



**Sitienei v Kenya Agricultural and Livestock Research Organization (Cause 53 of 2019) [2022] KEELRC 1120 (KLR) (5 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1120 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO  
CAUSE 53 OF 2019  
ON MAKAU, J  
MAY 5, 2022**

**BETWEEN**

**KIBET SITIENEI ..... CLAIMANT**

**AND**

**KENYA AGRICULTURAL AND LIVESTOCK RESEARCH ORGANIZATION ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed this suit on 23<sup>rd</sup> September, 2019 alleging to have been summarily dismissed from employment on unsubstantiated claims of sexual harassment. On 24<sup>th</sup> November, 2021, pursuant to leave granted by this Court on the 17<sup>th</sup> November, 2021, the Claimant filed an Amended Memorandum of claim dated 18<sup>th</sup> November, 2021.
2. The Claimant avers that he was employed by the Tea Research Foundation of Kenya on 6<sup>th</sup> January, 2009 as Assistant Research Officer, which appointment was confirmed on 2<sup>nd</sup> March, 2010.
3. In the year 2013, the *Kenya Agricultural and Livestock Research Act* No. 17 was passed to establish the Kenya Agricultural and Livestock Research Organization (KALRO) which merged four research institution being Kenya Sugar Research Foundation, Coffee Research Foundation, Kenya Agricultural Research Institute and Tea Research Foundation of Kenya. As a result, the Claimant was appointed by KALRO on transfer of service vide a letter dated 18<sup>th</sup> May, 2018. His position was now Research Scientist-1 in Job group KR 7 earning a basic salary of Kshs. 108, 209 plus with Kshs 35,000 house allowance, Kshs 8,000 commuter allowance and commuter allowance depending on millage.
4. The Claimant stated that he worked diligently for the Respondent till 11<sup>th</sup> September, 2019 when he was summarily dismissed from employment vide letter of termination of even date without any prior notice or disciplinary hearing as provided for under the law and the Respondent's Human resource manual.



5. The circumstances leading to the termination was that the Respondent had received a complaint from a visiting agronomist, that the Claimant had sexually harassed her and without carrying out any investigation or subjecting the Claimant to disciplinary proceeding the Respondent summarily terminated his services.
6. Due to the termination, the Claimant avers that, he lost an opportunity to travel to Rome-Italy to attend to a technical meeting held by Food and Agriculture Organization (FAO) on low carbon Tea in Kenya, to be funded by FAO, and which was of immense benefit to Kenya.
7. The Claimant therefore prayed for the following reliefs as: -
  - a. A declaration that the termination letter dated 11<sup>th</sup> September, 2019 is null and void.
  - b. A declaration that the purported termination offends *the constitution* and should be declared unconstitutional.
  - c. Reinstatement of the Claimant and treat him on all aspect as if the Claimant employment had not been terminated.
  - d. The Respondent be ordered to reinstate the Claimant's employment terms as existed prior to the 11<sup>th</sup> September, 2019.
  - e. The Claimant be awarded the 3 months' salary in lieu of Notice.
  - f. The Claimant be awarded 36 months' salary as damages for unfair labour practices by the Respondent.
  - g. The Claimant be awarded general damages for the damage to his reputation as a scientist.
  - h. The Honourable Court be pleased to award such other orders that it may deem fit in the interest of justice.
8. The Respondent entered appearance on the 15<sup>th</sup> October, 2019 and filed a response to the claim on the 20<sup>th</sup> July, 2020. The Respondent admitted having employed the Claimant under job group KR.7. It then stated that the Claimant's services were terminated for sexually harassing Mrs. Candice McGladdery. This termination was done in line with clause 11 of the Respondent's Code of Conduct and Ethics. He was informed of his right to appeal within 6 weeks of the termination in line with the said Code of Conduct, but he failed.
9. The Respondent then stated that upon termination, the Claimant was replaced by another employee who is carrying out all duties and responsibilities that had been bestowed upon him.
10. It was then stated that the offence of sexual harassment amounted to gross misconduct which entitled the employer to summarily dismiss its employee under its Human Resource Manual and Section 44(4) of the *Employment Act*.
11. Finally, the Respondent averred that the suit is premature because the Claimant did not exhaust all the internal dispute resolution mechanism before coming to court and therefore it prayed for the suit to be dismissed with costs.

## Evidence

12. The Claimant testified as CW-1 and adopted his witness statement dated 19<sup>th</sup> September, 2019 plus the documents filed with the claim as his evidence. He further adopted as evidence his supporting affidavit filed on 19<sup>th</sup> September, 2019 and 5 documents annexed thereto.



13. His testimony was that he was employed by the Respondent on merit and denied on allegation of sexual harassment. He dismissed the alleged sexual harassment as false contending that a drive from the office to the hostel takes only 2 minutes and not 30 minutes as alleged by the Respondent. He also contended that no report was made to the police for the alleged sexual harassment, yet such serious offence would have attracted criminal charges.
14. He stated that he was neither served with prior notice nor was he taken through any disciplinary hearing before the termination. Upon his termination he was not paid his terminal dues. He stated that he was dismissed towards the end of the month but was not paid his salary for the month. As a result of the foregoing matters, he suffered financial stress and now prayed for the amended claim dated 18<sup>th</sup> November, 2021 to be allowed as prayed.
15. On cross examination by Chesero Advocate, CW-1 testified that he was employed by the Respondent vide the letter dated 18<sup>th</sup> May, 2018 which was a transfer of service. He stated that upon reporting to the Respondent he was told to sign the letter of offer which letter required him to be given the Respondent's code of conduct but none was given to him. He admitted that under clause 11.21.2 of the Code of Conduct and Ethics manual, sexual harassment is classified as gross misconduct. However, he maintained that he was not aware that the said offense attracts summary dismissal.
16. He contended that the allegation of sexual harassment was by a visiting Agronomist but the complaint was written by DR. Kamunya.
17. On further cross examination, CW-1 testified that he filed this suit on 19<sup>th</sup> September, 2019 a day after receiving the termination letter. He admitted that the letter informed him that he could appeal against the dismissal.
18. On re-examination he stated that he saw the Code of Conduct the day he came to file the suit after being told to photocopy from the Library. He was not aware of the same during employment. He also stated that he handed over his work as instructed by Dr. Kamunya. He then stated that he was evicted from the Respondent's house when he was away and during the said eviction he lost some property.
19. He also stated that he was entitled to hearing before the dismissal. He then clarified that matters of sexual harassment were booked in a register and such culprits were subjected to disciplinary hearing which was chaired by a lady. He was part of the committee, but his case was never booked as required by procedure.
20. He maintained his denial of the offence contending that he was the one that send a vehicle to pick the complainant from Nairobi, and all what they talked about was the project ahead of them and their families. He then stated that on the material day the complainant asked him about his family and since she wanted to meet them, he took her to his house where his wife and children were present. Thereafter he dropped her back to the hostel and he went back to his house which was about 2 minutes' drive. The next day he sent the driver to pick the complainant but she was taken back to Nairobi with instructions from Dr. Kamunya. He tried to reach her by phone but she told him to talk to his bosses.
21. The Respondent's, director, Stanson Kamunya testified as RW-1 and adopted his written statement dated 5<sup>th</sup> November, 2021 as his evidence in chief. He also produced 5 documents as exhibits. However, the affidavit sworn by Candice Mcgladdery on the 14<sup>th</sup> October, 2019 was withdrawn and expunged from record.
22. In summary RW-1 testified that all employees are governed by Code of Conduct which is available in the Respondent's office for all employees to peruse and acquaint themselves with disciplinary offences, punishment, procedures and appeal process.



23. He testified that on 8<sup>th</sup> September 2019, the Claimant while on duty sexually harassed Mrs. Candice McGladdery contrary to the respondent's Code of Conduct. He relied on an email written by Mrs. McGladdery as evidence to support the allegation that the Claimant committed the said offence. He contended that the offence is classified as gross misconduct and it warrants summary dismissal.
24. Finally, he contended that the dismissal was done in accordance with the procedure set out in the respondent's Code of Conduct and maintained that the suit is premature because the Claimant brought it before exhausting the appeal process availed to him by the Code of Conduct.
25. On cross-examination by Ogado advocate, RW-1 admitted that only Director General has the mandate to represent the Respondent. However, he contended that the Director General had verbally delegated the mandate to him to give evidence herein.
26. He then testified that the HR manual was not attached to his employment letter and he came to know of it by virtue of his service in the management. He confirmed that the Claimant was in job Grade KR-7 which is not managerial position. He was not aware whether the Claimant was served with the HR manual.
27. RW1 admitted that he was aware how the incident occurred but only got to know of the said incident when he received an email from the complainant. He further testified that he was the one who persuaded the complainant not to report the incident to the police in order to protect the image of the organization which is ISO certified and advised that the matter be handled internally.
28. He testified that it has a Gender and Disability Committee that deals with disciplinary cases such as sexual harassment. However, he clarified that the Claimant being of a higher cadre could not be dealt with by the said complaints committee forcing him to refer the complaint to the head office which is headed by the Director General, who fired the Claimant. He admitted that he did not know what compelled the Director General to summarily dismiss the Claimant.
29. On further cross –examination, the witness testified that prior to writing the letter of 9<sup>th</sup> September, 2019 forwarding the complaint to the DG he had not summoned the Claimant or sought to hear his side of the story regarding the said complaint. He then maintained that such letter ought to have been drawn by the Director General.
30. He admitted that the respondent's HR Manual upholds the principles of Natural Justice. However, he confirmed that the Claimant was not accorded any hearing before dismissal. He contended, that the reason why the Claimant was not given audience was because there was an appeal procedure for him to raise his concerns.
31. On re-examination, the witness stated that he followed the procedure in the manual by forwarding the complaint to the Director General. He further testified that the consequence for gross misconduct is summary termination and therefore that the Director General acted in accordance with the Human Resource Manual.

#### **Claimant's Submissions.**

32. The Claimant submitted that this Court is vested with jurisdiction as provided for under Article 162 (2) of *the Constitution* to hear and determine all matters as contemplated under Section 12 of the *Employment Act*. In support of his argument the Claimant relied on the case of *Samuel Kamau Macharia & Another Vs Kenya Commercial Bank and 2 others* [2012] eKLR where the Supreme Court underscored that jurisdiction of a court flows from *the constitution* or statute or both.



33. It was then submitted that the fact that the Claimant had not exhausted all internal disciplinary mechanism is not a bar to seeking redress from this Court on the issues raised. Furthermore, it was argued that this Court's jurisdiction can only be limited by *the Constitution* or a statute and not the Respondent's Human Resource manual, he then cited the case of *Godfrey Osotsi v Amani National Congress* [2019] eKLR.
34. On the issue of unfair terminated, it was submitted that RW-1 has admitted that the Claimant was neither served with any prior notice nor was he subjected to any disciplinary hearing. It was argued that the said omission was contrary to Section 41 and 43 of the *Employment Act*. Further the respondent breached clause 11.7.1 of its own Human Resource Manual which outlines an elaborate procedure for handling disciplinary case for all its staff in grade KR 5 to KR 12 in which the Claimant fell. For emphasis the Claimant relied on the case of *Postal Corporation of Kenya V Andrew K. Tanui* [2019] eKLR.
35. It was further submitted that the Claimant was dismissed on allegation of sexual harassment which complaint was not subjected to any investigation by the Respondent neither were they verified to justify the termination. It was argued that the Respondent being tasked with the responsibility to give reason for termination failed to adduce any evidence in support of the allegation or even call the complainant as their witness to support its case. Therefore, it was argued that the Claimant's dismissal was not substantively unfair.
36. With regard to the reliefs sought, the Claimant urged this Court to order for his reinstatement as provided for under Section 49 of the *Employment Act*. It was argued that the Claimant is a scientist who was trained in special areas whose opportunity in other institution is limited in light of the fact that the Respondent is a merger of 4 research institutions. It was then submitted that there was no breach of trust between the Claimant and the Respondent and therefore the remedy of reinstatement is the appropriate remedy in the circumstances.
37. In the alternative the Claimant submitted that he should be compensated for the said unfair termination as prayed in the Amended Memorandum of claim.

#### **Respondent's Submissions.**

38. The Respondent, on the other hand, submitted that the dismissal of Claimant was justified in the circumstances of this case. It was argued that the disciplinary process followed is provided under clause 11.7.1 of the Respondent Human Resource Manual. It was further submitted that the Claimant being in job grade KR7 was to be disciplined by the Director General who summarily dismissed him vide the letter of termination dated 11<sup>th</sup> September, 2019 in accordance Code of Conduct and Ethics.
39. It is the Respondent's submissions that the reasons for terminating the Claimant's services was communicated to him and that he was given a window of 6 weeks to appeal the decision of the Respondent but he failed to do so.
40. The Respondent then cited the case of *Elvis K Likobele v Kenya Airports Authority* [2015] eKLR where the Court gave a combination of elements that amounts to sexual harassment. The Respondent then submitted that the Claimant was reported to have sexually harassed one of its visiting employees and therefore he deserved the punishment meted against him.
41. On whether the Claimant is entitled to the Orders Sought, it was submitted that, the allegation by the Claimant lacks particulars of the violation and the provisions allegedly violated. For emphasis it relied on the case of *Anarita Karimi Njiru V Republic* [1979] I KLR 54 and the case of *Mumo Matemo*



*V Trusted Society of Human Rights Alliance* [2013] eKLR where the courts held that pleadings in constitutional petitions must possess some degree of precision.

42. With regard to reinstatement, the Respondent submitted that the position which the Claimant was holding has already been taken over by another employee. Further, it argued that to reinstate the Claimant would not be practicable considering the passage of time from 2019 to date.
43. On the three months' notice pay and the damages for the unfair termination sought, it was submitted that the Claimant was justifiably dismissed and therefore notice was not warranted. Further, the 36 months' pay sought as damages, is not warranted because the Claimant's dismissal was justified by his gross misconduct. In addition, it submitted that section 49 provide for a maximum of 12 months' salary in compensation and not 36 months' pay.
44. On the damages sought for the alleged defamation, it was submitted that the Claimant has not pleaded and particularized the alleged defamation. Further it was argued that the same has not been proved and therefore cannot be granted. For emphasis it relied of the case of *Phineas Nyagab V Gitobu Imanyara* [2013] eKLR.
45. In conclusion the Respondent urged that it has proved the reason for dismissing the Claimant and that it followed the procedure provided in the Human Resource Manual before dismissing him. Therefore, it maintained that the dismissal was justified and the Claimant's case ought to be dismissed with costs.

#### **Issues for Analysis and Determination.**

46. I have carefully considered the pleadings, evidence and the submission presented by both parties. It is common ground that the Claimant was employed by the respondent until 11<sup>th</sup> September, 2019 when he was dismissed for sexual harassment of a visiting female Agronomist. The issues that commend themselves for determination in this matter are as follows: -
  - a. a) Whether the reason for the dismissal was valid and fair.
  - b. b) Whether fair procedure was followed before the dismissal.
  - c. c) Whether the reliefs sought are merited.

#### **Reason for the dismissal**

47. The reason cited for the summary dismissal of the Claimant was that on 8<sup>th</sup> September, 2019 between 5 and 7 PM he sexually harassed Mrs. Candice Mcgladdery, a visiting Agronomist from South Africa. The complainant was an employee of Sirius Minerals Plc, Africa, a South African Company which is collaborating with Tea Research Institute (TRI) on a 4-year project from 2019 – 2023 at a cost of Kshs. 6,423,174.
48. The Claimant has denied the alleged offence and contends that such serious allegation could have attracted criminal charges. He contends that he only talked with complainant work related issues and family. He maintained that the drive from the office to his residence takes only 2 minutes.
49. The complainant did not give evidence in this case and her affidavit on the alleged sexual harassment was withdrawn during the hearing. The only evidence produced to prove the said offence was an email written by her to RW-1on 9<sup>th</sup> September, 2019 by which she lodged an official complaint against the Claimant for sexual harassment. The Claimant did not give any reason as to why a foreigner he had met for the first time would, immediately after parting with him, make such serious allegation against him and even go to an extent of writing a long email detailing how she was harassed by him. The email was produced as an exhibit without objection.



50. The Claimant had the opportunity to commit the said offence because they were only two in the car when the offence was allegedly committed. According to the said email, he made repeated sexual advances and comments to Mrs. Candice McGladdery against her will. He also touched her body parts repeatedly despite her protest and went as far as asking her for a kiss which she turned down. In my view, a reasonable employer who is addressed the above email would dismiss the employee for gross misconduct unless the employees makes a rebuttal.
51. Section 6 of the *Employment Act* provides that an employee is sexually harassed if the employer of the employee or a representative of the employer or co-worker, among other things;
- “(d) Shows physical behavior of a sexual nature which directly or indirectly subjects the employee to behavior that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee’s employment, job performance, or job satisfaction.”
52. Clause 10.27.2(b) of the respondent’s Code of Conduct and Ethics provides for similar offence while the mode of reporting is provided in clause 10.27.3 and 10.27.4. The complainant was however not an employee of the respondent. The said allegations and especially by a foreigner who was in the country for the benefit of the respondent was serious. The employer should also not have prevented the lady from reporting the matter to the police for investigations and arraignment in court.
53. Having considered the evidence presented by both sides, I find that the veracity of the complainant’s email dated 9<sup>th</sup> September, 2019 has not been verified. The contents therein remains mere allegations since she did not appear before any disciplinary committee of the respondent or before this court to give evidence under oath and be cross examined by the Claimant. She wrote the email and disappeared.
54. Furthermore, Ms Bett whom the complainant allegedly spoke to immediately after returning to the guest house did not give evidence before any disciplinary committee or this court. The Respondent’s Director General only received a report from RW-1 on 9<sup>th</sup> September 2019 and on 11<sup>th</sup> September, 2019 he summarily dismissed the Claimant without talking to the complainant and the Claimant to establish the validity of the alleged sexual harassment. In my view, the Respondent has not proved on a balance of probability that the reason for the dismissal was valid and fair.

### **Procedure followed before dismissal**

55. Section 41 of the *Employment Act* provides for mandatory procedure which an employer must follow before terminating employment contract of an employee, thus: -

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

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



56. The Court of Appeal upheld the above provision in the case of *Kenfreight (EA) Limited V. Benson K. Nguti* [2016] eKLR, when it held that: -

“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee’s conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure...

Apart from issuing proper Notice according to the contract (or payment in lieu of Notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service”.

57. Again in the case of *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR, the Court held that: -

“Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee’s conduct, capacity, compatibility, or alternatively that the employer did not act in accordance with justice and equity. The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee”

58. It follows from the Section 41 of the *Employment Act*, and the said precedents that, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity, the employer must explain the reason to the employee, in a language that the employee understands. The employee is entitled to have a fellow employee or a shop floor union representative of own choice present when the employer is explaining the reasons for the intended termination and the two are entitled to make representations in defence, and the employer is obliged to consider the same before making the decision to terminate.

59. Clause 11.7. of the Respondent Human Resource Manual provides as follows; -

“The organization shall be guided by the following principles in handling disciplinary matters: -

- a) The rules of natural justice;



- b) Procedural fairness, where an officer must be allowed adequate opportunity to prepare and present his/her case;
- c) The deciding authority must be unbiased when hearing and making decisions;
- d) Decisions must be based upon logical proof or evidential material;
- e) Fair administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair;
- f) Every officer to whom disciplinary action is taken has a right to:
  - (i). Written reasons for any disciplinary action that is taken against him;
  - (ii). Prior and adequate notices of the nature and reasons for the intended disciplinary action.
- g) An opportunity to be heard and to make representations in that regard;
- h) An opportunity to attend proceedings in person or in the company of an expert of his choice, cross examine persons who give adverse evidence against him and where request for adjournment of proceedings necessary;
- i) Notice of right to legal representation, where applicable;
- j) Notice of right to an appeal or review against a disciplinary decision;
- k) Information, materials and evidence to be relied upon in making a decision or taking a disciplinary action.”

60. In this case RW-1 admitted during cross examination that the Claimant was not accorded any hearing before dismissal. He was neither served with a show cause letter to give a written defence nor was he summoned to an oral hearing before his dismissal vide the letter dated 11<sup>th</sup> September, 2019. Consequently, the dismissal was not done in accordance with a fair procedure as set out in Section 41 of the *Employment Act* and Clause 11.7.1 of the respondent’s HR Manual. Consequently, I find and hold that the dismissal of the Claimant was done without according him a fair opportunity to defend himself.

### **Remedies.**

- 61. Having found that the Respondent has failed to prove a valid reason for dismissing the Claimant and that fair procedure was followed, I make declaration that the dismissal was unfair within the meaning of section 45 of the *employment Act*. However, since the dismissal took effect on 11<sup>th</sup> September, 2019 and therefore it cannot be a nullity.
- 62. The Claimant’s main prayer is to be reinstated to employment without loss of any benefits. Section 12 (3) of the *Employment and Labour Relations Court Act* grants this court power to order reinstatement of a dismissed employee upon terms provided three years have not lapsed from the date of separation.
- 63. However, reinstatement is not automatic and the same is allowed only in very exceptional circumstances depending on the facts and circumstances of each case. In the case of *Kenya Airways*



Limited V Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR, the Court of Appeal (Maraga JA) held that: -

“As I have said, in Kenya, reinstatement is one of the remedies provided for in Section 49(3) as read with Section 50 of the Employment Act and Section 12 (3) (vii) of the Industrial Court Act that the court can grant. Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance, the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them. That will engender friction, which is not healthy for businesses, unless the employment relationship is capable of withstanding friction like where the employer is a large organization in which personal contact between the affected employee and the officer who took action against him will be minimal.”

64. Accordingly, the factors to consider in this case include; the wishes and expectations of the employee, the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances, the practicability of reinstatement, any compensation paid by the employer and chances of the employee securing alternative employment.
65. The Claimant’s basis for seeking reinstatement is based on the fact that he is still unemployed to date, that he is a specialized research scientist in Tea sector which Respondent is the only institution dealing with research of such specialized nature, his time of service at the Respondent that span for 10 years, and the fact that there is no breach of trust between him and the Respondent.
66. The Respondent on the other hand opposed the reinstatement considering the time lapsed from the time of termination and the fact that the Claimant’s position has already been taken over by another employee.
67. It is not in dispute that the Claimant in this case is an accomplished scientist and a PHD holder as evidence by his certificates attached to the claim. However, his position has already been taken over by another person and therefore reinstatement is not practicable now. Consequently, he will have to contend with an award of damages under Section 49(1) of the Employment Act.
68. He prayed for 3 months’ salary in lieu of notice plus 36 months’ salary as compensation. There is no evidence on record showing that he was entitled to 3 months’ notice period before termination. Therefore, I award him one-month salary in lieu of notice by dint of section 35 of the Act because he was drawing salary on monthly basis. According to his pay slip for August 2019, his gross pay was Kshs.151, 209.
69. I further award him 12 months’ salary as compensation for the unfair termination considering his long service of 10 years without any warning letters. The employer has also failed to prove that he committed the misconduct forming the basis for his dismissal.
70. The Claimant also prayed for general damages for alleged defamation and damage to his reputation. However, he neither pleaded the particulars of the said tort nor led any evidence to prove the same. Therefore, I decline this prayer.
71. In conclusion I enter judgment for the Claimant against the respondent in the following terms: -  
Notice Kshs. 151,209



Compensation Kshs. 1,814,508.

Total Kshs. 1,965,717

The award is subject to statutory deduction but in addition to costs and interests at court rates from the date hereof.

**Dated, signed and delivered at Nakuru this 5<sup>th</sup> day of May, 2022.**

**onesmus n makau**

**judge**

**Order**

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N. MAKAU**

**JUDGE**

