



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 155 OF 2017

DIANA GACERI KIGUNDA.....CLAIMANT

- VERSUS -

KENGA EQUATORIAL HOTELS LIMITED

T/A MOMBASA CONTINENTAL RESORT.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 22nd October, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 01.03.2017 in person. The amended memorandum of claim was filed on 01.08. 2019. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent has created an intolerable work environment and fundamentally breached the contract of employment with the claimant through sheer professional incompetence.
- b) A declaration that the respondent has repudiated the contract of employment with the claimant.
- c) A declaration that the respondent has constructively dismissed the claimant from employment effective 27.02.2017.
- d) A declaration that the constructive dismissal amounts to wrongful and unfair termination of employment.
- e) An order for:
 - i. Compensation for unfair termination of employment equivalent to 12 months' pay at a gross salary of Kshs. 125, 000.00 = Kshs. 1, 500, 000.00.
 - ii. Unpaid salary from April 2016 to February 2017 equivalent to 11 months at gross salary of Kshs. 125, 000.00 = Kshs.1, 375, 000.00.
 - iii. Severance pay for each year worked $(1/2 \times 125, 000.00) \times 3 = \text{Kshs.}2, 812, 500.00$.
 - iv. Leave and off days $60 \times (125, 000)/22 = \text{Kshs.}340, 800.00$.
 - v. Exemplary damages for inhibiting career growth Kshs.500, 000.00.
 - vi. Costs incidental to the suit and interests.

The respondent filed the memorandum of response on 11.07.2017 through Oluga & Company Advocates. The amended response was filed on 20.09.2019. The respondent prayed that the claimant's claim be dismissed with costs. The claimant filed on 03.10.2019 the reply to the respondent's amended memorandum of response.

The claimant testified to support his case. The respondent's witness (RW) was the General Manager one Mary Wangechi Stevens.

To answer the **1st issue** for determination the Court returns that the parties were in a contract of service. The evidence is that the claimant was initially engaged as a consultant to assist the respondent to undertake a bank reconciliation assignment for the year 2013 per the letter of

engagement dated 28.05.2013. The agreed professional fee was Kshs. 90, 000.00. The claimant rendered her interim report by the letter dated 18.06.2014. The contract was signed between the claimant and the respondent's General Manager one Charles Gichohi. By a letter of appointment dated 18.08.2014 the respondent employed the claimant effective 01.08.2014 as the Management Accountant. The monthly gross pay was Kshs. 85, 000.00 and for a probationary period of 3 months terminable by either party giving 7 days' notice or equivalent pay. The employment was subject to the Employment Act, 2007 and the terms and conditions of service in the letter. The letter was signed by the claimant and the General Manager Charles Gichohi on 19.08.2014.

By the letter dated 30.12.2014 the respondent confirmed the claimant's employment as the Management Accountant. The letter was signed by the claimant on 03.12.2014 and by the General Manager Charles Gichohi, presumably on 30.12.2014, the date of the letter. The remuneration was fixed at K125, 000.00.

The respondent has partly denied the fact and terms of employment as per paragraph 4 of the amended memorandum of response thus, "**4. The Respondent denies contents of paragraphs 6-11 of the Amended Memorandum of Claim and more specifically that the claimant was being paid Kshs. 125, 000.00 per month and avers that the letter dated 30th December 2014 was obtained by fraud and collusion with the respondent's former General Manager who authored the same. The Plaintiff was employed on 18th August 2014 for a probationary period of three months after which her employment was to be confirmed under the same terms. There is no way her salary would have gone up from Kshs. 85, 000.00 to Kshs.125, 000.00, an increase of nearly 50% within 3 months and only after serving probation period.**"

The Court observes that the respondent has not pleaded the particulars of fraud. The claimant has pleaded in the reply to the amended memorandum of response and denied that the letter dated 30.12.2014 confirming her employment was obtained by fraud and collusion between her and the respondent's former general manager. She has further pleaded that she successfully re-negotiated her salary to bring a rationale between what she was earlier offered to the job and the management group she was then going to belong to. Further, that was after she realised that an accountant at the head office one James Mwakiremba was earning a whopping gross pay of Kshs.150, 000.00 while she was to earn Kshs. 85, 000.00 per month so that her revised monthly pay of Kshs. 125, 000.00 was the harmonised pay she could get within her job group.

The Court has considered the evidence. While the claimant signed the letter of 30.12.2014 long prior to its date, the respondent has not pleaded and established the alleged fraud and collusion. Further, the claimant has exhibited her payslip for December 2015 showing a gross pay of Kshs. 125, 000.00 and which has not been disputed. Further RW testified that the claimant was employed by the respondent on 18.08.2014 and her last monthly pay was Kshs. 125, 000.00. In view of that evidence the Court finds that the claimant's last pay was Kshs. 125, 000.00 and the terms and conditions were as per the letter dated 30.12.2014.

The 2nd issue for determination is whether the claimant was constructively terminated by the respondent. The claimant testified, and it is not in dispute, that her last day at work was on 12.05.2016 when she received the letter to show cause. The letter set out over ten particulars of instances of alleged poor performance on the part of the claimant. The allegations included the following:

- a) She had received Kshs. 90, 000.00 for professional fees to carry out bank reconciliation for January to December 2013 but the auditors had reported to the respondent's Directors that the claimant had failed to do so and the auditors were unable to audit the period.
- b) The claimant was the Management Accountant and head of finance function for the period starting 18.08.2014 and the auditors could not carry out 2013, 2014, and 2015 audit because the books of accounts were not kept and a number of petty cash files could not be traced.
- c) In October 2015 the claimant was head of finance department and she led the Business Management Board to believe that books were ready to enable the audit to be carried out but when auditors arrived they could not proceed with the audit because the books were not yet ready again. Four weeks into the audit the auditors were still looking for petty cash files that had been locked away in safes at various locations in the hotel that the claimant knew about that contained vital information that was required to enable cash reconciliation to be done towards preparation of books for 2013 – 2015 audit. The claimant had led to delays and unnecessary expenses by withholding that information. More information that the claimant knew about was surfacing but which the claimant had failed to provide to auditors.
- d) The claimant deliberately failed to cooperate with the auditors and other staff during construction of books for audit in October and November by withholding copies of signed 2014/15 payrolls and even after the Director asked her to avail the information, the claimant failed to do so – and the respondent had to request to assist with their copies.
- e) The claimant was aware that she breached the standard operating procedures (SOPs) by single headedly authorising the use of day collections prior to banking in 2014 and 2015. The petty cash regulations were not followed and some money remained unaccounted for.
- f) Some staff leaving employment had been cleared yet they held balances of money they owed in the system.
- g) The claimant knew about her responsibility to comply with legal and statutory requirements concerning deductions and their submission thereof. The claimant knew about the non-compliance but failed to report it to relevant authority leading to heavy costs to the respondent.
- h) The year 2015 had many unreconciled accounts despite the respondent providing the claimant support staff to assist with the consequence that the respondent was not compliant and 2016 was put in a compromised position.

i) The letter further stated that the claimant as the head of finance had failed to provide the requested register of the hotel assets. Many hotel assets had been reported stolen or disappeared and the claimant had been asked to follow up but no conclusive finding was on record.

j) While the claimant was in office the hotel had been exposed to pecuniary loss and charges leading to hefty court fines

The letter concluded thus, **“You failed to exercise due care and attention in the performance of your duties. In view of this gravity of misconduct, you are suspended for a period of 14 days. You are hereby required to respond to these concerns in writing by 27th May 2016 why disciplinary action including dismissal, should not be taken against you. Please note that this suspension is to give you time to respond.”** The letter was signed by RW.

The claimant replied by her undated letter received by the respondent on 26.05.2016. The claimant replied as follows:

a) She completed January to December 2013 reconciliation undertaking it from 04.06.2014 to 31.07.2014. Her interim report was dated 15.07.2014 and her final report on 31.07.2014 both emailed to the then General Manager Gichohi. She was paid only Kshs. 45, 000.00 and there was outstanding payment of Kshs. 45, 000.00 of the agreed Kshs.90, 000.00 in fees.

b) She could not be held responsible for the books of accounts for 2013 and 2014 as she joined the hotel in August 2014. She had availed relevant information, (with help of the present accountants), to the auditors for 2013/2014. 2015 books of accounts were ready and availed to auditors. Bank and petty cash reconciliation for 2015 had been done. All petty cash files were ready and in custody of the Chief Cashier.

c) Auditors addressed the then accountant one Mwakirembe for audit of 2013/14 because he was the one in a position to advice than the claimant who had not yet joined the respondent during that period. When auditors arrived she could only account for the period she had been in respondent’s service as she could not provide misleading information.

d) Petty cash files locked in safes were for 2014 period and not for 2013 – 2015. Four weeks into the audit the auditors had completed with 2013 books of accounts and were now in 2014 books and when they requested for the books for 2014 they were given including those locked up in safes. The staff had common knowledge of the books being locked in safes and the security personnel had been involved. Thus it was not true that the claimant withheld or was reluctant to share the information. All books of accounts had been availed to the auditors as held at cashier’s office and which books were used on daily basis and there was no way the books would not be available to the cashiers. There were no books surfacing belatedly because the auditors had visited all departments.

e) Payrolls for 2014/15 were availed except for 4 months’ hardcopies which by email, the bank was requested to [provide copies and RW was aware per copy email.

f) The claimant authored no petty cash for January to December 2014. January to July 2014 she was not the respondent’s employee. She was not responsible for events during that period. In November 2014 the General Manager authorised her to sign petty cash vouchers. The finance department had acute shortage of staff and casuals were engaged to help maintain books of accounts. The new General Manager RW declined to sign reimbursement for the period May 2015 to November 2015 on account that she was not in the picture Thus daily collections were commonly used to sustain feeding of in-house guests to ensure hotel operations continued. The claimant attached the relevant evidence of petty cash and banking for the period for audit. The petty cash was therefore fully accounted for and evidence filed and held with the Chief Cashier. The goods were received by user department and witnessed by the security personnel.

g) The staff balances in issue had been carried forward since 2012. No staff left in 2015 with balances owed to the hotel as monthly deductions had been done to recover debts.

h) In November 2014 the claimant, the Board Chairman Duncan Ndegwa and the General Manager Gichohi had met KRA official who demanded VAT nad PAYE amounting to Kshs. 95, 258, 046.00 and after tracing evidence the figure came down. The claimant had provided evidence of what had been paid and what was owing – and done so on monthly basis to RW with respect to all statutory deductions and remittances.

i) 2015 accounts had been reconciled, send to auditors and all recommended adjustments done. The system kept 2012 issues open because the issues raised by the 2012 audit on staff accounts had not been resolved.

j) No one handed over to the claimant a register of hotel assets. She had searched and found a copy prepared by a firm hired to compile hotel assets. Every end month each head of department undertakes stock take for their respective departments. She prepared a file and handed it over to the auditor one Kinyanjui. Per RW’s instructions hotel cutleries and cookeries stock differences, for 2013 to December 2015, had been recovered from staff August 2014 service charge. She was not therefore liable as alleged.

The claimant concluded that she had not received her April 2016 salary which was in arrears and she had worked diligently during that period. She stated, **“I hope this is sufficient to justify and be clear to you that the finance situation is not due to my fault. I would be grateful if you could re-consider the decision of taking disciplinary action against me.”**

The respondent issued the letter dated 02.06.2016 acknowledging the claimant’s reply to the letter to show cause. The letter stated that the auditors’ preliminary assessment suggested that there were unaccounted items that called for a forensic audit which could bring about implications on accountability. Further there were a few areas the claimant’s help would be needed for a final handing over. Further the auditors had not finalised the audit for 2015 after which the reports would be presented to the Board. Thus the BMC could not give a full

response to the claimant's letter and she would receive further communication in due course. The letter concluded **"From now on, please note that you have been sent on unpaid leave until this matter is closed."**

The claimant filed the memorandum of claim on 01.03.2017.

By the email of 16.08.2017 RW forwarded to the claimant the letter dated 10.08.2017 requiring the claimant to clarify certain issues to bring the process to an end (meaning the in-depth-audit process, referred to earlier in the letter). The letter stated thus, **"Please note the issues raised in the audit findings are serious and require appropriate response. Failure to respond by yourself sufficiently may lead to your summary dismissal and any further action. Please respond in writing on the issues raised within 14 days after which we shall call you for a hearing depending on your response."** The audit implications and recommendations were on 2 issues. The first issue was on lack of supporting documents thus, **"It is our opinion that there is no way that the company had Kshs. 97, 156, 276 cash in hand as at 31st December 2015. This account balance is therefore certainly incorrect. We therefore recommend that this account be thoroughly analysed so as to identify how the error arose in order facilitate adjustments in the financial statements. The amount is very significant which makes the figures in the financial statements not to portray true and fair view of the status of the company as at 31st December 2015."** The second issue was, **"All petty cash payments should be properly supported with adequate supporting documents. They should also be approved and authorised by a responsible person and such approval/authorisation evidenced. Action and responsibility for refunds should be placed on those with authority to supervisor proper procedures."**

The claimant replied by her email of 23.08.2017. She stated that she was glad to note that the issues had narrowed down from nine to only one, petty cash account. She explained about the petty cash accounts and further stated that she could not comment on the cash at hand of Kshs. 97.2 million as that was impossible and she did not understand how the auditors arrived at that figure. By an email dated 03.07.2018, RW forwarded to the claimant a letter with information on the 2015 Audit as they awaited completion of the 2016 audit. The forwarded letter was dated 27.06.2018 being an update on the notice to show-cause. The letter referred to the one of 02.06.2016 and stated that the 2015 audit report was now complete and a number of audit queries had been raised requiring the claimant to respond. Further the 2016 report was not ready and the delay being attributed to the claimant. The letter enumerated issues requiring the claimant to answer, among other issues that may come up once the audit report for 2016 was ready. The eight issues were ranging from unbanked Kshs. 21, 173, 071.00, USD 56, 263, and Euros 2, 565, 533; Kshs. 14, 700, 333.00 actual cash balance for 2016 which had not been carried forward to 2016 as required and its whereabouts; and enumerated and alleged 8 irregularities in cash management. The claimant was invited to clarify and the letter concluded **"Once the 2016 audit is availed by the auditors, we will get back you with what may arise that requires your response to finalise on this matter."** The claimant replied the letter by email of stating thus, **"I have received your email and the usual allegations. Kindly, send me a copy of the concluded 2015 audit report that I may be able to give my report."** The claimant has never received a copy of the respondent's 2015 final audit report except by way of the exhibit No. 1 on the respondent's list of documents filed on 19.04.2021.

The claimant has pleaded that as at filing of amended memorandum of claim, it was 29 months from her suspension from work without justification and despite her effort to respond to all allegations of negligence the respondent has not concluded the matter causing a diminished employability of the claimant and wanton emotional distress. The claimant has prayed for:

- a) A declaration that the respondent has created an intolerable work environment and fundamentally breached the contract of employment with the claimant through sheer professional incompetence.
- b) A declaration that the respondent has repudiated the contract of employment with the claimant.
- c) A declaration that the respondent has constructively dismissed the claimant from employment effective 27.02.2017.
- d) A declaration that the constructive dismissal amounts to wrongful and unfair termination of employment.

The respondent has pleaded from paragraph 18 to 23 of the amended response as follows:

- a) The claimant never bothered to write to or even visit the respondent to ascertain the position obtaining on the ground before rushing to the Court with the present claim.
- b) The audited report was finally released and the claimant was invited to respond to a number of queries which were raised by the auditors and which pointed to the respondent's culpability and financial impropriety but the respondent (may be meaning claimant) declined to visit the respondent's premises or to respond to the invitations.
- c) The claimant's leave arose procedurally and the same cannot be declared illegal.
- d) The claim for pay for the days that the claimant has been out of work is premature as the same will be dealt with once the audit process is complete and the respondent makes a decision on the claimant's fate.
- e) The claimant is not entitled to any of the reliefs sought.

The issue for determination is whether in the circumstances the claimant was constructively dismissed. The evidence is clear. The claimant has received a letter to show cause and has replied. In the intervening period, audit for the respondent's 2015 and 2016 accounts has been on-going. Parties have engaged in correspondence and the claimant has continued to make clarifications to the respondent, about the audits, as requested for. Further and more allegations have been levelled. The claimant's last request was for the respondent to provide the audit report for 2015. The respondent appears not to have provided it administratively but, the report has since been filed in Court. The Court finds that the parties are in an active disciplinary process. The claimant has continued to reply to the incremental allegations. The Court considers that where parties are in active disciplinary process, and in absence of any other evidence, then a finding of constructive dismissal or termination cannot be said to have been established.

The claimant has alleged a frustrating work environment amounting to a fundamental breach of the contract of service. However, the claimant has not pleaded particulars of such frustration and established the same by way of evidence. Up to the last actual date at work being on 12.05.2016, the Court returns that the claimant has not established a frustrating work environment that may have amounted to a fundamental breach of the contract of service and therefore, constructive termination. Further, in view of the active disciplinary process, the Court finds that the respondent was entitled to plead, submit and has established that the suit was premature and the claimant ought to have waited for the disciplinary process to be concluded administratively.

As submitted for the respondent, in **Joseph Aleper & Another –Versus- Lodwar Water and Sanitation Company Limited [2015]eKLR** D.K.N Marete J held that there are two facets of the definition of constructive dismissal:

- 1) The employer making a unilateral alteration or breach of the employment contract to the detriment of the employee.
- 2) The employer making or otherwise permitting working conditions of the employee to be intolerable for him to continue working.

The Court finds that the claimant has not, by pleadings and evidence, established either of the facets of constructive dismissal.

Again, in **CocaCola East & Central Africa –Versus- Maria Kagai Ligaga [2015]eKLR**, the Court of Appeal held that constructive dismissal occurs where an employee terminates the contract under which he is employed (with or without malice) in circumstances in which he is entitled to terminate it without notice, by reason of the employer's conduct. Further, in **Richard Nyaundi Marasi –Versus – The Board of Management, Geturi Mixed Secondary School [2017]eKLR**, Maureen Onyango J held that the basic ingredients in constructive dismissal are:

- a) The employer must be in breach of the contract of employment.
- b) The breach must be fundamental as to be considered a repudiatory breach.
- c) The employee must resign in response to that breach; and
- d) The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived.

The evidence is that the claimant has never resigned from employment attributable to the respondent's fundamental breach of the contract of service. While it was misleading for the respondent to allege that the claimant had refused or neglected to respond to the invitations in the pending disciplinary process, the claimant had in fact cooperated and continued answering the respondent's correspondence. The respondent updated the claimant on the disciplinary process by the letter dated 27.06.2018 and the claimant replied by her email requesting for the 2015 final audit report. The respondent's letter of 27.06.2018 further indicated that after the 2016 audit report the claimant may be required to answer any arising matters prior to finalisation of the matter (disciplinary case).

Thus to answer the 2nd issue for determination the Court returns that there was no constructive termination and parties are still in an active employment relationship with an active disciplinary process.

By that finding, the Court further returns that prayers a, b, c, and d in the amended memorandum of claim will collapse as unjustified. Similarly, there is no justification for compensation for alleged unfair constructive termination. Further and as submitted for the respondent, there was no redundancy as envisaged in section 40 of the Employment Act, 2007 and the prayer for severance pay will fail. The claimant prayed for leave and off days Kshs. 340, 800.00. As submitted for the respondent, the claimant has not shown how she arrived at the figure in the combined prayer. The claimant testified thus, **"Specific off days not stated. I cannot tell as of now."** The Court therefore returns that the claimant has failed to plead the particulars of the combined liquidated claim and failed to strictly prove the same as required. It will fail.

The 3rd issue for determination is whether the claimant is entitled to the prayer for salary from April 2016 to February 2017 when she filed the suit. The Court has already found that parties are still in employment relationship and the respondent has pleaded as well as, submitted as much. The Court finds that it was misconceived for the claimant to fix the date of the alleged constructive termination to the date of filing the memorandum of claim and alleging in the submissions that at that time, she had discovered another accountant had been employed in her place. The Court has considered the suspension without pay and then the unpaid leave.

It is submitted for the respondent that the claim is premature in view of the pending disciplinary process and the issue of the claimant's pay will be dealt with at the end of the disciplinary process.

The claimant has submitted that after suspension the respondent stopped paying her the salary and the respondent does not deny that much. She further submits that in February 2017 she discovered another accountant had been engaged to replace her and she therefore considered herself terminated. The Court has already found that parties are still in a contract of service.

The court upholds its opinion in **Grace Gacheru Muriithi –Versus- Kenya Literature Bureau (2012) eKLR**, in which the court stated thus, **"The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or**

interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent's Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent, the provision offends Sub-Articles 41(1) of the Constitution; it is unconstitutional."

The court further upholds the opinion in Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers –Versus-Timber Treatment International Limited [2013]eKLR, where this court stated thus, "The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful employment or the employee fails to exculpate oneself as charged."

The Court therefore considers that the question whether the claimant will be paid since suspension will be determined after conclusion of the pending disciplinary case. The claimant testified thus, "Currently I casually work for a school. I started in 2020." The Court considers that such engagement of the claimant and other pertinent matters including that the claimant was emplaced on unpaid leave (thereby lifting the suspension) are all matters to be considered at the end of the disciplinary process. The Court will therefore not delve into the effect of the suspension, unpaid leave and their effect to parties' rights, obligations and claims so as to pave way for conclusion of the disciplinary process and parties to resolve the issues per their contract of service one way or the other.

The Court has carefully reconsidered the claimant's allegation and submission that by failing to accord the claimant due disciplinary process per section 41 of the Employment Act, 2007, the respondent has thereby repudiated the contract of employment with the claimant. However, the evidence was that the respondent issued the letter to show cause and updated the claimant on the pending disciplinary case and asked her to make clarifications or answer more queries. By that evidence the disciplinary process is still on-going and it cannot be found that the respondent had breached section 41 of the Act. The respondent has conceded that the disciplinary process is on-going. The Court reckons that the same has taken too long to conclude. However, the claimant appears to have contributed to the delay when she filed the suit and prosecuted it while at the same time submitting to the disciplinary process. It should be just that the disciplinary case is expeditiously concluded and failing to do so within reasonable time, the claimant be deemed exculpated – and in the Court's opinion, six months from the date of this judgment (by 01.05.2022) should be such reasonable time. While making that finding the Court has considered that the terms and conditions of service between the parties appear not to have elaborate provisions on suspension and unpaid leave but the claimant appears to have voluntarily submitted herself to the suspension and the unpaid leave.

If the disciplinary process is not expeditiously concluded and the claimant is deemed exculpated (in the findings of the Court in this judgment and fixed at 01.05.2022), the Court considers that the parties would be at liberty to pursue their respective rights and obligations by way of appropriate legal process and may become necessary.

The claimant by her letter replying the letter to show cause demanded her April, 2016 salary which had fallen in arrears and she had not been paid. There was no evidence before the Court that the respondent had paid that salary and the claimant is awarded **Kshs.125, 000.00**.

As submitted for the respondent the claimant has not submitted on the justification and basis of the quantum for the exemplary damages as prayed for and the same will fail.

In view of the pending disciplinary case and the margins of success, the claimant is awarded partial costs of the suit fixed at **Kshs. 50, 000.00**.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- 1) Payment of **Kshs. 175, 000.00** by 01.12.2021 failing interest to be payable thereon at Court rates from the date of this judgment till the date of full payment.
- 2) The respondent to expedite the conclusion of the pending disciplinary case and the respondent to render the final decision by 01.05.2022 and failing, the claimant to be deemed exculpated accordingly and in that event, the parties may be at liberty to pursue their respective rights and obligations by way of appropriate legal process as may become necessary.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 22ND OCTOBER, 2021.

BYRAM ONGAYA

JUDGE