



**Mwala v Aga Khan University (Cause 1437 of 2018)  
[2023] KEELRC 2055 (KLR) (11 August 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2055 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1437 OF 2018  
SC RUTTO, J  
AUGUST 11, 2023**

**BETWEEN**

**FLORAH VIHENDA MWALA ..... CLAIMANT**

**AND**

**THE AGA KHAN UNIVERSITY ..... RESPONDENT**

**JUDGMENT**

1. It is not in dispute that the Claimant was employed by the Respondent as an Executive Assistant with effect from 2<sup>nd</sup> November, 2009. The Claimant avers that following her appointment, she was assigned to work under Prof. Yasmin Amarsi, the then Dean of the Faculty of Nursing and Midwifery. According to the Claimant, she worked diligently and in the year 2014, she was honoured as the Respondent's employee of the year. She avers that following the retirement of Prof. Yasmin, the Respondent appointed Prof. Sharon Brownie as the new Dean of the Faculty. It is the Claimant's case that Prof. Brownie developed a dislike for her and there was no fusion of chemistry between her and the new dean (Prof. Brownie). That in furtherance to her dislike, Prof. Brownie initiated communication with the Respondent's Vice President, Human Resources, touching on the person of the Claimant. In the Claimant's view, the said communication pointed to a conspiracy, a plot or a scheme to demean, vex, degrade, dehumanize, devalue and frustrate her so as to cause her agony, anguish, pain, sorrow, deprecation, trauma and probably lead her to resign from her employment through acts akin to constructive dismissal.
2. From the record, the Claimant was suspended from duty through a letter dated 4<sup>th</sup> July, 2016 and eventually terminated from the Respondent's employment on 8<sup>th</sup> March, 2018. It is against this background that the Claimant seeks the following reliefs against the Respondent:
  - a. A declaration that the termination of the Claimant's employment with the Respondent was unfair and therefore null and void.



- b. A mandatory injunction directing the Respondent's its servants and/or agents to forthwith and unconditionally restore the Claimant's monthly salary and emoluments pending the hearing and determination of this claim.
  - c. An order of reinstatement of the Claimant into her employment without any loss of benefits and without any victimization.
  - d. In the alternative and without prejudice to prayer (b) an order directing the Respondent to pay to the Claimant KShs.18,536,632.45 being remainder of her contract period as a basis for her termination and that such payment to factor in expected future increments in salary and other benefits as tabulated.
  - e. A declaration that the Claimant ought not to suffer any prejudice by paying her lawyers legal costs on account of a conspiracy hatched by the Respondent's Employees and consequently the Respondent to settle the Claimants full legal costs on Advocate-Client basis based on a valid, enforceable and lawful legal costs settlement arrangement/retainer agreement between the Claimant and her Advocates.
  - f. Exemplary/aggravated/punitive damages as an expression of the Court's displeasure towards the dishonourable conduct of the Respondent's servants and/or agents.
  - g. General aggravated and/or punitive damages for constitutional violations of the Claimant's right to human dignity, the Claimant's right not to be subjected to psychological torture and the right not to be treated in a cruel, inhuman or degrading manner.
  - h. Interest on monetary reliefs and damages.
  - i. Any other or further relief as this Honourable Court may deem fit and just to grant.
3. Resisting the Claim, the Respondent filed a Statement of Response on 8<sup>th</sup> November, 2019. The Respondent avers that in blatant breach of the Respondent's Human Resources Policy and disregard of her employer's privacy, the Claimant begun monitoring the Dean's email while covertly hiding her access to the email. The Respondent has termed the said access as a calculated ploy to pry into her new employer's correspondences for purposes of retrieving confidential information. The Respondent further avers that the correspondence was not intended to degrade or dehumanize the Claimant but were intended to bring to the Respondent's Human Resource Manager's attention, issues the Dean was facing with the Claimant. The Respondent maintains that the Claimant's employment was terminated for a valid and justified reason and is not entitled to the demands made by her Advocate. On account of the foregoing, the Respondent prays that the suit be dismissed with costs.
4. The matter proceeded for hearing on diverse dates, during which both sides called oral evidence.

#### **Claimant's case**

- 5. The Claimant testified in support of her case and to start with, she adopted her witness statement to constitute her evidence in chief. She further produced the list bundle of documents filed on her behalf as exhibits before Court.
- 6. It was the Claimant's evidence that her performance appraisals for all previous years starting with her probationary period were exemplary, leading to her award as an employee of the year in 2014.
- 7. She stated that Prof. Sharon Brownie officially took office as Dean in the month of September 2015 and on Monday, September 28, 2015 at 12:13PM, in an email addressed to her (Claimant) Prof. Sharon Brownie designated her as a delegate to her email communication. She was granted permission to access



folders concerning the Dean's calendar, tasks, inbox, contacts and notes. That as a delegate, she was granted permission to read, create and modify items. The Claimant further stated that on the same day, Prof. Brownie in an email addressed to her invited her to view her calendar. That on the strength of the express and written authority granted to her, she had unhindered access to Prof. Brownie's email communication.

8. It was the Claimant's testimony that it was in the course of her appointment and in the furtherance of the mandate to read the email communication of the Dean that she began encountering troubling emails being exchanged between the Faculty Dean and the Respondent's Vice-President, Human Resources. She averred that the email communication she was able to capture, commenced on 15<sup>th</sup> December, 2015 and went on upto 27<sup>th</sup> May 2016.
9. According to the Claimant, the trail of email communication flowing from the Respondent's Faculty Dean to the Respondent's Vice President, Human Resources pointed to a conspiracy and caused her mental anguish, pain, sorrow and agony. She was shocked that two grown women were delighted in a conspiracy against a humble employee of her standing. In the Claimant's view, the language used to describe her and the cheekiness in the tone, pointed to people whose hearts were sadistic.
10. She was saddened to read emails describing her work performance as useless and the allegation that she was of zero help to the former Dean. She was even greatly traumatized by the allegation that a performance review was to be done right away on her and that the intention of this performance review was to document disappointment.
11. Referring to an email of 16<sup>th</sup> December, 2015, between the Respondent's Faculty Dean and the Respondent's Vice President, Human Resources, the Claimant averred that the true intent of the two, was to remove her from employment.
12. She further averred that the Faculty Dean, unable and having no reason to fire her, expressed her disappointment to the Vice President on 20<sup>th</sup> January, 2016. That she stated in her email that she did not want a stranger and did not want the Claimant. She was therefore unable to comprehend how in two weeks the Dean had formed such a despicable opinion about her work performance and her personality. The Claimant termed this as hate at first sight directed at her.
13. The Claimant further stated that sometimes in the month of June, 2016, the Respondent's Vice President travelled all the way from Karachi, Pakistan to Nairobi. According to the Claimant, she was on a clear mission to sack her. That on 30<sup>th</sup> June, 2016, she was summoned to the office of the Director, Human Resources, where was informed that she had shared confidential information with a person in the Respondent's Uganda Campus. She denied the accusations verbally and was asked to put down her denial in writing, which she did. Dissatisfied with her handwritten statement, she was summoned once again on 1<sup>st</sup> July, 2016 and the previous allegations were reiterated. She once again denied those allegations.
14. On 4<sup>th</sup> July, 2016, she was suspended from duty and on 25<sup>th</sup> October, 2016, she instructed her Advocates to reply to the Respondent's letter.
15. The Claimant averred that apparently, her Advocates letter made the Respondent to rescind its decision to terminate her appointment and she continued to be on paid suspension until 8<sup>th</sup> March, 2018 when for a second time, the Respondent stopped her salary and once again falsely alleged that there was a mutual agreement on separation.
16. She further contended that during her suspension, the Respondent did not notify her of any disciplinary sitting concerning her. That the Respondent has never to this day served her with the



evidence arising from the accusations leading to her suspension. She further contended that the Respondent has never notified her of the outcome of the investigations despite her demand and despite the Respondent indicating in its letter of suspension that they would notify her of the outcome.

17. It was the Claimant's further evidence that the hurt visited upon her by the Respondent's Vice-President, Human Resources and Faculty Dean, Nursing will probably never heal. That to be recognized as an employee of the year and then simultaneously denigrated as useless and of zero help is simply unfathomable. The hurt from this allegation will live with her for the rest of her life and she has remained inconsolable.
18. It was the Claimant's case that the Respondent's servants violated her constitutional rights not to be subjected to psychological torture, not to be subjected to inhuman and degrading treatment and the right to human dignity.
19. Concluding her testimony in chief, the Claimant asked the Court to allow her Claim as prayed.

### **Respondent's case**

20. The Respondent called oral evidence through its Human Resource-Business Partner, Ms. Vickie Adiedo, who testified as RW1. Ms. Adiedo started by adopting her witness statement to constitute her evidence in chief. She went ahead to produce the documents filed on behalf of the Respondent as exhibits before Court.
21. It was RW1's evidence that the Claimant's employment was subject to the main terms and conditions annexed to the letter including the Respondent's Human Resource Policies and Procedures, Faculty and Staff Handbook. She enumerated the Claimant's duties and responsibilities as including organizing the day-to-day activities in the Dean's office, preparing reports & presentations, maintaining a good filing system, scheduling meetings and handling office matters as well others assigned to her from time to time.
22. That to enable the Claimant manage the Dean's Calendar, in September 2015, she was granted access to her calendar on Outlook.
23. RW1 further stated that on 30<sup>th</sup> June, 2016, due to a technical hitch, an invitation was sent to the Claimant, which she accepted, inadvertently granting her sight of Prof. Brownie's calendar, tasks, inbox and contact. By Clause 86 of the HR Policy all staff are required to utilize the Respondent's facilities properly including telecommunication networks & computing facilities responsibly and appropriately, which includes the respect for privacy of colleagues' communications.
24. That as the Claimant had served with the Respondent as the Executive Assistant to the Dean for more than 7 years, and at the inception of her employment affirming to have read and agreed abide by the HR Policy, she knew or ought to have known that she was not authorized to have access to the Dean's official email, inbox and other private contacts. She failed to inform Prof. Brownie as well as the HR and IT Department of the blunder that had taken place. Instead, the Claimant surreptitiously monitored and read Prof. Brownie's emails.
25. RW1 further stated in evidence that Prof. Amarsi and the Claimant got along and indeed, she gave her positive reviews while they worked together. Prof. Brownie expected more of an Executive Assistant as per her employment beyond that of a secretary. That for instance, she expected full administrative support including actively and effectively arranging for travel banking, tickets accommodation, transport or efficiently managing the office in her absence-tasks which the Claimant apparently had not previously performed even though they were within her job description. According to RW1, the Claimant's performance did not meet Prof. Brownie's expectations.



26. That Prof. Brownie actively engaged the Claimant, setting out her expectations of an Executive Assistant, identifying the areas in which she fell short and seeking to work with her to get up to speed. These attempts did not go down well with the Claimant leading to tension between the two.
27. These escalated Prof. Brownie's frustrations who had taken up a new role with clear benchmarks to achieve but without satisfactory support from her assistant, the Claimant. In private communications, she poured out her frustrations on this as well as other matters to the person, who had recruited her on behalf of the Respondent, Ms. Carol Ariano, the then Vice President, Human Resources of the Aga Khan Universities, who was based in Karachi. Ms. Ariano provided a sympathetic ear, mollifying her lest Prof. Brownie took any precipitate drastic action.
28. According to RW1, while some of the language Prof Brownie used were graphic, this was in private communication to a person she was pouring her heart out to. There is nothing racist nor demeaning and dehumanizing but just vivid words used by someone venting privately. That unknown to the Dean, exploiting the access she had been given, the Claimant read these confidential private exchanges.
29. RW1 further stated that it came to the attention of Prof. Brownie that some of the contents of her communication with Ms. Ariano were circulating in Uganda and neither of them had shared them with anyone. This led to an inquiry as whether either of their emails had been hacked. It was then discovered that the Claimant had access to her emails. As neither Prof Brownie nor Ms. Ariano had anything to gain by leaking their private communication, suspicion centred on the Claimant as the only other person who had had sight of them.
30. On being confronted, the Claimant admitted that she had access to the emails but denied having leaked them. This was a serious matter that warranted investigation to determine whether she was indeed responsible for the leaking the emails. The Claimant was therefore sent on a paid suspension to enable the investigation. While the results of the investigations were inconclusive, it became clear that the Claimant had been secretly reading Prof. Brownie's emails, hence the relationship between them had irretrievably broken down. The Claimant had lost the Dean's trust and confidence. She could not therefore resume her position as the Executive Assistant to Prof. Brownie.
31. It was RW1's evidence that on 8<sup>th</sup> March 2018, the Respondent wrote to the Claimant confirming the termination of her employment which was to take effect from 9<sup>th</sup> March 2018. The letter outlined what the Claimant would be entitled to.
32. On 23<sup>rd</sup> July, 2018, the Respondent through its Advocates, wrote to the Claimant's Advocates confirming that her employment had been terminated by the letter dated 8<sup>th</sup> March, 2018 while forwarding a cheque dated 13<sup>th</sup> July 2018 of sum Kshs 578, 955/= an amount representing the statutory dues owed to the Claimant less financial loans and statutory deductions.

### **Submissions**

33. In her submissions, the Claimant argued that the letter dated 8<sup>th</sup> March, 2018, was not a termination letter but an offer subject to her acceptance. That since the written suspension is not revoked by another written revocation, it still stands. It was her further submission that no investigation report was shared with her or with the Court and in addition, no appraisal report on her performance was shared and no warning letter was availed to show that the Respondent's Dean disapproved of her performance.
34. It was further submitted by the Claimant that the Respondent had failed all the safeguards of what would constitute fair administrative action that in turn affected her means of livelihood.



35. The Claimant further submitted that the 20 months taken by the Respondent before terminating her employment was inordinately long. That she was never accorded an opportunity to attend the hearing in person and cross examine her accusers and in fact, her accuser was the decision maker and a Judge in her own cause.
36. She further maintained that she was terminated without any reference to her suspension and without being notified of the outcome of her suspension. That therefore, since the procedure was unfair, her termination was also unfair.
37. It was the Claimant's further submission that the Respondent has an ICT division which is competent enough to conducted an investigation on her suspected intentional misuse of official facilities. However, during the process leading up to her termination, there was no evidence from the ICT division identifying her as the transgressor. That it was not even suggested that the division investigated and established that her authorisation as a delegate to the Dean's emails was suspect or illegally obtained or that there was hacking done.
38. On the part of the Respondent, it was submitted that the Claimant's employment was terminated pursuant to the provisions of her employment contract and was due to a breakdown in the employment relationship due to want of trust and confidence. That the trust and confidence was lost upon being established that the Claimant had surreptitiously monitored communication between her superior and HR department.
39. The Respondent maintained that the reason for the Claimant's termination is valid while the process to be followed in case of termination under contractual notice provisions comprises service of notice or payment in lieu of notice. In support of its position, the Respondent placed reliance on the case of Manuel Anidos vs Kinangop Wind Park Limited (In receivership) (2019) eKLR.
40. The Respondent further submitted that the matters the Claimant is inviting the Court to consider were not the basis of her termination and therefore not the yardstick for determination of whether or not it was fair. That none of the matters i.e. the alleged unlawful access to emails and their leakage featured in the decision to terminate her services and a reliance of want of valid reasons as well as want of fair process is wholly misplaced.
41. With regards to the constitutional claims, the Respondent termed the same as bad at very imaginable level. Citing the case of Mbaka Nguru & another vs Jmaes George Rakwar (1998) eKLR, the Respondent maintained that the claims were not pleaded in the Statement of Claim.

### **Analysis and determination**

42. Having reviewed the record before me constituting the pleadings, evidence and the opposing submissions, the following issues stand out for the Court's determination:
  - a. Whether the Claimant's termination from the Respondent's employment was unfair and unlawful;
  - b. Whether there is a case of constitutional violation?
  - c. Is the Claimant entitled to the reliefs sought?

### **Unfair and unlawful termination?**

43. The parameters for determining whether the termination of an employee's contract of service was fair and lawful, are two-fold that is, substantive justification and procedural fairness. In order to satisfy



these twin requirements, an employer is required to prove that it complied with the provisions of Sections 41,43 and 45 of the *Employment Act*.

44. With regards to substantive justification, an employer is required to prove that the reasons leading to an employee's termination were fair, valid and related to the employee's conduct, capacity or compatibility; or based its operational requirements. In default of such proof, the termination is deemed to be unfair.
45. On the other hand, the element of procedural fairness requires an employer to prove that the employee's termination was in accordance with a fair process.
46. I will proceed to apply the aforementioned tests to the case herein.
  - i. Substantive justification
47. In the instant case, it is apparent that the employment relationship was severed through a letter dated 8<sup>th</sup> March, 2018, emanating from the Respondent. The letter is couched in part:

“Dear Flora,

This letter confirms the discussions we have had during which you have been informed your employment relationship with the Aga Khan University School of Nursing and Midwifery would be concluded. This will take effect from 9<sup>th</sup> March, 2018....This decision is due to the irretrievable breakdown in the employment relationship in circumstances which are known to you.”
48. Revisiting the provisions of Section 45 (2) (a) and (b) of the *Employment Act*, the Respondent was required to prove that the reason for the Claimant's termination was fair, valid and related to her conduct, capacity or compatibility.
49. The reason cited by the Respondent in this case is that the employment relationship had irretrievably broken down.
50. To put the issue into context, it is imperative to revisit the events that had taken place prior to the Claimant's termination.
51. The record bears that the Claimant was placed on suspension with effect from 4<sup>th</sup> July, 2016, following allegations that she had shared confidential information contrary to her contract of employment and the Respondent's institutional policies. She was informed that the Respondent's management wished to conduct further investigations on the matter and once complete, the Respondent was to communicate the next steps.
52. From the record, there is no outcome of the investigations hence there is no evidence from the Respondent's end that the allegations levelled against the Claimant through the letter of suspension, were confirmed.
53. Further it is notable that the details of the breakdown in the employment relationship were not spelt out in the Claimant's letter of termination.
54. In its submissions, the Respondent made reference to loss of trust and confidence upon establishment that the Claimant had surreptitiously monitored communication between her superior and the HR department.
55. It was the Claimant's evidence that on 28<sup>th</sup> September, 2015, Prof. Brownie in an email addressed to her, designated her as a delegate to her email communication. In this regard, she had certain rights and



could access Prof. Brownie's, calendar, tasks, inbox, contacts and notes. Apparently, it is through this access that the Claimant was able to view Prof. Brownie's email communication.

56. In its Response, the Respondent averred that in performing her duties, the Claimant was authorized access to Prof. Brownie's calendar to enable her properly manage her office. The Respondent further admitted that on 30<sup>th</sup> June, 2016, the Claimant received an invitation to view among others, Prof. Brownie's calendar, tasks and contacts. What the Respondent did not state is where did such access start and stop? This is noting the nature of the Claimant's duties. Hence, what was the Claimant allowed to access and what was she not allowed to access? What were the rules of access and did she have any limits with regards to such access? Indeed, I cannot help but question whether the issue only arose due to the nature of the email communication the Claimant was able to access.
57. The foregoing gaps, no doubt impair the Respondent's case that the employment relationship irretrievably broke down due to the Claimant's monitoring of the email communication between her superior, the Dean and Vice President, Human Resources. This is moreso noting the email of 28<sup>th</sup> September, 2015, through which the Claimant was granted access to Prof. Brownie's calendar, tasks, inbox and contacts. Further, the Respondent did not lead evidence to prove that the Claimant shared the said emails with a third party.
58. To this end, the Respondent has failed to prove the reason for the Claimant's termination to the requisite standard. In the end, I am led to conclude that the Claimant's termination was unfair as the Respondent has failed to satisfy the requirements set out under Section 43(1) as read together with Section 45(2) (a) and (b) of the Act.
- ii. Procedural fairness
59. On the question of procedure, the Respondent was required to comply with the minimum requirements set out under Section 41 of the *Employment Act*. These requirements entail notification and hearing. In a nutshell, the employer is required to notify the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations. In making such a representation, the employee is entitled to be accompanied by a fellow employee or a union representative of his or her own choice.
60. In this case, there is no evidence that the Claimant was subjected to any process akin to the one contemplated under Section 41 of the *Employment Act*. I say so because from the record, there is no evidence putting the Claimant on notice that the Respondent was contemplating terminating her employment on account of whatever allegations and thereafter, granting her the opportunity to ventilate her defence.
61. The Respondent has submitted that the Claimant was terminated as per her contractual terms as she was paid salary in lieu of notice. Respectfully, the contractual terms cannot oust the statutory provisions under Section 41, more so noting that the said provision is couched in mandatory terms and sets the minimum standards of what constitutes a fair procedure.
62. My position is fortified by the finding of the Court of Appeal in the case of *Postal Corporation of Kenya vs Andrew K. Tanui* [2019] eKLR where the Learned Judges reckoned as follows:
- “It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with. The section provides... for Four elements must thus be discernible for the procedure to pass muster:-
- (i) an explanation of the grounds of termination in a language understood by the employee;



- (ii) the reason for which the employer is considering termination;
- (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
- (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”

63. I wholly subscribe to the position taken in the above case and deploy the findings therein to this case.
64. Regardless of the reasons leading to the termination of the Claimant’s contract of service, the Respondent was duty bound to subject her to a fair process.
65. Needless to say, as the Respondent failed to comply with the requirements of Section 41 of the [Employment Act](#), it failed the test of procedural fairness, hence the Claimant’s termination was unlawful.
66. The total sum of my consideration is that there was no substantive justification to warrant the Claimant’s termination and the Respondent failed to comply with the requirements of procedural fairness in effecting the Claimant’s termination. This fell short of the requirements stipulated under Sections 41, 43 and 45 of the [Employment Act](#) hence the Claimant’s termination was unfair and unlawful.

**Constitutional violation?**

67. The Claimant averred that the Respondent’s servants violated her constitutional right to human dignity and right not to be subjected to inhuman and degrading treatment. In this regard, the Claimant’s case is hinged on the email correspondence exchanged between her former supervisor, the Dean Faculty of Nursing and the Respondent’s Vice President, Human Resources. For context purposes I will sample a few of the emails in question.
68. In the email of 15<sup>th</sup> December, 2015, the Respondent’s Vice President Human Resources writes to the Dean as follows:
- “She’s blowing smoke.....let’s start doing performance management on Florah..... She is quite useless in any of the albeit few exchanges that I have had with her, and she was of zero help to Yasmin...”
69. In another email of 16<sup>th</sup> December, 2015, the Dean addresses the Respondent’s Vice President Human Resources as follows:
- “Yep agree. She puffs up like those bull frogs and its intended to frighten so people back down. And she is very arrogant...today I simply suggested that we could have a meeting in the new year to discuss the idea with the others and she pulled that silly stunt that I have to get HR and that I don’t have the right to do this....Yep sheesh! I am also concerned at her level of nosiness and behind the scenes chit, chat...”
70. It is evident from the above emails that the Claimant’s then supervisor (Dean) and the Respondent’s Vice President Human Resources have described her (Claimant) in a manner that is quite unflattering. Can the same be termed as a violation of the Claimant’s right to human dignity?
71. Article 28 of [the Constitution](#) provides that every person has inherent dignity and the right to have that dignity respected and protected.



72. It is worth noting that Constitution has not ascribed a definition to the term human dignity. This being the case, I turn to case law.
73. In the case of *M W K & another vs Attorney General & 3 others* [2017] eKLR, the Court in considering what constitutes human dignity, had this to say:
- “ 81. The right to dignity is at the heart of *the Constitution*. It is the basis of many other rights. The basis is that of recognizing that every person has worth and value and must be treated with dignity.” Emphasis mine
74. Basically, the right to human dignity springs from the belief that all people by virtue of being human hold a special value, self-worth and deserve respect. The International Covenant on Civil and Political Rights which came into force on 23<sup>rd</sup> March 1976, provides partly in its preamble that, “These rights derive from the inherent dignity of the human person.”
75. Back to the instant case, a perusal of the email correspondence in question, leaves no doubt that the same were derogatory, inflicted injury to the Claimant’s dignity, were contemptuous, insulting and humiliating. They had the potential effect of diminishing the Claimant’s self-worth. As the Respondent admits, the same were graphic. Indeed, whichever way one looks, they cannot be viewed in any positive sense.
76. Granted, the Dean being the Claimant’s supervisor and the Respondent’s Vice President, Human Resources, may have touched on the Claimant’s performance at work in some of the conversations. Nonetheless, they crossed the line when they engaged in discussions regarding the Claimant’s person. That was uncalled for and beyond limits. This was further exacerbated by the fact that the two were the Claimant’s superiors.
77. In light of the above and considering the meaning of the term “human dignity”, I am inclined to find that the communication contained in the email correspondence exchanged between the Respondent’s senior officials (Dean Faculty of Nursing and the Vice President Human Resources) infringed on the Claimant’s Constitutional right to have her dignity respected and protected. To that end, the Respondent is vicariously liable for their actions.
78. The Respondent has also raised an issue with regards to failure by the Claimant to channel her grievance through the mechanisms established within its Grievance Handling Procedure. The logical question to ask, is who was the Claimant required to lodge her grievance with?
79. A review of the Respondent’s Grievance Handling Procedure reveals that the first step in the Reporting Structure, is the employee’s immediate supervisor. If unresolved, the grievance is then escalated to the Head of Department and finally to the Head of Entity and the Human Resource Director.
80. In this case, the Claimant was aggrieved by the actions of her immediate supervisor who was the Dean of the Faculty and the Respondent’s Vice President Human Resources. As envisaged in the Grievance Handling Procedure, these are the two people the Claimant was required to channel her grievance to. Was it therefore practical for the Claimant to channel her grievance as per the Respondent’s Grievance Handling Procedure? I don’t think so. The way I see it, the Claimant was in a catch 22 situation. How was she to confront her superiors? If anything, when it became apparent to the Respondent that the Claimant had had access to the email communication in question, she was the one who was let go. Indeed, there is no evidence that action was taken against the Respondent’s two senior officials once it became apparent that they had engaged in the communication described above.
81. That said, I now turn to consider the reliefs available to the Claimant.



## Reliefs?

82. The Claimant has prayed for an order of reinstatement into her employment without any loss of benefits and without any victimization. Under the [Employment Act, 2007](#), the remedy of reinstatement is provided for under Section 49(3) (a). The factors to be considered by a court of law when deciding whether to grant an order reinstatement, are spelt out in Section 49(4) as follows:
- a. the wishes of the employee;
  - b. the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
  - c. the practicability of recommending reinstatement or re-engagement;
  - d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
  - e. the employee's length of service with the employer;
  - f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
  - g. the opportunities available to the employee for securing comparable or suitable employment with another employer;
  - h. the value of any severance payable by law;
  - i. the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
  - j. any expenses reasonably incurred by the employee as a consequence of the termination;
  - k. any conduct of the employee which to any extent caused or contributed to the termination;
  - l. any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
  - m. any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.
83. Applying the above factors to the instant case, it is my considered view that an order of reinstatement is not practical noting the circumstances attendant to the Claimant's exit from the Respondent's employment. Besides reinstatement is only granted in exceptional cases. The Court is not satisfied that this is an exceptional case as to warrant reinstatement.
84. It is also worth noting that in terms of Section 12 (3) (vii) of the [Employment and Labour Relations Court Act](#), this Court can only order the reinstatement of an employee within three years of dismissal. The Claimant in this case was terminated from employment with effect from 9<sup>th</sup> March, 2018. Therefore, as at now, an order of reinstatement is not feasible as it will be contrary to Section 12 (3) (vii) aforesaid.



85. With regards to the payment of the Claimant’s salary for the remainder of her contract, the Court declines to award the same, seeing that it is an anticipatory relief in nature. In arriving at this determination, I am guided by the decision of the Court of Appeal in the case of D K Njagi Marete vs Teachers Service Commission [2020] eKLR, thus:

“(26) On the expectation of the employee as to the length of time that he would have continued to serve in the employ of the respondent, while it is true that the appellant was employed on permanent and pensionable terms, this, of itself, is not an indication that the appellant would have continued to be employed until the age of 60 years. In Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR (Civil Appeal No. 25A of 2013) this Court dismissed a claim for anticipatory earnings that the appellant would have earned until her date of retirement after adopting with approval the sentiments of the (then) Industrial Court in Engineer Francis N. Gachuri v Energy Regulatory Commission [2013] eKLR (Industrial Cause No. 203 of 2011) which held as follows:

“There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant’s contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the *Employment Act* does not mention the word „permanent employment?.”

(27) Thus, it is clear to us that the claim for anticipatory benefits was not anchored in law, and we therefore decline to review the judgment of the trial court on these terms. This ground of appeal therefore fails.”

86. In the circumstances, the order that commends itself in this case, is an award of damages for unfair termination. As the Court has found that the Claimant’s termination was unfair and unlawful, she is awarded compensatory damages equivalent to 12 months of her gross salary. The Court has awarded the Claimant maximum compensation having taken into account the events leading up to her termination from employment. This is more specifically noting the email trail constituting communication between the Claimant’s former supervisor and the Respondent’s Vice President Human Resources. I will sample a few.

87. In an email of 15<sup>th</sup> December, 2015, the Respondent’s Vice President Human Resources writes:

“She’s blowing smoke.....let’s start doing performance management on Florah. She is not “above” the others, and certainly she has the skills to...phone and reception. So, I am all behind you. So how...Do you have the JD’s? Her performance review could be right away when you return, and then your documented disappointment will most certainly get her attention. She is quite useless in any of the albeit few exchanges that I have had with her, and she was of zero help to Yasmin, who was used to Aziz. Go ahead and plan your changes. We can give them a month of notice or not....and on we go. All I can say is sheesh!”



88. In another email of 16<sup>th</sup> December, 2015, the Respondent's Vice President Human Resources writes:
- “Let's just start to figure out how to remove her, the right way. She will sue, but at this point we already have a few cases in the works, so what's another?”
89. In another email the Dean of the Faculty who was the Claimant's immediate supervisor writes:
- “...I need someone else to help me. I don't want a stranger and don't want Florah. I am having some issues with her level of intrusiveness...”
90. What manifests from the foregoing emails is that the Claimant's immediate supervisor did not want to work with her. It is also apparent that the Claimant's exit from the Respondent's employment was premeditated between her supervisor and the Respondent's Vice President Human Resources and had nothing to do with misconduct on her part.
91. For the foregoing reasons, the Claimant merits to be awarded maximum compensation.
92. As the Court has also found that the Respondent's employees being the Claimant's former superiors (the Dean Faculty of Nursing and the Vice President Human Resources) violated her right to have her dignity respected and protected, she is entitled to award of damages as compensation. In this regard, the Claimant has asked for a sum of Kshs. 36,000,000/= as compensation. However, she has not indicated how she arrived at the said sum. In the case of *M W K & another vs Attorney General & 3 others* [2017] eKLR, the Court awarded a global sum of Kshs 4,000,000/= having found that the actions of the Respondents who were police officers, violated the rights of the first Petitioner who was a minor, in that they failed to act in her best interests as provided under the Article 53 of *the Constitution*. The Court that case further found that the fourth Respondents' conduct of searching the first Petitioner in the presence of male police officers and/or other students and members of the public and photographing her or allowing or permitting third parties to take her nude photographs was a gross violation of the law and an infringement of her Constitutional Rights to dignity, privacy and her right not to be subjected to degrading treatment.
93. Drawing parallels with the above case and considering the nature and extent of the violation herein and noting that it is not possible to quantify infringement of the Claimant's constitutional rights in the case herein, my considered view is that an award in the sum of Kshs. 2,000,000/= would be reasonable in the circumstances. This is further noting that the Claimant has been awarded maximum compensation for loss of employment.

## Orders

94. In the end, I enter Judgment in favour of the Claimant against the Respondent as follows:
- a. A declaration that the Claimant's termination from employment by the Respondent, was unfair and unlawful.
  - b. The Claimant is awarded compensatory damages in the sum of Kshs 1,713,120.00 being equivalent to 12 months of her gross salary.
  - c. The Claimant is awarded damages in the sum of kshs 2,000,000.00 for violation of her constitutional right to have her dignity respected and protected.
  - d. The total award is Kshs 3,713,120.00.
  - e. Interest on the amount in (d) at court rates from the date of Judgment until payment in full.



f. The Claimant shall also have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF AUGUST, 2023.**

.....

**STELLA RUTTO**

**JUDGE**

Appearance:

For the Claimant Mr. Muturi

For the Respondent Mr. Amoko

Court Assistant Abdimalik Hussein

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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.

STELLA RUTTO

JUDGE

