



**Mokaya v Chandaria Food Plus Supermarket Ltd & another (Cause 1858 of 2017) [2022] KEELRC 1261 (KLR) (24 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1261 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1858 OF 2017  
K OCHARO, J  
JUNE 24, 2022**

**BETWEEN**

**ANN KEMUNTO MOKAYA ..... CLAIMANT**

**AND**

**CHANDARIA FOOD PLUS SUPERMARKET LTD ..... 1<sup>ST</sup> RESPONDENT**

**JANE MWANGI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This suit was initiated by a Statement of Claim dated 28<sup>th</sup> August 2017, wherein the Claimant alleged that her employment was unlawfully and unfairly terminated after being subjected to a frivolous disciplinary process. She seeks the following orders against the Respondent:
  - a. A declaration that the Claimant's constitutional rights and more particularly the right to fair administrative action and the right not to be discriminated against have been breached.
  - b. A declaration that Claimant's subsequent dismissal from the employment both was predicated upon illogical, unreasonable, oppressive, malicious and unfair grounds.
  - c. A declaration that Claimant's dismissal from employment was/is unlawful, illegal, unreasonable and unfair.
  - d. Compensation of the Claimant by the 1<sup>st</sup> Respondent for constructive termination and eventually unlawful and unfair termination
  - e. That the 1<sup>st</sup> Respondent pays the Claimant 2 months' salary in lieu of notice.
  - f. That the 1<sup>st</sup> Respondent fully pays the Claimant's salary arrears for the months of June, July and August 2017:
  - g. Interest at Court rates on (d) - (f).



- h. That both Respondents be ordered to pay general damages to the Claimant.
  - i. That both Respondents be ordered to pay the Claimant exemplary damages for discrimination on the basis pregnancy and motherhood; gross violation of the Claimant's human dignity; emotional stress and injury to her reputation occasioned by the malicious investigations.
  - j. That both Respondents pay the Claimant the costs of this litigation.
2. In response to the claim, the Respondents filed a Memorandum of Response dated 30<sup>th</sup> October 2017, wherein it denied the Claimant's cause of action, and entitlement to the reliefs she has sought.

### **Claimant's Case**

3. The Claimant avers that she was employed by the 1<sup>ST</sup> Respondent as a Human Resource Assistant on 1<sup>st</sup> January 2016, with a starting salary of Kshs.28,406 and a house allowance of Kshs. 4,829. She discharged her responsibilities competently, diligently and faithfully throughout her employment until her termination on 16<sup>th</sup> August 2017.
4. She stated that in the course of her employment she was made in charge of recruitment. However, she was not solely driving this function, the 1<sup>st</sup> Respondent also engaged a recruitment agency to hire employees on its behalf for various positions. The function was also exercised by the 2<sup>nd</sup> Respondent.
5. It was her case that on the 20<sup>th</sup> December 2016, she received a show cause letter from the 2<sup>nd</sup> Respondent, requiring her to show cause why disciplinary action could not be taken against her on account of bribery allegations. According to her, the allegations were baseless. She responded to the letter through Counsel.
6. The Claimant stated that the investigation in regard to the alleged bribery was conducted when she was away on maternity leave. The investigations were a witch hunt by the 2<sup>nd</sup> Respondent, without any valid cause, malicious and only intended to embarrass and eliminate the Claimant from her employment.
7. As the disciplinary process against her was going on, the 2<sup>nd</sup> Respondent caused to be advertised the Claimant's position, through a notice that was circulated internally, requesting her colleagues to apply for the same on the ground that her employment had been terminated. According to the Claimant all these was happening while the disciplinary process had not been concluded, and as she was on maternity leave.
8. The Claimant asserted that on the 9<sup>th</sup> of June 2017, she received a letter of redeployment from the 1<sup>st</sup> Respondent's Head Office as HR Assistant to Karen branch as a receiving clerk, a lower position. She took a position that this was a disciplinary measure, yet it was anchored on unsubstantiated bribery claims. This gave an impression that the disciplinary process was a sham and with a predetermined conclusion of guilty.
9. That consequently, by the said redeployment, her right to a fair hearing was breached and she was constructively dismissed from her position. She was subjected to discriminatory treatment without care that she had been expectant and just delivered.
10. The Claimant stated that she refused to accept the redeployment as according to her, acceptance would equate admitting that the allegations of bribery that had been levelled against her, were true.
11. In her oral testimony in court on the redeployment she stated that though she expressed her discomfort and unwillingness to move, the Respondents insisted that she does to allow the investigations to be conducted and completed.



12. On the 20<sup>th</sup> June, 2017 she was invited for a disciplinary hearing that was slated for the 6<sup>th</sup> July 2017. She attended with her Counsel. At the hearing no witness testified against her apart from the 2<sup>nd</sup> Respondent and no documentary evidence was tendered to prove the bribery allegations. In the hearing, the 2<sup>nd</sup> Respondent sat as the prosecutor, witness and judge in gross violation of due process.
13. Prior to or at the, hearing, she was not given any statements by the accusers, save for a narration by one Mr. Mwangi.
14. Through a letter dated 24<sup>th</sup> July 2017, the 1<sup>st</sup> Respondent terminated her contract of service.
15. Referred to the show cause letter dated 20<sup>th</sup> December, 2016, under cross examination, the Claimant acknowledged that she was asked to show cause over taking bribes to hire people. As at the date of the show cause letter, her due date for delivery was three months away, 11<sup>th</sup> March 2017. The show cause letter required her to respond thereto by following day. However, her Counsel requested for more time.
16. She acknowledged that during the period 20<sup>th</sup> December 2016 to 11<sup>th</sup> March 2017, she was not taken through any disciplinary process.
17. She stated further that the letter dated 11<sup>th</sup> March 2017 by the 1<sup>st</sup> Respondent required her to move to Karen Branch pending investigations. The letter didn't posit that the transfer was as a result of a demotion or a consequence of any finding of guilt against her.
18. The Claimant admitted that according to the code of conduct that was attached to her letter of appointment, the 1<sup>st</sup> Respondent as the employer, had a right to transfer her to any branch. However, she was not aware that it had a right to transfer her to another department.
19. She stated that she was supposed to report back to work in the month of July 2017, but she didn't. The letter dated 6<sup>th</sup> June 2017, transferring her to Karen Branch was served on her. She didn't report to the new branch because the 1<sup>st</sup> Respondent had not told her whether or not the investigations on the allegations of bribery were complete.
20. The Claimant acknowledged that she was served with a show cause letter dated 19<sup>th</sup> June 2017 and thereafter invited through a letter dated 20<sup>th</sup> June, 2017 to a disciplinary hearing that was slated for the 27<sup>th</sup> June, 2017.
21. On receiving the termination letter dated 24<sup>th</sup> July 2017, she appealed against the decision to terminate, and thereafter she was invited for the hearing of the appeal, which was heard on the 7<sup>th</sup> September 2017. The appeal was successful. She was reinstated to work, however not to the position she had earlier on held. She was supposed to report back to work on the 10<sup>th</sup> September 2017, she did not.
22. In her testimony the Claimant stated further that after failing to report to work, a show cause letter was issued on the 29<sup>th</sup> September 2017. She didn't pick the letter, therefore, she didn't know what its subject matter was. The letter is indicated to have been emailed to her advocate. However, the Advocate did not bring it to her attention.
23. She was subsequently served with a termination letter through her email address.
24. During the period she was on maternity leave her salaries were paid duly. However, she was not paid salaries for June, July and August, 2017.
25. In her evidence in chief, the witness stated that she delivered in March, her termination came in in July. She received the reinstatement letter on 15<sup>th</sup> September 2017. She did not report back to work because according to her, the matter had not been concluded.



## **Respondent's case.**

26. The 2<sup>nd</sup> Respondent presented the Respondents case. She urged the Court to adopt her witness statement as her evidence in Chief, and the documents that they filed herein as their documentary evidence. The witness stated that before her termination the Claimant was an employee of the 1<sup>st</sup> Respondent as a Human Resource Assistant, having been employed through a letter of appointment dated 11<sup>th</sup> February 2016.
27. In the course of the Claimant's employment, the 1<sup>st</sup> Respondent received complaints from various potential employees, that the Claimant was demanding for money from them as a pre-condition for their consideration for employment. The 2<sup>nd</sup> Respondent [witness], stated that she personally conducted the investigations and that indeed it emerged that the Claimant had been receiving bribes through agents to facilitate hiring of employees.
28. On the 20<sup>th</sup> December 2016, the Claimant was issued with a show cause letter over the allegations. She was supposed to give a response by the following day but she requested for more time through her advocate.
29. The witness stated that through a letter dated 11<sup>th</sup> January 2017, the 1<sup>st</sup> Respondent suspended the disciplinary hearing process and deployed the Claimant to the Customer Care/LPO & Receiving Clerk Desk effective 15<sup>th</sup> January 2017, pending the conclusion of the disciplinary hearing. The Claimant refused to acknowledge receipt of the letter contending that the same was wrongly dated. This prompted the 1<sup>st</sup> Respondent to issue another letter dated 9<sup>th</sup> June 2017.
30. The Claimant wrote a letter dated 13<sup>th</sup> June 2017, expressing her unwillingness to report to the new branch until the allegations against her were cleared. Consequently, the 1<sup>st</sup> Respondent issued a show cause letter dated 19<sup>th</sup> June 2017, requiring her to show cause why disciplinary action would not be taken against her for the failure to report to the new station, moving which was an interim measure pending completion of the disciplinary hearing, on the subject in the show cause letter dated 20<sup>th</sup> December 2016.
31. The witness testified that a disciplinary hearing was conducted on the 6<sup>th</sup> July 2017 in the presence of the Claimant's Advocate. Subsequently, the 1<sup>st</sup> Respondent decided to terminate her employment. Her services were terminated through a letter dated 24<sup>th</sup> July 2017.
32. The Claimant challenged the termination by way of an appeal through a letter by her Advocate dated 16<sup>th</sup> August 2017, subsequently, she was invited to the hearing of the appeal through the 1<sup>st</sup> Respondent's letter dated 31<sup>st</sup> August 2017. The appeal was successful, with a decision to have the Claimant reinstated in employment but be redeployed to the 1<sup>st</sup> Respondent's Karen Branch as A LPO/Receiving Clerk. Her salary was maintained.
33. The decision on the appeal and redeployment was communicated through the letter dated 15<sup>th</sup> September 2017. She was supposed to report to the new station not later than 20<sup>th</sup> September 2017. In the letter she was cautioned that a failure to report to the new work station would attract disciplinary action against her.
34. The Claimant failed to report to work on the 20<sup>th</sup> September 2017, prompting the 1<sup>st</sup> Respondent to issue the Claimant with a show cause letter dated 29<sup>th</sup> September 2017. Thereafter, the Claimant was invited for a disciplinary hearing that was scheduled for 13<sup>th</sup> October 2017, through a letter dated 11<sup>th</sup> October 2017.



35. The witness asserted that the Claimant failed to attend the disciplinary hearing, and instead through her Counsel indicated that she won't participate in the disciplinary process. The 1<sup>st</sup> Respondent was left with no option but terminate her employment. It terminated her employment through a letter dated 18<sup>th</sup> October 2017.
36. The witness asserted that the termination was justified and procedurally fair. The Claimant is not entitled to any of the reliefs sought. They therefore urge the court to dismiss the same with costs.
37. In her evidence under cross examination, the witness stated that there had been allegations of bribery not once not twice. There is a prospective employee who alleged that the Claimant had demanded from her Kshs. 50,000 to facilitate her employment. When the witness confronted the Claimant with the allegation, the latter demanded that she avails witnesses. It is this incident that triggered her to issue the 1<sup>st</sup> show cause letter.
38. The witness stated that at the hearing the Claimant's Counsel demanded for witnesses but instead of her availing the witnesses, she personally gave a narration of the events. The demand required some specifics, but they were not given.
39. In her evidence in re-examination, the witness stated that the appeal by the Claimant was allowed because there was no cogent evidence linking her to the bribery. Reason why she was reinstated.

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

40. The Claimant listed the following issues for determination:
  - a. Whether the Claimant was unfairly and unlawfully terminated from employment by the Respondent.
  - b. If paragraph (a) answers in the affirmative (unfair and unlawful termination), whether there was a procedural fairness in the process of terminating the Claimant's employment;
  - c. Whether the Respondent(s) had justifiable reasons in terminating the Claimant's employment;
  - d. Whether the remedies (if any) are available to the Claimant?
41. The Claimant submitted that from the claim and the evidence presented in court during the hearing, the Respondent had failed to discharge the burden in justifying the grounds for the Claimant's termination as provided for under Section 47(5) of the *Employment Act*.
42. On fair termination, the Claimant submitted that the two elements that must be satisfied by the employer to prove that termination was fair are fair procedure and presence of a valid reason as was espoused in the case of *Walter Ogal Anuro vs Teachers Service Commission* (2013) eKLR.
43. She submitted that Article 41 of *the Constitution* provides for fair labour practices, and Section 41 of the *Employment Act*, the essentials of the right to procedural fairness. Procedural fairness requires notification and hearing before termination of an employee's employment on grounds of misconduct. To buttress these submissions reliance was placed on the holding by Justice Radido in the case of *Anthony Mkala Chitavi vs Malindi Water & Sewerage Company Limited* (2013) eKLR;
 

“Section 41 of the *Employment Act*, 2007 has now made procedural fairness part of the employment contract in Kenya. Prior to the enactment of the Act, the right to a hearing was not part of the employment contract unless it was expressly incorporated into the contract



by agreement/staff manuals or policies of the parties or through regulations for public entities.

An employer was free generally to dismiss for bad reason or a good reason but on notice or payment in lieu of notice. The employer could even dismiss for no reason at all. There was no obligation to notify or listen to any representations by the employee.

The law was very harsh on employees. I believe this could have been one of the factors which led to incorporating what has long been referred to in administrative law as the rules of natural justice and embodied in the Latin Maxim *audi alteram partem* rule into the employment contract. Whatever the reasons, the *Employment Act*, 2007 has fundamentally changed the employment relationship in Kenya.

The ingredients of procedural fairness as I understand it is within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating.....

Secondly, it would follow naturally that if an employee has a right to be informed of the charges, he has a right to proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representation by the employee or shop floor representative if possible.

Thirdly if the is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

44. In terminating the Claimant’s employment, the 1<sup>st</sup> Respondent didn’t adhere to the mandatory procedure provided for in section 41 of the *Employment Act*, 2007.
45. On substantive fairness, the Claimant submitted that the requirement that an employer proves that there was substantive fairness in termination of an employee’s employment if the same were to be considered fair, flows from the provisions of section 43 of the of the *Employment Act*. To support this submission, the decisions in the cases of *Kenya Petroleum Oil Workers Union vs Kenya Petroleum Refineries Limited* (2013) eKLR and *Nazareno Kariuki vs Feed the Children Kenya* (2013) eKLR were cited.
46. According to her, the following forms the foundation for her position that the Respondent terminated her employment without substantive justification;
  - A]. The 1<sup>st</sup> Respondent failed to prove the reason for termination of her employment during the disciplinary hearing even after her counsel demanded for tangible evidence of bribery allegations against her.
  - B]. The 1<sup>st</sup> Respondent used the 2<sup>nd</sup> Respondent as the institutor of the alleged bribery allegations, investigator, witness and judge in regard to the Claimant’s case.
  - C]. The 2<sup>nd</sup> Respondent redeployed the Claimant to a lower position as a disciplinary measure, yet she had not been found guilty of any misconduct.
  - D]. The Respondents didn’t care about her expectant state during the investigations. They exposed her to health complications thus endangering the life of the unborn baby and the expectant mother.



47. She therefore argued that the Respondents had not advanced any valid reasons as to why she was unlawfully and unfairly terminated from employment and that the reasons given by the Respondents to justify her termination were invalid and unlawful thus rendering her termination illegal.
48. On the reliefs sought, the Claimant argued that the 1<sup>st</sup> Respondent having failed to prove that the termination was procedurally and substantively fair, she is entitled to the reliefs sought. Further, there was no evidence from the Respondents rebutting her claim that she was not paid her salary for the months of June, July and August, 2017.

### **Respondents' Submissions**

49. The Respondents listed the following as issues for determination:
  - a. Whether the reason for termination was fair and valid;
  - b. Whether due process was followed in the termination process;
  - c. Whether the Claimant exercised its prerogative within fair labour practices;
  - d. Whether the Claimant was discriminated against;
  - e. Whether constructive dismissal arises;
  - f. Whether the Claimant is entitled to any of the reliefs sought
50. Relying on the holding in the case of *Kennedy Maina Mirera vs Barclays Bank of Kenya Limited* (2018) eKLR, thus;
  16. However, section 47[5] puts a spin on this as follows-

“For any Complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment has occurred shall rest on the employee. While the grounds of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
  17. The two sections appear contradictory in terms, but this is not so taking into account that the provisions of section 107 of the *Evidence Act*, which provides-

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
  18. It is the Court’s considered view that sections 43[1] and 47[5] of the *Employment Act*, must be construed so as not nullify the conventional law on the burden of proof.
  19. Therefore, the plaintiff must adduce prima facie evidence that tends to show that his employment was not terminated for a valid reason and that the employer did not follow a fair procedure in terminating his employment. Once the Claimant presents prima facie evidence to that effect, the burden shifts to the employer to rebut the evidence by demonstrating that he/she had a valid reason to terminate the employment and that in effecting the termination, a fair procedure was followed. If the rebuttal is not sufficient then the Claimant is said to have proved his case.....”
51. Addressing the question as to the fairness of the procedure, the Respondents made the address in two segments, first, relating to the termination that was the subject matter of the letter dated 24<sup>th</sup> July 2017, second, the termination that was effected of the 18<sup>th</sup> October 2017. They argue that the Claimant’s pleadings, evidence and submissions dwell on the first termination, and do not touch on the second



- termination at all. The first disciplinary process was laid to rest when the Claimant succeeded in her appeal and a decision made for her reinstatement.
52. Due procedure was followed in the processes leading to the two terminations at the various times they occurred.
  53. The Respondents submitted that the 2<sup>nd</sup> disciplinary process was not challenged by the Claimant in her pleadings and evidence.
  54. Redeployment of the Claimant, was exercised in the 1<sup>st</sup> Respondent's prerogative within the fair labour practices.
  55. As per the provisions of Section 47(5) of the *Employment Act*, the burden of proving that termination was unfair or wrongful rests on the employee while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.
  56. Following the above, the Respondents submitted that the decision to terminate the Claimant was due to her unresponsiveness during the course of the events that led to her dismissal.
  57. On procedural fairness the Respondents submitted that the Claimant had only raised issues with her first disciplinary process which was abated as a result of the 1<sup>st</sup> Respondent's decision to reinstate her. The 1<sup>st</sup> Respondent also argued that the Claimant had not raised any objection to her 2<sup>nd</sup> disciplinary proceedings, both in her pleadings and evidence. The Respondents placed reliance on the Court of Appeal case of *Bamburi Cement Limited vs Farid Aboud Mobammed* (2016) eKLR.
  58. On her transfer, the Respondents submitted that the court cannot interfere with the policy of the 1<sup>st</sup> Respondent by agreeing with the Claimant that she was demoted. Parties are bound by internal policies and the Court cannot interfere with the same. To bolster this submission reliance was placed on the case of *Henry Ocbido vs NGO Co-ordination Board* (2015) eKLR.
  59. As for the Claimant's allegation of discrimination, the Respondents, while relying on the case of *GMV vs Bank of Africa Kenya Limited* (2013) eKLR argued that the Claimant had not adequately proved a case of discrimination. They maintained that the Claimant had not shown a nexus between her pregnancy and subsequent termination.
  60. On constructive dismissal, the Respondents submitted that the Claimant failed to demonstrate how the same arose and as such argued that the claim under this head does not arise at all. They placed reliance on the case of *Peterson Gutti Ondieki vs Kisii University* (2020) eKLR.
  61. The Respondents concluded that the Claimant is not entitled to the reliefs sought in her claim. They urged the court to dismiss the same with costs.

### **Analysis and Determination.**

62. The following issues emerge for determination in this matter, thus;
  - i. Whether the Claimant's pleadings do bring out a cause of action against the Respondents.
  - ii. Whether if the answer to (i) above is in the affirmative the termination of the Claimant's employment was fair.
  - iii. Whether the Claimant is entitled to the reliefs sought or any of them.
  - iv. Who should bear the costs of this cause?



### **Whether the Claimant's pleadings do bring out any cause of action against the Respondents.**

63. A cause of action or right of action in law is a set of facts sufficient to justify suing to obtain a legally recognized relief for instance, property, money, or to justify enforcement of a legal right against another party. Put in another way it is a fact or facts that enable a person bring action against another. Imperative to state that the fact or facts must clearly obtain in the pleadings seeking the relief(s).
64. The whole purpose of a pleading, be it a statement of claim, defence or reply is to define the issue(s) between the parties to confine the evidence of the trial to matters relevant to those issues, and ensure the trial proceeds to judgement without either party being taken to a disadvantage by the introduction of matters not fairly to be ascertained from pleadings. Put in another way, a party should know in advance in broad outline the case he will have to meet at the trial. This is the jurisprudence obtaining in the case of *Aristide Marage Nyangau v. Lavington Security Ltd* (2021) eKLR.
65. In the afore-cited cause, this Court held:

“No doubt, numerous judicial attention has been given on the importance of pleadings and the implication on a party’s dwelling on matters not pleaded or that cannot be ascertained from pleadings. In *Adetoum Oladeji (NIG) Ltd v. Nigeria Breweries PLC S. C. 91/2002*, Judge Pius J.S.C expressed himself.

“..... It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”
66. It is axiomatic therefore that pleadings are the lead fountain from which a cause of action flows, not the evidence adduced by a party or parties at trial.
67. The Claimant herein is an employee who suffered two terminations in the course of her employment with the Respondent. It is common cause that the first termination occurred on the 24<sup>th</sup> July, 2017, through a termination letter of the even date. That the ground that stirred the termination was that Claimant was receiving bribes to facilitate employment of staff.
68. The 2<sup>nd</sup> termination of the Claimant’s employment set in on the 18<sup>th</sup> October, 2017, under a letter of termination dated 18<sup>th</sup> October, 2017. The Respondent clearly indicated the reasons for termination; the Claimant never reported to work before 20<sup>th</sup> September, 2017 as was directed through a letter of reinstatement; the Claimant never picked up the show cause letter dated 29<sup>th</sup> September, 2017, despite being called to, but which was subsequently emailed to her and her counsel; she failed to turn up for a disciplinary hearing on 13<sup>th</sup> October, 2017. The non-responsiveness of the Claimant to the stated correspondences was the fulcrum of the termination.
69. Looking at the Claimants pleading [statement of claim], the witness statement turned evidence in chief, the same only dwelt on facts relating to the 1<sup>st</sup> termination and nowhere on the 2<sup>nd</sup> termination.
70. The Claimant appealed against the 1<sup>st</sup> termination using the Respondent’s internal mechanisms and succeeded in the appeal. She got a verdict of reinstatement in her favour. In the circumstance, I find considerable difficulty to understand how the termination which was essentially set aside by the employer can be made a subject of a suit for unfair and/or wrongful termination. It cannot. It is here that the Court concludes that the facts relating to the 1<sup>st</sup> termination cannot be a foundation



for attraction of any relief that is not independent of the claim for unfair termination herein as the Claimant has sought.

#### **Whether the termination was unfair.**

71. Having found as I have hereinabove, that the termination that the Claimant assails herein is that termination that was set aside by the 2<sup>nd</sup> Respondent through its internal mechanism, the Claimant cannot be heard to reattack the process and the decision to terminate through this cause. In fact, as I have indicated hereinabove, as regards the termination, she had no cause of action against the Respondents.
72. Consequently, I am not persuaded that there is a need for this Court to venture into considering the procedural and substantive fairness of that termination.
73. The 2<sup>nd</sup> termination was not made a subject matter in this suit, I shall not get into its fairness or otherwise.

#### **Of the reliefs.**

74. The Claimant sought inter alia, a declaration that her constitutional rights and more particularly the right to fair administrative action and the right not to be discriminated against were breached. Confining itself to the facts as presented in the parties' pleadings, and their respective evidence, the Court sees no material therefrom that can be basis for any such a declaration. The Claimant was notified of the Respondents intention to terminate her contract of service, and the grounds upon which the contemplation was anchored, she was allowed ample time to respond to the notice to show cause through her Advocate, she was heard at the disciplinary hearing in the presence of her Advocate, she was allowed to exercise her right of appeal, and consequently, the decision to terminate her services was reversed and a reinstatement granted in her favour.
75. Looking at the manner how the 1<sup>st</sup> Respondent handled the Claimant's matter it is difficult to discern any breach of the constitutional guaranteed right to a fair administrative action or any breach of that which is contemplated under the [\*Fair Administrative Actions Act\*](#).
76. This court has in past decisions held that the terms of an employer's Human Resource Policy and Procedures become terms of an employment contract entered into by the employer and an employee. The Respondent's Human Resource Policy provided for transfer of employees. I do not see the basis for the attack of the Respondent's decision to transfer the Claimant, considering the policy, and the circumstances of the matter in their totality.
77. It follows therefore that any crave for general damages of whatever nature predicted on the alleged discrimination and breach of the constitutional right under Article 47 of [\*the constitution\*](#) has to fail.
78. By reason of the premises hereinabove regarding the Claimant's cause of action, I am not persuaded that a declaration that the Claimant's dismissal from employment was unlawful, illegal, unreasonable and unfair, is available to the Claimant. The compensatory relief contemplated under section 49 (1) (c) of the [\*Employment Act\*](#), being a relief that is dependent on an employee's success in assailing the unlawfulness and or unfairness of a termination of employment or dismissal of an employee from employment, in the circumstances of this matter the relief cannot be availed to the Claimant.
79. In the circumstances of this matter, there cannot be any justification for a grant of 12 months in lieu of notice, since in essence the court has found that there was no termination.



80. The Claimant ceased to be an employee of the Respondent that day the 2<sup>nd</sup> termination took effect. The Claimant is therefore entitled to the salary for June, July and August 2017. The Respondent did not deny that the salary was not paid. Imperative to state that a claim for salary arrears is a claim independent of that of unfair termination. The Claimant is granted under this head Kshs. 99,705.
81. In conclusion, the Claimant's suit herein succeeds to a very limited extent.
82. Judgment is hereby arrived at in the following terms;
- a. The court is unable to find that there was a termination that was procedurally and substantively unfair.
  - b. The Respondent shall pay the Claimant the salary arrears for the month of June, July and August, 2017. Kshs. 99,705.
  - c. Interest at court rates from 30<sup>th</sup> August, 2017 till full payment.
  - d. Costs of this suit.

**READ, SIGNED AND DELIVERED THIS 24<sup>TH</sup> DAY OF JUNE 2022.**

**OCHARO KEBIRA**

**JUDGE**

In presence of:

Mr. Adonga for the Respondent.

Mr. Mumbi holding brief for Mr. Morara for the Respondent.

**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 has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the 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.

A signed copy will be availed to each party upon payment of Court fees.

**OCHARO KEBIRA**

**JUDGE**

