



**Kilonzo v Avacare Kenya Limited; Pharmaceutical Society of Kenya  
(Interested Party) (Employment and Labour Relations Cause  
611 of 2019) [2025] KEELRC 2302 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2302 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 611 OF 2019  
BOM MANANI, J  
JULY 31, 2025**

**BETWEEN**

**ELIZABETH MWENDE KILONZO ..... CLAIMANT**

**AND**

**AVACARE KENYA LIMITED ..... RESPONDENT**

**AND**

**PHARMACEUTICAL SOCIETY OF KENYA ..... INTERESTED PARTY**

**JUDGMENT**

**Background**

1. The Claimant has sued the Respondent alleging unfair termination of her contract of service. She also accuses the Respondent of having failed to appoint her as its director in violation of the law. She further alleges that the Respondent's officers subjected her to verbal abuses, intimidation and discrimination causing her mental anguish for which she claims redress.
2. The Claimant avers that the Respondent offered her employment as its pharmacist through a contract that was entered into on 30<sup>th</sup> July 2018. She contends that the contract was for a fixed term of one year which was meant to run from 30<sup>th</sup> July 2018 to 30<sup>th</sup> July 2019.
3. The Claimant avers that as the Respondent's pharmacist, she was supposed to manage its (the Respondent's) pharmaceutical business in the position of Superintendent Pharmacist. She further contends that by virtue of this position, the Respondent was supposed to appoint her onto its Board of Directors as required under section 21 of the *Pharmacy and Poisons Act*. She however contends that the Respondent deliberately omitted to capture this requirement in the contract between them.



4. The Claimant contends that the Respondent's failure to include the position of Director in her contract was because of discrimination against her on account of gender, race and ethnicity. As such, she contends that the Respondent's actions were unlawful.
5. The Claimant further contends that during the currency of her employment with the Respondent, the Respondent's management subjected her to a series of threats and verbal abuses. She contends that the actions by the Respondent's officers caused her to develop suicidal tendencies forcing her to seek psychiatric care.
6. The Claimant avers that the Respondent terminated her contract prematurely on 17<sup>th</sup> January 2019 after she had served it for slightly over five months. She contends that the Respondent's decision to terminate the contract was without valid reason and in violation of due process. As such, she seeks the various reliefs that she has pleaded in the Memorandum of Claim.
7. In response, the Respondent avers that the Claimant was not its employee but an independent contractor. It avers that the Claimant's remuneration was paid against fee notes she raised and that the payments were subject to withholding tax thus constituting her into an independent contractor as opposed to an employee. It further contends that the Claimant acknowledged this reality through her emails dated 20<sup>th</sup> August 2018 and 30<sup>th</sup> November 2018.
8. The Respondent avers that the Claimant used to work for it for only two days and a maximum of ten hours in a week. It further avers that it did not make statutory deductions from her salary. It also avers that at the time she was working for it, she was contemporaneously providing services elsewhere. As such, it contends that she was not in its employment.
9. The Respondent contends that the Claimant's roles were limited to the following:-
  - a. Ensuring compliance with the regulations and processes set by the Pharmacy and Poisons Board and other authorities.
  - b. Obtaining permission from the Pharmacy and Poisons Board for marketing materials.
  - c. Preparing documents for product introduction to various hospitals and institutions.
  - d. Outlining the requirements for labelling, storage and packaging of products.
10. The Respondent acknowledges that it terminated the Claimant's contract. It contends that the Claimant was informed of the decision to terminate the contract through its letter dated 17<sup>th</sup> January 2019.
11. The Respondent contends that it had valid reasons to end the relationship between the two. It avers that the Claimant made an application to the Pharmacy and Poisons Board to change its (the Respondent's) physical address without following the correct procedure thereby risking closure of its business. It further contends that the Claimant was guilty of insubordination and disrupting the sitting arrangements at the workplace. As such, it contests her assertion that termination of her services was devoid of valid reasons.
12. The Respondent denies that the Claimant was entitled to act as its Pharmaceutical Superintendent. It further denies that she was entitled to be appointed onto its Board of Directors.
13. The Interested Party substantively participated in the proceedings on account of its regulatory mandate over the pharmaceutical sector in Kenya. It contends that it is mandated to champion the rights of its members including the Claimant. As such, it contends that it was duty bound to participate in the proceedings in order to shade light on the statutory obligations the Respondent owed the Claimant.



14. The Interested Party avers that the *Pharmacy and Poisons Act* stipulates how persons, corporate and natural, carrying out pharmaceutical business are supposed to operate. In respect of corporate entities, it contends that the law requires them to engage the services of a registered pharmacist who should play the twin roles of a director and superintendent pharmacist of the corporate body. As such, it contends that the Respondent was obligated to appoint the Claimant to its Board of Directors in addition to recognizing her as its superintendent pharmacist.
15. The Interested Party contends that a superintendent pharmacist is expected to be continuously present at the facility where he has been appointed to oversee the day to day dispensation of pharmaceutical products. As such, one can only serve in that position if he is in fulltime employment as opposed to being a consultant.

### **Issues for Determination**

16. After evaluating the pleadings and evidence on record, the following issues arise for determination:-
  - a. Whether the Claimant and Respondent had an employment or independent contractor relationship.
  - b. Whether the Respondent was, in law, obligated to appoint the Claimant as a member of its Board of Directors.
  - c. Whether the Claimant's engagement with the Respondent was improperly terminated.
  - d. Whether the Claimant is entitled to the reliefs which she seeks in the Memorandum of Claim.

### **Analysis and Determination**

17. Whether the Claimant and Respondent had an employment or independent contractor relationship is central to determining whether the court is seized of the requisite jurisdiction to determine the instant dispute. As such, the issue must be disposed of before any other issue in the cause is considered.
18. The Claimant and Respondent entered into a contract of service on 30<sup>th</sup> July 2018. Through a letter of offer of even date, the Respondent appointed the Claimant as its pharmacist for a term of one year effective 30<sup>th</sup> July 2018.
19. In an attachment on the letter marked 'A', the Claimant's compensation is set out. She was to be paid a gross/basic salary of Ksh. 100,000.00 per month. The document further shows that the Respondent was to pay Ksh. 200 towards the Claimant's National Social Security Fund (NSSF).
20. The letter required the Claimant to signify her acceptance of the terms contained in it by providing as follows:-

We shall appreciate your confirmation of acceptance of the above offer. Please return the duplicate copy duly signed as a token of your acceptance of our offer of employment."
21. The aforesaid letter and the accompanying attachment leave no doubt that they created an employment relationship between the Claimant and the Respondent. This is evident from the fact that the Claimant was to receive a reward described as "gross/basic salary" for the services she was to render. Further, the document shows that the Respondent was required to make NSSF contributions for the Claimant's benefit.
22. The Black's Law Dictionary defines the term "salary" to mean agreed compensation for services rendered. The *Employment Act* defines the term "employee" to mean a person employed for wages or



a salary and includes an apprentice and indentured learner. As such, an individual who offers a service in return for a reward described as “salary” is considered an employee for purposes of the *Employment Act*.

23. The Respondent does not deny the fact that the contract between it and the Claimant created the impression that the two had an employment relationship. However, it contends that this impression is misleading.
24. The Respondent argues that the true intention of the parties when they signed the instrument dated 30<sup>th</sup> July 2018 was to enter into a consultancy agreement which was to yield an independent contractor relationship. The aforesaid position is self-evident at paragraph 5 of the Respondent’s statement of defense where it stated as follows:-

The Respondents aver that although the offer letter given to the Claimant and the manner of her termination could be construed as creating an employment relationship, the actions of the parties during the term of the Claimant’s engagement was such that she was an independent contractor.”
25. The above statement by the defense suggested that although the instrument that was drawn between the Claimant and Respondent suggests that the two had an employment relationship, their conduct and dealings pointed to the fact that they had an independent contractor relationship. To support this contention, the Respondent refers to the Claimant’s emails through which she described her pay as “consultation fees” and asked the Respondent to resolve the issue regarding whether she was to be deducted Pay As You Earn (PAYE) tax or withholding tax.
26. The Respondent also relies on documents described as invoices against which the Claimant’s monthly pay was made. It further relies on its statements of accounts and withholding tax certificates to push its case on the matter.
27. When the Claimant and Respondent signed the letter of offer dated 30<sup>th</sup> July 2018, they entered into a written contract of service which established an employment relationship between them. That notwithstanding, they retained the liberty to convert the relationship into one of an independent contractor. However, such conversion could only be executed in accordance with the law.
28. Under section 10 of the *Employment Act*, a contract of service which has been reduced into writing ordinarily speaks to various matters including its form and duration. If the employer wishes to change the form of the relation, he should do so in writing with the concurrence of the employee (see section 10(5) of the Act).
29. The general position in the law of contract is that once parties have reduced their agreement into writing, they are bound by the terms of the agreement. They may only alter such agreement through another instrument in writing executed by both of them.
30. Similarly, in the law of evidence, extrinsic evidence is generally not admissible to contradict the terms of a written instrument. Such evidence may only be admissible in instances where the terms of the instrument are ambiguous (*Too v Orchardson* (Environment & Land Case 56 of 2014) [2022] KEELC 12578 (KLR) (27 September 2022) (Judgment)).
31. The Respondent contends that despite the parties (the Claimant and Respondent) having entered into a written contract which spoke to the creation of an employment relationship between them, their true intention was to enter into an independent contractor relation. As such, they continued to engage on the assumption that they had an independent contractor relation.



32. Notwithstanding this contention, the Respondent did not provide evidence to demonstrate that the parties (the Claimant and Respondent) signed a subsequent instrument through which they converted the subsisting employment relationship into an independent contract relationship. Instead, it (the Respondent) now urges the court to disregard the written contract of service and rely on extrinsic evidence to find that the two had an independent contractor relationship. In view of the position expressed above, the court declines this invite.
33. Apart from the letter of offer which clearly established an employment relation between the Claimant and the Respondent, the fact that the Respondent treated the Claimant as an employee can also be discerned from its letter dated 17<sup>th</sup> January 2019 terminating the labour relation between them. From the letter, it is apparent that the Respondent elected to involve the local labour office in resolving the controversy surrounding the relation by copying it (the letter) to the said office. Why would the Respondent do so if it believed that the Claimant was an independent contractor and not an employee?
34. During cross examination of the Respondent's witness, he contended that the letter of termination of the Claimant's services was copied to the local labour office for purposes of information since the Claimant had reported the matter to the said office. However, the court does not buy this justification. If the Respondent believed that the relationship in question was not one of employment, it was under no obligation to notify the labour officer about its decision on the matter.
35. The notice to show cause letter which the Respondent issued to the Claimant provides evidence the Respondent exerted considerable control over the manner in which the Claimant discharged her duties. For instance, it is apparent from the letter that the Respondent had provided the Claimant with a specific work station in its premises. It is also apparent that the Respondent had assigned the Claimant a supervisor to whom she was expected to report on matters such as when she reported to and left the office in order to facilitate communication on work matters.
36. The foregoing places the Claimant in the position of an employee as opposed to an independent contractor if the control test deployed to distinguish between the two relations is anything to go by. In *Mungai v Avion Limited* [2023] KEELRC 399 (KLR), the court expressed itself on the test as follows:-
- Under the control test, the degree of control that the consumer of the service exerts over the service provider determines whether the contract is one of service or for services. The more the control that is exerted by the consumer of the service, the more likely it is that the relation between the parties is one of a contract of service.”
37. Further, there is evidence to demonstrate that before the Respondent released the Claimant from employment, it subjected her to a disciplinary process during which it informed her of her right to attend the disciplinary hearing in the company of “a fellow employee”. This right is donated by section 41 of the *Employment Act* to employees facing disciplinary action by their employers. As such, by the Respondent extending the right to the Claimant, it impliedly acknowledged that the two had an employment relationship.
38. The Respondent asserts that because it remunerated the Claimant based on fee-notes, the relation between them was one of independent contractor. However, it is noteworthy that the Respondent's witness confirmed that the fee notes were generated by the Respondent and not the Claimant. In an independent contractor labour relationship, it is the service provider and not the consumer of the service who generates invoices for payment. The fact that the Respondent, the consumer of the Claimant's services, was the one generating the invoices which it then proceeded to settle points to the fact that it (the Respondent) may have been manipulating the process to create the false impression that the two were engaged in an independent contractor relation.



39. The same thing may be said of the statements of accounts which the Respondent relied on to contend that the two had an independent contractor relation. The statements are the property of the Respondent. There is no evidence that they were generated with the involvement of the Claimant. As such, the court cannot rule out the possibility that they may have been generated for purposes of driving the narrative that the Claimant was an independent contractor as opposed to what the parties had initially agreed to through their contract dated 30<sup>th</sup> July 2018.
40. Deduction and remittance of taxes from the Claimant's remuneration was done by the Respondent. As such, the mere fact that it (the Respondent) posted the taxes as withholding tax as opposed to PAYE, cannot, in the face of the express contract between the parties dated 30<sup>th</sup> July 2018 showing that they had entered into an employment relation, be relied on to hold that the two had an independent contractor relationship.
41. In the ultimate and after evaluating the material before the court, it is apparent that the relationship between the Claimant and Respondent was one of employment and not independent contractor. It is so declared.
42. The preamble to the *Pharmacy and Poisons Act* declares that it is an Act of Parliament to make better provision for the control of the profession of pharmacy and the trade in drugs and poisons. As such, the key purpose of the legislation is to regulate the trade in medicines and poisons in order to protect the public from harm.
43. By virtue of section 21 of the Act, a body corporate may be licensed to engage in the trade of pharmaceutical products in Kenya. According to the law, such body corporate need not be registered as a pharmacist under the Act in order for it to undertake the aforesaid business. However, it must comply with the following requirements before it can commence the business:-
- a. Submit a copy of its certificate of incorporation to the Pharmacy and Poisons Board.
  - b. Appoint a registered pharmacist who will play the role of superintendent pharmacist and also be appointed as a member of the Board of Directors of the corporate body. The pharmacist should not be serving another corporate body in similar position.
  - c. If the corporate body has various outlets dispensing pharmaceutical products, this must be done under the supervision of the superintendent pharmacist or his/her assistant who must be a registered pharmacist.
  - d. In all such outlets, the name and certificate of registration of the superintendent pharmacist should be conspicuously displayed.
44. Having regard to the foregoing, it is apparent that a corporate body can only deal in pharmaceutical products if it has engaged the services of a registered pharmacist to serve as a superintendent pharmacist. Further, the pharmacist must be appointed as a member of the Board of Directors of the corporate body. As such, the contention by the Claimant and the Interested Party that the Respondent was required to onboard a registered pharmacist who was to act as its superintendent pharmacist and be a member of the Respondent's Board of Directors is correct.
45. The Respondent has resisted the fact that it was required to onboard the Claimant in the two capacities on the ground that it was not dealing in pharmaceutical products at the time. Further, it contends that the Pharmacy and Poisons Board had, in any event, not been operationalized.



46. These contentions are without sound basis. It is noteworthy that the Respondent's witness was quite ambivalent on these matters. At one point, he admitted that the Respondent was indeed using the Claimant as its superintendent pharmacist. Yet, at some other point, he sought to deny this fact.
47. Although the witness contended that the Respondent was not dealing in pharmaceutical products and that it was only handling distributorships and sale of supplements, he did not provide evidence to back these assertions. Further, he did not provide proof that corporate bodies handling distributorship of pharmaceutical products and supplements are exempted from the requirements of section 21 of the *Pharmacy and Poisons Act*. In any event, the witness did not explain why the Respondent obtained registration from the Pharmacy and Poisons Board using the Claimant's certificate if it (the Respondent) was convinced that it was not obligated to be registered under section 21 of the *Pharmacy and Poisons Act* for purposes of distribution of drugs and supplements.
48. According to the letter of offer which the Respondent issued to the Claimant, it specifically appointed her as its pharmacist. The Respondent did not table evidence to demonstrate that it had engaged the services of another person to serve as its superintendent pharmacist at the time. In any event, the Respondent's witness conceded during cross examination that the Claimant was engaged as a superintendent pharmacist.
49. Under section 21 of the *Pharmacy and Poisons Act*, a person who is appointed by a corporate body to serve as its superintendent pharmacist is to also be appointed to the entity's Board of Directors. As such, the Respondent was duty bound to appoint the Claimant as a member of its Board of Directors in compliance with the law.
50. The Respondent's witness asserted that the law which imposes this requirement was not operational at the time the Claimant was engaged. However, this contention is inaccurate since the *Pharmacy and Poisons Act* which imposes the requirement came into force on 1st May, 1957.
51. The guidelines on adjudication of disputes which arise from termination of employment relations are set out in the Halsbury's Laws of England. These guidelines have found acceptance in a series of judicial decisions. In the Court of Appeal case of Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR, the court reproduced the said guidelines as here-below:-
- “...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”
52. From the foregoing, it is apparent that the role of the court whilst adjudicating on a dispute relating to termination of a contract of service is not to simply substitute the employer's decision with its own merely because the trial judge considers that had he been in the employer's shoes, he would have reached a different decision on the matter. The court's role is limited to determining whether the impugned decision falls within the band of decisions which a reasonable employer would have made irrespective



of the trial judge's personal views on the matter. If the decision falls within the band, the court must uphold it. If it does not, the court ought to set it aside.

53. The foregoing is informed by the reality that different employers are bound to react differently to any set of facts at the workplace. However, the reactions are not to be considered as inappropriate merely because they are divergent. The employer's decision should be deemed as legitimate if it falls in the band of decisions which a reasonable employer, faced with the same set of facts, would have made.
54. In the instant case, the Claimant was accused of three infractions which resulted in the decision to terminate her employment with the Respondent. Accordingly, the role of the court is to evaluate the employer's decision with a view to determining whether it falls in the band of decisions which a reasonable employer would have made on the same set of facts. If the answer to the question is in the affirmative, the court is required to uphold the impugned decision. If it (the answer) is in the negative, the decision ought to be vacated.
55. Whilst evaluating the validity of an employer's decision to terminate a contract of service, the court should keep in mind that the burden of justifying the validity of the decision lies with the employer. The employee is only required to present prima facie evidence to demonstrate that the decision was unfair (*Rupra Construction Company Limited v Makomere* [2025] KEELRC 1376 (KLR)).
56. The court must also keep in mind that the burden of proof which is imposed on the employer is on a balance of probabilities. In terms of section 43 (2) of the *Employment Act*, the employer is deemed to have discharged this burden if he demonstrates that he had grounds to genuinely believe that the employee had committed the infraction in question (*Kenya Revenue Authority v Reuwel Waitaha Gitahi & 2 others* (supra)).
57. According to the notice to show cause letter which was issued to the Claimant, she was accused of the following infractions:-
  - a. Sitting at an undesignated workstation during office hours thus disrupting the work of her workmates.
  - b. Failing to notify her immediate supervisor of her arrival at and departure from the office thereby affecting communication on work matters.
  - c. Changing details of the Respondent's registered address with the Pharmacy and Poisons Board without the authorization and concurrence of the Respondent thus adversely affecting the Respondent's operations.
58. Although the parties did not present to court the Claimant's response to the notice to show cause, her position on the three issues can be discerned from a series of documents that were presented in evidence. These include the contested minutes of the disciplinary session for the Claimant and the various email exchanges between the Claimant and Respondent both before and after the disciplinary session. In determining the reasonableness of the Respondent's decision to terminate the Claimant's contract, the court will interrogate this evidence.
59. Regarding the first accusation, the Claimant's email dated 4<sup>th</sup> January 2019 suggests that the issue had been the subject of discussion with the Respondent's management at least once before the Claimant was confronted with the matter again at the disciplinary hearing. The Claimant expressed herself on the matter as follows:-

In my defense on the first allegation, I said that it is only once on the 3<sup>rd</sup> of December when this issue was discussed with me by both you and Ms. Pooja. I said that when you found me



sitting in the common sitting area, I was able to explain that I had sat in the area because it was quiet and regulatory [work] requires some level of concentration to read and understand guidelines and it was for the benefit of the company. I stated that I share my working station with a logistics personnel who is always making calls and there is also a lot of movement in the area so it can get a bit noisy at times. I also expressed surprise that the matter had been brought to my attention again as I thought I had satisfactorily explained myself. I also said that the reasons given to me on the said day for wanting me to sit in my designated area was to ensure accountability of all employees' locations at any given time by Pooja as well as a measure to prevent items in the office from getting lost. I said that the issue of disruption of anyone's work was new and was not mentioned then. I stated that on several occasions, I have found other employees at my designated working station and it has never been a big deal. I also stated that on the said day, Pooja falsely accused me of sitting and working from Catherine Mwendé's office. Upon seeking clarification from Catherine about whether she has ever seen me in her office, she said that she is not always in the office."

60. This excerpt confirms that indeed the Claimant had on occasions, been working from workstations which had not been assigned to her. The Claimant asserts that she did so because her office was noisy and she required a quiet place to focus on her work.
61. Although the Claimant asserts that the place she used to sit to execute her tasks was a common area, the Respondent asserts that it was reserved for field sales managers (see the minutes of the meeting held on 14<sup>th</sup> December 2018). In the Respondent's view, the Claimant's decision to use the room was disruptive of the work which the sales managers were to undertake from the impugned space.
62. From the foregoing, it is not in dispute that the Respondent's contention that the Claimant had occasionally been working from undesignated spaces in the office cannot be denied. The Respondent's position is that this was disruptive of its work since it denied the field managers who were to occupy the work stations their (the work stations) use. On the other hand, the Claimant contests this fact.
63. The employer has the prerogative to manage the workplace in the manner he considers appropriate as long as this is done within the bounds of the law. This includes assigning employees specific work stations. Once an employee is assigned a particular workstation, it is not open to him/her to unilaterally change the station particularly where the employer does not approve of it.
64. In this context, the Respondent was entitled to contend that by the Claimant unilateral relocating her workstation to an undesignated area for whatever reasons, she disrupted the work arrangements at the office. In the court's view, it was not open to the Claimant to insist on her decision to relocate her workstation if the Respondent did not approve of it.
65. Regarding the second accusation, the Claimant expressed herself on the matter through her email dated 4<sup>th</sup> January 2019 as follows:-

While responding to the second accusation, I clearly said that the accusation on the grounds of insubordination and being disrespectful was false and grossly misrepresented. I said that even though I was not oriented upon joining the company whereby the procedure of entering and leaving the office should have been explained to me, I have always informed Ms. Pooja before I left the premises. However, since the beginning of November 2018, she had not been communicating to me despite my efforts to talk to her and this greatly affected my work. I also said that I raised this among other issues to you through an email dated 29/11/18. I said that after the conversation about the sitting area on 3/12/2018, I left almost immediately and not after the alleged 15 minutes and that I did this in good faith and



not out of disrespect as I was done for the day and there was an ongoing monthly medical representatives' meeting that I did not want to disrupt as you had directed me. I said that you told me that if Pooja was not in the office or if she was in a meeting there was no need of telling her that I was leaving. I also said that before I signed my employment contract, it was agreed that I will be working 2-3 days with no specified working hours as you did not want me to idle around the office. I also stated that Pooja can attest that on my next working day, I informed her of my departure and that there has never been any need to inform her of my arrival as I usually get to the office before her.”

66. The above explanation by the Claimant was prompted by the Respondent's contention that her availability at the office was unpredictable making it difficult for management to coordinate office work with her. The Respondent had expressed concern that the Claimant used to leave the office without notifying her immediate supervisor (see the content of the minutes of the meeting of 14<sup>th</sup> December 2018 on the subject).
67. The Claimant's explanation appears to justify her actions on account of the fact that she had a strained relationship with her immediate supervisor making it difficult for the two to communicate. The Claimant also suggests that she had been instructed not to be disrupting meetings at the workplace and that she left the workstation on 3<sup>rd</sup> December 2018 without notifying her immediate supervisor because there was an ongoing meeting which she did not want to disrupt and that she was in any event done for the day.
68. In response to the Claimant's contention, the Respondent's management dismissed her assertion that she acted in good faith in leaving the office without notifying her supervisor. In the Respondent's view, the Claimant's conduct constituted insubordination (see page 34 of the Claimant's bundle of documents dated 11<sup>th</sup> September 2019).
69. The foregoing exchanges between the parties demonstrate that there was disagreement between them regarding how the Claimant was coordinating with her supervisor regarding her availability at the workplace. Hence the accusations of insubordination.
70. Regarding the third accusation, the Claimant stated that it was necessary for her to notify the Pharmacy and Poisons Board about the relocation of the Respondent's office in order to procure a license with this information on board. The Claimant explained that it was her obligation as the Respondent's superintendent pharmacist to inform the Pharmacy and Poisons Board about the aforesaid changes in time in order to flawlessly process renewal of the Respondent's license. As such, she contended that her decision to notify the Board about the changes in the Respondent's office location could not have been intended to sabotage its business.
71. In response, the Respondent contended that it had no issue with the Claimant notifying the Pharmacy and Poisons Board about the changes in its location. It however contended that the only issue it had with the matter is that the Claimant did not follow the correct procedure in executing the mandate. The Respondent alleged that the Claimant procured the license with the changed location without first applying for it in writing and having the new location inspected by the Pharmacy and Poisons Board.
72. Did the Respondent's decisions on the three accusations against the Claimant fall within the band of reasonable decisions that another employer would have made having regard to the existing set of facts? Is there justification for the court to interfere with the said decisions?
73. On the first accusation, it is apparent from the earlier parts of this judgment that the Respondent was justified to accuse the Claimant of disrupting its work program by sitting in an undesignated area. The Claimant does not deny that she sometimes sat at workstations which had not been allocated to her.



- In the court's view, it was not unreasonable for the Respondent to have found the Claimant's conduct in this respect disruptive particularly because she had not requested to change her workstation. Any other employer faced with the same set of facts would probably and reasonably have arrived at a similar decision.
74. On the second accusation, it is apparent that the Claimant did not sometimes notify her immediate supervisor regarding the times she would leave the office probably because of the strained relationship between them. However, departure from work without notice to the employer may disrupt coordination of work related matters. As such, the court believes that the Respondent's complaints in this respect were not unreasonable.
  75. In the court's view, any other reasonable employer faced with the same set of facts would probably have arrived at the same conclusion as the Respondent. As such, the Respondent's decision on the second count fell within the band of decisions that another reasonable employer would have made.
  76. On the final accusation, the court is of the view that the Respondent had a duty to notify the Pharmacy and Poisons Board of the changes to its location. This obligation fell on the Claimant in her capacity as the Respondent's superintendent pharmacist.
  77. As such, it was unreasonable for the Respondent to have taken issue with the Claimant's decision to notify the Pharmacy and Poison's Board about the changes to its (the Respondent's) physical location. In the court's view, the Respondent's reaction to the Claimant's action on this subject does not fall within the band of reactions that another reasonable employer would have had.
  78. The totality of the foregoing demonstrates that whilst the Respondent's decisions on the first two infractions fell within the band of decisions that any other reasonable employer would have made based on the same set of facts, the third decision did not. Having met the threshold in respect of the first two accusations against the Claimant, the Respondent was entitled to terminate her employment on those two grounds. As such, the court is not entitled to substitute the two findings with its own merely because it considers that had it been in the Respondent's position, it would have reached a different verdict on the matters.
  79. In their final submissions, the Advocates for the Claimant express the view that the two infractions were in any event trivial in nature and should not have been the basis for the Respondent's decision to terminate the Claimant's contract. This may well be the feeling of counsel and even the court. However, it does not change the fact that the infractions were missteps by the Claimant for which the Respondent was entitled to take disciplinary action against her including terminating her contract of service.
  80. The fact that the infractions were significantly minor cannot warrant the court's interference in the exercise of the Respondent's prerogative to manage its workplace. As long as they were proved, the decision as to the nature of punishment that was to be imposed on the Claimant fell within the purview of the Respondent.
  81. The record shows that the Respondent issued the Claimant with a notice to show cause letter detailing the accusations against her. The record further shows that the Respondent subjected the Claimant to a disciplinary hearing during which the latter was given an opportunity to express her viewpoints on the accusations against her before a decision was made on them. In the premises, the court is satisfied that the Respondent substantially complied with the requirements of procedural fairness in processing the Claimant's release from employment.
  82. Although the letter of termination of the Claimant's contract did not explicitly speak to the charges which had been leveled against her in the notice to show cause, it nevertheless underscored that the



said charges had been proved. It also made reference to accusations of disrespect and insubordination which were raised in the second count in the notice to show cause.

83. The last aspect of the case relates to whether the Claimant is entitled to the reliefs which she seeks through these proceedings. The Memorandum of Claim sets out several reliefs which she seeks. These include: a declaration that she was an employee of the Respondent and not an independent contractor; a declaration that the termination of her contract was wrongful; an order for compensation for unfair termination of her contract; a declaration that the Respondent violated her right to fair labour practice on account of the verbal attacks its officers subjected her to; general damages for verbal abuse and emotional trauma; a certificate of service; a declaration that the Respondent's failure to deduct and remit National Health Insurance Fund (NHIF) and NSSF dues on her behalf amounted to an offense; an order that the Respondent furnishes her with proof of PAYE remittance from her salary to the Kenya Revenue Authority for the duration that she was in its (the Respondent's) employment; reimbursement of Ksh. 9,972.00 accrued during her employment to the Respondent; a declaration that the Respondent's failure to appoint her as its director was due to discrimination against her based on gender, ethnicity and race; and an order for costs to be borne by the Respondent.
84. In the earlier parts of this decision, the court found that the labour relation between the Claimant and the Respondent was one of employment and not independent contractor. It is so declared.
85. The court has further found that the Respondent's decision to terminate the Claimant's contract of service fell within the band of decisions which another reasonable employer, faced with the same set of facts, would have made. As such, it (the court) declines to declare the decision wrongful.
86. Having found that the Claimant's contract of service was legitimately terminated, she is not entitled to claim compensation for unfair termination of the contract. As such, the court declines her prayer for compensation for unfair termination of her contract.
87. The Claimant has sought a declaration that the Respondent violated her right to fair labour practice on account of alleged verbal abuses and attacks its officers subjected her to. She has further sought general damages for the alleged verbal abuse and emotional trauma.
88. Although the Claimant made these claims, she did not tender cogent evidence to anchor them. The emails which she relied on to contend that the Respondent's officers hurled abuses at her do not point to the specific abuses.
89. Further, the medical report which she tendered in evidence is dated long after she had left employment. Although the report refers to treatment which the Claimant received in December 2018, she did not tender in evidence treatment notes to support the fact of treatment.
90. Besides, the report does not provide a scientific link between the Claimant's condition and her work environment. It appears to be wholly premised on the Claimant's claim "that she has stress from her place of work for being abused and shouted at by her superiors at the workplace."
91. A person may use strong language during a conversation but this does not necessarily render the language abusive. As such, to enable the court to determine the abusive nature of the Respondent's officers' language, the Claimant ought to have pleaded the particulars of the alleged verbal abuses.
92. In the premises, the court is not satisfied that the Claimant has sufficiently established the causal link between her medical condition and her work environment. In the court's view, the link between her medical condition and her work environment appears considerably weak and therefore remote. As such, it (the court) declines the aforesaid prayer.



93. The Claimant has prayed for a Certificate of Service. By virtue of section 51 of the *Employment Act*, a departing employee is entitled to this certificate. As such, the Respondent is ordered to issue the Claimant with the certificate.
94. The Claimant has prayed that the court declares that the failure by the Respondent to remit her NSSF dues amounted to an offense under section 27(1) of the *National Social Security Fund Act*. However, a look at the provision does not show that it creates an offense.
95. The offense relating to non-remittance of NSSF dues under the Act is created under section 55 thereof. As such, the court is not in a position to declare that the Respondent committed an offense under a section of statute which does not create an offense.
96. The Claimant has also prayed for the court to declare that the Respondent's failure to remit her NHIF contributions amounted to an offense under section 18 (2) (a) as read with section 18 (1) of the National Health Insurance Fund Act (now repealed). However, these two provisions do not create a criminal offense for non-remittance of dues under the Act. They only prescribe the amounts that the employer is required to remit as a consequence of default to make the regular remittances.
97. In any event, whilst adjudicating on the instant dispute, this court is exercising civil jurisdiction. It is not exercising criminal jurisdiction which will entitle it to make pronouncements regarding the criminality of the Respondent's conduct.
98. The Claimant has further prayed for an order that the Respondent furnishes her with proof of PAYE remittances from her salary to the Kenya Revenue Authority for the duration that she was in its (the Respondent's) employment. As noted earlier in the judgment, the Claimant was an employee of the Respondent and not an independent contractor. As such, the Respondent was obligated to deduct and remit PAYE from her salary to the Kenya Revenue Authority.
99. As the record shows, instead of doing this, the Respondent applied withholding tax on the Claimant's pay under the misguided belief that she was an independent contractor. As such, the Respondent is liable to pay the PAYE tax on the amount it paid to the Claimant as and when the Kenya Revenue Authority demands for these payments and furnish the Claimant with requisite proof of such payments.
100. The Claimant has claimed for reimbursement of Ksh. 9,972.00 allegedly accrued during her employment to the Respondent. However, she did not tender cogent evidence to substantiate the claim. Being in the nature of a special damages claim, it required to be specifically pleaded and proved (*Kosgei v Mutisya (Civil Appeal 4 of 2023) [2024] KEHC 156 (KLR) (19 January 2024) (Judgment)*).
101. Although the Claimant tendered several invoices for taxi fares, she did not provide receipts to demonstrate that the invoices were settled by her. Further, the invoices and the one receipt which she tendered in evidence do not have details to demonstrate that the expenses were incurred for purposes that were beneficial to the Respondent. As such, the claim for Ksh. 9,972.00 is declined.
102. The Claimant has also prayed for a declaration that the Respondent's failure to appoint her as its director was discriminatory based on her gender, ethnicity and race. However, she did not tender cogent evidence to establish this claim.
103. The Claimant averred that because the other directors of the Respondent were male and of Asiatic extract, this necessarily means that her non-inclusion on the Respondent's Board was motivated by gender and racial bias. In the court's view, this argument is purely speculative. The mere fact that the Respondent's directors were of a certain race and were male does not, ipso facto, provide evidence of discrimination against the Claimant.



104. Importantly, although counsel for the Claimant has anchored his submissions on discrimination on article 27 of the Constitution, the Statement of Claim does not make reference to this provision of the Constitution. As well, the Statement of Claim does not provide particulars of the alleged discrimination based on the aforesaid provision of the Constitution despite the requirement that a claim alleging violation of a constitutional provision should provide sufficient particulars of the alleged breach (Meru Cultural Center & 17 others v Kisima Farm Limited & 24 others (Constitutional Petition E006 of 2022) [2023] KEELC 19863 (KLR) (20 September 2023) (Ruling)). As such, the claim for discrimination is declined for want of proof.
105. Finally, it is important to point out that in law, the position of a director of a company does not usually attract remuneration unless this is expressly sanctioned in the company's constituting documents. Speaking to this, Smith and Keenan in their publication titled "Smith and Keenan's Company Law", 6<sup>th</sup> edition, pages 241 to 242 state as follows:-
- If a director is to receive remuneration by way of fees the articles must expressly provide for it and in the absence of such provision, no remuneration is payable even if the members resolve in general meeting that it shall be...The directors cannot evade the rule by appointing themselves to salaried positions within the company."
106. Although the Claimant was entitled to be appointed as a member of the Respondent's Board of Directors, the position was purely statutory with no guarantee for remuneration unless the Respondent's articles of association have provision for such remuneration. No evidence was tendered to demonstrate that the Respondent's constituting documents have provision for remuneration for its directors.
107. This being the case, although it has been proved that the Respondent breached the law by failing to appoint the Claimant as a member of its Board of Directors, the Claimant cannot claim to have suffered monetary loss as a result of the aforesaid breach in view of the law on director's remuneration. As such, the court declines to order compensation to her for the failure to appoint her to the position of director.
108. Every party to the cause to bear own costs.

### **Summary of the Findings and Orders**

109. After evaluating the evidence on record against the applicable law, the court makes the following findings and attendant orders:-
- a. The Claimant and Respondent were in an employment and not independent contractor relationship.
  - b. The Claimant's contract of service was terminated for valid reasons and in accordance with fair procedure.
  - c. As such, the Claimant is not entitled to compensation for unfair termination of her contract.
  - d. The Claimant's prayer for a declaration that the Respondent violated her right to fair labour practice on account of the verbal attacks its officers allegedly subjected her to is declined.
  - e. The Claimant's prayer for general damages for verbal abuse and emotional trauma is declined.
  - f. The Respondent is ordered to furnish the Claimant with a certificate of service.
  - g. The Claimant's prayer for a declaration that the Respondent's failure to deduct and remit NHIF and NSSF dues on her behalf amounted to an offense is declined.



- h. The Respondent is liable to pay the PAYE tax on the amount it paid to the Claimant as remuneration as and when the Kenya Revenue Authority demands for these payments and furnish the Claimant with requisite proof of the payments.
- i. The Claimant's prayer for reimbursement of Ksh. 9,972.00 allegedly accrued during her employment to the Respondent is declined for want of proof.
- j. The Claimant's prayer for a declaration that the Respondent's failure to appoint her as its director was actuated by discrimination against her based on gender, ethnicity and race is declined for want of proof.
- k. The court declines to order compensation for the Claimant for the failure to appoint her to the position of the Respondent's director.
- l. Every party to the cause to bear own costs.

**DATED, SIGNED AND DELIVERED ON THE 31<sup>ST</sup> JULY, 2025**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

.....for the 1<sup>st</sup> Interested Party

Order

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

