



**Akoto v Kenindia Assurance Company Limited (Cause E713 of 2020)
[2023] KEELRC 1623 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1623 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E713 OF 2020**

J RIKA, J

JULY 7, 2023

BETWEEN

PRISCAH A. AKOTO CLAIMANT

AND

KENINDIA ASSURANCE COMPANY LIMITED RESPONDENT

JUDGMENT

1. In her Statement of Claim, amended on 26th January 2021, the Claimant states that she was employed by the Respondent as Deputy General Manager-Head of Human Resource, from 22nd October 2013, until 12th October 2020, when the Respondent terminated her contract. She worked for the Respondent for 7 years.
2. On or around 9th October 2020, she received an e-mail from the General Manager-Finance, enquiring about alleged irregularity concerning review of salary of a former Managing Director of the Respondent, Inderjeet Singh. Review took place 3 years back, in 2017.
3. Contrary to the Respondent's Human Resource Manual, requiring a response to be made within 3 days, she was required to respond to the e-mail immediately. She denied having reviewed the former Managing Director's salary, stating that the mandate for such review, was vested in the Board. She provided additional information on the review to the Respondent, on 10th October 2020. On 12th October 2020, the Respondent terminated the Claimant's contract, on additional grounds, which were not part of the e-mail to show cause, including that she had refused to accept the apology of the Managing Director, signifying her unwillingness to continue working with the Respondent, and that her tone to Senior Managers disclosed insubordination. The apology from the Managing Director to the Claimant was for complaints the Claimant had lodged against the Managing Director, relating to workplace harassment and discrimination.



4. The Claimant states that, termination was in violation of the [Employment Act](#) and the Human Resource Manual. No investigation took place prior to the letter to show cause. There was no notice of termination. The Claimant was not granted a fair opportunity to respond to the accusations. The charges were not clarified, and the Disciplinary Committee was not involved. She was not granted the opportunity to appeal, and the letter of termination issued without authority.
5. The Managing Director and General Manager –Finance, who were expatriates, were hostile to the Claimant, and were abusive and discriminated against the Claimant. They used derogatory language against the Claimant.
6. They were hostile because the Claimant had brought to the attention of the Board of Directors, illegal and fraudulent compensation claims, made by the General Manager- Finance, and overpayment of claims amounting to more than Kshs. 2 million, made in favour of the Managing Director, in respect of expatriate leave travel expenses. On 25th February 2020, she made formal complaints concerning the hostility, insults and discrimination.
7. A meeting was held between her and the Managing Director, also attended by the Chief Operating Officer. The meeting did not yield settlement, and the complaints were escalated to the Board.
8. On the same date she was issued the letter to show cause, 9th October 2020, she was advised that the Board had deliberated on her complaints against the Managing Director, and that the Managing Director had apologized.
9. The Claimant wrote to the Board, pointing out that the complaints were not handled in accordance with the Respondent’s Harassment Policy, but instead were handled in accordance with the Grievance Handling Policy.
10. She had served diligently. She was promoted in 2018. She received annual bonuses and salary increments. She had been rated as excellent and outstanding, in her performance appraisal. She was granted retirement extension from 55 years to 60 years, on 6th February 2019, on account of her exemplary performance.
11. She desires to continue working. The Respondent is a big Organization, with over 200 Employees. She is unlikely to get alternative employment, because she is approaching retirement age.
12. Her monthly salary was Kshs. 631,071. She was due to retire in the year 2024. She prays for terminal benefits calculated to the year of retirement, and equivalent of 12 months’ gross salary in compensation for unfair termination, totalling Kshs. 64, 419, 601.
13. She prays for general damages for harassment and discrimination at the workplace. She details particular of harassment and discrimination to include: termination while retirement age had been extended from 55 years to 60 years; application of the Grievance Handling Policy, instead of the Harassment Policy to her complaints against the Managing Director; raising issues on a monthly allowance paid to the Claimant, which was a benefit payable to all Deputy General Managers; she was supposed to report to the Managing Director, but the Managing Director advised she reports to the General Manager -Finance; the Respondent opted to bypass the Claimant, and work directly with her subordinates, in the Human Resource Department; she was falsely accused of failure to perform her duty, after a committee she chaired, refused to pay an insurance premium; she was victimized for not supporting a decision to wrongly issue actuarial certificates; she was harassed because she sought clarification from the Board, on expatriates’ salary structure; she was tossed around within 1 year from the time a new Managing Director was employed, reporting to 3 different Officers; she was threatened that all support departments were going to be closed, with all Staff sent home; she was harassed when



she refused to send home over 55 local Staff, as a condition for her own retention; she was shouted at, abused and accused of not understanding her role; she was called a silly African, who did not know what she was doing, by the Managing Director; and she was racially discriminated against in favour of Employees of Asian origin.

14. Her prayers are: -
 - a. A permanent injunction to restrain the Respondent, its agents and/or servants from recruiting or appointing any other person to replace the Claimant.
 - b. Reinstatement.
 - c. Damages and/or compensation at Kshs. 62,846,749 as detailed at paragraph 15 of the Amended Statement of Claim.
 - d. Equivalent of 12 months' gross salary in compensation for unfair termination, at Kshs. 7,572,852.
 - e. General and aggravated damages for harassment and discrimination.
 - f. Costs.
15. The Respondent filed a Statement of Response, amended on 25th February 2021. It is admitted that the Claimant was employed by the Respondent.
16. Termination was mainly for the reason that the Claimant was involved in irregular salary review in 2017, of the Respondent's former Managing Director, Inderjeet Singh. This was compounded by the Claimant's demeaning attitude, and/or conduct, towards her Seniors. The reasons were explained to the Claimant in the letter of termination. The decision to terminate, was arrived at by the Board Executive Committee. The letter of termination, like that of appointment, was signed by the Managing Director.
17. The letter of termination did not place a caveat on the Claimant's right of appeal. The Managing Director and the General Manager-Finance, did not have any reason to be hostile to, or harbour any ill-will against, the Claimant. Complaints lodged against them by the Claimant, were dismissed by the Board Executive Committee, after they were found to be false.
18. The allegations against the Managing Director and the General Manager-Finance were blatant falsehoods. On 10th September 2020, the General Manager Finance wrote to the Claimant, raising her salary to Kshs. 631,071 monthly, from Kshs. 597,051. This would not have happened, if there was any hostility to the Claimant from the Managing Director and the General Manager-Finance.
19. Her complaints were discussed by the Parties on 2nd March 2020. The Managing Director, without admitting the allegations, apologized to the Claimant, for the sake of a conducive working environment. The complaints were treated as resolved. It is not true as alleged by the Claimant, that the meeting of 2nd March 2020, did not yield result.
20. The Claimant did not raise the matter again, until 24th September 2020, when she informed the Respondent that she had not withdrawn her complaints. It was then that the Respondent referred the matter to the Board Executive Committee on 24th September 2020.
21. The Board Executive Committee deliberated on 6th October 2020, in the presence of the Claimant. She was told that the Managing Director had apologized. She stated that she was uncomfortable with the apology. The complaints were properly handled in accordance with the Respondent's policy.



22. Termination was justified. The Claimant irregularly reviewed Inderjeet Singh's salary, occasioning the Respondent loss of Kshs. 5,068,605. Her explanation was unsatisfactory. Her action amounted to insubordination. She had persistently engaged in acts of insubordination.
23. She was given a hearing by the Board Executive Committee. She took a hard position, which did not promote a conducive working environment. She declined the apology of the Managing Director. She had developed a bad attitude towards her Seniors. She was incompatible. The Respondent had no alternative but to terminate her contract. Termination was in accordance with clause 12 of her letter of appointment.
24. At the time she was granted extension of retirement age, her irregular review of the former Managing Director's salary had not come to light.
25. She was incompatible, and the remedy of reinstatement is not appropriate. Her prayers for compensation, and terminal benefits computed to the expected date of retirement, are misconceived. Termination was fair and lawful. The pursuit of bonuses and other fringe benefits is totally misconceived. These benefits are open only to serving Employees. She is not entitled to any of the prayers.
26. The Respondent reiterates that it did not harass or discriminate, against the Claimant. She was, alongside 9 other Employees, the beneficiary of the retirement age extension to 60 years, in 2019. 3 expatriates were on secondment from the parent company which is a shareholder of the Respondent, and not subject to the local retirement policy. The Chief Operating Officer was on contract and similarly, not subject to the retirement policy. Her complaint was addressed properly. The remedy under Grievance Handling Policy and Harassment Policy, is provided for under the Disciplinary Policy and Procedures, which does not distinguish between the 2 aforesaid Policies. There was no discrimination by adoption of one Policy, over the other.
27. Being the Head of Human Resource, the Claimant ought to have invoked the Harassment Policy within the given timelines, if she was dissatisfied with the adopted Policy. She did not have to reopen the matter 7 months down the line.
28. The Management had the prerogative to raise the issue concerning the Claimant's monthly allowance. It was over and above the allowance paid to her contemporaries. It did not amount to harassment or discrimination. It was similarly within the managerial prerogative, to restructure its business, and reassign Senior Managers roles, to maximize resources. The Deputy General Manager-Marketing, the Deputy General Manager-IT, as well as the Claimant were to report to the Chief Operating Officer under the reviewed structure. Reporting lines were drawn by the Managing Director. This did not amount to harassment or discrimination.
29. It was not harassment or discrimination, for the Respondent to deal directly with Officers under the Claimant. Organizations act this way, to achieve quick results, by avoiding bureaucracy. The Claimant's assertion that she was belittled on account of the Respondent dealing directly with Officers junior to her, had no foundation. It was the Claimant's attitude towards her contemporaries that created a dysfunctional workplace. She was not victimized for not supporting the decision to issue actuarial certificate compensation from the General Manager- Finance. The expatriates' salary structure was approved by the Board, and the Claimant was not harassed or discriminated against, on account of her probing the issue.
30. She was not the only African employed by the Respondent in Senior Management. Her allegation about racial discrimination, on the ground that she is an African, is untrue and disclosed her contemptuous attitude towards her colleagues of Asian origins.



31. Her prayers for terminal benefits, compensation, aggravated and general damages are without foundation. The Respondent prays for dismissal of the Claim with costs.
32. The Claimant gave evidence on 6th October 2022 and 2nd December 2022, when she rested her case. James Macharia, Chief Operating Officer, gave evidence for the Respondent on 8th March 2023, closing the hearing. The Claim was last mentioned in Court on 20th April 2023, when the Claimant confirmed filing and service of her Closing Submissions, while the Respondent undertook to file and serve its Closing Submissions 7 days on.
33. The Claimant adopted her Witness Statement, Further Witness Statement, Documents and Further Documents, in her evidence. She was employed by the Respondent on 23rd October 2013 as Assistant General Manager, Human Resource. On 1st October 2018, she was promoted to the position of Deputy General Manager, Head Human Resource. Her last monthly gross salary was Kshs. 631,071.
34. She was issued a letter of termination of employment dated 12th October 2020. She received it on the same date. She was informed that the salary of the former Managing Director, Inderjeet Singh, was wrongly increased through her. It was alleged that increment, resulted in approximately Kshs.5 million' loss, to the Respondent. She was asked to explain her position immediately.
35. She explained after 17 minutes. She told the Respondent, that the letter to Inderjeet was sent directly to him by the Board Chairman. It was not copied to the Claimant. It was not within her authority to review the salary of the Managing Director, the Chief Operating Officer, the 3 General Managers or herself. She wrote an additional and detailed explanation the following day, 10th October 2020. She explained that increment was normal, after Inderjeet was made the Managing Director, from General Manager.
36. Board approval was granted in quarter 4, 2016. All Staff had annual increments at 10% of the basic salary. It was normal for the Claimant to sign Inderjeet's salary increment letter, because he could not sign it himself. All salaries were backdated to January. Expatriate salaries were handled by the Board, not by the Claimant. It was the practice, since she joined the Respondent.
37. She was issued the letter of termination on 12th October 2020. The Human Resource Policy requires that there is a disciplinary hearing in the presence of the Employee's representative. It requires that the Employee has at least 3 days' notice, to prepare for the hearing. The Human Resource Board Committee would be involved. This was not done. There were no charges read to the Claimant. She was not given a right of appeal. The letter of termination gave 3 reasons in justifying termination-the Claimant's tone in communicating to colleagues; her refusal to accept the Managing Director's apology; and her involvement with the salary increment made to Inderjeet Singh, former Managing Director. These were not the same charges, in the letter to show cause.
38. She had the discretion to accept or reject, the Managing Director's apology. She wrote to the Directors, summarizing the nature of harassment and discrimination she had continued to endure, and stating that she was not therefore at ease, accepting the Managing Director's apology.
39. Instead of the Respondent invoking the Harassment Policy, it invoked the Grievance Handling Policy.
40. The General Manager-Finance opted to address the Staff under the Claimant directly, instead of engaging the Claimant as Head Human Resource.
41. She did not engage in acts of insubordination. The Managing Director gave her an assignment. When she called on follow-up, he declined her calls. She wrote e-mail to him, expressing her concern about the Managing Director's lack of communication. She was not insubordinate. She did not have the



- mandate to review the salary of her Seniors. The Managing Director reviewed, and presented his proposal to the Board. It was only after the Board approved, that the Claimant issued letters to the beneficiaries, communicating salary increments. The Respondent does not deny that the Board had approved the salary increments attributed to the Claimant. If there was loss of Kshs. 5 million in irregular salary increment, the first person to note would have been the General Manager-Finance. He was the custodian of the payroll. There was a Senior Auditor. Audit was carried out annually.
42. A new Managing Director was employed in September 2019. There were irregular payments made to the Managing Director and the General Manager. The Claimant was a whistleblower, on the irregularities. She alerted the Chairman, Dr. Chandaria. The Managing Director and the General Manager were paying themselves Kshs. 2.5 million in travel allowances, irregularly. There was irregular increase of airtime and entertainment allowances, which the Claimant reported to the Chairman. The Chairman asked another Director to investigate, and also instructed the Claimant not to effect payment of irregular allowances.
 43. The promotion list shows that the Claimant and another Manager Satish, both received an additional allowance of Kshs. 51,000. The Respondent alleged that the Claimant granted the Managing Director salary increment irregularly, and received in return the additional allowance of Kshs. 51,000 irregularly. The allowance was payable to all Deputy General Managers, in accordance with the existing Policy. This was part of harassment the Claimant endured from the Respondent. The Respondent felt that the additional allowance was reserved for Asians, and not indigenes like the Claimant.
 44. On 25th February 2020, she lodged complaints against the Managing Director, Sharma. Inderjeet left the Respondent in 2019. Sharma shouted at the Claimant, and called her a silly African. He alleged that she had attained the retirement age of 55 years, and should leave employment. Retirement policy had already been changed, from 55 years to 60 years, from January 2020. The Managing Director alleged that the change did not apply to people like the Claimant. He accepted these acts of harassment and discrimination, and apologized. There was pressure on the Claimant to accept the apology, and exit the Respondent peacefully.
 45. The Respondent expressed its wish to restructure. On 22nd October 2020, a circular issued on intended redundancy. The Employees reported a labour dispute to the Labour Office. The process was halted. The Labour Office wrote to the Respondent asking for reinstatement of the Claimant. The Respondent declined reinstatement.
 46. The Claimant testified that she could have retired on 6th February 2024, upon attainment of 60 years. Her anticipatory prayers are based on this expected period of service. Her appraisals show her performance was good. She was paid bonuses. The Board approved extension of her retirement age. The Respondent refused to buy her a car worth Kshs. 3 million, a benefit she was entitled to, under the Human Resource Policy. She had not secured alternative employment, by the time she presented her evidence before the Court.
 47. Cross-examined, she told the Court that it was in her job description, to monitor Human Resource budgetary allocation. She identified and benchmarked, the best human resource practices. She managed company related communications, including circulars on matters approved by the Board. The payroll was in the Finance Manager's docket. Salaries was not part of the Claimant's budgetary allocation. She did not deal with budget on salaries.
 48. She issued letters of appointment for certain categories of Employees, excluding Senior Managers. Senior Managers were recruited by the Board. She would see the salary schedules after approval by the Board. She had custody of all files of Employees below her. The Senior Managers' files were retained by



- the Managing Director. The Claimant's contract had a termination clause. The Respondent retained the discretion to terminate the contract on notice, for lawful cause.
49. She signed the letter increasing Inderjeet's salary. Inderjeet was employed on 13th February 2017. His letter of appointment stated his monthly salary and other benefits. Salary was reviewed from 1st January 2017. The Claimant did not make a mistake. All Employees were due for review. She was not negligent.
 50. Review related to Employees in service, in the previous year. Sharma became the Managing Director in September 2019. He received increment twice, after 3 ½ months. Inderjeet was there from 2013. Salary being reviewed was for the Managing Director. Inderjeet had been acting as the Managing Director, before substantive appointment. The Claimant was not negligent. She implemented the resolution of the Board.
 51. She did not agree that the Respondent suffered loss as a result of any negligence on her part. The Board approved salary increments. Mohan was General Manager-Finance. He wanted to be paid for fake actuarial documents. The issue concerning Inderjeet's salary review, was made 3 years after the event. The Claimant reported to Mohan.
 52. The Claimant wrote an e-mail, enquiring why the matter was raised after 1 ½ years. She actually meant after 3 years. Her tone was not offensive. She did not have a wrong attitude towards the General Manager- Finance.
 53. She wrote e-mail to Pauline, the Payroll Manager. It was copied to Mohan. She stated that expatriate salaries structure, was reviewed after 5 years, the last one being in 2016. Inderjeet joined in 2016. The e-mail related to review of expatriates' salaries structure after every 5 years, not review of the actual salaries, which was carried out annually under the Human Resource Policy.
 54. She wrote e-mail on 2nd June 2020, stating that Deputy General Manager, Operations, Kumar, was provoking her to do things his own way. She said she would not respond to his e-mails. She said that he was issuing threats, and it would not work. She did not see anything wrong with this communication. She copied the e-mail to James Macharia, Chief Operations Officer, and Sharma the Managing Director. Kumar was a fellow Deputy General-Manager to the Claimant.
 55. Bad blood in the workplace was created by the expatriates, not by the Claimant. She had worked for 7 years. She wrote an e-mail on 22nd June 2020, complaining that Mohan was not picking his calls, even after he had completed his duties. The Claimant's and Mohan's offices were adjacent, separated by a glass partition. He was not attending to her complaints. She did not say that she was not answerable to anyone. She was assessed highly, in her annual appraisals.
 56. She lodged complaints concerning harassment in writing. They were addressed to Sharma, the Managing Director. The complaints were copied to other General Managers. The General Managers were present during harassment. She stated that she demanded mutual respect. There was a Harassment Policy. It referred to other forms of harassment, beyond sexual harassment. The first part regulated sexual harassment. The second part regulated other forms. Her complaints fell under the second part.
 57. The policy describes how harassment is dealt with. She did not agree that it was to be dealt with in accordance with Grievance Handling Policy. The 2 Procedures were different. Complaints by Senior Managers were to be dealt with by the Board. The Grievance Handling Policy and Procedure has 4 steps. 2 Directors, Dr. Patricia King'ori and Elizabeth Musyoka were tasked with hearing the Claimant's complaints. Hearing was there, but under the Grievance Handling Procedure, which is more lenient to injurers, than the Harassment Policy. The complaints were against the Managing Director. He could



not handle the complaints. The 2 Directors did not follow the Harassment Policy. They did not put to effect, the Disciplinary Procedure.

58. The Respondent wrote stating that the Claimant waited for 7 months to revive the complaints. She was told that it was the Chief Operating Officer's duty, to escalate the complaints to the Board. She was told that the Managing Director had apologized. The Board stated that it considered the complaints to have been resolved. She did not revive the complaints 7 months down the line, to arm-twist the Managing Director. Grievance Handling Procedure states, report should be made within 5 days. There is provision for mediation and appeal. The Claimant was familiar with all these policies.
59. There were 10 Employees who had already attained the age of 55 years. The Managing Director wished the Claimant to leave immediately, notwithstanding that retirement age had been extended to 60 years, and the other 9 Employees were still serving.
60. The Board used to meet 4 times annually. This is why it took long to address the complaints by the Claimant. The Managing Director called the Claimant to his office twice. In the first meeting he asked the Claimant to leave the Respondent. In the second, he apologized to the Claimant. Harassment Policy requires investigation to be carried out, and disciplinary procedure to be applied. Grievance Handling Policy was invoked, to subvert the Claimant's complaints. It was not her position, that the Managing Director had to be dismissed, at any cost.
61. The 2 Directors appointed to look into the complaints, stated that the complaints were resolved. The Claimant insisted that she was harassed and discriminated against, and the wrong Policy adopted to address her complaints. She received the letter to show cause on a Friday. Termination followed on Monday. She had attained retirement age of 55 years, while Inderjeet was still the Managing Director. The Board had extended her retirement age at the time, by 1 year. The Claimant did not use dishonourable language against colleagues. Her contract was not a lifetime marriage. The Managing Director had authority to sign the letter of appointment, and that of termination. She seeks anticipatory salaries and allowances. The contract could be terminated before retirement age. She seeks medical insurance benefits. They are given to serving Employees. She seeks to be reinstated. She was not the author of her own misfortune.
62. Redirected, she told the Court that the result would be different, if the Harassment Policy was adopted, instead of the Grievance Handling Policy. Inderjeet joined in 2013. He was placed on a starting salary of Managing Director. New Managing Director joined in 2019, and got annual increment in January 2020. Inderjeet was also entitled to increment. The Board or its Committee did not sit, to deliberate on the Claimant's complaints.
63. Chief Operations Officer, James Macharia, relied on his Witness Statement, Further Witness Statement, Documents and Further Documents filed by the Respondent, in his evidence.
64. The Claimant's contract was terminated fairly and lawfully. Prior to termination, she had been dealing with Managing Director and General Manager- Finance, on the matters under enquiry. Her complaint that there was no investigation, and that the letter to show cause did not offer her adequate time to respond, is unfounded. She responded to the letter to show cause immediately. She did not pray for time.
65. There was excess salary paid to the former Managing Director. Review was irregular.
66. The Claimant's contract made provision for termination through notice. The Claimant was not ready to accept apology from the Managing Director. It was taken that she was not willing to continue working with the Respondent. The Committee of the Board had decided to close the matter once



- apology was given. Her contract was terminated by the Board. The letter of termination is signed by the Managing Director.
67. The reasons were given. She wrote to Kumar. Her tone was offensive. She said she would not respond further to Kumar. She said he was trying to provoke her. She was very discourteous. She wrote to Mohan complaining that he was not picking her calls, even when he was alone in his office. She wrote to Macharia disowning matters he had discussed with her, concerning her complaints, implying that he was lying by alleging that such discussion never took place. Her complaints were properly handled. She was given a hearing. The Managing Director apologized, without conceding wrongdoing.
 68. Cross-examined, Macharia told the Court that the letter to show cause alleged the Claimant was engaged in misconduct. The Human Resource Manual has disciplinary steps to be followed. The Employee has 3 days to respond to notice to show cause. The Claimant was required to respond immediately. The Respondent is required to consider the reply made by the Employee. Hearing is required. There was hearing regarding her complaints. There was none, regarding allegations of gross misconduct.
 69. Senior Management Staff are handled by the Managing Director and the Board Human Resource Committee [a.k.a. Board Executive Committee]. The minutes of the hearing from this Committee are not exhibited. The letter of termination issued on a Monday. The Respondent does not open office on weekends. 3 reasons were given to justify termination - refusal to accept the Managing Director's apology; insubordination; and incompetence, the Claimant having reviewed the previous Managing Director's salary irregularly.
 70. The letter to show cause did not include the charge of refusal to accept the Managing Director's apology. There was nothing in it, about insubordination. The Claimant did not have an opportunity to comment about these allegations, in her reply to the letter to show cause.
 71. She was part of the review process, of expatriates' salaries. General approval is given by the Board Review Committee. Macharia did not have any minutes of any meeting, showing that the Claimant participated in review of expatriate salaries.
 72. The Managing Director signed a note, confirming that expatriate salary structure was reviewed, and annual increments given by the Board. Annual increment for 2020, was signed and approved by Human Resource Manager, General Manager-Finance and the Managing Director. The printed words do not indicate Human Resource Manager, only the Managing Director and General Manager-Finance.
 73. Salary review for expatriates at page 151 of the Respondent's documents, was backdated. The letter is signed by the General Manager- Finance. Arrears were backdated to January. The letter relating to Mohan, signed by the Managing Director, indicates that arrears would be paid immediately, but reflected in September pay slips. Backdating was normal. Inderjeet Singh was promoted in February 2017. The issue of his salary increment was raised on 2020, while review took place in 2016-2017. The anomaly was discovered while review of 2020 took place. The Claimant had raised issue of expatriate salary reviews in 2020. Eventually Inderjeet refunded some of the money.
 74. The e-mails from the Claimant to her colleagues were inappropriate. The Court should look at the e-mail threads and their context. She raised complaints which were dealt with, in accordance with the Grievance Handling Policy. The sanctions under the Harassment Policy differ. She did not raise issue, while the complaints were being dealt with, why Harassment Policy was not applied. Macharia did not have an explanation why Grievance Handling Procedure, and not the Harassment Policy, was adopted. The Claimant had a right, to raise the complaints.



75. Redirected, Macharia told the Court that sanctions under the 2 Policies are different. Harassment requires corrective measures, including dismissal. The complaint was against the Managing Director. If the Claimants was dissatisfied with the handling of her complaints, she was required to escalate them, to the Board Executive Committee.
76. The issues, as broadly understood by the Court are whether: -
- (a) The Claimant's contract was terminated fairly in accordance with the Sections 41 and 45 *Employment Act*, and the Respondent's Human Resource Manual;
 - (b) The Respondent had valid and fair reason[s] to justify termination under Sections 43 and 45 of the *Employment Act*;
 - (c) The Claimant was harassed, and discriminated against on account of race; and,
 - (d) She merits the remedies sought.

The Court Finds:

77. The Parties agree that they were in an employer- employee relationship. The dates of employment and termination are not disputed. The terms and conditions of employment are not disputed. It is agreed that termination was at the instance of the Respondent.
78. The reasons justifying the decision, are stated in the letter of termination. They are: -
- a. The Claimant refused to accept the apology of the Managing Director. She by doing so, indicated her unwillingness to continue working with the Respondent.
 - b. Her e-mail to the Board Executive Committee on the subject, showed she had not accepted her reporting lines.
 - c. Her tone of communication to Senior Managers, showed insubordination. Specific e-mails cited are-
 - I. E-mail to Valiveti Kumar dated 2nd June 2020, alleging that Kumar was trying to provoke the Claimant, by forcing her to do things, his own way. She advised Kumar that, she would not respond to his e-mails further, regarding the subject.
 - II. E-mail to Mohan Jha, dated 22nd June 2020, stating that the Claimant had called Mohan, to clarify on emoluments part, as it may/may not include benefits. Mohan was not picking her calls, even when he was alone in his office.
 - III. E-mail to James Macharia, dated 1st October 2020, alleging that Macharia lied, about the meeting of 2nd March 2020, and implying that the Managing Director also lied.
 - d. The Claimant's integrity and competence were called into question, by failure to follow Respondent's instructions on review of the former Managing Director's salary. The Chairman instructed in the letter of appointment of the former Managing Director, that his salary was Kshs. 770,500. The Claimant changed this to Kshs. 847,550, through her letter to the former Managing Director dated 17th May 2017. The Chairman clearly directed that the effective date for review was the date of joining, 13th February 2017, but the Claimant indicated the effective date was 1st January 2017. As a result of the Claimant's failure to follow the Chairman's instructions, the Respondent sustained loss of Kshs. 5,068,605.



Procedure.

79. The Respondent's Human Resource Manual clauses 5.8 and 5.10 regulate disciplinary procedure. Clause 5.8.1 provides that the Employee shall be heard, and that the Employee is entitled to have another Employee of his choice present at the hearing. Clause 5.10, requires that prior to disciplinary action, thorough investigation is carried out. Signed written statements will be obtained, and all relevant evidence documented. Employees will be given an opportunity to defend themselves.
80. The Disciplinary Policy and Procedures at page 105 to 113 of the Manual, prescribes disciplinary procedure in greater detail. It restates that before termination or dismissal of an Employee, he/she will be given an opportunity to defend himself/ herself. The Employee is entitled to have another Employee of his/her choice present, during this explanation or a Union Representative. The person who accompanies him / her may act as a witness and may take notes. The Disciplinary Policy and Procedures places a caveat on the person who accompanies the Employee, stating that such a person, should not take active part in the proceedings. There is no such caveat in the [Employment Act](#), and this part of the Disciplinary Policies and Procedures, is therefore contrary to the law. Co-Employees and/or Trade Union Representatives, who accompany Employees to disciplinary hearings are active participants, who are allowed to make representations on behalf of the Employee, which representations must be considered in full by the Employers. They do not go to the disciplinary forum, to merely offer Employees, secretarial services.
81. The disciplinary steps include: determination of the exact nature of charge or charges; forwarding of the charge or charges by Management to the Employee [show cause letter]; call upon the Employee to answer the charges in writing, within 3 days; the Human Resource Manager is required to consider the Employee's answer; and the Employee shall be given a hearing in the manner stated above.
82. The procedure under the [Employment Act](#), which is the minimum statutory standard of fairness on termination of employment, is prescribed under Sections 41 and 45 of the [Employment Act](#).
83. Section 41 [2] requires that before terminating employment on the grounds of misconduct, poor performance or physical incapacity, the Employer shall 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.
84. Section 41 [2] states, that before terminating employment, or summarily dismissing an Employee under Section 44 [3] or [4], the Employer shall hear and consider any representations which the Employee makes, and representations by any person chosen by the Employee under subsection [1].
85. Section 45 [4] [b] requires the Employer in all circumstances, to act in accordance with justice and equity, which requires a hearing.
86. The evidence by James Macharia, Chief Operating Officer, under cross-examination, was that the Claimant was required to respond to the letter to show cause with immediate effect, contrary to the clause on response within a period of 3 days. There was hearing regarding her complaints, but no hearing at all, regarding the accusations against the Claimant. The Claimant was compelled to answer the letter to show cause, on the same date it issued, which was a Friday. The Respondent does not open during weekends, and no hearing took place during the weekend. On the following Monday, she was issued the letter of termination. This was clearly a travesty of industrial justice.
87. Macharia told the Court that the letter to show cause, did not include the same charges or reasons for termination, contained in the letter of termination. The letter to show cause did not allege that the



Claimant had declined to accept the apology of the Managing Director. It did not have anything about insubordination.

88. This evidence, seen against the requirements of the Respondent's Human Resource Manual, the Disciplinary Policy and Procedures, and the *Employment Act*, justify the conclusion that procedure adopted by the Respondent, in terminating the Claimant's contract was unfair.

Valid and fair reason[s].

89. The first reason stated in the letter of termination was that the Claimant declined the apology by the Managing Director. It was inferred that because she did so, she was not ready to continue working with the Respondent.
90. Her complaints were presented through her e-mail dated 25th February 2020 to the Managing Director Sharma, Chief Operating Officer Macharia, and Mohan, among others.
91. She complained that the Managing Director had lately been calling her to his office. Every time he called her, he shouted at her. He told her that she did not understand things. He shouted at her in the presence of senior and subordinate Employees. He belittled her, and demeaned her professionalism. She was lost when the Managing told her to make her own decisions and take responsibility. She charged that the Managing Director displayed hatred and discrimination against her. He kept telling her that there are many Asians, ready to work for the Respondent. He told her that he wanted to retire all Staff, but retain her, and when she declined this proposal, the shouting got worse. He boasted that his job was safely waiting for him in India, and that it was the poor Kenyans who would be left suffering, when general business and support sections closed. On 19th February 2020, he called her a silly African. The Managing Director had taken over the running of Human Resource Department, through the Chief Operating Officer. He lied that the Claimant told him Staff wanted to kill him. The Claimant complained that the Managing Director asked her to apply for extension of retirement, while policy had changed from 55 to 60 years, and other officers had not been asked to make such application.
92. The Claimant made multiple complaints. It was not a single complaint, made against the Managing Director; there were multiple complaints, as summarized above.
93. The Claimant, the Managing Director and the Chief Operating Officer met, on 2nd March 2020. According to the Chief Operating Officer, in his e-mail to the Claimant, copied to the Managing Director, sent on 1st October 2020, it was noted and agreed that: -
- I. Mr. Sharma [Managing Director] stated that the events described by Priscah [Claimant] in her letter, had happened in the normal course of business and apologized for anything that had been said, that had personally offended her.
- II. Priscah stated that she had accepted the apology and noted that in her e-mail, she had asked for a better working relationship going forward.
- III. It was now agreed that this matter had been resolved, and going forward, the Parties would strive to create harmonious working relationship.
94. The meeting where the complaints were addressed and alleged to have been resolved, happened on 2nd March 2020. The e-mail by Macharia is dated 1st October 2020, 7 months after the meeting on 2nd March 2020. There are no minutes recording what was discussed and agreed on 2nd March 2020. There is nothing to show that the meeting of 2nd March 2020, resulted in consensus on the Claimant's complaints. There is no document, signed by the Parties, to show that there was an agreement, that the complaints had been resolved.



95. The Claimant wrote to Macharia the same day, expressing surprise that Macharia was responding to her complaints, after 7 months. She stated that Macharia had been visiting her office, to implore her to accept the Managing Director's apology. She told Macharia that she had fallen ill, as a result of the workplace depression. Once she resumed duty, she told Macharia and the Managing Director that she did not accept the apology. She reminded Macharia that there were no minutes, recording the meeting of 2nd March 2020. She did not sign any minutes. The Claimant was emphatic that she did not withdraw the complaints.
96. The Chief Operating Officer Macharia, forwarded the complaints to the Board Executive Committee, as communicated to the Claimant, through his e-mail dated 2nd October 2020.
97. Executive Board Members Dr. Patricia King'ori and Elizabeth Musyoka, looked into the complaints. They wrote to the Claimant on 9th October 2020, advising that the Board Executive Committee considered the matter closed. They questioned the Claimant's forthrightness, asking why she had revived the complaints after 7 months. They stated that they had brought together the Claimant, the Managing Director, the Chief Operating Officer, and the Claimant's Supervisor, where the Managing Director, apologized to the Claimant a second time.
98. The Claimant declined the apology, and in the view of the Executive Board Committee, this second refusal amounted to entrapment and insubordination.
99. This view was adopted by the Respondent as the first ground, justifying termination.
100. The Court does not think that this was a valid and fair reason, to warrant termination. It may have been tidy to the Respondent, and even wise for the Claimant to accept the Managing Director's apology and move on, but she was not obliged to accept the apology. She explained in her e-mail dated 8th October 2020, that harassment had persisted even after the Managing Director apologized in March 2020. She was not comfortable accepting the apology, and felt that the Managing Director intended to get rid of her.
101. The Court does not think that refusal to accept the apology, was fair and valid reason, to justify termination. The Respondent ought to have explored other avenues of dealing with the Claimant's decline of the Managing Director's apology, other than dismissal. It is not convincing to assert that decline of the apology amounted to insubordination. The Claimant's position was that she was a victim of the Managing Director. The Board Executive Committee ought to have examined her complaints systematically, one after the other, instead of hanging onto the unrecorded discussions and purported settlement coming out of the meeting of 2nd March 2020, involving the Claimant, the Managing Director and the Chief Operating Officer. The Board Executive Committee, just adopted the position taken by the Chief Operating Officer before escalation of the complaints, which was that the Managing Director had apologized, and the Claimant was bound to accept the apology, for the greater good of the Respondent.
102. Did the Claimant have to accept the apology, to be seen as being ready, to continue working with the Respondent's Management? Her complaints were against specific individuals, not against the Management as whole. She had worked for many years with another Managing Director and Senior Managers. She harboured what she felt were genuine complaints, against the relatively new Managing Director, Sharma. Refusal to accept his apology was not in the respectful view of the Court, tantamount to the Claimant's unwillingness to work with the Management. She was, by raising her complaints, pursuing what she felt would be a conducive working environment. She wanted corrective action taken. There were very grave racial slurs attributed to the Managing Director, against the Claimant and the African race. There were insults from the Managing Director, made against the



- Claimant's professionalism. Harassment and discrimination took place in plain view of Senior and Subordinate Staff. The environment created by the Managing Director, heavily weighed down the Claimant, affecting her health, and ability to discharge her role. She could hardly be blamed for lacking in the right disposition to build a conducive working environment.
103. The e-mails to Kumar, Mohan and Macharia detailed at paragraph 78 of this Judgment, were stated to amount to insubordination, in the letter of termination.
 104. Insubordination, under Section 44 [4] [d] and [e] of the *Employment Act*, comprises use by an Employee, of abusive or insulting language, or behaviour that is insulting to an Employer or to a person placed in authority over an Employee, by an Employer. Under Section 44 [4] [e], insubordination comprises deliberate failure, or refusal to obey a lawful and proper command, which it was within the scope of an Employee's duty to obey, issued by an Employer or a person placed in authority over an Employee by an Employer.
 105. In *Dede Esi Amanor- Wilks v. Action Aid International* [2014] e-KLR, it was held that the above law [paragraph 104], covers verbal and non-verbal insubordination.
 106. The Claimant used strong language in her communication with General Manager- Operations, Kumar, but in the view of the Court, the words cannot be interpreted as insubordination. The words were not insulting or abusive. She was working under a cloud of harassment and discrimination, and she may have felt rightly or wrongly, that the expatriate wing of Management, had allied itself with the Managing Director in the matters she complained about. She raised her voice against what she felt was a condescending attitude against her, from the expatriate wing of the Management. Kumar had written to the Claimant on 24th February 2020, the same date she lodged her complaints, stating that "it appears that there were deviations in the procedures to be followed during the previous years. I request everyone follow the proper procedure for now."
 107. The Claimant was communicating to Kumar, a position taken by CRS Committee, which she chaired. Kumar was not her supervisor. Her communication was, rather than an individual e-mail. Kumar had communicated to the CRS Committee, that the Children's Village Trust – Medical Cover Renewal 2019, had not been booked in the current year, and that the Broker had not conveyed anything on the matter. He told the CRS Committee that if it conveyed its final decision rejecting the proposal, Kumar would inform the Broker immediately.
 108. The Claimant wrote back, alleging that Kumar was provoking her by forcing her to do things his way. She stated that she was communicating the position of the CRS Committee, and also, doing what she thought was right. She firmly told Kumar that she was standing by her Committee's position, and that Kumar would not sway the Committee's position.
 109. The language employed by the Claimant was not insulting, or abusive to Kumar. It was very strong language, but neither insulting nor abusive. It was the language and position of the CRS Committee. It is communication which must be contextualized.
 110. The details of insubordination against Mohan, similarly do not meet the threshold of verbal or non-verbal insubordination. The Claimant merely stated what to her was factual- that Mohan did not pick her calls, even when in her view, he was alone in his office. She sought clarification from Mohan on emoluments. She was not sure if emoluments included benefits. Mohan was in charge of finance. Where is insubordination, in suggesting that Mohan had ignored her calls? It was open to Mohan to explain why he could not pick the Claimant's calls. The Respondent did not have justification to conclude that this statement by the Claimant, amounted to insubordination. She genuinely felt that Mohan had ignored her calls, even when he was not attending to other persons in his office.



111. The e-mail by the Claimant to Macharia, on 1st October 2020, contesting that the complaints had been resolved in the meeting of 2nd March 2020, was listed in the letter of termination, as the third e-mail by the Claimant, amounting to insubordination. Again, the Respondent was way off the mark, in its characterization of the e-mail as an act of insubordination. The Respondent stated that the Claimant implied that the Directors and Macharia were liars, because they took the position that the complaints had been addressed and resolved, while the Claimant insisted they were not. This was not insubordination, but a difference of opinion, between the Claimant of the one part; and Macharia, Directors Dr. Patricia Kingóri and Elizabeth Musyoka of the other part. The Respondent's conclusion that the Claimant's opinion amounted to insubordination was incorrect. She could have been wrong in her opinion, Macharia and the Directors could also have been wrong in theirs. Whether the Claimant's complaints were resolved in the meeting of 2nd March 2020, was a matter of perception, not insubordination by any of the participants in the meeting of 2nd March 2020.
112. The last ground advanced by the Respondent relates to review of salary of the former Managing Director, Inderjeet Singh, in 2017.
113. Why was this matter not raised in 2018, 2019, but only in 2020? This was not adequately explained by the Respondent, considering that there were audit reports made annually, which would have uncovered any irregularities on salary review, attributable to the Claimant over the period.
114. The Claimant explained that she was not responsible for salary review. Salary review for herself, the Managing Director, the General Manager and the various Deputy General Managers, was a function reserved for the Managing Director and the Board. Inderjeet's salary was reviewed and presented to the Board. It was approved by the Board. The Claimant only issued letters to Staff on salary increment, after the approval of the Board. The General Manager- Finance would prepare a schedule. The schedule was endorsed by the Managing Director, and forwarded to the Board for approval. The Board approved the increment granted to Inderjeet Singh. This is not disputed by the Respondent. The Claimant received the approval of the Board and the minutes of the Board meeting granting approval. The General Manager-Finance or the Senior Auditor, would have raised a red flag from 2017, if there was irregular salary review made by the Claimant.
115. The Court does not agree with the Respondent, that the Claimant had the authority to review the salary of the Managing Director, and that she reviewed the Managing Director's salary irregularly, resulting in loss of Kshs. 5,068,605, to the Respondent. If there was irregular salary paid to the former Managing Director, responsibility would be with the Board and the Managing Director, not the Claimant.
116. The Chief Operating Officer, Macharia, told the Court on cross-examination that approval of salary increments was made by the Board. He agreed with the evidence of the Claimant concerning salary reviews and increments. There were no minutes of any meeting, relating to salary of expatriates, establishing that the Claimant participated in review of expatriate salaries. The Managing Director signed a note, confirming that salary increments were approved by the Board.
117. The Respondent states that it indeed raised the issue directly with Inderjeet Singh, and according to the evidence of Macharia, Inderjeet eventually refunded some [undisclosed] amount to money. Direct contact between the Respondent and Inderjeet Singh is captured in the letter authored by the Respondent's Finance Department [Salary Section] dated 4th March 2020, addressed to Inderjeet Singh, General Manager, New India Assurance Company Limited, Mumbai, India. The letter informs Inderjeet, that his salary was wrongly increased in February and May 2017. He was advised to refund, which according to Macharia, he partly did. There is no reason shown why the Respondent sought to



fault the Claimant over the salary review to the former Managing Director, which was approved by the Board in 2017. The Respondent contacted the former Managing Director and sought refund. In her response to the letter to show cause, the Claimant stated that the Board was in direct engagement with Inderjeet Singh, and she ought to have been exonerated from the charge revolving around Inderjeet's salary review of 2017. What was the Claimant's liability in this salary increment? Did she review salary in favour of the former Managing Director, unilaterally or at all, without the endorsement of the Managing Director and the Board? Was she not simply acting on the resolution of the Board? Did the Respondent lose Kshs. 5,068,605 through the acts or omissions of the Claimant?

118. Review of salaries, including that of Managing Director Sharma and other Staff, was effective 1st January of the review year. There are several letters on review of salaries, including some issued by the Respondent to the Claimant, showing review was always effective January of the review year. The effective date would logically have been stated in the resolution of the Board, giving salary increments. Macharia told the Court on cross-examination that backdating of salary increments was normal.
119. The last ground in the letter of termination, surrounding increment granted to Inderjeet Singh, was not a fair and valid reason, to justify termination, under Sections 43 and 45 of the [Employment Act](#).

Harassment and Discrimination.

120. This aspect of the dispute formed the backbone of the complaints, which the Claimant lodged against her Managing Director.
121. There were grave, and manifold allegations of harassment and discrimination. There were allegations of direct and indirect discrimination, with the indirect ones, mainly manifested as harassment. As observed earlier, the Respondent did not deal with the complaints individually.
122. The Board Executive Committee, rehashed the history of the complaints by the Claimant, rather than look into the specific complaints and make findings. If it was alleged for instance, that the Managing Director called the Claimant a silly African, there was no effort made to investigate the slur. There were no statements recorded, from any Employee. The Claimant alleged some of the acts of harassment and discrimination took place, in the presence of other Employees. Dr. King'ori and Musyoka retraced the complaints from 25th February 2020; the discussions on the complaints involving the Claimant, the Managing Director and the Chief Operating Officer; the tendering of the apology by the Managing Director; the alleged acceptance of apology by the Claimant; and the assumption that the matter had been resolved through the apology. The Committee stated that the Managing Director had apologized a second time, and that the Claimant's insistence that the Managing Director apologizes in writing, specifying the items he was apologizing for, amounted to insubordination and entrapment.
123. Contrary to the Pleadings filed by the Respondent, the Board Executive Committee did not investigate the Claimant's complaints, and dismiss them based on any finding that the complaints were false.
124. There is no letter of apology from the Managing Director to the Claimant, issued to the Claimant in March or October 2020. The Board Executive Committee and the Chief Operating Officer just stated that the Managing Director had apologized, without clarifying which complaint he was apologizing for. They confirmed that he apologized twice.
125. The Court is of the view that this repeated apology, was a fault-admitting apology. There is no time the Managing Director, is recorded to have denied any of the complaints raised against him by the Claimant. Not even the serious allegations surrounding the Claimant's African ancestry. She told the Court that the Managing Director called her a silly African, who did not know her job. He kept telling the Claimant that there were many Asians ready to work for the Respondent, Kenindia. He



- alleged that he would close general business and support departments, and send staff home, and that it was poor Kenyans who would suffer. His own job was safe back in India. She specifically stated that the Managing Director referred to her as a silly African, on 19th February 2020. The allegation that the Respondent intended to reduce Staff, is verified by 2 Notices issued in October 2020 by the Respondent on restructuring and redundancy. The Managing Director received the serious allegations of racism made by the Claimant, but there is no letter written by him to the Claimant, or to any other office, refuting racism. He is not recorded as having denied these allegations, even before the Board Executive Committee, before whom the complaints were placed.
126. When the Managing Director received the complaints back in February 2020, he did not refute any of the complaints. He asked for a meeting with the Claimant post-lunch, on 27th February 2020. He did not write any letter of denial, in September 2020, when the complaints were revisited.
 127. Macharia and the Board Executive Committee did not state anywhere on record, that the Managing Director refuted any of the complaints, in their interaction with the Managing Director.
 128. The Managing Director's apology, in the view of the Court, was simply an acceptance of fault. He conceded that his conduct towards the Claimant comprised harassment and discrimination against the Claimant, and was injurious to the Claimant. It is noted that indeed, the Claimant was taken ill on account of a stressful working environment, an environment that was created by the Managing Director Sharma.
 129. The apology was not made in the course of mediation, or settlement. It was tendered twice, while the complaints were being considered, first in an informal meeting involving the Claimant, the Managing Director and the Chief Operating Officer; and on second occasion, while the complaints were formally being investigated by the Board Executive Committee. The apology was not in the nature of an excited utterance, an expression of benevolence, or a statement of compassion or commiseration, emanating from the Managing Director; it was in the view of the Court, a deliberate admission by the Managing Director that he had engaged in harassment and discrimination against the Claimant.
 130. It was unfortunate that the Board Executive Committee appears to have been persuaded by the Managing Director that, "the events described by Priscah [Claimant], in her letter, happened in the normal course of business..." The Court does not think that details of harassment and discrimination given by the Claimant, could be excused on the basis that they happened in the normal course of business. Harassment and discrimination cannot in any way, be part of the normal course of business.
 131. The Managing Director's apology was tendered merely to sweep the complaints against him under the carpet, and enable the Respondent to move on, as though the complaints had not been made in the first place. There was no written and detailed apology. The Board Executive Committee states that such a written apology, would lead to entrapment of the Managing Director. The Court understood this idea of entrapment, to mean that the Managing Director would have exposed himself to liability, by providing written evidence of his fault-admitting apology. The oral apology made twice, is in the view of the Court, was nonetheless, as good any written apology, in establishing culpability. Discrimination on the basis of race in particular, was raised, and instead of a proper investigation taking place, and appropriate remedial action being taken, the Respondent favoured an unwritten apology from the injurer.
 132. In dealing with the Claimant's complaints, the Respondent opted to adopt the Grievance Handling Policy and Procedure, instead of the Harassment Policy. The Claimant's problem with this choice of Policy, is that it did not make it possible, to have an outcome proportionate to the harm occasioned to the Claimant, through her harassment and discrimination. The Grievance Handling Policy has 4 steps, which do not clearly provide for punishment of harassment and discrimination injurers, such



- as the Managing Director, Sharma. The Grievance Handling Policy was suitable to the Respondent, and states at its tail end, a position which the Respondent adopted throughout out its dealing with the Claimant's complaints, that, "the company recognizes that not every problem can be resolved to everyone's total satisfaction, but only through understanding and discussion of mutual problems, can Employees and Management develop confidence in each other."
133. The Harassment Policy is emphatic, that harassment or workplace bullying of an Employee, which the Managing Director clearly engaged in against the Claimant, will result in disciplinary action. The Harassment Policy covers all Employees, and prohibits any form of harassing, bullying or discriminatory conduct. The Respondent, and its top Managers close to the Managing Director, shivered to the core, at the prospect of the Managing Director being subjected to any disciplinary process and sanctions. The Chief Operating Officer constantly visited the Claimant, to intercede on behalf of the Managing Director, imploring the Claimant to accept the unwritten apology and move on. The Respondent opted to subject the Claimant's complaints to the toothless Grievance Handling Policy.
 134. The Harassment Policy is split into Sexual Harassment, and Harassment other than Sexual Harassment. The Claimant did not lodge a complaint of a sexual nature, and her complaints should have been dealt with, under the second part of the Harassment Policy.
 135. The Managing Director's conduct towards the Claimant fell clearly within the Harassment Policy. Harassment other than Sexual Harassment, under the Policy, is defined as verbal or physical conduct that shows hostility or aversion to an individual, because of colour, race, nationality, ethnic, religion, gender, marital status, age or disability, or any other basis prohibited by the law, when such conduct has the effect of unreasonably interfering with the Employee's work performance, creating an intimidating, hostile or offensive work environment or otherwise adversely affecting and individual's employment opportunities. It ought to have been clear that this was the right Policy, in dealing with the Claimant's complaints.
 136. The Respondent opted for the Grievance Handling Policy, with the result that the complaints were not effectively investigated and dealt with, and the Managing Director held to account.
 137. The Court has formed the view that the Managing Director's apology, was fault-admitting, and the Respondent ought to have found a proper way of bringing him to account.
 138. Section 5[7] of the *Employment Act*, governs burden of proof in employment discrimination. 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 the Section.
 139. Once an Employee has demonstrated, a prima facie case of discrimination, the burden shifts on the Employer, to articulate clear, specific and non-discriminatory reason, for the actions or omissions alleged by the Employee, to constitute discrimination. This was expounded in *G.M.V v. Bank of Africa Kenya Limited* [2013] e-KLR and *David Wanjau Muhoro v. Ol Pejeta Ranching Limited* [2014] e-KLR. It can reasonably be inferred by the Court, if the Employer fails to articulate clear, specific and non-discriminatory reasons for the actions or omissions alleged to constitute discrimination by the Employee, that the Employer is dissembling to cover up for discriminatory purpose. The unwritten apology by the Managing Director, was in the nature of dissembling. The Respondent did not give legitimate explanation for its treatment of the Claimant. Its poetic refrain, was that the Managing Director apologized twice to the Claimant. The Court cautioned itself in the above decisions, adopting comparative jurisprudence in the South African case *Raol Investments [pty] limited t/a Thekwini Toyota v Mandlala* [2008] ILJ 267 [SCA], that while the Court must be vigilant to ensure that



discrimination does not occur, it must equally be wary of concluding too hastily, that an Employee has been discriminated against. There must be careful consideration and objective evaluation of evidence in discrimination claims. The Court has carefully looked at the evidence, in finding that the Claimant was subjected to harassment and discrimination.

140. She tearfully narrated her evidence on harassment and discrimination. The Managing Director did not refute the complaints, but instead apologized twice for harassment and discrimination. The Court does not think that the Respondent discharged its burden of proof, is establishing that the actions or omissions raised by the Claimant, did not amount to harassment or discrimination, and that those actions or omissions, could be attributed to other legitimate reasons.
141. The Claimant has established harassment and discrimination at the workplace.

Remedies.

142. Prayer [a], restraining the Respondent from recruiting other persons to fill the position previously held by the Claimant, is not reasonable. The Claimant stated that she turned 55 years on 6th February 2019. The mandatory retirement age was revised to 60 years by the Respondent. The Claimant is a few months away from the mandatory retirement age. She confirmed in her evidence, that she is approaching retirement age, and would not get alternative employment. There is no reason why the Respondent should be barred from replacing a former Employee, who would soon be due for retirement.
143. An order of reinstatement is similarly not reasonable. The Claimant is at the age of retirement and her relationship with Senior colleagues, was poisoned through the Managing Director. She was the victim of a toxic Managing Director. Other Senior Managers appear to have been drawn against the Claimant, and part of the Board Members dealt with her complaints, in a manner which left her teeth set on the edge. Reinstatement would not result in building a relationship founded on mutual trust and confidence, between the Claimant and the Respondent.
144. The suitable remedy for unfair and unlawful termination in the circumstances, is compensation. The Claimant worked for the Respondent from 22nd October 2013 to 12th October 2020, a period of 7 years. She had consistently been rated favourably in her performance appraisal. She had received bonuses and salary increments consistently. There were no warnings concerning her performance or discipline, which were brought to the attention of the Court. Until she lodged her complaints, and set off a series of accusations against her, the Claimant had a clean record. She expected to serve to the end of the extended period of 60 years. She had about 4 years to the mandatory retirement age. She told the Court that she did not secure alternative job, and as at the time of giving evidence, was just staying at her home in Rongai, Kajiado County. She did not contribute to the circumstances leading to termination. She merits and is granted, equivalent of 12 months' salary in compensation for unfair termination at Kshs. 7,572,852.
145. Her prayers for anticipatory benefits, computed to the expected year of retirement, 2024, have no merit. Bonus, leave, medical insurance and other such benefits, claimed through a Schedule attached to the Amended Statement of Claim, are not well-founded. The Claimant left employment on 12th October 2020, and ceased to have any mutuality of obligations with the Respondent, which would justify payment of benefits to the year 2024. The Court of Appeal in *Elizabeth Wakanyi Kibe v. Telkom Kenya Limited* [2014] spoke against anticipatory prayers, such as sought by the Claimant, holding that employment remedies must be proportionate to the economic injury suffered by the Employee. Courts are averse to grant of unearned salaries and benefits. These anticipatory prayers are declined.



146. Harassment and discrimination, warranting redress through general damages, have been established. Ultimately it was the complaints made by the Claimant which resulted in dismissal. The Respondent retaliated, confronted with a stubborn Employee, who would not accept an apology from above. Rather than redress the Claimant's complaints, the Respondent alleged her refusal to accept the outcome favoured by the Respondent, was an act of insubordination and unwillingness to work with Management. The victim of harassment and discrimination was denied redress on her complaints, and instead additionally victimized, through summary dismissal. There were extremely harmful acts of harassment and discrimination coming from the top of the Respondent's organogram. So harmful, that the Claimant's health was affected. She merits general damages.
147. An award of general damages is at the discretion of the Court, based on what is considered adequate. The Court considers as adequate, and awards general damages to the Claimant, for harassment and discrimination, at Kshs. 3,000,000.
148. Costs to the Claimant.

IN SUM, IT IS ORDERED: -

- a. It is declared that the Respondent harassed and discriminated against the Claimant.
- b. It is declared that termination of the Claimant's contract was unfair and unlawful.
- c. The Respondent shall pay to the Claimant equivalent of 12 months' salary in compensation for unfair and unlawful termination at Kshs. 7,572, 852 and general damages for harassment and discrimination, at Kshs. 3,000,000 – total Kshs. 10,572,852.
- d. Costs to the Claimant.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY VIA E-MAIL, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS ,2020, THIS 7TH DAY OF JULY 2023.

JAMES RIKA

JUDGE

