



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1495 OF 2013

JANE KIMEMIA MUGAMBI.....CLAIMANT

VERSUS

KENYA METHODIST UNIVERSITY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 20th December, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 16.09.2013 through Ameli Inyangu & Partners Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent's termination of the claimant's employment on 17.09.2010 was unfair and unlawful.
- b) Payment of the terminal benefits and damages as set out in paragraph 20 being:
 - a) Salary for 17 days worked in September 2010 Kshs. 383, 792.00.
 - b) 30 days accrued leave for 2009 Kshs. 677, 280.00.
 - c) 21.25 days accrued prorate leave for 2010 Kshs. 479, 740.00.
 - d) Service pay at the rate of 15 days per year for 14 years Kshs. 4, 740, 960.00.
 - e) 3 months' salary in lieu of notice Kshs. 2, 031, 840.00.
 - f) 12 months' pay for compensation for unlawful termination of employment Kshs. 8, 127, 360.00.
 - g) Leave allowance for 2009 Kshs. 338, 640.00.
 - h) Leave allowance for 2010 Kshs. 338, 680.00.
 - i) Total Kshs. 17, 118, 252.00.
- c) Interest on (b) above at court rates from the date of the suit until payment in full.
- d) An order directing the respondent to issue the claimant with a certificate of service forthwith.
- e) Costs and interest thereon at court rates.
- f) Any other or further relief as the Honourable Court may deem fit to grant.

The respondent filed a memorandum in reply to the claimant's memorandum of claim and counterclaim on 11.10.2013 through Kamau Kuria and Kiraitu Advocates. The respondent prayed for dismissal of the claimant's claim with costs and in the counterclaim prayed for judgment against the claimant for:

a) Kshs. 64, 362, 614 being:

- Kshs. 2, 163, 644.00 salaries paid to her for 38 months following purported appointment as Deputy Registrar, Human Resources and Administration on 29.12.2005.
- Kshs. 2, 719, 920.00 being salaries paid to the claimant for 14 months following the purported appointment as Associate Principal on 20.02.2007.
- Kshs. 54, 979, 050.00 being the wage bill of the respondent for 14 months from March, 2008 to 30.04.2009 paid on directions of the claimant and her husband but without the approval of the Council; the monthly wage bill at the instance of the claimant rose from Kshs. 16, 714, 115.00 to Kshs. 20, 641, 190.00.
- Kshs. 4, 500,000.00 being irregular salary earned by the claimant following a purported increase from a monthly salary of Kshs. 552, 280.00 to Kshs. 1, 02, 280.00 between 01.05.2009 and 31.08.2010.

b) Interest on (a) above.

c) General damages.

d) Costs of the suit.

The claimant filed the reply to the memorandum of reply to the claim and response to the counterclaim on 15.10.2018 through her changed advocates Mutua Waweru & Company Advocates. The claimant prayed that the counterclaim be dismissed with costs.

The pleadings and evidence on the claimant's employment history is clear but what is in dispute, and the **1st issue** for determination, is whether the claimant's subsequent promotions and payments were valid or were influenced with conflict of interest in circumstances whereby the claimant was a spouse to the respondent's Vice Chancellor and Chief Executive Officer one Professor Mutuma Mugambi, deceased.

The respondent came into existence in 1997 and its first Vice Chancellor was Professor Mutuma Mugambi who served in that capacity from 10.07.1997 to 15.02.2010.

The claimant was employed by the respondent's predecessor the Methodist Training Institute on 20.09.1996 as an Administrative Officer. The claimant became the respondent's employee when the respondent became a fully fledged university in 1997. On 15.11.1996 the claimant completed a form on personal particulars and indicated that her husband's name was Joseph Kimemia Migwe.

By the letter dated 13.09.1996 the respondent offered the claimant the post of Administrative Officer in Job Group MU6 on a 3 years' renewable term of service. The claimant accepted the offer of appointment by signing on 17.09.1996.

By the letter dated 29.12.2005 the claimant was promoted to the position of Deputy Registrar, Human Resource and Administration. The letter of promotion was signed by Professor Mutuma Mugambi as Vice chancellor (VC).

By the internal memo by Professor Mutuma Mugambi dated 20.02.2007 the claimant was, at the recommendation of the Deputy Vice Chancellor, Academic Affairs - DVC (AA), appointed Associate Principal of the Academic Satellite Centre in Nairobi and with additional responsibility for the other centres at Nakuru, Nyeri, and Mombasa. The memo stated that in her day to day operations she would report to the DVC, (AA) and where necessary to the VC.

The 2nd University Council meeting for the respondent was held on 12.10.2007. The VC Professor Mutuma Mugambi was present as Council Secretary and the claimant was present as ex-officio member and designated as Associate Principal and her name listed as Mrs. Jane Kimemia – Mugambi. It is recorded in the minutes that Mr. Eliud Murithi, the Chair of the HR Committee gave a detailed account of the deliberations of their committee meeting of 9th October and amongst the deliberations was, **“(c) The appointment of the DVC – Academic Affairs and the Associate Principal were confirmed.”** The internal memo of 14.02.2008 signed by the VC Professor Mutuma Mugambi conveyed to the claimant thus, **“Following the Full Council meeting held on 12.10.2007, this is to inform you that the position of Associate Principal; created to cater for the rapid growth of the Satellite Centres was confirmed by the Council. You are hereby fully appointed as Associate Principal of the Constituent Colleges. Let me congratulate you for this appointment and wish you all the best as you continue with your dedicated service to KEMU. All other Terms of Service remain the same. Find attached revised Job description.”**

By the memo dated 04.05.2009, the VC Professor Mutuma Mugambi informed the claimant that the respondent had approved salary increment from 01.05.2009 in recognition of the hard work she had done in the growth of the university. The salary structure for Job Group MU14 would be Kshs. 552280 x 25000 – 827280 per month. The claimant's entry point was to be Kshs. 677, 280 with a house allowance of Kshs. 135, 000.00.

The claimant in her evidence admitted that the VC Professor Mutuma Mugambi, deceased, was her husband. She testified that as she joined the university in 1996 she already lived with Professor Mutuma Mugambi as man and wife. She admitted that she did not describe Professor Mutuma Mugambi as her husband in her witness statement because it was not necessary to do so. It was her case that she was not employed and promoted in service by the respondent on account of her being a spouse to the late Professor Mutuma Mugambi. The claimant then testified that she officially got married to Professor Mutuma Mugambi in 2004 but as early as 1995 they were a couple with children and they were traditionally, spouses.

The claimant admitted that at all material times the respondent's charter did not provide for establishment of the office of Associate Principal as at March 2007 when she was appointed to the office. She admitted that the promotions came after she was officially married to Professor Mutuma Mugambi in 2004.

The Court has carefully considered the material on record. The claimant has admitted that throughout her employment she was married to the respondent's VC Professor Mutuma Mugambi, traditionally as at 1995 and officially sometimes in 2004. The parties have not pleaded or submitted on the respondent's internal provisions for managing conflict of interest. The Court has perused the charter establishing the respondent and the contract of service between the parties and finds that there were no elaborate provisions on managing conflict of interest.

The absence of the elaborate provisions on managing conflict of interest leaves the Court to analyse whether in the circumstances of the case the claimant was guilty of conflict of interest. **The Black's Law Dictionary 10th Edition** defines "conflict of interest" as a real or seeming incompatibility between one's private interests and one's public or fiduciary duty. The dictionary defines "fiduciary relationship" as one in which one person is under a duty to act for the benefit of another on matters within the scope of the relationship.

The claimant was a senior member of staff in the respondent's establishment. As cited for the respondent in **Chitty on Contracts pg. 731** an employee who holds himself as being skilled to do certain duties and is employed on that basis impliedly undertakes that he possesses and will exercise reasonable skill. Even if the employee does not profess a particular skill or competence, there is an implied term in the contract that he will exercise reasonable care in the performance of his duties. Further, it is an implied term in a contract of employment that the employee will serve the employer with fidelity and in good faith.

In the instant case, the Court considers that the respondent's case is that the claimant was conflicted and thereby failed to perform her duties properly by improperly influencing benefits to her husband who was the VC on the one hand and by being conferred benefits, on the other, because her husband was the VC.

The Court has considered the claimant's appointments and promotions and the attached benefits. The Court finds that the fact that the claimant and the VC were married and therefore likely to be conflicted in the discharge of their duties is not in doubt. The issue is whether the claimant and by extension, her late husband, were guilty of the conflict of interest as is known in management and law as applicable to handling of instances of conflict of interest.

The Court returns that in management of conflict of interest the affected employee or person is not liable of being conflicted if the situation of conflict of interest is common to all decision makers including the person in issue, the person avoids the situation of conflict of interest, the person declares the conflicted private interest to the relevant authority, or the private interest or fact of being conflicted is obvious to the decision makers. The Court is alert that the respondent is a private university but is regulated under the Universities Act, Cap. 210B. The Court considers that a university is an organisation of national life and though may be designated and be private like the instant respondent, a university is in its methods and expectations an organisation with a public character. The Court therefore returns that in absence of any other guiding material between the parties, it is reasonable that the ethical and integrity standards applicable in the instant case are measured against the provisions of the Public Officer Ethics Act, 2003. Section 12 of the Public Officer Ethics Act, 2003 provides thus, "**12. (1) A public officer shall use his best efforts to avoid being in a position in which his personal interests conflict with his official duties.**

(2) Without limiting the generality of subsection (1), a public officer shall not hold shares or have any other interest in a corporation, partnership of other body, directly or through another person, if holding those shares or having that interest would result in the public officer's personal interests conflicting with his official duties.

(3) A public officer whose personal interests conflict with his official duties shall-

(a) declare the personal interests to his superior or other appropriate body and comply with any directions to avoid the conflict; and

(b) refrain from participating in any deliberations with respect to the matter.

(4) Notwithstanding any directions to the contrary under subsection (3)(a), a public officer shall not award a contract, or influence the award of a contract, to-

(a) himself;

(b) a spouse or relative;

(c) a business associate; or

(d) a corporation, partnership or other body in which the officer has an interest.

(5) The regulations may govern when the personal interests of a public officer conflict with his official duties for the purposes of this section.

(6) In this section, "personal interest" includes the interest of a spouse, relative or business associate."

Pursuant to subsection 12 (5) above, regulation 11 of the Public Officer Ethics Regulations, 2003, provides thus,

“11. The personal interests of a public officer do not conflict with the official duties with respect to a matter, for purposes of section 12 of the Act, if the following are satisfied-

a) the personal interests of the public officer are not specific to the public officer but arise from the public officer being a member of a class of persons who all have personal interests in the matter;

b) it would be impractical for the public officer and all other public officers who have personal interests in the matter to refrain from participating in deliberations with respect to the matter; and

c) either the personal interests of the public officer are obvious or the public officer declares his personal interests to his superior or other appropriate body or person.”

At the respondent’s Council meeting of 12.10.2007 the claimant was promoted to the position of Associate Principal. The VC Professor Mutuma Mugambi was present as Council Secretary and the claimant was present as ex-officio member and designated as Associate Principal and her name listed as Mrs. Jane Kimemia – Mugambi. The Court returns that it must have been obvious to all Council members that the claimant and the VC were wife and husband – and in the present case the respondent has not taken the position that at all material time, it was ignorant about the fact of that marriage. The respondent has not pleaded and moved evidence that at all material time the respondent was ignorant of the marital relationship between the claimant and the VC. It is that in the initial personal information form of 15.11.1996 the claimant completed a form on personal particulars and indicated that her husband’s name was Joseph Kimemia Migwe and not the claimant. However, the Court returns that if the claimant was not the VC’s spouse as at the time of initial appointment, then the same does not aid the respondent’s case at all and no claims have been made with respect to that initial appointment.

To answer the 1st issue for determination, the Court returns that the claimant’s private interest and that of her late husband, if any, was obvious and the claimant did not therefore breach her fiduciary duty by reason of the alleged conflict of interest. In any event it was not the respondent’s case that the claimant was incompetent or improperly performed her duty and therefore the court returns that it has not been established that the claimant breached the fiduciary duty, the duty to act with due care and in the respondent’s best interests as her employer.

The 2nd issue for determination and which is related to the 1st issue is whether the respondent is entitled to the prayers in the counterclaim. It was submitted that the claimant irregularly and without authority from the Board of Trustees adjusted upwards the wage bill incurred by the respondent. The same was said to cost the respondent Kshs. 54, 979, 050.00 between March 2008 and 30.04.2009 over and above the previous spending. It is further submitted that the claimant acquiesced in having her husband’s salary increased from Kshs. 385, 000.00 per month to Kshs. 810, 000.00 in March 2008 and subsequently to Kshs. 1, 200, 000.00 per month in May 2009 together with housing allowance of Kshs. 150,000.00. The respondent’s submission was that the actions were taken without approval of the council.

The Court has revisited the charter establishing the respondent. Part V is on Financial Provisions. The part provides that Council approves annual budget including payment of salaries, allowances and other charges with respect of the staff of the university. The part further provides that council shall cause to be kept all proper books and record of accounts on the income, expenditure, assets and liabilities of the university. Further the council shall appoint an auditor to audit the respondent’s accounts on annual basis. Under statute XXXII on Terms and Conditions of Service council appoints administrative staff and academic staff necessary for the efficient functioning of the respondent, and, council determines the terms and conditions of service for the academic, administrative and other staff.

The Court has revisited the respondent’s case against the claimant for breach of the fiduciary duty, conflict of interest, irregular appointment or promotion and irregular payment to the claimant and her late husband of emoluments pleaded and submitted not to have been justified. The prayers were in the nature of special damages that must be strictly pleaded and proved. The respondent did not file the annual budgetary provisions as approved by council for the material time and then the actual payments allegedly made without authority and at the claimant’s irregular instance. The respondent did not also file the respondent’s audited accounts for the period and then such audit reports showing the alleged losses attributed to the claimant as was alleged. In absence of such evidence, the Court returns that the respondent failed to prove the claims and prayers against the claimant which were in the nature of special damages. Further the Court returns that the Court has already found that the alleged breach of fiduciary duty or the alleged conflict of interest were not established at all.

While making the findings, the Court returns that the extent of liability, if any that would be attributable to the claimant with regard to the counterclaim and the prayers thereof was not established. It was the evidence that the claimant’s husband was the VC and Chief Executive Officer for the respondent university. It was not shown how in the normal organisational protocols in the respondent’s establishment, the claimant being a holder of an office lower to that one held by her late husband would have conferred benefits to herself and her husband as was alleged for the respondent. The Court further considers that if the VC may have conferred certain benefits upon the claimant, then it was for the respondent to pursue the VC and not the claimant. Further the Court returns that the respondent has failed to establish the other persons that are said to have been paid out of the claimant’s actions and irregularly so and has not justified why the claimant would be the one to be held liable and not such 3rd parties as may have benefited out of the alleged irregular payments.

The Court considers that the respondent’s counterclaim was based on the alleged conflict of interest or breach of the fiduciary duty by the claimant arising out of her influence as a spouse to the VC. The Court has already found that the respondent, and in particular the respondent’s council, had failed to institute elaborate provisions for ethical and integrity requirements in its operational system and policies. It was the function of the council to provide for all terms and conditions of service for the respondent’s employees including, in the opinion of the Court, the relevant Staff Code of Conduct. In absence of such Staff Code of Conduct including on management of the ethical standards on fiduciary duty or conflict of interest, the claimant and her late husband (at the material time being the respondent’s VC) were entitled to do their best within the prevailing respondent’s deficiencies in the policies and operational requirements and systems. In view of that finding and the deficient operational system in that regard, the court upholds its opinion in **Grace Gacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR** thus,

“To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour

practice for the employer to fail to act on reported deficiencies in the employer's operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer's operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust."

The Court returns that at all material times the respondent did not initiate a disciplinary process against the claimant with respect to the matters in the counterclaim and further returns that in view of the identified respondent's deficiencies in the policies and operational requirements and systems the claimant will not be held liable and will not suffer adversity as claimed and prayed for in the counterclaim.

The Court has also considered that the counterclaim was filed on 11.10.2013 with respect to continuing irregular payments ending on 31.08.2010. The 3 years of limitation under section 90 of the Employment Act, 2007 lapsed on or about 31.08.2013 and more specifically, the 12 months of limitation under the section for a continuing injury lapsed on or about 31.08.2011. Accordingly, the Court returns that the cause of action for the counterclaim was clearly time barred.

Thus, to answer the 2nd issue for determination the Court returns that the Counter claim will fail.

The **3rd issue** for determination is whether the termination of the claimant's employment was unfair. The circumstances of the termination are as follows per the evidence on record. Around February 2010 the respondent carried out significant changes in its management structure characterised with reconstitution of the Board of Trustees and the respondent's top governance organ, the council. The contract of service of the VC Professor Mutuma Mugambi was terminated. It is the claimant's case that following the termination of the contract of service for the VC Professor Mutuma Mugambi, her own contract of service was visited with turbulence and times of trouble.

First, on 22.02.2010 the claimant's mandate as one of the signatories to the respondent's bank account was revoked as per the internal memo dated 01.03.2010. Effective 25.02.2010 she was replaced by Professor Robert Gateru as the Associate Principal at the Nairobi Campus. By an internal memo and effective 11.03.2010 the claimant was transferred to serve as a lecturer at the respondent's main campus in Meru. Effective 11.03.2010 the claimant's remuneration was revised downwards. By the memo dated 31.03.2010 the claimant was required to discuss matters about her terms and conditions of service and she was to contact the Vice Chancellor, Finance and Administration (VC – FA) on urgency basis. By the email of 07.10.2013 by the VC – FA the claimant was informed about council's directives on her terms of service to the effect that the available options for her were to accept to attend a placement or appointment interview by the academic department, or accept review of salary to the grade determined and offered by the academic department interview panel, or to accept separation as per the applicable terms and conditions of service. The letter of 29.04.2010 required the claimant to forward to the academic department her Curriculum Vitae (CV), transcripts and copies of her certificates for proper placement in the academic division. She was to do so by 06.05.2010. The letter dated 23.06.2010 conveyed that her house allowance was adjusted from Kshs. 85, 000.00 to Kshs.75, 000.00 applicable to the Meru station. All other terms of service remained the same. The claimant's case is that she was not paid the transfer allowance to facilitate her transfer to Meru though she reported as transferred and served with a lot of hardship. On 15.03.2010 she applied for 30 days leave but the same was declined without reasons.

The claimant wrote to the VC the protest letter of 06.05.2013 and met the VC on 13.05.2010 about her predicaments. She stated that she had reported as transferred to Meru per the memo of 10.03.2010 and she had been allocated lessons to teach. However, her transfer allowance had not been paid as promised in the transfer memo and she was finding it difficult to settle in Meru. Her monthly salary since March 2010 had not been paid. The belated request for her CV and certificates was viewed by her as harassment. The redeployment had not been subject to such submission of CV and certificates but she nevertheless attached her certificates to the letter. She stated that her appointment as an associate principal had been regular and Professor Robert Gateru had replaced her in that capacity following her transfer. It was not true that she had held two positions at the same time, that of associate principal and deputy registrar human resource and administration, because she never drew double salaries in that regard. She stated that she had already been transferred to the academic department and the purported interview was unjustified as she held an appointment letter to the position of senior lecturer. She stated, **"...For the avoidance of doubt, I am not agreeable to being treated in such selective and unreasonable manner by an employer I have served since 1996."** She concluded that the respondent confirms if she was still an employee; and, without delay, the respondent to pay her outstanding salary or in alternative indicate if and when she had been removed from the respondent's payroll. She stated that if she received no reply in 14 days then she would seek legal advice and take such lawful action. The letter was copied to the respondent's council chairman.

In the intervening period after transfer to Meru, it was the claimant's case that she received credible information that her relocation to Meru would be dangerous to her life in view of the events at the respondent at the time and she consulted the respondent's managers who advised her to postpone for a while her reporting to the Meru Campus. She reported the threats to her life at the Central Police Station, Nairobi under OB 34/ 19/ 03/ 10.

The claimant's case and testimony is that by the letter dated 13.09.2010 the respondent purported to lay against her a charge of gross misconduct and invited her for a disciplinary hearing on 17.09.2010. She replied by her advocate's letter dated 15.09.2010. The claimant stated that the matters raised were **sub judice** because they were similar to the allegations levelled against her husband Professor Mutuma Mugambi when he was a Vice Chancellor and was subject of pending litigation between Professor Mutuma Mugambi and the respondent. Further that she had a clean record of service and she had diligently served the respondent as she had done nothing irregularly or improperly. Throughout her service she had acted under her superiors and the council and she'd therefore not be the only culpable person. The office of Associate Principal indeed existed because after her transfer to Meru a successor was appointed. The advocates' letter further stated that it was unfair to adversely implicate the claimant on the basis of her being the wife to the VC Professor Mutuma Mugambi and not indentifying improper performance of her duties as an employee. The claimant's advocates stated that the alleged grounds of gross misconduct therefore lacked basis. The letter concluded that the claimant was not confident that her appearance before the council as requested would add anything further to the contents of the letter.

The claimant was summarily dismissed from employment by the letter dated 12.09.2010 signed by Professor Alfred M. Mutema, VC. The letter stated that council had noted the claimant's waiver to appear before the respondent's council and proceeded to consider the claimant's case and decided to terminate her upon the following grounds:

- a) First the council sadly noted that in breach of her terms of service the claimant used abusive or insulting language to the university as a whole and the council in particular. That constituted gross misconduct for which the university was entitled to dismiss the claimant.
- b) Secondly, the council noted that her answer amounted to a general denial of some of the acts of misconduct and further that yet many other acts of misconduct were not answered by the claimant at all. The council therefore considered that the claimant admitted all those which she did not respond to. The council rejected the claimant's explanations and concluded that the claimant committed gross misconduct as charged.

Thus, the Council had dismissed the claimant summarily. The letter stated that under the terms and conditions of service the claimant was not entitled to non contributory superannuating benefits and the same would not be paid. Further the misconduct by the claimant had led to loss to the university and no benefits would be paid to the claimant. She was asked to hand over to the Chairman, Department of Business Studies.

First, the Court considers that the respondent complied with section 41 of the Employment Act 2007 on the need for a notice and a hearing. The claimant indeed waived her right to appear before the council in company of a fellow employee of her choice and the respondent acted to proceed with the disciplinary case in her absence. The Court returns that due process was accorded to the claimant.

Second, the Court returns that the claimant was partly dismissed on account of abusive or insulting language but which, as submitted for the claimant has not been shown to have been subject of the show cause notice and established with particularity as at the time of termination or hearing before the Court. As submitted for the claimant and as was held in **CMC Aviation Limited –Versus- Mohammed Noor [2015]eKLR**, (Karanja, Musinga & Gatembu JJ.A) it was held that the employer must specify the alleged abusive or insulting words that the employee uttered in discharging the burden of justifying that the grounds of the termination of employment or wrongful dismissal as per section 47(5) of the Employment Act, 2007. In the instant case the respondent failed to discharge that burden and the Court returns that as a ground for termination the respondent has failed to show that as at termination, it existed as per section 43 of the Act.

Further the Court returns that the claimant was right when it was submitted for her that she had not been given a show cause notice with respect to the alleged ground of dismissal that she had used abusive and insulting language. In **National Cereals and Produce Board – Versus- John Kirui Tongorei [2017]eKLR**, the Court of Appeal (G.B.M. Kariuki, Sichale, and Kantai, JJ.A) it was held, “...**When the respondent was summoned to an administrative employment meeting, allegations were made notice of which had not been served upon the respondent. This was wrong. The appellant should have adhered to fair administrative action by notifying the respondent in advance of new allegations and giving him ample opportunity as required by law to prepare and present a response or defence to the allegations and to be represented by a representative to the said meeting if he so wished. This the appellant failed to do and in the process the respondent was denied a fair hearing. By terminating the respondent's services for reasons that were different from the reasons given in the suspension letter, the appellant breached the respondent's rights and the learned Judge was right to find that termination of the respondent's employment was unfair. We agree with that finding and can find no error in the way the trial Judge dealt with the same.**”

As for the other ground of termination on account of losses to the respondent, the Court has already found that the same had not been established as per the answers to the 1st and 2nd issue for determination earlier in this judgment.

Thus the Court returns that the termination of the claimant's employment was unfair for want of valid reasons under sections 43, 45 and 47(5) of the Act.

The Court has considered that the claimant desired to continue in employment, she did not significantly contribute to her termination, and the aggravating factor in her favour is that the respondent failed to be open in the process because, instead of forthwith confronting her with the disciplinary case, she was taken in circles such as transfer to Meru Campus without due salary and transfer allowance. The mitigating factor in favour of the respondent and considered by the Court is that the respondent accorded the claimant the due process of a notice and hearing. Taking the factors into account, the Court returns that to balance justice for the parties, under section 49 of the Act, the claimant will be awarded 6 months' salaries in compensation making **Kshs. 4, 063, 680.00** at Kshs. 677, 280.00 per month.

The 4th issue for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

- a) The claimant is entitled to salary for 17 days worked in September 2010 **Kshs. 383, 792.00** because she was dismissed effective 17.09.2010 and was not paid accordingly.
- b) The claimant has shown that she applied for leave but was declined and she is awarded 30 days accrued leave for 2009 **Kshs. 677, 280.00**.
- c) The claimant is entitled to 21.25 days accrued prorated leave for 2010 **Kshs. 479, 740.00** because she was dismissed effective 17.09.2010.
- d) The claimant is not entitled to service pay at the rate of 15 days per year for 14 years **Kshs. 4, 740, 960.00** because there being evidence and dispute, the Court returns that she must have been a member of NSSF and further it was clear that she had been a beneficiary of the non contributory superannuation scheme and she will not be entitled in view of the exemption in section 35(6) of the Act.

e) The claimant prayed for 3 months' salary in lieu of notice **Kshs. 2, 031, 840.00** as per clause 20.4 (i) of the respondent's terms and conditions of service.

f) The claimant is entitled to leave allowance for 2009 **Kshs. 338, 640.00** and leave allowance for 2010 **Kshs. 338, 680.00** because she was entitled to leave and the allowance but did not take the leave and payment for reasons not attributable to her.

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

a) The declaration that the termination of the claimant's contract of service by the respondent as per the letter dated 17.09.2010 was unfair for want of valid or genuine reasons.

b) The respondent to pay the claimant the sum of **Kshs. 8, 313, 692.00** by 01.03.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.

c) The dismissal of the counterclaim with costs.

d) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this Thursday 20th December, 2018.

BYRAM ONGAYA

JUDGE