorised absence from duty.
90. Taking a misguided position, in my view, the 2<sup>nd</sup> Respondent, in his evidence under cross-examination, admitted that they didn't try to reach out to the Claimant, and had no reason to, as she had absconded from duty. This position was ignorant of the protections and rights that the post-2007 labour relations legal regime set in with for employees.
91. In the upshot, I am convinced that the 1<sup>st</sup> Respondent failed to demonstrate the existence of a valid and fair reason (s) for the termination of the Claimant's employment. The termination was therefore substantively unjustified.

**Was there workplace harassment against the Claimant, and violation of her right to fair labour practice?**

92. Inarguably, the Respondents placed the Claimant on compulsory leave for two months, without pay. This action, which in my view, the 2<sup>nd</sup> Respondent totally failed to defend, wasn't anchored on any provision of the 1<sup>st</sup> Respondent's Human Resource Policy, or justified. The exclusion from the workplace was neither expressed to be investigatory nor administrative. It was handed down immediately after the Claimant expressed her views regarding her transfer to Samburu. Considering the totality of the circumstances, it isn't difficult for one to conclude as I hereby do, that their action was oppressive, arbitrary, and retaliatory, amounting to an unfair labour practice.
93. Candidness, forthrightness, and good faith are supposed to thrive in both parties to an employment relationship. These totally lacked in the Respondents. All through, they maintained that the two months' leave was requested for by the Claimant through her letter dated 25 June 2018, only for the 2<sup>nd</sup> Respondent to change tune in his evidence by confirming that the Claimant didn't request any leave in writing. This reinforces this Court's position that the 1<sup>st</sup> Respondent acted maliciously and in bad faith. Where the employer acts maliciously and in bad faith to the prejudice of the employee, the only fitting description that such an act can attract is none other than it being an unfair labour practice.
94. ILO Convention No. 190- Violence and Harassment in the world of work, the first international treaty to recognize the right of everyone to a world of work free from violence and harassment, including gender-based violence and harassment defines violence and harassment as " a range on unacceptable behaviour and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in Physical, psychological, sexual or economic harm, and includes gender-based violence."



95. Violence and harassment at the workplace can therefore include physical and verbal abuse, bullying, sexual harassment, threats, intimidation, belittling, and humiliating. In her pleadings, witness statement and oral evidence, the Claimant was consistent on how the 2<sup>nd</sup> Respondent handled her on the day she was handing over, truly, which could result in psychological harm. The Respondents' decision to place her on compulsory leave, which was not explained to be either investigatory or administrative, or anchored on the 1<sup>st</sup> Respondent's Human Resource Policy, without pay, was, in my view, an unacceptable act, which was intended to harm her psychologically and economically.
96. This Court notes that the Claimant complained about the conduct and action of the 2<sup>nd</sup> Respondent in various correspondences that she did to him. In his response, the 2<sup>nd</sup> Respondent decided to ignore commenting on the allegations or making a response thereto or escalating the matter to an appropriate forum for resolution. The Chairman of the Board equally failed to act on the Claimant's complaints, notwithstanding the escalation of the matter by her to him.
97. The 2<sup>nd</sup> asserted that if indeed he had harassed the Claimant as she alleged, nothing could have been easier than reporting the matter to the police. I find this argument very unpersuasive. The fact that a workplace violence or harassment hasn't been reported to the police doesn't sanitize committed violence or harassment. Victims of workplace violence and or harassment sometimes, for various reasons, do not report the same even internally, one of such reasons being a lack of an elaborate grievance procedure that is protective of the victims.
98. I have really agonized over the 2<sup>nd</sup> Respondent's silence on the express accusations against him, and the inexplicable failure by the 1<sup>st</sup> Respondent's failure to act on the Claimant's complaint, or escalating the matter to the 1<sup>st</sup> Respondent's Board for deliberation and action. I am prompted to infer that their inaction on the complaint was out of fear that any action could be prejudicial to the 2<sup>nd</sup> Respondent, as his unacceptable behaviour could have been unearthed.
99. I am convinced that workplace violence and harassment were meted out to the Claimant, as she asserted.

#### **Is the Claimant entitled to the reliefs sought?**

100. Having found that the Claimant was subjected to workplace violence and harassment, a vice which must be eliminated at any place of work, and that her right to fair labour practices under Article 41 of *the Constitution* was violated, the justice of this matter demands that she be compensated by way of damages. I award her general damages, KShs. 350,000.
101. Section 49[1][c] of the *Employment Act*, 2007, bestows upon this court the power to grant compensatory relief in favour of an employee who has successfully assailed his or her employer's decision to terminate his or her employment. However, it is pertinent to point out that the power is discretionarily exercised, depending on the circumstances of each case,
102. I have carefully considered that the Claimant's employment came to termination as a result of the Respondents' action which I have held was oppressive, arbitrary, infested by bad faith, and that amounted to unfair labour practice, the length of her service, and the fact that the 1<sup>st</sup> Respondent failed totally to conform to what the law required of them on procedural and substantive fairness, and hold that she is entitled to the relief, seven[7]months' gross salary, KShs. 1,155,000.
103. This Court has hereinabove found that the Claimant's employment morphed into one terminable by notice under section 35 of the *Employment Act*. Undeniably, no termination notice was issued to her as



contemplated under the provision. As a result, I award her one month's salary in lieu of notice, KShs. 165,000.

104. The Claimant contended that she was not paid salary for the two months that she was placed under compulsory leave. I have said hereinabove that the Respondents were unable to justify the action, first, of subjecting the Claimant to the leave as they did, second, the 1<sup>st</sup> Respondent's Policy allowed, in the circumstances, compulsory leave without pay. It is this Court's view that suspension of an employee without pay, unless it is administrative, and the employer's Human Resource policy provides for it, will be inappropriate and unlawful. As the Respondents failed to justify the action, I find no difficulty in concluding that she is entitled to the unpaid salary, KShs. 330,000.
105. The Claimant further sought against the 1<sup>st</sup> Respondent, compensation for earned but untaken leave days. The Respondents did not discount her claim at all. I award her the KShs. 154,687.50.
106. The 1<sup>st</sup> Respondent's overt act that signalled that it had terminated the Claimant's employment was revealed on 12<sup>th</sup> February 2019. Between August 2018, when she was put on compulsory leave, to February 2019, she remained an employee of the Respondent, and thus entitled to her contractual remuneration. This Court awards her KShs. 1,555,000, her unpaid salary during the period.
107. The Claimant specifically pleaded, and testified that during the period from July 2016 to February 2019, the 1<sup>st</sup> Respondent variously and arbitrarily deducted her salary. To fortify this assertion, she tendered in evidence her payslips. The Respondents didn't challenge this assertion sufficiently or at all. I grant her the sum sought under this head, KShs. 1,258,000.
108. The Claimant sought for service pay. I note that her payslip had the item signifying that deductions were being made for her NSSF account. As such, by dint of section 35 of the Employment Act, she doesn't qualify to pursue the benefit.
109. By reason of the foregoing premises, Judgment is hereby entered in favour of the Claimant for:
  - a. A declaration that the termination of the Claimant's employment was unfair.
  - b. General damages for workplace violence and harassment, and breach of her right to fair labour practices, KShs. 350,000.
  - c. Compensation pursuant to the provisions of section 49[1][c] of the Employment Act, seven [7] months' gross salary, KShs. 1,155,000.
  - d. One month's salary in lieu of notice, KShs. 165,000.
  - e. Compensation for leave days earned but not taken, KShs. 154,687.50.
  - f. Unpaid salary for the two months the Claimant was on the compulsory leave, KShs. 330,000.
  - g. Cumulative salary deducted during the period July 2016- February 2019, KShs. 1,258,000.
  - h. Unpaid salary for the months between August 2018 and February 2019, KShs. 1,555,000.
  - i. Costs of this suit.
  - j. Interest on the awarded sums at court rates from the date of filing this suit till full payment.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MOMBASA THIS 19<sup>TH</sup> DAY OF MARCH, 2025.**

**OCHARO KEBIRA**



**JUDGE**

