



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1413 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

MARILYN NYAMBURA MBUTHIA.....CLAIMANT

VERSUS

SAFARICOM LIMITED.....RESPONDENT

JUDGMENT

The Claimant filed suit on 19th July, 2016, seeking damages for unfair, wrongful and unlawful termination arising out of an employment contract entered into with the Respondent with effect from 17th March 2003.

According to the pleadings and the evidence presented to Court the Claimant's case is that: during the course of her employment she was ascribed exemplary performance resulting in her nomination as the Safaricom Employee of the Year 2007 for the Human Resources Department. In addition, she was seconded to Vodafone in the UK as a People Development Consultant for a period of 6 months. She was severally promoted due to her excellent performance and on 31st January, 2014, she was promoted to the position of Human Resource Operations, a position she held until termination. As at the time material to this suit she was entitled to a basic salary of Kshs.622,664 and a monthly car allowance of Kshs.175,000.

Ms. Marilyn further avers that sometime in February 2015, she travelled to the United States for official duties and upon her return she fell ill and could not report to work. She was admitted for 6 weeks part of which was in the Intensive Care Unit. Thereafter upon review, she was given a 3 months' sick off. Upon advice from her doctor she returned to work in May 2015 where she started working half day.

On return to work she was assigned additional responsibilities of looking after the CEO's office and to restructure her department which duties she states she diligently and successfully carried out. She goes on to state that she requested the manager who was undertaking her duties while she was on sick leave to hand over her duties back to her but the Manager refused.

As a result of the failure to hand over, she reported the matter to her immediate supervisor who scheduled a 2 day hand over meeting. On the 2nd day of the hand over meeting she was informed that her responsibilities had been taken away from her without any notice or justifiable cause.

That on 22nd September 2015, while undertaking her duties, she was summoned for a meeting at the office of the Director of Human Resources. At the meeting the Director of Legal Affairs who was in attendance the Claimant with a Contract of Separation by Mutual Agreement and requested her to sign it but she refused to do so. When she was asked whether she understood the basis of the meeting she answered in the negative.

Marilyn avers that on leaving the meeting she found that security officers had been instructed to evict her from the office with immediate effect without giving her a chance to collect her personal belongings. That her work identification card and access card were taken away as well and her email access withdrawn together with her medical cover and all other benefits. Thereafter she was escorted out of the building.

That sometime on 26th February 2016, the Director of Resources agreed to meet the Claimant at the Respondent's offices but upon arrival neither the Director of Resources nor the Director of Corporate Affairs were present. Another meeting was scheduled for 3rd March 2016 where she was informed that the Respondent's position on Mutual Separation had not changed. She then asked to be given reasons for the termination but none were provided.

She further avers that sometime in April 2016 she received a sum of money in her account from the Respondent and on 22nd April, 2016, she

received a letter through email terminating her employment on the grounds of poor performance with effect from 22nd September 2015. The claimant testified that she was never provided with reasons for termination prior to the letter of 22nd April, 2016, she was never given an opportunity to be heard and neither was she taken through any disciplinary proceedings as provided for in the staff manual before the termination of her services.

That the reasons provided for at termination were not valid as they cited poor performance whereas the claimant had been rated an excellent performer during staff appraisal undertaken by the Respondent's directors in April 2015, which resulted in a salary increment, bonus and share grant. That as a result she suffered immensely due to cancellation of the medical cover which was necessary due to her medical condition. That she has been unable to get employment elsewhere as the circumstances under which her employment was terminated remain unclear.

That Respondent is currently (at the time of the hearing) in the process of recruiting a replacement for the position held by the Claimant, and had already sent out advertisements for the position. The position held by the Claimant and the responsibilities have been split into 2 departments — Head of Department HR Operations and Head of Total Reward. These positions have been advertised in the Respondent's website and various fora and the closing date for receiving applications was 12th July 2016.

In the Memorandum of Claim dated 15th July, 2016, she prays for:

- i. A declaration that the termination of the Claimant's employment was unfair, wrongful and unlawful.
- ii. An order directing the Respondent to unconditionally reinstate the Claimant to her position or an equally suitable position with the Respondent without any loss of seniority, with all her salary, allowances, benefits, and any other legal dues
- iii. An injunction prohibiting the Respondent from recruiting for the positions Head of Department HR Operations and Head of Total Reward unless and until the Claimant's position falls vacant in a lawful manner.
- iv. An order directing the Respondent to pay the Claimant her salary, all allowances and benefits she was entitled to as an employee in her position from the 22nd September 2015 when the said termination was effective until the date of her reinstatement.
- v. An order directing the Claimant to pay all the costs of medical expenses incurred from the date of cancellation of her medical cover to date totalling to Kshs.196,800
- vi. in the alternative to prayer ii and iii above and without prejudice to the foregoing, the respondent be ordered to pay the claimant:-
 - a. Damages for unfair, unlawful and wrongful termination of the Claimant's employment services as provided for in Section 49 totalling to Kshs.10,608,864 being equivalent to 12 months' salary.
 - b. 15 days salary for every complete year of service amounting to Kshs.4,437,577.
 - c. Employee performance share grants amounting to Kshs.2,666,059
 - d. Employer and employee contribution to the pension scheme amounting to Kshs.3,025,571
 - e. Salary inclusive of allowances and benefits for the remainder of the period the claimant would have worked until lawful retirement at Kshs. 333,407,642.20 expected retirement being at the age of 60 years.
- vii. Costs of the suit
- viii. Interest on prayer vi and vii.

The Respondent filed a statement of response on 26th January 2017. In the response and in the evidence presented to court the respondent admits the employment relationship, the Claimant's exemplary performance and nomination as employee of the year in 2007 and being seconded to their affiliate Company in the UK and the termination but deny that the same was unfair for the reasons that:

That the Respondent's Staff Handbook formed part of the contract of employment dated 7th March 2003, and that it reserved the right at the sole discretion to change the conditions of the Claimant's employment upon issuing a written notice of such changes to the Claimant.

The respondent avers that it validly terminated the Claimant's services with effect from 22nd September, 2015, which termination was predicated on the grounds of poor performance, insubordination, failure to apply laid down protocols on approving payments for medical bills above the cover limit; and inappropriate outbursts and hostility towards staff members.

That the Claimant fell ill in February 2015, and proceeded for a long sick leave during which period the Respondent assigned her roles to 2 members of the Human Resources Leadership team. They aver that it was the respondent's sole discretion to restructure business as it deemed fit in the prevailing circumstances.

The respondent also avers that after the Claimant resumed work her duties were gradually handed back to her as she was experiencing

memory loss and was temperamental. She was assigned the duty of implementing a new tool for salary reviews that was to be effected in July, 2015 which project stalled as a result of the Claimant's inability to work with the Project Management Office and Business Analytics team thereby exposing the Respondent to risk of failing to effect salary reviews.

That the acting director HR at the time took the lead role in the project and the Claimant withdrew from the project team after the appointment of the acting HR Director to the project. That the Claimant also refused to take instructions from the acting HR Director leading to difficulties in the discharge of HR functions.

In addition to the foregoing, the Respondent claims that the Claimant in blatant disregard of the standard procedure of the Respondent, after exceeding her medical allocation, failed to seek approval from the Director of Resources for additional expenditure on her medical expenses.

The respondent avers that the mutual separation agreement was made under its policy which formed part of the employment contract. That on 22nd September 2015, the respondent terminated the claimant's contract on an amicable basis. That upon the said separation the Respondent paid the claimant salary for September 2015 of Kshs.515,689 and car allowance for the same period of Kshs.127,273. In March 2016, the Respondent paid the Claimant 3 months' salary in lieu of notice and car allowance in the sum of Kshs.2,127,216 and 525,000 respectively, accrued leave of Kshs.1,694,471 and statutory severance of Kshs.4,440,928/=.

The Respondent avers that the Claimant has not demonstrated any exceptional circumstances justifying the award of an order of reinstatement. That she was a member of the Respondent's Staff Pension Scheme which was managed independently of the Respondent.

The Respondent further avers that on or about 2016, it commenced and successfully restructured its human resources department as a result of which the Claimant's position became redundant. The positions of Head of Department HR Operations and Head of Total Reward which were previously held by the Claimant under the docket of Head of Department HR Operations no longer exist. They urge the Court to dismiss the suit with costs.

Claimant's Submissions

The Claimant submits that the termination of her employment contravened the provisions of section 41 of the Employment Act, 2007 as she was not notified of the termination before hand and neither was she given a hearing. She submits that the reasons given for termination were poor performance, insubordination, failure to apply laid down protocols in approving payment of medical bills above the cover limits and inappropriate outbursts and hostility towards fellow staff members. That none of these reasons were established before dismissal and therefore the dismissal was unfair.

On poor performance, she submits that this reason for dismissal was not justified as the same had never been brought to her attention. She cites the case of *Alex Wainaina Mbugua Vs Kenya Airways Limited (2017) eKLR* where it was held that an employee who is of poor performance should be given a fair and reasonable chance to address their work performance. That the allegation of poor performance did not pre-empt her right to be heard on the said accusation. She cites the case of *Kenya Union and commercial Food and Allied Workers versus Meru North Farmers Sacco Limited cause No. 74 of 2013* where it was held that whatever reason or reasons that arise to cause an employer to terminate an employee, that employee must be taken through the mandatory process as outlined under Section 41 of the Employment Act.

On the ground of insubordination it is submitted that the Claimant had never received any warning letter to justify this allegation. That no hearing took place in order for her to defend herself. She cites the case of *Fred Ondari Makori Vs the Management Committee of Ministry of Works Sports Club ICC 1079 of 2010* where the Court emphasized on the need for a hearing and to charge an employee formally and put them on their defence.

That the allegation of failure to follow laid down protocols in approving payments for medical bills above the cover limit was not proved as no documentation was provided to the Court to prove that the Claimant was guilty of the same.

As to inappropriate outbursts towards fellow staff it is submitted that no evidence was adduced in support of the same. That the Respondent never provided specifics of the said allegation such as the names of those affected, letter of complaint against the Claimant's actions, warning letters and/or minutes of a disciplinary hearing regarding this issue.

That the Report of the Ethics & Compliance, Risk Management Divisions has missing entries and cannot be wholly relied on. Furthermore the said report was only availed to the claimant in the Respondent's bundle of documents filed in Court and not at any time before the impugned termination. She therefore submits that this report cannot be relied on as evidence of any wrongdoing on her part.

On the remedies sought she submits that reinstatement should be ordered as she was not aware of the grounds for termination and neither was she aware of the report used to terminate her employment. That the Respondent deliberately breached section 41 of the Employment Act, 2007, which fact was admitted by RW1. Further that she is still aware of the Respondent's systems and operations having been fully involved in their development and management thus reinstatement is practicable.

That chances of getting comparable or suitable employment are slim as she has been actively seeking employment to no avail. That she suffers from decreased employability due to her illness and it is not practical to argue that she seeks employment elsewhere. That her position is not filled and thus there are no barriers to her reinstatement.

She prays to be compensated for medical expenses she incurred as a result of the loss of employment, employee performance share grants amounting to Kshs.2,666,059/=, 15 days' salary for each completed year of service, employer and employee contribution to the pension scheme amounting to Ksh.3,025,571/= and damages for unlawful termination. She also prays for costs of the suit.

Respondent's submissions

The Respondent submits that the Claimant's failure to deliver on identified tasks amounted to poor performance which is a valid reason for termination of a contract. The respondent cites the case of **Kenya Petroleum Oil workers Union vs Kenya Petroleum Refineries Ltd (2013) eKLR** where it was held:

“Performance is therefore gauged on the basis of sufficient job output, acceptable quality, compliance with employer operating procedures, sufficient employee effort and ability to perform the job at the expected level.”

That the Claimant's inefficiencies were confirmed by the Respondent's Ethics & Compliance Risk Management Division which carried out an internal investigation in August 2015, which revealed glaring inefficiencies, acts of intimidation, insubordination and derogation from the Respondent's policies. That due to the said reasons the Respondent submits that they were justified in terminating the Claimant's services.

As to the remedies sought the Respondent submits that it commenced restructuring process of HR Department sometime in 2015, as a result of which the Claimant's position as Head of Department HR Operations fell away as evidenced in the Respondent's organogram at page 18 of the Respondent's bundle of documents. That the remedy of reinstatement is not practicable and should not be granted. They cite the case of **Kenya Airways Limited Vs Allied & Aviation Workers Union Kenya & 3 Others Civil Appeal No 46 of 2013**, in which Murgor, JA quoted with approval the holding in **New Zealand Educational Institute Vs Board of Trustees of Auckland Normal Intermediate School (1994) 2 ernz 414 (CA)**, where the New Zealand Court of Appeal stated:

“Whether... it would not be practicable to reinstate the employee involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.”

It is further submitted that the Claimant's position does not involve use of special skill which could only be employed in the Respondent's service. That in terms of section 49 (4)(1) of the Employment Act, the Claimant was enjoined to mitigate her losses arising from the alleged unfair termination which she failed to do by not seeking alternative employment.

As to the medical expenses incurred from the date of cancellation of her medical cover to the date of filing the claim on 19th July 2016, it is submitted that medical allowances were predicated on the actual performance of the employment contract as was held in the case of **Pravin Bowry vs Ethics & Anti-Corruption Commission (2013) eKLR**.

On the claim for damages equivalent to 12 months' salary it is submitted that under the Employment contract, the parties had agreed that the same would be terminated by a month's notice or payment of a month's salary in lieu of notice. The Respondent submits that a maximum of 4 months' salary would be sufficient should the court be inclined to award under this head.

That the claim for employee performance share grants had already been paid and to award the sum claimed would amount to unjust enrichment.

It is submitted that the employer and employee contribution to the pension scheme amounting to Kshs.3,025,571/= is managed by Alexander Forbes Financial Services (E.A) Ltd, a separate legal entity and as such any claim arising from the scheme should be pursued against Alexander Forbes Financial Services and not the Respondent.

As for Service pay it is submitted that the Claimant was both a member of the Safaricom Staff Pension Scheme and National Social Security Fund and thus the Claimant is not entitled to claim service pay. The respondent cites the case of **Peter Gachenga Kimuhu Vs Kenol Kobil Limited (2014) eKLR** where it was held:

“Service pay is not available to the Claimant. There was no provision in his contract extending to him service pay. The Respondent had in place a staff Pension Scheme, and throughout deducted and paid contribution on account of the Claimant to the National Social Security Fund. Section 35(6) of the Employment Act, 2007, discourages the payment to employees of multiple social security payments, and disentitles Kimuhu from claiming such additional social security payments.”

That the claim for salary inclusive of allowances and benefits until retirement is not tenable for the reason that the contract was terminable by either party giving one month's notice. They rely on the case of **Engineer Francis N. Gachuri Vs Energy Regulatory Commission (2013) eKLR** to buttress this position.

The Respondent submits that exemplary damages are awarded in circumstances where the court may award more than the normal measure of damages by taking into account the motives or conduct of the Respondent. They are punitive and not intended to compensate the claimant from any loss, but rather to punish the Respondent. Furthermore that the issue of exemplary damages were only introduced by way of submissions and was never pleaded. That parties are bound by their pleadings and cite the case of **Independent Electoral and Boundaries commission & Another vs Stephen Mutinda Mule & 3 Others (2014)eKLR** quoted with approval the holding in **Adetoun Oladeji (Nig) Ltd Vs Nigeria Breweries PLC S.C. 91/2002**, where it was held:

“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with averments of the pleadings

goes to no issue and must be disregarded.”

They submit that damages be awarded in place of the order for reinstatement and the same should be awarded as submitted herein.

Findings and Determination

The issues for determination are –

1. Whether the Claimant was unfairly terminated
2. Whether the Claimant is entitled to the remedies sought

Did the Respondent have justification to terminate the claimant's services? In their pleadings the Respondent aver that termination was predicated on the grounds of poor performance, insubordination, failure to apply laid down protocols on approving payments for medical bills above the cover limit; and inappropriate outbursts and hostility towards staff members as was indicated in the termination letter dated 22nd April 2016.

The Claimant on the other hand stated that in the month of September 2015 while undertaking her duties, she was summoned for a meeting at the Director of Resources' office. At the meeting the Director of Legal Affairs was present who presented the Claimant with a Contract of Separation by Mutual Agreement and requested her to sign it but she refused to do so. Thereafter she was escorted out of the building without any further communication up until on or about April, 2016, when she received a termination letter which was with effect from 22nd September, 2015. She was also paid in terms of the separation agreement which she had never signed.

Mutual Separation

In the case of *State of Punjab & Others Versus Dhaniit Sins Sandhu Civil Appeal No. 5698-5699 of 2009* the Supreme Court of India expressed itself as follows:

“The principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled to on the footing that it is valid and then turn round and say it is void for purpose of securing some other advantage.”

In the instant case the mutual separation agreement was prepared by the Respondent and handed to the Claimant on 22nd September, 2015, but she refused to sign it on grounds that she had not been given reasons why she was being terminated. A mutual separation agreement is characterised by the aspect of choice and if this is missing it cannot qualify to be such. There is no evidence of such willingness to enter into an agreement to separate amicably and therefore the same is null and void.

Reason of poor performance

In the bundle of documents relied on by the Claimant there is a report at page 3 titled “*investigation into alleged unethical practice in HR Operations Department*”. The report was prepared by the Respondent's Ethics and Compliance Risk Management Division in 2015.

In the said report the Division apparently received allegations that the Head of HR Operations was stifling operations in HR through unnecessary and deliberate red tape delays leading to inefficient management of HR Operations and Poor Service delivery of HR initiatives. Subsequently an investigation was carried out and it was recommended that action be taken against the Claimant for inefficiencies and bad practices that put the Company at risk; insubordination through attempts to overturn decisions made by Director Resources and Approving expenditure on her medical bills above the cover limit.

From the evidence it is clear that the only information to reach the conclusion that the Claimant was underperforming or not performing at all was contained in the aforementioned report. There was no evidence of any appraisal done to come to the said conclusion. In the case of *Agnes Yahuma Digo v PJ Petroleum Equipment Limited Industrial Cause Number 2049 of 2011 (21 February 2013)* the Court held that:-

“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve a reasonable length of time.”

Further in the case of *Jane Samba Mukala v Ol Tukai Lodge Limited Industrial cause number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013)* the court held that:-

“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.

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.

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.”

From the pleadings and the evidence, it is clear that none of the requirements aforementioned were adhered to once it was reported that there were unethical practices in the HR Department attributed to the Claimant. My finding is that the reason for non-performance was not established and it could not therefore form a reason for termination.

Insubordination

Section 45(2)(b) of the Employment Act 2007 states that the reason for termination is fair, if related to the Employee’s conduct, capacity or compatibility. Insubordination falls under Section 44(4)(d) and (e) of the Employment Act 2007. It is a valid ground for summary dismissal.

In the case of **Abraham Gumba v. KEMSA (2014) eKLR** Rika J referred to the **Mississippi Supreme Court in Simms v. the Board of Trustees Holly Springs Municipal District School, 414 SO, 2d 431 [Miss. 1982]**, where insubordination was described as

“constant or continuing intentional refusal to obey direct or implied order, reasonable in nature, and by or with proper authority.”

The RW1 stated in evidence that while her immediate supervisor was out of the country, the Claimant refused, failed and or neglected to take instructions from the acting HR Director thereby causing difficulties in the discharge of HR functions. That she snubbed a HR leadership offsite meeting in Mt. Kenya without apologies; taking the HR operations team to a day out without seeking permission, storming out of a procurement meeting headed by the HRBP Regional Operations protesting that the said HRBP Regional Operations had no authority to lead the tender process.

From the above definition of insubordination, the acts complained of do fall under the head and form a basis for termination. The Report dated August, 2015, links her to acts of insubordination by refusing to honour instructions by the Director-Resources and copying such communication to junior staff in HR Operations. Such communication is however not attached to the proceedings in Court and thus the said acts were not proved.

Inappropriate Outbursts and Hostility

In the case of **Dede Esi Annie Amanor-Wilks v Action Aid International [2014] eKLR** the Court stated that Incompatibility can be a nebulous concept and workplaces normally have a wide array of personalities, approaches and managerial styles. Employers can tolerate mild eccentricity or idiosyncrasies, but cannot reasonably be expected to tolerate downright impossible or unmanageable Employees. In order that the Employee is not victimized for mild eccentricities, Courts have required the Employer to show that the Employee’s conduct has resulted in irreparable breakdown of the relationship [**Wright v. St. Mary’s Hospital 1992 [ILJ] 987 IC**]. The Court in this decision described incompatibility as –

The inability on the part of the Employee to work harmoniously with fellow Workers or Managers, or failure by the Employee to fit with the corporate culture.”

This offence however recognised in law was not established by the Respondent as no witnesses were called to that effect and neither was a hearing held to put her on her defence. In the circumstances the aforesaid offence cannot be said to have been a valid ground for dismissal.

Falling away of the Claimant’s position

The Respondent claims that the Claimant participated in restructuring of the Human Resources Department which resulted in the falling away of her position. This was mentioned in passing in the Statement of Response and in the evidence of RW1. The major reason for termination was not falling away of the Claimant’s position. In any event none of the requirements under section 40 of the Employment Act were followed in effecting her termination and as such the matter cannot be termed as a redundancy.

From the foregoing, I find that the termination of the claimant’s employment was unfair for failure to comply with fair procedure.

Remedies

Having found the termination of the claimant’s employment unfair she is entitled to remedies under Section 49 of the Act.

i. Reinstatement

This remedy is not practicable as the Respondent’s allege that the Claimant’s office fell redundant after a restructuring was done. Furthermore from the circumstances of the case it seems that the relationship between the parties has irretrievably broken down as evidenced by the conduct of the parties leading to the termination.

The conditions precedent to reinstatement are set out in section 49(4) as:

(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—

- a) the wishes of the employee;
- b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
- c) the practicability of recommending reinstatement or re-engagement;
- d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
- e) the employee's length of service with the employer;
- f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
- g) the opportunities available to the employee for securing comparable or suitable employment with another employer;
- h) the value of any severance payable by law;
- i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
- j) any expenses reasonably incurred by the employee as a consequence of the termination;
- k) any conduct of the employee which to any extent caused or contributed to the termination;
- l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
- m) any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.

Basing on the provisions of the aforementioned cases and the facts of the instant case the remedy of reinstatement is not practical and cannot therefore be ordered. The prayer for injunction to stop the filling of her position also fails accordingly.

ii. Medical expenses up to the date of termination

The Claimant was kicked out of the office on 22nd September 2015, when her medical cover was withdrawn. Her letter of termination is dated on 22nd April, 2016. During the intervening period prior to receiving the letter of termination she incurred medical expenses which she seeks to be reimbursed. The Respondent urges that this is a benefit predicated on the services rendered by the Claimant and in this case she was out of office not rendering any services to the Respondent and as such the allowances cannot be paid.

I do not agree with the respondent. The claimant was forced out of the office by the Respondent without a valid letter of termination and her fate had not been communicated to her until 7 months later. Any expenses incurred during the intervening period ought to be reimbursed subject to proof. I therefor award her Kshs.196,800 subject to production of relevant proof.

iii. Salary inclusive of allowances and benefits for the remainder of the period

The claimant urges that she would have worked until lawful retirement and claims payment in lieu thereof. The Respondent has urged that the Claimant position did not require specialised skill and can still get alternative employment elsewhere.

In the case of *Engineer Francis N. Gachuri Vs Energy Regulatory Commission (2013) eKLR* it was held: There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant's contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the Employment Act does not mention the word "permanent employment"

In light of the above, the claim for salary until retirement should fail.

iv. Employee performance share grants

The Claimant pleads for Kshs.2,666,059 whereas the Respondent paid ESOP proceeds of Kshs.2,653,386.38 as evidenced in the payslip of September, 2015. The Claimant has not proved how she arrived at the figure claimed and therefore the difference between what was paid and what is claimed cannot be ascertained. The claim that fails

v. Employer and Employee contribution to the pension scheme

The Respondent submits that the scheme was managed by Alexander Forbes Financial Services (E.A) Ltd a separate entity from the Respondent and thus any action would only lie with the said entity. From a cursory glance of the Claimant's statement for the staff pension scheme, it is evident that the same was managed by Alexander Forbes Financial Services (E.A.) Limited. Privity of Contract between the Claimant and the Respondent on the issue does not exist and the cause of action therein if any lies with the pension administrator.

The respondent is however under obligation to notify the scheme of the claimant's termination for purposes of processing of her benefits under the scheme in accordance with the Scheme Rules.

vi. Service Pay

The prayer for 15 days' salary fore very complete year of service also fails as there is no legal basis for the same.

vii. Damages for unlawful termination

The circumstances under which the claimant left employment were by any standards very unnerving.

The claimant's termination was without notice. She was called into a meeting and presented with a letter of mutual separation which she declined to sign. She sought for audience from her boss to explain the reasons for termination which was denied. She then discovered that a notice had been prepared to inform staff that she had chosen to leave the organisation to pursue other interests, which was not true.

After she left the room where she had been called for the meeting she went to the bathroom where she called her husband. On leaving the bathroom, three officers approached her and told her they had been sent to escort her out of the building. She asked to meet her staff but this was declined after the security people made a call. When she went back to her office she found that her laptop had been taken away. She was not allowed to take her belongings except her handbag.

The manner in which the claimant left service traumatised her. Even during her hearing she was still visibly traumatised. She stated that she had several miscarriages since then, had become epileptic and had to take expensive medication daily.

Taking into account the manner in which she was relieved of her duties, including the fact that at the time she was still working half day as she had not fully recovered, and further taking into account that she had worked for the respondent from March 2003 to September 2015 with exemplary performance, it is my opinion that the claimant is entitled to 12 months' gross salary as compensation. I therefore award her Kshs.9,571,968.

As admitted by RW1 the claimant was informed of the termination of her employment on 22nd April 2016. She is therefore entitled to full salary together with all attendant benefits up to 22nd April 2016.

The claimant is awarded the following –

- i. Medical expenses from 22nd September 2015 to 22nd April 2016, subject to production of proof.
- ii. Damages for unfair termination equivalent to 12 months' gross salary Kshs.9,571,968.
- iii. Costs
- iv. Interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF JANUARY 2019

MAUREEN ONYANGO

JUDGE