Gatobu v Tullow Oil Kenya Limited (Cause E964 of 2021)
[2025] KEELRC 1786 (KLR) (18 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1786 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E964 OF 2021

NZIOKI WA MAKAU, J

JUNE 18, 2025

BETWEEN

LYNNET NANCY KATHURE GATOBU ..... CLAIMANT

AND

TULLOW OIL KENYA LIMITED ..... RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim dated 22nd November 2021, the Claimant instituted this suit against the Respondent seeking:

    a. A declaration that the Respondent discriminated against the Claimant during her employment in the United Kingdom.

    b. A declaration that the Respondent's termination process was flawed and illegal.

    c. A declaration that the Respondent's termination of the Claimant's employment on alleged account of gross misconduct amounted to unfair and unlawful termination of employment.

    d. 12 months compensation for the unlawful and unfair termination of employment, of Kshs. 7,145,980/-.

    e. The Respondent be compelled to pay the Claimant's withheld and or accrued per diem due on account of a Long-Term UK Contract.

    f. The Respondent be compelled to pay Assignment uplift which was to be an increase in the Claimant's salary when an employee took an assignment outside jurisdiction.

    g. The Respondent be compelled to pay the Claimant's Cost of Living Allowance while in the United Kingdom (COLA).

h. The Respondent be compelled to pay the Claimant Transport Allowance amount of £400 per month for the duration of her UK assignment.

i. General damages for forex loss following the Claimant's salary payment in Kenya Shillings instead of Pounds while on assignment in the United Kingdom.

j. Relocation costs constituting the Claimant's two months' salary.

k. Damages in favour of the Claimant against the Respondent for discriminatory employment practices.

l. Damages for unfair labour practices and violations.

m. The Respondent to bear the costs and interests of this Claim.

n. Such further orders as this Honourable Court may deem just and expedient.

2. The Claimant averred that through a Contract dated 1st March 2012, the Respondent employed her as a Human Resource Advisor based in their Nairobi Office. She was later promoted to Senior Human Resource Business Partner on an annual basic salary of Kshs. 7,145,890/- as at January 2018. She worked in the Nairobi Office between 1st March 2012 and 6th April 2016, where she helped set up the Respondent's human resource department during the early years of the organization in Kenya. She was consequently awarded the highest performance ranking known as "Significantly Exceeds Expectations" in 2013 and 2014, and thereafter continued to be rated highly for both performance and potential. The Claimant further averred that it was because of her exemplary work that in December 2015, the Respondent informed her they would be seconding her on an international assignment to their United Kingdom Office, headquartered in Chiswick, West London, to assume the role of Human Resource Projects and Analytics Lead. She was advised that the international assignment would be for one year on a short-term basis as per the then Respondent's Global Mobility Policy, which described a short-term assignment as one that lasted between 3 and 12 months. The policy and company practice further stipulated that anyone moving with family on an international assignment could not be considered on a short-term assignment and that their terms of engagement were those of long-term assignees. The assignees on short-term assignments were not accompanied by their families and received a daily per diem of £50, while those on long-term assignments got an assignment uplift.

3. It was the Claimant's averment that since she was the sole caregiver to her two children aged 6 and 4 at the time, and who she was relocating with, she raised concerns regarding the funding per diem of £50 provided to her. She had discussions with the Respondent, among them-

i. An increase of the daily per diem from £50 to £100 in recognition of the fact that the former was the per diem allowance for a lone assignee, whereas the Claimant was relocating with her two children;

ii. Increase in the settling allowance, which for a lone assignee was £500;

iii. Increase in cold clothing allowance, which for a lone assignee was £500;

iv. Having the Claimant's children's nanny accompany them to the UK due to the extremely high costs of nannies or babysitters in the UK, or in the alternative, the company to cater for the UK nanny's cost, which was extremely high in comparison to the Kenyan rates; and,

v. The Claimant's salary to be paid in GBP instead of Kenya Shillings to avoid forex losses.

4. The Claimant's case was that the concerns she raised to the Respondent were not fully addressed, with the Respondent only increasing the cold clothing allowance to £750. She averred that since she was expected to start her international assignment, she moved to London on 7th April 2016 with her family to carry out her work, which was initially supposed to last one year until 31st March 2017. When in November 2016 the Respondent enquired whether her assignment could be extended, she expressly responded that she would extend her assignment if her terms were revised to compensate her correctly. Further, she informed the Respondent that none of her previous discussions with them had been addressed, thereby causing her financial strain during her stay in London. It was the Claimant's averment that she also requested that her assignment terms be converted from short-term to long-term since she would have stayed in the UK beyond the 12 months provided for in the policy.

5. The Claimant's further case was that she also raised concerns of discrimination because her colleagues who were equally on international assignments with their families were being compensated differently as long-term assignees, and their per diems were for families and not lone assignees. However, the Respondent blatantly ignored her concerns of discrimination as raised and made her working conditions hostile, expensive and difficult for her and her children. She particularised the discrimination in her Claim, including that her terms of engagement while in service in the UK were those of a single person, yet the Respondent was aware she had moved with her children. In addition, she was denied access to the benefits of an employee on long-term assignment, having worked for 24 months, and she received her salary in Kenya Shillings instead of Sterling Pounds. She contended that the Respondent declined to pay her relocation costs from London to Kenya when colleagues who relocated within the country were paid the equivalent of their one month's salary as relocation costs. In her particulars, the Claimant noted she was paid a per diem of £50 per day and was denied Cost of Living Allowance. It was the Claimant's averment that whereas the Respondent ought to have been aware that London is the most expensive city in the UK and the world, they failed to remedy the situation. She maintained that the discrimination against her was intentional, as the Respondent made changes to their workplace, culture and employee value proposition when she left the company. She further contended that the Respondent, on their website, admitted to not having put in place structures to address concerns by women, especially single mothers.

6. The Claimant stated that in January 2018, while in the UK, she was promoted to the position of Senior Human Resource Business Partner for Tullow Kenya. When she returned to Kenya, she was dismayed to learn that her job description entailed 90% facilities work and 10% human resource work, which was at odds with her skills, experience and job title. She argued that her colleagues in the Human Resource Unit holding similar positions globally performed functions that matched their jobs. That the new job description was therefore malicious and deliberately intended to mismatch her experience and skills, and subsequently push her out of the job. She averred that sometime in July 2018, the Respondent's Managing Director (MD) invited her to a meeting titled "Way Forward on Lynnet's Role". The meeting ended up being discussions towards mutual separation between her and the Respondent, with a draft copy of a Settlement and Termination Agreement given to her.

7. It was the Claimant's averment that instead of concluding the discussion on mutual separation, the Respondent initiated a premeditated sham disciplinary process against her on the ground that she questioned the rationale behind the new job description. On or about 20th August 2018, the Respondent issued to her a show cause letter for declining to serve in a role while being well aware that there had been restructuring and loss of some positions. She denied the allegation because while other departments had lost positions, Human Resource had increased its staff count by hiring a Learning and Development Specialist in 2017. She stated that she was required to show cause why her employment should not be terminated for declining a role she was not qualified for in the absence of any other role

that was suitable for her. That in essence, the Respondent had instituted a redundancy process through a disciplinary hearing, in breach of the *Employment Act*. She responded to the show cause on or about 23rd August 2018, clearly enumerating why she could not take up the Facilities Role. However, on or about 24th August 2018, the Respondent set up a disciplinary hearing on 29th August 2018 referred to as "...a next step in the process", without stating whether or not her response to the show cause letter was satisfactory. The invitation to the hearing also placed her on an indefinite "garden leave" that is defined in other jurisdictions to mean the leave an employee takes while serving notice, having either been terminated or resigned. In her case, she had neither been terminated from employment nor resigned and therefore could not have been sent on garden leave. The Claimant averred that the Respondent never communicated to her the decision of the disciplinary hearing panel after it was held as scheduled.

8. Additionally, the Claimant asserted that on or about 6th September 2018, a Respondent's officer wrote to her accusing her of using a personal USB flash disk on the company laptop and downloading 24,000 files on 31st July 2018 in breach of the Respondent's Code of Ethics. She explained that she was copying her personal files since discussions on her exit in July 2018 had commenced and that the Respondent's IT team had permitted the same as long as she followed the procedure they set out to her. The Claimant noted that the Respondent's investigation on the same did not disclose that any of their files had been copied by her, and no investigation report was provided to her. It was the Claimant's case that on 2nd November 2018, the Respondent proceeded to summarily dismiss her from employment with no justifiable cause, having found a reason to terminate her employment at the lowest cost since July 2018. She appealed the decision for summary dismissal, but her appeal was dismissed on or about 23rd November 2018. She contended that the disciplinary proceedings were an attempt at assuaging an illegal process.

9. According to the Claimant, the Respondent constructively dismissed her before subjecting her to dehumanizing proceedings and an unlawful and wrongful termination of employment. She averred that the Respondent refused to pay her terminal dues and benefits, which they withheld from her during her assignment in the UK. She further claimed shares in merit and performance that had been prorated to Kshs. 3,050,000/- as at August 2018, but which the Respondent had failed and/or refused to pay her despite her requesting the same in writing to the MD. The Claimant also claimed that the Respondent's actions as averred hereinabove breached the contract of employment.

Respondent's Case

10. The Respondent averred in its Statement of Response dated 6th June 2022 that it is referred to as TULLOW KENYA BV and not TULLOW KENYA LIMITED as stated in the Claim. That by an employment contract dated 6th February 2012, it employed the Claimant as a Human Resource Advisor at an annual basic consolidated salary of Kshs. 3,960,000/-. Through a letter dated 20th January 2016, it offered the Claimant a short-term assignment to London, UK, to help develop her skills and experience. The terms of the short-term assignment were explained to the Claimant before she relocated and she accepted the terms. The Respondent also gave the Claimant an additional £6,000 to cover childcare costs during the school holidays, as a specific exemption. It stated that the salient terms of the Short-Term Assignment were as follows:

    a. Duration of the assignment was from 1st April 2016 to 31st March 2017

    b. Base salary was Kshs. 5,513,870/-

    c. In addition, the Claimant received a compensation package as follows:

i. 10% uplift to the gross salary;

ii. £50 per diem for each day she was present in London;

iii. Settling allowance of £500;

iv. Cold weather clothing vouchers of £750;

v. Relocation costs catered by the Respondent;

vi. Respondent catered for her children's education and lunch, excluding special tutoring, school uniforms, field trips, school supplies, and extracurricular activities; and,

vii. Respondent took out a private medical insurance cover with Allianz Worldwide Care in favour of the Claimant.

11. The Respondent further averred that the Claimant's short-term assignment was extended for 6 months, by a letter dated 24th November 2016, under the following terms:

a. Duration of the extension was from 1st January 2017 to 30th June 2017

b. Base salary was Kshs. 5,513,870/-

c. In addition, the Claimant received a compensation package as follows:

i. 10% salary supplementary to the gross salary while the Claimant was in covering maternity leave, effective 1st January 2017;

ii. Location allowance at 10% uplift of the gross salary;

iii. £50 per diem for each day she was present in the UK;

iv. Respondent catered for her children's education, including tuition, enrolment fees, books, local transport, and lunch. However, it excluded: special tutoring, school uniforms, field trips, school supplies, and extracurricular activities; and,

v. Respondent took out a private medical insurance cover with Allianz Worldwide Care in favour of the Claimant.

12. The Respondent averred that, again, by a letter dated 15th May 2017, it extended the Claimant's short-term assignment by 12 months under the following terms:

a. Duration of the extension was from 1st January 2017 to 31st December 2017

b. Base salary was Kshs. 5,513,870/-

c. In addition, the Claimant received a compensation package as follows:

i. 10% uplift to the gross salary;

ii. Location allowance at 10% uplift of the gross salary;

iii. £50 per diem for each day she was present in the UK;

iv. £2,483 received in the December payroll as the cash-out value of the six-month assignment;

v. Additional 6 months' allowance of £2,483;

vi. Cold weather clothing vouchers of £750;

vii. Respondent catered for her children's education, including tuition, enrolment fees, books, local transport, and lunch. However, it excluded: special tutoring, school uniforms, field trips, school supplies, and extracurricular activities; and,

viii. Respondent took out a private medical insurance cover with Allianz Worldwide Care in favour of the Claimant.

13. It was the Respondent's averment that by a letter dated 6th March 2018, it issued the Claimant with a letter of extension of the short-term assignment for a further 3 months from 1st January 2018 to 31st March 2018. Then, in a letter dated 26th March 2018, it informed her of the end of the assignment and relocation back to Nairobi, effective 31st March 2018. However, the Claimant emailed the Respondent on 29th March 2018 requesting for extension of the relocation date by one month as she was scheduled to undergo surgery on 9th April 2018. She also requested temporary transport and accommodation upon her relocation. The Respondent acceded to the Claimant's request and extended her repatriation to Kenya to 30th April 2018, and she returned to Kenya on 28th April 2018. It further provided her with a furnished apartment and company vehicle for May and June 2018.

14. The Respondent's case was that it underwent reorganisation from 2017, following a decision to cut down drilling activities, and that the same entailed merging roles and inevitable redundancies. It noted that the Human Resource Function was one of the functions affected by the reorganisation, as two units, the Information Security Department and Facilities Management, were allocated to the Human Resource Function without additional headcount. The Claimant was informed beforehand that she would be allocated the Facilities Management role once she relocated back to Kenya, in addition to human resource management. It averred that the Human Resource Function retained its headcount to have the capacity to take up the Facilities Management role. That on 10th May 2018, it issued the Claimant with a job description of her new role as Senior HR Business Partner & Facilities Lead, but she declined to take up the said role upon her return to Kenya. Consequently, it emailed her on 6th July 2018 and offered her a mutual separation package for her consideration. The Claimant made a counterproposal on 17th July 2018 on the mutual separation package, which the Respondent revised by a letter of the same date.

15. The Respondent asserted that the outcome of the preceding disciplinary proceedings against the Claimant was not communicated to her because on 28th August 2018, it was discovered she had breached the Respondent's Code of Ethical Conduct (IS Security Requirements) by downloading approximately 24,000 files to a non-Tullow assigned StoreJet Transcend USB: 76b09b51. Nevertheless, the disciplinary hearing proceeded on 29th August 2018 as investigations on the Claimant's breach of the Respondent's IS security procedure had to be undertaken before any action could be taken against her. The Respondent asserted that through an email dated 6th September 2018, the Claimant admitted to having transferred files from the Respondent's laptop. Moreover, a Report dated 10th October 2018 evidenced that the Claimant downloaded the Respondent's information through an encrypted format to a non-Tullow authorized personal USB hard drive. The Respondent maintained that the Claimant was dismissed from employment through a letter dated 2nd November 2018 because she admitted to having downloaded company files using a non-Tullow approved external USB hard drive, and for gross misconduct for violating the Respondent's Code of Ethical Conduct and the Information System Security requirements. It therefore denied having unlawfully and wrongfully terminated the Claimant's employment as alleged.

16. It was the Respondent's further case that the Claimant had not been continuously rated highly for both performance and potential, as she was ranked as "exceeds expectations" in 2015 and 'successful' in 2016 and 2017. It denied that anyone moving with family on an international assignment was considered on a long-term assignment, asserting that it made exceptions in favor of the Claimant to travel to the UK with her children despite her engagement being on a short-term assignment basis. Therefore, whereas the Claimant was expected to be unaccompanied according to the Short-Term Assignment Policy, she was allowed to travel with her children for the duration of her assignment. Furthermore, her housing allowance was increased beyond that stipulated in the policy, and the Respondent catered for her children's relocation costs. The Respondent further averred that during the term of the Claimant's assignment, she received a cash payment for home leave in lieu of air tickets totaling £7,450 for her and her two children, notwithstanding that she was expected to make the said payment as per the policy. It noted that it also paid for the cost of sea freight for the Claimant's personal effects at the end of her assignment, and accorded her a fully furnished apartment and a company vehicle when she returned to Kenya, despite her not being entitled to the benefit under the policy. As additional assignment compensation, the Claimant also received an allowance of 10% base pay net per month, per diem of £50 per day and a transport allowance of £200 per month.

17. According to the Respondent, its Group Head of Human Resource and the Claimant held meetings to address the complaints raised by the Claimant. The Group Head of Human Resource then carried out investigations on the said complaints and, thereafter, by a letter dated 13th September 2017, informed the Claimant that he had found her complaints unmeritorious. It contended that notwithstanding the terms of the Short-Term Policy Assignment, it made numerous better exceptions in favour of the Claimant, which translated to her having better terms than other Tullow employees on similar assignments. It therefore denied that it discriminated against the Claimant. The Respondent averred that the pay gap existed because of the unequal distribution of men and women, particularly the higher proportion of men in senior technical and managerial roles in the oil and gas industry. Further, the calculation on the pay gap relayed on its website only related to the employees in the UK and did not affect the Claimant. The Respondent contended that the Claimant was duly paid Kshs. 285,387.92 as total dues, which she duly confirmed on 30th November 2018. It denied that the Claimant is entitled to relocation allowance as it catered for all her relocation costs to the UK and even paid her settling in allowance of £500 as a one-off payment while in the UK. It also paid her repatriation costs back to Kenya. It further denied that the Claimant was entitled to a cost-of-living allowance while in the UK, having been paid £50 per diem for each day she was in the UK as per the letter dated 20th January 2016, and the Short-Term Allowance Policy. It further averred that having paid the Claimant a transport allowance of £200 while in the UK, she is not entitled to a transport allowance of £400 as claimed.

18. It was the Respondent's case that this Court does not have jurisdiction to handle the claim of Kshs. 3,050,000/- being shares owed to her by the Respondent as claimed. It referred to clause 14.9 of the Respondent's Employee Share Award Plan, which stipulates that any dispute relating to the Plan and all awards shall be governed in accordance with the law of England and Wales, and the Courts of England and Wales have exclusive jurisdiction to hear any dispute. The Respondent noted that as per clause 10.3 of the Employee Share Award Plan, any award held by an employee summarily dismissed from employment lapses immediately upon their termination from employment. It prayed that the Claimant's Claim be dismissed with costs.

Evidence

19. The Claimant (CW1) testified in Court that having served as HR Advisor, she knew the Respondent's policy on international assignments. That her assignment should have been clarified as a long-term

one because she went for over 12 months. Further, any employee who travelled with their family for international assignments was not placed on short-term assignments, and therefore her assignment was not to be short-term as she was to leave with her family. She further testified that she never received a redundancy notice and instead got a promotion letter post the redundancy. That she was only called to a disciplinary hearing when she said she was uncomfortable undertaking the facilities management, but at no point had she refused to work. She noted that she did not agree with some of the clauses in the separation agreement, and that they had initially agreed for her last day in the office to be 31st August 2018.

20. CW1 stated under cross-examination that she was transferring her personal files in a Folder J, and she later apologised and handed over the laptop and USB so that they could take out what they considered company files. She acknowledged in re-examination that she was aware of the 12-month definition and the extension of a short-term assignment based on business period, which she believed were included in the long-term assignments. She asserted that she did not get a determination on the first disciplinary and was only summoned on the allegation of personal data.

21. Ms. Victoria Charles Jones (RW1) testified in Court that her work at the Respondent was Reward and Mobility Manager. She would look into the transfer of staff and that the issue of assignments was under her docket. She stated under cross-examination that the Claimant was purely on a short-term assignment, which could extend up to 12 months due to exigencies of business. That if such an assignment extends, each matter would be reviewed on a case-by-case basis. However, she acknowledged that there was no provision for extending beyond 12 months. She noted that child care was not available under either assignment and that the Claimant was given transport, which was not applicable in either policy.

22. Mr. Frankline Juma (RW2) produced documents 1-7, 22-36, 39-42, and 44-52 of the Respondent's Bundle, and pages 1-3 and 8 of the Supplementary Bundle. Under cross-examination, RW2 explained that shares were normally allocated every year after appraising performance, subject to the Share Award Plan, and depending on criteria and performance. He confirmed that the Claimant was not affected when the Respondent underwent restructuring and downsizing and was assigned a new role. He noted that the notice to show cause issued to the Claimant for her refusal to take up the new role came after the mutual separation agreement broke down. However, the issue was abandoned when a subsequent issue of her downloading files on a non-Tullow gadget arose a day before the scheduled disciplinary hearing. He stated that, as seen on pages 240-241, the Claimant signed for her dues, which were Kshs. 249,000/- or thereabout. RW1 clarified in re-examination that the Claimant's basic salary was Kshs. 595,498.50 per month as of 2018, and it would be Kshs. 7,145,979.96 as annual salary.

23. That marked the end of oral testimony and thereafter parties filed written submissions.

Claimant's Submissions

24. It was the Claimant's submission that from the outset, her termination from employment was unfair, unlawful and discriminatory, and thus amounted to unfair termination that warrants compensation. That the termination of her employment by the Respondent was the classic definition of constructive dismissal. The Claimant argued that the legal principles considered in determining what constitutes constructive dismissal were stated in Gatuku v Geminia Insurance Co. Limited (Employment and Labour Relations Cause 79 of 2019) [2023] KEELRC 2689 (KLR) (27 October 2023) (Judgment) and include the following:

    a. What are the fundamental or essential terms of the contract of employment?

b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?

c. The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract…" (emphasis by Claimant)

25. Further, and relating to her job description upon her return to Kenya, the Claimant relied on the decision in Meshack Mutilangi v Mustek East Africa Limited [2021] in which the Court quoted with approval the case of James Ang'awa Atanda & 10 others v Judicial Service Commission [2017] eKLR, that for an employment contract to be lawful, there should be mutual agreement between the employer and employee. In addition, a unilateral variation of an employment contract without the consent of an employee would amount to a breach of contract or repudiation, and where the employee accepts the repudiation, it amounts to constructive dismissal. The Claimant argued that the Respondent's actions of misaligning her role in the company go to the very root of the contract of employment, and the variations further led to her not being qualified for the position. That the Respondent completely rebuffed her legitimate expectations of the role and did not consider the growth and skills she had acquired in London. She thus asked this Honourable Court to declare that the Respondent constructively dismissed the Claimant from employment.

26. The Claimant further submitted that the process used to terminate her employment was flawed. She noted that the Court in Kenfreight (E.A) Limited v Benson K. Nguti [2016] eKLR, enunciated the correct procedure for termination of an employment contract, including issuing proper notice according to the contract, explaining the reasons for which the employer is considering termination of the contract, and hearing and considering any of the employee's representations. She stated that the Court in CMC Aviation Limited v Mohammed Noor [2015] eKLR explained that wrongful dismissal involves breach of employment contract, such as an employer dismissing an employee without notice or without the right amount of notice, contrary to the employment contract. The Claimant argued that the Respondent had placed her on garden leave unfairly and did not allow her to work as she waited for her disciplinary hearing. Since she had neither been terminated nor resigned and could not have been sent on garden leave, the same was unprocedural and unfair. She further argued that since the grounds for gross misconduct were unsubstantiated, the entire termination process became a malicious and unfair termination. She thus prayed for a declaration that the dismissal from employment was unlawful, unprocedural hence unfair for violating the rules of natural justice, and as such, the Claimant ought to be compensated for such heinous acts.

27. As regards discrimination, the Claimant submitted that the Court in the case of Keith Wright v Kentegra Biotechnology (Epz) Ltd [2021] eKLR relied on the holding in Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others [2018] eKLR that, "discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions…". She noted that sections 5(2) and 5(3) of the *Employment Act*, 2007 prohibit discrimination at the workplace, including in respect of terms and conditions of employment. Further, Article 27 of *the Constitution* of Kenya stipulates that every person is equal before the law and has the right to equal protection and equal benefit of the law.

28. The Claimant submitted that as seen in the Long-Term Assignment Policy annexed at pages 172-173 of the Claimant's bundle of documents, she was selectively given some long-term assignment benefits that ought to have accrued to her as a matter of right. These include her children's education, settling allowance of £500 and medical insurance for her and her family. That during the hearing of the matter, the Respondent failed to explain why the benefits they insisted were given to the Claimant while

on short-term assignment were terms in the long-term assignment policy, and how the short-term assignment was better than the long-term assignment. Further, that the Respondent could also not explain why they did not convert the Claimant's assignment to long-term, which this Court should thus consider as discrimination. The Claimant submitted that as enunciated by the Court of Appeal in Ol Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR, it is an unfair labour practice to pay different wages for equal work or work of equal value "if the reason or motive, being the cause for so doing, is direct or indirect discrimination on arbitrary grounds or the listed grounds e.g. race or ethnic origin". It was the Claimant's submission that her terms of engagement while in service in the UK were those of a single person, yet the Respondent was well aware she had moved with her two children. In addition, she was paid in Kenya Shillings instead of Sterling Pounds, which resulted in loss of income due to foreign exchange losses. She argued that her case therefore constituted discriminatory employment practices that made her working conditions hostile, expensive and difficult for her and her children. The Claimant thus prayed for compensation at 12 months' salary for discrimination in the workplace.

29. The Claimant submitted that section 49 of the *Employment Act* provides for remedies for wrongful dismissal and unfair termination. She argued that considering her service of diligently executing her roles under her contract of employment or international assignment, with many promotions therein, the Court should afford her the maximum compensation of 12 months for unfair dismissal. The Claimant further submitted that she is entitled to the costs of the suit as per section 27 of the *Civil Procedure Act* (Cap. 21).

Respondent's Submissions

30. The Respondent submitted that the Supreme Court in Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR settled the law on burden of proof in discrimination allegation when it held that a party who claims direct or indirect discrimination against him should prove his claim by application of sections 108 and 109 of the *Evidence Act*. The Respondent argued that since the Claimant neither adduced any evidence nor called any witness to corroborate her allegation that her colleagues on similar assignments like hers were compensated as per the long-term policy and not the short-term policy, the allegation remains unfounded. Secondly, the Claimant having been aware from the onset that she was going on a short-term international assignment by accepting the terms thereof, was bound by the said terms and cannot insist on being paid on different terms. The Respondent relied on Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014] eKLR in which the Court of Appeal held that it is not the duty of the Court to rewrite a contract for the parties, as the parties are bound by the terms of their contract. It urged the Court also to find that nowhere in the Claimant's letters of complaint did she ask the Respondent to convert her terms from long-term assignment to short-term assignment. It was the Respondent's submission that the letters of the short-term assignments given to the Claimant duly informed her that her assignment would be extended for a further temporary period. It argued that the extension of the period alone was therefore not a ground to convert the assignment from a short-term to a long-term assignment because the assignments are fundamentally different in terms of scope. That in any case, the Claimant never asked to return to Kenya and had no conduct of someone unhappy with her terms of engagement.

31. The Respondent submitted that the Court should deny the claim for accrued per diem withheld because it was neither founded in the short-term nor long-term policies, and secondly, it should be pleaded and proved to be in the nature of special damages. It relied on the decision by the Court of Appeal in Shell Limited v Benjamin Karuga Kibiru & another [1986] KECA 94 (KLR) on proving damages. The Respondent urged the Court also to deny the claims for assignment uplift because the Claimant's pay slips evidence that the same was paid while she was in the UK. That the Respondent's

documents before the Court further show that the relocation costs to the UK were paid, and that the cost-of-living allowance was only entitled to assignees on the long-term policy. The Respondent further submitted that the Claimant is not entitled to general damages for forex loss as claimed because the Respondent paid her tabulation on the same at £1,094.71, as a one-off net payment, as evidenced at pages 47, 48 and 51 of the Respondent's bundle of documents.

32. The Respondent asked the Court to consider the statement of Ms. Victoria Jones that the Claimant was better off under the short-term policy than under the long-term policy. Whereas it submitted that the Claimant's suit did not plead that she was constructively dismissed, the Claimant indeed asserted the same at paragraph 40 of the Memorandum of Claim dated 22nd November 2021. Without prejudice to its foregoing assertion, the Respondent submitted that the Claimant was not constructively dismissed from employment because:

    i. The Claimant had been informed that her role would be merged with that of facilities management, to which she responded, 'Role sounds interesting'.

    ii. The decision to add facilities management was informed by the Respondent's restructuring that entailed the merging of roles to avoid redundancies.

    iii. The Claimant neither resigned nor left employment because of being assigned the role.

33. It was the Respondent's submission that section 43(2) of the *Employment Act* guides that the reasons for terminating a contract are the matters that the employer, at the time of terminating the contract, genuinely believed to exist, and which caused the employer to terminate the services of the employee. According to the Respondent, the Claimant's employment was terminated because of her gross misconduct for violating the Code. That the Claimant having admitted that she transferred company data, the Court should find that the reason for termination of her employment contract was valid and justifiable. The Respondent urged the Court to find also that the Respondent followed due process when terminating the Claimant's employment contract and therefore was not entitled to the prayers sought. Concluding, the Respondent stated that the Court should find that the Claimant has not demonstrated any ground to warrant exercise of the Court's discretion in her favour to be awarded costs.

Disposition

34. The relationship between the Claimant and Respondent started vide a Contract dated 1st March 2012. Through the said contract, the Respondent employed the Claimant as a Human Resource Advisor based in their Nairobi Office. She was later promoted to Senior Human Resource Business Partner on an annual basic salary of Kshs. 7,145,890/- as at January 2018. The Claimant asserts that she worked in the Nairobi Office between 1st March 2012 and 6th April 2016, whereat she helped set up the Respondent's human resource department during the early years of the organization in Kenya. She averred that she was consequently awarded the highest performance ranking known as "Significantly Exceeds Expectations" in 2013 and 2014, and thereafter continued to be rated highly for both performance and potential. The Claimant further averred that it was because of her exemplary work that in December 2015, the Respondent informed her they would be seconding her on an international assignment to Chiswick, West London, to assume the role of Human Resource Projects and Analytics Lead. She asserts she was advised that the international assignment would be for one year on a short-term basis as per the then Respondent's Global Mobility Policy, which described a short-term assignment as one that lasted between 3 and 12 months. The policy and company practice further stipulated that anyone moving with family on an international assignment could not be considered on a short-term assignment and that their terms of engagement were those of long-term assignees. The

assignees on short-term assignments were not accompanied by their families and received a daily per diem of £50, while those on long-term assignments got an assignment uplift.

35. As the sole caregiver to her two children aged 6 and 4 years at the time, the Claimant relocated with her children. She asserts she raised her concerns regarding the funding per diem of £50 provided to her resulting in some minor changes. She asserts that the concerns raised with the Respondent were not fully addressed and that the Respondent only increasing the cold clothing allowance to £750. She asserts she was given an extended stay.

36. It was the Claimant's case that she also raised concerns of discrimination because her colleagues who were equally on international assignments with their families were being compensated differently as long-term assignees, and their per diems were for families and not lone assignees. She asserts that however, the Respondent blatantly ignored her concerns of discrimination and made her working conditions hostile, expensive and difficult for her and her children. She averred that her terms of engagement while in service in the UK were those of a single person, yet the Respondent was aware she had moved with her children and was in addition, denied access to the benefits of an employee on long-term assignment, having worked for 24 months. She also she received her salary in Kenya Shillings instead of Sterling Pounds and asserted that the Respondent declined to pay her relocation costs from London to Kenya when colleagues who relocated within the country were paid the equivalent of their one month's salary as relocation costs. It was the Claimant's averment that whereas the Respondent ought to have been aware that London is the most expensive city in the UK and the world, they failed to remedy the situation. She maintained that the discrimination against her was intentional, as the Respondent made changes to their workplace, culture and employee value proposition when she left the company. She further contended that the Respondent, on their website, admitted to not having put in place structures to address concerns by women, especially single mothers.

37. The Respondent on its part asserts that through a letter dated 20th January 2016, it offered the Claimant a short-term assignment to London UK, to help develop her skills and experience. The Respondent asserts that the terms of the short-term assignment were explained to the Claimant before she relocated and she accepted the terms. The Respondent averred that it also gave the Claimant an additional £6,000 to cover childcare costs during the school holidays, as a specific exemption. It stated that the salient terms of the Short-Term Assignment were as follows:

    a. Duration of the assignment was from 1st April 2016 to 31st March 2017

    b. Base salary was Kshs. 5,513,870/-

    c. In addition, the Claimant received a compensation package as follows:

        i. 10% uplift to the gross salary;

        ii. £50 per diem for each day she was present in London;

        iii. Settling allowance of £500;

        iv. Cold weather clothing vouchers of £750;

        v. Relocation costs catered by the Respondent;

        vi. Respondent catered for her children's education and lunch, excluding special tutoring, school uniforms, field trips, school supplies, and extracurricular activities; and,

        vii. Respondent took out a private medical insurance cover with Allianz Worldwide Care in favour of the Claimant.

38. The Respondent further averred that the Claimant's short-term assignment was extended for 6 months and later by another 6 months and that she received a cashout of £2,483 received in the December 2016 payroll as the cash-out value of the six-month assignment plus an additional 6 months' allowance of £2,483 among other benefits.

39. The Claimant's assignment in the United Kingdom came to an end on 28th April 2018 when she returned to Kenya. Upon her return to Kenya the Claimant asserts she was given an assignment that was different from her skill set as a human resource manager. While in the UK, the Claimant had been promoted to the position of Senior Human Resource Business Partner for Tullow Kenya. When she returned to Kenya, she was dismayed to learn that her job description entailed 90% facilities work and 10% human resource work, which was at odds with her skills, experience and job title. It was the Claimant's position that her colleagues in the Human Resource Unit holding similar positions in other parts of the globe performed functions that matched their jobs. The Claimant was of the view that the new job description was therefore malicious and deliberately intended to mismatch her experience and skills, and subsequently push her out of the job. She maintained that sometime in July 208, the Respondent's Managing Director (MD) invited her to a meeting titled "Way Forward on Lynnet's Role". The meeting ended up tilting towards discussions on a mutual separation between her and the Respondent. It was evidenced that the with a draft copy of a Settlement and Termination Agreement. However, the Claimant's reluctance to accede to her mutual separation led to a disciplinary hearing when the Claimant was found to have used a non-Tullow issued USB/External Hard drive to download files from the work laptop. She was taken through a disciplinary hearing and the initial efforts to mutually separate replaced by the termination on account of the use of a non-Tullow issue USB. The termination was on 2nd November 2018, with the Respondent summarily dismissing her. Her appeal did not yield a different result on 28th November 2018.

40. The Claimant asserts she was discriminated against in the manner of her treatment in the United Kingdom as well as unfairly treated upon her return to Kenya when her tour of duty ended. She was a mother of two and on the rise in her career. The Respondent was one of the companies exploring for oil in the vast oilfields of Turkana. The Respondent was from accounts a good employer. That is until the Claimant experienced the dark side of it.

41. Whilst in the United Kingdom, the Claimant was given short term assignments that cumulatively resulted in her being in the UK for a long assignment. The Respondent's witness Ms. Jones and Mr. Juma were unable to explain why the assignment was not a long term assignment as the import of the periodic extensions was one that resulted in the term served exceeding the lower threshold of a long-term assignment.

42. Discrimination is outlawed under *the Constitution* of Kenya and the *Employment Act* which provides under section 5(2) and (3)(a) that

> (2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.
>
> (3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—
>
> (a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;
>
> (b) in respect of recruitment, training promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.

43. Further, the Universal Declaration of Human Rights provides that every person has the inherent right to dignity while the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises under Article 7 the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular remuneration which provides all workers, as a minimum, with fair wages and equal remuneration for work of equal value without distinction of any kind, and in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work and equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence.

44. The UN Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW] provides protection against discrimination of women while the UK Equality Act 2010 prohibits discrimination based on nine "protected characteristics" which include age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. The Act covers direct and indirect discrimination. It is therefore against the law in the United Kingdom to discriminate against anyone because of the protected characteristics which include gender.

45. The Claimant was from all intents and purposes discriminated against whether it was the haphazard manner of her deployment, the fact that she was assigned single status yet she moved to the United Kingdom with her 2 children then aged 6 years and 4 years. It is trite law that the best interests of a minor are to secure the most favourable outcome and it would have been cruel for the Respondent to expect the Claimant who was the primary care giver of her children to relocate to the United Kingdom without her children. The Respondent turned a deaf ear to her pleas for reconsideration. The extensions given were particularly galling as the Claimant was given certain benefits at times and thereafter in renewals, those benefits were denied.

46. Treatment of employees facing the same circumstances differently is considered outright discrimination. The Claimant therefore suffered indignity by being unable to meet her basic needs. The Claimant was paid in Kenya Shillings and not Sterling Pounds thus disadvantaging her on her international assignment as London is not a cheap town to live in.

47. The Court finds that the treatment of the Claimant was less than ideal. The Respondent had commenced a mutual separation when it discovered a misstep by the Claimant in her use of an unauthorised gadget to retrieve her personal data from the Respondent. In short shrift the Claimant was shunted out of her employment and was to be paid a paltry Kshs. 249,000/- as her final dues.

48. The Claimant is entitled to the following remedies:

    a. A declaration that the termination of the Claimant's employment on alleged account of gross misconduct amounted to unfair and unlawful termination of employment.

    b. 12 months compensation for the unlawful and unfair termination of employment amounting to Kshs. 7,145,980/-.

    c. The Respondent to compute and pay the Claimant's withheld and/or accrued per diem due on account of a Long-Term UK Contract.

    d. The Respondent be compelled to pay Assignment uplift for her UK assignment.

    e. The Respondent be compelled to pay the Claimant's Cost of Living Allowance while in the United Kingdom (COLA).

f. The Respondent to pay the Claimant the Transport Allowance amount of £400 per month for the duration of her UK assignment.

g. Relocation costs constituting the Claimant's two months' salary.

h. Kshs. 4,000,000/- in favour of the Claimant against the Respondent for discriminatory employment practices.

i. Should the sums in b) c) d) e) f) and g) remain unpaid after the expiry of 30 days, interest to run on the sums at Court rates from the date of judgment till payment in full.

j. Costs of the suit.

Orders accordingly.

DATED AND DELIVERED AT KISII THIS 18TH DAY OF JUNE 2025

NZIOKI WA MAKAU, MCIARB.

JUDGE