



Bakhoya v Chane & another (Employment and Labour Relations Petition E147 of 2023) [2024] KEELRC 293 (KLR) (16 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 293 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E147 OF 2023
AN MWAURE, J
FEBRUARY 16, 2024**

BETWEEN

CLAIRE BAKOLA BAKHOYA PETITIONER

AND

RAKSHA CHANE 1ST RESPONDENT

MINAL CHANE 2ND RESPONDENT

JUDGMENT

Introduction

1. The Petitioner filed the petition herein dated 12th July 2023.

Petitioner’s Case

- 2. The Petitioner avers that she was employed by the Respondents as a house manager and 2nd Respondent’s caregiver from 2013 to 2023 and that she served them diligently, honestly and with dedication until her unlawful and unfair termination vide a whatsapp text message.
- 3. The Petitioner avers that the employment contract was never reduced into writing as required by the [Employment Act](#) and therefore the contractual engagement was governed by the Act as well as express and implied terms by the parties.
- 4. The Petitioner avers that at the end of March 2023, she fell ill and took sick leave; she reported back after 7 days but the 2nd Respondent opined she seemed sickly and must take additional sick leave.
- 5. The Petitioner avers that while on leave, she sustained a leg injury making it difficult for her to walk and/or perform her duties, she therefore notified the Respondents and they agreed that she returns upon getting better.



6. The Petitioner avers that she reported back in May whereupon the 2nd Respondent declared that there was no longer a vacancy for her and the 1st Respondent no longer required her services.
7. The Petitioner avers that she was not issued with a notice or paid on month in lieu of notice despite working for the Respondents for a decade. She was not given any reason for her termination or summoned for a disciplinary hearing or issued a notice to show cause to explain the reason of her absenteeism despite the Respondent having knowledge of her ill health.
8. The Petitioner avers that the Respondents required her to work beyond the 8 working hours as envisaged in the *Employment Act*, 2007 as she would be required to arrive as early as 7 am and at times work way into the night to be able to accomplish the set objectives.
9. The Petitioner avers that she was never allowed to go on leave during her employment.
10. The Petitioner avers that she was continuously sexually harassed by the 2nd Respondent who would force her to wash her in the bathroom when the 1st Respondent was not around. The 2nd Respondent is over 40 years and able to personally take care of herself, her intent was to satisfy her sexual desires. The 2nd Respondent communicated that she had to comply or lose her job. This violated her right to fair labour practices as provided under Article 41(1) of *the Constitution*.
11. The Petitioner avers that the 2nd Respondent would send her vulgar and obscene pictures despite her protest as she found them offensive as she did not subscribe to such.
12. The Petitioner avers that the 2nd Respondent would demean her and cause her mental anguish through daily insults with undignified words such as ‘stupid’, ‘donkey’, ‘malaya’, ‘jinga’, sending poop emoji to her equating to human excretion, telling her to ‘go fuck yourself’, ‘good night malaya’, sending the Petitioner insect emoji meaning she was an insect among others. This subjected the Petitioner to cruel, inhuman and degrading violation in violation of Article 28 of *the Constitution*.
13. The Petitioner avers that the insults caused her untold misery throughout her employment; she would dread going to work and sobbed endlessly at the thought of the inhumane tasks ahead and this lowered her self esteem as well as dignity but she still had to earn a living.
14. The Petitioner avers that the 2nd Respondent declared that she took priority above her family which she found offensive.
15. The Petitioner avers that her employment was terminated since she could no longer satisfy her sexual whims such as being massaged and washed as such she wanted to replace her.
16. The Petitioner avers that the Respondents failed to provide her with house allowance contrary to the *Employment Act* as her salary of Kshs 25,000 was not consolidated and did not contain a distinct element for house allowance.
17. The Petitioner avers that by terminating her employment without a valid reason and sufficient legal notice and without following the laid down procedures as per the *Employment Act*, infringing her right to fair labour practices as provided under Article 41 (1) of *the Constitution* she contravened her constitutional rights.

Respondents’ Case

18. In opposition to the Petition, the Respondents filed a replying affidavit dated 17th August 2023 sworn by the 2nd Respondent.



19. The Respondents aver that the Petitioner was initially hired by the 1st Respondent as a house help in 2013. She remained in this role consistently until April 2021 when she voluntarily resigned from her position and received her final dues and benefits of Kshs 50,000 and confirmed in writing.
20. The Respondents aver that the Petitioner reapplied for her previous position in May 2021 and was rehired. However, there was no written contract, hence the same was governed by the provisions of the Employment Act but there were no additional express and implied terms they are aware of.
21. The Respondents aver that the Petitioner contracted the flu on 21.03.2023 and took sick leave and resumed her duties briefly on 30.03.2023 solely to retrieve her salary. Subsequently, she did not come back to work or resume her responsibilities.
22. The Respondents deny that the Petitioner notified them of any injuries that she had sustained until 14.04.2023 and that they allowed the Petitioner to stay away until she got better.
23. The Respondents aver that the Petitioner only reported back on 25.05.2023 about 2 months later. She had not informed the 1st Respondent of her whereabouts during this time or when she would resume work. Further, the Petitioner has not displayed any treatment records or other documents to authenticate her claim of sickness.
24. The Respondents aver that the Petitioner stayed away from work without permission or notification for several weeks in excess of the period permitted by law. The 1st Respondent was perfectly entitled to employ a replacement.
25. The Respondents aver that the Petitioner dutifully took her annual leave and when she was rehired in May 2021 she almost immediately took 16 days leave which she acknowledged was advance leave due to her in 2022. At no time did they deny her leave.
26. The Respondents denied the claim of sexual harassment and use of vulgar language against the Petitioner. The Respondents aver that these are mere allegations not supported by any particulars and therefore cannot be authenticated. That the Petitioner does not state whether she reported the harassment to the authorities or the 1st Respondent.
27. The Respondents aver that the Petitioner walked out of her employment and only returned after 2 months after she had been replaced.
28. The Respondents aver that the Petitioner was registered for NSSF and all statutory deductions were remitted.
29. The Respondents aver that there has been no violation of the Petitioner's rights or any loss as alleged.

Petitioner's Submissions

30. The Petitioner submitted that even though she was absent from work, it was justified since she had been sent on an involuntary sick leave, following which she sustained an injury which made her difficult for her return to work which was within the Respondents knowledge and known to family members in Europe.
31. The Petitioner submitted that she would not have returned to work if she did not intend to do so. When she previously decided to resign, she had given a 3-month resignation notice, contrary to the law. If the Petitioner did not intend to return she would not have kept in touch with the Respondents or colleagues informing them of her predicament. She was on sick leave with notice.



32. The Petitioner submitted that even if the reason for termination was justified, the procedure followed in terminating her employment contract was not as prescribed by the law as she was never accorded a fair hearing. Section 45(5)(a) of the *Employment Act* provides that in deciding whether it was just and equitable for an employer to terminate the employee's employment, the court should consider the procedure adopted by the employer, the communication of that decision to the employee and handling of any appeal against the decision.
33. The Petitioner submitted that the Respondents have not adduced any evidence to prove that they made any efforts towards getting the Petitioner to resume work despite evidence of constant communication between the parties, in any event, this was not needed since the Respondents were the ones who sent her on sick leave. She relied on the procedure to be followed when an employee is accused of absconding set in *Felistas Acheha Ikatwa vs Charles Peter Otieno (2018) eKLR*.
34. The Petitioner submitted that she was never notified to show cause despite working for the Respondents for a decade. When she reported, she was informed they had already hired a replacement. In their replying affidavit however the Respondents, in contradiction, stated that a replacement was hired in July after her termination.
35. The Petitioner submitted that the termination of her employment lacked substantive justification as there was no valid reason for her termination and the procedure adopted lacked fairness resulting to unfair termination.
36. The Petitioner further submitted that in any event, she would have been entitled to consider herself constructively dismissed, granted the conditions of employment created by the Respondents. The work environment was so grave that she had developed high blood pressure and severe back pain as per her resignation letter of 2021. She relied on *Solid Doors (Pty) Ltd Vs Commissioner Theron and Others (2004) 25 ILJ 237 (LAC)* as emphasized in *Magare Gikenyi J. Benjamin v County Government of Nakuru & 4 others [2020] eKLR*.
37. The Petitioner submitted that the circumstances of her employment were that she was employed as a domestic worker and both parties confirmed that she had been issued an oral notice in 2021, but the employer insisted on a three-month written notice. In the absence of any written terms of employment, the Respondents had a duty to notify the Petitioner of her right to issue a one month notice as required by section 15 of the *Employment Act*.
38. The Respondents aver that the Petitioner never worked as a nurse, she worked during the day and a nurse was hired as the 1st Respondent's caregiver at night
39. The Petitioner submitted that after allegedly being rehired and working for an additional two months, the Petitioner allegedly took a 16 day leave in May 2021 which was allegedly advance leave for 2022. As per Section 28 of the *Employment Act*, she was not due for leave until 12 months of service, therefore, it would be unthinkable for the Respondents to give her paid leave just after finishing her notice period. This is especially due she was a domestic worker and had developed health complications as a result of being mistreated at work or if she would still be working after 12 months had lapsed.
40. The Petitioner submitted that in the circumstances, the alleged leave taken cannot be for the year 2022 but can only be construed as annual leave for the year 2021 if there was such leave.
41. The Petitioner submitted that the employment contract was never terminated and what the parties did was to renew the contract under improved terms, as such, terminal dues are to be calculates from 2013.



42. The Petitioner submitted that the Respondents did not produce any evidence to prove that she was paid in lieu of notice, leave taken and leave due to her save for the alleged leave taken. Further, they did not issue her with an itemized payslip needed to be consolidated to include house allowance.
43. The Petitioner submitted that she worked from 7am to 7pm and since 2021, from 5pm to 10am, as evidenced by the text messages to the 2nd Respondent updating the 1st Respondent's health status at night up to morning. The Petitioner did not volunteer to work extra hours but she was asked to do so. Failure to compensate her for work beyond regular agreed hours would be unfair labour practice.
44. The Petitioner submitted that her termination and prior toxic work environment was a violation of her rights as settled in *Anarita Karimi Njeru vs Republic* [1976-80] KLR 1272.
45. The Petitioner submitted that the 2nd Respondent would verbally insult her as proved from the termination letter as well as insults via her registered mobile number. The Respondents actions amounted to a violation of her right to dignity under Article 25 of *the Constitution*.
46. The Petitioner submitted that the Respondents violated her right to fair labour practices by failing to pay the Petitioner for work done beyond the regular agreed hours. She was also forced to wash and massage the 2nd Respondent's buttocks under duress as evidenced by the 2nd Respondent's text messages.
47. The Petitioner submitted that the Respondents violated her freedom from discrimination as enshrined under Article 27 of *the Constitution* as she lost her employment as a result of her ill health in the guise of prolonged absence. The Respondents were aware of her health status and had told her to come back to work when she got better.

Respondents' Submissions

48. The Respondents submitted that the allegations raised in the Petition primarily involve breaches of an employment contract, which are adequately covered under the *Employment Act*, making a constitutional claim unnecessary. They submit that this court emphasizes that constitutional petitions should only be pursued in exceptional circumstances, not as a means to circumvent existing statutory remedies as in *Josephat Ndirangu v Henkel Chemicals (EA) Ltd* [2013] eKLR.
49. The Respondents submitted that the Petitioner's advocates, in their submissions, have made no attempt to meet the conditions laid out in *Anarita Karimi Njeru v Republic* [1976-80] KLR 1272 about pleading the violations with specificity. The alleged violations in the present petition are insufficient to elevate this matter to a constitutional matter
50. Section 90 of the *Employment Act* specifies a three-year limit for filing claims. However, the petitioner's claims date back more than 3 years, rendering them time barred. Any claims that accrued prior to 28th August 2020 are caught up by limitation.
51. The Respondents submitted that Order 2, rule 11 of the Civil Procedure Rules read together with Section 108 of the *Evidence Act* requires that the petitioner was expected to adduce further evidence to prove her case but she failed to do so.
52. The Respondents submitted that the petitioner is entitled to limited compensation, considering the time-barred claims and the 1st Respondent's compliance with regulations and contractual obligations.
53. The Respondents submitted that the alleged sexual harassment and hostile work environment lack specificity and evidence, making them unsubstantiated. Discrimination claims also lack merit, as the Petitioner's circumstances differ from others.



54. The Respondents submitted that to establish discrimination, the Petitioner must establish that she was treated differently from other employees in the same circumstances. There was no evidence to show that any other employee had been in similar circumstances, or how they were treated.
55. The Respondents submitted that the Petitioner had stayed away from work for a period of about 2 months, without her employer's permission, and without informing her employer of her whereabouts. The 1st Respondent had a household to run and hired someone else to take over which is not discriminatory. They relied on the Supreme Court case, *Gichuru vs Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR).
56. The Respondents submitted that the principle of constitutional avoidance militates against the Petition and further, the grounds on which the petition is grounded do not meet the threshold established in the *Anarita Karimi* case.

Analysis and Determination

57. The issues for determination are:
 - a. Whether the Petitioner's employment was terminated on the basis of her health and was discriminatory, unfair and unlawful.
 - b. Whether the Respondents violated the Petitioner's constitutional rights.
 - c. Whether the Petitioner is entitled to the reliefs sought.

Whether the Petitioner's employment was terminated on the basis of her health and was discriminatory, unfair and unlawful.

58. The Petitioner submitted that her employment was terminated on the basis of her health status as she was unable to report to work after the end of her sick leave due to a leg injury. Upon resuming work, she was informed by the 2nd Respondent that she had already been replaced.
59. However, the Respondent denied this fact and stated the Petitioner was not terminated on the basis of health but on grounds of absconding duty. Vide their further replying affidavit dated 05.10.2023, the Respondents aver that Petitioner contracted the flu on 21.03.2023 and took sick leave and briefly resumed her duties on 30.03.2023 to collect her salary but she was visibly unwell and in fear she would pass the flu to the 1st Respondent, she was released to continue with her sick leave and instructed to return when she was well. The Respondents deny that the Petitioner notified them of her inability to resume work until May 2023.
60. Discrimination is defined in *Peter K Waweru vs Republic* [2006] eKLR as follows:

“Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description. Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”



61. The burden of proving discrimination was discussed in depth in *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021) (Judgment) in which the Supreme Court stated as follows: -

“Discrimination against any employee is specifically provided for under article 27 of *the Constitution* as well as section 5 read together with section 47 of the *Employment Act*. Article 27 of *the Constitution* at clause 4 and 5 provides that:

“(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4) (Emphasis).”

62. Therefore, no person should directly or indirectly discriminate against another person on any of the grounds specified or contemplated in clause (4) more particularly on account of health status or disability. Section 5 of the *Employment Act* (cap 226) provides that:

“(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.”

63. The protection of employees against any form of discrimination at the work place is therefore a significant matter and the burden placed upon an employer to disprove the allegations of discrimination is enormous. The employer must prove that discrimination did not take place as alleged and that where there is discrimination, it was not with regard to any of the specified grounds. Sub-section 7 thus provides:

“(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.”

64. Section 47 (5) of the *Employment Act* further requires that:

“(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

This however does not automatically shift the burden of proof in cases of discrimination against an employee to the employer. According to section 5(7) of the Act, an employer alleged to have engaged in a discriminatory practice must give reasons for taking certain actions against the employee. Where such actions are shown not to have any justification against the protected group, then there exists discrimination against such an employee and must therefore be addressed. In this instance, the



appellant had discharged the burden as to shift it to the respondent who failed to discharge on their part.

65. This court had occasion to lay emphasis on the burden of proof in cases of discrimination in the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR where the Supreme Court applied section 108 of the *Evidence Act* in requiring the claimant to prove his claim in a matter involving discrimination. The court also grappled with the issue of direct and indirect discrimination. The court observed thus:

“Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

66. In view of the foregoing, the Petitioner’s claim of discrimination holds no water as she has failed to show this court that she was treated differently than any other employee of the Respondents. Further, she failed to inform the Respondents of her inability to resume work after she was well but she instead informed third parties with the assumption that the Respondents will be informed. There were no other persons she could bench mark with to prove she was treated differently and to her disadvantage.
67. In respect to absconding or desertion of duties, the court in set out the procedure of dismissing an employee on such grounds as follows: -

“The law regulating the processing of release from duty of an employee who has absconded duty is now fairly settled. It is not open to the employer to simply plead abandonment of duty by the employee as evidence of termination of the contract. The employer must demonstrate that he has taken reasonable steps to find out the whereabouts of the employee and required him to resume duty to no avail. The employer must where possible demonstrate that he has addressed the matter of the employee’s unexplained absenteeism through the available internal disciplinary channels.

It is desirable that upon realizing that an employee is no longer reporting at work the employer should formally require the employee to resume duty immediately and warn such employee of the risk of disciplinary action if he fails to. If the employee persists in his absence, it is desirable that the employer issues the employee with a formal notice to justify why he should not be terminated for unsanctioned absenteeism.

Desertion being a unilateral act of abandonment of the contract cannot operate to bring a contract of service to a close until the employer acts on it. In *James Okeyo v Maskant Flower Limited* [2015] eKLR, the court observed as follows on the issue: -

“.....the employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party.”

68. “Even if it is up to the employee to show up to explain his absence from duty. It is possible that he may have been prevented from reporting on duty for justifiable reasons such as incapacitating sickness or natural calamities.”

“If the employee: fails to resume duty or respond to the notice to show cause; or is not traced by the employer despite diligent effort; or responds to the employer but the reasons for



his absence are considered unjustifiable, then the employer may proceed to terminate such employee for unauthorized absenteeism. These principles are well articulated in a series of decisions by this court including *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR and *Julius Kyalo Malonza v Ruth Osolo t/a Eraeva Catering Services* [2021] eKLR.”

69. “The essence of this procedure is to ensure that the employee is terminated in a manner that meets the requirements of section 41 of the *Employment Act* as read with articles 41 and 47 of *the Constitution* of Kenya. It must be demonstrated that the employer had a justifiable ground to terminate the employee and that he accorded the employee the procedural safeguards guaranteed under the law in the process leading to the termination.

“The implication of the foregoing is that absent evidence that the Respondent followed the procedure aforesaid in handling the Appellant’s absenteeism the Respondent cannot lawfully plead abandonment of employment by the Appellant as a way of closure of the employer-employee relation between them.”

70. Further, Section 41 of the *Employment Act* provides for procedural fairness which is applicable in such cases as expounded above, it states: -

“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

71. In the instant case, the Respondent have not produced any evidence in court to show that they took any step to check on the Petitioner and confirm the reasons why she failed to resume work. Neither did they issue her with a NTSC or invitation for a disciplinary hearing to give her an opportunity to defend herself and give reason of her absenteeism before dismissing her employment. This is an employee who had closely worked for the respondents as a house girl for ten (10) years and they must have known how to reach her.

72. Therefore, the Respondent’s decision was procedurally unfair in breach of Section 41 of the *Employment Act* and in violation of Article 41(2) of *the Constitution* which grants every person a right to fair labour practices in terminating the claimant.

73. Having established the Petitioner’s dismissal was procedurally unfair, this court declares that the Petitioner’s dismissal was unfair, unlawful contravention of the *Employment Act* and obviously fair labour practice.



b. Whether the Respondents violated the Petitioner’s constitutional rights.

74. The threshold for establishing constitutional violation was set out in *Mumo Matemo v Trusted Society of Human Rights Alliance Civil App 290/2012 (2013) eKLR*: the court said:

“if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

75. Further, in *Kanya vs Attorney General Republic of Kenya & 2 others (Constitutional Petition E085 of 2022) [2022] KEHC 3284 (KLR) (Constitutional and Human Rights) (14 June 2022) (Judgment)* the court observed: -

“The Supreme Court of Kenya on *Communications Commission for Kenya & 5 others v. Royal Media Services Limited & 5 others [2014] eKLR* on the same element of specificity and precision stated thus: “Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic [1979] KLR 154*: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

From the above decisions it is shown that petitions must be clear on what it is they are challenging. First of all, there must be a nexus between *the Constitution* and the alleged violated right. The nexus must be precise, and clear.”

76. The Petitioner alleges that the 2nd Respondent’s conduct, as an agent of the 1st Respondent of hurling insults to her violated her right to inherent dignity and the right to have that dignity respected and protected as provided under Article 28 of *the Constitution*.

77. The Petitioner produced in court a string of Whatsapp messages whereby the 2nd Respondent was insulting her on 29th May 2022, these messages were not denied by the 2nd Respondent.

78. The Petitioner also averred that the Respondent violated her right to fair labour practices under Article 41 of *the Constitution*. She avers that the 2nd Respondent forced her to wash and massage her buttocks under duress and was subjected to long working hours without pay for overtime hours.

79. Some actions like what the petitioner alleges of massaging the 2nd respondent’s buttocks are hard to prove or to call witness due to the nature of the action. There being no corroborative circumstantial evidence the court finds that allegation unproven.

80. In the case of *Kenfreight (EA) Limited vs Benson K. Nguti [2016] eKLR Civil Appeal No 31 of 2015* court held that:

Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided), an employer was duty bound to explain to an employee in the presence of another employee or a union official, in a language the employee understood, the reason or reasons for which the employer was considering termination of the contract. In addition, an



employee was entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service was taken.”

81. Clearly, the Respondents violated the Petitioner’s right to fair labour practices by terminating her employment without following the required procedure as set in Section 41 of the *Employment Act*. The claimant is therefore entitled to be compensated as per the reliefs listed hereinbefore;-
- a. One month salary in lieu of notice kshs 25,000/-.
 - b. There is communication claimant went on leave so a blanket claim of ten years leave is not justified and is declined.
 - c. Service pay for ten years is justified as there is no records of remittance to NSSF but claimant has not shown how she worked it to kshs 125,000/-. The same to be presented to court in details by 28/2/2024.
 - d. House allowance is allowed as respondent never tendered proof they were paying house allowance. Kshs 450,000/-
 - e. Unpaid overtime is also not worked out except to quote a lumpsum so the same is declined.
 - f. Claimant will be given 4 months equivalent of salary as compensation for unlawful termination Kshs 100,000/-.
 - g. The claimant is awarded costs and interest on the total award being kshs 575,000 at the court rates from the date of judgment till full payment against 1st and 2nd respondents.
 - h. Service charge will be presented to court on 28/2/2024 upon both parties working it out or presenting evidence of remittance to NSSF.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16TH DAY OF FEBRUARY, 2024.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

