



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 665 of 2011

BEATRICE ACHIENG OSIR..... CLAIMANT

VERSUS

BOARD OF TRUSTEES TELEPOSTA PENSION SCHEME.....RESPONDENT

JUDGMENT

1. The claimant is Beatrice Achieng Osir and she filed the memorandum of claim on 3.05.2011 through J.A.Guserwa and Company Advocates. The respondent is the Board of Trustees, Teleposta Pension Scheme and it filed the statement of response on 17.05.2011 through Mwaura and Wachira Advocates. The claimant's statement of response to the respondent's statement of response was filed on 22.07.2011. The case was heard on 29.11.2012 and on 6.12.2012. The claimant gave evidence to support her case and the respondent's witness was its Administrator and Secretary one Peter Kipyegon Rotich.
2. By the letter dated 17.06.1999 being BAO 1A on the statement of claim, the respondent employed the claimant to the position of Assistant Pensions Manager - Information Technology (IT). The claimant was promoted to the position of Pensions Manager, Information Technology and her pay slip for October 2010 produced as exhibit C1 shows that at the time of termination the Claimant was earning Ksh. 265,934 being the gross monthly salary.
3. By the letter dated 30. 04. 2010 being appendix BAO 2 on the statement of claim, the respondent suspended the claimant from duty. The letter was signed by one Mary Kita Nalianya as Chairperson of the respondent and it stated that the respondent had received certain adverse reports related to the disposal of the respondent's properties and several allegations touching on the integrity of the claimant's office and the Trustees had been made against the claimant. Accordingly, the respondent had made a decision to suspend the claimant from duty effective 30.04.2010 to allow further investigations into the matter. The letter further stated that while the claimant was on suspension she would be entitled to half gross pay. The letter required the claimant to avail herself at her duty station as the respondent could direct but not to perform her regular duties while on suspension.
4. By the letter also dated 30.04.2010 being appendix 3 on the statement of response, the respondent referred the claimant to the suspension letter and asked her to handover the following:
 - a) office keys for main entrance door, back entrance door and inner office;
 - b) leave the office intact with all official documents in their normal place;
 - c) arrange to visit the respondent's offices on Monday 3.05.2010 and provide all computer programs access codes to Mr. Julius Matagaro; and

d) leave behind her contact address and telephone numbers.

5. During the hearing the parties took considerable time to establish whether the claimant complied with the handover directives and in particular whether the claimant visited the office on 3.05.2010. The court has considered the evidence and finds that the purpose of the visit on 3.05.2010 was specifically to provide the computer programs and access keys to Julius Matagaro and it was not to hear, consider and determine the claimant's disciplinary case as was suggested for the respondent's case. The court further finds that as per the claimant's evidence she had already given to Julius Matagaro the programs and access codes and accordingly she had complied with the handover directive as it was not necessary for her to visit the office on 3.05.2010 because the purpose had already been served.

6. By the letter dated 30.09. 2010, the respondent informed the claimant that it had considered the investigation report into the allegations leading to her suspension and found no basis for the allegations and the respondent had resolved to absolve the claimant from any misconduct related to those allegations. The letter then proceeded as follows:

"It has however come to the notice of the Board of Trustees that before proceeding on suspension, you were directed by the Administrator/Trust Secretary to report to the Scheme offices on Monday 3rd May 2010 and provide all computer programs access codes to Information Technology Officer (Mr. Matagaro). You were rung on Monday 3rd May 2010 but declined to report and hand over data relating to properties and the source codes. You have to date not handed over this data. You neglected and/or refused to comply with this instruction.

As a senior staff of the secretariat, the Board considers this gross insubordination on your part.

It has further been noted that:

- 1. There has been laxity on implementation of the Information Technology System to aid in tracking of assets by Trustees.**
- 2. Two warning letters dated 9th April, 2009 and 1st March, 2010 have been issued to you related to unexplained absence and lateness from office.**
- 3. Various instructions contained in office memos dated 8th February, 2010; 24th March, 2010 and April, 2010 were not been acted upon with reasonable explanation.**

This record does not portray acceptable conduct befitting an officer of your rank. Before the Board of Trustees makes a decision on the conduct mentioned above, you are required to show cause why disciplinary action should not be taken on you."

The claimant responded by her letter dated 3.10.2010 being BAO 5A on the statement of claim. She explained that Mr. Matagaro had confirmed to the Board that the claimant had indeed given to him all the access codes and passwords. That was at the meeting of 20.09.2010. That the phone call of 3.05.2010 related to the physical files concerning lawyers and she confirmed she had left them intact at her former office. She agreed on phone that day that she could be contacted as need could arise but she had never been contacted. On laxity to implement the software, the claimant explained that all staff had been taken through the relevant demos and confirmed their ability to navigate the software with ease and it was only the Administrator-Trust Secretary whose ability to use the software was limited. As for the warning letters, she explained that she had effectively responded to them in her previous correspondence. She explained that the Administrator - Trust Secretary discriminated against her due to her physical disability. Upon his appointment the claimant had congratulated him but he threatened to get her dismissed. That he frustrated her by assigning her tasks which involved going up and down staircases knowing well that the claimant was physically challenged. The claimant in her response letter stated that the discrimination was evident in several other circumstances leading to demeaning situations and loss of dignity. She further stated that it was procedurally unfair for the respondent to have discussed all the allegations in the

meeting of 20.09.2010, found her innocent after taking her comments then asked her to again respond to the issues and at the same time trust that the respondent will exonerate her once again from the allegations. The respondent then prayed for a favorable response.

7. By the letter of termination dated 25.10.2010, the respondent terminated the employment of the claimant. The claimant was informed that the respondent had considered her response but found it inadmissible. That accordingly, authority had been obtained to terminate her from the service in accordance with the contract of service and effective 25.10.2010. The letter required the claimant to surrender her employment card and other official items in her possession to the Administrator - Trust Secretary and to liaise with the Manager, Finance and Accounts for her benefits.

8. During the hearing the claimant testified that her termination was without any basis or justification. She had been humiliated in view of the false allegations and she had been dismissed without any reason and without being heard. She also testified that the respondent's Administrator – Trust Secretary discriminated against her because she was a person with physical disability. In particular he assigned her to collect data on the respondent's properties in Kisumu while it was known that the task entailed movement up and down staircases well knowing the difficulties the claimant would face to accomplish the task. The respondent also deliberately and in a humiliating manner assigned the claimant the duties of attending court knowing very well that the claimant could not easily access courtrooms without accessibility facilities. The claimant recounted the day she was assigned to attend court in Kisumu. She had to be carried up the staircases to access the court. The respondent's Administrator had challenged her to call the Judge to hear her outside the court like at the car park. The respondent had been insensitive to her plight. The respondent's Administrator – Trust Secretary had insensitively insisted that she travels to Kisumu by air knowing very well that the airport in Kisumu did not have facilities for use by the claimant for alighting and boarding the aircraft. The claimant testified that she had been tasked to deliver tenancy verification forms in Kisumu and she had to send strange people to deliver them through the staircase. The claimant lamented that the respondent had been discriminatory and she singled out the day she had travelled to Kisumu by road using the respondent's car for official duty, namely, to attend court. She had spent time explaining why she was to go and come by car and not aircraft. The car developed mechanical problems and there was delay in returning to Nairobi and reporting to the office. The claimant testified that she was discriminately questioned while her driver was not put to any question. The mechanical problems the car developed were not attributable to the claimant and she was questioned merely to harass and embarrass her, the claimant being a person with physical disability. Thus, the claimant testified that the respondent wanted her out of its way despite her good performance and for the reason that she was a person with disability.

9. The claimant testified that she was 49 years of age at the time of termination. Being a person with disability she was entitled to retire upon attaining 60 years of age. She had been prematurely removed from employment and she had not been able to secure alternative employment due to the physical disability. In one attempt to get employment, the claimant testified, the respondent thwarted the chance by delaying to provide the appraisal to the prospective employer and by the time the appraisal came, the opportunity had already flown away.

10. The claimant also testified that she had prospects, in four years time, of promotion to the position of Administrator – Trust Secretary whose pay at the time of her termination was about Ksh. 398,000. She was willing to go back and serve the respondent or to be paid for loss of future earnings of 11 years she would have been in employment.

11. The claimant testified that she did not appeal against the termination because there was no such provision and it would be irrational to appeal to the same authority that had decided to terminate her employment.

12. The claimant stated that she had claimed for 45 leave days because she did not have the relevant record and when the record was shown to her in court (being letter of 13.02.2010 and attachments thereto), the claimant agreed that the justified claim was for only 37 leave days.

13. The respondent's witness was Peter Kipyegon Rotich, the Administrator – Trust Secretary. He had worked for the respondent for 12 years having been employed at the same time as the claimant. He previously served in the pensions department while the claimant served in the information communications department. He testified that the claimant had been terminated due to insubordination. She was assigned duties in Kisumu, the car she was using broke down and she did not come back from the court attendance in Kisumu as scheduled. The vehicle broke down and there were no funds provided for its repair. In the circumstances the witness admitted that the claimant was not guilty as alleged. The witness confirmed that he did not know whether the court and the respondent's properties in Kisumu were accessible in view of the claimant's physical disability.

14. The respondent's witness stated that the respondent ran a contributory pension scheme whereby the employee and the respondent each contributed 7.5% and the claimant's claim of 19,945 at paragraph 16 of the statement of claim was known to him as the pension contribution.

15. The witness testified that the claimant was a good worker and the particulars of the misconduct leading to the suspension were not given to the claimant. The termination was effective 25.10.2010 and the suspension was never lifted. When referred to the Respondent's letter of 17.08.2010 being last page of the bundle of the statement of response, the witness confirmed that the claimant's letters were received but not replied by the respondent. Further the Board never met on 3.05.2010 to discuss the claimant's case so that it was misleading to allege that the claimant's absence on 3.05.2010 resulted into the delay in hearing and determining the disciplinary case against the claimant. The witness did not know the point in time that the claimant handed to Julius Matagaro the computer programs and access codes. He admitted asking the claimant to fly to Kisumu and the claimant had protested in view of the physical disability. He had wanted her to travel by plane because he thought it was faster and he had faulted the claimant for spending a night at the Kisumu trip even if the car broke down because that was unacceptable. He confirmed gratuity could be claimed even if it was not provided for in the staff rules; the claimant was not paid 37 leave days and the leave allowance. The witness admitted that the claimant would earn the future incomes as claimed and she was entitled as claimed. If she were promoted to the position the witness held, she would earn the kind of payment the witness was paid by the respondent. The witness confirmed that the position of Manager, IT which was held by the claimant was vacant. The witness also confirmed, as per the claimant's evidence, that the driver on the Kisumu trip was never asked and required to explain the delay in coming back from the trip; only the claimant was required to explain.

16. The witness stated that the claimant had no complaints leveled against her during the eleven years of service and he would not have any difficulty working with the claimant in future. He was the claimant's immediate supervisor and had no bad blood with her.

17. The claimant's skeleton submissions were filed on 10.12.2012 and the respondent's on 11.12.2012. On 11.12.2012 the parties agreed to rely on the submissions as filed.

18. The claimant in the statement of claim prayed for:

- a) a declaration that the termination of the claimant's employment by the respondent was unlawful;
- b) reinstatement of the claimant to her position or job without loss of benefits;
- c) damages for unlawful and malicious termination amounting to Ksh. 42, 114,028;
- d) maximum compensation for wrongful dismissal; costs of the suit and interest thereon; and
- e) interest on the sum awarded at court rates.

19. The issues for determination in this case include:

- a) whether the termination was unlawful and unfair;

b) whether the claimant was discriminated against by the respondent because the claimant was a person with disability; and

c) whether the claimant is entitled to the prayers made in the statement of claim.

20. On the propriety of the termination, it has been submitted for the respondent that the claimant engaged with impunity in defrauding pensioners of their property and assets. That the claimant also engaged in insubordination by failing to implement an upgraded information technology system and disregarding instructions given to her by her superiors. The respondents further submitted that the termination was the culmination of acts of dishonesty, impropriety, insubordination and selfishness all of which negated or impeded the spirit of service delivery to the pensioners. For the claimant it was submitted that the respondent absolved the claimant at the meeting of 20.09.2010 with respect to allegations touching on her involvement in the sale of the respondent's properties. That the termination letter was issued to the claimant while she was still serving the suspension and the letter did not set out any reasons for the termination. The respondent breached section 41 of the employment Act which stipulates notification and hearing before terminating employment on account of poor performance or misconduct.

21. The court has considered the submissions and the evidence on record and finds that the respondent did not establish any valid reason for terminating the claimant's contract of service. As provided for in section 43 of the Employment Act, the cause for the termination must be such matters that the employer genuinely believed to exist at the time of termination. The claimant made elaborate reply to all the allegations. The respondent did not provide an opportunity for a hearing as envisaged under section 41 of the Act. There were no investigations and no investigation report was produced to verify the allegations. In addition, the initial allegations for which the claimant was exculpated were contained in the letter of suspension dated 30.04.2010. The subsequent allegations were in the letter of 30.09.2010 and related to matters which were alleged to have occurred long before 30.04.2010. The respondent did not offer any explanation why the charges for the alleged misconducts had not been made in the letter of suspension dated 30.04.2010. It is the opinion of the court that disciplinary proceedings must be genuine with manifestation of good faith and due process failing which the proceedings would amount to unfair labour practice. It cannot be that the employer releases allegations of misconduct or poor performance in dosages in a manner that is malicious and in circumstances that it was possible, with due diligence, to raise all the allegations at the earliest opportunity possible. The court finds that due process in disciplinary proceedings is invariably undermined where the employer fails to take due steps to convey and initiate disciplinary proceedings at the earliest opportune time, as the respondent, belatedly acted in this case. Employers are not at liberty to treat disciplinary proceedings as a venture in which the employee must be bushwhacked into a dismissal through pretended disciplinary proceedings. In this case the court finds that the dismissal was unfair because there was no hearing, the respondent acted belatedly and in bad faith, and the respondent has failed to prove the reason for the termination as there was no investigation to verify the alleged reasons for termination.

22. The claimant has pleaded and claimed that she was discriminated against because she is a person with physical disability. The court has considered the evidence and the submissions. It is not disputed that the claimant is a person with physical disability. The claimant gave a detailed testimony about the unfair discrimination as advanced against her by the respondent's Administrator – Trust Secretary who upon his appointment had threatened the claimant that she would be removed from employment. The respondent's witness did not dispute that there had been differences on whether the claimant would use air or road transport to Kisumu. The respondent's witness who was also the claimant's immediate supervisor displayed an unresponsive attitude in view of the claimant's justified needs as a person with disability. He did not bother and care to accord the claimant reasonable accommodation as he assigned tasks to her. For example, he did not care that the court and the respondent's houses in Kisumu were not accessible and therefore accord the claimant necessary assistance or assign the tasks to another officer. The witness unflinchingly while smiling told the court that he assumed travelling to Kisumu by air was conducive for the claimant and he did not know the physical accessibility status of the court and houses the claimant had to visit in Kisumu. He did not deny to have discriminately required the claimant to explain the delay in Kisumu following the car's mechanical problems while the driver who was directly in charge of the car

was not asked to make any explanation. The court finds that the claimant has established and proved discrimination on account of disability. The respondent acted as envisaged under section 2 of the Persons with Disabilities Act, 2003 which states that “discriminate” means to accord different treatment to different persons solely or mainly as a result of their disabilities including using words, gestures or caricatures that demean, scandalize or embarrass a person with disability. The court upholds the protection of the rights and dignity of persons with disabilities as was stated in **Silas Rukungu Karanja-Versus- Teachers Service Commission, Industrial Court at Nairobi Cause No. 567 of 2012 at page 40** of typed court’s judgment, thus, **“Article 27 of the Constitution protects the claimant from direct or indirect discrimination on the ground of disability. Article 54 of the Constitution specifically provides that a person with any disability is entitled to be treated with dignity and respect and, the respondent is required to progressively implement the principle that at least five per cent of the teachers in its service are persons with disabilities as provided for in Sub-Article 54 (2) of the Constitution. Under section 5 (3) of the Employment Act, 2007, the respondent is precluded from discriminating the claimant on the ground of disability as it happened in the instant case. Under section 5 (6) of the Act, it was the burden of the respondent to prove that the discrimination did not take place and which burden the respondent failed to discharge. Under section 5 (1), the court is vested with the duty to promote equality of opportunity in employment in order to eliminate discrimination in employment. In addition, the respondent is mandatorily required to promote equal opportunity in employment and strive to eliminate discrimination in all its employment policy or practice. It is the court’s considered opinion that an employee suffers injury whenever the employer discriminates on the ground of disability and in such instances the employee is entitled to compensation.”** The court finds that the claimant was discriminated against on account of disability as she was subjected to demeaning and embarrassing treatment. In particular, the court finds that the respondent has failed to prove that discrimination did not take place and the claimant has proved that the respondent discriminated against her on account of disability. Accordingly, the claimant is awarded **Ksh. 500,000.00** in view of the discrimination.

23. The next issue for determination is whether the claimant is entitled to the other remedies as prayed for in the statement of claim. The court makes the following findings:

- a) The court has found that the claimant was unfairly terminated. The court may award the claimant up to twelve months gross salary for the unlawful and unfair termination. The claimant has shown that the termination was actuated with bad faith and the respondent has not pleaded any mitigating factors to inform award of lesser compensation than the maximum available under section 49 (1) (c) of the Employment Act, 2007. The court finds that the claimant is entitled to the maximum compensation of **Ksh.3, 191,208** at the rate of Ksh.265, 934 per month being the gross monthly pay at termination.
- b) The claimant prayed for Ksh. 398,901 being pay for 45 accrued leave days. At the hearing it was established that the accrued leave days were only 37 and the court finds that the claimant is entitled to **Ksh. 327,985.30**. The claimant did not prove and establish the basis for the claim of the leave travel allowance and the same is declined as she is not entitled as claimed.
- c) The respondent’s witness confirmed that the claimant maintained a contributory pension scheme. Under the scheme the claimant and the respondent each contributed 7.5% of the claimant’s salary. The claimant’s pay slip shows the pension contribution of Ksh. 19, 945 and contribution for the National Social Security Fund of Ksh. 200. The claimant is entitled to be paid the contributed sums in accordance with the applicable law and rules. The court finds that in view of the contributions the claimant is not entitled to the claim of service pay or gratuity for the eleven years served and as claimed. In particular the court is guided by the provisions of section 35 (6) of the Employment Act which provides that where contributions are made to a pension or gratuity or service pay scheme or the Fund, service pay for the every year worked shall not be claimed.
- d) The claimant has prayed for Ksh.42, 114,028 for loss of prospective future earnings for 11 years. There is no doubt that the claimant was entitled to retire at the age of 60 years as per section 15 (6) of the Persons with Disabilities Act, 2003. The court was referred to the decision in **Silas Rukungu Karanja-Versus- Teachers Service Commission, Industrial Court at Nairobi Cause No. 567 of 2012** that the

provision applies to employment both in private and public sectors. In opposing the claim, the respondent's counsel referred the court to Walter Musi Anyanje –Versus- Hilton International Kenya Ltd and Another[2008] eKLR where the court of appeal reiterated its decision in Kenya Ports Authority – Versus- Edward Otieno, Civil Appeal No. 120 of 1997 stating thus, “**there can be no general damages in respect of suits based on termination of employment contract since the relation of the parties to such contract is contractual and thus terminable under the terms of the same contract.**” This court considered similar arguments in Grace Gacheri Muriithi – Versus- Kenya Literature Bureau, Industrial Court of Kenya at Nairobi Cause No. 44 of 2011. The court considered the jurisdiction of the court and stated, thus “**Sub Article 162 (2) (a) of the Constitution provides that Parliament shall establish a court with the status of the High Court to hear and determine disputes relating to employment and labour relations. Thus Parliament has established the court in accordance with the Sub-Article under the Industrial Court Act, 2011. The long title to the Act states, thus, “AN ACT OF PARLIAMENT to establish the Industrial court as a superior court of record, to confer jurisdiction on the court with respect to employment and labour relations and for connected purposes.”**”

Subsection 12 (1) of the Act provides that the court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162 (2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including-

- a) disputes relating to or arising out of employment between an employer and an employee;
- b) disputes between an employer and a trade union;
- c) disputes between an employer organization and a trade unions organization;
- d) disputes between trade unions;
- e) disputes between employer organizations;
- f) disputes between an employers' organization and a trade union;
- h) disputes between an employer's organization or a federation and a member thereof;
- I) disputes concerning the registration and election of trade union officials; and
- j) disputes relating to the registration and enforcement of collective agreements.

Subsection 12(2) specifically states that an application, claim or complaint may be lodged with the court by or against an employee, an employer, a trade union, an employer's organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose. The claimant is a public body being a state corporation established under written law. Accordingly, its legal status and establishment would not preclude it from the jurisdiction of the court.

Further, sub-Article 165 (5) (b) of the Constitution provides that the High court shall not have jurisdiction in respect of the matters falling within the jurisdiction of the Industrial Court. Thus, in view of the High Court status of the Industrial Court and in view of the provisions of Sub-Article

165 (5) (b) of the Constitution and Subsections 12 (1) and (2) of the Act, the Industrial Court is also vested with the jurisdiction as follows.

- a) Unlimited original jurisdiction in disputes relating to employment and labour relations.
- b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of

Rights provided for in the Constitution of Kenya, 2010, as far as employment and labour relations is concerned, has been denied, violated, infringed or threatened.

c) Jurisdiction to hear appeals from decisions of tribunals of competent jurisdiction in disputes relating to employment and labour relations.

d) Jurisdiction to hear and determine any question respecting the interpretation of the Constitution in employment and labour relations including the determination of:

(i) the question whether any law is inconsistent with, or is in contravention of the Constitution;

(ii) the question whether anything said to be done under the authority

of the Constitution or of any other law is inconsistent with or is in contravention of the Constitution;

(iii) any matter relating to constitutional power of state organs in respect of county government and any matter relating to the constitutional relationship between levels of Government; and

(iv) a question relating to conflict of laws under Article 191 of the Constitution .

The jurisdiction of the Industrial Court is therefore essentially the jurisdiction of the High Court as provided for in Sub- Article 165 (3) of the Constitution and with boundaries limited to the employment and labour relations as amplified in the Industrial Court Act, 2011 . However it is notable that the Constitution removes from the jurisdiction of the Industrial Court one aspect of employment and vests it in the exclusive jurisdiction of the High Court. Under Sub-Article 165 (3) (c) the High Court is vested with the exclusive jurisdiction to hear appeals from a decision of a tribunal appointed under the Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144 of the Constitution (being a decision by tribunal appointed for removal of the President on grounds of incapacity). Finally, the Industrial Court is vested with the jurisdiction, original or appellate, as may be conferred by any legislation with respect to employment and labour relations matters.

In the instant case the court finds that the dispute falls squarely within the jurisdiction of the court and the plea of lack of jurisdiction in view of the undisclosed status of the respondent lacked merit and had no legal basis.” The court upholds that wide scope of the jurisdiction of the court and finds that the remedies that the court may award are not restricted to the contract but spread to other injuries that may occur in the employment and labor relations. Section 12 (3) of the Industrial Court Act, 2011 empowers the court to make any other appropriate relief as the court may deem fit to grant. Section 12(3) (v) of the Act also empowers the court to order an award of compensation in any circumstances contemplated under the Act or any written law. The court, in this case, considers that the statutory protection of persons with disabilities to retire at the age of sixty years is sufficient contemplation by written law that breach of the provision would attract appropriate relief as the court may deem just and such relief in the opinion of the court includes compensation for prospective future income. In making this finding the court is also alert to provisions of section 3(1) of the Act that declares that the court’s objective includes proportionate resolution of disputes before it.

In view of the provisions of the Act and the jurisdiction of the court, the court considers that the remedy for prospective earnings should be considered alongside the prayer for reinstatement. The claimant was willing to go back to her job. The respondent’s witness confirmed that the position last held by the claimant was vacant and had not been filled by another officer. He also testified that he would not have any problem working with the claimant in future. The claimant was terminated effective 25.10.2010. The court considers that in view of the statutory protection of the claimant’s retirement age, she is entitled to be re-engaged back into the claimant’s employment until the age of sixty years, unless lawfully terminated earlier. The court considers 1.1.2013 to be an appropriate effective date of the reengagement. Failing the reengagement, it is the court’s considered view that the claimant is entitled to be compensated

for prospective future earnings. Over two years have lapsed and the claimant has not secured alternative employment. The court further considers that if the respondent fails to reengage the claimant then the claimant would be entitled to compensation for the respondent's strict liability flowing from the breach of the statutory protection of the claimant's retirement age of sixty years. The court has considered that the claimant is a highly knowledgeable professional with considerable experience so that she may secure alternative employment though with considerable difficulty in view of the disability. In the circumstances and taking the principle of proportionality into account, the court finds that the claimant, if not reengaged, is entitled to compensation for a period of three years for breach of her right to retire at sixty years of age and for prospective future earnings making a sum of **Ksh. 9,573,624** at the rate of her last monthly pay of Ksh. 265, 934.

24. In conclusion judgment is entered for the claimant against the respondent for:

- a) a declaration that the termination of the claimant's employment by the respondent was unlawful and unfair;
- b) the respondent to pay the claimant the sum of **Ksh.4,019,193.30** plus interest at court rates from the date of the judgment till full payment;
- c) the respondent to reengage the claimant to the office she held without loss of benefits with effect from 1.01.2013 until the age of sixty years and unless lawfully earlier terminated, **or in alternative**, the respondent to pay the claimant **Ksh. 9,573,624** for prospective future earnings and issue her with the certificate of service; and
- d) the respondent to pay costs of the case.

Signed, dated and delivered in court this 14th December, 2012.

Byram Ongaya
JUDGE