



Nyunja v Embassy of the Kingdom of Sweden & another (Cause E6486 of 2020) [2023] KEELRC 791 (KLR) (27 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 791 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E6486 OF 2020
M MBARÚ, J
MARCH 27, 2023

BETWEEN

SANTINO OLUOCH NYUNJA CLAIMANT

AND

EMBASSY OF THE KINGDOM OF SWEDEN 1ST RESPONDENT

CAMILLA HAFSTROM 2ND RESPONDENT

JUDGMENT

1. The claimant is an adult male, the 1st respondent is a diplomatic mission and the representative of the Kingdom of Sweden in Kenya and the 2nd respondent is an adult female and an employee of the 1st respondent.
2. The 1st respondent employed the claimant who held different positions the last being the finance officer in Nairobi where the 2nd respondent was the head of administration and supervising the claimant.
3. On December 11, 2019 the respondent terminated the claimant's employment contract. The claim is that this was unlawful and unconstitutional on the grounds that in July, 2015 the respondent employed the claimant on a fixed term contract as a junior finance officer and upon completion he was issued with another contract running from January 1, 2016 to February 28, 2017. The claimant would be subjected to annual performance appraisals except for the year 2018 and on the performance reviews he was promoted to the position of finance officer which converted his employment to a fixed term contract.
4. On December 11, 2019 the respondents terminated the claimant's employment without subjecting him to any form of disciplinary hearing, performance improvement plan or written warning. The claimant had a clean record for the entire duration of his employment and prior to being employed by the respondents he had worked for several other employers diligently but following termination of



employment, the claimant has suffered loss and damage and is unable to secure new employment due to the nature of his profession and practice of finance and accounts management.

5. The claimant had worked well with the respondents save for several instances when he experienced a hostile work environment and faced persistent harassment and derogatory treatment by a particular colleague which he reported to the supervisor but no action was taken.
6. In August, 2019 the claimant's supervisor was transferred and the 2nd respondent brought in as head of the administration and his supervisor but who treated him with disdain and racial prejudice and disrespect always shouting at him contrary to the Embassy human resource policies and code of conduct and making it clear that she did not want the claimant in the respondent's employment and would do everything to intimidate and victimise him. The claimant noted the hostile work environment but the 2nd respondent constantly harassed him leading to termination of employment when on November 19, 2019 she summoned him and issued a notice to show cause and called security to remove the claimant from the embassy premises. The show cause notice had 18 allegations of alleged violations of employment rules some going back to months and the claimant was required to respond within 3 days.
7. Having been removed from his work station, the claimant was denied access to emails and records and finance systems he ordinarily used to be able to respond to the allegations made against him. The 2nd respondent had used this system to formulate the allegations made and despite the claimant requesting for access, he was denied the same leading to unfair administrative action. Denial of systems access was deliberate and aimed at ensuring that the claimant did not reply to the allegations made and hence made with malice and contrary to the Embassy policy.
8. The claim is that despite the apparent constraints, the claimant responded to the allegations made against him and upon submitting his responses, being on compulsory leave at the time, he travelled to his home County of Siaya on a family emergency relating to his ailing mother who had been taken ill and needed emergency medical attention. The claimant informed the respondents that he was unable to attend oral disciplinary hearing on December 2, 2017 but the 2nd respondent went contrary to policy and ordered the claimant to report to Dr. Dogra in
9. Nairobi for a medical evaluation which occasioned the claimant mental anguish and trauma compounding his already hostile work environment particularly the demand to travel from Siaya to Nairobi within 48 hours covering a distance of over 400 kilometres to be medically examined.
10. The claimant attended oral disciplinary hearing on December 9, 2019 but the panel was chaired by the 2nd respondent as his supervisor and accuser contrary to fair administrative action and rules of natural justice and where he was informed that the allegations made would be considered together with his responses and on December 11, 2019 he was issued with letter terminating his employment. The 2nd respondent was bent on ensuring there was termination of employment and despite the claimant making detailed responses, such were not put into account. The respondent alleged that the claimant had made a cash deposit to a service provider's bank account when the signatories were not enough for the embassy bank account when in fact, the cash withdrawal and deposit payment had been properly authorised by the Ambassador being the highest ranking authority at the embassy. The claimant was also alleged to have made typographical errors in names and entries an allegation that was trivial and unfounded taking into account the show cause notice had errors including getting the dates wrong, incorrect spelling of Kenyan names and glaring grammatical and spelling errors yet the 2nd respondent used such reason of errors to terminate his employment.



11. The claimant was also alleged to have misplaced some requisite documents which was ambiguous and devoid of any meaning given the sensitivity of the finance department and the risk threshold. The claimant was not aware of any lost document and when he requested for better particulars the respondents failed to address.
12. Another allegation related to a time when a file cabinet had been left unlocked at the office, a space co-shared with 3 other colleagues including the 2nd respondent who would routinely not close the cabinet after picking a document. The claimant would always follow up and lock the cabinets left unlocked by the 2nd respondent and in this case such reason was only used to avoid bearing responsibility.
13. Another reason used was that the claimant failed to introduce the 2nd respondent as a bank signatory when it was in fact not part of his job description and he had no such power. This was the function of the Ambassador as the head of mission.
14. The claimant was accused of making payments for rental expense yet he was under instruction from management and 2nd respondent's predecessors that such rent could only be paid upon production of certified invoices by the landlords and there were no delayed payments in this regard. When the 2nd respondent joined the 1st respondent she did not take time to read the policy documents and to better understand any shortcomings or to understand the legal background behind various decisions that were ratified by her predecessors and hence treated the claimant with a lot of prejudice for applying the decisions taken in the past. This resulted in direct and indirect discrimination by denying the claimant equal treatment under the law and employment regulations without valid reasons contrary to Article 27 of the [Constitution](#).
15. The claim is that the claimant's right to be treated with dignity was violated by the 2nd respondent who frustrated his employment leading to termination notice and using armed security guard to remove him from the premises contrary to article 28 of the [Constitution](#) when the claimant required to respond to allegations made against him, he was denied access to the records contrary to Article 35 of the [Constitution](#). This resulted in unfair labour practices pursuant to Article 41 of the [Constitution](#).
16. At the time the claimant's employment was terminated, he had a young family and an ailing mother who were wholly dependent on him for their livelihood and upkeep and as result he has suffered loss and damage by the actions of the respondent. The claimant is seeking the following:
 - a) A declaration that employment terminated unfairly;
 - b) An award of Kshs 3.86 million in damages for unfair termination of employment;
 - c) An award of KShs 60 million being damages and compensation for breach of fundamental rights and freedoms and for being unable to secure alternative employment and had expected to serve for 19 more years before retirement;
 - d) General damages for mental anguish, torture and trauma resulting from discrimination and inhuman treatment occasioned by the respondents;
 - e) Compensatory damages for breach of privacy and the claimant's rights under the [General Data Protection Regulations 2016/679](#) (GDPR) in relation to use without his consent of his image and pictures on the website of the Embassy for weeks in relation to a declaration of vacancy for his position despite his employment then having been unfairly terminated; and
 - f) Award of costs.



17. The claimant testified at length in support of his case. Following his employment by the 1st respondent as the finance officer, he worked well until the 2nd respondent joined the 1st respondent when she commenced personal attacks against him without good cause. She caused to be issued a show cause notice with various unsubstantiated allegations and despite the claimant responding compressively, there was no fair hearing and the entire process was only meant to terminate his employment.
18. The claimant also testified that he suffered discrimination while working for the 1st respondent when the workplace policies were selectively applied on him as against other employees. His right to privacy was violated when his photograph was used to advertise for his position after he had left the employment of the 1st respondent which he found to be with malice and an attempt to belittle him without according him any decency.
19. The disciplinary process was chaired by the 2nd respondent who was his accuser and lacked any due process. The claimant was made to reply to the allegations made against him without the advantage of having records necessary for this purpose and despite requesting for them, he was denied access. He was removed from the 1st respondent's premises under security guard which humiliated him and exposed him to ridicule. Such action was not necessary or justified but only meant to injure his person.
20. The claimant is a finance professional and is unable to secure new employment due to damage occasioned against him by the respondents because the sector is very sensitive to matters of integrity and this has left him unable to support self and family and his ailing mother and the remedies sought should be issued with costs.

Response

21. In response, the respondents' case is that the 2nd respondent is a diplomatic agent who enjoys absolute civil and administrative diplomatic immunity in Kenya by virtue of Article 31 of the [Vienna Convention on Diplomatic Relations](#) of 18th April, 1961 read together with Article 2(6) of the [Constitution](#) and should be struck out of these proceedings.
22. Termination of employment was in accordance with the [Constitution](#), the [Employment Act](#) and therefore fair and lawful. Termination of employment was necessitated by the claimant's constant breaches of his employment contract and the 1st respondent's terms and conditions for locally employed staff.
23. The claimant's performance evaluations were not always satisfactory in that;
 - a) The performance review conducted on April 7, 2016 noted that the claimant required to improve on the quality of his work outputs and reports as well as improve on checking risks and compliance checks. The claimant needed to improve in being proactive in his approach to work as well as pay more attention to making accurate reports;
 - b) On March 19, 2018 another performance review was conducted where it was again noted that the claimant needed to improve on the quality of his output and minimise errors and risks, ensure payments were done on time, create a conducive work environment with other colleagues and improve his communication skills; and
 - c) On April 5, 2019 another review was conducted and the claimant had again not shown any improvement in the areas of making mistakes. It was noted that the claimant had not read the manuals.



24. The 1st respondent issued the claimant with a notice to show cause dated November 19, 2019 which gave an outline of the numerous offences carried out by the claimant all summarised to include;
 - a) Failure to obey lawful and proper instructions which was his duty to obey and this included central guidelines from Ministry of Foreign Affairs in Stockholm as well as instructions issued by his superiors of the 1st respondent both orally and in writing; and that
 - b) There was wilful neglect to perform work which it was the claimant's duty to perform and or carelessly and improperly performing various assignments which the claimant required to perform carefully and properly.
25. The claimant had been issued with verbal warnings regarding his failures and neglect but he never took heed and which led to the disciplinary process and subsequent termination of employment. The claimant had been made aware on the need to improve on his work performance as discussed with him but he did not oblige.
26. The 1st respondent was not made aware of any matter of the claimant being put in a hostile work environment as alleged. No report was made to any supervisor of the 1st respondent as required under the policy procedures.
27. The 2nd respondent was employed by the 1st respondent on September 1, 2019 with mandate to lead and coordinate internal administration, quality assurance, financial administration and budget operations, personnel matters and travel approvals. At all times she adhered to the policy manuals of the 1st respondent and treated the claimant well in accordance with the conditions of locally employed staff. Despite being asked on several occasions to comply with the directions issued, the claimant failed to address and repeatedly gave responses which had the effect of undermining the proper execution of the given tasks. There was no targeted removal from employment as alleged and upon the claimant being issued with the show cause notice he was escorted out of the premises by the 1st respondent's unarmed staff taking into account the sensitive nature of his role as the finance officer.
28. The claimant was allowed sufficient time to respond to the notice to show cause and also allowed an oral hearing on November 25, 2019 which was adjourned to November 2, 2019 at the claimant's request to accord him time to respond. The claimant was by this time on paid leave and never asked to access any records to assist in his responses which he did through extensive statements of 29 pages.
29. The claimant was accorded the due process and following a disciplinary hearing held on December 9, 2019 and considering his written statements he was found to have acted in excess of his powers, repeatedly failed to handle invoices and was of misconduct in relation to handling monthly book closures for monthly reports. This matter had been discussed with the claimant on several occasions but he failed to improve.
30. Termination of employment was lawful and based on due process. The claimant was paid in lieu of notice at Kshs 577, 313.10 together with accrued leave days up to March 11, 2020 at Kshs 290, 669.40.
31. The respondents' case is also that the fact of the group photo is that this was a photo of the entire staff of the 1st respondent, about 65 of them taken in March, 2019 and published on the 1st respondent's social media. This was taken down in less than a week and there was no breach of any image or privacy rights as asserted by the claimant and the claims made should be dismissed with costs.
32. In evidence the respondents called Sebastian Rasch who was working with the claimant but has since left and is based in Tanzania and who testified that he was the Deputy Head of Administration and Consular Affairs of the 1st respondent from September 3, 2018 to August 13, 2021 and that in



April, 2019 he had occasion to discuss with the claimant as was the case with other employees on his duties. This was a yearly discussion leading to salary reviews. The claimant as the finance officer was in charge of all expenses booking and he noted that some of the bookings made were wrong including indicating wrong amounts booked in the 1st respondent's entertainment expenses, housing costs were wrongly recorded by charging two months after the claimant had received the first instruction and after numerous talks with him. In June, 2019 the claimant wrongly calculated exchange rate loss and double-booked previous costs and generally the claimant failed to follow instructions and internal guidelines an example being, he booked the diplomatic staff's holiday trips and hardship travels incorrectly, he paid electricity bills for overlapping periods. On July 10, 2019 the claimant wrongly booked to the 1st respondent instead of the 2nd respondent.

33. Rasch testified that it was the duty of the claimant to pass on payment information to the protocol officers so they could issue VAT certificates as the 1st respondent was exempt but due to this failure to provide information, the 1st respondent was made to pay Kshs 99, 000 resulting in a loss.
34. As required under the internal procedures, the claimant was required to book flight tickets for the 1st respondent officials on an interim account after which the invoices would be rebooked but due to failures in this regard, the interim account was pending for over a year with USD 6,233.82.
35. The claimant kept on using old report forms when doing the monthly reconciliation despite repeated directions from the 1st respondent and then he used the wrong report from the booking system. When the claimant was told to rebook and improve previous booking, this took months to be done resulting in several reminders and some were never done.
36. Rasch also testified that the claimant made some booking without his approval or from the Head of Section as required by procedure and which led to the 1st respondent issuing the claimant with a notice to show cause and disciplinary hearing leading to termination of his employment on justified grounds.
37. At the close of the hearing both parties filed detailed written submissions.
38. The claimant submitted that his employment was terminated unfairly contrary to the Constitution and the law and contrary to the provisions of Section 5, 43 and 45 of the Employment Act, 2007 (the Act) as held in International Planned Parenthood Federation v Pamela Ebot Arrey Effiom [2016] eKLR that the burden of proof that employment terminated fairly is upon the employer and that the reasons given are valid as held in Muthaiga County Club v KUDHEIHA Workers [2017] eKLR.
39. The claimant was not taken through the due process and the reasons given leading to termination of employment assessed cannot be justified. All the issues addressed in the notice to show cause were responded to and which the respondent failed to consider when terminating employment.
40. The respondent submitted that pursuant to Section 43 and 45 of the Act termination of employment was fair and justified as held in Walter Ogal Anuro v Teachers Service Commission [2013] eKLR and in David Gichana Omuya v Mombasa Maize Millers Limited [2014] eKLR that before employment is terminated the employee must be issued with notice and allowed to attend oral hearing which was done for the claimant. During the disciplinary hearing, the claimant was allowed to call Felix Osok pursuant to Section 41 of the Act. The responses given by the claimant to allegation made against him must be satisfactory because the respondent was not expected to undertake a forensic audit to ascertain matters of misconduct so as to prove its case as held in Kenya Revenue Authority v Renwel Waitbaka Gitabi & 2 others [2019] eKLR. The claimant was found to have been making errors in booking and failed to follow up on matters brought to his attention leading to losses and such conduct cannot be justified as held in Nazareno Kariuki v Feed the Children Kenya [2013] eKLR the role of the court should not be to reconstruct the internal disciplinary procedures adopted by an employer or to improve on the



decision by the employer but to check whether in the circumstances the employer acted in a reasonable and fair manner.

41. The claims made by the claimant for payment of damages are not justified in view of the reasons given for termination of employment, he failed to prove what matters of discrimination existed against him and the same should be dismissed with costs.

Determination

42. On the pleadings, evidence and written submissions the matters which emerge for determination can be summarised as follows;

Whether there is unconstitutional, unlawful and unfair termination of employment; Whether there was discrimination against the claimant;

Whether the right to privacy was violated; and Whether the remedies sought should issue.

43. Before addressing the above issues, the respondents challenged the court's jurisdiction on the basis that under the Vienna Convention on Diplomatic Relations, the respondents enjoy immunity from litigation. This matter ought and should have been addressed instant when the claim was served upon the respondent and to wait until the tail end of the hearing and to address the same during submissions state is not good practice. Particularly when the jurisdiction of the court is challenged, such matter should be addressed before any other business.

44. With regard to the application of Article 31 of the [Vienna Convention on Diplomatic Relations](#) of 18th April, 1961 read together with Article 2(6) of the [Constitution](#), immunity against civil liability is not absolute. Article 31 requires that;

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
 - a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
 - b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
 - c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

45. Parties herein were governed and related through an employment contract without a restriction of immunity. The claimant was employed and governed under terms and conditions applicable to Locally Employed Staff of the 1st respondent. As held in the case of [Lucy Muingo Kusewa & another v Embassy of Sweden, Nairobi](#) [2017] eKLR the court held that though the Respondent may enjoy diplomatic immunity, this immunity is restrictive and does not cover employment matters as expressly outlined under [UN Convention on Jurisdictional Immunities of States and their Property](#). Employment matters also fall under the purview of Private law where immunity is restricted under the [Privileges and Immunities Act](#) and the [Vienna Convention on the Law of Treaties](#).

46. The question as to whether there is immunity with regard to employment and labour relations claims against a foreign mission based in Kenya such as the respondents are was addressed at length by the Court of Appeal in the case of [Embassy of Sweden v Lucy Muingo Kusewa & another](#) Civil Appeal No 345 of 2017 and the court affirmed the findings of the Court that;



47. The rule on restrictive immunity is not new and it has been applied in Kenya for decades. For instance in the oft cited case of *Ministry of Defence of the Government of the United Kingdom v Joel Ndegwa*, this court stated thus:-

"it is apparent that there is no absolute immunity. It is restrictive. The test is whether the foreign or government was acting in governmental or private capacity the doctrine will apply otherwise it will not afford protection to a private transaction. The nature of the act is therefore important"

48. The Supreme Court reaffirmed this position in the case of *Karen Njeri Kandie v Alassance Ba & another* [2017] eKLR and held that the doctrine of restrictive immunity does not apply to private and commercial activities which cannot be immunised.

49. In this case, the claimant having been engaged as an employee on Locally Employed Staff of the 1st respondent cannot be removed from the legal protections in Kenya following termination of his employment which he asserts was unconstitutional, unlawful and unfair. There exists jurisdiction to determine the instant suit as emphasised in the case of *Embassy of Czechoslovakia v Jens Nielsen* 78 ILR 81 where the Supreme Court of Denmark held that;

Neither according to the Vienna Convention nor according to the rules of international law can an embassy be held to be exempt from proceedings based on a civil law contract concluded by the embassy which provides that disputes are to be settled by the courts of the receiving state.

With regard to whether there was unconstitutional and unfair termination of employment, in a letter dated December 11, 2019 the respondents terminated the claimant's employment on the following grounds;

1. Failure to obey lawful and proper instructions which it was within the scope of your duty to obey. This includes central guidelines from the Ministry of Foreign Affairs in Stockholm as well as instructions given by supervisors at the Embassy both orally and in writing.
2. Wilful neglect to perform work which it was your duty to perform and/or carelessly and improperly performing various assignments which you were required to perform carefully and properly.

50. In response to the claim, the respondents asserted that in arriving at the reasons leading to termination of employment there were various performance review measures taken with the claimant who failed to improve or address and which compounded amounted to failure to obey lawful and proper instructions given by the employer and also were found to be wilful neglect to perform work which it was in its nature to be performed by the claimant and that he was careless and of improper performance of the duties which he was required to perform carefully and properly.

51. The particulars of such allegations were further explained to comprise that on April 7, 2016 the claimant was reviewed and assessed in his performance and found wanting. On March 19, 2018 the claimant's work performance was reviewed and again found wanting, and further on April 5, 2019 the claimant's work performance was reviewed and it was again shown that there was no improvement in the areas of making mistakes. It was noted that the claimant had not read the manuals.

52. The claimant was employed under various contracts and eventually as the finance officer by the 1st respondent. In its nature, such is a highly regulated position with standards and measures calling for



diligence and great aptitude in correctness. An error in a single digit, figure or nought would lead to severe damage to the entirety of the organisation.

53. The respondent's case that the claimant constantly made errors, mistake, and misspellings and was issued with verbal and written warning is however left without any evidence. No warning issued to the claimant was filed until he was issued with the notice to show cause. The notice has a total of 14 allegations without any attachment.
54. Some of the allegations made were that;
- a) The claimant made late payment of rent to which the claimant replied and noted that all rents were paid for save some officers of the 1st respondent had no signed lease agreements and he had to rely on issued invoices and his previous supervisor had instructed that no rent was to be paid without an invoice for the period that it was due on the basis that to make such payments would result in a charge of VAT and the 1st respondent would incur huge losses;
 - b) On cash counts the claimant was alleged to have failed to undertake the same properly and he explained that in all cash counts he filed monthly reports and which were sent to Stockholm very month end but when the Deputy Head of Administration went to Sweden for leave in July, 2019 he came back with a report that the claimant would no longer be required to attach the weekly cash counts while sending his report. Previously the claimant had been reburied to attach various documents particularly the flying inspection report done by the Head of Administration;
 - c) On Kenya Power Electricity Bills, the claimant was alleged to have failed to pay the bills in time and that according to him the same had been resolved and no embassy funds were lost;
 - d) On spelling mistakes, the claimant admitted that due to language and alphabet characters differences he at times made spelling mistakes because he was not accustomed to the spelling of Swedish names and that no such error resulted in any loss and when pointed out, he did correction and also noted that the show cause letter issued by the 2nd respondent had both spelling mistakes and grammatical errors because the officer was not conversant with local names; and
 - e) On booking on wrong budget and incorrect account, the claimant was alleged to have such an allegation was not common and it does happen in accounting and not a mistake he was prone to and most of the error entries were not of his own making but arose from Stockholm and which he corrected when he received funds from SIDA paid from trade and culture and promotion budget.

Just but to address a few of these instances.

55. The general allegations hence addressed under the show cause notice go into the work performance of the claimant. Without the respondent demonstrating how such work performance challenges were addressed save for the annual appraisals, the respondent cannot find justification to assert that the claimant failed to adhere to lawful directions and instructions that he was careless in the performance of his duties and which he was careless and of improper work performance.
56. Pursuant to Section 41 of the Act, an employer who terminates employment on account of an employee being of poor work performance cannot just cite poor performance and then translate such matter to mean that the employee failed to take lawful direction and instructions or that the employee was simply negligent of his duties by being careless.



57. The Court of Appeal in addressing a similar matter as herein in the case of *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR held that;

The reason advanced by the Bank for terminating the respondent's employment was poor performance. In *Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010*; [2010] LLR 255 (ICK) (September, 2013) the court held that;

- a) Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act, 2007*. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.
- b) It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.
- c) Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
- d) In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.

58. This gave an apt summary of the matters an employer should and ought to take into account before terminating employment on account of the employee being found to be of poor work performance. Have a policy on how to assess performance and the measurement standards; apply and objective criteria meant to give the employee support; allow for a timeline within which a poor performing employee is required to improve and at the end of it allow the employee to attend and address.

59. Such measures in my humble view, if taken well and into contest, ought and should have followed after the claimant was evaluated on April 7, 2017 and he was found not performing well in his duties. Again when he was evaluated on March 19, 2018 and which he contested that this was not done as asserted by the respondent, the identified poor areas of performance ought to have been picked and addressed. So that in the subsequent appraisal and evaluation on April 5, 2019 a repeat of the same reasons given previously should have been addressed way before such time.

60. In this regard, the respondent failed in its mandate as the employer and cannot be found to justify termination of employment on the grounds given. This is not in any way a substitution by the court of the reasons given, an assessment of the matters addressed by the parties and particularly the show cause notice assessed via-a-vies the law, pursuant to Section 41, 43 and 45 of the *Act*, termination of employment is hereby found not justified.

61. On whether there was discriminatory treatment of the claimant, Article 27 of the *Constitution* read together with Section 5 of the Act prohibit direct and indirect discrimination against any person.



Upon an employee alleging discriminatory treatment against him by the employer, in employment and labour relations the burden of proof shifts from such employee to the employer.

62. The claim is that the claimant was treated differently from other employees when he lodged his grievances to the respondent. His supervisor picked on him every time he made a grievance and which eventually led to termination of employment. Indeed, the claimant filed his grievances submitted to the 1st respondent as his employer and particularly his complaints against the 2nd respondent who he stated was frustrating his efforts in the performance of his duties. There is no response to these claims and the witness called Mr Rasch testified that he was not conversant with such matter as between the claimant and the 2nd respondent.
63. A claim that there is discriminatory treatment at work is serious and once alleged, the respondent is placed at a high threshold to disprove such matter. Without any responses on the grievances the claimant made as regards his employment environment, such touching on workplace practices at the 1st respondent, the claim that there was discrimination against the claimant is found with good basis. On these findings, the claim for general damages for discriminatory treatment is found justified.
64. Taking into account the discriminatory treatment applied against the claimant by the respondents, the unfair termination of his employment, cumulatively, general damages are due. In assessing the general damages to award to an employee who had faced discrimination at work, the Supreme Court in *Gichuru v Parckage Insurance Brokers Ltd* Petition No 36 of 2019 awarded Kshs 2 million. In this case, the court finds an award of Kshs 500,000 appropriate to award the claimant.
65. Right to privacy is well secured under the *Constitution*. The claimant's case is that upon termination of his employment, the respondents advertised for the position and used his photograph on the website. He testified that the photo had been taken with his consent while in employment but was shocked to find that the photo had been used in an online advertisement.
66. In response, the respondents' case is that the claimant gave consent to the taking of the photograph and when he lodged his complaint against its use, it was removed.
67. First, the claimant gave consent to the respondents to take the photograph. This photo is attached to the Memorandum of claim at page 330 which contain two groups of people without any caption as to names, place or time. A general look of the same, one cannot decipher or deduce who the claimant is unless one is familiar with him and can be able to pick him from the entirety of the group.
68. Secondly, the claimant lodged his complaints with the respondents about the use of his photograph to advertise for his position and this was pulled down.
69. The alleged breach of privacy is not apparent and cannot be discerned from the material filed.
70. On the finding that there was unfair termination of employment, pursuant to Section 45 and 49 of the Act, the claimant is entitled to compensation. The claimant worked for the respondent for over 5 years with a clear record and was last earning Kshs 235,000 and an award of 6 months in compensation is hereby found appropriate all at Kshs 1,410,000.
71. On the claim for compensation for breach of fundamental rights and freedoms and the claimant being unable to secure new employment, the claimant testified that he is well trained in finance and has previously worked with other employers. For the unfair termination of employment, that is addressed and a compensation awarded. The futuristic earnings have not been mitigated and the claimant was



expected to look for alternative employment upon the respondent terminating his employment as held in *D.K. Njagi Marete v Teachers Service Commission* [2013] eKLR the court held that;

A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, would not be a fair and reasonable remedy. The Claimant has moved on after the unfortunate and capricious decision of the TSC. He no longer renders any Labour to the Teachers Service Commission. The *Employment Act* 2007 requires he moves on as he has done, and mitigated the loss of his job An aggrieved employee must move on, and not sit back waiting to enjoy anticipatory remuneration.

72. On the claim for general damages for mental anguish, torture and trauma resulting from discrimination and inhuman treatment, as addressed above, such does not arise in this case. The right to privacy and alleged breaches were not particularised or proved within the required threshold.

73. On the claim that the claimant had a loan that was compromised following termination of employment, upon moving the court with the claim herein, the claimant ought and should have secured his property rights secured through his salary. Such action should have been addressed instantly and before he waited for the hearing of the main claim.

74. In *Abraham Nyambane Asiago v Barclays Bank of Kenya Limited* [2013] eKLR the court held that;

“... an employer who grants an employee a loan facility on special terms is entitled to vary the terms of the facility or even recall it altogether once the employment relationship ceases to exist. However, there is a basic assumption in all such cases, that the employment relationship terminates within the law. If there is a whiff of unlawfulness in the termination of employment, then the employer’s right to withdraw the special loan facility advanced to the employee is withheld”

75. On the claim for costs, the substantive claim of unfair termination of employment proved, the claimant is entitled to his costs.

76. Accordingly, judgment is hereby entered for the claimant against the respondents in the following terms;

- a) A declaration is hereby issued that employment terminated unfairly;
- b) A declaration is hereby issued that the respondents discriminated against the claimant;
- c) Compensation awarded at Kshs 1,410,000;
- d) General damages awarded at Kshs 500,000; and
- e) Costs of the suit.

DELIVERED IN OPEN COURT AT MOMBASA THIS 27TH DAY OF MARCH, 2023.

M. MBARŪ JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

