



**Ronoh v Taita Taveta University & another (Cause 3 of 2019)  
[2025] KEELRC 1087 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1087 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 3 OF 2019  
M MBARÚ, J  
APRIL 3, 2025**

**BETWEEN**

**NICHOLAS KIPROTICH RONOH ..... CLAIMANT**

**AND**

**TAITA TAVETA UNIVERSITY ..... 1<sup>ST</sup> RESPONDENT**

**JONAH ARAP TOO ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The claimant is an adult male, an officer of the court practising as an Advocate since 7 April 2005. The 1st respondent is a public university established under the Universities Act. The 2nd respondent is an adult male and the deputy vice-chancellor to the 1st respondent.
2. The claim is that the claimant was appointed legal officer grade 12 by Meru University of Science and Technology. On 4 May 2015, the 1st respondent invited the claimant for a job interview for the position of senior legal officer grade 12. During the interview, the claimant negotiated additional benefits owing to his previous experience and being an advocate of 10 years standing.
3. The claimant was issued a letter of appointment on 3 June 2015, which included the terms that he would be paid other allowances with his job grade and that the salary increment date would be 1 July. He accepted the appointment on 23 June 2015.
4. The claim is that during his employment, the 1st respondent tasked the claimant to head the legal department but deliberately failed to indicate the job specifications for such a role. There was a multiplication of assignments in the legal department, which the claimant handled alone. These included secretarial duties. The front office made the working conditions extraneous and unbearable. Despite the performance of such obligations, no allowances were paid commensurate with the duties performed.



5. The 1<sup>st</sup> respondent's management and administrative allowance policy (policy) required the respondents to address the realities of working at Taita Taveta University to compensate and motivate employees, which the respondents failed to address. The allowances contemplated under the policy include;
  - a. Entertainment allowance Ksh.5,000;
  - b. Extraneous allowances Ksh.7,000;
  - c. Electricity and water allowance Ksh.5,000;
  - d. Responsibility allowance Ksh.18,000;
  - e. Telephone allowance Ksh.5,000;
  - f. Non-practice allowance Ksh.30, 000.
6. The claim is that the respondents refused to pay the claimant the due allowances despite making similar payments to other employees in comparable and similar positions. The claimant was discriminated against, and he wrote letters to the respondents seeking payment of the due allowances without success. There was discrimination against the claimant when, in January 2016, Prof. Boga, the vice-chancellor, asked the claimant to pursue and become a Certified Secretary, then sit and take minutes during Council meetings to get council allowance. The claimant undertook the course study. In June/July 2017, the claimant produced evidence of being a Certified Public Secretary. He was promised an allowance once the Acting Registrar, Administration, Finance and Planning returned from his visit abroad.
7. In a meeting held in March 2018, the respondent promised the claimant to address the matter and the delay in paying due allowances. The claimant was advised that taking his Certified Public Secretary course would create a good image for the respondents. He was to benchmark with Kenyatta University and the University of Nairobi on how to conduct a legal audit.
8. There was discriminatory treatment when the respondents failed to subject the claimant's employment terms and conditions, privileges and benefits to other employees similarly placed. The 1st respondent could not provide facilities and effect such modifications in the administration to accommodate persons with disabilities. The fact that in 2005, the claimant suffered an injury to his spine that left him with a brachial plexus injury and a paralyzed left arm, and thus a registered person with a disability to the National Council for Persons with Disabilities, was within the knowledge of the respondents. The claimant was not provided a secretary and messenger to assist him with his secretarial and messenger duties.
9. The first respondent failed to ensure, through its security officers at the main gate, a barrier-free and disability-friendly environment to enable access to roads and buildings. The security officers at the main gate denied the claimant access to the premises and his place of work when his car's tyre punctured, yet he was able to carry the punctured tyre.
10. On 13 April 2016, the 1st respondent's security officers at the main gate discriminated against the claimant due to his disability. The claimant was denied access to the premises while on board a public service vehicle; there was selective treatment of the claimant due to his inability to disembark the public service transport vehicle and to physically carry the spare wheel of his vehicle to the premises. This resulted in public embarrassment and discriminatory treatment.



11. The claim is that the claimant represented the 1st respondent in both academic and administrative divisions as head of the department but was not assigned a secretary or messenger despite his disability. The 1st respondent stated to the general public that the claimant was the head of the legal department on its website. All heads of department are paid a headship allowance, and the claimant was not paid, which is discriminatory. The claimant was the de facto Corporation Secretary as defined under the Mwongozo Code of Governance.
12. On 7 February 2018, the first respondent notified the claimant that he was excluded from union leadership. A schedule containing the excluded position was issued; hence, the claimant was entitled to management allowances. The claimant was deliberately excluded. The claimant wrote seeking a salary increment as head of the legal department without success.
13. The claimant complained to the director of the Council of Persons Living with Disabilities, Commission for Administration of Justice (CAJ). Following the complaint, the CAJ, through a letter dated 21 April 2016, affected the claimant's employment with the respondents. In a conciliation meeting with Prof. Barasa, the Deputy Vice-Chancellor, the claimant was informed that he did not belong to the union cadre. Through a letter dated 17 November 2017, the 2nd respondent indicated that the claimant was absent from duty on 23 October 2017. The matter was settled, and the claimant explained his presence.
14. The second respondent issued the claimant a notice dated 29 November 2018 to show cause why disciplinary action should not be taken against him for gross misconduct.
15. On 3 December 2018, the claimant replied and asked about the particulars of the allegations against him. On 2 December 2018, the 2nd respondent directed the claimant to respond as directed and further respond to the notice to show cause.
16. Despite not being supplied with information and particulars of the allegations, on 14 December 2018, the claimant replied and noted that he had not been supplied with crucial information. On 8 January 2019, the respondents suspended the claimant from duty for 90 days on half pay. This was malicious and unlawful, as the claimant had not been adequately supplied with information to respond to claims against him. The 1st respondent failed to consider the law in ELRC Cause No.348 of 2013 that declared persons with disability a special class of employees requiring the court's protection. The respondents failed to consider that the claimant had undertaken his duties as required and that he had prepared and handed over the Charter for the University Council to Prof. Boga, the then Deputy Vice-Chancellor.
17. The claim is that in suspending the claimant, the respondents failed to consider that his salary was secured to a bank facility of Ksh.4, 000,000, which was repaid through the salary. In default, there were penalties and the risk of submission to the Credit Reference Bureau (CRB), jeopardising the claimant's chances with other employers.
18. The suspension was to pave the way for investigations. The respondent published confidential information about the claimant to third parties. On 13 January 2019, the claimant's landlord asked him how he was going to pay his rent upon suspension. A colleague asked the claimant how he would survive on half his salary on 14 January 2019. These questions injured the claimant's reputation and sanding and amounted to defamation.
19. Under article 27 of the *constitution*, the respondents failed to ensure the claimant was in a conducive working environment or provided facilities to support him due to his disability. This breached his right to dignity and equal protection under the law. The respondent's conduct amounted to a unilateral variation of employment terms and was discriminatory.



20. The 1st respondent invited the claimant to a disciplinary hearing through a notice dated 1 February 2019. During the hearing, the respondents failed to follow due process and the Policy. No warning was issued as stipulated under the Policy, contrary to the rules of natural justice. The hearing was a sham with a predetermined outcome to terminate the claimant's employment. The evidence relied on to justify the termination of employment was not provided in advance, and the alleged witnesses were not called.
21. The claimant appealed against the summary dismissal, which was never considered.
22. The claimant is seeking the following orders;
  - a. A declaration that employment terminated unlawfully, wrongfully and unfairly;
  - b. Reinstatement;
  - c. Damages for wrongful termination Ksh.2,451,372;
  - d. Pecuniary damages from loss and compensation for discrimination based on disability Ksh.24,000,000;
  - e. General damages of Ksh.15,000,000;
  - f. Notice pay of 3 months Ksh.612,483;
  - g. Outstanding pension remittances from March 2016 to May 2016 Ksh.71,925;
  - h. Outstanding leave days Ksh.1,008,534;
  - i. A declaration directing the 1<sup>st</sup> respondent to pay the claimant a further Ksh.70,000 per month from May 2015 for 44 months at ksh.3,080,000 being allowances and benefits under his appointment letter;
  - j. Costs of the suit.
23. The claimant testified in support of his case that he is an Advocate of the High Court in Kenya and a person living with a disability registered with the NCPWD. He is a resident of Voi within Taita Taveta County.
24. The claimant testified that he was employed by the 1st respondent on 3 June 2015 as a senior legal officer in grade 12 at a salary of Ksh.204 108 and entitled to allowances commensurate with the grade. The allowances were never paid. He noticed this lapse in his September 2015 pay slip and raised the matter with the respondents. Instead of making payments, the respondent advised the claimant to take CPS to take council minutes. He registered with KASNEB, got the certification, and informed the respondents. The issue was not addressed.
25. The claimant testified that the respondents were aware of his disability at the point of employment. However, on 13 April 2016, as he boarded a matatu from Voi Town to the University, he was accompanied by a mechanic and a motor vehicle tyre because his vehicle had a wheel puncture, and he could not carry and make changes with his functional hand. Security officers stopped the matatu at the university gate and barred it from entering. Despite the claimant's explanations of his circumstances, he was denied access.
26. The security officers insisted that the claimant offload the spare wheel from the matatu, and the mechanic was sent away. The claimant wrote a protest letter to the CAJ, which wrote to the respondents to be updated.



27. The claimant testified that on 29 November 2018, he was issued a notice to show cause why disciplinary action should not be taken against him. He sought information regarding the allegations since the notice referred to records in possession of the respondents. These were not furnished; the respondents constituted a disciplinary committee on 26 February 2019. This was flawed since the same was premature. The claimant had not been provided with information, there was no prior warning, and the respondent failed to adhere to the policy, CBA between Kenya University Staff Union and the law.
28. The disciplinary committee was only established after the claimant filed this suit. The second respondent, despite being a party herein, was part of the disciplinary panel.
29. Upon cross-examination, the claimant testified that he applied for the senior legal officer grade 12 position and was issued a letter of appointment. The salary scale for the position is Ksh.79 014 minimum and Ksh.104 067 maximum. His salary was agreed at Ksh. 104, 067, and he received the allowances outlined in his appointment letter. He signed the appointment letter to accept the terms and conditions of service.
30. Under the appointment letter, the position was not entitled to an entertainment allowance, responsibility, telephone, electricity or non-practice allowances. The pay slips show the claimant was paid a bus and hardship allowance.
31. The claimant testified that he was discriminated against regarding a salary increment. The starting salary was the maximum for the job grade. In a letter dated 3 August 2016, he demanded a salary increment, but the respondents replied, noting that a salary review would only be through interviews and competitive recruitment.
32. On the claimed allowances, the respondents replied to the claimant's demands that he was only entitled to a house allowance, commuter allowance, and hardship allowance, which were paid. He appealed to the vice chancellor, who replied that salary increments and allowances could only accrue with the following job grade, as the claimant had been allocated the maximum for his job grade.
33. The claimant testified that he had all along acted as the head of the legal department for the 1st respondent. The website represented that he was in such a position. However, he was not issued an appointment letter for the position.
34. The respondents published notice of persons excluded from the union leadership. Although his name was omitted, he was not paid the due allowance.
35. The respondents failed to allocate the claimant support staff. There were many employees in the vice chancellor's office, both subordinate and senior. There is no proof that anyone refused to offer assistance or take instructions from the claimant.
36. The claimant testified that his employment was terminated through summary dismissal. The respondents alleged that he was absent from work and neglected to perform his duties. On 15 July 2016, the respondents wrote a reminder to the claimant to complete his duties. He had not legally audited the University's transactions and the board charter. He had submitted a draft charter. The vice chancellor wrote a letter dated 23 October 2017, concerned about neglect of duty, but the legal audit was a work in progress. In an internal memo, the claimant admitted non-compliance with the instructions, apologized, and promised to complete the pending tasks.
37. The claimant testified that there were two allegations made against him,
  - a. Failure to perform duties as assigned;



- b. Absenteeism from work.
38. The 2nd respondent noted in the notice to show cause that the claimant was not at work without permission and that he had pending incomplete work. The claimant apologized and promised to complete the pending work, which included the charter and legal compliance audit.
39. During the job interview, the claimant confirmed that he had prepared similar documents during his previous employment. However, he did not submit the legal compliance audit report or the charter during the disciplinary hearing. He prepared the charter for the years before 2019. The vice chancellor asked the claimant to submit the charter by January 2018 on 23 October 2018, which was not done.
40. In his response on 31 October 2017, the claimant testified that he admitted that the vice chancellor's accusations were correct and apologized. He stated that he had not completed his tasks because of a disability. During his job interview, the claimant did not state his limitations in performing his duties.
41. On 17 November 2017, the deputy vice-chancellor issued a notice that the claimant had been absent from duty without permission on 14 and 15 November 2017. The claimant was required to seek permission from the VC to be away from work. This notice followed a warning issued two weeks before on absence from duty. There were six other officers issued with the same memo by the VC.
42. The claimant admitted that he did not sign in and out from 30 November to 17 December 2018, which contravened the express provisions of the VC and the employer. The notice to show cause required the claimant to explain why he was absent from work from 26 to 30 October 2018 and from 1 to 14 November 2018. The notice also indicated that the claimant had failed to carry out his duties and submit the legal compliance audit.
43. The claimant admitted that he was the full-time employee of the 1st respondent. He was not at his desk from 29 November to 17 December 2018 and did not sign the attendance sheet as required by the VC.
44. On 8 January 2019, the claimant was suspended pending investigations but on half salary. He was invited to attend a disciplinary hearing on 26 February 2019. The notice outlined the allegations made against him. He was issued a notice of summary dismissal on 20 March 2019 and allowed to appeal. On 24 April 2019, he was invited to attend the staff appeal committee.

## **Response**

45. In response, the respondents admitted that through an advertisement on 2 February 2015, the 1st respondent invited applications for several positions, including that of a senior legal officer in grade 12. The 1st respondent received several applications, including one from the claimant, who was then working as a legal officer at Meru University.
46. On 4 May 2015, shortlisted candidates were invited for interviews. The claimant was interviewed based on his application, resume, and recommendations on 3 June 2015 and offered the position of senior legal officer, grade 12. The letter of appointment included terms of service for non-teaching in senior administrative, catering, clerical, hospital, library, and technical categories from grades NT5-15.
47. In a letter dated 23 June 2015, the claimant accepted the appointment on the terms of his letter. He reported to work on 3 August 2015 and started demanding allowances which were not part of his position. The claimant became confrontational every time he was advised that he was not entitled to the allowances demanded and was advised accordingly through a letter dated 16 September 2015.
48. In May 2016, based on his experience as indicated in the job application and resume, the 1st respondent, through Prof. Hamadi Boga, instructed the claimant to conduct a legal audit on the



- university transactions and develop the University Charter. On 6 June 2016, the 1st respondent conducted an appraisal for confirmation of the appointment during probation, and the claimant was found struggling with basic tasks and failed to deliver on several assignments.
49. Through a memo dated 15 July 2015, the 1st respondent, through Prof. Boga, reminded the claimant to submit a progress report on assignments earlier given to him and specifically progress on the legal audit of the university transactions and the development of the University Charter. Instead of concentrating on completing his assignments, the claimant resorted to issuing several demands for salary increments, allowances and professional fees, which he knew he was not entitled to. Remainders are captured through internal memos dated 2 and 3 August 2016, 10 November 2016, 24 November 2016 and 9 March 2016.
  50. In a letter dated 21 February 2017, the 1st respondent informed the claimant that his entry-level salary was Ksh. 104,067, which was the maximum salary for the grade, and he was not eligible for further increments. The respondents also confirmed that the claimant was only entitled to allowances commensurate with his job grade 12.
  51. Aggrieved by the communications, the claimant appealed to the VC on 23 March 2017. The appeal was considered on 18 April 2017, and the VC found the same without merit and advised the claimant to work hard and apply for a promotion when a vacancy for a higher grade was advertised.
  52. Through a memo dated 23 October 2017, the 1st respondent reminded the claimant to complete assignments given to him in May 2016. This included the University Charter and legal audit, among other pending tasks. The claimant was also directed to provide an annual work plan for the financial year 2017/2018, sign a performance contract, submit weekly updates, present the council charter, assess legal compliance, and seek permission from the office of VC as his immediate supervisor in case he is away from the office for whatever reason.
  53. In a memo dated 31 October 2017, the claimant acknowledged the assignments' instructions and undertook to comply and work on pending assignments. Despite his assurances, the claimant neglected the assignments and continued to abscond from work without permission, contrary to the express instructions of his supervisor, the VC, through a memo dated 23 October 2017. In response, the claimant asked for further and better particulars of the misconduct.
  54. Through a notice dated 14 December 2018, the claimant responded to the show cause and disputed being absent and committed to finishing and presenting his assignments during the next council meeting in January 2019. However, the claimant absconded from duty from 30 November 2018 until 17 December 2018. On 8 January 2019, Prof. Too, acting on instructions from the University Council, suspended the claimant on the grounds of gross misconduct and specifically for;
    - a. Absenting himself from work without authority on 26, 29 and 30 October 2018, 1 to 14 November 2018 and 30 November to 17 December 2018; and
    - b. Failure to develop a council charter and to carry out the university legal compliance audit.
  55. In his letter dated 26 February 2019, Prof. Too invited the claimant to appear before the staff disciplinary committee. A copy of the particulars of the offences and an invitation to the claimant's union branch secretary were enclosed.
  56. On 7 March 2019, the claimant attended a disciplinary hearing and was accorded a hearing. The committee considered the response and representations and found the claimant guilty of absconding from work and neglecting his duties. A summary dismissal was issued upon considering the terms and conditions of employment and the CBA.



57. The claimant filed an appeal against the summary dismissal on 10 April 2019. In a memo dated 17 April 2019, the VC appointed the disciplinary appeal committee and, through a notice dated 24 April 2019, invited the claimant for a hearing on 2 May 2019.
58. In his letter dated 30 April 2019, the claimant acknowledged receipt of the invitation letter. Still, in a letter dated 30 April 2019, the union indicated that having participated in the disciplinary proceedings, it would not attend the appeal hearing. The claimant attended and made his representations, and through a memo dated 7 May 2019, the first respondent dismissed the appeal.
59. The response is that the termination of employment was under the *Employment Act*.
60. The claims that there were unpaid salaries and allowances are not correct. The claimant was employed at grade 12 and paid the maximum salary of Ksh. 104,067 was higher than his salary from Meru University at Ksh.79, 014 in November 2014. He was not eligible for an increment unless a promotion followed the advertisement and competitive recruitment. As alleged, the claimant was not allocated additional duties outside his job description. He did not execute assigned duties, which is admitted. The claimant worked in the office of the VC, which had a secretary, messenger and other support staff, and the only allowances due were per job grade 12. and was never appointed as head of the legal department.
61. The alleged discrimination is denied. The respondent had no knowledge of any private communications between the claimant and Prof. Boga or Prof. Barasa, and he could not conduct a legal audit until he went for benchmarking. In his letter of application and resume, the claimant indicated that he was conversant and had conducted a legal audit at Meru University.
62. There was no discrimination on the grounds of disability as alleged. The claimant was given support for his position, but he neglected his duties.
63. The claimant was suspended to allow for investigation, leading to an invitation to attend a disciplinary hearing. The claimant was found to have absconded from work and neglected his duties. He admitted that he was away on various dates without permission from his supervisor and VC and did not do his work. Despite several reminders, there is no evidence that the claimant submitted the legal audit as required by his office or the University Charter. The respondents referred the claimant to see a neurosurgeon at the University Referral Hospital for its members but elected not to attend.
64. The claims made are without merit and should be dismissed with costs. The damages claimed are remote, excessive and not recoverable in law. The claimant failed to take reasonable steps to mitigate his damages by failing to seek alternative employment, and his damages should be reduced.
65. In evidence, the respondents called Chrisantose Odhiambo Ogoni, the head of the human resources department of the 1st respondent. He testified in support of the response and relied on the records filed. The claimant was employed following an advertisement in the local newspapers and following interviews. He was issued a letter of appointment as a senior legal officer in grade 12, and his job description included terms and conditions and due allowances. Under grade 12, he was placed at the maximum salary of ksh.104, 067 and this could only be reviewed upon promotion to another grade based on advertisement and interviews.
66. Ogoni testified that the claimant failed to do his duties as assigned, and he absented himself from work without permission, leading to a notice to show cause on 3 December 2018. The claimant requested additional particulars to the notice, which were shared with an invitation to attend a disciplinary hearing, which he did. Still, his explanation was found unsatisfactory, leading to termination of



- employment through a notice dated 20 March 2019. He filed an appeal, which was heard and the termination of employment was affirmed.
67. Ogony testified that upon appointment, the claimant's allowances were listed in his letter, including a house and commuter allowance based on his mode of transport.
  68. When the claimant joined the employment of the 1st respondent, there was a university charter but no Board Charter, which he was required to prepare for the University. As the legal officer for the institution, the claimant was given this role. He was never appointed as the head of the legal department, and the website indicated that it was just a marketing tool and public relations. The claimant was not issued a letter reviewing his employment to claim that he was the head of the legal department. The university website kept changing based on information provided by the marketing department. Calling the claimant the head of the department was not correct.
  69. Ogony testified that heads of departments were paid an allowance, but the claimant was not in such a role to earn an allowance.
  70. As an advocate of the High Court of Kenya, the claimant was not paid a non-practice allowance because, despite being an employee of the respondent, he was practising in Voi.
  71. The 2nd respondent, as the VC, sat at the claimant's disciplinary hearing per the constitutive statute.
  72. On the claim that the claimant was discriminated against, Ogony testified that this is not addressed in his witness statement because the parties amicably settled the matter. In the instances where the claimant alleged that he was treated differently, there was an amicable settlement.
  73. At the close hearing on 30 January 2025, both parties agreed to file written submissions by 4 March 2025, but both parties remained absent. The respondents filed their written submissions later on 14 March 2025.
  74. The written submissions are analyzed and assessed using the findings. The issues which emerge for determination are;
    - Whether there was discriminatory treatment of the claimant by the respondents.
    - Whether there was wrongful, unlawful and unfair termination of employment;
    - Whether the remedies sought should be issued;

#### **Who should pay the costs?**

75. In a letter dated 28 November 2018, the claimant wrote to the respondents and asked for better particulars of the allegations made against him. Indeed, this is a requirement under Article 47 of the [constitution](#), which must also be read together with Section 41 of the [Employment Act](#).
76. On the issue of whether there was discriminatory treatment against the claimant, the evidence by the respondent's witness, Mr. Ogony, that the matter was settled amicably was not challenged. In his cross-examination and re-examination, he asserted that all issues that arose relating to the alleged discriminatory treatment of the claimant due to his disability were addressed, and that is why he did not address the same in his witness statement.
77. However, matters of discriminatory treatment, once raised with the court, are serious and should not be treated casually. There is no record of the matter being settled. There is no consent on the issue that the claim of discriminatory treatment was amicably settled. This is so because under Article 27 of the [constitution](#), read with Sections 5 and 6 of the [Employment Act](#), the employer is prohibited from



- engaging in discriminatory treatment of any employee on the stated grounds and for matters the court may find necessary. In the case of *Mutyaene v KCB Bank Limited* [2023] KECA 313 (KLR), the court held that workplace discrimination is prohibited under the constitution and the law.
78. In the case of *Morusoi & 34 others v Kenya Literature Bureau; Kenya Union of Printing, Publishing and Allied Workers (KUPRIPUPA) (Interested Party)* [2024] KEELRC 1938 (KLR), the court held that discrimination at work is contrary to Articles 27 and 41 of the constitution as read with section 5 of the Employment Act.
79. The claimant testified that he reported the incidents of discriminatory treatment to CAJ, which intervened and addressed the matters. Mr. Ogony, the first respondent, corroborated this evidence, testifying that these matters have since been settled amicably, as addressed above.
80. In this case, the claimant urged the court that the non-payment of allowances and refusal to pay a salary increment were discriminatory. His case was that he was the head of the legal department and other similarly placed heads of departments was paid a responsibility allowance, and he was left out. The claimant asserted that he discussed the matter with Prof. Boga and Prof. Barasa, who promised him that the matter would be addressed.
81. The claimant was appointed as the senior legal officer of the 1st respondent through a letter dated 3 June 2015. The letter had terms and conditions of his service where he was placed at the maximum legal grade 12, earning a salary of Ksh. 104,067 per month. Together with his salary, the claimant's grade accrued a house allowance and commuter allowance.
82. Under Sections 9 and 10 of the Employment Act, the letter of employment dated 3 June 2015 was not reviewed, amended, or the position held changed. The claimant accepted the terms and conditions of his employment, and his request for enhanced allowances and salary increments was considered. An advisory from the 1st respondent was issued stating that, having started at the maximum under his grade, any enhancement would only arise from an advertisement and competitive recruitment.
83. The case of discriminatory treatment on this basis does not arise. The claimant does not state the other employees who were similarly placed under grade 12 and paid enhanced allowances, and he was omitted. He cannot claim what other cadres of employees earned in allowances without falling foul of his appointment letter, which spells out his terms and conditions.
84. The claimant also raised the matter that he was discriminated against due to his disability when he used a matatu to ferry his mechanic and spare wheel when his motor vehicle had a puncture. The particulars of the claim are that the security officers at the gate and main entrance to the 1st respondent's premises on 13 April 2016 selectively treated the claimant without due regard to his disability, making it impossible to carry the spare wheel to his vehicle, which was at the car park. There is no particular response to the respondents' claims except a mere denial.
85. However, the claimant does not state whether the matatu he was using was ordinarily allowed within the 1st respondent's premises and why the security officers operating the gate targeted him as a person with a disability. Access to any premises, mainly where there are government installations, comes with high-security conditions. The purpose of placing security officers at the main gate and entrance must be for a given purpose. Did the claimant seek prior permission to be allowed access using the matatu, and was it declined? Was the respondent aware of the need for support, and did they decline?
86. The court finds no merit in the claim of discriminatory treatment.
87. The claimant also made a case that he was denied access to a secretary and messenger to perform his duties, and hence, he could not accomplish various tasks. In his evidence before the court, the claimant



was cross-examined at length and admitted that he was in the VC's office and had 6 officers at his disposal. These included secretaries, messengers and other senior and subordinate staff. He did not seek assistance from these officers and was declined. He did not ask for support and was declined.

88. The provisions under the law that prohibit discriminatory treatment against any person, including a person with a disability, should not be applied generally to make a case where none exists. The protections under Article 27 of the *constitution* and Section 5 of the *Employment Act* are meant to redress serious violations where there is a breach. These provisions should not be treated casually.
89. The claimant, as an officer of the court, is aware of the provisions in *Law Society of Kenya v Attorney General & COTU Petition No.4 of 2019*, where the Supreme Court defined what is discriminatory treatment as follows;

Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions... whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured

90. This position is reiterated by the Court of Appeal in the case of *Barclays Bank of Kenya LTD & Another vs Gladys Muthoni & 20 Others [2018] eKLR* and in the case of *Peterson Guto Ondieki v Kisii University [2020] KEELRC 1895 (KLR)* that The party claiming to be discriminated against must demonstrate the different treatment and on what grounds. The claimant's case that he was earning less than other heads of department is without basis since he had his letter of appointment and grade. There is nothing to distinguish others placed under his grade who earn more. The allegations made are bare and without evidence. Even where the claimant was the only legal officer within the 1<sup>st</sup> respondent and this was mentioned on the website as head of the department, there was no commensurate written notice changing his terms and position. The scenario demonstrated by the claimant cannot be used to infer a discriminatory practice.
91. Parties are allowed to resolve employment disputes at the shop floor including the mechanisms laid out under the CBA. As much as the CAJ amicably resolved the complaints lodged by the claimant, the office granted mandate to investigate discriminatory treatment as work is in the office and the Commissioner for Labour under the *Employment Act*. The matter resolved, such shall suffice.
92. On the reasons leading to summary dismissal of the claimant, through a notice dated 20 March 2019, the 1<sup>st</sup> respondent terminated his employment because, following a disciplinary hearing held on 7 March 2019, the claimant failed to satisfactorily charges of,
1. You absented yourself from work without authority on the following dates;
    - a. 26 October 2018, 29 October 2019, and 30 October 2019
    - b. 1 November 2018 up to 14 November 2018
    - c. 30 November 2018 up to and including 17 December 2019
  2. Your failure or neglect to perform duties assigned to you, and specifically'
    - a. Failure to develop a Council Charter
    - b. Failure to carry out the University's legal Compliance Audit.



93. Upon the disciplinary hearing, the claimant was found culpable for being absent from duty without authority and neglecting his duties leading to summary dismissal.
94. Before the disciplinary hearing, the claimant was issued a notice to show cause over his conduct. He asked to be supplied with particulars of the allegations, which were then outlined in the notice inviting him to the hearing and leading to the same matters forming part of the hearing. The particulars are reiterated in the notice of summary dismissal. The particulars of being absent from duty without authority are given together with neglect of duty.
95. The claimant did not contest the allegations of being absent from work without authority and promised to change. He further offered that on the stated dates, he was within the workplace but had opted to sit at the library for the legal compliance audit instead of sitting at his office. He was asked to provide evidence but had none.
96. On the second charge of neglect of duty, the claimant's case was that he had submitted a draft Council Charter on 27 September 2016 but never followed up for approval. The Legal Compliance Audit was ongoing work, but he failed to give the expected completion date or to produce the work plan indicating specific tasks required towards completion. The claimant admitted to receiving reminders from his supervisor about the pending work on 9 June 2016, 15 July 2016, 11 January 2017, and 23 October 2017, which he acknowledged.
97. Absence from work without permission or authority of the employer is defined under Section 44(4) (a) of the *Employment Act* as gross misconduct as held in *Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union* [2016] KECA 97 (KLR). that absence from duty for 5 consecutive days without leave or lawful cause, inability to properly perform work due to intoxication and other such self-induced acts, negligence or careless performance of duty Included conduct constituting gross misconduct to warrant instant dismissal.
98. In the case of *United States International University v Eric Rading Outa* [2016] KECA 78 (KLR) and the case of *Kenya Ports Authority v Mary Saru Mwandawiro* [2017] KECA 14 (KLR), the court held that absence from work without authority is gross misconduct and subject to summary dismissal.
99. In this case, the claimant failed to explain his whereabouts for several days. Although the days absent were communicated to him, he failed to give a proper account of his whereabouts.
100. In the case of neglect of duty, unlike a case of poor performance, this is defined as gross misconduct under Section 44(4) of the *Employment Act*, as held in *Postal Corporation of Kenya v Andrew K. Tanui* [2019] KECA 489 (KLR). This position is elaborated in the case of *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] KECA 446 (KLR);
 

... the appellant, in failing to alert the cashier or assistant to lock the door, had neglected the duty he had been employed to perform. Notwithstanding the acquittal in the criminal trial, an award of punishment, including dismissal as had happened, may still be imposed to discipline him.

... the dismissal was not founded on the criminal culpability of the appellant. It was based on his being liable for neglect of duty.
101. Neglect of an employee's duty is when there is a willful and deliberate failure to perform given tasks without good cause. Section 44(4) of the *Employment Act* sets out the employee's conduct, which amounts to gross misconduct, to justify summary dismissal. Pertinent to this case is section 44(4)(c), which recognizes as gross misconduct the willful neglect by the employee to perform any work which



it is his duty to perform or if he carelessly and improperly performs any work, which from its nature it was his duty to perform carefully and adequately. See *Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union* [2016] KECA 97 (KLR)

102. In this case, the claimant, as the senior legal officer of the 1st respondent, has not offered any justified reason for failing to undertake his duties and provide a Council Charter and Legal Compliance Audit, which were matters of their nature to perform. Despite repeated reminders by his supervisor and VC, he did not oblige.
103. Before the summary dismissal, the claimant was notified and allowed to attend with a representative of his choice. The KUSU representative was at the disciplinary hearing. The first respondent adhered to the provisions of Section 41(2) of the *Employment Act* before the claimant's Summary dismissal. The reasons leading to the termination of employment by summary dismissal were justified and valid.
104. The compensation and notice pay claims are unavailable in cases where summary dismissal is justified.
105. Damages accrue only where there are violations of the law. In this case, there is no proof of discriminatory treatment, as alleged.
106. On the claims for pension remittances from March to May 2016, pension regulations are separate matters in employment. The claimant shall return to the shop floor and address with the relevant agency.
107. The claimant's pending leave days amount to Ksh. 1,008,534. The basis of the claim is that the claimant did not take his annual leave for the entire period of his employment. The only payment statement filed by the respondent is the one for November 2014. This is for a period before his employment with the first respondent.
108. There is no evidence that the employer has filed annual leave records. This is right under Section 28 of the *Employment Act*. However, unless the employer has approved it, annual leave should not be accumulated beyond the period contemplated under Section 28(4) of the Act, and in this case, it should be based on Ksh's basic salary. 104,067 for 18 months, the claimant is entitled to leave pay at Ksh. 114,473.70
109. On the claim for payment of Ksh.70,000 for 44 months from May 2015, being allowances and benefits, as analyzed above, the claimant was under a written contract with terms and conditions of his employment, and the only available allowances were house and commuter allowances. These were allowances and benefits available under grade 12, under which the claimant was placed.
110. On the reasons leading to termination of employment, being absent from work for over 22 days, under section 19(1) (c) of the *Employment Act*, the pay due on these days should be deducted from the claimant's salary.
  - (c) an amount not exceeding one day's wages in respect of each working day for the whole of which the employee, without leave or other lawful cause, absents himself from the premises of the employer or other place proper and appointed for the performance of his work;
111. For the 22 days that have not worked, Ksh. 76,315.80 should be deducted from the final dues, as held in *Stephen Mbugua Chege v Nairobi City Water and Sewerage Company* [2019] KEELRC 488 (KLR).
112. The analysis above, the claim is without merit save for the award of leave pay at ksh. 114,473.70 To be paid less Ksh. 76,315.80 for the days absent from work. In this regard, each party is to bear its costs.

**DELIVERED IN OPEN COURT AT MALINDI THIS 3 DAY OF APRIL 2025.**



**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Denis

