



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
CAUSE NO. E467 OF 2020

KEITH WRIGHT.....CLAIMANT

VERSUS

KENTEGRA BIOTECHNOLOGY (EPZ) LTD.....RESPONDENT

JUDGMENT

The claimant filed his Memorandum of Claim on 1st September 2020 and his case is that the Respondent unlawfully repudiated his employment Contract and aggrieved by the decision he is seeking the following reliefs:

- a) A declaration that the claimant suffered wrongful repudiation of contract at the hands of the Respondent.
- b) An order quashing the alleged repudiation of contract
- c) Salary arrears for the entire period the Claimant has been out of employment.
- d) In the alternative, an order for payment of the Claimant's lawful terminal dues set out as follows:
 - i. Pay in lieu of three months' notice.....\$46,667
 - ii. 12 Months' Salary as compensation.....\$140,000
 - iii. Cost of getting goods back from
the shipping company.....\$18000
 - iv. Refund for the lease of a house in Nairobi.....\$8000
 - v. Moving expenses to the shipping company.....\$12000
- e) Maximum compensation of 12 months' salary in respect of unfair termination.
- f) Damages for discrimination.
- g) Exemplary damages for lost opportunities
- h) Costs of this suit with interest thereon.

The Respondent, Kentegra Biotechnology (EPZ) LTD filed a Response to the claim on 13th October 2020 where it denied the claimant's allegations in toto.

Claim

The Claimant's case is that he was offered employment by the Respondent through a Contract of Employment dated 6th June, 2019 which

was to take effect on the 1st of July, 2020.

On 16th day of June, 2020 the respondent unlawfully, without any notice, reason, cause or justification repudiated the Contract of employment of the Claimant on account of alleged lack of authority by the chief executive officer (CEO) to hire. That the impugned repudiation was an unlawful and unfair termination of the Claimant Contract that exposed him to great risk and expense.

It was the Claimant's case that the repudiation of contract of employment was effected maliciously and without any due regard to the Claimant's welfare and rights accruing to him and that the Respondent discriminated against the Claimant who had already resigned from his job in the United States of America and secured plans to relocate to Kenya.

The claimant particularized the grounds of discrimination against him and his case was that his contract of employment was repudiated without any justification; the respondent failed to offer him any other employment in the organization; there was no legal basis to terminate his contract while using his contacts to secure contracts; and that his constitutional right not to be discriminated against was violated.

In evidence, the claimant adopted his statement and documents dated 30th August 2020 and Supplementary Statement dated 22nd March 2021 and testified that he was offered employment by the Respondent on 6th June 2019. He was to start the job in 30 days but this did not take place and on 21st May 2020 he got a revised contract from the Respondent after negotiating for a lower salary. The start date for the revised contract was 1st July 2020 but on 16th June 2020, his contract was cancelled via email.

By this time, he had already made arrangements to travel to Kenya and had resigned from his previous job. He had signed a lease in Nairobi and also processed his goods for shipping to Kenya.

On the allegation by the Respondent to the effect that he had colluded with Mr. Bill Schaffer, the Respondent's CEO, the claimant testified that Mr. Bill Schaffer offered him the job in his capacity as the Respondent's Chief Executive Officer. Further that the claimant could not collude with Mr. Bill Schaffer as he was not familiar with the Respondent's internal procedures.

The Claimant further stated that repudiation of his contract left him without employment as he had already resigned from his previous job. He was discriminated against and suffered loss as pleaded in his claim.

Despite being in court, the Respondent's counsel opted not to cross examine the claimant and the Claimant's case was closed.

Response

The respondent amended Response to Claim dated 27th November 2020 and denied the claim and that they never offered the Claimant employment by contract **dated 6th June, 2019** and the alleged employment contract was questioned how the claimant held the contract for over one year without implementing it.

The response is also that in the event that an offer of employment was extended to the Claimant, the offer was not binding upon the Respondent as it did not accord with the Respondent's Board of Director's policy on employment of Senior Executives. The Respondent's Procedures and policies provide that any appointment of a candidate to a senior position must be approved by the Board of directors and that there was no vacant position to be filled by the Claimant.

The Response is also that the contract had to be repudiated because the position of Chief Farm Operations Officer and the duties listed therein did not exist and the company would have violated the law. The Claimant is well known to the members of the Board and Senior Management and that they had communicated to the Claimant on several occasions that the company did not have capacity to hire him and that the Board, had not sanctioned Mr. Bill Schaffer to issue the alleged employment contract.

The Respondent admitted to the repudiation of the employment contract on 16th June, 2020 and that the same was lawful, procedural and communicated to the Claimant well before its effective date.

The Respondent also avers that its actions did not affect the Claimant's residence and that he is still retained by his former employer. He did not have to relocate any goods or members of his family to Kenya and that if any goods were relocated; the same was done before execution of the repudiated contract.

The Respondent states that no employment relationship ensued between the parties as the contract was repudiated before commencement. If the Claimant incurred any relocation expenses the costs should be borne by Mr. Bill Schaffer from his personal funds. The allegations of discrimination and malice are also denied. The Respondent avers that the Claimant's claim is scandalous, frivolous, and vexatious and abuse of court process and should thus be dismissed with costs.

In evidence on 22nd September 2021, the Respondent called David Payne who testified that he is a co-founder of the Respondent and also serves as a member of the Respondent's Board of Directors. He adopted his witness statement and documents as evidence in chief.

Mr Payne testified that he met the Claimant in December 2017 where they had healthy interactions and the claimant indicated that he was interested in working for the Respondent. The Respondent's by-laws on appointment as an executive officer must be approved by the Respondent's Board of Directors.

The appointment of the Claimant was never approved by the Respondent's Board of Directors and the former Chief Executive Officer issued the offer without the board's approval. This violated the Board of Director's decision and as such, the former Chief Executive Officer was

issued with a Notice to show cause and the contract offered to the Claimant repudiated.

Mr Paine also testified that at the time the contract was issued, the Claimant was not in Kenya. The airspace had been shut down due to COVID-19 and as such the Claimant remained in the United States of America.

On the allegation that the Claimant had leased a house in Nairobi, Mr Payne testified that such was not true and that no lease agreement has been produced in court and that the respondent had followed up and confirmed that nothing had been paid. On the allegation that school fees for the Claimant's children had been paid, that was not true and that the same was paid by the former Chief Executive Officer and that the board was not aware of such payment. The former CEO was later on fired by the Respondent. He prays that the Claim be dismissed with costs.

On 6th October 2021, Mr Payne was cross-examination and testified that the Claimant had received an offer from the Respondent's former CEO but maintained that the offer was not approved by the board. He also reiterated that by 9th May 2020, he was not aware that school fees and accommodation for the claimant had been paid. Further that he believed that the Claimant was of high integrity and that he was well aware that his employment was not proper.

Mr Payne also testified that after learning of the Claimant's Contract, no notice was issued to him before the Claimant was hired by the Respondent. The Claimant was then working at Millennium Company in 2018 where he had an obligation to pay tax. He attached the tax returns from the Claimant to confirm his employment status.

The offer letter was not done by the Respondent and that it did not bear the Respondent's letterhead. That it was not the intention of the Respondent to make the Claimant suffer due to the acts of omission or commission by the former CEO.

Mr Paine also testified that it would be difficult for the Claimant to know whether the board had passed a resolution to appoint him and that the former CEO should have informed him. He however maintained that the former CEO should be blamed for failure to communicate. He also confirmed that the Respondent had not filed a counter claim for the school fees paid to the Claimant despite claiming that the former CEO had no authority to make such payments. He agreed that the fact that the offer was repudiated means that an offer had been issued.

The witness reiterated that it was not possible for the Claimant to fly to Kenya between March and August 2020 as the airspace was closed in a bid to contain the spread of COVID-19. Further that it was not possible for the former CEO to issue the Claimant with an offer as a resolution of the board was necessary.

At the close of the hearing, both parties filed written submissions.

The claimant submitted that there was a binding contract between the parties and the contract produced in evidence was duly signed by the Claimant and the Respondent's Managing Director for and on behalf of the Respondent Company. The Contract became binding on the date the Claimant accepted the same on the 31st of May, 2020. Further that the Contract was lawful, valid and legally enforceable and that the same was not challenged by the Respondents at the hearing of the case. The attempt by the Respondent to allude that the CEO who issued the Claimants contract had no authority to do so is an internal issue that should not be brought before this court. Further that the Respondent did not join the said CEO and/or Managing Director to the proceedings to take blame/responsibility for his actions if at all.

On whether due process was followed in rescinding the contract, the claimant submitted that the evidence by the respondent that the Contract was issued to the Claimant without the Board's approval yet the Respondent's on cross examination the Respondent's witness stated that the former CEO had the authority and power to communicate the decisions of the Board of Directors to third parties. The purported repudiation of the Contract issued to the Claimant was an afterthought made with malice and in bad faith and that there was no merit in issuance of the letter rescinding the Contract.

The Claimant was residing and working in the United States before he was offered the job by the Respondent. There is evidence on his losses which was not challenged by the Respondent as his evidence-in-chief remains unchallenged and/or uncontroverted. The Claimant's right to lawful expectation to work for the Respondent was completely frustrated and violated by the rescinding of the Contract. Counsel urges the Court to grant the Claimant the prayers sought in the Statement of Claim.

Counsel submits that the Respondent was not accorded a fair trial as stipulated in Articles 25(c) and 50 of the Constitution of Kenya. The submissions were anchored on interlocutory applications by the parties which the court has since addressed and matter proceeded for hearing.

The respondent submitted that there was no employer- employee relationship between the parties, counsel urges the court as held in **Maurice Oduor Okech v Chequered Flag Limited [2013] eKLR Cause No. 12 of 2011** that in determining the existence of an employment relationship, the Court is expected to go beyond mere terminologies employed by the parties and must inquire into the entire spectrum of facts and circumstances to establish whether an employer/employee relationship as defined in the Employment Act, 2007 actually exists. Clause 6.2 and 6.1 of the Respondent's by-laws which provide that the board exercises full control of all activities and that newly created positions on the Respondent's Board may be filled by the affirmative vote of the majority of the Board members then in office.

Section 37 (2) of the Companies Act is that a document is validly executed by a company if it is signed on behalf of the company by two authorized signatories or by a director of the company in the presence of a witness who attests the signature. That neither the statutory provisions of the Companies Act nor the by-laws of the Respondent were adhered to and as such, the former CEO had no authority to issue an employment contract to the Claimant and hence there was no establishment of any employer-employee relationship.

In the Minutes of the meeting held on 13th March 2020 by the respondent Board of Directors demonstrate that the former CEO made a unilateral verbal commitment to employ the Claimant after the Respondent held a vote and they unanimously voted to delay the potential

hire. Further that the Respondent, as a matter of good corporate governance and practice, had to communicate the decision to repudiate the illegal contract that was awarded to the Claimant and the same was signed off by two directors in compliance with Section 37 of the Companies Act. That if the Claimant had taken up the role, the Respondent would have paid the Claimant \$140,000 annually which would amount to 46.06% of the Respondent's income in 2020. The claimant would have also been illegally hired into a non-existent position. That subsequently as a matter of good corporate governance and to avoid legitimizing an already illegal contract, the Respondent had to repudiate the contract. the said contract could not be performed on the grounds that the same was frustrated owing to the government policy and directive to shut down the Kenyan airspace from March 25th, 2020, to July 31st, 2020, in a bid to contain the spread of the coronavirus (COVID-19) and relied on the case of **Kenya Airline Pilots Association v Kenya Airways PLC [2021] eKLR Cause 185 of 2020** the court held that the doctrine of frustration operates to excuse parties from further performance where an event in relation to the matter renders performance impossible or only possible in a very different way from that contemplated.

On the claimed losses, the respondent submitted that the Government of Kenya banned all passenger international flights into and out of Kenya between 25th March 2020 and that the flights only resumed after 1st August 2020. Further that the Claimant's verifying affidavit indicates that the same was sworn at Bethesda, Maryland and notarized before a Notary Public in District of Columbia in the United States on 13th August 2020 and as such the Claimant was not in Kenya and has all along been residing in the United States.

The Claimant was and is still working as an Executive Director of Millennium Water Alliance in Washington D.C since July 2018 with no interruption at all. That the annexed Claimant's tax records for taxes paid to the United States Department of

Treasury - Internal Revenue Service confirms that the Claimant was and is in active and gainful employment in the United States.

On the issue of house lease in Nairobi under paragraph 8 (iii) (b) of the memorandum of claim the claimant claims the amount of \$8,000, the attached draft tenancy agreement indicates that he paid \$2,000 as the rent. Further that the template tenancy agreement was never executed and the intended dates on the recital are conflicting, that is, 2019 and 2020, and the same is not supported by any evidence to show proof of payment which proves that no rent was ever paid by the Claimant. The attached vacation rental leases or Airbnb leases of 2019 in the United States which have no relevance and bearing on this case and is misleading.

On the issue of expenses for moving houses, counsel draws the court's attention to page 23 of the Claimant's supplementary list and bundle of documents where there is an email extract of 22nd June 2020 where a conversation of moving charges is ongoing and the charges are dating back to December 2019. The Claimant moving houses within the United States should have no bearing on this case and the Respondent given that the Respondent did not orchestrate any movement from houses.

The Claimant did not suffer any financial loss and therefore is not entitled to any of the claims listed on paragraph 8 of the memorandum of claim. He prays that the Claimant's entire suit should be dismissed with costs to the Respondent.

Determination

From the pleadings, the responses thereto and the submissions the following issues arise for determination:

- a) Whether there existed an Employer/Employee relationship between the parties.
- b) Whether the rescinding of the aforesaid Contract procedurally and lawfully effected
- c) Whether the Claimant is entitled to the reliefs sought

It is not in dispute that on 6th June, 2019 the Claimant received a letter of offer from the Respondent's Former CEO. The commencement date was 1st July 2020 and the Claimant was required to indicate acceptance of the offer by signing and dating the agreement. On 31st May 2020, the Claimant accepted the offer by appending his signature on the contract. However, the Respondent via a letter dated 16th June 2020 informed the Claimant that they had repudiated the contract. The Respondent cited the reasons that the former CEO had no authority and capacity to issue the offer and that such was a preserve of the respondent's Board of Directors.

The fundamental question in this dispute is whether there was an Employer-Employee relationship created through the letter of offer from the Respondent to the Claimant, and acceptance of offer by the Claimant.

Execution of employment contracts is provided for under Section 9 (1) of the Employment Act which provides that

A contract of service—

(a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or

(b) which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.

Section 9 (2) provides that:

An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).

It is not in dispute that on 31st May 2020, the claimant accepted the offer by appending his signature on the contract. For the Respondent, Mr. Bill Schaffer executed the contract in his capacity as the CEO and representative of **Kentegra Biotechnology (Epz) Ltd.**

The Claimant fulfilled his obligation under Section 9(3) of the Employment Act by signing acceptance while the Respondent fulfilled its obligation by preparing the contract and having it executed by its CEO, Mr. Bill Schaffer. It is not in dispute that at all material times, the Respondent's CEO presented himself as such and implied that he had authority to issues a valid appointment offer to the claimant. The fact that the board met and voted on whether to hire the Claimant means they were aware of the then impending appointment but opted not to act.

It is also commonplace that upon acceptance of an offer, a contract automatically becomes legally binding and can only be withdrawn or varied by consent or in accordance with the contract.

It is trite that the actions of an employee for and on behalf of the employer are binding the employer by operation of the law. Unless there is express agreement, policy or treaty directing the employee not to commit the employer in a given matter for and on behalf of the employer, the employer assumes liability for all the actions done by the employee. This means that where there was commitment by the CEO for and on behalf of the employer, respondent herein, this became a commitment for the business and company.

The respondent as the employer is liable to make good the commitment.

All the rights that the employee accrued against the employer at the time of the execution of the employment contract with the respondent, including the right to claim for various expenses thereof, became a right that he has against the employer.

The employer can only escape liability where there is an offending employee, who, while at work, contravened a provision of the law or that he engaged in any conduct that, if assessed by the employer, would constitute a contravention of a provision of the same law. The challenged conduct must immediately be brought to the attention of the employer and who must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and in compliance with the provisions of the applicable law. where the employer fails to take the necessary steps to address the wrong visited against the employee, the employer must be deemed also to have contravened that provision.

In this case, It is not sufficient that the respondent's Board of Directors met and passed a resolution to issue a notice to show cause against the CEO and passed a resolution that the claimant's contract of employment was illegal and not properly executed. Far from it. The claimant was not privy to internal policies, operational procedures and his contract of employment was properly executed by an officer of the respondent. Rights accrue from the employment contract.

The upshot is that this court finds that upon execution by the parties, the contract became legally binding and an Employer-Employee relationship ensued.

With a legally binding agreement executed between the parties, an employer and employee relationship was created. it naturally follows that the Respondent could not withdraw from the contract, without regard to the terms of that contract, and the governing law, the Employment Act, 2007.

In this regard, the Respondent simply wrote to the Claimant indicating that it had repudiated the contract as Mr. Bill Schaffer had issued the offer without authority and that such appointments were a preserve for the respondent's board of directors. It was also argued that the Claimant had colluded with the former CEO and as such the contract was void *ab initio*.

The Respondent argued that if the Claimant had taken up the role, the Respondent would have paid the him \$140,000 annually which would amount to 46.06% of the total income making it untenable. That the claimant would have been illegally hired into a non-existent position and subsequently as a matter of good corporate governance and to avoid legitimizing an already illegal contract, the Respondent had to repudiate this illegal contract.

The findings above with regard to the validity of the employment contract between the parties; it is a legal requirement that before ending an employee-employer relationship, the employer must meet both the substantial and procedural tests. While the reasons advanced by the Respondent may meet the substantial test the procedural test was not met. The respondent did not make any attempts to engage the employee to ensure the due process. They simply wrote a letter rescinding the contract without involving the Claimant.

Where indeed the position held by the claimant would have taken 46.06% of the total income of the respondent, this is without evidence. The alleged illegal hiring of the claimant is equally left without evidence on the findings above that the employment contract between the parties is valid. The justification for repudiating the contract of employment issued to the claimant is left bare.

It is noteworthy what the respondent's witness Mr. David Payne stated in his evidence that;

On 4th March, 2020 Bill [the CEO] sent an email to the Executive Team pushing for the hiring of the claimant. He also provided the claimant's reference contact information.

On 9th March, 2020 I wrote back to Bill declining the proposal on the basis that the respondent could not financially manage a new hire at the time because it was having difficulty making payroll. I argued that the company should make the decision based on a board vote by consensus.

Was it that the contract was wrongly issued or that the respondent could not afford to hire the claimant at the time?

As noted above, the claimant was not privy to the internal operational requirements of the respondent save he had a valid contract and had a legitimate expectation that his employment would be secured and only terminated in accordance with the law and due process.

The following provisions from that Employment Act, 2007 are pertinent;

43. Proof of reason for termination

(1) In any claim arising out of termination of a 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.

...

47. Complaint of summary dismissal and unfair termination

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

For these reasons the respondent fell short of the procedural requirements and as such this court finds and holds that the rescinding of the aforesaid Contract was not procedurally and lawfully effected. The claimant suffered wrongful repudiation of contract. Pursuant to section 45 and 49 of the Employment Act, 2007 compensation is due. This is assessed at 6 months equivalent to the salary due under the contract all at $\$225,000/12 \times 6 = \$112,500$.

Notice pay is due for want of due process and pursuant to section 35 of the Employment Act, 2007 and the court reading of clause VI of the contract of employment, the award of one month salary is appropriate all at \$18,750.

Clause VI provides as follows;

*The company reserves the right to terminate employment of any executive for just cause at any time without notice and without payment in lieu of notice. **The company will be entitled to terminate your employment for any reason other than for just cause, upon providing to you such minimum notice as required by law.***

The order seeking to quash the letter repudiating the contract hence addressed and redressed, such shall suffice.

The claim for salary arrears for the period the claimant has been out of work, the claimant was not able to report to work following the unlawful conduct of the respondent. Such is addressed above. Save, in preparation for taking up employment within the one year the claimant had to relocate from his home location in the United States of America to Kenya; he incurred costs which shall be addressed on the merits.

The claimant secured his employment contract on 6th June, 2019. He commenced preparations for relocation from the United States of America to Kenya and made plans to move his personal effects for shipping. This evidence as stated by the claimant was not challenged in any material way save for the respondent to urge the court the shipping of goods was not done and these remained in the United States of America.

The claimant is entitled to costs of shipping his goods at \$18,000.

The shipping of the goods and moving expenses can however not be separated and claimed under different vote head. To claim under both is declined.

On the claim for a refund of the lease of a house in Nairobi, for the claimant to plan, ship and commence his employment from his home country to Kenya, he required accommodation and for which he leased a house on the background of his employment with the respondent. Such employment is addressed and lease costs of \$8,000 are due.

As outlined above, the claimant particularized the grounds upon which he was discriminated against by the respondent. He also testified that the respondent repudiated his contract while aware that they had used his contacts to secure funds and then dumped him which was in violation of his constitutional and legal rights not to be discriminated against. The discrimination visited against him has caused him loss and damage.

The Supreme Court in **Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019) [2021] KESC 12 (KLR)** held that;

... Article 27 of the Constitution as well as Section 5 read together with Section 47 of the [Employment Act](#). Article 27 of the Constitution at clause 4 and 5 provides that:

“(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 (4)

Section 5 of the [Employment Act, 2007](#) provides that;

(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee —

(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status.

And in the case of **Kennedy Nyaguncha Omanga v Bob Morgan Limited Cause No 1983 of 2011** the court held that The protection of employees against any form of discrimination at the work place is a significant matter and the burden placed upon an employer to disprove the allegations of discrimination is enormous. The employer must prove that discrimination did not take place as alleged and that where there is discrimination, it was not with regard to any of the specified grounds. In this regard, section 5(7) of the Employment Act, 2007 directs that;

(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section

Did the respondent discharge this burden?

According to Section 5(7) of the Employment Act, 2007 an employer alleged to have engaged in a discriminatory practice must give reasons for taking certain actions against the employee. Where such actions are shown not to have any justification against the employee, then there exists discrimination against such an employee and must therefore be addressed. In this instance, the claimant had discharged the burden as to shift it to the Respondent who failed to discharge on their part.

In addressing a similar matter, the Supreme Court in the case of [Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others \[2020\] eKLR](#) held that a party who claims there is direct or indirect discrimination against him is required to prove his claim by application of section 108 of the Evidence Act;

Section 108 of the [Evidence Act](#) provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The Court of Appeal in defining what discrimination in employment portends in the case **Barclays Bank of Kenya LTD & Another v Gladys Muthoni & 20 Others [2018] eKLR** held that;

... discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions... whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age; sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.

tion is buttressed by the Supreme Court in the case of **Law Society of Kenya v The Attorney General and COTU, Petition No.4 of 2019** that discrimination involves the distinction, whether intentional or not but based on grounds relating to a person or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society. Discrimination also means unfair treatment or denial of normal privileges to a person(s) and a failure to treat all persons equally without any reasonable cause.

In my assessment, the Respondent not only failed in discharging its duty but also exhibited discrimination against the Claimant on account of his employability which exposed him directly and indirectly to loss and damage. He was forced to resign from his previous employment on the understanding that he had secured employment with the respondent after signing his employment contract on 6th May, 2019. In preparation to relocate and change countries, he commenced plans to move his personal effect, change of schools for his children and family all which were frustrated by the action of the respondent.

As outlined above, the claimant’s evidence-in-chief was not challenged. The Court therefore finds the Respondent guilty of discriminating against the Claimant on account of his employment status. This is contrary to Article 27 of the Constitution, 2010 and section 5 of the Employment Act, 2007.

The Supreme Court in the case of **Gichuru v Package Insurance Brokers Ltd** reduced the award of damages from Ksh.5, 000,000 to Ksh.2, 000,000. The cause of action in that matter arose in the year 2014.

In the case of **VMK v CUEA [2013] eKLR** where the learned Judge awarded the Claimant Kshs. 5,000,000 as exemplary damages for discrimination. The Court was also awarded the claimant a similar amount in the case of **James Mulinge v Freight Wings Limited [2016] eKLR** where a similar amount was awarded.

In this case, the court finds an award of Ksh.5, 000,000 in damages as appropriate.

On the issue of costs, the claimant's employment contract having been frustrated by the respondent and being forced to file suit to secure his rights, cost are hereby awarded

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms

- a) A declaration that the claimant suffered wrongful repudiation of contract by the Respondent;**
- b) Damages for discrimination Ksh.5,000,000 [\$44,642.85] (CBK exchange rates as at 1st December, 2021);**
- c) Compensation awarded at \$112,500;**
- d) Notice pay \$18,750;**
- e) Shipping costs \$18,000;**
- f) Awards in (b), (c), (d) and (e) above shall be paid within 30 days after which time the same shall be paid with interests from the date due and until paid in full; and**
- g) Costs of the suit.**

DELIVERED IN COURT AT NAIROBI THIS 9TH DAY OF DECEMBER, 2021.

M. MBARU

JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT: OKODOI

..... **AND**