



**Muthoni v Meridian Health Group (Petition E052 of 2022)
[2023] KEELRC 1037 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1037 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E052 OF 2022**

JK GAKERI, J

MAY 4, 2023

BETWEEN

LILIAN MUTHONI PETITIONER

AND

MERIDIAN HEALTH GROUP RESPONDENT

JUDGMENT

1. The Petitioner initiated this suit by way of a Petition dated 8th March, 2022.

The Petitioner's case is pleaded as follows;

2. That she was employed by the Respondent as an Assistant Receptionist vide a contract dated 6th November, 2008 at a monthly salary of Kshs.15,000/= and rose through the ranks to become the Human Resource Assistant Administration earning Kshs.90,000/= as at January 2022 when she was dismissed from service allegedly for having compromised the operations of the Respondent.
3. It is the Petitioner's case that before proceeding on maternity leave, she had handed over her roles and duties to the employees of the Respondent. That after resuming from maternity leave on 1st February, 2021, her request for an update on whether there had been any procedural changes in various departments yielded no response.
4. That on 19th May, 2021, the Petitioner received a message from the Finance Manager, one Beatrice Njoki Kamweru asking her to hand over the MPESA float for the Meridian Group Management to one Immaculate immediately.
5. The Petitioner depones that in July 2021, she forwarded her appraisal to the Human Resource Manager, Mr. Erick Njueh but was not appraised which led to the email dated 23rd August, 2021 to the Regional Directors, one Dr. Banguu Delle and Sangu Delle on execution of duties and communication breakdown and receipt was acknowledged and a promise made to resolve the issues. That the Petitioner



- wrote the second email to the Human Resource Manager on 27th August, 2021 on the challenges she was facing at work and seeking clarity which was unresponded to.
6. That the Human Resource Manager became intolerant and directed other employees not to allow her into the Human Resource Office as a consequence of which the Petitioner suffered depression and attended various counselling sessions.
 7. That the Petitioner wrote another email asking for a job description and the same had been agreed upon by 5th November, 2022 and a hard copy was given by the Human Resource Manager on 26th November, 2021 for an entry level position which the Petitioner declined to sign and sent an email to the Regional Director to adopt the Job description the Petitioner was discussing but received no response.
 8. The Petitioner deposes that she was neither given a job description nor reasons why the Human Resource Manger had given her a job description for an entry position.
 9. That on 1st December, 2021, the Petitioner received an email from the Human Resource Manager on missing staff files and responded and was asked to show cause why disciplinary action should not be taken against her and responded in detail.
 10. That on 2nd December, 2021, the Petitioner lodged a complaint that the cabinets she had been accused of not locking the files had been locked by the Human Resource Manager and left with the keys and returned a day later.
 11. That subsequently, the Petitioner was summoned by the Human Resource Manager and issued with a notice to show cause which required a response by close of business on the same day and the Petitioner responded accordingly and was invited for a disciplinary hearing and asked to inform management her preferred colleague as a witness by 9th December, 2021.
 12. The Petitioner responded to the invitation letter and due to unavailability of the witness, the hearing was postponed to 16th December, 2021.
 13. The Petitioner deposes that the disciplinary meeting was held as scheduled and Dr. Rose Kiura and Eric Njueh attended and deliberations on the issues raised in the invitation to the disciplinary and hearing took place and all attendees were promised typed copies of the minutes.
 14. That the Petitioner wrote an email to Dr. Kiura and Mr. Njueh stating that other individuals were accessing the Human Resource Office.
 15. That on 2nd January, 2022, the Petitioner applied for extension of leave as her family had been taken ill after being in close contact with a COVID-19 positive person and the extension was granted and the Petitioner resumed duty on 10th January, 2022 and was supplied with minutes of the hearing which according to her were not a true record of the proceedings and protested via email which was not responded to.
 16. That the Petitioner received a summary dismissal letter on 20th January, 2012 for gross misconduct.
 17. It is the Petitioner's case that the Respondent did not provide particulars of the employee's files in respect of which the Petitioner breached confidentiality, complaint or investigation report and the Human Resource Manager was the complainant and judge.
 18. That the Petitioner was not allowed to cross-examine the accuser as the committee comprised of one person in lieu of three and was not notified of the right of appeal but appealed and received no response.
 19. It is the Petitioner's case that the Respondent discriminated her on account of pregnancy.



20. The Petition is grounded on Articles 24, 27(1)(2) and (5), 19 and 47 of *the Constitution* of Kenya, 2010.
21. The Petitioner prays for;
- a. A declaration that the Petitioner's rights and freedoms secured under Articles 19, 20, 21, 22, 23, 24, 25(c), 27, 28, 29(d), 35, 42, 47 and 5 of *the Constitution* of Kenya, 2010 were threatened and infringed by the Respondent by the impugned demotion of roles after resumption of duty from maternity leave and subsequent dismissal.
 - b. A declaration that the Respondent violated the Petitioner's fundamental right from discrimination, right to fair labour practices and human dignity under Articles 27, 31 and 41 of *the Constitution* of Kenya, 2010 by unjustifiably withdrawing her roles and duties unilaterally.
 - c. An order that the Petitioner be paid terminal benefits and compensation for unfair termination and loss of employment as set out in paragraph 21 of the Petition comprising;
 - i. One month's salary in lieu of notice Kshs.103,500/=.
 - ii. Salary for 22 days worked in January 2022 Kshs.76,153.85.
 - iii. House allowance @ 15% of Kshs.90,000/= x 13 Kshs.2,016,000/=.
 - iv. Unpaid leave (admitted to be computed).
 - v. Overtime earned not paid (to be computed).
 - vi. 12 months salary compensation Kshs.1,242,000/=.
 - vii. Certificate of service.
 - viii. General damages for discrimination and termination on account of pregnancy.
 - ix. Exemplary damages for violation of the Petitioner's constitutional rights.
 - d. Costs of the Petition.
 - e. Interest on (c), (d) and (e) above.

Respondent's case

22. In its Replying Affidavit sworn by Erick Njueh, the Human Resource Manager, the Respondent admits that it employed the Petitioner on 6th November, 2008 as an Assistant Receptionist and also served as Personal Assistant to the Chief Executive Officer and Office Administrator.
23. The affiant deposes that during a routine check of staff records on 30th November, 2021, it was discovered that all staff files were missing from a cabinet in the Human Resource Office and on inquiry, it was ascertained that the Petitioner had removed them and left them unattended at her work station which posed enormous risk due to the personal information in the files.
24. That a notice to show cause was issued on 3rd December, 2021 requiring a response on whether the files were in a lockable cabinet at her work station, where the files were on 30th November, 2021 when she was on leave, why all the 75 files were removed from the cabinet at the same time and whether she could guarantee confidentiality of information contained in the files was maintained during her absence.
25. That the Petitioner admitted in her response dated 3rd December, 2021 that her actions potentially breached her duty to safeguard confidential information.



26. That on invitation for a hearing, the Petitioner sought its postponement so as to secure a colleague to accompany her and the request was granted and the hearing postponed to 16th December, 2021 when it took place and a decision was thereafter made to discharge the Petitioner from employment.
27. The affiant states that termination of the Petitioner's employment was substantively and procedurally fair in that the Petitioner exposed confidential information and was accorded an opportunity to respond to the charges in writing and by word of mouth.
28. That the termination was neither directly nor indirectly discriminatory on account of pregnancy as she was allocated duties after he returned from maternity leave and roles had been realigned to incorporate Africa Health Holdings, a fact the Petitioner was aware of and the issue of demotion did not arise.
29. That roles were aligned based on qualifications.
30. Finally, the affiant states that the Petition did not disclose any reasonable cause of action against the Respondent.

Petitioner's submissions

31. According to the Petitioner's counsel, the issues for determination are;
 - i. Whether the Respondent's conduct amounted to discrimination against the Petitioner on account of pregnancy and violation of rights.
 - ii. Whether in effecting the dismissal due process was observed.
 - iii. Whether the Petitioner is entitled to the reliefs sought.
32. On the 1st issue, counsel relied on Article 27 of *the Constitution* of Kenya, 2010 and Section 5(3) of the *Employment Act* to underscore the argument that discrimination is outlawed by law and urge that the Petitioner was dismissed from employment on non-existent and trumped up allegations and was thus discriminated on the ground of pregnancy.
33. Reliance was made on the decision in *G M V V Bank of Africa Kenya Ltd (2013) eKLR* to urge that the Petitioner met the test for discrimination that there was a nexus between the happenings and her maternity leave.
34. The court was urged to find that the reasons for dismissal was pretextual.
35. As regards due process in the termination of employment, counsel submitted that the provisions of Section 41 of the *Employment Act*, 2007 were not complied with. That the employer did not specify the files in respect of which confidentiality was breached.
36. That the Human Resource Manager was the originator of the complaint and the judge in the Petitioner's dismissal and principles of natural justice were violated according to the Respondent's manual as no investigation was conducted.
37. That the Petitioner responded to a show cause letter and subjected to a disciplinary hearing, a kin to double jeopardy and no witness statements were availed to the Petitioner.
38. That the disciplinary committee comprised of one person, Dr. Rose Kiura instead of 3 independent members and the Petitioner was not allowed to cross-examine the complainant.
39. That there were no deliberations and the Petitioner did not mitigate.
40. In sum, counsel submitted that the Respondent violated its own procedures.



41. As regards the reliefs sought, counsel submitted that Article 23 of *the Constitution* of Kenya, 2010 vested courts with jurisdiction to enforce rights and fundamental freedoms as the Petitioner was not paid anything upon dismissal.
42. The Petitioner's counsel indicated that the Petitioner had abandoned the claim for overtime owing to lack of particulars.
43. As regards 12 months compensation, reliance was made on the decisions in *Kenfreight (E.A) Ltd V Benson Nguti (2019) eKLR* and *Tracy Wangechi Mugambi V Windsor Golf Hotel and Country Club (2019) eKLR*.

Respondent's submissions

44. Counsel for the Respondent isolated two issues for determination;
 - i. Whether the Respondent unfairly terminated the Claimant's employment.
 - ii. Whether the Claimant is entitled to the remedies sought.
45. As regards termination of the Petitioner's employment, counsel relied on the provisions of Section 45(2) of the *Employment Act*, 2007 to underscore the requirements of a fair termination of employment.
46. Counsel submitted that the Respondent had valid reasons to terminate the Petitioner's employment in that she admitted having taken files from the Human Resource Office and left them at her work station unattended and acknowledged that the files contained confidential information on employees that should be treated with utmost confidentiality.
47. Relatedly, the Petitioner apologised for her actions.
48. Counsel further submitted that termination of the Petitioner's employment was neither directly nor indirectly related to her pregnancy in that after resumption from leave, the Petitioner was allocated duties in the existing structure as the Respondent had re-aligned its structures to incorporate Africa Health Holdings, a fact within the Petitioner's knowledge having been explained to her.
49. Counsel submitted that the roles were streamlined to align qualifications to employees unlike the previously practice.
50. That termination of the Petitioner's employment was traceable to 30th November, 2021 and was not related to her pregnancy.
51. Counsel submitted that it would be illogical to terminate the Petitioner's employment in 2022 on the ground of pregnancy as she had already proceeded for maternity leave and reported back.
52. As regards procedure, counsel submitted that the Respondent issued a notice to show cause dated 3rd December, 2021 setting out the reasons for the disciplinary action, invited the Petitioner for a hearing, acceded to her request for postponement of the hearing and conducted a hearing and the termination was in conformity with the law.
53. On the remedies sought, counsel submitted that no damages were due for discrimination as this was a case of breach of contract.
54. On pay in lieu of notice, counsel urged that the same was not payable as the dismissal was summary.



55. That house allowance was not due as the salary was consolidated as the appointment letter dated 8th June, 2015 provided.
56. That the number of leave days was not indicated and termination was fair.
57. As regards exemplary damages, reliance was made on the opinion of MC Gregor on Damages, 15th Edition at 406 to underscore the instances in which exemplary damages was payable.
58. Reliance was also made on the decisions in *Imenye v Kenya National Co. Ltd* (1986) KLR 350, *Obongo V Municipal Council of Kisumu* (1975) EA 91 and *Kampala City Council V Nakaye* (1972) EA 446 to urge that exemplary damages was not available to the Petitioner.

Findings and determination

59. The issues for determination are;
 - i. Whether the suit herein meets the test for a constitutional petition.
 - ii. Whether the Petitioner was discriminated on account of pregnancy.
 - iii. Whether termination of the Petitioner’s employment was unfair.
 - iv. Whether the Petitioner is entitled to the reliefs sought.
60. As to whether the suit herein meets the threshold of a constitutional petition, the court is guided by the sentiments of the court in the often cited decision in *Anarita Karimi Njeru V Republic* (1979) eKLR where Trevelyn and Hancox JJ stated as follows;

“We would, however, again stress that 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 justice is done to his case) that he should set out with a reasonable degrees of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
61. Similar sentiments were expressed in *Trusted Society of Human Rights Alliance V Attorney General & 2 others* (2012) eKLR and *Kiambu County Tenants Welfare Association V Attorney General & another* (2017) eKLR.
62. In the instant petition, the Petitioner relies on Article 35(1)(b), 41(1), 47 and 50 of *the Constitution* of Kenya, 2010 to urge that the demotion violated Article 35(1)(b) and the termination process was opaque, devoid of procedure and thus in violation of Articles 41(1), 47 and 50 of *the Constitution*.
63. Other Articles cited such as 19, 20, 21, 22, 23, 24, 25(c), 27, 28 and 29(d) were not supported by any factual allegations.
64. From the evidence on record, it is the finding of the court that although various articles of *the Constitution* of Kenya, 2010 have been identified, the Petitioner has failed to demonstrate the manner of the alleged violation as well as the nature and extent of the injury.
65. In the premises, the court finds that suit herein does not meet the rule in *Anarita Karimi Njeru V Attorney General* (Supra).
66. On discrimination on account of pregnancy, the starting point is a delineation of the concept of discrimination.



67. According to Black's Law Dictionary, 10th Edition, discrimination means;
- “Differential treatment; especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.”
68. In *Nyarangi & others V Attorney General (2008) KLR 688*, the court stated;
- “Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances.”
69. Similarly, in *Peter K. Waweru V Republic (2006) KLR*, the court defined discrimination as follows;
- “. . . Discrimination means affording different treatment to different persons attributable wholly or mainly to their description whereby persons of one such description are subjected to . . . restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description . . . Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex . . . a failure to treat all persons equally where no reasonable distinction can be found between those forwarded and those not favoured.”
70. Wilson J. expressed similar sentiments in *Andrews V Law Society of British Columbia (1989) 1 SCR 321*.
71. Article 27 of *the Constitution* of Kenya outlaws direct and indirect discrimination on the ground of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
72. Section 5(3) of the *Employment Act*, 2007 adopts a similar formulation.
73. Innovatively, Section 5(7) imposes a heavy burden on the employer to disprove an allegation of discrimination by an employee.
74. However, for an employee to succeed on an allegation of discrimination, he or she must as a minimum demonstrate prima facie discrimination.
75. The pith and substance of the Petitioner's case is that she was discriminated on the ground of pregnancy because she was dismissed on non-existent and trumped up allegations after resuming duty from maternity leave.
76. The Petitioner's case is that after resuming duty from maternity leave on 1st February, 2021, she appreciated that some changes had taken place but the same were not explained to her and was asked to hand over, Mpesa float to one Immaculate in May 2021 which did not go down well with her. That she was not evaluated in July 2021 and the new Job description did not come through as the one provided was not challenging enough.
77. The Petitioner wrote several emails on her grievances. The 1st dated 23rd August, 2021 related to finance payables, being handled by another person due to overlapping of duties, miscommunication with one Mr. Josephat Meeme, underutilization, non-involvement in evaluation of staff and had not been appraised by the Supervisor. The 2nd dated 8th July, 2021 related to not performing the duties she used to perform before proceeding on maternity leave and in particular finance and procurement which she had no expertise in but retained payroll management, exclusion from meetings and committee,



- managers meeting and on 26th August, 2021, non-involvement in recruitment and conflict resolution with Mr. Josephat Meme.
78. The email dated 26th November, 2021 related to the alleged underutilization by the organization as she was not involved in policies and strategy formulation.
 79. In his Affidavit, Mr. Erick Njueh, the Human Resources Manager deponed that the Petitioner was employed as an Assistant Receptionist in November 2008, and subsequently as Administration Officer and later as Personal Assistant of the Chief Executive Officer as evidence on record reveals.
 80. Documentary evidence also reveals that in December 2018, the Petitioner was transferred from Meridian Medical Centre to Meridian Hospitals Ltd and salaries and benefits were moved to the new employer and remained the Administrator to the Hospitals and Executive Assistant to the Group Chairman.
 81. Notably, the Petitioner's job description encompassed administrative, finance and human resource functions including payroll, payslips, statutory deductions, benefits, conduct of meetings, budgeting, customer service, customer complaints among others.
 82. From the records, it is discernible that the Respondent teamed up with Africa Health Holdings and realignment of roles was deemed necessary.
 83. Instructively, the Petitioner did not reveal the person(s) to whom she handed over her roles when she proceeded on maternity leave. This was important in order to ascertain how the roles were to be handed back and how.
 84. According to the Respondent, the realignment of roles to the qualification of employees was explained to the Petitioner via email dated 19th May, 2021, by one Beatrice Njoki Kamweru, an email the Petitioner did not take kindly as it was reducing her responsibilities.
 85. Notably, the email was explicit that the Respondent had joined Africa Health Holdings and had to streamline its policies and procedures.
 86. In the court's view, although the Respondent could have communicated the changes it was undertaking more succinctly to the Petitioner to enable her appreciate the new reality, it was within its mandate to reorganize its staff and realign roles for effective delivery of services.
 87. The previous practices whereby the Petitioner dealt with financial, administrative and human resource functions may have untenable.
 88. Equally, the Petitioner tendered no evidence to prove that the realignment of roles amounted to a demotion.
 89. The Petitioner may have had less on her hands than before but if the dispersal of roles ensured effectiveness and efficiency in service delivery, the better for the Respondent.
 90. Needless to emphasize, the Petitioner's remuneration and benefits remained the same.
 91. Finally, whereas the Petitioner was previously answerable to the Chief Executive Officer and the Group Chairman in Human Resource, she was operating under a manager who dealt with strategic and policy issues areas which the Petitioner had no expertise in, though necessary for her professional growth.
 92. Up to this juncture, the court is unable to find the nexus between the Petitioner's dismissal from employment in early 2022 and her pregnancy.



93. In fact, none of the several emails the Petitioner wrote make reference of pregnancy. Similarly, the Petitioner provided no evidence of the Respondent's conduct during her pregnancy and when she was on maternity leave to show that there may have been a background to the Respondent's alleged discrimination.
94. From the foregoing, it is the finding of the court that the Petitioner has failed to demonstrate a prima facie case that her dismissal from employment on 20th January, 2022 amounted to discrimination on the ground of pregnancy for the Respondent's rebuttal.
95. As to whether termination of the Petitioner's employment was unfair, the homeport are the relevant provisions of the *Employment Act*, 2007 and case law.
96. Section 45 of the *Employment Act*, 2007 provides;
2. A termination of employment by an employer is unfair if the employer fails to prove –
 - a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason:-
 - i. related to the employee's conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; and
 - c. that the employment was terminated in accordance with fair procedure.
97. The foregoing provisions are reinforced by other detailed provisions on termination notice, reason for termination, burden of proof and procedure (See Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR).
98. Needless to belabour, the foregoing provisions of the *Employment Act* are unambiguous that for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair as aptly captured by Ndolo J. in Walter Ogal Anuro V Teachers Service Commission (2013) eKLR and emphasized by the Court of Appeal in Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR as follows;
- From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required.”
99. Guided by these sentiments, I will now proceed to apply the provisions and propositions of law to the facts of the instant case.

Reason for termination

100. While the Petitioner's counsel submitted that Petitioner was dismissed on non-existent and trumped up allegations, counsel for the Respondent submitted that the Respondent had a valid reason to terminate the Petitioner's employment in that she admitted having taken all staff files from the Human Resource Officer to her work station, left them unattended and the files contained confidential staff records and apologised for her action.
101. To the Respondent, that was a valid reason for dismissal of the Petitioner.



102. By an email dated 2nd December, 2021, the Petitioner explained that she had taken staff files to her work station that had only one lockable draw and not all the files were under lock and key and the office was shared with other staff.
103. The Petitioner requested for an investigation to confirm whether breach of confidentiality had taken place.
104. The Petitioner apologised for having left staff files unattended at a place accessible by other employees.
105. By letter dated 3rd January, 2021, the Respondent required the Petitioner to show cause why disciplinary action should not be taken against her for having compromised confidentiality of information relating to staff and she responded on the same day.
106. In her response, the Petitioner admitted having removed the files from the Human Resource Office and understood that they contained confidential information regarding employees and utmost confidentiality was necessary and tendered an apology. This was followed by an invitation to a disciplinary hearing on 14th December, 2021, but the Petitioner requested for a postponement by letter dated 10th December, 2021 and the Respondent acceded to the request and the hearing was slated for 16th December, 2021 when it took place.
107. At the hearing, it was confirmed that the Petitioner had taken all the 75 staff files from the lockable cabinets in the Human Resource Office and kept some of them in an unsecured place for 3 days.
108. It also emerged that while taking the files away was not in contravention of any policy or procedure, leaving them in an open work station compromised confidentiality.
109. The Petitioner's defence was that there was no evidence that any member of staff had perused the files which was impossible to tell as the office had no CCTV cameras. Moreover, no member of staff would disclose having done so as that would amount to misconduct to their part.
110. Members of the Committee wondered why the Petitioner could not have carried about 10 files at a time as opposed to all the 75.
111. The termination letter dated 20th January, 2022 isolated five (5) reasons for termination, all tied to leaving staff files in an open office.
 - i. Allowed an opportunity to breach the confidentiality of sensitive employee information.
 - ii. Provided an opportunity for loss of staff information/records from their files.
 - iii. Breached the company policy and Human Resource Code of Ethics on confidentiality.
 - iv. Potentiality jeopardized the company's operations and/or exposed the company to legal claims by employees for breach of personal information.
 - v. Breached employment contract and general Human Resource Code of Conduct by the reckless and negligent actions.
112. Termination of employment was justified under Section 44(4)(c) of the *Employment Act*, 2007 on "wilfully neglect to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty under his contract to have performed carefully and properly."



113. In *Naima Khamis V Oxford University Press (EA) Ltd (Supra)*, the Court of Appeal stated as follows;
- “It is necessary to point out that reasons for termination of a contract are matters that an employer at the time of termination of contract can genuinely support by evidence and which impact on the relationship of both the employer and employee in regard to the terms and conditions of work set out in a contract.”
114. Under Section 43 (2) of the *Employment Act*, 2007, the reasons are matters which the employer genuinely believed to exist and which actuated termination of services of the employee.
115. From the foregoing, it is the finding of the court that the Respondent has on a balance of probability demonstrated that it had a valid and fair reason to terminate the Petitioner’s employment, though not summarily as it did.

Procedure

116. While the employer maintained that the summary dismissal was conducted in accordance with the law, the Petitioner faulted the process variously from want of investigation, offence not in the Respondent’s Human Resource Manual, double jeopardy, no evidence adduced, composition of the committee, no cross-examination by Petitioner, no mitigation, Petitioner’s part not considered, findings not presented within 72 works, the Petitioner not informed of the right of appeal, termination letter authorised by the committee not the managing director and no recommendation of the disciplinary action to be taken.
117. It is not in dispute that the Respondent issued a notice to show cause required by the Human Resource Manual to respond and the Petitioner responded and was invited to a hearing.
118. Although most of the foregoing alleged non-compliances had nominal impact on the Petitioner’s right to be heard as ordained in Section 41 of the *Employment Act*, 2007, such as double jeopardy which did not take place, failure to cross-examine the witness, mitigation and lack of deliberation, some of them were serious procedural flaws as to negatively impact on the right to be heard.
119. For instance;
- i. The Human Resource Manager interviewed the Petitioner’s colleagues in the Human Resource Office but their evidence was not furnished to the Petitioner for her rebuttal, nor were they invited as witnesses to testify.
 - ii. The Respondent tendered no evidence to show that the Committee made a written recommendation to the Managing Director justifying the dismissal of the Petitioner as ordained by the Respondent’s Human Resource Manual. Relatedly, it is also unclear as to when the committee considered and arrived at the conclusion on the way forward.
 - iii. Whereas the Respondent’s manual require an employee to be accorded 72 to respond to the notice to show cause, the Petitioner was accorded less than 12 hours to do so. The Petitioner received the letter on 3rd December, 2021 and had to respond by close of business on the same day.

It is unclear as to why the Respondent’s Human Resource Manager did not comply with the Human Resource Manual on the response.
 - iv. The more serious transgression by the Respondent was the non-compliance with its manual on the composition of the Disciplinary Committee.



The Respondent's Human Resource Manual provides that the disciplinary hearing will be presided over by the employee's Head of Department and shall comprise 3 of the following members.

1. Head of Department/Branch Manager
2. A Senior Manager
3. Human Resource representative
4. Independent departmental representative.

The Committee in this case comprised the following;

1. Dr. Rose Kiura – Chief Operations Officer
2. Erick Njueh – Manger Human Resource
3. Carol Mbinya – Employee representative
4. Lilian Muthon – Accused

120. First, the committee was not constituted in compliance with the Human Resource Manual as it had only two (2) members instead of three (3). Second, from the minutes, it is decipherable that Mr. Erick Njueh, the Human Resource Manager and the Petitioner's accuser was chairing the meeting. Granted that the Human Resource Manual prescribed 3 members of the Disciplinary Committee and in the instant case the Committee had only two members and the relevant paragraph of the manual is couched in mandatory terms, it would appear to the court that the Disciplinary Committee was not properly constituted and its purported deliberations were in the courts view irregular.
121. Where an employer has prescribed the composition or number of members of the disciplinary committee, it is obligated to comply with its manual or policy and the court cannot allow it to act otherwise to the detriment of the employee in any case the manual or policy would loose meaning.
122. In a nutshell, the Petitioner was not taken through a hearing as envisioned by the provisions of Section 41 of the *Employment Act*, 2007.
123. The Petitioner was neither heard nor were her representations and/or those of her witness considered before the decision to terminate her employment was effected.
124. From the foregoing, the court is satisfied and finds that the Respondent has failed to prove on a balance of probabilities that termination of the Petitioner's employment was conducted in accordance with the tenets of procedural fairness as ordained by the provisions of Section 41 of the *Employment Act*, 2007 as construed in legions of decisions including the Court of Appeal decision in Postal Corporation of Kenya V Andrew K. Tanui (2019) eKLR where the court catalogued the four elements of procedural fairness.

Reliefs

- a. Having found that the Petitioner has failed to prove any violation of her rights and fundamental freedoms under *the Constitution* of Kenya, 2010, the declaration sought is unmerited.
- b. Having found that the Petitioner failed to establish that her dismissal from employment was discriminatory on account of pregnancy, the declaration sought is disallowed.



Terminal benefits and compensation

c. One month's salary in lieu of notice

125. Having found that the Respondent did not give the Petitioner the requisite notice or pay in lieu of notice, the Petitioner is awarded the equivalent of one month's pay.

d. Salary for 22 days worked in January 2022

126. Since the Respondent did not pay for the days worked in January 2022, the same are awarded.

127. It is unclear to the court why the number of days claimed is 22 yet termination of employment took place on 20th January, 2022. The award under this head is restricted to the actual number of days worked in January, 2022.

e. House Allowance & 15% of 90,000/=

128. Housing is one of the statutory entitlements of employee by dint of Section 31 of the [Employment Act](#), 2007.

129. From 7th November, 2008 to 1st June, 2015, the contract of employment between the Petitioner and the Respondent made no direct reference to housing, housing allowance or consolidation of salary. In the absence of evidence that the Petitioner's salary was inclusive of housing allowance and guided by the Court of Appeal decision in Grain Pro Kenya Inc. Ltd V Andrew Waithaka Kiragu (2019) eKLR that 15% is reasonable percentage as housing allowance, the Petitioner is awarded housing allowance at 15% of the actual salary due to her from 7th November, 2008 to 30th May, 2015.

130. The contractual document executed on 10th June, 2015 and effective from 1st June, 2015 provided that the salary was consolidated and thus included a housing component and no allowance is payable from 1st June, 2015 to 20th January, 2021.

131. The Petitioner is awarded a housing allowance at the rate of 15% of the actual basic salary paid to her from 7th November, 2008 to 30th May, 2015.

f. Unpaid leave days

132. Guided by the Termination Notice dated 20th January, 2022, the Petitioner is awarded pay for any earned but unutilized leave days.

g. Overtime earned

133. The Petitioner abandoned this prayer for lack of essential particulars.

The same is declined.

h. 12 month's compensation, Kshs.1,242,000/=

134. Having found that termination of the Petitioner's employment was unfair for want of procedural propriety, the Petitioner is entitled to the relief provided by Section 49(1)(c) of the [Employment Act](#), 2007.

135. Under Section 49(4) of the Act, the court is enjoined to take into consideration the relevant circumstances set forth therein.



136. In the instant suit, the court has considered the fact that;
- i. The Petitioner was an employee of the Respondent from 7th November, 2008 to 20th January, 2021, a duration of about 13 years and 2 months which is a long period of time.
 - ii. The Petitioner wished to continue in the Respondent's employment as evidenced by her appeal for a review of the dismissal dated 21st January, 2021.
 - iii. The Petitioner substantially contributed to the termination of employment.
 - iv. From the evidence on record, the Petitioner anticipated being an employee of the Respondent for a long time.
137. In the circumstances, the court is satisfied that the equivalent of four months salary is fair.
- i. Certificate of service
138. The Petitioner is entitled to a certificate of service by dint of Section 51 of the [Employment Act](#), 2007.
- j. General damages for discrimination
139. The Petitioner did not submit on this prayer or demonstrate entitlement to general damages.
140. Having found that the Petitioner failed to demonstrate a nexus between her dismissal from employment and her pregnancy, the claim for general damages for the alleged discrimination is unsustainable and is accordingly declined.
- k. Exemplary damages
141. Puzzlingly, counsel did not submit on the Petitioner's entitlement to exemplary damages.
142. In [Obonyo and another V Municipal Council of Kisumu](#), Law JA stated as follows;
- “ . . . exemplary damages are appropriate in two classes of case; oppressive arbitrary and unconstitutional action by the servants of government, and conduct by a defendant calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff, and these classes should not be extended. This raises the question whether the expression government should be read as meaning the central government only and whether it should be interpreted as including a local government.”
143. The learned judge agreed with the position that exemplary damages could be awarded in actions for tort.
144. The instances or circumstances in which exemplary damages may be awarded were explained in English decision in *Rooke v Barnard & others* (1964) AC 1129.
145. Significantly, the Petitioner did not adduce evidence to demonstrate that the Respondent's conduct was arbitrary and oppressive against her and counsel did not urge the court to so find.
146. In the circumstance, the claim for exemplary damages is unproven and is accordingly disallowed.
147. In conclusion, judgement is entered for the Petitioner against the Respondent in the following terms;
- a. One month's salary in *lieu* of notice.
 - b. Pay for the days worked in January 2022.



- c. House allowance at 15% of the actual basic pay from 7th November, 2008 to 31st May, 2015.
- d. Unutilized leave days as applicable.
- e. Equivalent of 4 months gross salary.
- f. Certificate of service.
- g. Costs of this suit.
- h. Interest at court rates from date of judgement till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 4TH DAY OF MAY 2023

DR. JACOB GAKERI

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 *Civil 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.

DR. JACOB GAKERI

JUDGE

