



**Indangasi v Friends of Lugulu Mission Hospital (Cause 3 of 2018)  
[2022] KEELRC 13367 (KLR) (1 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13367 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE 3 OF 2018  
JW KELI, J  
DECEMBER 1, 2022**

**BETWEEN**

**ERASTUS MUGANDA INDANGASI ..... CLAIMANT**

**AND**

**FRIENDS OF LUGULU MISSION HOSPITAL ..... RESPONDENT**

**JUDGMENT**

1. The Claimant, following termination of employment, vide memorandum of claim dated 25<sup>th</sup> January, 2018 against the respondent sought the following reliefs: -
  - a. a declaration that the termination of employment of the claimant by the respondent was wrongful, unlawful and without procedure.
  - b. payment of :-
    - i. one month salary in lieu of notice totaling to Kshs. 29,000/-
    - ii. unpaid 6 month salary totaling to Kshs. 174,000/-
    - iii. compensation for wrongful/unlawful and /or unprocedural termination and adverse effects on the claimant's career and prospects of employment Kshs. 493,000/-
  - c. An order that the respondent issues to the claimant a certificate of employment and evidence of remission of the statutory deductions .
  - d. costs of this cause.
  - e. interest on (b) on the above at court rates until payment in full.



2. Together with the claim the claimant filed his verifying affidavit, Claimant's list of witnesses, his witness statement, witness statement of James Indangasi and claimant's list of documents and the bundle of documents paginated 16 to 39.
3. The claim is opposed. The respondent filed statement of defence dated 5<sup>th</sup> June 2018 together with list of witnesses, statement of David Gadi, defendant's list of documents and the bundle of documents.
4. On the 23<sup>rd</sup> July 2019 the Respondent filed a further witness statement of Jackson Wakhungu Fukwo dated 22<sup>nd</sup> July 2019 and attached a payment voucher and the tabulation of the payment.
5. On the 21<sup>st</sup> January 2019 the respondent filed a further list of documents dated 21<sup>st</sup> January 2019 being the claimant's job application form and his employment contract.
6. On the 9<sup>th</sup> July 2019, the claimant filed notice of change of advocates from Abok & Company Advocates to Samba, Odeck & Mulama Company Advocates.

## **THE HEARING**

### **The claimant's case**

7. The Claimant's case was heard on the 28<sup>th</sup> January 2019 by Justice Nderi Nduma where the Claimant gave sworn evidence, produced his documents marked as exhibits a to v and was cross-examined by Counsel for the Respondent Mr. Obilo. The claimant further called another witness of fact James Indangasi (CW2) who testified on oath and was also cross examined.

### **The defence case**

8. The Defence case was heard on the 24<sup>th</sup> April 2022 with witness of fact Dr. Mohammed Noor Adam(DW1) adopting his statement dated 16<sup>th</sup> November 2021 as his evidence in chief and produced employment contract of the claimant dated 23<sup>rd</sup> December 2015 (exhibit1 ), the sick leave date 6th October 2018(exhibit 2), release from work dated 17<sup>th</sup> July 2017 to seek eye treatment (exhibit 3), medical report (exhibit4), duty performance letter by Wamati dated 20<sup>th</sup> September 2016(exhibit 9), payment voucher for Kshs, 66,640/- being part of terminal dues (exhibit 10). The witness was cross examined by counsel for the Claimant, Mr. Mulama.
9. On the 26<sup>th</sup> September 2022, the defence called DW2 Dr. Geoffrey Meshack Likata who told the court he worked as eye doctor at Kakamega County Referral hospital. DW2 produced the ophthalmological report of the claimant dated 7<sup>th</sup> September 2017 as exhibit 6 . The witness was cross examined.
10. The parties by consent allowed the Respondent to produce the report by Dr. Bett(exhibit 5).

### **The Claimant's case in summary.**

11. The Claimant told the court that he was a trained clinical officer. That he signed contract with Respondent (hospital) on the 23<sup>rd</sup> November 2015, that he worked until January 2016 when he fell sick and was admitted in the same hospital and tests showed he had malaria was treated with quinine and ceftriaxone in the evening (injections in the vein). That he had pain and itching all along and asked for the dose to be discontinued. The nurses insisted and went for 2<sup>nd</sup> dose, he had burning sensation, and asked the nurses to discontinue the drugs. That in the morning his body was black as charcoal. His eyes were red and produced pus. His sight diminished. 2 days later he could not see completely. That the doctor came and confirmed it was drug reaction. Further medication was stopped. After 5 days his skin pilled off. It was burnt. He was transferred to Cherangany nursing home and admitted, that he



was put in acute room in isolation and could not talk or see. That after 15 days he went back to Lugulu Hospital and was re-admitted again at the hospital in the ward where he stayed for 1 and ½ months and was discharged. That he went to his house at the staff quarters where he stayed in April and May attending clinics. That his body had soles all over. One eye could see abit. That he went back to work in the months of June to October then December in his condition. That his sight diminished and he applied for sick leave and proceeded on leave in November 2016 for 3 months. That he was not paid during the leave and could not see well. He applied for another 3 months which was granted and paid. Payment was stopped in May 2017. The claimant stated he was told to bring a medical report which stated he needed cornea transplant The employer terminated his employment on the by notice dated 16<sup>th</sup> June 2017. That he asked for alterative duties but Dr. Wamati said they had no provision for blind people. That on the 17<sup>th</sup> July 2017 he got termination letter and was paid Kshs. 66640/- gratuity. He told the court he was discriminated against and his employment termination was unfair.

### **Evidence on cross examination**

12. The claimant told the court he was a clinical officer, he complained of the drug immediately, he did not sign consent, his father took him to Cherengany hospital using Lugulu Hospital ambulance. He had been discharged in April and May 2016 and did not work. That in November and December 2016 and January 2017 he as on sick leave. The claimant told the court that he was not aware he had exhausted the leave days in October 2016.
13. The Claimant denied that on the 17<sup>th</sup> July 2017 he was heard before the termination stating he was called but not listened to by the chairman and director. He said that he appealed to the Director not to the Board. That NHIF and NSSF was paid. The claimant told the court that the contract provided for cover not NHIF.
14. The Claimant told the court that he paid for his medical bills to Cherangany and Lugulu total Kshs. 140,000/- deducted at Kshs. 15,000/- monthly reflected in his pay slip. The court noted the said amount was reflected as advance and not medical deductions. The claimant denied he was incapacitated and stated he could still work in the male ward. He could see then but could not see anymore. The Claimant told the court that in July 2017 he was not at work. He stated that in June 2017 he was still sick. He complained and was sent to Dr. Bett for medical report.
15. On re- exam the Claimant asked for payment of salary for months of November, December 2016 January 2017, May , June and July 2017, termination was on 17<sup>th</sup> July 2017, that medical scheme per contract was not NHIF. That matter of termination was predetermined. Dr. Wamati the medical director simply informed him of the decision to terminated his services. He pleaded for alternative duty and the director told him they had no duties for blind people in the facility.

### **CW2**

16. CW2 was the father of the claimant. He reiterated the same facts as the claimant save to add that the claimant's employment was terminated in his presence by the Director. On cross – examination CW2 told the court that they were sent to Cherangany hospital by Lugulu hospital ambulance. The Claimant became blind. That they were not heard as they did not go before the board. Only one doctor terminated the claimant's services and CW2 collected the termination letter.

### **The defence case**

17. RW1. Dr. Mohammed Noor Adam was the doctor in charge of the respondent hospital. He produced documents as outlined above. RW1 further told the court that the Kshs. 66,640/- was part of the



terminal benefits, that the respondent is ready to revive the claimant once he can perform his duties as per letter of 17<sup>th</sup> July 2017. That the claimant has not come back to say he is fine.

18. On cross examination RW1 confirmed the Claimant was an employee of the Respondent, that he was earning monthly salary of Kshs. 29,000/-. That in the course of employment the Claimant was taken ill and admitted at the facility. RW1 denied that as a result of the medication the claimant received at the facility reaction occurred. RW1 admitted that the Claimant was administered drugs at the facility. RW1 admitted that the claimant was referred to another facility (Cherengany Nursing Home). RW1 denied the claimant returned to work after treatment. RW1 told the court there were no further documents for leave as the claimant was asking leave from the management. RW1 told the court that the claimant on being taken ill never went back to work. He admitted the termination letter was due to the condition. RW1 told the court that Dr. Wamati did not reach a conclusion on performance. He did not have evidence of the claimant having reported back to work in June 2016 and worked upto October and that is when the claimant sought for further leave. RW1 told the court the claimant was paid during first leave and they gave evidence to their first lawyer. RW2 did not know about payment under 2<sup>nd</sup> leave having been paid on complaint by Claimant. He had no evidence of the payment in court.
19. RW1 on exhibit 4 stated he was not in office to confirm that the meeting with CEO was held and had no minutes of the meeting. He could not confirm decision to terminate the claimant was by the CEO.
20. RW1 stated he was aware the claimant was invited to hearing but could not confirm representation. RW1 told the court the claimant under clause 10 of his contract he was entitled to medical cover and stated the hospital paid the medical bill.
21. RW1 on letter dated 20<sup>th</sup> September 2016 (exhibit 9) stated that the claimant was unable to perform due to his condition. That the decision was based on the medical reports and his requests for sick leave. The Claimant was not terminated hence no certificate of service. He could not confirm if terminal dues were paid to the claimant.
22. On re-examination RW1 told the court under letter of 17<sup>th</sup> July 2017 the respondent can re-admit the claimant to work if he can perform his duties which he was unable to perform due to his blindness. That Dr. Wamati communicated on behalf of the Board.

#### **RW2 (Geoffrey Mechack Likata)**

23. RW2 told the court that he worked at the Kakamega County referral hospital and held higher diploma in ophthalmology. He produced his Ophthalmological report dated 7<sup>th</sup> September 2017 in respect of the claimant as exhibit 6 and stated that from the report the diagnosis of the claimant was total blindness. That the claimant was not able to perform his duties as a clinical officer as he was not able to observe or examine the patient. He produced the report of Dr. Nderitu dated 8<sup>th</sup> September 2017 where the claimant had been diagnosed as totally blind and suffering from Steven Johnson syndrome (exhibit 8).
24. RW2 was cross-examined by counsel for the claimant. RW2 told the court the patient needed the report. On being asked on whose behest the medical report was prepared, RW2 told the court they usually write the report for the disabled. RW2 told the court he saw the claimant personally on the 7<sup>th</sup> September 2022 and that the records were in the hospital. RW2 told the court when he saw the claimant he did not rely on previous treatment notes. RW2 told the court that the Claimant was certified as totally blind as the right eye with perception of light below 3/60 is classified as blind. RW2 told the court he was a member of the union was aware that the claimant was also a member.



25. RW2 told the court the normal process was certification of the claimant as blind was to first inform the medical superintendent who is in charge of the hospital to come up with documentation and inform the employer ( the Ministry of Health.) RW2 told the court in terms of compensation the Board has to meet. RW2 justified the 2 reports done 2 days apart stating Dr. Nderitu was a physician and the patient needed to see a eye doctor. RW2 stated he had not seen a job for blind in the hospital stating may be in administration but adding there were personnel for that.
26. On re-examination RW2 told the court he saw the claimant who requested for the report(exhibit 6)
27. Dr. Bett's medical report was produced by consent as respondent's exhibit 5.
28. After the hearing parties filed written submissions. The claimant's submissions drawn by Samba, Odeck and Mulama advocates are dated 4<sup>th</sup> October 2022. The respondent's submissions drawn by M/S R.E. Nyamu & Company Advocates are dated 21<sup>st</sup> October 2022.

## **Determination**

### **Issues for determination.**

29. The Claimant addressed issues of legality and justification of the claimant's termination and grant of reliefs sought.
30. The Respondent addressed the merits of the claim in general.
31. The court having considered the evidence by the parties is of the considered opinion the dispute placed by the parties before it for determination are as follows: -
  - A. Whether there was termination of employment
  - B. If (i) in affirmative whether the termination was lawful and fair
  - C. Whether the claimant is entitled to reliefs sought

### **Whether there was termination of employment of the Claimant**

32. RW1 told the court that the Claimant's employment was not terminate but he was released upon medical report of the doctors that he was blind (defence exhibit 5 and exhibit 6) so as to seek treatment and could return once well. That the claimant had not returned and told them he could see. The letter is dated 17<sup>th</sup> July 2017(defence exhibit 3) the body of the letter addressed to the claimant reads: 're: Released To Seek Eye Treatment

As a follow up to the letter to you dated 16/6/2017 and after discussion between yourself and the medical officer I/C, I hereby inform you that you have officially been released by the hospital to allow you seek treatment for your eyes.

Once you have recovered and fit to resume duty, the hospital shall employ you as a clinical officer subject to availability of a vacancy without subjecting you to interviews.

The Hospital shall pay you Kshs. 95,200/- as terminal benefits less 30% tax. We thank you for your service and wish you quick recovery, thanks , yours faithfully

Dr. Oliver Mamati

ED/ Medical Officer I/C.”



33. Relying on the release letter the respondent submits that the claimant was not terminated hence compensation cannot arise.
34. The Claimant did not submit on this position taken by the respondent.
35. The Court noted that the release letter by Dr. Mamati, referred to letter addressed to the claimant by the author dated letter of 16<sup>th</sup> June 2017(exhibit 4). The letter of 16<sup>th</sup> June 2017 read:- ‘ Medical Report Greetings from Lugulu Mission Hospital.
- I received your medical report detailing the extent of damage to your eyes and required treatment and I feel you will not be able to perform your duties as a clinical officer effectively. This is to notify you that the hospital intends to terminate your employment due to the disability. You are hereby invited to meet the Hospital CEO for a discussion before final decision is made. We wish you quick and full recovery. Yours Faithfully
- Dr, Oliver Wamati.
- ED/ Medical officer.”
36. The Claimant told the court that the termination was pre- determined as Dr. Wamati simply called him and informed him of the decision to terminate his services. That there was no discussion. That he pleaded for allocation of other duties as he was then partially blind and Dr. Wamati informed him there were no duties for the blind as the facility.
37. CW2 was the father of the claimant who told the court that the claimant resumed duty in June 2017. That the claimant’s employment was terminated in his presence. RW2 said he was given the letter by the Director in presence of only the claimant.
- No minutes of the said meeting was produced.

### **Decision**

38. The Court finds that the Respondent had the intention of terminating the services of the claimant on account of his blindness as stated in letter of 16<sup>th</sup> June 2017 where the incharge stated in view of the medical report he felt the claimant would not be able to discharge his duties.
- The release letter read in part-‘ As a follow up to the letter to you dated 16/6/2017 and after discussion between yourself and the medical officer I/C, I hereby inform you that you have officially been released by the hospital to allow you seek treatment for your eyes, Once you have recovered and fit to resume duty, the hospital shall employ you as a clinical officer subject to availability of a vacancy without subjecting you to interviews.”
39. RW1 told the court that the claimant’s services were not terminated. The letter of 16<sup>th</sup> June 2017 gave indication of the hospital to terminate the claimant’s services and the release letter gave condition of subject to availability of vacancy. In the statement of defence dated 5<sup>th</sup> June 2018 paragraph 5 and 6 are to effect that the claimant’s appointment was terminated on issuance of one month notice done on 16<sup>th</sup> June 2017 as he was released on 17<sup>th</sup> July 2022 as he could no longer work being blind.
40. The court finds and determines that the letter of 16<sup>th</sup> June 2017 gave indication to the claimant of the intention of termination of employment by the respondent and the letter of 17<sup>th</sup> July 2017 amounted to termination of the employment as it stated that the claimant would be re-employed back subject to availability of vacancy if he recovered and was fit to resume duty. Further the letter referred to terminal benefits.



41. The court holds and determines that the letter dated 17<sup>th</sup> July 2017(defense exhibit 3) amounted to constructive dismissal of the claimant from the employment of the respondent.

If (issue a) in affirmative whether the termination was lawful and fair

42. The court found in the affirmative that the claimant's services were terminated.

**The law on lawful and fair termination applies-**

43. Section 43 of the *Employment Act* addresses proof of termination as follows:-

“(a) in any claim arising out of termination of contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

(b) The reasons or reasons for termination of contract are the matters that the employer at the time of termination of the contract genuinely believe to exist and which caused the employer to terminate the services of the employee.”

44. Section 44 (4) of the *Employment Act* provides for justifiable and lawful grounds for dismissal from employment, inter alia if:-

- (a) Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of work,
- (b) During working hours, by becoming or being intoxicated and employee renders himself unwilling or incapable to perform his work properly,
- (c) an employee willfully neglects to perform any work which it was his duty to perform or if he carelessly and improperly performs any work which was his duty under his contract to have performed.....”

45. Section 45 (2) of the *Employment Act* provides that a termination of Employment by an employer is unfair if the employer fails to prove:-

- a. The reason for the termination is a fair reason:-
  - i. Related to the employees conduct, capacity or compatibility or
  - ii. Based on the operational requirements of the employer.

46. Section 46 of the *Employment Act* provides for reasons that do not constitute fair reasons for dismissal.

47. Section 47(5) of the *Employment Act* provides for burden of proof in claims for wrongful dismissal as follows:

“(5) For any complaint of unfair termination of Employment or wrongful dismissal the burden of proving that unfair termination of Employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.”

48. Thus the obligation of the employee is discharged upon proving wrongful dismissal has occurred and the burden then shifts to justify the grounds of termination.



49. Section 41 of the *Employment Act* provides for procedural fairness as follows:- ‘41. (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 a shop floor union representative of his choice present during this explanation.’
50. In the event the employer is contemplating termination of employment vide summary dismissal under section 44 of the *employment Act*, the employee is entitled to hearing pursuant to the provisions of section 41(2) to wit: -“(2) Notwithstanding any other provision 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.” The court finds and determines this was the applicable law in the instant claim.
51. The burden to prove valid reasons for the termination of the employment lies with the employer as contemplated under section 43 and section 45(2) of the *Employment Act*(supra).
52. The Respondent’s case was that the claimant was released from work because he was diagnosed as blind and as per oral evidence of RW2 who produced his ophthalmological report (exhibit 6) where it was stated the claimant was blind and stated that the claimant could no longer perform his duties as a clinical officer which required observation of patients. RW2 further told the court the only duties the claimant could do was administrative duties of which he noted there were employees in position.
53. The Respondent submits that the request for alternative duties by the claimant was an acknowledgement that he was not able to carry out his duties as a clinical officer at the respondent’s facility. The respondent submits that no evidence of the procedures omitted.
54. Fairness of termination of employment has to meet two tests:-Valid and fair reasonsProcedural fairness

**Were the reasons for the termination valid and fair?**

55. The reason for the termination from the evidence before court was that the Claimant was unable to perform duties as a clinical officer due to his blindness.
56. Section 45 to wit Section 45 (2) of the *Employment Act* provides that a termination of Employment by an employer is unfair if the employer fails to prove:-
 

‘The reason for the termination is a fair reason:-

Related to the employees conduct, capacity or compatibility or

Based on the operational requirements of the employer.’”
57. Article 27 of *the Constitution* states:- ‘(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause.
58. The court finds that it is unconstitutional to discriminate any person on basis of disability like in the instant case of blindness. To live a life of dignity the employee who suddenly finds himself blind needs protection not dismissal from work due to that physical challenge.



59. The court finds that the alleged inability to perform of the claimant due to the blindness was not proved. The letter of 16th June 2017 stated in part ‘.. I feel you will not be able to perform duties as a clinical officer effectively..’ (exhibit4). The test for poor performance or failure to perform was set out In *Jane Samba Mukala v Ol Tukai Lodge Limited* Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013) upheld by the Court of Appeal in *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR where the court observed as follows; “a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance. b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established. c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses. d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.”(emphasis given)
60. The Court noted that from the letter dated 16<sup>th</sup> June 2017, the incharge stated he was of the view that the claimant would not be able to perform his duties as a clinical officer(defence exhibit 4). This was a subjective opinion as the medical report of Dr. Bett (exhibit 5) did not inform on the Claimant’s ability to work. The court upholds the decision in *Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK)*(September, 2013 cited with approval by the Court of Appeal *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR to find that there was no assessment of the performance of the claimant as a blind clinical officer to state he was unable to perform his duties. The position taken by the incharge in letter dated 16th June 2017 who also issued the release letter of 17th July 2017 was subjective and not based on any valid criteria. Under Section 43 of the *Employment Act* valid reasons are ones which employer believes to exist at time of termination. This burden of proof of valid reasons lies with the employer hence submissions that by asking for alternative work the claimant acknowledged his incapacity does not meet the legal threshold upheld by the Court of Appeal in *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR(supra). The court holds that the reasons for termination of the claimant were invalid, illegal and unfair.

### **Procedural fairness.**

61. RW2 told the court the Board would ideally be involved as well as the employer. The court finds that the claimant was arbitrarily released from employment at the whim of the medical officer in charge Dr. Wamata and the conduct is not acceptable in a just and lawful society.
62. Section 41. (1) of the *Employment Act* reads:- ‘ 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 a shop floor union representative of his choice present during this explanation.’”
63. In Jane *Samba Mukala v Ol Tukai Lodge Limited* Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013) upheld by the Court of Appeal in *National Bank of Kenya v*



Samuel Nguru Mutonya [2019] eKLR the court observed as follows; “d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.”(emphasis given)

64. The court found that the claimant who was a member of union as per evidence of RW2 was not afforded opportunity to be accompanied by the union representative or employee of choice when the medical incharge called him to issue the termination letter. Evidence was led by the claimant that he was simply informed of decision of termination and was not heard. No minutes or other evidence was produced to discharge the burden which had shifted to defence. Section 41 of the Employment Act is couched in mandatory terms as was held by the Court of Appeal in Pius Machafu Isindu v Lavington Security Guards Limited (2017)e KLR.
65. The court finds and determine that the process of termination of the employment of the claimant was unfair.

#### **Whether the Claimant is entitled to reliefs sought.**

66. The court finds this is one claim which deserved of compensation for violation of Article 27 of the Constitution. Unfortunately parties are bound by their pleadings and the claimant did not plead the violation and pray for compensation.

#### **Notice Pay**

67. The Respondent pleaded that the letter of 16<sup>th</sup> June 2017 amounted to notice. The court finds and determines that the said letter is not a notice as envisaged under Employment Act section 35 (c) to wit-‘where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.’”
68. The letter of 16<sup>th</sup> June 2017 invited the claimant for further discussion before final decision. That is not a notice of termination.

The court finds and holds that the claimant was entitled to notice of one month in lieu. The monthly salary as per letter of employment dated 23<sup>rd</sup> December 2015 was Kshs. 29,000/- which is awarded for one month.

#### **Unpaid salary claim of 6 months.**

69. The Claimant told the court he applied and was granted in leave in November 2016 for 3 months without pay. He applied for another leave of three months which was granted and was paid. He told the court his salary stopped in May 2017 and his employment termination was on 17<sup>th</sup> July 2017. In re-examination the claimant told the court that he was not paid in months of November, December 2016, January 2017, may 2017, June 2017 and part of July 2017 his employment having been terminated on 17<sup>th</sup> July 2017. The submissions by respondent that it was not clear from pleadings and testimony of unpaid months are thus not true.
70. The court finds and holds that the claimant’s evidence of unpaid salary was for months of November, December 2016, January 2017, may 2017, June 2017 and part of July 2017 his employment having been terminated on 17<sup>th</sup> July 2017. 5 months(Kshs. 145000) x KSHS. 29,000 X 17/30 X 29000 (16433)Total salary in arrears awarded at Kshs. 161,433/-



## Compensation for wrongful and unfair termination

71. The Claimant pleaded for Kshs. 493,000/-. The claim for that amount was not justified. The court finds that its award on finding unlawful and unfair termination is guided by section 49 of the *Employment Act* to wit:- ‘(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following— (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service; [Rev. 2012] CAP. 226 Employment 35 [Issue 1] (b) where dismissal terminates the contract before the completion of any service upon which the employee’s wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal. (2) Any payments made by the employer under this section shall be subject to statutory deductions. (3) Where in the opinion of a labour officer an employee’s summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to— (a) reinstate the employee and treat the employee in all respects as if the employee’s employment had not been terminated; or (b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.’”
72. The Court has already awarded notice pay. There was no prayer for reinstatement or re-engagement. The only remaining available remedy under the claim for unfair termination is section 49(1) c to wit: ‘c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.’”
73. The Claimant’s last monthly salary was Kshs. 29000/- The court found that he was discriminated against on basis of his disability and terminated on unfounded grounds of inability to perform his duties. The claimant got sick while on treatment by the employer and in all ways was condemned to life of indignity and suffering on the termination as he had not access to medical attention which the employer provided in the sickness leading to the blindness. This is a claim which deserved more than the maximum compensation. The court awards maximum compensation equivalent of 12 months last salary. Thus Kshs. 29000x 12 total sum awarded as compensation for the unlawful and unfair termination of Kshs. 348,000/-.

## Conclusion and Disposition.

74. The Court enters judgment for the claimant against the Respondent in the following terms:-
- a. Declaration that the termination of employment of the claimant was unlawful and unfair.
  - b. Award Notice pay for one-month salary in lieu Kshs. 29,000/-.
  - c. Award Compensation for the unfair termination at the equivalent of 12 months salary for total sum of Kshs. 348,000/-.
  - d. Award for salary in arrears for 5 months and 17 days total sum of Ksh Kshs. 161,433/-.  
(above awards in b,c, and d subject to statutory deductions)
  - e. Interest on the awards in b, c and d at court rates from date of judgment until payment in full.



f. Costs to the claimant.

g. Certificate of service to issue to the claimant pursuant to Section 51 of the [Employment Act](#).

75. Stay of 30 days.

76. It is so ordered.

**SIGNED, DATED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 1<sup>ST</sup> DAY OF DECEMBER 2022.**

**J. W KELI,**

**JUDGE.**

**In the Presence of:-**

Court Assistant: Brenda Wesonga

Claimant:- Mulama Advocate

Respondent:- Ms. Watii representative of the Respondent . Mr. Nyamu Advocate absent

