



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2229 OF 2014

JUSTINA MUTITU NYAGA.....CLAIMANT

VERSUS

KENYA CIVIL AVIATION AUTHORITY.....RESPONDENT

JUDGEMENT

1. The claimant filed the claim on 16th December, 2014. Defence was filed on 23rd June, 2015. The claimant filed a reply thereto on 21st July, 2015. Parties also filed lists of documents and witness statements.

Claim

2. The claimant was employed by the respondent for the period 1975 to 2014 as Trainee rising through the ranks to the position of Aeronautical Information Services manager as at 1st January, 2004 and at a monthly salary of Kshs.10, 748,658.00 the claimant served for 39 years until his retirement.

3. On 9th October, 2008 the claimant was appointed Director East Africa School of Aviation which position she held for 65 months up to 31st March, 2014. While so acting the claimant was paid a salary of Kshs.142, 600.00 plus a 15% thereof without applying the applicable acting allowance as provided for in the Civil Aviation Authority Manual in force at the material time set out under clause E16 which provides that an officer appointed to act in a higher post will be paid acting allowance at the rate equivalent to the full difference between the salary and the minimum attached to the job which she is acting. An officer appointed to act in a higher post has a salary above the minimum of the higher post such an officer is to be paid acting allowances determined by the Director General. The acting allowances is paid only when the officer acts in the higher position or a continuous period of not less than 30 days or when the acting appointment follows another within an interval of not more than 15 days and the duration of both is not less than 30 days. Also that an officer appointed to act in the higher post is eligible only for such duration of appointment for travelling privileges at the rates applicable to the minimum of the salary of the job grade assigned to the higher post. This excluded house allowance.

4. The claimant retired on 31st March, 2014 on attaining age 60 years which was the retirement age at that stage of her services as the acting Director East Africa School of Aviation and was appreciated leading to her payment of a token bonus, excluding the accrued acting allowances in the sum of Ksh.15, 847.00.

5. The claimant raised concern on the non-payment of her acting allowances vide letter of 27th December, 2013 and a reminder of 7th February, 2014 to which the respondent replied vide letter dated 3rd April, 2014. The claimant was invited to meet the members of the financial human Capital Committee and the

audit committee on the 27th May, 2014. At the meeting, the claimant stated her demands and the matter was discussed and the respondent wrote letter of 25th June, 2014 informing the claimant that the matter was receiving the attention of the board and she was to be given a response in July, 2014.

6. Before retirement, the claimant had applied for the position of Director East Africa School of Aviation (EASA) in September, 2011 which position she had been acting in and despite performing well at the interview, she was discriminated against by virtue of her gender and was side-lined as the results were never released to her although she continued to work in the acting capacity until March, 2014. A second re-advertisement was done in February, 2013 when the claimant applied, the job specifications were altered. The respondent once more failed to process the applications. The claimant is seeking damages for discrimination.

7. The respondent without giving the claimant any valid reason or justification have continued to withhold and deny her the benefit of her acting allowance accruing to her as her lawful expectation that has been violated. The claim for special damages are for payment of Kshs.15,416,487.00 being outstanding allowance for the 65 months; damages for discrimination in the recruitment of the director general; and compensation for unlawful retention of the lawful acting allowances benefit.

8. The claim is for;

a) A declaration that the claimant is entitled to her lawful benefits by way of the accruing acting allowances in the sum of Kshs.15,416,847.00;

b) Damages in respect of discrimination;

c) Damages in respect of unlawful retention of lawful dues;

d) Cost of the suit and interests thereon; and

e) Interests on the sum awarded at court rates.

9. The claimant testified in support of her claim. Upon employment, the claimant served the respondent diligently for 39 years from 1975 to 31st March, 2014 when she retired. The claimant had by then served in different capacities.

10. On 9th October, 2008 the claimant was appointed acting Director EASA and just before had been manager, Aeronautical Information Services at a salary of kshs.142, 600.00. The acting appointment was for an unspecified period and was noted as *until further notice*. The respondent had a human resource manual on acting positions. The claimant was to act in the appointed position until a substantive appointment. The then managing director had stepped aside and the acting appointments was for over such period and until the incumbent resigned. The acting was for 65 months.

11. The claimant was supposed to be paid acting allowances at full being the difference between her salary and the position held in acting capacity or at a salary noted by the director general to be paid a 15% of her salary and where the salary was lower than the applicable salary for the acting allowances payment was that of the higher position held and who was paid at Kshs.193, 200.00.

12. The claimant was not given the difference over the acting allowance between her salary and that of the incumbent director. For the 65 months the claimant was only paid the 15% instead of the difference between the salary and that of the managing director position.

13. There were other benefits not paid being the responsibility allowances; house allowance; and transport allowances. On 1st April, 2010 the claimant was supposed to be paid the salary due to the managing director, a total sum of Kshs5, 738,745;

Telephone allowance difference of Kshs.288, 000.00

Leave allowance difference Kshs.235, 010.00;

Gratuity allowance difference Kshs.4, 217,467.46;

17 months acting allowance October, 2010 to march, 2013 difference

Total claim being Kshs.10, 980,392.40.

14. The claimant also testified that in 2011 the respondent advertised for the position of managing director and she applied. The claimant had been acting in the position at the time. She was qualified for the job. She was called for the interview but does not know what happened.

15. In late 2013, the claimant was informed that she did not succeed in the interview. She continued in the acting capacity. In February, 2013 the position was re-advertised and the respondent changed the criteria and required a Ph.D. holder and the respondent knew that at that time the claimant did not have such academic qualification. She took this to mean an act of bad faith. It was not clear why the respondent changed the requirements. She nonetheless applied for the position. There was no reply to her.

16. This amounted to discrimination against the claimant despite 6 years in acting capacity over the position, there was no equity and she was not paid the due acting allowance and thus seeks damages for discrimination against her.

17. In defence the respondent has asserted that the claimant was paid 15% but the human resource manual was clear that on how the acting allowance was to be computed. The respondent has since changed the manual and is using a new one different from the one applicable at the time of the claimant's appointment to act.

Defence

18. In defence the respondent admits they employed the claimant and by letter dated 9th October, 2008 was appointed to act as the director, EASA with effect from 13th October, 2008 until further notice. The claimant was paid an extra 15% of her basic salary as acting allowance in accordance with legal regime.

19. Although the respondent planned to fill the position of director, EASA substantively within the time stipulated by the policy and legal framework, it became extremely difficult by some internal and external occurrences that were beyond its control.

20. On 5th September, 2008, Timothy Waweru the holder of the office got suspended from duty pending disciplinary proceedings against him. At the end of the same he opted to resign on 9th February, 2010 thus making the office vacant.

21. While preparing to fill the position, the head Human Resource Department, Joseph Ndung'u was suspended from employment and charged by the Anti-Corruption Court on 25th January, 2010 for abuse of office. The proceedings took a long time and concluded in February, 2012. This halted the recruitment process.

22. In 2010, the respondent appointed a head of human resource department, Tomas Bett. He found various matters to be resolved in the department before he could settle to have the managing director's position re-advertised. Such was advertised together with other senior positions in September, 2011.

23. Interviews were conducted and save for the position of director which the claimant was acting, all other positions were filled. The ratings had been found so poor that it could not be possible to fill the vacancy competitively and a decision was taken to re-advertise.

24. One of the senior positions advertised was that of Corporation Secretary filled by Judith Ng'ethe. There was no gender discrimination in the recruitment process by the respondent. In February, 2013 the position of director, EASA was re-advertised but the advert was non-responsive so as to allow a competitive selection it had to be re-advertised with the unfortunate situation that the claimant continued acting in the position.

25. Due to the growing stature of the respondent school, the leadership had to be entrusted in the hands of woman or man with far much higher credentials than had happened in the past. Following a directive by the government, the respondent board resolved to introduce in subsequent job advertisement critical qualifications for the job of director. Added was academic qualification for PhD holders in areas of aviation, management or organisational development or education or business as well as being academic leaders in their areas of specialisation.

26. After rigorous process on 4th December, 2014 the respondent appointed Dr. Mugambi G.K M'Nchebere, PhD as the director, EASA from 3rd November, 2014. At the time the claimant retirement was approaching. Her dues were paid in accordance with applicable law and policy.

27. In recognition to the claimant's contribution and achievements as acting director the respondent was generous and paid her a bonus of Kshs.860,952.00 an amount equivalent to one month's salary for the years 2010/2011, 2012, 2013 and 2014.

28. Where the claimant held an acting position it was due to factors beyond the control of the respondent. she was appropriately compensated for her time. The claimant has failed to disclose material facts to the court. the claim has no basis and is without merit and should be dismissed with costs. The claim is made to harass, intimidate the respondent to pay more for an unjust enrichments.

29. In evidence, the respondent's witness was Stephen Osino Rangar, the chief human resource and Staff Welfare officer of the respondent and who testified that the claimant was paid 15% of the director's salary when she held the acting position. the policy in place at the time is the one for 2003 which applied until 2014 when it was changed when the claimant retired. The incumbent was interdicted in 2008 and the claimant was to be paid half (½) salary from 5th September, 2008.

30. The policy provided that when one was acting the pay was 15% of the basic salary. The difference between basic pay and the acting position pay. The policy changed from 3rd May 2011. On a higher grade the claimant was paid Kshs.29, 210.00. When the respondent got a new policy the clause on acting allowance provided 15% whichever was higher which was an amendment from the previous position.

31. The new manual and policy came with changes and salary reviews. The claimant's salary became Kshs.142, 000.00 and acting allowance increased. The claimant got a favourable package;

32. May 2010 to March 2011 all arrears were paid at 15% at kshs.55, 213.00 based on a director's salary of Kshs.368, 054.00. By 2011 the respondent had complied and paid all due allowances to the claimant. Transport allowance; telephone allowance; and house allowances.

33. Only the transport allowance was in the pay slip.

34. The policy provided for other allowances – responsibility allowances – while house and telephone remained at normal pay allowances. The claimant was pensionable and upon retirement, pension was paid. She did not qualify for gratuity.

35. When the claimant was acting as director, EASA the position was advertised and she applied. The claimant was invited for the interviews and in the first call nobody qualified or appointed. The interviews were confidential and the board made a decision. The human resource manager was under the policy required to send regrets to candidates who did not qualify. on 10th October, 2013 the claimant was issued with a letter of regret and that the position would be re-advertised.

36. In the second interview, the job specifications changed for the respondent to be able to cope with the changing market need. A higher academic requirement was made and the board appointed a director with a doctorate. The claimant did not have a PhD. The registrar Academic was Dr. Sarah Waitiki while the new director was Dr. Mugambi. Over the years the respondent was offering a course which had changed and required highly qualified managers.

37. There was no discrimination against the claimant. The respondent's policy prohibits discrimination on gender basis and all adverts observe 31% to ensure non-discrimination. The respondent has female employees and the claimant was an act of management. Currently all directors are male as the female managers have retired.

38. Mr. Ragar also testified that the claimant's salary was Kshs.142,600.00. The director's salary was Kshs.193,200.00. The difference between the two salaries was Kshs.50,000.00. The claimant was not paid this amount. The policy allowed the claimant to be acting director from 2008 to 2014 a period of 6 years. The acting allowance was at the rate of 15% of basic pay at 146,000 and the director's salary at 193,600.00.

On the claimant's salary, 15% of basic pay is Kshs.21,390.00

On the director's salary, 15% of basic pay is Kshs.28,980.00

The 15% computation was based on the basic pay.

39. The claimant was to be paid the 15% based on the director's entry salary which the respondent did not compute. The scale used to make these computations are not submitted in court. In 2011 the respondent amended the human resource manual. Before the amendment, the claimant was paid the difference between her salary and the position she was acting on. Before the amendment, all those in acting position were either paid 15% of the higher position or their position, whichever was higher. When the changes took place in 2011 the claimant was already in an acting position and was not reappointed for her terms to be changed.

40. On 3rd February, 2017 the respondent filed the witness statement of Joseph Kiptoo.

Submissions

41. Both parties filed written submissions.

42. The claimant submits that upon employment by the respondent in 1975 she served diligently and was promoted. In 2008 she was appointed acting director EASA on 9th October, 2008 to 31st March, 2014. The allowances payable to the claimant during the period she held an acting position are in dispute in that they were not paid and when such was paid it was in violation of the respondent's human resource manual and the Regulations of Wages and Conditions of employment. When the respondent reviewed its human resource manual the respondent went ahead and denied her the acting allowance entitlement due.

43. The claimant also submits that although she was qualified for the position of director, EASA she was discriminated against and was not appointed to such position despite acting for 6 years without fault.

44. The respondent's human resource manual at clause E16 on acting allowance provides for payment of an acting allowance *equivalent to the full difference between the officer's salary and the minimum attached to the job on which she was acting*; the acting allowance could also be determined by the director general; the acting allowance was to be paid where the officer acting does so for a period of not less than 30 days; and the due travelling privileges at the rate applicable to the minimum of the salary of the job grade assigned to the higher post. The claimant was therefore entitled to an acting allowance.

45. The claimant is entitled to Kshs.10,980,392.40. The offer by the respondent for payment of the sum of Kshs.894,707.00 is an admission that not all acting allowances were paid and even in such case, the full

allowances are not correctly computed by the respondent. the defence that the computations were based on two different human resource manuals is not correct. The claimant's acting appointment was made within the context of human resource manual, 2003 and not 2011. The pay scales for employees for a comparison were not submitted by the respondent.

46. The claimant is claiming the payment of gratuity which was contractual under the position of director, EASA. For the period the claimant was acting director, gratuity pay is due.

47. The claimant was discriminated against on the basis that she applied for the position of director, EASA having acted on the same position but was not appointed without any reason. The new advertisement made by the respondent with new requirements for a PhD was to lock the claimant out. The claimant had performed her duties diligently for 6 years and despite such record and experience, she was technically locked out from the position of director, EASA.

48. The claimant has relied on the cases of **Beatrice Achieng Osir versus Board of Trustees Teleposta Pension Scheme, Cause No.665 of 2011; Fredrick Odongo Owegi versus CFC Life Assurance Ltd, Cause No.1001 of 2012; and Henry Musemate Murwa versus the Public Service Commission & another, Cause No.564 of 2011.**

49. The respondent submits that the claimant is not entitled to the claims made for an acting allowance. The respondent admit they did not pay the claimant an acting allowance based on the 2003 human reduce manual to the time the new manual was reviewed in 2011. The respondent admit to owing the claimant a sum of Kshs.894,707.00 being the difference between the amount paid to entry point of the post and the amount the claimant was paid. The sum of kshs.29,240.00 for 30 months and 21 days when she was substantive holder between 13th October, 2008 to 4th May, 2011.

50. The claims made by the claimant are erroneous;

A claim for gross basic salary variance at kshs.5,738,345.00

Telephone allowance variance Kshs.288,000.00;

Leave variance Kshs.240,010.00;

Gratuity variance Kshs.4,217,467.40;

Add 17 months acting Kshs.496,570.00

Total claimed Kshs.10,980,392.00.

51. That these computations do not depict an acting allowance but a claim to be confirmed in the position of director, EASA. In **Kenya Airways Limited versus Aviation & Allied Worker Union & 3 others [2014] eKLR** the court held that the court is limited to interpreting and enforcing the obligations which the parties to the employment relationship have agreed to and there is no legal obligation express or implied for the implication into the employment contract of the terms that the parties have not agreed to be binding condition for the mere reason that they are considered reasonable.

52. The respondent also submits that in 2011 the respondent adopted a new human resource manual that became applicable to the claimant and the position she held. The reviewed manual of 2003 at clause E16 made provision for payment of an acting allowance at the rate equivalent to the full difference between his salary and the minimum attached to the job on which he is acting while in the new manual, 2011 acting is to be paid 15% of his substantive basic salary or 15% of the entry level of the position he is acting whichever is higher.

53. At the time the claimant was acting and new manual came into force she had served for 30 months and 21 days. Upon review of manual in 2011 the staff salaries also improved. The claimant's salary

increased from 142,600.00 to 270,000.000 and at the time of retirement it was kshs.310,384.00.

54. The claimant was paid an acting allowance of Kshs.40,558.00 and the last pay slip notes an acting allowance of Kshs.55,213.00 and arrears of Kshs.141,897.00 after April, 2012. The amount of Kshs.55,213.00 is a 15% of 368,084.00 when the claimant's basic salary was Kshs.270,384.00. by the respondent paying the sum of Kshs.55,213.00 the rationale was the manual, 2011.

55. That the claimant assertion that the manual applicable is that of 2003 then she should give up the benefits that came with the manual, 2011. She consented to its application and as such is bound by its terms.

56. The respondent also submits that the assertions made by the claimant against the human resource manual, 2011 is barred by limitation of time. Under section 90 of the Employment Act the claimant is precluded from claims outside the 2011 human resource manual as any claim outside of such period is made 3 years after the claim arose.

57. The claimant is not entitled to any other allowances as acting director, EASA. Under the manual, 2003 the claimant was entitled to acting allowance and travelling privileges which excluded the house allowance. In the 2011 manual, there is an acting allowance and accommodation rates in hotels but no other remunerations for the position. the claims for telephone allowances; leave allowances are not due to the claimant.

58. Gratuity is payable where one is not on pension scheme. The claimant was employed on permanent and pensionable terms and cannot qualify for gratuity. Such gratuity cannot be claimed under the acting capacity role the claimant held.

59. There was no discrimination against the claimant. The respondent employed female managers and he policy has 31% rule to ensure gender balance. The claimant's evidence did not relate to gender but to academic qualifications which was a requirement for the position she had applied for and he claimant did not possess a PhD. The respondent relied on the case of **Dakianga Distributors (K) Ltd versus Kenya Seed Company Limited [2015] eKLR**.

60. The claims made are not due and should be dismissed with costs to the respondent.

Determination

61. The Employment Act, 2007 has given great emphasis to employers that all employment terms and conditions should in writing. Such is to ensure the employee has at all material times a written communication as to the nature of job/appointment and what the job description or requirements are. Such is to reduce work place conflicts and to ensure the employee is aware of what they are required to do and attend to and the employer has a template within which the employee can be assessed or appraised.

62. The entire Part III of the Employment Act is dedicated to matters that should go into an employment contract with emphasis on a written contract of employment. Even in cases where the parties are not able to put the terms and conditions into writing, the law requires that within 2 months such should be regularised. Section 10(1) of the Employment Act provides that;

(1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3), be given in instalments and shall be given not later than two months after the beginning of the employment.

63. It is common cause that the claimant was issued with a letter of acting duties for director, EASA with effect from 13th October, 2008. In the letter, the claimant was directed that;

... appoint you to perform the duties of Director East African School of Aviation on a temporary

basis with effect from 13th October, 2008 until further notice.

On performing these duties you will be paid 15% of your basic salary as acting allowance.

64. At this time, 13th October, 2008 the human resource manual applicable was the 2003 one. It gave more details on the provisions for an acting position and the payment of allowances.

65. This letter directing the claimant to act for the position of director, EASA is important as with it, it carries work benefit for the extra and added duties that go with it. Though the acting role is stated to be *temporary basis*, The claimant held the acting position, that of EASA director from 13th October, 2008 to 31st March, 2014 when she retired. During the period, the respondent had a Human Resource Manual of 2003 and a new one was put in place in May, 2011.

66. The importance of this communication and letter issued to the claimant is that, any changes to an employee's terms and conditions of employment, whether in confirming the employment, changes to the job description or changes with regard to an acting role should be done in writing and with the consent of the employee. Any change therefore to the position held by the claimant is required to be in writing. The basis of such communication is to be found within the law and under sections 10(5), (6) and (7) of the Employment Act which requires the employer to;

(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

67. Any changes to employment status must be in writing and communicated to the employee for the employees consent; the employer should keep such records; where there is a dispute filed in court such as this one, the duty is vested upon the employer to produce such work records.

68. In this case, I find no material evidence that the letter dated 9th October, 2008 was lifted, its terms and conditions changed and that when the respondent reviewed its human resource manual, the matter was regularised to conform with the reviewed changes. It cannot be a case that the claimant cannot seek to benefit to terms in the manual, 2011 just like other employees. The case here is not that of the application of the manual, 2011 rather it is the application and implication of the letter issued to the claimant as an employee of the respondent on 9th October, 2008 to act in the position of director, EASA and was to be paid an acting allowance of 15%.

69. Where the human resource reviewed in 2011 held a different position, the duty was on the respondent to issue new and appropriate directions to the claimant. Such was not the role of the claimant to initiate. The claimant cannot be denied the benefit that go with her appointment as acting director, EASA on the simple fact that the respondent had deemed it fit to review the manual that applied when the appointment was made and now was in place a new and changed manual with different terms. Where the claimant had been specifically and personally singled out to hold the position of acting director, EASA, then as a matter of law and good practice, any changes to the same should have been communicated in writing to the claimant.

70. In the HR Manual of 2003, the provisions for the payment of an acting allowance were that;

E15 remunerative allowances

Remunerative allowances are those allowances which are additional to the salary and include allowances covered in E16 to E20

E16 Acting Allowance

c) an officer appointed to act in a higher post will be paid acting allowance at the rate equivalent to the full difference between his salary and the minimum attached to the job on which he is acting.

d) where the officer appointed to act in a higher post has a salary above the minimum of the higher post such an officer will be paid acting allowance as shall be determined by the Director General.

e) ...

f) an officer appointed to act in the higher post will be eligible only for the duration of the appointment for travelling privileges at the rates applicable to the minimum of the salary of the job grade assigned to the higher post. This excluded house allowance.

E17 duty allowance ...

E18 hardship allowance ...

E19 ...

E20 leave allowance

Every officer before proceeding on leave will be entitled to a leave allowance as determined by the Director General from time to time.

71. Thus without the respondent making a review to the communication made to the claimant on 9th October, 2008, the terms as above applied. The duration of the claimant's acting role is immaterial as the reasons for the same were not within her powers to change. The internal and external reasons given by the respondent cannot be visited upon the claimant. The duty is upon the employer to communicate any new changes to employment terms and conditions.

72. The review of the human recourse manual, 2011 was for all employees of the respondent and not specific to the claimant. Where there was need to make changes to the claimant's position, the respondent as the employer had that duty to issue a communication. Had the respondent appointed a director, EASA during the tenure of the claimant's employment with then, a new memo should have issued making changes to the appointment to the acting position. the claimant left the role due to retirement and not for any other reason.

73. The remuneration payable to the claimant should be based on the letter dated 9th October, 2008 and none other.

74. The respondent submitted that the claimant cannot seek claims outside the provisions of section 90 of the Employment Act. Where the claimant retired on 31st march, 2014 and there were unpaid dues as admitted by the respondent, nothing stopped the claimant from filing a claim with the court. the cause of action arose with termination of employment by retirement and with it, all outstanding dues that the claimant felt were due and unpaid should have been settled with her retirement. See **Fred Mudave Gogo versus G4S Security Services (K) Ltd [2014] eKLR; Kenya Union of Commercial, Food and Allied Workers v Water Resource Management Authority & another [2015] eKLR; Benjamin Wachira Versus Public Service Commission & Another, [2014] eKLR;**

... accrual of the cause of action in a claim emanating from an employment contract takes effect from the date of termination as stated in the letter communicating the termination. The fact that an employee whose employment has been terminated seeks a review or an appeal does not mean that

accrual of the cause of action is held in abeyance until a final verdict on the review or appeal.

75. In the evidence of Joseph Kiptoo he avers that clauses 46 to 56 is to the effect that when the claimant was acting as director, EASA she was paid a responsibility allowance. That in October, 2011 the government issued notice to the effect that the two allowances ought to be paid together and the claimant continued to earn her allowances. The alleged government notice is not submitted. This witness did not attend court for cross-examination. His evidence must therefore be taken with a lot of caution.

76. The only basis for the respondent not paying the claimant the due acting allowance is the reviewed human resource manual, 2011. As noted above, without the revocation, review and or written changes to the respondent's letter of 9th October, 2008 the terms and conditions made remained in force. Such cannot be negated to the disadvantage of the employee without prior communication of the same. As this was within the mandate of the respondent to undertake and was not done, such cannot be visited upon the claimant to negate her claims for acting allowances for the position of acting director, EASA.

77. The owing dues unpaid for the duration of 5th May, 2011 to 31st March, 2014 is due.

78. The above outlined, the human resource manual, 2011 of the respondent apply to all its employees without distinction. The benefits there is and unless there is specific communication to a specific employee to the contrary, cut across and the terms and condition stand for the benefit of the entire staff. Where the manual, 2011 has a benefit, nothing stops the claimant from seeking the same over and above what the letter of 9th October, 2008 secured for her within the employment with the respondent.

79. In the manual, 2011 at E18, telephone allowance is due to specified officers. There is no link between the acting allowances set out under E8 and the benefit under E18. The benefit due under E8 in the manual, 2011 and by extension the benefits due under E16 in the manual, 2003 are specific and do not extend to other remunerative outside the same and not set out under the letter issued to the claimant dated 9th October, 2008.

80. Leave allowance is regulated under E12 is at the rate of 1/3 of the salary due. In terms of manual, 2003 under which the claimant got the acting position, the same being applicable as set out above with regard to Clause E16 to E20 benefits, the due leave allowance should be that of the position of the director at 1/3 of the same. Such benefit should only arise once a year where not paid to the claimant for the period 2011 to 2014 at the point of retirement.

81. Question of gratuity payable, clause C12 of the human resource manual, 2011 under which the benefit is claimed requires that the same to apply where an employee does not qualify to join the existing pension scheme or the terms of her contract excludes her from joining the pension scheme. The claimant testified that she has since collected her pension dues. Based on the letter of her acting appointment being specific in terms of the benefits due, and having been paid the pension due to her position, gratuity pay does not apply in terms of the human resource manual applicable at the time of termination by retirement.

82. Discrimination in employment is prohibited under section 5 of the Employment Act read together with article 27 and 41 of the Constitution as any discrimination, directly or indirectly amounts to a prohibited ground and also is an unfair labour practice. Such is a violation of the rights and freedoms of the individual.

83. Section 5(7) of the Employment Act provides 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

84. The question of discrimination in employment is a matter taken very seriously in law and the court is mandated to address the same firmly. Section 5 of the Employment Act therefore makes mandatory

provision to ensure that there is equality of opportunity in employment and that all manner of discriminatory practices are eliminated in employment and labour relations. The foundation of the right against discrimination in employment is therefore sound and secures a right that must be discerned from the circumstances of each case as the question of direct and indirect discriminatory practices must be interrogated. Section 5(2) and (3) of the Employment Act provides that;

(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

(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;

(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.

85. In this case, the claimant testified that she was acting director, EASA when the position was advertised and she applied; was interviewed but was not given feedback. The position was re-advertised and the respondent changed the academic qualifications to lock out the claimant.

86. The defence is that the respondent as a growing institution with new courses required a highly qualified director and the requirement for the person to have a doctoral/PhD would assist in the new focus of the respondent work. the job specifications changed for the respondent to be able to cope with the changing market need. A higher academic requirement was made and the board appointed a director with a doctorate. The respondent also asserted that The respondent did not discrimination on gender as the Company secretary was a woman.

87. It is not lost to the court that the claimant held the acting position from 2008 to 2014 when she retired. Within this period, the respondent went through various changes in terms of senior management. The claimant served her term and only left due to retirement. Before the claimant were two other male directors. The requirement for a PhD on then had not been necessary. Such previous director left under different circumstances but the claimant served her full term to retirement.

88. The issue before court is not that the claimant was discriminated against on gender lines but the defence made that there was another senior female officer, Ms Judy Ngethe only serves to expose the respondent in terms of gender balance at its work place. Indeed at the time of hearing, there was no female senior officer serving.

89. The issue set out by the claimant is that as at September, 2011 when the position of director, EASA was advertised, she had been acting since 2008, a period of 3 years. No questions had been raised with regard to her capacity, qualifications of being able to cope with the changing market need. Where such market changed and the respondent saw the need to have a director with higher qualifications, such then arose during the claimant's tenure and to keep her on the job without appointing a substantive officer holder and then changing the job qualifications to lock the claimant out cannot be defined in any other manner in a society which values fair labour practices. Such amounts to gross acts of discrimination against the claimant.

90. Where the claimant served the respondent it was a period of turmoil as they searched for a new director, the claimant's service was found sufficient. Having dealt with the turmoil, the claimant, despite serving the respondent for a record 3 decades was found unfit.

91. The requirement that an employee should not be directly or indirectly be discriminated against in employment cannot be defined in any other better terms than what the claimant was taken through by the respondent. I find no justification or good defence that the claimant suddenly became unqualified for the

job she had held for 6 years and thus was subject for replacement ad did not fit the standing to be confirmed for a position she was qualified to hold in fact and in practice until the qualifications were changed to lock her out. Such practice is prohibited in law and under the constitution. It should not happen in any civilised society such as ours.

92. I find the claimant was discriminated against in her employment with the respondent when the respondent failed to appoint her in a position she had been acting for 6 years and changed the qualifications to lock her out from holding such position through a re-advertisement. Damages are due

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

- (a) The claimant is entitled to the lawful benefits by way of accruing acting allowances unpaid for the duration of 5th May, 2011 to 31st March, 2014 is due. such dues shall be computed and paid based on the letter of appointment as acting director, EASA dated 9th October, 2008 under the Human Resource Manual, 2003;**
- (b) Payment above shall be computed and confirmed with the court on 18th July, 2017;**
- (c) Damages of discrimination against the claimant awarded at Kshs.5,000,000.00;**
- (d) The dues at (a) above shall be paid with interests from the date they became due;**
- (e) Costs of the suit.**

Dated and delivered in open court this 29th day of March, 2017

M. MBARU

JUDGE

In the presence of:

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